PRESENT,

LORDS CHIEF COMMISSIONER AND GILLIES.

WELSH and IZAT, *v.* STEWART and Others.

1818. March 24.

Damages assessed to the purchaser of growing wood, against the seller, for not having intimated to the purchaser of the land the time allowed for cutting it down.

THIS was an action of declarator and damages by Welsh, the purchaser of part of the forest of Culross, and Izat, his cautioner, against the creditors of the Earl of Dundonald, and the agents who conducted the judicial sale of his estate, for being prevented from cutting wood purchased.

DEFENCE:—No damage was sustained; but, if there was any damage, Lord Keith, the purchaser of the ground, is liable.

Welsh, the pursuer, purchased lots 11, 12, 14, and 15 of the wood of the forest of Culross at a judicial sale, on 20th January 1802. By the articles of roup, the wood was to be removed by 20th October 1804; but, on application by Welsh to the Court of Session, in

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1802, the time was prolonged to 20th January 1807. In November 1803, the ground of the forest was sold by the same parties, and purchased by Lord Keith; but, in the articles of roup, no notice was taken of the prorogation of the time for removing the wood.

In 1804, Lord Keith obtained an interdict, which subsisted for a short time, prohibiting the pursuer from cutting the wood; and, after a great deal of litigation, he obtained another on 1st February 1806, which continued in force till June 1807, when it was decided that the pursuer's right to cut the wood endured to 20th January 1807.

In 1814, Welsh raised the present action, which concluded that, in consequence of what had taken place in the action with Lord Keith, the defenders had no right to require payment of the price of lot 15 of the wood, nor of the half of that of lot 14, and also concluded for damages for the loss which he had sustained by being prevented from cutting and carrying away the wood purchased by him.

Lord Pitmilly found, that, in consequence of the defenders having neglected, in the articles of sale of the land, to refer to the prorogation of the time for cutting the wood, the pursuer was entitled to damages as to lot 15, but

not as to the other lots. *Inter alia* the interlocutor found, "That the pursuer was put to "expence in the action with Lord Keith, and "is said to have sustained certain damages, in "so far as relates to lot 15, at the commence-"ment of the process."

The condescendence lodged for the pursuer stated, That the quantity of wood, as ascertained by the articles of roup, was 16,200 feet, of which 5400 had been cut. It farther stated, that the price at which the pursuer purchased it was 6d. per foot, while wood of the same quality sold in 1806 at 1s. 6d. and 2s. per foot. Afterwards the case was sent to the Jury Court to try the following issue:

ISSUE.

"What loss and damage the pursuers have "sustained in consequence of the negligence "of the defenders, whereby the pursuers were "involved in the litigation with Lord Keith, "relative to the fir-wood on lot 15 of the "Culross estate, purchased by the pursuers at "the judicial sale, on the 20th January 1802, "and in consequence of the interdict obtained "on 1st February 1806, in the course of said "litigation against their cutting down the said

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" wood, and which interdict subsisted till 20th " January 1807 ?" *

A party found not entitled to the whole quantity of wood contained in a document produced by him, but only to the smaller quantity which, in his condescendence, he stated to be the quantity ascertained by that document.

Jeffrey, in opening the case for the pursuer, stated,—There is a clerical error in the schedule annexed to the issue, and the first piece of evidence we produce will show that it is erroneous. The quantity of wood purchased was 20,000, instead of 16,200 feet; and the price was 4d. instead of 6d. The sum in the schedule ought therefore to have been the difference between 4d. and 2s. on 14,600 feet, instead of the difference between 6d. and 2s. on 10,800 feet. This being the case, the Jury are not limited by the schedule, but must give what is proved, as they are not restrained by any terms in the summons, interlocutor, or issue. The same errors as to quantity and

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* The following schedule of damages was annexed to the issue:

" 1. The difference on 10,800 feet of wood, betwixt 6d. and " 2s. per foot.

" 2. The loss of mariners' wages, provisions, and demurrage, on " a sloop in the harbour of Culross, from 20th October 1804 to " 1st December 1804, L.29, 8s.

" 3. Two men and a horse kept idle during said period, L.33, " 16s. 6d.

" 4. Legal proceedings with Lord Keith, L.139, 4s. 7½d.

