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been mistaken in the opinion which they formed; and, on the whole facts, you will consider whether this individual was of a sound or wandering mind.

Verdict—For the pursuers.

Moncreiff, D. F., and *M. Brown*, for the Pursuers.
Jeffrey, and *Cuninghame*, for the Defenders.
(Agents, *John Campbell Jun.*, W. S. and *William Waddell*, W. S.)

PRESENT,

LORDS CHIEF COMMISSIONER AND CRINGLETIE.

1828. Jan. 10.

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Damages against a law-agent for not obtaining a valid security from a married woman.

AN action of damages against a law-agent for negligence and error in not obtaining a valid bond in security.

DEFENCE.—The defender was not employed by the pursuers; and the bond he obtained was in conformity with the instructions he received. The pursuers accepted of the bond, and are barred by homologation.

ISSUE.

" It being admitted, that, by a bond, dated
" the 19th day of September 1821, executed
" by the late Alexander Smith and Robert
" Anderson, they became cautioners for Adam
" Clark, farmer and cattle-dealer at Whiteside,
" for a cash-account, or credit, with the Branch
" of the Bank of Scotland at Dumfries, for the
" sum of L. 300 Sterling, and interest there-
" on :—

" Whether, on or about the 17th day of
" September 1821, the defender, acting as law-
" agent for the several parties aforesaid, pro-
" mised and undertook to obtain a valid and
" effectual bond of relief from the said Robert
" and Adam Clark, and from Mrs Mary Clark,
" (she at the time last aforesaid being a married
" woman,) the mother of the said Adam, in
" security of the said sum, by obtaining from
" the said Mary Clark such bond or other
" written instrument as would affect her sepa-
" rate estate of Whiteside; and whether the
" defender failed to perform the said promise
" and undertaking, to the loss, injury, and
" damage of the pursuers?"

Whigham, for the pursuers, said, The defen-

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der was the agent of the Clarks, and the pursuers trusted to him to get a proper bond. The pursuers had to pay to the bank, and when they applied to Mrs Clark, she and the defender believed her liable. The defender ought to have known that a married woman could not grant a personal obligation. He was the sole agent, and it is of no consequence from whom he got his instructions.

Ersk. B. i. T. 6. § 22. Struthers *v.* Lang, 2d Feb. 1826. Aff. 28th May 1827. Lillie *v.* M'Donald, 13th Dec. 1816. Chatto *v.* Marshall, 17th Jan. 1811.

In opening a case documentary evidence ought to be described, not read.

When certain passages from the condescendence and answers were read in the course of the opening, the Lord Chief Commissioner observed, The evidence should almost never be read, but only described, and afterwards said, The proposition is self-evident, that a person undertaking to do business must either do it or state that it cannot be done, and no evidence of the practice is necessary.

A document rejected, not having been produced eight days before the trial.

In order to exclude a writing on the back of the bond, when the bond to the bank was given in evidence, the objection was taken, that it had not been produced eight days before the trial. The answer made was, that the case had all along been argued on this bond.

LORD CHIEF COMMISSIONER.—The act of sederunt is imperative, unless it is made out on

oath that the documents could not be produced before.

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This being rejected, it was then proposed to call a witness to prove that the sum had been paid to the bank.

Circumstances in which a witness was admitted to prove that a sum was paid to a Bank.

Cockburn.—This is a person from the office here, who can only speak from the books, and I object to the competency of parol evidence to prove payment of more than L. 100 Scots.

Jeffrey.—It is in the defences that at a particular date I was called upon to pay this. Though not formally produced, this bond was exhibited at the time the issues were prepared. The purpose of the regulation was to prevent surprise.

LORD CHIEF COMMISSIONER.—This appears a great hardship, and the parties ought to consent to withdraw a juror, and perhaps the cause may be settled before coming to trial again. In the circumstances I will stretch every thing consistent with law and justice to aid the pursuer.

