EWING
v.
CRICHTON
AND OTHERS.

there is a letter from Mr Rollo, sending the draft of the deed, and the important evidence is what follows this, combined with that of the instrumentary witnesses. One of them proved that the deed was read, which is important for Mr Rollo, but was not necessary, as law would presume the reading, and the pursuer must make out that it was not read. You must consider the whole circumstances, and say whether they prove the person to have been acquainted with the deed, and to have approved of it at the time he signed it, and it is of no importance how soon after he became incapable. The case depends on your opinion of the evidence, not mine; and according to that opinion you will return your verdict.

Verdict—"For the defenders."

Jeffrey, R. Bell, and *Cuninghame,* for the pursuer.
Moncreiff, D. F. and *Jameson,* for the defender.
(Agents, *James Greig,* W. S. *Donaldson* and *Ramsay,* W. S.)

PRESENT,

LORDS CHIEF COMMISSIONER, CRINGLETIE, AND MACKENZIE.

1827.
March 15.

EWING *v.* CRICHTON AND OTHERS.

Finding that a private convey-

AN action against the office-bearers of a Ship-

ping Company, to recover the value of five shares of the stock of the company, conveyed to another company without the pursuer's consent.

EWING v. CRICHTON AND OTHERS.

ance of the property of one Company to another was not to the loss, &c. of a partner of the first Company.

DEFENCE.—The office-bearers are not liable as individuals, unless the whole members are called. They are not liable as office-bearers for acts sanctioned by unanimous meetings of the members.

ISSUES.

" It being admitted, that a Company called " the Edinburgh, Glasgow, and Leith Shipping " Company, was formed by a contract of co- " partnery, dated the 1st day of March 1814, " for the purpose of carrying on trade between " Leith and London, and the ports in the river " Clyde, and that the capital stock of the Com- " pany was divided into shares of L. 50 each :

" It being also admitted, that the pursuer " was a proprietor of five shares of the said " capital stock, at the period of the dissolution " of the Company in the year 1820, and that, " during the said year 1820, the defenders " were the chairman, deputy-chairman, and di- " rectors of the said company :

" Whether the defenders did, illegally, and

EWING
v.
CRICHTON
AND OTHERS.

" in violation of their duty as chairman, depu-
" ty-chairman, and directors of the said com-
" pany, without the consent of the pursuer,
" transfer the sailing vessels and other proper-
" ty of the said company, to the London, Leith,
" Edinburgh, and Glasgow Shipping Company,
" according to a private valuation, to the inju-
" ry and damage of the pursuer? Or,

" Whether the pursuer did acquiesce in, or
" homologate a *bona fide* transference of the
" said vessels, &c. for their just and true value
" at the time, although according to a private
" valuation?"

Skene, for the pursuer.—The pursuer could not be deprived of his shares by any act of the other members. At the time they attempted to dissolve the first company the defenders had *already* transferred the stock to the new company, and after this a majority went into their views, and agreed to a dissolution. The transfer by private bargain was illegal, and they were advised by counsel that it was so. As the property cannot now be brought to sale, the pursuer is entitled to the value on the books.

1. Montague on Partnership, 120. Featherstonhaugh, 17 Vesey 298.

Circumstances in which a memorial to counsel,

An objection was taken to a memorial to counsel and their opinion being produced,

Jeffrey.—The opinion is not evidence, but shows the defenders did not act *bona fide*.

and his opinion upon it, were admitted in evidence.

LORD CHIEF COMMISSIONER.—The defenders, in taking this opinion, appear to have been transacting for the company, and we admit this as part of the transaction. The opinion also bears on the question, whether this was a *bona fide* transaction?

Written evidence should be read by the clerk, and in general not by the counsel.

In the course of the trial, his Lordship observed, in reference to the necessity of the clerk reading documents, that, in opening a case, documents in general ought to be described, not read, by the counsel, but whether they are described or read by the counsel, they ought to be read by the clerk, and there can then be no question as to whether they have been given in evidence, or not.

Query, Whether an admission in answers to a petition is to be admitted in evidence?

Answers by the defenders to a petition in the Court of Session were afterwards put in without objections from the Bar, and a passage read from them.

LORD CHIEF COMMISSIONER.—If the answers contain a distinct admission of fact, I do not object to this, but we are apt to get into very loose practice. I wish objections of this sort came from the Bar, as the Court cannot at

EWING
v.
CRICHTON
AND OTHERS.

all times interfere. When a categorical averment and admission is made in a condescendence and answers, then it is of such a nature and solemnity that they are evidence. But when mixed with argument, I doubt if they should be admitted.

Circumstances in which a valuation of the stock of a Company by one of the partners was admitted in evidence.

When a valuation of the stock, &c. produced by Mr Crichton, was given in evidence, his Lordship observed, that he understood Mr Crichton to be an active party in this case, and that this valuation had been recovered from him, he would therefore allow it to be put in, reserving till afterwards any observations on its effect.

Incompetent to prove a fact in a cause by the deposition of a haver.

It was objected to certain depositions by havers, that they were not evidence of a fact.

