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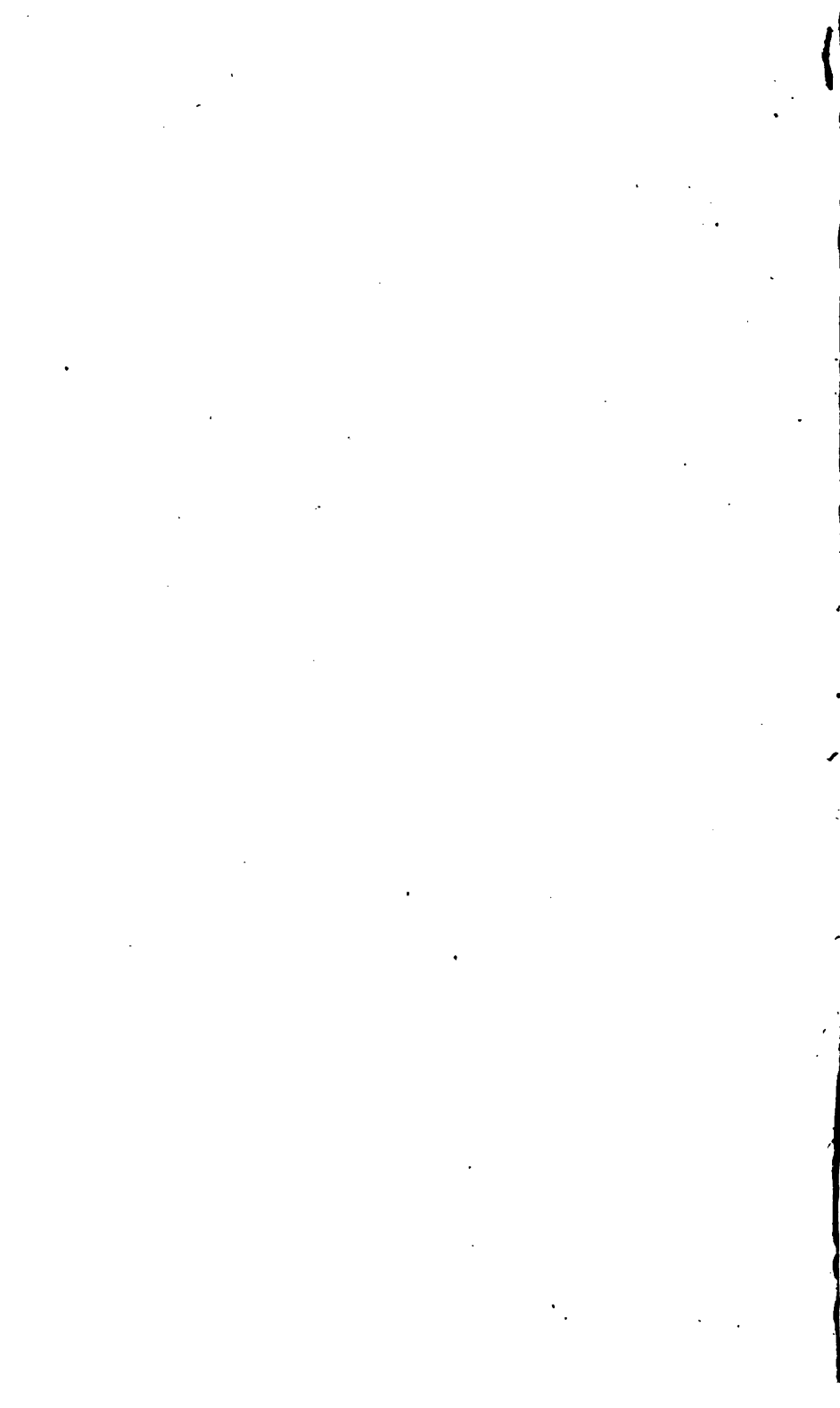


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**DUNDONNELL CAUSE,**

AP -  
AMB  
HTD

**SECOND TRIAL.**

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**REPORT**

**OF**

**THE TRIAL BY JURY,**

**THOMAS M'KENZIE, Esq.,**

**AGAINST**

**ROBERT ROY, Esq., W. S.,**

**IN THE**

**COURT OF SESSION AT EDINBURGH,**

*4th January 1831, and four following days.*

---

REPORTED BY MR S. MACGREGOR AND MR D. LIZARS,  
OF THE NEW NORTH BRITON.

---

**EDINBURGH:**

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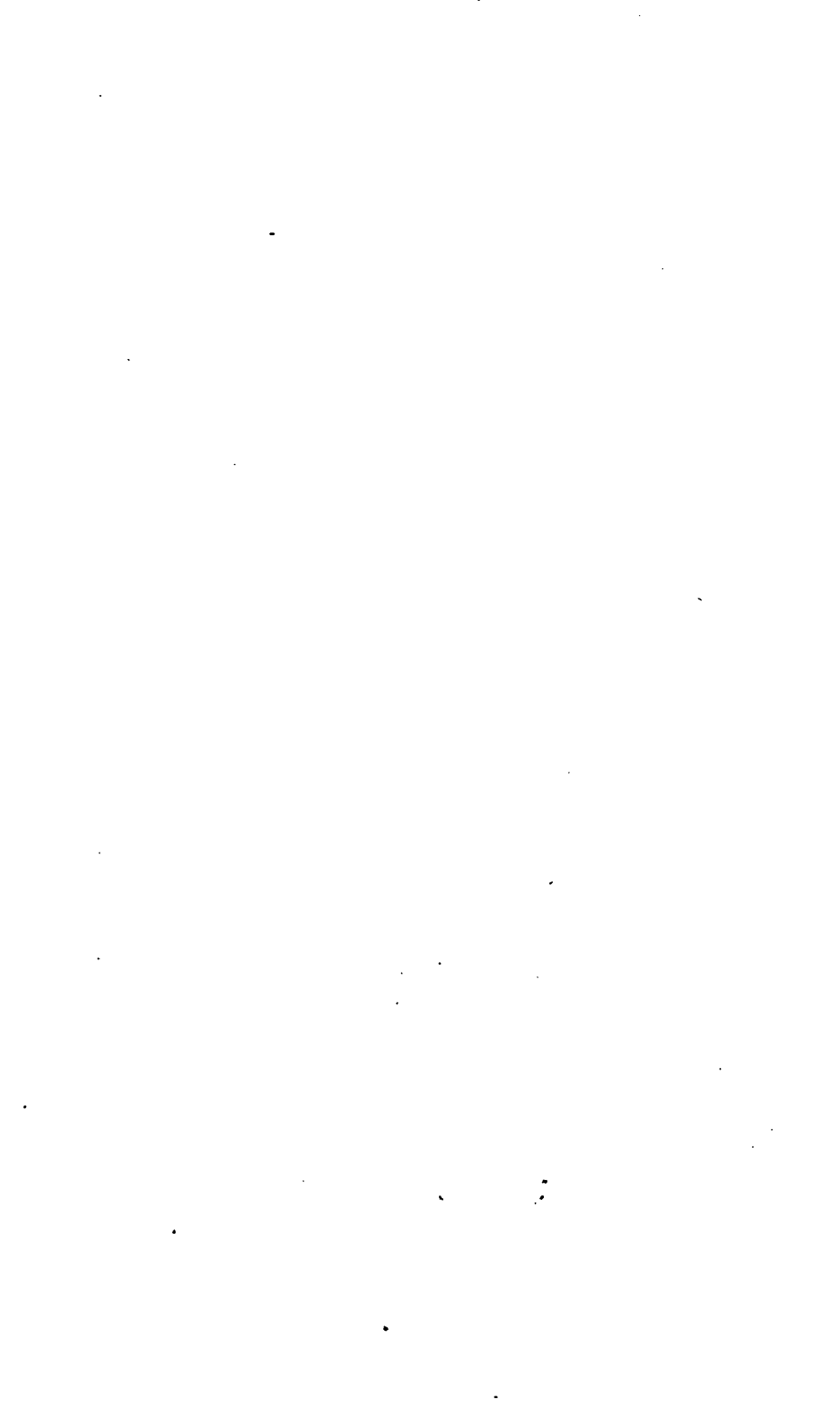
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THE Dundonnell Cause has, perhaps, excited greater interest, not only amongst those connected with the parties, but the public in general, than any civil cause that has ever come before a Scottish Jury, arising as much from the importance and peculiar features of the case itself, as from the singular mode in which the former trial terminated. On Tuesday the 11th May 1830 it was brought before the Jury Court, and, after occupying the Court for four days, the Jury, being divided, were unable to come to any decision, and were discharged, according to the statute, at the expiration of twelve hours from the time they were enclosed. The parties were thus left precisely in the same state in which they were before the commencement of the trial; and, on the 4th January 1831, the case, as reported in the following pages, was again brought before a Special Jury in the Court of Session, in which the Lord President Hope and the Lord Chief Commissioner Adam presided.

The Proprietors of the NEW NORTH BRITON, in which Journal this and the former trial were reported, have yielded to a very general desire, expressed among gentlemen connected with the law, to extend, at full length, the speeches of Counsel, which were necessarily curtailed in the columns of their Journal, and to publish the whole in a separate form, uniform with the former. In presenting it to the public, the Proprietors have to express their acknowledgements to Counsel for the readiness with which they entered into their views, and for the assistance which they afforded them by the revision of their speeches. It is necessary, however, to state, that, owing to circumstances not necessary to be explained, only a portion of the speech of the Solicitor-General, Counsel for the Pursuer, came under his notice.

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\*. A few copies of the former Trial still remain on hand, which may be had at the Office of the NEW NORTH BRITON, No. 5, South St David Street.



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# DUNDONNELL CAUSE.

## COURT OF SESSION,

EDINBURGH, TUESDAY, 4TH JANUARY 1831.

PRESENT,

The RIGHT HON. CHARLES HOPE, LORD PRESIDENT,  
RIGHT HON. WILLIAM ADAM, LORD CHIEF COMMISSIONER.

The Dean of Faculty, (HOPE,) PATRICK ROBERTSON, ADAM ANDERSON, and W. F. M'KENZIE, Esqrs. Advocates, } Counsel for the Pursuer,  
THOMAS MACKENZIE, Esq.

HUGH MACQUEEN, Esq. W. S., Agent.

ALEXANDER SHEPHERD, Solicitor, Inverness, Country Agent.

The Lord Advocate, (JEFFREY,) Solicitor-General, (COCKBURN,) THOMAS MAITLAND, ANDREW RUTHERFURD, W. GIBSON-CRAIG, and W. PENNY, Esqrs. Advocates. } Counsel for the Defenders,  
ROBERT ROY, W.S., and Others.

Messrs GIBSON-CRAIGS, WARDLAW, and DALZIEL, W. S., Agents.

ALEXANDER MACTAVISH, Solicitor, Inverness, Country Agent.

THE following special jury were impannelled to try the cause :—

Alexander Craig, residenter, Ann Street, Stockbridge, *Chancellor*.  
John Wilkie, tailor and clothier, Prince's Street.  
William Stewart Watson, portrait painter, Duke Street.  
Alexander Henderson, goldsmith, Rankellor Street.  
Henry Curren, builder, Union Place.  
James Milne, architect, Northumberland Street.  
Robert Grahame, merchant, Links, Leith.  
Thomas Anderson Shand, merchant, Constitution Street, Leith.  
William Pattison, merchant, Links, Leith.  
James Hay, manager of the Edinburgh and Leith Ropery Company, Links, Leith.  
Adolphus Seeales, rope and sail maker, Links, Leith.  
John Vicary, Ann Street, Stockbridge.

The jury were sworn to try the following issue :—

“ Whether the trust-disposition and conveyance, dated 27th August 1821, bearing to be executed by the late Kenneth Mackenzie of Dundonnell, and sought to be reduced, of which No. 9 of process is an extract; and the disposition and deed of settlement, dated 28th August 1821, bearing to be executed by the said Kenneth Mackenzie, and sought to be reduced, of which No 7 of process is an extract, are not, or either of them is not, the deeds or deed of the said Kenneth Mackenzie of Dundonnell ?”

MR PATRICK ROBERTSON—My Lords and Gentlemen of the Jury, I can assure you that in this important case I rise to address you with no ordinary feelings of the difficulty and magnitude of the task devolved upon me. The extent of the inquiry into which we are now to enter is almost unexampled in the history of judicial proceedings in this country; and I know that I do not draw too much on your kindness, and on your conscientious regard for your duty, when I implore you, for the sake of justice, to look cautiously and deliberately at the evidence to be brought before you. I must begin by entreating you to dismiss from your minds, now and for ever, all that you may have heard, or read, or conjectured about the Dundonnell cause; whatever publications may have reached you; whatever clamour or excitement, on either side, has existed, you are sworn to decide the case on the evidence, and you are bound to dismiss from your minds all that you have previously heard on the subject; and when I ask you to do this, I ask nothing unreasonable of you, or unfair to either party in the cause. The case, as you see from the issue, regards the reduction of certain deeds of settlement executed by the late Kenneth Mackenzie, Esq. of Dundonnell; and the sole question for you to try is, whether these deeds of settlement, by which he disinherited his brother and his brother's family, and left his property to strangers, at least to his blood, are the true deeds of Kenneth Mackenzie?

The estate of Dundonnell is situated in a remote part of Ross-shire, one of the most remote counties in the Highlands, about sixty miles from the town of Dingwall; and for thirty or forty of these miles there is no carriage road to Dundonnell, and hardly a horse road leading to it. From the remoteness of the situation, you will see that the evidence must be limited, so far as regards the latter part of Dundonnell's life, to those who had occasion to be in that part of the country. By a contract of marriage in 1785, George Mackenzie of Dundonnell, the father of the late Kenneth, destined the estate to the heirs-male of the marriage. Of that marriage there were born three sons and a daughter; the eldest, Alexander, who became an apprentice to a writer to the signet in this city, and who died before the death of his father; the second, Kenneth, the alleged maker of the deeds, born in 1790; and the third son, Thomas, the pursuer of the present action; and the daughter is the wife of the Rev. Dr Ross of Lochbroom. In early life, Kenneth was marked by the imbecility of his character. He was incapable, from natural deficiency, of learning or following his studies in the way the other branches of the family did. He kept aloof from the other children, wandering alone, or associating with fools or idiots about the place. He betrayed a singular propensity, a singular predilection for all kinds of poultry. He had the good fortune to be born in the better ranks of life, otherwise he could not have shown that small degree of capacity, which, by dint of education driven into him, and the society in which he lived, made him conduct himself in a more tolerable manner than his incapacity would otherwise have permitted him. In 1798 he was put under the guardianship of the Rev. Niel Kennedy, now a respectable clergyman, who remained his tutor at Dundonnell till 1801. He was succeeded by his bro-

ther, the Rev. John Kennedy. These gentlemen I will bring before you, and they will be able to detail to you the early habits of this unfortunate person. He did acquire writing, but arithmetic was considerably beyond his powers. Every exertion was made by his tutors to instil into his mind such education as his capacity enabled him to follow. He was a good-natured lad, easily imposed upon, easily flattered, and easily led. His attachment to his relatives, so far as he was capable of forming attachments, was kind-hearted and good. He was of great timidity of disposition, and, as I shall show you by clear evidence, he was the source of the bitterest regret to his parents, from his incapacity and inability to conduct himself with ordinary prudence. Every exertion being made to improve him at Dondonnell, in 1804 he was sent to Aberdeen, and placed under the tutorage of the Rev. Niel Kennedy, who had been appointed minister of the Gaelic congregation in that city. I call your attention thus early to a letter written by George the father to his eldest son, who had come to the office of Mr Kenneth Mackenzie, W. S. Edinburgh, dated the 1st March 1808:—

DEAR SANDY—I got the proof taken at Inverness by Mr Mackenzie. Mr Duncan was very active in getting it taken. Sanders at Bracklach, and he, the banker, showed his friendship in taking the proof. I wrote Mr Kenneth yesterday, expecting he would give every aid, so as to get it over or the session is up by all means. I hope you received it or now. *Your brother Kenneth gives me very great concern, and he will not be advised by Mr Niel. I must have him removed from there against the latter end of March, or early in April. I wish to send him to some academy, and to a man who would take strict charge of him, and a man of morals and character. I mean to keep him only one year at school, so as he may be capable to write and spell, [he was at this time 18 years of age,] and know to transact any business he may follow. He is ignorant and proud, and that is instilled in him where he is. God knows who directs him, but I am persuaded Mr Niel and his wife gives him every attention, and endeavours to keep him at his education with a private teacher. I wrote Mr Kenneth if he could direct me where to send him, and to whom. I hope when you settle the teinds, you will not neglect to look out for a place for him of good fame, and will strictly look after him. Your mamma is but poorly. She is to write you soon. She, Jean, and Mr Duncan, join me in compliments to you.—I am, &c.*

Here is real evidence under the handwriting of the father, that he did not consider Kenneth capable of conducting himself, and of the difficulty of instilling into his mind the rudiments of education. In Aberdeen, notwithstanding the exertions of Mr Kennedy, and a private tutor, the Rev. Mr Finlay, it was extremely difficult to make him apprehend any thing. His appearance there will be described to you. His habits were of the grossest description—wandering about without stockings, and associating with old women. He had no amusement, except his affection for the fowls. Mr Kennedy was afraid to leave him alone, or to give him the pocket-money usually given to young men in his station in life. He would sell his clothes for trinkets; he was easily intimidated, and easily flattered. Mr Finlay could not make him comprehend the day of the week, the month, or the year of God. He was treated by the boys as a fool, and went by the name of the Highland minister's fool, and I believe he was caricatured in the print shops. Here a scene occurred strongly indicative of that imbecility which never forsook him. An attempt was made to inveigle



him into a marriage with a person unsuitable, when he was about 19 years of age. Mr Kennedy thought it necessary to interfere, and the bridegroom was carried away in tears by Mr Kennedy from the object of his affection. An attempt was made to detain him, and Mr Kennedy was obliged to threaten to send officers to force him away, if the parties would not give him up. Upon taking him home, he was locked up for the night, and next day he was sent from Aberdeen to his uncle at Nairn, to be put out of the way. The parole evidence upon this subject is supported by another letter from the father, who had heard of this extraordinary marriage. It is addressed to Mr Mackenzie, banker at Inverness, and dated 9th April 1808:—

DEAR SIR—I had letters late last night from Sandy, of the 1st and 2d April, and a letter from brother Simon from Nairn; and you may verily believe me that my wife and I are greatly distressed since we received them; and, by what Simon writes me, he came to consult you upon the business. I have only to say that nothing ever distressed us in the manner this unlucky affair has; but still we have hope that our friend's counsel and plan may, with God's assistance, turn out better than we expect. Therefore, I run the bearer express, in order that you may detain this unlucky youth at your house till I arrive, and till I concert with you and his uncle what is to be done. This is in the event he has left Nairn; and if not, I wrote his uncle by this express to keep him there, and not let on that I am going. I shall be at your house (God willing) Wednesday or Thursday at farthest. My distressed wife joins me in kind compliments to you and family.— And I remain, yours, &c.

Here you see for the imbecility of this unlucky youth he felt bitterly. He appears afterwards to have gone to Inverness, and again, in September 1808, George writes to the banker—

Mr Frank Gillanders leaves here to-day. I wish my Kenneth was so solid as Frank; I do not know on earth how to dispose of him; but I suppose, if no better does, he must go to the army, as he is qualified for no business. My brother leaves here also to-day, as he sees the weather so broken. Sandy is to remain for some time. I never knew a country so reduced in point of money or credit as this coast is; nothing but failures every day; nor do I suppose there will be a shilling of rent paid this year in the parish of Lochbroom. No fishing, or the least demand for black cattle; in short, credit is at stake.

To the army he accordingly was sent, having obtained a commission in the Ross-shire militia, which he joined at Hillsea Barracks; and a pretty officer he was. We shall bring before you some of the officers, and the respectable surgeon of that regiment, to give their own description of Kenneth. One of these happens now to be a physician in Edinburgh, my friend Dr Borthwick, and who had occasion to observe him when called upon to give him medical advice, in consequence of over-eating himself; and notwithstanding the remonstrance of Dr Borthwick, he stuck to his beef-steaks and his favourite drink, cream. Did he enter into the usual conversation at mess, trifling as it was? He did not. With him there was no occupation—no reading of books—no reading of newspapers; but he had his cocks and hens in the barracks, and these were his great delight. He also amused himself with stories of ghosts and witchcraft, in which he was a firm believer. He frequented the mess-kitchen; and when on parade, he was attended by a serjeant, who pricked him on the right and left, that he might be able to perform his duties. The Ross-shire militia came to Leith, and was

stationed at Pennicnick. There he made exhibitions which indicated that he had no sense of shame. The witnesses will describe them to you. When in Leith, he was afraid to go home in the dark; and when visiting a friend in the evening, a chairman was sent to accompany him home, not from excess in drinking, but from a fear of ghosts. In 1812 or 13, he obtained a commission in the Inverness-shire militia. He rose in rank. In intellect never. His habits continued the same. He had persons who generally wrote all his letters for him. We are fortunate in being able to bring Dr Campbell, who was the surgeon of that regiment, and now in Edinburgh, and another medical gentleman, and they will describe him. He had the honour to be present at a review before the Allied Sovereigns on Portsea Heath, while the regiment was stationed at Portsmouth; and in marching along with his regiment, he was put behind a hedge to be out of the way, and was afterwards taken up and sent home in a post-chaise, from inability to make any exhibition. On the 21st November 1813, the eldest son, Alexander, died. This of course was a source of great regret to the father; and I believe we shall be able to prove, that while he mourned over the loss of his eldest son, he also deeply regretted that his estate should fall into the hands of a fool. Soon after this, he communicates the matter to his friends, and on the 15th December of that year he writes to banker Mackenzie; and after deploring the loss of his son, he says—

I fear Kenneth has gone to Holland. I wrote Kindace to stop him; he is a sillie senseless boy; never studies his company or credite.

And on the same day he writes a letter to the pursuer of this action, in which, after deploring at some length the death of Alexander, he adds—

I fear Kenneth's judgment—he is uncommonly sillie, and fond of low company; if this continues by him, he'll repent it; and he is expensive and sillie to an uncommon degree, and minds nothing but his sillie dress—no word of credite or honour with him.

I say that the parent's heart must have bled when he recorded the character of his son, and the heir now to succeed to his family, in these very strong expressions. The regiment was disbanded about 1814. You must expect, from the character of this man, that he was not careful of his money matters. This also was a source of regret: and accordingly, on the 20th of August 1814, the father writes to the banker—

As to the letter you enclosed me, I do not know what pretension or cause for asking such, but mere dissipation and folly; and till a proper atonement is made to me, for lavishing more than his pay as a Captain, and furnishing him money at different times—it was rather more than should have been done; and I am determined to abide as I am, with respect to money matters.

His extravagance and folly still continued, and his father again writes, on 5th June 1815, that he would make no farther advances. What does he do next? He takes a place called Seabank, in the neighbourhood of Inverness; hires a great number of servants, and conducts himself in a very absurd manner. Several witnesses will speak to this. He has poultry there in still greater numbers, and

you will find him, on some occasions, lying on the ground, groveling in the dust, with his hens perched upon his shoulders. Here he had an hospital for sick hens, and he gave them names and designations. His belief in ghosts increased instead of diminishing. He believed in charms and spells, and had white and red tape tied round his legs to keep away the witches. He was visited here by the common idiot of Edinburgh, called General Brown; and you will find them sitting together, adorned with mock moustaches, drinking their cream, and going through their military exercises. Another scene also took place here, exhibiting that want of shame which he had shown in the early part of his life. In another letter of the 20th November 1815, from his father to banker Mackenzie, we have the following:—

His taking the farm you allude to, seems to me that he is not in his proper senses, or that he has done, or got done, what cannot be reversed; but whatever is behind the curtain, or is fixed on Kenneth, time will tell, but I rely on your letting me know every circumstance, or what induced him to take such a farm, or if you know or heard of his marrying any one in the town or neighbourhood of Inverness, or while at Portsmouth; but I shall take care that he shall not be bettered one penny sterling, by me or my order, till such time as he shows me, [not by merit, certainly, I should think] and the world that knows me, that he reclaims; and even should that be the case, he will have but a poor chance of ever enjoying what belongs to me if I can; so please let me hear from you in course, and weekly, if you please, regarding him.

On the 11th of December 1815 he writes to the present pursuer—

I have no news in the world to amuse you with, but what will surprise you a good deal to hear, that your brother Kenneth has taken the farm of Seabank without letting me know, or the banker, *as he says himself*, nor had his mother or I a letter from him since he left Portsmouth. His conduct surprises us, and the banker says the same; however, I suppose he means to marry, *if not married*; he has collected at Seabank a number of Lochbroom servants, such as Aby, John Kenneth's daughter from Ullapool; Isobel Bain, the smith's daughter, that served John Bain in Corihail; a cook-maid; Allan Maclauchlan, that married Aby Miller, for his grievance; John Fraser (Rachel's son); and a body-servant—being six in number at Seabank. His regiment was sent to Forres about a fortnight ago, and, as I am told, he comes frequently to Seabank—so that he must have something in view which the banker says is not known to him; however, his misconduct will not hurt you in the least, whatever it may better you. He never consulted me on any point, and so will appear by him. I shall write you in the next any thing that I hear of Kenneth's future proceedings, as his conduct does not surprise me in the least, as he is not possessed of common sense.

The regret which the parents of this unfortunate lad felt remained with them to the last. George again writes the pursuer on the 19th Feb. 1816, in which letter he says—“Your mother and I are giving way fast, and consequently we look up to you as our only helper.” I say that this is testimony beyond all value. There is here wrung from the heart of this parent, attached as he was to this poor lad, a description of the character of that unfortunate son. “We look to you in our declining years as our only helper.” Had Kenneth been a person of ordinary understanding and conduct, what father would have thought of disinheriting him, or looking up to his younger son as the prop and stay of his house? This resolution was one he followed up with the strong intention of making a settlement, and en-

tailing the property on his son Thomas, which, unfortunately, was not carried into effect. The father died on 26th September 1816, at Inverness. We shall be enabled to describe to you, by a witness, the scene of his deathbed; and I believe you will find in that scene expressions of regret with regard to Kenneth, such as appear in his letters to Thomas, dropped from his dying lips; and that his own dissolution was nothing to the dying man, to the distress which he felt that the honours of his house devolved on one so unworthy to wear them. Kenneth took no charge of the funeral. The younger brother took the charge of it. Kenneth attempted to uplift his voice in prayer, but the attempt failed, and it excited, even upon this solemn occasion, the laughter, the unrestrainable laughter, of those who witnessed the mockery.

Before I leave Seabank, I shall call your attention to a specimen of Kenneth's own handiwork. You will be told of the number of letters written by this well-educated captain; such of those letters which are holograph of him are consistent with our theory of the case, but are contrary to the theory of the defender. I will show you one of the letters of this well-educated gentleman, who had two tutors at Dundonnell, and three at Aberdeen. And how does he write to his mother?

Seabank, 7th March 1815.

MY DEAR MOTHER—I should have not neglected writing you for it is yourself that minds me however I may have it in my power yet to mind you and repay you for all your trouble and anxiety about me however distant we may be on this present occasion, yet there is none of them that wishes you better there I do and feel a great deal the loss of your good advices towards me which I have few friends to look up to but the Great One who is alwas about and has brought me out of a great deal of difficulties and still supports me yet. My dear mother I never thought there would be such a reformation on me for I am too strict upon my servants they can hardly say that I am an easy master to serve I am to much of your own way of thinking for the more you trust to one the less they do I am afraid they will make me a girning creature for I am continually scolding them I am sorry I wrote John Fraser at all for I have a favourite boy and I am afraid he is not a good companion for him John would make aney one belive he is a good worker but shew me the one I would give for Allan he is so quiet and does every thing without being asked but John makes me think shame he is so indolent Inclined I was obliged to scold him severely he tells such a deal of lies that I am not belive him he is to fond of his bottle I feer but I hope you won't mention what I said about him Many thanks to you for your present of beef I am afraid you are robbing yourself I know every thing is hard enough upon you at present no person knows that but those that is seen it and many us the time I felt for you that dirty body Finlay wont carry any thing I was going to send you four beautiful milk cogs for your own use might you not send me word when you wanted aney thing to be carried to Lochbroom my coup and horses would be at your service aney time the length of Kirktown It defied me to make Finlay carry the close stool I offered him aney thing but he would not do it if you would like I should send you two flocks of chickens if you would rather that then sending you a cock and a hen I would send them both Isabal could not get the shoes cheaper than three shillings Finlay says you only gave him twenty pence we would not take it I have got three milk cows and expects two more I sell the milk in town every day it amounts per day to twenty pence and sends my eggs to market, regularly gets seven pence the dozen for them,—there is no eggs to be had in town except my own, they are of a very laying kind. I mad fresh butter for the first time yesterday, which was very good. I have been complaining for some time back, but I am getting better now,—it was with boil upon my stomach [arising from the beef, I suppose] I could not take aney thing but it always returned in a few

minutes I never hardly go to town at all, I have plenty to do at home. the meal is very cheap, a shilling per peck. I am going to write to my father; I don't know how he will receive it; as it is your particular desire, I will do it. I hope you will excuse the shortness of my letter. I remain, &c.

Shortness of the letter! I hope you will excuse the length of it, gentlemen. He had been stationed for some time as captain in command of a detachment at Fort George, and you will hear the eloquence of my learned friend the Solicitor-General explaining to you with what vigour and power he discharged his duties; but, in point of fact, he did not attend the parades there; and when he did go, the serjeant pricked him on. He showed him how to sign the returns; and one of his military manœuvres was, that when a drunken drummer was carried to the guard-room, the captain followed, and kindly carried the drummer's shoes. Here he became acquainted with the family of the Roys. The family consisted of Dr Roy, the surgeon of the fort; of Mr Robert Roy, W.S. of whom we shall hear enough before we are done; and of several daughters, one of whom was ultimately married to Kenneth. The father by this time was dead. Kenneth improved not in his military acquirements, nor in his literary attainments; but he had one improvement dear to the eyes of the lady, dear to the eyes of the family of that lady—he was now the Laird of Dundonnell, and had succeeded to the estate. I believe the estate was clear of incumbrances at the time, with the exception of one bond for L.6000, which sum had been borrowed to pay off the debts which Kenneth had incurred at Seabank. It yielded at this time from L.800 to L.980 a-year. After his acquaintance with the Roys he came to Edinburgh; and it is material to observe, that in July 1817 he set his hand to a deed, leaving his estate to my client, the pursuer. Miss Roy brought no tocher, but there was a contract of marriage made out, and a precious document it is. It is a contract by which I fearlessly say, while they cognosed Dundonnell, they set their hand to their own disgrace. L.900 a-year was the outside of the rental. How much money did she get, think you? L.500 to Miss Roy, who brought nothing, by way of pin-money! which is not customary in Scotland, except in families of great distinction. The contract goes further; it begins by conveying the lands to Kenneth for his liferent only, and the heirs of the marriage in fee;

—reserving full power to sell and dispose; but with the special assent and consent of the said Isabella Colina Roy, and not otherwise; but excepting always from the power of sale the liferent annuity hereinafter provided, which was declared irrevocable, agreeably to the following deed:—“In which lands and others the said Kenneth Mackenzie bound and obliged himself, his heirs and successors, to infest and seise himself in liferent, and the heirs and others above-mentioned in fee; and he further bound himself and his successors to make payment to the said Isabella Colina Roy, yearly, during all the years of her life, *not only during the subsistence of the said marriage*, but after his decease, in case she should survive him, a free liferent annuity of L.500 sterling;”

so that, without the consent of Isabella Roy, the unfortunate man could not contract sixpence of debt, nor dispose of an acre of his estate. Here is an interdict against him, “but excepting the liferent annuity, which is declared irrevocable.” So, not only was he restricted, but she was, out of L.900, to have L.500 for her own



use, but restrictable to L.400 in the event of there being children. They were to go to reside at Dundonnell; and this lady's pin-money, who had not one farthing of tocher, was to be L.500, living quietly among the mountains. Then it is pretty tightly fenced; there is power given to her, without consent of her husband, to uplift and discharge the annuity; and there is given to her, in the event of her surviving, the half of the furniture. She was to be infest and secured in her L.500 a-year, whatever became of the rest of the rents.

Now, did you ever hear of such a contract of marriage? I ask, under the correction of this Court, whether such a deed was ever seen? L.500 a-year of pin-money out of L.900! and the husband to be tied up not to interfere! This was right enough, if they wished to cognosce Dundonnell, and quite consistent with his imbecility, but totally inconsistent with the theory on the other side, of his being a person of ordinary capacity. This contract is dated 25th August 1817, and, after residing some time at Seabank, Kenneth and his lady go to reside at Dundonnell. Meantime Mrs Mackenzie, a tolerably adroit penwoman, commences keeping a set of books, which so far back as we have recovered them, commenced 15th October 1817, and are entitled, "Account of money laid out by Isabella Colina Mackenzie." She commences also to correspond with the agents of the family, and she conducts the whole of Dundonnell's correspondence. She manages all the laird's affairs, and the laird into the bargain; she corresponds with her brother Robert on matters of business; with Mr Macandrew, agent at Inverness—of whom more anon—writing admirably of cash credits, bank bonds, &c. These are sent to her with instructions how her husband was to sign the necessary instruments for carrying on the affairs of the family.

To Dundonnell then they came. What are his habits? His torpidity increased to a degree almost inconceivable; he conducted no business—attended no county meetings: took no share in road business: no share in the sports of the country—no fishing—no shooting: he had his cocks and hens to the number of 2000, which, with his hen-wife, were his chief companions. He became more and more timid; he got more and more afraid of witches and ghosts. General Brown visited him at Dundonnell, and the laird received him with open arms. He had other idiots residing at the place at the time. You will find him engaged on Sunday forenoon with idiots, with flowers in their heads, and amusing himself by causing them to dance, and jump over sticks. We have Mrs Mackenzie boasting how like the laird she could sign and write. Dr Wishart, the family physician, was not allowed to visit him when sick; Dr Adams was preferred, the brother of Mrs Mackenzie, resident at Forres, at a great distance from the house. There was a servant in the family of the name of Campbell—I almost tremble when I mention the name of that man, but mention it I must, mention it I shall. Dundonnell, torpid as he was, uneducated as he was, had still about him human feeling—feeling that can hardly be dignified by the name of human, as he had it; but he had a feeling of jealousy against this man Campbell. God forbid that I should say it was just. That is no

part of my case. Just or unjust, I care not; Dundonnell had his suspicions, and had expressed them to many. He expressed his abhorrence of Campbell, and his anxiety to have him dismissed; but dismissed he was not. Mrs Mackenzie would not permit it. If she were as pure as the unstained snow, when she heard that this suspicion lurked in the mind of her husband, in the name of Heaven why was he not instantly dismissed for ever, when he was the object of aversion or detestation to her husband? But no; the laird could not get quit of Campbell; and you will see that we are justified in bringing this painful matter before you. In autumn 1819 Robert Roy paid his first visit to Dundonnell. His first visit! Would to God it had been his last! I make that prayer not so much in behalf of the pursuer, but I make it in charity to Robert Roy himself; and this visit he describes in the record of these proceedings as follows:—

It was in the course of that first visit, in 1819, that Dundonnell put into the defender's hand a written note of instructions, which he directed him to transmit to Mr Æneas Macbean, then his agent, containing the heads of a settlement of his estate in entail, in favour of the heirs of the marriage, then of the defender and other heirs substitute, under burden of his wife's liferent, and certain legacies and provisions. Nothing could have been more unexpected to the defender than this communication. He remonstrated at the time; but was told it was not a matter for his consideration, that Dundonnell had well reflected upon it, and that his resolution was decisive, to exclude his brother and his family, and to settle upon his sister's family sufficient provisions in money. In communicating this note of instructions to Mr Macbean, the defender expressed a very strong opinion to that gentleman, that one of Dundonnell's nephews or nieces would ultimately be his heir, and begged him to keep this distinctly in view, in framing the clauses of destination, so far as regarded heirs to be afterwards named, and in reserving a power to revoke and alter in the most ample and comprehensive terms.

About this time Mr Roy was substantially the agent managing the affairs of Dundonnell; he was in the office of Mr Æneas Macbean, but you will see from a mass of letters that he was well acquainted with his affairs. From 1819 to 1822 there are only eight letters from Mr Macbean. Roy was in correspondence with his sister in every thing. I pray your attention to what was done in 1819. He got this note of instructions, he tells us, on his first visit, with an expression of Dundonnell's full resolution to put the estate past his brother. We have recovered written evidence, which shows how Mr Roy set about the work, in the following letter dated Fort-George, 5th September 1819, addressed to Æneas Macbean:—

MY DEAR SIR—I have now returned from Ross-shire. Dundonnell, you will be glad to hear, is in good health, and takes continual exercise.

The subject about which he expresses most anxiety is his settlements. I annex a copy of the letter of instructions written out by himself. I shall, in case of accidents, keep the principal till I have an opportunity of delivering it to you personally. I also annex a note of the legacies, the original of which I likewise hold. He desires that the scroll may be ready for him by the time I go back there, which you know must be in twelve days hence at farthest. But it is quite indispensable that you too should make arrangements for going there from Inverness.

I wish that his letter may sufficiently explain his intentions. You will observe that in it I am named after the heirs of his marriage, reserving power to alter. Now, although he is fully determined on excluding Thomas altogether, yet it is only for the present, and from personal and temporary reasons, that he passes by Dr Ross's children. One of them, I am confident, will ultimately be

his heir; and you will require to keep this in view, in directing the clauses of entail against the heirs afterwards to be named, and also in making the clause, reserving power to alter, as to the heritage, as ample as possible.

The liferent to Mrs Mackenzie, and to me, whom failing, to the trustees, under burden of debts and legacies, &c. and then to the heirs, was adopted by Dundonnell, as being the best calculated for getting his intentions effected. If any other is more eligible, he expects you to suggest it. I shall daily expect to hear from you.

