PRESENT,

THE THREE LORDS COMMISSIONERS.

1820.
May 11.

MILLER *v.* MOFFAT.

An action for repetition of bank-notes stolen, and of multiplepoinding, to ascertain the right to three drafts upon London, said to be purchased with a part of the notes.

AN action for repetition of a balance of a sum stolen from the Paisley Union Bank, Glasgow, and for damages; and an action of multiplepoinding, at the instance of the City-clerk of Edinburgh.

ISSUES.

"1*st*, Whether, on the evening of the "13th day, or the morning of the 14th day "of July 1811, or about that time, the de-"fender, James Moffat *alias* M'Coul, did "steal, or unlawfully abstract and carry off, "or was art and part in stealing, or unlaw-"fully abstracting or carrying off, from the "office of the Paisley Union Bank in Glas-"gow, cash and bank-notes, and bankers' "notes belonging to the said bank, amount-"ing in value to L.19,753. 4s. or there-"abouts? And whether the defender still re-

"tains, and refuses to restore to James Mil-
"ler, the pursuer, for and on account of the
"said Bank, a large portion of the said cash,
"bank-notes, and bankers' notes, amounting
"in value to L.7644. 9s. or thereabouts?

"*2d*, Whether the amount in value of
"L.19,753. 4s. in cash and bank-notes, and
"bankers' notes, was, on the 13th and 14th
"days of July aforesaid, stolen, abstracted,
"or carried away from the office of the Pais-
"ley Union Bank Company at Glasgow
"aforesaid, and whether the said defender re-
"ceived the whole, or any, and what part
"thereof, knowing the same to have been
"stolen; and whether he still retains, and
"refuses to restore to the said James Miller,
"for and on account of the said Bank, a
"large portion of the said cash, bank-notes,
"and bankers' notes, amounting in value to
"L.7644. 9s. or thereabouts?

"*3d*, Whether three bills of exchange, one
"dated 4th March 1813, for L.540, drawn
"by the British Linen Company on the
"house of Smith, Payne, and Smith, bankers
"in London, payable to James Martin, at
"forty days' sight; one dated 5th March
"1813, for L.31, drawn by the British Li-

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"nen Company on the said house of Smith, "Payne, and Smith, payable to the said "James Martin, at fifty days' sight; and one "dated the 5th March 1813, for L.400, "drawn by the Commercial Banking Com-"pany of Scotland, on Bruce, Simpson, Freer "and Company of London, to the said James "Martin, at forty days sight; all in the ac-"tion of multiplepoinding brought at the in-"stance of Alexander Callender, Depute "City-clerk of Edinburgh aforesaid, admit-"ted to have been purchased by the defender "the said James Moffat *alias* M'Coul, from "Banking Companies aforesaid, amounting "in all to L.991, were purchased by him with "a part of the cash, bank-notes or bankers' "notes, stolen or unlawfully abstracted or car-"ried off by him and others as aforesaid, or "in the stealing or unlawfully abstracting or "carrying off of which, he was art and part, "or of other cash or notes obtained as the "proceeds of the notes or cash so stolen or "abstracted; or, whether, having received "the same, knowing them to have been sto-"len, he did apply part thereof, or of other "notes or cash so stolen or abstracted, in pur-"chasing the bills of exchange aforesaid, ad-

"mitted by the said James Moffat *alias* "M'Coul, defender, to have been purchased "by him?

"*Schedule of damages claimed by the Pursuer.*

"I. - - -				L.19,753	4	0
"Under deduc-						
"tion of L.11,938	15	0				
"And of 970	0	0				
				12,908	15	0
				L.7644	9	0

"with interest upon the said sum of L.7644 "9s., and provisionally with deduction of "L.991, contained in the drafts, the subject "of the multiplepoinding.

"II. L.1500 of damages."

1820. 14th and 19th February.

Circumstances in which the Court would not interfere, to compel a defender to appear in Court on the day of trial.

In this case an application was made for an order for the defender to attend the trial.

Jeffrey, for the pursuers.—This is necessary, as it may be impossible to identify him, as he went by different names.

LORD CHIEF COMMISSIONER.—By what process can we enforce the order?

