MITCHELL
v.
MAGISTRATES
LINLITHGOW.

PRESENT,

LORD CHIEF COMMISSIONER.

1820.
Dec. 20.

MITCHELL *v.* MAGISTRATES LINLITHGOW.

Found that it has not been the general practice to levy custom upon horses, &c. crossing a part of the river Avon.

AN action to compel payment of custom to the town of Linlithgow, by persons passing at or near the mouth of the river Avon.

DEFENCE.—The Magistrates have not for 40 years collected custom at the place where the defenders cross the river. The rate demanded is beyond the grant.

ISSUES.

"Whether, it being admitted that the "defenders have levied custom at the bridge "of Linlithgow on horses, cattle, carts, and "all other carriages conveying merchandise, "and at Torphichen Mill Ford, or Bridge, "and at the West Bridge, on cattle going to "and coming from Falkirk Tryst, the de-"fenders have not been in the general prac-

" tice, for forty years and upwards, prior to
" the 26th day of January 1813, of levying
" custom upon horses, cattle, carts, and all
" other carriages conveying merchandise, pass-
" ing the river Avon from the West Bridge
" to the mouth of the said river?

" Whether the defenders have not been in
" the general practice, for forty years and
" upwards, prior to the 26th day of January
" 1813, of levying custom at the ford of Jink-
" about, on the said river Avon?

" Whether the said defenders have not
" been in the general practice of levying cus-
" tom for forty years and upwards, previous
" to the 26th day of January 1813, from the
" tenants and others residing upon the estate
" of Kinneil, the property of the Duke of
" Hamilton, passing the said river Avon at
" the ford of Jinkabout?

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This case was advocated from the Sheriff of Linlithgow, who had found the defenders liable.

A witness called for the pursuers, stated that he farmed about 60 acres of ground belonging to himself, in the neighbourhood of Torphichen Mills.

On an Issue as to the practice of collecting custom by the Magistrates of a burgh, a proprietor residing on his property in the neighbourhood of the burgh, a competent witness.

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Moncreiff objected.—He has an interest.

Jeffrey.—If this was an Issue confined to the neighbourhood, he might be an objectionable witness; but this Issue is general, and those in the neighbourhood are the best witnesses.

Moncreiff.—It is said the objection applies to all witnesses; but that is not the case, as the interest of a stranger is so remote as to vanish. Here the interest is manifest, and he is in the same situation as a corporator. Peak, 156; 1. Phillips, 65. (5th edit.).

LORD CHIEF COMMISSIONER.—I have attended to the whole of this argument, as every thing is important on such a subject, and if it is ruled in one way, it strikes at the root of the pursuer's case. In every question of this sort we must attend to what goes to the admissibility, and what to the credit of the witness.

This is a case where there is no individual who may not be said to be interested; and in the case of the individual now offered, I do not think the situation of his property such as to render him inadmissible. When he has no interest as a party—when the verdict can-

not be used by him—and when the objection would apply to all the world, I cannot lay it down that it is an objection to any one of the world, though I do not at present recollect any case precisely in point.

This is not a question whether this person is excluded *virtute tenuri*, but it is a claim by the Magistrates of Linlithgow to exact it from all the world. The objection to the tenants of Kinneil would be quite different; and even in the case of this witness, his evidence is subject to observations by counsel.

Circumstances in which a witness, incompetent to prove one of three Issues, was admitted to prove the other two.

A tenant on the estate of Kinneil was afterwards called to prove the two first Issues.

An objection was taken, that if these were proved, the third was of no consequence.

LORD CHIEF COMMISSIONER.—I wish to know if this advocation contains the whole matter in dispute. My difficulty is from the matter being brought here on a special Issue. If this case were tried on a general Issue, and if one of the questions raised involved the right of the Duke of Hamilton, there is nothing clearer than that this person would be interested. If this third Issue was

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contained in the summons, and was made separate merely for greater perspicuity, then I cannot lay down a different rule for the different Issues; but if this was added by the parties in the Jury Court, then it may be treated as a separate cause, and the objection will not apply to the evidence on the other Issues.

Mr Jeffrey observed, that it was not in the summons or advocation, which Mr Cockburn said strengthened the objection.