" 5. The pursuer's travelling expences, L.46, 10s."

price are also in the condescendence, which arose from the articles of roup being in the hands of the other party till the case was sent to this Court, after which there was no means of rectifying the mistake, as the case could not be sent back to the other Court.

LORD CHIEF COMMISSIONER.—The name of Lord Keith has been so often mentioned, that I wish to know how far he is interested, as, I understand, in this part of the island it is proper for me, as a near connection, to decline to be the Judge to preside in the trial of these issues, if it affects his interest.

Clerk, for the defender.—I cannot say how far he may be interested. The interest is of a very shadowy nature.

LORD CHIEF COMMISSIONER.—I wished this ascertained at this stage of the proceedings, and consider Lord Keith to have no interest in this issue; my uncertainty as to the fact has prevented me from interfering while Mr Jeffrey was stating the case.

A great deal has been said of the issue and schedule, which it is necessary to notice now. We do not sit here to frame, but to try issues. If the terms of the issue be doubtful, then I will go to the prior proceedings to explain it. Here it is quite clear we are to ascertain da-

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mages of two descriptions, arising from the negligence of the defenders. In general, the sum mentioned in the schedule is the same as that claimed in the summons, unless it is restricted in the condescendence. The purpose of the schedule is to point out to the Jury the sum beyond which they cannot go. The amount of damages must depend on proof, but they cannot go beyond the sum to which the party has restricted his claim.

As I see the opening counsel is not satisfied of this, I must have recourse to the condescendence, where I find it so stated; but I never will have recourse to this except when I am driven to it. The schedule is certainly no part of the issue; but, when I look to the condescendence, I find the quantity and price there stated to correspond with it.

Jeffrey.—The first article in the condescendence states that 16,200 is the quantity "declared by the articles of roup;" now, the articles of roup show it was a larger quantity; the Jury, therefore, must choose between them.

LORD GILLIES.—Mr Jeffrey says the articles of roup show the quantity; but the condescendence is a subsequent paper put in by the pursuer, in which he limits his claim. It is admit-

ted that this could not be corrected in the Court of Session, and yet we are called on to correct it here. The only point before the Jury is for damages on 10,800 feet of wood, and they would be going beyond their oath if they went beyond this limit.

The pursuer then produced the articles of roup, to which an objection was taken.

LORD CHIEF COMMISSIONER.—The doubt is not if they are authenticated, but if they are relevant.

Jeffrey.—We produce them to prove the purchase of lot 15, and the terms of that purchase.

They were accordingly produced, along with a number of other documents.

The first witness was a man who had been employed by the pursuer in 1804 to cut and saw wood in the forest of Culross. He was asked if the work people were stopped, and at what time?

Clerk objected,—It is not competent to prove an interdict by parol evidence.

Bell, for the pursuer,—We produced expede letters of suspension containing an interdict.

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Circumstances in which an interdict having been granted, it was found competent to prove by parol evidence that the party *de facto* stopped his operation.

Clerk.—This is not the interdict of 1806, mentioned in the interlocutor of the Lord Ordinary, but one in 1804. We may suppose from the terms of the interlocutor that there was an interdict in 1804, but these expede letters afford no evidence that it was intimated, and without intimation it is good for nothing. An interdict in the Bill-Chamber is nothing till served; till then the party knows nothing of it; they attempt to prove service by parol evidence instead of a written intimation.

LORD GILLIES.—Is it not necessary under the issue to prove that the pursuers were stopped? The interlocutor is very general. What are these damages in the commencement of the process? The expede letters prove that an interdict was granted, and the existence of it is admitted in the answers to the condescendence, and you only say it does not apply to this lot. If we require proof of regular service, there is scarcely any case in which a party will be able to recover damages, as the written intimation is scarcely ever preserved. Besides, I doubt how far intimation may be necessary; if a party is *de facto* in the knowledge that an interdict is granted, and in compliance with that interdict abstains from doing that from which he was interdicted, I hold he would be entitled

to damages. If in this case the cutting was stopped in consequence of the interdict, it is a nice question whether we are entitled to prevent them from proving the fact. In the case of the North Bridge Buildings, if the interdict had been granted, and being notorious, the parties had stopped, (though the suspenders did not choose to intimate it,) I am rather of opinion the proprietors would have been entitled to damages.

