that on board and sail, but the want of wood for ballast, for which there was time, but which was not supplied; and therefore they find against the defenders. And being of opinion that this was the view taken by the jury, I must come to the conclusion, that the damages are erroneous. If they could have been modified, it would probably have been the best result.

LORD CHIEF COMMISSIONER.—The other judges having come to the same conclusion, though on different grounds, it is not necessary for me to say much. But when I compare the issue with the verdict, and the verdict with the evidence, I coincide with my brethren in the opinion, that complete justice has not been done. But in a case which has depended so long, and is of such a nature, it gives us the greatest uneasiness to come to this conclusion, and still I hope the parties will now settle it by agreement.

PRESENT,

LORDS CHIEF COMMISSIONER AND MACKENZIE.

ANGUS AND COWAN *v.* MAGISTRATES OF EDINBURGH.

1827. July 23.

Finding that magistrates had wrongfully

THIS was an action of declarator to have it

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raised the rate of custom upon unfreemen fleshers attending the market of the burgh.

found that the pursuers were entitled to attend the flesh-market of Edinburgh, and that the defenders had no right to exact more custom than in a table published by them in 1776.

DEFENCE.—The market-place was altered in 1782, and a new table of customs became necessary, which was sanctioned by a judgment of the Court in 1783.

ISSUE.

"It being admitted, that the pursuers are "unfreemen fleshers who attend the flesh-mar- "ket of Edinburgh, and that the defenders are "magistrates of the said city, and are entitled "to collect the customs or duties payable by "butchers attending the said market:

"It being also admitted, that the customs or "duties levied from such unfreemen fleshers "attending the said market, prior to the year "1782, is specified in the table No. 11 of pro- "cess:

"It being also admitted, that certain altera- "tions were made on the said market-place dur- "ing the said year, and that a new table of "customs, being No. 12 of process, was issued "by the magistrates during the same year:

"Whether, during the year 1782, or subse-

" quent thereto, the magistrates of Edinburgh " have unwarrantably and wrongfully raised the " rate of customs or duties upon the unfreemen " fleshers selling meat in the market of Edin- " burgh, and to what extent ?"

Forsyth opened the case for the pursuers, and said, The questions were, whether the magistrates raised the customs above the rates prior to 1782—to what extent—and was it done wrongfully ? Magistrates are bound to furnish a market-place, and to enlarge it when necessary. Prior to 1782 the whole rates for all kinds of meat was half a merk, (6s. 8d.) but by various subsequent regulations the rate is now doubled. For these regulations there was no statutory or prescriptive authority ; and the butchers are not bound to pay for the improvements the magistrates may make; but if the defenders go into proof, it will be found that they are greatly overpaid for these improvements.

Stat. 1540.

Before the case was opened, Angus was struck out as a pursuer in the cause. When his father was called as a witness, it was objected, that the son, having been a pursuer, remained liable for expenses, and the witness was not received.

The father of an original party in a cause an incompetent witness.

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Query, Whether it is competent to prove matter admitted in the Answers to the Condescendence, and where, *prima facie*, the case is in favour of the pursuer.

A witness having stated that he paid for his stall by the week, and got no deduction when it was occupied for a day by another person,

Hope, Sol.-Gen.—This is a declarator of exactions by the magistrates, and they are only liable for what is sanctioned by them, not for exactions by the tacksman. If the practice now stated exists, we are anxious to put it down, and quite ready to let the stalls daily.

Cockburn.—This may be very good in argument to the jury; but how can I be thus cut short in my evidence? The pursuers could not tell the legal right. The jury must say on the whole evidence; whether the magistrates could be ignorant of it.

Hope, Sol.-Gen.—Proof of the authority by the magistrates is necessary to make this evidence. This is surprise, as I am not prepared on any exaction beyond the table 1782.

LORD CHIEF COMMISSIONER.—The admission of being ready to let them daily is to be taken when it is made, and it renders proof of the matter unnecessary.

The question here is, whether it is necessary to prove that the magistrates had authorized or confirmed this act of the tacksman? or whether; *prima facie*, it is to be presumed that he is

their agent, and that the magistrates must show that they disavowed the act? Whether the pursuers must show that this was the act of the magistrates, or that the magistrates must show that they did not authorize it, this appears to me settled by the answers to the condescendence, which goes the whole extent of showing that the *prima faciæ* case is in favour of the pursuer; and the only doubt is, whether we have not all the fact already before us?

