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state of the injury, and not to give it for the publicity the accusation has now got, as the publication was by the pursuer.

There is no doubt the letters contain slanderous matter, as the defender applies epithets as well as states facts; but you will consider them in reference to the relation and situation of the parties. This is an action by a nephew against his aunt for a private communication of an infirmity of his wife, stated no doubt in language stronger than was proper; and the epithets show her anger at the marriage. This gives a right to maintain the action; but it is for you to say what *solatium* you will give; and in a family question you should be extremely cautious.

Verdict—For the pusuers, damages L. 50.

Jeffrey and *Skene*, for the Pursuers.
Hope (*Sol.-Gen.*) and *Buchanan*, for the Defender.
(Agents, *Campbell* and *Tod*, w. s. *Hugh Macqueen*, w. s.)

PRESENT,

LORDS CHIEF COMMISSIONER, CRINGLETIE, AND MACKENZIE.

1827. March 22.

CLARK'S TRUSTEE *v.* HILL AND OTHERS.

Damages for abstracted multures.

AN action by the tenant of flour mills to re-

cover the multure on certain quantities of wheat carried by the defenders to other mills to be ground.

DEFENCE.—The mills are incapable of making marketable flour. They were shut up for a year before the action was brought. They are incapable of grinding the quantity necessary for the thirl; and the defenders can only be liable on a proportion of the quantities carried away. The rate of multure claimed is too high.

ISSUE.

"It being admitted that the pursuer is trus-
"tee on the sequestrated estate of Alexander
"Clark, and that, during the year from Mar-
"tinmas 1823 to Martinmas 1824, the said
"Alexander Clark was tacksman of the mills
"of Baldovan, the property of the town of
"Dundee, on the water of Dighty;

"It being also admitted that the defenders
"are bakers in the said town, and are astricted
"to the said mills, and bound to grind or ma-
"nufacture all the grain intended to be ground
"into flour or meal for use and consumption
"within the burgh of Dundee and liberties
"thereof;—

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" Whether, during the said year, the defen-
" der, James Hill, did wrongfully abstract from
" the said mills 1500 bolls of wheat, or about
" that quantity, to the loss, injury, and damage
" of the pursuer?"

There was a separate question as to each of the other defenders.

Alison opened the case for the pursuer, and stated, That almost all the facts as to the abstraction were admitted, and that the question to be decided was, whether the mills were in such a state as to warrant the defenders in going to other mills? Whether they could not grind marketable grain; and whether the wants of the thirl being 25,000 bolls, and the mills incapable of grinding that quantity, this warranted the whole thirl in deserting the mills?

In proof of their capacity of making marketable flour, the corporation of bakers offered L. 500 a-year of rent for them; and during the lease to the corporation, which ended in 1823, they ground at an average 10,000 bolls a-year. The incapacity to do the whole work does not justify any one going away till he experienced the inconvenience; and none of the defenders ever came.

Landal *v.* Meldrum, 22d February 1745,

Mor. 16023.—Lockart *v.* His Vassals, 27th July 1736, 2 Elchies, 294.—Earl of Wigton *v.* Kirkentilloch, 2 Elchies, 295.—M'Dowall *v.* M'Culloch, 28th Feb. 1684, Mor. 8897 and 15987.

Millers' dues are exigible on grain abstracted. Adamson *v.* Tenants, 20th March 1682 Mor. 15965.—Mar *v.* Kerr, 20th February 1610, Mor. 15962.—Campbell *v.* Campbell, 26th Jan. 1672, Mor. 15978.—Ersk. b. ii. t. 9. § 32.

LORD CHIEF COMMISSIONER.—One of the questions stated is a pure question of fact, viz. the insufficiency of the mills; but another is a mixed question of law and fact, on which the Court must state the law, and the jury apply the fact to that law. The law involved in this case is not every day law; and the decisions on the subject are of old date. The principle may be affected by the difference of times, and may vary according to the nature of the thirlage, whether predial or in burgh. It may perhaps be useful, and save time to suggest now, that this is not a case in which pure finite facts are to be expected, so as to bring out a special verdict, but a mixed question of law and fact; I would therefore suggest, that the best way of

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treating it would be, for the jury to find a verdict for the pursuer, and assess the damages, and that a motion should be made for a new trial, in which the rule to show cause would be grānted as a matter of course, and the question would be considered deliberately during the Session. If the law is reversed, then the damages would fall.

