tradicted by his own witnesses, it is only necessary to attend to the terms of the issue.

DAVIDSON v. LESLIE.

On the first, you may find that he made the purchase, and that 557 were delivered free on board, and negative the second issue.

Verdict for the pursuer on both issues.

Forsyth and *Jeffrey*, for the Pursuer.
Cockburn, for the Defender.

(Agents, *Alex. Forsyth* and *Arch. Duncan*.)

PRESENT,

LORDS CHIEF COMMISSIONER AND GILLIES.

JOHNSTON and PROUDFOOT *v.* PENNYCOOK and OWLER.

1818. February 16.

Damages for breach of contract.

THIS was an action of damages against one of the defenders for not implementing a sale of cattle; and against the other defender for subsequently purchasing them, knowing of the previous sale; and for affronting, calumniating, and abusing the pursuers in a public market.

DEFENCE.—The first bargain was not com-

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pleted; there was no abuse; and if there had been, it is not relevantly laid. *

ISSUES.

"Whether, on the 11th September 1816, "or about that time, the defender, Alexander "Pennycook, at the Falkirk Tryst or Fair, sold "to the pursuers 40 stots or steers, at the "price of L. 5, 12s. 6d. a-head, for which he "agreed to receive their bill to him, payable "at two months date?

"Whether the said bargain was completed, "and the cattle delivered to the pursuers' ser- "vants; and whether the said defender, Pen- "nycook, to the loss and damage of the pur- "suers, and in breach of said previous bargain, "shortly afterwards, on the same day, sold, or "pretended to sell, said cattle to the other de- "fender Owler? or whether the defender "Owler bought them, knowing of any pre- "vious sale? or whether Owler was a real or "fictitious purchaser?

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* Before the trial commenced, the LORD CHIEF COMMISSIONER suggested, That though there were two defenders, and one of them had a separate defence, yet as the case was one, the Jury could not divide it, and it would therefore be better to allow the circumstances as to both defenders to arise in the course of the procedure.

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" Whether the said other defender Owler " did, knowing of said previous sale to the " pursuers, shortly thereafter, on the day afore- " said, come up to the place where the cattle " were standing in the custody of the pursuers' " servants in the said tryst or fair, and, assist- " ed by several other persons acting under his " directions, to the loss and damage of the said " pursuers, drive away the said cattle, and " take them by force from the pursuers' ser- " vants? or whether the said defender Owler " did, during the altercation, offer to put the " cattle into a neighbouring grass park, till the " point of right should be determined?

" Whether the said defender Owler, or per- " sons under his orders, when they drove away " the said cattle as aforesaid, struck the pur- " suers' servant; and whether the said Owler, " or others under his orders, or by his instiga- " tion, did, on the same occasion, to the injury " and damage of the pursuers in their charac- " ter and reputation, calumniously allege that " the pursuers intended to pay for the said " cattle in base stuff, by which they meant bad " bills or forged notes? or whether the pur- " suer first threatened to strike the defender " Owler, and to drive the cattle over his head, " and used opprobrious language towards him?"

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"The damages are laid at L. 500."

The parties, who were strangers to each other, met on the second day of the Falkirk Tryst in September 1816, and the pursuers wished to purchase 40 stots belonging to Pennycook. At first he refused to sell them, as it was proposed to pay the price by a bill at two months; but late in the day he agreed to take a bill if M'Ritchie, a person known to both, would indorse it. This person would not indorse the bill, but assured Pennycook that the pursuers were in perfect credit; and, from other circumstances, it appeared that there would have been no difficulty in discounting their bill.

After this the parties were seen striking hands, which was proved to be the common method of concluding bargains in the public market. The pursuers' servants proceeded to mark the cattle, which is never done till a bargain is concluded, though it is done before the price is paid.

The parties went to a tent to settle the price, but Pennycook soon left it, and sometime afterwards the servants of the other defender were found driving off the cattle. A dispute arose, and there was much abuse on

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both sides, but the pursuers failed in an attempt to prove that Owler said they were to pay in "uncurrent stuff." Some of the witnesses on each side swore that the party for whom they were called offered to put the cattle into a field till it was ascertained to which party they belonged. And it was proved that several of the pursuers' friends offered to pay the price, if Pennycook would appear and receive it.

It is competent to put leading questions to a witness on his cross-examination.

The counsel for one of the defenders mentioned a particular expression, and asked a witness for the pursuers if he had heard the pursuer Johnston use it, to which an objection was taken that it was a leading question.

LORD CHIEF COMMISSIONER.—In cross-examination you may lead a witness, because the party against whom he is called has no communication with him; and because the cross-examination is to try his truth and consistency. In examining in chief it is not allowed, because a leading question suggests the answer to a witness with whom communication has been had, and who may answer according to the suggestion.

Another witness, in his examination in chief, having stated that Owler during the dispute

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shook his stick at Johnston, and threatened to knock him off his horse,

Murray, for Owler, asked him whether Johnston was a strong man,—whether he was good natured, &c.

LORD CHIEF COMMISSIONER.—I by no means disapprove of this mode of examination, but it is not, according to the rule which has been so often insisted on here, viz. that cross-questions must be confined to the subjects of the examination in chief. I feel very anxious that this rule should be altered; and that as, in the neighbouring country, when a witness is brought forward by either party, it should be in the power of the opposite party, in his cross-examination, to put questions to him on every point of the case. It appears to me not a rule of law, but a mere matter of practice; and, therefore, if the Court and bar unite they may do it away; by which we shall in all cases be sure of getting at the truth of the facts.