I waited on Dr Ross. Did his words and acts correspond, no cause of offence would subsist between him and Dundonnell; and I am quite sanguine that your presence would go far to remove differences. That consideration, as well as the incomplete information regarding the minutiae of the settlements, will, I trust, at once induce you to visit your client.

I shall make their other matters the subject of a different letter.—Sincerely yours, &c.

(Copy NOTE of INSTRUCTIONS by Kenneth Mackenzie, subjoined to the preceding letter.)

Dundonnell House, 31st August 1819.

DEAR SIR—I subjoin general heads of the settlements of entail I formerly spoke about, and desire that you will immediately complete them. The heirs of my marriage to be first; then Robert Roy; then Kenneth Adams; Joseph Adams; then Strathgarve's second son; then my heirs whomsoever, reserving right to prefer others; the legacies to be according to a note I shall send of them; and other particulars. I wish a liferent of all to Mrs Mackenzie and to Robert, and then to these trustees; Dr Roy, Mr Adams, Mr Mackenzie, Strathgarve, Captain Campbell, Mr Anderson, banker, Mr Macbean, Mr Macandrew, or one of them accepting. Make any suggestions you think advisable in the scroll, as I shall carefully revise it. Yours, &c.

(Signed)

KENNETH MACKENZIE.

Here then Mr Roy, by his own account, on his first visit receives the note of instructions, which is really a curiosity. Remember the description I have given you of Dundonnell—think of his early history—remember his habits, and now look at this note of instructions said to be holograph of Dundonnell, and to be the spontaneous effusion of this country gentleman. Look at the terms of it. I doubt very much if any one of you could compose such a document as this; I am sure I could not without assistance. It happens to be addressed to nobody, but dated Dundonnell House, 31st August 1819, and begins, “Dear Sir.” Recollect the letter about the hens and cocks. Contrast that note with it. This man, in the scale of intellect I have described, is made to write, if he did write that note of instructions; and so cautious and strong-minded a man is he, that notwithstanding the fullest confidence he had in Mr Macbean, he writes to him that note of instructions, as if he said, “These are my instructions for my settlement, but have a care how you follow them,” for “I shall carefully revise the scrolls!” What! this man revise the scrolls! He correct the entails! He look that every thing is tight and right! Then follow the legacies; and how are they expressed? Pretty well for this well-educated captain.

#### LEGACIES.

To Mrs Ross (excluding the *jus mariti*), L.6000 in liferent, and to the children equally in fee [pretty complicated, you must observe, gentlemen] interest payable from the time of her husband's death, or in the event of her predecease, to the children respectively from that term—under the control of the representative under that deed. [Tolerably complicated again.]

To the heir of the body of Thomas, L.1000, interest from his attaining twelve years, under control as above—principal of this and former legacy payable on legatee's being of age.

To Kenneth Adams, second son of George Adams, residing in Forres, L.1000, interest from legator's death, principal payable as above.

To Louisa and Patricia Roy, L.1000 each, interest as above. The three last legacies to be each augmented to L.2000 if Mrs Mackenzie dies before they become payable.

To Robert Roy, L.2000, interest as above. But, if any legatee succeeds, the legacy to be held as paid.

Mrs Flors Mackenzie, Dundonnell's nurse, whom failing, Aby Mackenzie, or Robertson, her daughter, to occupy for their lives the farm of Gorstinore rent free, and the representative to allow 40 head of sheep to graze on the Mains.

Now, remember what I told you of Mr Campbell, and of Kenneth's aversion to him; and if you can in your imagination figure to yourselves the last man to be recorded in the will of this individual—no matter whether his suspicions were just or unjust—would you not conjure up any human being sooner than Campbell! The note continues to state, "Dundonnell verbally added, that Alexander Campbell, if continuing in his service at the time of his death, was to have an annuity of L.20!" Let the suspicion be as foul as they represent it, can you imagine that this man, if he had the ordinary feelings of a man, could have ever made such an addition to his proposed settlement as this? But such is the document which he transmits to Mr Macbean. Now, after having written this letter, we trace by dates, pretty tightly, the course by which Roy proceeded, step by step. He had written that he was to be at Dundonnell twelve days after the 5th September, then on the 12th he writes to Mr Macbean from Forres—

MY DEAR SIR—I am anxiously looking out for a letter from you. As the bond has not yet been sent for Dundonnell's signature, I am apprehensive that some unexpected obstacle to obtaining the loan has occurred. If so, there seems to remain only the alternative of a sale; and it, I have no doubt, will, on your recommendation, be readily adopted.

Mr Macandrew has retired bills and paid petty accounts to the extent of L.75; there is another bill of L.58 noted at Inverness; and as Dundonnell intends coming down here on the latter days of this month, he will require a farther sum on that account, say L.200 in all. You can remit through the Bank of Scotland; and as I go again to Dundonnell on the 20th, it will perhaps be as well to make it payable to me; or unless I hear from you to the contrary, I shall draw on you for it at one month's date.

I waited on Dr Ross, who manifests much inclination for a cessation of hostilities; he has deferred all active measures till you come north, and I trust things will then be settled.

I devoted almost the whole of my time at Dundonnell to Mr Urquhart's accounts. They are unintelligible and extravagant. He quits his place at the term, and a happy riddance he will be.—Yours, &c.

Here he states that he was going on the 20th to Dundonnell, and the same day he writes to Mr Cumming—

I shall be within your town of Dingwall about Monday week; and write you now to request that your accounts against Dundonnell may be in readiness by that time, as it is wished to get them looked over while I am with Mr Mackenzie.

Then on the 13th Mr Macbean writes to him, acknowledging his letter of the 5th, stating that neither Thomas nor Dr Ross's family ought to be overlooked, and ought to be called next after

the heirs of the marriage, and should therefore form the draft after that footing.

I shall endeavour to have it in a packet at Dingwall by Saturday or Sunday next. If Dundonnell, however, remains still of his former opinion, as expressed in the copy of his letter sent to me, I would like that the alterations and completion of the settlements were managed by some other man of business. There is, besides, a propriety in this, and I know Dundonnell will not take it amiss.

This is creditable to Mr Macbean, but inconsistent with the theory of the defender. The packet was to be at Dingwall by Saturday or Sunday next. Then on the 16th September Macbean writes directly to Dundonnell, stating that he now sent the drafts by the mail coach, and stating also that he mentioned to Mr Roy, in a letter of the 13th current, the reasons which induced him to recommend an alteration in the instructions. Then on the same day Macbean writes to Roy that he had prepared and sent by the mail the draft of Dundonnell's entail and trust-deed in a packet to Dingwall. Roy knew that a packet containing these deeds was sent to Dingwall, and what does he write in return? Remember he stated his intention of being at Dundonnell. Then, on the 21st of September, he writes to Macbean the following letter:—

Your letter of the 13th September arrived here when I was absent on a visit at Forres. I presume you addressed it to me, instead of to Dundonnell himself, who alone can judge of it, as through me his instructions were transmitted to you; but that was done merely because it appeared to him not unlikely that you might have left Edinburgh on your way north before it could have reached you; and he desired me, if, on inquiry, I found that had been the case, to leave the letter with Mr Macandrew, that the deed might be prepared by him. I have now, however, forwarded it to him, and shall be glad to find your matured opinion induce him to adopt, in his settlements, the alteration which already I have earnestly, but in vain, recommended. That recommendation I repeat in the letter which accompanies it, and I shall beg your perusal of a copy of it retained by me.

Now, he knew the parcel was at Dingwall. He writes to Mr Macbean, consistently with his former intention, that he was to return to Dundonnell, and to leave Fort George that day (the 21st). The mail goes round by Inverness and Beaully to Dingwall, Dundonnell's post town. Roy crosses the ferry to Fortrose, and gets to Dingwall in time to receive Mr Macbean's parcel; and upon the day which he records in his letter that he is setting out for Dundonnell, he writes the letter of remonstrance, to which I shall call your attention presently; and we shall prove by the marking on the back of the letter, in the handwriting of the postmaster, that he must have got possession of his own letter to Dundonnell—an admirable letter for the purpose of evidence for the pursuer:—

Fort-George, 21st September 1819.

MY DEAR SIR—I communicated to Mr Macbean your instructions regarding the entail, and now send, enclosed, a letter from him, addressed to me, probably because you intrusted your letter to me in case he might be on his way from Edinburgh.

From it you will observe, that the children of Thomas and Dr Ross are called next after the heirs of the marriage, in the draft of the deed to be prepared by him, and which probably has by this time reached you. He thinks that they should not, on any account, be passed over; and I entreat that you will most deliberately consider the opinion so impartially given by him. Do not think that, because you reserve power hereafter to call them, you do all that he recommends;

for, from sudden illness, you may want the power when you have every inclination to call them; and, writing on such a subject as this, it would be wrong in me not to remind you that, from your general habits, you, perhaps, more than most other men, are exposed to the attacks of sudden infirmity. Besides, I can scarcely suppose that it is your serious intention, ultimately, to deprive the children of your nearest relations of that property which, should you have no family, does by law descend to them. If it is not, why should you now permit the behaviour of these relations themselves in any degree to influence your conduct? If it is, assuredly I, who am comparatively a stranger to you, have never, more than your nephews and nieces, had it in my power to do any such service to you as should entitle me to what is to them a ruinous preference.

You must forgive me pressing the subject on your attention; privy as I am, from my situation with your agent, to your affairs, and made your confidant when so great an eventual benefit was held out to me, I would yet be wanting in duty to you, and integrity to myself, unless, in writing, I undisguisedly laid the subject before you, although I have already done so verbally. Be assured it will afford me sincere pleasure, on seeing you, to find that my suggestions have had the desired effect.

The amount of the legacies will require to be diminished, if the property is meant to remain with your heir, whoever he may be; and I shall therefore give you back the minute formerly made out, and intrusted to me.—Yours most affectionately.

ROBERT ROY.

Nauseous and disgusting hypocrisy! This is not the genuine effusion of a person who felt as he wrote. Did he not say in his letter that Dr Ross's children would be ultimately his heirs; and why did he not trust to his own verbal remonstrances when he was going to the very spot? Why did he take his own letter out of the post-office, which was ultimately found carefully put up in the repositories of Mrs Mackenzie? And it is thus by too much protestation of integrity that you detect the hypocrisy which pervades the whole of this case. It is proper to mention at the same time, which Dundonnell has recorded through his wife, that he had no dislike to his brother Thomas; for on the 24th September he addresses a letter, his wife's composition, but signed by him, in which he congratulates his brother on the birth of a child, the man whom he was disinheriting, and with whom he had quarrelled; so that at this time, when Roy was remonstrating against the disinherison of Thomas, and taking precious care, as he imagined, to have written evidence of it, Kenneth is writing in affectionate terms to his brother Thomas. Mr Macbean declined to have any thing to do with such a settlement; and as it was necessary to have some fitter agent for so foul a purpose, Mr Roy selected Mr Macandrew, writer in Inverness. I shall show you hereafter, on the record of this case, that Roy has disavowed all connection and communication touching the settlement. Macandrew is represented as a stranger agent, employed by Dundonnell to carry through that settlement which Mr Macbean had refused to be the instrument of accomplishing. We have already recovered, within these few weeks, a letter from Roy to Macandrew, immediately after his return. And how does he write to him, with whom he said he had no connection or communication, and that he had never exchanged words with him on the subject of this settlement? He actually in that letter writes to him that he had written to Dundonnell, and had told him that he had actually spoken to Macandrew on the subject of the settlement, and begged him to consult Macandrew regarding it—another deliberate and

scandalous falsehood, proved by his own writing. (Here the learned counsel enlarged eloquently on a fact, dated 18th October 1819, by which Macandrew, who resided in Inverness, a distance of sixty miles from Dundonnell, is made the factor to collect the rents, warn and remove the tenants, with full power and authority to act and vote for Kenneth in all county meetings of heritors, road trustees, &c. &c.; so that Mrs Mackenzie having secured herself in L. 500 during the marriage, Macandrew became bound to report her discharges of that sum.) Under this fact they took means of proclaiming the imbecility of Dundonnell to the bank. A bank order of a very singular kind was printed for Macandrew, to transact business with the bank in name of Dundonnell, and in which order the signature of Kenneth Mackenzie was printed—a thing never done in any case, and which afforded another indication that he was incapable of managing his affairs. This may be very right according to their view of the case, for Dundonnell had a very odd way of doing business. The mode of his accepting bills was rather curious; they were accepted “Kenneth Mackenzie, Esq. younger of Dundonnell.”

This closes the scene in 1819. They had got no settlement executed that year; and as Roy, by his own account of the matter, states that Dundonnell should not make a settlement in his favour, what occasion had he to commence a correspondence upon the subject again, when the law would have taken its course, and given the estate, as Roy pretended he wished it, to the rightful heir? He resumed the subject in February 1820. Did he take the means of reconciling the brothers? Did he go to the other relations of the family to procure their aid for this purpose? Did he intimate to Thomas that his brother was to disinherit him? No; but he begins again to write about it in the following letter to Dundonnell, dated Edinburgh, 19th February 1820:—

MY DEAR DUNDONNELL—Will you forgive the liberty I take in writing you on a subject to which it is very painful for me to allude for many reasons, of which it is not the least, that it subjects me to the appearance of indelicacy and selfishness. But after anxious consideration, I consider it my duty, and therefore I do it.

It occurs to me, from your not having completed your settlements, that you are now satisfied of the propriety of altering them; although, from feeling a delicacy towards me, you cannot bring yourself to destroy hopes which you may think your previous unexpected and unsolicited intentions may have raised. If this is your feeling towards me, believe me it is not right. It would afford me real satisfaction that all differences between you and your brother were removed; [would it indeed! Did he take the means for the reconciliation? Did he go to him?] and if it is your desire to make him, or, at all events, his child, your heir, and they have a right to expect it, why will you hesitate to say so? You know how frequently and how strenuously I have urged the propriety of this. I repeat, I shall be sincerely delighted to hear that all obstacles to it are at an end. It cannot disappoint me, [Oh no!] for I have never for a moment allowed myself to calculate or think on it; [Not in the least! such a thing never passed his thoughts!] and add to this, without imputing vanity to me, that from my habits of self-dependence, I am better qualified, in all probability, to support myself, than him in whose place you put me.

I beg that you will reflect again on these things, and then write Macbean with your own hand—[I am very fond of MSS. I like the instructions in 1819]—your own lazy hand shall I call it?—“As I intend making Thomas (or, at all events, Thomas’s son) my heir, you can have no objections to complete my settlements. You will therefore get the deeds from Mr Stewart, and copy them out with that alteration, leaving all the others I have made on the deeds. Robert

is to be a *sine qua non* trustee; [Oh yes!] and Mrs Mackenzie must get the Mains and moveables, as I at first distinctly directed." Or if you do not wish to write Mr Macbean again on the subject, write in these terms to Stewart or Macandrew, [What right had Roy to interfere?] bidding him get it done; or if you are not fully determined what to do, write Stewart, "requesting him to copy out the deeds which were some time ago sent him for that purpose, making over my property to trustees; but as I have not made up my mind as to the heirs [tolerably important in a man's settlement] leave that part in such a way as that any heir I may afterwards name can succeed, in terms of the entail."

I cannot help again apologizing for writing you on this subject. You know well that with yourself it originated; [Did it indeed?] and rather than that there should be a chance of your, for one instant, suspecting me of an interested motive in what I have now done, I would just add one request to that of entreating your instant attention to this letter, viz. that with the exception of leaving me a trustee for my favourite sister, you would entirely strike out my name from your settlements.—Yours, &c.

This is the genuine effusion of Roy; prove it to be nonsense if you can. In 1820 Roy is again at Dundonnell; and here again, by documents recently recovered, we trace him step by step. On the 11th of June he writes to Macandrew that he is to be at Dundonnell on the 8th of July; and on the 23d he writes to Cumming that he was to be at Dingwall on the 2d of August. On the 7th of August he writes Macandrew from Dundonnell, and on the 11th he writes to Cumming from Mackenzie's Inn, that he and Macandrew were to be there on the following Tuesday. Now, if there were any farther instructions given in 1820, these, like the former, were frauded when Roy was at Dundonnell.

Then comes 1821. Was he there again, being the year when the deeds were executed? We shall show you how we trace him day by day during these proceedings. [The learned counsel here quoted several letters from Roy to Macandrew, and proved that Macandrew arrived at Dundonnell, and Roy with him.] And who were the rest of the party? Dr Roy was there, Mrs Roy was there, Misses P. and L. Roy were there. Some of the Adamsons were there, and when the deeds came to be executed, who were the instrumentary witnesses? First, a certain person called Grant Manford; and we shall prove to you that he was indebted to Roy for many favours, and was largely promised by Mr Roy; the other was a man of the name of David Fraser, a carpenter. Roy and Macandrew go out of the way—they don't choose to be present, and they leave the boy Manford to get these deeds executed. They arrive on the Friday evening; no business was done that day. The trust-deed was executed on the Monday, and the other deed on Tuesday. Where are Roy and Macandrew? They go out of the way—they leave this stripling to explain to Dundonnell these two large deeds on the Saturday. They have only the Saturday, and part of the Monday, to explain. When was it explained? Who explained it? Manford. Why did Roy go away? Was he ignorant of the deed? Had he not remonstrated about the settlement? He says he knew nothing about it. Will you tell me that Roy did not know that they were executing this settlement? They had a ball in the evening; the laird was fond of this amusement, and they danced till six o'clock next morning. The laird would not be very early up next day after the ball the anniversary of his marriage, a fitting occasion for so foul a deed



To complete the robbery, the other deed is executed on the Tuesday, and they are sealed up. Will any man doubt that Roy knew this? Did they tell any thing about the deeds? Not a word. Manford is silent as the grave. Unknown were they to my client, unknown, says Mr Roy, to himself. Believe that if you can. Roy returns with Macandrew. They had been out of the way fishing or shooting, or collecting rents, at some distant part of the estate. Why should they not be present at the will? Why select the morning after the ball to make this man do the most important action of his life? All this, explicable on our theory of the matter, is the reverse on theirs. Roy returns from Dundonnell with Macandrew, which we have letters to prove; and Macandrew, the framer of these deeds, never, they say, whispered one word to Roy that he was to succeed to the estate—a story which is utterly incredible. Mark the haste with which the deeds were executed! See that Roy, the law-agent, was the person interested in the deeds. If they were explained, the explanation must have been by Roy, the party benefited, or Macandrew. I pray your attention to the import of these deeds. They are complicated, and beyond the comprehension of Kenneth.

The trust-deed begins with the statement that he owed sundry debts, and was bound by sundry obligations; and so on with the usual clauses. Then he disposes in trust to "James Roy, Esq. surgeon to the forces at Fort-George; Robert Roy, Esq. writer in Edinburgh, my brother-in-law; George Adams, Esq. surgeon in Forres; William Mackenzie, Esq. of Strathgarve," [the only one of the clan mentioned;] "Captain Patrick Campbell, of the Royal Navy; Alexander Anderson, Esq. banker in Inverness; and John Macandrew, Esq. solicitor in Inverness," &c.

What is the first purpose in this deed? To secure to Mrs Mackenzie the provisions under the contract of marriage of L.500 a-year; and this is fenced with the usual clauses. The next is a provision of L.200 per annum to the heir entitled to take up the succession, during the life of the said Isabella Colina Roy or Mackenzie, his spouse; and to his sister, Mrs Ross, the sum of L.6000 sterling. So that if this man knew what he was about, he had his brother before his eyes, and his brother's family; and if such was his rooted antipathy to his brother, that he not only disinherits him, but disinherits all his brother's children, was it in mockery he left the heir-male of his brother "L.1000, payable within three years of his decease? To Kenneth Adams, he leaves L.1000 sterling; to Louisa and Patricia Roy, his sisters-in-law, L.500 sterling each; to Robert Roy, the sum of L.2000 sterling; to Alexander Campbell, if in his service at his death, L.20 sterling per annum;" and after providing for all these purposes, he directs his trustees to pay the free residue of the rents to his wife. And recollect that at all events the power of revocation was to be reserved, declaring, however, that no revocation shall be inferred by implication. Look at the clause of revocation declaring this.

—reserving always full power to me, at any time of my life, to alter or revoke these presents, either in whole or in part, and to sell, burden, or otherwise dispose of the whole estate, heritable or moveable, hereby conveyed, or any part thereof

at pleasure : But declaring, that this deed, in so far as the same shall not be expressly revoked or altered by a writing under my hand, shall have the effect of a delivered evident, though found in my repositories, or in the custody of any other person, undelivered at the time of my death ; and that no revocation thereof shall be inferred by implication, and in particular, that no deed of settlement or destination of my estates shall be deemed a revocation of this trust, in whole or in part, unless such revocation is specially expressed therein.

So that, in place of the implicit power of revocation, not only was it not to be implied, but if, after the deeds were sealed up, Kenneth had been advised to alter his settlement without a special revocation, it would not have been effectual. Such is the trust-deed. Now for the deed of settlement, found on the morning after the burial. It proceeds to recite very properly the contract of marriage, and after setting forth the terms of the contract, and the burden of L.6000 on the estate, it proceeds in this way :—

I have resolved, for certain good causes and considerations, in exercise of the powers reserved, as before narrated, to execute the following destination and taillie of my said lands, estate, and others ; therefore, wit ye me, to have given, granted, alienated, and disposed, as I do hereby give, grant, alienate, and dispose from me, my heirs and successors, to and in favour of myself, and the heirs-male of my said present marriage ; whom failing, to the heirs-female of my said present marriage ; whom failing, to the heirs-male or female of my body of any subsequent marriage —the eldest daughter or heir-female throughout the whole course of succession, either above or after specified, succeeding always without division, and excluding heirs-portioners ; whom failing, to and in favour of Robert Roy, Esq. writer in Edinburgh, my brother-in-law, and the heirs of his body ; whom failing, to Kenneth Adams, son of George Adams, Esq. surgeon in Forres, and the heirs of his body ; whom failing, to Joseph Adams, son of the said George Adams, and the heirs of his body ; whom failing, to Mackenzie, second son of William Mackenzie, Esq. of Strathgarve, and the heirs of his body ; whom all failing, to such other heirs and substitutes as I shall hereafter nominate and appoint, by a writing under my hand, at any time during my life,—&c.

Thus you see that he names Robert Roy and his heirs out and out ; Kenneth Adams and his heirs ; Joseph Adams and his heirs ; and the only Mackenzie in the settlement is a person of whose christian name he was ignorant, so that he is designated *blank* "Mackenzie !" Then he describes the lands, and then he attempts to say that this is an entail ! Let me explain to you shortly what is necessary to the constitution of an entail. The instructions were, according to their own statement, to make an entail. Did he make an entail ? I say he made no entail. There is, no doubt, an express declaration that they shall bear or carry the surname and arms of Dundonnell ; and there is a provision appointing the order of succession, with the necessary clauses, in order to render that effectual. But in the very deed in which there is this provision, there is an omission of the clauses necessary to prevent the sale of the estate, or the contraction of debt. The learned Lord will explain to you whether I am stating this correctly, hereafter ; in the mean time, my Lords, I have to state that the usual clauses, called irritant and resolute, are not inserted in the deed, so as to fence the deed against the sale of the estate, or the contraction of debt. In Mr Macbean's draft all is right ; but in this deed they depart from the legal solemnity, although they take Roy bound to carry

the name and arms in all time to come ; and to the understanding of a lawyer, the deed does not contain within it the necessary clause to support that distinction which is to spring out of it. And to render it more striking, there is inserted a provision contemplating that Roy shall break the deed. They knew that Roy never could possess these lands. They make a provision by which Roy has it in his power—Roy carrying the name and arms of Dundonnell—to sell the estate, and invest the price in houses any where. Now, I ask if you ever heard of such a proceeding ? They knew how to make it right, but they purposely made it wrong. These are the deeds under reduction. Kenneth makes no communication to any body of their execution, and he continues still to write letters, perfectly consistent with those he had written from Seabank.

MY DEAREST ISABELLA—You may believe how happy your kind and long-looked for letter made me upon Sandy Mackenzie's arrival on Wednesday night. Indeed, I was near dispatching a bearer all the way to *Treetown*, had not your letter arrived that night, I was in such misery about you. I had no pleasure in any thing sine you went away. Our assemblies [these were the dances among the servants] were put a stop too till your *epistol* arrived, and then we had a merry night with Bell M'Rae, [that was a mad woman]—she was hoised up and down in famous style. Kenny is quite well, and the cough quite left him, enquiring always if aunty will be home to-morrow or not ; and if any one dares to challenge him, he will tell his own dear aunty when she will come home, that they were bad to him since they went away. The Marys are very attentive to him, so is all.

And so on with trash to the same effect. This is the careful reviser of scrolls : " Think of any thing else, and I shall carefully revise it." He remembered Bell Macrae ; and Mrs Mackenzie remembered the accounts, the cash credits, and other transactions. She had a full and complete recollection of the household affairs, and the affairs of the family and the farms, while the laird employed himself with his idiots and poultry. This letter just goes on, like all the rest, with the most childish gabbling. I will not take up your time in reading more of these letters, which are a precious contrast to the holograph note of instructions, and to the provisions in this deed of entail, explained by nobody but by Manford, or by Roy, or Macandrew, who made it ; and a precious contrast to the letters signed Kenneth, and holograph of his wife, and a precious contrast to all the other letters which they will parade as the spurious composition of Kenneth Mackenzie, holograph of his wife. [The learned counsel proceeded to state that Kenneth was afterwards made to execute a trust-deed, under which certain lands were sold, and that the business was conducted by Roy.]

Kenneth died on 15th April 1826, in his brother Thomas's arms, whom he had disinherited, ignorant of the deeds he had been made to execute. The repositories remain unsealed for five days. Mr Roy goes north to attend the funeral ; recollect all his letters ; remember all his communications with Macandrew ; recollect the times of his presence at Dundonnell ; recollect his knowledge of the original note of instructions ; forget not his presence in the house at the time these settlements were said to be signed. His story is, that he knew not of the settlements ; but passing through the town of Perth, on his way to the funeral, he meets with a respectable gentleman of the name of Douglas, now deceased, but whose deposition

has been taken in this case, and shall be laid before you. He tells that gentleman, "I am going to Dundonnell's funeral; I, Robert Roy, am the heir of Dundonnell." The secret silence which had been so long preserved, and the sealed packet in the repositories of Mrs Mackenzie, are now useless. Dundonnell had breathed his last. The proclamation of the disgraceful entail in favour of Roy was safe—at least he thought so. Your verdict will show its safety; but believing it safe, he now communicates to Douglas that he is the heir. He arrives at Dundonnell; he meets my client there; he stretches forth to him the right hand of friendship—he dares to shake by the hand the man whom he had so basely betrayed. At the dinner after the funeral, he sits at the foot of the table, and proposes the health of Thomas Mackenzie of Dundonnell, as the roof-tree and heir of the family. Base and infamous deceiver! He knew what he had done. He cannot deny that he knew, for he told Douglas that he knew; and you have evidence enough even without it. But out of his own lips shall I convict him of that base hypocrisy which characterises the letters I formerly read to you. He ventures to carry on to the last the farce which he had so long enacted. He profanes, he scandalously profanes, that solemn occasion, by uttering what he knew to be false. If he had had the deed in his pocket the day he gave this toast, he could not have lied more deeply than he did with the knowledge of it.

I have thus closed this part of the history of these settlements, and I come now to draw a little longer on your patience, in order to explain the tone, style, and manner of the defence.

Fraud is generally supported by falsehood, truth is always consistent; and you will judge whether there be consistency or falsehood in their theory of the transaction. I must explain to you that George the father had made a trust-deed, the bearing of which you will see immediately. He made it in 1809, conveying certain heritable bonds and moveables to the amount of L.12,000. The object of this trust was to secure an annuity of L.200 to his wife, and L.3000 to each of his two younger sons, Kenneth and Thomas, Alexander being then alive; and L.500 to Mrs Ross, in addition to a certain sum already advanced to her. Shortly before his death he had executed a conveyance of his moveable property in favour of my client. Now, in November 1816, a couple of months after the death of George, Mrs Ross brings an action of reduction of the first deed, of December 1809, and of the disposition of moveables in favour of my client, of September 1816, as being in violation of a contract of marriage executed by George, and as illegally disappointing Mrs Ross of her legitim. She claimed legitim of the whole, including the last half-year's rent of the estate. This half year's rent was claimed by my client; and the claim having been referred to arbitration, that terminated in his favour, a balance of L.800 having been found due by Kenneth to Thomas. The second action was an action of multiplepounding by George's trustees, in which there was a claim made on the part of Kenneth, both for the L.3000 in the trust-deed by George, and also for the executry, as against my client. That claim, on the part

of Kenneth, so far as my client was concerned, was decided against Kenneth, and dismissed with expenses. At this time Kenneth was in France, and he was unable to comprehend those law-suits, which I find some difficulty in rendering intelligible even to you. In March 1817, a third process was raised, in name of Kenneth, to have the cattle and sheep taken away from the farm. That complaint was also dismissed. The fourth related to a certain farm which had been advertised to be let by Mrs Hay Mackenzie of Cromarty. Now, it had been let to George the father, but, by a mistake on the part of the agents for the proprietor it was supposed to have been let on a liferent lease, and on his death they accordingly advertised it to be let. My client took the lease of the farm, when Mrs Mackenzie began a process for the removal of the subtenants. But upon the production of the lease, which had been amissing, and had still a few years to run, the action was dismissed. The consequence of this was, that my client, not having got possession of his bargain, raised a process against Cromarty, and succeeded in obtaining L.300 damages. The fifth was an action, in the name of Kenneth, for exhibition and delivery of the title-deeds; and the last was another process of exhibition against George's trustees. These are the law-suits; and you will see now the reason that I have mentioned them. They were not law-suits in which my client was in the wrong; Kenneth was away at the time, and he knew nothing of them; and these processes could not have created any dispute between the brothers. He was not a party to several of them.

Now let us enter upon the defences of this case. One defence has been given in, in the name of Roy, and another in the name of the trustees. And such a tissue of falsehoods, from beginning to end, as both these defences are, never was presented in a court of justice. Roy begins his defences by stating that the pursuer was his mother's favourite, and that, by giving way to this partiality, she ruined his good feelings and character, and alienated from herself the affections of the other children. Then they go on to state, that, in the eager pursuit of his own interest, the pursuer forgot what was due to his brother and his own honour; and that, with the assistance of a friend, he endeavoured to obtain a deed from the father, disinheriting his brother, without the shadow of foundation. Then they state that he at last obtained that deed, settling the moveables upon him, and disinheriting his sister, which is also false; and knowing that they must have some theory for accounting for these deeds, what do they set forth, after a coloured and incorrect statement of these matters? "All this was bitterly felt by Kenneth. It was impossible it could be otherwise; and the impression was deepened by other proceedings, not less lawless and unjustifiable." Kenneth, they say, felt this so deeply, that he never could look on his brother again. Then they represented these law-suits in the most inaccurate manner possible—that my client raised law-suits against his brother, which drove him from his residence at Seabank, and forced him to leave Scotland for a time. They then give an erroneous statement of the lease from Mrs Mackenzie, and that his conduct was felt by Kenneth to be disgraceful to the

family. The law-suits I have explained, and the circumstances under which they originated. Let us see now how they describe Kenneth Mackenzie.

The defender has been under the necessity of mentioning thus generally these miserable dissensions, in order to account for the feelings with which Kenneth regarded the pursuer from the moment of his succession. He was a man, naturally, of a mild disposition, but, as often happens, susceptible of strong and lasting impressions; and such was his resentment for ill requited kindness, and for those wrongs attempted and inflicted, that he never after forgave the pursuer, or held him as a brother, but had formed a steadfast and unalterable resolution to exclude him absolutely from the estate.

Now, he made a deed in the pursuer's favour in 1817—he received him in his family with kindness—and he died in his arms. The defences describe Roy's first visit to Dundonnell, and they set forth the pursuer's letter of the 21st September 1819, got up for evidence; and they say that Dundonnell received this letter, but returned no answer to it. Why should he? Was not Roy there with him? Did he not precede his own letter, or meet it by the way, and carry it along with him in his pocket? Then he says that he had nothing to do with the agency till 1822, and that

In his capacity as agent, nothing ever passed between him and Dundonnell on the subject of those deeds, or of his settlements. Indeed, after they were completed, Dundonnell never mentioned the subject, except on one or two occasions, to some of the *pursuer's intimate friends*, whom he seems to have thought it right to make aware of his intentions.

Then he goes on to say in the defences—

From great aversion to address a stranger on the subject of his settlements, as to which he had made up his own mind without consulting any body, he had never written to Mr Stuart. In August 1820, Mr Macandrew was again at Dundonnell. Upon that occasion, Mr Mackenzie resumed the subject of his settlement; and having made some alterations, particularly with respect to the legacies, he executed a regular minute of instructions, dated the 17th of August 1820; which minute, and a relative letter, he delivered to Mr Macandrew, [we shall see that when they produce it], desiring him to get back the former scroll, and to have the deeds immediately extended and executed, in terms of these last instructions. Mr Macandrew was again north in December 1820, or January 1821, but he had not found leisure in the meanwhile to prepare the deeds, and in apology to Dundonnell, who expressed anxiety on the subject, he pleaded the multiplicity of his engagements, promising to extend them immediately on his return to Inverness, and to transmit them with a clerk, for the purpose of execution. Dundonnell expressed a desire to delay the execution of the deeds till Mr Macandrew himself should come with them; but it was not till August 1821 that he had any opportunity of returning to that part of the country, when he brought with him the deeds under reduction, which, after being maturely considered by Dundonnell, were executed of the dates mentioned, namely, on the 27th and 28th of August 1821.

This at all events shows you that Roy was at Dundonnell in 1820, as well as in 1821. The defences go on to say—

During all this period the defender had no communication whatever with Mr Macandrew as to the subject of those deeds. [Just look at this, after I have laid the evidence before you.] He never saw the draft of the deeds; he never saw the deeds themselves during Dundonnell's life;—he never even was informed that they were actually executed. [How did he tell Douglas at Perth that he was the heir

of Dundonnell?] Indeed, after they were completed, Dundonnell never mentioned the subject, except on one or two occasions, to some of the *pursuer's intimate friends* [who are they, and what are they, let the defender tell us, and prove it?] whom he seems to have thought it right to make aware of his intentions.

Then here is their character of Dundonnell, drawn by my friend Mr Rutherford, with all his elegance of diction:—

Dundonnell's early education had been much neglected—[Remember the tutors that I said would be brought before you]—but he was a person certainly not deficient in natural talent, and possessed of plain good sense. In country matters generally he was remarkably intelligent, and very much consulted. His business and affairs, and every thing connected with the management of his property, he understood perfectly. He assumed the exclusive charge of his household—[Look at the books of Mrs Mackenzie; her books are the only books that can be got]—including a large establishment of servants; and superintended and directed the details of a considerable farm, which he had retained in his own hands.—[Yes! remember the cocks and hens.] He built extensive additions to the house of Dundonnell, and transacted directly with the different tradesmen employed. He took upon himself the whole business of his estate, having daily and hourly transactions with a numerous tenantry, who resorted to him for directions and advice on all occasions. He was remarkably attentive to his own interest, and very acute in bargains and settlements, which he always concluded personally, and almost always without assistance. He was a good landlord, however, showing much indulgence to his tenants, but with a just discrimination of those who deserved it. He introduced into that part of the country the newer and more approved modes of agriculture; and his estate, during the few years he possessed it, changed its appearance, and gave every indication of improvement which could be expected in that time, from the most liberal and beneficial management. He exercised the greatest hospitality, and was visited and respected by all the gentlemen of his county. He was kind and generous to the poor, of regular, sober, and religious habits—[Recollect the dancing idiots]—and an ardent promoter of all instruction among the peasantry of that district.

In the other defences it is said that

Instead of being facile and incapable, the deceased was a self-thinking, strong-minded, resolute man. He occupied a station which makes this posthumous discovery of his imbecility absurd. For one thing, during the very time that the pursuer particularly speaks of, he commanded a detachment of militia,—[Gallant man!] and was afterwards, when he resided permanently at Dundonnell, as much looked up to, and as much consulted, as any country gentleman in the county. He lived on his own extensive property, in the midst of his numerous tenantry, and directed the whole letting and general management of his estate—he directed, and personally superintended, the operations of two valuable farms in his own hands, and the sales of the very extensive stocking on them—and completed judicious and systematic improvements of every description on the estate. He was dealt with in all manner of important transactions, by his neighbours, and by men of business, in every part of the country, whose duty and interest it would have been to have declined to have any thing to do with him, if a thousandth part of the pursuer's description had been accurate.

The assertion that he was under the control of his wife, “who surrounded him with creatures of her own,” is inconsistent with the prominent and notorious facts of his character and habits. There never was a man in the world who took his own way more completely, or whose wife was less capable of forming even the idea of keeping him in thralldom.

And so on, page after page, in the strongest possible language; so that you will see that the two cases are as widely different as the poles asunder. Such is the character they give of Dundonnell; and what do they say generally of my client? They have put

on this record a statement against the pursuer, whom Roy met at the funeral in the way I have mentioned, in the graphic words of my learned friend the Solicitor-General, that my client "had made *exhereditation* his right;" and that Kenneth, from a knowledge of the pursuer's character, who they say had fallen into habits of dissipation, had resolved to deprive him of the estate.

They have drawn the sword with a vengeance, but on their own heads must the vengeance fall. They have defended those deeds, not by stating that Kenneth Mackenzie was a person of tolerable capacity, but they have drawn a high-coloured picture of his strength of mind. Here they have joined issue with us out and out; and they have made the base and calumnious statement, that my client had fallen into debauched habits, which statement Roy knew to be false, and that he was unjustly disinherited. This is no ordinary case. The pursuer is on trial here, not only for his estate, but for his honour and character. Who the person is that shall benefit by these proceedings, your verdict shall show.

