had been set down in a different order, it might have been necessary to make a change; but it is a mistake to think the Court can compel the parties to try the actions by the same Jury. It may be the same pannel, but it is only by consent that they can be tried by the same individuals. SHARP v. WADDELL.

At the trial the parties consented that they should be tried by the same Jury.

PRESENT,

LORD CHIEF COMMISSIONER.

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1820. March 8.

DAMAGES for breach of bargain, by furnishing unmarketable herrings, and of a different year's curing from that marked upon the casks. Damages for furnishing unmarketable herrings.

DEFENCE.—A denial of the allegations.

ISSUE.

"Whether of 145 barrels of herrings ad-

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" mitted to have been sold and delivered to " the pursuer at Inverness, in the year " 1815, by James Lyon of Inverness, mer- " chant, admitted by the defender to have " been his, the defender's agent, at the price " of 23s. per barrel, and warranted by the " said James Lyon to be well cured, and to " be fish caught and cured in the season of " 1815; seven barrels admitted to contain " fish of the season aforesaid were ill cured, " and 115 barrels contained fish not caught " and cured in the season aforesaid, or were " ill cured, or were in an unmarketable con- " dition."

The herrings had been furnished to the pursuer by Mr Lyon of Inverness, acting for the defender. Upon the representation that the herrings were bad, they were examined by inspectors, who swore to their report. Mr Lyon took back the herrings, and paid some expence that had been incurred; but the defender disapproved of his conduct, and disputed the allegations of the pursuer.

A witness fined for not attending a trial.

When the case was called, Mr Cockburn stated that a witness was absent who did not choose to come.

LORD CHIEF COMMISSIONER.—You must call the witness, and shew that he is a material one, and the Court will then punish him for a contempt.

The witness having been called, his Lordship said he had no hesitation in imposing a fine of L.5, subject to deduction if he had a good excuse to offer.

A person formerly examined extrajudicially upon oath, admitted as a witness.

The second witness called was one of the inspectors.

Jeffrey, for the defender, objects.—He was unnecessarily examined upon oath, and is not a free witness; the case is different from an oath in judicial proceedings.

Cockburn, for the pursuer.—The only question is, if he is inadmissible. The oath was necessary, and is matter of every day's practice. He was appointed inspector by the *defender*.

Jeffrey.—He was appointed by Lyon without any authority. The report, or at least the oath, was *ex parte*.

LORD CHIEF COMMISSIONER.—I feel considerable diffidence in deciding when the Scotch rules of evidence are involved. The question here is, whether this objection goes

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to the competency or credit of the witness. In my opinion, it goes to his credit, which is matter for the consideration of the Jury; and now that a full cross-examination is allowed, they will have much better means of ascertaining the credit due to him.

Taking voluntary affidavits is a great abuse. In England, Lord Kenyon was of that opinion; and the present Lord Chancellor stated, that though it was the constant practice, it bordered on illegality.

Incompetent to ask a witness what he formerly swore.

After the witness had been examined, it was proposed to produce the affidavit, but the objection was taken that it had not been lodged eight days before.

The LORD CHIEF COMMISSIONER, after discussion, was satisfied that it was incompetent to ask a witness what he had formerly sworn, and stated that he must sustain the formal objection, if persisted in.

An objection was taken to a witness, that he was called to prove facts as to a different quantity of herrings.

LORD CHIEF COMMISSIONER.—If this witness is not to prove more than the last, the evidence is inadmissible; for we do not sit

here to try whether Dr Henderson was in the habit of furnishing a bad article.

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Mr Lyon was called as a witness for the defender.

An action against a witness on the same facts, does not disqualify him, unless the verdict can be used in evidence against him.

Cockburn objects.—He is interested, as we have an action of relief against him.

Jeffrey.—He has clearly no direct interest in this case. The interest of the witness is against us.

LORD CHIEF COMMISSIONER.—It is a mistake to call the action an action of relief; it is an action of damages brought against the witness, on account of his conduct as to these herrings. The rules on this subject are general, and are intended to forward the ends of truth and justice. The question here is, can the verdict in this case be given as evidence for or against him in the other case?

