

Friday, 11th December 1868.

LINDSAY AND LONG *v.* ROBERTSON AND
OTHERS.

(*Ante*, vol. iv, p. 91 ; vol. v, p. 555.)

Verdict—*Mussel-Fishings—General Title—Prescriptive Possession—Barony*. Motion for a new trial to set aside the verdict of a Jury, finding that the pursuers had established a right to mussel-fishings under a general title, by proof of prescriptive possession, on the ground that the verdict was contrary to evidence, *refused*.

This case, which relates to the right to the mussel scalps on the north bank of the river Eden, was tried before Lord Barcaple and a jury during the last summer session. These scalps were claimed by the pursuers, Sir Coutts Lindsay and Colonel Long, on the ground that they had had the exclusive possession of them during the prescriptive period which set up their general title. The fishermen of St Andrews, on the other hand, maintained that they had effectually interrupted the alleged possession. The jury found for the pursuers.

The defenders moved for a new trial, on the ground that the verdict was contrary to evidence, and obtained a rule.

YOUNG, Q.C. (with him WATSON and BALFOUR), in showing cause argued that, assuming the possession of the defenders to have been the most favourable,—that it had been continuous, open, and persistent, it could be of no avail to them, for it was possession which could not be referred to a title. It had been decided by the judgment of the Court in the case of *The Duchess of Sutherland v. Watson and Others*, that the right of mussel-fishing was patrimonial property; the defenders, therefore, who appeared in the action as members of the public could have no title. That being so, the alleged possession of the defenders was illegal,—an act of trespass. They were nothing but thieves, and therefore any amount of such possession that they might set up would never avail to interrupt the possession of the pursuers.

D.-F. MONCRIEFF (with him A. MONCRIEFF and W. A. BROWN) in support of the rule.

The pursuers, in showing cause, had not read a word of the evidence, and yet it was on the ground that the verdict was contrary to evidence that the defenders had obtained a rule. There was a strong body of evidence to show that the defenders had during the prescriptive period been in the habit of going over to the north side of the river Eden, and taking mussels wherever they chose—both for domestic purposes and as bait for fishing. Such possession was amply available to interrupt the alleged possession of the pursuers. True, the defenders appeared as members of the public, and it had been decided that the right to mussel-fishing was not in the trusteeship of the Crown. But it was absurd to say that therefore their possession was that of trespassers. The title was in the Crown, and the possession of the defenders was tolerated possession for the Crown. Under this condition of the argument, the possession of the pursuers was trespass just as much, because, until proof by prescriptive possession, which was the question in issue, their title was no better than that of the defenders.

Lord BARCAPLE delivered the leading opinion, reviewing and repeating the law he had laid down

in his charge to the jury. There was no foundation whatever for the pursuers' argument—that the possession of the defenders was that of trespassers. So long as the Crown, in whom the radical right was, did not interfere, their possession was perfectly legal; and if proved for the requisite period, and to be of the requisite nature, was available to compete with and to destroy the counter-possession of the pursuers. He should be sorry to assent to the doctrine that the public, by merely walking on the fore-shore, were amenable as for a trespass; for the pursuers' argument really amounted to that. These views had been fully and anxiously explained to the jury. After that, the question was a balancing of evidence. If the jury had returned a verdict in favour of the defenders, he was not prepared to say that he would have agreed to disturb it; and the same considerations led him to suggest that the verdict which had been pronounced should not be interfered with. The question was peculiarly one for the jury, and it could not be said that their verdict was one for which there was no support in the evidence.

The other Judges concurred, the LORD JUSTICE-CLERK observing, that this case had signally testified to the wisdom of the provision in the New Court of Session Act, requiring the Judge who presided at the trial to be a member of the Court when hearing a motion for a new trial.

Agents for Pursuers—Dundas & Wilson, C.S.
Agent for Defenders—A. Beveridge, S.S.C.

Thursday, December 17.

FIRST DIVISION.

MAXWELL AND OTHERS *v.* MAGISTRATES
OF DUMFRIES.

(*Ante*, ii. 43.)

Bridge-dues—Customs—Burgh—Usage. Magistrates were in use, in virtue of charters and an Act of the Scottish Parliament, to levy certain customs, the rate of which was not fixed either by the charters or the Act. *Held* that in framing a new table of customs no change could be admitted which was not sanctioned by immemorial usage. Remit to accountant to frame table with reference to proof of usage.

The Magistrates of Dumfries, in virtue of certain ancient charters and an Act of the Scottish Parliament in 1681, claimed and exercised a right of levying custom on goods and bestial crossing the Nith within certain limits. There was not, either in the charters or in the Act, any table of rates, but at different times the magistrates issued tables, three being extant, issued in 1732, 1766, and 1772. In 1854 the magistrates issued a new table, mostly corresponding with that of 1772, but introducing certain new duties, and raising others previously enacted. Certain gentlemen of the stewartry brought a reduction of the table of 1854, and asked declarator that no dues could be levied except such, and at such rates, as were sanctioned by immemorial usage. Lord Kinloch, on 30th June 1865, held that the magistrates were not entitled to exact any other or higher duties than were contained in the table of 1772, and were not entitled to exact such of these duties as might for forty years and upwards prior to the date of the action have ceased to be levied; and pronounced various other special findings with reference to the subjects for which