

WIGHT  
v.  
EWING.

PRESENT,  
LORDS CHIEF COMMISSIONER AND MACKENZIE.

1828.  
July 25.

WIGHT v. EWING.

Damages to a  
person dismissed  
from the ma-  
nagement of a  
coal-yard.

AN action by the manager of a coal-yard to recover his salary and share of profits under a written agreement ; and of damages for breach of that agreement.

DEFENCE.—The defender had a right, in the circumstance, to dismiss his manager or servant from the coal-yard. No salary is due.

ISSUES.

“ Whether the pursuer and defender entered into an agreement, in terms of a letter from the defender, dated the 22d day of June 1825, being No. 371 of process ; and whether the parties began to act under the said agreement ?

“ Whether, on or about the 10th day of January 1826, the defender wrongfully put an end to the said agreement, to the loss, injury, and damage of the pursuer ?”

*Murray* opened for the pursuer.—The de-

fender had a right to put an end to the contract by giving notice to the pursuer; but instead of following this course, he attempted to dismiss the pursuer as a servant, and he obtained an old caption in the name of another person, and imprisoned the pursuer to try by concussion to compel him to submit. The case was referred to arbiters, who fixed the sum due to the pursuer.

**LORD CHIEF COMMISSIONER.**—I have always held, and the doctrine has not been impugned, that when parties have entered into a compromise which has not resulted in a settlement, it is a sacred and universal rule not to mention what took place under that attempt to compromise.

*Murray.*—I admit this law where there is an attempt to compromise; but where the compromise has taken effect, I may leave it to the jury to say whether they will not give the sum awarded by the arbiters, and I may prove the facts by the counsel.

*Hope, Sol.-Gen.*—If the agreement to submit is good, there is no case here.

**LORD CHIEF COMMISSIONER.**—If the agree-

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Incompetent to prove at a trial what took place under an ineffectual attempt to compromise the case.

Incompetent to prove at a trial the amount of damages said to have been awarded in the case by arbiters.

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ment to submit is binding, the pursuer may enforce it in the proper way, but he cannot prove what took place under it to make out his damages in this case. How can what took place in the arbitration be held an acknowledgment here, when it was an agreement for the purpose of taking the case out of Court? This case must either go on in the manner and subject to the rules applicable to a case in Court, and excluding this evidence; or if this is a binding agreement, then it must be enforced by an action. The pursuer must make his choice.

*Lord Mackenzie.*—I cannot have any doubt on the subject.

Before a copy is admitted in evidence, proof should be given that the original is lost.

It was stated that part of the process had been lost while in the hands of the agent for the defender, and therefore the pursuer should be allowed to produce a copy of an agreement.

LORD CHIEF COMMISSIONER.—The Court will assist the party, but some evidence should be given as to the document said to be lost. What has taken place here, and the liability of original papers to be worn out, shows the propriety of all originals remaining at the office, and only copies being given to the parties.

When the former agent of the defender was asked whether the defender had given an obligation to the person at whose instance the pursuer was incarcerated, he submitted to the Court whether he ought to answer the questions put to him.

LORD CHIEF COMMISSIONER.—The dissolution of the connection between the party and agent does not dissolve the obligation to secrecy. The agent, however, is subject to examination, and it frequently happens that it is impossible to prevent the evil arising from the refusal to answer a question; but when it is in my power I will prevent it, and the question now proposed is incompetent, as the witness was the agent of the party.

It was then proposed to ask as to the incarceration, and whether the witness was also agent for the person holding the diligence.

LORD CHIEF COMMISSIONER.—The objection is the same here; for though the questions may be competent in the abstract, they tend to nothing unless connected with the defender, and whenever you connect them with him the objection of confidence arises. While you keep the questions separate from this cause they are competent, but as soon as you connect them with it, they are incompetent.

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The former agent of a party is bound not to disclose confidential information.

A question, though competent in itself, held inadmissible in the circumstances in which it was put.

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Circumstances in which it was found competent to prove the terms on which a messenger offered to liberate his prisoner.


