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was proper, but not necessary to entitle the party to damages, as every one ought to be cautious in using diligence.

I could wish the case had not been brought; and if the defender were personally liable, scarcely any sum would be too small for the damages.

Verdict—"For the pursuers.—Damages "L. 10."

Jeffrey and *Brownlee* for the Pursuers.
Cockburn and *Robertson* for the Defender.
(Agents, *Gilbert Lang* and *Mackenzie & Innes*, W. S.)

PRESENT,

LORD PITMILLY.

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1825. July 15.

Finding for the defender on two issues, one as to a deed being the deed of a party, the other as to the property being conveyed in trust.

REDUCTION of two deeds on the ground of facility, fraud, and intoxication; or to have it found that they conveyed the property in trust.

DEFENCE.—The conclusions of the summons are inconsistent;—trust can only be

proved by writ or oath, and no such proof is offered.

ISSUES.

" Whether the release and assignation, dated
" the 11th September 1815, and now sought
" to be reduced, and the supplementary dispo-
" sition and assignation, dated the 7th October
" 1815, also sought to be reduced, were not,
" or either of them was not the deeds or deed
" of John Chalmers, some time butcher in Al-
" loa, and now residing in Edinburgh? Or,
" Whether, at the time of receiving the said
" deeds, or either of them, the said John Wil-
" son agreed to hold the property conveyed by
" the said deeds in trust, for behoof of the said
" Margaret Newlands?"

This case was in Court for a considerable time, on a summons concluding merely to have the deeds reduced and set aside; and special issues were framed. But a new summons was brought containing other grounds of reduction, (facility) and the conclusion for having it found that the deeds, if genuine, were granted in trust.

1821. May 18.

A motion was made in May 1821, before Lords Chief Commissioner and Pitmilly, to hold

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Before returning a case to the Court of Session on the ground of delay, the Jury Court will judge of the probability of the party being held as confessed.

the pursuer confessed for not proceeding to trial.

Jeffrey, for the pursuer.—The delay has been reasonable, and the Court ought to consider and decide, whether, in the circumstances, it was reasonable or not, as, in another case, the First Division held, that, by the case being transmitted, they acted ministerially in holding the party confessed.

Moncreiff.—The summons was raised in 1817, and the question is, whether we are not entitled to a remit, as it is only the Court of Session can judge of this?

LORD CHIEF COMMISSIONER.—The case was sent here in May, and the issues were settled on the 21st of June 1820. It is now in a very singular situation, and we must exercise our discretion on the subject, otherwise it is vain to argue it. If the Court of Session alone are to judge, then we must send it back; but it is said that they hold themselves bound to put in force the regulation, merely on the ground of our having transmitted the case. If the case is sent back, the question is, whether the Lord Ordinary should exercise his discretion, or whether the discretion should be exer-

cised here. The nature of the case—the necessity of examining the trustee in London—and it having been necessary to change the agent—are all circumstances accounting for the delay, and leading us to think that the same decision which we now give would be given in the Court of Session, and if so, the additional expence occasioned by the transmission would be unnecessary.

We have seen sufficient to induce us to call on the party to try next Term, or immediately after; and a very strong case must be made out to induce us to delay the case again.

A person incompetent as a witness if present at the precognition of others.

At the trial agency was objected to a witness who had been present when some of the other witnesses were precognosced, and, on a hint from the Court, the pursuer did not insist on his being examined.

A witness being called to prove what Newlands, the wife of Chalmers, had said of the postnuptial contract of marriage, by which the pursuer was appointed trustee, and upon which his title to pursue depended.

Jeffrey.—The title to pursue has been sustained, and the defenders are not entitled incidentally to question it.

Moncreiff.—The deed is connected with

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this issue, and it is not as questioning the title of the pursuer.

LORD PITMILLY.—I think Mr Moncreiff has stated sufficient reason for allowing the question.

A letter from a trustee who is a party in the cause, and had been agent in another cause for the person interested in the trust, is not evidence.

A letter was tendered in evidence from the late Mr Berry, one of the trustees, giving an account of a meeting with the defender Wilson.

J. A. Murray, objects.—This is not an oath, but a letter from the agent to the party, and cannot be evidence in his favour.

Jeffrey.—This is not an oath, but the writer is dead. The letter was written two years before the action was brought, when he was not a trustee, and had no bias; before his death, the writer renounced all benefit. The only ground is, that he was agent in another case, but that was not with this defender. It was always held that this might be used in proof of fraud, and we hope the Court will also receive it in proof of the trust.

