CADZOW
v.
WILSON.

LORD CHIEF COMMISSIONER.—I think they are not entitled to find a fact, when they state that they think it not proved.

Verdict—For the defender.

Jeffrey, D. F., Cockburn, and *Spiers,* for the Pursuer.
Hope, Sol.-Gen. and *Forsyth,* for the Defender.
(Agents, *Walter Cook,* W. S. and *Lockart* and *Swan,* W. S.)

PRESENT,

LORDS CHIEF COMMISSIONER, AND MACKENZIE.

1830.
Jan. 4.

CADZOW *v.* WILSON.

Finding that the defender was indebted to the pursuer in a certain sum as the balance of the price of a property.

THIS was an action to recover the balance of the price of certain property sold by the pursuer to the defender.

DEFENCE.—The pursuer failed to put the defender in possession of seven acres of the property sold, containing a lime-quarry, and has not given, and cannot give, a sufficient title.

ISSUES. *

"Whether, in the year 1809, the pursuer

The want of a stamp, though not insisted in by the party, renders a document inadmissible.

* This case was originally set down for trial on the 18th July 1829, and opened by the counsel for the pursuers, but

" sold for the sum of L. 980 Sterling, and put " the defender in possession of, certain houses

the missive not being stamped, the Court held that the case could not proceed, as they were bound to protect the revenue when the subject was brought to their knowledge, even though the party did not insist in the objection. The parties consented to the jury being discharged, and agreed, on the suggestion of the Court, that the expenses should abide the event of the suit.

When the defender moved for expences, Nov. 24, 1829.

Murray objects.—This was the fault of both parties.

Cockburn and *Aytoun*.—The Court ordered the jury not to return a verdict; and in a similar case at Glasgow, where a party got a verdict, the Court refused costs, as the objection of the want of a stamp was held a surprise.

Park's Pr. K. B. and C. Pl. 161. Tidd Pr. 936. Hullock's L. of Costs, 396.

LORD CHIEF COMMISSIONER.—The question at present is, Whether this shall go to the auditor on a general order for expences? and I shall consider it first on principle, and then on the cases. It was no fault of the party claiming, that the jury did not give a verdict; and it is not a sufficient excuse for the pursuer, that this case passed through the ordeal of the Court of Session, and the clerks and Court here, without the objection being discovered. When it is produced, the Court must take the objection; and I cannot say it is hard on the pursuer, as the defender must have had a verdict. If I had had the power to nonsuit, (which must at some time be given to the Court,) I would have nonsuited the pursuer; but not having this power, I suggested withdrawing a juror: but this must be considered as a nonsuit.

2. On the cases Tidd is quite right, as the new trial was given by agreement; but in the general case, the rule would be different. This case ought to be regulated by the principle of nonsuit, and the justice of the case; and on these principles the defender ought to get the costs of that day, allowing the

CADZOW v. WILSON.

" in Kilncadzow, and lands in the neighbour-
" hood thereof, in terms of the missive letters,
" No. 6 of process?

" Whether the defender is indebted and rest-
" ing owing to the pursuer in the sum of
" L. 600, or any part thereof, with interest
" thereon from the 17th day of June 1809, as
" the balance of the price of the said houses
" and lands?"

Aytoun opened for the pursuer and said,—The pursuer sold thirty acres of ground to the defender, and it was agreed that if he succeeded in reducing a perpetual lease of seven acres more and a quarry, that they also should be conveyed. He did not succeed in the reduction, and on that ground the defender refuses to pay L. 600 out of L. 900, though the pursuer knew the circumstances and got possession of the quarry, the tenant not having taken

Ersk. B. 2, T. 6. § 25.

other costs to remain to the end of the case. If a verdict had been given for the defender, the pursuer might have got a new trial, but it would have been on payment of costs.

LORD MACKENZIE.—I am of the same opinion.

The Court afterwards held that half the expense of stamping the document ought to be deducted from the sum claimed by the defender.

possession of it. He has homologated the transaction by pulling down houses.

CADZOW *v.* WILSON.

When the second witness was called,

J. A. Murray, for the defender.—The daughter of the witness was married to the pursuer, and the relation having once been constituted, the objection is good.

A father, after the death of his daughter, inadmissible as a witness for her husband. Humphrey *v.* Aitken, 18th Feb. 1822. 1 Sh. Cases H. of L. 111.

Cockburn.—This is a necessary witness, and the relation was dissolved ten years before the date of the deed. The case relied on is a solitary decision, and there is no principle supporting it, besides it was not a direct decision on this point.

LORD CHIEF COMMISSIONER.—We have had an agent admitted after he ceased to be agent, and my disposition was to dispense with the objection founded on relationship, but I am tied up by the law of Scotland, and by this decision, which affirms the interlocutor of the Court of Session, which specially finds the witness inadmissible.

Another witness having stated that, at a meeting of the parties, Cadzow offered to take back the land. The Lord Chief Commissioner said this was not the way to prove a compromise.

Evidence of what the pursuer said at a meeting of the parties, inadmissible to prove a compromise.