LORD MACKENZIE.—The only doubt I had was, whether this should not be rejected as unnecessary?

A butcher renting a stall in a market-place an incompetent witness to prove that the rate of custom had been wrongfully raised in that market.

A person having a stall in the market was called as a witness, but rejected on the ground of interest.

Hope, Sol.-Gen. opened for the defenders, and said, An attempt was made to create a prejudice in this case; and it is assumed that the magistrates have no right to these duties, and that they are bound to furnish stalls without charging rent. But here the only complaint is of an increase on an admitted table. There is an express grant of custom, and there is a right in the corporation to make a table under control of the courts of law. In opposition to

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this a statute is referred to; but that is a statute against the freemen, not the corporation. This case would have been simpler, and more in terms of the interlocutor of the Court, if it had been sent on special issues of fact; but this issue is partly law, and partly fact.* Whether the rates were unwarrantably raised, is a question of law on which you must find for the defenders; or, if you doubt on the subject, you must find a special verdict. The right to exact custom is coeval with the burgh; and by a charter in 1603 a right to exact so much on each beast is given, and a separate grant of stand-mail or rent, and the old table was framed under this charter. By another charter in 1636, the duty on the beasts and the stand-mail is thrown into one sum, and so much is paid for each kind of meat sold. The table was questioned in 1782, and was held reasonable by the Court; and the only rise since is the night custom, which was only exacted when the butcher used the stall in the night; and the letting stalls for a week was for the convenience of the butchers. The magistrates are not restrained by statute in fixing the rates. The pursuers

Thomson *v.* Boyd, Feb. 25, 1824.

* Several unsuccessful attempts were made to frame special issues, but the Second Division of the Court of Session became satisfied that a general issue was preferable.

have not proved the issue; and there ought to be a verdict for the defenders, or a special verdict.

LORD CHIEF COMMISSIONER.—It would be extremely difficult to get facts so definite and specific that there was nothing for the jury to conclude from them.

In a special verdict, the facts must be so definite and conclusive that nothing is to be concluded from them by the jury.

Hope, Sol. Gen.—The jury might find the table 1782, and the charges under it for all kinds of meat, then whether the second table was enforced, and whether the rates were raised?

Moncreiff, D. F. in reply,—When the magistrates claim an unlimited power to lay on custom, it is right you should know that it is the public who pay it; and it is of consequence to have a check on the freemen fleshers, who pay only L. 3, 3s., while the unfreemen are charged L. 26 a-year. The charter gives only a right to the customs payable at the time, and to make a table in the manner pointed out in the charter, but it omits to state what that manner is. We say the authority for the old custom was use and wont, and that there is no other right; and I was surprised at the argument as to stand-mail and rent, as this is solely a table of "customs."

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Those who paid the highest rate under the old table might sell all kinds of meat; and the magistrates have raised this rate. The sum laid out on the market-place, and the additional accommodation to the fleshers, did not warrant this rise. It was not necessary, as the enlarged market enabled a greater number to attend, which has more than repaid the sum.

The issue is proved by showing the night custom—the double custom for the same stall—insisting on stalls being taken for a week—making the butcher pay for a large craem when a smaller might have answered. The rise is not warranted, but is unreasonable and unjust. In Peacock's case, the Court was misled by a statement that 4s. 8d. was all that could be levied, instead of 10s. 4d., the present rate. Thomson's case was reversed on appeal; and in Reid's in 1810, it is said the judgment was contrary to the report. We think not. If you went into the particulars of the evidence, you would find the magistrates had paid L. 6500 for the new market-place, and have drawn L. 55,000!

Reid *v.* Boyd, Dec. 6, 1810.

LORD CHIEF COMMISSIONER.—The case has occupied so much time, that I shall say very little before coming to the consideration of the issue; but it is necessary to know something of

the history of the market to understand the question. The market prior to 1782 was in bad order, and at that time the meat was exposed to sale on boards; after this some of the butchers erected craems and stands, and finally stalls were introduced. In the present market there are twenty-six stalls and fifty-one craems.

The single question for you to try is the issue; and the object of trying it is to convey information to the Court of Session by your verdict, to enable them to pronounce judgment in the declarator; and this object will be attained by your finding for the pursuer or defender. If there is any error in the statement by the Court there is a means of redress.

