MILLAR AND HUSBAND, *v.* FRASER.

A consent was given, that the action of relief should be disposed of as if a verdict had been returned for the trustees.

Cockburn and *Robertson* for Callender.
Jeffrey and *More*, for Eddington.
Buchanan and *Gibson-Craig*, for Morison's Trustees.
(Agents, *C. C. Stewart*, W. S., *H. Graham*, W. S., and *Gibson, Christie, & Wardlaw*, W. S.)

INVERNESS.

PRESENT,

LORD PITMILLY.

1825.
October 25,
and 1826,
July 20 and 21.

Finding as to the date at which a legatee died.

MILLAR AND HUSBAND *v.* FRASER.

AN action by the daughter of a legatee under a will to recover a legacy of L. 500 left to her mother.

DEFENCE.—No title is produced. All the legacies were paid and settled twenty years ago, soon after the death of the testator.

ISSUES.

"It being admitted that the late Simon Fra-
"ser, Esq. of Dominica, executed a will or tes-

"tament, dated 29th May, 1802, contain-
"ing the following clause: 'Item, I give
"and bequeath to my cousin, Mrs Robinson,
"daughter of the late Reverend Mr Fraser
"of Boleskine, L. 500 of like money, to be
"paid to her by five equal and annual instal-
"ments, without interest, in manner afore-
"said:' And it being also admitted that the
"said Simon Fraser, Esq. died on the 2d
"day of July 1802;

"1. Whether the pursuer, Mrs Miller, was
"and is the only lawful child of Mrs Catha-
"rine Fraser or Robertson, wife of Duncan
"Robertson, late tacksman of Wellhouse?

"2. Whether the said Mrs Catharine Fra-
"ser or Robertson was the person meant and
"intended by the testator in the aforesaid be-
"quest?

"3. Whether the said Mrs Catharine Fra-
"ser or Robertson survived the 2d day of
"July 1802?*

Whigham opened the case, and stated the facts to be proved, and that the only question was, whether this lady had survived the testator?

* The two first issues were abandoned before the trial.

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When a copy of the inscription on Mrs Robertson's tomb-stone was produced, an objection was taken that it had not been produced before the trial. It was then proposed to call back a witness who had been examined, which was also objected to.

Incompetent to give in evidence a writing not produced eight days before a trial, or to call back a witness examined and dismissed.

LORD PITMILLY.—This would not be regular. The only way is by making the writing evidence.

M'Neill, in opening for the defender, said, That though the evidence for the pursuer was strong, the evidence for the defender would prove that the witnesses they had heard were mistaken. The pursuers did not insist in their claim at the time the fact could have been ascertained.

A witness admitted, who had formerly given an affidavit on the fact to be proved.

An objection was taken to a witness that he had formerly given an affidavit on the subject; but it not being denied that the defender's father had at one time promised to pay the legacy, provided Mrs Robertson survived the testator; and the affidavit having been taken to prove that fact, the witness was called and examined.

Evidence of the contents of a letter admitted, the letter having been searched for and not found.

A deposition by Mr Fraser of London was produced, in which it was stated, that by a letter the date was proved to be 1802.

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Whigham objects, It is incompetent by parol evidence to prove the contents of a letter. This is stronger than the cases formerly decided, as this letter is traced into the hands of the defender. The letters to the pursuer, if not produced, ought to have been proved by the copy in the letter-book, and not by a witness.

Stewart *v.* Buchanan, and Rose *v.* Gollan, 1 Mur. Rep. 38 and 84. Peter *v.* Tirrol, and Snadon *v.* Stewart, 2 Mur. Rep. 30 and 63.

M'Neill.—It is proved that this letter is lost, and that it was called for. In the cases referred to the writings had not been called for; but here the defender having attempted to produce the best evidence, is not to be deprived of the contents of a letter, because it has perished.

Robertson *v.* Ferguson, 2 Mur. Rep. 304.

LORD PITMILLY.—I do not think myself entitled to exclude this evidence, though it may not be so good as we could wish. I would not allow parol evidence of the contents of a writing which is in existence, but it is impossible to exclude it where the party has not failed in his duty in trying to recover the writing. Mr Fraser swears that he believes he sent the letter, and the defender swears that he has searched for it and has not found it. The evidence offered is not so strong as the writing, but I cannot exclude it.

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When the Inverness Register of Marriages was produced,

Whigham objects, It was not produced till yesterday, and it is by the neglect of the defender, not the pursuer, that it was not produced.

A book admitted in evidence, though not produced eight days before the trial.

M'Neill.—It was only yesterday that we traced the witness, and we produced the book as soon as possible.

LORD PITMILLY.—As it was not till yesterday that the defender knew that the witness was to be examined I repel the objection.

