PRESENT,

LORDS CHIEF COMMISSIONER AND CRINGLETIE.

1830. Jan. 11.

## KERRS AND COMPANY *v.* PENMAN, &c.

Finding for the defenders on a question of vitious intromission.

AN action against the widow of the acceptor of two bills of exchange, and two others, on the ground of vitious intromission.

DEFENCE for the widow.—That she was confirmed executrix, and made up inventories, and that the property was of small value, and was preserved;—for another defender, that he accounted for his intromissions, which were authorized by the relict;—for the third defender, that he did not intromit.

ISSUE.

"It being admitted, that the late Robert "Penman died on the 1st of February 1828, "and, at the time of his death, the said Robert "Penman was indebted to the pursuers in the "sum of L. 90, 16s. 7d., contained in a bill, "dated 1st October 1827; and the sum of

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" L. 61, 10s. 9d. contained in another bill, " dated 28th November 1827; and that the " sums contained in said bills have not since " been paid:

" Whether, subsequent to the death of the " said Robert Penman, the defenders, or any " of them, vitiously intromitted with the funds " and effects of the said Robert Penman?"

2 Bank, 421, § 3, Ersk. 3. 9, § 56. Drummond *v.* Campbell, 13th Dec. 1709. Mor. 14414, Ritchie *v.* Bowes, 7th Mar. 1795. Mor. 9838.

*Rutherford* opened for the pursuers and said, The action is for illegally taking possession of the property of a person deceased. Being the widow and confirmed, is no defence if the inventories were defective. If they are intentionally so, this *increases* the presumption of fraud, and presumed fraud is the foundation of this part of the law.

A great change was made on this branch of law at the end of last century, but still, where the inventories are fraudulent, or when possession is taken beyond them, the law is the same.

A letter sent by a pursuer as notice to the defenders, admitted in evidence for him.

When a letter from the pursuer to one of the defenders was produced,

*Jeffrey, D. F.* objects.—This can only be evidence to explain the answer, and they must produce the answer. Their statement cannot be evidence for them.

*Cockburn.*—We use it as proof that, on the 8th of April, they had notice that we intended to challenge their proceedings.

LORD CHIEF COMMISSIONER.—You use this as a notice to the other party, to show that they were warned, and that their conduct was founded on it. A written notice of a party is evidence for him. The question is, Whether sending a letter of the nature of a notice is sufficient? If the notice had been verbal, they would have got the answer on cross-examination.

A person having a preferable claim against an estate not disqualified from giving evidence.

The brother of the deceased was called, and stated, that he had a claim against this estate for funeral expenses. This being a preferable debt, was not held an interest to disqualify him.

A minute made up after a funeral by the relations of a deceased person not admitted in evidence.

It was then proposed, but objected to, that the minute made by the relations at sealing up or opening the repositories should be read.

LORD CHIEF COMMISSIONER.—The paper cannot be produced in evidence, but the witness may look at it, and you may examine him on the facts.

A person received as a witness, though precognosced in presence of her husband.

A witness having stated that she was precognosced about eighteen months ago, and a second

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time lately, and that on the second occasion her husband was present, and that she was present while he was precognosced.

2 Hume, 379.—Fall *v.* Sawers, 10th August 1785, Mor. 16777.

*Jeffrey* and *Thomson* object.—This is a case in which the agent gave them an opportunity of making one story if they chose. The objection is not founded solely on the disapprobation of the practice, but it is held that the memory of the witness is thus tainted and confused.

*Cockburn.*—I leave this to the Court. In the cases referred to, it was combined with impropriety, here the being present was casual, and with no bad intention.

LORD CRINGLETIE.—I am satisfied that Mr Cockburn's is the true interpretation of the law. In all cases it must amount to prompting or instructing the witness, and if the conduct of the party amounts to tampering with, or instructing the witness, the objection is good. In all the cases where the objection has been sustained, the Court have been satisfied of this, but it has not been sustained when the presence of the witness was natural or accidental. There was a case before me where there had been a criminal proceeding, and the procurator-fiscal was received, though he had been present at the examination of the others.

LORD CHIEF COMMISSIONER.—I was particularly anxious to hear the opinion of my brother, from a wish not to trench on any peculiar regulation of the law of Scotland. There is nothing to which I would more strictly adhere, than in what regards partial counsel to a witness, but in this case the witnesses were first examined separately, and nothing appears of any suggestion made to amend their testimony, or alter what they had said before.

We have not decided this point *in specie*, but in one case, when I wished to call back a witness after he was examined and dismissed, Lord Pitmilly thought it incompetent, and I yielded; and in another case a witness was called back.

A witness coming into Court and hearing another examined must be excluded, as it cannot be ascertained what impression was made, or what his motive was.

If the case does not amount to one of partial counsel, it will not exclude him. The rule does not appear to me so stern that in no case a witness who has heard another examined can be received.

His Lordship was requested to note this as a most important point in the law of evidence.

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LORD CHIEF COMMISSIONER,—In ancient times the rules as to vitious intromission were strictly applied, but more recently they have been gradually relaxed. In the present instance no case of vitious intromission has been made out, as it is cured by the confirmation, and two inventories, in which there is no appearance of fraud; on the contrary, the taking the goods appears most proper. They were taken by the widow to her father's openly, and it was fair she should have the use of them. Two inventories are made up. There is no foundation in the proof for the statement that there was money taken away, and it would be beyond all example, if you were to render the defenders liable for the whole debts.

Verdict—For the defenders.

*Cockburn, Rutherford,* and *Shaw,* for the Pursuers.
*Jeffrey, D. F.,* and *R. Thomson,* for the Defenders.
(Agents, *A. C. Howden,* W. S. and *Wm. Hunt,* W. S.)

PRESENT,

THE LORD CHIEF COMMISSIONER.

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## COUSELAND v. CUTHIL.

Damages for defamation.

DAMAGES for written and verbal defamation.