PRESENT,

THE THREE LORDS COMMISSIONERS.

Baillie *v.* Bryson.

1818.
March 12.

Damages claimed for adultery, but the adultery found not proven.

This was an action of damages against the defender for the seduction of, and adulterous connection with, the pursuer's wife.

Defence.—A denial of the fact alleged.

ISSUE.

"Whether the defender did, on the 1st day "of January 1808, or at any time between "that time and the 1st day of January 1812, "seduce, and maintain an adulterous connec- "tion, and did commit adultery, with Mrs "Elizabeth Cross, or Boyes, then the wife of "the pursuer, at the pursuer's house of Carn- "broe, or in the neighbourhood thereof?"

"Damages laid in the summons at "L. 10,000."

Fullarton, in opening the case for the pur-

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suer, said,—I shall prove that the defender visited almost daily at Carnbroe, and remained all night more frequently when the pursuer was absent than when at home; that he encouraged Mrs Baillie in habits of intoxication, using such indecent familiarities as prove that they must previously have had criminal connection; that she was in the habit of going into his room both at night and in the morning, with scarcely any clothes on; that part of her clothes have been found in his bed; that, on one occasion, he was seen coming out of her bed; and that, on another, they were seen in a situation which left no doubt in the mind of the witness that they were guilty of adultery; that, after she left the pursuer's house, on his accusing her of adultery with the defender, she went to reside with her mother; and that, in the neighbourhood of her mother's house, she had frequent meetings with the defender alone in the dark.

Before a witness is examined, it is only competent to prove an objection to his competency, not to his credit.

An objection was taken to the first witness before she was examined, and an offer made to prove malice and bad character.

LORD CHIEF COMMISSIONER.—If it be the common course to allow proof of this nature in this stage of the proceeding, I shall not object.

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LORD GILLIES.—At present we can only allow proof of the malice. The parties must be farther heard before we can allow proof of the other branch of the objection.

After Gallaway, a witness, had been examined on the point, the LORD CHIEF COMMISSIONER observed, That he only proved blackguard expressions, not malice; and asked the counsel if they intended to move the rejection of the witness on the evidence given, or if they were to bring farther proof.

Moncreiff, for the defender.—This is the leading witness for the pursuer; her evidence is materially connected with the other evidence in the cause; and it is most important that the Jury should know her character before she gives her evidence. We shall prove, by those who know her, that they would not believe her on oath. We shall prove that she was infamous at the time she came into the pursuer's family, and that he knew that she was so. She has been guilty of various infamous crimes, [which he stated in detail;] and we are entitled to bring these before the Jury, that she may be received *cum nota*. Mr Erskine says expressly, that evidence of crimes is sufficient to cast a witness, though no conviction in a Court or by a Jury has taken place.

Ersk. Pr. IV. 2. 14.

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LORD PITMILLY.—I am quite satisfied that it is incompetent to prove the objection stated on the ground of general character; and I am equally clear, that no proof can be allowed of the particulars facts alleged against her. In the case of the Dundee Bank, Macdonald was received as a perfectly competent witness, though he was afterwards convicted of forgery. If I were to enter on a discussion of the subject, I think there are good reasons why this ought to be the law, but at present it is sufficient to say that I am clearly of opinion that it *is* the law.

Bruce *v.* Falconer, Hume, III. 156.

LORD GILLIES.—I concur in the opinion delivered. This question occurred, and was decided in this Court in Lord Fife's case. It was there admitted by counsel of great eminence, that it was incompetent to prove the general character. I state this not that the admission of counsel can make law, but to show that it was held to be clear.

Earl of Fife *v.* Trustees of, &c. *supra* 131.

The door is shut against both objections.

As to special objections, I think it is the law, and ought to be so, that proof of them cannot be admitted. As to the objection to general character, I think it *is* the law that proof of it cannot be allowed; but, on this point, I wish a bill of exceptions were presented, to have the point settled.

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LORD CHIEF COMMISSIONER.—The question is decided by the opinions given, and I wished to hear these opinions, as this is a question on the law of Scotland. If I had been to follow the lights of my own mind, I would have taken the distinction that it was competent to bring evidence as to general character, though not in this stage of the proceeding; and that particular facts may be brought out on the cross-examination of the witness. I am satisfied, on general principle, as well as on the law of Scotland, that proof of the particular facts is incompetent.

