BROWN v. STEWART.

Verdict—For the pursuer, damages L. 26, 10s.

Jeffrey and *Monteith*, for the Pursuer.
Cockburn and *Robertson*, for the Defender.
(Agents, *G. Napier* and *John Jameson.*)

PRESENT,

THE LORD CHIEF COMMISSIONER.

1824. July 15.

Finding as to an alleged encroachment by the wall of a house.

BROWN v. STEWART.

REDUCTION by Stewart of a decree in absence, confirming one in the Dean of Guild Court, authorizing Brown to erect a house on the Castle Hill, Edinburgh, which was said to encroach on the property of Stewart.

DEFENCE.—The house did not encroach.

ISSUES.

"It being admitted, that William Stewart "is proprietor of a tenement of houses, and "ground, upon the Castle Bank, in the city "of Edinburgh, and that James Brown is pro- "prietor of ground immediately to the east of "the said tenement;

"It being also admitted, that, in the year

" 1815, the said James Brown erected a house
" or building immediately to the east of the
" ground belonging to William Stewart, with
" windows towards the property of the said
" William Stewart, and with the eaves-drop
" from the roof of the said house, falling into
" the property of the said William Stewart;

" Whether, previous to the erection of the
" building complained of, there stood on the
" property of James Brown, upon, or nearly
" upon, the site of the said building, a house
" or houses, the face of the west wall of which
" ran in a line as far west as the face of the
" west wall of the building complained of, and
" which said ancient house had a window or
" windows in the said wall towards the pursu-
" er's property, the eaves-dropping of which
" fell into the property of the said William
" Stewart?"

Jan. 26, 1824.

The person on whom the *onus* of proving the point in issue lies, must be pursuer in the Jury Court, though defender in the action.

In this case, there had been a good deal of procedure before the Lord Ordinary in the Court of Session.

The Solicitor-General moves to have Stewart, the pursuer in the original action, made pursuer in the issue; and stated that the titles of the parties decided the case.

Fullarton, for Brown.—If the question is

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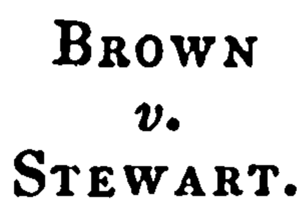

merely who shall be pursuer, we have no great reason to object, but we cannot admit that the titles decide the case.

LORD CHIEF COMMISSIONER.—The question is on whom the *onus probandi* lies, as that must decide who is pursuer; and a question of relevancy, and of our power, may be raised. If the case came here on a general issue, whether there was an encroachment, then the person complaining must make out the encroachment; but if it is reduced to one point, the *onus* may be altered.

On the general issue, Stewart would have made out a *prima facie* case, to show that the wall was mutual, and then Brown would have met this by a proof that a house had existed there. If the case is sent here in such a state as requires no proof on the part of Stewart, then the leading point comes to be, whether there was an old house? By the interlocutor sending the case, the question is confined to one point, and we are of opinion that the *onus* lies on Brown.

LORD GILLIES.—If the whole case were sent here, the argument for changing the situation of the parties would be irresistible. But

the Lord Ordinary has limited it to one point.

Brown v. Stewart.

Whether a plan can be received as evidence.

Before any parol testimony was given, the pursuer produced a plan of the ground and houses, to which it was objected, that, being dated in 1816, it could not affect the question; but that, if the pursuer would admit that it was drawn upon information given by him, then the defender would not object.

Lord Chief Commissioner.—I doubt the competency of producing plans as evidence, they are merely good as explaining evidence. This plan must be taken as of the date it bears; but the information on which it was made is a subject of proof. At this stage of the case, I cannot reject the plan; but it is not a thing to go to the Jury, it is for me to look at, and from it to explain the matter to the Jury. I must have some plan, whether it is made now, or in 1816.

When a plan made in 1820 was afterwards given in, his Lordship said, I am frequently puzzled by plans being put in as evidence, but it seems consonant to the law of Scotland, and the practice of the Court of Session. We must, however, be cautious not to allow injustice to

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follow from the practice. It would be much better if parties in all cases would agree to hold them merely as explanatory.

Maitland in opening, and *Cockburn* in reply, stated, That this was a simple question of fact, as to whether the house stood on the same foundation, &c.

The Solicitor-General, for Stewart, maintained, That it was a question of encroachment, and that the Jury, before they could find for Brown, must be satisfied that the old house or wall was built on his property—but that he would prove it a mutual wall.

LORD CHIEF COMMISSIONER.—This is a case much more for a Jury than a Judge, and ought to be decided on the evidence, and not upon any opinion that may have been formed from having seen the subject. The purpose of a view is merely to present to the mind of the Jurors the thing in reality, that they may understand the witnesses when they describe it. There have been numerous applications for views since the institution of this Court, and this was a proper case for one, but the Court must be cautious in granting them, as in two cases I had an opportunity of seeing that the nature of a view was not understood. The one was the first

case tried in this Court—the other was a case at Inverness, where I wished to see the subject in dispute, and where I found that, most improperly, the agents for the parties were the showers, who, instead of merely showing the subject in dispute, wished to argue the merits of the case. In that instance, I had an opportunity of correcting the error on the spot; and if, in this case, any impressions were produced at the view, I am persuaded that they will now be banished from your minds, and that you will go entirely by the evidence.

In this case, there was much previous litigation in the Court of Session, but the point is now reduced to three simple questions of fact, and I am clearly of opinion, that *property* in the issue is merely descriptive, and does not raise any question of property;—it is the same as if it had been described as immediately to the eastward of Stewart's property.

His Lordship then stated the general outline of the evidence on each side, and left it to the Jury as a case of contradictory evidence on each of the three points.

Verdict—That two houses stood nearly on the scite of the one complained of—that in

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one of them there was a window looking westward, but that the eaves-dropping did not fall into Stewart's property.

Cockburn and *Maitland,* for the Pursuer.
The Solicitor-General, for the Defender.
(Agents, *Hotchkis* and *Meiklejohn,* w. s. and *J.* and *A. Smith,* w.s.)

PRESENT,

THE LORD CHIEF COMMISSIONER.

1824, July 16.

Finding that a deed was obtained from a facile person by fraud and circumvention.

CLARK *v.* SPENCE.

REDUCTION of a disposition and deed of settlement on the ground of imbecility—of facility, circumvention, and lesion—and of fraud.

DEFENCE.—Homologation.

ISSUES.

"It being admitted, that, on the 25th day "of November 1816, the late Marion or May "Thomson signed the disposition and deed of "settlement in process. It being also admit-"ted, that the said Marion or May Thomson "died on the 20th day of April 1818.

"Whether the said deed was not the deed "of the said Marion or May Thomson?