
PRESENT,

THE THREE LORDS COMMISSIONERS.

1817.
January 27.

AUCHMUTIE and Others, v. FERGUSON and Others.

Found that not more than four ferry-boats plied regularly from Kirkaldy to Leith and Newhaven.

THIS was an action of declarator and damages at the instance of the trustees appointed by act 53d Geo. III. c. 125, for improving the ferry from Kinghorn and Burntisland to Leith and Newhaven, with concurrence of the Lord Advocate, against the Magistrates of Kirkaldy, and the owners of boats carrying passengers from thence to Leith.

DEFENCE.—The trustees have no title to pursue, as the foundation of the action is a decree in 1684, in a submission with third parties.

The submission was *ultra vires* of the magistrates of Kinghorn, Burntisland, and Kirkaldy, the parties to it.

The decree is prescribed ; but if not prescribed, its terms do not apply to small boats.

Kirkaldy is a free port, and its magistrates have no power to regulate the ferry.

The trustees had first presented a bill of suspension and interdict to prevent the inhabitants of Kirkaldy from using ferry-boats to Leith, but failed in this. Having afterwards discovered a decret-arbitral dated in 1684, limiting the number of boats at Kirkaldy to four, they brought the present action of declarator and damages, to have it found that the magistrates of Kirkaldy were not entitled to license more than four boats on the ferry, in terms of the decret-arbitral; and that the owners of the boats were liable in damages. The defences given in for the magistrates and for the owners of the boats were in fact the same.

After a good deal of procedure in the Court of Session, which was conducted principally by the owners of the boats, the following issue was sent to the Jury Court :

ISSUE.

“ Whether, at any time between the 5th
 “ day of March 1684 and the year 1813,
 “ more than four boats were established at one
 “ and the same time as passage boats, plying
 “ regularly between the port or town of Kirk-
 “ aldy and the ports of Leith or Newhaven ;
 “ and if more than four boats did so ply within
 “ the time above specified, for how long, and

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“ at what period, and by what authority they
“ did so ply ?”

The owners of the boats (who were appointed to stand as pursuers in the Jury Court) limited their proof to the practice during a few years about the beginning of the American war, at which time one of the boats belonged to John More, a salter, who carried passengers to Leith when not employed at the saltworks.

In proving that passage boats plied regularly, it is incompetent to adduce evidence of the practice at other places in explanation of the term “ regularly.”

A witness, called for the pursuers, having stated that the boats at Kirkaldy, when not fully employed on the ferry, were accustomed to take freights to Aberdeen, and to ports in the Firth of Forth, was then asked if the practice was the same at Kinghorn, to which an objection was taken ; but the witness having previously stated that he did not know the fact, the Court did not think it necessary to decide the competency of the question.

The collector of the customs at Kirkaldy was then called, who swore that he had signed a paper in support of the Kirkaldy boats.

Grant, for the defenders, objected.

LORD CHIEF COMMISSIONER.—He is called, I suppose, as a haver.

Murray, for the pursuers,—We call him to

produce the books, and to prove from them that the boats at Kinghorn were not confined to the passage to Leith. This is a material part of our case ; it is only since 1792 that the boats have been solely employed on the ferry. We admit that our boats took freights to other ports, but say it was the practice at all other ferries. If it was competent for them to prove that our boats went on other voyages, it must be competent for us to prove that theirs did the same ; the proof must be competent for us, if it is so against us.

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Clerk, for the defenders,—This is not within the issue ; their only plea is, that it is necessary to explain the term regular ; this term is defined in law, and it is vain to seek the explanation in general practice.

LORD CHIEF COMMISSIONER.—Though it is of importance to admit all evidence necessary to explain terms, yet this must be limited by the rules fixed for doing justice to both parties ; and no party can be called on to answer what is not fairly included in the issue.

