PRESENT,

LORD CHIEF COMMISSIONER.

WATSON and HUSBAND *v.* HAMILTON.

1822. March 12.

Findings—As to the capacity of the maker of a deed—as to instructions being given to prepare it—as to blindness, and instructions to notaries.

REDUCTION improbation of two deeds executed by means of notaries-public,—on the ground that no proper authority was given;—and that the granter was in a debilitated state of body and mind, and under undue influence.

The issues were, Whether, on the days the deeds were signed, the granter "was of a sound "and disposing mind, and capable of under-"standing her affairs?" Whether she was blind, or so blind that she could not read or see what she had written? Whether she gave instructions for preparing the deeds, and whether they were prepared in conformity with these instructions? Whether the first was read over at the time the second was executed? and a counter issue, Whether she declared she could not sign, and gave instructions to the notaries to sign for her? *

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* On the following day, the case of Thomson *v.* Wilkie was tried, which was also a reduction of two deeds on nearly the same grounds as the present case.

WATSON and HUSBAND *v.* HAMILTON.

When Agnes Weir was called,

Whigham and *Cockburn* objected, She is designed as servant to *James* Lawson, W. S., residing at Cairnmuir. We applied to *James* Lawson, W. S., who had no such person in his service.

Designation of a witness held sufficient, though not perfectly accurate.

Before the case was opened, the Lord Chief Commissioner observed, The issues in this case are the same in substance with, though more correctly worded than one of the issues tried yesterday. The issue is better put in the negative than positive form, and the bar ought to consider whether *instructions* do not mean written or verbal instructions, something different from the fact of having executed the deed, (upon which an ingenious argument was raised yesterday,) or the facts and circumstances attending the reading and subscribing the deed. In the case last night there was no evidence of instructions having been given by the person settling her property to frame the deed, but she approved of a scroll, and afterwards of the deed when read to her.

An objection was taken to the designation of a witness, but was afterwards given up;

When his Lordship observed,—This objection of the want of proper description is likely to lead to difficulty, the cases run into such shades. There ought to be a rule, that such objection would not be sustained, unless the agent makes oath that he was misled by the description.

At the close of the evidence, Mr Moncreiff left the case to the Jury, without reply; and the Lord Chief Commissioner stated very shortly the points on which they had to find; and that, though much delay and expence had been incurred, to enable the pursuer to bring a supplementary reduction, on the ground of forgery, that not a scintilla of evidence had been adduced on that subject.

LORD CHIEF COMMISSIONER.—I am not to decide till I hear more of the fact; but at present I may state, that, so long as lists are given, they must give descriptions of the witnesses; and the question here is, If such a description was given, as would lead, by a fair inquiry, to a discovery of the witness? She is described as servant to James Lawson, residing at Cairnmuir, and if I find that there is a Lawson residing at Cairnmuir, I will hold the description sufficient. It is the servant who is described as residing at Cairnmuir, and inquiry ought to have been made there.

The witness having stated, that she resided at Cairnmuir as servant of Mr Lawson, she was examined.

Jeffrey opened the case, and stated, That, in this case, the Jury were merely to find the facts as they should be proved,—that the woman was in a state of dotage,—that the deeds had been prepared without consulting her,—that they contained a clause declaring them irrevocable, and were reducible as not the deeds of the party.

Cockburn, for the defender.—It is undoubtedly most important to open the door at all times for detection of fraud; but it is also of

WATSON and HUSBAND *v.* HAMILTON.

great importance not to allow deeds to be called in question years after the death of the granter. The question now is, Whether the pursuer has overcome the presumption of law that a deed was properly executed?

This is one of the most delicate situations in which a Jury can be placed, as they are called on to set aside rational deeds, executed by a person who was treated by all around her as capable of making a settlement. In order to succeed on the first and second issues, the pursuer must make out that this woman was reduced to a state of idiocy. We have only to show that she had sufficient capacity to know the general intention of the deeds, and to choose the persons to whom her property should descend; and in the state of her sight, she was entitled to use notaries.

LORD CHIEF COMMISSIONER.—This case comes before us on the evidence for the pursuer; and, in one point of view, it is a case of considerable anxiety to the Judge, though, in another point of view, it is not so, as it is the Court of Session who are to discuss and decide whether the deed is valid or not.

That Court, however, cannot decide without having the facts ascertained; and ever since

WATSON and HUSBAND v. HAMILTON.

the institution of this Court, the verdict of a Jury has been thought a better method of satisfying the conscience of the other Court than proof by commission. Soon after this Court was formed, a cause of this nature, and of great nicety and value, was tried. It occupied three days, and occasioned much anxiety to the Court. I trust there is nothing in that cause which will be subject of regret, but from it we may learn the means of improving the form of issues in questions of this sort.

