to direct the Jury to find a shilling damages, and leave the account to be taxed.

Verdict for the pursuer, damages, 1s.

J. A. Murray and *Jeffrey*, for the Pursuer.
Forsyth and *Cockburn*, for the Defender.
(Agents, *John W. Ness* and *W. Grierson*, W. S.)

PRESENT,

LORD CHIEF COMMISSIONER.

FORBES and COMPANY *v.* HUDSON and COMPANY.

1822. March 18.

L. 300 damages found against the defenders for furnishing wine of inferior quality.

ADVOCATION from the Judge-Admiral of an action to recover L. 500, as the loss sustained by the non-delivery of wine of the quality bargained for.

DEFENCE.—The wine was of the quality, soundness, and colour, the defenders were bound to deliver.

ISSUES.

"It being admitted, that, upon the 24th

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" day of January 1818, a bargain was entered
" into betwixt the pursuers and
" Hudson, acting for the defenders, whereby
" the defenders agreed to furnish and ship for
" the pursuers ' 50 pipes of good sound Port
" ' wine, of good colour and body,' and to de-
" liver the same to the pursuers free on board
" the vessel at Leith, freight and insurance in-
" cluded, at L. 36 per pipe, payable in Lon-
" don at twelve months from the date of the
" bill of lading, and that the said wine was to
" be shipped, if possible, within two months
" from the said 24th day of January 1818 ;—
" and it being farther admitted, that the de-
" fenders did ship at Oporto 50 pipes of Port
" wine, which arrived at Leith on or about the
" 23d June aforesaid,—

" Whether the said defenders improperly
" delayed to ship the said wine, according to
" the terms of the said agreement, to the loss
" and damage of the pursuers ?

" Whether the wine shipped as aforesaid was
" not of the quality agreed upon, but of an in-
" ferior quality, to the loss and damage of the
" pursuers ?

" Damages laid at L. 500."

The first evidence offered was a circular letter, transmitted by the defenders, dated October 1817.

Forsyth objects, This is not evidence.

LORD CHIEF COMMISSIONER.—The letter relates to the subject-matter of the contract, and is an act by the defenders relative to their business, which probably gave rise to the contract. The admissions in the issues are to show the general nature of the contract, and to cut off the fringes of the cause, but do not prevent a party from producing competent evidence in support of his case. In the present instance, it is proposed to produce this letter to show the nature of the contract; and, as it relates to the sale of wine, and immediately precedes the contract, and refers to the same vintage, I think it is admissible.

A letter to the pursuers, from Bertram and Company, to whom twenty pipes of the wine had been sold, being produced,

LORD CHIEF COMMISSIONER.—The transactions between Bertram and Company and the pursuers, relative to this wine, may be proved

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in this case; but I doubt if this is the proper way to prove them. It appears to me, that Bertram should be called, and examined upon oath, with the letter in his hand.

Jeffrey.—We do not produce it as evidence of a transaction with Bertram and Company, but as part of a series of letters.

LORD CHIEF COMMISSIONER.—Then it is quite correct, as the correspondence would not be intelligible without it.

A witness held not to be disqualified unless the verdict can be used in his favour.

Mr Carnegie, a partner of Bertram and Company, was called as a witness.

Forsyth objects.—He is a partner of the company who rejected this wine, and has an interest to make it bad, otherwise the pursuer will have an action against them for rejecting it.

Jeffrey.—The interest is the other way, but there is no case in Court; and the verdict in this case cannot be used in any case that may be brought against them.

LORD CHIEF COMMISSIONER.—One consideration here is, whether the verdict in this case can be used for or against the party. It

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v.
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cannot be used for him; and, therefore, this is such an interest as goes to his credit, not his competency. If any question is put in which he is interested, an objection may be taken to that question.

I cannot see how he can be interested in this case, as he is called by the party who would be prejudiced by his testimony.

A witness thinking himself interested, does not disqualify him.

The witness having stated, that he considered himself disqualified, his Lordship informed him, that he could not disqualify himself, but it was for the Court to consider whether his evidence was competent.

After several questions to ascertain the nature of the disqualification, the witness was admitted; upon which Mr Forsyth intimated his intention to tender a Bill of Exceptions. At the conclusion of his examination, however, his Lordship put some questions, from which it appeared that he was to share in the sum to be awarded by the Jury, and thus, being interested in the event of this cause, his evidence was struck out.

A clerk to Forbes and Company was afterwards called, and stated that he had looked into their books.

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LORD CHIEF COMMISSIONER.—How can you make their books evidence for them? Do you mean to hold, that, when regularly kept, they afford *prima facie* evidence till rebutted?

Books of a mercantile company afford a *semiplena probatio*, but must be produced eight days before a trial.

Forsyth objects.—The books have not been produced, in terms of the regulations, and excerpts ought at least to have been given. I admit, that books, when proved to be regularly kept, together with an oath in supplement, afford a sort of proof.

Jeffrey.—It is the practice not to produce books before the trial. If regular books are produced, and the keeper of them swears that the transactions are real, they are sufficient *prima facie* evidence.