Jeffrey contended, that the pursuer having kept the herrings for two months, was not entitled then to object to them. It was the statement, that the defender had attempted a fraud, by altering the brand, which made it necessary for him to push this case to trial.

Matheson, in opening the case, and *Cock-*

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burn in reply, stated the facts, and maintained, that the herrings could not have been well cured, from the state they were in so soon after; and that no want of care in the pursuer could have occasioned their being in that state.

LORD CHIEF COMMISSIONER.—As the case returns to the Court of Session to be there disposed of, our duty is merely to find what you think proved, after due consideration of the evidence. We are to attend to the terms of the Issue; and the main question is as to the 115 barrels; there was an attempt to throw a doubt upon their identity, but it rests entirely in argument.

A witness swore that all the herrings cured in 1814 were sold some time before; and if you believe him, you must find that the herrings in question were not caught that year. But I must also submit to you, along with this positive evidence, the inference drawn by the inspectors from the appearance of the herrings. My opinion however, is, that more reliance ought to be placed on the positive evidence of a disinterested witness speaking to a fact, than on an inference drawn by others, however skilful.

If the herrings were unmarketable, that

may have arisen either from bad curing or bad keeping; and in reference to this point, it is necessary to look at the evidence of the curers and inspectors in connection. All that is necessary in law is, that an article be in good condition at the time of delivery; but when not examined at the time, an inference may be drawn as to its condition at that time, from its condition afterwards.

You have evidence that they were well cured; you have also evidence of the state they were in at the end of two months; and you have the opinion of the inspectors, that if well cured, they could not have been in such a state in so short a time. You must say whether you think the evidence of good curing sufficient to counterbalance the other evidence, and find according to your opinion; but I think the better course for you, is to find, whether the state they were in was occasioned by want of care in the curing or keeping.

Verdict.—1*st*, "That the seven barrels con-
"taining herrings caught in 1815, were ill
"cured. 2*d*, Find that the 115 barrels con-
"tained herrings caught in 1815. 3*d*, Find
"that the 115 barrels herrings were ill cured.

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"4th, Find that the 115 barrels herrings "were on that account in an unmarketable "condition."

Cockburn and *Matheson* for the Pursuer.
Jeffrey for the Defender.

PRESENT,

LORDS CHIEF COMMISSIONER AND PITMILLY.

1820. May 15.

New trial refused.—Grounds of the motion *res noviter* and surprise.

Jeffrey moved for a rule to shew cause why the 1st, 3d, and 4th findings of the verdict should not be set aside, as contrary to evidence. We proved the herrings to have been well cured, and to have been of the fishing 1815, which were the only points. Even now, at the distance of years, they are not so bad as the herrings described by the witnesses.

LORD CHIEF COMMISSIONER.—The Issue is *or*, not *and* well cured; and the Jury went upon the ground (and it appears to me a sound one), that the state they were in in November, proved that they had not been well cured. It does not, however, interfere with your ground of application, which appears to me to be more properly surprise, than that

the verdict is contrary to evidence. It is not every surprise which will be the ground of a new trial; and this ought to be verified by affidavit. It appears to me a nice question, but that we ought not to cut you out of your rule, upon a proper affidavit being produced.*

Cockburn.—There is no ground for the new trial. The verdict is not contrary to evidence; and there was no surprise. He knew from the first that we were to prove the herrings bad.

LORD CHIEF COMMISSIONER.—He may say this is *res noviter*. We are not here to go into the merits of the case, but merely to say whether we think the defender has laid sufficient grounds for us to grant a new trial.

Jeffrey.—They did state that the herrings were bad, but coupled it with an allegation, that they were cured in some former year. Being prepared to prove them cured in 1815, and well cured, we perhaps paid too little attention to the state they were in. The evidence was contradictory; but the direct evidence was for us. The defender is so anxious to

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* In answer to a question from Mr Jeffrey, his Lordship stated, that an affidavit by the agent would be sufficient.

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clear his character, that he is willing to pay into Court any reasonable sum, as the expence of the new trial.

