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has been attempting to fix ever since his appointment, and which is essential in this Court.

GLASGOW.

PRESENT,

LORD CHIEF COMMISSIONER.

1820. Oct. 2.

SMITH *v.* PULLER.

Question as to the liability of a person for the debts of a mercantile company.

DECLARATOR to have it found that the defender was a partner of, and liable for the debts of, George Puller & Co.

DEFENCE.—A denial that the defender was a partner, or is liable for the debts of the Company.

ISSUES.

"1*st*, Whether, in the business of bleach-
"ing carried on at Gateside, near Barrhead,
"in the county of Renfrew, from the year
"1816 to the year 1819, under the partner-
"ship firm of George Puller & Co. it was un-
"derstood between the defender, William

"Puller, and the other persons who are al-
"leged to have constituted the said partner-
"ship, that the said William Puller was a
"partner of the said company from or about
"its commencement in 1816; and whether
"they considered that he so continued until
"or near to the period of its bankruptcy in
"1819?

"2*d*, Whether the said defender, during
"the subsistence of the said company, was
"in the custom of interfering with and
"taking a part in the management of the
"business and concerns of the said company
"as a partner thereof, or acted as a partner
"of the said company?

"3*d*, And Whether the said defender did
"admit himself to be, or hold himself out to
"certain persons, who supplied the said com-
"pany with various articles used in the ma-
"nufacture, as a partner of said company?"

George Puller, the son of the defender, was ostensibly the partner of the company; but it was alleged that the defender drew the profits, and managed the business. The company was sequestrated, and this action was brought to ascertain whether the defender was a partner.

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Declarations taken under the Bankrupt Act not evidence.

The first pieces of evidence offered were the declarations of the other partners, when examined under the Bankrupt Act.

More, for the defender.—By the statute these cannot be used, except in cases of fraudulent bankruptcy.

LORD CHIEF COMMISSIONER.—You need not labour this point; I am quite satisfied. The proceeding is an *ex parte* one, and cannot be laid before the Jury.

Pleadings bearing to be in name of a party, allowed to be produced, the counsel undertaking to prove that they were authorised by the party.

A process was then offered, to shew that the pleadings were in name of the defender.

More objects.—The pursuer must first shew that they were given in by authority of the defender.

LORD CHIEF COMMISSIONER.—These pleadings will not go to the Jury, unless the defender gave instructions to put in the pleadings. Mr Cockburn proposes to shew, that certain things were done; and he undertakes to prove, that these things were done with the knowledge and approbation of the defender, and the documents must be afterwards withdrawn, if he fails in his proof.

In proving a person to have acted as a member of a mercantile company, competent to prove statements by another partner of the company.

The first witness was asked what George Puller said as to William being a partner.

More.—George was a partner, and could not have been a witness in this cause. His declaration, therefore, cannot be proved, except made in presence of the defender. It does not fall under any of the Issues. I could not cross-examine.

Cockburn.—In a case for detecting concealed partners, I am entitled to prove the declarations of partners, whether dead or alive.

LORD CHIEF COMMISSIONER.—According to the construction contended for by Mr More, it would only be competent to prove the partnership by direct evidence; but the fact to be found by the Jury is to be inferred from the *res gestæ.* The objection to examining a partner is, that he is interested to increase the fund. The question here is, Whether that interest applies to the facts proposed to be proved? Any thing done by G. Puller might have been proved to shew that the defender was a partner, and why may not his words be proved; they are part of the *res gestæ.* How they may be connected with the party, and whether they may be fit to be stated to the Jury, is a different question; but I am bound to admit this evidence, and it is

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quite clear of the objection of interest. As an admission by a party, it would be quite competent, even if the law of Scotland was as I wish it, on the subject of declarations of a dead witness.

A debt constituted by writing, or a conveyance of a debt, must be proved by writing, not by parol evidence.

A witness, on his examination *in initialibus*, stated, that he had been a creditor of the company, but had conveyed his claim to the trustee on his sequestrated estate.

More objects.—He is interested. The conveyance of his whole property can only be proved by writing.

Cockburn.—His interest is at an end by the conveyance. The conveyance is proved by the same evidence as the debt.