In the suggestion of moving for a new trial, Mr Moncreiff expressed his acquiescence.

Moncreiff, D. F. for the defenders, said, The defenders are a few individuals subjected to a severe thirlage, which no doubt was legal, but only provided the dominant tenement did its duty. If there is no mill, or if it is incapable of making marketable flour, it is clear that the action will not lie. Stair, b. ii. t. 7. § 27.—Ballardie *v.* Bisset, 8th February, 1781, Mor. 16063.—Reid *v.* Yeaman, 15th January, 1794, n. r. but alluded to by Mr Hume.

The pursuer must be in a condition to take decree for the 25,000 bolls required by the thirl, before he can claim thirlage on the whole quantity abstracted by an individual. Being incapable of serving the thirl, he cannot pursue for abstracted multures. Being so high a rate,

the defenders are entitled to the best work; and this is far inferior to other mills. In these circumstances the question is, Whether the defenders wrongfully abstracted?

As no miller or carter was kept or used, of course this part of the charge must be deducted, as to that extent it was not to his loss and damage. The passage in Erskine is against the pursuer.

LORD CHIEF COMMISSIONER.—You maintain that he cannot get loss and damage which he did not incur; but is not this important in another view? The miller is bound to carry the corn; but is there not a similar obligation on the other party to send, stating that he has corn to be ground; and can you maintain this plea, that the mill was insufficient, without being able to state that you sent to him, and that he took your corn without having the means of grinding it?

A protest, no proof of the facts stated in it.

An objection was taken for the pursuers, to the production of a protest taken by the defenders, and to one taken by the corporation of bakers.

LORD CHIEF COMMISSIONER.—A protest is

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a public act, but is no proof of the insufficiency of the mills. That by the incorporation is also inadmissible.

Billets given by one miller not admitted as evidence against his successor in the mill.

The persons sending wheat to the mill got certain checks or tickets called billets, in which the weight of the wheat and the quantity of flour produced from it were entered. When a book containing a number of these billets was tendered,

Cockburn.—These billets were made at a time when the person making them was not our servant; and though we admit that these are the billets given to this baker, we do not admit their contents to be true.

Moncreiff.—This is the best evidence, as they state the weight of the wheat and the return of flour.

LORD CHIEF COMMISSIONER.—You bring these to affect the pursuer, though not made by him or his servants. You may get from a witness a description of what a billet is, and what it contains; but if you wish this as evidence against the pursuer, you must connect it with him. It would be good against him at the time the miller was his servant.

Circumstances in which a witness

It was then proposed to call back a witness

who had been formerly examined, but this was objected to by the pursuer.

may be called back and again examined.

LORD CHIEF COMMISSIONER.—I know that in one case, when I wished to call back a witness, Lord Pitmilly informed me that it was incompetent. But I do not know that it is without example to call a witness again. It is certainly better to examine him fully at once; but I know no good reason why he should not be called again, if any thing has been omitted.

LORD CRINGLETIE.—I think it necessary that the witness should have been reinclosed, or that he should not have been in Court, or mixing with the other witnesses. But if he has been out of Court, and not contaminated by such intercourse, I see no objection to his being called again.

A person astricted to a mill a competent witness in a question of abstracted multures, unless the verdict can be used for or against him.

An objection was taken to another witness, that he was one of the thirl.

LORD CHIEF COMMISSIONER.—If this were to prove a custom in the thirl, he would be objectionable; but he is a competent witness to prove a fact, though his being one of the thirl must go much to his credit. There may be objections to the questions put, as affecting the interest of the witness as one of the thirl;

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but, unless the verdict can be used for or against him, he is a competent witness.

Cockburn, in reply.—The question here is not the rate of thirlage, or what is to be the future fate of the case, but whether these five individuals, who admit they have abstracted wheat, have done so wrongfully, which does not mean disgracefully, but illegally.