LORD CHIEF COMMISSIONER.—I wish to be sure of my ground before delivering an opinion on any point involving the technical forms of the law of Scotland. In any case I conceive it incompetent to prove by parol evidence that a party was stopped by a legal process. It is said this interdict was not served, but it is proved by the correspondence produced that the common agent was in the knowledge of it; and that being the case, it is competent to prove that *de facto* they stopped.

Clerk, for the defenders, contended,—The proof has entirely failed; by the articles of roup, the pursuer was bound to cut so much of each lot each year, and, therefore, was not entitled (even if he had proved the quantity) to the whole wood remaining on the lot, but

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only to what would have remained if it had been cut in terms of the agreement. The interdict in 1804 does not apply to lot 15, and the one in 1806 could not stop them, as it was not granted by the Lord Ordinary on the bills, but by the Court, and, of course, could be brought under review, and the operations might have gone on till it was finally decided. After the case was decided against Lord Keith in 1807, the pursuer might have gone on cutting the wood for a year, because Lord Keith had no right to derive any benefit from his illegal interference, by which the pursuer had been prevented for a year from cutting the wood. This issue is sent to ascertain the damages due to the pursuer, not the degree of the fault of the defenders, and though damages have been found due, he has failed to prove any.

LORD CHIEF COMMISSIONER.—The issue has relation to the amount of damages only, and we have only to do with the issue, not with the other parts of the proceedings in the Court of Session. If the issue be doubtful, the Court will explain it to the Jury, and for this purpose, they will have recourse to the prior proceedings; but, in this case, if we separate the issue into parts, it will appear to be quite distinct.

In the first part it is assumed that the damage was occasioned by the negligence of the defenders, and, therefore, we must hold the negligence to be found by the Court of Session. In judging of this case we must look to the testimony, not the argument, and must confine our attention to what is proved as to lot 15, and lay out of view any proof applicable to the other lots.

The second part is the litigation with Lord Keith.

The third is the damage occasioned by the interdict obtained. Here we must distinguish between the interdict 1804 and 1806. Much general doctrine has been stated on this subject, which in the other Court may be a proper subject of discussion. But here we are merely to try the issue. In the schedule of damages five articles are specified; the 2d and 3d articles relate to other lots, and as to article 5th no proof was brought; we must therefore confine our attention to the 1st, which includes the damages for the interdict, and to the 4th, which includes the expence.

This case is ushered in with the precision of a schedule of damages, and is followed by such a looseness of proof as I never before witnessed, which renders the case an extremely diffi-

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cult one for the Court and the Jury, because the Court sending it could only intend that we should find such damages as are proved.

As to the expence, an account is given in amounting to L. 139, but it extends to a much longer period, and embraces several articles which do not appear to me to relate to the legal proceedings with Lord Keith. In one view of the account, it appears to me that it ought to be reduced to L. 46, and in another to L. 13. Though the evidence given was extremely loose, I am not entitled under the terms of the interlocutor to withdraw it from you entirely; you must therefore consider it, and reduce the amount to what you think justly due.

The main question is the remaining one, being the difference of price on 10,800 feet of wood. Here you have heard the party attempt to enlarge his claim from 10,800 to 14,600. It happened here, as is frequently the case, whether from mistake or admission, that the party started at a disadvantage. The proof is very vague and unsatisfactory, and I scarcely know to what evidence to refer you. The two workmen examined can give scarce any account of the quantity, and the estimated quantity would give the party double that to which he has restricted himself. You must consider how

much under 10,800 feet you can give; but must not include the growing wood, or that carried to Kirkton farm by the pursuer. On the whole, you will give what sum you think right as the amount of the expences, and on account of the pursuer having his property locked up for some time.

Jeffrey, for the pursuer,—Excepted to the direction not to take into consideration the evidence of a larger quantity than was contained in the condescendence.

LORD GILLIES.—The direction was, that *if* you had given evidence of a larger quantity, it would not have been competent to consider it. You have only proved proportions of the whole quantity.

LORD CHIEF COMMISSIONER.—The observation I made applies both to quantity and price. I doubt if there is evidence of the quantity; the price is proved to have been 4d. not 6d.

Verdict for the pursuers, damages L. 220.

Jeffrey and *R. Bell*, for the Pursuers.

Clerk and *Cuninghame*, for the Defenders.

(Agents, *David Scott*, W. S. and *Roger Aytoun*, W. S.)