LORD CHIEF COMMISSIONER.—They certainly are not evidence of a fact in the cause, but they are produced to show that the party made the inquiry, and as a foundation for giving secondary evidence.

Moncreiff, D. F.—This is a very short and simple case. Two companies agree to unite, and apply to counsel for advice as to the mode of doing it;—they are advised, that, unless they are unanimous, they must dissolve both, and

then unite ;—they do so—the property is made over to the new company at a valuation. The pursuer averred that the property would have sold higher at a public roup, but he has completely failed on this, which is the only point. It is said that the property of a company must be sold by auction, but the objecting partner must appear and insist. This sale, however, is under the contract, and there is nothing there of a public sale. The directors were bound to obey the meetings, and they approved of the transfer which had been made; and we shall prove that it was a judicious measure. There is no doubt on the second issue.

After much documentary evidence had been produced on both sides, his Lordship suggested the propriety, in such a case, of sending to the Judge, the night preceding the trial, a reference to the passages in the documents on which the parties relied, and proposed that an act of sederunt should be passed on the subject.

Jeffrey, in reply.—It is lamentable that so much time and argument should be wasted to save a great company from a claim of L. 120. There is no doubt the action is competently laid.

LORD CHIEF COMMISSIONER.—The only

EWING
v.
CRICHTON
AND OTHERS.

question of law in the case is on the first branch of the first issue; and I am uncertain if it is necessary to rest it upon this. For though I were satisfied that the private sale was legal, I could not nonsuit, even if I had the power, nor could I direct a verdict for the defenders, as this is an issue sent by the Court of Session, who had this point before them.

Moncreiff.—I admit that the action is competently laid; but if it is proved that the defenders acted by the authority of the company, then they are not liable.

Jeffrey.—This point is not open, as it was stated in the defences, and there is a finding by the Lord Ordinary upon it. There is nothing in the contract against a public sale; and the case in Vesey goes the whole length. The defenders acted as attorney for the pursuer, without any authority from him; and as the transfer was illegal, the sale must be reduced; but for the benefit of the defenders we limit the claim to the original value of the shares, and he is entitled to have his interest ascertained by the last balance-sheet.

Featherston-haugh, 17 Vesey 298.

The second issue is, Whether I acquiesced in a *fair* valuation?

LORD CHIEF COMMISSIONER.—After so long

and protracted a trial my strength is not equal to going into all the matter which has been discussed; but I must make a few observations on the case. The issues in the case are signed by me, but are to be considered as issues sent by the Court of Session; and the point to which they are directed is stated in the interlocutor ordering the condescendence. That order is to condescend on whether the property would have sold for a larger sum at a public than at a private sale. This is the point for the pursuer to make out. The point for the defenders to prove is acquiescence.

Much law has been stated, and when law is involved in the question to be tried, it is the duty of the Court to state the law; but this appears to me a question of fact; and I should be sorry to lay down any abstract point of law in such a case. There was much discussion in the case before the Lord Ordinary; and by sending it here, I hold the question of law closed. It is said I ought to direct you that this was illegally done; but I shall submit it to you, as a question of fact, Whether damage was done to the party? The issue is not to be cut in parts, but to be taken as one proposition. Whether the defenders have illegally injured the pursuer by a private valuation; and if you

EWING
v.
CRICHTON
AND OTHERS.

are of opinion that damage has been done to him, then it is to his injury; but if not, there is no injury. I cannot agree to the proposition that the valuation on the books is to be taken as the rule. The question here is the difference of a public or private sale. The general tendency of the evidence was, that a private sale was more advantageous than a public one; and you must judge of the credit due to that evidence; and if you think that no damage was done, you will find for the defenders, because there may be a breach of law without any injury, in the same way as there may be damage without any breach of law.

If you find for the defenders on the first issue, it is unnecessary to go into the second; but if you think the evidence proves damage, then you must consider whether this was a *bona fide* and honest transference. If you are of opinion that it was not, then there was no acquiescence or homologation in it; but if it was fair, then you must consider on the evidence whether the pursuer acquiesced. This depends not on any positive act by the pursuer, but on his not acting; and this is a question of fact in the first instance, though no doubt it is law, whether this will conclude the party. There are two letters by

the pursuer, which are material on this point, for your consideration; and you will observe, that, though the first seems to be suspending his judgment, the second differs from it, and seems as if he would acquiesce in what was done by the others.

Verdict—"For the defenders."

An exception was taken to the direction, holding that the interlocutor of the Court of Session was conclusive, and that it was unnecessary to decide the point raised at the Bar. But the exception has not been followed out.

Jeffrey, *Skene*, and *More*, for the Pursuer.
Moncreiff and *Buchanan*, for the Defender.
(Agents, *Campbell* and *Mack*, W.S. *John Young*.)

PRESENT,

FOUR LORDS COMMISSIONERS—LORD MACKENZIE ABSENT.

JOHNSTON v. WEST OF SCOTLAND INSURANCE COMPANY.

1827. March 16.

Query, Whether an Insurance office is liable to pay for damage done by pulling down the wall of a house consumed by fire?

AN action on a policy of insurance to recover the value of certain goods and furniture.

DEFENCE.—The damage was not done by or