Moncreiff.—If this is admitted, any one may make evidence in the prospect of bringing an action. He was agent in support of an interest adverse to the present defender. We

have reason to complain of an issue as to trust having been granted.

LORD PITMILLY.—This is a nice and difficult point, and I wish I had had more time to consider it. This is clearly inadmissible in proof of the trust, but I cannot reject evidence of fraud. Had the trust-deed been granted before the letter was written, I could not have received it, and the case might have been preparing at the time, though he was not then a trustee. His being agent before this letter was written, and afterwards becoming trustee, is also a strong circumstance, and how is it made out that his heir is not liable for expences? If he had only been trustee, it might not have been sufficient; but, on the whole, though the point is nice and difficult, I do not think myself entitled to receive the letter.

Jeffrey.—This is a case peculiarly fit for a Jury, as the conclusion is to be drawn from a true construction of the circumstances, rather than from any legal question, or the credit due to any witness. The practical question is, whether this was a transaction by which two stupid people were deprived of a patrimony of L. 7000, by a designing cattle-dealer, for the sum of L. 100?

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The issue is general, and comprehends every valid ground of objection to this as the legal deed of the party, whether it is challenged on the ground of incompetency—of the want of witnesses—of fraud—or of facility, fraud, and circumvention—error *in substantialibus*—and enorm lesion. Cases have been decided which clearly prove that, though no one of these separately may be sufficient to cut down a deed, still, when taken together, they may be sufficient.

Maitland *v.* Ferguson, Feb. 13, 1729. M. 4956. Mackay *v.* Maxwell, Nov. 24, 1752. M. 4963. Gordon *v.* Crawford, July 28, 1730. 1 Ste. and Cra. App. Cases, 47. Long *v.* Taylor, June 8, 1821, 1 Sh. and Bal. 58.

It is said the second issue can only be proved by oath or writ of party, but the statute does not apply to cases of fraud like the present, and even the writings very nearly prove it.

Moncreiff.—This is a singular case. It is a reduction, not by the party, though he is alive, but by others; and after the case was set down for trial, and delayed on an offer of compromise, this new action, with inconsistent conclusions, is brought, the issues in which destroy each other.

The deed in favour of the pursuers is dated in 1816, and shows that they did not believe this man facile. But it is said, the issue is sufficient to try the case, whether the deeds were fair or fraudulent, and to enable the party to try his case on the various circumstances, sepa-

rately or complexly. My view is, that it is intended to cover every ground of reduction that is legal and relevant, and that is set forth in the summons and condescendence.

Here the allegation is not incapacity, or such error *in substantialibus* as is sufficient; but the case is one of facility, circumvention, and enorm lesion. Fraud is out of the case. There is no evidence of facility, and facility by itself is not sufficient; neither is inadequacy of the consideration proved, and they have not proved the amount of property conveyed.

By 1696, c. 25, proof of trust is incompetent, except by the oath of the trustee. I admit, that, if the deed is set aside on the ground of fraud, this does not apply.

Wight's case was exactly the same with the present, and there was a case tried at Dumfries. But it is impossible to argue from one case of this sort to another.

LORD PITMILLY.—The general nature of this case is simple, and there is no such difference of opinion on the point of law as to require much explanation. The pursuer insists on the total reduction of two deeds on the ground of facility, fraud, and circumvention, and enorm lesion, and he must prove them all

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to succeed in a reduction. But, if he fails in this, he maintains that the conveyance was in trust.

The first issue is very general, and the question in it is, whether this was legally the deed of Chalmers? or, as expressed by the counsel, it applies to all the grounds of reduction, in so far as they are relevant, and as they are stated in the summons.

In this case the question is, whether, on attending to the evidence, these deeds, in your opinion, were obtained by fraud and circumvention operating upon a weak and facile mind, and are to the great prejudice of the granter? If you are of opinon that all these points are made out, then your verdict will be for the pursuer; but, if all three are not made out, then your verdict will be for the defender. The pursuer must make out facility to the extent law holds necessary—he must also prove lesion—and likewise that all was done by fraud and circumvention. Facility to a great extent, and lesion to the greatest amount, are not sufficient without fraud and circumvention; for, unless a person is in such a state, that, if he were taken before a Jury, he would be cognosced as a lunatic or idiot, he is held capable of managing his own affairs. At the same time, if the facility and

lésion are great, then slighter proof of fraud and circumvention are sufficient, which is the only limitation I can make of the doctrine, when applied to the peculiar circumstances of this cause.

This being the case, you must take the whole evidence for the pursuer into consideration on the three points. It is not sufficient that you disapprove of the deeds, but, taking the law laid down, you must consider separately the evidence of the three points.

