REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

Court of King's Bench,

WITH

TABLES OF THE NAMES OF THE CASES AND PRINCIPAL MATTERS.

BY EDWARD HYDE EAST, ESQ.

OF THE INNER TEMPLE, BARRISTER AT LAW.

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Candidus imperti: si non, his utere mecum.—Hor.

VOLUME XIV.

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A

TABLE

OF

THE CASES REPORTED

IN THIS VOLUME.

N. B. Those Cases which are printed in *Italics* were cited from MS. Notes.

1811.

The following is the same case which is reported in 4 *Term Rep.* 157. for another point, which came on upon demurrer, in *Hil.* 31 *Geo.* 3. and where the plaintiff had leave to amend.

Morewood against *Wood, M.* 32 *Geo.* 3. *B. R.*—Trespass for breaking and entering the plaintiff's close called *Swanwick Common*, in the parish of *Alfreton*, in the county of *Derby*, and digging stones therein, and carrying them away, &c. The defendant pleaded, that there are certain wastes or commons lying open to one another, one called *Swanwick Common*, being the close in which, &c. the other called *Swanwick Green*, in *Alfreton*, &c. and that he was seised in fee of a messuage and lands in *Alfreton*, in right of which he prescribed for the liberty of digging for and carrying away all necessary flags and stones in *Swanwick Common*, and in *Swanwick Green*, for the repair of his houses, fences, &c. The plaintiff replied, that he was lord of the manor of *Alfreton*, and that the defendant of his own wrong committed the trespass. The defendant, in his rejoinder, insisted on his prescriptive right as stated in the plea; on which issue was joined. At the trial before *Hotham*, B. at *Derby* assizes, the defendant called many witnesses, who proved that, for between 60 and 70 years past, he and those from whom he claimed had been in the constant exercise of the right stated in his plea; in many instances to the knowledge of the lord, who had threatened to bring actions, and been dared to do so by the defendant's ancestors, who insisted on their right. On the other hand, the plaintiff produced a presentment in 1717, of the freeholders of the court baron of the manor of *Alfreton*, of which the plaintiff is lord, and which presentment was signed by one *Robert Wood*, the foreman, and others; which name of *Robert Wood* was proved to tally with the subscription(1) to the will of *Robert Wood*, the grandfather from whom the defendant claimed, and which will was produced from the registry. One of the items in that presentment was,—"If any person gets stone without leave of the lord of the manor, we pain him 10*s.*" The plaintiff also called another witness to prove that, in a conversation with the defendant's uncle, from whom the defendant also claimed, the uncle had admitted that the lord of the manor had the right, and he would not be beholden to him for the stone. The jury found for the defendant. Thus much appeared on the Judge's report, on a motion for a new trial. But the plaintiff's counsel stated further, (which was admitted by the other side, and so taken by the Court,) that the learned Judge had rejected other evidence which they had tendered, and for which alone the new trial was moved for, viz.

1st, Other presentments of a similar nature to the one received in evidence; but to which no subscription could be proved by any person from whom the defendant claimed: this was offered as evidence of *reputation*.

2d, General *parol* evidence of *reputation*, that none but the lord had a right to dig stone, &c. on the locus in quo.

A rule nisi having been granted; *Chambre, Clarke, Sutton, Willis*, and *Iscough* contended, in support of their rule, that a general custom or prescription, covering all the estates of the tenants of the manor, might clearly be proved by evidence of reputation; and that there was no solid distinction between that case and the case of a particular prescription. There were no title deeds in the one case more than in the other, to which, as to a more certain criterion, reference could be had. In both instances the right rested on memory of particular instances of the exercise of it. In the case of a modus, reputation is evidence; and yet that relates to a particular estate. In the *Bishop of Meath* v. *Lord Belfield*, in 1747, cited in *Bull. N. P.* 295., it was held that evidence of reputation was admissible in a quare impedit, that one *Knight* had been in by the presentation of Lord *R.*; which is a stronger case than this. The case of *Webb*, v. *Potts*, *Nov.* 44. was clearly the case of a modus for a particular farm; and there the court held hearsay evidence to be sufficient. Such evidence as this is also admissible in the case of a manerial custom; and yet the public have as little to do with the custom of a particular manor as with a private prescription. Other persons in the parish may claim the same right as the defendant: and then it might have been laid as a custom; in which case these presentments would have been decisive evidence against it. So that by laying it as a prescriptive right annexed to each farm, instead of a custom, all the lord's proof of his right is gotten rid of; and the tenants may give in evidence those very tortious acts as evidence of a prescription, all which united together *could not have supported a custom against the positive written testimony sub-

