PRESENT,

LORDS CHIEF COMMISSIONER AND PITMILLY.

## CLARK *v.* THOMSON.

1816. November 8.

Damages assessed for arrestment of a vessel and detention of the master on a *meditatio fugæ* warrant, during an ill founded action.

THIS was an action originally brought before the Water Bailie of the river Clyde at Glasgow, for damages occasioned by the arrestment and detention of the ship Perseverance, of which the pursuer was master, and for his imprisonment on a *meditatio fugæ* warrant.

DEFENCE.—The proceedings were not illegal or vexatious. The pursuer was not necessarily detained in this country.

The case was brought by advocation into the Court of Session; damages were found due, and the following issues sent to ascertain the amount.

ISSUES.

"What loss and damage has been suffered
"by the pursuer in consequence of the arrest-
"ment and detention of the ship Perseverance

CLARK
*v.*
THOMSON.

" at Greenock, upon the 21st June 1808, or " about that time, upon a warrant obtained by " the defender, and of the arrestment and ap- " prehension of the pursuer's person upon the " 24th June 1808, or about that time, upon a " warrant obtained against him as in *medi-* " *tatione fugæ*, at the instance of the defender, " and of the proceedings that took place before " the different Courts of law in consequence " thereof?—And,

" What loss and damage has been sustained " by the pursuer, in consequence of the claim " brought against him by the defender, and of " the action founded upon the same, conclud- " ing for L. 8000, from which action the pur- " suer has been assoilzied by the decision of " the House of Lords?"

To this issue was annexed a schedule of specific damages, amounting to L. 20,000. *

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* The above sum is composed of the following items:—

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|---|---|---|---|
| 1. Maintaining the crew during the detention of the vessel, from 21st June to 1st August 1808 | L. 45 | 0 | 0 |
| 2. Wages during the same period - | 56 | 0 | 0 |
| 3. The pursuer's expences during five and a half years he was detained by the action against him | 2200 | 0 | 0 |
| 4. Claim made by Messrs Leslie and Macnaught, for commission and other charges - | 856 | 0 | 0 |

CLARK v. THOMSON.

In an early stage of the proceedings in the action mentioned in the second issue, the pursuer was arrested, and was under the necessity of finding caution *de judicio sisti*. On the 25th June 1808 he brought the present action of damages, which was not proceeded in till after the decision of the other case by a judgment of the House of Lords, affirming the decision of the Court of Session.

The conditions of a bond of caution can only be proved by the bond or an extract of it, not by admissions in the pleadings in the Court of Session, or even a copy of the bond, though sworn to be correct.

The first witness was the extractor of the Burgh Court of Glasgow, who produced copies of the two bonds of caution in that action. An objection was taken that the originals ought to have been produced; to which it was answered, that, by the custom of the Burgh Court, the originals could not be borrowed.

It was then contended, that an extract was sufficient, and that the witness having sworn that the copies were correct, he might sign them as extracts in presence of the Court.

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|---|---|---|---|
| 5. Profits that would have been made by the pursuer if not detained - - | 5750 | 0 | 0 |
| 6. Profit that might have been made by the vessel | 4400 | 0 | 0 |
| 7. Costs of the appeal - | 270 | 18 | 4 |
| 8. Law expences paid to his agents in Glasgow | 469 | 14 | 4 |
| 9. Solatium - - - | 6000 | 0 | 0 |
| | L. 20,047 | 12 | 8 |

CLARK
*v.*
THOMSON.

*Clerk*, for the defender, stated,—It is no part of the duty of the extractor to sign and attest copies of deeds; he only prepares extracts for the subscription of the clerks of Court, who alone have the custody of the bonds and can attest them. In the present case this is no extract, and the witness is not clerk of Court, and therefore cannot render it an extract.

LORD CHIEF COMMISSIONER.—From what has been stated, it is clear that if the copy produced is not an extract it cannot be received. The question then is, whether it is an extract? It does not bear the marks of one, nor is this the proper officer to grant an extract. This copy is inadmissible; the principal deed, or an extract of it, ought to be produced.

Circumstances in which the Court allowed documents to be produced before deciding if they were evidence.

*Jeffrey*, for the pursuer, stated,—Though we have been disappointed in not laying the bonds before the Jury, still we think we have sufficient admissions by the other party to show that such bonds were granted.

*Clerk*, for the defender, objected.

But the Court allowed the pursuer to produce the documents on which he meant to found, reserving the question of admitting them as evidence to be submitted to the Jury.

