

HARPER
v.
ROBINSONS &
FORBES.

After a careful examination of the records, I am of opinion, that there is no foundation for stating it to be the practice; and upon the present case, I agree in opinion with your Lordship.

LORD GILLIES.—I concur entirely on both points.

The Court therefore discharged the rule.

PRESENT,

LORD CHIEF COMMISSIONER,

DONALDSON v. EWING.

1821.

Jan. 11.

An action for remuneration for superintending the building of houses.

AN action for remuneration for trouble in superintending the building of certain houses.

DEFENCE.—The claim is prescribed. The service was understood by both parties to be gratuitous, and the defender did not benefit by it.

The Issues were, Whether the pursuer was employed to superintend, inspect, or direct the execution of certain buildings? Whe-

ther he did superintend? &c. Whether L.55, or what other sum, is due to him? or Whether it was understood that he was to act gratuitously?

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The first witness called having, on his cross-examination, been shewn a disposition to the property,

Jeffrey.—The defender must be aware that he is leading evidence.

LORD CHIEF COMMISSIONER.—I conceive that they are entitled to do this now, to shew that there was a written title to the property.

In opening the case for the defender, Mr Moncreiff stated, that he would prove, by a letter, that the pursuer's name, though in the contract, was there by mistake.

An opening counsel not entitled to read a letter, unless he believes that he shall afterwards make it evidence.

Jeffrey.—I object to reading this letter, and shall object to it when offered in evidence.

Moncreiff.—The question is, whether it was the understanding that the service was to be gratuitous.

LORD CHIEF COMMISSIONER.—The question is, whether this person was employed to superintend these buildings; and if this let-

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ter is necessary to make the case intelligible, Mr Moncreiff is entitled to read it, in the same way as he might repeat it, if he had it by heart. I am not now going to decide, what appears to me perfectly clear, that a person is not entitled to aver against his own deed. I have to deal with sensible men ; and if this is not necessary to make the case intelligible, they will not state it ; but we cannot tie up an opening counsel very strictly. Counsel must, however, state, what they intend to make evidence ; and we give the bar credit, that they will not state any thing but what they believe they shall make evidence.

Mr Moncreiff afterwards stated, that one of the defender's letters would shew how a case might be got up.

LORD CHIEF COMMISSIONER.—How can you make your own letter evidence for you ? You are not to suppose that I am to admit it as evidence because you are allowed to state it ; and though I am unwilling to interrupt you, yet I am very doubtful if we should allow you even to state this.

When a letter of Mr Young, agent at the time for the defender, dated 4th March 1807, was given in evidence,

More objects.—They are not entitled to prove against their own contract.

Cockburn.—They mistake our object in producing it. He describes himself as an architect; we dispute this, and wish to shew that his name was accidentally put into the contract.

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LORD CHIEF COMMISSIONER.—My wish is, to avoid laying down any rules which may exclude any thing which ought to be admitted. It is clear, however, that you are not entitled to produce evidence to unsettle a deed; you cannot gainsay a contract solemnly entered into; and Mr Cockburn does not rest it on that ground, but says, though the pursuer's name appears in the contract, there was another person more trusted by the defender. The question is, how that applies to this case; but this will be more properly adverted to in addressing the Jury.

Another reason is, that the writer is dead. Evidence is, by the law of Scotland, admissible of what a person deceased had said; and the only distinction between proving what a person said, and what he wrote, is, that in the one case you have a witness on oath to prove the statement, and he is indictable for

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perjury; but I do not know that the law of Scotland has taken the distinction.

Mr Cockburn withdrew the letter.

Incompetent
for a defender
to produce a
letter from
himself, unless
the pursuer
was privy to it.

An objection was taken to a letter from the defender to a Mr Laidlaw, on the subject of their houses.

LORD CHIEF COMMISSIONER.—You need not state any reasons. Letters to the pursuer are received to explain the letters from him; but this is not in a course of correspondence with the pursuer, but to a third party, with whom the pursuer has no privity.

Moncreiff.—If the name of the pursuer being in the contract was sufficient, there was no use for the trial. If we are not allowed to prove all the circumstances, the justice of the case is excluded. The pursuer must have been privy to this.

LORD CHIEF COMMISSIONER.—I shall be very sorry, if any rule I lay down shall exclude the justice of the case; but on mature deliberation I shall state my opinion. I agree, that a case of circumstances may, and must be proved, and that the *res gestæ* must be proved; but this must be done by legal evidence. It will simplify this, to take it by

steps. If the defender were put in the witness box, you could not examine him. If he had said any thing on the subject, proof of that would be evidence against him, but not for him; and in that case, having a witness upon oath, you are a step higher than in the present case, which is only a letter. This correspondence may enlighten your minds in the mode of conducting the case; but it is not therefore evidence. The proof must be *viva voce*, and upon oath. How does it appear that the pursuer was privy to this correspondence? and if not, how can it be used against him? If you shew that he was privy to it, then it will be evidence against him; but we cannot receive it, in respect of its contents, or allow you to prove his privity to it from the letter itself.

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An objection was taken to a letter, the handwriting of which had been proved by one of the pursuer's witnesses.

LORD CHIEF COMMISSIONER.—You might have cross-examined the witness from the letter, and confronted him with it; and it is clear, that is what you ought to have done. The leaning of my mind, however, is to admit the letter, though I am not quite satis-

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fied upon it; it does not, however, appear to me to fix any principle.

A letter from the agent of the defender also rejected.

When a letter from Mr Young was offered, Jeffrey objects, he was agent; and this is the same as a letter from the party. He could not have been examined if alive.

Moncreiff.—It is decided, that an agent in a transaction is competent to prove that transaction.

LORD CHIEF COMMISSIONER.—Being agent in the cause might add to his bias in favour of the party, but cannot make his letters, any more than those of the principal, evidence against the opposite party.

Jeffrey, in opening the case, and in reply, stated the facts, and contended that he had proved them.

Moncreiff, for the defender, denied the employment, or that the work was done, or that there was any claim for remuneration.

LORD CHIEF COMMISSIONER.—This is a very short case; for, notwithstanding the time it has occupied, the real question is, whether the pursuer was employed as a tradesman, or was to act gratuitously.

The contract in which he is named is here ; and the only thing of importance to us is, that he is there named as a tradesman about those buildings. One witness swears that the pursuer did inspect ; and in one of the letters, he is desired to take care that the work is done, before he desires Mr Young to pay the money. As there are facts and circumstances, you must take this evidence into consideration, and balance it with the evidence of the other witness, who does not recollect his inspecting.

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On the whole, and from looking through the letters, it seems right to say, that this was not a gratuitous employment, but as a tradesman.

Verdict.—“ Find for the pursuer on all
“ the Issues ; and on the 3d Issue, that the
“ sum of L.50 is due to him, as a just and
“ reasonable charge.”

Jeffrey and J. S. More for the Pursuer.

Moncreiff and Cockburn for the Defender.

(Agents, *Tho. Lawson, and Campbell and Mack.*)