It is said this must be admitted to explain the meaning of the terms passage boats, and regularly plying ; these cannot be explained by the usage of any place ; they must be explained by law, and we do not preclude the

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pursuers from stating what is their legal meaning. If the evidence were admitted, it could only be on the ground that Kinghorn differs from other places, the passage being to Leith. The decision of the Court is, that the terms cannot be explained by evidence ; counsel must rest their legal import on argument.

To this decision the pursuers excepted.

On an issue, if there were more than four passage boats, it is incompetent to adduce proof as to boats carrying goods only.

Mr Thomson, for the pursuers, then stated, that perhaps the other party would save the trouble of proving the next part of the case, by admitting that there were boats carrying goods beyond the number permitted by the decret-arbitral. Mr Clerk at first admitted the fact, but afterwards stated that proof of this was incompetent, and that he was not called on to make such an admission.

LORD CHIEF COMMISSIONER.—No evidence is competent that is not relevant. No one could suppose from the issue that it related to any boats except those carrying passengers and their goods, and we cannot refer to the decret-arbitral.

This, therefore, is inadmissible, as irrelevant to the issue. There can be no doubt that Kirkaldy is a port for general trade ; that is not a subject of proof.

Thomson.—We wish this reserved.

LORD CHIEF COMMISSIONER.—When a point is reserved it only entitles you to be heard on the point if you move; there is nothing on record that goes directly to the Court.

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The town-clerk of Kirkaldy was called to prove that no entry appeared in their books as to the boats for a century past; he produced the books.

LORD CHIEF COMMISSIONER.—It is right to have the books for examination in case it should be found necessary.

A certificate was produced that a witness was unable to attend the trial; he had been examined on interrogatories, and a question had been put as to the boats at Kinghorn, but his answer was not read to the Jury.

The son of the treasurer of the Gilt Box Society at Kirkaldy was called as a witness to produce the books of the Society.

Murray objected,—These are the books of a private society; we had no notice that they were to be produced.

Grant.—Though they are the books of a private society, they contain entries of all the

The books of a private society may be produced at the trial, and if the secretary cannot attend he ought to be examined on interrogatories.

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seamen in Kirkaldy; the pursuer has made them evidence, as he gave notice that he expected the father of this witness would produce them.

Murray.—These books are irrelevant; though the name of any individual do not appear in them, this affords no presumption that he is not a seaman, as all seamen are not entered in them; if the father had been called he could have explained this.

LORD CHIEF COMMISSIONER.—It is not yet the time to state this objection. Section 24 of the Act of Sederunt does not apply to documentary evidence of this sort, but to such writings as are in the power of the party. There is nothing to prevent this book being brought, but we do not decide that any part of it can be read.

The witness was then examined, and produced the book.

LORD CHIEF COMMISSIONER.—What do you intend to prove by this book? You may prove that the name John More appears in this book, but how is this connected with the man in question?

Grant.—We shall prove him dead, and then prove his hand-writing in this book.

Murray.—1. It is a good legal, though it may appear a captious objection, that this witness can only prove that his father kept the books during the time he can recollect, which is about ten years.

2. An invincible objection is, that the book is not evidence in this cause; for though the name of John More may not appear after a certain time, it only shows that he did not pay his contribution, but does not afford even a presumption that he ceased to be a mariner at Kirkaldy. The book may prove that he was a member of that society and nothing more. The witness only swore that a great many (not all or even most) of the mariners at Kirkaldy were members of this society.

Clerk.—We shall prove entries in the book in 1784, and shall prove the father of the witness to have been treasurer, by proving his hand-writing. The object of this proof is not to prove More dead, but, when taken along with the proof of his death, to show the inaccuracy of their witnesses as to dates.

Murray.—Proving the hand-writing will only prove that he wrote in this book, not that he was treasurer to this society.

In records, the presumption is in favour of entries prior to the memory of man; but the

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books of a private society are only evidence so far as supported by the oath of the witness.

