

DOWNIE
v.
BURGAN & Co.

issues showed that the question to be tried was the state of the herrings when they left this country, not when they arrived in Ireland.

LORD CHIEF COMMISSIONER.—This may be a good reason against reading the answers, but at present this objection is premature; examining a witness on commission is much the same as citing him at the trial. The commission is at the risk of the person seeking it; if the proof be irrelevant, the party who takes it must pay the expence.

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PRESENT,

THE THREE LORDS COMMISSIONERS.

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1817.
March 13.

MURRAY and Others v. Tod and Others.

THIS was a multiplepinding brought by the treasurer of the Royal Bank of Scotland, for the purpose of ascertaining who had right to two promissory notes, the one for L. 800, the other for L. 200.

The claimants on the one side were the nearest of kin of the late Mr Tod, and on the other certain parties who claimed those notes as having been delivered to a third party to be held for their behoof.

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v.

TOD, &c.

ISSUES.

“ Whether the Reverend John Tod, mi-
 “ nister of Fogo, being possessed of a promis-
 “ sory note of the Bank of Scotland for L.800,
 “ did indorse the said promissory note in pre-
 “ sence of one Thomas Younger, a residenter
 “ in Fogo, and deliver the same to one Janet
 “ Murray, his servant, as a reward for her ser-
 “ vices ; and whether she did place the said
 “ note in the hands of the said Thomas Young-
 “ er, to be kept by him for her? Or whether
 “ the said John Tod did place, or cause to be
 “ placed, in the hands of the said Thomas
 “ Younger, to be kept by him for the use and
 “ benefit of the said Janet Murray, with direc-
 “ tions that the said note should be delivered
 “ to the said Janet Murray after the death of
 “ the said John Tod, as a reward for the ser-
 “ vices of the said Janet Murray ?

“ Whether the said John Tod, being pos-
 “ sessed of another promissory note of the
 “ Bank of Scotland for L. 200, did indorse the
 “ same, and, before his death, place, or cause
 “ the same to be placed, in the hands of the
 “ said Thomas Younger, to be kept by him for
 “ the use and benefit of Andrew, William, and
 “ John Mather, residing at Eyehaugh, with

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“ directions that the said note should be delivered to them after the said John Tod’s death? And whether any or what reasons were assigned by him for so doing?—And, “ Whether the said John Tod did get back “ one or both of the said promissory notes “ from the said Thomas Younger, and again “ deliver one or both of them to the said Thomas Younger; and whether, when he so delivered one or both of them a second time, “ he gave any, and what directions to the said “ Thomas Younger, or any other person, concerning the said note or notes?” *

A special verdict does not state the evidence on which it proceeds.

When the first witness was called, *Clerk*, for the defenders, stated,—I do not mean to object to him; but as a special verdict is expected, it ought also to state the evidence on which it proceeds, whether written or parol, and if the latter, the number of the witnesses, &c.

LORD CHIEF COMMISSIONER.—As this has been broached by counsel, it may be as well to state the manner in which this case may be disposed of.

* The interlocutor approving of the issues also “ Finds, that, “ in the trial of the said issues, Janet Murray, Andrew, William, “ and John Mather, must appear as pursuers.”

From the nature of the case a special verdict must be returned ; such a special verdict as was returned in a great case lately tried in this Court. The facts may be found either by proof or agreement of parties. In the neighbouring country, where trial by Jury has been long established, it is seldom that a special verdict proceeds on proof taken at the bar ; it is commonly matter of agreement ; but perhaps that is more than can be expected in this new and experimental institution. If the verdict is to be drawn from proof, it is impossible to go into Mr Clerk's idea ; it would be putting the evidence on record, and not the result of the proof, which is the way to form a special verdict.

If the party be dissatisfied with the verdict, he may apply for a new trial, and the Judges' notes will show the nature of the evidence, the number of witnesses, what evidence was received, what rejected.

The witness was called, and asked if the late Mr Tod lived on good terms with his relations ; to which it was objected, That this was not in the issue.

LORD CHIEF COMMISSIONER.—It is compe-

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Lord Fife v.
Trustees of
late Earl, *supra*, 121.

Competent to ask, if a person lived on good terms with his relations, to show the probability of his not intending to leave them his property.

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Incompetent
 to support the
 character of a
 witness by
 proof.

tent ; it is to show the probability of the truth of the testimony given.

The witness was then asked as to the state of Mr Tod's mind.

LORD CHIEF COMMISSIONER.—His faculties are not impeached.

A question was then put in order to support the character of Younger, (mentioned in the issue,) a witness afterwards called.

LORD CHIEF COMMISSIONER.—It is not competent to put this general question. You may ask as to his occupation and employment, but the question proposed goes to support his general character ; and if you are entitled to support it the other party may impeach it, which is incompetent by the law of Scotland.

A minute, which had been made up at opening the repositories of the late Mr Tod, was shown to the witness, and the Court allowed it to be read as it was stated to be necessary, for understanding the future testimony.

The witnesses swore that the late Mr Tod was a man about 70 or 71 years of age.

LORD CHIEF COMMISSIONER.—This is only evidence that he was advanced in life, not proof of his age, if any thing is to be rested upon it.

