GARDNER, &c. *v.* REEKIE, &c.

is a case in which, from its nature, great care should be taken in selecting witnesses. As in the Queensberry cases, we thought it better that they should be tried here; so it is desirable that this case should be tried at a distance from the scene where any local feeling may prevail.

If an application is made for a view, we must hear reasons for it, as at the institution of this Court there was too great laxity on this subject, and it is necessary to restrict the granting them; and I hold that in this case no view ought to be allowed. With respect to the time of trial, the pursuer ought to consent to delay the trial till a fuller bench may be had; for though this is not a case of difficulty, yet from the amount, it is desirable that more than one Judge should be present.

PRESENT,

LORDS CHIEF COMMISSIONER AND MACKENZIE.

1828. Feb. 4.

## GARDNER, &c. *v.* REEKIE, &c.

Finding that a usage existed different from the terms of the set of a burgh as to the election of magistrates.

THIS was a petition and complaint against the election of the Magistrates of the burgh of Kilrenny for the year 1823. The case was carried

to appeal, and remitted to the Court of Session to inquire into the usage.

ISSUES.

"It being admitted that the set of the "burgh of Kilrenny, in the county of Fife (as "recorded in the books of the Convention of "Royal Burghs, bearing date the 5th Septem- "ber 1710), in so far as regards the election "of the bailies of the said burgh, is, 'that the "bailies give in a leet of nine persons, where- "of they themselves are always three, out of "which they (the burgesses) are to choose the "three bailies for the year ensuing.'

"Whether any and what usage, different "from the said set, has prevailed in the said "burgh for forty years and upwards, in respect "to the election of the bailies thereof, and at "what period such usage commenced and ter- "minated? And,

"Whether such different usage did not pre- "vail at the election of bailies at Michaelmas "1823?"

*Hope, Sol.-Gen.* for the pursuers.—The only question here is the fact, whether any and what usage, &c.? We shall prove the usage for 100 years to have been, that the bailies sent three

GARDNER, &c. v. REEKIE, &c.

leets, and that the election in 1823 differed from that usuge. Out of the three leets, the person having most votes in the first leet was first bailie, although there might be more votes in favour of a person in the second or third leet. By giving one leet of nine, the council retained their power of naming which of the three elected should be first, instead of the burgesses having this power. (Mr Solicitor wished to put into the hands of the jury copies of certain parts of the books of the burgh, to show the manner in which the names were written; but the Lord Chief Commissioner observed, that it could not be done until a foundation was laid for it in evidence. Mr Solicitor then described to the jury the different forms, and made one of the jury write them down.)

Competent to prove by parol, how a communication was made, but if it was in writing, incompetent to prove the contents.

The first witness was asked how the result of the voting was communicated to the burgesses.

*Robertson* objects.—The minutes are the only evidence, and parol evidence is incompetent.

*Moncreiff. D. F.*—We are entitled to ask in what manner the names of the persons on whom the burgesses were to vote were communicated to them.

LORD CHIEF COMMISSIONER.—The witness

cannot prove the contents of the minutes, but may prove the transaction. There is no objection to his answering the question as now put. If he says the communication was in writing, the question will arise, how far it is competent for him to prove the contents? but if the communication was verbal, he may prove it.

Circumstances in which a printed list referred to in an extract of a process was admitted in evidence.

An extract of a process was given in evidence, which referred to a printed list of the burgesses, appended to the papers in the Advocates' Library. When that list was given in,

*Robertson.*—This extract proves that a list was produced in an old process; but I do not admit this to be a true list, or a true copy of the list.

*Hope, Sol.-Gen.*—We produce this to show that at that time they voted on three leets. From the lapse of time, no one could prove the accuracy of the list.

LORD CHIEF COMMISSIONER.—I am not quite certain how this bears on the case; but in considering the objections, we must recollect that this is a case of usage, and going far back to establish a usage contrary to the set of the burgh. The period here is for no less than 118 years, and in cases of usage and pedigree, when, from length of time, direct evidence is

GARDNER, &c. v. REEKIE, &c.

not to be had, though the proof must be regular, the strict rules of evidence must be relaxed, and evidence of reputation be admitted. If that relaxation is not to be the rule here, then we ought to reject what is now offered. If the document is one to be resorted to, and in which there is no radical defect, perhaps the relaxation must do away with the strict rules. After such a lapse of time, the call for the original and its non-production is perhaps sufficient to show that it is not to be found. The question then arises, whether this is a document bearing faith? and it appears to me that it is, but subject to this observation, that it is only mentioned, not copied as it ought to have been, in the extract; but it is a document laid up in the proper place, and there is no evidence of error or fabrication. It is farther sanctioned by the parol evidence as to how it came into the Library. The only difficulty is, that this printing may not be quite correct; but as this is a case where the strict rules are to be relaxed, I think it admissible.

LORD MACKENZIE.—I am quite clearly of the same opinion.

In proving usage, incompetent to ask a witness

Another witness was asked what he understood the former practice to have been.

LORD CHIEF COMMISSIONER.—The question ought not to be put in this general way, but ought to be, Whether he was informed by aged persons as to the former practice? Indeed, in strictness it ought to be limited to the individuals who informed him.

what he understood to be the former practice.

At the close of the pursuers' evidence the case was adjourned.

An adjournment of part of a trial to the following day.

1828, Feb. 5.

On the following day the pursuer gave in his condescendence, as showing the points and the form in which the verdict might be returned.

