Counsel then gave in a minute, consenting that the Jury should be dismissed; and upon this consent, Lord Pitmilly granted an order accordingly.

TENNENT, &c. v. HODGE.

(Agents, *William Ellis*, and *John Young, Jun.*)

PRESENT,

LORDS CHIEF COMMISSIONER AND PITMILLY.

SNADON *v.* STEWART.

1819. January 11.

Damages claimed, but not found, for arrestment of a vessel, and defamation.

DAMAGES claimed for arrestment of a vessel, and for calumny.

DEFENCE.—The vessel was not arrested as belonging to the pursuer. The calumnious expressions were not used.

ISSUES.

" 1*st*, Whether, on Wednesday the 11th " day of March 1818, or about that time, " the defender John Stewart arrested or " caused to be arrested a vessel, then ly- " ing in the harbour of Leith, called the " Janet of Kennet, with her float-boat, fur-

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" niture and apparelling, the property of the " pursuer, in virtue of a precept of arrest- " ment from the Court of Admiralty, at the " instance of the said defender, against James " Snadon, coalmaster, Kennet colliery, where- " by the said vessel was detained for some " time in the port of Leith, to the loss and " damage of the said pursuer?

" 2*d*, Whether, when the pursuer call- " ed upon the defender, in order to shew " him that he, the pursuer, and not James " Snadon, was the owner of the said vessel, " for the purpose of getting the defender to " loose the arrestment, Whether the said " defender did insult or abuse the pursuer; " and did say that he the pursuer was a swind- " ler or cheat upon the public, or did on said " occasion use expressions of that import, or " to that effect?

" Damages and solatium claimed in sum- mons, L.500."

About the 11th March, the defender arrested the vessel as belonging to *James* Snadon, his debtor; and an execution of arrestment was put on the mast about one o'clock, which remained there for an hour.

At this time the cargo of coals was not fully discharged; and it was stated, that the vessel, after her cargo was discharged, required to take in ballast, so that it was impossible for her to sail that evening. On the other side, it was stated that she might have sailed.

In the evening, the pursuer and his brother went to the law agent of the defender, and shewed him the register of the vessel; upon which he said, that if the vessel belonged to *John*, the pursuer, she might sail when they pleased. On seeing the indorsation of the registry, the defender said to the agent, in a whisper, that may be a way of cheating the public, but he (the agent) did not believe the pursuer could hear it. This was the only proof offered of the calumny.

Parole evidence of the contents of a written document incompetent.

The collector of the customs at Alloa was the first witness called, and was asked whether there was an entry of the registry of the vessel in the books.

A. S. 10. Feb. 1616, § 24; A. S. 9. July 1817, R. pp. 79, & 93.

Jeffrey, for the defender, objected.—The register is the only proof of ownership. It ought to have been produced eight days before the trial. Even if it had not been in the

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possession of the other party, he was bound to take a diligence to recover it.

Clerk, for the pursuer.—The rule is a good one, but does not apply. The register must go with the vessel, and the master is here to produce it, if necessary. Not being in our possession, we are entitled to parole evidence. It is sufficient if we prove reputed ownership.

LORD CHIEF COMMISSIONER.—It is premature to discuss whether the register is the only proof of ownership. The question at present is, whether we are to allow parole evidence of the contents of a written document. This I hold to be incompetent.

Incompetent to produce a copy of the registry of a vessel taken from custom-house books.

The witness was then asked, whether he had taken from the books of the custom-house, a copy of the registry; to which an objection was taken, and sustained.

A written document must be produced before a trial.

The master of the vessel was then called, and stated, that it was his duty to keep the certificate of registry.

Clerk.—We intend now to call on the witness to produce the registry. It was impossible to produce it before the trial, as the master must have it, to prevent seizure of the vessel.

Jeffrey.—The register is the only evidence of ownership. There was no impossibility of producing it; and as the pursuer has failed to do so, he cannot prove this fact.