Younger swore that Mr Tod indorsed and gave the bills to Janet Murray, and desired her to deposit them with the witness, and that he got them back from the witness, but returned them, saying, let all things be as they were. The witness also swore that Dr Murray had attended Mr Tod in his last illness, but that he had since gone to India;—was told by his relations that he was gone to Berwick on his way to India, and when the witness carried a parcel for him to Berwick, he was there informed that he had sailed. Witness was asked whether he considered himself custodier for Janet Murray, or for Mr Tod?

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LORD CHIEF COMMISSIONER.—That is a question of law, not of fact.

Janet Murray was called as a witness.

Jeffrey, for the defender,—We must object. It is only in the question with the Mathers that they can possibly think of calling her, and even there she is inadmissible. She is the leading pursuer; the transaction is one; there is one issue, and it is sent to one Jury. From the manner of conducting the case it is impossible she could give evidence in their case without, at the same time, giving evidence in her own.

Circumstances in which one pursuer was held to be a competent witness for another.

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Cockburn, for the pursuer,—As they object we do not insist on calling her.

LORD CHIEF COMMISSIONER.—Though the party declines calling her, it is proper to state that the Court do not consider her inadmissible in the question with the Mathers.

Clerk, for the defenders, stated an objection to some questions after they were answered.

LORD CHIEF COMMISSIONER.—Unless you object the Court will not interfere; a great deal of evidence is rendered good by no objection being taken to it.

Cockburn, in his opening speech, stated,—The Jury are not to decide the cause, and may therefore free their minds from any argument in law that may be stated. Their duty is to find the facts, and the Court will apply the law.

Clerk contended,—The pursuers have not proved an absolute gift. A legacy or *mortis causa* donation is revocable, and cannot be constituted by bill.

By the law of Scotland, (to which the Jury are sworn to adhere,) two witnesses are necessary, and here there is only one. A gift even of a sum of money which has no ear mark, can only be proved by the oath of the defender,

as was expressly found by the Court of Session in one case. A case, decided a few years after, is not merely similar to the present, but is this very case.

This statement is necessary, in order that the facts may be brought out so as the law may apply to them. It is not conceivable that Mr Tod intended to give away these bills, though certified by a hundred witnesses; and it is clear that he and all concerned believed the property of them to remain in his person.

The defenders called no witnesses.

LORD CHIEF COMMISSIONER.—The first matter for consideration is the character in which we are here; we are not ultimately to decide the rights of the parties, but to have facts found on which the Court of Session may decide.

The verdict must be derived from a pure consideration of the facts, without reference to the law, therefore, our object must be to frame a verdict in such a manner that the Court of Session may apply the law.

It is clearly implied in the terms of the issues, that the Court consider it material to have it ascertained whether this was an absolute gift, or only to take effect after death;

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the distinction, therefore, taken by Mr Clerk is a matter for your consideration.

Two witnesses are necessary by the law of Scotland ; but one witness, if supported by facts and circumstances, is sufficient. In this case there is only one witness to the facts that took place when the documents were delivered ; but,—the minute made up at opening the repositories, when most of those interested were present,—the intention of Mr Tod to provide for his servant, and his consultations about the best method of doing so, which are proved by other witnesses,—his duty to provide for an old servant, and his intention to do something for a family in Northumberland,—we consider as facts and circumstances rendering it proper for us to submit this testimony to your consideration.

I have no observations to make on the condition in life of the principal witness. You have seen him, (which is one peculiar excellence of this mode of trial,) and can judge if his evidence does not seem consistent with truth.

It is not contradicted that Dr Murray has left this country, and his absence is proved by good legal evidence. The witness was told by his family that he had gone to the East Indies ;

and when the witness carried a parcel for him to Berwick, he was informed that he had sailed for London.

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Mr Tod having taken back the bills is an important fact in judging to whom they belonged ; but you must consider whether this was done with the intention of showing his power over them, or with a view of making the pursuers more secure.

If you believe Younger, (and I see no ground to discredit him,) you will find the first part of the first issue proved ; but I do not consider the second issue so clearly proved, though the difference in the language sworn to by the witness was natural in speaking *to* Murray who was present, and *of* the Mathers who were absent.

Verdict,—“ That, in respect of the matters
 “ of the said issues proven before them, they
 “ find as to the first issue, that the Reverend
 “ John Tod, minister of Fogo, being possessed
 “ of a promissory note of the Bank of Scotland
 “ for L. 800, did indorse the said note in pre-
 “ sence of Thomas Younger, residenter in
 “ Fogo, and deliver the same to the said Janet
 “ Murray, the pursuer, his servant, as a reward
 “ for her services, and that she did place the

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“ said note in the hands of the said Thomas
 “ Younger, to be kept by him for her. As to
 “ the second issue, That the said John Tod
 “ being possessed of another promissory note
 “ for L. 200, did indorse the same, and before
 “ his death place, or cause the same to be
 “ placed, in the hands of the said Thomas
 “ Younger, to be kept by him for the use and
 “ benefit of Andrew, William, and John Ma-
 “ ther, residing at Elyhaugh, pursuers, with
 “ directions that the said note should be de-
 “ livered to them as a mark of gratitude for
 “ past favours. As to the third issue, That
 “ the said John Tod did get back both of the
 “ said promissory notes from the said Thomas
 “ Younger, and again deliver both of them to
 “ the said Thomas Younger, directing that all
 “ should remain as it had been.”

Baird and Cockburn, for the Pursuers.

Clerk, Jeffrey, and Clephane, for the Defenders.

(Agents, *Robert Strachan, and Renton and Grant, w. s.*)