injury done to his wife's health, I do not think he is entitled to any thing, as he came there knowing the situation. Supposing the injury to the farm rendered it not tenantable, still his loss was not great, as it is proved that he did not manage well.

Verdict—For the pursuer. Damages L.235, 5s. 9d.

Jeffrey and *A. M'Neill*, for the Pursuer.

Cockburn and *Tait*, for the Defenders.

(Agents, *Campbell* and *Burnside*, W. S., *Taits* and *Young*, W. S.)

PRESENT,

LORDS GILLIES, CRINGLETIE, AND MACKENZIE.

SCOTT *v.* GRAY.

1826, March 25.

REDUCTION of two deeds on the ground of imbecility, facility, and incapacity in the maker, or at least facility and circumvention.

Finding for the defender on a question of incapacity, facility, and circumvention.

ISSUE.

Whether the deeds were not, or either of them was not, the deeds or deed of the deceased John Scott, merchant in Montrose.

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Skene opened the case for the pursuer, and stated, The maker of the deed was reduced to a state of total imbecility, and was incapable of understanding the deeds. His brother and other near relations were excluded from him, which, I submit to the the Court, takes off the presumption, which would otherwise have been strong, that the deeds were genuine. Indeed, where there is great facility, and the granter is in the power of the party interested, that has been held sufficient to cut down the deed.

Williamson *v.* Fife, n. r. Bell on Testing Deeds 142 and 220. Gillespie *v.* Gillespie 11th Feb. 1817. Clark *v.* Spence, 3 Mur. Rep. 450.

Cockburn, for the defender, proposed, That the pursuer should call the writer of the deed, and the medical attendant as witnesses, and he would not address the Jury; but this not being done, he said, Were this to be tried by the Judges, I would only say the deeds are regular, and prove themselves, and the pursuer has not called the writer of the deeds, or the medical attendants, who ought to have been called. But the pursuer thinks he will obtain a verdict from the inexperience of the jury, by calling witnesses from the lower ranks, whose opinion is always much affected by the bodily appearance.

To entitle a party to read a deposition taken to lie *in retentis*, the inability of the witness to attend.

A deposition of the medical attendant was tendered in evidence, and a certificate produced to show that from illness he could not attend.

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Jeffrey.—This deposition ought not to be received, as *we* have a certificate that the witness could attend.

tend the trial, must be proved on oath.

Cockburn.—I admit the danger of receiving depositions, and that it is possible to move this witness; but he may die by the way. A medical certificate on soul and conscience is held equal to an oath.

Act Sed. 29th Nov. 1825, § 28.

LORD GILLIES.—This is an important case, and there might be some difficulty were we at liberty to depart from the words of the act of sederunt; but the act of sederunt contains an express regulation on the point, and we must recollect that this act was framed under authority of an act of Parliament.

LORD MACKENZIE.—There is a great difference between an affidavit and certificate, as in the one, if the statement is false, it is perjury, but not so in the other. Parties may think it hard, but no feeling of hardship can authorize us in holding a certificate equivalent to an affidavit. A different rule applies to the Court of Session and Admiralty; but this act is made by authority of an act of Parliament, and is therefore of the same authority.

LORD CRINGLETIE.—In the Court of Justi-

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ciary certificates have been held equal to affidavits, but here it is different.

LORD GILLIES.—I concur in the opinions given, and feel sorry if the party has been misled. It is true that in the Court of Justiciary certificates are received, but that must have been under the view of the Court at the time this act of sederunt was made, and a different rule has been fixed. Here neither oath nor affidavit fixes the fact, so I must concur, and reject the deposition.

The first piece of evidence tendered for a defender being rejected, his counsel did not produce any other, and the pursuer had no reply.

This being rejected, Mr Cockburn declined leading evidence, which Mr Jeffrey said he thought not quite correct, but did not insist in having a reply.

LORD GILLIES.—You must dismiss from your minds all the statement of facts made by Mr Cockburn, as he has not proved them; but the strong case for the defender is the failure of the pursuer.

The pursuer does not say the deeds were not signed by Scott, or that they are forgeries, but that the granter was in a state of mental incapacity, and that there was a fraudulent conspiracy on the part of those interested

in them. If there was no soūnd and disposing mind in the maker of the deeds, and if his weakness was taken advantage of to exclude his relation, then there was no legal consent.

The question is, Whether the pursuer has made out his case? The deeds on the table are regularly signed, and have all the authority legal solemnities can give them. They were prepared by respectable men of business, who for years had been the confidential agents of the party, and if a fraud had been intended these are the last persons who would have been applied to. You have had proof of his acting as a sensible man in reference to the execution of the deeds, and must contrast that with the evidence brought of his incapacity. He had a stroke of palsy, which does not always, though it may generally, impair the mind, and he sent for the physician and writer at the same time, which is just the prudent step for a man to take when he has improperly delayed to make his settlement. This is not like making a bargain, where he has to combat another mind; all that is necessary is, that his mind is sound, and that he can clearly express the individual he means to favour. You must judge of the evidence; but it appears to me that there is nothing to shake the testimony of the writer, who stated that

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Scott's mind was not otherwise affected than by age and weakness of body; and we all know that every disease in some degree affects the mind, and palsy more than others. The great defect in the pursuer's case is, that he did not call the framer of the deed, or the intimate friends of the deceased, whom he ought to have called, but rests on the evidence of those in an inferior situation, and failed in proving the alleged conspiracy.

If you think there is no sufficient proof of incapacity, or fraudulent conspiracy, then you will find for the defender; but if you think there is evidence of fraudulent conspiracy and incapacity, or of his being totally bereft of mind, then you will find for the pursuer.

Verdict for the defenders.

Jeffrey, Skene, and *Macallan,* for the Pursuer.
Cockburn and *Jamieson,* for the Defender.
(Agents, *Ainslie* and *Macallan,* W. S., and *James Burness,* S. S. C.)

PRESENT,

LORD CHIEF COMMISSIONER.

1826.
June 7.

GREIG *v.* EDMONSTONE.

Damages for defamation.

DAMAGES for a libel in a printed letter ad-