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,

" banker in Dunkeld, was elected trustee on
" the sequestrated estates of Martinsons and
" Sommerville, and that he offered, as his
" cautioners, James Stevenson and John Duff,
" merchants in Dunkeld, and the pursuer, the
" late Hugh M'Dougall.

" It being also admitted, that the bond of
" caution, No. 1–3 of process, bears to be sub-
" scribed by the said James Stevenson, John
" Duff, and the late pursuer, Hugh M'Dou-
" gall.

" Whether the said bond is not the deed of
" the late pursuer, Hugh M'Dougall ?"

Forsyth opened for the pursuer.—The ground of reduction is not that the signature is not genuine, but that the party was misled by one for whom the defender is answerable. The deed was laid before the pursuer by the agent of the defender as a true deed subscribed by three parties ; but it turns out that one of the subscriptions is forged, and the other two were not regularly attested. The Court of Session were of opinion, that, if this was the fact, then I was entitled to succeed.

Lord Chief Commissioner.—The Court are clear, that, to render a deed probative, the

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subscription must be seen by the witnesses, or the party must acknowledge it to them. It appears to me that this case results in a pure question of law, how far the other parties, not having signed, or their subscriptions not being regularly attested, relieves the pursuer from his obligation. Would it not be better to have it tried on a special case?

The facts being disputed by the defender, the case proceeded.

Circumstances in which a party was entitled to prove a fact not directly stated in the record.

The clerk of the agent having stated that he took the bond to the pursuer to be signed,

Cockburn for the defender.—If they mean to prove mistake, this is surprise, as there is nothing of this on record. The plea there is, that the pursuer was misled.

Hope, Sol.-Gen.—This is no part of my case, but I am entitled to prove the *res gestæ* to meet their defence. There is no surprise.

Cockburn.—The objection is important and well founded. The case is brought and was opened to the jury as one where the party was *misled,* not mistaken.

LORD CHIEF COMMISSIONER.—In this case the issue is a general one, and in all general issues

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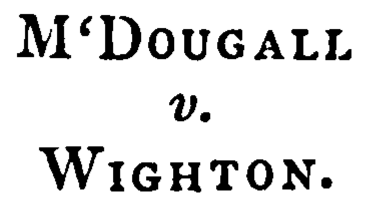

surprise is a good ground for rejecting evidence, as the only defect of a general issue is, that the party may be entrapped by surprise. From the course here taken, and from the manner in which the objection is brought forward, there is enough to show that there is no surprise; on the contrary, it is clear that it has been matter of previous consideration that the cause would take this course. The issue is sufficient to admit it, and the question is, whether there is a substantial objection to the evidence? The intention here is to get at the question of law, and the evidence is to be laid before the jury to get the facts necessary for that question. If the facts are to be stated in a special case, then the first thing would be the bond and the testing clause, and it is necessary to have all the facts clearly proved whether they are to be in a case or in a general finding on the direction of the Judge.

This evidence is by anticipation, and, as the pursuer undertakes the proof in this form, it would be improper to impede him in doing so. If we exclude this, how might the case stand? There may be evidence of the signature of the deed, the truth of the subscription, and that the witnesses saw it subscribed, and if this is excluded, you leave out a part of such impor-

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tance as to render all the rest abortive. The evidence goes purely to the situation in which Mr Duncan, the agent, stood, and to prove that he was agent not of the party who signed the bond. It is admitted not on the ground of fraud or misleading, but that the pursuer is entitled to prove the character in which the agent acted in reference to this bond.

LORD PITMILLY.—I was not aware that this case was to be tried to-day, or I would have looked more into it; but this point of the agency was one on which in the Court of Session we wished for information. If there is surprise we must yield to it; but we must be very strict as to records if we hold this evidence excluded. The question appears to me sufficiently raised by the third plea, and I have no notion of thus narrowing the point.

But not allowed to prove matter not there stated.

An objection was afterwards taken to the question, whether any communication was made by the witness to the agent relative to the subscriptions of the other witnesses?

LORD CHIEF COMMISSIONER.—If the answer tends to prove misleading, I am clear that it is not within the object of inquiry.

It is clear that the whole of this leads to a

pure question of law, on which the jury must take the direction of the Judge, or find a special verdict, or find in terms of a case to be drawn up. They are not to consider any thing as to deception.

The jury have only to find formally, as there is no fact on which they can find generally for the pursuer. The questions for them are, Whether the deed was regularly executed? Whether Stevenson wrote his name? and Whether Mr Duncan was agent for the trustee and creditors, (which was afterwards admitted?) The only points on which there is any contrariety of evidence is the regularity and genuineness of the signatures. It is for the Court to say, whether there is an immunity to the pursuer from liability, on account of what is proved as to the signatures of the others.

By consent of parties, engravers not called as witnesses on either side.

At the close of the evidence for the pursuer, it was stated that engravers were cited for each party, but that they had consented not to call them on either side, which was approved of by the Court.

Cockburn opened for the defender.—The two facts to be tried are, whether Stevenson's name is forged, and whether, if genuine, it is regularly attested?

