PARIS
v.
SMITH.

PRESENT,

THE LORD CHIEF COMMISSIONER.

PARIS *v.* SMITH.

1823.
March 5.

Finding that an agent was employed to convey a share of a vessel, and ought to have caused the conveyance to be inserted in the custom-house books.

AN action against an agent to compel him to appear and defend in an action brought against the pursuer as owner of a vessel called the Three Brothers, or to pay the sum for which the pursuer may be found liable on account of damage done by that vessel.

DEFENCE.—The defender was employed, not by the pursuer, but by the purchaser of the share of the vessel.

ISSUE.

"Whether, on or about the 20th day of "January 1818, the defender was employed "by the pursuer, or by David Paterson, for the "pursuer's behoof, to execute a vendition, and "to complete the transference of one half of "the vessel called the Three Brothers, in fa- "vour of Robert Steven; and, Whether the "defender failed to make proper entries at the "Custom-House, and thereby failed to com-

" plete the transference, to the loss and damage
" of the said pursuer ?"

PARIS
v.
SMITH.

In an action of relief, the process, which is the ground of the action, must be produced eight days before the trial.

After the case was opened for the pursuer,

Skene, for the defender.—They have not produced, in this case, the process to which they wish us to be parties, and in which they allowed a verdict to go in absence.

Jeffrey.—The defender cannot plead surprise, as the process is made the ground of our action, and they might have borrowed it on payment of a small fee. As they refused to admit the process, we have brought the clerk of the Admiralty to produce it when he is called.

Skene.—The objection is not to the examination of the clerk, but production of the process. The rule in the act of sederunt, § 24, is absolute, and the only exception is that stated in act of sederunt, 9th July, 1817, § 5. A similar attempt was rejected in Tytler's case.

LORD CHIEF COMMISSIONER.—It is disagreeable to turn a party round on a point of this sort ; but, so long as the act of sederunt exists, the Court, before it can allow such a production, must be thoroughly satisfied that it falls under the exception referred to. The fact, in this

PARIS
v.
SMITH.

case, is clear—notice was given of the witness and of the production,—it is also noticed in the summons in the cause, and it is said, a call was made, in regular time, upon the party to admit it, but that he did not appear.—The question now is, whether enough has been done to entitle the Court to exercise its discretion, and the whole rests on that part of the act of sederunt. The general rule is contained in the act, 10th Feb. 1816, § 3; and after Lord Fife's case, another act, 9th July, 1817, was passed, which gives the Court a right to exercise its discretion.—Under that act, the party must call the haver.

The only conclusion I can draw, is, that the discretion is to be exercised within the meaning of this clause. It is said this is a public document, but the pursuer might have borrowed it, and though I regret it, I cannot say that the pursuer has brought himself within the rule. This is a record to which the defender is not a party, and it runs to a great length, which is a reason for producing it before. It has been said, that it has been the practice to receive such documents at the trial, but that has been, so far as I recollect, by consent; if any case can be shown where it was

done without consent, I shall be ready to relax in this instance.*

A party failing to recover a document from a haver, allowed to prove the contents.

During the examination of Paterson, who is mentioned in the issue,

Jeffrey.—We have endeavoured, by an examination of the parties on commission, to recover the agreement betwixt them, and having failed, are now entitled to prove generally its contents.

Skene.—There are no authorities for such a proceeding.

LORD CHIEF COMMISSIONER.—This examination was in the Court of Session, and it is customary to rely upon that. Is it agreed that the document is not to be found? If so, and if it is made out that the defender had any thing to do with it, I will admit this evidence.

An objection was taken to a question, whether, if the witness were employed to com-

---

* The production of papers is now regulated by an act of sederunt, dated 8th March 1826, and, in the case of Combe and Company *v.* Morison and Hossack, tried on the 23d March 1826, Lords Pitmilly, Cringletie, and Mackenzie held, that, to entitle a pursuer to call on the defender to produce papers at the trial, he must show good reason for their not being produced before.

PARIS
v.
SMITH.

plete the transference of a vessel, he would think it necessary to make an entry in the Custom-House books.

LORD CHIEF COMMISSIONER.—Put the case to the witness as it is proved.

An extract from the custom-house books not received as evidence.

A witness was called to produce excerpts from the books of the Custom-House at Montrose.

