that there was some blame to be attached to the Hope.

Moncreiff, D. F., Cockburn, and *Macallan,* for the Pursuer.
Forsyth and *Robertson,* for the Defenders.
(Agents, *Ainslie* and *M'Allan,* W. S. *Daniel Fisher,* S. S. C.)

PRESENT,
LORDS CHIEF COMMISSIONER AND PITMILLY.

1827.
March 14.

CAMPBELL *v.* DAVIDSON, &c.

Finding for the defenders on a question whether a deed was not the deed of the party.

REDUCTION of a trust-deed and latter will, on the ground of a false date, of blindness, of insanity, or want of disposing mind, of the granter not being made acquainted with its contents, and of its being obtained through gross fraud and circumvention.

ISSUE.

Whether the deed was not the deed of the late John Mackinnon Campbell?

Bell, for the pursuer, stated, That the granter of the deed was in a state of delirium, from constant and excessive use of spirits: That the agent had acted rashly in being a party to it, and had made out the deed without either written or verbal instructions.

CAMPBELL
v.
DAVIDSON, &c.

In the course of the evidence for the pursuer, it was proposed to give in the settlement of Mr Campbell's mother, with reference to a witness that might be called by the defenders. And a question was asked, whether it was necessary to call the instrumentary witnesses?

LORD CHIEF COMMISSIONER.—It is not necessary to produce evidence now, either to support or defeat the testimony of a witness. This deed is not in the cause, and is therefore inadmissible. With regard to calling the instrumentary witnesses, the Court can give no direction,—Counsel must judge for themselves.

Moncreiff, D. F. for the defender, said, That, from the nature of the charges in the summons, he felt it his duty to call the instrumentary witnesses, though the pursuer had completely failed in making out his case. There is not the least evidence of fraud. Facility, which they attempted to prove, is not in the summons, and there is not a vestige of evidence of insanity. We shall show by the correspondence that instructions for the deed were given.

Circumstances in which a counsel in opening a case was allowed to state the import of documents, the Court not then deciding whether they were admissible in evidence.

Jeffrey.—It is not competent to read letters from the agent, who was sole trustee, and the party on the record.

Moncreiff.—Unless I state them now, I have no opportunity of commenting on them.

LORD CHIEF COMMISSIONER.—There is no doubt you may state this now; but were it the practice at the Bar, I should think it better in all cases rather to describe than to read written evidence; but the practice is so inveterate, and has gone on so long, that I can only say, that, if the Court shall hold them not to be evidence, the jury will discharge them from their minds.

Moncreiff, D. F.—We have been deprived by death of the evidence of Mr Rollo, who undoubtedly might have been a witness, as he was a mere trustee—had no interest in the case—and never acted as agent.

When Mr Rollo's letter-book was produced, *Jeffrey* objects, This is a letter of the party, as he was a sole defender for two years, and though he assumed other trustees, and then resigned, that does not make it different. He could not have been a witness at the time the letter was written.

The letter-book of a deceased agent admitted to prove that a draft of a deed was transmitted to a party.

Jameson.—We do not insist on having Mr Rollo's evidence. We do not produce the letters to prove the truth of the statements in

CAMPBELL
v.
DAVIDSON, &c.

them, but to prove that a letter was sent containing such statements.

LORD CHIEF COMMISSIONER.—The difficulty I have at present is in point of form, but that should not be relaxed.

This is the case of a defender trustee, and the objection rests on his being defender. The witness states that a letter was written, which he believes he carried. That is sufficient evidence that it was sent. The question then comes, what use can be made of the letter? and if the only fact required was that a letter was sent, that is proved; but I wish to know on what principle the contents of the letter can go to the jury. Is it on the principle, that, if the communication had been verbal; and a person had been present, that it would have been competent to prove what Mr Rollo said?

Moncreiff, D. F.—We mean to prove that Mr Rollo made this communication to the party, and the letter is much better than proof of what he said. A trustee is a competent witness.

Smith *v.* Pentland. See 10th July 1813.

Jeffrey.—I admit it competent to prove words spoken by him, but that is on the principle that the testator was present. If any

question occurred on the answer by the testator, that might make the letter evidence, but no such question occurs here. Being trustee and defender is a good objection, though when there are several trustees some of them have been examined.

Peake, L. of Ev. 171.

LORD CHIEF COMMISSIONER.—This in one view is a point of nicety and delicacy. The letter would not have been evidence of a fact stated in it if Mr Rollo had been alive, as he must have been examined on oath. But if this is to be used as proving the acts of Mr Rollo, then the witness proving that the letter was sent is not sufficient. I feel much difficulty in this, as his acts are not to be proved by his own letter. Is it intended to follow this up by proving that the testator received this letter, and acted in consequence of it?

LORD PITMILLY.—This deed is dated on the 26th, and the letter now in question is dated two days before, and is from the person who transacted the business. Suppose that letter were in existence in the hands of a third party, it appears to me, that, whether Mr Rollo were dead or alive, it must be evidence to the jury, as an act of the person employed in the execu-

CAMPBELL
v.
DAVIDSON, &c.

tion of this deed. It is admissible evidence to the fact, that he sent the draft of the deed to the testator.

The evidence therefore was admitted.

A legatee of B admitted to prove facts to support the deed of A, though it was said the funds of B were insufficient to pay the legacies, without a sum left to B by A.