CAIZOW
v.
WILSON.

J. A. Murray opened for the defender.—The pursuer says that he has fulfilled the bargain, or that, if he has not given full implement, the defender knew the deficiency. He admits he must give a feudal title to the seven acres, and this will turn out to be a question as to their value. If it had been intended to except them from the bargain, it must have been done expressly. They are not entitled to compound interest.

LORD CHIEF COMMISSIONER.—If you consent to a verdict, the jury may find a sum with interest, leaving it for discussion what the rate should be; but unless you admit that a certain sum is due, there is no ground for the arrangement.

Circumstances in which a bill of advocation containing an interlocutor of a Sheriff, was received as evidence of the terms of that interlocutor.

To prove an interlocutor of the Sheriff in a question for removing the tenant of the seven acres, the pursuer proposed to produce a bill of advocation in which it was quoted.

Cockburn objects,—This is not the best evidence. The original interlocutor must be produced.

J. A. Murray.—We give in the proceedings in the Court of Session, which contain their statement of the interlocutor, and any statement by them is evidence against them.

CADZOW v. WILSON.

LORD CHIEF COMMISSIONER.—The question here is, How far the evidence tendered is admissible; and though I agree that the best evidence must be given, yet there may be solemn acts of a party which may render this unnecessary. If the advocation had stood alone, the original proceedings must have been produced, but there is an act of the pursuer admitting the interlocutor. The proceedings, as now offered, ought to be admitted, and the interlocutor being correct, may be held as proved; the pursuer, by his judicial acts, having rendered it unnecessary to look for higher evidence; but we do not, by admitting the proceedings, hold that you are entitled to read every part of them.

LORD MACKENZIE.—I agree, especially as the object is to show the proceedings in the Court of Session.

A plan must be produced eight days before the trial. The husband of the pursuer's niece rejected as a witness.

A plan not having been produced eight days before the trial, was rejected, and also a witness, who was married to a niece of the defender.

Cockburn, in reply, said, This is a selfish, paltry, and improper case, in which the defender keeps possession both of the property and the price. We do not know whether the defender holds the previous right to the seven

CADZOW
v.
WILSON.

acres good or bad, but if he holds it a lease, the answer is, he knew it at the time of the purchase,—if an alienation, then he did not purchase these acres. The lime-quarry is the only valuable part of the seven acres, and that is in the possession of the defender, who drained his other quarries through it. We have offered, and now offer, L. 50 of deduction, but hold that we are entitled to compound interest on the balance due.

LORD CHIEF COMMISSIONER.—The burden of proving the first issue is on the pursuer; and this leads to the consideration of what is sold. By the missives the pursuer sells all his lands and houses, and he puts the defender in possession of thirty acres in different places, who pays L. 380. A question arises as to whether other seven acres and a lime quarry were sold.

The sale is made out by the evidence, and the defender was put in feudal possession. If he was also to be put in actual possession, then you must fix the value. If you think it ought to be more than the L. 50 offered, perhaps you may be disposed to take L. 75 as the average between that and twenty-five years' purchase of L. 4, which was stated as an estimated rent.

As to the quarry, if the defender used it for draining his other lime-rock, then there can be no deduction for the want of it.

The proof of the second issue rests on the defender; and the question is, Whether he is to retain the L. 600, or any part of it, on account of the non-delivery of the seven acres and the lime-rock? With regard to the lime-rock, there is no distinct evidence whether it was under lease at the time of the sale or not; but the defender has not brought evidence to meet what was proved as to the draining the other quarries through this. In these circumstances, you may safely hold that it was part of the transaction, and that he has got possession, and that no deduction should be made for it. The evidence is so vague, that it is impossible to get at any thing very satisfactory to the mind; but, on the whole, I think you may find for the pursuer on the first issue, and also on the second, subject to such deduction as you think the value of the seven acres, unless you think the defender at the time knew the situation in which they were.

As to interest, we are both of opinion that compound interest ought not to be given; and that it would have required a *direction* by the Court of Session, which would have been transferred to the issue to entitle you to give it.

M'DOUGALL v. WIGHTON.

Verdict—" For the pursuer, and that the " defender is indebted to the pursuer in the " sum of L. 540, with interest from 17th June " 1809."

Cockburn, Rutherford, and *Aytoun,* for the Pursuer.
J. A. Murray, Jameson, and *D. Dickson,* for the Defender.
(Agents, *Aytoun* and *Greig,* W. S. and *James Lang,* W. S.)

PRESENT,

LORDS CHIEF COMMISSIONER, PITMILLY, AND MACKENZIE.

1830. Jan. 5.

M'DOUGALL v. WIGHTON.

Finding as to the manner in which a bond of caution was subscribed.

THIS was a reduction of a bond of caution by one of three cautioners, on the ground, that the instrumentary witnesses did not see the principal party, or the other two cautioners sign, nor did they hear them acknowledge their subscription.

DEFENCE.—The pursuer homologated the bond, and promised payment. The principal party delivered it as a true document; and the pursuer does not deny his own signature.

ISSUE.

" It being admitted, that James Cameron,