

had been done. The question of writ or oath was one of great nicety and delicacy, and he should be sorry on light grounds, or on such averments as were made and had been proved in the present case, to throw any discredit on the valuable *dicta* made by some of the learned judges in the cases referred to. The observations of Lord Medwyn in the case of *Lockhart* were particularly valuable; and, without saying whether or not the writ of one partner might be held to bind the company, there was nothing in the present case requiring the Court to accede to the extension of the principle that was asked by the reclaimers.

The other Judges concurred.

Agents for pursuer—Patrick, M'Ewen & Carment, W.S.

Agents for defender—Cheyne & Stuart, W.S.

Wednesday, November 20.

FIRST DIVISION.

HOPE *v.* LORD ADVOCATE.

Exchequer—Non-Entry Duties—Issuing of Crown Charter—A draft charter of confirmation was lodged with the Presenter of Signatures on 15th April. It was not ready to be given out till after Whitsunday. *Held*, in the circumstances of the case, that the vassal was not liable in a half-year's non-entry duties claimed by the Crown in respect that the charter was not ready to be given out till after Whitsunday. *Observed* that neither the date of presenting the draft charter nor the date of completing the charter, can be taken as an invariable rule in giving the amount of duty, but that every case is special.

This was a note of objection for Henry Walter Hope, Esquire of Craighall and Waughton, to the amount of duties marked by the Presenter of Signatures and Queen's Remembrancer on draft charters of confirmation in favour of the objector in the lands of Luffness, Waughton, Saltcoats, Craighall, and Easter Fairney.

It appeared that the last vassal, George William Hope, Esq., died on 18th Oct. 1863. The draft charters of confirmation in favour of the objector were lodged at the office of the Presenter of Signatures on 16th April 1867. It was found that one of the requisite titles was wanting, and that there was an error in the destination. These matters were put right on 1st May. Thereafter, the report by the Presenter of Signatures bore—"The clerk to the Presenter having gone over the new production and made the necessary corrections upon the drafts, the whole titles, along with the drafts, were on Friday, 3d May, sent to the Presenter for revival. On the 7th of May they were returned from the Presenter revised, and the Presenter's clerk then proceeded to make out notes of the non-entry and other duties payable to the Crown. This occasioned considerable calculation, and, on the 9th of May, notes of these duties were sent to the Auditor in Exchequer for revival and authentication. In fixing these duties the clerk to the Presenter only charged three and a-half years' non-entry duties, expecting that the drafts might probably be carried through before the term of Whitsunday 1867. But in going over the notes of duties, the Auditor in Exchequer considered it necessary to have evidence whether certain mines and minerals, on the value of

the workings of which a duty was payable to the Crown, had been wrought, and, on the 14th May, notice of this having been given to the Presenter's clerk, he on the same day wrote to the objector's agent, requesting to know whether these mines and minerals had been worked, and also requesting him to send the receipt for the last payments of the feu-duties. On the 24th of May the objector's agent sent the necessary information, as will be seen from his letter herewith; as the term had then passed, an additional half-year's non-entry duty became payable."

Mr Hope contended that, as it was not his fault that the non-entry duties were not fixed and paid prior to Whitsunday 1867, he ought not to be charged with the additional half-year's duties.

It was stated in reply for the Presenter of Signatures, that the uniform practice in Exchequer had been followed, and that the original cause of delay lay with the objector. Answers were also lodged for the Commissioners of Woods and Forests.

The Lord Ordinary (ORMIDALE) held that, in the special circumstances of the case, the objector ought not to be held to have incurred the additional half-year's duty, but did not adopt either, on the one hand, the contention that the date of presenting the draft charter was to be the rule in all cases; nor, on the other hand, that the date when the charter was completed was to be the invariable rule. Expenses to neither party.

The Lord-Advocate reclaimed.

SOLICITOR-GENERAL (MILLAR) and T. IVORY for him.

ADAM in reply.

At Advising—

LORD CURRIEMHILL—I concur with the Lord Ordinary.

LORD PRESIDENT—I am of the same opinion. We are told by the Officers of State, that since the passing of the Crown Charters Act it has been the uniform practice in Exchequer to calculate non-entry duties from the date of the charter, and not from the date of lodging the draft, and that a contrary practice would lead to confusion. If by that is meant that under no circumstances whatever can the calculation of non-entry duties be made from any other date than delivery of the charter, the sooner that practice is put an end to the better. It might lead to the greatest hardship if there were any such inflexible rule, and the present case seems to be illustrative of this position. But I am not prepared to assent to the proposition that the date of calculating the non-entry duties is always to be the date of lodging the draft. That would be equally unjust and absurd. We are dealing with a special case, and every such case is special. The facts necessary for our judgment may be shortly stated. The first application on the part of Mr Hope was made on the 16th April, that is, just a month before Whitsunday. And certainly when an application is made for that charter a month before the term, it may reasonably be expected that the charter will be obtained before Whitsunday, and that no non-entry duty will be incurred in respect of the arrival of that term. It is true that here the draft was incomplete. There was a title wanting, and there was also some error in the destination. But it is to be observed that these difficulties,—the only difficulties in the Presenter's office,—were completely removed before 1st May. There was then a full fortnight to give out

