PRESENT,

LORD CHIEF COMMISSIONER.

Fowler v. Paul.

1821.
Feb. 19.

A finding for the pursuer on an Issue whether a person supported himself with propriety.

An action of multiple-poinding by an executor, to ascertain who had right to one-fifth part of the property of the late Dr Fowler, in which the Court of Session sent the following Issue.

ISSUE.

"Whether the late Andrew Fowler did
"not support himself by his own industry
"with propriety, and in terms of his father's
"will, from and after the 6th day of November
"1809, (when it is admitted his father died,)
"till the said Andrew Fowler attained the
"age of 30, exclusive of the period between
"the 12th of April 1810, and the 24th
"of April 1813, when it is admitted he was
"serving in his Majesty's service?

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In the multiple-poinding, the claimants were the younger children of the testator, and the defender, who was assignee of Andrew, the eldest son. The clause in the will, upon which the question arose, was as follows: "The other fifth to be reserved, and placed in "the funds, until my son Andrew shall have "arrived," &c.

The Lord Ordinary, and afterwards the Court, decided in favour of the defender; but on a reclaiming petition, they altered the interlocutors, and sent the above Issue to be tried.

A probate of a will rejected, there being no witness called to prove the sale, &c.

The first evidence offered for the pursuer, was a probate of the will.

Clerk and *Murray*, for the defender, object. —The will ought to have been produced.— 1. Phillips, 397, 5th edit.

Even if the probate were proved, it would not be sufficient.—1. Phillips, 342.—But there is no evidence that this is the seal, or that these are the subscriptions, of the deputy registrar. —Robertson *v.* Gordon, 15th November 1814.

Moncreiff, for the pursuer.—The only claim of the other party, is under this will. By the law of Scotland, this probate is evidence, and proves that the will was produced in the Prerogative Court of Canterbury.

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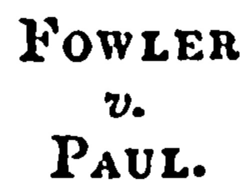

There is no necessity for proof of any writing in Scotland. The defender does not aver that this is not a genuine seal and subscription.

Clerk.—The question is, whether this parchment proves the will. We ought to have had a witness to explain it, and also the opinion of English lawyers, on the meaning of the indefinite terms of the will.

LORD CHIEF COMMISSIONER.—Among many questions which arise in this Court, this is the one which, of all others, occasions the greatest anxiety.

In this case, the parties have been litigating since 1816. The right of the defender is by virtue of an assignment to a sum claimed under the conditions of the will; and if he had been called upon, there is no doubt that he would have admitted the will, as he did the death of Dr Fowler.

If the Court of Session were as much in the habit of directing Issues as the Court of Chancery, I have no doubt that they would have directed that this probate should be received as evidence of the will. But the difficulty now is, whether, after the Jury are sworn, and can only be relieved by consent, I

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shall turn the party round on a mere technical objection.

Were I to introduce my private knowledge into this case, perhaps there are few who have had more experience, as to this seal and the signatures; but I mention this, that I may lay it aside.

I am most anxious not to decide this on the law of England, but on the principles of the law of Scotland; and I am most unwillingly brought to the decision. But here I think I have principles of the law of Scotland, as well as of England, and all civilized states, to guide me.

The act of a Court, within the province of that Court, must be held sufficient; but in a foreign country, these acts are mere matters of evidence, which must be subject to the common rule.

In England, the law of Scotland must be proved as a fact, and the documents authenticated. In England a bond must be proved by a witness, but in Scotland a deed does not require such evidence, but must have certain solemnities. If such a deed were produced in England, it would not be necessary to prove the subscription; but it would be sufficient to prove that such evidence was not necessary in

Scotland; and the law being thus proved, the deed would be received.

Does this deed come proved in this manner? If I were satisfied with the proof of this probate, I would admit it to be read, as the same accuracy is presumed as to a foreign will, as would be presumed of a will within the province of the Court.

The case of Robertson goes the whole length of this, that there must be proof of what is necessary in the country from which the document comes.

This is a separate country, and we must reject this, as no witness has been called to prove the correctness of the document, the signatures, and seal.

The claim by A. Fowler was then offered.

Clerk—Objects.

LORD CHIEF COMMISSIONER.—According to this view, the Court of Session sent the case here to be tried, when there was no will in existence.

After mentioning the cases of Leven and Young, Vol. I. p. 350 and 376, and Thomson and Clark, Vol. I. p. 167, Mr Clerk withdrew the objection.

