PRESENT,

THE THREE LORDS COMMISSIONERS.

MACNEILL *v.* MACNEILL.

1822.
July 18.

A finding for the defenders, on an issue as to the mental capacity, &c. of the maker of a disposition and deed of settlement.

THIS was an action of reduction, declarator, and count and reckoning, to set aside two deeds, on the grounds of incapacity, imbecility, fraud, and gross deception and circumvention.

DEFENCE.—The granter understood and managed his affairs for many months after the dates of the deeds under reduction.

ISSUES.

"1. Whether, upon the 1st day of May "1816, when the disposition under reduction "was executed by the late Dr Macneill, in fa- "vour of the defender, Mary Black Macneill, "or upon the 15th day of April of the said "year, when the disposition and assignation "under reduction was executed by the said Dr "Macneill, in favour of the said defender, the

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" said Dr Macneill was not of sound disposing " mind, and was not capable of understanding " his affairs?

" 2. Whether, at the time aforesaid, the said " Dr Macneill was of a weak facile disposition, " and easily imposed upon?

" 3. Whether, for some time previous to the " execution of the deeds under reduction, the " said Dr Macneill was in the habit of drink- " ing strong liquor, and was encouraged in that " habit by the defenders, or one or other of " them, for the purpose of acquiring an in- " fluence over him?

" 4. Whether, at the time of executing and " signing the said deeds, or either of them, " the said Dr Macneill was under the influ- " ence of strong liquor, and from that cause " incapable of understanding what he was then " about?

" 5. Whether Dr Macneill gave no instruc- " tions for the preparation of the said deeds, " or either of them, and was ignorant of their " meaning and contents?

" 6. Whether instructions for preparing the " said deeds, or either of them, were given by " the said Mary Black Macneill and Malcolm " Macgregor, or one or other of the said per- " sons?

"7. Whether the said defenders, by fraudu-
"lently misrepresenting the meaning of the
"said deeds, or one or other of them, did in-
"duce the said Dr Macneill to sign the same?

"8. Whether, for some time previous to the
"execution of the said deeds, the said Mary
"Black Macneill kept the said Dr Macneill
"secluded from the company of his visiting ac-
"quaintances and friends, by denying them ac-
"cess to him?"

Mr Buchanan, in opening the case, read a protest and bond of interdiction by Dr Macneill, and a letter of instructions.

LORD CHIEF COMMISSIONER.—Are these protests by Dr Macneill? He surely cannot prove his own incapacity? How can this be evidence?

Jeffrey.—We read it to show, that he executed an inhibition, and then wrote recalling it, which he had no power to do.

LORD CHIEF COMMISSIONER.—That may be excellent evidence if a witness is called to speak to the transaction; but reading what he wrote cannot be evidence of this. The document

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ought to be described, and not read at present.

Moncreiff.—We do not object to this, as we know how the case will turn, and we think he is proving the capacity of Dr Macneill.

During the examination of a witness, Mr Jeffrey wished a letter to be shown to him.

Calling on a defender to produce a letter, held sufficient to entitle the pursuer to use it, without also inserting it in the list of writings.

It was objected, That it had not been produced eight days before the trial; and that calling on a party to produce a paper is not the same as giving it in a list of papers to be used in evidence.

LORD CHIEF COMMISSIONER.—What more could they do than call for it? How many notices would you have? It is produced on their requisition, which is surely sufficient.

The witness, on his cross-examination, was desired to read to the Jury a settlement of accounts which was shown to him. This was objected to.

LORD CHIEF COMMISSIONER.—You are entitled to get out of this witness what you want. Mr Jeffrey having examined him as to an ac-

count, you may also examine him as to it; and, with the document in your hand, you may get from him the facts that are material.

You are not entitled to put in that piece of paper, but he has been examined in chief upon it, and a certain effect produced on the Jury. In order to undo this effect, you are entitled to examine the witness, and to read a part or the whole of the contents of this document, if that is necessary, to explain the examination in chief; but you are not entitled to produce the paper in evidence.

LORD GILLIES.—Every thing must be done to make the deposition of the witness intelligible. How can we know the meaning of the questions put as to a paper, which the pursuer will not allow us, or the Jury, to look at?

Incompetent to show a day-book to a witness, unless the entries in it were made by him.

The clerk of the Black Bull Inn was called as a witness, and the day-book of the inn shown to him.

Cockburn.—This is not competent, as he did not keep the book.

Jeffrey.—This is admitted to be a regularly kept day-book, and does not require proof.

LORD CHIEF COMMISSIONER.—To admit

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the book as evidence is one thing, and as a means of refreshing the memory of the witness is another. The admission as to this book, I conceive to be merely, that it is the document it bears to be, but subject to all objections as to its admissibility. As this witness did not write the entries in the book, it cannot be shown to him for the purpose of refreshing his memory.

A law agent examined as to certain facts, there being a *penuria testium*.

After the case was opened for the defender, and some letters produced, the first witness called was James Smith.

Jeffrey.—He is agent in the cause. I admit that he signed as an instrumentary witness, after seeing the Doctor subscribe, or hearing him acknowledge his subscription. In Richardson's case the objection of agency was sustained; and, in Gibson's case, the objection was held good, unless he could prove that he had not acted.

Richardson *v.* Newton, Nov. 30, 1815. Sir T. Carmichael *v.* Tait and Fraser, Dec. 7, 1822.

LORD CHIEF COMMISSIONER.—They ought to state to what they mean to call the witness. If the examination is to be as extensive as they point at, we cannot allow it, but if they limit their inquiry, it may be competent.

LORD GILLIES.—They may examine him as to any matter to which he is a necessary wit-

ness; but there are hundreds of persons who can speak to the state of Dr Macneill's mind.