This is so general a question, that I hope some case will soon occur where it will be carried to the last resort, in order to have it finally settled.

Clerk, for the defender, said, He must except to the decision on account of the rejection of evidence, 1*st*, As to general character: 2*d*, As to particular facts; and stated, that it was offered to discredit, not to disqualify the witness.

LORD CHIEF COMMISSIONER.—That is incompetent in this stage of the proceeding. It is clear that any objection to credit cannot be brought now. In so far as the objections affect the competency of the witness, we reject the proof absolutely now. In so far as they affect

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her credit, we reject them *hoc statu*. If, at the proper time, you offer any thing as to the credit of the witness, we shall then judge of it.

LORD GILLIES.—Our decision was, and only could be, applicable to the objection to the admissibility of the witness. If we allow any proof at present regarding the credit of the witness, we shall do what was never done before. The objection was always taken to the competency of the witness, and though the proof was insufficient to cast the witness, it frequently affected his credit.

Jeffrey, for the pursuer, before calling his witnesses, stated,—The other party asked us to admit the printed copies of the proof in the divorce case. We now call on them to say if they intend to use it for the purpose of pointing out discrepancies between the statements made then and those made now. If this be their purpose, the witnesses are entitled to have their former depositions read over. The proof is on the table, and *in potestate* of the Court.

Clerk.—This motion was rejected in a former case.

LORD CHIEF COMMISSIONER.—The time is

not yet come for this discussion, if it shall *ever* come. *

A witness examined and dismissed called back to identify a witness who denied ever having seen him.

The first witness for the pursuer was then called, and several special questions arising out of Gallaway's examination, were put to her *in initialibus*. She denied having made these statements, or ever having (so far as she knew) seen Gallaway.

The LORD CHIEF COMMISSIONER suggested that Gallaway ought to be brought back to identify her, which was accordingly done; and he stated that he had seen her once, and that she was the person who made the statements—she persisting in her denial of ever having seen him.

In the course of her examination, the LORD CHIEF COMMISSIONER observed, That the counsel for the pursuer might ask, in general, how the defender and Mrs Baillie behaved to each other; but that it was irregular to put special questions as to particular facts.

The witness having stated that she saw the defender come out of the bed in Mrs Baillie's room, was asked, by one of the Jury, Whether

* The question was not again moved during the trial.

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she believed Mrs Baillie was in the bed at the time?

LORD CHIEF COMMISSIONER.—The question is incompetent. The witness must speak to her knowledge, not to her belief—whether Mrs Baillie was in the bed, is an inference to be drawn by the Jury from the proof, and not by the witness.

Before proving that money was given by a party to a witness, it must be stated that it was given as a bribe.

When one of the witnesses for the pursuer was called, it was objected that the pursuer had given money to her and several other witnesses.

LORD CHIEF COMMISSIONER.—Before being allowed proof of this, you must specify for what, and at what time, it was given. The examination must be confined to the witness now called.

It being stated that it was a bribe for her evidence in this cause, the proof was allowed, but failed. The same objection was made to another witness, but the proof was equally defective.

It was proved that Mrs Boyes (Mrs Baillie's mother) was dead. One of her servants was then asked what she said of her daughter going out at night to meet the defender?

Grant objected,—This is hearsay; and of a person who, if alive, could not have been a witness.

Jeffrey.—The first point is settled. As to the second, she, if alive, would have been a competent witness; but, rather than waste time, I withdraw the question.

Rules and Orders of Jury Court, § 33.

The cross-examination of a witness was begun by one counsel, and continued by another, when the LORD CHIEF COMMISSIONER observed, That cross-examination was as much to be conducted by one counsel as the examination in chief.

In an action of damages for adultery, held competent to give in evidence the decree of divorce. The clerk of the Commissary Court reading from the record, is sufficient proof of the judgment.

The pursuer, on the 15th May 1815, had obtained decree of divorce against his wife on the ground of adultery with the defender. With a view to show the amount of the expence incurred in that action, it was proposed to call the clerk of the Commissary Court, to prove the decree.

Grant, for the defender, contended,—The present is an action by the pursuer for the loss of the society of his wife. She may have been almost a common prostitute; and, if the husband did not know it, he may be entitled to a divorce, though not to damages. This is never

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admitted in England. The defender here cannot be answerable for Mrs Baillie's conduct in the other case.

