

SPENCE  
v.  
HOWDEN, &c.

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PRESENT,  
LORD CHIEF COMMISSIONER.

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SPENCE v. HOWDEN, &c.

1819.  
July 12.

A SUSPENSION and interdict, to prevent Mr John Spence being admitted a member of the incorporation of goldsmiths of Edinburgh, on the ground that he had not served a regular apprenticeship.

Circumstances in which it was found that an apprentice did not serve during seven years.

DEFENCE.—He did serve.

ISSUE.

“ Whether John Spence, the charger,  
“ served an apprenticeship to his father as a  
“ goldsmith, for the period of seven years  
“ from and after the 19th May 1804, in  
“ terms of the regulations of the incorpora-  
“ tion of goldsmiths?”

In 1804, Mr Spence had been entered in the books of the incorporation of goldsmiths, as an apprentice to his father, and for some

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time served regularly ; but afterwards having attended Mr Lea, a dentist, it was alleged that he could not regularly complete his time with his father. In 1814, Mr Spence began business as a surgeon dentist in Edinburgh, and afterwards applied to be taken upon trial as a goldsmith, with a view to being admitted a member of the incorporation. This application was resisted, but the objections were overruled, and an assay was appointed to Mr Spence, upon which the present application was made to the Court.

The first witness called was the father of the pursuer.

*Clerk*, for the defenders.—They know he is incompetent.

*Cockburn*.—We think he is admissible, as he is a necessary witness, and the facts arose at a time when there could be no idea of calling him.

LORD CHIEF COMMISSIONER.—Is there any instance in which a father was allowed to be called as a necessary witness? The pursuer must of course prove the necessity before calling him. The commencement of the service may be proved by writing. I therefore decide that he is inadmissible in *hoc statu*.

A witness was asked the date of the indenture.

LORD CHIEF COMMISSIONER.—I doubt if you can ask the date of the indenture; but you may ask at what time the service commenced.

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Incompetent to prove by parol, the date of a written instrument.

A Juryman wished to ask a witness, whether he heard that the pursuer was also under indenture to Mr Lea.

Evidence of hearsay incompetent.

LORD CHIEF COMMISSIONER.—The answer would not be evidence, and therefore the question cannot be put by any part of the Court.

A witness having stated that the pursuer had abandoned his father's business, and gone to Mr Lea, was asked, whether he did not still attend his father's shop.

LORD CHIEF COMMISSIONER.—Your own witness has proved that he abandoned his father's business. I agree that it is not necessary to prove a constant attendance; but here the Issue is, if he abandoned this business, and your own witness swears that he did.

Evidence of skill incompetent to prove that an apprentice had served during the time required by his indenture.

A witness was called to prove that the pursuer had performed the assay appointed by the corporation.

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*Clerk and Baird* object.—It is not in the Issue.

*Cockburn*.—It tends to prove that he attended regularly.

LORD CHIEF COMMISSIONER.—It is incompetent (and it has been often so decided) to go out of the Issue. The Issue is the rule which bounds the admissibility of evidence. It may be obscure, or doubtfully worded, and may require explanation. Are there in this case doubtful words? The Issue is sent, to enable the Court of Session to decide whether they ought to prevent the pursuer from being admitted a member of this corporation. The first part of the Issue is, whether he served seven years; and if it stood here, there could be no doubt that the evidence tendered would be incompetent. The Issue, however, farther states, “in terms of the regulations of the incorporation of goldsmiths.” This entitles the pursuer to prove these regulations. If an assay is part of those regulations, the assay must be in evidence; but does the assay prove, or is it possible that it can have any effect on the time? Mr Cockburn says he produces it, not to prove that the pursuer could make it, but to shew that he served seven years. How

does this appear, unless he can also shew, that being able to make an assay, is to be held an equivalent for seven years service. Time is one thing, and skill another; and it has not been proved that the one is to be taken as an equivalent for the other. In the circumstances it would be going beyond the question sent, were we to admit this evidence; and there is a difficulty even in admitting evidence of the equivalent, as the Court of Session, if they wished that question tried, ought to have sent an Issue upon it.

*Cockburn* again tendered the pursuer's father as a witness, and stated, he is necessary, as the only witness who can prove that the pursuer had leave of absence. Having called the other persons connected with the shop, we are now entitled to call the master.

*Clerk and Baird*.—Near relations are only admissible when the necessity arises from the nature of the thing, and other evidence cannot be expected. This was solemnly decided in 1775, and it is believed the decision was entered in the books of sederunt. Till last Session the rule was held inviolable, and even then, the general rule was distinctly admitted, though, in a case of a private and peculiar nature, its application was questioned.