Many things are admissible that are not conclusive of the fact, but they must be conclusive of some branch of the presumption. In this case, admitting the fact to be as stated, it founds no presumption of More's death. In Clark and Thomson's case, we were not allowed to produce many things which raised strong presumption, that the bonds of caution had been granted.

LORD CHIEF COMMISSIONER.—This is a question of difficulty, but I have no hesitation in stating what has occurred to the Court, as it may lead the party to relieve them from the difficulty, but is more as an outline for consideration than a decision.

This, though the book of a useful, is still that of a private society. It is not incorporated, nor is this book a record of events, which, in defect of other evidence, might be admissible. The difficulty is greater, as the subject of dispute is a matter of public right and convenience.

If More's hand-writing were proved, then it might be used as a letter. One great difficulty is, that the son, in the eye of law, is a servant, and can only prove the hand-writing;

the father ought to have been examined; the book, if admitted, would be unauthenticated by the person who keeps it.

If, in a matter of usage and public right, we were disposed to relax, still we must take care that no spurious evidence is produced.

We are of opinion, that it is inadmissible, unless something farther can be brought in support of it.

Nothing being brought, it was not produced.

Grant produced a certificate of More's death, which he said proved itself.

LORD GILLIES.—Was this lodged in process?

Not having been produced, two witnesses were called to prove it; the one swore that he got it from the session-clerk, and saw him sign it; the other swore that he had compared it with the record; but on his cross examination, admitted that he did not read the record, but examined the certificate while the session-clerk read the record.

Murray,—The register of deaths is irregularly kept; it is not a proceeding of a court of record nor of any court; there is not even a meeting of session.

This paper is not proved to be a true copy

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An extract or certificate must be produced before the trial.

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of any book. In the case of parish books, the original ought to be produced. In Clark and Thomson's case, the witness swore that the copies were correct. This paper was not produced in terms of the Act of Sederunt.

*Clerk.*—In Thomson's case, a copy, not an extract, was produced. By the law of Scotland, an extract is as probative as the original, and there is no instance of a certificate, by the proper officer, being rejected; we must presume that the books are regularly kept. Every Court with us is a Court of record. The section in the Act of Sederunt does not apply, when witnesses are called to produce the writings.

**LORD CHIEF COMMISSIONER.**—I have a fear of mixing the law of Scotland with that of the neighbouring country. In Thomson's case, little was said as to the admissibility of an extract; the difficulty being, that it was not an extract.

This is not an extract but a certificate, and being evidence by the law of Scotland, might be laid before a Jury. If the session-clerk had been called, and had produced the original books, they would have been admitted, as they might have been examined as to their accuracy. But this not being the original, it falls under

the rule in the Act of Sederunt, which was intended to give parties an opportunity of comparing the copy with the original, and had this been done, this document must have been admitted. This rule not having been observed, it will be very difficult to receive the certificate in evidence, for, though compared by the witnesses, yet there may be a mistake. It appears to me that we are tied up by the Act of Sederunt, but I wish to hear the opinion of my brethren.

LORD PITMILLY.—I entirely concur in all the observations made by your Lordship. I also agree with the counsel for the defenders, that this would have been evidence if produced in proper time: But I saw, from the first, the difficulty from the Act of Sederunt, though it is unnecessary to add any thing on this head. If produced in proper time, the pursuer might have objected that it was incorrect, and have had it in his power to show this by producing the books. If not to this, to what case can the Act of Sederunt apply?

Hard as it may be, our duty is to adhere to rules of Court. On that ground alone, I am for rejecting this document.

LORD GILLIES.—I entirely concur with both your Lordships. It is clear that we sit to ad-

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minister the law of Scotland, and I think we have hitherto succeeded. In England, writings, unless proved to be authentic, are not received, as cases there are decided by a Jury at once; but in the Court of Session they are received, as the other party has time to question them if incorrect.

If we are to decide by the law of England, the Act of Sederunt has no meaning; but it is just intended for such a case as the present. If a party intends to rest on an extract, he must produce it before. The extract may be correct, but it may be otherwise. We must reject this document.

