INVERNESS.

PRESENT,

LORD PITMILLY.

MACKENZIE *v.* ROSS.

1816. September 12.

Damages claimed for building a hut on the property of the pursuer.

AN action of molestation, declarator, and damages, for having built a house on a muir, said by the pursuer to belong to him.

DEFENCE.—The house is not built on the pursuer's property; nor did the defender ever molest the pursuer in the possession of his property.

ISSUES.

" Whether the defender, by himself, or " his tenant Donald Munro M'Finlay, has, " without the pursuer's consent, and to the " loss and damage of the said pursuer, erected " a house in the neighbourhood of the village " of Tollie, upon a part of the Muir of Tol- " lie formerly belonging in common proper- " ty to the predecessors of the pursuer and

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" defender in their respective lands, but " which, by a contract of division of said " muir, entered into betwixt the pursuer's " grandfather and the defender's predecessors " in the lands of Milncraig, in the year 1757, " became the exclusive property of the pur- " suer?

" Whether the defender, by himself or his " foresaids, have committed other encroach- " ments on the parts of said muir, his the " pursuer's exclusive property, as aforesaid, " by cutting and paring the surface thereof, " and carrying off the same for fuel, to the " loss and damage of said pursuer.

" Damages claimed in the summons " L.2000."

The muir of Tollie, which it was said had been possessed in common, was divided by a contract in 1757, in terms of which, the pursuer was to have 1600 yards, from the burn of Tollie westward, and the defender 1200, from the burn of Tomatten eastward. It was alleged that the defender had built a hut on the portion assigned to the pursuer, and the present was an action to ascertain the rights of the parties to the ground.

When the case was called on for trial,

the same objection was taken to the viewers as in the above case, and was again repelled.* The first witness for the defender was called to prove the state of possession.

Proof of possession of a muir allowed, on an issue as to encroachments made on the part given to the pursuer's predecessor by contract.

Moncreiff.—There is nothing in the issue to warrant this. The deed in 1757 is regular and probative; and the Jury are merely to say, from the proof, whether this part was given by it to the pursuer. The Jury are not to set aside a regular mutual contract, by a proof of the state of possession. The Court have not power to send such an issue.

Cockburn.—The pursuer only says that a contract did exist, and that parties acted upon it. If the question depended entirely on the contract, the Court would have called for it, and not have sent the case to a Jury; but they were aware that there might be other contracts, or that this might never have been acted upon.

LORD PITMILLY.—The averments by the pursuer are—

1. That this is part of the muir of Tollie.

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* See *ante*, p. 17; & *post*, p. 28.

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2. That the muir was divided in 1757.

3. That a hut has been built by the defender, on the share allotted to him, the pursuer.

The defender neither admits nor denies the existence of the contract; and he might have added, that, if it did exist, it was departed from; and then there would probably have been an issue on the subject. But there is no question whether, if the contract exists, it is binding.

The hut is built so near the line of march, that, in my opinion, it is important to fix the possession, as an article of evidence, in a doubtful case, to shew the precise line allotted by the contract 1757. I admit this evidence, that I may know all that I can know as to this fact. Perhaps on hearing the whole I may change my opinion.

Moncreiff.—I must tender a Bill of Exception, to entitle me to question the verdict.

LORD PITMILLY.—I have taken a note, that I find it competent to examine the witness as to the possession of the muir since 1757.

Moncreiff, in opening the case contended, that the questions were, 1*st*, Whether the hut

was built? 2*d*, Whether it was on ground formerly common? 3*d*, Whether it fell under the division made by the contract? It is not competent to try the validity of the contract, or whether it is cut down by prescription.

Cockburn.—We admit having directed the building of the hut; and the only question is, Whether had we a right to do so? or Whether is it built on the property of the pursuer? The pursuer must prove that the hut is built on his exclusive property: he has not proved any thing as to the possession since 1757; and you must hold that the contract was never acted upon: we cannot prove that it was not acted upon; and it is a singular fact, that the defender did not know of the existence of the contract till eight days ago. It is proved to have been possessed in common subsequent to 1757; and at the place in question, there are not 1600 and 1200 yards, which are the measures stated in the contract.

Moncreiff.—There is no difficulty in this question. The whole pleading on the other side was to shew that the contract was done away with. His Lordship held, that this

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evidence could not cut down the contract, but was admissible to shew on which property the hut was built. The hut is far within the part belonging to the pursuer. It is not enough for the defender to prove the hill common after the contract; he must claim it as his property.

LORD PITMILLY.—In the course of the proof, I had occasion to express my opinion of the nature of the issue, and the points you ought to keep in view. They are, whether before 1757 the muir of Tollie was common to Ardross and Milncraig? Whether this property was divided in 1757, by a contract? and Whether the hut was built on that part of it which ceased to be common, and was given to Ardross?

We are tied down to the issue, and are not entitled to wander into the summons and other proceedings. The defender says the contract is dead, and lost by prescription. This is a good allegation in the proper place, but not here. If you are satisfied that there was a contract in 1757, you must give effect to it, though you may think it was not acted upon.

That there was a common in the property,

is clearly proved. The extract also proves that there was a contract; and this is not to be done away by usage or prescription. The whole case, therefore, turns on the question, whether this part was given to Ardross.

It is near the march, and close on Milncraig; but it is difficult to say on which side. I am happy that there was a view, as it is a case most fit for it. The pursuer must make out his case, and prove that this hut is on his property. If he has left it doubtful, you must find for the defender.—(His Lordship then gave a summary of the evidence.) —If you find for the pursuer, it will be proper also to assess the damages, which, I suppose, will be the smallest coin. If he has not made out his case, then you will find for the defender.

"Verdict for the defender."

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

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

This case was tried on Saturday; and in order that part of the Jury might return

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home, the counsel consented to ballot for the Jury to try another question between the same parties, set down for trial on Monday. The same Jurymen who had the view in the case above reported, had also been viewers in the case to be tried on Monday; and when the Court met on that day, Mr Moncreiff again tendered a Bill of Exceptions to the decision that the viewers were to form part of the Jury, and did not proceed to trial.

In both the cases reported above, applications were made for new trials, which were refused. Both were carried to the House of Lords by appeal, and both appeals dismissed.

ABERDEEN.

PRESENT,

LORD PITMILLY.

1818. September 26.

PETER *v.* TERROL.

An apprentice not bound to work for his master, except in relation to his trade.

SUSPENSION by an apprentice and his cautioner, of a charge by a master, to compel performance of the conditions of indenture.