One topic more, and but one, has been introduced into these defences. They tell us that this is a case of clamour got up in Ross-shire. They talk of a conspiracy—that my client's circumstances have not been good—and they taunt him with this—and they accuse some of his relations for supporting him. Does Roy complain of this? Is not he the person that remonstrated on the impropriety of these deeds, and is he the person to complain? They tell us in one defence that Dundonnell kept the deeds concealed; they tell us in the other that they were not concealed at all. They tell us at one time that there were outrages among the peasantry; at another time, that they respected the will of their landlord, not only as legally binding, but as morally good. But you will not be carried away by any prejudices. You will hear witnesses of all kinds examined. You will judge of the will; you will look at the evidence dispassionately, and you will see on what side the truth lies. Look back to the whole matter; look at Dundonnell's early imbecility and bodily habits. Remember his conduct at Aberdeen. Recollect the proceedings in the different regiments. See that Roy is his agent. See that Kenneth had no quarrel with my client. Remember the marriage contract and the factory. Look at the bequests of this deed. Forget not Campbell; and remember the tone of the defence, and the way in which they have ventured to attack the character of my client. These are the facts of the case that I have shown you; and if the case shall be made out in the way I have mentioned, no man can doubt that your verdict will be in favour of the pursuer.

A variety of documentary evidence was then given in.



## EVIDENCE FOR THE PURSUER.

*Rev. Niel Kennedy*—Is minister of Easter Logie, in the county of Ross, where he has been since 1813. He became acquainted with the late Mr George Mackenzie of Dundonnell in 1798, at which period he became tutor to his family. Mr George Mackenzie had three sons and a daughter; the oldest was Alexander, the second Kenneth, Jane the third, and Thomas the youngest. The daughter married the Rev. Dr Ross of Lochbroom. Dundonnell is situated in a remote part of Ross-shire, to which there is no carriage road; there is, however, a bridle road. It is a very wild and inaccessible country in certain seasons of the year. As far as witness could judge, the late Kenneth Mackenzie of Dundonnell was between eight or nine years of age when he became tutor; he lived in the family for three years, and had the charge of the boys; Thomas was some years younger than Kenneth.—State what was your opinion of the capacity and intellect of Kenneth at the time you were then with him as tutor? I was not any time in the house when I marked the difference betwixt Kenneth and Sandy, and my opinion of Kenneth's capacity was very low indeed; I considered that there was a natural and original defect in his mind; he would not learn. Witness did not ascribe this to idleness, but to the cause mentioned; every exertion was faithfully made by him that could be made, but with no success; Kenneth had had one or two teachers before witness entered the family; he brought him the length of reading indistinctly; he was more successful in writing than in reading. He did not appear to understand the ordinary books that he read, which appeared to him to be from want of intellect; his memory was very deficient; this proceeded from a defect of the understanding, and likely to be incurable; his habits as a boy were very dirty, and his occupations extremely trifling. He did not join in the pursuits or games of the other boys; when witness went to walk with the boys, he always took hold of Kenneth by the hand, to keep him from wandering away from them. He did not take care of his clothes; and when left to himself, witness was sure to find him in the hen-house, the kitchen, or the stable, amusing himself with dirt; he was timid even to an extraordinary degree; he was treated with great affection and kindness by his parents; so much so that he thought there was a partiality for him, by his father in particular. As a boy, he was comely in person. Witness's brother, John Kennedy, succeeded him in 1801 as tutor; witness went as minister of the Gaelic Chapel at Aberdeen in 1804, and Kenneth went along with him, at his father's particular desire, and he boarded with witness at Aberdeen for six months in the house of William Troup. At Whitsunday thereafter he took up house, and Kenneth remained with him till 1806, when he went north with witness to Dundonnell. He returned with witness in November 1806, and remained with him till April 1808. Witness had frequent communications with Kenneth's father before undertaking the duty; Kenneth's father was at a loss how to dispose of him, and was pleased to say that he placed more confidence in witness than in any other. In 1804 Kenneth was more than fourteen years of age; he examined him, and found that he had made no progress, and he was confirmed in the early opinion he had formed of his incapacity. In other respects, as well as incapacity to learn, he appeared to be very weak minded. In sense of propriety and shame he was very deficient; he was not sent to college at Aberdeen, as witness could not get him the length during all the four years he was under his charge; witness sent him on his arrival at Aberdeen to Mr M'Lachlan, teacher of the grammar school; Mr M'Lachlan said he could make nothing of him. He placed him after that under Mr Cruden, and he made no progress there; he then employed Dr Bryce, now of Calcutta, to instruct him, and he was under him from five to six hours a-day. He must have been more than six months under Dr Bryce; Mr Finlay, a minister in some parish in Banffshire, succeeded Dr Bryce; witness had examined him sufficiently to find that he had made no progress; witness was always afraid when Kenneth was out of his sight that he would fall into some scrape or other. He disposed of, or at least gave away, many parts of his clothes, also of his watch, and his fiddle, worth about five guineas, for a few shillings. This conduct occurred very frequently during this period; he was a good looking lad when he grew up, but his face

exhibited a want of intellect; he had a room in the house which the tutor and he occupied; and when not with them, he disposed of the most part of his time in the kitchen. Mary Mathieson was then the maid servant; he had no partiality or fondness for any amusement; he had a few fowls at Dundonnell when witness was there, and he showed a great partiality for their society. He showed no attachment for horses or dogs, nor was he allowed to keep poultry when residing with witness. He was allowed very little pocket money, as witness thought it absurd to trust him with his father's money; he might have given to him perhaps 1s. a-month or so. He had not got over his timidity of character when at Aberdeen, and was very easily wrought on by fear and flattery, to an extent beyond the effect of good nature. Principal M'Leod had been his father's tutor. Witness did not think it right to introduce him to the Principal, as he was satisfied that this would be no credit to Kenneth. In April 1808, witness received an intimation from Mrs Cheyne, a cousin of Kenneth's, that tended to alarm him, and on the same evening he had the same intimation from Mary Mathieson, in consequence of which he requested his tutor, Mr Finlay, to remain with him and keep him in the house the whole day; he made his escape towards the evening by a back door from the house, and witness sent Mary Mathieson after him; he went to Mrs Cheyne, and brought her and Mary Mathieson to the house of a Miss Forbes, to whom Kenneth said he was to be married; Miss Forbes said that she was not the person, but she directed him to a house in Union Hill, beyond the Denburn Bridge; he knocked at the door, but got no answer; a number of children playing in the street cried out that the marriage was behind, up a "stein (stone) stair;" he asked for Mr Mackenzie, and a female said to him that her company was not to be disturbed by any gentleman; he desired Mary Mathieson to go and get a warrant, and he would stand there till she came back; upon which a man, the landlord he presumed, said he would send Mr Mackenzie to him; he opened a door, and witness saw a number of well-dressed people in the room, none of whom he knew; they did not appear to be persons of decency; Kenneth came out without his hat, and witness put him under the charge of Mrs Cheyne till he recovered it; witness took him home, and put him into his bed-room, and locked the door; witness asked him that same night if it had been his intention to be married, to which Kenneth made no answer, and he got no account of the transaction from him at all; the proposal of marriage was neither admitted nor denied; he did not know much of the character of the woman at the time, but he found out something of it afterwards; she was a Mrs Affleck. Witness did not remonstrate with Kenneth at the time, as he did not think him capable of being remonstrated with; he kept sight of him during the whole of next day, and engaged a gig to take him next morning, under charge of John M'Kay, to his uncle at Nairne, who was the brother of George; witness saw him only once after 1808, on the occasion of his father's funeral in 1816; he had seen the father in June 1816, when on a visit at Dundonnell; during the eight or ten days he was there he had a great deal of conversation with the father about Kenneth; the father told witness that he was proposing to go to Inverness to disinherit Kenneth, as he was so dissatisfied with his conduct, and give the estate to Thomas; the father said he would leave a pension to Kenneth, for he had neither sense nor conduct to manage the estate; neither Kenneth nor Thomas were at home at the time; his father seemed to be very much alive to Kenneth's deficiency of understanding, and very much distressed at it; there was no feeling of animosity exhibited by the father towards him; it was Kenneth's general conduct that he complained of; nothing whatever occurred to lead him to suppose that the father had taken offence against him; when witness saw Kenneth at his father's funeral, he was settled in his parish, and had a notification of the father's death at Inverness, and he met the funeral at the Muir of Ord; he never had any letter from Kenneth, who did not announce his marriage to witness; a great number of people were present at the funeral, and both Kenneth and Thomas were there; Kenneth's size was immense, greatly beyond what is generally seen; witness has perhaps seen one or two of equal size, but not of his age; Kenneth had become very unwieldy; witness had no conversation with him, excepting merely

"how do you do?" The party dined in an inn; the memory of the deceased was drank, and Thomas returned thanks, and not Kenneth; there was no appearance of agitation or grief on the part of Kenneth to prevent him from returning thanks.—At the time he left you in 1808, when he must have been more than 18 years old, is it your opinion, if you had put an ordinary passage of the Bible into his hands, that he would have understood its import? My opinion is that he would not.—Before you left the funeral, did you observe any dryness betwixt Thomas and Kenneth? I did not.—Was he capable of following or understanding any writing on business that might be put before him? Not when he left me. He had not a mind capable of entering into transactions of any importance; he was not able to manage the ordinary affairs of life, like other lads; he was very easily imposed upon; he had not mind enough at that time to understand the relation of marriage. Witness would not have married him, unless he were obliged to do so by law. Witness did not think he was capable of being married. He never had received the sacrament, so far as witness knew. This was not from laxity of morals, but witness did not think him capable of comprehending the principles of Christianity, and he would not have thought it his duty to send him to the sacramental table.—Apart from all legal terms, do you think he was capable of understanding the plan and object of the settlement of an estate? I do consider that he was incapable.—Look at this note of instructions; do you think he was capable of understanding that paper? I do not think that he was when he left me. Witness could not tell his handwriting at that time.—Look at that paper beginning "Legacies?"—I do not think he was capable of understanding that paper. Kenneth's deficiency was not one of mere dullness or of want of attention.

Cross-examined by Mr Solicitor-General—Is your wife any relation of the agent for the pursuer? They are first cousins. Witness always considered Kenneth comfortable and happy while he resided with him. Witness was acquainted with Principal M'Leod, but did not visit. He is convinced that he did not introduce Kenneth to the Principal, and he does not know that he was introduced by any other person. Witness does not know that Kenneth was intimate in that family. Witness did not know much of the late Rev. Mr Fraser of Inverness, but understood him to be a respectable character. It was the opinion of witness that Kenneth did not understand the nature of marriage; and he was not able to understand the abstruse parts of the sacred writings. If Kenneth had been giving a legacy of L.500 to one man, and of L.1000 to another, he might be capable of understanding the difference, if particularly explained to him. Witness did not think him capable of writing a very sensible letter when he left his house. He could perform the manual operation of the letters, so as to enable him to write a long letter. He did not think him capable of originating and planning, and writing, long sensible letters. He did not write a good hand.—Is that letter of 1805, addressed and written to his father, written and signed by you? Yes.—[Here witness identified letters dated 3d June and 18th July 1807, to have been also written by him.]—Look at that letter, (putting a letter into witness's hand.) That bears to be signed by Kenneth when he was with you? I could not swear to his letter; I do not conceive it to be his.—Take it for granted that it is his handwriting, do you call it a very bad handwriting? It is not a bad hand.—[Here a letter from witness to George Mackenzie, on 28th January 1805, was put in.]—Witness knew Mrs Mackenzie of Braeda. He did not know that Kenneth had been introduced to her, and was a constant visitor.

Re-examined—Witness could say nothing as to any eccentric habits of Mrs Mackenzie of Braeda.—[Here the clerk of Court read the following letter from witness to Kenneth's father, giving an account of the marriage scene at Aberdeen :]—

Aberdeen, 30th March 1808.

MY DEAR SIR—In this world of distress and disappointments, we may prepare our minds for disagreeable as well as pleasing intelligence. I am truly sorry to be under the most painful necessity of being the messenger of bad news both to you and Mrs Mackenzie, and in which, let me assure you, both Mrs Kennedy and I feel ourselves most nearly concerned and interested. Along with this you'll receive Kenneth, at which, no doubt, you'll be surprised, but, as matters stand, the only step that could possibly be adopted; and let me assure you,

however painful it is to my feelings to communicate to you the reason of his appearance in Dundonnell, I am in some measure most thankful that he is away in such circumstances. There is nothing so bad but might be worse. I hinted in my last that I dreaded Kenneth getting into a circle of acquaintance that would be of bad consequence to him. Sorry am I to say that my suspicions were but too well founded; though I must own, that till matters had come such a length, I did not dread any such consequence as was likely to have followed. I know you and his mother will be grieved to learn that Kenneth was on the eve of being married, not only to a low bred, but likewise (I am distressed to add) a woman of most infamous character. It was only last night this report reached me, to which, although I could not then prevail with myself to attach much credit, I am now fully convinced is but too true. I had even ocular demonstration of the fact. The report mentioned that they were to be married last night, which made me determined to watch him. I insisted, as I always did, that he should remain within doors during the whole night, to which he readily agreed; but no sooner was his teacher away, and that he found me somewhat engaged, than he slipped out. You can easily conceive what situation I was in. No resource was left but immediately to follow him, which I did, with his cousin, and after much research and great abuse, found out the place—there, among many others unknown to us, was Kenneth and the infamous *Dame* to whom he was that night to be married. It was with much difficulty that they gave him away—not indeed till I had threatened to obtain a warrant to have them apprehended. Even the children pointed out the place; and a Berean minister, her father, ready in waiting to marry them when called upon. My dear Sir, I have been this particular in detailing these painful facts, that you and his mother might justify me in taking the step I have done. Were it not for the communion which I have just among hands, I should see him safely lodged in your house; but, circumstanced as I am, and the case admitting of no delay, I send along with him a trusty steady man, of my own congregation, and hired two horses the length of Nairn to his uncle, who, I'm convinced, will see him your length. No doubt this will be necessarily attended with expense to you; but, in such a situation, this cannot be helped, when his all, and your comfort in him, were at stake. I know he'll soon forget the business—nor do I see the propriety of any undue rigour either from you or his mother; though, at the same time, you should express your disapprobation, and carefully watch over his conduct till he forgets it. He persists in denying it; but this is of little consequence when the evidences are so strong. I shall feel most anxious to hear from you. Being much hurried and perplexed, and can only add, that Mrs Kennedy unites in kind respects to you, Mrs and Miss Mackenzie; and that I remain, my dear Sir, sincerely yours.

(Signed) NIEL KENNEDY.

*P. S.*—I was obliged to borrow a few pounds to pay the expense of the journey, horses, and man. But of this afterwards.

From the time he wrote that letter till now, witness had not seen it, nor was he aware of its existence. He had written, he believed, at least fifty letters on the subject of Kenneth to his father.

*Rev. John Kennedy*—Is minister of the parish of Killearnan in Ross-shire, about six miles from Inverness. In early life he taught a school for about six years. He was at Dundonnell in August 1799, and took charge of the boys for some months, while his brother was at the Divinity Hall in 1800. He took the charge as tutor in the beginning of winter 1801, and remained till the middle of August 1802. During the interval he had resided in the house of Dundonnell, while his brother was there also, and he had plenty of opportunities of seeing the children. There were at that time three sons and a daughter. The oldest son was Alexander, Kenneth the second, and Thomas the third. His opinion of Kenneth's capacity to learn was very low indeed. He made more exertions for him than for any other child he ever had under his charge, on account of the state of his incapacity. He appeared to be eight or nine years of age when witness entered the family, and might be from 11 to 12, or 12 to 13, when he left the family, but he never asked any questions at his parents about it. At this time he was attempting to read, but he could not. He was convinced that this arose from a natural defect in his understanding. When out of school, he generally occupied himself in the kitchen, or among the poultry; and when witness's attention was occupied with Alexander, Kenneth would fall asleep. He was not, in other respects, of the same strength of understanding with other boys. Witness had had the charge of a great many boys, and had never seen but one other so

weak in intellect as Kenneth. He considered at the time that it arose from a natural defect in understanding to a considerable degree. Witness saw him again in Aberdeen in September 1807, when under charge of his brother, at which time witness lived in the house between two and three weeks. He examined him, and found nothing of improvement in him, considering the advantages he had. He could give witness no account of any thing he had been about, and he had sufficient opportunities of observation. Witness saw Kenneth afterwards in his own manse in the summer of 1814; Kenneth had been in the militia in the interval. He tried to ascertain what improvement he had made, and if he could describe any thing he had seen; but witness found he could get no account from him, and he dropped the subject, and began to ask him about his father and mother. Witness considered that Kenneth's visit was a friendly one, and that he had no indisposition to talk to him; witness afterwards saw him at his father's funeral at the Muir of Ord, and dined with him at the inn; the "roof-tree of Dundonnell" was drank by the company; it was expected that Kenneth would return thanks, but he observed, with regret that Thomas did so; there was no appearance of grief or agitation on the part of Kenneth; nothing occurred to lead witness to believe that there was any dryness betwixt Thomas and Kenneth; he saw Kenneth once after his marriage in the manse of Lochbroom, the house of Dr Ross, his brother-in-law, on the Thursday of the fast, and he left the manse on Friday, and did not return during the solemnity; the manse is from three to five miles from Dundonnell House.—[Here letter from witness, dated 13th April 1818, was put in.]

After the examination of the preceding witness, the Lord President addressed the Jury in nearly the following words:—

Gentlemen of the Jury,

Before going further, I have to state to you that my learned brother (the Lord Chief Commissioner of the late Jury Court,) and myself have come to the determination, with a sincere desire to promote the ends of justice, and the purity of this institution, to place you beyond the reach of being influenced by any thing except what you hear in the cause. This case has made so great a noise in the world, and so many prejudices are entertained on both sides, that we feel it necessary that you should not have the means of communication with any human being, and that no one should have the means of obtruding upon you; and we have, therefore, come to the conclusion that you shall not be permitted to return to your homes, but all of you shall be sent to a respectable hotel, during the dependence of the trial, and taken charge of by an officer of this Court. Your good sense will point out to you the propriety of this arrangement, that the utmost purity of procedure may take place. This, gentlemen, is no new or extraordinary proceeding; nor is it intended to reflect on, nor does it imply any distrust in you. In cases of high treason, tried before a special commission, my learned brother and I had occasion repeatedly to adjourn the Court, when all the Jurymen were sent to one hotel, under the charge of an officer; and although this is not a criminal proceeding, it has excited so much noise, and been the subject of so much discussion and excitement, and even of publication, that the Court is of opinion that justice would not be done to yourselves if you are not placed beyond the reach of interference or obtrusion. It is therefore necessary that we take every precaution that no suspicion even may go abroad that you might be practised upon. You will, therefore, have the goodness to write to your families or friends. We shall order such refresh-

ments as are necessary for you in the mean time; and in the evening you shall be sent to a respectable hotel, under charge of a macer of this Court, where you will be provided with every thing that is necessary to your comfort.

The Jury immediately complied with the order of the Court, and the macers were enjoined by his Lordship to deliver the notes of the Jurymen without delay. The examination of the witnesses then proceeded.

*Mrs Kennedy*, wife of the Rev. Niel Kennedy—Was married in 1806, when her husband took up house in Aberdeen. She knew the late Kenneth Mackenzie, who was boarded in the house, and sat at table. Kenneth took no care of his person and dress; his habits were slovenly to a great degree, and was the cause of much distress and anxiety to them. He spent his time in the lowest company he could find, and in the lowest haunts of the town, connected with the congregation over which Mr Kennedy was minister. She formed a low estimate of his capacity; the only things he had the least liking to were birds and poultry. He attempted to bring them to the house, but she discountenanced it. His propensity for fowls was very strongly marked. He was not in the habit of taking charge of his clothes, and he sometimes disposed of them very improperly, and she could not find out what became of them. He was introduced to the friends that came to visit the house; and when she and her husband went to visit a friend, they took him with them to keep him under their own eye; but this did not produce any improvement. He could not be got to learn any thing; and this she considered to be from want of capacity, and she had ample opportunities to see that. She had no conversation with him on the marriage. She saw him sent to his bed that evening, and he was not the least aware of the serious engagement he was about to enter into at that time. The best way to manage him was by coaxing, and she must say that he was treated as a child; there was no severity used by her husband towards him that ever she saw; she could not say that she ever saw him sulky or discontented; she always found him ready to oblige her when she opposed his views; he had a private tutor in the house, and spent a good deal of his time with him; she would not have considered it safe to send him to Nairn by himself; she did not introduce him to Mrs Mackenzie, Braeda, but she knew that he went there; she saw him once, after he left the family, in her own house, and it was not her impression that he was improved, or that his mind was opened or enlarged; when under her husband's charge, he was fond of wandering about the streets; but she could not say how he was treated on the streets.

*John M'Kay*, weaver—Was at one time in the service of Lord Aberdeen; he was a member of the Gaelic congregation at Aberdeen, and had occasion to see the late Mr Kenneth Mackenzie there some time previous to 1808, when he lived with Mr Niel Kennedy; witness was applied to, to take the charge of Mr Kenneth to his relations at Nairn, and hired a gig for this purpose. Witness objected that they should ride on horseback; it being reported that Kenneth was going to be married, he formed the idea that if Kenneth's horse was swifter than witness's, he might run off. (Laughter.) He set off with him next morning at six o'clock; and a little after they left the city, Kenneth proposed to visit Mrs Mackenzie at Braeda, but witness objected, because it was out of the line of march, and it being too early to call on ladies. They then went on to Huntly. Witness had there occasion to look after another horse, and on his return found Kenneth was absent; and he found him with two or three young gentlemen. At Forres, when he went to order the horses to be put up, having brought him in a chaise from Huntly, on his return he found him absent again. After a considerable search, witness found him, when Kenneth said he had gone to visit a shoemaker. On arriving at Nairn, and having delivered him over to the charge of his uncle, he got out of the way again; but on a search, witness found him sitting on the face of a stack, and took him back to his uncle.

*Mary Mathieson*—Was servant to Mr Niel Kennedy at Aberdeen three years. Mr Kenneth was there at that time, excepting for a few weeks; had

constant opportunities of seeing him. When not at school, he engaged himself in foolish conduct; he spent his time among the lowest class of people; he was not often in his room, but oftener in the kitchen. Witness did not think him like other young men; thought him very weak in his judgment; recollects his leaving Mr Kennedy's. Mr Kennedy told me he was going to be married to one Miss Forbes in a few days. Witness then told Mr Kennedy immediately. I said to Dundonnell, are you going to disgrace the family by marrying a woman of so low a class? Dundonnell said, I would not forsake her for the world. Mr Kennedy desired me to have a close eye on him. He was confined in the house all that day; the other girl and I were employed in the garden; and he then made his escape from the house in the afternoon. I told Mr Kennedy he had got off; he desired me then to go to the washerwoman to tell her to give him no clothes. On seeing her, she said—What shall I do? he is dressed already. Witness went afterwards to the house in Denburn Brae, where she met Mr Kennedy and Mrs Cheyne. We then went in search of Miss Forbes, who said she was not the person, and directed us in search of Mrs Affleck. On getting to the house, there was a number of children around the door, who told us this was the house where the marriage was. Mr Kennedy and Mrs Cheyne went to the door, and having got Dundonnell, they took him home. Mr Kennedy sent him off in the second morning following, but he was kept close confined in his room during the previous day, and witness kept the key.

*Rev. William Finlay*—Has been minister of the parish of King-Edward for more than four years. Was assistant in one of the public schools at Aberdeen, of which he was afterwards master, where he first became acquainted with Dundonnell; but at the same time witness was his private teacher. Dundonnell was at the public school for a year, more or less. Witness is a native of Angusshire, and has no connexion with Ross-shire. He attended Dundonnell two hours a-day while he lived with Mr Kennedy. Dundonnell was remarkably backward. He studied arithmetic under witness, who had to begin him again, although he had undergone a course before. But witness could not get him to understand the simplest rule of arithmetic, owing to his incapacity. Witness was eight years after this period at the head of this school at Aberdeen, and never, during his experience, saw a lad of Dundonnell's age, who had enjoyed his opportunities, so deficient. He appeared to labour under a weakness of intellect to a very considerable degree, and witness cannot say that he ever made any progress under witness. Dundonnell appeared to be about eighteen or nineteen years of age, and was a tall lad. Witness devoted two hours a-day wholly to Dundonnell, and paid him every attention; but his incapacity continued to the last, and witness cannot say that he made any progress. His writing was tolerable. Witness was present on one occasion when Dundonnell had to date some paper. When he asked witness to tell him the day, month, and year, witness said, Do you not know the year? when he replied he did not. Witness was astonished at the answer, but was convinced from it, and by Dundonnell's appearance, that he was ignorant of both month and year. He was obliged to hang over him; and his impression is, that without him, Dundonnell could not have worked any question in arithmetic. Witness was of opinion that from his weakness there was little prospect of Dundonnell making any progress. Witness recollects seeing him once on the street, when he passed by two or three individuals very hurriedly, with a vacant stare on his countenance indicating fear, but does not recollect seeing Dundonnell followed on the street by any one. He was simple and good natured.—Would you say his imbecility amounted to idiocy? It did not amount to idiocy, for he could take care of himself. He laboured under very considerable incapacity. He could not examine a tradesman's account, and was liable to be imposed upon. The impression on witness's mind is, that he was a lad of weak intellect.

Cross-examined by the Lord Advocate—Witness was chiefly employed to instruct him in arithmetic. Found Dundonnell slow and dull. Had very seldom conversation with him on general subjects, and did not consider him as a companion. Witness might have conversed with him generally, but cannot recollect any particular conversation. Witness's impression was, that he was remarkably frivolous.—You do not think he could have summed up a

tradesman's bill; do you mean to say that he could not have undertaken the making of a will? He might have known that any property was his, and that he had the right of giving it away; but my opinion is, that he was not calculated to judge of any thing complicated.—If he was told to leave L.1000 to one brother, and L.500 to another brother, could he have known the difference between the larger and the smaller sum? I think he might have understood that; he was not destitute entirely of mental capacity; but, as I said before, he was not capable to judge of any thing complicated. He had his feelings and affections to a certain extent; and I mean to say he would not rush heedlessly into danger, throw himself over a precipice, or drown himself in a pond. Witness has heard him say he visited Mrs Mackenzie of Braeda; may have seen him with the family of Braeda; but saw him so seldom on those occasions, he cannot say how he was treated by his associates. Dundonnell wrote tolerably, but witness cannot say if he could write a letter of three pages, owing to his great indolence. Arithmetic and mathematics were principally taught in the school; but witness does not recollect having taught any lad of his age who was so dull. There are few who do not understand the simple rules of arithmetic. Witness is of opinion that Dundonnell could not have summed up a column of figures correctly; he tried to carry the tens, but found them to be too heavy for him.

Re-examined by Dean of Faculty.—Do you think Dundonnell was capable of judging of or originating any plan of a settlement of his affairs, or of his property? My opinion is, from the natural indolence of his mind, he would not have given himself the trouble. There was such a want of capacity also as would have prevented him from originating such a settlement. He had the power of judging of the rationality of acts put before him; and my impression is, that he could distinguish good from evil; but from his being so little acquainted with figures, and the management of his own affairs, he must have been continually liable to imposition.

*Rev. Hugh Mackenzie*, minister of the Gaelic chapel, Aberdeen.—Knew the late Dundonnell about twenty-three years ago. Witness then attended college, when he saw Dundonnell two or three times a-week, for five or six months during the session. Dundonnell did not attend college. From witness's opportunities he thought him extremely weak and childish in his manner. He was of a mild, timid, and credulous disposition. Witness often saw the students telling him anecdotes; they played on his credulity, as he believed every thing they told him, and they called him "feelish (foolish) Kenny." Witness met with him at Inverness in the course of the following summer of 1808; a young gentleman was along with him; they drank tea together, and had some conversation; Dundonnell did not appear improved; he partook very largely of sweetmeats; so much so, that witness remarked it.

*William Troup*, formerly merchant in Aberdeen, but now retired from business.—Knew Mr Niel Kennedy, who lodged with witness in October 1804; Mr Kennedy then had Kenneth in charge. They boarded with witness till the May following, and took their meals with him in family. Dundonnell looked older than fourteen at that time; witness had daily opportunities of judging of him, and he considered him a lad of weak intellect. He was young, but his conduct appeared to witness considerably different from that of boys of his time of life. His habits were awkward and slovenly; he went often into the kitchen, and his wife used to turn him out. Witness has heard Mr Kennedy quarrel him for giving away his clothes, neglecting and spoiling them. Mr Kennedy frequently chided him for his conduct, but never said any thing severe. Witness has seen crowds of boys following him, and upon one occasion he put off about a hundred boys who followed him to the house; on another occasion he sent his shop-boy to bring him from a crowd who were following, pulling, shouting at him, and making game of him; they were crying he was new caught from the Highlands, and he was going like an idiot before them; the boys, who were from the same school, were mostly younger than himself. Witness saw a caricature of Dundonnell in a window in Long Acre, among a great many others of remarkable persons. It was a good likeness. Witness had it taken down; he called and said it was improper, as Dundonnell had a great many respectable friends in the neighbourhood.

Cross-examined by Mr Solicitor-General.—Dundonnell was an awkward lad, and appeared like a person of 21 years of age. Witness never thought him



an absolute idiot, but weak and easily persuaded to do any thing. He supposed those that followed him home were partly his school-fellows. He never saw the boys following any body else ; it was from the oddity of his appearance they followed him ; he was very good natured, and understood what was said to him. His wife turned him out of the kitchen sometimes three times in the day.

*Dr Borthwick*, physician, Edinburgh—Has no connexion with the county of Ross ; was at one time surgeon in the Ross-shire militia. Recollects the late Dundonnell when he first joined the regiment at Hillsea Barracks in the spring of 1810. He appeared a very stupid, heavy, uninformed person, of weak mind. This was the first impression witness formed of him. The regiment marched from Hillsea to London. He remained about two years in the regiment. Witness had a great deal of intercourse with him, during which several professional opportunities occurred. Dundonnell had a very absurd practice of gluttony. Witness repeatedly remonstrated with him on this absurd practice. He did not seem to understand what witness said to him, when he told him not to overeat himself, nor did he give over this practice. He generally dined at the mess, but took no share in the conversation. Never saw him occupied in reading. His impression was confirmed by his after observation.—State the capacity of his mind in your own language ? I should think that he was of great imbecility, and had considerable weakness of mind—naturally defective. His reasoning powers seemed to be very obtuse. Witness had no opportunity of ascertaining whether he could manage the ordinary business of life. In 1810 he was very torpid, drowsy, stupid, and slothful ; was very much overgrown, and was fond of lolling on the chairs and sofas. His favourite beverage was large draughts of cream, which would tend to increase his bulk, and in a great degree to the obscurity of his understanding, and almost to extinguish his mental powers. In any person that tendency would hold ; still more strongly in persons of originally weak mind. He was not an absolute idiot, but his mind may be called bordering on mental incapacity.—Would you say that Kenneth was in a state of mental incapacity, in medical language ? There is a difference as to this in medical language, and there are different shades of mental incapacity. He was not an absolute idiot—[Shown note of instructions of the 31st of August, and another document, entitled “Legacies.”]—Witness said he had considered the former very anxiously ; he did not believe Dundonnell capable of originating or comprehending the sequence of these things ; indeed he did not understand them himself ; Dundonnell could not follow an arrangement, or the consequence of an arrangement. Witness made the same observation in a greater degree as to the other paper.—Putting aside legal phraseology, could Kenneth have formed the plan of an arrangement by way of settlement, containing a series of propositions ? Not as a combined whole, such as that paper.—Do you think he could plan or originate a scheme of settlement, or comprehend a deed ? His mind seemed so obtuse when I knew him, that I do not think he could.—Was he capable of writing out these two papers without instruction ? I do not think he could.

Cross-examined by the Lord Advocate—The first impression Dundonnell's manner and appearance made on witness was, that he was a man of no conversational powers, and witness did not cultivate his acquaintance. Another person might be with him more than he was. He did his duty as a company officer. Witness had occasion to see him in his professional capacity—certainly twice, perhaps three times within a short interval. The first occasion happened when he was on a march.—Is it apt to make a fat man rather hungrier than usual ? It might. The march was from fifteen to eighteen miles a-day.—If a person had told him about making his deed of settlement, and said that he should make the heirs first, then Robert Roy, then the Adamsons, &c., would he have understood it ? He might have understood that as long as the recent impression was on his mind, if explained to him line by line, or bit by bit, as minutely as has been done in the interrogatory ; but he was not capable of dictating the whole. With regard to the “Legacies,” witness is of opinion he would have understood them in the same way as the previous paper. He certainly could not recollect the whole.—But if it had been the subject of a great deal of conversation, morning, noon, and night, do you think that he could have an idea of it in his mind ? It is a doubtful question ; even

were we to consider him a person almost insane, a person labouring under insanity may be led to understand a question if driven into him. Witness's belief is, that he could not originate the deeds; but if gone over bit by bit, as often as mentioned, he might have understood them. He has known many plump, fat persons who are remarkably intelligent and acute.

*Dr Campbell*, surgeon in Edinburgh, and one of the surgeons of the Royal Infirmary—Comes from Perthshire; has no connexion with Ross-shire; was surgeon in the Inverness-shire militia. Remembers the late Kenneth Mackenzie joined that regiment at Hillsea about 1812 or 1813. Had frequent opportunities of seeing Dundonnell at mess and otherwise. Had formed a very low estimate of him, and considered him a weak-minded man. His reasoning powers were weak or impaired, and he had no conversation. Never saw him reading books or newspapers. Never saw him writing. Knew Captain Grant, who told witness Mrs Grant was in the habit of assisting Dundonnell in writing letters. Dundonnell was a heavy torpid overgrown man. If corpulency increased much afterwards, should think medically this would have produced somnolency, so as to impair the mental powers. Witness has seen the note of instructions. Considers Dundonnell not capable of originating the whole. Would not think him capable of combining a series of propositions, or of understanding their mutual relations, or combined tendency. Might have understood one single proposition, if exceedingly simple.—[Shown note of instructions, and asked to examine the first passage towards the conclusion, "I wish a life rent," &c.] He could scarcely have followed that. As to the other passage, "make any suggestions," &c., witness does not think the idea of composing or revising would originate with him. Does not think him capable of composing such, or any deed.

Cross-examined by Mr Solicitor-General—If he had been asked, Do you mean to leave any thing to Louisa and Patricia Roy? and the same person said, How much, would he understand L.1000 each? Yes.—And if separate from the other legacies, and the L.1000 was to be increased to L.2000, on a certain event taking place, would he understand that? I would suppose he would not understand them combined.

Re-examined by Mr Robertson—He certainly could not have given these instructions, even apart from the legal instructions.

*Dr Bayne*—Is a native of Aberdeen, now residing in Inverness-shire; first knew Dundonnell in 1805; thought he was a very silly lad; he knew him in 1815, when he joined the Inverness-shire militia as surgeon; Dundonnell was then a captain; the impression he had formed of him in early life was confirmed; had reason to think him of the same weak intellect; did not think him capable of exercising his mind on any subject of importance; he would not have transacted any business of importance with him, and would have considered any person doing so liable to the suspicion of taking an advantage of him; he had increased in size to an enormous degree; from what he saw of him, if he had continued to increase for six or seven years, his obesity would have increased the natural weakness of his understanding.—[Shown note of instructions.] He considered him incapable of composing the document put into his hand, and also of giving another person instructions to draw out such papers; he never reflected; witness did not think him capable of judging of the ultimate consequences of his actions.

Cross-examined by the Lord Advocate—Saw him very frequently in the shop of Mr Troup of Aberdeen, but never transacted any business with him; he thought every thing he said and did was frivolous; he considered he was easily led, and the dupe of others; he might have understood a simple bequest of L.1000, and known that the value of L.2000 was more than L.1000, but thinks nothing that required reasoning would have occurred to him; motives did not act on his mind, or any process of reasoning; he would be urged by hunger to eat, or by the want of a coat to order one; but to originate a deed of such a kind was a process of reasoning of which he was incapable; his idea was, that by simple motives he might be urged to simple actions.

*Captain James Cameron*—Is a native of Inverness-shire; now resides in Aberdeenshire; joined the Inverness-shire militia in 1810; was called out again in 1815; Dundonnell joined in 1812; witness had not seen him before;

om kindness witness had shown to him, he took a fancy to witness, who could speak Gaelic, and sing Gaelic songs. Had many opportunities of seeing him; conceived him a very weak silly person; he believed in witchcraft and supernatural beings, and in a warlock, Gregor M'Gregor, or Gregor Willox. Told witness Gregor used to go to Ross-shire to cure cattle and people that were bewitched. He had great pleasure in talking on this subject. He had a notion of charms against bodily injury, and told witness instances where people were witched, and put a shilling in a cog or caup of water, and if the person was bewitched, the shilling would stick to the cog or caup; if otherwise, the shilling would come with the water in drinking it; and that a shilling put in the heel of the shoe of a bridegroom on his marriage day would procure issue. He said that cheese made of cats' milk was a protection against bullets; in which he seriously believed. When at Portsmouth, he was fond of consulting gypsies; has seen him there followed by females and boys; could do very little duty of himself; he often told me he depended on persons in the ranks to direct him. He consulted the subaltern officers before he did any thing when on guard. He never made out the report himself; was capable of copying it, but does not believe he could make it out. Witness made out the mess accounts for him, when he was vice-president; they will appear in witness's hand-writing in the mess-book. Considered him certainly very easily imposed upon, and likely to be taken advantage of. He had a particular fondness for hens, and kept the only hens witness had ever seen in Portsmouth; probably three or four of them. Witness had many opportunities of seeing him, both private and public. Was very weak and silly, which arose from various causes; a want of common sense; and he is quite satisfied there was an original defect in his mind. Dundonnell never told witness that any person furnished copies of his letters.

Cross-examined by Solicitor-General—A belief in charms is not uncommon in the Highlands among a certain class of persons.