Jeffrey, for the pursuer.—This is not the foundation of the action, but the pursuer is entitled to recover the expence incurred in consequence of the conduct of this defender. The claim (as in the case of the seduction of a daughter) is for the loss of the services, not the society, of the wife. In the first case on the subject, in this country, the expences of the divorce was the first article claimed.

Stedman, 20th Jan. 1744. Kil. 484. M. 7337 and 13909.

Mr Clerk, in reply, was proceeding to state what he considered proved.

LORD CHIEF COMMISSIONER.—The question to be decided is not the merits of the case, but whether we are to allow proof of the expence of the divorce. At present we decide that it is competent to prove the decree which is the foundation of the other question. The objection can be taken when the question as to the expence is put. It would be cutting before the point to decide it at present.

Mr Carphin, clerk of the Commissary Court, was then called upon to read from the process the decree of the Commissaries, when an objection was taken that it had not been pro-

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duced by the pursuer. But, on the other side, it was stated that, when application was made for the process, the answer returned was, that it was in the hands of the other party, who were to produce it.

Lord Gillies.—The Act of Sederunt is not imperative. The Court, if they see cause, may allow it to be produced.

Clerk.—Being produced by the defender, the pursuer is not entitled to use it. The decree cannot be proved by parol evidence; the only competent proof of a decree is an extract, containing the grand decerniture in the cause, without which no execution can follow; and the defender was no party to the cause.

Lord Gillies.—You are confounding two things which are quite distinct.—If you was not a party, an extracted decree would be no better evidence than what is offered. An extract is the only thing on which execution can follow; but it is not on that account the only proof that the judgment was pronounced. The original record is as good evidence as any extract could be; and we think this quite sufficient to prove that a judgment was pronounced of the tenor of the one on record.

Lord Chief Commissioner.—This, though in one sense evidence against you, is not evi-

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dence against you on the issue before the Jury. It is only produced to show that there is a process of divorce in progress, and to found their claim for the expence of it.

The question was allowed, and a bill of exceptions was tendered.

It is incompetent, in an action of damages for adultery, to give in evidence the expence incurred in the divorce, if that question is not finally decided.

A witness was then called to prove the expences.

LORD CHIEF COMMISSIONER.—We think this proof incompetent. I do not mean to enter into my opinions at large on the general question, as there is sufficient to warrant the judgment, in the circumstances of the case. The decree is not extracted, and therefore not perfect. It is stated that the judgment of the Commissaries has been carried to the Court of Session by advocation; and it is clear, from the date of the decree, that it is subject to review in the House of Lords. In this situation, and when it is possible that the judgment may be reversed, the question is, whether the Jury can pronounce, in pounds, shillings, and pence, on the sum laid out? We cannot, therefore, allow it to go to them as special damages; it must be rested on as a matter of inconvenience, that the pursuer has found it necessary to bring an action of divorce.

Jeffrey.—There would be hardship in being under the necessity of delaying to bring the action of damages till the question of divorce was finally settled. The account of expences will not bind the Jury, but give a general view of the amount, and they may find them provisionally, if the case is not reversed.

Moncreiff.—The hardship shows the incompetency. The pursuer is only entitled to the direct, not the consequential damages of the loss of the society of his wife.

LORD GILLIES.—In the case reported by Kilkerran, the decision in the divorce was final. There may be good grounds for finding damages, though you may be wrong in bringing your divorce. In that process there may be good defences, *e. g.* recrimination, which are not competent here. We are called on to go out of our way to give you this. There is no final decree, and what would be our situation if we were to give you the expence of an action, which by a final decision is found to be improperly brought?

LORD CHIEF COMMISSIONER.—We do not know what were the conclusions of the summons in the case in Lord Kilkerran, neither can we here look into yours; and I think it

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might in his case depend on the terms of the summons.

Proof of the pursuer's conduct limited to the time of the existing marriage.

After the case was opened for the defender, the admission of his marriage and also of the pursuer's marriage was read by the clerk.