Bell, Bank. Law, p. 75. (164).

LORD CHIEF COMMISSIONER.—It is painful to decide on questions of this sort, where a technical form stands in the way of material justice, or at least delays it. In a former case, Clark *v.* Thomson (see Vol. I. p. 161), we decided that the rule must be adhered to, notwithstanding the inconvenience to the party.

We do not decide whether the registry is the only evidence of ownership; or whether, in a case of this sort, it is sufficient that he was reputed owner. In many cases the register is the only admissible evidence; but in this case it is doubtful if it is necessary to be so strict.

The only question at present is, whether it is competent for this witness to produce the register, or whether it ought to have been produced before the trial. The first branch of the Act of Sederunt 1816 is imperative. There is not the discretion allowed which is given in the second branch, as to witnesses. The Act of Sederunt 1817 does

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not seem to make any alteration. We are therefore obliged to say that this document cannot be produced. We must look to the words of the law, and cannot listen to the plea of the difficulty of producing it before.

If this Court had an original jurisdiction, the party here might suffer a nonsuit, and would only be subjected to the trouble and expence of this trial; but at present a more circuitous mode must be followed, and an application made to the other Court for a new trial.

We can only decide that the Act of Sederunt applies. If it is inaccurate, it may be altered to suit future cases.

LORD PITMILLY.—I am of the same opinion. It is of consequence that writings should be produced, to prevent surprise. There is a mode in which this object might have been obtained: if the original could not be produced, a commission might have been taken, the master called as a haver, and a certified copy of the register taken; and if the defender had refused to admit such certified copy, in these circumstances the Court might possibly have interfered.

However hard on the party, it is of much

more importance that the rule should be strictly adhered to.

Clerk.—Before the witness is called back, I may state, that I mean next to ask who was owner in March last. When a person comes claiming a vessel as his, the registry may be the only proof of who is owner at present; but parole is the only evidence of who was owner at a former period.

Jeffrey.—I am uncertain whether I ought to answer this question, put by anticipation.

LORD CHIEF COMMISSIONER.—Mr Clerk states, that he means to prove the ownership of the vessel by parole evidence. It is just as well to answer it now.

Jeffrey.—It is a mistake to say that it is only the present ownership that requires to be proved by the register. All the cases in Bell and Abbot are cases of a prior period. Indeed, it is impossible that it could mean the ownership at the moment of the trial.

In an action of damages for arresting a vessel, *prima facie* evidence of ownership sufficient.

The pursuer has tendered the register, shewing that he knows it to be the proper evidence. It lasts as long as the vessel, and transfers are indorsed upon it. In questions with a third party, proof of reputed ownership

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has been allowed; but there is *no* instance where it was allowed in a penal action, like the present, between the original parties.

LORD CHIEF COMMISSIONER.—This is not a question of the law of Scotland, but of general law; and therefore the authorities in the law of England may be referred to. I remember the origin of the law of registering. The first Act on the subject was brought in by Lord Liverpool, when Lord Hawksbury; and the intention of the law was, to keep the transfer of the vessel clear; not to tie up the hands of parties, in cases like the present, where *prima facie* proof is sufficient.

A case similar to the present is that of an injury done by an officer of the revenue. In that case, it is not necessary to prove, by production of his commission, that he is an officer. It has been held sufficient, if the party proves that he acted as such.

We have hitherto only decided, that if the registry was to be founded on, it ought to have been produced, in terms of the Act of Sederunt; but we had this objection also in contemplation. Abbot states, that presumptive evidence of property is sufficient; and we think this authority goes the full length of

Abbot, Law of Shipping, p. 82.

shewing the competency, in a case like the present, of proving reputed ownership.

Jeffrey requested his Lordship to note this decision.

LORD CHIEF COMMISSIONER.—I shall do so; and if it is made the subject of discussion elsewhere, the grounds on which it is founded ought also to be made the subject of statement.

