PRESENT,

LORDS CHIEF COMMISSIONER AND GILLIES.

1817.

WHYTE and Mandatory *v.* CLARK and Others.

March 20.

THIS was a reduction brought by Mr Whyte, the nephew and heir-at-law of James Duthie, for setting aside certain gratuitous deeds which he had granted to the brother and sister of the pursuer, and a sale of part of his heritable property to Mr Kinloch. The grounds of reduction were, that Duthie was an idiot and imbecile, and that the gratuitous deeds had been impetrated through fraud and circumvention.

Impartial and intelligent witnesses having sworn that they considered a person capable of managing his own affairs, and having supported their opinion by particular facts; found that he was not to be considered an "idiot" or "fatuous and incapable of understanding business," though other witnesses swore that they considered him so.

ISSUE.

"Whether the deceased James Duthie was "an idiot from his infancy, or, at least, at the "beginning of the year 1801, was fatuous, and "incapable of understanding business, and con-"tinued in that situation until his death?"

Duthie, from his infancy, was a man of weak mind. When he came to Edinburgh he lived with his sister, Mrs Whyte, but spent the

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greater part of his time in the kitchen, and appeared to have been much neglected.

He afterwards lived with his niece, Mrs Clark, the defender, who treated him with much kindness and attention, and his conduct during this period was very different from what it had formerly been.

A number of witnesses were examined on both sides; many of those for the pursuer considered him an idiot and incapable of managing his own affairs, but they grounded their opinion principally on observations made during his residence with his sister. The witnesses for the defenders, on the other hand, considered him capable of managing his affairs, and stated the facts on which they grounded their opinions.

After a case is called on for trial, a commission to examine a witness will only be granted of consent. Act Sed. 9th Dec. 1815, § 18 and 22.

When the case was called on for trial, a motion was made for a commission to examine a witness confined to bed, or that the Jury might be allowed to hear the witness examined in his own house. On reference to the act of sederunt, it was decided that the motion ought to have been to put off the trial, and that a commission could only be granted by consent of the defender; which not being obtained, the counsel for the pursuer consented to go to trial without the witness.

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A witness not contained in the list served on the opposite party will not be received without cause shown.

Within the time limited by act of sederunt, there had been served on the defender an additional list of eleven witnesses. Before proceeding to trial, it was proposed that the pursuer should be allowed to examine them, though regular notice had not been given. The Court would not determine on this motion till they heard the evidence of some of the other witnesses, and were fully aware of the situation in which these witnesses stood. The Lord Chief Commissioner, however, remarked in general, that agents ought not to try how many witnesses they can cite, but with how few they can prove their case; and that the number cited in the other cases was remarkable compared with the number examined, though allowance was to be made for the anxiety natural, especially in a new institution.

After the examination of several witnesses, it was proposed to call one in the additional list; and to induce the Court to receive him, it was stated, that he was a material witness; that his examination would save calling a number of others; that the pursuer was ill in London; and that his agent was in the country, taking the proof on commission at the time this witness was discovered, and did not return till it was too late to give regular notice.

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LORD CHIEF COMMISSIONER.—This is a matter of discretion, but it is not to be used in an arbitrary manner, but according to rule, and from that rule we cannot swerve from any consideration of fatigue. This regulation does not take its rise from any analogy with the practice in England. There, except in cases of high treason, there is no notice of the witnesses, except what is got from the nature of the case; but it was thought proper to adopt the rule as more consonant to the ordinary administration of law here. At first, the rule was absolute, that only the witnesses in the list could be examined, but this addition was made in the amended Act of Sederunt.

This is the first time that we have been called upon to exercise this discretion, and we must take care on the one hand, that the party may not, by surprise, be deprived of a material witness, and on the other, that he may not be allowed to bring forward a witness of whom he ought to have given notice.

The question is, whether there is such surprise as entitles us to deviate from the general rule? We cannot listen to the absence of the party, it is to the agent *only* that we look. I am as ready as any man to testify the respectability, industry, and ability of the agent in

this case, but I cannot allow this to influence my opinion.

