[*27th June* 1833.]

No. 27. ALEXANDER RINTOUL, Appellant.—*Dr. Lushington—Wakefield.*

ALEXANDER BOYTER, Respondent.—*Lord Advocate (Jeffrey.)*

Proving the Tenor.—Circumstances in which a decree of the Court of Session, holding the tenor of a destroyed deed proved, was affirmed.

Expenses awarded against a defender in a process of proving the tenor.

FIRST DIVISION. THIS action was instituted for the purpose of establishing the tenor of a deed of settlement, and was brought at the instance of the respondent, Alexander Boyter, against the appellant Alexander Rintoul, and Thomas Rintoul, shoemaker, in Sunderland. The deed was alleged to have been fraudulently abstracted and destroyed by the latter, and to have been of the following tenor:

" We, Alexander Boyter, grocer, Balmerino, and " Helen Rintoul, spouses, from our mutual affection to " each other, and with mutual advice and consent, do " hereby make, constitute, and appoint the longest " liver of us to be the first deceaser's sole executor and " universal legator, with full power to intromit with " the whole moveables and executry of every description " of the first deceaser, to give up inventories thereof, " and to confirm the same, and generally to do every " thing in the premises competent to an executor, but

" under the burden always of the just and lawful debts " and funeral charges of the first deceaser; and we dis- " pense with the delivery hereof, and declare that these " presents, though found lying beside either of us at " the time of our death, or in the custody of any other " person undelivered, shall be as valid and effectual to " the survivor as if the same had been duly delivered; " and we consent to the registration hereof in the " books of Council and Session, or others competent, " therein to remain for preservation; and for that pur- " pose we constitute our procurators, &c. In witness " whereof these presents, written by Charles Mather, " clerk to James Hunter, writer, Dundee, are subscribed " by us at Dundee, the 28th day of December 1827 " years, before these witnesses, the said Charles Mather " and David Myles, also clerk to the said James Hunter.

" ALEXANDER BOYTER.

" CHARLES MATHER, Witness.

" DAVID MYLES, Witness.

" At the desire of the above-mentioned Helen Rin- " toul or Boyter, and by authority from her, who " declares that she cannot write, and she having, in " token of the authority given to me, touched my pen, " I, notary in the premises, do subscribe for her, the " before-written deed having been previously read over " to the said Helen Rintoul or Boyter in presence of " me and the witnesses before designed. Nil nisi " verum.

(Signed) " JAMES HUNTER, N. P."

It was alleged, that after the death of Helen Rintoul in June 1829, when the settlement came into operation, that it was read, after her funeral, in the presence of her nephews (the appellant and his brother Thomas) and

No. 27.

27th June 1833.

RINTOUL v. BOYTER.

other friends; but that thereafter Thomas Rintoul, (the appellant's cousin), surreptitiously and violently took possession of the settlement, and, having torn it to pieces, swallowed or otherwise put away the fragments; and within a few days thereafter an edict of executry was raised by the appellant in the character of nephew to the deceased.

The appellant alone appeared in the Court below, and lodged defences, stating in particular that Mrs. Boyter "did not execute a settlement of the tenor "mentioned in the summons," and denying that "the "said settlement was read over in the presence of the "persons mentioned," and also that any such deed was violently and fraudulently abstracted and destroyed by Thomas Rintoul.

In support of the action the respondent produced a mutual testament between Mrs. Boyter and her sister Agnes Rintoul, dated 21st June 1821, (which was proved to have been used as a style by the man of business who prepared the mutual settlement between the respondent and his wife); also a deposition of the appellant's country agent in the proceedings, at the appellant's instance, before the commissary, showing that that person had for some time in 1829 been in the possession of or had repeatedly seen a copy (taken by the appellant's son) of the deed in question; and parole evidence both as to the terms of the deed and of its destination.

