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ration (all which his Lordship described) and then say whether the damage was caused by this operation? If you think it was not, you will find for the defender.

The damage in the schedule is not fully proved, which shows a grasping disposition on the part of the pursuer; but some damage was done to the wheat and hay, and you must consider whether it was done by the regurgitation produced by this dam; but the defender ought not to suffer from the inaccurate proof of the damage by the pursuer.

Verdict—"For the defender."

Jeffrey, D. F. and *Russell* for the Pursuer.
Robertson and *W. Bell* for the Defender.
(Agents, *John Cullen*, W. S. *Dickson* and *Stewart*, W. S.)

PRESENT,

THE LORD CHIEF COMMISSIONER.

1829. July 17.

INCORPORATION OF TAILORS OF ABERDEEN *v.* MUNRO and GRANT.

Declarator of the exclusive privileges of an incorporation, and damages for infringing that right.

THIS was an action of declarator and damages, to have it found that the Members of an Incor-

poration had the exclusive right of exercising the trade within Burgh, and that the defenders were liable in damages for infringing the privileges of the corporation.

DEFENCE.—The defence insisted on was, that Munro was a King's freeman by having served in the army, and was entitled to assume an unfreeman as a partner, and employ journeymen.

ISSUES.

" It being admitted that the pursuers are the " Deacon and Members of the Incorporation " of Tailors in the city of Aberdeen :

" Whether, at several times, between the " 2d April 1824 and 2d April 1828, in vio- " lation of the privileges granted to said Cor- " poration, the defenders, or any of them, by " themselves, or their workmen, wrongfully ex- " ercised the trade of tailors within the said " city, or liberties thereof, to the loss, injury, " and damage of the pursuers ?"

Neaves opened for the pursuer and stated, That the privilege of the incorporation being admitted, the fact the pursuers had to make out, was, that the defenders exercised the trade

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within Aberdeen. Munro is not personally capable of carrying on the trade, and his partner is not a freeman. They are not therefore entitled to employ servants to make clothes for sale. The act was intended to enable a soldier, who supported himself by his own personal labour, to exercise his trade within any burgh, but he must be apt and fit, and not use his privilege merely as a cover to others.

LORD CHIEF COMMISSIONER.—Was not this decided the other way, and if so, would it not be better to admit the fact, and take a bill of exceptions to my direction.

Cockburn.—We do not admit the fact, and shall prove him expert.

Skene.—The point which occurs in this case was never decided.

Tailors of Glasgow *v.* M'Kechnie, March 1777. Mor. 2014, and Ap. Burgh R. No. 3; Hammermen of Glasgow *v.* Dunlop, 18th Feb. 1757. Mor. 1950; M'Ewan and Ferguson *v.* Davidson, 27th June 1816. Shoemakers of Perth *v.* Martin, 24th Feb. 1790. Mor. 2014 and 2 Hailes' Dec. 1079.

Neaves.—The defender was unfit during the period of which we complain, though he may have made some attempts to qualify himself during the dependence of this action.

Though he were apt and able, and entitled to practise the art, it is a personal privilege, and he is not entitled to communicate it to another.

An objection being taken to the production of an account paid to the defenders,

LORD CHIEF COMMISSIONER.—You must prove it.

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An extract of a sentence of the Dean of Guild Court was afterwards tendered.

Evidence must be confined to the issue, not to the condescendence or pleas in law.

Cockburn.—This is not an extract, and is irrelevant. It is merely a narrative by the clerk of what he thinks the substance of a judgment imposing a fine on the defender as not a freeman.

Skene.—They aver that he is a burgess, and upon this ground a plea in law is stated; and we produce this to disprove the averment.

LORD CHIEF COMMISSIONER.—We are not here trying the pleas in law, or averments in the condescendence, but the issue, whether they wrongfully exercised the trade? and, though it is right to draw the attention of the Court to the averments and pleas, yet the evidence must be confined to the issue. It would be wild work were we to admit evidence to meet every averment or plea. When the issue is settled, it contains the question to be tried; and it must be shown, that it is evidence on that question. What is tendered is clearly not evidence,—it is on another matter in a different Court. If the fact is material, it must be prov-

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ed regularly, and not by an extract, whether regular or irregular.

A witness was asked whether it was consistent with his knowledge that Munro was, or was not, apt and fit for the business of a tailor.

Cockburn.—We hold this irrelevant.

LORD CHIEF COMMISSIONER.—Might not a special verdict or special case be the best way of disposing of this question. In England, when a case is taken, it is necessary to have leave to turn it into a special verdict if it is intended to carry it to a higher tribunal on a writ of error; but this distinction does not hold here, and the advantage of a special case is, that the jury are not called on to find any thing, but it is made up by counsel of consent from the notes of the Judge. In either case the object is to state what will raise only a question of law. They must contain facts, from which no conclusion is to be drawn by the jury, but by the Court. This appears to me such a case, and I shall state my views of it, and counsel will be able to judge whether the case can be so disposed of.

The question is, whether, under the terms of the statute, "apt and fit," a person of the

description of Munro, who is proved to have his freedom by service, is bound by law to be apt and fit. What it is to be apt and fit must be decided by the statute and the cases. The jury must find on this according to my direction, and I am not sure that there is any conclusion for the jury to draw, except according to the law that may be stated to them by the court. I might say according to the opinion of the witness, that skill in the profession was necessary. But, if what I have proposed is adopted, then, instead of the jury finding this, they will merely find for the pursuer, subject to the opinion of the court on a case to be made up. As to damages, I consider that matter of form.

The counsel on both sides assented to the propriety of this mode of settling the case.

Verdict—"For the pursuers, subject to the "opinion of the Court of Session on a special "case."

Skene and *Neaves*, for the Pursuers.
Cockburn and *Moir*, for the Defenders.
(Agents, *Carnegy* and *Shepherd*, w. s. and *Æneas Macbean*, w. s.)