To this decision, Clerk, for the defender, tendered a bill of exceptions.

A counsel examining in chief, may state any fact that he thinks will recall a date to the recollection of a witness.

A witness not recollecting a date, the Lord Chief Commissioner observed, (to the counsel examining in chief,) you may state to the witness any fact that you think will recall it.

*Murray* asked a witness if he had formerly given the same account of the facts.

*Clerk.*—This is incompetent.

LORD CHIEF COMMISSIONER.—The question is incompetent by the law of Scotland.

The question being one of usage, Mr Grant held that he was entitled to hearsay evidence, but did not insist on it.

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When the defenders had closed their evidence,

A party is not bound to read to the Jury proof taken by him on commission.

*Murray*, for the pursuers, observed,—The defenders are bound to read the evidence of Malcolm, a witness examined by them on a separate commission. The question is not decided in any former case.

*Clerk.*—It is incompetent, though, in this case, of little consequence. In Lord Fife's case, we were so sensible of the strength of the objection, that we did not insist on the commission being produced.

LORD CHIEF COMMISSIONER.—I am sure counsel will not push the Court to decide an abstract point, unless it is material to their case. This case is quite different from Lord Fife's. But I should think, in any case, the rule ought to be, that as the Court knows nothing of the evidence at the time of granting the commission, so they cannot be called upon to compel a party to bring it forward. A trial would never be finished, if the parties are to call upon the Court to bring forward evidence, without their knowing what it is.

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*Infra*, 217.

If a party puts cross interrogatories, and any thing comes out which he thinks of importance, then he may have a commission to examine the witness in chief, and the Court will delay the trial to have this brought forward.

To this decision a bill of exceptions was tendered.

*Murray*, in opening the case for the pursuers, stated,—The trustees at first denied that the pursuers were entitled to use any boats; but being unsuccessful, they discovered a decret-arbitral, which they alleged limited the number to four. As the parties have a good plea in law, the practice is of little consequence; but that is the question sent to this Court; and we will prove that more than four boats plied as regularly as those at other ferries. The decret-arbitral, if sustained, would prevent the inhabitants of Kirkaldy from carrying goods as well as passengers.

*Clerk*, for the defenders,—It is irrelevant to inquire how the case may be decided in the other Court. The question is a simple question of fact, whether more than four boats plied. They have not proved that more than four plied; but if you are of opinion that they proved five, there ought to be a return made

of the short time during which the fifth plied. They did not ply regularly.

*Thomson*, for the pursuers, in reply, observed,—The pursuers have proved, that more than four ferry-boats plied at one time, and they were as regular as those at other ferries at the time. Usage is the only way of explaining what is regular, there being no Act of Parliament on the subject. The pursuers are entitled to a special verdict, finding the facts they have proved.

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LORD CHIEF COMMISSIONER.—The first question is, whether more than four boats plied; after that there are what may be called conditional issues,—how long they plied, &c.

*Supra*, p. 201.

If I am right in the view I take of the evidence, it will not be necessary to go into this latter inquiry.

Passage-boats must mean boats principally employed in carrying passengers across a narrow arm of the sea, and you must be satisfied that the boats were plying regularly as such, before you can find that there were more than four at Kirkaldy.

It is material that the Court of Session have changed the situation of parties; the burden of the proof is thrown on Auchmutie, though, originally, the defender, and he must,—by clear



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evidence,—by his own strength,—make out his case; and if he fail in this, even if no evidence had been led for the defenders, your verdict must have been against him.

In the question of the probability of more than four boats having plied, it is material, that, from 1684 to 1814, the pursuers have limited their proof to a very few years. [His Lordship then went through the evidence in detail, and in conclusion, said,] The witnesses have spoken, in general, of five boats, but you must consider, whether the boat which the salter used in summer, when his saltworks were not going, can be called a passage-boat; and whether the large boats can be said to have plied at the same time, when one of them was generally away on a voyage, when the other two were employed on the passage.