There was then shown to the witness the pe-

tition to the Water Bailie to have Thomson apprehended till he should find caution, with an order subjoined to it for apprehending him.

*Murray*, for the pursuer, contended,—Having proved the order for imprisonment, it is unnecessary to produce the bonds, as the presumption is that he was sent to prison.

*Clerk*, objected to this mode of proving proceedings in Court, and stated, that there was no evidence who the parties were in the action to which reference was made.

LORD CHIEF COMMISSIONER.—They are now proving the documents in detail; they are not before the Jury till the Court direct their officer to read them. They are now proving the second branch of the issue, and in my opinion are proceeding regularly. When the proof is concluded, we shall determine whether these documents are evidence or not.

When an objection is taken to a document produced by a witness, counsel may state the nature of the document, but ought not to read it.

The keeper of the records was called to produce the process mentioned in the second issue. Mr Jeffrey was proceeding to read a protest in that case, to which Mr Clerk objected, that he was not entitled to state any part of its contents.

LORD CHIEF COMMISSIONER.—I do not agree with the counsel on either side. Mr Jef-

CLARK
*v.*
THOMSON.

frey is not entitled to read the whole, nor is he prevented from stating the general import of the document. The Court are cautious in allowing any thing to be stated in presence of the Jury which is not evidence; and the counsel will not state more than is necessary. At the same time, the Court must know the general import of the document before they can determine whether it is relevant. Being a production in the process makes it, I conceive, a step of procedure.

A cautioner may be asked if he consented to become cautioner, though the bond is not produced, but cannot prove the conditions of the bond.

Several other papers were referred to, and Gillespie the cautioner was called, and asked if Clark was apprehended, and if he agreed to become cautioner, and whether he took from Clark a written obligation in certain terms, which the counsel was proceeding to quote.

*Clerk.*—They are attempting to prove a *meditatio fugæ* warrant by parol evidence. This evidence consists of two parts; 1*st*, That he was apprehended and in some sort imprisoned; 2*d*, That he was required to grant a letter *to Gillespie* his cautioner. They are not entitled to assume the imprisonment and bond of caution; they must first prove the cautionary obligation before they are allowed to prove the counter part.

LORD CHIEF COMMISSIONER.—It is doubtful if they can prove his apprehension in this manner. Before allowing this question, I think the Court must decide on the competency of the documentary evidence. They may ask the witness whether an application was made to him to become cautioner, and whether he consented. The document will then be put into the clerk's hands, and the Court will decide whether it is competent to read it.

A letter was shown to the witness, who swore that he must have asked, or directed his agent to ask, such a letter.

*Jeffrey*.—Was the condition that the pursuer should not leave this country?

*Clerk*.—Such a condition should be proved by writing. Being reduced to writing, parol evidence is incompetent.

LORD CHIEF COMMISSIONER.—If the condition was afterwards reduced to writing, the question is incompetent.

This I consider the conclusion of the documentary evidence; and as the question is very important, the counsel for the defender had better state his objections.

*Cockburn*, for the defender.—The fact to be proved is, that the pursuer was kept in this

CLARK
*v.*
THOMSON.

country by certain bonds of caution; unless he can prove the condition in these bonds, this proof is frivolous.

This proof is incompetent on many grounds. 1*st*, It is not the best evidence, but the worst. If there was proof that the bonds were lost, it is *possible* this might be competent; but it is admitted that they are in existence, and only at a few miles distance; and if the bond could not be borrowed, an extract might be got as matter of right. 2*d*, The documents are not evidence here. They do not prove the facts, and are not even adminicles of proof. In a former case, it was found incompetent to prove the contents of a letter by a statement in the condescendence. 3*d*, Even if admitted, they only prove that a bond was granted, but not the terms of that bond. The original may be unstamped, or be liable to some radical objection.

Rose *v.* Gollan, *supra*, 84

*Jeffrey*.—The law of Scotland does not require the best evidence, provided sufficient evidence is given. If any scale is to be fixed, that which is conclusive is the only rule. The solemn admission of a party is the best evidence, and, in fact, excludes and renders other evidence absurd, for there is nothing at issue.

I produce the original documents on which

the bonds were granted. It is not a general application for a bond of caution, but for one *de judicio sisti et judicatum solvi*. The order is to commit him till he executes such a bond; the presumption is that all was properly done; and if a bond was granted, it must have been in terms of the application.

In the answers to this application it is stated that caution has been found, and on that Clark is allowed to go away. The protest which was afterwards taken contains a requisition that the bond should be vacated; and the defender does not deny that the bond existed. It is also stated in Lord Robertson's interlocutor, and admitted in the memorial, and summons of reduction; also in the bill of advocation in this case.

