CAMERON
v.
CAMERONS, &c.

must be general, but the party may object to any charge he thinks improperly made.

PRESENT,

LORDS CHIEF COMMISSIONER AND PITMILLY.

1820.
March 15.

REID *v.* STODDART.

Found that the purchaser of a share of a lottery ticket had abandoned his purchase.

DAMAGES for selling the one-sixteenth share of a ticket in the State Lottery, after it had been sold to Stoddart.

DEFENCE.—The purchase was not completed. Stoddart abandoned the purchase.

ISSUE.

"Whether, upon the 19th September 1813, "the defender abandoned and gave up the "purchase of the one-sixteenth share of the "ticket No. 3934, in the State Lottery, admitted to have been purchased by the defender from the pursuer, upon the 18th "day of September aforesaid?"

On Saturday the 18th September, in Reid's

shop, Stoddart selected two shares of tickets in the Lottery, and put his name on the back of them, but did not pay for them. On the same evening, Reid's shop-boy sold one of these shares to Mr Harper. The mistake was not discovered till late at night, and Reid sent his shop-boy early the following morning to offer Stoddart his choice of the unsold shares.

The ticket having been drawn a prize, Stoddart applied to the Sheriff, who assoilzied Harper, but gave judgment against Reid for the amount of the prize, and for expences. This judgment was brought before Lord Pitmilly by advocation, who sent the case to the Jury Court.

When a witness for the pursuer was called, an objection was taken to his admissibility.

Jeffrey for Reid.—I admit that he is cautioner in the advocation; but we have consigned L.1400, which is more than sufficient to relieve him.

Fullarton for Stoddart.—This does not relieve him, as he is still a party; and it is not clear that the sum consigned will cover the whole with costs. A discharge by the

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Clerk of the Bills, is the only way of relieving him.

Moncreiff.—The sum consigned is sufficient to do away the objection of interest. Alison *v.* Gordon, 17th December 1701, M. 16,705; Sime *v.* Simpson, 9th February 1793, M. 16,781; Smyth *v.* Pentland, 20th May 1809.

Mr Fullarton being doubtful of his right to reply, the Lord Chief Commissioner observed, that he was entitled to observe upon the cases cited, which he did shortly.

Jeffrey.—As there is no form by which a cautioner in an advocation can be freed from his obligation, we now give in a bond by two sufficient cautioners, to relieve him, and keep him skaithless of all the consequences of his cautionary obligation; also a bond of relief from the two gentlemen, his co-cautioners in the advocation.

LORD CHIEF COMMISSIONER.—The question originally was, whether the sum of L.1400 was sufficient to relieve him; but now there can be no doubt on the subject, from the bonds of relief produced.

A boy who was sent to Stoddart on the Sunday morning, having proved that he saw only Stoddart's father, who made

certain statements; it was proposed, on the part of Stoddart, to call a witness to prove statements by his father, contrary to those proved by the boy; and Mr Cockburn said—We are aware that Stoddart, senior, could not have been a witness for us; but if they called him, we should have been entitled to cross-examine him. Now that he is dead, they, by proving what he said, have made him their witness; and we are entitled to prove statements which he made to others, contrary to those sworn to by the shop-boy.

Jeffrey.—We did not prove the statements because the father was dead, but because he acted as agent for his son. If they could prove that he made a different statement to the boy from what we have proved, that might be material.

Cockburn.—We deny that the father was an agent, and are therefore entitled to prove all we could have proved on cross-examination.

LORD CHIEF COMMISSIONER.—This does not require much discussion to make the ground of decision clear.

It would have been different if a witness had been called to prove the statement of the father as evidence. That was the point in the case of Thomson, Vol. I. p. 181. The point at

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present, however, is different. On the Sunday morning, the defender, Stoddart, authorises his father to tell the boy what has been proved to us: he authorises his father to disaffirm the contract made on the preceding day. There is no ground laid for calling this evidence of what a person since dead had said.

Jeffrey opened the case, and stated the facts, and maintained, that though the Issue was limited to the Sunday, he might prove facts as to the defender's conduct on the Monday, shewing that he had abandoned the bargain the day before. Here the defender is claiming an unbought profit; the pursuer is resisting a loss which will be ruinous to him.

Fullarton.—The question here is not one of profit or loss, but a simple question of fact, whether the defender abandoned the purchase he had made. Reid did not alter his books till after intimation that a demand would be made for the prize. There is only one witness. Parol evidence against the writing is incompetent; it must be dissolved by writing.

Moncreiff.—We are not bound to prove a solemn abandonment; and we have proved that the defender considered that he had aban-

doned it. The objection to the parol evidence comes too late. The declaration of the defender proves that he made his father his agent; but it is not proof of the message he sent.

LORD CHIEF COMMISSIONER.—This is a question of pure fact, though there has been an attempt in argument to mix it with a question of law. The Issue shews that it is pure fact, and it is peculiarly fitted for a Jury. The Issue also shews that there was a concluded bargain. It is said that the bargain was constituted by the entry in the books, and, that being constituted by writing, it could only be dissolved in the same way. But if the entry in the books was conclusive, how could it be a question in the other Court whether there was a bargain or not? If this had constituted the bargain, the case never would have been sent here to try whether it was dissolved by facts and circumstances. From the evidence of the boy taken in connection with the facts and circumstances, and the declaration by the defender, you are to say whether there was an abandonment on the Sunday. The words used by the father, as proved by the boy, are equivocal, and re-

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quire explanation; and they must be explained by the other evidence. It is said there is only one witness; but he is a competent witness; and if there are facts and circumstances supporting his evidence, this is sufficient.

(His Lordship then stated the evidence.)

Something has been said of the abandonment being on Sunday. Had the contract been entered into on that day, it would have been contrary to decency; but in the circumstances of this case, what was done was in some respects necessary. On the whole circumstances, you are to say whether you think what took place on the Sunday was a disannulling of the contract.

Verdict—"That the defender abandoned "his right to the lottery ticket, No. 3934, on "Sunday the 19th September 1813."

Jeffrey and *Moncreiff* for the Pursuer.
Fullarton and *Cockburn* for the Defender.

(Agents, *Gibson*, *Christie*, and *Wardlaw*, W. S. and *Peter Halkerston*, S. S. C.)