The clause in the act of sederunt is imperative, and we must adhere to it. If I had the power I would nonsuit the pursuer, and he would then be entitled to come forward again;

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and if the defender has a good case on the merits, I think he ought to agree to put it in a position to be again tried. If the case is to go on I admit this witness.

Cockburn.—I cannot consent to withdraw a juror.

Parol evidence of what took place at a meeting of creditors rejected.

When the trustee on Clark's estate was called as a witness, an objection was taken to the questions, whether the estate of the Clarks was sequestrated, and whether a claim was made upon it by a certain individual?

Cockburn.—I object to his telling a word which is in the minutes.

Jeffrey.—These minutes are part of a record in the Court of Session made up by this witness, and this is the proper officer called to prove facts in his management.

LORD CHIEF COMMISSIONER.—If you wish to prove any thing which is established by writing, then the writing must be produced. The date ought not to have been proved by a witness. The witness, as trustee, has custody of these minutes, which being in writing are the best evidence, and he must speak from them. If it is alleged that what is wanted is not in

them, he must examine to see whether it is so. His memory is not to be set up against the minutes, but they must be proved like any other document.

Cockburn, for the defender.—This is a case in which, more than any I have seen, you, the jury, are in the hands of the Court.

The issue you are sworn to try is, whether the defender promised and undertook, &c.? and upon this there cannot be a doubt. But there are several questions which are not put in the issue, and on these the pursuer's case rests. If a party is employed to do a known piece of business and blunders it, then he is liable, as the employment is clear, and the question is on the failure; but here there is no blunder in the bond. Before it can be held that he made the promise mentioned in the issue, it must be proved that Mrs Clark had a separate estate; that the defender knew it; and that he engaged to bind it. If the pursuer fails in any of these, and he failed in all, then his case is gone. They have not proved the nature of the employment, or that he was agent for all the parties. There is no evidence that he did not tell them that this was only a legal security binding the two men, and that her name was put in, thinking it would do no harm. There are several cases

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in which a bond by a married woman is binding. There is no evidence of damages.

Brodie on Stair, B. i. T. 4. § 16.

LORD CHIEF COMMISSIONER.—On the question of damages I wish to hear farther argument, as this is not a question of *solatium* or ideal damages, but a claim for a specific sum requiring evidence.

Jeffrey.—There is a series of cases holding, that a professional person failing in his duty is liable for the utmost loss that might have occurred. If employed to execute a diligence, it is incompetent to plead compensation, or even that the diligence was inept. Magistrates of burghs are liable for the escape of a prisoner, and the same is the case as to a law agent.

Lillie *v.* Macdonald, Dec. 13, 1816. Struthers *v.* Lang, Feb. 2, 1826. Dangan *v.* Smith, July 3, 1817.

Cockburn.—This action is for loss actually sustained; and there is no evidence that the other parties have been discussed. Was it ever heard of, that damages could be given for breach of contract where none is proved?

LORD CHIEF COMMISSIONER.—Before addressing you, I wished to get at any fit terms in which to state the damages. When I did not stop the case early in the day, it was on the supposition that evidence of the specific damage might be given.

If I was sure the justice of the case was with the defender, I would direct you to find for the defender, on the ground that the pursuer had not made out his case by failing to prove the damage. But it is probably better to go through the case, and to consider the terms of the issue, and the bearing of the evidence upon it, independent of the question of damage; then I shall observe on the damage, and leave the whole to you.

It is said the defender ought to have got an heritable bond; but that by misconduct he took a personal one. The issue contains an admission and three questions; and, in considering the two first, you may leave out of view the third. The first question is, Whether the defender, acting as agent for the parties, undertook to obtain, and did obtain, a valid bond of relief from Mrs Clark; and here the term bond of relief is not a technical term, but a general one. A. and R. Clark could grant such a bond in the common form, but the other party being a married woman could not; and the question is as to a valid and effectual bond by her, which must be one affecting her property, not her person.