Murray, for the defender, when another witness was called, took a distinction between the case of a defender attempting to make out his defence by the pursuer's witnesses, and his examining them as to the pursuers' case; he

contended, that, though the defender was not entitled to make out his own case in this manner, he was entitled to examine them as to the pursuers' case.

Jeffrey objected,—Cross means cross to the examination in chief of the witness, not cross to the pursuers' case.

LORD CHIEF COMMISSIONER.—When the objection is taken we must sustain it. In that case, the only way of getting the evidence is to have the witness reinclosed, and called and examined in chief by the defender.

When two defenders have separate defences, both their counsel must address the Jury before the pursuer makes his reply.

As there were two defenders, and as it was doubtful whether both or either would lead evidence, Mr Jeffrey, when the evidence for the pursuer was closed, asked the opinion of the Court as to the form of procedure.

LORD CHIEF COMMISSIONER.—The defenders must do every thing they are to do before you reply. The case is in substance an action against one defender for breach of bargain, and against the other for aiding him in doing so. The examination of the witnesses for Pennycook must be confined to the first of these.

The case was then opened, and evidence led

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for Pennycook. When it was closed, the case for Owler was opened and his evidence led.

Keay, for Pennycook, contended,—The first bargain was not concluded, as the agreement was to sell for money, and the pursuers offered a bill. There is no damage proved, as the markets fell. This is a mere question of humour, as, even according to the rise in the market alleged, (and that sworn to only by one witness,) the whole sum in dispute would not exceed L. 5.

Murray, for Owler, admitted,—If there was a breach of bargain from corrupt motives, the party will be liable in damages; but there was no concluded bargain, and no proof even of a bill having been drawn or offered. The second was a *bona fide* sale, and the only claim against Owler is on the ground that, by a fictitious sale, he enabled the other to break his engagement. The defamation is not proved.

Cockburn, who opened the case for the pursuer, and *Jeffrey*, in reply, insisted,—There was a concluded bargain; and Owler is liable whether he knew it or not, as he carried off the cattle after he was informed of the sale. The

cattle were sold and delivered, and a mark was put on them, in presence of Pennycook; notwithstanding the evidence given by his drover to the contrary. Even had the pursuer engaged to pay ready money, this would only have entitled the defender to retain them till the condition was fulfilled, but would not entitle him to sell them to another.

Even if the market had fallen, the pursuer is entitled to damages on account of his disappointment, and to do away the idea that he is not to be depended on in his dealings. If Owler did not know of the first sale before, he is clearly accessary after the fact.

It is difficult to reconcile the testimony as to the proposal to put the cattle in a field till next day; but if Owler really wished this, why did he drive them away to his own farm?

LORD CHIEF COMMISSIONER.—In this case I shall rather state the import of the evidence than enter into it in detail, as more depends on the general effect of it than on particular expressions, or on the mode in which it was given.

The issues are more involved than those usually sent here. The first is clear, and on it the whole rests. The second involves a num-

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ber of issues. Whether this was a pretended sale may now be left out of view, for it is proved that the price was paid.

The last issue is given up.

The only question is, whether the first bargain was concluded. In a bargain for sale there are three things: 1*st*, An agreement of two parties for a sale; 2*d*, The price to be paid; 3*d*, The mode of payment.

In this case the price was fixed, and, therefore, the questions are, if there was an agreement for a sale, and if the parties had settled the mode of payment.

That there was an agreement for a sale appears from their striking hands, from the cattle being marked, and other circumstances. In this case there was no attempt to prove that it was done fraudulently, or that Pennycook ever appeared and said it was done without his authority. There certainly is a *prima facie* case made out; and it was therefore incumbent on him to come forward and show that there was some misunderstanding, and that the bargain was not binding on him; but, instead of this, he absconds. A number of circumstances show that the payment was to be by bill. If you differ from me as to the bargain being com-

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pleted, and the payment being by bill, I think you may find for the defenders.

All that has been said applies equally to the second issue. It was not a pretended sale, but a real one. The damages against Owler depend upon his knowledge of the first sale, and it is therefore important to decide whether he knew of it. His knowledge of it does not rest on positive testimony; but, if you are satisfied that he knew of it, I do not think it necessary to separate the damages.

As to the last issue, it is clear he drove them away and against the will of the pursuers. Both parties seem to have made a proposal to put them into a grass field.

Specific damages have not been proved, and, therefore, they must rest generally on the injury done; and vindictive damages ought not to be given.

"Verdict for the pursuers, finding the de-
"fenders jointly liable in damages to the ex-
"tent of L.20 Sterling." *

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* The Jury, in this and several other cases, gave a verdict for costs, as well as damages, but were informed by the Court that that was not within their province.

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Jeffrey, *Cockburn*, and *Sandford*, for the Pursuers.
Keay and *Whigham*, for Pennycook.
J. A. Murray and *Alison*, for Owler.
(Agents, *N. W. Robertson*, *Macritchie and Murray*, W. S. and *P. Smyth*, W. S.)

PRESENT,

LORDS CHIEF COMMISSIONER AND PITMILLY.

1812. Feb. 24.

Mrs HARLEY and Others v. LINDSAYS.

THIS was an action for proving the tenor of a settlement executed, and afterward destroyed, by the late John Lindsay of Easter Annafrech. There was also a declarator to have it found that, at the time the deed was destroyed, he was imbecile, from palsy, or some other cause.

DEFENCE.—The settlement was destroyed by the granter. In proving the tenor, it is irrelevant to inquire whether he had the full use of his faculties when he destroyed the deed; as they were in the same state as when he executed it.

ISSUES.

"Whether, about the beginning of June