

MILLAR  
v.  
ROAD TR.

PRESENT,

LORDS CHIEF COMMISSIONER AND CRINGLETIE.

MILLAR v. ROAD TRUSTEES.

1828.  
July 17.

THIS was an action brought against the road trustees of the western district of the county of Edinburgh, and their overseer and watchman, for damages caused by their negligence.

Damages for injury caused by the fault or negligence of Road Trustees.

DEFENCE.—There was no negligence ; and the damage done was caused by the gross carelessness and illegal conduct of the pursuer.

ISSUES.

The issues contained an admission that the defenders were trustees,—that an alteration was made on the road to Mid-Calder,—and that the pursuer was a carrier. The question was, whether, in travelling along that road, the cart of the pursuer was overturned at or near the alteration, in consequence of the fault or negligence of the defenders ?

Before the issues were framed, *Moncreiff*,

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Circumstances in which the Court would not decide before the trial, whether certain defenders were improperly called, but granted separate issues as to them. Glassford, Pr. of Ev. 435. Tait, L. of Ev. 369. 2 Mur. Rep. 459.

1 Phillip's, L. of Ev. 56. 3 Mur. Rep. 413.

D. F. and *Jeffrey*, moved to have the overseer and watchman assoilzied from the action, or if they were not assoilzied, to have separate issues framed as to them, that they might be called as witnesses for the trustees, who were ready to become answerable for the damages, or to consign the money.—Glassford and Tait on Evidence.—Chaplain v. Baillie.

*Hope, Sol.-Gen.* and *Forsyth*, on the other side, contended, That the action was properly brought, and that they were not bound to take the trustees as the sole parties.—Phillip's Law of Ev.—Macfarlane v. Young.—The trustees, if they did their duty, are only liable as a master for a servant, and they cannot purchase the evidence of these men by agreeing to relieve them from the consequences of their conduct.

LORD CHIEF COMMISSIONER.—Undoubtedly the principle laid down by Mr Tait is conformable to the principle upon which we act, and is the principle applicable to all cases tried by a jury.

Both the applications now made involve a question of great importance to justice; and it is a serious matter for the Court, acting by itself, and before the facts are proved, to take a

step which will enable a party to become a witness. This appears to me the difficulty in my present view of the case; but if, on the contrary, the act of the pursuer in calling these defenders tends to injustice, it may be necessary for the Court to interfere, but it can only exert so strong a power after minute inquiry and consideration of all the consequences.

It appears to me clear, that at the trial the case may be extricated. The grounds of responsibility of the trustees and the other defenders are quite different; but suppose the Court were now to grant what is asked, would it relieve the men entirely? It is clear that parties may be improperly called, but it is difficult to decide on this beforehand.

Separate issues were framed applicable to the overseer and watchman, and at the close of the evidence for the pursuer his counsel consented to a verdict being returned in their favour upon the terms proposed by the counsel for the trustees.

*Forsyth* opened for the pursuer, and said, That he was a man of good character, and particularly sober habits: That the defenders had cut down one-half of the road four feet lower than the other, and had not taken the proper

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4 Geo. IV. c. 49.  
§ 92 and 93.

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precautions for the safety of passengers, and had violated the statute: That, while traveling in the dark, the cart of the pursuer was overturned; and that the defenders, instead of making any reparation, resisted his claim, and tried to injure his character by alleging that he was drunk and asleep. The road ought to be safe even for drunk men.—*Innes v. Magistrates of Edinburgh.*

*Moncreiff, D. F.* opened for the trustees, and said, They were only anxious to discharge their duty; and it would impede them in the discharge of it if their responsibility was to be increased by subjecting them in actions of this nature. Improving the road was part of their duty, and the public are bound to aid them, and to take care when they know that an alteration is proceeding. There must be reasonable care on the part of the public at all times, or an overturn may take place every day on every road in the kingdom. If a person has been drinking, and goes to sleep on his cart, or turns his back to the side, which he knows to be dangerous, he must take the consequences; and if the trustees place a watchman, who finds it impossible to raise him from sleep, can they be liable for the consequences? He was not driving according to law. The trustees could

not make reparation without admitting that they were wrong, as the pursuer demanded it as a right.

