

JOHNSTON,
&c.
v.
PENNYCOOK,
&c.

Jeffrey, Cockburn, and Sandford, for the Pursuers.
Keay and Whigham, for Pennycook.
J. A. Murray and Alison, for Owler.
(Agents, *N. W. Robertson, Macritchie and Murray*, w. s. and *R. Smyth*, w. s.)

PRESENT,

LORDS CHIEF COMMISSIONER AND PITMILLY.

1812.
Feb. 24.

Mrs HARLEY and Others v. LINDSAYS.

THIS was an action for proving the tenor of a settlement executed, and afterward destroyed, by the late John Lindsay of Easter Annafrech. There was also a declarator to have it found that, at the time the deed was destroyed, he was imbecile, from palsy, or some other cause.

DEFENCE.—The settlement was destroyed by the granter. In proving the tenor, it is irrelevant to inquire whether he had the full use of his faculties when he destroyed the deed; as they were in the same state as when he executed it.

ISSUES.

“ Whether, about the beginning of June

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“ 1811, the deceased Mr John Lindsay executed a deed of settlement of his estate and effects, conform, or nearly conform, to a scroll recovered from Mr Alexander Hogg, writer in Kinross, and produced in this process ?

“ Whether the said deed was not afterwards, in the course of summer 1812, destroyed, and in what manner ?

“ Whether, at the time the said deed of settlement was destroyed, the said Mr John Lindsay was reduced, by disease or otherwise, to such a state of mental incapacity and imbecility as to render him incapable of understanding or managing his affairs ; and whether he did not continue in that state down to the time of his death ? ”

The late Mr Lindsay was in very bad health for some years before his death ; he could scarcely move, and, from a disease in his throat, what he said could not be understood, except by those accustomed to communicate with him ; but it appeared that, though he was in this state of bodily weakness, his intellects were not destroyed, though, to one not acquainted with the cause of his illness, he had much the appearance of a man whose intellects were impaired.

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In 1811, Mr Hogg, writer in Kinross, was employed by him to make his settlement. This deed, after it was executed, was returned to Mr Hogg. In the following year, Mr Lindsay wished to alter his settlement, and sent for the deed. At first, Mr Hogg was unwilling to part with it, but having satisfied himself of his capacity, and Mr Lindsay having come in a gig along with his niece, the deed was delivered to him.

Sometime after this, two of his servants were called into the room, to see him destroy it, which he did by holding it to the fire till it was nearly all consumed, when one of the servants shook it from his hand under the fire. They were called back a little after, and one of them wrote a certificate (to the dictation of Mr James Lindsay) of what they had seen, and both signed it. Mr Hogg had several meetings with him, with a view to prepare a new deed, but this was not done, and he died intestate.

This action was brought to prove the tenor of the deed destroyed.

Before the witnesses were called, the LORD CHIEF COMMISSIONER observed,—The defender must take care, when the pursuer closes his

case, that three witnesses, also in his list, be not discharged with the rest. In a case at present in dependence in the First Division of the Court of Session, on a motion for a new trial, one of the grounds stated is, that a witness cited for the defender was discharged along with the pursuer's witnesses.

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One of the servants, who was present when the deed was burnt, was asked if he recollected what was in the certificate which he signed on that occasion.

Before asking a witness the contents of a written paper, it ought to be proved that it is destroyed, lost, or withheld.

LORD CHIEF COMMISSIONER.—Before asking its contents, you ought to prove that you made every effort to produce it, but that it is lost or destroyed, or that you applied for it and was refused.

Jeffrey opened the case for the defender, and called two witnesses, but Mr Cockburn declined making any reply.

LORD CHIEF COMMISSIONER.—Since Mr Cockburn makes no reply, this comes to be a short case; and unless you have any doubt, or call on me to do so, I shall not go into the evidence. Since that of Mr Hogg, the whole has been in favour of the defender.

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LINDSAYS.


I shall not go through the evidence, but merely state the issues, and what I think proved on each.

1st, It is proved, and therefore you may find, that the late Mr Lindsay executed a settlement, conform to the scroll.

2d, Two witnesses swear that it was the late Mr Lindsay who put it into the fire; and therefore you may find that it was destroyed by his putting it into the fire.

3d, This is the important issue, and it also is sufficiently proved. Mr Hogg, before delivering up the deed, went and satisfied himself that Mr Lindsay had not become incapable of understanding what he did. Though Mr Lindsay could not always make him understand what he wished done, still he could signify his approbation, or disapprobation, of any proposal made to him. Mr Hogg, also, on another occasion, acted as a notary for Lindsay; and, on this occasion, like a correct man of business, he also satisfied himself of his capacity. Dr Spence explained the nature of Mr Lindsay's disease; and, in answer to a question, "Whether he was reduced to such a state of mental incapacity and imbecility as to render him incapable of understanding or managing his affairs?" Dr

Spence said, it was from bodily, not from mental incapacity, that he was incapable of managing his affairs.

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The Jury consulted for some time, when they were asked if they had any difficulty, or if they wished to retire. The Chancellor stated that they had no difficulty on the case—their only difficulty was, how to return their verdict in terms of his Lordship's direction.

LORD CHIEF COMMISSIONER.—I shall read to you what I have drawn out, (which is the common way in special verdicts,) and you may, if you choose, adopt it.

The Jury did so accordingly.

“ Verdict for the defender.”

Cockburn and More, for the Pursuers.

Jeffrey and Jameson, for the Defenders.

(Agents, *P. Couper*, w. s. and *P. Orr*, w. s.)