In Rose's case, the letter was here, and they wished to infer its contents from a statement in the condescendence. In the present case a demand was made for a specific thing; it is proved by admissions (the best evidence) that the demand was complied with. Can the defender now say that the bond granted differed from what was asked? *Supra*, 84.

*Clerk*.—They must prove the terms of the bonds, which it is impossible to do in this manner; even in proving the tenor, there must be

CLARK v. THOMSON.

some written adminicles. It is not fair to take a detached sentence from such multifarious proceedings, as a solemn admission; even those referred to do not prove the terms of the bonds. Copies were rejected, and this is worse.

*Mr Jeffrey* rose to speak again.

Rules and Orders of Jury Court, § 34.

The LORD CHIEF COMMISSIONER stopped him, and stated,—The rule in the act of sederunt is, that a counsel is heard in support of an objection, then one on the other side, then the objector in reply.

The Court proceeds with considerable anxiety to deliver its opinion on this question. It is important not only to the parties in the case, but as fixing the rules on which the Court must proceed in receiving or rejecting evidence. This is a case, however, where the admissibility of the documents does not depend on mere rules of Court; but on those broad principles which are essential for ascertaining that the evidence produced is the evidence of truth, and for excluding all evidence that might lead to false and unjust conclusions.

The course of procedure has shown that the pursuer intended to produce the bonds, but that in this he has been disappointed. This would have been the best evidence; next

to this, and what is sufficient in law, is an extract; but here a copy only is offered, which is inadmissible.

Being thus disappointed, the pursuer next attempts, by facts and circumstances, to lay before the Court and Jury proof of the bonds and their contents; in this attempt the Court threw no impediment in his way, being anxious to allow him full opportunity of supplying, if possible, the want of the bonds.

In deciding this case, we must attend to the issue to be tried,—it is the loss from the arrestment, &c.

It is impossible the Court sending the issue could mean these to be ascertained, except by the clearest evidence of the terms on which he was detained. The Court here must, therefore, have proof of those terms; they rest on the nature, terms, and conditions of the bonds. Of them we must have the best evidence. The bonds are not here, and we are called on to infer the terms of them from other documents. It is said that there is proof that the bonds were granted, and that, in bonds of this sort, there must be a clause binding the party to remain in the country.

Parol evidence as to the terms of a written document is likely to lead to falsehood, and

CLARK
*v.*
THOMSON.

evidence of the terms of such bonds is not competent. If their existence were the question to be proved, then accuracy would be presumed, but the law does not prescribe the terms of such bonds, and they may differ in each case. The case might be very different, according as the bond required him to remain in the country, to appear only at specified times, or to pay a sum of money if he failed to do so.

If the Jury were to decide on such proof, they would be deciding on inference and supposition, not on facts.

55 Geo. III. c. 42, § 7. Act Sed. 9th Dec. 1815, § 31.

By statute and act of sederunt, a mode of redress is pointed out, by which our decision may be brought under review, and it is most important that it should be so, as very difficult questions arise, which it is necessary to decide immediately, in order that the trials may proceed. In this infant institution I shall never object to applications for redress.

LORD PITMILLY.—In a question of so great importance, I think it my duty also to state an opinion.

This question divides into two parts. Is the evidence admissible, 1*st*, To show that a bond was granted? 2*d*, To show the terms of that bond?

The petition and deliverance upon it, the admissions in the pleadings, and the mention of the bond in the interlocutor, may perhaps be sufficient to show that a bond was granted; but even of this I am doubtful; the bond ought to have been produced. We have seen, however, how this difficulty arose, and perhaps on that account we might admit the proof that a bond was granted.

But here I stop, and have not the slightest doubt that it is incompetent to prove any of the clauses or conditions of the bond. Parol evidence cannot be received to prove any of the contents of the bond,—that it was signed,—stamped,—or otherwise valid or not; it can merely show that a paper was put in, which parties acted upon as a bond of caution. The evidence ought not to be received.

*Jeffrey*.—The agents have sent for the bonds, and we would humbly move the Court to adjourn this part of the case till to-morrow.

By management in calling and examining our witnesses, the proof would last to an hour at which the Court would probably think it expedient to adjourn; and by changing the day of trial, we understood that the Court contemplated the possibility of this case occupying two

CLARK
*v.*
THOMSON.

days. There is no order in which a case must be proved. In the Court of Justiciary, the *corpus delicti* is frequently the last thing proved, and sometimes the proof of it fails.