The evidence of lesion is not extensive, or very precise, but is sufficient to show that the sum given was inadequate.

The import of the evidence of facility (which his Lordship read) is, that this man was easily led, though there is also evidence of an opposite description.

The chief point is, whether there was fraud and circumvention in obtaining the deeds? Was Wilson aware of the decision of the Privy Council, and Chalmers ignorant of it? Did Wilson or Chalmers press the bargain? Was Chalmers kept in a state of intoxication, or was advantage taken of his being addicted to it? The transaction may not be proper or commendable, but you must look narrowly to it before you find fraud. His Lordship then stated the facts which led him to the

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conclusion, that no man of proper feeling would approve of such a transaction, but that it was a question for the Jury, whether the transaction could be held fraudulent? and he remarked, that the second deed confirming the first, and executed without any fraudulent concealment, after Chalmers was fully apprised of the decision of the Privy Council, and of all the other facts, could not be overlooked by the Jury.

Upon the second issue the question is, whether the deeds were not for Wilson, but in trust? The evidence on this subject may go to show a scheme under the first issue, but is not sufficient to prove trust. But it is unnecessary to state this, as I am bound to say there is *no* evidence of trust, as that cannot be proved by parol evidence, but by writ or oath. I therefore have not the least hesitation in stating that there is no legal evidence, and in advising you to return a verdict for the defender on this issue.

Verdict—"For the defender on both the "issues."

Jeffrey and *Pyper*, for the Pursuer.

Moncreiff, *J. A. Murray*, and *Jamieson*, for the Defenders.

(Agents, *Campbell* and *Mack*, W. S. and *Wm. Smith*.)

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Jeffrey moved for a rule to show cause why a New Trial should not be granted, on the grounds of misdirection in point of law, of the rejection of the letter in evidence, and of the verdict being contrary to the weight of the evidence; and said, separate proof of fraud is not necessary, but it may be inferred from the facility and lesion. We think there was intrinsic evidence of fraud, but great facility and enorm lesion is sufficient.

Ersk. IV. 1. 27. Mackie *v.* Maxwell, Nov. 24, 1752. M. 4963. Maitland *v.* Ferguson, Feb. 13, 1789. M. 4956.

The Court took time to consider, but afterwards granted the rule.

PRESENT,

FOUR LORDS COMMISSIONERS—LORD PITMILLY ABSENT.

1826.
March 1.

A new trial granted.

LORD CHIEF COMMISSIONER.—This case turned entirely on the first issue, and it is said that the direction given to the Jury was erroneous—that evidence was improperly rejected, and that the Jury did not draw a correct conclusion from the evidence.

On the last point, I felt as great difficulty as in any case since I sat in this Court. This is always a question for the exercise of the discretion of the Court, and where they must

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be cautious not to send the case to a second trial, merely that another Jury may make a better guess.

It appears that the party had to discredit a witness he was bound to call, and it is a sacred rule that a party is not to discredit his own witness; but still, when the witness is brought, the Court and Jury must judge whether his evidence is true, and we cannot grant a new trial on that ground.

The next point is the admissibility of the letter, and as this is a point of great nicety, I am not surprised, that, in the hurry of a trial, it was rejected; but, in the whole circumstances, I am of opinion that it ought to have been received.

Knowing the nature of the testimony, the question is, whether it is admissible? The Court will not grant a new trial, if the evidence rejected will not be available in the cause; but this appears to me material, though I shall not now state in what respect it is so. I may mention, that I have reason to know that the Judge who tried the cause adheres to the opinion he then entertained.

LORD GILLIES expressed his concurrence in the opinion that the letter should have

been received, and a new trial was granted on payment of costs.

GLASGOW.

PRESENT,

LORD GILLIES.

GRAHAM AND COMPANY *v.* NEWLANDS. *

1825. Sept. 24 & 26.

Finding for the defender, on issues in a reduction of a verdict on a brief of idiocy.

JOHN NEWLANDS had, for several years, been the confidential clerk of William Graham and Company, merchants and manufacturers in Glasgow. They at last suspected him of having been in the habit of defrauding them, and they charged him privately with this offence; and upon the 28th of April 1821, obtained his subscription, in their own counting-house, to a written acknowledgment of guilt, and took four bills from him in their favour, for L. 500 each, as a liquidation, *pro tanto*, of the damage they said they had sustained. The friends of Newlands afterwards took out a brief for having him cognosced; and upon the 11th day of

* I am indebted to a learned friend who was present at the trials, for the report of this case, and the following one of Syme and Marshall.