[*9th April* 1835.]

GEORGE JOHNSTON junior, Esquire, Appellant.
S. A. Murray.

THE EDINBURGH AND GLASGOW UNION CANAL COMPANY, Respondents.— *Keay* — *Bruce.*

Proof.—Parole proof to control the terms of a written agreement refused to be admitted.

Circumstances under which two defenders were held (affirming the judgment of the Court of Session) bound under an agreement with a pursuer in mutual relief of a claim of damages, although it was afterwards proved that neither party was the cause of the damage.

2D DIVISION.
Ld. Medwyn.

IN the year 1829 an action of damages was brought before the Court of Session at the instance of May Rogers, late cook to John Innes Esq. of Cowie, narrating, that on the 24th day of June of that year she was sent by Mr. Innes from his house at Portobello to his country residence at Ratho-hall, and she accordingly proceeded so far on her journey as Port Hopetoun, where she entered on board a passage-boat, the property of and employed by the Edinburgh and Glasgow Union Canal Company to convey passengers: that they proceeded up the canal till they came opposite to Redhall quarry, which was held in lease by the appellant Mr. Johnston, where the passage-boat was brought in contact with a boat belonging to Mr. Johnston, which was lying at the side of the canal without any person on board, and used by him for conveying stones from the quarry to Port

JOHNSTON v. EDINBURGH AND GLASGOW UNION CANAL COMPANY.

9th April 1835.

Hopetoun, &c., on board of which there was a crane, with which large stones are raised, and the boat loaded or unloaded by means of it: that this crane, through the gross neglect of Mr. Johnston, or those intrusted by him with the management of his boat, was left unfastened, and when the Canal Company's passage-boat was improperly brought into contact with it, the crane swung forcibly round and struck May Rogers, who was then standing upon the deck of the Canal Company's boat with several other passengers, so violent a blow, that it dislocated and separated her right shoulder from her breast-bone, and thereby severely and dangerously injured her person; and she was, besides, materially hurt by several of the other passengers, who were also knocked down by a spent blow of the crane, though not much injured, falling upon her when she was lying on deck: that she was carried out of the canal passage-boat into a house, and a surgeon was immediately sent for, who put the dislocated joint into its place; but the parts had been so much injured and fractured by the blow, that it would not remain united, and it was found necessary to remove her to her master's house at Portobello, where she was provided with proper medical attendance: that she had been informed by medical gentlemen of competent skill that there was a probability that she would not recover from the effects of the blow, and that at all events she was debilitated for life; and all her prospects in life had been frustrated and rendered abortive, and she had been rendered unfit to provide for her daily sustenance. She further alleged, that she had sustained all these injuries through the culpable neglect, carelessness, or inattention on the part of the said Union Canal Company, or those employed and intrusted by them

with the management of the passage-boat, in so far as they ought and were bound by law, and in justice to the passengers, to have noticed that the crane of Mr. Johnston's boat was loose, and ought to have stopped their boat till the crane was fastened, or given timeous intimation to the passengers to keep out of the way, as they must have known the danger they were in, the neglect of which, on their part, was the cause of all the subsequent disasters that befel the said May Rogers as before stated, and rendered them responsible for the consequences, and for the damage she had sustained:—That, on the other hand, the said George Johnston, or those employed and intrusted by him with the management of his boats, were bound, when they leave their boats, to have both the cranes and the boats properly fastened and secured, so as to prevent danger from their being left otherwise; and their culpable neglect of this precaution on the above occasion was, at least in part, the cause of the injury the said May Rogers has sustained: at all events, through the culpable neglect of the said Union Canal Company and the said George Johnston, or one or other of them, or those intrusted by them, she had suffered the great injury and loss before mentioned, and they were jointly liable to her in reparation and damages. She therefore concluded that the Canal Company and Mr. Johnston should be decerned jointly and severally to make payment to her of the sum of 500*l.* sterling in name of damages and reparation to her for the great injury she had sustained in having her breast-bone separated from her right shoulder, and thereby rendering her unfit to follow out her profession, or earning her subsistence, and for the other losses and personal injuries sustained or to be sustained by her in consequence of the culpable neglect of the

JOHNSTON v. EDINBURGH AND GLASGOW UNION CANAL COMPANY.