LORD CHIEF COMMISSIONER.—It is a distressing case, but the Court cannot adjourn to correct the blunders of an agent.

This proof would be entirely hypothetical. We have given the pursuer full scope in his proof from seeing the manner in which he was disappointed.

The Court, in changing the day of trial, had it not in contemplation that this case was to occupy two days, but thought that the Jury might perhaps find it difficult to make up their verdict before the following day.

It is a principle of Jury trial, that the case should be decided at one sederunt, if human strength can accomplish it.

A bill of exceptions was presented on the ground of the rejection of the evidence. It was then contended by the counsel for the pursuer, that they were entitled to withdraw a Juror, or that the Jury should find specially the facts, but this was resisted by the counsel for the defender.

LORD CHIEF COMMISSIONER.—It is a mis-

take to say, that in England a party has a right to withdraw a Juror; he would there suffer a nonsuit; but I am much afraid of acting on analogies. I would advise, but I cannot compel, the defender to consent to withdraw a Juror,—no harm could result from it,—the Jury can only be discharged by this consent, or by returning a verdict for the defender.

CLARK v. THOMSON.

This consent being refused, a verdict was accordingly given for the defender.

*Jeffrey, J. A. Murray,* and *J. S. More,* for the Pursuer.
*Clerk, Cockburn,* and *Rutherford,* for the Defender.
(Agents, *J. and W. Murray,* and *Hill and Hopkirk,* W. S.)

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1816. Nov. 27, & Dec. 7 & 11. New Trial granted.

*Jeffrey* moved in the Court of Session for a rule to show cause why a new trial should not be granted, and stated,

1*st*, It is essential to justice to grant a trial, the case not having been before the Jury.

2*d*, There was an undue rejection of evidence, in so far as the pursuer was prevented from laying before the Jury competent evidence, though the Court might be of opinion that it was not sufficient.

3*d*, The verdict is contrary to evidence, as

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CLARK
*v.*
THOMSON.

the order for imprisonment was proved, and the Jury ought to have found some damages.

*4th*, The verdict is incompetent. Damages are found due by a final interlocutor, and the Jury have found for the defender, which is the technical form of finding no damages due. In a case at Aberdeen I maintained, that though the Court had found damages due, still the Jury might find none proved. In this I was overruled by Lord Gillies, and I believe the other Judges of the Jury Court are of the same opinion.

The rule was granted, and the 29th appointed for the other party to show cause why a new trial should not be granted; but, owing to particular circumstances, it was not heard till the 7th and 11th December.

*Clerk* showed for cause,—The pursuer's libel only concludes for L. 70,000 as the value of the vessel, not as damages, on account of his personal detention. The issues go beyond the libel.

Mill. * Though the Court found damages due, the Jury may find none proved.

* This was stated to be a case of damaged fish, in which damages had been found due; but the Court of Session, on advising

The pursuer has no just claim to these damages, as he held himself out as an American, though he is a native of this country, and has been guilty of high treason in trading with an alien enemy. In England no new trial is allowed on account of slight irregularities, if material justice has been done.

It is said he proved his imprisonment, and that some damages ought to have been given on that account,—he could prove nothing, having given up the only thing for which he concludes in his libel. We would not consent to withdraw a Juror, as that would have returned the case to another Jury in the same faulty shape.

*Jeffrey.*—The grounds stated do not apply to those in favour of a new trial.

No authority has been stated to show that in England, if by argument doubts could be reared as to the justice of the claim, the Courts would refuse a new trial; but, in England, this question could not have occurred, as the pursuer might have deserted the bar, and then a

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the proof taken on commission, were of opinion that none were proved. I have not found this case reported.

CLARK
v.
THOMSON.

nonsuit would have followed. To supply the want of a nonsuit, a new trial must be granted.

The plea on the other side is cut off by the defender continuing the litigation, and by a final interlocutor finding damages due. The interlocutor sending the issue is also final, and yet it is said to be incompetent, and contrary to justice, to allow this issue to be tried.

The Jury cannot look beyond the issue; and if I had proved damages, they must have found them, and the Court must have applied the verdict; the act of Parliament is imperative.

I still claim damages for being detained; and L. 70,000 is merely mentioned in narrative, as the value of the vessel. I could not claim that sum merely as the value of the vessel, never having offered to make it over to the defender.

LORD JUSTICE-CLERK.—This case has been argued with great ability, and the Court feel for the natural anxiety of parties in a case of such magnitude.

