WILSON v. WILSON.

it is dissolved, for this may be done by facts and circumstances,—but the proof necessary to dissolve a written contract, must be clear and perspicuous.

After going through the evidence, his Lordship stated that it was far too loose to undo a written contract, and that there was no evidence of any new contract having been entered into.

Verdict—For the defender on the first issue, and for the pursuer on the second issue.

Jeffrey and *Whyte*, for the Pursuer.

J. A. Murray and *J. W. Dickson*, for the Defender.

(Agents, *David Clyne*, S. S. C., and *James Lawson*, W. S.)

PRESENT,

THE LORD CHIEF COMMISSIONER.

1823. March 5.

WILSON v. WILSON.

Reduction on the ground of imbecility.

REDUCTION of a disposition and deed of settlement, on the ground of fraud and circumvention, and of mental imbecility. The first ground

was not insisted on, and the case came to trial on the second.

ISSUE.

"Whether, on or about the 16th day of "September 1817, the date of the disposition "and settlement now under reduction, alleged "to have been executed by the late Thomas "Wilson, heckle-maker in Crosscauseway, "in favour of Agnes Wilson, widow of the de-"ceased Adam Robertson, baker in Edin-"burgh, and others, the said Thomas Wilson "was not of a sound and disposing mind, but "was in a state of mental imbecility and in-"capacity, and thereby incapable of under-"standing his affairs?"

To entitle a party to proceed to trial, in absence of the other party, he must prove notice to the opposite party, or his mandatory.

When the case was called for trial on the 20th February, the pursuer did not appear.

Maitland, for the defender.—We gave notice of trial to the known agent for the pursuer, who is also attestor for the mandatory. It is said the mandatory does not mean to act, but his appointment being a proceeding in Court, his declinature should appear on record.

LORD CHIEF COMMISSIONER.—Where is proof of notice to the mandatory? The Court

WILSON
v.
WILSON.

must be very cautious in the absence of either party.

In the absence of a defender, the case is quite simple, and when all the notices have been given, the Court has no hesitation in allowing the case to go on; because, if the pursuer does not make out his case, the defender would have a verdict. But, in absence of a pursuer, the case is different, as the defender has no proof to offer, and the verdict comes to be one in absence without evidence. This question was much discussed in the case of Scruton and Catto; and, in that case, the Jury Court confirmed the decision given by Lord Gillies, that the pursuer not having appeared, and there being no power to nonsuit, the only way to extricate the case, was to take a verdict for the defender. A Bill of Exceptions was taken to this decision, and the First Division of the Court of Session held the Jury Court right, and confirmed the judgment.

Scruton *v.* Catto, *ante* p. 56.

That I hold a complete case in point, and an authority upon which I should have no difficulty to allow a verdict to be taken for the defender, or to hear any evidence he may have to offer. But the difficulty here, is of a different nature, and is the same in the absence of the pursuer as of the defender. It is the want

Vol. I. p. 198.

of the proper notice. In the case of Beardsworth, I held that the notice must be served on the mandatory personally, or at his dwelling-house. Suppose I allowed this notice as sufficient, and that the mandatory came forward and appointed a new agent, and wished to go on with the case? As to the situation of an attestor for a mandatory, I wish to see one of the other Judges, as that is a question of peculiar Scotch law.

Notice to the attestor of the mandatory is not sufficient.

After consulting the Judges of the First Division of the Court of Session, his Lordship said,

I have not only seen Lord Gillies, but the other Judges, and they are unanimously of opinion, that the agent, being attestor for the mandatory, does not make any distinction in the case, as it is the mandatory who is to be looked to, as he is *dominus litis*.

The rule of Court has been, that there must, at least, be service at the house of the mandatory.

Moncreiff and Maitland.—In this case, the notice to the agent was regular,—we had no reason to believe it was to be in absence, and have a right to go on and obtain a verdict.

LORD CHIEF COMMISSIONER.—I do not say

WILSON
v.
WILSON.

that, in all cases, it is necessary to give notice to the mandatory, but I say that you must give notice to the party, or his mandatory, when you are to try in absence. It is perfectly competent for the Court to stop a proceeding which may be carried on without the knowledge of the party interested.

This is an objection on the part of the Court, and no person has a right to go to trial in absence, without the leave of the Court; and the Court will not allow a proceeding that may do injustice.—I will not try this cause without being satisfied that the proper notices have been given, and they have not been given in this case.

It is not only my own opinion, but that of the Judges of the Court of Session, that, if both parties are present, no such notice is necessary—but that, if a party is absent, the rule is different, and notice to the attestor of the mandatory is not sufficient, as he is a mere cautioner. In the case of Beardsworth, this was held necessary, and the present is the case of an absent pursuer. In this case, the defender gives notice by *proviso*, and, if intimation had been made to the mandatory, I should have held it good, but I cannot hold notice to the agent sufficient.

If the mandatory intimates that he does not

mean to appear, I have no objection to take this on an early day ; but, let intimation be made to him, and let the person intimating make an affidavit as to what passes.

At the trial, Mr Maitland stated that the mandatory had withdrawn two years ago, and that they wished to put into process the letters on the subject.

LORD CHIEF COMMISSIONER.—If I thought I had jurisdiction in this matter, I would certainly proceed ; but, as there is some doubt of the jurisdiction of this Court, and as the case goes back to the Court of Session, I shall take a note of it, and have no doubt that Court will proceed to the utmost, as it appears to me a piece of great misconduct on the part of the agent.

The Jury were then sworn, and his Lordship stated, that, after the deliberate decision in the case of Scruton and Catto, now final, he could only direct them to find for the defender.

Verdict for the defender.

Moncreiff and *Maitland*, for the Defender.
(Agent for the Defender, *William Williamson*.)