You will attend to the admissions; and the tables of custom prior and subsequent to 1782 will be put into your hands, as the case turns essentially on the comparison of them. The pursuers admit that the first table has existed past memory of man, but dispute the right to make the other. The defenders say it was such a table as they were entitled to make, and that it is not proved that it was wrongfully made. The pursuers admit the first table for the purpose of comparing it with the second; but it is difficult to make the comparison so as to come to a clear conclusion on this part of the

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case. Putting the amount out of view, the magistrates had a right by their charter to make a table of dues, provided these were legal dues. The defenders having this right, the question is put, whether they wrongfully exercised it? The former dues were collected by a table, and the right of the magistrates to make a new table is undoubted; but it is a very different question, whether, by the table thus to be made, they could raise the dues? If, from a change of circumstances, it became necessary to collect the same dues in a different form, this they had power to do; but there is no statutory authority, or evidence of immemorial usage for fixing new and higher rates or dues. The right given by the charter is merely to make a new table. We must therefore consider the amount of the dues, as proved in this case.

Prior to 1782 the old table was used; but in that year an alteration of the market was made, and a new table became necessary. It is said by this change in the table a profit has been made; but if that was a legal profit, it is of no consequence in this case;—if it was illegal, there must be a verdict for the pursuers. It is admitted that night custom was not in the old table; but this is defended as a payment by agreement for an accommodation which the butchers did not for-

merly enjoy; if you are of opinion that it is paid by agreement, you cannot, on this point, find for the pursuers.

The new table differs from the old; and it is said that the old would not apply to the new accommodation, as the stalls and new craems are larger and more commodious than the old. This alteration, however, does not give the defenders a right to impose a higher duty; it only gives them a right to impose the taxation in a different form; and the question is, whether, by altering the form, they have increased the duty? Now, a butcher takes a stall and sells all kind of meat; formerly each kind of meat had a separate charge. The defenders contend, that formerly the duty of each kind of meat sold on the same board, on the same day, must be paid. The pursuers, on the other hand, aver, that, if a butcher paid for a beef board, which was the highest, he might sell on it all the other sorts of meat. If this is the case, the rise is easily ascertained, as you have only to compare 20d., the former dues on a beef board, with 10s., the present dues on a stand. It appeared to me, that, according to the regulation prior to 1782, and to the evidence, a person who took a beef board was also entitled to sell other kinds of meat; and if this is correct, then the case of the defenders

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falls from under them. But if you are of opinion that the magistrates were entitled to accumulate the whole dues under the old table, then it does not appear to me that they were not entitled to alter the form of the table.

A minor point is letting the stalls by the week. This I consider an agreement; and though the tacksman, when the butcher was absent, may have let them to another for the day, and thus collected more money, this was not raising the duty on any individual.

You will, therefore, compare the tables, and consider the alteration on the market; and if on the evidence you think the magistrates were entitled to accumulate the whole duties, you will compare this accumulation with the new table, and say whether the duty is raised. If they were not entitled to accumulate them, there can be no doubt.

On the whole, as there is no statutory authority for raising the dues, nor any proof of immemorial usage to collect them, if you think the magistrates have raised them, you must find for the pursuers.

It is not absolutely essential to find the extent of the rise; but if you find for the pursuers, and have grounds on which to ascertain it, you may mention the extent.

Verdict—Finding that the dues are raised, but that the jury could not fix the amount.

CHATTO, &c. v. PYPER, &c.

A bill of exceptions was tendered, to the direction, that it required a statute or immemorial usage to sanction the magistrates in drawing the custom levied under the new table. But the exception was disallowed by the Second Division of the Court of Session.

Moncreiff, D. F., Forsyth, Cockburn, and *Currie,* for the Pursuers.

Hope, (*Sol.-Gen.,*) *L'Amy,* and *Robertson,* for the Defenders.

(Agents, *Gibson-Craigs & Wardlaw,* W. S. and *Macritchie, Bayley* and *Henderson.*)

PRESENT,

LORDS CHIEF COMMISSIONER AND MACKENZIE.

CHATTO AND Co. *v.* PYPER AND Co.

1827. July 24.

Finding for the proprietors of a stage coach on a question whether they wrongfully failed to deliver a parcel.

THIS was an action to recover L. 135, 2s. 9d., the sum contained in letters of caption, delivered to the defenders in a parcel to be transmitted to Glasgow.

DEFENCES.—The parcel was delivered in Glasgow. No money could have been recovered