When a case is remitted by the Court of Session for information on a certain point, special findings, and not a special verdict or case, should be returned.

LORD CHIEF COMMISSIONER.—You may put this in, though I do not see how it can assist us. The finding of the House of Lords must control or rather regulate the finding. The jury must find so, that by the specialty of their finding the Court of Session may be able to judge of the legality of the election. A special verdict or special case would not do, as they are calculated to raise a point of law; but in this case there must be special findings describing the custom or usage, so as to enable the Court of Session to give judgment in the cause.

*Robertson* for the defenders.—It is diffi-

GARDNER, &c. v. REEKIE, &c.

cult for me to understand the hardship complained of in this case, as we gave the burgesses a list of nine from which to choose, if they thought proper, the first, second, and third bailies to their respective offices; and they plead that we should have limited the choice of each bailie to a list of three. The set of the burgh is in our favour, and there must be an uniform and uninterrupted usage to alter it. Though the pursuers have produced evidence to show the usage in a number of years, they have passed over others which you must hold to be against them; and you will not hold that they have proved enough to disfranchise the burgh.

LORD CHIEF COMMISSIONER.—This is a question of fact which is sent here by the Court of Session, in consequence of a remit from the House of Lords. That remit contains two parts; but one of them is law for the Court of Session, the other depends on your verdict either establishing the usage or not. Whatever you may think the best constitution for this burgh, you must confine your attention to the evidence; and we must also attend to the best form in which to make the return, that the Court of Session may be enabled to judge how far the usage will affect the set. The second

issue may be first disposed of, as it is not disputed that the election was not according to the alleged usage.

The material part of the set is in the issue, and being clear, the pursuers must make out by distinct evidence a clear and undoubted usage existing for forty years; but if they have proved an inroad on the constitution more than forty years ago, that raises a presumption in their favour which is not to be taken off by mere observations by the defenders. You must, however, always keep in mind that there is a much greater burden on the pursuer than the defender;—he must give good and sufficient evidence of the first inroad; but having done so, we are not to hold that the original constitution revives every year. The loss of records and other circumstances may break the train of the evidence.

The pursuer proved an inroad in 1719; and then there are five or six years left out, but you cannot expect the same distinct evidence as to every year in so long a period. The general principle for you to consider is, whether the presumption is in favour of the set or the usage, the pursuer having distinctly proved an inroad on the usage at so early a date.

The procedure at an election was distinctly proved to you by a witness, and much stress has

GARDNER, &c. v. REEKIE, &c.

been laid on the term leets, not leet, being used in the minutes; but as there was a leet for the treasurer as well as the bailies, that would justify the use of the plural.

You will first consider whether you will find for the pursuer or for the defender. If you find for the defender, that puts an end to the case. But if you find for the pursuer, you will let me know that you do so, that I may suggest some points respecting the usage to enable you to frame your verdict, so as to secure a verdict that will enable the Court of Session to decide the question.

Verdict—"For the pursuers on both issues; "and on the first issue they find, that a usage "different from the said set has prevailed in "the said burgh for forty years and upwards, "in respect to the election of the bailies there-"of: Find that the said usage has been, that "the bailies have been elected by three leets "being given out by the council of the bur-"gesses for the election of the three bailies; "that the said three leets were made up by "placing the old bailies for the former year in "their order of precedence severally at the "head of a list of three persons, of which each "bailie formed one; that the said three leets

" have been designated and understood as the
" first bailie leet, the second bailie leet, and
" the third bailie leet; that on these leets
" thus separated, each burgess gave a vote for
" the *first* bailie, the *second* bailie, and the
" *third* bailie, confining his voting for the first
" bailie to the persons named in the *first* leet,
" his voting for the *second* bailie to those in
" the second leet, and his voting for the third
" bailie to those in the third leet; that after
" the votes of all the burgesses who chose to
" vote in the election of the bailies were thus
" given on each leet severally, the person in
" the first leet, who had the majority of votes
" on that leet, was declared to be duly elected
" *first* bailie, the person in the second leet, who
" had the majority of votes on that leet, was
" declared to be duly elected *second* bailie,
" and the person on the *third* leet, who had
" the majority of votes on that leet, was de-
" clared duly elected third bailie; that the
" result of the polling on the several leets con-
" ducted in this manner was then published to
" the burgesses by the order of the town-coun-
" cil without any order or resolution of the
" council; and that thereafter the council as-
" sembled, and the new bailies accepted of
" their several offices in the order in which

HOGG, &c. v. MACGILL, &c.

"they stood in the leets as aforesaid: That "this usage has existed from 1719 till 1818 "inclusive."

*Moncreiff, D. F., Hope, Sol.-Gen., Ivory,* and *Johnston,* for the Pursuers.

*D. M'Neil, Robertson,* and *H. Bruce,* for the Defenders.

---

PRESENT,

LORDS CHIEF COMMISSIONER AND CRINGLETIE.

---

1828. March 8.

## HOGG, &c. v. MACGILL, &c.

Reduction of a deed on the ground that the granter was not of sound mind, &c.

AN action of reduction of a trust-deed signed by notaries, on the ground that the truster was not of sound mind, occasioned by a stroke of palsy, and that the deed was impetrated from him.

DEFENCE.—The deed was framed by instructions from the truster, who lived eight months after its execution, and gradually improved in health till within a few days of his death.

ISSUE.

Whether it was not the deed of the truster?