## INVERNESS.

PRESENT,
LORD PITMILLY.

## MACKENZIE *v.* ROSS.

1818. September 11

AN action of molestation, declarator, and damages, on account of the defender having used a road through the property of the pursuer, and repeatedly pulled down a march-dike built across it.

Damages claimed for using a road.

DEFENCE.—A denial of having illegally broken down the march-dike, or used any road through the property, to which he had not a just right by his titles and immemorial possession.

ISSUES.

" Whether the road leading through the " pursuer's property from Taynauld to Ross- " hill-House, the property of the defender, " was first made by the defender's father " breaking through the march-dike that se-

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" parates the defender's property from that " of the pursuer; and the pursuer having en- " deavoured to put a stop to the said en- " croachments, by rebuilding the march-dikes, " or otherwise, Whether the defender, by " himself, or others acting in his name, and " for his behoof, have broke down said dike " as often as it has been rebuilt, or at least " repeatedly, and continued the said encroach- " ment on the pursuer's property, by using it " as a road, to the loss and damage of the said " pursuer? or,

" Whether the said road has been used as " a public road from time immemorial?

" Damages claimed by the pursuer in the " summons, L.2000."

In this case an order was obtained for a view. The agents could not agree on the viewers; and in that event, 55. George III. c. 42, § 29, provides, that " six or more " of the first twelve on the list of Ju- " rors returned by the Sheriff," shall have the view. The subject in dispute being situate in the county of Ross, the Clerk named the first six on the list returned by the Sheriff of that county.

When the case was called on for trial,

*Moncreiff*, for the pursuer, objected.—A party in general has a right to challenge the Jurymen peremptorily, and for cause. But in the case of a view, he is excluded from this privilege as to six of the Jury, by the 29th section of the Act. The agent for the pursuer objected to the three named for the defender; and therefore the duty devolved on the Clerk, who named these three, along with others, to have the view.

Viewers to be taken from the county where the subject in dispute is situate.

Russel's Form of Pro. p. 40.

The provision is, that six out of the first twelve must be named. The list for Inverness was first in the hands of the Clerk, and also first in the list made out by him, and was first read in Court. There are some of the viewers to whom we do not object; and as there is a provision that the trial may proceed, though the whole named have not had a view; those who are objected to may be omitted, and their place supplied by ballot.

*Cockburn*, for the defender.—This is saying the case cannot be tried fairly, or even intelligibly.

No protest was taken against the nomination by the Clerk; on the contrary, the pursuer was named his own shower, to point

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out the subject in dispute, and the view proceeded. Notwithstanding this, he now does not move to delay the trial, but says the proceedings must be annulled, that he may enjoy the *imaginary* right of peremptory challenge.

There is no ground in law for this objection, as the Clerk is not directed to make a list; nor is there any provision in the statute as to how the counties are to be arranged. It is the principle of trial by a Jury, that the Jurors ought to be from the vicinage; and, indeed, there is no method by which gentlemen could be sent from Inverness-shire, for the purpose of taking a view in Ross-shire. The case is not provided for in the Act, of more than one Sheriff: it therefore was a matter of discretion with the Clerk, which county should be placed first. A view has been had; and if the viewers are rejected, we must move to delay the trial, as it cannot properly be tried without them. The safest way is to allow the trial to proceed, and this discussion can go on upon an application for a new trial; but if we are forced to a trial without the viewers, the whole expence may be incurred to no purpose.

*Moncreiff.*—It is admitted that this case is not provided for. It is six out of the first twelve, which shows there must be a list, consisting of at least twelve; and there are only eight from Ross. It is the universal practice, and seems sanctioned by the 20th section of the Act, to follow the example of the Justiciary Court, and to place first, the Jurymen of the county in which the circuit town is situated. The other party must show a positive rule, or the trial cannot proceed on this view. It is a fallacy to say the Sheriff cannot send the Jurors to another county: he may direct them to go, and there is no compulsitor whether the place is situate in his own, or another county. A fine is the only compulsitor to make them attend the Circuit; and there is no fine in the case of a view.

LORD PITMILLY.—There is no precedent to guide me, as this is the first case in which the agents have not been able to agree upon six out of the Jurymen. I impute no blame, but merely state the fact. In this situation the Jury Clerk was to exercise his discretion; and he has done what appeared to him fair and right.