Moncreiff then wished to put in an extract of the pursuer's divorce from his former wife; but an objection being taken, he said, We did not think any objection could be made to it. The pursuer puts his character in issue, and it is extremely doubtful if in England a person who had himself been divorced ever obtained damages; his ideas of the married state are such that he is incapable of enjoying its comforts, and though it is not proved that he treated his present wife ill, he may not have treated her well. The question is, whether the conduct of the defender is injurious, and to what extent? If a man, within a month or two after his own divorce, marries and brings an action like the present, would he be entitled to *any* damages, or to the *same* damages as a virtuous man?

LORD CHIEF COMMISSIONER.—If you bring proof of his loose character during his present connubial state, I have no objection; but we are not trying General Baillie. If this is al-

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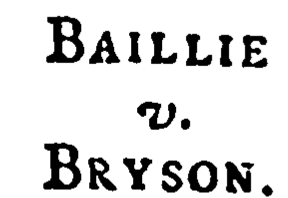

lowed, you might as well go into proof of his conduct through life. If you could show that he was absolutely incapable of enjoying the comforts of the married state, there might be some ground for admitting the proof; but is that conceivable? This divorce can never be brought here, as we can only receive proof of facts with reference to his present wife; and, however loose his conduct may formerly have been, if he behave well to her, we are not entitled to inquire farther.

My brethren agree with me that it is impossible to allow proof of this fact without allowing it as to the whole of his life, which is certainly incompetent. The question here is, if he is to have damages? If he is to be cut out of these by a proof of his former conduct, it is going into a field so wide, that this long case would be absolutely interminable.

With a view to show the loose conduct of the pursuer, a witness was asked, if, about ten years ago, he had been employed to find a lodging in Glasgow for him and a young woman?

Jeffrey objected,—By this question it is intended to infringe the decision of the Court. It is a leading question.

Lord Chief Commissioner.—If the question be put, it must be limited to the period of

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General Baillie's present marriage. It is a common remark, that you may lead a witness up to the point, but not in the cause. You may ask if at such a time he was employed to find a lodging, that is leading him to the point; but you must not ask whether it was for General Baillie and *a young woman.* This last is telling him what to answer, and is leading him in the cause.

Evidence was again offered of the bad character of some of the witnesses for the pursuer, and that they were not to be believed upon their oaths; and was also offered to prove the particular facts. It was held to be incompetent on both points; and the two bills of exception were now presented as the most regular time for doing so.

Clerk.—Adultery must be proved by some circumstance necessarily implying it, and not from a train of loose and unconnected circumstances. No instance has been proved; the stories told by the witnesses are improbable, some of them incredible, and the witnesses are single witnesses. The defender wished to marry Mrs Baillie's sister, which accounts for their intimacy. If you doubt of the fact of

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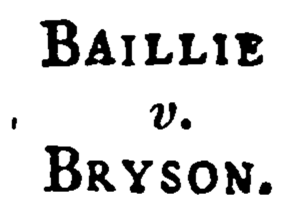

adultery, the foundation of the action is gone; but even if the adultery were proved, the pursuer is not entitled to damages, as, instead of comforting and protecting his wife, he did every thing to corrupt her morals.

Jeffrey, in reply,—The questions are, 1*st*, Is the adultery proved? 2*d*, Is there any thing in the pursuer's conduct which ought to prevent him from recovering damages? Many facts not criminal in themselves have been proved to show the probability of the crime, and no explanation has been given of the facts necessarily inferring guilt, except her frankness and the defender's attachment to her sister. The only explanation of the *facts* sworn to, is a general charge of perjury against the witnesses. There is not the slightest suspicion of this, and if they were to perjure themselves, why did they stop half way? Why did not the one witness swear that she saw the lady in bed at the time the defender came out of it, and the other that he saw them in the act of adultery?

Mrs Baillie's declarations are not evidence against the pursuer, and nothing has been proved against him. His kindness and attention to his natural children show him to be possessed of proper feelings.

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LORD CHIEF COMMISSIONER.—It is now my duty to lay before you the evidence of fourteen witnesses for the pursuer and eleven for the defender; and I doubt whether, after sitting here for 18 hours, I shall have sufficient strength to lay it before you with the clearness and succinctness I wish to do.

There is given in the issue, a period of four years, and there are three points for your consideration; 1*st*, The seduction; 2*d*, The adultery; 3*d*, The damages.