9th April 1835.

defenders, or those intrusted by them with the management of their boats, as before mentioned, besides 200*l.* of expences.

Both the Canal Company and Johnston brought actions of relief against each other, the former alleging, "That if any injury was sustained by the said May "Rogers in the way and manner described by her in "the summons before narrated, the same was occasioned by the crane on board the boat of the said "George Johnston having been left loose, and for which "neglect he the said George Johnston is alone responsible, and not the pursuers, who had no control or "management of his boat: That the said George "Johnston is therefore bound to defend, free, and "relieve the pursuers against the aforesaid action of "damages at the instance of the said May Rogers in "manner after mentioned;" "and therefore the said "George Johnston ought and should be decerned and "ordained, by decree of our said Lords of Council and "Session, at his own expence to defend the pursuers "against the said action at the instance of the said May "Rogers, and to free and relieve them of the whole "conclusions and consequences thereof:—or otherwise, "the said George Johnston ought and should be decerned and ordained, by decree foresaid, to make "payment to the pursuers of the said sum of 500*l.* of "damages, and 200*l.* of expences, concluded for by the "said May Rogers, or in so much thereof as the said "pursuers may be found liable in to the said May "Rogers in the course of the said process; as also of "100*l.*, or such other sum, less or more, as the amount "of the expences which the pursuers have already "expended, or may expend, in defending themselves

" against the aforesaid process;" besides the expences of their own action.

Johnston on the other hand alleged in his summons, " That even though the very exaggerated account " of the injuries sustained by May Rogers contained " in her summons before narrated be true, she has " no claim for damages or reparation against the " pursuer. The boat belonging to him was lying per- " fectly still and motionless in a part of the canal " where he has a right to station, and where he has " uniformly been in the habit of keeping her, when " the passage-boat, in which the said May Rogers was, " came into that neighbourhood; it was then broad " day-light, and there was abundance of room for the " said passage-boat to have passed the boat of the pur- " suer without coming in contact either with that boat " or with the crane, or any other part of the machinery " that may have been projected from it. No part of " the crane was then projecting from the boat, beyond " the side of which it never can at any time extend " more than three feet; but that, by some negligence or " awkwardness on the part of those who had charge of " the passage-boat, she was brought into collision with " the boat of the pursuer, whose crane, being thus " loosened and set in motion, swung round so as to upset " several persons in the passage-boat, and, among others, " the said May Rogers; but there was no fault what- " ever on the part of the pursuer, or those having charge " of his boat, either in having stationed or moored her " in the place where she then was, or in having placed " or left the crane in any unusual or dangerous position; " the fault, if any, was wholly with those who directed " the passage-boat." He therefore concluded that the Company should be decerned and ordained " to defend

JOHNSTON v. EDINBURGH AND GLASGOW UNION CANAL COMPANY.

9th April 1835.

" the pursuer against the said action at the instance of " the said May Rogers, and to free and relieve him of " the whole conclusions and consequences thereof;" or otherwise " be decerned and ordained by decree foresaid " to make payment to the pursuer of the said sum of " 500*l.* of damages and 200*l.* of expences concluded for " by the said May Rogers, or in so much thereof as the " said pursuer may be found liable in to the said May " Rogers in the course of the said process; as also of " 100*l.* sterling, or such other sum, less or more, as the " amount of the expences which the pursuer has already " expended, or may expend, in defending himself against " the foresaid process," besides the expences of his action.

Both parties put in separate defences against May Rogers' action; and an issue was framed with a view to a trial of the cause before a jury.

