

that from the date when it came into operation, which it had done in Perthshire, "the management and maintenance of the highways and bridges should be vested in and incumbent on the county road trustees." Sec. 32 provided that "the whole turnpike roads, statute-labour roads, highways, and bridges within each county respectively should form one general trust, . . . and all the roads, bridges, . . . rights, interests, moneys, property, and effects, rights of action, claims and demands, powers, immunities, and privileges whatever, except as thereafter provided, vested in or belonging to the trustees of any such turnpike roads . . . and bridges within the county, shall be by virtue of this Act transferred to and vested in the county road trustees appointed under this Act, who, subject to the qualifications hereinafter expressed, shall be liable in all the debts, liabilities, claims, and demands in which the trustees of such turnpike roads and bridges are or were liable under any general or Local Act then in force, except in so far as such debts, liabilities, claims, and demands may under the provisions of this Act be discharged, reduced, or extinguished."

The Act further provided (sec. 52) that the management and maintenance of the highways and bridges should be vested in and incumbent on the county road trustees, and that the amount required for the maintenance, &c., of the highways (including bridges) "within each district respectively, or, in the option of the trustees, within the several parishes constituting such district, . . . shall be levied by the trustees by an assessment to be imposed at a uniform rate on all lands and heritages within such district, or, in the option of the trustees, within each of the parishes constituting such district as aforesaid."

Sec. 108 provided that persons acting as trustees under the Local Acts in force should pay and deliver over to the county road trustees any "moneys collected by virtue of such Acts, or any books, deeds, papers," &c., belonging to the turnpike or statute-labour trusts.

Sec. 119 provided that "All moneys received by the trustees on account of assessments or penalties, or otherwise, for the application of which no special provision is made in this Act, shall be applied as follows:—(1) In payment of the salaries and allowances of officers and servants, and the general expenses of management of the trust; (2) In payment of the expense of maintaining and repairing the several highways; (3) In payment of interest on the debts affecting the highways, valued and allocated as hereinbefore provided, and thereafter towards payment of the principal of such debts."

Held (dub. Lord Justice-Clerk Moncreiff), upon a construction of the Act in question, that where funds which had been accumulated from pontages under an old Local Act for the purpose of maintaining a bridge across the river Earn, had, in terms of the 108th section of the Act cited above, been handed over to the County Road Trustees, they were

entitled to apply them to the general purposes of the road trust, and were not bound to set them apart for the maintenance and upholding of the bridge in question.

Observed that by the provisions contained in the 119th section of the Act, relating to the disposal of the assessments by the trustees, it was not intended that there should be any priority or order of application.

Counsel for First Parties—Kinnear—Dundas.
Agents—Dundas & Wilson, C.S.

Counsel for Second Parties—Asher—A. G. Murray. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Third Parties—Mackay. Agents—Thomson, Dickson, & Shaw, W.S.

Tuesday, March 16.

FIRST DIVISION.

[Sheriff of Perthshire.]

CHRISTIE v. HUNTER.

Proof — Parole and Written — Roup — Where Auctioneer reads Conditions from a Paper Signed by Exposer only, and is alleged to have added other Conditions not on the Paper.

A written agreement for the sale of turnips by public roup was signed by the seller, and read by the auctioneer previous to the roup. *Held* that this agreement did not constitute a written contract to the effect of excluding parole proof that the auctioneer on behalf of the seller had added other obligations than those contained in the agreement; but *observed* that it would not readily be assumed that such other obligations had been so undertaken.

On 10th October 1877 Charles Christie, a fruit and potato merchant in Dundee, and the pursuer in this action, purchased from Patrick Hunter, the defender, at a public sale upon his farm of Ardgath, Perthshire, a quantity of turnips for £135, 3s. 11d. The pursuer averred that "it was a condition of said sale and purchase, verbally stated by the auctioneer at the time of the sale, and shortly after the sale had commenced, and evidently in consequence of the sale being likely to prove a flat one, that whatever turnips were wished to be pitted should be so pitted on the ground by the defender free of expense, and that the defender would drive, free of expense, any turnips purchased to the station, or any similar distance, provided the tops or shaws were left with the defender; and relying upon these conditions, the pursuer was induced to bid more for the turnips than he otherwise would have done." The turnips were not pitted, and in consequence of this neglect they were, as the pursuer averred, so damaged by frost as to bring when sold £70 less than the price paid for them. After certain correspondence this action was brought for recovery of that sum. The defender averred that "the sole conditions on which the sale took place are embraced in a written agreement of sale signed by the pursuer, dated the said 10th day of October 1877. This document was read to the public

assembled previous to the commencement of the said sale. The said agreement of sale contains no obligation on the defender to pit any of the said turnips sold in terms thereof." The defender further denied that any such obligation had been announced by the auctioneer verbally.