I will not go farther into the case, than to say, that I am clearly of opinion that the bond or an extract ought to have been produced, and that the supplementary evidence could not

be sent to the Jury. My only doubt is, if it was competent to examine the witnesses.

I am clear, that, in the infancy of this institution, the clause in the act must be liberally construed, and that a new trial must be granted.

It is hardly possible that a similar case should occur, and so it will not lead to loose practice; the pursuer expected to go to the bottom of his case, and though the clerk, not the extractor, be the proper custodier of these bonds, and there may be some error in the notice, yet I am of opinion that we may grant the new trial. If your Lordships have any doubt, expences may be given.

Whether this claim is contained in the libel, is not *hujus loci*. If this be a good objection, it might be a ground for amending the issue, but it is no ground for not trying it after it is approved of.

The other Judges concurred, and the question of expences was reserved.

A subsequent application was made for authority to transmit the bonds, and all other documents on which the pursuer meant to found, which was granted, and the case was again returned to the Jury Court.

CLARK
*v.*
THOMSON.

## NEW TRIAL.

PRESENT,
THE THREE LORDS COMMISSIONERS.

1817.
Jan. 9 and 10.

OF these dates the new trial proceeded.

A letter relative to a bond on judicial proceedings is admissible evidence, though it has no date or stamp.

The pursuer offered in evidence the holograph letter to Gillespie his cautioner, under the *meditatio fugæ* warrant, binding himself not to leave the country during the proceedings to which the bond applied.

*Objected for the defender.*—1*st*, It is not stamped; 2*d*, It has no date.

It was offered to prove the date by witnesses, and the Court found the letter admissible; and that being a document relative to a bond on judicial proceedings, it did not require a stamp. To which the defender excepted.

After a witness is dead, his deposition taken in the Admiralty Court to lie *in retentis* may be given in evidence; but if alive, the rule is different.

By authority of the Bailie of the Clyde, while the case depended before him, the evidence of several witnesses (seafaring men) had been taken to lie *in retentis*. In a minute given in by the defender, two of the witnesses were admitted to be dead.

The Court held that their depositions were admissible evidence, on the ground that what a person who was dead had said was admissible evidence by the law of Scotland. *

It was proved that another of the witnesses, the master of an American ship, had left the country soon after he gave his evidence, and that he had not been in Scotland, nor had any tidings been heard of him since.

*Objected for the defender.*—This deposition was not taken in terms of the rules and regulations of this Court, nor was any application made for a commission. It must be considered as sealed, and this Court has no power to open a sealed deposition without an order from the other Court.

*Answered for the pursuer.*—It is not sealed, and therefore the application was unnecessary. It would have been competent evidence if a proof on commission had been allowed. The rules and regulations only apply to Courts having authority to send issues. It was regularly taken before this Court was established; and this Court being bound by the law of Scotland, it must receive these as legal evidence.

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* See Lord Fife's case, *supra*, 95.

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CLARK
*v.*
THOMSON.

The Court found this deposition could not be laid before the Jury.

To which dscision the pursuer excepted.

It was then offered to be proved that the defender sent to America the goods intended to be put on board the pursuer's vessel, and made a profit on them. This proof was offered to show that he could not have *bona fide* maintained the action which he had raised against Clark for not having taken these goods on board.

The Court held that this evidence would be admissible if the question were damages or not; but the issue is sent only to ascertain the amount, damages being already found due.

The pursuer called a witness to prove the situation of his family in America.

*Clerk*, for the defender, objected,—The summons only concludes for the value of the ship, not for any thing personal to the pursuer. Although this evidence may be within the issue, it is not within the summons; and the Court should restrict the evidence, or interpret the issue, so as to bring it within the summons, which is only for damage occasioned by the detention of the ship, not the person of Clark.

CLARK v. THOMSON.

LORD CHIEF COMMISSIONER.—We can only look to the issues; if there is any thing doubtful in the wording of them, we must interpret them, but we cannot new model them to suit the summons; that is for the Court which sends the issue. But, in this case, the matter can be so managed as not to operate injustice, or force the parties back to another trial. The schedule specifies the demand on each head of damage; and I will direct the Jury to apply their damage to each head, in finding their verdict. By this course, if the Court of Session shall think that the summons does not warrant the issue, as to personal detention, the verdict can be corrected by striking out the damages on that head, without sending the whole matter back to be tried again.

The Court admitted the evidence.

To which decision the defender excepted.