On the morning of the day of trial the respective counsel for the parties entered into an agrement of the following tenor:—" We, the counsel for the parties in " the action at the instance of May Rogers against the " Union Canal Company, and George Johnston, tacks- " man of Redhall quarry, agree to settle the case upon " the following conditions:—1st, That the defenders " shall make payment to the pursuer of 200*l.* sterling " in name of damages, and for all other claims on the " part of the said May Rogers against the said defenders; " 2d, That the said defenders shall pay to the said May " Rogers the expences of the action, taxed, as between " party and party, by the auditor of Court; and 3d, " That all questions of relief between the defenders shall " be reserved entire." In pursuance of this compromise, a decree was pronounced against the Canal Company and Johnston, conjunctly and severally, for 200*l.*

of damages, and for 100*l.* 14*s.* 5*d.* as the expences of process.

A dispute having arisen between the Company and Johnston as to the party who was to advance the money, Rogers raised diligence against them both, and the Company paid the amount. The Company then insisted in their action of relief against Johnston, and his action being conjoined with theirs a record was closed, and the following issue sent to a jury:—"It being "admitted, that during the year 1829, the defender "George Johnston was proprietor of a certain boat "used for the purpose of conveying stones along the "Union Canal, from Redhall quarry to the city of "Edinburgh, and that the pursuers, the Union Canal "Company, were, during the same period, proprietors "of another boat for the purpose of conveying passen-"gers along the said canal: it being also admitted, that "one May Rogers was, on the 24th of June 1829, a "passenger on board the said boat, the property of the "pursuers, and on the said day sustained certain inju-"ries, for which, on the 22d day of January 1831, she "obtained decree, finding the pursuers and defender con-"junctly and severally liable in the sum of 300*l.* 14*s.* 5*d.* "as damages and expences on account of the said "injury, and reserving all questions of relief; whether "the said injury was caused by the fault, negligence, or "want of skill of the defender George Johnston, or of "any person or persons in his employment for whom "he is responsible, or by the fault, negligence, or want "of skill of the pursuers, the Union Canal Company, "or of any person or persons in their employment for "whom they are responsible."

The following verdict was returned by the jury:—

JOHNSTON v. EDINBURGH AND GLASGOW UNION CANAL COMPANY.

9th April 1835.

"In respect of the matters proven before them, they "find that the injury was not caused by the fault, "negligence, or want of skill of the defender George "Johnston, or of any person or persons in his employ- "ment for whom he is responsible, nor by the fault, "negligence, or want of skill of the Union Canal Com- "pany, or of any person or persons in their employ- "ment for whom they are responsible."

The Court having applied the verdict, remitted the case to the Lord Ordinary.

Lord Medwyn thereupon (3d June 1832) pronounced this interlocutor:—"The Lord Ordinary, in respect of "the verdict of the jury, finds, in the mutual actions of "relief that neither party has established a claim to "total relief from the adverse party; but as they "mutually agreed to transact the action of damages "brought against them conjunctly and severally, by "paying the 200*l.* with the expences incurred, the "whole of which was paid in the mean time by the "Union Canal Company, instead of being paid by both "in equal proportions, till the mutual claims of relief "were disposed of, finds the Canal Company entitled "to repayment of one half of said sums; therefore "decerns against the defender George Johnston junior "for the sum of 150*l.* 7*s.* 2½*d.* sterling, being one half "of the sums paid by them on the 7th day of February "1831 years, with interest from that date till payment; "further finds the said defender liable in the expences "incurred before the Lord Ordinary under the remit "from the Court; allows an account thereof to be given "in," &c.

Against this interlocutor Johnston presented a reclaiming note to the Court.

Thereafter the Court sisted process till a new summons should be brought on the part of the Glasgow Union Canal Company.

In consequence of this sist the Company raised a new summons libelling on the action at the instance of May Rogers on the above agreement, on the payment of the money by them and the verdict; and they concluded for repetition of one half of the sums paid by them.

