Verdict—" For the pursuer, damages L.92 12s. 6d.

BELL v. LEIGHTON, &c.

Cockburn and *Fletcher* for the Pursuer.
Jeffrey and *Hope* for the Defender.

(Agents, *David Murray*, w. s. *Gibson, Christie, and Wardlaw*, w. s. and *Dugald Mactavish*, w. s.)

PRESENT,
LORD GILLIES.

HOULDSWORTH v. WALKER.

1819. January 28.

Damages claimed for not supplying steam-engines with coal.

AN action to compel the defender to furnish coal or culm for steam-engines, and of damages for failing to supply it.

DEFENCE.—The contract is not binding, as it was not signed by all the parties to it. The pursuer broke it by misapplying the power of the steam-engines.

ISSUES.

" Whether the defender has furnished " coal or culm, in terms of the contract enter- " ed into between Henry Houldsworth, cot-

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" ton-spinner at Anderston, the deceased " Alexander Pollock, and James Gillespie, " manufacturers in Anderston, carrying on " business under the firm of Henry Houlds- " worth and Company, cotton-spinners at " Woodside and Anderston, and the defender " Andrew Walker, coal-master at Gairbraid, " upon the 21st October 1804, for the use " of the cotton-works, in which Henry " Houldsworth and Company, and those " standing in right of that company, have " been, or are now engaged at Anderston " and Woodside, or elsewhere; or whether " the claims of the pursuer, under this con- " tract, were settled up to the 31st December " 1807, by a settlement of accounts between " the parties?

" And whether any loss and damage has " been sustained by the pursuer, in conse- " quence of the defender's non-performance " of said contract, by failing to furnish coal " and culm for the pursuer's cotton-works, in " terms of the same, and to what amount?"

In 1804, the parties entered into a contract, by which the defender became bound to furnish Henry Houldsworth and Company with such a quantity of small coal, or culm,

as should be sufficient to supply with fuel, the whole works now erected, or to be erected, "in their present or future works, at Wood-side, Anderson, or elsewhere;" with a declaration that, if the defender failed, the other parties were to be entitled to supply themselves from other coal-works, at his expence, and that the account and oath of the acting partner at the pursuers' works, should be held sufficient proof of the quantity so furnished.

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Some time after the date of this contract, a steam-engine of larger power was erected at Anderston, and the whole of the power not being required in the cotton-work, part of it was at one time employed in a foundery, and to pump water for the Cranston Hill Water Company. The defender conceiving this a misapplication of the fuel, and that he was only bound to furnish coal for the cotton-mill, at first supplied only a small quantity, and for some time did not supply any. The pursuer applied to the Sheriff, who pronounced a judgment enforcing the contract. The case was referred to arbitration, but the decreet pronounced was set aside by the Court of Session, in an ac-

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tion at the instance of the defender. The application to the Sheriff was renewed, and the defender being dissatisfied with the decision, brought it under review by advocation; an action of damages at the instance of the pursuer was conjoined with it, and the above Issues were sent.

In opening the case for the pursuer, Mr Jeffrey stated, that he wished to put into the hands of the Jury a report by an accountant, not as evidence, but as his averment, and to save the Jury the trouble of taking it down from his statement.

Grant, for the defender.—We must object to any thing that is not evidence being put into the hands of the Jury.

LORD GILLIES.—It is impossible for me to take down 28 folio pages of figures.

When Mr Jeffrey concluded his speech,

LORD GILLIES.—I would suggest, in order to do justice in such a case, that the pursuer should call his evidence to the first part of the first Issue. If he fails there, then the case is at an end. If, on the contrary, he succeeds, then he is clearly entitled to da-

mages, and the Jury may find so; but the amount of the damages parties ought certainly to refer to arbitration.

How is it possible for the Jury to go into this *marc magnum* of papers, books, accounts, scientific evidence, &c. It is impossible for the Court to do so, and I suppose it is equally so for many of the Jury. That damages are due, we may find, but the amount we cannot fix. I find it incompetent to suggest a reference of the first point; but being charged with the time of the Jury, I must suggest a reference of the second.

Grant.—At present I am only entitled to refer the whole case, and have no doubt that we shall shew that there is no foundation for the action; but in the course of the proof I may be satisfied that it is proper to refer part.

Jeffrey.—We are most anxious to save time, and to adopt the course pointed out; but if the defender is to plead the application of the engine to pumping water as a total defence, we must lead proof on this subject, along with proof of the quantity of fuel necessary for it.

After several witnesses were examined, and

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a protest produced, the defender was called, and desired to produce several letters from the pursuer; but not producing them,

A copy of a letter received as evidence, on proof of the practice to dispatch the originals of which copies were kept.

Jeffrey.—We produce the letter-book in which the copy is entered.

Grant.—You must prove that the letter was sent, and that the copy is a true one.