*Serjeant David M'Pherson*—Was serjeant in the Inverness-shire militia from the formation of the regiment in 1803. Recollects Captain Mackenzie, who joined at Hillesea Barracks as a captain; discharged his military duties very ill, because he was very silly and weak in mind. The covering serjeant and non-commissioned officers had to support him in every point; had to direct him how to do his duty, and had to put the word of command in his mouth; he never got better. Witness was corporal; the support was not once or twice; the whole non-commissioned officers were subjected to it; could not trust him to go through the manual or platoon exercise; had always poultry in the barracks. He built a hen-house at Portsmouth for them; he had a great quantity of them; he associated principally with old women; has seen him frequently with them; recollects a review at which the Allied Sovereigns were present in 1814; when Kenneth was going to Portsdown Hill, three or four of the party took him to the back of a hedge; the regiment marched on and left him till the review was over; they then got a post chaise and drove him back to the barracks. They left him not from fatigue, having only gone a few yards up the hill. Was at Fort George when Dundonnell was captain in command; he never appeared at parade. Recollects a drummer got intoxicated, and in consequence lost one of his shoes; two or three men carried him off to the barracks, when witness saw Dundonnell carrying the drummer's shoe in his hand across the square. Has been in the mess-kitchen, and seen Dundonnell sitting with the cook and the other women, in his red coat. He never inspected the men or barracks, and witness never saw an officer go through the duties as Dundonnell did.

*Serjeant David Clark*, of the Ross-shire militia—Knew Lieutenant Kenneth Mackenzie; drilled him; he did not succeed in drilling him, from his want of comprehension; a non-commissioned officer constantly attended him when on parade to lead him to his post; witness did so himself; witness had always to tell him the word of command.

Cross-examined by Mr Solicitor-General—Was there when Lieutenant Kenneth Mackenzie joined; found him to require more instructions than any one he ever saw; the lieutenant did not profit any at all from witness's instructions.

*Rev. Mr M'Donald*—Has been minister of the parish of Urquhart for many years; first met Dundonnell about 1811 at Leith; he was then in the Ross.

shire militia, stationed there. He formed an impression of him of what he would call mental imbecility, or mental weakness. Knew him to be the son of Dundonnell; took occasion to satisfy himself as to his capacity, and made up his mind on the first interview; observed from the first time he met Dundonnell there was always an unmeaning smile on his face. Witness met him with the other officers, and never could discover him to enter into rational conversation, and had occasion afterwards pretty frequently to confirm his first impression. This imbecility arose, he has no hesitation in saying, from defect of intellect; witness met him again at Lochbroom in 1822; he had increased to an immense size, about thirty stone weight; never saw him on horseback; he took three or four hours to step down a steep hill at the manse of Lochbroom; does not know if he communicated at the sacrament; witness cannot say if he was there on Sunday; Mr Thomas resided in witness's parish about twelve years, and now lives in London; all his children were born and baptised in witness's parish.

Cross-examined by Mr Solicitor-General—Is brother-in-law of Mr Mackenzie of Millbank; has seen Dundonnell five or six times, so as to have conversation with him; never had occasion to transact business with him.

*James Jackson*, gardener, Pennicuick, author of "Essays for Prizes given by the Highland Society"—Remembers in 1812 the Ross-shire militia being there; his father and mother took in lodgers; he recollects Dundonnell, who lodged with them; was frequently in his company, and had occasion to have conversations with him; Dundonnell was quite imbecile, and but one remove from an idiot; was apt to be imposed upon. Witness's family was sorry for him; he was very timid, and imposed upon by the less respectable officers; he would not go past the dog, which was remarkably good natured and fond of soldiers, without witness's mother leading him. Witness kept a grocery shop along with his brother, and sold confectionary; Dundonnell was much about the shop, and sat frequently in the kitchen in his uniform.

*Thomas Jackson*, Leith, brother of Mr James Jackson—Kept a shop with his brother James at Pennicuick; he remembers the Ross-shire militia being stationed there, and recollects Mr Mackenzie of Dundonnell lodging in his mother's house. Witness had an opportunity of seeing a good deal of him; he was a very weak-minded man. Witness's mother treated him with great respect on account of his being a sort of a child, and the son of a Highland laird; he came frequently into the kitchen, and sat much there. Kenneth purchased an unusual quantity of carvies and barley-sugar for his own gratification.

*William Dodds*, paper-maker, in the neighbourhood of Pennicuick—Remembers the Ross-shire militia being at the barracks there; he had occasion to see Lieutenant Mackenzie of Dundonnell. Witness had occasion to see that Dundonnell had not the sense of shame. Witness went into a house one night with a private in the regiment after a day's fishing, and had some of the trouts made ready; witness left the house, and afterwards went back with a person whom he had met; Mr Mackenzie of Dundonnell came into the room where they were sitting, and had nothing on him but his stockings and his shoes, and danced about the room two or three times; he did not appear to be drunk; he went out of the room again to another, where a fiddle had been playing, and where he said he had been dancing with the girls, and that he had thrown off his coat because of the heat. Witness remarked he must have been very hot when he had thrown off the rest of his clothes; he afterwards returned into the room where witness and his friend were sitting with only a shirt upon him, and his other clothes below his arm. Witness never saw him going about drunk.

Cross-examined—Witness knew that he was Mackenzie of Dundonnell, as he had told his name, and witness saw him frequently afterwards.

*Mr Collins*, British Linen Company's office—Is one of the principal clerks in the accountant's office of that establishment. Was in December 1810 in the branch at Inverness, and remained there until 1818. He entered the office in Edinburgh in July 1819. Had frequent occasion, when at Inverness, to see Mr Kenneth Mackenzie; at the time witness resided with Banker Mackenzie, where Kenneth was frequently visiting. Witness had frequent occasions of seeing him at Seabank. His impression was that there was nothing like absolute

idiotcy or insanity about him, but he certainly thought he had an extreme and excessive imbecility of character. Kenneth was a person very easily to be imposed on; he was generally quiet in company, and seldom spoke on matters of importance. Witness heard him talk of witchcraft, and it occurred to him that Kenneth believed in it to a great extent. It appeared to witness that Kenneth was not capable of understanding any business of importance, or the ordinary affairs of life. He thought he had no discretion or rational judgment. Witness would not have trusted him with any piece of business. Had a good opportunity of forming an opinion, as far as his judgment and penetration went, as to the managing and arranging his affairs; and his general impression was that it was quite impossible for him to enter into transactions which a plain country gentleman is capable of, and of managing affairs in his own sphere. Witness saw him at Seabank after his marriage; he had an immense flock of birds and fowls, and a cockatoo. Witness having occasion to be there, found him in the hen-house, taking out the eggs from the hens, and calling them by their names. This establishment of hens was beyond an ordinary one; there was a greater number than ever he had seen together; if he said that there were 500, he believed he was perfectly safe; he considered him a sort of halfling, and thought it the best term by which he could convey his case in simple language. Witness dined with him at Seabank before his marriage, where he used frequently to have company; he did the duties of the table, but never entered into any rational solid conversation with him. Witness's impression was that he was really incapable of conducting his own affairs without the agency of others.

Cross-examined by the Solicitor-General—Witness being shown a letter, dated 25th September 1815, from Mackenzie of Ord to Kenneth Mackenzie, said there were two parts of it his handwriting, Ord having requested him to write to his diction. When witness was in the branch office at Inverness, he knew that Kenneth's drafts were honoured in a private way. Witness is nearly forty years of age. When he became acquainted with Dundonnell, he was about twenty or twenty-one years.

*William Allan*, tailor, Inverness—Was acquainted with the late Dundonnell; he went on one occasion to take his measure for a suit, and saw him not far from the barn or byre, lying at full length on the ground under his fowls, which were picking corn off his person; witness waited for him for fourteen or fifteen minutes; and when he came to be measured, he wished him to change his clothes, as he was covered with fowls' dirt, which he would not do; and witness measured him as cleanly as he could for his own comfort; he never took measure of any body of the same size.

Cross-examined—Are you a creditor of Thomas Mackenzie?—No.

*Alexander Smith*—Was gardener to the late Dundonnell at Seabank; entered his service in 1815, and remained three years; witness saw a woman frequently visiting him from the village under the character of a witch; she tied strings round his naked thighs, and round his wrists, which she said would make him happy in marriage, the happiest gentleman in Inverness-shire; the witch's name was Widow Macdonald, or Henny Runn; witness saw this performed about three different times, and these were at considerable intervals; she would continue with him from one to four hours; witness heard her checking Dundonnell for loosing the strings; if Kenneth had not believed in this, he would not have allowed her to do such a thing on his naked skin; witness had no belief in any superstition of the kind; Kenneth had a great quantity of poultry at the time; witness never saw such a quantity of poultry about any gentleman's place; he had names for them, and witness had seen him taking off the eggs; he had seen him feeding them lying on his back, and the fowls picking the barley off his body; when the fowls died, he was uncomfortable; witness had seen John Cameron, a mail-coach driver, about the place.

*John Cameron*, mail-coach driver—At one time had occasion to be at Seabank occasionally. He knew a wandering idiot of the name of General Brown, and had seen him at Seabank before Kenneth's marriage. The General and Captain Mackenzie were both dressed in regimentals. General Brown said to witness that Kenneth was his aid-de-camp. General Brown had mustachios, and Dundonnell had mustachios painted with ink or paint. They

were eating gooseberries and milk at the time ; he did not observe hens in the room ; they marched ordinary and quick time around the room. The General gets old clothes occasionally from the officers ; witness had himself been in the hospital for Kenneth's poultry ; he had a conversation with Kenneth in regard to the sick fowls ; he gave him a letter, which, on reading, Kenneth said, " I am wanted down to Treeton—what will I do when half of my poultry is sick in the hospital ? " Kenneth asked witness if he used cordial balls, which he said he did, but none such as he used, as those which witness used were urine balls. Kenneth asked no explanation of this. He gave witness a pair of pantaloons for overalls ; he took them back and picked a parcel out of the head-band, which were some things he got from Henny Runn—by having which, he said, he might ask for a wife in any place in the world, and he would not be refused. Kenneth also said to witness, that cheese made of cats' milk would prevent steel or lead from ever touching him, and he appeared to witness to believe it.

*Mrs Clunas*—Was a first cousin of the late Kenneth Mackenzie. She was much at Dundonnell in the time of George, the father, when Kenneth was about six or seven years of age ; she was in the habit of being there every year, or once in every two years ; she knew Kenneth well after he returned from the militia ; she only formed one opinion of him, and that was that he was a weak silly lad ; she did not consider him an absolute idiot, but he would have run much farther had he not been taken great care of. He had a very great defect of understanding and judgment ; she had opportunities of seeing that he made very little progress in learning. She was at Inverness when his father died ; Kenneth came to the house shortly before his father's death, when he was insensible ; Kenneth's conduct was weak and silly, and he did not know how to act for himself ; he did not appear to have the ordinary feelings of a son. Thomas took charge of the funeral ; she did not think Kenneth capable of managing the ordinary affairs of life ; thought he would be very easily wrought on by flattery or fear ; his parents were rather indulgent to him ; his father stated to witness that he intended to make a settlement to secure his property, having always expressed the opinion that Kenneth was incapable of managing it, or conducting himself as he ought to do in society ; she saw him once or twice after his marriage, when he lived almost exclusively at Dundonnell ; he was grown to an inconceivable size ; he had none of the ordinary occupations or pursuits of those of his own age when a boy, and was always under restraint with his equals. This character continued as long as she knew him.

Cross-examined by the Lord Advocate—She was often on a visit for six months at a time at Dundonnell. She saw him when he went to Aberdeen, and when he came home on a visit. She did not see him often after he went to the militia. She saw him at Inverness after he left it. His pursuits were quite different from those of any young person she ever met with. He associated with the lowest he could find, with fools and idiots. He was easily persuaded by flattery ; she never saw him after he made Dundonnell his residence ; he made some kind of show of grief at his father's funeral.

Re-examined—She lived sometimes six months at a time at Dundonnell ; her mother was his aunt ; he always came to her house in his way backwards and forwards.

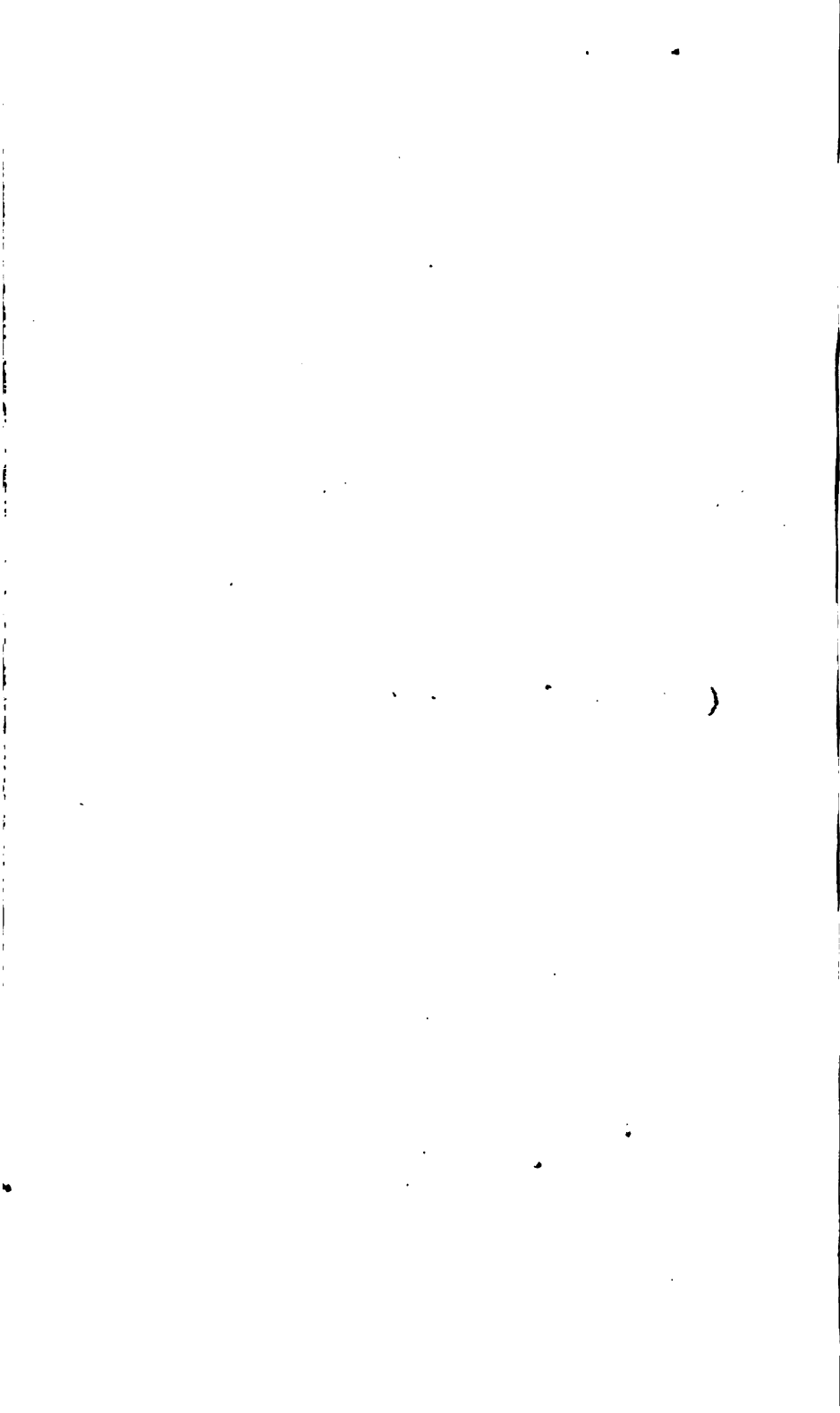
*Alexander Mackay*—Lives at Forres, and was in the service of Dundonnell when in the militia, and afterwards at Seabank, and remained some time with him. He saw an old woman, a reputed witch, coming about him. He saw her sew a stone into the head-band of his master's breeches. His master had an enormous quantity of fowls ; he had seen him lie down and feed the fowls on his person. Before his marriage he had them in his bed-room. He slept with Dundonnell different times, and this was the practice when strangers were not in the house. Witness believed he was afraid to sleep alone. He was afraid to go out in the night-time, and to go from Seabank to Inverness, which was better than a mile distant.

Cross-examined—He was about sixteen years of age when he entered into Dundonnell's service ; it was at Seabank where the woman sewed the stone in the head-band of his breeches ; Captain Mackenzie appeared serious at the time, and gave the woman something ; he allowed the stone to remain there,

Ma' mather  
Money money  
Mr Reid

Madame

Miss  
J B Skinner





and never knew it to be taken out; witness slept with him oftener than he did not; it was when he was at Seabank that he slept with him; Dundonnell paid him his wages himself, and gave him over and above his wages, and witness could not say whether his master knew this or not; a good many visited Seabank; Alexander Fraser took the charge of the dinners, but Dundonnell sat at the head of the table.

*Donald Young*, toll-keeper between eight and nine miles from Aberdeen—Was a gardener with Kenneth Mackenzie at Seabank, and remained with him for a year, and went to Dundonnell, and was with him more than two years and a half; he had an immense quantity of poultry, and had seen plenty of them in most of the rooms of the house; the sick ones had a place for themselves; he was a year with him before his marriage, and got very few orders from him; he did what he thought best himself; Dundonnell was not capable of giving directions for his work; after the marriage, for the first year he was paid by Dundonnell, and after that Mrs Mackenzie settled every thing with him; he had seen him carrying the poultry in his hands almost every day; a great deal of poultry was sent from Seabank to Dundonnell, and some of them died by the road; they were brought in carts, and some of them went by sea. Donald Car, or as he was nick-named Touterman, an idiot, used to go about the house; Dundonnell was very much with him; he liked to get him into a passion; he had seen him make him expose himself before the women servants. Another idiot, Rory M'Leod, was at Dundonnell all his days. Touterman went there, and Dundonnell would make them dance together; much of Dundonnell's time was spent with these idiots.

The Court here adjourned till the following day.

#### WEDNESDAY.

The Court having met at ten o'clock, the Dean of Faculty moved for an order on the Lord Ordinary officiating on the Bills for the production of a memorandum-book recovered from one of the witnesses, which was accordingly made. The Court then proceeded with the evidence of the following witnesses for the pursuer.

*Mrs Cairns*—Is postmistress at Peebles; remembers the Ross-shire militia being at Peebles; witness had two daughters; remembers Kenneth Mackenzie; he paid attention to her second daughter, now dead, and made proposals of marriage, but she would not listen to him, having a decided aversion to him from the first, her daughter alleging as her reason that she never would marry a man she would be ashamed of. Witness and her daughter were aware he was a man of property. There was nothing unpleasing in his appearance; he was a silly, innocent man; every body who knew him said that.

*Mr Robertson*, tacksman of Polchoir, Ross-shire—Knew the late Kenneth Mackenzie since a boy. Was sent for by him on business about six years ago (two years before his death), by letter, but was ignorant by whom it was written. Went to Dundonnell, and met Mr Thomas Mackenzie and Millbank; Mr and Mrs Mackenzie were there. Thomas intimated the business to witness, and Mrs Kenneth Mackenzie was also passing her opinion about it. It was to appraise a stock of sheep on the farm of Auchandrean. Witness arrived on Saturday; remained there Sunday and Monday. Had some conversation with Dundonnell, not much, but he was speaking some sentences. Mr Thomas Mackenzie took the charge of the business; Kenneth trusted the whole business to his brother. The stock was valued and handed over to Millbank, and a receipt taken by Thomas. There was a fool called Janet something—does not know her name—there at the time. On Sunday forenoon, after breakfast, Millbank, Thomas, and witness, went into the garden; Kenneth and the idiot came in, and began to play themselves with a peacock; he then directed her how to put flowers in her cap, and gave her a shilling for his amusement. The idiot was dancing on a plank in the afternoon, and leaping over it; Kenneth spent the whole day in this occupation. In the evening he remained in our company, amusing himself with the idiot; witness saw them seated on a form; they then went into the black kitchen, where a quarrel began among them. Jane Miller, or Mackenzie, was there; witness fancied she was the hen-wife; was at the door of the kitchen, in which there was a number of women, but there was only one idiot; Kenneth was

looking over them, and seemed to be amused, or he would not have allowed such doings. The idiot raised the clothes off Jean Miller's backside. Witness got one or two letters afterwards, signed by Kenneth, and went to him; Mrs Kenneth gave witness some directions regarding them; witness paid her no compliments, but she said the laird wrote the letter. Witness said that it was not Dundonnell's, that it was written by herself, but that the laird signed it. She smiled at this remark. Mr Thomas was not present on the latter occasion. Dundonnell and Thomas were on a very kind footing, equal to brothers. Thomas was treated in a very kind manner by Mrs Kenneth, so far as he understood. From what witness observed of Dundonnell, he was not fit to transact worldly business, unless others would do it for him; witness never saw him look after any thing while he was there; considered him unfit to manage worldly business from silliness, or weakness of mind.

The Dean of Faculty said, that in this case the defender had put on record and stated, as the origin of this trial, that the charge of imbecility against Dundonnell was never heard of till after his death, and till this settlement appeared, and that his imbecility was stated to be a posthumous discovery. He had occasion to know, from experience of the line of defence—he would not say how acquired—that almost every witness that would be called upon by the opposite party would be asked whether he had, during Dundonnell's lifetime, heard that he was reputed to be a man of deficient understanding. Now, that statement which the defender has chosen to make, the pursuer is prepared to contradict, and prove that the belief of the whole country was; that Dundonnell was imbecile previous to his father's death. He had tendered the evidence, on the special ground that the defender had put the opposite averment on record, and attached importance to it—not that he (the Dean) regarded it as of importance on either side.

The Court—First let them attempt to make such a proof. If they do, the pursuer may be entitled to prove in replication.

The Dean of Faculty said, that his only reason for making this statement was to save trouble. He was quite willing for his own part to drop it out of the case, if the Solicitor-General will drop it out of his part of the case.

The Solicitor-General said, he did not admit the pursuer's right to go into this inquiry. He intended to prove that the pursuer's allegation of his being reputed a weak man, during his lifetime, was a fabrication; but he had no objection to consent to the Dean being allowed to go into this matter, and he thought it much better that it should be done then.

The Court objected; as when the question as to the competency of the defender's leading evidence on that point should come before them, they might decide against its admissibility.

The counsel for the pursuer, in consequence, ordered several of the witnesses to be reinclosed, in order that they might be afterwards, if necessary, examined on that point.

Cross-examined by Mr Solicitor-General—Saw Dundonnell at two other periods besides the Sunday when witness met with Thomas and Millbank; no other strangers were present; witness had no right to challenge the sport; the others might have enjoyed it, and smiled at it.—[Shown letter 6th June 1825.]—Identifies it as his. Got a horse from Dundonnell; witness bought it from him; does not recollect the year, which will be seen on the date of the letter. The pony, when witness bought it, was drawing loads of peats; Millbank was surprised to see it so employed, and said an old horse would do as well; a gentleman present said it was worth L.20. When witness returned from the valuation of the sheep, asked him if he would sell the pony, and he

would give an old horse and money also for it. Dundonnell said, make me an offer, when witness offered L.16, and got it. It was a good bargain.

Re-examined—Witness sent his son with the money, and knows not who wrote the receipt.

The Dean of Faculty, addressing the Court, said that the letter shown witness is backed by Mrs Mackenzie.

*Mrs John Robertson*, wife of Mr Robertson, W. S.—Witness, before marriage, had met Dundonnell frequently; the first time was at the Northern Meeting in 1816; he was introduced to her. Witness danced with him, and went to the supper with him on that occasion, and was in his company for several hours. Witness met him frequently both at her own house and at others, both before and after her marriage, but saw more of him before that event. Thought him a man of weak mind; of weaker mind than any other person of her acquaintance; to the extent of silliness certainly.

By the Lord President—Witness is quite certain she formed that opinion at the time, and which had been then formed and expressed.

Examination in chief continued—Would say he was deficient in mind. His appearance was striking from his immense size, but his manners were so far like others, as far as one could judge. He danced well; he was very torpid; she has seen him fall asleep while conversation was going on around him. At his own house on the first occasion she met him after his marriage, he fell asleep. At Seabank, he asked witness to go out to see his collection of fowls, and we proceeded to the barn, which was full of pigeons; they alighted on his head and arms, and he seemed highly delighted. The individual fowls seemed perfectly familiar with him, and followed him. Does not recollect if he had names for any of them. Saw him a year or so previous to his death; his size had greatly increased. Witness did not think he could live long. Witness never saw any thing like his bulk. In his disposition she saw traits of obstinacy in trifles, but he was very good humoured. It appeared to her, that if any one had an influence over him, they could easily manage him, but at times he exhibited marks of childish obstinacy. He appeared to be as easily guided as a child.

Cross-examined by Mr Solicitor-General—When I have seen him, he was neatly dressed for company; he wore generally his uniform.

The deposition of Mr Douglas, Perth (now dead), was then read by the clerk of Court as follows:—

DEPOSITION of Mr JOHN DOUGLAS, Land-Surveyor in Perth.

*At Comely-Bank, near Bridge-end of Perth, the 29th day of September 1830 years.*

In presence of CHARLES HUSBAND, Esq. of Glenearn, Sheriff-substitute for the county of Perth, Commissioner appointed for taking the oath and deposition of John Douglas, land-surveyor in Perth, a witness for the pursuer, in the cause in which Thomas Mackenzie, Esq. residing at Findon, is pursuer, and Robert Roy, W. S. and others, are defenders, to be tried before the Lords Commissioners of the Jury-Court in civil causes, in that part of Great Britain called Scotland, conform to commission, dated and sealed the 24th instant, and who appointed Patrick Soutar, writer in Perth, to be his clerk, to whom he administered the oath *de fidei*.

Compared the PURSUER, by Mr John Miller, writer in Perth, and Mr Patrick Adam, clerk to Mr Hugh Macqueen, W. S., his agents; and the Defenders, by Mr William Roberts, writer in Edinburgh, their agent. The agent for the pursuer produced diligence, with execution thereof against the said John Douglas; and he, the said John Douglas appeared, and the oath prescribed by the commission having been administered to him, and the interrogatories attached to the commission having been put to him, he depones as follows:—Interrogated, Are you acquainted with Mr Robert Roy, W. S. one of the defenders in this cause? depones, That he is so. Interrogated, How long have you been acquainted with him? depones, That he has been acquainted with him for eight or ten years, or thereby. Interrogated,

Do you recollect that Mr Roy called upon you at Perth in the year 1826 depones affirmative. Interrogated, At what period of the year was that? depones, That he thinks it was in the beginning of summer said year. Interrogated, Did he, on that occasion, inform you where he was going, and what was the object of his journey? depones, That he told him he was going north to attend the funeral of Dundonnell. Interrogated, Did he mention to you that he was on his way to the place of Dundonnell? depones, That he did not mention the place to which he was going, but that he was going to attend the funeral of Dundonnell. Interrogated, Did Mr Roy say any thing to you on that occasion, respecting the death of Dundonnell, and the deeds of settlements of the estate of Dundonnell, in favour of Mr Roy,—if so, you are required to mention particularly what Mr Roy said to you, on both or either of these subjects? depones, That he does not recollect if Mr Roy said any thing to him respecting the death of Dundonnell, but he mentioned to him, as far as the deponent recollects, that Dundonnell had left his property to him: That the deponent may have mistaken the words which Mr Roy used, but the impression on his mind is, that he expressed himself to the above effect, and such was the impression on the deponent's mind at the time, and has continued so since: That the principal subject of conversation betwixt Mr Roy and the deponent on the said occasion, related to the estate of Kinloch, in the county of Perth. Interrogated, Had you, on any other occasions, conversations or communications with Mr Roy respecting the estate of Dundonnell; if so, describe them? depones, That on no other occasions had he any conversation or communication with Mr Roy, respecting the estate of Dundonnell, so far as he can remember. Interrogated by the Commissioner.—Depones, That the conversation with Mr Roy, above mentioned, did not occupy more than two minutes, in reference to the affairs of Dundonnell. Depones, That the above conversation passed between Mr Roy and the deponent, on the street or road opposite to Atholl-Place of Perth, when Mr Roy was waiting for a carriage to take him up. Interrogated on the part of the defenders.—The pursuer having objected to the question being put, Whether the witness repeated the conversation before-mentioned to any other person, and if so, at what time? *Objected* on the part of the pursuer. That the interrogatories attached to the present commission, under which alone this examination takes place, were regularly and formally adjusted in the usual way, before one of the principal clerks in the Jury-Court: That neither of the defenders in this cause proposed any interrogatories either *in initialibus*, or by way of cross-examination to the present witness: That no such interrogatories for them have been adjusted, and it is therefore utterly incompetent and irregular, and it is *ultra vires* of the Commissioner, whose powers are precisely limited to the expiscation of what he shall consider proper and intelligible answers to the interrogatories attached to the commission, to allow any such questions to be put to the witness, as that now proposed on the part of the defenders: That the interrogatories having been put *seriatim* to the witness, and explicit answers having been obtained thereto, and put upon record, the commission, as well as the powers of the Commissioner, are thereby completely exhausted. *Answered*.—The nature of the pursuer's objection is quite unheard of in practice: The defenders are here precisely in the same situation, and having the same powers, with reference to the examination of the witness, as if he had been placed in the witness' box during the trial of the cause. If the witness had been in Court, there can be no question that the defenders had a right to cross-examine him upon the question in chief. It never happens that cross-interrogatories are prepared, except when the party preparing them means to put substantive questions to the witness on behalf of his own case. It invariably happens, when necessary, and indeed the Commissioner has power, by the very commission before him, to put all pertinent and relevant questions tending to expiscate properly, or explain the evidence given by the witness. The nature of these questions depends on the answers given to the questions in chief; and until the parties see these answers, it is impossible for them to shape their question. The one objected to arises out of the examination of the witness already taken; and the defenders submit, that, both in point of form and practice, they have a right to put it. Besides, the pursuer has truly no interest in objecting to the question;—because, even

admitting there was irregularity in it, the pursuer can object to, and avail himself of, every thing competent to him at the time the deposition is opened to be read to the Jury. The Commissioner makes *avizandum* with the objection and answers to the Court; and, in the meantime, allows the question to be put, and the answer to be taken down on a separate paper, to be sealed up, and opened or not, as the Court shall see cause to direct, after hearing parties at the Bar. And what the witness has deponed is truth.

In the course of the examination of John Douglas, land-surveyor in Perth, as a witness for the pursuer in the cause in which Thomas Mackenzie, Esq., residing at Findon, is pursuer, and Robert Roy, W.S., and others, are defenders, the following interrogatory was put on the part of the defenders, and objected to on the part of the pursuer, and the Commissioner made *avizandum* with the objection and answers to the Court; and, in the meantime, allowed the question to be put, and the answer to be taken down on a separate paper, to be sealed up and opened or not, as the Court shall see cause to direct; viz. Whether the witness repeated the conversation before-mentioned, that is, a conversation between him and Mr Roy, to any other person, and if so, at what time?—Depones, That since the trial he has mentioned the matter to different persons he thinks, but he cannot condescend on the persons, nor the times or places, and he may have mentioned the same on previous occasions, but he has no particular recollection of having done so. And what he has deponed is truth.

Mr Mackenzie of Millbank was called, upon which Mr Rutherford said, that an objection was stated to this witness on the grounds, first, that he entertained enmity against Mr Roy, and, second, that he had been conducting himself as an agent in precognosing witnesses; and also that the present case was carried on at the instance of the pursuer, in consequence of a subscription raised by the gentlemen of Ross-shire, and that the witness was one of the subscribers.

Mr Robertson said that the whole charge was denied.

*Mr Mackenzie* was then called, and examined *in initialibus* by the Solicitor-General—Is not aware of any subscription to support the pursuer of this trial. Witness never bound himself to do so; never was asked. Never stated to any one that he subscribed. Is acquainted with Mr Scott, agent to the Duke of Gordon. Did you state to Mr Scott that you had subscribed?

The Dean of Faculty objected to the question, and ordered the witness to withdraw; but after some discussion waived his objection.

By Mr Solicitor-General—Never stated to Mr Scott that witness had subscribed. Does not remember desiring Mr Scott to communicate with Mr Roy on the subject of this trial. Was an evidence on the last trial. Saw Mr Scott about that time. Denies having authorised Mr Scott to go with a communication to Mr Roy. Has no recollection of such. Can deny ever having said to Mr Scott to make a communication to Mr Roy about a subscription. Knows Mr Macandrew, solicitor, Inverness. Witness wrote him a letter, to become agent in this cause for the pursuer.

The Solicitor-General stated he held in his hand the letter referred to, which was sealed up. The counsel for the pursuer agreed to its being opened. It is dated Millbank, 8th May 1826.

Mr Robertson—My Lords, the summons in this case is dated September 1828.

By Mr Solicitor-General—Is acquainted with Mr Shepperd, agent, Inverness. Knows John M'Lean; was with him in Mr Shepperd's office, but was not present at a precognition, as witness did not remain. Did not act as Gaelic interpreter, but merely introduced him. This case has excited a good deal of interest in Ross-shire. Do you recollect at any meeting giving a toast applicable to this business?

This question was objected to by the Dean of Faculty, as the objection was stated to be agency and enmity. The Solicitor-General said he was entitled to prove malice. The Lord President asked how would that prove malice? The Solicitor-General said, I ask him if he said "Damnation to Mr Roy?"

Witness did not recollect the terms of his toasts. Does not recollect being at any particular ball shortly after Dundonnell's death. Did not, as far as he recollects, give a toast in such terms. He may have expressed himself warmly certainly, and may have expressed sentiments on both sides, but may have felt indignant on the occasion. Has no hostility to Mr Roy individually.

By Dean of Faculty—After the will was discovered, did one man exhibit a desperate feeling towards Mr Roy? I kept that man from making his way up stairs, where Mr Roy was; the man was considerably intoxicated, and I apprehended violence to Mr Roy.

The Solicitor-General—I purpose, my Lord, now to call Mr Scott to prove the last gentleman's subscription to carry on this cause.

The Dean of Faculty objected, and said that a distinct statement and explanation of the cause of the malice must be required by the Court, and made matter of proof; or it must be rested on the examination *in initialibus*. When a party calls the witness, and examines him *in initialibus* as to alleged objections, the admissibility of the witness must be decided, so far as the party objecting to him is concerned in the answers he then gives. Two courses were open to the defender. To prove his objection now by competent evidence, in order to exclude Millbank, in which case the Court always requires a specific statement of the alleged enmity, and a reasonable cause assigned; or, the defender might try to prove it by the examination *in initialibus*. If he takes the latter course and fails, the witness must be admitted. What evidence against his credibility may be afterwards adduced, so as to shake the credibility of the witness, if the defender shall be allowed, and can contradict him as to the matters of the initial examination, is a different point. But the witness must now be admitted.

Mr Cockburn—If this gentleman subscribed, he is a party in the case, and I call Mr Scott to prove this.

The Court—Suppose Mr Scott says that Millbank told him so, it is merely contradicting him.

The Dean of Faculty said, that he apprehended that the opposite party must make a statement relative to what they are to prove. This is a fixed and established point. If the witness's answers are such as the Court cannot reject, he must be examined in the mean time.

The Court—Certainly—no doubt of it.

*Mr Mackenzie* was then recalled, and examined in chief by Mr Robertson—Witness became acquainted with Dundonnell in 1807. Mr Kennedy is married to a near relation of his, and witness generally passed Saturday and Sunday at his house in Aberdeen. Is of opinion Kenneth was a weak man. Witness renewed his acquaintance with Kenneth while his regiment was at Leith. Was then closely acquainted with him. When in Edinburgh, Kenneth was almost always at witness's lodgings; no change had then taken place, in witness's opinion, regarding him since he was at Aberdeen. Kenneth was a credulous person; can give no particular instance, but could have made him believe anything witness chose. He was timid; always afraid to go out after nightfall, and would never go out without some person being along with him. Witness's lodgings were in George Street, and had often seen him safe to Leith, and as often sent a chairman with him to see him home. This was not from intoxication. Witness never saw him so. Does not think he had any particular sense of shame. Witness remembers having seen him dancing at Leith with his person exposed, and almost naked, with figures marked on his body with a burned cork. Kenneth was quite sober on that occasion; he was a very sober man; he was very large and torpid; has seen him fall asleep in the early part of the evening. Witness accompanied the

funeral of the father from Inverness to Dundonnell; Thomas and Kenneth were there; they seemed on good terms. Witness saw no party spirit among any of the company. Kenneth took no part at the funeral. Witness dined on the first day at the Muir of Ord. Does not recollect anything occurring at dinner. On arrival at Dundonnell, Kenneth requested witness to wait that night at Lochbroom; it was with difficulty he could be kept on horseback, and it took many men to assist him into the saddle. At the funeral dinner at Dundonnell, Kenneth's mother asked him to say grace; he remained silent for about a minute, and then burst out a-laughing, which distressed his mother very much. A good many years after this, witness made Dundonnell an offer for a farm, which he afterwards took. Thomas, and a Mr Robertson, who valued the stock on the part of Dundonnell, were there. Witness transacted the business with Thomas, who delivered over the stock, and gave a receipt. There was a female idiot there at that time. On a Sunday afternoon we were in the garden; Kenneth was there amusing himself with the idiot, dressing her head with flowers, and making her jump over a stick after tickling her, which made him laugh. Witness was at Kenneth's funeral. At the dinner Thomas was in the chair, and Mr Roy was at the foot of the table. Mr Roy gave as a toast, the representatives of the family of Dundonnell, viz. Thomas's and Dr Ross's eldest son. Mr Roy made several speeches, and gave various toasts. The repositories were not opened till the following day. From all witness's intercourse with Kenneth, did not think him capable of managing his affairs without assistance.

Cross-examined by Mr Solicitor-General.—Shown three letters; witness denies one, and identifies the other two. One of these is dated 2d January 1823.

Re-examined by Mr Robertson.—There is reference in those letters to Mr Roy, as witness understood the farm could not be let without applying to him, as he was informed Kenneth was under trust. The other letter is dated 22d December 1824, from witness to Kenneth. Read passage from it.