LORD CHIEF COMMISSIONER.—The books being laid on the table by the party, it is admitted, does not make them evidence; but, in the old method of taking proofs, books, when regularly kept, afforded a *semiplena probatio*. But, it is said, the clerk will swear to the entries, and that they are merely to suggest to his memory.

With regard to the objection on the terms of the act of sederunt, the first regulation was

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HUDSON, &c.

positive, but, by a subsequent one, a discretion was given to the Court; the deposition of the haver is, however, to be taken.

Russel's Form of Process, p. 78 and 79.

In the present case, no reference was made to these books in the admission of the writings called for, or produced; and it does not appear to me a case for the Court to admit them, under the discretionary power given to it.

Cockburn, in opening the case for the pursuers, and *Jeffrey* in reply, stated the nature of the questions—That they had commissioned wine from a correspondent of the defenders; and being new customers, and the quantity large, they were entitled to expect it at a lower price than if they had been in different circumstances. The correspondent, too, was negligent in transmitting the order.

On the second issue, we shall prove that the wine sent was not sound, &c. as warranted.

Skene, for the defenders.—The real question in dispute is the meaning of the bargain made by these parties; and if the terms of the contract were doubtful, I admit that reference might be made to letters to explain it, but here there is no doubt.

With regard to the delay, the pursuers acquiesced in it; and, according to their evidence,

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In opening a case, a counsel ought not to read a report made under the authority of the Judge-Admiral.

they would have gained by the delay, as the markets were rising.

On the question as to the quality of the wine, a report was made in the Admiralty Court, decidedly in our favour.

Jeffrey, for the pursuer, objects.

LORD CHIEF COMMISSIONER.—Mr Skene may state, that an order was made by the Judge-Admiral, remitting to certain gentlemen to take samples, and to report as to the quality of the wine, and may then state the evidence they will give as to their opinion of its quality.

Skene.—The pursuers are bound by this report, and it is decisive of the question. The samples produced in Court have not been properly taken. The price must enter into the opinion formed of the wine, as the order was for *good* wine, not *the best* or most superior. Part of the wine was sold for profit, which takes away any claim of damage.

LORD CHIEF COMMISSIONER.—The issues consist of an admission and two questions, and to entitle the defender to a verdict, you must be of opinion that he is right on both questions;

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but the case of the pursuer is different, as, if you are of opinion that he is right on either question, you must then consider the amount of damages, and still more, if you think him right on both.

The question in the issue is not whether it was possible to send the wine, but whether there was negligence and improper delay in transmitting it? You will judge of this from the evidence which has been adduced, and you will consider whether the pursuers did not depart from the original agreement as to two months, and whether the delay can be said to be improper, when the pursuers gave directions how it should be sent after the two months had expired.

The agreement in this case refers both to quality and price, but the issue is merely as to the quality. The question is, Whether it was good, sound, &c.? and you are to form your opinion upon this from the evidence given, for, though there is no reference to price in the issue, it was still proper to allow the witnesses to refer to the price, in order to explain any thing that may be obscure in the question. But in this case, the missives seem to refer exclusively to quality—the letter, recommending the pursuers to the défenders, states a motive for going

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beyond the ordinary quality—the wines are to *bear out* the agreement, which cannot apply to any thing but quality—if the price were taken into account, it would be nonsense, but is extreme good sense as applied to quality—it is to be in terms of the contract, but not inferior.

The question, then, is, Whether it is proved to be of good quality? and upon this there is contrariety of evidence. I do not think it necessary to go through it again, and shall only observe, on the evidence of Mr Carnegie, that it ought not to weigh a feather with you, and that, if I had at first understood the situation in which he stood, you would never have heard it. You had much evidence to show that the wine was not of the quality agreed on, but on the other side, you have the evidence of three extensive merchants, who first report to the Admiralty Court, and now give their evidence, that the wine is of good sound quality at the price.

It is said, the samples produced in Court were improperly taken, and it would have been better if the wine had not been stirred; but you are to judge of this, and to consider whether the evidence of the three witnesses called for the defenders, and who were not desired to

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taste the wine in Court, is to counterbalance the testimony on the other side. If you are of opinion that it does not, then you will assess the damages, which I do not think proved to the amount claimed.

Verdict—On the first issue for the defender, and on the second issue for the pursuer, damages L. 300.

Jeffrey and *Cockburn*, for the Pursuers.
Forsyth and *Skene*, for the Defenders.
(Agents, *Thomas Johnstone*, and *James Swan*, W. S.)

The defenders moved for, and obtained, a rule to show cause why the verdict should not be set aside.

PRESENT,

THE THREE LORDS COMMISSIONERS.

1822. June 4.

New Trial refused, the motion being founded on the verdict being contrary to the weight of the evidence, and the Judge having misconstrued the issues.

The Lord Chief Commissioner read his notes of the evidence, and stated, that Mr Skene had taken broad ground, and maintained that the witnesses had not had a fair view of the subject sold.