Jeffrey.—We have only to prove this the true letter-book, and that the clerk believes the principal was sent.

LORD GILLIES.—I understand that you mean to prove that this is a true copy, and that it was the regular practice to dispatch, to the persons to whom they were addressed, the original letters of which copies were entered in that book.

Jeffrey.—The clerk who copied the letter is dead, but we shall prove his hand-writing, and the regular practice of sending the originals.

After two witnesses were examined on this subject,

Grant.—The same principle must hold in this case as in the delivery of goods. Delivery must be proved by the person who delivered them; but if he is dead, proof has been admitted of an entry in a book regularly kept by him.

Proof; however, has never been allowed that a person wrote in the book, whose duty it *was not* to keep it.

Jeffrey.—This is a regular letter-book, and is better evidence than the clerk would be, were he alive, as this entry cannot be *ex post facto.*

LORD GILLIES.—It is impossible to prove any particular letter sent to the post-office, and therefore a letter-book is received, provided it is proved that it was customary to send the letters, and that the witness has no reason to doubt that the one in question was sent. I have therefore no doubt of the competency of producing the letter-book. I do not think it makes any difference that the clerk is dead, as, if he were here, he could only prove the writing. The witness has proved the writing, and that it was the practice to send the letters, copies of which were entered in this book.

After producing certain documents,

Jeffrey.—By not going into the evidence in detail, I give up strong proof on this first branch of the case; but I now call on the other party

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to say whether they are willing to refer the amount of the damages.

Murray.—We cannot form any opinion till the pursuer has concluded his proof.

LORD GILLIES.—This question arises from the fault, partly of the pursuer, partly of the defender. The pursuer erected an engine of superior power to that which was in the contemplation of the parties at the time of entering into the bargain, and applied part of this power to a different purpose. This gives rise to great intricacy of proof, and affords a reason for submitting the whole case, or at least part of it, to arbitration.

A witness, though not interested in the question put, is incompetent if intrusted in the event of the case.

The foreman of the foundry was called as a witness, and stated, that he was paid a share of the profits of the foundry.

An objection was then taken to his evidence; to which it was answered, that he had no interest in the question put—that the pursuer meant to prove the quantity of coal necessary for the foundry, and deduct it from the quantity demanded from the defender.

LORD GILLIES.—This witness has a share

in the profits of the foundry, which is wrought by the steam-engine for which the defender engaged to supply coal. The defender was only bound to supply coal for the cotton-work, and this witness has an interest to diminish the quantity applied to work the foundry. If a witness is interested in the result of the trial, it is not enough to say that he is not interested in the particular question put.

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After calling another witness, Mr Jeffrey stated, that the pursuer was willing to refer the whole case. A minute of reference was accordingly signed by the parties, and an order made, that the Jury should be discharged without returning a verdict.

Jeffrey, *Cockburn*, and *J. S. More*, for the Pursuer.
J. A. Murray, *Grant*, and *Robinson*, for the Defender.
(Agents, *William Ellis*, and *Carnegy* and *Neilson*.)

A general order for inspection of the books of a mercantile company refused.

Some of the books in this case had been produced by the pursuer, sealed up. Before the trial, Mr Grant moved that the defender should be allowed inspection of them, to which Mr Jeffrey objected, but stated that

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he had no objection to allow the Clerk of Court to look into them.

LORD CHIEF COMMISSIONER.—It is extremely important that there should be a selection of such books as are necessary; but it is not usual for the Court to make a general order for inspection of the books of a great mercantile company, by the opposite party. We cannot make any as to the books which are sealed up. The proposal made to submit them to the Clerk is very proper. The whole ought to be in his hands.

LORD PITMILLY.—I hope that, in addition, there will be some admissions made, as I never saw a case where that was more necessary for the ends of justice. Without this, the case must go as a *mare magnum* to the Jury.

On the 22d February a motion was made to have the books, &c. delivered up.

LORD GILLIES.—I never understood that the books were produced here; but if they were, then I grant the order to deliver them up, and to return the process to the Court of

Session. I can grant no order for producing them to the arbiter.

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PRESENT,

LORD CHIEF COMMISSIONER.

CLARK *v.* CALLENDER.

1819. February 1.

AN action to compel implement of an alleged agreement; and for damages.

A finding for a defender, as the pursuer adduced no legal evidence.

DEFENCE.—A denial of the agreement. Writing was essential to such an agreement.

ISSUES.

"Whether the defender did, in or about "the month of February 1806, enter into "an agreement with the pursuer, to relieve "him, the said pursuer, from, and take upon "himself, the said defender, a certain bargain "set forth in the summons, bearing date the "8th day of December 1805, between Mr "George Aitken of Cupar in Fife, and "others, and Mr James Gibson, writer to "the signet, respecting wheat, or the price