*Alexander Stronach's* father was minister of Lochbroom. Witness has a farm about thirty miles from Dundonnell, on the road to Dingwall. Knew Kenneth from childhood, and continued to know him through life. Witness was at the funerals of both Alexander and Kenneth. Witness knew their father well, and saw the remains of Alexander put into the coffin. Immediately after this ceremony, the father said to witness his property had now fallen into the hands of a fool. In a few days he would prevent the property from being spoiled by Kenneth, as he would get it entailed. This was said in distress. Kenneth was treated by his father with little notice when a child in the house, but cannot say he was ever treated with harshness. Witness saw the father at Inverness before he died, and had a conversation with him there to the same effect, to get the property entailed; his reason was that Kenneth was such a man that he would soon involve the property. Kenneth always stopped at witness's house on his way to and from Dundonnell. Witness had frequent opportunities of seeing him, and was of opinion he was deficient in intellect to a great degree. Witness is of opinion that Kenneth had not judgment enough in doing business, and was a person of easy disposition. Witness was invited to the dinner after Kenneth's funeral by Thomas, who was in the chair. Mr Roy sat at the foot of the table, and gave a particular toast to Mr Thomas Mackenzie, as the Laird of Dundonnell. Witness was on Mr Roy's left hand; he made a speech about his sister, and said that though she had lost the property, he hoped she would never lose the countenance of the friends of the family. After the funeral, and before the settlements were opened, witness saw Roy and Thomas coming from the place of interment together, and heard Roy advise Thomas to make an exchange of a piece of property belonging to Mr Mackenzie of Cromarty. Remembers Kenneth leaving Seabank; there was an enormous number of birds of different kinds sent from thence in carts; witness did not see much of them at Dundonnell, as he had them nine or ten days at Garvan.

Cross-examined by the Lord Advocate.—Mackenzie of Strathgarve was at the funeral of Kenneth. Millbank was there. Strathgarve and witness overtook Millbank half-way to Lochbroom. Witness did not hear Strathgarve say any thing about Thomas's succession being taken from him.

*Ninian Jeffrey*—Was acquainted with the late Kenneth; met him at Dundonnell when on a visit; on two different occasions conversed with him on his own affairs. Felt very much for the situation he was held in by his wife's friends; Kenneth spoke disrespectfully of Mr Roy, and by no means in terms of affection. Lamented bitterly that his business was in the hands of Roy and Mr Macandrew; this was in 1822 or 1823. Part of this conversation passed in the presence of Mrs Mackenzie, who said it would be much better to take the business out of her brother's hands; when Kenneth answered, she knew too well he could not do so. He took no management of his affairs either in or out of doors. Passed his time walking about the house; in the evening he generally sat in the kitchen; there were no idiots at Dundonnell when witness was there. Considers from what witness saw of him, that he was incapable of managing country affairs; thinks he was not a man fit to manage business.

By the Lord President—On your oath, is that the opinion you formed at the time? It is, my Lord: Kenneth always spoke of Thomas and his family in terms of affection.

Cross-examined by Mr Solicitor-General—Witness never asked him to sign a bill. Witness wrote him, but he did not do it.

Re-examined—Got an answer, but cannot charge his memory who wrote it. Witness rather thinks it was written by Mrs Mackenzie.

*Alexander Mackenzie Cheyne*, medical student, now settled at Aberdeen—His mother was first cousin to the late Kenneth Mackenzie of Dundonnell; witness was on a visit there in 1824, when he was about fifteen years of age, and remained from two to three months. He saw a great deal of Dundonnell, who was very fond of witness. A person of the name of Campbell was in his service at the time, and Dundonnell told witness that he had discharged Campbell, but that he had not taken his departure. This dislike was a feeling of strong aversion. Some conversation of a more delicate description passed between witness and Kenneth relative to Mrs Mackenzie; witness told him a circumstance that he saw between Campbell and Mrs Mackenzie—of great impropriety—and thought it his duty to do so, that Kenneth might discharge him. The suspicion did not appear to be new to Kenneth's mind, who had long before this shown his aversion to Campbell; he said he could not help such things, and proceeded to state many acts of Campbell's impertinence, as he called it, to witness; he looked very simple on the subject. He seemed to entertain a belief of the impropriety between Campbell and his wife; from the way he spoke and acted, he appeared to witness to be very far from entertaining the ordinary feelings of a man. His usual habits were very indolent, spending a great part of his time in the kitchen by the fire, where he sat for hours together, and sometimes slept for a length of time. Witness had seen Kenneth at his brother Thomas's house, at Kildonan, and had seen them in company on the lake, and had seen Kenneth dining there several times, and Thomas dining at Dundonnell; witness had seen Thomas's children at Dundonnell; and from all that he saw, Kenneth behaved to his brother with the greatest kindness. Mr Mackenzie took no charge of anything within or without doors but his poultry. From what he saw, witness formed the opinion that he was simple—imbecile he should say; and that was the opinion that he had formed of him at the time of that visit.

Cross-examined by the Solicitor-General—Witness is rising twenty-one or twenty-two years of age on the 23d December next. Witness informed his mother some time after of what had passed between him and Kenneth relative to Campbell. His mother and Mrs Mackenzie were never in habits of correspondence, as far as he thinks, nor in habits of intimacy, and he thinks that they are now in the same habits as formerly. Witness identified two letters, dated 17th January 1825 and 26th June 1824, written by his mother, and addressed to Dundonnell. It was within a year, he believes, that he told his mother of what he saw between Campbell and Mrs Mackenzie.

Re-examined by the Dean of Faculty—Witness thinks it was about July or August that he went to Dundonnell. Mention is made in the letter of 26th June that the witness intended going to Dundonnell. The other letter is after he had been at Dundonnell.

*Mr James Falconer Gillanders*—Is a son of Mr Gillanders of Highfield; is a



relation of the family of Dundonnell, but somewhat removed. About Christmas 1825, or beginning of January 1826, he went on a visit to Dundonnell, and remained six weeks. He had never seen Kenneth before. During his stay there, he saw a great deal of Dundonnell every day, who took a liking for witness. There were many dancing meetings during the evenings among the lower class, which Dundonnell always attended. Witness repeatedly heard toasts given, and they were principally regarding Dundonnell's family, and of his brother and his children, in which Kenneth joined with the greatest cordiality. Heard him often talking of his brother, and always in affectionate terms. At the time witness was at Dundonnell, Kenneth expected his brother, and seemed very anxious for his arrival. The toasts alluded to gave him great pleasure. A person of the name of Campbell was then in his service. Kenneth spoke of Campbell to witness, and told him that he had dismissed him, but that Campbell would not go. The cause of his dislike to him seemed to be that he was too much with his lady, and so familiar, and always with her, that he called him a polecat. This conversation commenced on the part of Dundonnell. He was constantly in the habit of spending his time in the kitchen with the servants; and his only source of amusement was in his poultry, of which he had more than a thousand. Witness's impression of him was, that he was a very silly and weak man, amounting to what he considered a defect in his intellect. He did not consider him capable of taking charge of his own affairs. When witness was at Dundonnell, the factor's clerk, a person of the name of Cameron, was there for a week; and had Dundonnell been capable of transacting business, he would have done so with the factor's clerk. Mrs Mackenzie always did business with him. From witness's knowledge, he can certainly say that Dundonnell was not capable of doing business with the factor's clerk. There was no collection of rents at that time. Mrs Mackenzie was entirely occupied during the day with the factor's clerk. Witness was at Kenneth's funeral; Millbank, Kilcoy, and Ord, were there. Thomas sat at the head, and Robert Roy at the foot of the table at dinner. Roy drank the health of Thomas as heir to the property.

Cross-examined by the Solicitor-General—Witness is certain that Cameron was there for a week; he watched him so far as to see that he did no business with Dundonnell. Mrs Mackenzie did all the business with him. She told witness that she was transacting business with him. Witness believes that there were from one to two thousand fowls all about the Strath; an immense quantity of them were about the house, and more about the house than any where else. Dundonnell had a great variety of Spanish fowls, and different varieties of pigeons.

Re-examined by the Dean of Faculty—Witness had conversations with Dundonnell that impressed him that he was strongly addicted to superstitious belief. He told witness that he had at one time seen a gentleman's ghost, and that it had given him a slap on the side of the head. He did not hear it coming, but he saw it walk away, and he saw nothing else, and this ghost alarmed him very much. It was the witness's belief that Dundonnell was quite serious when he said so. Dundonnell told him that a country lad in the neighbourhood had seen a ghost, and that in consequence he had lain in bed three or four days. Witness went to see him, and the lad said that he had seen the evil spirit. Witness said that he was 22 years of age this month.

Miss Gillanders, daughter of Mr Gillanders of Highfield—Knew Kenneth since her earliest recollections to the last. She has seen him at Inverness, Seabank, and at Dundonnell. She was only once at Dundonnell since his marriage, in the summer of the year 1822, and was there for six weeks. Dundonnell's occupation when she was there was going from one hen-house to another, feeding his poultry, and attending to their wants. Dundonnell took no charge of the house, and of nothing but his poultry, and did nothing else out of doors; the ordinary affairs were managed by Mrs Mackenzie; witness always heard her speak as if she kept the accounts. Witness had friendly conversations with Dundonnell about Roy and his family, and he spoke of Roy with great aversion and dislike, and apparently as if he had a fear and dread of him; he always spoke thus of him to witness when he had an opportunity. Witness never having seen Roy, asked Dundonnell what like a person he was. Dundonnell answered that he was a nasty, impudent, black, conceited puppy. Dundonnell was

very fond of cream, and drank a great quantity at all times. Witness never saw him reading. Kenneth Adams, a nephew of Mrs Mackenzie, was about the house. Joseph Adams was not there. Kenneth spoke in great dislike of Mrs Adams, and could not endure her name. He did not appear to like the boy, which surprised her, as he was fond of children. After dinner, Dundonnell went to his hens, and when he came back to supper was covered on the head and back of the neck with the small down of the fowls. Witness never saw Dundonnell act for himself. He seemed to be under the continual fear of Mrs Mackenzie. A conversation took place between Mrs Mackenzie and witness at the time with regard to the resemblance that married people have to each other; Mrs Mackenzie said that she and her husband had no resemblance but in their handwriting, and that she (Mrs Mackenzie) either could or did write so like him, that her hand could not be known from his. Being desired to look at a letter, dated 9th May 1823, addressed to Mrs Mackenzie, recognises it to be a letter from her mother; and read a postscript, stating that she had a *general* to send to Dundonnell, which any person calling for would get; and she explained that this general was a Spanish fowl, or chittagong, which she wished to send to the laird. The letter was produced.

Cross-examined.—That letter was written by her mother.

*John Mackenzie*, cattle-dealer—Knew Dundonnell, and had occasion to be frequently at his house, where he lived for months at a time during a course of seven years. Witness had transactions with him in regard to cattle; but transacted with the lady the most, and had repeated transactions with her. Remembers giving money to the laird, which he never counted; witness counted it himself; Mrs Mackenzie was at the back door, and came in and got the money from the laird. Witness had seen him among the haymakers between the years 1819 and 1821. The people, while making the hay stacks, were fixing papers with pins on the back of his coat, to make themselves laugh. He could not say if any idiots were there at this time. He often saw the Dundonnell idiots, and the laird amusing himself with them. The laird often desired them to dance, and took great delight therein. Campbell was at the time in his service; and witness had frequent conversations with Dundonnell about him. Witness mentioned to Dundonnell a circumstance he knew of Campbell, in a house where there were some girls assembled, and the laird said, "O the beast, that's his practice." He spoke the very reverse of kindly about Campbell. He said nothing of Mrs Mackenzie. Of Campbell he said he could not get him out of the house; that Mrs Mackenzie kept him. He said to witness several times, he wished to get Campbell away. Witness had conversations with the laird about Roy, and he did not talk kindly of him. When he heard on one occasion that Roy had arrived at Dundonnell, he said, if he had another place to go to, he would not stay in the same house, but would stay out of his way. This happened about the year 1822 or 1823. The witness at one time saw the laird crying, which happened on a washing day. The laird requested that the washing should be delayed, because it would put the salmon down to the loch. Mrs Mackenzie came to the laird, and talked violently indeed to him. The washing was gone on with, and Dundonnell fell a-crying.

*Mary M'Kie*—Was in service as lady's maid at Dundonnell for six years, and left it after his death. The laird occupied himself in attending his poultry, and sat much in the kitchen. Campbell was then a servant in the house. Witness had sometimes conversations with the laird about Campbell; the laird said that his service was a torment to him, but that Mrs Mackenzie would not allow him to part with him. Campbell remained in the service till the period of Dundonnell's death. She remembers General Brown, an idiot, who remained upwards of a fortnight at Dundonnell at the time. She did not remember that there were other idiots there at the time. The General drilled the men-servants in front of the house, and the laird attended the drill, which was their usual occupation. There were two or three more idiots at other times, and she saw them dressed up, one of them with bed-curtain prints, which Dundonnell purchased. They went to dance at night. The dances were in different parts of the house. Dundonnell was present at these dances, and took much delight in these amusements. There was a private runner came with the letter-bag between the Strath and Dundon-

nell house. Mrs Mackenzie was in the habit of opening the bag, and taking out the letters

*Isabella M'Lean*, Gaelic witness.—Rev. John M'Donald, of Urquhart, sworn as interpreter.—Was a servant with Dundonnell. Recollects of Mr Mackenzie of Cromarty paying a visit to Dundonnell; does not recollect who was with him. Dundonnell was within the hen-house when the gentlemen came.—Did any thing particular take place in altering the dress of the laird before he was brought into the house to be introduced to the company? Remembers that Campbell the servant took Dundonnell into a shed, and brushed his boots or shoes, and cleaned him, before going into the house.—Was there a bundle of clothes taken out by Campbell? Does not remember at present whether there was or not.—When strangers came to Dundonnell, was it usual to conceal the poultry, and keep the habits of the laird out of sight? Recollects they were locked up and sent out of the place when strangers were expected; and they were so when these gentlemen visited Dundonnell.

*Mr Duncan Mackenzie* of Keppoch—Was some time a merchant in London; now resides in Ross-shire; is a deputy lieutenant and a justice of peace of the county; is a brother of Avoch. Saw Dundonnell in Inverness first. Saw him in London in 1817, in April or May of that year. Major Monro of Poyntfield and Dundonnell lived at Charing Cross; called for Dundonnell and the Major. Saw Dundonnell at his father's funeral; saw no appearance of enmity between Thomas and Dundonnell at their father's funeral; saw nothing of a dispute with the brothers, nor of their refusing to speak to each other. Had conversations with Kenneth in London; thought him a weak-minded man, very much so indeed; was led to take particular observation of Dundonnell's conduct; supped with him and the Major; after supper, Dundonnell got up, and wished to go and see an exhibition of paintings; does not know whether he wished to go to Somerset House or to some panorama, but the Major said to Dundonnell, "Don't go, or the Cockneys will humbug you, as sure as you are living." Saw Dundonnell frequently after returning to Ross shire. The opinion first entertained by witness of Dundonnell's weakness of mind was confirmed very much by his subsequent intimacy. This weakness amounted to imbecility. The shepherd in the employment of the witness purchased some widders or lambs at Dundonnell. The money to pay for these was sent, and a receipt for the money was brought back. Witness did not like the receipt, and sent it back. It was signed "Kenneth Mackenzie," and the witness knew that Dundonnell was in the low country, and therefore returned the receipt. The money was afterwards sent to Mrs Mackenzie. Witness did not get a new receipt, but in a day after, witness made an entry of the transaction in the day-book. From all the witness's knowledge of Dundonnell, he was a man very easily imposed upon, and this opinion was formed at the time.

Cross-examined—Joined the father's funeral at the Muir of Ord.

*William Mackenzie*—Is tacksman of Baddentarbat; pays L.200 per annum to Mrs Mackenzie. Interrogated, what he knows of the late George Mackenzie of Dundonnell's opinion of Kenneth? George Mackenzie said to witness, that he did not know what to make of Kenneth. Witness saw Kenneth frequently, and from his habits considered him weak and unfit for business. Was at the funeral of George Mackenzie; Mr Thomas was present; Mr Thomas took charge of the funeral. Witness recollects of Mr Roy being at the funeral and dinner; Roy was at the foot of the table. There were two persons between Roy and witness. Roy stood up and gave a toast, drinking the health of Thomas Mackenzie as the heir of Dundonnell.

*Mr Mackenzie*—Is the tacksman of Monk Castle; knew George Mackenzie of Dundonnell; heard him say that his son Kenneth was little better than a fool. Witness had occasion to see and know Kenneth in early life; saw a great deal of him, and formed an opinion from this acquaintance, that Kenneth was no better than a halfling. Had a small grazing on the lands of Dundonnell; was frequently present at collecting the rents of Dundonnell. Different persons were then collecting rents during this period, viz. Cameron, Dingwall, Campbell, Urquhart, all factors; Dundonnell was very seldom present. Had the grazing many years; paid the rent once a year, and was present when Dundonnell was there, but he did no-

thing save sitting in the room; never saw him take any charge of what was going on. Had frequent conversations with Dundonnell about Campbell; Dundonnell told witness that Campbell was a proud impudent fellow; and from what Dundonnell said, and his manner of talking to him, witness thought he disliked him very much. Dundonnell was kind tempered to witness.

The Dean of Faculty stated that it was necessary to call the Gaelic interpreter to prove that Thomas came to Dundonnell, and was present when his brother died. These facts were admitted by the opposite parties, and rendered unnecessary.

*Alexander Dingwall*—Is a clerk in Mr Rose's office, Dingwall. Was in the employment of Peter Hay, postmaster, Dingwall, from the year 1815 to 1821. The post-office was kept in the shop. Mr Hay kept accounts with the gentlemen round about the country. There was a private post-bag kept for Dundonnell, and which was sent out once a-week, on Wednesday, with the other post-bags. Mr Hay was in the habit of giving out letters to gentlemen calling for them. The letter produced has markings in the handwriting of Hay. The mark "Entd." signifying the entry of the post in the account of the family; the figure 2 is to denote that it was sent by a private hand, and is the number of letters sent by the private hand at the time. The 1s. 7d. marked is the aggregate postage of the two letters; 1s. 2d. was the post from Edinburgh to Dingwall; a letter from Fort George to Dingwall 6½d. There is 1s. 0½d. on the letter shown. No such marking was made when the letters were deposited in the private bag. There is a ferry between Fort George and Fortrose. It is nearer by many miles to go this way to Dingwall than by the mail. The mail goes by Inverness and Beaulieu.—[The other party here admitted the genuineness of the markings on the back of the letter.]

The Dean of Faculty here stated to the Court that he would lodge letters and papers as evidence, of which the following is an abstract:—

1. Roy wrote to Dundonnell during the years 1823, 1824, and 1825, business letters to the number of sixty-four; but there are only six letters produced from Dundonnell to Roy during same period, all of which are holograph of Mrs Mackenzie, with the exception of two.—2 Letters from Dundonnell to J. Cumming, writer in Dingwall, the country agent, during the years 1818, 1819, and 1820, all holograph of Mrs Mackenzie, seven.—Letters written and signed by Mrs Mackenzie, herself, to Cumming on business, four.—3. Letters signed by Dundonnell, but written by and holograph of Mrs Mackenzie, to John Cameron, writer in Dingwall, the successor of Cumming as country agent, during the years 1821, 1822, 1823, 1824, and 1825, twenty-two. Letters written and signed by Mrs Mackenzie to Mr Cameron on business during said period, four.—4. Letters from Dundonnell to John Macandrew, solicitor in Inverness, on business, during the years 1818, 1819, 1820, 1821, and 1822, all of which are in the hand-writing of Mrs Mackenzie, excepting two holograph of Dundonnell, twenty-two. Letters written and signed by Mrs Mackenzie to Macandrew during same period, all on business, about sixty. Letters from Macandrew addressed to Mrs Mackenzie, about sixty. Letters from Macandrew addressed to Dundonnell, about thirty.—5. All the letters from Dundonnell to Macbean, subsequent to his marriage, are holograph of Mrs Mackenzie, in number about eight.

#### RECEIPTS TO TENANTS AND OTHERS.

6. Between 150 and 160 receipts to tenants, &c. have been recovered, and produced in process. (Of that number there are only sixteen holograph of Dundonnell, the remainder are in the hand-writing of Mrs Mackenzie, excepting two or three.)

#### HOUSE BOOKS.

7. All the house books which have been recovered are holograph of Mrs Mackenzie, and do not contain a *single* entry by Dundonnell.—8. The greater number of the letters addressed to Dundonnell are titled or docketed on the back by Mrs Mackenzie.

*Mr Grant Manford*, solicitor in Inverness.—Served his apprenticeship with Mr Macandrew, solicitor there. He entered in 1819, when about nineteen years of age, and had not been in any writer's office before that time. The first occasion of his being at Dundonnell was in 1819 or 1820. He had commenced his apprenticeship in May. Nobody was at Dundonnell on that occasion; he was there alone. He had previously been acquainted with Mrs Mackenzie. Witness was born in Greenock, and went to Fort George in 1814, where he resided till 1819. He knew Mrs Mackenzie before her marriage, and Mr Roy's family. He was introduced to Mr Macandrew by Mr Aeneas Macbean, W. S. He was not acquainted with Mr Macbean, but he knew his friends and relatives at Campbeltown. He was at Dundonnell in 1821, but does not remember whether oftener than once. He had been there two or three times before the settlements had been executed by Dundonnell, which was in August of that year. He was first aware of the probability of a settlement being executed by the late Dundonnell on the occasion of the scrolls being sent to Mr Stuart, W. S. Does not remember at what date they were sent; these scrolls were never executed. The scrolls were written by himself at Inverness, at least altered and remodelled in his handwriting.—In what period of the year were the scrolls written out before their execution? They were written out very shortly before their execution, but I cannot remember how many days.—Witness was first aware that he was to go to Dundonnell in regard to the execution of these settlements, very shortly before he actually went, and was desired to go by Mr Macandrew, his employer. Before he left Inverness, it is very probable that Mr Roy must have been previously there, but he cannot remember. When he arrived at Dundonnell, he found Mr Roy there. He went to Dundonnell with Mr Macandrew and Dr Roy, the father of Robert Roy. Witness found Mrs Roy, Mrs Mackenzie's mother, there. He was, on his former examination, under the impression that Dr Adams and Mrs Adams had been there, but they were not. He was satisfied of this from having looked at his diary, which was familiar to the learned Dean. Witness had been four or five days at Dundonnell, for the purpose of extending the deeds, and had carried the stamp paper along with him. He could not recollect the day of the week. The deeds were extended by him. Mr Macandrew might have come into the room while he was extending the deeds, but he does not think he did. It is possible he might have seen the deeds after they were prepared. When the scrolls were extended, witness thinks the deeds were compared with the scrolls. He thinks they might have been compared, as he would not have taken it upon himself to execute them without his comparing them. Witness was satisfied, that if they were compared, he and Macandrew must have compared them together; but he had no recollection whether this had taken place. Macandrew remained at Dundonnell all the time; he might have been walking about the property, but he was at Dundonnell every night. The room in which the deeds were extended was a small room between the dining-room and the drawing-room. Mr Roy was at Dundonnell. Witness knew that Macandrew and Roy took an excursion round the estate; but whether they came home every night, or remained a night away, he cannot remember.—Are you aware whether there are any other circumstances that make you believe that the scrolls and the deeds were compared? It was always my impression that the deeds were compared. This was not his impression at one period, but he is now satisfied that he would not have executed them without comparing them.

By the Court.—Did that impression arise from your subsequent experience? This impression has arisen from the experience which I have had since.

Examination continued.—The deeds were executed on separate days, as he believes. The second he suspected had not been extended on the same day the first was signed. Witness thought the ball happened on the occasion of signing the second deed. There was a dance on one of the evenings on which one of the deeds was executed.—Was it on the anniversary of the laird's marriage? It was.—Have you no recollection whether the second deed was signed on the day of the dance? I don't think it was, so far as I recollect. Witness recognised the trust-disposition executed on the 27th shewn to him. The other testamentary witness was David Fraser, now residing within a mile of Fort-George. Witness saw Dundonnell sign this deed, and Dundonnell read it before he subscribed it. Witness either read the scrolls to him, or Macandrew explained them to him. Witness does not

recollect of Kenneth actually reading the deeds, but witness is quite satisfied that he read them to him. From after recollection and looking at the record which I kept, I am satisfied that the deeds were read over by me to Dundonnell.—Is it according to your knowledge that they were explained by Macandrew? It is from Macandrew stating so to me. Fraser was present at the time, and came into the room at the time Dundonnell was in the act of signing. Fraser was sent for.—Independently of this record, have you any recollection of the fact of having read over this deed to Dundonnell? After thinking of the thing and the record (diary), I am satisfied that no remarks were made on signing them. After Fraser was called into the room, was any thing said to him? Dundonnell wished the deeds should be read over in his presence; I said that it was not necessary for an instrumentary witness to hear the deed read over. Dundonnell asked me if it was necessary, and I told him it was not.

By the Dean of Faculty—I thought Dundonnell wished the deed to be read over? Witness—I correct my former expressions. Dundonnell merely asked if it was necessary, and I said it was not; he did not propose it in any other way but a question.—Did Dundonnell ask the same question with regard to the second deed that was executed? I cannot recollect.—Is it your belief that any thing passed at the time the second deed was executed about their being read over to Fraser? I think not. Witness sent for Fraser, and desired him to come, and he came into the room when Dundonnell was in the act of signing the other deed, the same as on the former occasion; Macandrew might have been in the house at the time, but the witness thinks not. He does not think that Macandrew was present at the signing of the deed, or at the reading of it over; he was not, if he (witness) recollected. When the deeds were executed, witness sealed them up, and gave them to Dundonnell himself, or to Mrs Mackenzie, he cannot say which. Cannot remember whether any docquet was put on the back as to the contents of the parcel. He recollects that both were sealed in one parcel; and of course the parcel was not sealed till the second deed was executed. Witness had the custody of the first deed during the interval. He might have seen Macandrew at the time, but does not remember. [Witness shewn the other deed executed on 28th August, which is witnessed by Fraser.]—What led you to read over the deeds to Dundonnell? It is a customary thing to read over the extended deed to the party who is to execute it, unless he declares himself satisfied with it. Witness was aware that the scrolls had been approved of by Dundonnell. He desired Fraser to make a memorandum of the transaction. Witness was passing Fraser's shop, and desired him to take a note of what he saw done. Does not remember of adding any thing else. He might have stated to Fraser as a reason why he should take a memorandum, that he might be called upon afterwards. It was impossible for him to say that he stated any thing to Fraser, but to take a note of it.—Is it your belief that you told him that he might afterwards be asked as a witness? It was my impression that he might afterwards be asked, and it is possible that I gave that reason for it. Fraser did not show witness the memorandum he had made of the transaction.—[The learned Dean desired the diary kept by the witness to be handed to him, upon which witness asked their Lordships if he would be allowed to open the diary sealed under the commission. It was ordered to be opened by the Clerk of the Court, and handed to the witness.]—Being requested to turn to the date of 22d August 1821 in the diary, and to read the entry of that date, read as follows:—"Left Inverness to-day on my way to Dundonnell, accompanying Dr Roy and Mr Macandrew, without any thing amusing happening on the road."—[Witness here said that unless directed by the Court, he declined to read farther, upon which the Court, inquiring if it related to the business, ordered him to read on.]—"We arrived safe at Garve, where I had a most miserable lodging, such as I never before had but once in this hopeful country."—Being further ordered by the Court to read the entry of the 23d, witness said it had nothing to do with the case; but on being ordered by the Court to read on, read—"Set off from this at five o'clock A. M.; a delightful day; sorry for a circumstance which happened on the road." [Here it seemed that there were some unintelligible marks in the diary.]—"In the evening we arrived safely at Dundonnell, where we found all well." Read the entry of the 24th—"Quite busy to-day getting the deeds

of settlement arranged for Dundonnell." Read the entry of the 25th—"Occupied busily in getting the trust-deed and deed of settlement by Dundonnell extended." Read the entry of the 26th. Witness: This entry is on a Sunday, on which no business was done, and the entry has nothing to do with this case. Being again ordered to proceed, he read as follows:—"Sunday—Long of getting up; keep irregular hours; dined late, and then went to bed; Mr Macandrew took a long walk down the way to Kildonan."—Endeavour now to recollect if Mr Macandrew and Mr Roy were away a day or two on an excursion? I rather think they were for a day. Read the entry of the 27th—"This day memorable at Dundonnell for two things; 1st, the execution of the trust-deed regulating the legacies; and 2d, the anniversary of the laird's marriage; they danced till six o'clock in the morning, and then went to bed." Read the entry of the 28th—"This day nothing particular or amusing happened; I got the deeds of settlement executed; went through the regular form of explaining to the witness the nature of the deeds, and previously reading them over to the laird, who had already read and approved of the scrolls." Witness here paused, and the Dean ordered him to read the rest. Witness said it had no relation to this case.—Dean: That may be your opinion, Sir; it is not mine. Read on.—Witness: Am I bound to do so, my Lord? Certainly. Witness then proceeded—"A very pleasant conversation took place to-day betwixt Roy and I with regard to remaining with Macandrew. To this I made no objection, provided I got what would keep me in Iuvernness. Every time I see Roy he always inspires me with hopes with regard to my future prospects; much am I beholden to him and his family." (Witness read with difficulty from the passages having been papered over. Dean assisted him from copy made by Lord Newton. The words "inspires me with hopes," and "much beholden," witness had difficulty in making out.) Witness said he had wafered a sentence of this entry when last examined. Witness is not sure that the *pleasant* conversation alluded to in the diary occurred after the deed was executed. Thinks Roy was at the dance on the 27th; he was there on the 28th; but does not recollect whether it was on the 28th the conversation took place or not. It is very likely it may have taken place on that day, as it is entered in the diary.—What was the pleasant conversation, alluded to in the diary, about you remaining with Macandrew? Mr Roy asked me if I had any intention of leaving Mr Macandrew; I said I had not, provided I had a sufficient salary. Mr Roy approved highly of the resolution I formed. This was all that passed. Witness was merely a clerk with Mr Macandrew at the time, and was not bound by indenture.—The entry goes on to say, "Every time I see Roy he always inspires me with hopes with regard to my future prospects."—Had he inspired you with hopes as to your salary? I put it down in the diary in consequence of Roy's having recommended me to Mr Macbean, and I anticipated Mr Roy's interest to get me into Mr Macbean's office. Mr Roy approved of witness's resolution to remain in Mr Macandrew's office. Mr Roy might have spoken to Mr Macandrew in his favour, but witness does not recollect. Is that the reference to your future prospects to which you allude? Probably it was. Witness thinks he had been previously entrusted by Mr Macandrew to execute deeds. He had witnessed and seen many deeds executed in the office, and he must have had the same charge as the other clerks. He had got deeds executed, and took the same charge as other clerks, but he did not know that he had been entrusted previously with the execution of any deed, except the supplementary deed of settlement by Mr M'Pherson.

By the Court—When you were so particular as to desire Fraser to take a memorandum of this deed, thinking it might be called in question, did it not strike you to be particular that Macandrew left this deed to your management? It did not. When he desired Fraser to take a memorandum, he considered him to be an ignorant, stupid man, and he might not remember it. Did you know Fraser to be an ignorant stupid man when you sent for him? I knew the man could sign his name, but that was all; he was the only person about the place that I could get.—Could not the completion of the deeds have remained over for a day—there was no hurry? I do not know, my Lord; I went about the transaction in the regular way.

Witness being shown a letter, dated 10th January 1820, from Macandrew to Mrs Mackenzie, identified a postscript to the letter in his handwriting, as follows:—"All friends at the Fort, Treeton, and Forres, are well. I saw a lady from the latter place, who drank tea, Friday evening, with Mrs A. My friend Robert was with his father at Glasgow on New Year's Day. The Fort is again deserted, the veterans have fled. J. G. M. I see I am to have the

pleasure of seeing Dundonnell."—The friend Robert was Mr Roy. In a letter, dated 13th November 1820, from Mr Macandrew to Mrs Mackenzie, witness identified the postscript to be written by him—"There is at present nothing worth recording. Betty Mackenzie is still stiff, stiff." This referred to an account that he wanted to get abated. The person was stiff in the demand, and would not give down what he wanted.

Cross-examined—Witness kept a diary four years before the execution of the deed, and was in the habit of entering every thing, both great and small, into the record. The entry as to the execution of these deeds is not more full than the entries as to the execution of other deeds. Before he went there, and while there previous to the execution of the deeds, he had no conversation with Roy or Mr Macandrew as to the difficulty of getting the deeds executed. He never heard it insinuated by Mr Roy or Mrs Mackenzie, that Dundonnell might not know the tenor of the deeds. Never had a word with any one but Mr Macandrew on the subject of the deeds. The nature of his conversation with him was about the execution and copying of the deeds, and so on. Witness had no impression that led him to expect that there might be a difficulty, and he found none. He asked Kenneth if he approved of the deeds, and he answered that he had done so. Witness presumed, that while he was reading the deeds, Dundonnell had attended to them. Witness thought that Mrs Mackenzie came in when he was employed in extending the deeds. She did not remain in the room, but only came in to take a book out of her library for her mother to read, and went away, and neither looked at the deeds, nor asked any question at witness. He did not hear any conversation between Mrs Mackenzie and her husband, Mr Macandrew, or Mr Roy, in reference to the deeds; and at the time he had no suspicion or belief that the deeds had been improperly got up. He never heard nor saw any thing that, on reflection, gave him such an impression; and he had no such impression now, and never had. Nothing ever occurred to him that led him to understand that Dundonnell did not understand the deeds, or that he executed them unwillingly. Witness's impression was, that he gave the deeds over, after they were executed, to Dundonnell.

By the Court—Who desired you to seal them? Nobody. I think I marked something on the back, but I don't recollect what it was.—It was not usual to make one of the dispoonees a witness. It occurred on the spur of the moment, when passing Fraser's shop, to desire him to make a note, because he was a stupid man, and he might be apt to forget. He had no other chance of witnesses but Campbell, and he was not a competent witness. Does not think that either Robert Roy or Dr Roy were there at the time the deeds were executed. Does not think he saw Roy or Macandrew at Dundonnell at all after the deeds were executed, but does not recollect. He left Dundonnell the day after the deeds were signed, which his diary would show. He started early on the morning of the 29th, on his way back to Inverness, alone. The deeds were executed before dinner. He saw Mrs Mackenzie after the deeds were executed, but had no conversation whatever with her on the subject of the deeds. Roy never opened his lips to witness on the subject, and he had no reason to know whether Roy knew anything whatever with regard to them.

Re-examined—The entry as to the execution of these deeds is not more minute nor more full than the entries of similar transactions in his diary.—You say you had been entrusted with the execution of one deed previously, viz. the supplementary deed executed by Mr M'Pherson; read the entry as to that deed. Witness: What is the date of it? The Dean: How can I know, sir? Find out the entry yourself. You know this diary of yours pretty well by this time, I should think. Witness then read—"Came to Ardesair, and got Mr M'Pherson's supplementary deed executed." Entry of the 29th he supposed was made at next stage in the course of his journey, and the other entries made at Dundonnell.

By the Court—Macandrew gave him no farther instructions about these deeds than were generally given to clerks employed in such settlements. He proceeded in the same manner in this as in other cases of a similar kind. He never had occasion to see the execution of any deed signed by any one who was not an educated person.

David Fraser, carpenter in Campbeltown, examined by Dean of Faculty—He went to be carpenter at Dundonnell two or three months after the laird's marriage, and left it about a year after his death. Witness recognised the signature of the deeds. He witnessed these deeds in August 1821. He saw Dundonnell sign, as far as he remembers. The deeds were not both signed on the same day;



one of them was signed on the 27th, the other on the 28th. Witness and Manford were the only persons present, as far as he recollected, when the first deed was signed by Dundonnell. Witness was sent for and went into the room, and saw nothing, and waited there till the deed was signed. Dundonnell said on that occasion, "We had better read the deed over;" and Manford said that there was no necessity for it. Dundonnell meant of course that witness should hear it. Witness was standing at the time at the back of Dundonnell's chair, and saw him sign it. There was a ball the day the first deed was signed, in commemoration of the laird's marriage. Dundonnell said nothing else except proposing to read the deed to witness, and when it was signed, saying that he might go away. Witness could not say if he recollected if he saw any thing written on the top of the first deed; though pressed frequently on the point, he remained a long time silent.—As the eye of God is upon you, I ask you if you saw any thing written on the top of the deed, and what it was? Witness, after considerable hesitation, said he saw "title-deed," or something like it, written on the top of it, as far as he could remember. Have you any doubt that you saw these words? No. I surely saw them. The dance took place that night, and the second deed was signed the next day, in day light, as far as he could remember; but did not recollect whether before or after dinner. He was sent for on the occasion, and Campbell went for him. He did not remember who was at the ball. There were some of the tenantry. He dared to say that there were persons from the neighbouring cottages; of course there were some persons from Ullapool and Lochbroom, both men and women. He looked into the ball-room, and that was all; the ball was in the low room, and the family were present. When he went into the room the second day to sign, Dundonnell and Manford were there, and no other person that he remembers. He believed Dundonnell talked of reading over the second deed to him, which Manford said was unnecessary. He saw Dundonnell sign the second. He saw "title-deed" written on the top of the second also, he thought, but he might make a mistake. Why were you so unwilling to answer the question as to what you saw on the deed? Had any one told you you had made a mistake? He did not recollect if he was told that he made a mistake, and that he had not seen the word title-deed on the top of the deed, since he was last in Edinburgh. No person had said to him that he had made a mistake, so far as he remembered. He did not recollect if he had any conversation with any person as to whether he had or had not seen the word title-deed on the deed. He could not say whether it was likely that he had conversation with any body. As far as he remembered, he could not say if he ever said any thing about it. He did not know why he had been so unwilling to tell if he had seen the word title-deed on the top of the deeds. Manford told him to write a memorandum of what he had done, in case he might be called upon afterwards about the deeds. He wrote such a memorandum on the 28th, the same day that he witnessed the second deed. He showed it to Manford at his house in Campbeltown, better than a year after Dundonnell's death. Something was said about the deeds, but he could not say positively what it was. He did not remember what Manford said concerning the memorandum. Manford had been going to Fort-George at the time, or coming from it. Mrs Roy, mother of Mrs Mackenzie, lives at Freeton, which is nearer Campbeltown than Fort-George. He could not say whether Manford had been at Freeton or not. He left Dundonnell because there was no more employment for him there, and he works to any person that will employ him. He is employed sometimes at Freeton, and sometimes another carpenter is employed there. [Witness here read the memorandum which was handed to him, of his signing the deeds at Dundonnell.]—"Dundonnell, 28th August 1821.—I, David Fraser, was witness to Kenneth Mackenzie, Esq. of Dundonnell, signing 2 title-deeds, and heard him say that he approved the same." Remembers quite well now that he heard him say that he approved of the deeds. He remembers now that he saw the word title-deed as on this memorandum. Manford did not give him the form of this memorandum; it was his own doing. Mr Roy had seen the memorandum after he went to Campbeltown, and after Manford saw it, as far as he remembers. Macandrew did not know, to his recollection, that he made the memorandum. He has a neighbour of the name of Munro. He knows Mrs Roy, Dr Roy's widow. He did not get the coat he wore from her; he bought it; he got no clothes whatever from her.

