" was executed on the 12th January: That " John Harkness was not then labouring under " the disease of which he died: That the " name Janet Burgess was not her true sub- " scription; and That Harkness was of a sound " and disposing mind," &c.

MARQUIS OF TWEEDDALE v. BROWN.

Jeffrey and *Whigham* for the Pursuer.
Forsyth for the Defender.

(Agents, *Archibald Crawford*, W. S. and *James Smail*, W. S.)

JEDBURGH.

PRESENT,

LORD CHIEF COMMISSIONER.

MARQUIS OF TWEEDDALE v. BROWN.

1821. Sept. 18.

Damages against a tenant, for mismanagement of his farm.

AN action of damages against a tenant, for ploughing during the last year of his lease, more of his farm than he was entitled to have under corn crop.

DEFENCE.—A denial of having done any thing during the occupation of his farm, which entitles the pursuer to damages.

MARQUIS OF TWEEDDALE v. BROWN.

ISSUES.

"It being admitted, that the farm of Tul-
"lishill, consisting of 3000 acres or there-
"abouts, the property of the pursuer, was
"held by the defender, under lease and decree-
"arbitral in process, up to the term of Whit-
"sunday 1819, as to the houses and grass,
"and to the separation of that year's crop from
"the ground, as to the arable land,

"1*st*, Whether the said farm was a pasture
"or stock farm, with the exception of from
"60 or 70 acres, or thereabouts, usually kept
"in tillage?

"2*d*, Whether the defender, in the last
"year of his possession of the said farm, con-
"trary to the rules of good husbandry, and
"the custom of the country upon such farms,
"did, besides the aforesaid 60 or 70 acres,
"plough up from 90 to 100 acres, or there-
"abouts, in different parts of the farm, and
"in situations injurious to the future cul-
"tivation of the farm as a stock farm, to
"the loss and damage of the said pursuer?

"3*d*, Whether the defender, contrary to
"the rules of good husbandry, and the cus-
"tom of the country in such cases, ploughed

" up the whole or any part of the said 90 or " 100 acres, without having previously fold- " ed, limed, or dunged the same, to the loss " and damage of the said pursuer?

" *4th*, Whether in the last year of his pos- " session of the said farm, the said defender, " contrary to the rules of good husbandry, " and the custom of the country in such " cases, did take a white crop from a part of " the arable land in the said farm, which had " borne a white crop the preceding year, to " the damage and injury of the said pur- " suer?

" Damages claimed L.2000."

A report made under a remit from a Lord Ordinary not evidence.

After calling several witnesses, the pursuer gave in evidence a report by Mr Tait, under a remit from the Lord Ordinary.

LORD CHIEF COMMISSIONER.—If this report is founded on information given by others, it is not evidence; but in so far as Mr Tait's opinion is founded on personal inspection, and is now confirmed by him on oath, I do not object to it.

A decision by an arbiter, in a case not proved to be similar, or the practice on a particular farm, not evidence of the custom of the country.

A witness was called to prove a dispute similar to the present, and a decision by arbiters on the subject, and that the tenant was

MARQUIS OF TWEEDDALE *v.* BROWN.

paid for not ploughing part of his farm, the last year of his lease.

Moncreiff—Objects.

LORD CHIEF COMMISSIONER.—If they prove that the lease was an open one, and that the discussion was as to the custom of the country, this would be evidence; but unless this is done, it is not competent.

When another witness was called, and asked what proportion of his farm he ploughed during the last year of his lease,

LORD CHIEF COMMISSIONER.—I am unwilling to interfere when no objection is taken; but really you ought to lay a foundation, by proving that there was a discussion as to the custom of the country. It is that which makes the testimony of any use, and unless you prove this, the presumption will be, that it was the agreement of the parties which regulated the matter.

Cockburn opened the case, and stated the origin of the action, and that the Issues here were special, and to go back to the Court of Session; and that the amount of the damage was the only question of any difficulty.

Jeffrey.—The only damage done must be

to the incoming tenant; and we have a letter from him, relieving us from damages.

LORD CHIEF COMMISSIONER.—How do you shew the privity of the Marquis to this?

Jeffrey.—It is only through the tenant that he can suffer damage. The present action is not to fix what is good husbandry, or the wisdom of the custom; but the fact of what the custom is. By the custom, the defender might have ploughed twice as much as he did. The only possible expence from being detached is, that an additional herd must be kept; and yet a witness estimates the damage at L.400.

The custom as to two white crops, is more than proved.

Moncreiff.—It is said there ought to be favour to the defender; but though that is the rule in a claim for an injury to the feelings of the pursuer, it has no place in the present case, which is an injury done to the property of one, for the emolument of another. The pursuer did not bring the proper evidence of the custom of the country. Instead of proving that in particular instances a larger proportion was ploughed, he ought to have brought persons skilled in the general practice; Brodie *v.* Murdoch, 7th Feb. 1777.—M. App. Tack,

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No. 3.—In this case, though there was permission to plough, the tenant was found not entitled to a way going crop.

LORD CHIEF COMMISSIONER.—It is a great satisfaction to a Judge to know that a question of this nature is submitted not only to an intelligent Jury, but to those who have greater experience in the practice of this part of the kingdom than he has. I shall therefore state results, rather than go into detail on the different Issues.

On the first Issue, it is admitted that this is a stock farm, and the first question is the extent of the cultivation upon it.

This is merely a preliminary question; and it is on the three following Issues that the damages depend. There is some contrariety of evidence as to the quantity, but it was from 60 to 90 acres in different parts of the farm; and the pursuer must make out that this was contrary both to the rules of good husbandry and the custom of the country.

On the evidence for the pursuer, it appears to me that there is a *prima facie* case made out, that it was contrary, &c.

In the third Issue, the term previously, according to my view, must mean the year preceding; and if you take it in that view, I

conceive you must find for the pursuer, as there is no proof of folding or dunging at any time; and the evidence as to liming does not apply to that year.

On the fourth Issue, there can be no doubt of the fact of two white crops having been taken; but some of the witnesses, even for the pursuer, approve, and others disapprove of this.

You will consider attentively the evidence as to the quantity of ground the defender might plough according to the custom of the country. Four of the witnesses are to be thrown out of view, as they did not speak to open leases; five others spoke to other matters, and ten to the custom, only one of them having mentioned the rules of good husbandry.

Custom is to be proved, not by witnesses speaking in general to what they consider the custom, but is to be made out by several individual and unconnected instances, free from any agreement of the parties.

If you find for the pursuer on all the Issues, you will then fix the amount of the damages; if for the defender, then no damages; if partly for the pursuer, and partly for the defender, then of course you will modify the

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damages. I agree, that in a case of this nature, or of money withheld, the pursuer is bound to prove loss; but I do not think he is bound to fix it in pounds, shillings, and pence. I cannot agree with the counsel for the defender that no damage is proved; for it has not been proved that the rent of the incoming tenant was fixed before this ploughing took place, and even this goes to the deterioration of the soil. If the rent was so fixed, there is no evidence that he has not since got an abatement. How you are to discover the amount, is a different question; and I have no hesitation in saying, that I think it would not be proper, without considering the circumstances of the case, to give L.400, which is the only sum we have had proved. If part of the Issues are found for the defender, this will of course diminish the sum.

Verdict.—"Finding upon the first Issue, "that the farm of Tullishill was a pasture "farm, or stock farm; and find upon all the "Issues, a verdict for the defender."

Moncreiff and *Cockburn* for the Pursuer.
Jeffrey and *Cuningham* for the Defender.

(Agents, *Gibson, Christie, and Wardlaw*, W. S. and *James Hay*, W. S.)