

BELL  
v.  
BELL.

to give in a special condescendence of the circumstances, and the names of the witnesses.

The Court afterwards refused the new trial; on the ground, that if the pursuer did not know the facts to which he referred before the trial, he might have done so.

PRESENT,

LORD GILLIES.

1819.  
May 31.

EDINBURGH, LEITH, and HULL SHIPPING  
COMPANY, v. OGILVIE.

Finding as to delivery of a cask of paint, and that, by the usage in Leith, delivery of goods to carters there, is not equivalent to delivery to the consignee in Edinburgh.

**SUSPENSION** of a charge by the defender for the price of a cask of paint.

**DEFENCE.**—The cask was delivered to a Leith carter, with proper directions.

ISSUES.

“ 1st, Whether the suspenders, on or  
“ about the 17th May 1814, delivered the  
“ goods referred to in the lybel, to Widow  
“ Wilson and to George Stedman, members  
“ of the Society of Carters in Leith, with

‘ proper directions to deliver the same to the  
“ charger ?

“ *2d*, Whether, when goods are trans-  
“ mitted by smacks or coasting vessels from  
“ England, and consigned to persons in  
“ Edinburgh, delivery of the said goods to a  
“ member of the Society of Carters in Leith,  
“ with proper directions, but without a re-  
“ ceipt, or insertion in the Carter’s books, is,  
“ by the usage of the trade in Leith, held to  
“ be equivalent to delivery by the ship-own-  
“ ers to the consignee in Edinburgh ?”

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Two casks of paint were sent to the de-  
fender. He admitted receipt of one, but said  
the largest had not been delivered. The  
suspenders, pursuers of the Issue, maintained,  
that their contract was only to carry goods to  
Leith, and that delivery there to a regular  
Leith carter was sufficient.

A witness was called to prove, that de-  
livery to a Leith carter was held good de-  
livery, and was proceeding to state an in-  
stance in support of his opinion.

Parol evidence  
incompetent in  
proof of a deci-  
sion in a Court  
of Record.

LORD GILLIES.—This was a trial in a  
Court of Record, and we cannot take the  
decision from a witness.

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A witness re-  
jected, from an  
error in the  
name inserted  
in the list.

An objection was taken to a witness, that his name was not in the list; the name in the list being J. F. Walker, instead of James Thomas Walker.

LORD GILLIES.—I must proceed on the same rule as in the Court of Justiciary, and reject this witness.

When the first witness for the defender was called,

*Jeffrey* objected.—He is interested, as he is a partner of the present Shipping Company, in which the late company is merged, and for the debts of which they are liable.

*Forsyth*.—They must prove this if they insist in it. His interest, if he has any, is against us, and therefore he is a competent witness for us.

LORD GILLIES.—The Edinburgh, Leith, and Hull Shipping Company does not now exist, and cannot be represented. The present Company is not here as a party, and where is the evidence that the former one merged in this? If you mean to prove this by a witness, I think that evidence would be incompetent.

A bulker's book  
being sworn to  
be an office  
book, received  
as evidence.

A witness produced the bulker's book, written by a clerk.

*Jeffrey* objects.—The clerk ought to be called.

LORD GILLIES.—The witness held this to be an office-book, and regulated his conduct by it. I therefore hold it to be evidence.

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*Jeffrey*.—The sum demanded is very small, but involves a general question. We shall prove by our landing book, that the cask was delivered to a Leith carter, which is the same as delivery to a carrier; and when things are lost, it is the carter who is liable.

*Cockburn*.—The simple fact in this case is; whether this cask was delivered? We shall prove that it was not delivered. They prove that they delivered it to a carter; but he did not deliver it to the defender.

The second Issue is not a question of opinion, but *usage*; and they have failed in proving it. Leith carters are not carriers.

LORD GILLIES.—We have merely the question of fact to try; and it appears to me, that the landing book of the Company, the bulker's book, and the carter who actually received the cask, are sufficient to prove the

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first Issue, and to warrant you in finding that the cask was delivered to the carter.

On the second Issue it is impossible to deny that there is contradictory evidence; and, what is singular, the witnesses were perfectly fair, and appeared to give their evidence under a proper sense of their oaths. The Shipping Company being pursuers, are bound to prove the affirmative of the Issue, which is, not what *should* be the rule, but whether it was held as the usage of Leith, to free the Company, on delivery to the carter.

The evidence for the pursuers, I conceived sufficient to prove their case; but there have been a number of witnesses equally respectable brought on the other side. The question is, whether the pursuers have proved the understanding to be general? and if you cannot go that length, you must find for the defender.

Verdict—"For the pursuer on the first Issue, and for the defender on the second."

*Jeffrey* for the Pursuer.

*Forsyth* and *Cockburn* for the Defender.

(Agents, *Daniel Fisher*, and *James Dunlop*, w. s.)