Whigham, in reply, contended, That the evidence for the defender had failed, and that Mr Fraser's letters did not prove the date of Mrs Robertson's death, but merely that Mr F. stated it.

LORD PITMILLY.—The fact on which a return is to be made is the simplest possible; but the case is not without difficulty, from the contradictory evidence produced. In considering it you should dismiss all that would distract your minds from the simple point to be tried. You may dispose of the two first issues by finding for the pursuer, as the last is the only one which

is disputed, and it is purely and properly a question for a jury; and as there is contradictory evidence, and no law in the case, it is my duty not even to hint an opinion on the evidence.

The point is narrow in the issue, and is still farther narrowed by the evidence, as it is clear that this woman died in a month of October; and the only question is, whether it was in October 1801 or 1802? It is much to be regretted that there is no register of births, deaths, and marriages, as the want of it may in this case be productive of injustice to one or other of the parties, and much benefit arises from their being regularly kept.

There is a strong body of evidence on both sides, and it will require serious attention and discrimination to decide on which side the truth lies. The letter of Mr Fraser must be thrown out of view, and you will attend, that several of the witnesses for the pursuer merely swear to the fact of the date, without mentioning any fact confirming their recollection. On the other side, the evidence of one of the witnesses, when coupled with the register, goes far to contradict that on the other side.

Verdict—"For pursuers on all the issues."

Whigham, for the Pursuer.

D. M'Neill, for the Defender.

(Agents, *John Macandrew*, S. S. C., and *J. B. Fraser*.)

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An application was made to the Court of Session for a new trial on several grounds, one of which was, that a letter had been admitted in evidence which must have borne a false date, as it was written on paper manufactured on patent moulds, which were not invented for several years after the date. A number of affidavits of paper manufacturers were produced on both sides. The Court granted the new trial.

June 2, 1826.

Circumstances in which the Court refused to change the place of trial

When notice of trial was given for Edinburgh, an application was made to change the place of trial to Inverness.

LORD PITMILLY.—It is always matter of delicacy to grant a new trial, and it is of consequence that the jury should know nothing of the evidence given at the first. In general it is better that cases should be tried here, unless there is strong reason against it, and in this case, even if the difference of expence was greater, I think there are strong reasons for having the trial here; but I do not think that it has been made out that the trial would be more expensive here.

LORD CHIEF COMMISSIONER.—It cannot be laid down as a general rule that a case is not to be tried twice at the same place; but there is a great deal of weight in what Lord Pitmilly has

said. There is no sufficient disproportion of expense made out to induce us to change the place; and it is clear that this ought to be the place of trial. There have been sent to me printed copies of affidavits in the cause which the parties must take care not to allow to go out of their hands.

NEW TRIAL.

PRESENT,

LORD MACKENZIE.

1826.
July 20 and 21.

Finding for the defender in a question as to the date at which a legatee died.

WHIGHAM opened the case, and stated the facts; and that the witnesses would prove the date, not from mere recollection, but by reference to public events: That the case would be proved without the letter referred to; but that, as it had been made one of the grounds on which the new trial was granted, it would be produced, that the defender might object to it.

A soldier may state the time at which he was at home on leave of absence, without producing the books of the regiment.

A witness, a soldier, having stated that he had been at home at a particular time on a sick pass, Mr Solicitor-General insisted that the pass ought to be produced, or rather the books of the regiment.

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LORD MACKENZIE.—You cannot carry the rule requiring the best evidence so far as this.

A witness admitted who had previously made affidavit to the fact to be proved.

Another witness having stated that he had made affidavit before a Justice of Peace to the fact, by desire of the pursuer; and that he believed he was present along with others,

2. Hume, 365. 189, edit. 1800.

Robertson objects, He is not a pure unbiassed witness. Two witnesses being examined together disqualifies both. There is a sort of conspiracy.

Jeffrey.—I am not anxious either on the law or expediency; but this objection was overruled at the former trial, and I doubt if it is competent to move it now, as no objection was made to the verdict as founded on incompetent evidence. This examination took place with a view to satisfy the defender before any law-suit was instituted. If the objection is good, it must disqualify all the witnesses, as they were examined at the former trial.

Wemyss *v.* Wemyss, 26th Feb. 1793, Mor. 16782.

Robertson.—This is not *res judicata*. The action was in contemplation. In Sharp's case the objection was overruled from the necessity of the case.

LORD MACKENZIE.—It does not appear to

me that I can sustain the objection to the examination of the witness. The objection was to taking the deposition at all, and that was overruled by Lord Pitmilly and the Court.

That reduces the objection to this, that the witnesses were present during the examination of each other, which is very weak, especially as he is called to prove a detached fact, and not a detail, where a story might be made up.