I must consider, 1*st*, The enactment of the

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statute; and *2d*, What appears necessary in the circumstances which have occurred.

The statute does not contemplate the precise case which has occurred: The 29th section proceeds first on the supposition that parties would agree; but if they differ, then the enactment is, that six or more of the first twelve on the list of Jurors returned by the Sheriff, not Sheriffs, shall have the view. It contemplates only *one* return, and applies to the list made up by the Sheriff, not to one made by the Clerk. But there are returns by *four* Sheriffs, and the Clerk may arrange these as he chooses. The Clerk puts this question to himself, Shall I issue a precept to the Sheriff of Inverness which he cannot execute, and may therefore disobey? Shall I bring this Court into the situation of issuing a precept which is null? He thinks this improper, and therefore issues the precept to the Sheriff of Ross, who is bound to obey it, and the gentlemen are bound to attend. In doing so, I am of opinion the Clerk did right. Besides, when we are all met here—when so much expence has been incurred—when a view has been had, at which the pursuer was present, and acted as a shower—when a view is necessary from the nature of the case—and

when it would be so inconvenient to go through the whole of this again; even if I doubted what might have been the proper course to follow, in the first instance, I would be of opinion that the trial ought to proceed.

If there is any special objection to any of the viewers, of course it may be stated as a reason why he should not be on the Jury.

To this decision a Bill of Exception was tendered. And as one of the viewers had been appointed tutor to the defender, Mr Cockburn consented that he should not be put on the Jury.*

Proof on Commission, in a cause against the father of the defender, relative to the same subject of dispute, received as evidence after the death of the witnesses.

It was stated for the pursuer, that formerly there had been a question as to this road, with the father of the defender; and after discussion, the depositions of some of the witnesses who were proved to be dead, were read.

*Matheson* opened the case, and stated the facts. He would prove that there was no road in the situation contended for, till the late Mr Ross made it in 1796, when he im-

* See *post*, pp. 20 & 28.

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properly shut up another road; till that time, no one had any interest that there should be a road where the defender wishes to establish one.

*Cockburn*, on the other hand, said he would prove there had always been a road in the direction contended for; and the Jury must take this positive, in opposition to the negative evidence which had been produced.

*Moncreiff*.—The defender has no right to this road by his titles, and must therefore prove immemorial possession. To this extent he is the pursuer, and bound to prove his case. He has only proved that some persons broke down the fence, or went over it, which is not uncommon, where there is no road.

LORD PITMILLY.—This is purely a question of fact, unmixed with law. But before stating the evidence, I may mention, that it will not be sufficient for the defender to prove, that he or others went clandestinely by this road. The question is, Whether the possession was clear and undoubted?

In the Court of Session, the averments were so opposite, that they sent this issue to

have the fact ascertained. The pursuer says, there was no road till it was made by Ross—that there was a march-dike across what is now the road—and that the dike was repeatedly rebuilt, when pulled down by the defender; and being the pursuer, he is bound to prove his averments. On the other hand, the defender says there was always a road here, and he must prove immemorial possession.

There is much important proof on both sides, and the Jury must consider and come to a conclusion as to which is right. It is my duty to state the important points, and I shall do so without encroaching upon the province of the Jury, by even hinting an opinion. (His Lordship then read a considerable part of the evidence on each side.) The result of the evidence is, that the witnesses for the pursuer state that there was no track, and no slap. Those for the defender agree that there was a road and a slap.

A general finding for the pursuer or defender is sufficient; but it is quite competent to find specially the facts you consider proved.

"Verdict for the defender."

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v.
Ross.

*Moncreiff* and *Matheson* for the Pursuer.
*Cockburn* and *Maitland* for the Defender.

(Agents, *James Pedie*, W. S. and *Joseph Gordon*, W. S.)

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Direction by a Judge in a matter preliminary to a Trial, not a subject for a Bill of Exceptions.

**14*th June* 1819.**—A motion was made (in presence of the three Lords Commissioners), that Lord Pitmilly should be authorised to sign the Bill of Exception in the above case.

LORD CHIEF COMMISSIONER.—We must refuse this application, as it relates to a matter preliminary to a trial. If granted, it would be set aside in the House of Lords for irregularity, Bill of Exceptions not being the remedy for such a proceeding. It is like an objection to the notice or summons of a witness, which may occasion what is termed a mis-trial; the remedy for which is not a Bill of Exceptions, but an application for a new trial.