Before entering on the proof, I may state to you that I take it to be clear law, that it is the adultery, not the seduction, that is the criminal act on which the claim of damages is founded. The adultery is the fact founding the action, the seduction and gaining the affections of the wife may involve circumstances to be considered in aggravation of damages. In finding damages due, it is not necessary to find specially as to the seduction.

Having drawn this distinction, I wish you to come to the consideration of this case with coolness, and without those prejudices which may arise in such a case; and that you should give fair consideration, but not rashly give too much weight to the circumstances. With this view, and as this is a circumstantial case, it is

of importance to consider the situation of the parties. The defender is established to have been in a respectable profession, and a man of respectability; he is also proved to have been from an early period attached to the sister of Mrs Baillie, a virtuous young lady, to whom he was afterwards married.

The points of inquiry are, 1*st*, Whether there are facts and circumstances sufficient to prove that the act of adultery was committed? 2*d*, Whether it is proved that Mrs Baillie was in a state of mind rendering her a more easy victim?

During the four years included in the issue, and during a constant and unconcealed intercourse, there are only four instances selected to which the proof applies. You may free your minds from the consideration of the proof of part of her dress being found next day, or the day following it, in a bed that had been prepared for the defender. One witness has proved that the defender left Carnbroe on the night in question, and another that he came home to his house in Hamilton. One of the main facts proved to infer guilt being disproved, is a material feature in the case.

The small number of instances is mentioned, not with the view of making you disbelieve

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them, but as a reason for requiring your particular attention to them, and for your being satisfied that they are clearly proved; and this being a circumstantial case, you must consider all the probabilities. It is said that he effected his purpose by encouraging this unfortunate lady in habits of intoxication. On this head all that can be said is, that he did not prevent her from drinking in his presence, as there is only proof of his supplying her with a bottle of brandy on one occasion. You must also take into consideration whether it is probable that he would encourage the sister of the lady to whom he was attached, in a habit that rendered her disgusting to a man of proper feeling.

There is proof of his paying very frequent visits, and he might have pleaded business as an apology for not coming so often. There is also much proof showing her desire that the criminal intercourse should take place, but you must consider whether this desire was mutual, and whether the fact of adultery took place. In judging of this, you will consider his character and situation with regard to her sister; his power of absenting himself; and the requests by the General to visit him.

After commenting on the evidence, his Lordship stated,—If you are satisfied that the adul-

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tery is proved, then you will find damages. The seduction as an aggravation of the amount is in this case out of the question. The present is the second case of this sort tried here; in the first the parties, the man and wife, were of an inferior rank; here it is a case of persons of respectable rank in society.

I cannot help thinking that Lord Kenyon (for whom I had the highest esteem during his life, and veneration since his death) introduced into cases of this sort a principle as to damages extremely dangerous in its consequences. He considered such questions not merely as calculated to repair the injury done to the one party, but as a punishment of the other, and as intended to correct the morals of the country. The morals of the country have not been improved, and I am afraid its feeling has been much impaired. A civil Court, in matters of civil injury, is a bad corrector of morals; it has only to do with the rights of parties.

In England there is no judicial tribunal having the power to separate *a vinculo matrimonii;* and to prevent imposition, the House of Lords, before passing a divorce bill, require not only a divorce in the Consistorial Court, but also a finding of damages at common law. This makes it necessary in the neighbouring

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country in all cases where a divorce *a vinculo* is sought, to estimate the injury in money; but here the reformation having gone further, and having established a separate tribunal, possessing the power of divorce, there is no such necessity, and claiming damages is the voluntary act of the husband.

His Lordship said, That he had no fear of the Jury giving excessive damages; but he thought it right, in concluding, to state to them the circumstances which induced him to think, that, if given, the damages ought not to be high.

Verdict,—" The Jury find the fact of adul-" terous connection between the 1st of January " 1808 and the 1st day of January 1812 is not " proved."

Fullarton, Jeffrey, and *Cockburn,* for the Pursuer.

Clerk, Grant, Moncreiff, J. A. Murray, and *Robinson,* for the Defender.

(Agents, *J. Mowbray,* W. S. and *Carnegy and Nelson,* W. S.)

June 10.

Jeffrey, in the Court of Session, moved, on several grounds, for a rule on the defender to show cause why a new trial should not be granted.