It is long since the condescendence in this case was given in, at which time, the general nature of the evidence ought to have been known. It is also a considerable time since the issue was framed. This witness resides in the neighbourhood; this is a case of oversight, not of surprise.

LORD GILLIES.—I entirely concur. We must hold to the general rule. Mr Clerk admits that there is not specialty in this case.

It is not competent to prove bankruptcy by parol evidence.

A witness being asked if a man was bankrupt before his death, the Lord Chief Commissioner observed,—This is irregular, if you mean to prove the bankruptcy.

Two defenders are not entitled to address the Jury by separate counsel, unless injustice will be done by allowing only one.

When the pursuer's proof was closed, Mr Clerk stated,—The two defenders are not entitled to address the Jury by separate counsel—if the Clerk of the Jury Court—if Lord Gillies, or the Division of the Court of Session, had supposed this possible, they would have framed separate issues.

LORD GILLIES.—There is a manifest distinction between the situation of these parties here, and their situation in the Court of Ses-

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sion. There they maintain various pleas. Here there is only one point.

In the other Court, the only case which appears to me analogous to the present, is that of a hearing in presence. In the case of the Duke of Roxburgh, the Court ordered the parties maintaining the same plea on the matter to be made the subject of argument, to be heard by the same counsel, though the interest of the parties differed materially on the other branches of the same case. How far under the rules and regulations we are entitled to prevent both counsel from being heard, is more doubtful; but, on the whole, I think we ought to follow the practice of the other Court.

LORD CHIEF COMMISSIONER.—I was anxious to hear how this would have been regulated in the Court of Session. I can conceive cases where more than one party is entitled to be heard, *é. g.* in an action for assault against two defenders, if one pleads justification and the other does not.

The rules and regulations do not appear to me to apply to this case. Unless the rights of justice call upon us we should be cautious in allowing it.

It must be as clear as day, that the conduct

of the case on the part of Mrs Clark will do injustice to the other defender, to induce us to hear his counsel; but I am not of opinion that, at present, we should decide absolutely that he is not to speak. It is the interest of the Court to cut off speeches, but justice has a paramount claim.

Moncreiff, in his opening speech, was proceeding to read certain letters from the late Mrs Whyte, (Duthie's sister,) and from the defender Mrs Clark, when he was interrupted by a question from the opposite counsel, whether it was possible to make these evidence? Mr Clerk contended, that they were clearly relevant, and that Mr Moncreiff was entitled to state every word of them from copies, but he would not *read* them till they were proved.

A counsel, in opening the case, ought not to state the substance, or read the words of any document which he does not intend to make evidence.

LORD CHIEF COMMISSIONER.—If this is not made evidence, it cannot be laid before the Jury. The rule is, that a counsel, in an opening speech, ought not to state or read any thing which he does not intend to make evidence, but the Court will not stop short and inquire into the relevancy of the statements. The counsel must state that he considers it relevant, and that he intends to make it evidence. It must come before the Court with all its circumstances; as what does not ap-

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pear evidence now, may be so from other facts proved.

Jeffrey stated, That he did not object to the relevancy of the contents of the letters, but to the letters themselves.

It is incompetent to read letters from a person who, if alive, could not have been a witness in the cause.

After being proved, they were tendered in evidence, and the objection was again stated, that they were not evidence, being from a person who could not have been a witness.

LORD CHIEF COMMISSIONER.—There is no doubt that Mrs Clark's letters are here; but I have considerable doubts if we can, without consent, admit those of Mrs Whyte. This is not a domestic question; there is no *penuria testium*. She does not fall under any of the exceptions which could have entitled us to receive her as a witness, and much less can we take her letters.

After some farther discussion, Mr Clerk did not insist on reading them.

