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 PRESENT,
 LORDS PITMILLY, CRINGLETIE, AND MACKENZIE.

COMBE AND Co.
 v.
 HOSSACK,
 AND HOSSACK
 v.
 COMBE AND Co.

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 COMBE AND Co. v. MORISON AND HOSSACK,
 AND HOSSACK v. COMBE AND Co.

1826.
 March 23.

THIS was a reduction of a missive by Hossack offering to purchase the stock in trade of Morison, in a shop in Hanover Street, Edinburgh, and Morison's letter accepting the offer. And an action of damages by the defender Hossack, against the pursuers of the reduction, for having pointed part of the stock as the property of Morison. *

Finding that two missives of sale did not constitute a *bona fide* transaction; and for the defender in an action of damages.

DEFENCE.—The pursuers have no title to pursue, not being creditors of Morison. The transaction between Morison and Hossack was a *bona fide* sale.

ISSUES in the Reduction.

“ 1. Whether the missives in process bearing
 “ date 4th August 1824,—the one bearing to

* There was no appearance for Morison at the trial, and an affidavit was produced to prove that the notice had been served on him.

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“ be an offer by the defender Daniel Hossack
 “ to purchase the stock in trade in the shop,
 “ No. 18, Hanover Street, Edinburgh, at a
 “ valuation to be made ; and the other, an ac-
 “ ceptance of the said offer by the defender
 “ Colin Morison at the said valuation,—did
 “ not constitute a true and *bona fide* contract,
 “ whereby the said Colin Morison did really
 “ transfer the property of the said goods to
 “ the said Daniel Hossack, upon the said 4th
 “ day of August, for actual value paid, or to
 “ be paid (or delivered) by the said Daniel
 “ Hossack to the said Colin Morison ?

“ 2. Whether the said Daniel Hossack was a
 “ conjunct or confident person in relation to
 “ the said Colin Morison ? and whether the
 “ aforesaid alleged transference of the proper-
 “ ty aforesaid was without just, true, and ne-
 “ cessary cause, and without any just price
 “ really paid, and in violation of the act of the
 “ Parliament of Scotland 1621, chap. 18 ?

“ 3. Whether on the said 4th day of Au-
 “ gust, the date of the said missives, or within
 “ sixty days thereafter, the said Colin Mori-
 “ son was bankrupt ? and whether the goods
 “ mentioned in the said offer and acceptance
 “ were transferred from the said Colin Mori-
 “ son to the said Daniel Hossack, either at or

“ after the said Colin Morison became bank-
 “ rupt as aforesaid, or within the space of six-
 “ ty days before his said bankruptcy, either for
 “ the satisfaction or farther security of a prior
 “ debt due by the said Colin Morison to the
 “ said Daniel Hossack, in preference to the
 “ other creditors of Colin Morison.”

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In the action of damages.

“ Whether, on or about the 10th day of Sep-
 “ tember 1824, the defenders did poind, or cause
 “ to be poinded, for a debt alleged to be due by
 “ Colin Morison, distiller at Ratho, twenty-
 “ four dozens of port and sherry wine, four and
 “ one-half dozens port wine, all in bottles, the
 “ property of the pursuer, and in a shop, No.
 “ 18, Hanover Street, in the city of Edinburgh,
 “ and cellar thereof, to the loss and damage of
 “ the said pursuer? Or,

“ Whether the said wine was not the pro-
 “ perty of the pursuer, but was the property
 “ of the said Colin Morison, distiller at Ra-
 “ tho, and was poinded for a debt alleged to
 “ be due by the said Colin Morison to the
 “ defenders?”

Jeffrey opened the case for the pursuer, and
 stated this to be an attempt by Morison, by

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means of a fictitious sale, to carry on the business of a distiller at Ratho, and a spirit-dealer in Edinburgh. And that the issues on the statutes were taken rather to show the nature of the transaction and the connection of the parties, than as separate grounds, though of themselves they were sufficient.

Evidence admitted of an admission made by a defender, for whom no appearance was made at the trial.

A witness being called and examined as to an admission by Morison,

Hope, Sol.-Gen., objected.—This is incompetent, as I appear only for Hossack.

LORD PITMILLY.—Morison is a party, and though I do not consider this very important, I cannot reject it. You may cross-examine the witness as to Hossack.

Competent to ask a creditor whether he accepted a composition of 10s. per pound on his debt without producing the minutes of the meeting of creditors.

The second witness was asked, Whether a composition was agreed to, and what was paid?

Hope, Sol.-Gen.—They must produce the minutes.

Jeffrey.—I am entitled to prove the meeting, and that the witness received ten shillings.

LORD PITMILLY.—I understand the question to be, Whether he accepted a composition, and whether he got ten shillings per pound, and not what took place at the meeting? The question therefore is competent.