1817. Jan. 10.

*Clerk*, for the defender, stated,—The pursuer was bound in honour to remain in this country; but as the caution was only *de judicio sisti*, not *judicatum solvi*, the cautioner, by presenting the debtor in Court, might have got free of it at any time. If the cautioner continued bound, it was owing to his own culpable negligence; for by the decision in favour

CLARK v. THOMSON.

of Clark by the Water Bailie, he, the cautioner, was relieved of his obligation.

It is said that caution found in an inferior Court continues when the case is brought under review of the Court of Session, and that it is revived by a reduction.

This may be law where the caution is *judicatum solvi*, as there the cautioner is liable for the debt; but when it is only *judicio sisti*, if the case be once out of Court the cautioner is free, for it is not then in his power to present the debtor in Court.

The application for bail and consequent detention was owing to a statement by the pursuer, that he is a foreigner, though it is proved that he is a native of this country.

[Mr Clerk was asked if he intended to prove this.]

It is proved by the record.

The pursuer chose to remain in this country to look after his law-suit, because he knew he could not legally make profit in his own profession; as, for a considerable part of the time, all trade was prohibited between this country and America.

If a person is improperly arrested, he may be entitled to damages on that account; but if he remains in prison for a debt for which he

might easily find caution, he is not entitled to damages for his own obstinacy in continuing in jail.

CLARK v. THOMSON.

You must be cautious in finding any damages, as, in another case, it has been found by the Lord Ordinary that L. 5 damages carries an account of L. 460 of expences.

Hyslop *v.* Miller, *supra*, 55.

I submit to the Court that the defender is entitled to have the record read to prove that Clark is a native of this country; and if he does not call "*witnesses*," the pursuer is not entitled to reply.

If a defender require part of the record to be read, this will entitle the pursuer to reply. The record is not proof of a fact in the cause. Rules and Orders of Jury Court, § 31.

*Jeffrey*.—Mr Clerk may read from any part of the record which we put in evidence, but not from any other.

LORD CHIEF COMMISSIONER.—I would have gone farther than Mr Jeffrey. When a party puts in evidence any part of the record, he is not bound to read the whole; but this entitles the other party to read such part of it as he chooses, only he must read it as *his* evidence. This I hold to be the rule unless we are restrained by the word "witnesses" in the 31st section of the Rules and Orders of this Court. Though it was proper for counsel to notice this

CLARK
*v.*
THOMSON.

looseness of expression, it is not a ground on which the Court can decide.

Mr Clerk concedes, that, unless they were put in by the pursuer, he is not entitled to read those papers which were admitted, to save the trouble of proving them.

I cannot accede to the statement that the record is evidence, nor that proof of a paper puts it in the hands of the Jury.

The defender must rely on it as a matter of argument that the pursuer is a native. Assertions on the record would not prove it.

(*To the Jury.*) This case has occasioned considerable anxiety to the Court.

We have had much (not too much) discussion as to the admissibility of evidence; and, as it frequently happens, a great deal of light has by these discussions been thrown on the case. We must attend to the situation in which we stand, and be cautious not to render any part of this case final. Any observations on the evidence can do no harm to either party if he has a good case in law. If there is law and fact so mixed, that they are inseparable, then it is our duty to state the law; but if they can be separated, then we can give no opinion on the

law, but you must find specially the facts that the Court of Session may apply the law.

This action is founded on a bond of caution and letter referring to it; the case was often argued in the Court of Session, and damages were there found due. It is sent here on points not found in the other Court. It is said that, as damages are found due, the pursuer is entitled to a verdict; we are of opinion, that if he do not prove damages, you cannot find him entitled to any; this is law, mixed with fact, and therefore I state an opinion.

On the distinction taken by Mr Clerk between a bond of caution *de judicio sisti* and one *judicatum solvi*, sitting here, I can give no opinion, as it is a question of pure law, and might have been argued in the other Court before the issues were sent, or may be decided after the verdict is returned, as it would be a ground for suspending the judgment, or arresting it, on this head of damage; and, upon the plan which I suggested, of finding the damages as applicable to each head of the schedule, there will be no inconvenience in leaving that to be decided by the Court of Session, who, if they agree in point of law with Mr Clerk, will disallow the damages on this head of the case.

Another point made is, that this was only a

CLARK
v.
THOMSON.

bond to present him in any action brought within six months. Here, again, if you think damages are proved, you ought to find them, under the proper head of the schedule, and if necessary, I shall make a note of the direction given. By proceeding in this way, each point is reserved for the other Court; whereas if I gave an opinion that on this ground no verdict could be returned, then if the other Court were of a different opinion, the whole trial must proceed again.