Earl of Fife v. Trustees of Earl of Fife, Vol. I. p. 88.

In the issues now under consideration, I am not to direct you in the law, but to assist you in getting at the fact. You are not to be told by me, whether a person with a certain degree of sight can execute a deed by notaries; but it is of great importance, that we should put the facts in proper shape, to enable the other Court to decide the questions of law; and, with this view, I would request that you would not return a finding for the pursuer or defender, but that you would make your return in terms of the issues, or in such terms as you may think the evidence warrants.

The 1st and 2d issues apply to different deeds; the one conveys the property, the other only puts it in a conveyanceable position, but the question on both is the same; and, on the

WATSON and HUSBAND *v.* HAMILTON.

whole evidence, I do not think there is any difference proved in this woman's state of mind at the two periods. But the parties differ as to the meaning of being in a sound and understanding mind. On the one side, it is said she was feeble—of advanced age—of feeble memory, or almost deprived of memory—that she forgot the common occurrences of life, and that she was not capable of understanding her affairs. On the other side, it is maintained, and with some reasonable ground of argument, that the ground for reducing a deed is the same as would have been necessary to warrant putting her in the hands of the law.

Are you then of opinion, that at the two periods she was of so sound a mind, and so capable of understanding her affairs, that these are her deeds? If you are of opinion that she was, and no part of the issue is found the other way, then it is left to the other Court to decide one way or other. You are to judge of the credit due to the witnesses, and the weight to be given to the evidence on the whole. Some of the witnesses (whose evidence his Lordship stated) spoke directly to her mental weakness, and the evidence given in chief by others was very strong; but was much weakened by the facts brought out on cross-examination. The others

all say, they could not state her to be incapable, and some of them even advised her to make a settlement. You have also indirect evidence of her capacity in the testimony of the instrumentary witnesses, who state, that the person who began to read the deed, did so in a low tone of voice, and that she leaned forward, seeming not to hear distinctly; but that, when another person read in a louder tone, she appeared to be satisfied. It is not for me to say how you are to find; but it is important for you to attend to what I have now stated, as it is evidence arising out of what was done by the party, and it is for you to consider whether a person without intellect would attend to any deed? There is also evidence arising from the deed itself; for though it takes the property away from part of her relations, yet it cannot be said to be irrational, merely because the heritable property is given to one, instead of being divided.

It is to the question of blindness that the observation I made on Lord Fife's case applies. The defender says the pursuer was bound to prove this, but has not proved it. I wish you to avoid making a return of not proven; for though that may afford sufficient ground for

WATSON and HUSBAND *v.* HAMILTON.

the Court of Session to decide the case, yet it is not a correct verdict.

I shall not embarrass you by stating the point of law, but shall merely mention, that it is material in the decision of a question of law, that there should be a direct finding on the issue, and it would be more satisfactory to the Court of Session than the slovenly return of not proven.

After stating the facts proved, his Lordship said, I have no hesitation in saying this woman was not blind; and, in absence of all evidence to the contrary, I think it established that she could read her Bible. At the same time, I do not say that there was any misfeasance on the part of the notaries, as she was led in, and said she could not see.

The same principle applies to the next issue. It cannot be doubted that there was a scroll and a deed, and that the deed was read at the time it was executed, which, it is maintained, proves instructions; but you never bring her in contact with the scroll till after it was framed. But her paying attention to the deed, before executing it, proves that it was the thing she meant, and also proves her capacity. It is said, however, that it could not be hers, unless

she had given instructions to prepare it; if you are not satisfied that she did so, then I wish you to find the special facts. Of which his Lordship gave a general outline.

On the fifth issue, it is clear, that the former deed was not then read, nor the tenor of it explained, but merely the necessity of the second deed stated.

The sixth issue is alternative, and it is clear that she instructed the notaries to sign, and stated that she was unable to sign from bodily weakness. Whether this was truly the case is not the question here, but whether she said so.

Verdict—The Jury found that the woman was in a state of mind capable "of disposing "of her estate and effects"—that she laboured under a defect of sight, but was not incapable of reading or seeing what she might write—that there was no evidence of instructions for preparing the deed—that the first was not read, &c.—that she declared she was unable to sign, and instructed notaries to sign for her.

Jeffrey and *More*, for the Pursuer.
Cockburn and *Whigham*, for the Defender.
(Agents, *Andrew Paterson* and *Alexander Goldie*.)