Upon hearing the case argued the Lords of the First Division, on the 16th March 1832, pronounced this judgment:—"The Lords having advised the state of "process, adminicles produced, and testimonies of the "witnesses produced, and heard parties by their coun-

" sél, Find the casus amissionis of the writ libelled; and " the tenor thereof as libelled proved, and decern and " declare accordingy: Find the defender, Alexander " Rintoul, liable to the pursuer in the expenses."

No. 27.

27th June 1833.

RINTOUL v. BOYTER.

Against this interlocutor the present appeal was brought.

Appellant.—The proof of the tenor of the document is by no means such as to have warranted the judgment pronounced. The deed is said to have been executed on or about the 28th December 1827. It is alleged to have been a mutual conveyance by the respondent and Helen Rintoul of the whole of the property, and in particular it is alleged to have contained that clause upon which the efficacy of the whole deed depended:—" And we dispense " with the delivery hereof, and declare that these pre- " sents, though found lying beside either of us at the " time of our death, or in the custody of any other " person undelivered, shall be as valid and effectual to " the survivor as if the same had been duly delivered." But as to this clause there is no proof whatever.

By the judgment the appellant is subject to the whole costs of the action, while there are no grounds, either on principle or according to the practice of the Court, upon which such an award could have been pronounced. No expense has been caused by the appellant to the respondent, who would equally have been obliged to advance the whole of his proof although the appellant had not appeared. It is not even alleged that the appellant is chargeable with the destruction of the deed, and there cannot be produced any instance in which the expense of the proving of a tenor has been

No. 27.

27th June 1833.

RINTOUL v. BOYTER.

laid by the Court below on a defender, unless the deed sought to be proved had actually been destroyed by the defender.

Respondent.—The respondent adduced all the evidence to support his libel which could be reasonably required or expected under the very particular circumstances of the case. This is the case of a personal deed, and as such related to a settlement of moveables only, and therefore no deed connected with it (such as an instrument of sasine) fell to be entered on record, or could be obtained from any register. The loss of the deed arose from violence; it was forcibly and feloniously taken from the possession of the custodier, in the most unusual manner, in presence of a number of witnesses. It would be preposterous if the party injured by such an act had no remedy unless he produced the scroll of the deed or some other written evidence relating to it. But adminicles were produced; for another settlement was produced, which one of the instrumentary witnesses swore was used as a form or draft of the deed in dispute. And the deposition of the appellant's own agent showed that he was at one time possessed of a copy of the deed taken by the appellant's son. These, under the circumstances of the case, were sufficient written adminicles.

The parole proof adduced by the respondent was also most complete and conclusive in all points. The violent and fraudulent destruction of the will by Thomas Rintoul, in presence of the appellant's brother, who looked on without interference, was proved by an accumulation of evidence. The tenor or purport of the destroyed deed was equally clearly proved. The original execution of the will in question, and its

existence after Mrs. Boyter's death, was also distinctly proved.

The appellant was justly subjected in the costs in which the respondent was involved, by the fraudulent act of the party and his coadjutors who destroyed this will. For the appellant almost instantly after the felonious act attempted to avail himself of it by bringing all manner of actions against the respondent as in a case of intestacy. He thus adopted the fraud, if he was not antecedently privy to it. Besides, the appellant put forth a series of statements, in his defences, which were all proved to be false.

No. 27.

27th June 1833.

RINTOUL *v.* BOYTER.

LORD CHANCELLOR.—My Lords, if I could entertain any doubt in this case, I should suggest to your Lordships the propriety of taking time to consider before you affirmed the decision of the Court below, but I entertain no doubt. In the first place, by the judicious abstinence of the learned counsel on the other points of the case, the question is reduced simply to one upon the result of the evidence before you; and the learned Judges of the Court below having made up their minds on the examination of that evidence, and having thought that sufficient to satisfy them of the facts of the loss of the instrument, and of the instrument lost being of the tenor and effect stated,—which phrase "of "the tenor and effect," as your Lordships are aware, is used in the law of Scotland in a different sense from that in which we use it—we using it to express the very words of the instrument, they using it rather to express the purport of it,—the Court below being satisfied that the instrument so lost was of the tenor and effect which the party has alleged it to be, and proved it to be, it

No. 27.