Skene.—They must bring the books, as they are the best evidence.

Jeffrey.—We understood from this witness, that the books were immoveable; but it now seems they might be got on application to the Board.

LORD CHIEF COMMISSIONER.—It often happens that evidence of the sort offered, is admissible. When a record is immoveable, then an office copy, (an extract) is admissible. But, the document being bulky, is not a sufficient reason for admitting the copy. I dare say, the excerpts now offered are correct, but the books, if here, might be cross-examined.

In an institution such as this, it has often struck me, that it would be desirable to have persons to conduct cases in this court, to prevent mistakes of this sort. In more than one

English court, there are clerks of court, who are employed to give advice to the parties, and act for them, in conducting the cases before these courts.

Jeffrey opened the case, and stated, That the defender did not make the entry in the books of the Custom-House, and by 34 George III. cap. 68. the omission of any form renders the whole void. It is said the defender acted for the purchaser, but if he did, he also acted for the seller, which is customary in such matters.

Skene.—This is an action for gross neglect on the part of the defender, and we do not differ much on the fact. The question is, whether there was an employment, not only to execute a vendition, but to complete the transference; and whether the defender failed. There is not sufficient evidence of such an employment, and it is not proved that he failed, as there is no evidence that the entry was not made.

1 Phillipps's Law of Ev. p, 195.

LORD CHIEF COMMISSIONER.—This case goes to you on the evidence for the pursuer. It arises out of a clause in the act of Parliament, which requires an entry of the sale of a vessel to be made in the Custom-House books, which

PARIS
v.
SMITH.

is a formal proceeding, without which the sale is void.

This is an action against a person for not doing what it is alleged he was bound to do; and in all such cases, the fact must be clearly made out; the pursuer must make out that the employment was given and undertaken, and was not fulfilled. It must be established, that the undertaking was not only to execute the vendition, but to complete the transference, and that this was not executed. A distinction is taken, and it is said, that employment to execute the writings does not imply that the agent is to complete the transference. You have heard the evidence as to the fact, and the practice of other agents in similar cases, and if you are of opinion that the employment was only to execute the vendition, and that it required a special order to render it the duty of the agent to make the entry, you will find for the defender. If you are of an opposite opinion, you will find for the pursuer; but to entitle you to do so, you must be satisfied of the whole matter in the issue.

His Lordship then stated the evidence, and that the Jury must consider whether the term *convey*, which was used by one of the witnesses,

meant that all was to be done that was necessary to complete the transference, and whether the defender, in this case, did all that was necessary, by giving the vendition to the purchaser, with instructions to send it to Montrose.

If this term had occurred in a legal deed, then I would have stated what in law was its meaning, but, as occurring in parol evidence, I shall only say, that a conveyance is a complete transference of the property, and, unless there is some strong evidence or argument against it, you will consider whether this is not made out for the pursuer.

It is clear that the defender knew that something more was necessary to be done, and it would have been more natural to have given the vendition to the seller than the purchaser. On the whole, it appears to me that the weight of the evidence is, that the employment was to complete the transference, and that a verdict should go for the pursuer, but, if you are of a different opinion, you will find for the defender.

The terms of the second issue ought to have been not "to make proper entries," but to *direct the officers* to make, &c., and this would be a proper correction for your verdict. Unless your verdict is for the pursuer on the first issue, in which case, this question does not arise, but if

PARIS
v.
SMITH.

it does arise, you must consider such evidence as we have, the books not being here.

After detailing what appeared the result of the evidence, his Lordship said,

It is a very serious thing calling a man of business to account for a neglect. No doubt a party may bring such an action, but, before you subject the defender, you must be thoroughly satisfied that the employment was undertaken, and that he failed to perform it.

Skene and *Buchanan* suggested, that, as nothing was proved as to the books, the presumption was, that the entries were regular.

LORD CHIEF COMMISSIONER.—There is no doubt the presumption that the books are regular. But if the Jury are of opinion that the conduct of the defender was not correct, the question is, if we are to presume the entry made. I hold the pursuer has made a case to be left to the consideration of the Jury.

Verdict—"For the pursuer."

Jeffrey and *Sandford*, for the Pursuer.
Skene and *Buchanan*, for the Defender.
(Agents, *Archd. Duncan*, s. s. c. and *T. Deuchar.*)