

STOTHART  
v.  
SIR J. L.  
JOHNSTONE'S  
TRUSTEES.

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DUMFRIES.

PRESENT,  
LORD CHIEF COMMISSIONER.

1821.  
Sept. 13.

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STOTHART v. SIR J. L. JOHNSTONE'S  
TRUSTEES.

Damages  
against the  
proprietor of a  
mill, for not  
implementing  
his contract.

**DAMAGES** by a miller against his landlord, for not implementing the conditions of the lease; and causing legal diligence to be executed for the rent, when he, the landlord, had not implemented the contract.

**DEFENCE.**—The proprietor did all that was incumbent on him under the lease.

The Issues contained an admission that a mill and 20 acres of land were let to the pursuer, in terms of an offer by him, and of the conditions of set, proposed by the late Sir J. Johnstone. The questions then were, 1st, Whether the 20 acres were to be adjoining the mill? and Whether the defenders failed to put the pursuer in possession, to his loss and damage? or Whether the pursuer agreed to

accept of 20 acres in the vicinity of the mill, as pointed out by Thomas Johnstone? and Whether he took possession of  $13\frac{1}{2}$  acres, and two years after was offered  $6\frac{1}{2}$  more, as pointed out by Thomas Johnstone? *2d*, Whether the defender became bound to build a house at the mill, and to repair the others? and Whether he failed to put the pursuer in possession of the house for two years, and did not put the others in proper habitable condition? *3d* and *4th* Related to the thirlage of certain farms,—*5th*, As to injury to the mill-dam—and the *6th*, *7th*, and *8th*, were, Whether in the years 1812, 1813, and 1814, the defender applied for, and obtained sequestration of the pursuer's crop and stock for the rent, although he had failed to implement his agreement with the pursuer.

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Besides the action of damages, there was a declarator by the trustees, to have it found that they had implemented the contract, and that the tenant was bound to pay his rent.

The first piece of evidence offered for the pursuer, was an extract of the articles and conditions under which the mill and a number of farms were let.

An extract not received as evidence, the original writing being in Court.

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*Jeffrey*, for the defenders, objected.—This is not sufficient to prove the tenor of the original, which is on the table.

*Whigham*.—An extract is evidence, and they do not say this is forged. If they wish for the original, they may produce it.—Russel, Form of Pro. p. 32.

LORD CHIEF COMMISSIONER.—This comes forward in a shape that is often extremely puzzling; but at present it appears to be a struggle to make the defenders produce the original.

In the Court of Session, an extract is frequently used without the original; and there, from the frequent diets, they have an opportunity of correcting any error, by calling for the original; but here the diet being peremptory, the Court must decide at one sitting.

In the circumstances of this case, I lay down the strict rule, that the original being the best evidence, and being in the power of the party, it ought to be produced. It is said this is a production by the defenders, and ought to be given in evidence by them. This shews a desire on the part of the pursuer to withhold it; and as there may possibly be some error, it appears to me, that

receiving the extract would be admitting secondary evidence.

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A witness was called as a haver, to produce a writing.

The Court has power to allow a haver to produce a writing at the trial.

*Jeffrey*.—It ought to have been produced eight days ago. Act of Sed. 10th Feb. 1816, § 3. and 9th July 1817, § 1.

LORD CHIEF COMMISSIONER.—There is an exception near the end of the 5th section of the act last mentioned, under which this is competent.

A witness was called to prove the handwriting of another person whose name was in the list of witnesses, but who could not attend.

*Jeffrey* objects.—This is not the best evidence. If the witness is ill, they ought to have examined him on commission.

*Whigham*.—We attempted to bring the best.

LORD CHIEF COMMISSIONER.—It is incompetent to admit the evidence of an absent person, even on a certificate on soul and conscience that he is unable to attend. The rule is, that the testimony must be given in presence of the Court and Jury; and the ex-

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ceptions are permanent infirmity, or being beyond the jurisdiction of the Court. I do not say that no relaxation of this rule has taken place; but it is our determination to bring it back to this. If you mean to prove facts by this witness, you ought to have moved to put off the trial; but at present I am only to decide on the legality of the question put; and can it be disputed that his hand-writing is a legal matter of proof? I am not at present to say whether this paper, after it is proved, is to be admitted in evidence.

Circumstances in which parol evidence was admitted, although a bargain was in writing.

A witness called for the pursuer was asked, on his cross-examination, whether he had any conversation with the pursuer as to the bargain.

