SCRUTON v. CATTO.

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,

for the sum of L. 5000, as the value of a vessel called the Sheepfold; and for relief of any claim of damage on account of the obstruction to the harbour of Aberdeen, occasioned by the wreck of the vessel.

DEFENCE.—The facts show, that the loss was occasioned by the fault of those on board the Sheepfold.

There was a pilot on board, and by the statutes 48th Geo. III., c. 104, and 52d Geo. III., c. 39, § 30, owners are not liable for the neglect or incapacity of pilots.

ISSUES.

"It being admitted, that, on or about the "23d day of March 1819, the vessel called "the Sheepfold was struck or run foul of by "the Princess of Wales, the property of the "defenders, near the harbour of Aberdeen, "and that the Sheepfold soon afterwards "sunk,—

"Whether the said collision arose from the "fault or neglect of the master or mariners on "board of the said ship, the Princess of Wales? "And whether the loss of the said vessel took "place in consequence of the said collision;

SCRUTON v. CATTO.

" or what damage was caused to the said vessel " therefrom ?"

The case was tried before Lord Pitmilly at Aberdeen, and the following verdict was returned :—" That the collision arose in part, " but not altogether, from the fault of the " master or mariners on board the Princess of " Wales : And find the defenders liable in " three-fourths of the damages caused by said " collision."

Hunter moves to have the verdict set aside, and a new trial granted, on the grounds,

Nov. 17, 1821.

1*st*, That the verdict finds the loss to have been occasioned by a different cause from the one in the issues.

Grant on New Trials, p. 75.

2*d*, It is not affirmative or negative of the issues, and does not exhaust the issue.

Ibid. p. 79 and 88.

3*d*, It finds a point of law, which Mr Bell states to be an open point.

2, Bell, Com. p. 372.

4*th*, It finds damages, though no question of damage was remitted.

The rule to show cause was granted, and, on the 22d November,

Jeffrey showed for cause against the rule, that there had been an intelligent special Jury,

part of whom had had a view of the subject—that a new trial would cost more than the sum in dispute, and that the verdict was not contrary either to law or evidence, and ought not to be set aside, on the ground of a foolish addition of the word *liable*, which he agreed to hold *pro non scripto*.

The main issue was as to the fault; and if there is any ambiguity, it is in the issue.

The question was, not whether it was exclusively through the fault of the defenders, but whether it was through the fault of one or other, or both, and the Jury have answered this. We proved gross mismanagement previous to the vessels coming near each other.

Moncreiff contended, That the Jury had fallen into the error of supposing themselves the sole arbiters in the case, and had gone contrary to all the evidence. That the point of law was an open question in this country, and could not be settled in this Court. That the loss of a vessel was occasioned either by the act of God —the positive fault of one of the parties—or by the occurrence of such circumstances as rendered it impossible to determine whether it occurred by the fault of any party.

This last comprehends the case where the loss is by the fault of both parties. In order

SCRUTON
v.
CATTO.

to render a party liable, the Jury must make up their minds that it was by his fault.

We did not lead evidence on the second issue, as it was an answer to the first, on which the pursuers failed.

The question of damage was not before the Jury, as the value of the vessel was ascertained. A verdict by inference is bad.

Grant on New Trials, p. 43.

The verdict is contrary to evidence, as not one of the witnesses swear that it was by the fault of the Princess of Wales.

Jeffrey suggested, That it was not necessary to send all the issues to a second trial, and referred to the cases of Lord Fife and the City of Edinburgh.

LORD CHIEF COMMISSIONER.—These cases were in the Court of Session, and that Court may send an issue on any point on which they wish to be informed; but we stand in quite a different situation.

This is an application for a new trial, in which three grounds are stated.

1*st*, That the verdict is not conformable to, and does not answer or fill up the issues.

2*d*, That a question of law has been decided which was beyond the power of the Jury.

3*d*, That the verdict is contrary to evidence.

Much has been said on the meaning of the issues, and whether they could be so construed as to make the verdict applicable to them.

When any doubt arises as to the meaning of an issue, we must look into the summons, defences, condescendence, and answers, to ascertain the fact and nature of the averments from which the issue was drawn; and, in this case, we have had recourse to the summons to construe the issue. In the summons, the protest by the master of the vessel is quoted, and it proceeds on the ground that the loss was occasioned entirely by the fault of the master and crew of the Princess of Wales. The condescendence and answers contain the same ground of claim, and if the party meant to alter it, the case must have been returned to the Court of Session, in order to amend his summons.