By the Court—He did not remember if he saw Mr Manford before he went to execute the deeds. He had very little acquaintance with Manford.

Dean of Faculty—This, my Lord, is the case for the pursuer.

MR SOLICITOR-GENERAL (Cockburn.)—My Lords, and Gentlemen of the Jury, I have the honour to attend you not only on behalf of Mr Roy, who, as I shall afterwards show you, except in point of reputation, has not one single sixpence of interest at stake in this trial; but on behalf of Mrs Ross, the sister of the deceased, who has at stake the whole provisions given to her family by her deceased brother; and also on behalf of certain gentlemen of undoubted respectability—against whose honour not even the slightest suspicion has been whispered—who are the trustees under these deeds, and who have no interest but to do their duty, and who, according to the feelings that they have even at this moment, hold it to be their absolute duty to defend them.

I have the most implicit confidence in the candour and discretion both of you and of the Court; I must say that I have rarely, if ever, known a jury and a Court upon whose steadiness any party had a stronger claim than we have now; because you don't require to be told—no man acquainted with life does—that there are always two sides of every question; and that so long as the one party is uncontradicted in his statements and evidence, he has it always in his power, even in a case that ultimately turns out quite hopeless, to make a strong impression in the first instance. Now, the defenders have been exposed to this unfavourable impression, almost without interruption, during two entire days. You have been for two days, and during the intermediate night, kept a prey to those feelings which it has been the interest of the pursuer to create; and it is on this account that I say we have now a peculiar claim upon your dispassionate attention, which I am certain you will not grudge me, when I tell you, now that the story of the defenders is told, and their evidence unfolded, that I have no more doubt than I have of my existence, that the feelings, which, I am aware, this partial exhibition of statement and of evidence must have produced upon you, shall be entirely beaten down and reversed.

Let me remind you in the outset of the exact question you are to try, which I am the more anxious to do on this occasion, because, although it does not form the subject of evidence, I know the errors which juries in similar cases have committed, and are always liable to commit. What is the question for your consideration? Read the issues. It is, *not* whether these deeds *are*, but whether they are *not* the deeds of the late Kenneth Mackenzie, indicating to your mind, and intended (as the Court will explain to you if necessary) to indicate, that these deeds are fortified by a legal presumption in their favour; and unless the pursuer can get the better of that legal presumption, you must give effect to these regularly executed instruments. Now, the question put to you is, whether they are *not* the deeds of the deceased, and not what you might, in a careless manner, have supposed it to be, whether they are the deeds that the deceased Kenneth Mackenzie *ought* to have executed. You are not asked to say whether they are deeds that a wise or an affectionate man should have made; or if it was expedient in him to execute them. He was the absolute monarch of his estate, and of all his property, and had that

unlimited right of posthumous distribution, which is the main value and attribute of property; and therefore if he chose, without choosing, or being able to give any reason for his preference—if he simply chose—if it was his will to destine his property in any particular manner,—you have nothing whatever to do inquiring into his motives or reasons; you have simply to investigate the fact, is it really his *will*, meaning thereby his free and rational will. Therefore, it is foreign and immaterial to the question, that none of us would like to disinherit our brother. We have known men, most affectionate and judicious brothers, who have desired not to let their property descend in the legal course of intestate succession. The question is not whether he ought to have disinherited the pursuer Thomas, but whether it was his deliberate pleasure to do so; and the main question that you have to try is this, is it not the rational will of this man? And in estimating his rationality you are not to view the transaction as you would view a transaction between man and man, amongst the living, each striving to obtain the best of a bargain. The Court at the proper time, if necessary, will inform you of this, for I think it vital to the case. This is not a deed of contract. The question relates virtually to a will, and though it was not in the real technical form and exact shape of a will (by which heritage cannot be conveyed), it is immaterial. It is a testamentary distribution of this man's property, and being such a distribution, in reason and in law the thing to be looked to is, whether the individual had an uncontrolled will to do as he pleased; you are therefore to measure his capacity with reference to this merely.

All that you have to look to, even in the testator's object in the exercise of his affection is, whether his affection was of a rational description, so as not to justify the denial of his having any feelings at all upon the subject? A man makes a will, the object of which is, to prefer another family as he has no children of his own; he prefers the family of his wife to the family of his brother, prompted by a feeling natural and not unusual amongst affectionate and judicious kindred. And the question is, whether this man had sufficient natural capacity, not to contract with an adversary trying to overreach him, but whether he had sufficient capacity to form and express a rational volition upon that object of affection and selection? Now, gentlemen, it is the business of the pursuer—first, because he is the pursuer, and must make out his case; and secondly, because he has to sustain the burden of proof here *in the face of a general legal presumption in favour of the deed*—to convince you by the evidence that his grounds of challenge are well founded. *He* has to convince you. The defenders have *not* to convince you. They have nothing to do but to say, these are our deeds. But the pursuer has undertaken to convince you in the first place—so I understand him to say,—that this testator was under an absolute mental incapacity—that he was in the situation of a natural born absolute idiot, incapable of executing a deed even if there had been no fraud exercised against him, but all kind and kindly assistance given to him. Or the pursuer says, and must

say, that though not absolutely incapable, he was defrauded, and that that fraud was made more easy by his weakness. So that you will observe, that the pursuer must either make out *absolute incapacity*, or he must make out *fraud acting on facility*. If there be capacity, it is certain that in reason and in law, a man, though weak, may make a perfectly good deed; and the only alternative is weakness, as the foundation of the charge of fraud. Whether the pursuer rests his case upon the one or the other of these, as yet I do not know. If I were to believe his evidence, so far as it has gone, I should hold that he must rest upon absolute incapacity; for it seems to me, that the only result of his evidence is, that this person was merely a shade above one of the lower animals—a miserable, mindless, slavering idiot. But if that is not his case, he must make out, not merely facility, but along with the facility, he must make out actual fraud in the concoction and impetration of these deeds. Gentlemen, that is what you must try; and at present, and before I say one word to you farther, or make even an allusion to that which has been given in evidence, if that is the case for the pursuer, I think it better at once to tell you distinctly what is the statement, and what is to be the evidence for the defender; and out of it, and after seeing the condition in which we place this individual, then you will be best able to appreciate the testimony by which his power of disposing of his effects has been questioned.

Now, gentlemen, let us forget for a moment the partial and selected statements and opinions which you have heard for the last two days. Now for the first time has the curtain been lifted up, and your mind let in, even to the smallest perception or conception of the defender's case. I need say nothing to you about the condition of this individual, because, though we have not heard about him till he went to Aberdeen, I am perfectly willing to assume, that during the period of his infancy, he was a heavy looking boy. What the truth is I don't know, and it is not worth speaking of; but he came in his boyhood to Aberdeen, and you have his conduct there explained.

I must so far break through the rule I have prescribed to myself, as to allude upon this one occasion to the pursuer's statements. You have an account given by various persons, chiefly by the Kennedies, with whom he lived, and another gentleman who was his tutor. And what is their account of his conduct during this time? It is, literally—almost literally—that he was an *idiot*, totally incapable, in the course of six years, of being educated; scarcely capable to form the letters; nothing more than capable of forming them in writing; so stupid was he, that he positively did not understand the meaning of an ordinary verse of the sacred writings—totally incapable of conceiving the idea of writing one rational or intelligible letter—dead to all the facilities and beauties of arithmetic—not even capable of keeping himself from being hooted at upon the streets—virtually debarred, or at least not admitted into, or encouraged in the company of any family of respectability; and particularly excluded from the family of the learned and reverend principal of that college, who had a natural regard and affection for

him, from having been at one time the teacher of his father. That is the account you have upon the one side of his conduct at Aberdeen. Now the truth is, that at Aberdeen he was used with extreme harshness by these Kennedies. I have no authority, and no inclination, to say one word against the propriety of the system pursued by these gentlemen; but we all know what severity will drive a boy to, especially a boy supposed to be silly and dull in his early years. I believe that under a harsh system of tuition, the intellect is oftner driven out of boys than by any other circumstance in their subsequent life.

Mr Kennedy told you that so far as he knew, this lad was perfectly comfortable in his house. Gentlemen, we have the recorded opinion of this pretended idiot, who could not write a sensible letter. He states that he was not comfortable under that roof. In a letter to Mrs Gillanders of the 21st January 1808, he says:—Observe I am reading of *the idiot*, incapable of understanding, or making good characters even in writing—incapable of reading the Bible—and incapable of composing a letter. I only read a few sentences out of it:—“I am very ill situated at present with Mrs Kennedy. God knows how, I have no life with her, She has left me so broken hearted that I think my very life a burden on the face of the earth. I have not acquainted my father of it. even suppose I should do it he would not believe it, many a one did not meet with such difficulties as I have put an end to their life.”—Now, Gentlemen, this was the opinion of the poor lad; it might be an erroneous one, but it was under this feeling that he wrote it, being destined, at a distance from his father’s house, to pass his time under the charge of Kennedy. We are told by this gentleman now, that in spite of all his care and kindness, he would not learn any thing, because he *could* not learn. The question was put frequently and emphatically on the other side, “Was it laziness, incapacity, or idleness?” The answer was invariably, “No: he could not learn, because there was a total want of intellect.” So speaks Mr Kennedy, the witness, in 1831, coming warm from the impressions of Ross-shire. Let us hear how Mr Kennedy, the tutor, speaks, in a letter which he wrote to the father of the boy, and which he identified, dated 11th January 1805. It is a long letter, and I shall read you only what relates to the subject in hand.—“Kenneth continues to attend to his education, and to all the instructions that I gave him. I endeavour to give him all the assistance that my time will admit of. I hope he will improve; he seems *much fonder of his arithmetic* than his Latin. *He is beginning multiplication*; I should like to know from you what you mean Kenneth for, as it is time you should fix upon it. Since he is much grown, I humbly think that his education should be conformed to his views. I have not to complain of him since I got the charge of him. *He does not want sense or affection*, though a little thoughtless, his mind having not got any fixed set. I trust he may in time give satisfaction to his friends,” &c. “He does not want sense!” This is the opinion

of that gentleman at the moment when the Ross-shire fever, with which half of the pursuer's witnesses are afflicted, had not broken out, to impair their memory, or taint their understanding. This is not all the evidence which we could produce before you with respect to him at this period; but I merely produce this, to show you the striking, internal, and irreconcilable contradiction between Mr Kennedy in 1805, and Mr Kennedy in 1831. This is a specimen of the evidence for the pursuer, destined yet to be ultimately shivered to pieces, and over which a complete triumph is to be achieved. The truth is, and we could prove it, that at this time the young man was a good deal depressed by his parents, for this reason, that he was not then the heir in succession—he was neither the eldest nor the youngest, but the second son. I suppose you know the first, being the heir, is generally the favourite of the father; and the youngest, the favourite of the mother; and he being the second, had the least chance of affection; so Kenneth was neglected. But he was a lad of promise. I do not describe him as a lad likely to turn out a genius; but he is described by his teachers, and by every body that knew him to be of ordinary promise, and not once or twice, but the daily and hourly associate of many of the most respectable families in and about that place; for remember, according to Mr Kennedy, he was in no genteel family, because he was unfit to be there; and he did not let him go into society on that account. Gentlemen, we shall shew you that if he was not the chosen, he was the approved friend in the house of his father's tutor, Principal Macleod. He was the chosen friend both in the house of my Lord Seaforth's sister, Mrs Mackenzie, and other families there. There may be more; but it is of no consequence.

However, he left Aberdeen at last, we are told, in circumstances which denote craziness, because he attempted to make a low marriage, and Kennedy hurries him out of the way. That you heard him describe to his father in the letter which he wrote to him. Now I totally demur to the doctrine that any man, especially an overgrown lad of eighteen, attempting to make an imprudent marriage of this kind, is a proof of intellectual weakness. It may be a proof of precocity in other respects; but I deny that the planning of a marriage of this kind, is a proof of that state of idiocy in which this man is described to be; a state of idiocy not only destroying his intellect, but extinguishing the ordinary emotions of the heart. I deny that any such inference can be drawn from that fact. But, gentlemen, the better answer is that the story is utterly and totally without foundation. We have here, and shall examine before you the parties who were present at the scene. We shall bring before you the individual with whom it was said that he was about to form that connection; and she will explain to you, that except in the brain and fancy of the tutor, who came to the house, for reasons that he has not yet explained—misled by some nonsense of his own—no human creature, least of all Kenneth Mackenzie, ever had such an idea. That he might have *told* Mr Kennedy that he was going to be married—a mode by which he could get his instant liberation from the

thraldom of that man—I do not dispute: and it is a proof of cunning, not of imbecility. I think we shall prove to you beyond a doubt that the whole thing was a mere phantom. Take this as an example, and, with the general statement that he was a promising and well-received boy at Aberdeen, and escaped from that place in the way I have told you, I take leave of his residence in that city.

This was about the year 1808, and from that time till 1810, he lived chiefly at home, except a few months that he acted as clerk in the office of a writer in Inverness, of the name of M'Kenzie; not that he intended to make it a regular profession, but to improve his writing, and that was partly the way in which these two years were employed; and he occasionally lived at Dundonnell, under the impression that his disinheritance would happen because he was not the favourite son and heir of a great and rich succession.

After 1810, and down to the year 1816, Kenneth went into the Ross-shire, and then into the Inverness-shire militia; in both regiments he discharged all the duties of a fair average officer. An expert officer, certainly he was not: nobody says so; but I am afraid, when we go through the conduct of many sensible military officers, we will get much of their conduct checked by the observations of their soldiers, and who would find themselves placed in very awkward predicaments. This gentleman did the duty of a soldier well, and you will infer this from his superior officers not having been called on to find fault with him in the discharge of that duty. That fact will be proved by his superior officers, and not, as the pursuer has tried to prove it, by serjeants and corporals burning from Ross-shire. Show me the major or colonel, who ever was known or heard, to make out that this man was unfit for doing the duty of a commanding officer or of a subaltern. Is there any report of him to his superiors as incapable of being intrusted, or any statement of there being any great danger with him when he had an important command? Gentlemen, so well did he conduct himself while here, that from an ensign or lieutenant he rose, without the slightest objection, to the station of a captain. He was entrusted with the command of a company; and I believe, on more occasions than one, with a *separate command* of a detachment away from every other officer belonging to the regiment. There is no vestige of a report against his conduct upon this occasion. That he may have got a serjeant to make out his report occasionally, I dare say is true. Is there an officer in his Majesty's service, naval or military, who will say he has not been helped an hundred times over to make out his reports?

Gentlemen, there is a circumstance which took place in his military career that I may mention to you, because we have not heard, either this day or yesterday, any thing about it on the other side, which I do state as *conclusive* in putting down all the insinuations that you have heard. All these gentlemen whom we have examined as to his military capacity state, that when he was with the regiment at Portsmouth, he gave a ball in his barrack-room, which was attended by ladies and gentlemen of the neighbourhood,

and by his brother officers. He was not such an insipid idiot that no gentleman or lady consented to honour the invitation. His barrack was lighted up with a genteel company; but it pleased the major of the regiment, to think that this ball was improper, and to desire him to dismiss it. He did not give it up at the time his major chose; but did the major report to his Majesty that this captain was an idiot, unfit for doing his duty, which if it was the case, he had now a fair opportunity of doing? No, but he treated him like a man capable; he brought him to a court-martial for it; and the result was, that he was honourably acquitted, and the major was afterwards censured. Dundonnell by this time incurred certain expenses in defending himself, and threatened to prosecute the major for these expenses, who paid them to the extent of £200. Observe, the court-martial sat day after day upon a man whose external appearance, it is said, denoted him to be an idiot, and whose weakness our Ross-shire friends would have you believe was little superior to that of one of the inferior animals. One presumption of humanity is, that they tried this man, who was honourably acquitted; and by his Majesty's orders, the major was publicly reprimanded. There is a gentleman whom you will see from Portsmouth well known to us professionally, and well known to the British public. I believe he has been employed either as counsel or attorney in all the courts-martial that have been in Portsmouth for the last twenty-five years. In a late memorable one, the case of *Sir Edward Codrington and Captain Dickenson*, which extended to about twenty days, this gentleman Mr Minchen, conducted the defence. He has been the depository of all the secrets, where there has been any individual subjected to the ordeal of a military or naval tribunal within the period that I have mentioned; and he was publicly and professionally retained for Captain Mackenzie who attended alongside with his adviser against his adversary in Court. Mr Minchen arranged his defence. The relation of Mr Minchen's evidence I will not trouble you with at present; you will hear from himself that Kenneth Mackenzie was as intelligent in communicating materials for conducting his defence, as any man whose defence he had ever undertaken before any tribunal either military or naval; and the idea of his being an idiot never once entered his imagination, and the first time he ever heard of such a thing, was in the course of these discussions.

After the regiment had been disbanded, he lived at Seabank, near Inverness, for some time. During the short time that his father survived, you have some evidence of his behaviour at Seabank, upon which I shall say nothing. We shall meet it by contrary evidence. It is said that he was extremely idle; but you know that that is nothing very new among militia officers. After being disbanded, he also incurred some causeless displeasure from his father for spending too much money—for which other fathers have called their sons fools and idiots, as well as the father of Kenneth Mackenzie; and this it seems is a proof that he was an idiot.



At last Mr George Mackenzie, the father, died; and it is a fact which of itself affords a key to all the subsequent proceedings of Kenneth Mackenzie—that Thomas Mackenzie the pursuer, the second son of the family—the eldest at that time being dead, and Kenneth being the heir—endeavoured to persuade that dying father to disinherit his natural heir; but it was found that it was not in the father's power fully to accomplish that object, because in the marriage contract those estates stood destined to the heir of the marriage, and of course, failing Alexander the eldest son, it devolved by right upon Kenneth the second. But Thomas not being aware of this, made the attempt; but it failed, because he was told of the difficulty that stood in his way, and that there was no chance of getting the better of that difficulty, except actually getting Kenneth Mackenzie to agree to a deed to be made by the father. Kenneth Mackenzie was applied to, to give that consent. Excluded by the partiality of his mother for Thomas, from his father's death-bed scene, he was, nevertheless, applied to upon the streets, to consent to a deed, disinheriting himself; the idiot was applied to; and being now a person represented as incapable of making a will, he was then applied to and asked by this pursuer to consent to a deed, by which he himself would have lost his birthright. He refused, and he refused with that indignation that became him; but the fact that offended him was the asking for his consent to this deed of self-disinheritance. In the condition that the pursuer was thus placed, nothing that ever happened either altered or abated his brother's resentment—with that resentment I readily sympathize. Foiled as Thomas was with respect to the estate that was by this project destined to him, he was not foiled in respect to the personal property; for with respect to some of the entailed heritage over which Dundonnel had the power of disposal, the arts of the pursuer were successful to the extent of getting or taking from the dying father a deed in his own favour of all his personal property, and of all his unentailed heritage—a deed, you will observe, cutting Kenneth off with nothing, and not, I believe, giving one sixpence to his sister, Mrs Ross, or her children. This was bad enough; but I am not sure that it made such an impression on Kenneth Mackenzie as what afterwards took place; because, being a most humane and affectionate man—affectionate and reverential almost to excess, to his sister, Mrs Ross—he was asked to agree to ratify, or consent to abstain from exercising his right to reduce this deed granted on death-bed; and he said he would not consent *except upon the solemn condition and understanding with Thomas that he would give a large sum of money, I believe £3000, to his sister, Mrs Ross, and on that understanding* Kenneth gave a letter agreeing to pass from challenging that deed. But Mrs Ross never profited to the extent of a farthing of her father's bond through Thomas; and that piece of perfidy never left the mind of Kenneth.

Now, gentlemen, the father being dead, in the course of a short time—the exact date is immaterial—Kenneth contracted his marriage—that marriage which you heard so piteously lamented by

Mr Robertson. He formed an alliance with that family, which you were told began in iniquity; and was intended not only by Mrs Mackenzie, then Miss Roy, but by the whole of that family as nothing but a link in the chain by which this man's estate was ultimately to be turned aside from the rightful heir. How a marriage in 1816 or 1817 could come into operation with respect to the validity of a deed made in 1821, I cannot guess. It is not explained to me; and you will see what sort of a case the pursuer has when he finds it necessary to go back and say, that this marriage was contrived to sacrifice the honour, happiness, independence, comfort, and respectability of Miss Roy, to the base, inconceivable purpose of ultimately swindling the husband out of his paternal property. Gentlemen, you have all the evidence of this that you can have on the part of the pursuer; but against that monstrous and ludicrous statement, I simply propose, and I tender those who were in the immediate neighbourhood where the family lived—I would simply utter the words of those who are best acquainted with Dr. Roy, that there was not a man or a family in Scotland in his day, whose character and station were more respectable; and although the pursuer makes a statement so utterly extravagant, you have no evidence of it at this moment, and I would just as soon believe it if I were told that this had happened in the family of the Lord President, the family of the Lord Chief Commissioner, or the family of the Lord Advocate. Gentlemen, I am surprised, in the first place, that any evidence could be produced that this idiot was married at all. One lady is produced to say that her daughter would not have him. It is said that the clan Mackenzie never succeeds in its first attempt. An attempt was made, and his failing in his first attempt shews him to be an idiot! If this is the conclusion, Kenneth Mackenzie certainly was an *idiot*. Though the first lady he asked would not marry him, strange to say he was married; and the marriage was not hid in a corner; he was married in the usual form of a respectable marriage; all friends, on both sides of the house, were consulted, and consented to the marriage; and they were married by the senior minister of the city of Inverness, a man now dead, but who, we shall prove to you, knew Kenneth, and who was not likely to lend himself to the celebration of any marriage, if he thought one of the party was in the least incapable of understanding what he did. But it seems all this is proved by the extraordinary contract that he entered into—a contract not under reduction—and I am entitled to say, and the Court is *bound* to say, that the contract expresses the will of Kenneth Mackenzie.

But we are told that this is an extraordinary contract, because, in the first place, this estate being worth only £900 a-year, £500 a-year is given out of it, which the pursuer is pleased to call pin-money. It is not a term in our law language, but it means a sum that is to be paid annually to the wife, independently of the husband, provided that sum is payable from the date of the marriage; but, in point of fact, it never was paid; and having made that provision for the wife, it is further provided that the husband shall not defeat that contract by selling the estate with-

out her consent. And so, because a gentleman marries a lady, and provides to her £500 a-year out of £900, (but the estate, in fact, was worth, from £1600 to £1800 a year,) and prevents himself from contracting debt, and takes away the power of selling the estate, that contract is evidence of the slavery and stupidity of the husband! Now, gentlemen, when a person about to marry, with a small estate, and with habits that lead him to contract debt too freely—is it very unusual for him to secure his wife, and secure himself and their heirs against creditors, by making a provision in favour of the wife, and making, *on purpose*, the payment to commence at the moment, by merely beginning at a legal term? Whole estates are conveyed with this peculiarity. It is not unusual to do as was done here; or, by creating an obligation not to convey the estate, or by absolutely conveying it, out and out, in favour of trustees, to give the husband an annuity out of that estate, on purpose that the creditors might never touch it, and that the amount might go to the wife. I understand something like this to be the invariable system of all marriage-settlements whatever in the sister kingdom; but whether it be the case or not, it is said that there is a style in our Juridical Styles for that very purpose. Mr Macbean is a gentleman of the first respectability in his profession, as the pursuer admitted and must admit; and in making this contract he consulted Mr Clerk, now my Lord Eldin; and it was by their particular advice that the *form* adopted to render the provisions effectual was given. It was a provision to save Kenneth, and to save his wife from the result of his own extravagance. That peculiar form of the deed, was shaped by the advice of a gentleman who has not yet been accused; but who may afterwards be accused of having joined in this conspiracy against Thomas Mackenzie. The impropriety of the conduct, of his brother Thomas's treatment of his sister, was still deep in the heart of Kenneth; for in the year 1817, he gave holograph instructions for the preparation of his marriage settlement, to disinherit Thomas in his succession. His holograph instructions in 1817 were, that the estate was to go to himself and his wife; failing them and his heirs if they died without children, it was to go to the family of Mrs Ross and her children, to the exclusion of Thomas and any succession that he might have. Whether that was a rational contract or not, I shall speak of by and by. We shall now leave Kenneth's intention of excluding Thomas, before he had fallen under the supposed influence of the Roys in 1821. It was his fixed determination: it was his opinion after the death of his father, when he did that very thing in principle which he did afterwards in practice, and he ultimately accomplished it in the deeds before you.

Now, being thus married, he retired, and lived during the rest of his days at Dundonnell. What the pursuer says of him there, we shall speak of in a little. I beg you will take along with you the view which the pursuer has given you of this absolute mindless *idiot*, at least of a man so facile, that, if not a whole *idiot*, he was a halfling. That he was fat, I don't deny. I don't deny that fat

begets laziness, and that laziness begets sleep; nor do I dispute that as laziness and fat increase, the intellectual faculties are absorbed. His mind to a certainty was not an active mind. But he was a proud, honourable, self-willed man. I do not say that in trifles he would have always exerted himself; for his pleasure was in non-exertion; but on matters in which his mind was excited, or his interest involved, more especially when his will or partiality were concerned—besides being intelligent and honourable, he was a proud, and, I would rather say, a mulish man. An idea of his being that soft lump that could be turned by unfair coaxing or flattering, is not only not true, but exactly the reverse of truth. It is said, that he did not like associates. This fact is mentioned for the sake of making you believe that he did not like to have an associate; it is selected for the purpose of making him appear to be a fit dupe of design; but just because his house was the only one in the district, it was the house to which every human creature passing in that part of the country necessarily repaired. The house of Dundonnell in that strath was just the natural asylum and resort of all social persons, especially of all respectable persons who visited the neighbourhood; it is the same as an eastern caravansary—as the asylum of the pilgrim of the east, every creature went to the house of Dundonnell; and I found upon his habitation being solitary, for the sake of accounting for the constant society in which this gentleman lived, and in that society he was treated as a gentleman; and he had those feelings and that temper, that no man we have seen was inclined, or dared to have treated him otherwise. He was pious and remarkably kind to strangers, and useful in the country to all around him—hospitable, and a blessing to every body. With respect to his own paternal affairs, I say that he managed his own estate as well as any gentleman manages such an estate, chiefly composed of pasture. I do not mean to represent him as skipping over the hills. I do not mean to represent him as taking no assistance from the penmanship of his wife; but with all this assistance, his mind was bent on improving his affairs, and he did attend to the concerns of that estate, and did nothing but judge and act as men do every day in such matters. He not only managed his affairs, but managed them intelligibly. He understood his affairs; and they were complicated. He had occasion to go over a variety of transactions, and he has done so; and if he did not understand them, no man either in the north, south, east, or west of Scotland, could understand them. He was treated with by every body, and treated in every respect like a sane and sensible man.

If this general statement be true, it is impossible to doubt that the pursuer's case must be false; and the question is, is it true, or is it not? Now, gentlemen, in support of this I intend to lay before you, in the first place, the testimony of a number of witnesses; as few of them as possible—perhaps none—I rather prefer none, taken from the infected country; but I shall produce you witnesses of character; and you will observe, that I purposely select them, that the point of his dealing or trying to deal with

them, may be settled; for you must have observed, from the evidence of the pursuer's witnesses, that we asked the question till it almost became a matter of course, and we gave it up as a matter of mere tediousness, "*Did you ever deal with him, or try to deal with him?*" And they say they never did. He appeared to them as a man that was not able to converse, because they saw him notoriously incapable. I believe that they have adduced 40, and had they gone on to the extent of 100 witnesses, I would have given you, man for man, individuals *dealing with him*; and you would perceive whether or not he was the character said by the pursuer. I will not trouble you with the detail of what those witnesses can prove; but allow me to impress upon you this consideration, which is of superior value in every such case—the opinion of the persons who have dealt with him over that of individuals who have not dealt with him—the consideration of the opinion of those individuals who have dealt with him, and say that he is sane, over those that say they have not dealt with him, and say that he is insane. I know no sensible man who has not, on detached occasions, behaved like a fool. If you sift up all the detached practices or extravagances of his life, there is no man that has not done a series of very foolish actions; but there is no fool who can act like a sensible man; I am not speaking of a lunatic, who has lucid intervals. There is no natural born idiot that ever can make himself behave like a man of common sense. Therefore, if I see a man said to be an idiot behaving like a rational man in rational affairs, one fact of that kind is worth a thousand of the others. Here, in the first place, is a witness deponing to what conversations he had with him. Gentlemen, it is to my understanding, in such a case, the very weakest part of it; because the better evidence that I wish to press upon you is in the hands of the clerk of the process. And I refer to this merely because it is apt to be overlooked in a case of this description. The evidence of the continuation of sanity of this man is to be found among the *important multifarious transactions in which he was engaged*. This is apt to make no impression, because it consists commonly of looking at the backs of papers. But I think that no *justice* can be done in this trial, if you do not read the interior parts of those most important documents. It is not enough to put them into the witnesses' hands, in order to examine them upon these papers; but that nothing *like justice* will be done by the judge or the jury, *if the documents that I refer to are not read and considered by them*. Gentlemen, when I speak of Kenneth's engaging in transactions, observe that I am speaking of an individual whom the pursuer calls an *idiot*. Now, let me run over a few of his transactions to you in a moment,—I am sorry to say but for a moment. I wish I could say I could detain you—not for a moment longer—but many hours longer. Many hours longer will not bring it so impressively as the deeds do. But this moment is all that you will hear from me on the subject. We may be wrong. But if ever I was right, I am confident I am not far wrong when I say that we produce to you sixty-six letters of Kenneth Mackenzie, extending through every period of his life. Don't imagine that they are all we can produce. But from the

period he was at Aberdeen till he died, 66 *holograph* sensible, rational, social, amiable, business, and domestic letters—more so than these cannot be written by any man in this room, though they are not always written with the most correct punctuation or grammar—such as *I* for *us* and *me* for *him*. That they are not correctly spelt I admit; but the counsel have made arrangements with each other that nothing is to turn upon the spelling in this case.

Dean of Faculty—Not of the *spelling* of the letters—

Solicitor-General—If there is any objection to that, I will produce volumes of letters by Thomas, in which I will shew you the same defects, in point of spelling and grammar, exactly there as in the case of Kenneth's.

Dean of Faculty—The arrangement was, that if I said nothing of the bad spelling of Kenneth's letters, you would take up twenty referring to those of Thomas, Mrs Gillanders and Miss Gillanders, and others, in which you say there is bad spelling. You have now mentioned all their names, and have broken through the arrangement.

Lord Adv.—What makes the arrangement to be broken through?

Solicitor-General—It is not worth contending for. We have produced to you 66 *holograph* letters of this man. That is a great number for his "lazy hand." There are above 80 letters, not *holograph* letters, and letters to him, upon which I have not yet heard comment, and from persons against whose ability I never heard a word uttered. The letters to him, as a sensible man, amount to 577. I produce 67 bills signed by him, embracing transactions extending to L.11,000 in value *with third parties*, who, you will observe, treat with him as a sane man to that extent. I produce 23 *holograph* receipts, and great numbers extending to above 100 or 200 signed by him, but not *holograph*. These exceed in value L.3500. There are receipts in his favour 70, got for money received above L.3400, independently of his letters, bills, &c. Of the class of writings called deeds, not regular dispositions—not entails or trusts, but regular tested deeds, there are above 100, amounting in all to above 1100 documents, extending to above L.18,000. These transactions I wont describe, at least in detail. I just say in general that they comprehend deeds, bills, leases, cash accounts, cautionary obligations, and at least one reference to oath as a party; and, in short, gentlemen, look at that table (pointing to the clerks' table, which was loaded with papers), and I believe there are a few boxes by me, which you may look at if you like—there is the life of a man from his earliest infancy—a humble *idiot* that no man ever thought of speaking to or having any transactions with. I will venture to say to you, and to their Lordships, that there never was yet exhibited in any court of justice a case of imbecility where such an exhibition was made.

Now, gentlemen, it has been said by the pursuer in this case that Kenneth was what has been termed *sui juris*—that he was a man not cognosced—that he was dealt with as a man fit to be dealt with. It does prove that unquestionably. But it would be a most miserable, a most fallacious, and most illegal view of this case, were I to suppose that these transactions prove *this alone*. Gentlemen, they say we have produced these to shew that

he was not cognosed. We do not produce them for that purpose. But I produce them for a greater purpose ; for every one of them is worth a thousand of such witnesses as those who do not found upon the actual experience of dealing with him. Every one of these 1100 documents is a witness of the highest description in reason and in law, to prove the fact that he was a man of a sound understanding. If the question were hereafter to arise, whether any individual was sane or insane, what would any body, on being asked, refer to to enable the enquirer to make up his mind upon that subject ? He would ask, what were his deeds ? If this Dundonnell's life had been a perfect blank—if the pursuer could have said—"was he ever seen as a man in business ? shew us a single thing that Dundonnell ever did," and no answer had been made to this question, the pursuer might have affected to be alarmed. Yet when we give such transactions, we are told that we have merely proved that the law has not set him aside as incapable. I don't trouble you or the Court now with referring to authority upon that subject. I know I am speaking to a judge who does not require to have his memory refreshed upon such a case. I am speaking of what was referred to as evidence, and actual evidence, in a case where that came to be considered ; recollecting the view that was taken of that matter in a case, though very imperfectly—by Lord Redesdale, in Dow's Appeal Cases, vol. 5, p. 231. Towart *ag. Sellers*. I refer to it in order to justify the explanation I gave of the view taken by the House of Lords in that case. Mr M—— acquired some land. The person said to be insane became deranged, and then he enlisted as a soldier, but being incapable of doing exercise, he was discharged ; and not being fit for the common operation of field labour, he attempted to cut his own throat and to burn the house. He was generally known by the name of daft —— ; in short, there was a variety of circumstances proving his insanity, which make the case to have a particular reference to this cause. I may mention that the thing attempted to make an impression upon the Court here was, that this person was booted at like Dundonnell. He attempted to go to the College of Glasgow in a state of entire nudity. The answer to this was the obligations contained in various deeds which he granted—in his transactions with other men having dealt with him as a sane man ; the condition of the evidence from which the legal inference was to be drawn was of that kind called collateral evidence, which arises from the deed.

" The parole evidence given that he was quite deranged from 1761 to 1804,  
 " the evidence applying to his insanity generally, and not to the particular mo-  
 " ments when the deeds were executed. This evidence encountered by parole  
 " evidence of his general sanity during the same period—and this latter evidence  
 " corroborated by notes and receipts written by M—— having reference to the  
 " contents of those deeds, and shewing that he understood their nature and ef-  
 " fact ; and also by the deeds themselves, which were rational in the circum-  
 " stances ; corroborated also by the circumstances that the deeds were attested by  
 " witnesses of undoubted credit, &c. These transactions, proceeding on the sup-

“position of his sanity, and remaining unchallenged. ‘Held by the House of  
 “ ‘Lords, reversing the judgment below, that the deeds were good.’ Lord Re-  
 “ ‘desdale added, in endeavouring to find out the truth from contradictory evi-  
 “ ‘dence, try *collateral circumstances*, as to which there can be no doubt, in order  
 “ ‘to ascertain how far it is consistent with these circumstances.’ And then his  
 “ ‘Lordship subjoined, “ *the written evidence is worth a host of parole testimony,*  
 “ ‘*as it demonstrates that the evidence for the respondent cannot be true.*”

value of this transaction is, that you are to look to what was the real opinion practically expressed in regard to the conduct of all the parties at the time the transaction was entered into.

Gentlemen, I have mentioned to you the testimony of our witnesses rather generally as to the inference that ought to be drawn from this transaction: but I have two witnesses here, each of whom deserves special mention and special attention; and the first that I call is Thomas Mackenzie, the pursuer. You will observe that this is a gentleman who professes to you, that all along his brother was in a state of great facility—such facility as that he was not only incapable of entering into any transaction, but could not be trusted even to express that volition, which was necessary to the execution of this deed. This is the opinion of Thomas Mackenzie *now*; but it was not the opinion of Thomas Mackenzie *before*. Now, gentlemen, we have recovered a great many documents, and much correspondence. I cannot exactly say how many; but I believe we have already produced above 30: don’t take me at the exact number: I think we have about 30 letters of this person to this idiotical brother; but no letter of condolence on the state of his faculties; no letters of general kindness or compliment; but letters of business, and the letters on which the business generally consisted was in begging pecuniary favours from the *idiot*. Take for example one instance.

