PRESENT,

LORD CHIEF COMMISSIONER.

MACKAY, &c. *v.* WADDELL, &c.

1820. Feb. 29.

Found in an action against road trustees, that stones were improperly allowed to remain upon a road.

AN action by the defenders in the above case, for relief from the claim of damages made against them.

DEFENCE for Waddell.—The stones did not encroach upon the road. Defence for the trustees.—Trustees are not liable, and gave no permission to lay down the stones. They were not on the metalled part of the road. The original action is founded solely on the culpable and improper conduct of the servants.

ISSUES.

"Whether, on or about the 5th day of "April 1816, the Telegraph coach was over-"turned, near Airdrie, from the improper "conduct of the defender Waddell, in laying "down, and allowing to remain, improperly

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"and illegally, on the said road, a quantity "of stones, or rubbish? and,

"Whether the trustees did improperly and "illegally allow the stones and rubbish to re- "main on said road, whereby William Gunn "suffered severe bodily harm and damage?"

Evidence in one case being held evidence in another, does not deprive the pursuer of his reply.

It was proposed that the evidence in the former case should be held evidence in this; and a question being raised as to the pursuers' right to reply,

LORD CHIEF COMMISSIONER.—In this case, it appears to me that the pursuers must have a reply; and as the grounds for subjecting the defenders are different, the one being held liable for laying the stones, the other for allowing them to remain, the best arrangement would be, that the counsel for the pursuers should open the case with a few observations; then the counsel for both defenders be heard in answer, and then the counsel for the pursuers in reply. But there is some difficulty in the form, as I am not accustomed to actions of relief.

It was then agreed, that the evidence in the former case should be held evidence in this; and that a few witnesses, in addition, should be examined for Waddell.

To one of the witnesses called, it was objected, that his name was not in the list.

LORD CHIEF COMMISSIONER.—Lists, instead of being of use to forward the ends of justice, are a great abuse. In the lists yesterday, there were 290 names, and 20 called for the pursuer, and for the defender. If a proper selection had been made, the case might have been tried in half the time. I really wish gentlemen at the Bar, but particularly agents, would attend to this.

Cockburn opened the case, and contended —The pursuers were only found liable in the first instance; and there is no inconsistency in finding that the present defenders are liable, which was the view of the Court in sending the Issues. Even had the driver been drunk, if a person puts a stone before the wheel, which overturns the coach, that person is liable.

Greenshields, for Waddell, contended, that the Jury had already decided, that the injury was occasioned by the fault of the driver; and it cannot also be by the fault of Waddell. He was exercising a common right in building; and neither the trustees, nor the land-

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lord of the inn, ever complained. There was sufficient roadway left.

Moncreiff.—In this case, the accusation is, that the injury was occasioned solely by the defenders. The verdict yesterday negatives this; and we must now hold that it was by the negligence of the pursuers. There are here a number of questions, both of law and fact. Were the stones upon the road? What is road at that place? Were the stones improperly laid upon the road? Are the trustees answerable for an improper act of another?

We shall maintain in the proper place, that the trustees are not liable for a nuisance laid upon the road by another person, and request either to have this point reserved, or the Jury directed to find for us. It is only for direct orders or permission to lay the stones that they are liable.

LORD CHIEF COMMISSIONER.—Would it not be better to have a special case, that this point may be decided? There is no written or express permission.

Jeffrey.—Reserving the question is the least expensive, as, if the verdict is for us, the question does not arise.

The only proof of the trustees knowing that the stones were there, is the testimony of one witness, which is not sufficient. Lord Fife's case, Vol. I. p. 124.

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The testimony of a single witness submitted to the Jury.

LORD CHIEF COMMISSIONER.—In that case, the question was, whether there were facts and circumstances sufficient to render the evidence of one witness conclusive. The Court said expressly, that we did right in submitting the testimony to the Jury; but that does not touch your case, as your object is to shew, that there are not facts and circumstances sufficient to support this witness.

Moncreiff.—There is no fact proved; and they might have had plenty of evidence, if the fact had been in their favour. Finding that the stones were on the road, is not a sufficient answer to the Issue.

Jeffrey, for the pursuers, maintained—1*st*, That the verdict did not bar the claim; and 2*d*, That the stones were upon the road. If it had been on the private road to the inn, the case might have been nice; but here it was not. The trustees are liable, whether they knew it or not, as they ought to have

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known, and their surveyor was frequently there.