Jeffrey.—We ask an order in the first instance, and if that is not effectual, he must pay the costs occasioned by putting off the

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trial. The general principle of law is, that the party is in Court; and there is no doubt the Court have power to compel this, or hold him confessed. A witness is compelled to attend.

Alison, for the defender.—On a diligent search, I have not been able to find a single instance of this being done. The defender is most anxious to be present, and to bring this case to an end; but he does not choose that it should go to the Jury with an order of this sort against him; and it is possible that he may be called away by other business. We hold, judicial examination is incompetent in such a case, though the Court of Session allowed it in this case.—Gordon *v.* Campbell, 22d Dec. 1819.

LORD GILLIES.—Is there any precedent for such a proceeding, or any case where the foundation of the action was an alleged criminal proceeding? The defender comes here, and we must presume him perfectly innocent. Would it not be a strong measure to grant an order, as if there was a presumption that he is about to leave the country? If the pursuer gives him notice, and he does not attend, this might be a reason for putting off the trial.

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In the Commissary Court, though the party attends, I never knew an order for attendance.

LORD PITMILLY.—I recollect a case, where the criminal proceeding was stopped till the civil suit was brought. In this case, I confess the bent of my opinion is, that if the ends of justice require it, we have power to make the order; but I am uncertain if disobedience would be a contempt.

LORD CHIEF COMMISSIONER.—The singular nature of this case arises from not having proceeded with the criminal case first. It appears to me extremely difficult to know how this order could be enforced, if we granted the order. It may, however, be intimated to the defender, that he is expected to attend; and it will be matter for observation to the Court and Jury, if he does not. Mr Alison speaks after a diligent search; but he only speaks negatively: on the other side no case is mentioned. I do not think we have power to make the order, as there is no authority given by which to enforce it. Holding the party confessed would be the way of enforcing it in the Court of Session; but our only authority is the Act 1819, 59. Geo. III. c. 35, § 28, and that is merely to compel parties to proceed with their cases.

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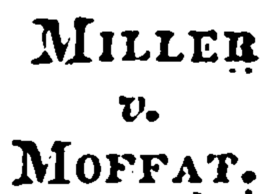

An affidavit was put in; and on the 20th February, before proceeding to the trial of another case, the Lord Chief Commissioner stated, If this affidavit had been put in at first, it might have saved two attendances upon the Court. This is an application for an extraordinary interference of the Court; and though, in the course of 35 years practice, I never heard of such an application, and do not believe that any such has been made during the long practice of trial by Jury in England, yet I hold myself bound to yield to the law of this part of the country; and what I heard created doubt in my mind whether it might not be competent here. But on the matter contained in the affidavit, we are unanimously of opinion that there is not enough stated to entitle the pursuer to this order. If it was granted in this case, the application might be made in every case. But it is unnecessary to enter into the reasons of the rule, as, with sufficient activity, all may be got which is necessary to the ends of justice in this case.

In opening the case, Mr Cockburn was proceeding to state the conduct of the defender.

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Grant, for the defender.—The pursuer is not entitled to state criminal charges against the defender. His character is not the subject of discussion here.

Jeffrey.—I admit that we are not entitled to prove what is reported of him; but we are entitled to shew who his companions were, to make out the probability of his doing what is charged against him, and as contradicting his declaration as to his employment.

Grant.—All authorities agree that you are not entitled to prove a person in such a situation, or of such a character that it is likely he was guilty of a criminal act.

LORD CHIEF COMMISSIONER.—When the evidence is offered, you may object to any part of it. The pursuer cannot know exactly what will be admitted. From the hands in which the case is, there can be no doubt it will be stated with propriety; and without allowing the statement to proceed, we cannot understand the case. But the statement will not influence the Court or Jury in any thing that is not allowed to be proved.

In opening a case for the pursuer, his counsel allowed to read judicial declarations by the defender.

Mr Cockburn was about to read from the declarations by the defender.

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Grant.—We mean to object to the production of these in evidence; and Mr Cockburn ought therefore only to state the import of them, as of the testimony of the witnesses.