Hope, Sol-Gen., in opening for the defender, said, That, though it was a question whether the pursuer had made out his case, there would be evidence for the defender;—that after so long delay by the pursuer the defender was entitled to the benefit of any doubt they might have;—that, in 1803, 1806, and 1807, he was informed that the legatee died before the testator, and acquiesced in the statement.

A case adjourned on the motion of a party, a juryman having stated that he could not proceed.

After producing some documentary evidence, Mr Solicitor-General proposed that the case should be adjourned, which Mr Jeffrey opposed, as not coming from the proper quarter. Lord Mackenzie stated his readiness and wish, so far as he was concerned, that the case should proceed; but a juryman having stated that he could not go on with safety to himself, Mr Jeffrey consented, and the case adjourned to the following morning.

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1826. July 21.

On the following day, during the examination of a papermaker a piece of paper was handed to him by one of the jury, that he might say whether it was made on old or new moulds; on which Lord Mackenzie remarked, that this was improper, as this juryman would be proceeding on his private knowledge of the history of the piece paper, and not on the evidence.

A witness called and examined in replication.

A witness was called in replication, and Mr Jeffrey wished this done before his reply, though he stated it as his belief that it was more regular to call him after. When the witness was called he was asked upon what authority the entries were made in the record of marriages.

Incompetent to prove by parol evidence wrong entries in parish books, but competent to prove the system on which the books were kept.

Hope, Sol.-Gen.—It is incompetent in this manner to raise doubts of the accuracy of the entries. The only case on the point is a criminal one, where evidence was admitted to prove that mistakes were frequently made in apothecaries shops; but that was not held authority by Lord Pitmilly.

Jeffrey.—The person who was session-clerk in 1802 is dead; but we call this witness as having held the situation before the present one, who was called by the defender.

LORD MACKENZIE.—If you mean to ask the

practice that was handed down to him by his predecessor I think it competent. For though it is not competent to prove particular instances of blunders or wrong entries made by this witness, I think it is competent to prove the system.

Jeffrey, in reply for the pursuer, said, He did not mean to conceal that this was a case of difficulty and doubt, and that the jury would have to reconcile statements apparently opposite, and in some cases to make a selection of the witnesses where the statements were irreconcilable: That the case of the pursuer was proved by witnesses who spoke to facts in which they could not be mistaken; but undoubtedly it was impossible to reconcile with this the story told by the defender's witness as to the marriage of the servant.

LORD MACKENZIE.—This is a simple issue, and a pure question of fact, which must be decided by the evidence, without any reference to the former verdict, or to the Court having set it aside. The evidence now is different from what it was formerly; and you are not to allow what then took place to influence your minds. Nor must you be influenced by the hardship to either party by the determination

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of the fact. Indeed it would be a great error to allow this to influence your judgment. This is the only thing like legal observation in the case; and perhaps I might leave it here, but being a case of conflicting evidence, I think it my duty to go over it in detail. His Lordship then read the evidence, observing that it was material to consider how far the witnesses stated facts sufficient to fix the date, as without such facts the memory had very little power of retaining the period, at which such a thing as the survivance of this lady had existed. But still it was also necessary to bear in mind, that, if a witness is dishonest, he may supply reasons of recollection from his own invention. With respect to the witness from whom the affidavit was taken, that was an incorrect proceeding, and is a matter affecting his credit, and a fair subject for the consideration of the jury.

With regard to the letter, about which so much evidence has been given, it is in a singular situation; for it is not a funeral letter, but an answer, apologising for not attending the funeral; and there is not a distinct account of where and how it was preserved.

The testimony of the witnesses for the defender is directly contrary to that given on the other side, and I cannot point out any mode of

reconciling them. You must judge which are mistaken, or, if not mistaken, which are false; and in judging of this last, which I fear you are called upon to do, you will consider which are the most respectable, and which are best supported by any evidence existing in the cause to which the suspicion of intentional falsehood is not applicable. If you come to be of opinion that the letter is a forgery, it will influence the opinion you form on the evidence of the pursuer generally; for if, in a case of this aspect, you find fraud on one side, you will be more disposed to think that perjury is on the same side.

Verdict—"For the defender."

Jeffrey and *Whigham*, for the Pursuer.
Hope, Sol.-Gen., *M'Neill*, and *Robertson*, for the Defender.
(Agents, *John Macandrew* and *J. B. Fraser.*)

GLASGOW.

PRESENT,

LORDS CHIEF COMMISSIONER AND PITMILLY.

DUNN *v.* ANDERSON, WALLACE *v.* ANDERSON.

1826. Sept. 19.

Damages claimed for being detained in prison after an alleged tender of the sum due.

AN action of damages for detaining the pur-