the charter before Whitsunday. See what followed. The Presenter says that his clerk having gone over the new productions, and make the necessary corrections upon the drafts, the whole titles, along with the drafts, were, on Friday 3d May, sent to the Presenter for revision. On the 7th of May they were returned from the Presenter revised, and his clerk proceeded to make out notes of the duties. This required considerable calculation, and on 9th May notes of the duties were sent to the Auditor in Exchequer for revision and authentication. These are the notes we have printed before us, and in which the non-entry duties are clearly brought out. In the 4th set, applicable to the lands of Craighall in Fifeshire, the mines and minerals are entered as of no value,—no duties being due in consequence of the mines and minerals not having been worked. That was sent on 9th May to the Auditor in Exchequer, and on 14th May it is authenticated by him as a correct note of the non-entry duties, the total non-entry duties being brought out by addition, on the footing of charging nothing for the mines and minerals. It must have been therefore after he had actually authenticated this note as a correct statement, that it occurred to him that it might be as well to inquire if the mines had been wrought. I don't ascribe to him any blame for instituting such an inquiry. But if such a thing occurs to him just one day before the term, when it has all along up to that day been held by all parties, including himself, that nothing is chargeable, it will not do for him to say on the eve of the term, I shall direct inquiry, though the result will be to throw the charter past the term day. I think that is practically unjust. We must remember that we here represent the Crown, coming in place of the Barons of Exchequer, and administering the affairs of the Crown, and we must do what is necessary to control the servants of the Crown. Here it is necessary to interfere for that purpose.

LORD DEAS and LORD ARDMILLAN concurred.

Reclaiming note refused, with expenses to objector since the date of the Lord Ordinary's interlocutor.

Agents for Objector—Hope and Mackay, W.S.

Agent for Crown—A. Murray, W.S., Solicitor H. M. W. & F.

Wednesday, November 20.

LYELL v. GARDYNE.

(*Ante*, vol. iii, 299; *vol.* iv, 14, 237.)

Expenses—New Trial. In an action of right of way raised by one of two conterminous proprietors against the other, the jury found for the pursuer. The verdict was set aside, and in a new trial the jury found for the defender. *Held*, in the special circumstances of the case, that the defender was entitled to expenses of the first as well as of the second trial.

This action was raised by Mr Lyell of Gardyne, in Forfarshire, against Mr Bruce Gardyne of Middleton, for the purpose of establishing a public right of way through the defender's lands leading from Gardyne Den northwards to the Forfar turnpike road. The case was twice tried. On the first occasion the jury returned a verdict for the pursuer. That verdict was set aside as contrary to evidence, and a new trial granted. The case was

then sent to a special jury, who found for the defender.

The defender now moved the Court to apply the verdict, and for expenses. The pursuer moved for his expenses of the first trial, in which he had been successful, and for the expenses of discussing the rule obtained by the defender.

CLARK and WATSON, for the pursuer, supported the motion chiefly on the ground that the defender had failed in the first trial to adduce certain witnesses whose evidence was, in the second trial, held to be very material for the defender's case. The defender had thus simply made use of the first trial as a rehearsal. They opposed the defender's motion for expenses on the authority of *Lindsay v. Shield*, 31st January 1863.

SOLICITOR-GENERAL (MILLAR), and Æ. J. G. MACKAY for defender.—In none of the cases have the expenses of the first been given to the party losing the second trial where the expenses of the first have been reserved; the most he can ask is that these expenses should be given to neither party. The present is an exceptional case, of the nature alluded to by the Lord President and Lord Deas in *Lindsay v. Shield*—the pursuer having shown bad faith in bringing the action when his predecessors had acknowledged by letter that the road was private. The defender therefore should have the expenses of the first trial: his evidence at both trials had been substantially the same.

The following cases were cited:—*Lindsay v. Shield*, 31st January 1863, 1 Macph., 380; *Barns v. Allan & Co.*, 20th December 1864, 3 Macph., 269; *Millar v. Hunter*, 24th November 1864, 4 Macph., 78; *Magistrates of Elgin v. Robertson*, 12th March 1862, 24 D., 780.

LORD PRESIDENT—The only anxiety I have in disposing of this case is, that we should not seem to throw any discredit on the general principle that is enounced by Lord President M'Neill in the case of *Lindsay*. I agree with the principle which that judgment contained, and particularly with the way in which the Lord President enounced it. If there arise a pure case of a verdict in a first trial for a pursuer, and then, that being set aside as against evidence, a verdict in a second trial for the defender—there being no appearance or allegation of misleading or misconduct of the case on either side—the proper course would be to find neither party entitled to the expenses of the first trial. The only question is, Is this a case for the application of that rule? For, as to the pursuer's claim for expenses, that is out of the question; and the only difficulty is, Has the defender a right to the expenses of the first trial? Now, I cannot see that it was through any fault of the defender that he did not gain a verdict in the first trial. It was against him, but the jury ought to have found for him, and therefore there was no misconduct attributable to the defender. That, however, is not enough to lead the Court to the conclusion that he ought to have the expenses of the first trial. But looking to the nature of this case, there are some things weighing unfavourably on the pursuer. This is a case of one or two conterminous proprietors claiming a road through a neighbour's policy, and he is not content with a servitude, but he insists on making the road public. Now, I cannot help supposing that in claiming on that ground he speculated on the inclination of a jury as to public roads, and he probably got his first verdict by shaping his claim in that way. If so, that would