*Inverlael, 18th November, 1821.*

MY DEAR KENNETH,—I just arrived here a few minutes ago, being detained by the badness of the weather, and Anne being in a very poor state ever since I went home, but she is now considerably better, though in a very weak state; the little fellow (whose name is Alexander) is doing pretty well. I am under the necessity of troubling you to indorse me a bill per £150 sterling; this I hope you will have no hesitation in doing, when I promise you it will be regularly paid when due.

My rent for this farm falls to be paid on Tuesday first, and our Laird being a man that shews no mercy, it would give me the greatest uneasiness, and would lead to my RUIN, its not being paid; however, I hope you will indorse my bill, and that I shall be able to meet him on Tuesday first.

I fully intended going to Dundonnell to-night, but being so late and obliged to return home to-morrow, I find I will not have as much time; and I remain, with best wishes to you and Mrs Mackenzie, my dear Kenneth, affectionately  
 your’s,  
 (Signed) THOS. MACKENZIE.

I put two marks in the place you will require to sign it at, as it will require your name on the back as well as front.

(Signed) T. M.K.

(Addressed) KENNETH MACKENZIE, Esq. of Dundonnell



To which the *idiot* returned the following answer :

MY DEAR TOM,—Notwithstanding my firm determination of never putting my name to a bill for any man, I have, at your request, signed the enclosed ; but I trust you will be able to meet it when due, as I candidly own to you my inability to do so, owing to the various disappointments I have met with of late ; and having many serious engagements of my own to fulfil, which I shall have trouble and anxiety enough in providing for, owing to the distressing and indeed alarming state of the country. You have not stated for what period the bill is to be.

Mrs Mackenzie and I are happy to hear you left Mrs Mackenzie in a fair way of recovery, and that the child is well. With our united good wishes to all at Findon, on your return, I remain, your's affectionately,

(Signed) KENNETH MACKENZIE.

Dundonnell, Sunday night, 11 o'clock, 18th Nov. 1821.

On the 24th May 1822, Thomas gives him an account, and asks him to pay a sum of about L.1000 ; and on a subsequent occasion on 7th June 1824, he sends and asks him for more money, as he has particular occasion for it to pay a bill—as he says it was intended for that purpose. I need not trouble you with the long story here, written for the purpose of working on the mind of this man to try if he would accept this bill—as if he meant to say, that if he did not do it, he would cut his throat. He says in that letter, “ I cannot be answerable for my own conduct, being in a state of mind I have never before experienced.” The following is the answer returned by Kenneth, who was not such a fool as to be gulled by the threat of his brother.

Dundonnell, 8th June 1824.

MY DEAR BROTHER,—I regret you should have put yourself to the trouble of sending a bearer purposely with the intelligence that your creditors were ‘ *determined to be at me without a day's delay,*’ as it was only what I had cause to expect, sooner or later, when you put me in their power, and on the subject I have nothing farther to say, than has already been communicated through my brother-in-law. I have perused his letter to Mr Kelly, and am at a loss to know why or how it should have stunned you so much. You surely were not so unreasonable as to expect that I was to pay such a sum as that demanded, without first endeavouring to ascertain the justice of the claim. I feel it unfair as well as unjust, and shall certainly resist it, though ultimately I may be made liable. I have no desire to ‘ *feed lawyers longer.*’ I never had, though, to defend my just rights, I have been driven to it, when my ruin seemed to be the object of those I had to do with, and that without regret or consideration on the part of those from whom I might expect most. I have every wish, and ever had, to befriend you and your's, as far as my own limited circumstances will admit ; beyond that, I cannot reasonably be expected to go. I have been much injured, and by various persons, as you well know ; but I confess this business hurts and disappoints me most. However, I shall direct my agent to have it set at rest, one way or other, without delay ; and be it adjusted as it may, I trust I shall not have to accuse myself of coming short of any promises I may have made to you, notwithstanding what you insinuate to the contrary. I ever am, your's truly and affectionately,

(Signed)

KENNETH MACKENZIE.

(Addressed)

To T. MACKENZIE, Esq. Findon.

Now, gentlemen, you will observe that, letter after letter, *the pursuer himself is always dealing with his brother as a man fit to transact business* ; for he not only asks him for pecuniary favour, which, if there is any sincerity or truth in his present opini-

on, he ought never to have asked him for -- but he enters into transactions with him of a more serious nature connected with third parties. In the year 1824, it was necessary for Kenneth Mackenzie to go through the solemnity of ratifying before a magistrate a bond to his mother; and if Kenneth was at that time incapable of ratifying it, it was an act of fraud on the brother to permit him to go through it. Nevertheless, he ratified the bond, and *Thomas Mackenzie acted as the justice of peace on that occasion*. He as a magistrate was bound to take no ratification by a man whom he knew to be incapable; notwithstanding that, he took that ratification in the year 1824, three years, you will observe, after the date of the deed now sought to be set aside, which is important in reference to the disease that this man was subject to, which was always growing worse and worse in time and space. Three years after the date of the deed, Mr Mackenzie had occasion to ratify another bond in favour of Lady Carnegie for L.6000; and *Thomas acted as a justice of the peace upon that ratification also*. This was giving Lady Carnegie, and all the world the most solemn attestation that, in his opinion, the man was fit to do business to the extent of L.6000 in one transaction. In the year 1824, Kenneth Mackenzie made a trust conveyance of the whole of his estate to his creditors, in favour of the late Mr Scott, accountant, and at that time Thomas Mackenzie witnessed the infestment in favour of Mr Scott—he witnessed that proceeding carried through, by which Dundonnell was to divest himself of his whole estate, without either whispering or suggesting it to Mr Scott or the creditors, that all these proceedings were inept. Gentlemen, Thomas himself failed, and his brother being a considerable creditor, Thomas called a meeting of his creditors, and Kenneth among the rest. Now, if there was one creditor that he held as incapable of understanding his affairs, he was bound not to deal with that creditor; nevertheless, he, in the year 1824, wrote to his brother a letter, which I need not read to you, but in which he tells him that there was to be a meeting of his creditors; and on the 15th November 1824, *he invites him to attend that meeting*, and to transact in the affair, telling him that a *deed of accession lay for the subscription of all the creditors, and invited Kenneth his brother to sign the deed*. This is the practical evidence at the time, of the gentleman who now tells you, that during all this time Dundonnell was totally incapable of managing his own affairs; that is to say, he is capable to sign every thing in my favour, he is perfectly capable to sign a deed of accession, and to sign bills for me; but whenever he prefers his wife's family to his own, then his mind is totally gone, and his deed is to be set aside.

We now come to the evidence of the doctors. Some of them said he could understand detached propositions, and I think one of them added, that he could understand two, but not the effect of the deed. One of them said he could go near a fire when he was cold, or put on a coat when he wanted it; but more than acting from the impulse of his bodily sensations he could not do. Now, gentlemen, against that, I am entitled to have you to look to every one of those letters. Talk not to me of the time you waste; whether you

will sit here till Saturday first or Saturday next week, I care not. It would be most advantageous to you, and it is my duty, understanding the impression which may have been made already on your minds, to desire you to read these letters; not that I will trouble you by reading them now, but I request that you may do so afterwards; and see if they be not rational letters. That lunacy admits of intervals in which a man may be made to do a deed rational in appearance merely, is quite true; but Dundonnell's madness was confessedly a growing idiocy. I do not speak of his letters as important, but absolutely conclusive on the whole case. Suppose the *idiot* was now alive, and you were about to try his capacity, and that you had called him into your presence, and said, "Sir, sit down there and write me a story; invent me a rational tale, or give me an account of your journey from Inverness to Edinburgh, or from Edinburgh to Inverness; write me a sensible letter to any creature;" if that man had done so, what remained to be said? Do me not the favour, but your own consciences the favour, of reading those letters; and you may let the *Ross-shire* folly rage as it pleases, justice will be done. And, gentlemen, just to shew you this, I request my friend to do me the favour of reading two or three of that man's letters to you, I do not care which.

Mr Rutherford then read the following letters:—

Kenneth Mackenzie, Esq. of Dundonnell, to Mrs Gillanders,  
Castle Street, Inverness.

*Aberdeen, 24th January,*

(Post-mark, *Aberdeen, 24th Jan. 1808.*)

MY DEAR AUNT,—I take the liberty of writing you those few lines to inform you of my present situation, which I hope you will not be offended at me for acquainting you. I was at my cousin Abey marriage, who married, Wednesday last, one Mr Chyne, a very rich man, and set away immediately for Edinburgh. I went along with them 30 miles, and was not willing to part with them. My uncle left Aberdeen this very day. My dear aunt, I have not heard from my father since Mr K. came; the cause of it I do not know. I am very ill situated at present with Mrs Kennedy—God knows how—I have no life with her,—she has left me so broken-hearted, that I think my very life a burden on the face of the earth. I have not acquainted my father of it; even suppose I should do it, he would not believe it;—many a one did not meet with such difficulties as I have put an end to their life.—The only worthy friend I have has Mrs Mackenzie, Breda, who is a very kind friend. I don't know what I would do but for her. I wish to know your advice what I shall do, for whether my father gives me leave or not, I shall not stay here longer, because I intended to write you about it. My whole desire is the army; a commission is very easy gotten just now; and if my father does not get it, I shall not refuse an offer I have just now; however, I have three months notice, and if you don't approve of it, mention it in your letter to me, say to a friend. I should have written my cousin Frank, but something always put me out of the way of writing him; however, few likes him so well as Kenneth does. Whether he believes it or not, that is my mind all at once. I trust you will write, Dear Aunt, in the course of the next week at farthest. I have nothing more to say just now. Give my compliments to my dear cousin Frank, to Miss Abigail, and Alexander, and all enquiring friends. I am your faithful friend till death,

(Signed)

KENNETH MACKENZIE.

Excuse my bad writing and spelling. Direct to Mr Kennedy charge.  
*Mrs Gillanders, Castle Street, Inverness.*

Kenneth Mackenzie to Miss Mackenzie, care of Henry Anderson Esquire three Chares Wharff London, Aberdeen 25 Jany, 1808.

MY DEAR COUSIN,—I suppose you dont recollect such a freind as your old acquaintance Kenneth, but I take the liberty of writing you but I hope will excuse me. My Dear Cousin Abbey that told me about you whois now married to one Mr Chyne a merchant at Aberdeen, two days ago; our uncle Symon came to the marriage, they are at Edinburg to remain for a few weeks. My Dear Cousin, I am at present very ill situated; I did not hear from my father for a half year ago, the cause of it I dont know. I did not hear from Jean since I came to Aberdeen last, Sandy *never* writes me, or yet Tom. they are both at Edinburg. My dear Cousin, Abbey desired me to mention to you that she would write you on her return; the Army is my whole Inclination, and tell me dear Cousin, if you will approve of it or not. There is nothing hardly would give me greater pleasure than to hear from you. My Dear Cousin tell me when you hard from your father. Sandy is turned such a great man that he does not care for me, but I cannot help it. I am Cousin Abbey greatest favourite and I was yours when you left the country, but I dont but you have changed your mind since. Mr Kennedy does not use me well, but my father does not know how I am used, nor yet would he believe it from me. *she* is a very bad tempered woman as ever was born. Dear Cousin she has made me so broken-hearted that I think my life a burden. I thought several times to write you but did not know your direction—

My Dear Cousin, I have nothing more to say at present, but I trust you will write me soon, before Cousin Abbey return, and shall be unhappy till you write me. I hope you will excuse my bad spelling and write. I am your ever faithful Cousin, believe me till death.

(Signed) KENNETH MACKENZIE.

Drect to me K. Mackenzie care of Mr Kennedy, Minister of the Galick Chapel Abcrdeen

Kenneth Mackenzie, Esq. to Miss Mackenzie, care of Henry Anderson, Esq. Three Chares Wharff, London.

Portsmouth, 5th June 1813.

MY DEAR COUSIN,—I received your kind letter sometime ago, but owing entirely to my laziness, has been the cause, of my not writing to you sooner; but I hope you will excuse me as you know as well as I can tell you that it was not for the want of will, but entirely owing to my indolence; I am getting so tired of being a *feather bed Soldier* I wish to God I had gone out as a Cadet in some regiment before I remained in a Militia Regiment. I am getting quite angry at my self for remaining so long as I have done, doing nothing, only being in reverence of those whom I despise. I hope I shall get some other appointment soon. I am sure you heard of the disturbances in the Highlands of Scotland; there is a Regiment to be formed of these men, and sent as a local Militia to *Lord Selkirks* property in Canada in *America*; both Officers and men are to have permanent rank, and will have so much acres of land. I hope it will answer. Captain Munroe of our Regiment is going to get a Majority from *Lord Selkirk*; I expect a Company in it; I should rather accept of a Lieut. thane remain where I am, I would be so independent of my friends, it would be to me a great blessing to be out of reach of their malicious tongues, for I should never see them any more, if that was to happen—I dont think there would be much lamenting upon *both sides*; I heard of your friend *Mrs Cheyne* lately from some person that came up from *Aberdeen*. She is an impudent woman, she wrote me a few lines, hopping I was turned out a different leafe from what I was when in *Aberdeen*; God knows she had much need of turning out better thane she was, for if she did not I dont know what she would be fit for—Miss Cummings Cousin is gone into the 93 Regiment about a year ago. He has been very lucky in getting out of a Militia Regiment, he's far up in the Army List.—The Captain Grant you mentioned is at Inverness recruiting ever since I joined this Regiment. I had a letter from R. Campbell, he is doing very well in Calcutta, the Regiment is lying in the East Indies. He tells me it is the finest climate in the world, they live very cheap in that quarter. What do you think of the long march my late Regiment got all the way from Glasgow to fort Cumberland in Hampshire, six hundred miles. it was lucky for me that

I left them before that time; they tell 50 pounds did not carry them—they were very ill used: I am sure I felt very much for them; all the Gillanders is gone home to Inverness, they did not enjoy good health while in London.—I am told Frank is coming into Rosshire as Captain in place of one of them that resigned, I am sure he wont like it well for they are dirty set of fellows in the Regiment.—I have nothing more to say but hope to hear from you soon

I remain My Dear Cousin

Yours most affectionately

(Signed

K MACKENZIE  
Capt Inver Malitia

P.S. Excuse Blunders  
(Sigd) K. M.K.

The Lord President.—Do you make any objection, gentlemen, to putting these in evidence? Have you any objection that the whole parcel be referred to the jury?

Dean of Faculty—We have no objection; they are only read now as parts of the speech.

Solicitor-General (in continuation)—Now, gentlemen, I have read these two or three letters to you, not in order to supersede the necessity and the duty of your reading them all, but merely to shew you, on better evidence than mine, that they are not the letters of an idiot. These are not letters selected from the holograph correspondence of Kenneth Mackenzie as being the best. Read them as you may, you will find no letters denoting more incapacity than these. That the pursuer may, or anybody may find in them, little bits here and there, that seem to be frivolous and jocular, and, as we have no good means of knowing the subject, silly and unintelligible, is extremely probable. I know no man's correspondence in which the very same thing is not to be found. My friend, Mr Robertson, who read some of his letters, and who always read them with a tone, and a look, and a gesture, that gave them the construction that he wanted to put upon them, found only one addressed to his wife; and in the conclusion he subscribes himself "your sulky, dorty husband Kenneth Mackenzie," a very innocent jest among spouses. The absoluteness and conclusiveness of his capacity for business is to be found in the general state of his mind, proved, as shall be proved by the opinion of the witnesses, and proved by his transactions, admitted by the business done with him, demonstrated by his own correspondence, and which fully justify the account that I gave you of him generally, that he was an intelligent, kind-hearted, sensible, obstinate man.

And now with respect to the alleged *fraud that has been practised in the execution of the deed*. You will observe, before I say any thing upon this part of the case, that if there was no incapacity and no facility, then you have nothing to do with the fraud. If he was, as I maintain, a man who was fit to manage his own affairs, that is sufficient. I do not understand that even the pursuer alleges that this is a deed which can be cut down by the allegation of fraud alone. But let us see the whole separately and together. Supposing him to be facile, *where is the evidence of the fraud practised against him?* Of the pursuer's evidence I shall speak hereafter; at present I say nothing about that part of the case. I refer simply to the history of the execution of that will.

It originated in the mind of this individual. It is needless to found upon little detached circumstances that we think favourable to our own case. The only sound understanding of it must be attained by looking at it as a whole; and accordingly my statement to you on this part of the subject only consists in simply tracing out the progress of this deed, from its first conception till the time it was closed by the death of the testator.

Now, if we look to and view every thing about his settlements, surely I must leave every thing out of the question about another settlement, which we have heard something of, in 1817, in favour of the pursuer; because you will observe that that settlement, in the first place, never was delivered, and in the next place stands revoked by the deed now in question. If this is a good deed, we need not talk of that settlement. Now the question with respect to his sanity or fitness, or the fraud practised against him in reference to this will, begins when he first began to think of his own settlement. When did he begin first to think of his will, and when did he express and indicate his intentions of making a will? In his marriage contract, — when he gave instructions for disinheriting Thomas and his family. What kind of a will do you think would be natural to his mind and station? Gentlemen, the fact that I have set out with, I think, explains all that has taken place, viz. that he had a rooted, and natural, and just determination to disinherit his brother. This may seem to you strange, and I am told at least in this case that it is strange. I have not been accustomed to think it strange in actual life, that any man should make a succession to himself contrary to the course of our law, or to what is best in our private judgment. But we are told that there was fraud or incapacity. Now, let us see whether that be true in relation to this party; and I state to you in general, that this Kenneth Mackenzie had a determination, that this man should never inherit either his honours or his succession by the name and title of Dundonnell. That he had that opinion, is a matter of evidence; and it will be proved. And lest the existence of such an opinion should be stated as evidence of folly or of want of intellect, I think it right to fortify myself in the statement of those circumstances which made that opinion absolutely necessary in the situation in which he stood.

Now the first circumstance which made this a natural and irresistible feeling, was, as I have told you, that Thomas tried to disinherit him. Thomas tried to prevail on the dying father to take his birthright from his elder brother; and in so far as the land was free, and his personal property was concerned, he actually succeeded in that attempt. From that moment Kenneth cherished a resentment against the pursuer that never abated. I do not mean to say that during the rest of their lives he absolutely banished this man from his house. I do not mean to say that he always treated him with a personal rudeness, and with ostentatious dislike to the eye of the world. A man may carry dislike against his brother whom he has resolved never shall succeed him, and who, nevertheless, may look upon him with a superficial civility. But from the moment that Thomas tried to take the lands

from him, they were in nature no longer brothers; and I cannot state this more strongly than by mentioning, that, in the following year, when they had to attend their father's funeral, these two brothers could not be united in performing the decent obsequies of their father. One witness was called, and he told you that there was nothing peculiar in the funeral; but he met the procession at the Muir of Ord; the corpse was by that time removed from Inverness; but it is a fact that, on that solemn occasion, the one stood upon the one side of the street, and the other upon the opposite; neither would move first: and although such conduct was absurd, and criminal, yet when they did not join their hands, or mingle their tears over the grave of their common parent, this speaks volumes as to what was passing here, (laying his hand upon his heart) betwixt the brothers upon that solemn occasion.

I have mentioned the part that Thomas had acted in another proceeding in which he had been already detected; and here I may state that nothing could be more offensive to Kenneth's mind than that when Thomas got from him the two letters agreeing not to challenge an ineffectual settlement, on condition that he gave a large sum, I believe £3000, to their sister, Mrs Ross, *Thomas took the benefit, but refused to submit to the burden of that transaction.* Then, there was a farm necessary to be possessed, if he considered his comfort in any shape, by Dundonnell, the lease of which did not expire for some years after George's death. Thomas knew of that lease, but Kenneth did not; and Thomas attempted to get a lease of that farm from the factor of Mrs Mackenzie of Cromartie. He was within an inch of getting it; but he was foiled, and Kenneth expresses his opinion in the strongest terms in the following letter to Mr Macbean, describing that transaction.

MY DEAR SIR,—As I perceive my brother Thomas is now here, I request you will take the opportunity of waiting upon him, to express how much I feel hurt in his taking advantage of me, by inducing me to write a letter, which, I am given to understand, may be detrimental to my interest; as also the part he has acted with regard to the farm of Achuscauld, which, unless he withdraws, will make me, with regret, have no communication with him whatsoever; and in a way he little thinks, I will be upsides with him and all his advisers; and, therefore, I would recommend of him not to irritate me, if he consult his own interest.—I remain, my dear Sir, yours unalterably,

18th June 1817.

(Signed)

KENNETH MACKENZIE.

Besides this, Thomas, immediately after the father's death, embarked in a course of litigation, not merely with his brother Kenneth, but with the whole of the family, so as to make their lives miserable. And not only did he bring actions against them, but threatened his brother with diligence. The first threat appeared in 1820, stating, that unless a sum of money was paid, he (Thomas) intended to raise an action for recovering what had been due. Now, gentlemen, you will perceive that these were causes enough to create hostility between them; and although the pursuer was not sparing in strong words yesterday, I have no pleasure, and feel no necessity in imitating him to-day; and therefore I shall refrain from stating what I am afraid the witnesses must state

respecting certain other things in the conduct of Thomas, with regard to his brother and his family. He was a man in constant difficulties. On this account he was beset with messengers, and involved his brother-in-law and his family in constant discreditable and painful transactions. Of his personal habits, I shall say no more, than that certainly they could not increase the love of his brother, or promote the harmony or respectability of the family. So far as we have yet advanced, there are sufficient *reasons* to account for Kenneth's resolving to disinherit this man. The fact is certain, you see it indicated in the marriage contract; you see it in the letter, where he says "*I shall be upsides with him in a way he does not think of.*" There was a proposal under the kind and judicious influence of Mr Macbean, the agent and friend of both parties, and an attempt at one time was made for a reconciliation, and they were reconciled apparently; but it was only skin deep—it was but for a moment and could not be sincere.

Such, Gentlemen, were the causes of the hostility between the brothers; now mark the progress of the deed. When anything like fraud is practised, the transaction is generally hurried over. But observe the gradual steps taken in the preparation of these deeds, which *extended over a period of two or three years*. Observe the judicious and respectable men employed in their preparation and execution. On the 31st August 1819, we have the holograph instructions of Kenneth intended for Mr Macbean as agent. Now when I say that they were holograph, don't misunderstand me. The pursuer gravely gave you to understand yesterday, that when a person gave instructions for the making of a will or of a deed, he ought to be as it were hermetically sealed—that no human creature is to be allowed to speak to him, and that the smallest appearance of any advice, direction, or suggestion, is fatal to that deed. That is not in my opinion the way in which any deed is, or can be made; therefore, when I say that this is holograph, I don't say that the deed was absolutely without the slightest suggestion, the exclusive work of the party. I mention this, because there is one passage which has been taken notice of, viz. the grant of the legacy of £6000 to Mrs Ross, excluding the *jus mariti*: by which exclusion the debts of the husband or the diligence of his creditors cannot attach the provision intended for the wife. Thus it provides a legacy to Campbell of £20 a-year, if he shall be in his service at the time of his death.

DEAN OF FACULTY.—The original of the legacies is not in existence.

MR ROBERTSON.—It has that condition of £20 only subjoined to Roy's copy as verbally added by Dundonnell.

THE SOLICITOR GENERAL.—We have these instructions on the 31st of August 1819.

Now, you will observe that the person said by the pursuer to have concocted this deed was Mr Roy. If Roy is the man he is said to be, he could have induced Kenneth to make a deed in his favour *at that moment*, without the intervention of a third party—but upon the 31st day of August 1819, Dundonnell gave holograph



instructions to Roy, in order that they might be sent to Mr Macbean, in whose office Roy then was ; and he accordingly sent them, of which we have evidence in a letter in the following terms from himself to Mr Macbean, (see page 11.) look at and read this letter ; and if the contents are at all incorrect, I will give up this part of the case. Mr Macbean kept them, and he wrote to Mr Roy on the 13th September 1819, in the following terms :—

“ As I know both Dundonnell and you yourself would expect me to offer candidly my advice in any thing that concerns you or him, I have no hesitation in recommending an alteration in the destination of the proposed taillie. Whatever Mr Thomas' conduct to Dundonnell may have been, I think neither his nor Dr Ross's family ought to be overlooked, or rather, I think they ought to be called next after the heirs of the marriage, and perhaps after Mrs Mackenzie's liferent. I shall therefore frame the draft on that footing. I shall endeavour to have it in a packet at Dingwall by Saturday or Sunday next. If Dundonnell, however, remains still of his former opinion, as expressed in the copy of his letter sent to me, I would like that the alterations and completion of the settlements were managed by some other man of business. There is, besides, a propriety in this, and I know Dundonnell will not take it amiss.”

It is impossible for you to consider these letters too carefully, because you will there perceive that the objection to the exclusion of his brother's family, is stated to Dundonnell by Mr Macbean, calmly, sincerely, and honestly, as between one friend and another.

I shall now beg my friend Mr Rutherford, to read Mr Macbean's letter to Kenneth of the 16th, and his letter to Mr Roy of the same date.

ÆNEAS MACBEAN, W.S. to KENNETH MACKENZIE, ESQ.  
of Dundonnell.

16th September 1819.

Mr Roy handed me a copy of your letter to me of the 31st ultimo, with the relative instructions for preparing your taillie and settlements, the drafts of which, viz. of deed of entail, and trust-deed relative thereto, I have framed, and now send it in a packet to you by the mail coach, which carries this to Dingwall. The reasons which induced me to recommend an alteration of your instructions, so far as to introduce your brother's family and your sister, and her family, into the destination, after the heirs of your own body, I mentioned to Mr Roy in my letter to him of the 13th current, and of which, to prevent necessity of repetition, I annex a copy.

P.S.—It has defied me as yet to get your loan arranged.

ÆNEAS MACBEAN, W.S. to ROBERT ROY, 16th Sept. 1819.

I have received your letter from Forres. I leave this on Sunday, and shall be at Relugas, Ardcloch, and Campbeltown, next week, at Inverness the week after, then at Dingwall and Tain, and back here again on the 20th of next month. I shall give orders to honour your drafts on Dundonnell's account. I have prepared and sent by the mail, draft Dundonnell's entail and trust-deed in packet to Dingwall.

I am to be at Campbeltown, as already said, on the 28th. Perhaps you can see me on your way south.

P.S.—I have just got the draft of Dundonnell's bond for revival.

Gentlemen, observe that Mr Macbean had deviated from the instructions; and he writes his client concerning it, and encloses a copy of the letter which he sent to Mr Roy. Now, in that way, not only Mr Roy, but Kenneth Mackenzie were told distinctly of the proposals of Mr Macbean, and of the alteration in the deed that he proposed to make. Mr Macbean will be called before you; and he will tell you his reasons for proposing to make such a settlement, and refusing to execute the one sent him by Dundonnell, and that it was not on account of the weakness of Kenneth Mackenzie—He was the law agent of that gentleman at the time. He knew him perfectly; and he considered him to be a man as fit to execute a deed as any one. But, Mr Macbean thought it was imprudent to disinherit the brother absolutely; and that it was not proper to execute a deed in favour of *one of his own apprentices*; and he says, if you are for executing the deed contemplated, you should get another man of business to do it. It will be proved to you that Kenneth expressed the greatest possible displeasure at Mr Macbean for not following out his instructions, and for not following them out instantaneously and articulately. He almost entirely, and from that moment, withdrew his business from that gentleman. He was resolutely bent on the execution of that deed, and he took the advice not to do it, very ill. Here was the piece of clay in the hands of any man who chose to mould him! Mr Macbean intimated that he refused to extend the deeds, because Roy was his own apprentice. He goes to Mr Macandrew, and why? First, because there was not a legal practitioner in Inverness of greater respectability;—and in the second place, because that individual had been his country agent and factor for about three years before this time. Without making any supposition inconsistent with the character of that respectable gentleman, these are surely sufficient reasons for his being employed. It is another curious circumstance in this swindle upon poor Dundonnell, that Macandrew suggested a different gentleman from either Mr Macbean or himself. In 1819, Dundonnell shewed Mr Macandrew Mr Macbean's scrolls; but he declined the responsibility of the employment, and suggested Mr *James Stuart of Dunearn*, another conspirator with whom Dundonnell had had some transaction, as a person proper to write out the deeds. Well, the deeds after this were sent to Mr Stuart; but Dundonnell having got himself into unusual habits of inactivity, never could summon activity to have them extended, which shews the total absence of all haste and precipitancy in their collection and execution. He delayed writing to Mr Stuart, for nearly a year, in point of fact he did not write to him at all. But, about a year after this period, we come to the next stage in their history.

I have now to call your attention to the following important letter, written by Mr Roy to Dundonnell, in which he repeats his request that he might not expose him by disinheriting his brother; thus falling in and coinciding with the advice given by Mr Macbean to Dundonnell, (See page 15.) Having got this warning, Mr Macandrew happened to be at Dundonnell on one of his

periodical visits on business; and on that occasion Mr Macandrew is furnished with written instructions to make a deed for Dundonnell, and he will tell you that these instructions were given personally by Dundonnell. I found on the fact that the instructions were received; and it is demonstrative evidence that after the lapse of a year, he retained his former ideas, and adhered to his original intentions. Had Macandrew wished to push the execution of these deeds which had reposed from 1819 to 1821, he might have got them executed before he left the room; but it was not till the month of August, 1821, that they were executed. Roy and Macandrew go a fishing or shooting for a day or two, leaving Manford to extend the deeds. He gets one deed extended and executed by Dundonnell, and records the fact in his diary, that the deeds were read over and witnessed by him and a carpenter of the name of Fraser; and after the execution of both deeds, he requested Fraser to make a memorandum of what had taken place. Much has been said about this diary and this memorandum. Now, as to the diary of Manford, what is it but a log-book of his life. Surely you are not to be led away by such rank trash as we heard t'other day, although, I dare say, you are destined to hear more of it before the case is closed.

Then, what evidence have we, either of Mr Macandrew's or Mr Roy's interference—the former is never heard of during the whole history of the transaction—and the latter, only in his honourable and generous interference in behalf of the children and family of the Rosses. Dundonnell, down to the year 1826, when he died, never announced that during all that time he was held under thralldom; he never wrote a line or spoke a word to a common friend that that deed did not express his will.

The pursuer objects that the Roys were chiefly present at the death-bed scene. But who would you expect to be present upon such an occasion, but the relations of the dying man? A great deal has been attempted to be made of the alleged toast. It is a circumstance utterly foreign any how to the true merits of the case; but is well calculated for popular effect. The answer that I make to it is, first, that Mr Roy, whatever he might have expected, had no certainty that he was to succeed, and that therefore it would have been cruel and absurd to have assumed the station of heir; and second, that after all, neither the words nor the sentiment ascribed to him, were ever uttered. The pursuer's evidence consists solely of a Mr Douglas, who admits that he does not remember the words. The defenders shall show by others who were present, that instead of drinking the pursuer as the heir to the estate, he only proposed the healths of his and of Dr Ross' children, as the representatives of the families, which in strictest truth they were.

Let us now attend to the case of the pursuer. He is bound, first, to prove either absolute incapacity, or second, facility acted upon by skilful fraud.

Now, with respect to capacity, I dont think the better of the pursuer's case, that when in a situation in which he was called upon to produce all the evidence applicable to it, that he has inexcusably kept the best evidence back. The man who prepared this

deed is alive and accessible, but he has not ventured to call Mr Macbean, or Mr Macandrew; and the idea that the pursuer assigns for this—that they are all in a conspiracy against him,—is too ludicrous either to be stated or refuted. Of the thirty or forty witnesses which he called, if I counted right, there were 14 or 15 of them direct hissing hot from the county of Ross, and these in many respects not the best evidence which could be adduced. I was struck with the paucity of those who profess to have *done business* with Dundonnell. The pursuer has not gone into the half of this man's life; look at our evidence,—observe that table loaded with the proofs of the numerous transactions in which he had been engaged. Then observe how the witnesses they have produced in many respects vitally contradict themselves. Mr Neil Kennedy, who told you that this lad was an idiot, wrote to his father that the lad did not want sense or affection, but that he was a little thoughtless. After this, what care we what he says in 1831, when contrasted with his written evidence at the time when the facts were fresh in his recollection. Then Mr John Kennedy gives you exactly the same opinion that his brother gave.

Then you have a witness of the name of Collins, who is now very confident of the idiocy of this man, and yet he told you that the letter produced, dated 25th December 1818, from Mr Mackenzie of Ord to Kenneth, relating to a transaction of some bonds, was *written by him to the dictation of Ord*. He wrote to this man who he professes was an absolute idiot without saying that he had ever hinted to Ord, that he was a man totally incapable. Not only so, but this Mr Collins, who was the clerk of the British Linen Co. stood by, *and saw the drafts of Kenneth Mackenzie honoured* in the same manner as the drafts of any other person on that Bank. Then we have Alexander Robertson, who was pretty clear that he was incapable of doing any business, and yet that gentleman *purchased a horse from him*, and wrote to him in June, 1825, after the date of the deed, treating him as a sensible man, and qualified to do business also. He was the person who was employed by Dundonnell to act as joint valuator of some sheep, and instead of saying, had he considered him incapable, "Sir, I cannot act for you," he acted on that order of Kenneth's, and did business on his order, and he could not have done it upon a better. Then we have that most singular witness, Mr Mackenzie of Millbank, who tells you just the same thing, and we have from that gentleman two letters, one dated, 7th Jany. 1823, in which he says,

"My dear Dundonnell—I am happy to hear of your being well since I had the pleasure of seeing you; indeed, I have seldom, if ever, felt so happy as while under your hospitable roof. Mr Davidson continues to talk in rapture of your kind reception of himself and his friends, which was truly in the style of good old times. I am concerned at not being able to fulfil my promise of passing Christmas with you, which is quite out of my power, from causes which I cannot obviate."

Then, in his subsequent letter of 22d Dec. 1824, (observe, they all went to the idiot whenever they could turn a penny by him), he says,

“ My Dear Dundonnell—I am happy to hear of you occasionally, and that you are well, though circumstances put it out of my power to see you, however much I would incline it. The chief cause of my writing you now is, that I have taken a desire of possessing Auchindrean as a farm, should I be so fortunate as get it on fair terms; and, since no sale took place, it will rest with you and your Edinburgh friends, to treat with me about it. If I took the farm, I, would, of course, take stock at valuation, and give satisfactory security for its amount. Now, my good friend, let me hear from you about this. I wrote, two days ago, to Mr Roy, that if it was to be sett, I would offer for Auchindrean, but you will probably hear from him, before I shall.”

This is the idiot.—They all are willing to deal with him, and here is a man willing to take a farm from him, one of the very best farms upon his estate, and yet has the assurance to tell you, that from his earliest years he always reckoned him to be utterly incapable of doing any thing. Then we have Ninian Jeffrey, who had asked Kenneth to *sign a bill for him*, which he, the idiot, refused to do. He was sensible enough not to sign a bill, but not sensible to make a deed. I do not mean to say that they have all perjured themselves, No. They have only been afflicted with a moral disease—an epidemic, a local distemper, which has infected all Ross-shire. I give them all credit as to the reservedness of the man, though they may on that account have mistaken him; but let us see after all what they state. I at present say nothing at all about their opinion, because, before appreciating their opinion, it is right to know upon what it is founded.

Now, observe this great fact, that not one of them ever attempted to do *business* with this man.—Many of them never even attempted to speak to him. They held him incapable of rational speech. Now, what are the other facts.—You find in general that they consist merely of selections of those eccentricities and detached parts of the life, or a few unexplained foibles or fooleries of the conduct, of Dundonnell, which it is peculiarly necessary for a jury trying such a case as this to guard against; because they occur in the life of every man, and are easily selected. There is no man, however sensible, out of whose life absurdities could not be easily picked—absurdities not merely of speech, but of conduct. You, gentlemen, are sensible men; and, yet I doubt if there be one of you out of whose lives there might not be picked absurdities as gross perhaps as those of Dundonnell; and yet none of your friends ever thought of cognoscing you. I know no friend, out of whose life I could not produce absurdities fully as extraordinary as I have heard to-day, or could hear in any case of this kind. You are to look at the full life, and not at parenthesis. You are to look at conduct ratified by reason, and not at excentricities which arise from ridiculous, absurd fancies at the moment. What does not biography teach, more than the little eccentricities of great and sensible men? It is for the sake of eccentricity that a great part of biography is valued. I have heard of a great poet, who used, in the presence of respectable persons, to drink his claret out of a cup made of a human skull—yet, no one thought the noble poet was insane. I have heard of a man, I may almost say I knew him, who sat in the company of respectable persons, and made a repast of parts of the

human body.—collops of men and outlets of women!!! I have heard that a great lawyer, perhaps I might call him a Lord High Chancellor, who went to a horse-race in a sedan chair!\* I have known an excellent member of parliament, go into a china-shop, and smash every article of crockery that came in his way! These are whims; yet surely you would not say, that these “follies of the wise,” are marks of incapacity.

Again it is said, that in his early youth he was incapable of learning. This evidently is false: and I shall prove the falsehood under the hand of the very man who makes the assertion.

