KYLE AND MISS COOK, ... APPELLANTS.
JEFFREYS, ... RESPONDENT.

1859.
June 27th.

Bills of Exceptions.—Per the Lord Chancellor: A bill of exceptions has always been construed strictly. We can look only at the record to see what was laid down by the learned Judge, and to see whether what was so laid down be exceptionable or not; p. 613.

Per Lord Brougham: There can be no doubt whatever as to the principle laid down by my noble and learned friend, that the exception must hit the bird in the eye, according to Lord Mansfield's phrase in a similar case. The exception must set forth distinctly what it is that the party excepts to; p. 615.

Per the Lord Chancellor: As in England we have abandoned bills of exception, and substituted special cases for them, I would earnestly recommend that in Scotland, if it can now be done according to the existing procedure, that course should be adopted. A special case brings the real merits of the case before the Court; p. 614.

Per Lord Brougham: I quite agree with my noble and learned friend, that there should be a setting forth of the facts in the form of a special case for the opinion of the Court; p. 616.

Per Lord Cranworth: Although I believe there is not power, according to the Scotch Judicature Acts, of having this question embodied in a special case, yet there is certainly a power of turning the matter into a special verdict; p. 616.

Copyright—Primâ facie Title under 5 *&* 6 *Vict. c.* 45.—If the *primâ facie* title be rebutted, the right may be supported without the production of a formal assignment attested by two witnesses.

Per Lord Wensleydale: I think that the opinion of the six Judges in the case of *Jeffries* v. *Boosey* was correct, that since the Statute of 54 Geo. 3. c. 156, there is no

KYLE
v.
JEFFREYS.

occasion to have an assignment in writing of a copyright executed in the presence of two witnesses; p. 617.

Per Lord Wensleydale: I think that the receipt in writing for the price of the copyright would operate as an effectual assignment; p. 617.

IN this case a bill of exceptions had been tendered to the ruling of the *Lord President* delivered in his charge to the jury at the trial of a question of copyright in a song, the composition of Miss Cook, which she had sold to Mr. Jeffreys for 2*l.* 2*s.* as appeared by her receipt produced.

Mr. Jeffreys who asserted the copyright gave in evidence a certificate of registration under the 5 & 6 Vict. c. 45. This was *primâ facie* evidence of title under the statute. The Counsel for the Appellants excepted to the charge of the learned Judge "in so far as it laid down that in the event of *primâ facie* evidence being rebutted, the Pursuer might still support his title without production of a formal instrument of assignment attested by two witnesses." These were the precise words in which the exception was expressed (*a*).

The First Division of the Court of Session disallowed the exceptions. Hence this Appeal.

Mr. *Knowles* and Mr. *Quain* appeared on behalf of the Appellants.

The House, without hearing Mr. *Forsyth* for the Respondent, affirmed the judgment complained of.

(*a*) Mr. Jeffreys might have had the copyright, although no formal deed of assignment had ever been granted. He might have married Miss Cook. She might have died, and he might have been her executor. In either case his title would have been legally sufficient. Even if there had been a formal deed of assignment, it might have been lost or destroyed, and its former existence might have been proved by secondary evidence. Therefore to except in words which assumed "production" of such deed to have been indispensable was erroneous. Besides, there was the receipt of Miss Cook, which satisfied the justice of the case, and as Lord Wensleydale says above, the requirements of the Statute.

The following opinions were delivered :—

Lord Chancellor's opinion.

The LORD CHANCELLOR (*a*):

My Lords, I must advise your Lordships in this case to decide in favour of the Respondent.

A bill of exceptions has always been construed strictly. We can look only at the record to see what was laid down by the learned Judge, and to see whether what was so laid down be exceptionable or not. Now, in this case what was laid down by the learned Judge at the trial was, that "in the event of the *primâ facie* evidence being rebutted the Pursuer might still support his title without production of a formal instrument of assignment attested by two witnesses." Is that right or wrong? My Lords, it is admitted by the learned Counsel who have addressed your Lordships at the bar on behalf of the Appellant that that is perfectly correct, and that the Pursuer might have maintained his title without production of a formal instrument of assignment. If that be so, *cadit questio.*

My Lords, I think it is of the last importance that strictness should be observed upon such an occasion. The learned Counsel (*b*) who last addressed your Lordships said that it would be impossible to bring such a case as this before your Lordships if we were to decide that this was not a proper bill of exceptions. Why, he himself has pointed out the form in which it might have been done. It might have been done by saying "without *proof* of a formal instrument of assignment." But we, looking at this record, must suppose that the exception was taken to the words in which the learned Judge laid down the rule, that the Pursuer's title might be supported without "*pro-*

(*a*) Lord Campbell. (*b*) Mr. Quain.

KYLE
v.
JEFFREYS

Lord Chancellor's opinion.

duction" of a formal instrument. Under these circumstances, there being nothing upon the record to show that it was not used in this sense, we cannot say that the question that was raised was not whether the "*production*" of the instrument was indispensable or not.

My Lords, I feel the less regret in coming to this conclusion, because, looking at the facts of this case, it appears that this was a proceeding *in pessimâ fide.* It would appear that Mr. Jeffreys was most undoubtedly the proprietor of this copyright, and the only objection that could be made to his right was merely formal and altogether unconnected with the merits of the case.