In defence against this action Johnston alleged that the minute of agreement was meant and understood by the present parties "to form a contract "between them on the one side, and May Rogers "on the other, in order to compromise and settle her "claim; but it was not meant or intended to regulate "or ascertain any thing relative to their mutual rights "of relief or liability in relief to each other, which "rights, whatever they might be, were merely reserved. "They did, however, enter into a bargain relative to their "relief; but that bargain was verbally made, viz. That "the Canal Company should satisfy May Rogers in the "mean time, and rely on their action of relief for "recovery of the money from Mr. Johnston. It was "on the express condition allenarly that he was to pay "nothing to Rogers, or nothing to the present pursuers, "unless his liability should be established in that action "of relief, that he gave his consent to his counsel to "enter into the compromise with May Rogers." He therefore pleaded that it was competent to prove, prout de jure, the conditions on which two defenders of a personal action may have agreed inter se to transact the action with the pursuer; and further that the parties to this case having agreed to settle the original action in which May Rogers was pursuer, on condition that the Company should pay the full sum agreed to be taken by

JOHNSTON v. EDINBURGH AND GLASGOW UNION CANAL COMPANY.

9th April 1835.

May Rogers for a discharge of the action, and should have relief to the extent only that they should recover in their action which had been previously raised; and nothing having been recovered in that action of relief, the present action was inconsistent with the contract of parties; and a judicial reservation could not decide what these rights were.

The allegations in point of fact were denied by the Company, and they pleaded that, according to the true construction of the agreement, the parties were to relieve each other to the extent of one half; and they maintained that it was incompetent to contradict the legal import of the written document by parole evidence.

This action having been conjoined with the other conjoined process, the Court, on 17th January 1834, pronounced the following judgment:—"The Lords repel "the defences pleaded by George Johnston, junior, to "the second action at the instance of the Edinburgh and "Glasgow Union Canal Company, and decern in terms "of the conclusions of that action: Find the pursuers in "that action entitled to the expences of process, and "remit the account thereof, when lodged, to be taxed; "and recall the Lord Ordinary's interlocutor of June 5, "1832, in so far as relates to the expences of process prior "to the commencement of the said second action."[1]

Johnston appealed.

Appellant.—There is no principle or authority in the law of Scotland, which declares it incompetent for two defenders in a personal action to fix conclusively inter se, by a verbal bargain, the conditions on which they will

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[1] 12 S., D., & B., 304.

transact or settle the action with the pursuer, such as that the one defender shall pay more and the other less, or that the one shall pay the whole compounded sum, and that the other shall pay nothing, but shall merely hold the character of joint debtor to the pursuer, or surety for his associate.

If it be competent for parties defenders thus to adjust matters inter se by a verbal bargain, it must of necessity be competent to prove the fact or terms of the bargain by every form of legal evidence. No doubt the fact that two parties defenders have compounded an action by undertaking to pay a sum of money to the pursuer for a discharge may perhaps give rise to a presumption that they are liable equally, as in a question between themselves, for the compounded sum; but this is nothing more than a presumption, and the rule must have effect, —præsumptio cedit veritati; the Court below therefore did wrong in refusing to admit evidence to establish the appellant's allegation. Besides, the presumption was in favour of the truth of his averment; for, as remarked by a learned judge, the appellant was bound by no contract with May Rogers; whereas the Canal Company, as common carriers, were bound to show that, with regard to them, the accident was the result of an act of God. Further, a public trial tended to discredit them as traders conveying passengers, by showing that the public could not safely use their passage-boats, while the appellant on the other hand loaded his boats with nothing but his own blocks of stone. It is also corroborative of the appellant's averment, that after the compromise the Canal Company actually paid the compounded sum to May Rogers. They no doubt took an assignment to the decree in her favour, but did not attempt to enforce it against the ap-

JOHNSTON v. EDINBURGH AND GLASGOW UNION CANAL COMPANY.