If the admission as to the value of the vessel had not been made, the party must have proved as for a total loss; but, by the admission, only the first part of the issue was before the Jury.

It seems to be admitted, that the Jury have decided a point of law, but, in order to save the expence of a new trial, an alteration of the terms of the verdict is proposed.

A vessel may be lost either by the act of God

SCRUTON
v.
CATTO.

or man. If by the act of God, then no damage is due. If by the act of man, then it may be by the fault of one party,—or it may be inscrutable, or by the fault of both. The last of these falls under the principle discussed by Mr Bell, but he leaves the question undecided, Whether the damage ought to be sustained equally, or in proportion to the value of the ships in collision.

The alteration proposed on the verdict would render it a special verdict, but in this view it is an insufficient finding, upon which no Court could decide the law, and the Court of Session must send it back to trial, and greater expence would be thus incurred. The direction by the Judge, that the Jury might find for the pursuer or defender was perfectly correct, and such a verdict would have been an answer to the issue; but the verdict returned neither answers the summons, condescendence, nor issues.

If the Jury did not choose to take the direction, they should have found a special verdict stating the facts, and the Court above would have had grounds for finding the law. They have not followed this course, but seem to have considered themselves in the situation of an arbitrator, empowered to do what appeared just between the parties; but this is not the proper

province of a Jury, and there must therefore be a new trial.

As it is the opinion of the Court, on the grounds already stated, that there must be a new trial, perhaps it is not necessary to say any thing of the verdict being contrary to evidence; but I think it better to state shortly my views of the evidence.

The evidence of the two naval officers proves, that it is proper to keep a look-out before sailing; but theirs is general evidence, and does not specially apply to this case; and the pilots and other witnesses prove, that it is the course of this harbour not to look out.

The officers also prove the rule at sea to be, that the vessel that has the wind must keep to windward; but they admit that this does not apply to narrow seas, and the present case falls within the exception.

It appears that nothing could be done at the time the vessels met; and if there was any fault, it appears to have been in the want of look-out in the Sheepfold and Margaret, for the Sheepfold was under the necessity of tacking sooner than she would have done, in consequence of the Margaret being in her way, and not from any fault of those in the Princess of Wales.

With regard to the view, I do not think it

SCRUTON v. CATTO.

could be of any service in this case. The Court must, in future, take some method of regulating this subject, and will expect to have the grounds of the application for a view stated at the time the motion is made.

Jeffrey moved for the expence of the former trial, or at least that he should not be cut out of his right to them.

LORD CHIEF COMMISSIONER.—In some cases, new trials are granted on payment of costs, but in others not. On a future day, the Court will state whether costs ought to be given in this case.

Dec. 10, 1821. His Lordship afterwards stated, The Court have maturely considered the question as to the expence of the former trial, and have compared this with the other cases where new trials have been granted. In these cases, the evidence entered into the consideration of the Court in granting the new trial, but in this case, though some observations were made on the evidence, the grounds on which we granted the new trial were,

That the issues were not fully or correctly answered, and that a question of law was involved in the finding by the Jury. It appears

SCRUTON v. CATTO.

to me a principle of sound sense, that when a Judge mistakes the law, or when he states the law, and the Jury do not find according to the direction, that a new trial ought to be granted without costs, and that they should abide the event of the next trial, as the party must be held to have known that he was retaining a verdict contrary to law.

Jan. 14, 1822.

Hunter moves to have the place of trial changed from Aberdeen to Edinburgh, as the witnesses would be abroad before the Circuit.

Jeffrey opposes.

LORD CHIEF COMMISSIONER.—There appears to be no provision for this case, and, therefore, the application must lie to the discretion of the Court. A very strong case of partiality must be made out to induce us to grant the change.

PRESENT,

THE THREE LORDS COMMISSIONERS.

1822. May 16.

A New Trial refused, though the verdict was given in respect the pursuer did not support his case by evidence.

ON the 18th April 1822, the case was again tried, and the pursuer not appearing, a verdict was returned "for the defender, in respect the "pursuer did not support his case by any evi- "dence."

SCRUTON
v.
CATTO.