That his Lordship had directed the Jury to transpose the words of the contract into the

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issue, and judge whether the evidence bore it out—that he had stated his opinion in favour of the defenders on the first issue, but that to relieve them from damages, the Jury must be of opinion for them on both issues.

That if the price was part of the contract, and to be considered in judging of the quality, then his observation amounted to a direction in point of law, but if not, then it was merely observations on the fact.

Jeffrey showed for cause against the rule, That the defenders knew that their witnesses could not attend—That the pursuers did not know the situation in which Mr Carnegie stood—That what is called contrary evidence was merely a difference of opinion—That there was no misdirection as to the meaning of the issue, but mere observation on the evidence—That the letter said to be improperly admitted was introductory to the contract, and was not objected to.

Moncreiff.—We move this as a case where the verdict is against the great preponderance of evidence. The presumption is in favour of the defenders, and the report made by experienced wine merchants to the Court of Admiralty, upon the application of the pursuers, is

Skene v. Maberly, Vol. II. p. 352.

conclusive against them, as it proves the price to be an essential ingredient in forming an opinion.

We also object to the direction, that the Jury were not to consider the price in forming their opinion of the quality, and that our evidence was tainted by our witnesses coupling the price as part of the ground of the opinion they formed of the quality. Ours was the only proper evidence, and theirs was infected with the idea, that the best wine was to be furnished. The Jury could not judge fairly.

LORD CHIEF COMMISSIONER.—You put it to the Jury, that the price was an item in the contract, and as such was embraced in the issue, and that it was improper to say the question was merely as to body and colour; but on this my opinion was different.

Moncreiff.—We also contend that Mr Carnegie ought not to have been called, as he told the pursuers out of Court what disqualified him. Two witnesses that we meant to have called did not appear.

LORD CHIEF COMMISSIONER.—If it was meant to make a serious question of my con-

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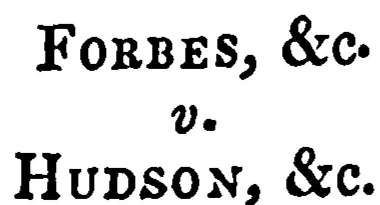

struction of the contract and the issues, the Court might take time to consider. But the case appears so clear, that we think it better not to delay.

As to evidence,

1. The application is founded on the admission of Carnegie's evidence, and that it might have contaminated the verdict of the Jury. If, in the course of a cause, whether by the mistake of parties, or in any other way, matter gets in which it is clearly understood is not evidence, and which is not summed up by the Judge, there would be great danger in granting a new trial merely on that ground. But if the witness so admitted is only one of fifteen, and not so clear as others, it forms no ground whatever for granting the new trial.

2. It is said that the verdict is against evidence, or at least that the preponderance of evidence was the other way. It is said, that one of the persons who made the report was unexpectedly absent, but he was only one of four, and this would scarcely have been a sufficient ground for delaying a trial, and is certainly not sufficient ground for setting aside a verdict. The verdict is said to be against the weight of evidence, as the wine produced in Court, upon which the witnesses formed their

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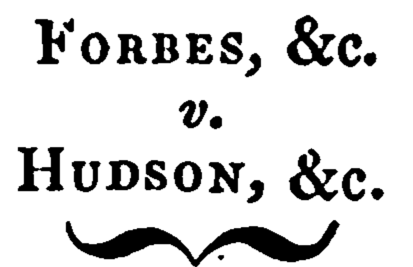

opinion, was drawn off after the wine in the casks had been stirred. Mr Cockburn stated, that in his experience as a wine merchant, he had never known this done, but admitted that it would put it in nearly the same condition as when landed; and the witnesses admitted, that when they tasted the wine in Court, though it was not of proper quality, it was better than at the time it was landed.

This was a case in which there was evidence of great respectability on both sides; that evidence was left to the Jury, and it was for them to decide upon it.

3. The only point, then, is the construction of the issue, and it is said the whole contract ought to have been under the consideration of the Jury. This objection is in the nature of what in England is called an arrest of judgment.

The agreement is to sell good wine; and in the way the second issue is framed, I cannot think that the Court could require the Jury to consider more, than whether the wine was of the quality agreed on, or of inferior quality? The expression is, shipped as aforesaid, and it is contended that this refers to the whole admission, including the price. It is also said, that the case is affected by the proceedings in the Ad-

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miralty Court, and by a report made there. If that report had been put in issue, the question to be tried by the Court and Jury would have been clear; but after meeting with the parties, the admission is made out, and the question is not put in terms of that report, or of the interlocutor of the Judge-Admiral, but is limited to quality; and it appears to me, that I could only transfer body, colour, and quality, and not price, from the admission to the issue.

The fifteen witnesses on one side state the wine not to answer this description; those on the other state it to be of sufficient body and quality, and to be good fair wine at the price.

We think the case was necessarily confined to the issue, and that there ought not to be a new trial.

PRESENT,

LORDS CHIEF COMMISSIONER AND PITMILLY.

1822. May 31.

New Trial granted, the Jury having decided a point of law as to the running down a vessel.

SCRUTON v. CATTO.

THIS was an action against the master and owners of a vessel called the Princess of Wales,