

FORBES
v.
TAYLOR.

when this mode of trial is better understood, I hope cases of small, as well as great importance, will be tried, and without great expence.

The Jury, the essential part of the institution, has always done its duty, by an honest, upright, and deliberate consideration of the questions brought before them.

PRESENT,
LORD PITMILLY.

1818.
November 24.

HAMILTON and OTHERS v. HARVEY and
OTHERS.

Reduction on
the ground of
mental de-
rangement
and idiocy.

REDUCTION of the conveyance of an heritable property, on the ground of mental derangement and idiocy.

ISSUES.

“ 1st, Whether, in spring 1799, when the
“ trust-disposition in favour of Andrew Ait-
“ chison, the defenders’ author, was executed,
“ the late Captain Hamilton was in a state of

“ insanity, and whether he continued in that
 “ situation until the time of his death ?

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“ 2d, Whether, at the date of the alleged
 “ sale of the lands of Garthumlock, referred
 “ to in the process between the said Andrew
 “ Aitchison, as trustee for Captain Hamil-
 “ ton, and the late John Harvey, the said
 “ John Harvey was in the knowledge that
 “ the said Captain Hamilton was in a state
 “ of insanity ?

“ 3d, Whether, before the said transaction
 “ was concluded, or before the said John
 “ Harvey had made the alleged expenditure
 “ upon the property, as specified by the ac-
 “ counts in process, the said John Harvey was
 “ specially warned of the objection that lay
 “ against Aitchison’s title to sell the lands,
 “ and put upon his guard against concluding
 “ the sale, or paying the price, or commen-
 “ cing or continuing any operations on the
 “ property ?

“ 4th, Whether the sum of L.3125, the
 “ price paid for the lands by the defender, was
 “ a fair and adequate price at the date of the
 “ sale, and whether the said sale proceeded at
 “ the instance of heritable creditors ?”

The late Mr Hamilton was, for some time

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before his death, in a state of mental derangement; and it was alleged, and ultimately found in a different action, that, while in this state, Mr Aitchison obtained his signature to a trust-deed, empowering him to sell Garthumlock. The heritable creditors, anxious to obtain payment, urged Mr Aitchison to sell, otherwise they would be under the necessity of forcing a sale, under the clause in their bond. He accordingly advertised the lands for a public sale; but the upset price was not offered, and he sold the land privately to Mr Harvey. This action, brought in 1810, by the son of Mr Hamilton, and Mr Bower, his curator, was for the purpose of setting aside that sale, on the ground that Mr Hamilton was, at the time of executing the trust-deed, in a state of "melancholy mental derangement and idiocy." The defenders admitted the fact, that Mr Hamilton had been insane, but pleaded that this could not affect their right, as Mr Harvey did not know it at the time of the sale, and made the purchase from Aitchison, who acted under a regular trust-deed.

Agency sustained as an objection to a witness.

The first witness called for the pursuers was Mr Bower, who was married to the aunt, and had been appointed by the Court, curator to young Hamilton.

Jeffrey, for the defenders.—It is impossible to receive him. He is a party in the action—he acted as agent ever since the case began—and is a relation within the degrees excluded from giving testimony.

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Clerk, for the pursuer.—Mr Bower was curator to the pursuer at the time this action was brought, but his curatory lapsed three or four years ago, by the pursuer coming of age. Tutors and curators are good witnesses; and being nominally a party is no objection, which reduces this to the simple objection of agency. Agency, though at one time a good objection to a witness, is no longer so by the law of Scotland—*M'Latchie v. Brand*, 27th November 1771—*M.* 16,776; *M'Alpine v. M'Alpine*, 2d December 1806—*M. App. Witness*; *Reid v. Gardyne*, 10th July 1813. In *Richardson v. Newton*, 30th November 1815, the Court refused to allow the examination of one agent; but there must have been other objections, as in the same case the examination of another agent was allowed. In *Clark v. Thomson*, in the Jury Court, an agent was admitted to prove a hand-writing.

There is no ground in reason or principle for rejecting the evidence; and if it is to be

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decided by authority, there are many judgments of the House of Lords, where the objection has been uniformly repelled, though undoubtedly the Court of Session have been most unwilling to adopt the principle.