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Grant opposed the motion, and contended, In fact, there are only two grounds on which this new trial is sought; 1*st*, That the verdict is contrary to evidence; 2*d*, *Res noviter veniens ad notitiam.*

The first is a most delicate ground, and if the Court are in every case to review verdicts on the report by the Judge, trial by Jury, instead of being the best, will be the worst method of trying cases, and will be the beginning instead of the end of litigation. In England, when there is evidence on both sides, the Court will not set aside the verdict as contrary to evidence; Hankey *v.* Trotman, A. *v.* B., Norris *v.* Tyler, and the judgment of the Court, as delivered by Lord Camden in Beardmore *v.* Carrington. In case of a tort, which is in form criminal, no new trial will be granted where the verdict is for the defender; Huckle *v.* Money, and Smith *v.* Parkhurst.

1 W. Black. 1, 2.
1 Wilson, 22.
1 Cowper's Rep. 37.
2 Wils. 249.

2 Wilson, 206.
2 Strange, 1105.

2*d*, *Res noviter veniens ad notitiam.* It is not enough that he did not know the facts. There may be cases where a party by the act of God is deprived of evidence, but these are very rare; Hogg *v.* Spong, Cases in Equity Abridged, &c.*

W. Black, 802.
Ca. in Eq Abr. 377. Patterson *v.* Stow, &c. Feb. 1, 1817.

* See most of the above cases in Grant on New Trials, 172-6, 131, 227, 220, 175, and 104.

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LORD CHIEF COMMISSIONER.—In Sloper's case in 1738, as I recollect, but it is long since I have looked to it, there was much discussion of the point, whether a new trial could be granted when there was a verdict for the defender in a case of this kind. I do not think the principle you state has been applied to cases of damages for adultery. New trials are granted in trespass, which is in form criminal, and I do not think it does any good to your argument to carry it so high.

July 9.

Jeffrey.—The Court must set aside the verdict as contrary to evidence. I admit that a clear case must be made out; but it is a matter of discretion, and there is no absolute rule against granting new trials. The rule only applies to cases of contradictory testimony; but here the verdict is against the testimony on both sides. The case of Berks *v.* Mason, and the cases in Grant, 162-5, support this application.

6 Bac. Abr. 662. (*v.* Trial.)

6 Bac. Abr. 663. 1 Burrow, 390.

2*d*, *Res noviter*. The First Division ordered a condescendence in a similar case. In England it would be granted; Grant, 128. The whole evidence as to the pursuer's misconduct was a surprise. Incompetent witnesses were admitted, which gives a party a right to claim a new trial; Grant, 167. Incompetency not

Patterson *v.* Stow, 1st Feb. 1818. 1 Vesey jun. Rep. 135-6.

7 Mod. 54. 6 Bac. Abr. 661.

known at the time is the same as if it had been overruled.

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The Court were unanimous in thinking that there was not sufficient ground for setting aside the verdict as contrary to evidence. The LORD JUSTICE-CLERK and LORD ROBERTSON delivered their opinions in detail, and stated,—Setting aside a verdict as contrary to evidence is matter of discretion, but of a sound and legal, not an arbitrary discretion. It is not a sufficient ground for setting aside the verdict, that the Court think they would have drawn a different conclusion from the evidence. This was a circumstantial case, and peculiarly within the province of a Jury; they were not merely to find facts, but to dispose finally of the case. In such a case it is not sufficient that the verdict is against evidence; it must be in the face of evidence. The English authorities do not appear consistent with each other, but there seems no rule against granting a new trial, though there has been evidence on both sides. The Court, therefore, refused the new trial on the first ground.

With respect to the other ground, LORD ROBERTSON said, I cannot judge of it until the facts are ascertained. It is not enough to state that

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the facts were not in the knowledge of the party; it must also be shown that they were relevant, and that diligence was used to discover them. In Paterson's case the condescendence was thought not relevant. Surprise is not applicable to this case, as the regular notice was given of the witnesses. It was not to be expected on the present occasion, as the evidence has been under discussion in the other case since 1811.

The other Judges concurred in this opinion, and a condescendence was ordered on the second ground.

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1818. March 16.

BERTRAMS v. BARRY and BRUCE.

Damages assessed for non-delivery of a quantity of wine.

THIS was an action of damages for breach of contract brought by Messrs Bertram for themselves, and as assignees of William Goddard and Company, and of James Stevenson.

DEFENCE.—The person who took the order had no authority to do so.