LORD CHIEF COMMISSIONER.—The defender may undoubtedly prove that a debt was due to the witness, and the pursuer may prove that this debt was conveyed to another; but if the pursuer proves that the debt was constituted by writing, then the defender must produce that writing, and in that case the debt must both be proved and taken away by writing. But as the debt may be constituted without writing, it was competent for the defender to prove it in the manner he has

done. The conveyance, however, could only be by writing; and to prove it, the pursuer must produce that writing.

This witness admits that, by transactions in business, he became a simple contract creditor; to prove a debt of this description, writing is not necessary. The interest being thus established, it is wished to do away the objection, by proving that the debt is conveyed to the trustee. This conveyance can only be effected by writing; and the party wishing to prove the conveyance, must produce the writing.

Parol evidence incompetent to prove by whom an action was brought.

An objection was taken to a question put to another witness, as to an action brought against her.

LORD CHIEF COMMISSIONER.—It is competent to ask the witness to state from memory, whether an action was brought; but if you go a step farther, you must produce the summons. You may also ask her to state who were pursuers; but if it is to be rested on as a fact, her answer will not prove it; but it must be proved by production of the document.

In re-examining a witness, he was asked

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if he suspected that the defender was a partner.

More objects.

LORD CHIEF COMMISSIONER.—On re-examination, I hold it fair enough, in this stage of the examination, to ask a witness his suspicions, with a view to asking him the grounds of that suspicion. His suspicion, however, goes for nothing, unless it is followed by a statement of the grounds on which it rests.

Circumstances in which a party may discredit his own witness.

Mr Cockburn insisted that one of his witnesses should answer a question, or he would move the Court to send him to prison; and on a similar attempt to discredit another witness, Mr More objected.

LORD CHIEF COMMISSIONER.—I feel a difficulty in allowing you in this manner to discredit your own witness, and I much regret the time that is lost by men of business not making themselves acquainted with what the witnesses can say; that calling such witnesses may be avoided. It is a very delicate matter to allow a party to discredit his own witness; but an unwilling witness must be treated in some respects as one from the enemy's camp.

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When a witness does not appear at a trial, proceedings to be had against him ought to be moved in the following Term.

A witness not appearing (he sent an affidavit that he knew nothing material of the matter), Mr Cockburn moved that some proceeding should be had against him.

LORD CHIEF COMMISSIONER.—He must be called upon his citation, and if he fails to appear, he will be appointed to appear next term, and be dealt with as for a contempt of Court.

It was afterwards arranged that the order should be for his appearance on such a day as counsel should move for.

Mr Cockburn opened the case, and stated the facts. Mr More attempted to explain away the facts sworn to by the witnesses, and Mr Cockburn made a few observations in reply.

LORD CHIEF COMMISSIONER.—The question here is not, whether there was a concealed partnership, but there are three distinct Issues to be answered, and you are to draw the conclusion from the whole facts and circumstances proved, and not from the opinion of others, though it was necessary to produce that in proof of the understanding.

A reclaiming petition has been given

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in, which bears the name of the defender; and though it would have been competent to shew that it was given in without warrant from him, it is not enough merely to say so. The document affords *prima facie* evidence, and not being contradicted, it becomes a pregnant proof.

You will also consider the evidence of the witnesses, as to the manner in which the father spoke of the company; and whether the terms he used were those of a member of the company, or of a father speaking of the affairs of his son. You will also consider the evidence of declarations by the defender, as in all courts the declaration of a party is evidence against himself.

The evidence for the defender was evidence of belief, but not of facts and circumstances on which you can form your opinion.

I would rather prefer that you should give an affirmative or negative to each Issue; but if you choose, you may find generally for the pursuer or defender.

Verdict—"1*st*, That it was considered by "William Puller, and the other partners of "the said company, that William Puller "was a partner of said company, and con-

" tinued to be such until near its termina- " tion. 2*d*, That he has acted several times " as a partner of said company. 3*d*, That " he has admitted himself to be a partner, " but has not held himself out as a partner " to any persons who furnished articles for the " use of the manufacture."

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Cockburn for the Pursuer.
J. S. More for the Defender.

(Agents, *J. F. Orr*, w. s. and *J. Stewart*.)

PRESENT,
LORD CHIEF COMMISSIONER.

WALKER *v.* ARNOT.

1820. Nov. 27.

AN action of damages for defamation.

Damages for defamation.

DEFENCE.—A denial of having stated any thing defamatory.

The case was tried on the 8th November, and the Jury found for the pursuer, damages 1s.

Costs allowed where one shilling damages was given for defamation.