

of a recall by the defender does not appear to me to contain any thing like a distinct call on her to return ; but if you think differently, you must consider that he was at the time living with another woman. If you are satisfied that the agreement is made out, then I state to you that he was not in a situation to cancel the agreement, as his house was not pure.

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BUTE.

Verdict—For the pursuer on the 1st, 2d, 3d, and 5th issues, damages aliment and maintenance of the boy, L. 360, 12s.—for the defender on the 4th issue.

Pyper and Ayton, for the Pursuer, .

J. A. Murray and Russel, for the Defender.

(Agents, *Ayton and Greig, w. s. and Campbell and Burnside, w. s.*)

PRESENT,

LORD CHIEF COMMISSIONER.

COUPER &c. v. MARQUIS OF BUTE.

1828.
June 18.

AN action to recover the arrears of an annuity contained in a bond for L.100 a-year, granted by the late Marquis of Bute to the late Reve-

Finding that a person was of unsound mind at the time he gave up a bond

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of annuity, and
that the obliga-
tion in the bond
had not then
been extin-
guished.

rend James Couper, and said to have been re-
delivered when the grantee was insane.

DEFENCE.—The obligation in the bond was
extinguished at the time it was delivered up,
Mr Couper having got livings in the English
church to a greater amount than the annuity.

ISSUES.

“ It having been decided by the Court of
“ Session, by interlocutor dated the 22d day
“ of June 1827, that an unconditional bond of
“ annuity, dated on or about the 22d day of
“ November 1809, was granted by the late
“ Marquis of Bute to the late Reverend James
“ Couper, for the payment of L. 100 Sterling
“ per annum, during Mr Couper’s life ;—and
“ it being admitted that the said bond was, pre-
“ vious to the 10th day of February 1813,
“ transmitted by the said James Couper to the
“ said Marquis of Bute :

“ Whether, at the time the said bond was
“ so transmitted, the said James Couper was of
“ unsound mind, and incapable of managing
“ his own affairs ? or,

“ Whether, at the time the said bond was
“ so transmitted, the obligation therein con-
“ tained had been extinguished ?”

Robertson opened for the pursuer, and stated the facts ; and that, as the pursuers would prove that Mr Couper was insane, the defender must prove the precise circumstances in which the bond was delivered up, and that it was cancelled. Any understanding or agreement that it was to be given up on Mr C. being presented to the livings, is simony, and void and null.

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2 Burn, Ecc.
Law. 337.
31 Eliz. c. 6.

When a letter from a commissioner, making a statement as to the conduct of a witness examined in his presence, was tendered in evidence,


Facts relative to the conduct of a witness while under examination on commission, cannot be proved by a written communication from the Commissioner.

Jeffrey objects,—It is no part of the report, but is dated fourteen days later ; and after signing his report a commissioner is *functus*.

Hope, Sol.-Gen.—It was written at the time, and was transmitted to the clerk that it might be under the order of the Court. The information is important ; for though the witness was ours, we had no choice as to who should be called.

LORD CHIEF COMMISSIONER.—The difficulty is to discover the authority which a commissioner has in this Court to do what is here done ; and this is an additional inconvenience of evidence taken in this manner. The object

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of this is to impeach the credit of the witness by proof of her conduct during her examination; and this may be done by calling a witness, or by taking a commission to examine him. We must take commissions with all their defects; but in this instance, as it is a party wishing to discredit his own witness, the remedy would have been not to call the witness. I throw no reflection on the commissioner; on the contrary, he has acted with propriety. When this note was communicated to me, the impression on my mind was, that we could not receive it, and I have heard nothing from the Bar to alter that impression. This is a matter which may be regulated in future, but is not so at present.

When Dr Couper was called,


Jeffrey.—He is inadmissible, being the uncle of the parties interested, and brother of their curator, who is a pursuer, and from whom we may get expenses. The deposition of the other medical gentlemen may be read from the cognition.

Hope, Sol.-Gen.—There is *penuria testium*, the two other medical gentlemen who attended the late Mr Couper being dead. The brother of the witness is nominally pursuer, but the executors have the interest.

Penuria testium
arising from the
death of other
witnesses, does
not render an
uncle admissible.


LORD CHIEF COMMISSIONER.—The death of the two witnesses does not make out a *penuria*, but the reverse, unless it were established that this examination is applicable to a period at which the situation of Mr Couper was kept private. If the defender insisted in the objection, it would be departing from the principle of *penuria testium* to admit the witness. It is the same as a relation employed in the management of a man's affairs ; and this was decided as to an important witness in a former case. In the present instance they might have called a different medical adviser ; and though I am sorry to have to enforce this technical rule of the law of Scotland, I must administer that law.