The defender was then called as a haver to produce a book, for recovery of which a diligence had been got.

Hope, Sol.-Gen., objects, We had no notice of this.

Jeffrey.—It is in the hands of the party, and might be sent for now, even if *no* notice had been given. There is here no fair interest to withhold it, and the Court have the power to allow it.

LORD PITMILLY.—Is this not provided for by the act of sederunt? I think this very questionable.

LORD CRINGLETIE.—I cannot think this doubtful, as this book might as well have been called for a month ago; and though the party may have had notice of it, his counsel had not.

LORD MACKENZIE.—I am of the same opinion. It is against both the words and spirit of the regulation that a person should be brought here, and all the papers thrown upon the table at the trial.

Hope, Sol.-Gen., in opening for the defender, said, That he was at a loss to know upon which of the inconsistent issues the pursuer's claim was rested. But, 1. We shall prove that

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A writing,
though in the
hands of the par-
ty, cannot be
called for at the
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Hossack purchased the stock. 2. It is proved that he was not a confident person. 3. On the last issue it is said the conveyance was in security of a prior debt, but Hossack was debtor, not creditor, and had it been in satisfaction of a debt that would prove the transaction real; and if it was a real transaction, and he not a confident person, then they must prove that he knew Morison to be insolvent.

A witness was called, and stated that he was applied to by Morison.

Jeffrey.—I object to all evidence of what another person said, unless he is dead. This would be the party giving evidence.

Hope, Sol.-Gen.—We wish to prove the arrangement made by the parties, which could only be known by information. We wish to prove that it was given out that such was the arrangement.

LORD PITMILLY.—I do not see how this evidence can be excluded. The first thing is, that Morison applied to the witness to get some one to purchase the stock. The witness then stated that Hossack went to the shop to learn the business and see the stock, and that both Morison and Hossack told him this was the purpose of his going.

Jeffrey, in reply to the Jury, maintained, that


Circumstances in which a defender was allowed to call a witness to prove a communing held by the witness, and with a defender, for whom no appearance was made.

in a case of fraud direct evidence was not to be expected : That the intention of Morison, the leading party, was proved, and that they must decide under the direction of the Court whether the fraud affects Hossack ; and from his refusing to swear that the property was his, and from the other circumstances proved, it is impossible to suppose that they did not understand each other. If you are not satisfied that it was a simulate transaction, then we maintain that Hossack was a confident person, and if so, they must prove the onerosity ; or if we fail on both these, then I say that Morison was insolvent, and that the onerosity is not proved.

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LORD PITMILLY.—In a case which has occupied so much time, and in which you must be quite aware of the points which you have to try, I shall proceed at once to the issues and the evidence.

The first issue is the important one for your consideration, and on this the averments are opposite, and there has been evidence on both sides. The averment on the one side is, that when Morison apparently left the business, he retained a share in it, and put Hossack in to manage for him. On the other, it is said that Hossack, having made a little money, wished to

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invest it in this way. There is evidence of intended fraud on the part of Morison, and it may be difficult to conceive that the intention of Hossack was different ; but you must be cautious in applying to the one the evidence given as to the other. It is clear that Hossack came at first either as a shopman, or to learn the business, but a change afterwards took place. I do not think much is to be rested on his refusing to answer the agent, unless his demands were put in writing, or on his refusing to depone. On the point of the power of the messenger to put him on oath, my opinion is, that the pursuer is right, though it is of little consequence in this case, but may be so in the action of damages. As the messenger had a judicial character, I think he might put the defender on oath, and that, had he known the law, he would have given his oath ; but an ignorant man might not have known the law.

His Lordship then read the evidence, and commented on the circumstances.

On the other issues, there is not much difficulty, as they depend on your opinion on the first.

There are two questions on the act 1681 on the confidence, and the true cause. If he was a shopman, then he was a confident person ; but



if he paid the price, there was no confidence. On the other point, the conveyance proves the true cause, and the pursuer must make out want of value.

The third issue is out of the question, as if he was any thing, he was debtor, not creditor, and I think you must find on this for the defender.

If, on the whole, you think this was a trick, then you may find for the pursuer ; but if you come to the opposite conclusion, then for the defenders.

Verdict—In the reduction for the pursuer on the first and second issues, and for the defender on the third. In the action of damages for the defenders.

*Jeffrey and More for the Pursuer.*

*Hope, Solicitor-General, and Buchan for Hossack.*

(Agents, *John Young and Andrew Smith.*)

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PRESENT,

LORDS GILLIES, CRINGLETIE, AND MACKENZIE.  
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SCOTT v. TAIT AND RUSSELL.

DAMAGES by a tenant against a landlord and the trustee on his estate, for damage done by a

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Damages to a tenant for injury done to his farm by the overflowing of a river.