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The watchman was called as a witness, and asked, on cross-examination, whether he had said to A. Millar that he did not know how the accident happened? To which an objection was taken.

A statement by an individual at a time when he was a party in the cause, not to be proved as an admission in the cause, after he has ceased to be a party.

*Hope, Sol.-Gen.*—The trustees have admitted that they are responsible for the acts of this witness; and we wish the facts so far as he was concerned with them. I certainly understood that under the agreement this was to be competent to me.

LORD CHIEF COMMISSIONER.—By the transaction with the pursuer this witness was rendered competent, except in so far as he was liable to the trustees, and they have released him. If, then, he is freed from this action, and from his responsibility to the trustees, is he not in the same situation as any other witness? This question is not put to try his truth as a witness, but to get a fact from him which you could not have got unless he was a party.

*Hope, Sol.-Gen.*—It would scarcely have

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been necessary to say any thing in reply had the Dean of Faculty not exerted his ingenuity to turn to account statements of which no evidence has been brought. It is admitted that the trustees are liable for negligence ; and they are not to visit the effects of it on a poor carrier, even if he is found on his cart after a long day's work. This seems a case where the trustees have been misled by those in their employment, and where they attempt to defend a case in which they were clearly wrong.

LORD CHIEF COMMISSIONER.—This is a case arising out of an injury done to a person travelling on a high way, on which the trustees were performing an operation which there was a right and obligation to perform, in so far as it is their duty to put the roads in the best possible order. The act was legitimate, but was performed with some danger to the passengers, as the road was narrowed, and if carriages had in consequence come in contact, it would have given rise to an action like the present.

In doing such an act the trustees are bound to the utmost caution, and to employ careful workmen ; but you are also to consider the obligation on travellers, because, even where an obstruction is placed on a road contrary to law,

there is no right to recover damages, unless reasonable care is taken by those travelling. Here the trustees, if they did not do what was necessary fully to protect the public, at least took some means; and you will consider whether the other party has done what he was bound to do. You are not to take this case on nice weighing of evidence, but on the great features of it—that the parties were doing a legal act—that they were bound to do certain acts with a view to the safety of passengers—that damage was done to a passenger—and that he acted in the manner proved.

If you think the trustees ought, in addition to the means they used, to have put up a rail, that will go far to subject them, and you will also consider the evidence as to the watchman not being sufficiently alert.

But there are on the other side material circumstances for consideration, viz. That this was not the case of a common carter, but a carrier who knew the condition of the road—that he had a dog which might prevent the watchman from doing his duty,—and though it is extremely to be regretted that a traveller should suffer in his person and pursuit, still you must consider the conduct of the pursuer, and if he acted as a person ought not to have

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done in the prospect of passing such a place on the road, you cannot find for him. There is no evidence of his being intoxicated ; but he is met and warned to take care. He knew what was doing on the road, and in such a situation ought he to have got on his cart, and in a position with his face *from* the danger? It is material for you to consider whether he took reasonable care at a part of the road which he knew, and was warned, was a dangerous part of the road. If you are of opinion that the trustees did not take the proper care, or that this was not properly watched, and that the pursuer did what others were likely to do in such circumstances, then the pursuer will recover damages ; but even if the trustees did not do all that might and ought to have been done, still if the pursuer was deficient in care, he cannot recover.

Verdict for the pursuer,—damages L. 100.

*Hope, Sol.-Gen. and Forsyth, for the Pursuer.*

*Moncreiff, D. F.-Jeffrey, Cockburn, White, Gibson-Craig.*

(Agents, *Daniel Fisher and Andrew Howden, w. s.*)