not the party to the bill, you will consider whether he ought not immediately to have communicated this to his employer.

It appears to me a case for moderate damages, and though you might find generally against all the defenders, I would recommend to you to find specially against each.

Verdict—"For the pursuer,—damages "against Anderson, L. 30, against Gilfillan, "L. 15, against Millar, L. 5."

Robertson and *A. M'Neill*, for the Pursuer.
Jeffrey, *D. F.* and *E. Monteath*, for the Defenders.
(Agents, *Charles Fisher*, and *Wotherspoon* and *Mack*.)

PRESENT,

LORDS CHIEF COMMISSIONER AND CRINGLETIE.

BUTCHARD *v.* WALKER AND WEST.

1830. July 20.

Finding for the defenders in a claim for indemnification for improvements made on a farm.

THIS was an action by a tenant to recover compensation for improvements made on a farm.

DEFENCE.—The pursuer is not entitled to the profit arising from the improvements, but

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to his outlay, under deduction of the benefit reaped by him from the improvements.

ISSUE.

" It being admitted, that, on the 14th day " of April 1821, the Directors of the Bank of " Scotland let to the pursuer a certain portion " of land in the neighbourhood of the village " of Auchtermuchty, for the period of nine " years from Martinmas 1821, under condition " that it should be in the power of the proprie- " tors to resume possession of the land at Mar- " tinmas 1826, upon condition, however, of in- " demnifying the pursuer for such improve- " ments as he may have made on the lands, and " not reaped the benefit of:

" It being also admitted, that, on the 8th " day of November 1825, the defenders pur- " chased the said lands, and at Martinmas " 1826 resumed possession of the same in terms " of the said agreement;

" Whether the pursuer made improvements " on the said lands, of which he did not reap " the benefit prior to Martinmas 1826; and " whether the defenders wrongfully failed to " indemnify the pursuer for the improvements " so made,—to the loss, injury, and damage of " the pursuer?"

Anderson opened for the pursuer.—The issue shows the question; and it is a hard case for the pursuer, as the lands were in bad order, and he much improved them. He cannot now prove all he laid out on them, and the landlord got the four most profitable years of the lease. We are entitled to the profit drawn during these four years, and the defender will only allow us part of the sum laid out. We are at issue both on the fact and law. The case of Sharp *v.* Burt, 31st July 1788, Mor. 15262, shows the principle on which this ought to be decided. Having resumed possession, the proprietor must pay the loss suffered by the tenant.

Cockburn, for the defender.—It would save time if the Court fixed the point of law, as it would limit the proof to the outlay which had not been repaid.

Circumstances in which the Court would not fix the construction of a missive prior to the pursuer leading his evidence.

LORD CHIEF COMMISSIONER.—From the question which has been raised, we naturally looked from the issue to the summons and defences; and it appears to us, that both parties push the question to an extreme; the defender maintaining that the pursuer is not entitled to any thing after he quits, while he maintains that he is entitled to all the profits that would arise during the lease. This question is brought

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to trial on the issue before us; and the real question is, whether he made improvements of which he has not reaped the benefit? It appears to us that the construction of the missive requires him to prove that he made improvements, and that he was not indemnified. He is not entitled to his outlay; but he must show the improvements, and that he has not reaped the benefit of them.

Hope, Sol.-Gen.—I shall show that part of the land was of scarcely any value before the lease. The question now is, not whether the improvements extended over one, two, three, or the whole of the lease. The question is, whether he reaped the fair return on the improvements made by him? Whether he is indemnified for the profit he would have made.

Cockburn.—The point is, that, if he laid out L. 100, he is to be *indemnis*, and we say that he is indemnified for the improvements.

LORD CHIEF COMMISSIONER.—The question is, whether he reaped the benefit prior to 1826, or how long he is to draw the return? I wish the Court of Session had construed the terms of the missive; but we will not at this stage restrict it for the one party, nor extend it for the other.

At the close of the evidence for the pursuer,

LORD CHIEF COMMISSIONER.—Have you any one to prove exactly the comparison of outlay and receipt? If not, it appears to me there is some difficulty in the pursuer's case. There has been some loose evidence as to the improved value of the land, and on this I entertain no doubt; but the true question is, whether he reaped the benefit, and, for any thing which appears, he may be full in pocket? In the present position of the case, you (the jury) may find for the defender; but, if you are not prepared to do so, Mr Cockburn must proceed. I would only remark, that a case of this sort must be made out clearly and distinctly to the jury, by accurate computation of what *was* laid out, and was *not* received again.

The jury not being prepared to find for the defender,

LORD CHIEF COMMISSIONER.—You must then resume consideration of the case without prejudice from any thing which has passed.

Cockburn, for the defender.—I cannot conceive any one who understands what a pursuer must make out, doubting in this case. The pursuer takes a lease for nine years with a break,

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and what he is to get is not the profit he might have made—not the extravagant rent which has been stated—but if he lays out L. 10 on improvements, and increases the rent L. 100, still he only gets the L. 10. If he has drawn that from the improved land, he gets nothing from the landlord. The pursuer kept no account of his improvements, and there is not a particle of evidence showing that he did not reap the benefit of them prior to 1826.

LORD CHIEF COMMISSIONER.—From the course this case has taken, I shall go rather more at length into the state of the evidence than formerly. It is the duty of a Judge to tell the jury if he thinks the pursuer (who is bound to make out his case) has failed in doing so. It is the duty of the jury to find according to the principles applicable to the case. A judge may observe on the reason of the thing to a jury, and may state principles, but ought never to trench on the province of the jury, or press on them any opinion he may have formed of a fact, so as to prevent their deliberating on their verdict.

No jury can understand a case unless they understand the issue, and what they *are* and what they are *not* to try. In the present case,

the pursuer comes bound to prove not only that he made improvements, but that he has not been indemnified; and if he fails in proving this, the defender is entitled to a verdict, as a verdict of not proven is not applicable in this Court. The agreement and the issue show that the question is not the profit he might have made during the remaining four years, but whether he was indemnified. A person entering into such a lease was bound to keep an accurate account of what he laid out and of what he drew in, but here neither has been proved—and things are in such a state that you can neither say the sum he laid out or what he drew in, and yet it is on the comparison of these that your verdict ought to rest. It is proved that he laid on lime and dung, but it is also proved that he reaped wheat and barley; and though you are not to conjecture what this put in his pocket, it is fair to say that this was a mode of cropping as likely as any other to put money in his pocket.

On the whole, I am sure your good sense will come to the same conclusion which I formerly stated shortly, that the pursuer has not sufficiently made out the burden of proof which is on him.

Verdict—"For the defenders."

Hope, Sol.-Gen., and *A. Anderson*, for the Pursuer.
Cockburn, and *D. M'Neil*, for the Defender.
(Agents, *John Johnson* and *Thomas Leburn*.)