Cockburn, in his speech for the defenders, stated, That certain actions had been brought against Duthie, by the pursuer and others; to which it was objected, that these actions were no part of the present case. But the objection was repelled, as the statement was made to show the opinion entertained of this person by the pursuers in these actions.

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The first witness for the defender, having stated that he wrote to the pursuer on the subject of one of these processes, but that he got no answer, was called upon to read from his letter-book the copy of the letter.

A witness swearing that he believes a letter was put into the post-office with his other letters, may read a copy of it from his letter-book.

Clerk.—This is not evidence; it was not produced in terms of the Act of Sederunt. In the case of the Trustees of the Kinghorn ferry, we were not allowed to read a regular extract, although produced by a witness.

LORD CHIEF COMMISSIONER.—It was competent to prove that the witness wrote a letter, but the letter is the only evidence of its contents. There is also *prima facie* evidence that it was sent, the witness having stated his belief that it was sent to the post-office with the other letters of that day. In the case of the Kinghorn ferry, the objection was, that the witness did not produce the original book, and that the extract was not produced eight days before. In this case, the Act of Sederunt has been complied with, as a copy of this letter was lodged, which was perhaps more than was necessary.

Mr Robertson, from the Register Office, was called on to produce several writings, one of them the register of seisins for a particular

When a principal record is to be produced in evidence, it is not necessary to lodge it before the trial.

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year. To the production of this it was objected, that only *two* days notice had been given of this production.

LORD CHIEF COMMISSIONER.—This is an original record, and cannot err. If a paper be doubtful, or if it be in the custody of the party, it ought to be produced. If in the case of the Kinghorn ferry we had refused the original, it would be similar to the present.

LORD GILLIES.—The Act of Sederunt does not apply to a record. If the party had produced an extract, it must have been lodged eight days ago.

Statements in the proceedings in the Court of Session are not evidence to the Jury.

Mr Jeffrey gave in evidence the answers for the pursuers to the condescendence for the defenders, in which it was stated that he would prove by a witness therein named, that he (the pursuer) disapproved of the sale of the property by Duthie to Mr Kinloch. He then called the witness, who proved that the pursuer was present, but did *not* object to the sale.

After the passage was read and the witness examined, it was objected for the pursuer that it was not evidence.

LORD CHIEF COMMISSIONER.—I thought this was acquiesced in as no objection was stated. This question was first agitated in Lord Fife's

case. The proceedings in the Court of Session can only be received here as statements by the party, but not as proof of facts; they often contain argument and what is not fact.

Our decision would have been that this ought not to be read, but the parol evidence is as good without it.

LORD GILLIES.—It is peculiarly improper in this case. I entirely concur in this opinion.

Jeffrey.—I hope the Court will allow a fuller discussion of this point in some future case, before fixing it as a general rule.

LORD CHIEF COMMISSIONER.—It has been much agitated in our consultation.

A witness who has been examined and afterwards remained in Court, may be of new examined to prove a writing.

The Lord Chief Commissioner having suggested that it would be necessary to prove Duthie's handwriting before receipts by him were given in evidence, it was proposed to call back a witness formerly examined; but it being objected that he had, since his examination, remained in Court, the defenders called a different witness. The Lord Chief Commissioner, however, observed, This objection only applies to a witness called to prove a fact. I see no objection to his proving the handwriting.

Moncreiff, in his opening speech, stated,—

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The question is, whether Duthie was so deficient in judgment as to render him incapable of disposing of his property. We shall prove him so by the opinion of those who knew him best, and also by proof of his mode of life.

Cockburn contended,—The pursuer is bound to prove a total extinction of mind; he has only proved that Duthie was a stupid man, and the Jury must be cautious of taking the feeling produced by a frequent repetition of the same story for a deliberate judgment founded on conviction. Mr Erskine, p. 158, defines what in law is fatuity. The question is not whether this was a clever man, but whether he was capable of managing his own affairs: The defender will prove him to have been so.