9th April 1835.

pellant; on the contrary, they proceeded with their action of relief. The Court below therefore ought to have either allowed the proof tendered, or assoilzied the appellant.

Respondents.—The appellant's averment of a verbal agreement is irrelevant, and the proof offered of it is incompetent, as the object is to control or modify the written agreement. Under that agreement the parties transacted with May Rogers as conjunctly and severally liable to her; they reserved inter se, not merely the questions of relief, or the actions of relief, which were in dependence between them at the date of that transaction, but all questions of relief, whether under depending suits or suits to be instituted, on whatever grounds the relief might be claimed, and whether to the extent of the whole sums paid to May Rogers, or for a part of them only. Yet the appellant now avers and offers to prove by parole, that there was a verbal condition attached to the written agreement, whereby it was understood and agreed, that unless he were subjected under the action of relief then in dependence at the instance of the respondents against him, he was to pay nothing to May Rogers, and nothing to the present respondents; but this is an attempt to control and narrow a concluded written agreement by parole proof of a verbal condition alleged to have been adjected by the appellant to that agreement in his own favour. There is not the slightest reference to a depending action of relief in the agreement; it is not so limited; and the appellant does not pretend that the respondents afterwards agreed to limit the agreement; his averment is, that it was only on condition of that limitation that he authorized his counsel to enter into the compromise at all. The respondents cannot possibly

know what authority he gave to his counsel; any proof on that subject is clearly inadmissible; and if he be entitled to prove prout de jure verbal conditions inconsistent with the terms of a written agreement, and alleged to have been at the very time adjected to that agreement, then the reducing transactions of the kind to writing will not be a means of preventing disputes arising from the misapprehensions or wilful misunderstandings of men, but the commencement of strife only. But the rule of the law of Scotland is that a written contract cannot be disproved or controlled by parole.[1]

The allegation is however altogether unfounded, and the appellant's case is rested on averments which are either misrepresentations of the fact or inconsistent with the truth. It was not part of the agreement that the respondents should pay the full sum agreed to be taken by May Rogers for a discharge of her action; the parties were called as conjunctly and severally liable to May Rogers; and the first head of the contract with that person is, that "the defenders shall make payment "to the pursuer of 200*l.* in name of damages; second, "that the said defenders shall pay to the said May "Rogers the expences of the action." It was not the respondents alone who were to pay, but both parties; and though May Rogers was to receive the money, still the conditions of the agreement were not in her favour alone, but in favour of each of the other contracting parties also; inasmuch as they were only to be jointly liable, and not the respondents only, in the first instance, with a claim of entire or partial relief, as the case might be, against the appellant;

[1] Tait on the Law of Evidence, pp. 330, 342, et seq.

JOHNSTON v. EDINBURGH AND GLASGOW UNION CANAL COMPANY.

9th April 1835.

besides, judgment in terms of the agreement was entered in May Rogers's favour, without objection, against both the appellant and respondents. This was nearly a month after the agreement was concluded; and it was not until May Rogers had raised letters of horning on the decreet, and threatened to charge both parties to make payment, that the respondents were compelled, through the appellant's inability or unwillingness to pay his share of the costs, to pay the whole sums contained in the decree of Court. The counsel for the respondents, no doubt, consented, at the time of the agreement with May Rogers, to a request made on the part of the counsel for the appellant, that the respondents should in the meantime advance the stipulated damages; but they gave no consent that the respondents should advance more than their share of the costs awarded; and it was in consequence of the appellant's refusal to pay his share of the costs, that May Rogers was obliged to extract the decree and raise letters of horning upon it; and the respondents paid the whole, and took an assignation to the debt and diligence, in evidence of the fact and further security of their relief from the appellant. But while the respondents by their counsel acceded to the appellant's request, that they should in the first instance advance the damages to May Rogers, their consent did not in any respect interfere with the terms and conditions of the written agreement of parties; it could not extend to the third condition of that agreement, "whereby all questions of relief were reserved entire;" neither did it narrow it by restricting all questions of relief to the action of relief which had been previously raised: the consent to pay the damages to May Rogers left the contract of parties precisely where it previously stood.