The agreement of sale in question was an instrument signed by the defender only, and tested in the usual way. It did not contain any obligation on the defender to pit the turnips sold.

The pursuer pleaded—" (1) It being part of the conditions of said sale that the defender should pit said turnips, and the defender having refused to do so after having been required, and damage being thereby occasioned to the extent of at least £70, the defender is liable therefor, and decree ought to pass against him for said sum."

The defender pleaded—" (2) In any event, the conditions of sale having been reduced to writing, it is incompetent for the pursuer to modify, contradict, or in any way alter the same by parole proof."

The Sheriff-Substitute (BARCLAY) before answer allowed parties a proof of their respective averments, and on appeal the Sheriff (LEE) adhered.

A proof was led, the import of which sufficiently appears from the judgments *infra*.

The following memorandum from the auctioneer to the defender, dated 20th Dec. 1877, was produced:—"Dear Sir—Please deliver to the bearer, Mr Chas. Christie, the turnips purchased by him at the roup; and please to pit what quantity he wants."

The Sheriff-Substitute thereafter pronounced an interlocutor finding—"First, On the 10th day of October 1877 the defender exposed to public sale a quantity of turnips then growing or situated on the farm of Ardgath: Second, The pursuer purchased a certain quantity of the said turnips, paid the price, and took delivery at sundry times: Third, It formed no part of the written conditions or articles of sale that the defender was to pit the turnips so sold, and it is not proved that any verbal announcement was made by the auctioneer that such was to be done, or that any obligation to that effect was undertaken by or with the sanction of the defender: Therefore assolvies the defender from the conclusions of the petition.

"Note. — The pursuer's solicitor very ingeniously argued the case for his client. There is no doubt that clear and direct evidence is always to be taken in preference to mere *non memini*. Words may be spoken at a meeting though some present may not have heard them. There is also the memorandum from the auctioneer, which gives no small colour to the pursuer's claim, though it admits of some explanation. On the whole, the pursuer has failed to establish a distinct condition of sale that the turnips were to be pitted. Though the auctioneer had verbally super-added that stipulation to the written articles of sale, it would require to have had the sanction of the defender. A Vendue master is merely to sell according to the conditions of sale, and under the beat of his hammer. It is notorious that this class are apt to puff their articles, and spout much nonsense to encourage competition. The seller is bound by his articles, but it would require the express sanction of the exposer to place important obligations on him. There indeed was another addition admitted and implemented by

the defender, and the pursuer's solicitor argued that this went far to support the obligation libelled. But there was this obvious distinction—that the obligation implemented was mutual and remunerative to both parties, whereas the one now set up was onerous only on the exposer. Besides, it is possible that some of the persons present on the field, moving to and fro, with the accompanying noise, may have mistaken the one stipulation for the other. After the defender in December refused to perform the pitting of the turnips, the pursuer ought to have done so himself, and charged the expense, or then distinctly given notice of the claim of damage, which he did not until long after. The amount of damage is far from being satisfactorily ascertained, even though a distinction be allowed between the requirements of a farmer and those of a green-grocer in a town."

The Sheriff adhered, adding the following note:—

"Note.—On the question as to the competency of evidence qualifying the conditions of sale, the Sheriff is of opinion that it is a mistake to represent that document as constituting a written agreement. On the evidence in this case he is unable to say that the sale took place on these conditions. There was admittedly a variation as regards the lifting of the turnips; and he has no doubt that the auctioneer, in the presence and with the authority of the exposer, might competently be proved to have, on reading them over, made an additional intimation.

"But then it is clearly necessary that any such additional condition should be proved to have been so announced as to be one of the generally understood conditions of the sale.

"Upon this point the Sheriff, after full consideration, has ultimately come to the same conclusion as the Sheriff-Substitute. He was at first much impressed by the evidence as to the memorandum dated 20th December 1877, from the auctioneer to the defender. But, on the whole, he thinks it insufficient to supplement the undoubted weakness of the pursuer's evidence apart from that item. It is scarcely possible that the other persons present at the sale should have been unable to corroborate more distinctly the pursuer's statement if the auctioneer had in any sufficient way announced the alleged variation of the conditions.

"In this view it is unnecessary to give any opinion on the question of damage. But there is certainly difficulty in finding sufficient evidence on that subject to support the pursuer's claim."

The pursuer appealed.

Authority—*Lang v. Bruce*, July 6, 1832, 10 S. 777.

