PRESENT,
LORDS CHIEF COMMISSIONER AND PITMILLY.

CARLETON and Others, *v.* STRONG and Others.

1816. March 13.

THIS was an action brought in the Admiralty Court to recover L. 900 insured on the ship

Insurance.—Found that a vessel was in the state represented at entering into the policy.

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witness; but having come from France to give evidence in Miller's case, they wish to take the benefit of his testimony. Some of our witnesses got notice not to attend, and they may be material if he is examined. The provision in the act of sederunt does not apply to an intentional, but accidental omission of a witness.

Rules and Reg. § 24, as altered by Act of Sed. 10th Feb. 1816.

LORD CHIEF COMMISSIONER.—The Court must proceed with caution in granting or refusing this application. From the first I thought Grierson a material witness, but supposed there were reasons for not calling him. In the action by this pursuer against Major Miller, there is an affidavit in December last, stating Grierson to be a material witness; and though this case was sent to the Court soon after, in all the steps taken in it, from the 3d January downwards, till yesterday, he was never stated to be a material witness. The affidavit now produced says, that he was the bearer of a challenge. This was unnecessary, but, being stated, the Court will take it into consideration; and it would have been my duty to inform him, that he was not bound to answer this question. On the whole circumstances, the Court are of opinion that there are not sufficient grounds for delaying the case.

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v.
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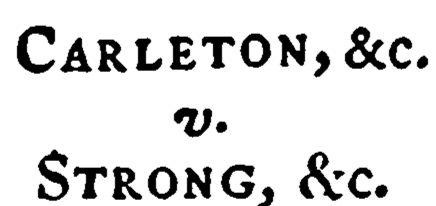

Sprightly, which was lost on her voyage from Limerick to the Clyde.

Defence.—One defence was, that, in the representation to the underwriters, the vessel was described as remarkably strong built, but was not so.

The insurance was effected with Messrs Strong, Crisp, and others, underwriters, by Messrs Eddington and Sons, as agents for the owner, and these gentlemen afterwards abandoned the vessel, and claimed for a total loss. After certain steps in the Court of Admiralty, judgment was obtained against the defenders, but the decree was suspended by Lord Robertson, with expences, on the ground of want of title in the pursuer. A new action being brought in name of the proper party, the Judge-Admiral adhered to his former decision, and the case being again brought into the Court of Session by suspension, Lord Craigie, Ordinary, after successively ordering two condescendences to be withdrawn as irrelevant, found the letters orderly proceeded, and expences due. His Lordship refused two representations. A petition was then presented, and the Court having repelled the objection to the title of the

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pursuer and to the register of the ship, appointed the suspenders to condescend, and afterwards approved of the following

ISSUE.

"Whether the said Sprightly, represented "by the chargers to be a remarkably strong "built vessel at the time of entering in the po-"licy in question, was, at that time, and at the "time of her sailing on the voyage, a remark-"ably strong built vessel?"

The ship's articles are not evidence, unless supported by oath.

The defenders tendered in evidence the ship's articles, when it was objected, that they were not probative, not being holograph or tested in terms of law, nor an official extract of a probative writing. On the other side, it was maintained, that they were in common form, had been sent by the master to Mr Eddington, one of the chargers, and had been in process for some time unchallenged.

LORD CHIEF COMMISSIONER.—Being in process is not sufficient. If any document is questioned, the Court of Session would determine whether it was admissible. There is a great difference between the admissibility of a document, and the credit to be given to it when admitted; but in all cases the production

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should be supported by the sanction of an oath, unless the law has fixed otherwise. Persons should have been called to prove the handwriting; or Mr Eddington should have been called to prove that it came from the Sprightly, and perhaps this might have been sufficient with such fluctuating people as sailors. This is a printed paper with the name of the ship written at the top, but it may be all a fabrication, and therefore cannot be allowed.

It is incompetent, after the death of a witness, to read his deposition, if irregularly taken.

The master's death was admitted, and it was then proposed to open up and read a deposition by him taken and sealed up under authority of the Judge-Admiral.

Cranstoun.—This is not evidence; it is a deposition taken before any action is in Court. There is only a petition stating that an action is about to be brought. This petition was not served on the known law agent of the chargers, and the broker on whom it was served had no authority to attend. An action must be in Court, a condescendence given in; and in a late case, even after this was done, the commission was refused, because there was no certificate of the age of the witness. I recollect a case in which a Sheriff-substitute of Inverness or Argyle did exactly what the Judge-Admiral

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did here. The Court refused to open up the deposition. When a material witness is dead, it is sometimes competent to prove what he has said; but an *ex parte* oath, like the present, is quite of a different nature. Here there is no cross-examination, and though upon oath the deposition is much more suspicious than the voluntary declaration of a party, without reference to any question or law suit. Sometime ago, the magistrates of Aberdeen, wishing an act of Parliament, several witnesses were examined upon oath. The deposition of one of them (then dead) was offered in a process that afterwards arose; but the Court would not receive it, and this has since been held a good decision.

Phillips, p. 10, and 199.

Magistrates of Aberdeen *v.* More, 1812, or 1813, not reported on this point.

Baird.—This was the only way of preserving the master's testimony. In May 1810, we obtained warrant for his examination, which was attended by a partner of Scougal and Company, for Mr Eddington. It was in that month Eddington wrote to Scougal and Company, requesting them to recover the loss. Thus the deposition was regularly obtained. In general, a procedure of this nature is incompetent, but there may be, and there are exceptions; and depositions are sometimes allow-

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Smith, Jan. 21, 1802.

ed to be taken before the action is in Court. In the case of Smith, a summons was only executed, not called in Court; and till that is done, there is no depending action.