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A pursuer giving part of a process in evidence, does not entitle the defender to insist that he shall produce the whole process.

The claim was then given in, and part of it read.

Murray.—They must give in the whole pleadings; and we are entitled to have a minute and the interlocutor upon it read. In the case Harper *v.* Robinson, *ante*, p. 393, the declarations were held part of the precognition, and were read. In Thomson's case, it was held that proceedings in the Court of Session only proved the allegation of the party, not the existence of the deed.

Cockburn.—Do they mean to say, that, by our giving one document in evidence, they are entitled to give in any part of the process?

Clerk.—We are entitled to all matter explanatory of that document.

LORD CHIEF COMMISSIONER.—The rule is, that when a party reads part of a document or proceeding, he need not go farther than he chooses; but he puts the whole in evidence; and the other party is entitled to have the whole of it read. The question is, whether what you propose to have read is *pars ejusdem negotii*. The pursuer gives in part of the proceedings in the Court of Session, and you say you are entitled to give

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other proceedings, as cross to this matter. I must first know what you propose to give in, before I decide this. I am anxious not to decide any thing as to the reply; indeed that is a subject of which the Court should never know any thing,

It is said that the document given in by the pursuer, entitles the defender to give, at this stage of the cause, any evidence from the process, that may be an answer to the action. I shall regret if the Court has laid down any such doctrine. After looking at the document, his Lordship said—I am sorry that I intimated any opinion before seeing this document. It is complete of itself, and is given in to prove that there was a will; but it is admitted that this does not fix it on the present defender. Can it be held, that in justice or common sense, you are entitled to range through all the productions? Whatever is *ad idem* in this document given in by the pursuer, may be read; but my opinion is, that you are not entitled to range through the other documents at present, though it will be competent for the defender afterwards to offer them in evidence, and to shew that they are competent evidence.

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The raiser of an action of multiple poinding received as a witness.

When the executor was called as a witness,

Murray objects.—He is the raiser of the multiple-poinding, and is liable for the consequences.

Moncreiff.—He merely brings the money into Court, and has no interest.

Clerk.—The interlocutor must be read; and I will shew that he is an incompetent witness.

LORD CHIEF COMMISSIONER.—It is not necessary to read the interlocutor, as his being a mere party on the record, I should not think sufficient. In all cases of this sort, I think the Chancellor would direct that such a witness should be examined; but in a case involving the proceedings of the Court of Session, it is impossible for me to proceed, except on general principles.

Lord Gillies afterwards came into Court, and the question as to the competency of the executor being called, was again agitated.

Clerk.—The executor has a large fund to account for, and has to justify himself in bringing the multiple-poinding, and to account to every one for his share. May not his conduct in the case subject him in expences?

Moncreiff.—He is clearly admissible, as he

has consigned the money. Even if he had not, what interest can he have in this Issue? If he had *not* paid, he must pay to some one. Even an administrator is admissible.—Reid v. Gardyne, 10th July 1813.

LORD CHIEF COMMISSIONER.—My great anxiety was not to run into any technical difficulty; and from that I shall be perfectly relieved by my brother. If there is no technical difficulty, my opinion on general principles is clear, that it must be made out that he has an interest. In this case he brings the multiple-poinding; in that action he must pay to one or other, and must thus account for the last fraction. All that he can get by his evidence is, that he may shift the responsibility; but still, if he remains responsible to one or other, this does not relieve him from any thing.

LORD GILLIES.—I have attended to this objection, which is, that the witness is a party, and has an interest. It may sound strange; but the raiser of a multiple-poinding is in many cases made a party, without his knowledge or consent. In this case, whether it is raised by the witness or the party interested makes no difference; for the summons merely

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states, that he has a sum to which he has no claim; and all he wishes is to know to whom he ought to pay it, which does not appear to me to make him a party, to the effect of excluding him from being a witness.

The second objection is interest; and that excludes a witness, whether he is a party or not. In this case, it is a matter of indifference whether the witness accounts to A or B; and the only way of supposing him to be interested, is to suppose that one will, and the other will not, exact it. Suppose the case of a tenant whose landlord dies, and that the legitimacy of the heir is disputed; could an objection be taken to the tenant as a witness, that he expected the one party to be more favourable than the other?

Mr Miller, the executor, was then called. On his re-examination, he was asked if he gave in a minute, consenting to pay over the share of Andrew Fowler, in consequence of a consent from the family.

Clerk objects.—This is incompetent: the terms of the minute will appear from the paper.

LORD CHIEF COMMISSIONER.—The only