It is not inconsistent to find us entitled to complete relief. There are many contracts, even, in which a party is primarily liable to another, though he is entitled to complete relief from a third party.

LORD CHIEF COMMISSIONER.—The question yesterday was of importance to the public; but the case to-day, especially the second Issue, is much more important; and I am happy that there has been so much ability in the argument from the Bar; that the case has met with so much attention from you; and that we have had time to reflect upon it.

The first point stated for the defenders is, that any verdict you can give for the pursuer, will be inconsistent with the verdict yesterday.

My mind is very easily made up on this point; for the Issues in the former case are not exclusive; and by finding for the pursuer, you have not excluded the question of relief. The Issues in the former case were approved of by the Court of Session, and they must have had the actions of relief under consideration at the time. My opinion is,

that there is nothing in the proceedings to prevent you finding what is warranted by the evidence. We are here to find facts which are to be returned to the Court of Session; and I am clearly of opinion, that that Court would be much disappointed if the case was returned without any finding.

The first question in both the actions of relief is, whether the stones were on the road; and this is a question of law and fact; but the law is easy, as it arises from the fact. Those of the Jury who saw the ground, will know what is road; and even from the plan it may be seen. By the Act of Parliament for making this road, the trustees are entitled to make the road 60 feet wide, but there is nothing binding them to metal the whole. Near the place in question, the open space is 62 feet wide, and it is afterwards reduced to 40 feet. My opinion in law is, that the trustees being entitled to take 60 feet for a road, wherever that space is left open, we must hold it to be road; and the question for you to answer is, whether the stones were laid within these 60 feet.

Having determined whether they were upon the road, the next question is, whether they

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were laid there by Waddell; and the third, whether they were improperly laid.

The argument that we are to take the custom of the country as sanctioning the laying down the materials, is important in this branch of the case. The custom seems to be in favour of what was done; but if materials are laid down, they must be laid with common care and attention, and in such a way as not to be liable to be turned out of their place by others. If you are of opinion that they were properly placed, you may find that they were placed, but not improperly. You will, however, attend that they were near the metalled part of the road, and might with very little difficulty have been placed elsewhere.

It was said the question was, whether the stones were the cause of the accident; but that is not the proper manner of putting it. There is a great difference between *the* cause, and *a* cause; and I am of opinion, the Court of Session wished to know whether they were *a* cause of it. There is no doubt the coach was overturned by running upon the stones, and that it might have avoided them; but we have no evidence to shew that the coach would have been overturned if the stones had not been

there, and we must presume that it would not.

If you think they were not on the road, or were not improperly laid upon it, or were not a cause of the accident, then the next question does not arise.

2d Issue.—This involves a most important matter of law, as it refers to all road trusts in the kingdom; and I should be sorry if we could not put this case in a proper shape to have the question tried. The question turns upon the evidence, and upon your opinion whether the trustees allowed the stones to remain, and whether they allowed them improperly to remain.

There is only one direct witness to the fact of the trustees knowing the stones were there; the evidence is not of the highest degree, and the witness does not prove direct knowledge. I do not, however, think myself entitled to withdraw this evidence from you; and Mr Moncreiff, if he thinks this direction wrong, may have his redress, either by an application for a new trial, or by Bill of Exceptions.

I shall not decide whether trustees are bound to know what is upon the road; but I think the law is in such a state as to make it proper for me in this case to submit the evi-

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dence to you; and one can hardly suppose the stones were there for weeks without the trustees knowing it. The presumption is, that they were seen by the trustees, as well as by the surveyor; and his seeing them, and having communication with the trustees, is an additional circumstance; but you must still consider the weight due to the testimony. There is an article in the defences (reads it), which shews that they knew something of the matter, and that the surveyor acted upon the knowledge of it. You may, if you choose, find a special verdict, but if you prefer it, you are at full liberty to return a general finding.

Verdict—"The Jury found that the trus-
"tees improperly allowed the stones to re-
"main on the road for two or three weeks;
"that the Telegraph coach, by coming in con-
"tact with them, was overturned, whereby
"William Gunn suffered severe bodily harm.
"But whether upon the whole," &c. (in the form of a special verdict).

Jeffrey and *Cockburn* for the Pursuers.
Moncreiff, *Keay*, and *Rutherford*, for the Trustees.
Greenshields and *J. A. Murray* for Waddell.

(Agents, *J. Greig*, W. S. *Dallas*, *Innes*, *and Hogarth*, W. S. *and John Meek*, W. S.)