In future I trust that care will be taken in framing these bills of exceptions to see that they do raise distinctly the question that is meant to be brought before your Lordships' House; and I will take the liberty of observing that as in England we have abandoned bills of exceptions, and substituted special cases for them, I would earnestly recommend that in Scotland, if it can now be done according to the existing procedure, that course should be adopted (it may be adopted at the trial just as well as before the trial). It brings the real merits of the case before the Court, and ultimately before your Lordships, much better than by spending words in these bills of exceptions.

If this cannot be done by the present procedure which is established in Scotland, I shall be very happy to assist with my noble and learned friends here in obtaining an amendment of that procedure, by which, instead of bills of exceptions, special cases may be employed.

Therefore, I move your Lordships that the Interlocutor appealed from be affirmed.

KYLE
v.
JEFFREYS.
—
Lord Brougham's opinion.

Lord BROUGHAM:

My Lords, I entirely agree with my noble and learned friend. It is of the greatest importance, as long as bills of exceptions are continued, and this course of procedure is continued, and even after it shall cease and be replaced, according to my noble and learned friend's recommendation, by a more convenient mode of bringing the merits of the case before the Court, namely, by a special case,—even then it will still be of the greatest importance, to adopt the strictest rules for the purpose of bringing the matter at issue formally and regularly before the Court. There appears to have been a great defect in the manner of drawing this bill of exceptions. The learned gentlemen who have very ably argued at the bar on behalf of the Appellant say that it was settled by a very eminent Scotch Counsel. No doubt they would have done it better if, in settling it, they had attended to the course of procedure in this country, where bills of exceptions have long been known, they being necessarily of recent introduction in Scotland, having arisen since the jury trial in civil cases was extended to that part of the United Kingdom. But there can be no doubt whatever as to the principle laid down by my noble and learned friend, that the exception must hit the bird in the eye, according to Lord *Mansfield's* phrase in a similar case. The exception must set forth distinctly what it is that the party excepts to—what part of the ruling, or deciding, or observation (for it may be to an observation of the learned Judge that the party excepts) is the very object of the bill of exceptions. In order to bring that matter before the Court itself before which the bill of exceptions carries the cause, and ultimately to bring it before us as the Court of Appeal, it must be stated distinctly what the point is that is made below, that is to say, what the

KYLE v. JEFFREYS.

Lord Brougham's opinion.

Judge said which the party excepts to. If the whole of the charge of the learned Judge had been set forth in the exception, then the objection might have stated what particular part of the charge was objected to; but here a proposition is objected to about which there can be no doubt whatever.

My Lords, I quite agree with my noble and learned friend that it is highly desirable that where bills of exceptions have been used there should be (subject to the mode of procedure in Scotland) a setting forth of the facts in the form of a special case for the opinion of the Court. I do not distinctly recollect at this moment, any more than my noble and learned friend does, whether the Scotch Judicature Acts preclude this. The inclination of my recollection is, that they do not preclude it, and that there might have been a special case here. I will not, however, take upon me to say how that may be. If that is not included in these Acts it is a defect for which my noble and learned friend, I have no doubt, will be able to obtain a legislative remedy.

I ought to add that as to the merits of the case I agree with my noble and learned friend in feeling no regret whatever that it should go off upon this point; for really when I come to look at the substantial justice of the case it appears to me a satisfactory termination of the case between the parties.

Lord Cranworth's opinion.

Lord CRANWORTH:

My Lords, I have only a word to add to what my noble and learned friends have said. I quite concur with my noble and learned friend on the woolsack and with my noble and learned friend opposite; although I believe there is not power, according to the present Scotch Judicature Acts, of having this question embodied in a special case, yet there is certainly a power,

KYLE v. JEFFREYS.

Lord Cranworth's opinion.

and a power which is continually exercised, of turning the matter into a special verdict (*a*). That has been continually done; and what should have been done in this case was to have had the jury find that the money was paid, and the receipt given; and that there was no other assignment. Whether upon that state of facts judgment should have been given for the Pursuer or the Defender the Court would have to determine; and then the question would have come in a proper way before this House.

I will only add that I trust that my noble and learned friend will not only move to affirm the Interlocutor, but that the Appeal be dismissed with costs.

Lord Wensleydale's opinion.

Lord WENSLEYDALE:

My Lords, I quite concur in the opinions which my noble and learned friends have expressed; at the same time I must observe that I think the Appellants have lost nothing by the inaccurate mode in which the exception has been stated, because I think that the opinion of the six Judges in the case of *Jeffries* v. *Boosey* (*b*) was correct; that since the statute of 54 Geo. 3. c. 156, there is no occasion to have an assignment in writing of a copyright executed in the presence of two witnesses; and I think that in this case the receipt in writing of the 14th May 1841 would operate as an effectual assignment.

Lord Chelmsford's opinion.

Lord CHELMSFORD:

My Lords, I entirely agree with my noble and learned friends, and I will only further say that I am

(*a*) See the Common Law Commissioners' recommendations as to special verdicts, special cases, verdicts directed by the judge, bills of exceptions, and new trials, &c., 2nd Rep. p. 27.

(*b*) 4 House of Lords Ca. 815.

KYLE v. JEFFREYS.

Lord Chelmsford's opinion.

glad that we have an opportunity of showing the necessity of strictness with regard to these bills of exception in raising the very point that is at issue; and I am glad to have an opportunity of acting upon that opinion in a case in which justice as between the parties is not defeated by giving way to the objection.

Interlocutors affirmed, and Appeal dismissed with Costs.

SHEARD AND BAKER—BENNETT AND STARK.