

not have rendered him liable, as there was no danger of publication, and it was regularly seeking redress against a public officer ; but having published it he must be answerable, unless he proves it true, and on part of the libel he has taken no issue in justification.

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Verdict—“For the pursuer, damages L. 300.”

Jeffrey and Cockburn, for the Pursuer.

J. A. Murray and Skene, for the Defender.

(Agents, *A. H. Manners*, w. s., and *James Smith*, s. s. c.)

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PRESENT,

LORD CHIEF COMMISSIONER.

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INGLIS v. CUNNINGHAM.

1826.
June 14.

AN action of damages for breach of agreement in not securing to the pursuer the right to carry off the chips made by him in quarrying.

Damages for breach of an implied agreement as to the chips made in quarrying stones.

DEFENCE.—The pursuer was aware of the agreement made by the defender with the proprietor of the quarry, which only gave a right to take paving stones from the quarry.

ISSUE.

“ It being admitted that the pursuer entered

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“ into the contract in process, dated 26th
 “ March 1818, to make the road across the Cal-
 “ ton Hill, and that by the said contract the
 “ pursuer was bound to take stones from Salis-
 “ bury Craggs, and that the defender gave the
 “ pursuer the use of a quarry in the said
 “ Craggs, rent free, for that purpose : It being
 “ also admitted that the pursuer prepared stones
 “ in the said quarry for making the said road,
 “ and that in preparing the same a great quan-
 “ tity of refuse and chips were produced in the
 “ said quarry ;

“ Whether the defender was bound and
 “ obliged to secure the said refuse or chips to
 “ the pursuer as his property ? and Whether
 “ the defender has failed to implement the said
 “ obligation, to the loss and damage of the pur-
 “ suer ?”

Rutherford opened the case for the pursuer, and stated, That, as the parties had agreed to refer the value of the chips, the only question was, Whether, by the practice of the trade, the person quarrying was entitled to the chips in absence of any stipulation to the contrary ?

Circumstances
in which parol
evidence of a
usage was admit-
ted as to a mat-
ter not provided

The first witness was asked, to whom the chips in a quarry belonged when the contract was silent on the subject ?

Hope, Sol.-Gen. objected, There is a written contract, and it is incompetent to prove this, which is *inter essentialia* of the contract, by parol evidence, especially as the contract is specific on the subject.

Cockburn, for the pursuer.—The objection taken is more to the import of the proof than its admissibility. The question is, Whether it is competent to prove usage of trade by parol evidence, and cases of this sort have been tried. This is an accessory to the contract, which is provable by witnesses.


LORD CHIEF COMMISSIONER.—I have given this a good deal of consideration, but it does not appear to me that I can reject this evidence, as I cannot judge whether it is *inter essentialia* till I hear it. But I have great difficulty on another ground, how far this is or is not the explanation of a written contract by parol evidence. The case at Glasgow was a specific issue, and the practice was the question to be tried. In cases of insurance, being in *re mercatoria*, proof of usage has been admitted; but the propriety of this has been doubted by some great men. Lord Mansfield, and Lord Kenyon admitted it; but in the case of *Anderson v. Pitchard* the highest legal authority now in

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for by the terms
of a written con-
tract between the
parties.

Kerr v. Marshall,
1. Mur. Rep. 59.

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the country stated, that he would not admit it even in policies of insurance.

In matters extrinsic of a contract parol evidence is admissible ; as if there are two estates of the same name, you may prove which was intended, but you cannot prove the meaning of the contract. There is a great difference between explaining the meaning of a contract, or adding to it.

In policies of insurance, and in farms, the usage is so generally known, that an insurer or farmer is held to know it ; but I doubt if the usage of quarries is in the same situation. But I admit the evidence, because the usage may be so flagrant that the commissioners could not be ignorant of it. But, though I admit it, I save the point, and this allows the case to go on to a verdict ; and if, in consequence of admitting it, the pursuer gets a verdict, the Court will be moved on the subject. I receive it subject to the opinion of the Court on the admissibility of the evidence.

Hope, Sol-Gen., in opening for the defender, said, This is an important question of usage, not of general usage, but in reference to this particular contract, whether the defender was bound to secure the chips. The

custom is not proved, and if it were, the question would still be, whether it is so general that it must have been known to the commissioners, and formed part of the contract made with them? But we shall disprove the custom.

The defenders were not proprietors of the quarry, nor had they any right to open quarries, except by agreement with Lord Haddington, and the pursuer knew the nature of their agreement. There was an arrangement for settling this, which is entered in the minutes of the commissioners.

An objection was taken to the minute-book being produced.

LORD CHIEF COMMISSIONER.—If you propose to read the minute-book to show the nature of the arrangement, I think you must prove that the pursuer was privy to it. The minute stating that this was read to him does not prove it; but if they prove that it was read to him then it may be read now.

It being afterwards admitted that the pursuer assented to a reference to Baron Clerk, the Lord Chief Commissioner observed that that did not entitle the defenders to read the minute.

When Baron Clerk was called as a witness.

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A minute-book kept by Commissioners for making a road will not prove a fact stated in it against a third party.