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Jeffrey opened for the defender.—The real question is, whether the defender is due L.100 a-year up to the death of the late Mr Couper ? If we can make out that the late Marquis had a right to demand up this bond, or if there was a good reason for giving it up, the fact that it was given up is no evidence of insanity. The whole conduct of Lord Bute was most liberal, and he gave Mr Couper better terms than he was disposed to ask. In 1812, he gives him a living ; and after that Mr

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Couper delivers the bond to the Marquis. There is no evidence of insanity at the time. And after all Lord Bute's kindness, can you suppose that by an infamous fraud he took advantage of the act of an insane person? In 1813, when the insanity is undoubted, his father, in writing to Lord Bute, does not even hint that the annuity was due.

On the second issue you may find for the defender, even should you think Mr Couper was insane; for though a madman is to be protected against acts injurious to himself, injustice must not be done to those who deal with him as if he were sane.

Hope, Sol. Gen. in reply.—I feel anxious, not from any doubt on the evidence, but from this having been pressed as a case of unjust demand on the part of the pursuers, and as supposing fraud on the part of the late Lord Bute. You are to deal with it as a case between man and man, holding the honour and integrity of the pursuer as high as that of the defender, or any of his ancestors. The question is not whether the sum is due, but whether Mr Couper was insane, and whether the bond was extinguished. Being proved insane, the question is, whether the defender proved the bond extinguished?

On the second issue, what is the extinction contended for? If it was a contract, then it must be proved by writing; and if it was of the nature which is stated, it was illegal.


LORD CHIEF COMMISSIONER.—This is a special case, not belonging to this Court, but which is sent by the Court of Session for the purpose of having their minds informed on the two questions in the issues, that they may decide the cause. After much litigation in the Court of Session, it was found that the bond granted by Lord Bute was unconditional, and you must keep this in mind, especially in considering the second issue. We have nothing to do with the origin of the transaction, but simply the questions in issue. In considering the insanity of Mr Couper, the date is of consequence; but though he was cognosced, and the verdict finds him insane from a particular date, that is not conclusive against the defender, he not being a party to that proceeding.

His Lordship then gave a view of the evidence of insanity as applicable to different dates, and observed, that at an early period, the facts, though not conclusive, were to be taken in connection with what afterwards occurred, and that, though there was an apparent contradiction as

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Clark v. Callender. 2 Mur. Rep. 89. Fletcher v. E. of Airly, Dec. 16, 1692. 1 Fount. 533.

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to his state at one period, that every one knew that this malady did not show itself at all times.

It is said Lord Bute at one time refused to take the bond, and that at a subsequent period he took it, and that both the bond and his letter are destroyed. The point to be considered under the first issue is, whether Mr Couper was insane at the time he transmitted the bond; because if he was so, then it was the act of an unsound mind, which the Court cannot sanction? If you are of this opinion you will affirm the issue in terms, if not, then you will negative it.

On the second issue, the obligation was for an annuity during the life of Mr Couper, and the question is, whether it was extinguished? On this there is no direct evidence either parol or in writing, but it is left to inference from the facts and circumstances, and it is on this part of the case that the letters relative to the terms on which Mr Couper should have his situation in Glasgow, bear. The first proposal was for church preferment in Scotland, but this goes off, and a new agreement is entered into. If that agreement was one as to preferment in the English church, that may account for its not appearing on the face of the bond, as being simoniacal it is one which

the law of England would not sanction. It is in evidence that he did get livings to a greater amount than the annuity secured by the bond, and if there was an understanding of the nature I have mentioned, then, in point of moral honesty, it was properly given up. But there is a difficulty which I cannot get over. There is not evidence in point of law to support the agreement, and if supported, it is not one which could bear the light in a Court of justice. If under the first issue you consider Couper to be insane, then the burden of proof in the second issue rests on Lord Bute; and as he has not made out in point of fact, except by conjecture, the extinction of the obligation in the bond, and as that conjecture would establish a simoniacal agreement on the second issue, you ought to find for Couper.

COUPER, &c.

v.

MARQUIS OF

BUTE.

Verdict—That at the time the bond was delivered up, James Couper was of unsound mind, and that the obligation therein contained had not then been extinguished.

Hope, Sol.-Gen. and Robertson, for the Pursuer.

Jeffrey and Fullarton, for the Defender.

(Agents, *J. G. Hopkirk, w. s. and Thomas Ferguson, w. s.*)