Tait, L. of Ev. 361.

When the principal clerk of the late Mr Rollo was called,

Cuninghame.—He has a material interest, as there is a legacy left to him by the mother of the testator, Mrs M'Kinnon, who is dead; and the property conveyed by this deed is the only fund from which it can be paid, and this is a vested interest.

1 Phillips, 46. Tait, 367. 2 Hume, on Cr. 351. Mackenzie *v.* Henderson, 2 Mur. Rep. 219. Clerk *v.* Spence, 3 Mur. Rep. 451.

Moncreiff.—They are naturally anxious to exclude this witness, as he is the best; but to exclude him, the interest must be certain, direct, immediate, and he must be able to use the verdict in evidence. There is no direct interest here; but the allegation is, that the debtor of the witness is interested in it, and that, without the property conveyed by this deed, the funds left by Mrs M'Kinnon cannot pay the legacy; and are you to try whether there are sufficient funds to pay the debts before admitting this witness? Besides, the legacy may not be good, as the pursuers question the validity of Mrs M'Kinnon's deed.

Jeffrey.—In general terms we admit the

doctrine laid down, but differ as to what is a contingent interest. Here no event can occur to defeat the interest, as the person is dead; and we offer to prove that she had no moveables, and that her property is burdened beyond its value. In Clerk's case, the interest was contingent, and reviving a prior deed was not held sufficient to disqualify the witness.

Clerk v. Spence. 3 Mur. Rep. 451 and 465.

LORD CHIEF COMMISSIONER.—It is not necessary for the Court to enter at length into the general principle, as the reports show that we have already decided upon it. The object here is, to prove that this person is interested, as the property conveyed by this deed may go to increase the fund from which his legacy is to be paid. But the verdict in this case could not in any shape be given in evidence in support of his claim. It is said the legacy cannot be paid except from the funds conveyed by this deed; but this is uncertain, and remote; and what are we asked to do? Why, to inquire into the value of the personal and heritable property of Mrs M'Kinnon, and the debts due by her. It is impracticable to ascertain the fact upon which the objection to the competency of the witness depends, and therefore it must go to his credit.

CAMPBELL
v.
DAVIDSON, &c.

Incompetent to prove a fact in a cause by the deposition of a haver.

When the deposition of the late Mr Rollo as a haver was produced,

Jeffrey objects, This is incompetent, as the writings are all produced.

Moncreiff.—It is not to prove a fact, but to explain why he had no instructions, and he is now dead.

LORDS CHIEF COMMISSIONER and PITMILLY.—It was ruled in a former case, that it is incompetent to prove a fact by the deposition of a haver, and we cannot receive it in this case.

Ker *v.* D. of Roxburgh, 3 Mur. Rep. 132.

Jeffrey.—This is a short point, the question being, whether, at the date of the deed, this person was in a state of incapacity, so as to render this not his deed. His capacity at the time of giving instructions is of no consequence; and the most charitable supposition is, that when Mr Rollo saw him, he drew out any remains of mind that were left, and that he believed him more capable than he was.

LORD CHIEF COMMISSIONER.—Though this case has occupied an immense number of hours, it is confined to very narrow bounds. The issue shows the question; and if you are satisfied that the person was capable at the moment

of executing the deed, your verdict must be for the defender supporting the deed; but if he was incapable, then it must be for the pursuer reducing the deed, as a party must be of a sound and disposing mind at the time of executing such a deed. The great and important date is about eleven o'clock of the forenoon of the 26th of October; and the evidence of the previous bad habits of this person, which occupied so much time, may be easily disposed of, though it was material as showing the state of his mind up to the most recent period prior to the execution of the deed. You are then to consider whether his mind continued, up to the time of executing the deed, in such a state that the deed was his voluntary act, disposing of property over which he alone had control. It is not necessary to the execution of such a deed that a person should have great powers. It is sufficient if he is capable of knowing what is done, and has the power of volition.

There is a most important letter only fifteen days before the deed, which takes off the effect of all the evidence prior to that date, and shows, that, if he was incapable at the date of the deed, the incapacity must have come on during these fifteen days. After this letter there is a considerable blank; but on the 24th,

EWING
v.
CRICHTON
AND OTHERS.

there is a letter from Mr Rollo, sending the draft of the deed, and the important evidence is what follows this, combined with that of the instrumentary witnesses. One of them proved that the deed was read, which is important for Mr Rollo, but was not necessary, as law would presume the reading, and the pursuer must make out that it was not read. You must consider the whole circumstances, and say whether they prove the person to have been acquainted with the deed, and to have approved of it at the time he signed it, and it is of no importance how soon after he became incapable. The case depends on your opinion of the evidence, not mine; and according to that opinion you will return your verdict.

Verdict—"For the defenders."

Jeffrey, R. Bell, and *Cuninghame,* for the pursuer.
Moncreiff, D. F. and *Jameson,* for the defender.
(Agents, *James Greig,* W. S. *Donaldson* and *Ramsay,* W. S.)

PRESENT,

LORDS CHIEF COMMISSIONER, CRINGLETIE, AND MACKENZIE.

1827.
March 15.

EWING *v.* CRICHTON AND OTHERS.

Finding that a private convey-

AN action against the office-bearers of a Ship-