One of the concurrents of the messenger was called, and desired to state upon what terms the messenger offered to liberate the pursuer.

LORD CHIEF COMMISSIONER,—At first I doubted whether it was sufficiently made out that the messenger was agent for the defender. But, on the whole circumstances, which are such as seldom occur, I think we must allow the question, for it is proved that the messenger was sent to the defender. He is then sent to search for captives, and the defender is at the spot to see the pursuer incarcerated. On the whole *res gesta*, I think it competent to ask the terms on which the pursuer might have been liberated.

*Hope, Sol.-Gen.* opened for the defender.—The case has been long, but the evidence does not bear on the real question, which is not a general claim for damages, but for actual loss said to have been sustained. This person came to the defender with fraudulent calculations, to induce him to commence the undertaking, and when his conduct in the management was discovered he was turned off. The right to turn off is clear, and it was so found by the Sheriff; and if we prove him fraudulent, and that he cheated the public, his claim for remuneration

is clearly cut off. Instead of making this claim the pursuer kept forcible possession of the yard ; and as no profit was made, his claims on this head are also cut off.

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*Moncreiff, D. F.*, in reply, The substance and marrow of the issue is, whether this contract was not wrongfully broken ? and all our evidence was pertinent to that question. The pursuer was not a servant, but a partner. The defender was to advance money, and the pursuer his labour and skill. The contract was for seven years, and it is admitted that the defender broke it. Even if this were a contract of service, there has been no fact stated justifying the turning the pursuer off, and the Sheriff, when he finds the right of the defender, reserves the claim of the pursuer. There not being any profit is owing to the mismanagement of the defender.

LORD CHIEF COMMISSIONER.—This is an action of damages for having put an end to an agreement, which is one of an anomalous nature. In one part it appears to be a contract of hiring and service ; in another, a contract of partnership. All the first part relates to employment, but the latter is something more. There were originally three parties to


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this contract, which was to last for seven years, and after the stock was purchased, it was in a certain way to become the property of the three. If the event contemplated had happened, of the half of the profits being equal to the sum advanced, then this would have been a partnership. There is no provision in the contract for dismissal, but if the defender wished to withdraw, he was to give six months notice. But it is not necessary to go minutely into the meaning of the paper, as facts and circumstances show the situation of the pursuer.

If this is a contract of service, then under that contract the master may dismiss his servant, if he thinks it necessary, but the question of whether he is liable in damages remains. If it is a contract of copartnership, and one of the partners is likely to ruin the other, he may, though it is more desirable to proceed at law, put an end to the contract, and take his chance that no damages will be given. In the present case, whatever was the degree of acquaintance of these parties, they entered into this contract, and went on for a certain time, till something occurred which made the defender wish to get quit of the pursuer; he then wrote the letter which he was entitled to do, and which may be held a notice under the contract. He

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also has recourse to legal proceedings before the Sheriff, but before any decree is pronounced, uses means to find out some one who has diligence against the pursuer, and arrests and imprisons him under that diligence. As soon as the pursuer is incarcerated, he breaks up the establishment, and removes and sells the horses, &c. Nothing was done on a decree which the Sheriff had pronounced in the case before the sale, as the object was previously obtained ; and the question now comes for your decision on the damages. The question is not one of violence, but all the acts are to be taken as evidence of breaking the agreement ; and the question is whether that was done wrongfully ? Whether this is a contract of service, or partnership, or one of a peculiar nature ; the true point for consideration is, whether the defender was justified in saving himself from an injury likely to arise to him ? You must consider whether a justification of what was done is made out, for it may be made out ; and whether the facts on which the case is now rested were known to the defender at the time he dissolved the agreement.

