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is not a ground for giving a different verdict.

Verdict—"For the pursuer, damages L.5."

Cockburn excepted to the direction that the Jury were entitled to consider the evidence of the engravers.

Jeffrey and *Alison* for the Pursuer.
Fullarton and *Cockburn* for the Defender.

(Agents, *Burns* and *Allister*, W. S. and *Tennent and Lyon*, W. S.)

AYR.

PRESENT,

LORD CHIEF COMMISSIONER.

1820. April 12.

COCHRAN *v.* WALLACE.

Finding as to the multure payable by the tenants of a barony.

DECLARATOR of immunity from thirlage, and of being only liable in out town multure.

DEFENCE.—The miller only exacts the thirlage which has been exacted for time immemorial. Several other defences were also stated.

ISSUES.

"1*st*, Whether the pursuers, who are "tenants upon the barony of Corsewall, in "the parish of Kirkcolm and county of Wig- "ton, who are admitted to be thirled to the "mill of Corsewall on said barony, have been, "from and since the year 1787, by their "leases or agreements for leases from the "Earl of Galloway, then proprietor of the "barony and mill aforesaid, bound to pay no "higher rate of multure than 1s. 6d. per "Galloway boll, or $\frac{1}{32}$ part in kind, or "thereabouts, in full of all demands, upon all "the grain which they might have occasion "to make into meal for the use of them, "their servants, and cottars in their families; "and whether the pursuers, since granting "the leases, and during the period aforesaid, "have paid no higher rates of multure than "aforesaid? Or,

"2*d*, Whether, for the period of 40 years "or upwards, the said tenants have paid as "multure, at least, the $\frac{1}{32}$ part for grind- "ing; $\frac{1}{4}$ part of a stone out of 16 stone "for fanner dues; $\frac{1}{4}$ part of a stone out of "$2\frac{1}{2}$ bolls of corn for the kilnman; three-

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"pence per boll of corn for kiln dues, and the "dust of the whole for duster's dues; and a "lock or bannock on each millder to the "miller, upon the corns they had occasion to "grind as aforesaid?"

An Issue cannot be altered without consent of parties.

Before proceeding to trial, it was proposed to make an alteration on the second Issue.

LORD CHIEF COMMISSIONER.—I cannot alter the Issues, except by consent of parties. If the defender does not prove the second Issue, a verdict must go upon it for the pursuer; but if the facts proved by the defender appear to be material, it is competent for me to order them to be indorsed on the Issue.

Competent to prove a general rate of multure throughout a district, on an Issue as to the rate payable at a mill within that district.

The first witness called for the pursuers was asked the rate of the out town multure at other mills.

Mr Campbell objected to this, and his Lordship at first intimated an opinion that the question was incompetent under the terms of the Issue, the Issues being as to the multure at a particular mill, which could not be affected by that paid at others, unless the pursuer would undertake to prove a general rate throughout the district.

Campbell, for the defender, then submitted

that there was no such term as out town in the Issue—that the Issue was limited to these particular farms, or at all events to this mill. We had no notice of a question as to any barony but this.

Ferguson.—The Issues refer to the leases, and these again refer to *in* and *out* town multure. We shall prove the in town not so high as the defender states the out town to be; and we are entitled to prove the general rate, leaving him to prove his specialty as to the superiority of his mill to the others.

LORD CHIEF COMMISSIONER.—It is most important that Judges should not admit incompetent evidence; but it is also most important that parties should not be turned round upon a point of this sort; and it is the proper leaning of Judges rather to admit than reject evidence.

At first it struck me that the evidence offered was proving *res inter alios*; but now it appears to me competent to prove, 1*st*, That there is a general rate in the district. 2*d*, The amount of that rate. Mr Campbell states that there is nothing of in and out town in the Issue, and that the Issue is confined to the contract between the parties. The terms of that contract are not expressly for the sums stated in the Is-

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sue, but for out-town grain allenarly. These terms must have been known to the parties in 1786 and 1796; and the question is how the meaning of these terms is to be proved. The pursuers state that there is very little of the out town multure at the mill in question, and that they will support their plea by proof of a general custom.

