

rectly with regard to the effect of the deeds, as depriving her of the power to revoke : That they were not her free and voluntary acts : That there was not sufficient evidence of undue influence, and no evidence of her settling accounts, or being able to subscribe ; * and that the reason she gave for using notaries, was, that she could not see to write.

RUTHERFORD
v.
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Forsyth, Jeffrey, and More, for the Pursuers.

Cockburn and Whigham, for the Defenders.

(Agents, *Andrew Paterson and Alexander Goldie, w. s.*)

PRESENT,

THE LORD CHIEF COMMISSIONER.

RUTHERFORD v. BAIRD.

AN action by a law-agent for payment of the expence of defending the late Mrs M'Kinnon on her trial.

DEFENCE.—The defender did not employ the pursuer, nor did he subsequently render

1825.

Jan. 31.

Finding for the defender, on a question as to his liability in payment of an account of law expences.

• His Lordship directed the Jury to reconsider their verdict before returning one of not proven ; but on reconsideration they adhered.

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himself responsible for payment of the account.

ISSUE.

“ It being admitted that the pursuer was
“ employed as agent to conduct the defence of
“ the late Mrs M’Kinnon, and did conduct
“ her defence accordingly,

“ Whether the pursuer was so employed by,
“ and on the credit and responsibility of the
“ said Mrs M’Kinnon? or by, and on the
“ credit and responsibility of the defender? or
“ by, and on the credit and responsibility of
“ the defender and Mrs M’Kinnon jointly?”

At the close of the opening for the pursuer, the

LORD CHIEF COMMISSIONER observed, I wish to bring it under the consideration of counsel, that, in this issue, the only fact is the employment, the credit and responsibility are points of law. The case must rest on the fact, and it is a subject of serious consideration, whether, as you state the case, the Jury are to put a point of law on the face of their verdict. The reason of my interfering is, that you put it to the Jury to find the credit and responsibility, and I could not allow them to put a find-

ing of law upon the face of their verdict. The verdict may either be on the fact, or a general verdict, the Court stating the law, but it is necessary to have it cleared, as a finding that the defender is responsible would be a finding in point of law.

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When the first witness was called,


Jeffrey, for the defender, objected.—He wrote the summons in this cause, and saw the other parts of the process, and has a claim for extra expences.

LORD CHIEF COMMISSIONER.—I cannot conceive this going to his admissibility as a witness.

Rutherford and *Fullarton* said, That the pursuer was employed by Mrs M'Kinnon and the defender, and that he did not deny his liability till six months after her death, though there had been frequent demands made upon him.

Jeffrey.—No case has been made out ; it is only proved that the defender assisted another person in defending Mrs M'Kinnon, and made certain payments out of her funds. The evidence shows that the pursuer was employed before the defender saw him.

RUTHERFORD
v.
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LORD CHIEF COMMISSIONER.—This case depends on facts and circumstances, and requires minute attention to what occurred. The issue was not prepared here, but is sent by the Lord Ordinary, to ascertain a point upon which he wishes information. The question we are to try is, whether the defender is liable to pay the pursuer for conducting the defence of Mrs M'Kinnon? In trying this question, it is my duty to state the law, and yours to take this principle of law, and to apply the fact.

The law of this case is very simple, and the principle applies in common life, as well as in the practice of the lawyer. To raise an obligation to pay for business done, it is not necessary that there should be any written obligation, or that there should be an express promise in words to pay. It is agreed at the bar, and is correct law, that such an obligation may be proved by facts and circumstances.

In the present case, as there is no written or express agreement proved, it is necessary to attend to the nature of the transaction, and what passed between the parties.

His Lordship then stated the parol evidence, and afterwards, when commenting on the written evidence, he directed the Jury to consider,

whether the pursuer knew that the defender, by a fictitious sale, had got possession of property belonging to Mrs M'Kinnon ; because, if he did not, he must be presumed to have trusted to the defender's personal credit, as Mrs M'Kinnon could have no property from which he could be paid. The Jury must put what they thought a reasonable construction upon the letters, and say whether the circumstances were such as rendered the defender liable in payment, or if he was only liable to the extent of the proceeds of the fictitious sale, and whether the money, which was proved to have been paid, was not out of the proceeds of that sale.

No case requires a clearer proof than such an one as the present ; the facts should be such as a Jury can scarcely doubt, and it is difficult, in this case, to lay hold of any one point inferring liability.

As this is an issue drawn in the Court of Session, I feel anxious as to the verdict to be returned. If you think the pursuer has not made out his case, you may find for the defender—but if you think he has made out his case, it is difficult to say what finding you ought to return, as the verdict must be returned to the Court of Session, for that Court to find the law.

RUTHERFORD;
v.
BAIRD.



RANKINE
v.
M'LAREN.

If a general issue had been sent, then a verdict upon it would have been a warrant for judgment here. The issue would have been, whether the defender alone, or along with Mrs M'Kinnon, undertook to pay, and the Jury could then have distinctly found one way or other; but here the question is so put, that, if the Jury make a return in terms of the issue, it would be putting a point of law on the face of the verdict. This you must try to avoid, and will find for the pursuer or defender, according to the opinion you have formed on the facts and circumstances.

Verdict "For the defender."

Fullarton and Rutherford, for the Pursuer.

Jeffrey, Skene, and Gillies, for the Defender.

(Agents, James Rutherford, w. s. and Thomas Syme, w. s.)

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PRESENT,

THE LORD CHIEF COMMISSIONER.

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1825.

Feb. 28.

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Circumstances in which a person was not held liable in damages for incarcerating a person on a caption proceeding on a horning with an erasure in the date.

RANKINE v. M'LAREN.

AN action of damages for incarcerating the pursuer by virtue of a caption following on vitiated letters of horning, and for again incarcerating him for payment of the same debt.