The accusations of the pursuer drinking, of his absence from the yard, his dilatoriness in the morning, the debts due by him, and his re-



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fusing coals to the defender, are none of them made out in evidence so as to justify his dismissal. The only serious charge is that of his cheating the customers ; and if you believe the carter, who appeared to me a fair witness, this fraud is proved ; but it is proved more strongly against the third party in the contract than against the pursuer. You must consider also at what time this was known to the defender ; for, if after knowing it he continued that other party in his employment, it will go far to cut him out of this plea ; or if it was known to him at the time it was committed, can he benefit by his own wrong, or can it be a ground for dismissing one and not both the parties to it ? On the contrary, if this was not known till after the dismissal, that puts an end to the question. This being the only ground made out in evidence, the question is, whether it justified this dissolution in the manner in which it took place ? Was it reasonable to take the strong hand when the Sheriff's decree was about to be pronounced ? If you think it wrongful, then you will find damages ; if not, then for the defender. The evidence of the damage is extremely loose, and you must be on your guard not to be misled by it. As to wages if the contract had gone on, the defender was

entitled to withdraw on six months notice ; but this dissolution took place in a different manner, so that this cannot be the rule ; and on the other hand, I am not prepared to say he should have two years, which is the sum he claims.

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Verdict—For the pursuer on both issues, damages for profits L.100, and for wages L.50.

*Moncreiff, D. F. and J. A. Murray, for the Pursuer.*

*Hope, Sol.-Gen., Cockburn, and Maitland, for the Defender.*

*(Agents, James Adam, w. s. Phineas Daniel, w. s.)*

Some time before the trial mutual motions were made for previous expenses. The one for the pursuer rested on the ground that the statement for the defender had been four times revised, with a view to an issue in justification, while the defender made his claim on the ground that all the previous proceedings were incompetent, as the document on which the action was raised had not been stamped till within a few days of the date of the motion.

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Costs of part of the preparation of a case granted to the pursuer, though the document on which the action is founded was not stamped at the date when the expense was incurred.

LORD CHIEF COMMISSIONER.—There have been a vast variety of points discussed in this case ; it has been often before the Court, and the proposal that the pursuer should pay all the

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In the prepara-  
tion of a case,  
has the Jury  
Court power to  
decide that a do-  
cument must be  
stamped?

previous expenses is one to which I can never accede. Indeed, I doubt if, in the preparation of a cause, we could make an order that a document must be stamped, as that would be deciding a point of revenue law; at least some case must be made out, showing that our doing so is essential to justice, otherwise this is a matter not for us, but the Court of Session. There is a time when this Court has the power of deciding, and when the party may carry the decision to the last resort, and I see no detriment in allowing it to remain for decision at that period. If the document had remained unstamped till the trial, and had been rejected on that ground, then the party must have lost his cause, but at this period there is nothing requiring us to interfere; but, on the contrary, many things which render the interference inexpedient.

As to the claim by the pursuer, it can only be for the attendance of counsel and agent, when the orders were made for revising the paper of the defender. I regret that there is not a fixed time after which a party cannot amend, but I am so anxious that every case and every issue should be as well prepared as possible, that amendments have been allowed to all parties, but the party making the amendment

should be subjected in the expense, as the averments should have been perfect at first. Whether the defender is to pay for these amendments, depends in some degree on the nature of the agreement, which is either a partnership or for service. It is only in the first point of view that I conceive the justification to apply. This plea must not only be stated with precision, to enable the pursuer to meet it, but must be such as will defend a dissolution of the partnership. Even by the last amendment, the averment is not such as would justify a dissolution. But it is said that this was an agreement for service, and that law has said it is not to be dissolved without reason ; but law has not said that you may not prove sufficient reason under the term " wrongful," by proving such conduct as renders it unsafe to continue the service. As at present advised, I think this evidence would be competent without a justification, and that it may be proved without an issue, but it is a matter requiring much consideration, whether in such a case we should clog the record with an issue. As this is the first instance of such a defence by a master against his servant, I shall not at present decide whether an issue is necessary, but look into the averments minutely.

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The pursuer having been found entitled to the expense caused by the alteration of the pleadings, an account was given in. When the case was again brought before the Court,

LORD CHIEF COMMISSIONER.—This account is not in such a state that the Court can possibly deal with it. The amount is L. 69, which is far beyond what in law the party is entitled to. The Court only intended to give the expense of the amendments.