JOHNSTON v. EDINBURGH AND GLASGOW UNION CANAL COMPANY.

9th April 1835.

LORD CHANCELLOR.—I shall advise your Lordships to affirm the judgment of the Court below. The sole question of any importance is, whether parole evidence is admissible for the purpose of varying the obvious import, as it strikes me, of this agreement. It is an agreement between the Canal Company on the one side, and Johnston on the other, that they will pay this money. It imports that they will pay in equal proportions, under the circumstances that have ultimately taken place. It was to be subject to all questions of relief. That question appears to be over, in consequence of the finding of the jury that the parties acted under a mistake, and that no blame was attributable to either party; under those circumstances it appears to me that the true construction is, that the two parties were each to pay their equal proportion of the expence. It is contrary to all rules of law in this country, and, if I recollect rightly from the argument, contrary to the rules of law prevailing in Scotland, to admit parole evidence for the purpose of varying a written agreement. The object of the parole evidence offered in the present instance is to put a qualification on the terms of this agreement, contrary to the obvious import of those terms as they stand on the written agreement. I am of opinion, agreeing with the opinion expressed in the Court below, that such evidence was not admissible. I am also of opinion that these two original conjoined actions and the third action that has been brought, having been joined together, are to be considered as one action. The last action became necessary in consequence of some proceeding that took place after the institution of the two original suits, namely, by the finding of the jury, from which it appeared that no blame was imputable

JOHNSTON v. EDINBURGH AND GLASGOW UNION CANAL COMPANY.

9th April 1835.

either to the Canal Company or to Mr. Johnston. It appears to me, that on the question as to the admissibility of the evidence, and on the question as to the form of the suit below, the judgment is right, and ought to be affirmed.

LORD BROUGHAM.—I agree entirely in the view which the Lord Chancellor has taken of this case. I have only heard a portion of the argument, but from what I have heard, I entertain no doubt; and I think it important that it should be understood, that, as far as we know, the rules of evidence are not peculiar to Scotland, but that by the general and well-understood rules of evidence parole testimony is not admissible to alter, or qualify, a written instrument. Upon this subject, there is no difference between the rules that prevail here and those which prevail in Scotland. We have some niceties in the law of England which are peculiar to ourselves; but this does not appear to be one of those cases, for it depends in a great degree on principles of common sense. Where there is a writing, you naturally suppose that is the thing to which the parties have recourse. What is the use of writings, if you are to bring in parole evidence? It would tend to the great multiplication of the chances of error and perjury, to prevent which our Statute of Frauds was passed. With respect to collateral matters it is quite different. A collateral agreement is not an agreement which the parties agree to reduce to writing, and consequently they do not say, "we are to be held bound by "what we have written and signed." I suggest to your Lordships that this is not at all a case of nicety which ought to be exempt from the general rule of allowing the respondent to have his costs. It would be a very dan-

gerous thing if, merely because there was some difference of opinion among the judges in the Court below, parties were to understand that they were at liberty to appeal, and that no costs would be given against them. An appellant might often be willing to pay his own costs for the chance of success ultimately, if he were sure that, at all events, he would not have to pay the costs of his opponent. Upon the whole, I suggest to your Lordships that this judgment ought to be affirmed, with costs.

It was accordingly ordered and adjudged, by the Lords Spiritual and Temporal, in Parliament assembled, "That the "said petition and appeal be, and is hereby dismissed this "House, and that the interlocutors therein complained of, be, "and the same are hereby affirmed: And it is further "ordered, that the appellant do pay or cause to be paid to "the said respondents the costs incurred in respect of the said "appeal, the amount thereof to be certified by the clerk-"assistant."

JOHN MACQUEEN—SPOTTISWOODE and ROBERTSON,—Solicitors.