*Verdict.*—“ Find for the defenders, in respect, that, between the 5th day of March 1684, and the year 1813, there were not more than four boats established at one and the same time as passage-boats, plying regularly betwixt the port or town of Kirkaldy, and the ports of Leith and Newhaven.”

*Thomson and J. A. Murray, for the Pursuers.*

*Clerk, Grant, and Cockburn, for the Defenders.*

(Agents, *Campbell and Clason, w.'s.* and *D. Wemyss, w. s.*)

The following is a statement taken from the report of the Lords Commissioners of the Jury Court, dated the 22d day of March 1817, referring to the case of Auchmutie v. Ferguson. After stating that the question, whether a party having taken proof on commission is bound to produce it to the Jury, had been stirred in Lord Fife's case, but that it had not been insisted in, the report proceeds :—

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“ The Lord Chief Commissioner stated  
 “ strongly the impropriety of the Court inter-  
 “ fering with the parties in the conduct of their  
 “ case ; but it seemed, from the analogy of the  
 “ proceedings before the Court of Session, to  
 “ be at that time the inclination of the other  
 “ Judges to consider it to be conformable to  
 “ the practice in this country to require the  
 “ production of the deposition. The counsel  
 “ for the pursuer, however, did not insist upon  
 “ the production, so that in Lord Fife's case  
 “ the point was carried no farther. But in the  
 “ case of the Magistrates of Kirkaldy it form-  
 “ ed the subject of a bill of exceptions ; and  
 “ the Second Division of the Court of Session,  
 “ after an argument, found that the Jury  
 “ Court did right in not ordering the deposi-  
 “ tion to be read.

“ The matter had been very fully talked

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“ over by the Judges in the Jury Court, both  
 “ when the first trial in Lord Fife’s case took  
 “ place, and between that time and the trial  
 “ of the case of the Magistrates of Kirkaldy;  
 “ and it is now their unanimous opinion, that  
 “ the reading the depositions or not, should be  
 “ entirely at the discretion of the party who  
 “ applies for them. That this is not like the  
 “ examination of evidence before a Commis-  
 “ sioner, according to the course of the Court  
 “ of Session. In that case the whole testi-  
 “ mony is reported, and is before the Court.  
 “ But in suing out a commission under the  
 “ Act of Sederunt for the Jury Court, the de-  
 “ positions taken under it are only to be read  
 “ in case the witness is unable to attend at the  
 “ trial. It must be proved that he is not able  
 “ to attend, otherwise the deposition cannot be  
 “ opened, and the compelling the party to call  
 “ the witness, because he examined him in  
 “ interrogatories, is a proposition that never  
 “ was attempted to be maintained; besides, it  
 “ is clear that no injury can happen to the  
 “ case of a party requiring such an act on the  
 “ part of the Court; because, if the witness,  
 “ examined upon interrogatories, had any  
 “ thing to say in support of the case of that  
 “ party, such party has only to sue out a com-

“ mission, examine the witness under it, and  
 “ thus secure against the testimony being kept  
 “ back.”

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DOWNIE v. BURGAN and COMPANY.

1817.  
 February 24.

THIS was an action to recover a sum of money paid to the defenders to account of the price of a cargo of herrings, and for damages on account of breach of contract.

Damages for  
 breach of con-  
 tract.

DEFENCE.—The herrings, when shipped, were of the quality stipulated. The pursuer accepted of them, and paid part of the price after they had been some weeks in his possession.

ISSUES.

“ 1. Whether the defender did, in the  
 “ months of September and October 1814, sell  
 “ to the pursuer 500 barrels of herrings of the  
 “ best quality, and in a state to keep for six or  
 “ eight months, and engage to ship the same  
 “ at Eyemouth, to be conveyed from thence to  
 “ the pursuer, at or near Cork, to be at the