Jeffrey.—I do not dispute that tutors and curators have been received, though nominally parties in the action; but this case combines with that character, the character of agent. It is admitted that the action was brought and conducted by the advice of this person; in fact, it is his own case; he pays the expence of conducting it, and has an interest. His wife is next heir to the estate; and she being aunt to the pursuer, her husband is an incompetent witness. An agent can only be received where, from *the nature of the case*, there is a *penuria testium*—Lang, 16th November 1814. In the present instance, the defender says that the fact to be proved was universally known.

The objection is much weakened by stating it as merely agency. He has to this hour acted as *dominus litis*, and has been more active than is proper even in a party.

Agency is said to be no longer an objection. M'Latchie's was a most limited case

of agency ; and in the later case of *Sundius v. HAMILTON, &c.* Sheriff, *n. r.** a witness was rejected, as he had been present at one consultation ; and the Court adhered, on a remit from the House of Lords. Reid's case shews, that if he is more than nominal pursuer, he cannot be received.

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LORD PITMILLY.—By the forms of Court, the debate is concluded ; but I wish to hear what is to be said as to the fact of the agency.

Clerk.—It is no good objection, that a person is nominal pursuer, heir, tutor, or agent ; and if these objections' are not good separately, they cannot be so when combined. In this case the witness is neither pursuer, heir, nor tutor ; he only gave his advice as curator. *Sundius's* was a strong case of agency ; and the House of Lords disapproved of the objection. The agent who was rejected in *Newton's* case, was called to prove, what it is doubtful if any man would now be allowed to prove, that the de-

* This case is mentioned at pp. 21 and 40 of the Form of Procedure in the House of Lords, published in 1821. It is there stated to have been decided on the 26th November 1811.

HAMILTON, & C. fender promised to pay the sum in a bond
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LORD PITMILLY.—Several objections have been stated to this witness. *1st*, It is said he was tutor to the late Mr Hamilton, and that he then brought an action similar to the present. This might be a circumstance affecting his credit, but could be no ground for rejecting his evidence. *2d*, It is said he is curator to the son; but the son is now of age, and the curatory has fallen. *3d*, That he has been an active agent.

If the curatory had subsisted, and he had been an active agent, I would have decided this on the principle of Reid's case, which is confirmed by that of Sundius; but this case is different, as the curatory has fallen, and the objection is confined to the agency.

My opinion is, that agency is a good objection by the law of Scotland, though there are special circumstances in which an agent may be examined. In the present case, it is stated, and not denied, that the witness acted as agent,—that he is *dominus litis*,—and examined the other witnesses. In these circumstances I must sustain the objection.

One of the heritable creditors was called HAMILTON, &c. as a witness for the defenders, to prove a letter by them in 1797, urging a sale of the property. After the letter was read,

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A letter dated in 1797, received on a question as to a sale of property in 1801.

Clerk, for the pursuer, objected.—This letter cannot prove that the sale in 1801 was at the instance of the heritable creditors.

LORD PITMILLY.—I cannot sustain this objection at present. They may produce a series of letters, down to 1801; and if they do not, their not doing so may be fair matter of argument to the Jury.

A witness was asked, whether the house built by the defender was a suitable one?

Cockburn objects.—This is not in the Issue. In opening the case, I merely mentioned it as matter of argument.

Jeffrey.—It was quite right to state it, and we must be allowed to prove it. Whether the improvements were extravagant, is certainly a competent question.

LORD PITMILLY.—It is of great import-

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ance in all cases, and especially in one of such length, to keep within the Issue, and not confuse the Court and Jury by proof of extraneous matter; and it appears to me that this is not within the Issue. From having looked into the proceedings in the Court of Session, I know that there was a good deal of argument on this subject, but the Court have not sent it here. The question, therefore, is incompetent.

Jeffrey.—The question here is not whether this was a fair transaction, but whether certain facts are proved or not. We shall prove that the full value was paid; and that the fact of the insanity was not known to those of the defender's rank, who lived near. Aitchison acted for Hamilton while sane, and there is no motive assigned for his acting fraudulently.