*Whigham.*—The bargain was reduced to writing; and they are not entitled to bring parol evidence; Ersk. 4, 2, 19; Kendal and Co. v. Campbell, 18th June 1766, and Maxwell v. Burgess, 28th Jan. 1773; Mor. 12,351; Clark and Callender (in this Court); Philipps, 423 (2d edit.), (554, 5th edit.)

*Jeffrey.*—This is competent by the frame of the Issues, to explain the meaning of flexible terms. Geddes v. Wallace, Bottle, and Company.

This writing is not sufficient of itself, but requires possession to perfect it.

*Whigham.*—The Issues do not prescribe the means of proof. Even the payment of money cannot be proved in this manner; nor can an arbiter be called to explain his decree. This writing is the foundation of their action, and of their applications to the Sheriff, and must be good or bad *in toto*.

LORD CHIEF COMMISSIONER.—This having arisen on cross-examination, does not vary the nature of the question, as the only deviation from the rules of examination in chief is, that you may lead in cross-examining.


The last objection has been very ably and lucidly argued; but I wish to lay it out of view, as it rests on a technical objection; and when I have a general principle to go upon, I wish to avoid deciding on technical objections.

The question is, Did any thing pass between Stothart and you as to receiving of 20 acres? and if it goes to contradict the contract, it will be difficult to receive it. But in a case sent in circumstances like the present, and resulting from such proceedings, it is clear that facts and circumstances must be admitted

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in evidence to explain the agreement between the parties.

At present I throw out of view the meaning of the term adjoining. After I have heard the evidence, I shall be better able to direct the Jury whether they are to throw it out of view or not.

The question in issue is, whether it was *understood and agreed*; and how is it possible to make that out, except by proving the transactions of the parties. In order to shew the original transactions of the parties, I think the question may be put, and that the investigation may be so conducted as to shew this without admitting incompetent matter.

It was then objected by the pursuer that the witness was incompetent.

LORD CHIEF COMMISSIONER.—You waive all personal objection to the witness by calling him.

At an after stage of the proceeding, it was proposed to pass from any claim on one point.

LORD CHIEF COMMISSIONER.—This must be so arranged, that it can never again be brought to trial, which might be done by an agreement to submit it.

When Mr Hamilton, the former commissioner of Sir J. L. Johnstone, was called,

*Whigham*.—He is inadmissible, as at the time of this transaction he was commissioner, and almost sole agent for Sir John. Reid and Gardyne, 10th July 1813; *M'Alpine v. M'Alpine*, 2d Dec. 1806, M. App. Wit. No. 4.

*Forsyth*.—He is not agent in this cause, and has no interest to support either side.

LORD CHIEF COMMISSIONER.—There is no doubt he is admissible. The affairs of life could not go on, if the parties to such transactions could not be examined.

A letter was then produced.

*Whigham* objects.—This was a previous communing, and cannot be brought to vary the contract. *Gordon v. Hughes*, 15th June 1815, reversed March 1819.

LORD CHIEF COMMISSIONER.—Since the question was first agitated, I have turned it much in my mind, and I am satisfied that I am right in admitting the evidence, and I shall therefore state it to the Jury. The whole fallacy of the argument consists in viewing this as what goes to the reduction of a deed, or at least to vary it.

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A witness admitted who had been Commissioner for the defender at the date of the transaction to be proved.

In damages for breach of bargain, competent to produce a letter dated antecedent to the bargain.



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The only question here, is a question of damage, not as to the validity of the contract; and as this is competent under the Issues, I think it ought to be admitted.

*Whigham*, in opening the case, and in reply, maintained, that the pursuer was entitled to 20 acres adjoining the mill, and that he had proved damage by not getting it.

*Jeffrey*, for the defender, maintained that there was no ground for damages, as the claim rested on a quibble on the word adjoining, which it was clear was not to be taken in its strict sense.

**LORD CHIEF COMMISSIONER.**—After more than 13 hours of your praiseworthy attention to this case, I am sorry that it will be necessary for me to detain you, by going somewhat into detail; but it is some consolation, that after seven years litigation, your verdict will be such as to put an end to this case; for it is the question of damages, not the declarator, that is before you.

There has been some discussion as to the admissibility of part of the evidence, on the ground that the contract, when finally settled, had been reduced into writing; but the ques-

tion here is not whether the contract was final or not, or probative or not; but what the conception of the party was of his right; and whether he has suffered damage. It is on the two first Issues that the weight of the case depends.