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On the first point, one witness for the pursuer believed it to be his; and we shall call others who will swear that it is his. On the second point, you must take direction from the Court as to the forms necessary, and the grounds on which a deed may be cut down. The act 1681 contains the whole law on the subject, and by it the witnesses must see the subscription, or hear it acknowledged. There is no case in which a deed has been cut down on the oath of the instrumentary witness alone, as this would make the most regular deed depend on the oath of a person coming to swear against his attestation. Law presumes in favour of a regular deed, and each fact requires two witnesses. The Court ought not to allow this part of the case to go to you, as there is only one witness as to Stevenson, and one as to Duff, and these witnesses in suspicious circumstances.

Condie *v.* Buchan, 26th June 1823. 2 Sh. and Dun. 432. E. of Fife's Tr. *v.* E. of Fife, 3 Mur. Rep. 504. Smith *v.* Bank of Scotland, 25th January 1821.

LORD CHIEF COMMISSIONER.—Lord Eldon has in many cases laid it down that he would not rely on the testimony of a person who comes to disaffirm his act, and so solemn an act.

Hope, Sol.-Gen. in reply.—I do not mean to trouble the Court with any law as to the execution of deeds; but on the case of Condie I

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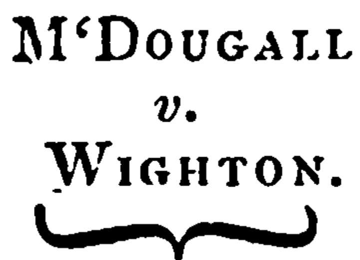
would observe, that the opinion given is merely that the evidence of the witness, in the circumstances of *the case*, is not sufficient, and clearly in that case it was not sufficient.

In the present case it is not the fault of the pursuer that there is not other evidence to lay before you, and the evidence which has been given is both admissible and admitted; and, therefore, unless the Court tell you that you are not to consider it, you must say whether you believe it. Duff and Stevenson neither signed in presence of the witnesses, nor acknowledge that they had signed; and the witnesses prove that they were not witnesses to the signature of either of them, though the deed states them to be so.

LORD CHIEF COMMISSIONER.—You may dismiss from your mind the general question raised in the cause, and even the question put in the issue, as this case has reduced itself to a question of law arising out of the facts proved in the course of the cause. You may also free your minds from all the facts, except as to two points, the forgery of the name of James Stevenson, and the attestation of the deed in presence of the instrumentary witnesses, or acknowledgment to them. These are the facts dis-



puted by the parties upon which you are to find, and it is unnecessary to distract your minds by stating the question of law.

The forgery depends on the proof as to the handwriting. Evidence on this subject of handwriting differs from the general principle of the law of evidence, as here, unless the witnesses saw the words written, which is seldom the case, they speak merely as to their belief. The Bar have in this case wisely abandoned a species of proof by engravers, which has been brought in other cases. Proof of handwriting ought to be by those who know it either from having seen the party write, or from having corresponded with him, by which they acquire a knowledge of the writing similar to that which we acquire of the face of an acquaintance. The instrumentary witnesses did not see him subscribe ; it is therefore possible that the signature was imposed on them. You are to consider, however, whether there is not pregnant evidence that the witnesses believed it genuine. You are to say yes or no, whether you consider it genuine or a forgery, or fabrication.

As to the regularity of the execution, you have only to consider the fact, not the effect, of it. The law of Scotland says, that to render a deed effectual, the witnesses must see the

party subscribe, or hear him acknowledge his subscription. You are to say whether they saw the subscriptions, or heard them acknowledged. No doubt the instrumentary witnesses are in such a situation as to make it necessary to look narrowly to their evidence. In Lord Fife's case, Lord Eldon says their evidence ought to be sifted and attended to with care and suspicion. Lord Mansfield said he would receive such a witness, but tell the jury not to believe him ; and Lord Kenyon adopted the same view. It appears to me that Lord Eldon's is the soundest view. We admit the witness because the objection goes to his credit, but it is for the jury to weigh it in scrupulous scales. They have done a solemn act without the solemn injunction being attended to which law requires, and they come to disaffirm that act. They come and swear that they neither saw the subscription, nor heard it acknowledged, though this may expose them to an indictment for forgery under the statute. As to Duff, he says he never acknowledged, and the witnesses say the same.

In a question of forgery, the instrumentary witnesses are admissible, but their evidence must be scrupulously weighed.

You are to draw the conclusion on the whole, whether they saw the subscription, or heard it acknowledged.

Verdict—" Find, 1*st*, That the signature

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"of James Stevenson adhibited to the bond
"is genuine. 2d, That the names of James
"Stevenson and John Duff were not signed
"in the presence of Peter Cochrane and Peter
"Hall, the instrumentary witnesses to the
"bond, and that James Stevenson and John
"Duff did not acknowledge their signatures to
"the said Peter Cochrane and Peter Hall."

Nov. 13, 1830.

When the special case came before the Second Division of the Court of Session, the Lord Justice-Clerk said, That it had removed the doubts he had on the subject, and that he had no idea that a cautioner who admitted that his own signature was genuine, had a right to take advantage of such an irregularity with respect to the subscriptions of the other cautioners. That there was nothing in the special case showing that the creditors had bound themselves as to the regularity of the signatures of the other cautioners, or that the pursuer stipulated that, if they were free, he should not be liable. The Lord Chief Commissioner and the other Judges concurred in this opinion, and the pursuer was found liable in expences from the date of the Lord Ordinary's interlocutor.

Hope, Sol.-Gen. and *Forsyth,* for the Pursuer.
Cockburn and *Rutherford,* for the Defender.
(Agents, *Daniel Fisher* and *Robert Cargill,* W. S.)