Cockburn, in opening the case, and *Clerk* in reply, stated—The insanity was notorious in the neighbourhood. The defender was on an intimate footing with Aitchison, and must have known it before making the purchase. At all events, it is proved that he was informed of it before he began his improve-

ments. The price paid was not near the value, though there is some contrariety of evidence on this subject.

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LORD PITMILLY.—The following are the facts out of which this question arises. The late Mr Hamilton, along with another person, granted an heritable bond for a debt due to a Coal Company; and for several years prior to the property being sold, it had been in contemplation to compel a sale, under that clause in the bond which empowers the creditor to sell. This bond is followed by a factory in 1796, empowering Aitchison to sell. Then there are letters in 1797, from the creditors, urging him to sell. After that, there is a trust-deed in 1799, upon which Aitchison was infeft, in virtue of which, he, in February 1810, sold the property to Harvey. The disposition is in 1801, and the creditors are consenters to the sale.

It is said that Hamilton became insane early in 1799, and that he left the regiment, and was, in November 1799, brought to Scotland, where he died in 1802. A question was raised on the trust-deed—an action was brought against Aitchison, and the trust-deed has been set aside; but the question

HAMILTON, & C. with Harvey still remains. Another ques-
 HARVEY, & C. ^{v.} tion is, on what principle are the parties to
 adjust the sum laid out in melioration? These
 are difficult points of law; but they are not
 here. All we are concerned with are the
 facts; and we must suppose them important
 to the after decision of the questions of law in
 the Court of Session.

You may dismiss from your minds all the
 other points, and attend solely to the Issues.

1st.—On this Issue there is an admission
 by the party, of the fact, which is the best evi-
 dence; and the simplest way to dispose of
 this Issue is to find for the pursuer.

2d.—This is the most important Issue; and
 you must keep the whole evidence in view,
 and bend your minds to the facts which took
 place in the months of June and July 1800.

The pursuer has undertaken, and is bound
 to prove this Issue: the defender is not bound
 to prove any thing. It is admitted that
 there is no direct evidence, and that you are
 to draw your conclusion from circumstances.
 You are not, however, to take these sepa-
 rately, but must consider the whole; and if
 you are satisfied, on a view of the whole, you
 will find accordingly. You will consider the
 evidence as to the notoriety of the insanity,

You will also observe, that he was in constant communication with Aitchison, who must have known the fact. On the other hand, the witnesses for the defenders, though creditors, and connected with this sale, did not know of the insanity. There were also two persons who had been in the service of Hamilton at the time, who did not know it. The direct communication of the insanity made to him by Mr Burns, is said, on the one side only, to apply to the third Issue, but in my opinion it also applies here. There can be no doubt that this conversation took place; and the only doubt is, whether it took place before the sale. You must make up your minds on the subject, taking into view the evidence of the other witnesses. I do not think there is sufficient evidence that it took place before July 1800, though Mr Burns states it to have been in 1799 or 1800.

3d.—This requires attention to dates. The improvements did not begin till 1804; and though I did not think Mr Burns' conversation took place before the sale, still I think it did take place before 1801. It is said he is a single witness; but it is not necessary to have two witnesses to each fact. His evidence is quite sufficient in law.

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The judicial proceedings in the other action, though directed against Aitchison, are also circumstances to be considered.

4th.—Here there are two points: *1st*, Was the price adequate? The evidence for the pursuers would raise the value far above the price paid; but on the other side there is what I consider a preponderating weight of evidence; but my opinion is not to be regarded, unless in so far as it agrees with yours. *2d*, The creditors urged Mr Aitchison to sell, and would have sold it, but thought the method adopted less expensive. If you think the price adequate, you will find for the defenders.

Verdict “for the pursuers on the *1st*, *2d*, “and *3d* Issues;” and “for the defenders on “the *4th* Issue.”

Clerk, Jardine, and Cockburn, for the Pursuers.

Jeffrey, J. S. More, and Grahame, for the Defenders.

(Agents, *Thomas Johnstone and William Ellis.*)