The schedule (though not part of the issue) is annexed, to show the sum which you cannot exceed under the separate heads, as the general charge of damage limits you to that sum in whole; probably the clearest method of returning your verdict will be to take into consideration the articles in the order of the schedule, and find on each particularly, and then find a general sum, consisting of all the articles. In this way, as already stated, if the other Court are of opinion that in law the pursuer is not entitled to claim any particular article, they will have it in their power to find so without overturning the verdict on the other points. This will also enable them to judge of the question of costs. In Miller's case, I understood the difficulty was, that the

Court did not know for which assault the L. 5 was given.

His Lordship then went through the different articles, stating what he considered proved; and stated that they ought not to give profits of illicit trade;—that the sixth article was given up,—that he did not think they should give the expences of the appeal,—and that, by a decision of the preceding day, they had been relieved of L. 500 of the claim made by the mercantile house in Glasgow for commission and other charges, which was an illegal and unconscientious demand; and which, if paid, the pursuer had done it in his own wrong.

Verdict.—The Jury found, "That the said "defender is liable in damages to the said pur- "suer, 1*st*, For the expence of maintaining "nine men for forty days at the rate of 2s. 6d. "each man per day, viz. from the 21st of June "1808 till the 1st of August following, and find "that the sum due to the pursuer on that ac- "count amounts to L. 45 Sterling. *2dly*, That "the defender is liable to the said pursuer in "the sum of L. 56, as the wages paid to nine "men for the said forty days at the rate of "L. 4, 10s. each per month, and to the mate "at the rate of L. 6 per month. *3dly*, The

CLARK
*v.*
THOMSON.

" said Jury on their oaths say that the said de-
" fender is liable to the said pursuer for the
" sum of 12s. 6d. per day during the time that
" the defender Thomson's action was in de-
" pendence, for the expences of the said pur-
" suer's maintenance and travelling charges,
" and find that the time the said action did
" depend was five years 287 days, and that the
" sum in which the said defender is liable to
" the said pursuer on said account is the sum
" of L. 1320. *4thly*, Find that the defender is
" liable to the said pursuer in the sum of L. 126,
" 3s. 6d. on account of insurance and of the
" claim made against the pursuer by certain
" merchants in Glasgow, acting and trading
" under the firm of Leslie and Macnaught.
" *5thly*, That the defender is liable to the pur-
" suer for a sum at the rate of L. 600 per year
" during the time the pursuer was detained in
" this country in virtue of the defender Thom-
" son's arrest, on account of the profits that
" might or would have been made by the pur-
" suer during said period: Find that the pur-
" suer was so detained from the 21st June
" 1808 till the 4th of April 1814, a period of
" five years and 287 days, and that the sum in
" which the defender is liable to the pursuer
" during said detention and on said account, is

CLARK v. THOMSON.

" the sum of L. 3471, 15s. 7d. *6thly*, Find " the defender liable to the said pursuer for the " sum of L. 544 for the law expences paid by " the pursuer to his agents in Glasgow, Messrs " Douglas and Fergusson. *7thly*, Find the " said defender liable to the pursuer in the " sum of L. 1000 on account of his detention " and imprisonment in this country, at a dis- " tance from his family and friends; all which " sums the said Jury find amount to the sum " of L. 6562, 19s. 1d. Sterling, for which last " mentioned sum the said defender is found " liable in damages to the said pursuer, and " which are hereby assessed accordingly."

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1817.

1st to 8th Feb.

New trial refused.

*Cockburn*, for the defender, applied in the Court of Session for a rule to show cause why a new trial should not be granted, and stated,

1. Evidence was admitted at the trial which was inadmissible under the summons. The summons concluded only for the value of the vessel; and in the Jury Court the only claim made was for personal detention. The summons concludes for damages to and against different parties from those for and against whom they have been found. Null proceedings cannot be homologated, and all Mr Erskine's reasons apply here. Ersk. 4. 3. 3.

CLARK v. THOMSON.

2. The Jury have given what could only be the profit of illicit trade.

3. They have given L.1000 as solatium, though there is no evidence of the pursuer's detention; the caution was only *de judicio sisti*, and the cautioner might at any time have got free. It was his duty, when the original action was first decided in favour of the pursuer, to have presented him in Court, and no Judge would have granted a new warrant.

The rule was granted.

13th February. The Court and parties having been furnished by the presiding Judge with copies of the report of the trial, it was agreed to hold it as read. *

*Murray*, for the pursuer,—I am to show why no new trial should be granted. The reasons stated for granting it are not new, but were formerly stated as grounds for refusing it.