Qu. Whether general evidence of reputation as to a prescriptive right of digging stones on the lord's waste, annexed to a particular estate, be admissible? Two Judges against * [328] two. But one of those who held the affirmative thought it required other evidence of the right to be first laid as a foundation. It seems, however, that such evidence may be given as to a particular custom, though not to a private prescription; by three to one. Where a person had been dead a great number of years, whose hand wri- * [329] ting was

ing was required to be proved, it was done by shewing the similarity of the hand-writing in question to the hand-writing of his will, and no objection was taken to it, either at the bar or by the court.

(1) Vide *Doe* v. *Rawlings*, 7 *East*, 281.

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scribed by all their ancestors who were tenants. Here, they said, there was sufficient to ground the hearsay evidence on.

The counsel on the other side were not heard by the court, who made several observations during the argument, to which the counsel for the plaintiff adapted their answers. On granting the rule nisi,

Lord KENYON, C. J. said, he doubted very much if evidence of reputation could be adduced in support of any prescription, unless it affected the public interest in some way or other.

ASHHURST, J., in the course of the argument, said that if this had been laid as a custom, he conceived that general reputation would have been evidence; but in the case of a private prescription, he doubted it very much.

BULLER, J., observed that the practice had been different on different circuits. On the *Oxford* it has been the practice to reject, and on the western circuit to receive this sort of evidence. But upon the latter, I have told the counsel, that I would indeed receive such evidence, if they pressed it, but that in summing up, I should tell the jury that they were to decide upon the other parts of the case.

Lord KENYON, C. J. (after the argument.) The evidence given by the defendant of an usage of about 70 years is extremely strong in his favour; and the only evidence to weigh against it is that of the presentment signed by *Robert Wood*: but that is not necessarily inconsistent with it. The lord might have the general right, and yet a particular tenement have a prescriptive right also. On that ground, therefore, there is no pretence for impeaching the verdict. With respect to the other question raised respecting the rejection of general evidence of reputation; it is involved in great dispute; and one is apt to imbibe prejudices from the opinion one has always heard inculcated. Upon the *Oxford* circuit which I went, such evidence was never received; and I cannot help thinking that that practice is best supported by principle. Evidence of reputation upon general points is receivable, because all mankind being interested therein, it is natural to suppose that they may be conversant with the subjects, and that they should discourse together about them, having all the same means of information. But how can this apply to private titles, either with regard to particular customs or private prescriptions? How is it possible for strangers to know any thing of what concerns only these private titles? I barely, however, throw out these hints as the ground of my present opinion; laying in my claim to change that opinion if I should hear any thing which shakes it.

ASHHURST, J. declared himself of the same opinion: adding, that the utmost which the evidence offered went to prove in the present case was, that the lord had the general right; but that did not negative a particular right, provided it was made out in evidence, which it had been in the present instance.

*BULLER, J. I have already mentioned what has been the general practice on the *Oxford* and on the Western circuit; and as there are two judges from each of these circuits in court(1), it is hardly likely for us to agree upon the general point. But thus far I agree with my lord and my brother *Ashhurst*, that in no case ought evidence of reputation to be received, except a foundation be first laid by other evidence of the right. Now here there was no foundation, or at least a very slight one, in comparison to the evidence given by the defendant. But I cannot agree that it ought not to be received at all. It was settled that it ought in the cases cited in argument, and also in many other instances which relate merely to private titles: in one in particular, as to whether such a piece of ground is parcel of one close or another. So again in the case of pedigrees. But as to this particular case, the evidence is very strong with the defendant. It was not proved that the estate in question was in the possession of the defendant's grandfather at the time he signed the presentment which was read in evidence; and even if that were made out, all the evidence since for above 60 years is the other way. The defendant's ancestors have all that time taken stone in defiance of the presentment, and in the face of the lord himself, who was dared to bring an action for it. Now, supposing all the evidence of reputation had been received, I think it ought to have weighed so slightly with the jury, that the court ought not to grant a new trial. For I do not know that, because evidence which ought to have been received was rejected, therefore the court are bound to grant a new trial, if they see clearly that the verdict is right, notwithstanding such evidence had been admitted. * [330]

GROSE, J. was of the same opinion as *Buller* J. on the general point, that ev-

(1) Lord *Kenyon* and *Ashhurst* J. had gone the *Oxford*, and *Buller* and *Grose*, J. the Western circuit.

