PRESENT,

LORD CHIEF COMMISSIONER.

1822.
June 24.

DARLING *v.* GRIEVE.

A finding for the defender on an issue, as to the capacity of a person to understand her affairs.

THIS was an issue sent to try, "Whether, on "the 8th day of March 1814, the date of the "execution of a summons at the instance of the "defender against the late Margaret Darling, "and from the said 8th day of March 1814, "to the 17th day of March of the said year, "the date of the decree in absence obtained "by the defender against the said Margaret "Darling, before the Sheriff of Berwickshire, "the said Margaret Darling was not capable "of understanding her affairs, or was in a state "of mental imbecility?"

Incompetent to prove the opinion of a person, since dead.

A witness called for the pursuer having stated that his father was dead, was then asked, what opinion his father entertained of the mental capacity of M. Darling.

LORD CHIEF COMMISSIONER.—It is impossible to admit this. I always feel difficulty in

admitting evidence of a fact stated by another; but I yield to the law. I doubt, however, if this can be extended as to the opinion given by a person deceased.

After all the witnesses for the pursuer had been examined, his Lordship observed,

In a case of this sort, it is necessary either to show the state of mind at the precise time specified in the issue, or for a long period embracing that time. I would suggest to the counsel for the pursuer, whether they have established any fact applicable to the issue. The only fact of this nature is the alarm into which this woman was thrown when the officer went to execute the summons; and that fact is only spoken to by one witness.

My opinion at present is, that there is only one witness to this fact, but I am ready to hear what may be stated on the subject.

After some observations by Mr Moncreiff, his Lordship stated, that he would allow the case to go to the Jury, subject to an exception by Mr Cockburn.

Bruce opened the case for the pursuer, and stated the true question to be, Whether this woman so far understood the summons as to be

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able to give instructions for defending herself?

Cockburn, for the defender.—The real question here is, not whether this woman understood the summons, but whether she was in a state of mental imbecility?

The presumption is in favour of sanity, and the pursuer has not made out his case against this presumption. He could not, upon such evidence, have cognosced her while alive, still less after her death.

LORD CHIEF COMMISSIONER.—What is to be tried is the alternative in the issue, and I shall not embarrass the case with stating the question of law that may arise after the verdict. But the bearing of the question will appear more distinctly by stating the manner in which the case comes here. It is sent here in order that the verdict may form a step towards the ultimate decision of the case in the Second Division of the Court of Session.

The proof here is tied down to a precise date, and the pursuer may either prove the conduct of this woman at the instant of the citation and decree, or refer to her antecedent and subsequent conduct, provided it embraces the date specified.

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The only evidence as to the precise time is that of the officer, and, when taken all together, it does not prove any thing like imbecility, but merely that she did not understand legal business; and she may have perfectly understood her affairs, and not been imbecile, though she did not understand a legal proceeding.

A party is bound to make out his case, and cannot ask a Jury to go upon conjecture—the pursuer was bound to call some comer and goer—some indifferent person, to prove the state of her mind, and, though some of the witnesses speak in strange terms as to her capacity at a former period, still the evidence does not, by any means, go to the extent of the issue.

My opinion is, That the pursuer has not made out his case, and that there cannot be a verdict for him.

Verdict for the defender.

Moncreiff and *Bruce*, for the Pursuer.
Cockburn and *Christison*, for the Defender.
(Agents, *Tait & Bruce*, W. S., *Molle, Turnbull, & Brown*, W. S.)

Moncreiff suggested, That, by the 9th section of the act, power was given to the Court

59th Geo. III. c. 35, sect. 9.

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Circumstances in which the Court refused to indorse a fact under 59th Geo. III. c. 35, sect. 9.

to indorse any material fact which appeared in evidence. In this case, the real question was, and we wish the fact indorsed, that this woman did not understand the nature of this summons, so as to be in a situation to defend herself.

Cockburn.—This is the first case in which this clause has been acted on, and I doubt if it ever should be acted on where earlier notice is not given.

LORD CHIEF COMMISSIONER.—You will not be cut short, as the fact is for the Jury, and if you have any witnesses who will vary the fact as stated by the messenger, you will be entitled to call them.

Cockburn.—They ought to have foreseen this before the issues were adjusted. The question is not if she *did*, but if she could understand it; she might not choose to read it.

Moncreiff.—We gave warning of this, and the case is now closed, and must go to the Jury. We proved an attempt to explain it to her, but that she could not understand it.

LORD CHIEF COMMISSIONER.—This section of the act I thought, and still think, of

great importance to this Institution in cases which are returned to the Court of Session. When the object of the issues is to inform the minds of that Court as to certain facts which are material to the decision of a question of law, this section is to enable the Jury Court to inform them as to any important fact proved under, though not properly embraced in, the issues. The Court must be particularly cautious in exercising this power.

This Institution was founded on long experience in England; and, finding that it succeeded, as constituted by the act 55th Geo. III. c. 42, the Legislature sanctioned its continuance, and added this power, which was not contained in the first act. The clause was proposed from it having occurred to me, in one of the cases tried under the former statute, that, if the Court had had this power, it might have been the means of saving much expence to the parties.

If I am wrong in what I am about to state, there are means of setting it right.

In considering whether this power should be exercised on the present occasion, it is of great importance to attend to the interlocutor of the Court of Session, and the manner in which the fact is proved. The object is to inform the

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Court of something they did not, or could not foresee, and we must take care that it is founded in legal evidence.

The interlocutor of November 1821 refers to that of 14th July 1821, and I hold the terms of the one as transferred into the other, and the state of mind is clearly what was in the contemplation of the Court. The Judges have made up their minds on this subject, and have not sent to us to try whether she understood this particular transaction. Calling on me to indorse this fact, is calling on me to raise a new cause; and it is not fit that I should tell the Court, that there is another fact which they ought to have sent to trial, a fact, too, which it is impossible they could have overlooked.

Another ground for rejecting the application now made is, that the proof of this fact rests on the testimony of a single witness; and the facts spoken to by the other witnesses are not concomitant. All that I could indorse in this case would be, that one witness swore so and so.

The grounds upon which I reject the application are,—1. That it is not a fact in this cause, but in another question. 2. That it is not proved by legal evidence.

Moncreiff.—We are not quite sure of our

remedy in this case, and it is important that this should appear in your Lordship's notes.

LORD CHIEF COMMISSIONER.—The second ground is law, to which you may except, and you may consider of the other, upon which I am ready to hear you at Chambers.

PRESENT,

LORD CHIEF COMMISSIONER.

1822. July 12.

LINDSAY *v.* GILCHRIST and BLACK.

A finding that a subscription to a bill was not the handwriting of the party.

SUSPENSION of a threatened charge, upon a bill of exchange, on the ground that the acceptor's name was forged.

ISSUE.

"Whether the name of James Lindsay, "subscribed to the bill in process for the sum "of L. 197, dated 13th June 1815, and bear- "ing to be drawn by Jabez Auld, and address- "ed to James Lindsay of Hatchbank, is not "the true and genuine subscription, and pro- "per handwriting of the said James Lind- "say?"