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Circumstances in which the father of a defender was admitted as a witness.

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The *penuria testium* must arise from the nature of the thing, not from the fault of the party.

LORD CHIEF COMMISSIONER.—We are rather in a wrong course here. Mr Cockburn ought to have called the witness: Mr Clerk would then have stated his objection, and Mr Cockburn should have answered.

I was most anxious to hear the discussion, as the question is a very general and important one. A *penuria testium* is a reason for getting over the objection of relationship, but it must be a penury arising from the nature of the thing. Suppose a secret trade carried on by a father and a son—it would then be reasonable to call the father; but this is a public shop, and the attendance may be proved by the persons who frequented it, or by those who wrought along with the pursuer. At first I thought, that admitting the father might appear like allowing the pursuer to call him, when he had failed to prove his case by proper evidence. I am now, satisfied, however, that in this case I ought to admit him to the extent of proving a reasonable leave of absence. We must not confound the objections to admissibility and credit;

for, though admitted to prove this single point, the question of what credit is to be given to the testimony of so near a relation, remains open for the Jury. It is said the father had not power to cut off three years from the term of apprenticeship required. I do not mean to enter into the question as to what leave of absence the father was entitled to give, but may now mention, that Mr Cockburn can gain nothing by asking questions as to so long a period as three years. I merely admit the testimony to prove a reasonable leave of absence, and shall take a note of this direction, that the subject may be afterwards discussed, if parties are dissatisfied with my decision. It always appears to me safest to lean to the admission of testimony, leaving the credit due to it for the consideration of the Jury.

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Mr Clerk, in opening the case for the defenders, stated that some details did not require proof.

In opening a case, counsel ought not to state facts which he does not intend to prove.

LORD CHIEF COMMISSIONER.—Every latitude is given to a gentleman opening a case; but with a distinct avowal that statements are not to be proved, it is impossible to allow them to be made.

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*Cockburn*, in opening the case, and in reply, contended—The simple question is, Whether the pursuer served the last three years of his apprenticeship? We shall prove, by the neighbours, customers, &c. that he was considered an apprentice; and his father will prove, that, when absent, it was with his leave. The purpose of attending is to qualify him to be a goldsmith; and he has proved his qualification to the satisfaction of the corporation.

The only question of any difficulty is a question of law, What shall be held as sufficient to constitute an apprenticeship? and I am entitled to a special verdict, finding that there was regular attendance for four years, and such an attendance for the other three as you may think proved.

*Clerk*, for the defenders, insisted—The pursuer has only proved four years attendance; and seven are required. During the last three, even the father will not swear to particulars of the absence; but merely says, in general, that his son was never absent without his leave. It is clear that Mr Lea could have compelled him to attend; and it is therefore impossible, that, at the same time, he could be apprentice to his father.



LORD CHIEF COMMISSIONER.—This I consider a general Issue; and if ever there was a case in which a general answer should be given, it appears to me that it ought to be in this case; for, with the exception of one fact, and one or two subordinate facts, there is no evidence which would warrant a return of a special verdict. If you give a verdict for the pursuer or defenders, it will be for the other party to move for a new trial, on the ground that it is contrary to evidence, or contrary to law; but in the present state of the evidence, I do not know what facts could be found.

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The question is, if he served in terms of the regulations. The first charter requires a complete service, and the second charter requires fair service. There must be good faith: fraud vitiates the transaction; not merely such fraud as is punished; but there must be that fair dealing, which, if wanting, the civil court will defeat the rights of the party.

In order to give a distinct answer to the question, it is proper to take a view of the nature of the case. There was an honest and fair commencement of the apprenticeship, and an honest and fair service down to 1808; and if the whole of the case had been like this, there

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could have been no question ; but there was then a considerable variation, and the father gave his son leave to attend Mr Lea. He might fairly give him leave to attend, to get general instruction ; but in the circumstances of this case, it is clear that the attendance was for the purpose of learning a different business. On considering the whole facts and circumstances, as given in evidence (part of which his Lordship read), you will say whether the honest and fair intention of being a goldsmith continued, and whether the pursuer has made out his case. If he has, you will find in the affirmative ; if not, in the negative. You will also attend to the circumstance, that, at the end of an apprenticeship, the same attendance is not given as at the beginning ; and that the leave of the master, if honestly given, will cure irregular attendance ; but I cannot conceive that it will cure absence for the purpose of learning another trade.

Verdict for the defenders.

*Cockburn* and *Fletcher* for the Pursuer.

*Clerk* and *Baird* for the Defenders.

(Agents, *D. Murray*, w. s. and *George Tod*, Jun.)