LORD CHIEF COMMISSIONER.—The argument by Mr Cockburn applies to what is gone by, but does not bear on this question. I still think I was right in the decision on that point, and if I am wrong, the remedy is by Bill of Exceptions. Suppose any question as to the toll on Leith Walk, would all the inhabitants of Edinburgh be incompetent witnesses? My only difficulty on the present objection, is from the uncertainty whether this question formed part of the original cause, and was separated merely for the purpose of greater precision. If so, then, as this person could not have been a witness on the whole, so he could not have been as to a

part; but as this appears to me not to have been a part of the original cause, I think he is admissible.

The witness having stated that Brown was at one time tenant of the customs of Linlithgow, and that he sent a man to watch at Jinkabout, to know how much he lost,

Cockburn.—The person is alive, and ought to be called.

LORD CHIEF COMMISSIONER.—The witness is speaking as to a statement by another person, and your objection is that it is hearsay. But surely what the customer says is evidence, whether he is dead or alive.

An objection was taken to the question, What does the tenant get by the custom table?

LORD CHIEF COMMISSIONER.—You may go through the different articles in the table, and ask as to each, but you cannot put this question as to what he gets by his lease. The table contains the different articles, and if you wish to shew the practice, you must do it by facts, and not by opinions. But it does seem to me that this is unnecessary, as the

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instrument carries the right, unless the contrary is proved.

Jardine, for the pursuer.—The Magistrates have an old grant of custom, according to use and wont; and they now claim a right to collect it at every point; but we shall confine our proof to five points at which they did not collect. The question here is as to the general practice, and not as to a few instances in which custom may have been exacted.

Moncreiff, for the defender.—A great deal of the pursuer's evidence does not apply to the question to be tried. It is a mistake to say this is a grant of the customs in use, to be collected before 1695. The grant is absolute, and use and wont merely applies to the rate. This is not a mere gratuitous grant, but for supporting the bridge of Linlithgow.

The Magistrates having an absolute grant, their collecting at some points keeps up their right as to all; and the proof on the other side being confined to a few individuals crossing at a few points, does not entitle the pursuer to a general verdict.

Jeffrey.—All the witnesses for the defenders confirm what was stated by ours. The question here is not, if at any time duty was

collected, but if it was the general practice not to collect.

We are bound to prove that no toll was levied; but our evidence, though negative, in fact proves positively. From what is proved, we are entitled to a general verdict.

LORD CHIEF COMMISSIONER.—In this case, the question is so clear, that it is scarcely possible to elucidate it.

The first Issue contains the point to be tried; and the Court of Session send it here to have the question settled, Whether, &c. The question is put in a negative form; and it was truly stated that the pursuers are bound to prove; and that you cannot take negative evidence against positive. When a party is to establish a proposition, the proof is positive; and even where he is to establish a negative, that is done by a positive proof of facts. If it is to be proved that no toll is levied, the way to do this is by proving persons passing without paying.

The question here is as to a general practice; and it appears to me that the Issues are established beyond the possibility of doubt. All the witnesses for the pursuers prove their having passed without paying;

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and, on the other side, though one witness speaks of something having been collected at one point, the others appear to me to confirm the testimony on the other side.

They also prove, that when an attempt was made, it was resisted, and not enforced, which goes far to prove that there is no general practice to collect.

If you agree with me in the view of the evidence, you may find generally on the first Issue.

As to the other Issues, it may be thought that it is unnecessary to find on them; but it appears to me that it would be more satisfactory to the Court to have a finding on each.

Verdict—"That the defenders have not "been in the general practice, for forty years "and upwards, of levying custom upon "horses, &c. from the West Bridge to the "mouth of the river Avon, or at the ford of "Jinkabout: That they have not been in "the general practice of levying custom from "the tenants and others residing upon the "estate of Kinneil, passing the ford of Jink-"about."

Jeffrey and *Jardine*, for the Pursuer.
Moncreiff and *Cockburn*, for the Defenders.

(Agents, *Ro. Rutherford*, W. S. and *A. Watson*, W. S.)

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PRESENT,
THE THREE LORDS COMMISSIONERS.

HARPER *v.* ROBINSONS & FORBES.

1821. Jan. 8.

Damages for defamation, and causing the pursuer to be tried for reset of theft.

DAMAGES for defamation, and combining to cause the pursuer to be apprehended, and tried for reset of theft.

DEFENCE.—Iron had been stolen from the Messrs Robinsons, of which they gave notice to the local magistrate, Mr Forbes, who acted in the discharge of a public and official duty.

ISSUES.

In this case, the Issues were, Whether the defender, Forbes, combined with the Robinsons to defame the pursuer, by presenting a petition, accusing him of reset of theft?—