If a new trial be granted, it must be on one

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* By act of sederunt 9th July 1817, § 9, it is enacted, "That "it shall not be necessary to read the report in open Court;" and by the same section it is also enacted, "That henceforth written "or printed petitions shall not be presented to the Divisions of "the Court of Session for the judgment of the Court upon the "verdict of a Jury, or in moving for an order to show whether "there shall be a new trial."

or other of the grounds stated in the act, and, as was decided in Lord Fife's case, it must be a trial of the same issue.

1. All authorities agree that the *media concludendi* must be taken into account in ascertaining what is within a summons, and if, in this case, it was doubtful, it is explained by the pleadings.

2. The report shows that the Jury were directed (and the presumption is that they took the direction) not to give profit of illegal trade. We did not except to this direction, though, if we had, we could have shown by the authority of Lord Mansfield, and cases of insurance from this country to Russia, that the Courts of this country are not bound to enforce what is matter of municipal law or internal regulation of other countries.

[The LORD CHIEF COMMISSIONER here observed,—It is not material to this case, but I wish it to be understood that I contemplated the case of an American subject acting against the laws of his own country; the case might have been different if he had been a British subject.]

3. *Solatium.* The action of reduction by Thomson concludes against the cautioner—he therefore remained bound during the depend-

CLARK
*v.*
THOMSON.

Robertson, &c. *v.* Ogilvy, 2d March 1762, Sel Dec. 259, and Fac. Col. M. 2047. Miles *v.* Lyall, 1st Dec. 1797, M. 2063.

ence of that action. This is fixed by the terms of the bond of caution; but if not, he was bound at common law during the subsequent proceedings in the Court of Session and House of Lords. If the cautioner had presented him he must have gone to prison. It was not proved at the trial that Clark remained in this country after the decision in his favour.

*Clerk*, in reply, insisted at great length on the grounds stated by Mr Cockburn.

LORD JUSTICE CLERK.—A new trial is sought on three grounds. I have paid the ut-

February 18.

most attention to the able and forcible argument used; but I am clearly of opinion, that neither on all or any of the grounds can a new trial be granted. The argument deserves, and will meet with, the greatest attention at the proper stage of the cause. The pursuer can recover nothing till we apply the verdict, and I reserve my opinion till then. Our decision on the present application is final, and the grossest injustice might be done if our opinion were conclusive on the other point. When we apply the verdict, if we shall then be of opinion that the different sums fall within the summons, our decision may be carried to the House of Lords.

1. They have failed in showing that the verdict is beyond the issues; and another trial on

CLARK v. THOMSON.

these issues would do no good. Unless where strong grounds are shown, the same issue will be sent back.

2. I am equally clear that illegal profits were not in contemplation of the Jury; and I am not disposed to disturb a verdict on the ground of the sum given being a little too high or too low.

3. If the Court shall be of opinion that the pursuer was not detained, he cannot be entitled to the *solatium*; but he will not be cut out of his claim of damages by remaining in this country after the decision in his favour. He was entitled to remain to take measures for recovering these damages.

LORD ROBERTSON.—I subscribe to every thing stated. I wish the point of *ultra petita* to be reserved, but the only question at present is, if the verdict is beyond the issue.

Lords Bannatyne and Craigie were of the same opinion.

The new trial was therefore refused.

1817. July 10.

When the Court applied the verdict, they sustained the first, second, fourth, fifth, and sixth articles found by the Jury, but struck off the third and seventh articles as not contained in the summons. Two of the Judges were of

CLARK v. THOMSON.

opinion that the fifth was in the same situation, but it was allowed.

Both parties petitioned against this judgment, but the Court adhered to their former interlocutor.

PRESENT,

THE LORD CHIEF COMMISSIONER.

1816. December 20.

## SHEARLOCK v. BEARDSWORTH.

Damages found due to the commanding officer of a regiment for defamatory expressions used against the regiment.

THIS was an action of injury and damages at the instance of the lieutenant-colonel of the 4th Dragoon Guards against the defender, who was farmer of post-horse duty, for slandering and abusing the regiment.

DEFENCE.—The action is incompetent; but if competent, the defender denies the charge.

ISSUE.

" Whether the defender, John Beardsworth, " did, upon Wednesday the 20th day of July " 1814, or about that time, at Edinburgh, " loudly and openly declare before many of the " King's subjects then and there assembled, " that the 4th regiment of Dragoon Guards,