The first question is the capacity of the mill to make marketable flour. I admit, that if there is no mill, or if it is *incapable* of making marketable flour, that the abstraction is legal; but, on the other hand, these mills are not to be compared with new mills on the best construction, but it is sufficient if they can do their work as they did a hundred years ago. It is not proved that these made worse flour than other mills, but just "off and on with the other;" and every thing depends on the care and attention of the miller.

On the second point, the plea seems to be, that, as the mills cannot grind more than 14,000 bolls, therefore they shall grind none. I submit to the jury that I have proved that they could grind more; but, admitting that we cannot grind 25,000 bolls, the whole thirl is not here. There are only five individuals, who admit that

the mills could grind three times as much as they required.

The mill is the dominant tenement, and entitled to relieve any part of the thirl they think proper. In all the cases decided it was only the *minimum* of abstraction that was allowed. The parties were held bound to go to the mill, and only, after finding that the work could not be done, they were allowed to grind what was necessary, and no more, at other mills.

LORD CHIEF COMMISSIONER.—This question arises on an obligation on the defenders to grind their corn at the mill of the town of Dundee, of which the pursuer has been tenant since 1823, when in a competition who should be tenant he outbid the incorporation of bakers. The issue is the question to be tried; and where law is stated from the Court, it is your duty to apply the fact to that law.

You had better free the case from what is simple, and with this view consider first, whether the mill was shut up, or whether the work could have been done there if required.

The next point is, whether the mill was capable of grinding marketable flour, which is a mixed question of law and fact; but the law is easy, as it would be iniquitous to exact multure,

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if the mill was incapable of doing that for which it was intended. Work is what the dominant tenement is bound to render; and if it cannot give the work, it is the same as if it were shut up. It is for you to consider the evidence; but it seems to me that the tendency of the pursuer's evidence was to show, that with attention the mills were capable of making marketable flour; and if that is your opinion, you will find for the pursuer. The evidence of fact for the defenders seems to me to apply rather to the quantity than the quality of the flour; and it is essential to keep in view, that it is not necessary that this mill should be of the best construction. It is sufficient if it is capable of fulfilling the original constitution of the thirlage, and has been so improved, as not to make unmarketable flour. The evidence of opinion as to the machinery is upon points on which ingenious men may differ.

The last point presents a question of law of greater difficulty, but the fact is admitted. 25,000 bolls is the quantity required, and the mills can grind only 14,000. There is a dispute as to the meaning of this last admission; but it is unnecessary to enter upon that, as the evidence of the capacity to grind more than 14,000 is so loose, that I cannot recommend it

to you to proceed upon it, especially as there is sufficient admitted to raise the question; and upon that question you will find according to my direction, that the party may have an opportunity of getting the question more deliberately considered, either in the Jury Court or the Court of Session. As at present advised, it does not appear to us that this can be so well decided, while a trial is going on, as it may be in the Court; but I am bound by my oath to give my view of the law, though that may be altered on farther argument.

It is admitted that the mills could grind 14,000 bolls, and that the quantity required was 25,000; but even though the mills could not grind the whole, it is impossible to say that these defenders were not bound to do something, which was not done, in order to show that they were free.

At these mills the miller is bound to carry the grain, though perhaps it would not alter the law if the thirl had to send it, and take it away. But it is clear, that, as the miller must send for it, the persons thirled must give him notice when they have wheat to grind; and if they had desired him to send for wheat, he might have given them notice that he could not grind it; but nothing of this kind takes place.

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I therefore direct you to find for the pursuer on this point, which will not prevent the defenders from having the question more deliberately tried.

If you are of opinion that the mill could grind marketable flour, you must then consider the damages; and here, if you are of opinion, that, though the mill was not shut up, the servants were transferred to the pursuer's other mill, and no carts were used, there must then be a deduction of 10d. on these accounts.

Verdict—For the pursuers, and assessing separate damages against each defender.

Cockburn and *Alison*, for the pursuer.
Moncreiff, D. F. and *Christison*, for the defenders.
(Agents, *George Lyon*, W. S. *Ritchie* and *Miller*, S. S. C.)

1827. June 12.

A new trial refused, and bill of exceptions tendered.

A rule to show cause why there should not be a new trial was granted.