27th June 1833.

RINTOUL v. BOYTER.

would certainly have required a very strong contrary opinion, to justify your Lordships in altering the decision thus pronounced. It is a case in which four or five learned Judges have made up their minds upon the result of the evidence before them; and it would be extremely difficult for any one to press upon your Lordships a contrary opinion, unless he entertained a very confident belief that they had gone wrong. But, my Lords, I see no reason whatever for thinking that the Court below came to a wrong conclusion. In the first place, it is perfectly clear a will was in existence; that Alexander Boyter and his wife, Helen Rintoul, came to the house of Mr. Hunter to have a will made for them. That is proved clearly by the evidence of David Myles, not contradicted at all by the evidence of Charles Mather his fellow clerk, though I will not say (and so far I agree with the argument of the learned counsel for the appellant) that it is carried further by that evidence. The truth is, that one of those witnesses speaks to his recollection of certain facts specifically enough, and the other swears, as far as he goes, consistently with the recollection of that former witness; but he recollects very little about it. What he swears is consistent with it, but he says little in addition. But Myles says that they came, and that a will was made. He says it was copied either from the Style Book, (that is, the Book of Precedents, as your Lordships are aware,) or copied from the settlement of Mrs. Boyter and her sister in the office. There is no doubt that such a settlement between Helen and Agnes Rintoul, that is, Agnes Rintoul and Mrs. Boyter, was in the office; and that settlement being shown to him, this of course, refreshes his memory, and he says it was from

that. First he says it was either from the Style Book or the settlement; and when he sees the settlement, he says this, "that, to the best of his knowledge, that is the "will which he thinks was copied on the above occa- "sion." Therefore that settlement was copied to make a mutual will for Alexander Boyter and his wife; and then, as to his recollection of the contents, he states it with some particularity, which, without disbelieving Myles, makes it impossible to doubt there was at that time somewhat in the nature of a mutual will made by Alexander Boyter and his wife. Well, then, there is no appearance of evidence in the cause of any other will having been made by those persons, or for those persons. This will was made for them, and it was signed and attested, Myles says, by himself and Mather. Mather does not recollect whether he signed it or not—recollecting, in fact, nothing about it. Nor is it probable there should have been another will. Persons in their station, and at their time of life, were not very likely to have made more wills than were necessary. Then as to the depository—it is found in their house; and thus your Lordships come to the second part of the evidence, as to what took place immediately after the funeral, before the will was read, upon which you have some evidence of one of the persons present. The three witnesses present were James Mitchell, David Jack, and Robert Vietch, who all attended at the reading of the will, and they have deposed to the contents of the will as well as they could recollect, in a manner exceedingly natural and very trust-worthy. As far as they could recollect, it was a will of the husband and wife, and it left the property to the survivor of the two; that was the impression remaining upon their recollection. Now, is

No. 27.

27th June 1833.

RINTOUL v. BOYTER.

that or not consistent with the more particular account of the instrument given by a professional man, the clerk of Mr. Hunter, namely, David Myles, who gives you more in detail the provisions of the mutual will? It is perfectly consistent with it in every respect, though not so minute. Thus, we have the existence of a will proved, and then we have the act of spoliation most distinctly proved, for James Hardie and Mary Norrie were present at that flagrant and most criminal act of spoliation committed by Thomas Rintoul, the cousin of the present appellant. Now, Hardie swears that he read an instrument indorsed with this title, "Mutual Dispo-" sition between Alexander Boyter and Helen Rintoul;" and Mary Norrie swears she heard him read those words before the act of spoliation; that he read no more, for Thomas Rintoul immediately came behind him, snatched it out of his hands, tore it into pieces, endeavoured to swallow it, and, in short, committed an act of the most flagrant spoliation. Why, then, upon this evidence no jury would doubt for five minutes, before whom this question was brought; they would at once conclude that the will prepared at Hunter's office was thus destroyed by Rintoul; and that it was a mutual will between the two parties in favour of the survivor.