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idence of reputation is to be admitted. I confess, he said, that habit has so enured my mind to think it admissible in these cases, that I cannot change my opinion without much further consideration: though I certainly should, if, upon future thoughts, I should be convinced that the practice of the western and I believe also of the northern circuit, is wrong. Once, indeed, I remember the case of a pedigree tried at *Winchester*, where there was a strong reputation throughout all the country one way, and a great number of persons were examined to it: but, after all, the whole was overturned, and proved to have no foundation whatever, by the production of a single paper from the Herald's Office: which shews, to be sure, how cautiously this sort of evidence ought to be admitted.

Rule discharged.

* [331]

In the case of *Outram* v. *Morewood, Hil.* 33 *Geo.* 3., 5 *Term Rep.* 123., Lord *Kenyon* C. J. said, "Although a general right may be proved by traditionary evidence, yet a particular fact cannot." The particular fact there was whether a certain close, then called the *Cow close*, had *been part of the estate of Sir *John Zouch* in the 18th of *Eliz.*, out of which certain rents and coals had been reserved: and all the court agreed, that this fact could not be proved by entries made by a third person, deceased, in his books of receipts of rents from his tenant; considering such entries as no more than a declaration of the fact made by such third person; which was different from the entries of a steward, who thereby charges himself with the receipt of the money. And *Grose*, J. distinguished this from the cases where traditionary evidence had been allowed, "because the tradition of a particular fact is not evidence."

Traditionary reputation is evidence of boundary between two parishes and manors; and this though the old persons deceased making the declarations claimed rights of common on the respective wastes, which might be enlarged by such evidence; there being no litigation pending or in contemplation at the time which could induce a belief that they had in view to make evidence for themselves, though the boundary had long before been and afterwards continued to be vexata questio.

In *Nicholls* v. *Parker, Exeter* summer assizes 1805, upon a question of boundary between two parishes and manors, whether a certain common was within the parish and manor of *Holne*, of which Sir *Beuchier Wrey*, Bart., was lord, or within the parish of *Buckfastleigh* and manor of *Mainbow*, of which Colonel *Parker* was lord: *Le Blanc*, J. admitted evidence of what old persons, now dead, had said concerning the boundaries of the parishes and manors; though not as to particular facts or transactions. And this, though these old persons were parishioners, and claimed rights of common on the wastes, which would be enlarged by their several declarations; there not appearing to be any dispute at the time respecting the right of the old persons making the declarations, at least no litigations pending; (for in truth, the boundary had been long in dispute between the respective parishes and manors, and intersecting perambulations had been made both before and after such declarations by the respective parties; so that those persons could not be considered as having it in view to make evidence for themselves at the time. And in support of the same opinion were cited, *The King* v. *The Inhabitants of Hammersmith*, sittings at *Westminster* after *Hilary* term 1776, before Lord *Mansfield*, C. J.(1), and a case of *Dixon* v. *Hole*, at *Taunton*, in 1795, before *Lawrence*, J. in both which the same point had been ruled.

But evidence of reputation of a boundary between two estates were rejected.

* [332]

In *Clothier* v. *Chapham*, *Bridgewater* summer assizes 1805, where, in replevin, the question was, whether *Street Hill*, alias *Ivythrone Hill*, a waste, was parcel of *Ivythrone Farm*, and the soil and freehold of one *Rooke*, or not; evidence was offered of declarations of old persons deceased, as to the ancient boundary of the waste belonging to *Ivythrone Farm*, that it extended to the inclosures on the north side of the hill: and 2 *Roll. Abr.* 186. *pl.* 5. tit. *Prerogative*, was cited in support of it, where it was held that such declarations, as to whether certain land was parcel of a manor or of an estate, were deemed admissible as between subjects, but not as against the crown: and *Davies* v. *Pierce*, 2 *Term Rep.* 53. was also cited. But *Graham*, B. rejected the evidence in this case, where the question was not as to the boundary of a parish or manor, *but between one person's private property and another. There was a verdict afterwards for the defendant, by whom this evidence had been offered, so that the question could not be stirred again.

See the next case. [See also *Phillipps' Evid.* 189 to 192. where the authorities upon the subject are collected and arranged.]

(1) Vide *Peake's Evid.* (Appendix, 33.,) and vide another case of *Ireland* v. *Powell, Salop* Spring Assizes, 1802, cor. *Chambre*, J. *ib.* 18.