LORD CHIEF COMMISSIONER.—It is difficult to say that the Court should interfere to prevent the counsel from using their discretion as to reading declarations solemnly made, and taken down in writing, upon the mere possibility that the Court may reject them, and with the possibility also, that if admitted, he may have no opportunity of observing upon them.

When the declarations taken at the time the defender was apprehended on suspicion of the crime, were given in evidence, Mr Grant at first objected, but afterwards admitted them to be authentic.

LORD CHIEF COMMISSIONER.—They ought regularly to be read now; but if the passages read by Mr Cockburn are marked, it may be sufficient if I state them to the Jury. This is not a document to be given to the Jury, but to be taken on statement, as the testimony of the witnesses.

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When the declaration before Lord Gillies was produced,

Grant objects, not to the authenticity of the document, but to such a document being evidence in this cause. Lord Gillies will recollect, that after heaping all the abuse they could on the defender, they were reduced to refer the whole to the declaration of the party. Lord Gillies doubted, and refused to examine him as to a capital felony.

The First Division altered this interlocutor to a certain extent; but it is perfectly clear, that in a civil court a man is not bound to state what may be used to convict him of a capital felony. Many cases might be quoted both in England and Scotland.

Jeffrey.—These declarations were taken in *this* case.

Lord Chief Commissioner.—We do not require any authorities, or any reply. The competent Court has ordered this examination, and it has been solemnly and regularly gone into. If the party thinks it necessary to refer to this as evidence, we must receive it.

Grant.—We must refer to the peculiar situation in which we are placed as our apo-

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logy; we would have advised an appeal against the examination, but that was incompetent, and our only mode of redress is by now tendering a Bill of Exceptions.

LORD CHIEF COMMISSIONER.—Adjust the bill, and we shall receive it before we leave the Court.

A witness (Porter to the Bank) having stated that he saw a parcel in the Bank, with a note upon it; was asked if he copied the note?

Grant objects.

LORD CHIEF COMMISSIONER.—It is certainly competent to ask if he copied the note. It is quite a different question if he will be allowed to speak to his copy.

Parol evidence competent of what a person since dead had said; but incompetent if the person was interested at the time of making the statement.

The witness having stated that Mr Likely of the Bank, who died about five years ago, had gone to London, and returned, he believed, with a number of the stolen notes, was asked, did he tell you?

Grant objects. This is hearsay, and of a person interested, who could not have given evidence.

Jeffrey.—This was an official person, and

as such, his evidence would have been admissible, had he been alive. The statement was made when there was no suit depending, and he is since dead.

Grant.—If a person ceases to have an interest before the trial, it has been held, but not uniformly, that he might be examined; but was it ever heard of that his testimony, at a time when he was interested, could be reared up as evidence? If an incompetent witness had been examined on one trial, could what he then said be proved as evidence in another case?

With all deference, I shall on every occasion argue, that hearsay is totally inadmissible.

LORD CHIEF COMMISSIONER.—I hold it quite clear that hearsay is inadmissible by the Law of Scotland; but if the party is dead, what he said may be proved as a circumstance of evidence, which forms an exception to the general rule.

As to the objection of interest, that appears to me a question of importance. If this had been a criminal prosecution, this would have been admissible for the ends of public justice; but here it is an action to recover a sum of money, and is a matter in

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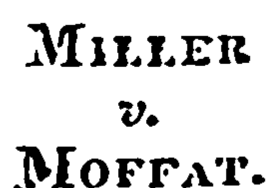

which this person, if alive, would have been interested. We must see what they mean to prove, as it may be far short of what we suppose, and may differ, as this is a private company, not a corporate Bank. If this person had been alive and interested, you could not have called him, but you might have called a witness to prove the sum he brought back from London. In all cases, I am most anxious to lay down accurate rules; but this is a case of greater anxiety, from its very peculiar complexion; for though it is for a civil debt, the evidence is of a criminal nature. The question as to proving what a person, since dead, has said, I hold as disposed of; and the question is, if the interest is such as to make the evidence inadmissible.