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The word adjoining, which is in the agreement, is introduced into the Issues; and it is said this word is to over-ride the offer by the pursuer, and that it means adhering to, and round about the mill; but it is important to observe, that up to the date of the summons for damages, this was not the construction put on it by the pursuer.

The question is, whether the miller took this as a transaction to be settled by Mr Johnstone, and whether he accepted of it as settled by him. Mr Johnstone is dead; and as in that situation it would have been competent to prove what he had said, so it was competent to prove his letter, and the word near is employed in that letter, to describe the situation of the ground.

You are to consider the letters and the conduct of the pursuer; and from these you are to draw the conclusion as to what was his understanding.

On the question as to the building the

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houses, I do not think you will go very deep into the pocket of the defender.

The question as to the thirlage appears to me a very minute one; and the evidence as to the injury to the dam, is in a very doubtful state.

Whether damages are due on account of the sequestrations, depends entirely on your opinion on the two first Issues. As the sequestrations are regular, the only claim is on account of using diligence for the whole, when it is said only part was due.

Verdict.—The Jury found L.10 damages on account of the pursuer not having been put in possession of the houses in reasonable time; L.10 on account of the insufficiency of the houses; and L.5 for the injury to the mill dam. They also found that he had not been put in possession of the thirlage of certain farms; and found on the other Issues for the defenders.

*Whigham* for the Pursuer.

*Forsyth* and *Jeffrey* for the Defenders.

(Agents, *T. Johnstone*, w. s. and *Dallas* and *Innes*, w. s.)

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There had been an order given for expences in this case, and the accounts were taxed by the auditor.

LORD CHIEF COMMISSIONER.—In this case there were two actions, and Issues upon each went to trial. Both parties were actors, and both have been in part successful. The one party has succeeded in the declarator, and the other has partly succeeded in the action of damages.


When one party brings another into Court, and that party is unsuccessful, having caused the expence, he is bound to pay it. Thus, if the tenant had brought his action alone, he would have got his expences; or if the landlord had brought his declarator, he would have got his. This is the natural *prima facie* rule, though it may be altered by circumstances. We can only lay down the principle, and must remit to the auditor, to separate the expence according to that principle.

This day a motion was made that decree should go out in name of the agent, for the balance of the accounts of expences. This

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May 14. & 23.

In conjoined actions in which each party got expences, decree in name of the agent granted only for the balance of the two accounts.

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was opposed by the counsel for the tenant, who maintained that each agent was entitled to decree for the amount of his account, and reference was made to 2 Bell Com. 112, and to Smith and Gemmel, 9th July 1802. M. 6257.

**LORD CHIEF COMMISSIONER.**—This case was stated to me when sitting alone; and as it appeared to me to involve a principle of very considerable importance, I wish it to be fully stated now, when the Court is full.

*Cockburn.*—The simple question is, whether the agent is entitled to decree. There is no doubt that the practice is in our favour. Mr Bell is mistaken in saying that the right is to an assignation merely; the expences belong to the agent. The Court held in Smith and Gemmel, that bankruptcy was what raised the right of the agent. A private settlement by the parties does not cut off the right.—*Bryson v. Hamilton*, 17th June 1813—*Rox v. Stewart*, 3d July 1818.

*Jeffrey.*—We admit the authorities and principles, and that a party is not entitled to plead compensation on a separate debt. But the specialty here is, that this is the same case. Agents may, on the principle con-

tended for, advance money, in the hope of recovering it from the opposite party, which ought not to be encouraged.

**LORD CHIEF COMMISSIONER.**—We should be extremely sorry were we called on to decide upon a technical rule, in opposition to the justice of the case; but here the technical rule is got quit of. Here there is a case with six Issues, and three are found for, and three against the party applying; and he has, on the whole, lost instead of gaining. The order must be for the balance of the accounts.

**LORDS PITMILLY and GILLIES** expressed their concurrence in opinion that the order should be for the balance.

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**DUMFRIES.**

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**LORD CHIEF COMMISSIONER.**

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**M'CRACKEN, &c. v. PEARSON.**

**REDUCTION on the ground of death-bed.**

**M'CRACKEN,  
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September 14.

**Deathbed.**—  
Found that at the date of a deed under reduction, the granter was ill of the disease of which he died; but that he went to, and returned from, the public market unsupported.