At advising—

LORD PRESIDENT—If we were dealing here with a written contract of sale, there would be great difficulty in admitting proof of conditions not mentioned in the contract. In general such proof cannot be admitted. But this is not a written contract. It is a writing called an agreement of sale. It was represented to be equivalent to articles of roup in the ordinary sense of the term, but it does not appear to me to answer the description of the instrument which we know as articles of roup in any particulars of the

slightest consequence. Where a landed estate is to be sold, and articles are drawn up specifying the upset price and the various conditions of exposure, that is a very formal instrument, not executed by one party alone but by all concerned in the procedure. It is executed anterior to the sale by the exposer, and every step at the auction is recorded in writing and subscribed by the party whose act and deed it is; and accordingly at the end—it may be after many biddings—when the judge declares the purchaser, the contract is complete and binding as a written instrument, because it is subscribed and duly executed both by seller and purchaser. But this document is not of that description. It contains a number of things. It may be described as a paper of instructions by the exposer to the auctioneer, and a general authority to him to deal with the subject as his own, subject to certain conditions which it is the auctioneer's duty to explain at the sale. But people who come to the sale know nothing of the document except what the auctioneer tells them.

Well, what did he tell them? We are told by some witnesses that he read the conditions. But others say that by reading they do not mean that he read every clause, but that he explained the gist of them. It appears to me that that proceeding was merely parole. It was not writing; it was reading. These articles were not made a written contract, and the people who heard them read, and who knew the conditions which were thus announced and published, were not bound by them as by a written instrument. The sale between the auctioneer for the owner and the purchaser is really a verbal contract as regards every one of the lots. Therefore the doctrine of law referred to has no application.

Then comes the question whether the pursuer has proved that in addition to the conditions of sale which the auctioneer read to the bidders there was at the same time another condition agreed upon not contained in the paper. The addition of such a condition is a thing which may competently be proved by witnesses, but it would require to be very distinctly proved. It is not to be readily assumed that the owner and the auctioneer added to the conditions which they had advisedly proposed. The most that the pursuer can say is that there is a conflict of evidence. It was said that the evidence of one or two who say that they have heard a thing said is weightier than that of a multitude who did not hear it. But when both had equal opportunities, the force of the observation is diminished, and especially so when the question is, not whether anything was said, but what was said, for undoubtedly something was said. I should be slow to disturb the judgment of the Sheriff-Substitute, before whom the proof was led, unless I was satisfied that he had gone perfectly wrong on the evidence. But the printed evidence has made very much the same impression on my mind, and I am quite prepared to concur in the judgment.

LORD DEAS, LORD MURE, and LORD SEAND concurred.

The Court adhered.

Counsel for Pursuer (Appellant)—Trayner—Young. Agents—Begg & Murray, Solicitors.

Counsel for Defender (Respondent)—Dean of Faculty (Fraser)—Scott. Agents—J. & J. Galletly, S.S.C.

Friday, March 19.

FIRST DIVISION.

CITY OF GLASGOW BANK LIQUIDATION—
(LIQUIDATORS' REMUNERATION CASE)

—JAMIESON & HALDANE v. ANDERSON.

Public Company—Voluntary Liquidation—Minute appointing Liquidators—Remuneration of Liquidators—Proof—Parole—Companies Act 1862 (25 and 26 Vict. cap. 89).

The minute of a meeting of a company registered under the Companies Act 1862, which is made under statutory authority, and an abstract of which is subsequently transmitted to the Registrar of Joint-Stock Companies, is a document which proves itself, and is not to be contradicted or explained by parole evidence.

Where such a minute bore that four liquidators had been appointed with equal powers, and did not draw any distinction between the liquidators in regard to the amount of their remuneration, and where the liquidation had subsequently come under the supervision of the Court, who pronounced an order approving of the previous proceedings in the voluntary liquidation—held that the Court, in fixing the amount of the remuneration, could not look at any alleged agreement between the company and the liquidators relating to the terms upon which they had originally offered their services.

Observed that it might have been different had the question related to an agreement amongst the liquidators *inter se*.

Observed that, in fixing the distribution of remuneration amongst a plurality of liquidators, statements of the time occupied and of the nature of the work done by each will be elements of great importance to the Court.

This was a note in the liquidation of the City of Glasgow Bank by two of the liquidators—Mr Jamieson and Mr Haldane—to have their remuneration as liquidators fixed. The note set forth:—

“That at an extraordinary general meeting of the shareholders of the City of Glasgow Bank, held in Glasgow on 22d October 1878, the petitioners, along with William Anderson, C.A., Glasgow, and John Cameron, banker there, were appointed liquidators for the voluntary winding-up of the said bank.

“At the said meeting it was, *inter alia*, resolved that each of the liquidators so appointed ‘may act separately, and exercise every power which by the Companies Act of 1862, and Acts amending and extending the same, is conferred on liquidators; and that the remuneration to be paid to them, and each of them, as such liquidators shall be left to be fixed by the following partners, who are hereby appointed a committee for the purpose, with full powers, viz.’—[*here followed the names*].

“On 27th November 1878 the Court pronounced an order directing and ordaining the