Jeffrey moved for a rule to show cause; and stated, That the counsel for the pursuer had moved to delay the trial, and this being refused, intimated his intention not to appear. Upon this he might possibly have been held as confessed, but it was incompetent to impannel a Jury. We might possibly move this on the ground of misdirection; but rather put it on the ground of being essential to the ends of justice.

Act of Sed. Dec. 9, 1815, sect. 10 and 11.

LORD CHIEF COMMISSIONER.—In the present state of the proceedings in this Court, the disposition of the Court in general, is to grant a rule to show cause. We may, however, take time to deliberate whether we will grant it or not. This is a serious question as to the jurisdiction of this Court, and, on discussion, it may appear that there is a defect in the original constitution of the Court. Though there is no statute or deliberate enactment as to a case of this sort, we are in the same situation with respect to it as they are in England; and my recollection of the proceedings there is, that the plaintiff generally carries down the record; he may apply to the Judge to put off the case; the Judge has a discretion to put it off or not; if he does not, the plaintiff may withdraw the

record, and be non-suited. If the case goes on a peremptory order to try, and there is a non-suit entered, then a motion is made for a judgment, as in case of a non-suit. But though this is the ordinary mode of proceeding, the defendant may also carry down the record, and, in that case, though the plaintiff withdraws his, the defendant may call on the Judge to proceed, and may obtain a verdict without evidence.

In this case, notice of trial was given by the defenders—the case was moved to Aberdeen by the pursuers, but still it was on the notice by the defenders. We do not decide any thing at present; but it appears that this motion is founded on the Judge being wrong in having refused to put off the trial.

LORD GILLIES.—It is not correct to state, that the Judge knew that the pursuer was not to appear. The pursuer appeared by eminent counsel, and a regular agent, and moved to delay the trial; and no judicial intimation was made of his not intending to appear till after the Jury were sworn.

LORD PITMILLY.—In a question of damages, which came before me at Glasgow, I directed

SCRUTON v. CATTO.

a Jury to return a verdict where there was no evidence. The question related to a partnership. The contract of copartnership was produced. An objection was taken to it, which I sustained; and as there was no evidence for the pursuer, I directed the Jury to find for the defender.

May 31, 1822.

Moncreiff.—I am to show cause against the rule. This case was, by an order of Court, to be tried at Aberdeen. The pursuer expected to defeat this, by giving notice of trial, and countermanding it, but that was totally inept. By not giving notice in time, the pursuer lost his right, and the defender was entitled to proceed.

Act of Sed. Dec. 9, 1815, sect. 9 and 10.

There are two cases, which, taken together, are conclusive of the present question. In Paterson's case at Glasgow, both parties were present, but there was not a particle of evidence produced; and in a case at Aberdeen, notice was given by proviso—the pursuer was absent—the defender called evidence, and had a verdict.

Fraser *v.* Maitland, Vol. II. p. 32.

By the first, it is established, that the defender is entitled to try the case, and get a verdict without evidence. By the second, it is

proved that he may try, though the pursuer is absent.

Jeffrey.—It is said this trial took place by order of the Court.

LORD CHIEF COMMISSIONER.—The Court cannot fix a trial but on the application of the party. In this case, the application was not to discharge the notice by the defender as irregular, but to change the place of trial, and under that motion, the Court could not deprive the defender of the right he had by his notice.

Jeffrey.—There is no power given to the defender to try, but merely to fix the time and place; these were altered by the Court, and the trial stood on the notice by the pursuer. His advisers relied on getting the case put off, on an affidavit of the absence of a material witness; and, therefore, the other evidence was not ready.

The Jury are to give their verdict according to the evidence, but in this case there was none.

In England, in Chancery cases, the remedy is, that the case must be tried within twelve months. Neither of the cases relied on apply here.

SCRUTON
v.
CATTO.

LORD CHIEF COMMISSIONER.—Since this case was last before us, I have turned the whole subject in my mind. When I then mentioned the law of England, I stated that the defender might carry down the record, and get a verdict; but a distinction ought to be stated. The defender cannot do this in every case.

Barnes' Notes, 458.

A case occurred in 20th Geo. II. where the defender carried down the record, and got a verdict; but the Court, on argument, ordered a non-suit to be entered.