LORD CHIEF COMMISSIONER.—We require to be cautious, as this is the first instance in this Court, where we have had occasion to decide upon an application of this nature. If we felt any room for doubt, we would take time to deliberate, as our decisions must form the law upon a subject which is new here, though well established in England. The application is made on two grounds; 1*st*, That the verdict is contrary to evidence; and an attempt is made to couple with this, an offer of farther evidence. 2*d*, Surprise.

It was correctly stated, that there were two points in the Issue, the time of curing, and whether the herrings were well cured; and it has been maintained, that the Jury had gone upon inference, not on direct evidence. It is quite clear that the whole evidence was fit for the consideration of the Jury. It is not said there was any misdirection on the part of the Court. The Jury considered the whole, and have found a verdict in conformity with the evidence, and without partiality to either party. This brings the

case to a question of surprise, or *res noviter*.

On that ground we ought to attend to whether the evidence was designedly kept back, or was not produced through negligence or mistake.

The defender had always a power of inspecting the herrings, and might have done so before the trial. I am sorry that any thing should occur here which may hurt the feelings of a person, who, I dare say, is of excellent character; but I think any imputation thrown upon him will be rebutted by the observations of his counsel. We cannot, however, grant a new trial to repair the injury done to his feelings, or to enable him to rectify a mistake into which he may have fallen, as that would give rise to carelessness in the conducting of causes.

If the evidence was designedly kept back, then, by all the rules and principles of justice, it is no ground for a new trial.

Was there any impossibility of discovering this till after the trial? It appears from the whole proceedings, that the defender had full warning on the subject; and it was the duty of him and his agents to have made the

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necessary inquiry. But I wish to hear the opinion of Lord Pitmilly.

LORD PITMILLY.—I most completely concur in every one word stated by your Lordship.

The ground of the application is, that the pursuer resorted to a sort of evidence, which, though competent, the defender did not foresee, but that is a bad ground to rest upon. The evidence was competent, natural, and proper; and it would be very dangerous in us to grant a new trial, on the ground that the party did not come prepared to meet evidence of the description I have mentioned.

1820. June 1.

A verdict in substance for the pursuer, carries costs.

Cockburn moves for expences.

Horne objects.—The pursuer suspended as to the whole, but afterwards admitted he was wrong as to 20 barrels.

LORD CHIEF COMMISSIONER.—In this case damages were found, and, in substance, a verdict for the pursuer. There must be an order for expences; but if there is any article to which the defender objects, he will have an opportunity of being heard, and of stating all his reasons before the auditor.

PRESENT;
THE THREE LORDS COMMISSIONERS.

When the auditor's report was returned,

Jeffrey objected, and stated that he was not only entitled to deduction from the sum claimed, but was entitled to expences, as he was successful on the most material Issue.

Cockburn.—It is most desirable to have a general rule; but at present we wish for justice, according to the old rules, whether they are the best or not; and being successful in the subject in dispute, we must have costs.

LORD CHIEF COMMISSIONER.—This is an application for costs, which is resisted by the defender, on the ground that one Issue was found against, and two for him. In the case of Guthrie and Kirk (Vol. I. p. 280), the Court did not give full expences; but that was by no means the same as the present case. There the Issues were upon different causes of action.

We are not to lay down any new rule in this case. We consider that here is a verdict, and that the pursuer is entitled to have the expence to which he was put in obtaining it.

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I should be happy if expences were regulated by statute, or by Act of Sederunt; but the Court are unanimously of opinion in this case, that the usual rule must be followed.

PRESENT,
LORD CHIEF COMMISSIONER.

1820. March 13.

YOUNG v. ALLISON.

Damages for assault and battery.

AN action of damages for assault and battery.

DEFENCE.—A denial of the charge.

ISSUE.

" Whether, on or about the 25th day of " June 1818, the defender did enter the " garden possessed by the pursuer at Spring- " field, Leith Walk, in the county of Mid- " Lothian, and did violently assault, strike, " and kick the pursuer, to the injury and " damage of the said pursuer? Or, Whether, " time and place aforesaid, the pursuer first