Though disqualified as a partner of the Bank, it is said, that as an officer, his evidence must be taken. What was the situation and character in which this gentleman acted in going to London, &c.? Was he then acting as cashier, or merely as a messenger from the Bank, and in a character in which any of the other partners might have been employed? This witness is asked to speak to statements made by this person while acting in this character. It is said, as his heirs have

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no interest, he is in the situation of a witness with a release; but it is a sufficient objection, that, at the time he made the declaration, he was interested. If we allow any part of what he said to be proved, we must allow every circumstance, even to his having received the money from the hands of the defender, if he got it there. We can only look to his situation at the time he made the statement, and at that time he was interested.

A partner of Sir W. Forbes & Co.'s bank was called.

Grant objects.—The Company are cautioners to the Magistrates, in case we succeed in recovering the three drafts; Alison *v.* Gordon, 17th December 1701. The same is law in England; 1. Phillips, 52; 1. T. R. Carter *v.* Pearce.

The counsel for the pursuers withdrew the witness, till a discharge could be got.

An objection of want of sufficient notice that a witness is to be called, ought to be made before the examination is commenced.

After a witness was sworn, and partly examined, Mr Grant objected, that they had only got notice of his being a witness the night before.

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The Court will not compel a party to shew himself in Court during a trial.

LORD PITMILLY.—You are too late with your objection.

The counsel for the pursuer wished this witness to see the defender.

LORD CHIEF COMMISSIONER.—The Court have no power to compel him to attend; but they have sent him notice that you wish it.

An objection was taken to two articles of the condescendence, and part of a third, with the answers, which were given in.

LORD CHIEF COMMISSIONER.—The condescendence certainly is not evidence, but must be received, as the answer is not intelligible without it.

Circumstances in which the copy of a note entered in the books of the office at Bow-street was allowed to be read.

Vickery, the Bow-street officer, in the course of his examination, stated, that in a pocket-book found on Huffy Whyte, there was a note which was copied into the books of the office, and he afterwards compared it. He had searched for the original, but could not find it, and thought it probable it had been returned to Whyte.

Grant.—They have not proved that the memorandum is destroyed; and it is not ours, nor in our custody.

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LORD CHIEF COMMISSIONER.—If this had been offered at an early stage of the cause, the objection would have had much force; but they have given so much evidence, and laid their ground so strong, to connect these persons with each other, and with this memorandum, that I think it is admissible in the circumstances of this case.

Parol evidence not sufficient to prove that a person was convicted of a capital crime, to the effect of excluding proof of statements made by him.

The witness then read from the book, and stated that Whyte had been executed.

Grant.—This is hearsay, and inadmissible, though the person is dead. In a case of this nature we must proceed according to the strictest rules.

Jeffrey.—There is nothing so clear as that this is admissible in a civil court.

Grant.—This is the hearsay of a person I have proved a convicted felon.

LORD CHIEF COMMISSIONER.—You have not proved him so to the effect of excluding his testimony.

Grant.—If the witness had been alive, and offered, I must then have produced a conviction; but brought in this way, I could not be prepared for it. I have proved it in the same way they proved him dead.

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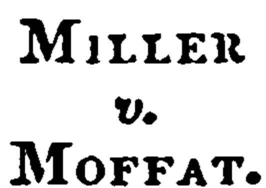

Jeffrey.—They admit that if Whyte were here, they must have produced a conviction, and are they on surmise to cast this evidence?

LORD CHIEF COMMISSIONER.—We think this evidence admissible; but if you ask our opinion of it, we think it of very little weight. In England, the civil action merges in the felony; but here we must treat this as a civil case; and there is no doubt that there is a ground of action, and even for damages. If the case were properly before us, there is really no point; and it is on the manner in which it is brought forward, that my only doubt rests. It comes here by a side-wind, and it is said that the other party had no notice of it. It is said, on the other side, to be proved by another witness, that Whyte was a convicted felon. I have already stated my opinion of the weight of this evidence; but if Mr Grant thinks this a surprise, he may move for a new trial on that ground. This is certainly not evidence of the conviction; for, though it may drop from all the witnesses, that a person escaped from the hulks, yet, on examination of the record, it may appear that the conviction was irregular. Here the question is, if, under all the circumstances,

we are to admit evidence of what this person said; and in my opinion, we ought to admit it.