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One of several Commissioners for making a road may be called as a witness for the others as to facts for which he is not personally liable.

I. Phillipps, 71,
(ch. 5, § 2.)
Tait's Law of
Ev. 375, 376.

Cockburn.—He is a commissioner, and as such a party, though the commissioners may be, and are sued by their officer.

Hope, Sol.-Gen.—They have no interest, and are therefore admissible.

LORD CHIEF COMMISSIONER.—The clause as to the power of suing and liability to be sued puts the commissioners much in the same situation as a corporation; and Mr Tait says that a corporator may be admitted. In Lord Fife's case the distinction was, that the witness was a trustee in the deed under reduction, and had a salary.

In this case, however, I think the commissioners must be received, as the possibility of an action being brought is too distant an interest. It must be proved that they have done some act, for which money may be taken out of their pockets. They are in the same situation with road trustees; and in a great cause relative to a western district, it was decided, that merely being trustees did not render them liable in damages, but that they must have done some act, binding themselves personally.

In an action of damages for not securing to the pursuer the chips made by

An objection was taken to the tacksman of the quarry being asked whether the chips belonged to him or the pursuer.

LORD CHIEF COMMISSIONER.—How could this verdict be evidence in his favour? He has no interest in the cause. The doctrine on the subject is well laid down in England in a case on a bill of exceptions.

Cockburn said, The evidence for the defender confirmed that for the pursuer; and that all bargains had accessories: That this case depended on usage, and that cases of usage had been tried as to writers, to trade, and to farms: That what he contended for was reasonable, as the quarry must be kept clear, and workmen were entitled to the chips and shapings of their work.

LORD CHIEF COMMISSIONER.—This case is of importance in several views. The issue contains the question, and an admission as to the contract, which is a regular deed drawn with all the solemnities required by the law of Scotland. Had the question turned on the contract, it never could have been here, as the Judge in the Court of Session would not have sent it, unless there had been extraneous matter averred.

The parties have judiciously referred the amount of the damages to arbitration.

The liability of the defender depends on the

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CUNNINGHAM.

him in quarrying stones, competent to ask the tenant of the quarry whether these chips belonged to him.
Bent v. Baker.
3 T. R. 27.

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custom, usage, or practice of the trade. A question was raised as to the admissibility of parol evidence in this case; and if you find a verdict for the pursuer, and the Court are of opinion that the evidence was improperly admitted, then a new trial will be necessary; but if the parties are satisfied with the decision of the case, then it is at an end.

I hope this will not embarrass you, as you must consider the evidence and hold that it was properly admitted by the Court. I state it to you, and therefore you must consider it, and make up your minds whether it is of that clear and distinct character which ought to control a written deed; and whether the practice is so general through the country that the contract is to be explained by it, and the intention of the parties to be got from the usage, there being nothing in the instrument entitling the pursuer to the chips. The defender has failed to give him the chips; and the question is, whether he was bound to secure them to him? and this depends on the usage and the acts of the party.

The contract is specific in its clauses, and shows that this quarry was not the property of the defender, but of Lord Haddington. There is no question as to the stones to be used on the road, but this being a contract as to paving,

the question is, whether the pursuer was entitled to sell the chips for his own profit?

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The true way to view the case is to consider whether the evidence proves so clear and universal a custom as required a clause in the contract to bar it or prevent its operation. For if it is doubtful in its nature, and if the knowledge of it was limited, then it does not require such a clause.

You must also consider the conduct of the pursuer, as that has been proved, and the nature of the claim he seems to have made to these chips, and whether it proves, that, at the time he first made it, he was aware of the clear and universal usage for which he now contends. There is no evidence of the demand having been made on the ground of usage from August 1818 till the date of the summons in 1823.

It is said that usage is admitted in other cases to control contracts, and policies of insurance. Charter parties, and agreements as to farms, have been mentioned, but on these there is difference of opinion as to the propriety of admitting parol evidence, though it is now too late to vary what has been done. But all these are general matters known to all merchants and all farmers; and being universally known in the common transactions of mankind must bind all mankind.

LANG
v.
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But is the present case of that description? Is it universal in its character and clear in its proof? If it is, then you should find for the pursuer, but if not, then for the defender. One witness stated the chips to be a perquisite of the quarrier; but that, if he did not take them at the time, he was not entitled to use the roads to carry them off afterwards, which shows the necessity of a communing with Lord Haddington; and the question to consider is, Whether the evidence is so clear, distinct, unclouded, and without impediment, as to make out a clear and universal usage?

Verdict—“ For the pursuer, damages L.300.”

Cockburn and Rutherford, for the Pursuer.

Hope, Sol.-Gen., and L'Amy, for the Defender.

(Agents, *William Mercer, w. s., and Charles Cunningham, w. s.*)

PRESENT,

FOUR LORDS COMMISSIONERS—LORD GILLIES ABSENT.

1826.
July 12.

LANG v. LILLIE.

Damages for assault and battery.

AN action of damages for assault and battery.

DEFENCE.—The pursuer insulted the defen-