I am of opinion that this proof is admissible, as it is not a proof of a particular transaction between other parties, but a proof of a general practice through a great district of country. What the effect of the proof may be is a question for the Jury, upon which I shall observe to them at the proper time.

In this case I think there is no surprise, as the miller ought to be ready to shew that 1s. 6d. was not the out town multure.

The deposition of a witness taken in another question between the same parties, inadmissible as evidence, even after the death of the witness.

Campbell, for the defender, proposed to give in evidence the deposition of a witness (since dead) in a question between the parties in an inferior Court; and stated, we are here free from the objection to proof of what a person since dead has said, as this is evidence upon oath, and the other party had an opportunity of cross-examining him.

Ferguson, for the pursuers, objected, and

referred to the case Carleton *v.* Strong, Vol. I. 30, but afterwards withdrew his objection.

LORD CHIEF COMMISSIONER.—When a witness is dead, you may prove what he said; and in a question of reputation, the same thing is competent. But here it is proposed to give in evidence the deposition of a witness in another cause; and as the objection is not insisted on, perhaps it may be admissible. But it would have been more regular to have examined him by a commission from this Court. In Strong's case I do not think the proper reason is given for rejecting the deposition.

Marshall, for the pursuer, stated the history of the case, and of the law of thirlage. Being a restriction on liberty, the lowest multure must be taken; Ersk. II. 9. 20.—Before 1787, this was a very heavy thirlage, but it was then much modified. The first Issue must be found for us; and if, on the second, the defender proves any higher multure to have been paid, the Jury should specify it. The payment could not have been for 40 years, as the leases are only 33 years old.

Campbell, for the defender.—This is a simple question of fact. The pursuer has not

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proved the last part of the first Issue, which must therefore be found against him. On the second I shall prove more paid than is stated in the first Issue. I shall prove it for 33 years, and the old leases shew the payments before that period.

Ferguson.—On the first branch of the first Issue, I am not bound to prove any thing of kiln dues, but only as to multure.—Skene *v.* Riddie, 20th Dec. 1775.; M. 16,062. Thirlage is an undeviating rate; and if you find that the payments varied, you must find for me, as it is that of which I complain. If you find for me on this Issue, I am indifferent about the second. If I am bound to prove the first, the defender is bound to prove the second; and his evidence does not prove that any of the *pursuers* paid it.

LORD CHIEF COMMISSIONER.—The history of this case may in some degree clear our way to the subject for consideration. It is evident that in 1787, Lord Galloway intended to alter the rate of multure, and to grant a great ease to his tenants. He did so with accuracy in the articles of roup; but the matter is not stated with the same accuracy in the leases. The miller seems to have been a

party to this transaction, and the tenants complain that he has since taken more than he was entitled to take.

There is here no question as to what the tenants are bound to grind; and the only question sent by the Court of Session is for the purpose or ascertaining the rate of the out-town multure. The rate stated by the pursuer in his summons is 1s. 6d.; and it has been proved, that that is now the proper compensation for the labour of grinding.

Evidence of the practice at other mills is no proof of the practice at this; but it is competent and most convincing evidence of the rate to which out-town multure had generally fallen; and it has been proved that the same rate had in some instances been paid at this mill. It appears to me that you may find the first branch of the 1*st* Issue in the affirmative: The second branch is the question the Court of Session have to determine.

2d Issue.—This is not a simple question of prescription, but a special question as to these tenants. If a miller is bound by a contract, he cannot set up a general prescription against it; and in this case, though proof may have been given of larger payments by others, I

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think you ought to limit the inquiry to whether the proof applies to these tenants.

The findings would then be, that they are not bound to pay more than 1s. 6d. per boll, though some instances of a higher rate have been proved; and as no evidence has been adduced on the second Issue, applicable to these tenants, you may on that Issue also find for the pursuer.

Verdict.—The Jury found, 1*st*, That the tenants were not bound to pay more than 1s. 6d. per boll, or the $\frac{1}{33}$ part in kind; but that instances had occurred where more had been paid. 2*d*, That they had not paid for 40 years the dues specified in the second Issue.

J. Ferguson and *Marshall* for the Pursuer.
Campbell for the Defender.