Moncreiff.—This is a question of great importance, and I mean to ask him as to the situation in which the Doctor was at the time the deeds were executed. In M'Latchie's case, in Scott's, in M'Alpine's, the questions were as to the capacity of the granter. Smith is the only person who can prove the instructions; —he was present at the execution of both deeds, and they have called as a defender the other person who was present.

M'Latchie *v.* Brand, Nov. 27, 1771, M. 16776; Scot *v.* Caverhill, Dec. 19, 1786, M. 16779; M'Alpine *v.* M'Alpine, Dec. 2, 1806, M. App. Wit.

LORD GILLIES.—This may be an important general question, but I do not understand its application to this case. Is it meant to call this person merely for the purpose of asking whether he wrote a deed for a person that he believed to be incapable of executing it? Or does Mr Moncreiff mean to maintain, that he is entitled to examine him as to the whole cause? There is no doubt that agency is a good objection; but to this general rule there are exceptions, and one of these is the case which occurred in the decisions referred to. An agent is a witness, but it is merely to those facts which he only knows. I agree in the general

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doctrine, that an agent should give up acting when he knows that he is a necessary witness; but I cannot in this case deprive the defender of the benefit of proving facts which the agent only knows, or which can well be known to him alone.

The witness was then called and examined.

Buchanan opened the case, and stated the manner in which Dr Macneill gained his fortune, and detailed the facts from which he held the Doctor not to be of a sound and disposing mind, and that he had been imposed upon.

Moncreiff.—This is a short case, and much of what is called evidence bears the opposite construction to that put on it by the pursuer. It was said there were no instructions for the deed, but Mr Smith, a most respectable man of business, proved that instructions were brought to him, that he saw Dr Macneill, and discussed some of the points with him, and that a scroll of the deed was sent to the Doctor before it was extended.

The first issue is the material one. The second is not sufficient by itself, and none of the others are proved. The persons they brought to prove his want of capacity transacted with

him as if they considered him capable. He was clearly not liable to be cognosced when alive, and the question now is exactly the same. Much less capacity is required for a *mortis causa* settlement than for one *inter vivos*. The deed was rational.

Jeffrey.—This is a case peculiarly for you, the Jury. In some views, it is complicated and difficult, and the evidence contradictory; but all the evidence shows, that it was proper to bring the action.

We may assume, that, in 1816, if he was not in dotage, he was at least on the verge of it, and the two deeds, following each other so rapidly, ought to have excited Mr Smith's suspicion.

However respectable the evidence on the other side, the witnesses had little opportunity of observation, and a great deal of it does not touch the case.

LORD CHIEF COMMISSIONER.—In this case, the issues must go back to the Court of Session, and, therefore, unless you find them all for the defender, it will be necessary to mark distinctly what you find for each party. There is very little law in the case, and a finding for the pursuer or defender on each will be sufficient.

There is a great distinction between the fa-

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cility which would defeat a bargain, and that which would defeat a settlement; a bargain requires much more capacity than a settlement; indeed, less capacity is required for a settlement than for any other transaction.

There are here eight issues, but the five last I consider as out of the case, as it does not appear to me that any of them are proved. As to the fourth, the evidence of all the witnesses is distinct and clear that he was not intoxicated. Smith was there, but we cannot take his evidence on the subject. The presumption is, however, that the person, to whom he read the deeds, and with whom he discussed them, was in a state fit to hear and converse about them. There is no evidence of seclusion; and there is evidence, of first verbal, and then written instructions, and it is not necessary that the instructions should be holograph—the best proof of instructions is the reading and discussing the deed, and we must hold, that there were instructions unless the contrary is proved. —The instructions for the first deed are sworn to by Smith; and there were written instructions for the second. There is not the least attempt to prove fraud, and, on these points, you are in perfect safety to find for the defenders.

There is some evidence as to drunkenness, but the issues must be taken altogether. The pursuer is bound to make out his case, and you must find for the defender, unless you are satisfied that he was encouraged in the habit for the purpose of acquiring an influence over him.

The two first are the material issues.—If you think he was not of a sound and disposing mind, or that he was weak and facile, you will find so in terms; but if you are of the contrary opinion, you may find for the defenders.

In this case there is contrary swearing, and, in such a situation, it is the duty of the Court and Jury to reconcile such testimony if possible.—There were thirty witnesses for the pursuer, some of whom knew little of him.

Those who speak to the state of his mind all transact business with him, and such business as requires more mind than choosing his heir.

Smith's evidence can be taken only as to the fact of deeds having been executed; but he states, that in the first the plate was included, and that Dr Macneill made it be taken out, which shows that he was attentive to the subject.

The evidence of Dr Robertson is most material,—he proves that, within a month of the date of the deeds, Dr Macneill attended, and

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gave away in marriage this young woman as his daughter;—the relationship is thus acknowledged on a solemn occasion, and it is a relationship which, though not lawful, binds the heart. You are to say whether there is any thing in the pursuer's case which shakes this. His being in the country on business, affects the whole case; and he transacts in a manner different from a facile person. Facility and incapacity are very different, and are attended with very different consequences.

His hand may have been led in signing the first, but from what took place at signing the second, we will presume that the first was done in the same way; and as to the second, there is decisive evidence. The pursuer made Macgregor a defender, who could have spoken to this, and I am not certain that he was a necessary party.

Verdict.—The Jury found "For the de-"fenders on all the issues excepting the second, "which they find for the pursuers."

Jeffrey, *Skene*, and *Buchanan*, for the Pursuer.
Moncreiff, *Cockburn*, and *Rutherford*, for the Defenders.
(Agents, *James Bridges*, w. s., and *James Smith*, w. s.)