The next question is, whether it is made clear to you in proof that she was possessed of a separate estate, and that the defender knew

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that she had such estate, independent of her husband? There is no direct evidence on this subject, but there are two letters from the defender, which are material. If he was aware of this, then, as a man of business, he was bound to take care that the security should affect it; and a man of business is bound to know the situation of the parties for whom he acts. The evidence is defective; but if the pursuer has made out a *prima facie* case, then the defender ought to have taken off this presumption against him.

The third question is the damage, and this is a case in which a specific sum is claimed, and in that case the sum is essential, and must be proved. The best evidence of this is not before you, owing to the rejection of a document on a point of form. The only evidence is that of a clerk of the bank, who proved that L.300 was at one time due on the account, and there is no evidence that this was afterwards paid.

I suggest to the Bar that there are two ways of disposing of this case, either by directing a verdict for the defender, as there is no evidence of the damage, leaving the pursuer his redress by bill of exceptions, on which the Court will decide. Or, if the jury are of opinion that the defender is liable, then I may direct them to

find the sum stated by the bank clerk; and the other party will be relieved, if it is made out that this sum was paid to the bank. This last appears to me the best course. It holds the defender liable in the first instance, but he gets relief if the sum is paid.

LORD CRINGLETIE.—This case is embarrassed, but it is clear that a verdict for the defender would be contrary to justice, if the jury are of opinion that he acted as agent, and knew of the separate estate.

Cockburn.—We must dissent from this mode of disposing of the case, as the pursuer has failed to prove his loss.

LORD CHIEF COMMISSIONER.—It is not just that the party should suffer from this paper having been put in only seven, instead of eight days before the trial. The evil arises from our not having the power to nonsuit, as in that case the party would have brought forward his case again; and what I wish is, to put it in a position in which he may have an opportunity of trying it again.

Jeffrey.—The obligation in the bond is to

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free me from demand, and it is proved that the demand was made. I doubt if a bill of exceptions would lie.

Cockburn.—This is the common situation of a party who fails to prove his case, and the remedy is a verdict for the defender. This was the course followed in Thomson's case, and in one at Glasgow, where a document wanted a stamp.

Clark *v.* Thomson. 1 Mur. Rep. 161.

LORD CHIEF COMMISSIONER.—There is no doubt a party must suffer from his own laches, but the Court should have the power to regulate when any thing against conscience and detrimental to justice would follow from a slip of this nature. A remedy for this must be provided by the Legislature, as a new trial is an awkward remedy.

The two cases referred to were in peculiar circumstances. *(To the Jury.)* You are to determine for the pursuer or defender, according to your opinion of whether the defender knew the situation of Mrs Clark. If you are of opinion that he is not liable, then we get rid of the question; and my direction to you is, that if you find for the pursuer, you will find L.313, the sum drawn from the bank, as damages, and leave the party to deal with the verdict as he may be advised.

Verdict—For the pursuer, damages L. 313, 9s. 8d.

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Jeffrey and *Whigham*, for the Pursuer.
Cockburn and *Maitland*, for the Defender.
(Agents, *Ad. Hoggan*, W. S. *T.* and *J. Brodie*, W. S.)

1828. Jan. 18.

A new trial granted, the Court being of opinion that certain evidence had been improperly left to the jury.

Cockburn moved for a rule to show cause why a new trial should not be granted; 1st, As the radical fact of the promise to get an effectual security was not proved; 2d, The loss was not proved; and 3d, The defender was thrown off his guard by the conduct of the case in Court, as no one anticipated the turn it would take till all possibility of the defender bringing evidence was cut off.

LORD CHIEF COMMISSIONER.—I am extremely glad that this case has been brought before the Court, as of all the cases I have tried it gave me most uneasiness at the time, from not being able exactly to see the position in which the cause stood. I doubted at the time how far our decision as to damage was right. Where the damage is ideal, then the giving it is in the minds of the jury; but when the damage is real, it must be proved. I had great difficulty in getting out of the dilemma in which we were placed; and particularly from

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the objection being taken not to the bond, but to the writing on the back of it. This would have been a proper case for a nonsuit, if the Court had had the power; and if that power is ever given, in my opinion it ought not to be, as it is in England, vested in the pursuer, but ought to be under the control of the Court.