There is also a little more evidence, which is not immaterial as to the conduct at least of the party here,—that is as to Thomas Rintoul, the son of the defender himself. He appears to have been sent to take a copy of the will, and I think it requires no wizard to conjecture who sent him there;—that he was sent by his father, in all probability, to take a copy of that will,—that he came back and brought it to the office of his employers, Campbell and Scott. It was taken in; but I do not go into the

observations to which the evidence of Mr. Campbell is undoubtedly liable. He may have forgotten some of the circumstances, he may have been partial to his clients, and prompted by zeal to give the sort of evidence he has given. I cannot say it would become me to express the least approbation of the proceedings in that office, if they were exactly as described by Mr. Campbell; but it would also be unjust to charge Mr. Scott, his partner, who is not examined upon this question, and respecting whose conduct, in writing the threatening letter, you have only the account given by his partner Mr. Campbell; but I think of this there can be no doubt, that some proceedings were in contemplation on the part of Alexander Rintoul, whether for a reduction or not does not very distinctly appear. In one part of his evidence he says he did not mean to have any reduction, and in another part he says there was a reduction in contemplation; but at all events there was something doing, either by way of threat to the party, or with the intention to effect a reduction; and at that time Campbell and Scott are proved to have had in their office a copy, more or less accurate, more or less legible (for there are great doubts on all those matters), of that very will, the will in question, copied by Thomas Rintoul the son. They seem to have had that in their office; what became of it does not so distinctly appear. I think it may be said, if it had contained any thing favourable to Alexander Rintoul—if it had contained any thing very inconsistent with the evidence which has been given in this cause, describing the tenor of this will,—we probably should have heard more of it. That, however, is a matter of no importance in the present stage of the question. I have no manner of doubt the Court below came to a right

No. 27.

27th June 1833.

RINTOUL v. BOYTER.

conclusion; and without shutting one's eyes to the facts —without straining in order to acquit Alexander Rintoul of all knowledge of what happened,—I think it is quite impossible to doubt that he misinstructed those solicitors who put in the defences, in which they positively deny all the leading facts of the case. To doubt that Alexander Rintoul was cognizant of what had happened,—was cognizant of the spoliation, and misinstructed his professional advisers who put in those defences, untruly denying those facts, would be to shut one's eyes against the whole light of the case. Therefore, my Lords, I think your Lordships will be well warranted in giving the expenses as well as the judgment against this party; and when you find they have appealed on several grounds, all of which are abandoned at your Lordships bar, except that upon which I will not say no appeal ought ever to have been lodged, namely, a mere question of fact, where there is little or no conflicting evidence, but upon which appeals ought most sparingly to have been lodged, I think your Lordships cannot have the least hesitation any more than the Court below had in allowing the costs of this appeal. My Lords, I trust that the learned counsel who sign the certificates—I am sorry once more to have to make the observation—I trust the counsel, in signing the certificate in such cases, will never depart from that scrupulous caution which ought to regulate the conduct, and I am sure does regulate the conduct, of all professional men in signing attestations. I hope they will ever bear in mind their duty to this House, and feel that they are bound to exercise the best of their judgment in giving their opinion upon such appeals. I only regret that it is not possible to visit the principal, Thomas Rintoul, in this case, with at least his

full share of the costs. That, of course, is entirely out of the question; but the party who has profited by his spoliation, and who instructed his professional advisers to deny it,—that party was well visited with costs in the Court below, and I think ought also to be visited with the costs of this appeal.

No. 27.
27th June 1833.
RINTOUL v. BOYTER.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondent the sum of 147*l.* for his costs in respect of the said appeal.

G. W. POOLE—RICHARDSON & CONNELL, Solicitors.