Cockburn—Showed for cause against the rule, 1. The mill made marketable flour. 2. The quantity from a boll of wheat was fair, and the jury were right in holding this proved. But it is said there was misdirection, as the Judge said they were not to consider the quantity of wheat which the mill was capable of grinding. The admitted fact is, that the mill could grind

14,000, and the defenders only required 5000, and they were not entitled to leave the mill till they could not be served; but they never sent a single boll. It is said thirlage is a mutual contract, and it is so; and I was ready to do their work, and was entitled to let others escape, and insist on the defenders coming. The principle of all the cases is, that the party must come and wait a reasonable time, and only then take away the quantity absolutely necessary. The older the decisions, they are the better, as the subject was then better understood. John's Mill, &c. See *ante*, p. 203. Bank. B. ii. t. 7, § 59. Stair, B. ii. t. 7, § 27.

Bank, ii. 7. 59. Stair, ii. 7. 27.

If the whole 25,000 had been sent, the mill would have been made capable of grinding them; and can it be said, that, if the mill cannot grind five or ten bolls out of the whole quantity, that the whole thirl is free?

Moncreiff, D. F.—The question here is, whether we *wrongfully* abstracted? and we say no. The question on the evidence is, whether the mill could grind the grain of the thirl into fair marketable flour, as the witnesses agree that the worst mill may grind marketable flour in small quantity? But it could not do the work of the thirl, and were the defenders bound to go, and lose a peck out of every boll?

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Several of the cases are tenants on a barony, which is a specialty. In the case of Reid *v.* Yeaman, in 1794, n. r. the party was not liable for excrescent multure. Mr Erskine states the older practice; but Lord Stair is the clearest of any on the subject. It is a fallacy to say we were bound to send to the mill, as there was no mill, it being incapable of doing the work of the thirl. Should a mill capable of doing the work be erected, the thirlage may revive, but in the state in which the mill was, no individual was bound to go to it.

Ersk. B. ii, t. 9, § 37.
Stair, B. ii, t. 7, § 27.

LORD CHIEF COMMISSIONER.—The first ground embraces the whole evidence, and the second being on law not every day before the Court, and upon which the views of judges seem to have varied, it will be better to take time to consider.

(Having been detained by other business, when the decision was given, what follows is taken from a note with which I have been favoured.)

This case was tried at last sittings; and from what then took place, it was understood that a motion for a new trial should be made. This has been rested on the grounds that the verdict

was contrary to evidence, and the direction contrary to law.

The questions of fact were on the state of repair in which the mill was, and the quantity of flour turned out from the wheat, and upon these there was a variety of evidence; but the jury must have been satisfied that the flour was marketable.

The miller was bound to send for the wheat upon notice by the other party; but no notice having been sent, there was an abstraction, and the question was, whether it was wrongful? For the defenders it was contended, that they were entitled to carry away the corn, in consequence of there not being sufficient power to grind the corn required by the thirl during the whole year; but it was proved that the defenders might have got their corn ground. Had they sent their corn, and had there been any neglect on the part of the miller, there might be a question, whether he should recover damages. But the jury having found that the mill could grind marketable flour, and it being admitted that it could grind more than the defenders required, we refuse the new trial.

To this judgment, a bill of exceptions was tendered, which is now in the Court of Session.

MACLACHLAN v. ROAD TR.

The ground of exception was, that the thirl required 25,000 bolls, and the mill was only capable of grinding 14,000, and that the defenders were not bound to go to the mill, unless it was capable of grinding the quantity required for the whole thirl.

PRESENT,

LORDS CHIEF COMMISSIONER, CRINGLETIE, AND MACKENZIE.

MACLACHLAN v. ROAD TRUSTEES.

1827. May 14.

Damages against road trustees for injury suffered through their fault or negligence.

AN action of damages against road-trustees for injury done to the pursuer by the overturn of his gig.

DEFENCE.—If any one is liable for the damages, it is not the defenders, but Lord Stair. But the pursuer caused the damage by his rashness and inattention.

ISSUES.

"It being admitted that the defender is "clerk to the road trustees for the county of "Wigton, and that the road from Portpatrick "to the town of Stranraer, in the said county,