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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,

" is under the direction and management of the " said trustees :

" It being also admitted, that, on the 11th " day of February 1826, the pursuer, while " travelling in a gig, was overturned in the im- " mediate neighbourhood of the said town of " Stranraer,—

" Whether the said overturn was caused by " the fault or negligence of the said trustees, " and was to the injury and damage of the pur- " suer ?"

Marshall, for the pursuer.—This is a claim for reparation of an injury caused by the culpable negligence of the defenders in not shutting up an old road. Their liability is clear under the 63d section of the road act for the county.

Jeffrey, for the defenders.—The defenders act gratuitously, and so are only liable for fault. The facts are simple. The only difficulty is in the conclusion to be drawn from them. It was agreed, that the old road should be the property of Lord Stair, from the time it was shut up; and the contractor was bound to shut it up, and did shut it up by a strong paling, which stood for fifteen months. The road had not been under the management of the trustees for

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many months, and this accident could not be by their fault. As the pursuer was the immediate cause of the accident, the defenders are not liable even were they blameable.

Rutherford, 11 East. 65. 2 Taunt. 314.

When a letter from the pursuer's agent was produced,

Competent to prove admissions made by a party, provided they were not made with a view to a submission of the case to arbitration.

LORD CHIEF COMMISSIONER.—A transaction with a view to a submission cannot be given in evidence; and I should be sorry if the Court admitted any thing of this nature. You cannot give in evidence any thing with a view to an arbitration, or a decision of the question out of Court; but if, without any such view, a party makes admissions even verbally, they might be proved at the trial.

LORD CRINGLETIE.—There is no doubt of this. It is competent to rebut the statement in the summons, that the pursuer has often desired and required the defenders to pay the sum claimed.

After looking at the letter, The Lord Chief Commissioner said, it was a letter with a view to a compromise, and could not be read; but

Smythe *v.* Pentland. See Fac. Col. 10th July 1813.

Mr Cockburn having obtained the opinion of the Court, consented to the letter being read.

LORD CHIEF COMMISSIONER.—The Bar deserve much credit for their conduct relative to the extrajudicial settlement of cases; and we would be sorry to do any thing that might tend to impede such settlement. If called to decide this, we must have rejected the letter, but are much better satisfied to have it read of consent.

Cockburn, in reply.—Though the trustees act gratuitously, they undertake a duty, and having undertaken it, they are bound to fulfil it. The pursuer's case is clear, and the only question is on the defence. By stating that they took the contractor bound to shut this road, they admit that it ought to have been shut; but what occurred proved that it was open. There is no evidence that the pursuer knew that the road was shut up; and as to furious driving, he does not appear to have been going faster than the mail.

LORD CHIEF COMMISSIONER.—This is a case of importance to the parties. To the pursuer, that he should get redress for the injury he has suffered; and to the trustees, who are individually liable, and have no fund from which to pay the damages, if found due. They have no interest in the roads, farther than residing

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in the neighbourhood. This, however, will not free them from responsibility, if a case of negligence has been made out against them; but it will induce you to examine, whether such a case has been clearly made out. It is important to the trustees and the public, that they should not be subjected, unless the case is clearly made out; but if it is made out, you will then have to consider the damage of the pursuer.

The issue is most clear and accurate, and under it there are two matters for consideration. Whether the trustees discharged their duty in protecting the public travelling on these roads; for if they did the pursuer has mistaken his party. 2. Whether they remained responsible at the date of the accident, and whether, under all the circumstances, the pursuer is entitled to damages. The evidence shows that the intention was to shut up the road on which the pursuer was overturned, and that a strong paling was put up for this purpose, and you are to say whether it remained in such a degree of preservation as that this road was shut up. Any evidence of a transaction between the trustees and Lord Stair as to the property of the old road cannot affect the pursuer. But the important consideration here

is, at what time the responsibility of the trustees is to terminate; for if their responsibility was at an end, so is their liability; and on this subject it is an important fact, that this road remained shut up for a year and a half; and if you are of opinion, that, by this length of time, and the acts done by the trustees to warn the public, their obligation to keep up the paling was at an end, then they are not liable, whatever claim there may be against Lord Stair.

It was correctly stated that in every case of this sort there are two ingredients. There must be fault in the party setting up an obstruction on the road, or omitting to set up an obstruction to prevent danger; and there must, on the other side, be in the main, ordinary care and attention. If there is any unfitness or impropriety in the party injured, or if, by usual care and attention, the injury would have been avoided, then the party putting, or omitting to put, the obstruction is not liable. The person claiming must come with clean hands; and if he has been acting in a careless, irregular, and extraordinary manner, and not regularly and carefully, and in the usual manner in the circumstances in which he is placed, the other party is not liable to repair the injury he has suffered. You will consider whether the pur-

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suer acted in the manner he ought to have done in a dark night, and knowing that a change had been made on the road.

On the whole, you will consider whether the trustees remained liable up to the date of the accident, and whether the pursuer acted in such a manner as to entitle him to claim damages.

Verdict—For the pursuer, damages, L. 21.

Cockburn and *Marshall*, for the pursuer.
Jeffrey and *Shaw*, for the defenders.
(Agents *R. Matthew* and *Vans Hathorn*.)

PRESENT,

LORDS CHIEF COMMISSIONER, CRINGLETIE, AND MACKENZIE.

HAMILTON *v.* HOPE.

1826.
March 27.

Damages for defamation.

DAMAGES by one Professor in a university against another for words uttered at a meeting of the Senatus Academicus.

DEFENCE.—The expressions and sentiments uttered by the defender were different from those stated in the summons; were not false or malicious, but were true, and were used in