LORD GILLIES.—The evidence of the conviction was given by a different witness; and Mr Jeffrey most properly objects, that the other party wish to reject that evidence, but to take the benefit of his testimony, to discredit his witness. Perhaps, however, Mr Jeffrey ought to have given some notice that he meant to bring this evidence.

Circumstances held sufficient to prove a person dead.

In the course of the examination, Mr Grant objected, that there was no evidence of Whyte's death; but the witness having stated that he knew he was convicted,—that report said he was hanged,—and that he had not seen him since, his Lordship held this to be *prima facie* evidence of the death.

A person who had acted as attorney for the defender being called, was warned by the Court, that he was not to state any thing he had from the defender in his character as attorney.

The bank of Sir William Forbes & Co. being released from their cautionary obligation, the partner of the company was called,

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and stated the amount of the notes sent to the Paisley Union Bank, and that a letter was written stating this.

Grant.—This is no evidence against the defender, and a letter is not even evidence of the fact.

Lord Chief Commissioner.—This is no evidence against Moffat, but it shews the amount sent to the Paisley Union Bank, and is to be taken in connection with the other circumstances.

Cockburn, for the pursuer.—The simple questions are, Whether the defender robbed the Bank? or Whether he received the notes, knowing them to be stolen?

There is no direct evidence on the subject; but by a train of circumstances we shall *demonstrate* that he robbed it.

Grant, for the defender.—This is a most singular case, and such an one as I never expected to argue in a civil court; but as it is here, we must sift the evidence as if we were trying this man for his life. Such a case would not have been allowed in England, and the conduct of this bank is highly objectionable. You must hold that they stipulated not to prosecute for this sum.

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The Court always lean to the admission of evidence, and therefore allowed proof of the persons with whom the defender associated; but the Jury are not bound to believe it; and except the partners and clerk of the Bank, there is not one uncontaminated witness. With respect to what was proved to have been said by Whyte, I must beg of you to wipe it entirely out of your minds; for had he been alive, his evidence could not have been received.

LORD CHIEF COMMISSIONER.—This case has been one of considerable length in evidence; but now that that is concluded, it may be shortly stated. Before going farther, I would warn you that we have nothing to do with the conduct of the parties, except so far as it relates to the Issues before us. We are not to investigate the conduct of the Bank, nor are we to try the defender for a crime, but must look to the Issues before us.

This is a case of circumstances (here his Lordship stated them), and you must judge from the whole, whether it is made out against the defender. We had an important question to consider, as to the competency of proving

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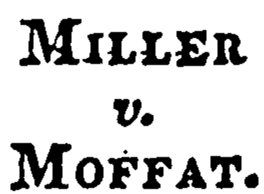

statements by Whyte; and I am still of opinion that we were right in admitting the evidence; but though legally and necessarily admitted, it is still for you to consider the weight due to it. In proving what a person since dead had said, there is always the disadvantage that there are no means of cross-examination. But if the law is, as we know it to be, that hearsay of such a person is admissible, then this must be held sufficient notice to the opposite party, to bring the best evidence to shew that the dead person would have been an incompetent witness. You have then the testimony of Whyte's widow and another witness, as to confessions by Whyte, and of Moffat knowing the whole; and there was nothing appeared to lead us to doubt the truth of what she stated, though you must take into view the persons with whom she was accustomed to associate. You have the defender also, in his declaration, stating himself to be a merchant, though it is proved that he never was so.

On the three Issues, you must consider whether there is not sufficient to satisfy your minds that these bills were purchased with the notes taken from the Bank. If you find for

the pursuer, it is for you to assess the damages, in doing which, you will attend to the schedule.

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Verdict—" For the pursuer on all the " Issues, but found no damages due."

L'Amy, Jeffrey, and *Cockburn*, for the Pursuer.
J. P. Grant and *Alison* for the Defender.
(Agents, *James Smyth*, w. s. and *William Jamieson*, w. s.)

PRESENT,
LORD PITMILLY.

HENRY *v.* EVANS.

1820. June 26.

Damages for assault.

DAMAGES for assault.

DEFENCE.—A denial of the statement; and a plea that, the defender's estate being sequestrated, the claim is incompetent.

ISSUES.

" 1*st*, Whether, on or about the 4th day " of January 1816, on the shore of Leith,