Clerk, in reply, said,—The evidence is so opposite, that it almost induces a belief that the witnesses spoke of different individuals; but none of the facts proved by the pursuer have been disproved on the other side.

It is not possible to prove a total want of mind in any case, and we have proved this man incapable of business for sixty years, which is all that is necessary. The passage read from Mr Erskine is not his own opinion, but that of

some doctors. The words of the brief of idiotry show that it is only necessary to prove the person not of a disposing mind. We have proved facts by those who observed them; and one witness swearing to a fact which he observed is worth a hundred who did not observe the fact.

The question is not whether his was the worst species of madness or the next to it, but whether he was an idiot; and the witnesses swear that he was.

LORD CHIEF COMMISSIONER.—The question here relates to two periods, and the year 1801 is particularized, as that is the date of the deed under reduction. This is not a question whether this man was easily imposed upon, but whether he was fatuous, fool, idiot; and to show what the Court meant by sending this issue, I cannot do better than read the passage from Mr Erskine.*

In this case there is a contrariety of evidence.

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* "Of the first class are fatuous persons, called also idiots in "our law, who are entirely deprived of the faculty of reason, "and have an uniform stupidity and inattention in their manner, "and childishness in their speech, which generally distinguishes "them from other men; and this distemper of mind is common- "ly from the birth and incurable."—Ersk. I. 7. 48.

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The counsel for the pursuer says there is no contradiction, yet it tends to contrary conclusions; and it is for you to decide which carries conviction. Several witnesses for the pursuer proved, in terms of the issue, that Duthie was an idiot, but a greater number for the defender proved that he was not. The pursuer raised a strong presumption that he could not read or write, but it is proved beyond doubt that he could do both. There is also a contradiction as to his capacity for business, knowledge of plants, &c.

We must consider well how these contradictions are to be reconciled. The witness examined for the pursuer on commission, and who knew Duthie at a very early period, describes him as "airyish," and some of the other witnesses state facts which indicate some mind.

At first when he came to Edinburgh, he appears to have been allowed to go about the streets, and was not only neglected but ill treated. Afterwards, when living with his niece, she appears to have been attentive to him; her letters prove that she did not consider him deprived of mind; they are affectionate and even dutiful. It is most important if this can furnish a clue to explain the contrariety of evi-

dence; and you must consider whether this difference of treatment is not sufficient to account for it. In the one situation he is dressed in old clothes, and subjected to contumely, in the other he is well dressed, and treated affectionately. Considering the rank and situation in life of some of the witnesses for the defender, and the perfect fairness of them all, it is impossible to conceive them perjured. If you are of the same opinion with us, and find for the defender, the testimony of the pursuer's witnesses may be accounted for in the way I have mentioned; but if you find for the pursuer, it can only be by stamping perjury on the evidence for the defender.

Verdict for the defenders.

Clerk, Baird, and *Moncreiff,* for the Pursuer.
Forsyth and *Cockburn,* for Mrs Clark.
Jeffrey and *Macdonald,* for Mr Kinloch.

(Agents, *Stuart and Donaldson,* w. s. *Campbell and Mack,* w. s. and *G. Kennedy.*)

On the 27th June, Mr Jeffrey moved for expences to Mr Kinloch. Mr Clerk opposed the motion, and went into considerable detail. Mr Jeffrey was about to reply.

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LORD CHIEF COMMISSIONER.—You have a verdict and a judgment upon it, and must have your expences. The question of modification is not now before the Court; the only question is whether expences are due. The proof showed, that the pursuer, by going to very public characters, might have got such information as ought to have prevented him bringing the action. Mr Kinloch is entitled to his expences.

Mr Cockburn then moved for expences to the other defenders. Mr Clerk also opposed this motion, but was again unsuccessful. He then wished the Court to find expences, subject to modification.

LORD GILLIES.—In the Court of Session we sometimes find expences due, subject to modification, but that implies that the Judge is to diminish the sum after the account has been taxed. In this case I see no reason for finding them subject to modification.

The order was a general one for expences.