Cranstoun.—In the Court of Session, in Smith's case, there was the greatest difficulty in allowing the examination, and they took all the precautions possible. They ordered intimation on the walls of the Outer-House, and copies to be served on the private party. In the Douglas case, they required an express consent of the opposite party.

LORD CHIEF COMMISSIONER.—It is incident to human affairs, that, from the death of witnesses, and other events, cases may sometimes be not so well tried as it is desirable they should be, yet it is the duty of Courts to lay down such general rules as appear best on the whole, for doing justice between the parties. In the rules for perpetuating testimony, they have been most scrupulous.

An *ex parte* examination is never competent, as it is only the statement given on questions from one side. The question therefore is, if this deposition is *ex parte?* It is said not to be so, because Mr Cassils was present. It

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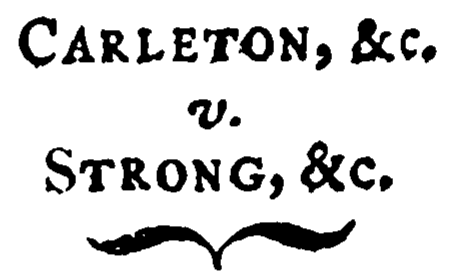

is sufficient to know, that Mr Cassils is not law agent for the pursuers, and thus being *ex parte*, it cannot be received.

Is it, then, by authority of Court? And must it be received in consequence of proper notice given, though no person attended for the pursuer? There was no cause in Court; there was merely a petition, stating that a cause was about to be brought, and praying to have this person's oath taken, to lie *in retentis*. It is unnecessary to inquire whether the Court did right in granting the prayer of that petition; it is sufficient to say the Court of Session would not have granted it. In the ordinary case, there is a provision in the rules and regulations for taking evidence to lie *in retentis;* but it was not thought of providing for a case like the present. The deposition cannot be opened.

LORD PITMILLY.—I completely concur in this opinion. If the question had occurred in the Court of Session, the defenders would not have been allowed to take the deposition, nor being taken, would they have been allowed to open it up. It is the duty of the Court to preserve evidence, but it is also their duty to exclude suspicious testimony, and this is extremely suspicious.

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It being objected to a book produced in evidence by the defenders, that it was not the log-book, they called the Depute-Clerk of Admiralty, who was present at the examination of the master; and though he did not recollect that any papers were produced, yet, on being shewn his own subscription on the book in question, he swore that it must have been produced on that occasion.

It was contended, that this witness did not swear that it was the log-book; but it was received, as it had been produced by the master in the manner stated; and the pursuers had called it the log-book, in several of their pleadings in the Court of Session.

The witnesses for the pursuer had been examined on commission in Ireland, and swore that the Sprightly was a remarkably strong built vessel.

Marshall, 2d edit. p. 155 and 156. Lee *v.* Beech, p. 160. Midsummer Blossom, 12th May 1813, Dow, p. 344.

Grant, for the defenders, contended, That a representation that the vessel was remarkably strong built, included one that she was seaworthy; and, therefore, all the authorities on that subject bore *a fortiori* on this case. It was owing to her not being strong that she was carried to the rock on which she struck.

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A number of witnesses were examined for the defenders, who did not think the weather stated in the log-book could have hurt a remarkably strong vessel; but several of them swore that the book was not in the usual form of a log-book at sea, and that there were some things in it which they could not understand.

The LORD CHIEF COMMISSIONER observed, in summing up the case, that there was a general character of the evidence which would save the Jury going into it in detail. The simple fact to be tried is, if this was a strong built vessel? The witnesses for the pursuers swear that she was; and the defenders, instead of putting cross interrogatories to those witnesses who saw the vessel, rest their case on the indirect evidence afforded by the log-book, and the opinion of naval men, founded upon it.

The pursuers having called this the log-book in the Court of Session, the Court found itself bound to admit it as evidence; but it is the more necessary to warn the Jury against giving undue weight to it. It is competent and proper to be laid before a Jury, but cannot be opposed to the direct evidence on the other side.

The evidence for the pursuers is strong, clear, and direct,—for the defenders it is incidental,

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and founded on a spurious and incorrect document.

The Jury found, "That said ship Sprightly, "represented by the chargers to be a remarkably strong-built vessel at the time of entering into the policy in question, was at that time, and at the time of her sailing on the voyage, a remarkably strong-built vessel." *

Cranstoun, Archd. Bell, and *Cockburn,* for the Pursuers.
Baird, Grant, and *Buchanan,* for the Defenders.

(Agents, *John Kermack,* W.S. and *David Murray,* W.S.)

PRESENT,

LORDS CHIEF COMMISSIONER AND PITMILLY.

1816. March 14.

STEWART *v.* BUCHANAN.

If there is otherwise a foundation for an action of damages for defamation, the pursuer may rest on private letters, though written two years before.

THIS was an action of damages raised by the Chamberlain to the Duke of Argyle, in Kintyre, and Provost of the burgh of Campbeltown, against the Collector of the Customs at Inverary, for slander.

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* In this case, a rule was obtained to shew cause why a new trial should not be granted, but after hearing Counsel, the Court of Session were unanimous in refusing the new trial.