In this case I endeavoured to prevail on the party to withdraw a juror, but this was resisted. I then stated the case in various views; but, on the whole, thought it better to leave to the jury the question of employment; and as to the damages, to take the sum drawn out from the cash-account and interest. The most material point for the Court to consider is, whether the debt due to the bank in 1823 is not *prima facie* evidence of damage, to be taken off by evidence on the other side?

1828. Jan. 29.

Jeffrey showed for cause against the rule, 1. That law presumes the employment from there being no other agent. 2. That an official person, if he blunders a document, must pay the utmost loss caused by the blunder. 3. That it is admitted in the defences, and was proved at the trial, that the pursuer was called on to pay this sum, and is therefore entitled to claim the sum in the bond. Magistrates of

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Gilchrist v. Sutherland, July 19, 1776, Mor. 8892. Chatto v. Marshall, Jan. 17, 1811. Lillie v. Macdonald, Dec. 13, 1816. Dougan v. Smith, July 3, 1817. Struthers v. Lang, Feb. 2, 1826.

burghs and messengers are liable for the escape of prisoners, without proving that payment of the debt would have been obtained by imprisonment. If justice does not require it a new trial will not be granted. 4. There was no surprise, as we went into evidence, and the defenders might have done the same.

Cockburn.—If the defender is prevented from again laying his case before a jury, every friend to this institution must regret to see a verdict stand in a case which was never tried. There is no evidence of an undertaking; and it is impossible for the Court to shrink from its opinion as to the damages. In the cases referred to the employment was to do a specific thing; and the only question was, whether that was done? Even if the sum was paid, there is no evidence that it was under this bond, but there is *no* evidence of payment. We are told, and I hope will always be told, that it is sufficient to succeed on one point; and we relied on the opinion of the Court communicated to us, that the pursuer had failed to prove the damage.

LORD CHIEF COMMISSIONER.—The statement by the Court was, that the pursuer was cut out of the evidence of this bond by the negligence of an agent, and that that was a cir-

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cumstance which would have induced the Court to nonsuit him, if it had had the power, in order that the case might be brought forward on the merits. I am not at present to go into the case, or give the opinion of the Court; but if on mature consideration it turns out, that at the trial there was good *prima facie* evidence of loss, though it did not then so clearly appear, then we must refuse this application.

As to the conduct of the Court at the trial, it was never supposed that the Court should have the power of arbitrarily nonsuiting a pursuer, but merely that it would be desirable that where justice required it, the Court should have the power, in the exercise of a sound discretion, of affording a pursuer a means of again bringing forward his case; and this case appeared one in which it would have been fair to allow a pursuer to retrieve his error.

1828. Jan. 31.

This case has occupied much attention, and is one of all others in which the Court feels anxious. It was manifest from the beginning, that there was danger that part of the case would be decided, not on the justice of the case, but on a point of form. The Court was naturally desirous to relieve the party from this, and allowed the case to go on, and it was sent to the jury. It is clear, that, at the time the Court

first addressed the jury, there was much difficulty in getting out of the position in which they were placed. I saw, that, if a verdict was given against the pursuer, there was great difficulty in getting quit of it, though justice might be on his side; on the part of the defender the difficulty did not seem so great; but I thought he might get justice, provided he could show that the money was not paid. With this view, I directed the jury minutely to consider the evidence of employment and negligence, and if they were satisfied, then to find the sum stated in the books of the bank as the damage.

It is always dangerous to allow a case to go on mere *prima facie* evidence. I am now satisfied that this is not proper *prima facie* evidence, and that the only remedy is to allow the case to go to another jury, where the pursuer will have an opportunity of remedying the defect of evidence, and the defender of bringing forward his case; and no prejudice can be done to either party by what has been stated.

When the case was again brought on for trial, the parties settled it by a compromise.