The analogy of cases from the Court of Chancery is not correct, as in these the issues are for the information of the mind of the Court, and the Court keeps them in its own hands, and prescribes the time within which they are to be tried. The case of Lord Fife was analogous to the Chancery cases, but this is more analogous to the cases at common law.

We must, however, decide this case on the analogy of the law of Scotland, and not of England. In England, the policy of the law is, not to conclude the party, but here it is the reverse.

There are two regulations applicable to this case. The one is, that for holding the party confessed, after two terms and sittings have

elapsed. The other is, that by which the defender may give notice by proviso. In this case the defender gives notice—the pursuer appears, and moves to have the case put off—the Jury is impannelled, and there is no pursuer to open the case, and call witnesses.

Reference has been made to the terms of the oath by the Jury, but that does not embarrass the case, as the only way of discharging them was by a verdict. The pursuer appeared at this proceeding; and if a verdict is to be set aside whenever a pursuer does not choose to appear and call evidence, he would have it in his power to hang the case up against justice.

It is said, the notice by proviso was got quit of by the order of Court: but there is nothing in the terms of the order to take away the right of the defender to try.

It is a cause of regret when cases are not tried on their merits; but in this case I am of opinion that we ought not to grant another trial.

LORD GILLIES.—I am of the same opinion. I have no notion that a party is entitled to proceed in this manner. I think this was a case decided *in foro contentioso*, and that we cannot set aside the verdict.

SCRUTON
v.
CATTO.

To this decision a Bill of Exceptions was tendered.

LORD CHIEF COMMISSIONER.—This is entirely a question of law; and it is perfectly regular to tender a Bill of Exceptions.

Dec. 6, 1822.

An intention to appeal from the judgment of the Court of Session, no ground for refusing expences in the Jury Court.

On a motion for expences,

Jeffrey.—Expences are not to be given till the term for asking review of a judgment is elapsed. An appeal may be taken from the judgment of the Court of Session, but it must be within fourteen days, (not five years,) and be set down for the fourth cause day. If I succeed, there is no way of getting them back.

Moncreiff and *Skene*.—We got a verdict; they moved for a new trial, and were refused; they tendered a Bill of Exceptions, and the Court of Session have found all their exceptions bad. This is final here, and they do not state that an appeal *is* lodged, but that they mean to lodge one. Without a finding for expences, we cannot get interim execution from the Court of Session.

LORD GILLIES.—It appears to me that an order may be given for expences, as there is no legitimate ground stated why it should not be

given. Formerly, in the Court of Session, to prevent an application for expences, it was usual to have a petition of appeal ready, and to send it off immediately; but, when Parliament was not sitting, there was no means of preventing the application for expences. The evil was found so great, that the act 48th Geo. III. c. 151, authorizing interim execution, was obtained, and now the party has not the benefit of the delay from the appeal. That act only applies to the situation of an appeal entered, which was the case to be remedied, and it empowers the Court of Session to give expences, upon caution for repayment.

The act, being prior to the institution of this Court, does not apply here, and we are in the same situation as the Court of Session was prior to that act. If an appeal were entered, there might be a difficulty; but in the Court of Session, it was never heard of as sufficient to prevent a finding of expences, not that a party had appealed, but that he was to appeal.

The act making it competent to give expences renders it necessary for us to do so, after a final judgment, in the Court of Session,—and as I do not see any difference in the situation in which we are now from that in which the Court of Session was formerly, if we think expences should be given, I see

SCRUTON v. CATTO.

no objection to our ordering them. If the Court of Session remitted a case to a Sheriff, it would be a contempt of Court, if he refused to proceed on an intimation of an intention to appeal.

LORD CHIEF COMMISSIONER.—If the decision in the Court of Session is to be considered a final judgment, then this Court is tied up as to what it ought to do, and the mere intimation of appeal is not to be held a bar. But the difficulty is, that we may have called on the party to pay expences, when, in the Court of Appeal, there may be no means of extricating the case, and doing justice to the parties. There is no doubt Lord Gillies is right in strict law; and the only question is, Whether we may not give expences under some reservation, or by the party consenting to give security?

LORD PITMILLY.—I think it competent to give expences, whether he consents or not.

Mr Jeffrey then applied for the expences of the first trial, which was opposed.

LORD CHIEF COMMISSIONER.—The first trial goes for nothing. Ought not each party to sit down with their own expences?