An objection was taken to a question, whether the vessel was arrested, and whether it was at the instance of Stewart.

In proving an arrestment of a vessel, the execution of arrestment ought to be produced before adducing parole evidence.

LORD CHIEF COMMISSIONER.—I conceive the regular method is, to put in the papers, and then to prove, by the witness, the facts which took place—who came on board the vessel—what was done, &c.

In re-examining a witness, it is incompetent to commence an examination in chief.

The witness having stated that the pursuer was owner of the vessel, was asked, on his cross-examination, on what grounds he founded his opinion?

In re-examining the witness, Mr Clerk wished to ask whether he had seen the register?

LORD CHIEF COMMISSIONER.—I do not

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think it competent, in re-examining, to commence an examination in chief.

On a similar question being put to the next witness, his Lordship stated, that if the witness spoke from recollection of having seen the written document, the evidence was inadmissible.

Incompetent to state to a witness a particular expression, and ask whether it was used.

Mr Clerk asked a witness, whether he met the defender, and whether they talked of the arrest? The witness not recollecting the conversation, Mr Clerk then asked him, whether the defender made use of a particular expression, and maintained that he was entitled to do so, after putting the general question.

LORD CHIEF COMMISSIONER.—This is a leading question. My objection to it, is not the incompetency of putting a particular question, but of putting into the question, the answer you wish the witness to give.

An objection was taken to proof of a conversation in the office of the agent for the defender.

LORD CHIEF COMMISSIONER.—It must be proved that the defender was present, or

it must be inductive to some admission on his part.

Clerk, in opening the case, admitted that he could not prove direct damage, but maintained, that the pursuer was entitled to some damages, on account of the injury done to his credit by the arrest, and to his feelings by the defamation.

Jeffrey trusted that, as Juries were ready to give proper and exemplary damages in cases of real injury, so they would give none in such cases as the present, where no injury was done, and where the arrestment proceeded from pure, and not culpable mistake.

The defender only stated, that the transfer of the vessel might be a way of cheating the public; and this being said to his agent privately, is not actionable.

LORD CHIEF COMMISSIONER.—This is a very short case; and the first point presented in the Issue is, whether the vessel was arrested. Upon this we held it sufficient for the counsel to prove a *prima facie* case of property in the pursuer, and we think they have

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proved it. It is also proved, that it was arrested as the property of his brother.

It is quite clear, from all the evidence, that the arrestment arose from mere mistake; and in case of mistake, a party is only entitled to the actual loss he can qualify. As to the delay, I construe what is stated in the Issue to imply, that it must have been detained by a culpable act of the defender, for the detention is coupled with (not disjoined from) the loss and damage, &c.

It does not appear to me, that any damage has been proved; and I agree with the counsel for the defender, that frivolous actions of this nature ought not to be encouraged.

I cannot state to you, in point of law, that in consideration of the unnecessary expence, you ought to find for the defender. But I believe, if you do find for him, the Court above will not disapprove of the verdict.

The second Issue is as feebly, or more feebly, supported than the first. I therefore leave the case with you; but feel satisfied, that if you find for the pursuer, you will fix a small sum of damages.

Verdict—" For the defender upon the first

" Issue, as no damage is proved; and also find " for the defender on the second, as it is not " proven."

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Clerk and *Dalzeil* for the Pursuer.
Jeffrey and *Cockburn* for the Defenders.

(Agents, *Wm. Landers*, and *M. Burd*, w. s.)

PRESENT,

LORD GILLIES.

BELL *v.* LEIGHTON and DONALD.

1819. January 18.

Damages for breach of contract by not delivering tallow.

AN action of damages for breach of contract against Leighton as principal, and Donald as agent and broker, for not delivering a quantity of tallow sold to the pursuer.

DEFENCE for Leighton.—No authority was given to make, nor did he confirm the bargain.

The LORD ORDINARY repelled the defence, and found the parties conjunctly and severally liable in damages.