That he was a learned person I do not say, but the assertion that he could not learn is false; for I shall prove that he examined the sacred writings—that he was a reader and explainer of the Scriptures—and that piety was one of his distinguishing features. Then we are told that he did not associate in his youth with children of respectable people. This is not true.—We will prove the falsehood of this assertion by the parents of the youths with whom he associated. It is said, that he was about to make a discreditable marriage. This also is false. But, in point of fact, if true, it would be no proof of mental weakness, but, on the contrary, was an ingenious invention to get free from the thralldom of the individuals under whose charge he then was; and in point of fact, it did liberate him. Then in the army, it is said that he was incapable of being made an officer,—and that he was obliged to depend upon his subalterns for going through the duty required of him by the commanding officer. Again denied. We shall produce evidence of its falsehood, not such as you have heard, but the evidence of his commanding officers. I do not say that he could go through the manual and platoon exercise. Do you think the Duke of Wellington himself could do so? Then you are told that, in consequence of his incapacity, he could not attend a review, when his corps was to be reviewed by the Allied Sovereigns at Portsmouth. Now we have evidence to shew, that upon that very occasion, and upon that very day, he was under arrest, previous to being tried by a court martial for the offence, of which he was honourably acquitted. Then it is set forth as his first, his last, his midst, and without ending infirmity, that he was extravagantly fond of his fowls, the number of which has been exaggerated from 10 to 20, from 20 to 100, and from 100 at last to thousands. The exaggeration, in point of numbers, is extravagant. He had no doubt a number of cocks and hens about him, for he had a taste for poultry of all sorts and denominations, especially foreign birds, but he gave a good reason for this. In the first place, he found amusement in it, he found it economical; and the statement that he made to several respectable persons was, “you blame me for keeping these fowls, would you blame me if I kept a pack of hounds?” Oh no! That would have been the amusement of an honest, good hearted, country gentleman, and the pursuer would not have

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\* Related of Lord Brougham, when a counsel at the Scotch bar.

blamed him for keeping them ; but with reference to passion or feeling,—with reference to reason, whether was it wiser for Dundonnell to keep a pack of hounds, or a great number of cocks and hens, the rationality of the one is, at least, equal to the other, although it may not be so fashionable. Had he kept a hundred game cocks, would you have called such folly sense? But he had an hospital for sick hens. What does this hospital turn out to be, but merely that he had a separate place where he kept those that were ill. As to the feeding hens, what is it? It is merely that a great fat man was not in the habit of lying down upon the horizontal grass, but of reposing himself upon a sloping bank and tossing a few handfuls of grain, on which the cocks and hens come upon and about him, and hopping upon him, may have left marks of their favour in the shape of certain *vestigia*. I knew a gentleman who kept a fish-pond, and who made such friends of his fish that he used to name them *John, and Tom, and Mary*, and they came and eat out of his hand ; but I never heard that he, though he employed his skill in feeding his fish, was considered as insane. You are told that hundreds and thousands of fowls were upon the estate, and that he had dozens in his house, but what is wonderful in all this? I knew a reverend and sensible man, a Professor of Divinity into whose house no one could enter without encountering, not small and beautiful birds,—not humming birds and tom-tits—but owls and crows—which met him at the door, disputed the chair with him in the drawing room, and obliged him to wipe his seat before placing himself at dinner. Yet instead of being a fool, he was a wise and learned lecturing professor.

Then it is said, that Dundonnell sometimes exposed himself without clothes. It is not true ; and if he did so upon one or two occasions, they are easily explained. He is said however to have been so, and the scene is laid at Pennyquick. If it had been the case, I hold that it is no proof of idiocy, but a whim. I also remember a gentleman who lived near Lasswade, a Commissioner of the Customs, who, every morning in summer, might have been seen walking naked as the day he was born, with the exception of a pair of shoes, from his house down to the bridge to bathe. I have seen him, again and again, stand in this primeval dress, and directing the village idiot to fly a paper kite, and yet I never heard that in consequence of this freak, he was considered as a fool. And then they say, that he was fond of cream. Who is not? That he was fond of beef-stakes,—every man of sense is. He went into the kitchen. But observe that there is a white and a black kitchen. The black kitchen which is properly the culinary kitchen ; and the white kitchen, where almost all the business of the estate is done. It is the place where the rustics and all assemble in the evening. It is the audience chamber for the factor and the tenants, and because the usual meetings took place in that apartment which the father of the family George, had allotted for that purpose ; and although a man of the very highest character, you are told that he sat in the kitchen occasionally. Then we are told next, that he was a believer in witches and

charms ; and that upon one occasion, he extended his palm and got his fortune told him by an old woman. The answer I make to this is, that it is notorious that a belief in such things at this hour is common over all that part of the country, not only with the low, but very often with those of a higher rank. I believe many of the witnesses who were examined to-day would not have mocked him, or thought him unworthy for entertaining this belief. Who does not know of the superstitions of the Highlands ? We have the poet's lore on those superstitions. Need I go farther than state to you the existence as to the belief in charms, in the cure of disease, the touch for example in the cure of the king's evil, the belief in ghosts, and the second sight. What would you say of the great mind of Samuel Johnson, who was notoriously all his life, subject to this belief ? Look at his discourses on his journey to the Western Islands. Look at his relation of ghosts, which, whilst it delights us by the beauty of the writing, is calculated to astonish us at the inconceivable credulity of this grave philosopher, and acute reasoner. With respect to the second sight, he says, that his mind upon that subject is all but convinced. It is notorious what the state of that gentleman's mind was upon that subject. And it is perfectly notorious that sensible men have believed in it again and again.

Then besides the predicament of Dundonnell's believing in these superstitions, they say, he was not only a fool and an idiot, but he was fond of the society of such persons. There is no part of the case upon which grosser misrepresentation has been practised than upon this subject. It is said that he walked up and down the garden, and indulged in speaking to the idiots. Now I deny that there is any thing in the circumstance, even had he amused himself with the idiots, which denotes incapacity. Who has not heard of idiots walking up and down for hours before the houses of those whose protection they enjoyed, and talking with the proprietor and the domestics ? I believe, that I shall succeed in producing to you some gentlemen in the highest ranks of life, who keep fools at this present moment ; I don't say tolerating them, but who keep them as a necessary appendage to their establishments. One of the greatest, most ingenious, and most dignified minds which our country boasts of stands in this predicament. There are still David Gellatlies kept by modern Bradwardens. The picture that is drawn by our talented townsman, does not give you to understand that the presence of a fool in the Castle of the Baron of Bradwarden, makes him out to be a person of inferior intellect. Dundonnell's conduct was not irrational in this respect ; and the protection he gave to these poor unfortunates gives no evidence of imbecility, but is a proof of his kindness and humanity.

Then you were told that George Mackenzie, the father of Dundonnell, had a poor opinion of his understanding, and lamented that his estate and honours should after his death descend to his son Kenneth, a fool,—that he wished to prevent such a misfortune ; and that he would entail his estate, and prevent it from going into the hands of this fool. This statement I



dont believe. That he may have occasionally and repeatedly called his son a fool, because he was reducing the family by spending more money than he ought, I dont deny ;—many fathers have called their sons fools for doing so, but that will not make them out idiots. Now, I can prove to you under the hands of old George himself, that he did entertain the most kindly and affectionate opinion of the lad, and that he considered that he would not be unworthy of bearing the honours of his family. There are many letters which I shall read to you before I leave you ; but there is one dated the 4th December, 1813, to which I will now direct your attention.

**MY DEAR KENNETH,**—The sudden and afflicting death of our dear brother, which was announced to you last week by the Doctor, could not fail to overwhelm your mind with the deepest distress, in which you may readily believe that his distracted parents richly participate. What comfort have we but to see our dear children doing well, and settled around us respectably in the world,—when these hopes are disappointed or blasted, what remains to us in life but lamentation and regret. Impressed with these melancholy reflections, it is with the greatest grief and surprise that I now learn by a letter from Tom, that you have come to the rash resolution of extending your service in the army to the line, and are just on the eve of setting out for Holland, the scene of active, and no doubt bloody operations. Let me entreat of you, my dear Kenneth, to give up every idea of this measure, and to lie by in the country during a little time, until I shall be able to make arrangements for your comfortable and respectable settlement at home, an event I have much at heart. I never meant that you should lead a military life,—you know how much our family has already suffered from its connection with the army. And though I thought that a few years of your time might be agreeably and profitably spent in forming the correct and economical habits of a soldier, I did not intend that you should go abroad amidst the dangers and difficulties of a military life. Allow me now to desire that you will make up your mind to leave the army, and look forward to a settlement in your native land ; you know how happy your mother and sister will be to see you, and you may fully rely upon every effort in my power to promote your comfort and best interest. Write to me immediately on receipt. Your mother unites in kindest good wishes. I am, dear Kenneth, your most affectionate father,

(Signed) **GEORGE MACKENZIE.**

**Capt. KENNETH MACKENZIE, Inverness-shire Militia, }  
Fourhouse Barracks, Portsmouth. }**

Again Dundonnell is accused of having signed an acceptance to Major Munro, and of having designated himself “ Kenneth Mackenzie, Esq. younger of Dundonnell ” across the face of the bill. This statement is exaggerated ; for it was at the particular request of Major Munro, as is proved by a letter from him, enclosing the bill for signature, that Dundonnell did so.

Besides this, they produce the medical gentlemen to prove that Kenneth could not originate or understand a deed. It was never intended that he should originate the deed. As to his understanding it, they confessed that if explained bit by bit he might have understood it, and that is all that can at any time be required. They talk of the rationality of the deed. The rationality or irrationality of a deed is very often conclusive of the question. But where is the irrationality of this deed ? I have accounted to you for the reason that induced Kenneth to disinherit his brother.—I say it was a natural and rational reason---he had a fixed dislike to

his brother, an undoubted fixed resolution that he should not have the estate. I believe that one of the witnesses who has not been produced by the pursuer, but who has been always complimented by him for his delicacy in this transaction, will say, from his knowledge of the fact, that if he was in the same circumstances in which Kenneth was placed, he would have acted in the same way. Then we are told that the deed is irrational because Kenneth has excluded the families of the Rosses and his brother. They are not excluded in one sense; they receive a bequest of ten thousand pounds, which is more than I believe the value of the estate.

There is one error into which I am afraid you may have fallen, viz. that the Dundonnell estate is a very great inheritance. I am sorry I must dissipate this idea—the truth is, it is an estate only in name. It is in reality all gone. When Mrs Mackenzie's liferent of L.500 is paid out of it, and the debts and legacies which the deceased left, are paid out of it, there will not be one sixpence left. This deed is nothing to Mr Roy: not one farthing will he ever get by it. It is the Rosses who are struggling for it. It is the sister and nieces of the deceased that are clinging to the deed as their sole stay against penury and want. They are left L.6000 by this deed, and were the estate to go to Thomas, they would see as little of it as they did of the amount for which he pledged his truth and basely violated it. It is the Rosses who are instructing their counsel here to defend the deed, and it is they who are abiding by it to the last. Roy cares not for it: it is no profitable thing to him, and were it not that his honour and fair fame were attacked, when the deed was attacked, he would at once and gladly renounce all benefit or interest which he might expect to derive from it.

Observe the fact that I alluded to, viz. the legacy left to Campbell. Now it seems to be supposed that nothing can evince the weakness of Dundonnell more, than leaving a legacy to that man. Gentlemen, this appears to me the most idle part of the case, because, let it be discussed as it may, the dead brother never whispered hostility to Thomas, nor said any thing as to the character of Mrs Mackenzie; and I cannot help thinking, that the pursuer might have conducted his case without at once involving in discredit the interest of his nephews and nieces, and imputing insanity to his dead brother, breathing also upon the purity of his living sister. This, however, he has done, and never was there an attempt by evidence to support so feeble a case by a more damnable falsehood. There is not a single thing that could be stated by man, more utterly the reverse of truth, and more utterly ridiculous and unreasonable, than such a foul, disgraceful, and infamous slander on the character of this lady. As to the character of Mrs Mackenzie, we have produced in evidence a letter that we shall lay before you from Dundonnell himself, expressing the greatest affection to his wife, and his favourable opinion of Campbell; and though occasionally he may from his lazy habits have conceived indignation, and been frivolously angry at this individual's being out of the way of his attendance upon his master, may be true;

—his being jealous, is altogether false—in every particular false, and contradicted by the recorded declaration of the deed itself; for when he was at perfect liberty to say and to write what he pleased, he spoke of his wife in terms of affection, and of Campbell in terms of kindness; and it was with his own hand that the direction to leave Campbell the legacy alluded to was written in the corrected scroll, and his is the only legacy which is attested by Kenneth Mackenzie of Dundonnell. The pursuer may say, this was because his hand was constrained; but where is the proof of this? We shall show you in every letter that he wrote, that all his sentiments are consistent with this fact. And, Gentlemen, what is the evidence to the contrary? Some persons have stated that he expressed himself fretful and angry at Campbell for flirting with some of the domestics, and desired to turn him off in consequence. If true, and suppose it to be so in point of fact—how can you cut down a deed upon evidence regarding circumstances that have nothing to do with the deed at all? Is the evidence of the jealousy to be reared upon the words which he may have used to two boys who were on a visit, and who at the time were much about the age of 14.—You have the boy Cheyne and the boy Gillanders, both now only beginning their twenty first year, speaking as to what took place when they were 14 or 15; and can you believe that any idea of irregularity at all could have entered into the mind of these boys at that age? Do you think that they could have an idea of any thing like the feelings of Dundonnell, supposing the jealousy to have existed? Can any thing be more disgusting than the expression used by one of these youths, Cheyne, I think, “that Dundonnell had not the feelings of a man”—when he could have had no more knowledge, nor idea of those feelings than when he was a boy of 6 or 7 years of age. Yet it is upon this testimony that you are called upon to deny the statement of Dundonnell himself—the fact of his having mentioned Campbell in kindly terms, and of his having written this legacy of £20 to him in his own hand writing. It is upon this evidence also that you are to contradict the affectionate and flattering letters which he wrote to the lady herself, and that you are made to believe that this deed is irrational! Gentlemen, the deed was not only rational but the wisest deed, considering the situation in which he was placed, that he could have made, and I would have thought him a fool if he had not had great affection for that lady who was the source of all his comfort. Then they say that to make Robert Roy—a stranger to his blood, who had never been in his presence for the course of an hour—his heir; is utterly irrational. I have stated to you that the pursuer had meditated the exheridation of his brother who had made it his right by his conduct; and the disinheriting him was only an act of justice from the hands of his brother. So much for the rationality.

But then we are told that there was a trick—that there was influence exercised over this man. A very few words indeed, will dispose of this. If you hold that he was incapable and facile there is an end to the case. If he was facile, you must learn the trick

that was practised upon him ; but if you hold the deed rational then I tell you that trick or no trick, a rational deed cannot be reduced. But, gentlemen, where is the trick ? It is a very extraordinary feature in this case, that the nature of this trick has never yet been explained. If I accuse a man of a trick, would you not enquire, How did he trick you ? Was it by filling the man drunk, or slipping a wrong deed under his hand when he signed, that the deed was accomplished ? Was it by coaxing, or solicitation, or by intimidation ? None of these things are here said—certainly, at least, none of them are proved. Where is the trick ? What is the foul trick hereafter to be explained ? It is this—you exercised influence over him, and having a weak man in your hands, instead of guiding him right, you guided him wrong. Now, upon this subject of influence, I must state to you, that it is an incorrect assumption out of which it is deduced, because the pursuer seems to think that he will not let the deed stand unless Dundonnell originated it like a dream. He thinks that a deed will not stand unless assistants, parties, and all kinds of friends are removed, and the maker dispatched to a solitary place to make a will of his own. The nature and plan of the deed which he chooses is not the less his, because it is the sense of those in whom he is interested ; but if there were influence, is it improper in you to use your influence with your friends, your relations, your wife, to advise them to make their settlement ? So far from being improper, it is proper,—it is just and right,—it is the duty of every one to do so ; and this is a dicta of Sir John Nicol, Hagart's Reports, vol. i. p. 801. Now, gentlemen, where is the proof of such influence being practised upon Kenneth ? Not a human being has been called to say that he ever saw influence practised upon him ; nor is there any one letter that tends to shew that Mr Roy ever talked to him, or ever suggested, or entreated, or intimidated, or solicited Kenneth Mackenzie on this subject. The pursuer is at pains to go into every little circumstance, generally incorrectly, and with the most elaborate and interminable industry, mixing up every thing in order to make up a story of what is altogether clouded ; and out of which he wishes you to infer, that there was an infernal fraud practised in the concoction of this deed. The defender was not in such a situation as to be able to exercise any influence over Kenneth, because the pursuer has voluntarily told you, that Kenneth Mackenzie did not like Roy at all,—that he occasionally said, that he was sorry to see him come to the house, and that he was an impudent puppy : Can you view this fact in this light, that Mr Roy was his agent after the execution of the deed ; and it was the duty of Mr Roy to make that client (as many others are bound to make their clients who are too extravagant) to be a little moderate in his expenditure. I will shew you, however, that there was the warmest possible growing affection subsisting between these parties ; but if true what the pursuer says, that there was this dislike between Kenneth and Mr Roy, nothing is more incredible than that he should have had any influence over him. The whole case is bottomed upon one or two letters that Mr Roy

wrote to Dundonnell, and one to Macbean, remonstrating against this very settlement, which, I say, do honour to his head and heart, and in which he seems not to wish that he might be the heir. Now, according to the pursuer's statement, he must have written his letter anticipating a challenge, and that he had preserved these writings as evidence for this day.

Gentlemen, if that had been his idea and his knowledge, it of course would have destroyed the case at once, but he did it fairly, honestly and openly, in the way that the pursuer proved him to do it. Suppose then, that he had known nothing of Dundonnell's intentions, never had written one word, never had spoken to a friend on the subject, and never interfered with Dundonnell or Macbean, but just let the idea work upon the mind of Dundonnell—What would have been the argument? Just the reverse of what it is to-day. Suppose you had a brother, a silly and weak man, that wished to make what you thought an improper deed, the question would be, did you ever remonstrate and argue with him? If you had done so, you would have been an honest man; and instead of having left your interference to be gathered from mere words; you would have written letters on purpose that the testator might have had time to consider the import, and ponder over what you had written, and you would have called in neutral persons to execute the deeds. You would have acted in this way, they would say, and not left your honour to hazard, but would have left your recorded opinion to testify in your favour. Now, this is just what this gentleman has done; but this very act is inverted, and made the foundation of the case against him.

Gentlemen, the alleged fraud or impropriety on the part of Mrs Mackenzie, seems to me, if possible, to be a shade worse than what is alleged against Mr Roy, her brother; because, in the first place, you will observe, that she was the wife of Dundonnell, and I presume it was not only her right, but her bounden duty to advise him, and consult with him in the preparation of his settlement. It is to me a very new doctrine that a husband in executing such a settlement, is entitled without exposing himself to suspicion of incapacity, not to take his wife into his counsel. But in the next place, I know not upon what fact the statement of improper influence by the wife is founded. You have heard so much by the pursuer against this lady, and against every mortal connected with the deed, as being in a conspiracy against Thomas, that I am not at all surprised there should be a general haze on your mind against Mrs Mackenzie. Recollect for one moment, when you retire this night,—what the fact is—that Mrs Mackenzie did nothing wrong, except going into the room once, and saw nothing. She was not a party to the deed, nor had any thing more to do with it than I had. Then as to her having any influence over him, such an idea is as far removed as in the case of Mr Roy. They allege and falsely allege, (but take the pursuer's story as he gives it) the charge of jealousy being substantiated on the mind of her husband, that the wife induced the husband to make a settlement in her favour. This to me is a new case in the story of life. Gentlemen, I have told you that no couple ever

were blessed with more conjugal amity than they were. And accordingly we shall lay before you all the holograph letters of Dundonnell, not written when he was with his wife, but written to others, and to her, when he was at a distance from her, breathing the most amiable affection. When he was away from his wife, we never hear him telling to Mr Macbean or any other person, "I have not regulated my will to my mind; let me set my name to a writing, to destroy the deed which I have been induced to make; let me not return under the controul of that woman."—No, his letters, are written in the most decisive and affectionate manner, that either he, or any other affectionate man could write.

Then, Gentlemen, we are told that she wrote many of his letters.—I will not speak at this hour of a thing so frivolous. Is there any thing improper in any man, (more especially a man of such bodily habits) employing his wife as his amanuensis?—I will not give an answer to a thing so absurd.—I will not suffer myself to think you care one farthing about it, or about what was said or insinuated in the statement of a witness' as to a mere joke by Mrs Mackenzie, that married persons were, in general, like each other; but that she and Dundonnell were not like each other in any thing, except in the resemblance of their hand-writing, and that she could sign like him. I think I could make the wife of a learned Lord, or of a certain Solicitor, imitate the hand-writing of a learned Lord by me, so well, that he could scarcely know it. And as for the President there, I say I will sign to-night in such a manner as that learned Lord will not discover it. Is there any thing in all this, except folly, or loose and palpable nonsense.

Gentlemen, such is the nature of the influence said to be exercised by the wife, who had not so much to do with the matter as many other persons had. You have the deed regularly executed, and sworn to by the witnesses. Mr Macbean refused to prepare the deed, because it was in favour of his own apprentice. If it had been me, or you, or any body else to whom the estate had been destined the deed would have been executed.—Mr Macbean would have had no hesitation in doing it. Then Mr Macandrew, who was not benefitted one penny, and Manford, and the poor carpenter Fraser, and Campbell, were, it is said, in a conspiracy with the Roys, in the making of the deed—in the obtaining, signing, and inducing Dundonnell to the making of it. You must believe this, before you can believe that this is not the deed of this individual.

Now, Gentlemen, I wish as I am parting finally with you, to give you an answer by anticipation to all that is to follow. Each of you are aware, that after our evidence is led, and when we are for ever dumb in this Court,—having no power of reconciling apparent contradictions, and no means of explaining defective statements, and no right to enquire into undoubted blunders and misrepresentations; the pursuer has you entirely in his own hands, and may comment upon our evidence as long as he pleases; and I know, and you must know, that every thing that zeal, talent, or industry can do, is reserved against this defender. All that the most elaborate ingenuity, the most interminable industry, and the most remorseless misre-

presentation can accomplish, will undoubtedly be brought forward in order to perplex you, and to rear up the semblance of a case out of detached circumstances or extravagant exaggerations ; and however monstrous or absurd may be the statements or arguments addressed to you, our lips are sealed for ever upon the subject. I earnestly beseech you, therefore, to keep constantly before your minds, that the real question you are to try, is not, whether this man had a few whims and eccentricities, but whether the deeds sought to be destroyed, are not his, and whether he was incapable of executing them ? Let this be the star which guides your course ; let this be the anchor to which your faith is moored. Call to mind the attempted disinherison of Kenneth by Thomas ; remember the disgraceful violation on the part of Thomas, of the condition on which the letter was obtained from his brother, consenting not to challenge a part of the father's settlements ; think of the causes of offence and alienation accumulated throughout a long course of years, and of the determination so often expressed by the deceased to exclude the pursuer from the inheritance ; look at the numerous transactions in which this idiot was engaged ; read the holograph letters ; remember that the patrimony of the sister and nieces of the deceased depends upon your verdict ; remember that to have left the estate to a bankrupt brother, who, by his own act, had made exheredation his right, would have been tossing it to his creditors, and leaving them without a shilling in the world.

Gentlemen, these are the general outlines of the case which you will never lose sight of. If you lose sight of them, you will not merely upset this man's deed, but you will imply that all and every man who in the course of business were employed in framing and concocting them, are guilty -- guilty of fraud in handing down this trust. As to the wife of this gentleman, we have proved by his letters, that she was held and understood by him to be his best friend. Of Mr Roy I say nothing. Of the other persons I have named, I know nothing ; but the gentleman I shall name last, Mr Macbean, is one with whom I have the most perfect acquaintance ; and I am entitled to say, that such is my impression and my conviction of his character, that no verdict that may be pronounced in this case, whatever it may be, will shake the firm belief which I have always entertained of his honour and integrity ; and I am bound to say, that of all the men of business I know, he is the last that would ever enter into or act the part of a conspirator, or be capable of any thing inconsistent with the most perfect honour and most spotless integrity.

## THURSDAY.—EVIDENCE FOR THE DEFENDER.

*Mrs Jane Mackenzie or Mead.* The witness being called, was not in attendance.

When the following Deposition *in testis* of *Mrs Mackenzie of Breda*, dated at Aberdeen, the 24th day of December 1830, was read by the Clerk of Court :

Depones, That she does not know the parties in this action : That she has seen the pursuer once, but does not recollect of having seen the defender, Mr Roy : That she is 65 years of age, and is sister of the late Lord Seaforth : That she knew the late Kenneth Mackenzie of Dundonnell, when he was attending school, in the years 1806, 1807, and 1808, or thereabouts, perfectly well : That he then resided with the Reverend Niel Kennedy, minister of the Gaelic Chapel in Aberdeen : That the distance between the house where the witness lived and the house of Mr Kennedy was about a mile : That she was not in the habit of calling on Mr and Mrs Kennedy : That she only called on them once or twice : That she never heard either Mr or Mrs Kennedy complain of Kenneth's conduct or capacity : That she had no opportunity of forming any opinion, from her own observation, of Mr Kennedy's fitness for an instructor : That the deponent's opinion was, that Kenneth should not have been placed with Mr Kennedy, who had no other boys of Kenneth's age under his charge, but that he should have been sent to a genteel public school, where other boys of his age and rank would probably have urged him on to exertion : That Mr and Mrs Kennedy associated chiefly with members of Mr Kennedy's own congregation of the Gaelic Chapel : That the society they moved in was of a middle rank, neither high nor low, but certainly not high, and not of a rank to have done Kenneth any good : That she thinks she must have heard Kenneth read, and have seen him write : That he associated a great deal with her boys, and pursued the same studies with them : That he was a common reader, not remarkably good, but equal to some of her own sons, who were of the common run of scholars, except one, who was remarkably clever : That in these respects of reading and writing, she considered him just on a footing with her own sons : That Kenneth appeared sensible of being of rank above the common : That schoolboys are not very nice in regard to their ideas of feelings and manners appertaining to rank, but he appeared to the witness to be sufficiently conscious of his title to associate with her sons, and to be of equal rank with them : That Kenneth was a daily visitor in the witness's house : That she, consequently, saw him frequently : That Kenneth came very often to witness's house, and frequently remained hours at her house at a time : That the names of the witness's sons were, William, Thomas, and Frederick, with whom Kenneth used to associate : That she had three other sons, who were children in the nursery at the time : That their names were, Francis, John, and Alexander :—" Was Kenneth Mackenzie, in regard to mental capacity, equal to witness's sons ? Would you, in comparison, call him idiotical or imbecile ?—That Kenneth Mackenzie did not take up his learning so rapidly as witness's sons, but in regard to every thing except book-learning, he seemed equal to them in mental capacity : That the witness's sons were particularly well attended to in their education, which the witness thought Kenneth was not, from his situation, that situation not being, in the witness's opinion, well adapted for improvement : That he was a dull boy in taking up his learning ; but that, in every other respect, he cut as good a figure as her sons, and the witness would not, in comparison with them, have called him either imbecile or idiotical." That Kenneth Mackenzie, while at Aberdeen, in regard to person, manner, and in conduct and appearance, was exactly like the witness's sons, and other boys of their rank : That there was nothing remarkable in Kenneth Mackenzie's manner at his meals, or in the quantity which he ate : That in these respects he resembled the witness's sons and other boys : That Kenneth was a companion of her three eldest sons, and that he was about the age of her eldest boy.—" What opinion had witness of him ? That the witness had a high opinion of Kenneth Mackenzie : That he was a handsome and affectionate, and a well-disposed boy, and the witness's sons were all remarkably fond of him."—That there was nothing remarkable in Kenneth's conduct or appearance : That there was nothing remarkable in regard to his dress : That he was



not slovenly: That he was like other schoolboys of his rank: That he was always neat and clean in his dress and personal appearance: That the witness never observed any thing silly or foolish in Kenneth Mackenzie's conduct: That she never saw any thing rude or improper in his conduct: That he was always civil and well-bred to the witness.—“Did he appear to know perfectly well what he was about? That Kenneth appeared to the witness to know perfectly well what he was about: That, in his own affairs, he was as knowing as any person need be.—Will witness swear that she considered him perfectly wise and sound in his mind? That witness will swear, that she never considered him otherwise than perfectly wise and sound in his mind.—Did she ever hear any thing to the contrary? That she never heard, until after Kenneth Mackenzie's death, that he had been reported to have been not perfectly wise and sound in his mind.”—That from what witness knew of Kenneth's character, she did not believe it likely that he would have formed a dishonourable or improper connexion, or married below his rank in life: That the witness had no reason to think that Kenneth Mackenzie conducted himself, in her presence, different from his general conduct: That Kenneth Mackenzie had every opportunity of displaying his natural disposition before the witness: That he listened to her respectfully when she had occasion to reprove him, but he did not appear to stand more in awe of her than her own sons did: That he was at perfect ease and liberty in the witness's house and presence, and seemed to be under no restraint whatever: That the witness thinks, from her observation, that Kenneth would not have submitted calmly to any insult or ill treatment, but would have resented it like a boy of spirit: That the witness saw him afterwards when he passed through Aberdeen, and the witness thinks this was about 1816: That the witness considered Kenneth much improved in his appearance, in dress and manner, from the character of the rough schoolboy, which she had formerly seen him in: That his mind appeared to have kept pace with his improvement in personal appearance.—“Did he, after leaving the militia, come to Aberdeen, and live with her for about a week? That she does not know at what time Kenneth Mackenzie left the militia: That at the time immediately before deposed to, he took his meals, and spent the day with the witness, and slept in the New Inn of Aberdeen for about a week.”—That on this occasion she saw a good deal of Mr Mackenzie, as he was in the witness's society all that week: That in consequence of what the witness then saw of him, she formed a very high opinion of him: That in manner and conversation he appeared a perfect gentleman: That his conversation was perfectly correct, and such as would have become any other gentleman visiting her house: That she again saw Mr Mackenzie, when he and his lady, Mrs Mackenzie, called for the witness, in 1824: That at this time she did not see Mr Mackenzie take any food: That the witness had lately received accounts of the death of a son, which prevented her from inviting Mr and Mrs Mackenzie to dine with her: That she never saw Mr Mackenzie fall asleep in the forenoon: That Dundonnell and Mrs Mackenzie did not dine with her: That on the occasion of Mr Mackenzie and his lady calling for the deponent, he behaved to the deponent in a very delicate manner, and consoled with her on the loss of her son, with great propriety and feeling: That he lamented the death of her son as of a person whom he highly respected: That he inquired most affectionately for the rest of the family, and how those that were young, when he was in use to come about the witness's house, had been fitted out in the world: That he appeared to be very much interested in the welfare of her family: That he was only a few hours in the witness's house at this time, and the witness never saw him again: That on this occasion Dundonnell and Mrs Mackenzie, his wife, conducted themselves very properly towards each other: That she would have had no hesitation, had it been necessary, to have transacted business with Mr Mackenzie, as readily as with any other gentleman of her acquaintance: That it was the practice, when the deponent lived in the Highlands, for the sons of the laird to associate with all ranks, and to frequent the kitchen: That if her sons had been born in the Highlands, she would have expected them so to have associated in the Highlands: That she knows that in the remote Highlands, both higher and lower classes are very superstitious, and believe in charms and witchcraft: That all classes are in

the habit of using a variety of charms for the cure of man and beast : That she knew some of the higher ranks of society give credit to alleged influence of these charms : That Mrs George Mackenzie of Dundonnell, the mother of Kenneth, was sister to the late Mackenzie of Ord : That Mackenzie of Ord was celebrated for keeping a great number of cocks and hens, and bees, and also singing birds of various sorts : That Mackenzie of Ord was never said to be an idiot, or imbecile person, in consequence of this : That it was just his fancy : That her brother, Lord Seaforth, had a great partiality to fowls and birds of different descriptions : That besides home birds, he procured a great number of foreign birds, and spent a great deal of money upon them. On the interrogation of the Commissioner, depones, That the witness's three elder sons, who were Kenneth's associates at school, are all now dead.

*Mrs Jane Mackenzie or Mead*—Her family name is Mackenzie ; is a brother's daughter of Dundonnell's father. In early life resided in the neighbourhood of Dundonnell ; went to the Highlands about 1798 ; then went to reside at Dundonnell. Her father was then comptroller of customs at Ullapool, a few miles from Dundonnell ; was frequently at her unele's ; continued there till 1802. Was intimate in the family ; Kenneth was second son, Alexander eldest, Thomas youngest, and a daughter ; has a distinct recollection of her cousins. When first she recollects Kenneth he was about eight years of age ; about twelve when she left ; saw no difference between him and the other boys ; he was fond of play, but not the least inferior in his intellect ; did not observe anything peculiar in his amusements ; associated with witness, his brother and sister ; he was not more fond of his dress than others, nor was he slovenly or careless ; was extremely sociable, and very affectionate. Kenneth was of her other cousins certainly her favourite. She came to Edinburgh to her aunt, wife of the late Mr John Boog, W. S. ; where she resided in 1810 and 1811. Saw Kenneth daily with his regiment about a year, till 1811, when the regiment left. He was then very much improved ; but she thought his education had been less attended to than that of his brothers ; she thought that he had fewer advantages when she was at Dundonnell, in 1802, than his brothers. Alexander was sent to college ; Kenneth was kept at home ; Thomas was a child. Kenneth was remarkably good-looking in 1810-11. Always clean and remarkably neat. She had a letter from Kenneth when he resided at Aberdeen with Mr Kennedy. [Shown a letter in January 3, 1808.] This is the letter. She answered the letter ; she received several letters, say two or three, which are lost or mislaid. Had no particular reason for preserving this letter ; the others were accidentally lost. Had frequent conversations with him when he resided in Edinburgh. Her aunt was a great invalid ; he called often to see her aunt, and was admitted to her sofa. Sometimes he stopped to dinner ; frequently came to tea. She was not struck with any deficiency in his understanding ; he conversed on the usual topics of the day with intelligence ; he shewed not the smallest degree of imbecility that she ever saw ; his deportment, look, and manners, were always those of a gentleman. His conduct to strangers was distant and shy, and he did not readily engage in conversation ; with witness and others who knew him, he was perfectly open and ready in his conversation. During the year alluded to she never observed anything remarkable indicating a deficiency. Kenneth left Edinburgh in 1811 ; witness left Edinburgh also, and went to London. Saw Kenneth in London in 1817, after returning from France, before his marriage ; she thought him very much improved ; thought his remarks on what he had seen in Paris pertinent, and very acute indeed. Major Monro of Poyntzfield was with him, and spent an afternoon. He did not appear to exert any influence over him. Kenneth was partial to theatrical amusements ; one night Kenneth engaged witness to go to the theatre, and she did not go ; another night when witness proposed to go, Kenneth refused, as the play was rather indelicate. Saw Kenneth about a fortnight at that time ; never saw him afterwards. Shewn several letters, which are all in his handwriting ; in these letters he speaks of ill-treatment in his family. His affection continued the same in manhood ; he was a person likely to keep ill feeling. Complained to witness against his parents, and his brother Thomas. After his father's death the resentment became a fixed feeling ; he said to witness, Thomas had used him very unlike

a brother; this was in 1817, after his father's death. Kenneth, remarking the ill-treatment, stated that he intended to entail his estate, and that none of them should have it. Never saw him after his marriage. Did not remonstrate against his resolution. This feeling was expressed with great warmth, and she did not think she could make any impression on him. Did not observe that he ate very extraordinarily. When he was in London he was making a collection of fowls, common and Spanish; presented witness with a breed of fowls; witness is fond of fowls; it is a family complaint; witness hopes that this predilection is not considered a mark of incapacity, otherwise she must want capacity. Never saw any idiots at Dundonnell; does not know that Kenneth associated with any of them. There is a belief in spells and witchery more common in the north than in the south. Witness is married, and resides in the county of Essex. Kenneth was not one easily persuaded; was particularly firm in his like or dislike of persons; thought him rather proud. Witness's father is dead; he made a settlement in 1816, and nominated trustees. Kenneth was named one of the trustees for the children. When in the Highlands, Kenneth used to accompany her father; knew his sentiments of Kenneth were the same as witness's; he was the favourite nephew; considered him capable of managing his affairs; witness would have no hesitation in dealing with him; he was certainly capable of executing a settlement of his own affairs. Kenneth was very tenacious in his dislike to those he did not esteem, and very affectionate to those whom he loved; a letter shown is in his handwriting.

Cross-examined by the Dean of Faculty—Witness was about sixteen when she went to reside in the neighbourhood of Dundonnell. In a letter of 26th August 1812, is the following passage:—"I confess to you I felt rather neglected, but that's nothing to *our loving friends in the North*, who think only of their own dear selves before chuck or child, be they dead or alive."—"Who were the loving friends alluded to in 1812? She meant her relations in the north, including Kenneth's parents." In a postscript is the following passage:—"Is Ross still with you. I hope he is, as he seemed so careful of you."—"Who is Ross? A most faithful servant, who attended him in his illness at Edinburgh." This letter is addressed to him in the Ross-shire regiment at Glasgow. In a letter dated 20th March 1813, there is the following passage:—"I am sure some of our friends could have got you an appointment under his (Lord Moira's) protection and patronage, through the Countess's friends; it would have been the making of you at once, and made you quite independent of your stinging friends in the north." By these she meant Kenneth's father and mother.

Re-examined by the Lord Advocate—Something in these letters of the penurious feeling of old Dundonnell. This was known to witness and all the country. Kenneth complained to witness of this. Witness had no personal quarrel with old Dundonnell. Addressed these letters to Kenneth as a person of judgment, capable of feeling the subject. It was entirely in sympathy with Kenneth's feelings, not out of any interest of her own, that she wrote these letters. Witness had no notion that Kenneth required Ross from any imbecility, but solely referred to his health, as Kenneth had a fever in Edinburgh; none of his relations came near him; Alexander, his brother, was in Edinburgh at the time. She advised Kenneth, not on account of any mental deficiency, but owing to the neglect of his education.

*Mr Murdo Morrison*, examined by Mr Penny—Lives near Campbelton in Argyshire; was in the Commissariat a short time; was born in the parish of Gairloch, within two hours' row of Dundonnell; was repeatedly there in his youth; his first recollection of being at Dundonnell was in the year 1801; was there also in 1809; these visits were continued from 1801 to 1811; his visits were not long, but he was there frequently; there were three boys; knew Kenneth very well; saw Kenneth as often as he went there, previous to his (Kenneth) leaving for Aberdeen; saw no difference between Kenneth and the others, as to mental capacity; saw nothing particular in his habits—no marks of a defect of mind. Thomas was said to be the mother's pet; saw no difference between Kenneth and the other boys; he did not associate with idiots. Witness saw George Mackenzie going about the place; he was very plain; his dress was a kelt-coat and trousers, but always cleanly;

saw Kenneth, and remained with him 14 days; Kenneth could not be called intelligent, but he was a man of ordinary capacity; witness thought him capable of managing his own affairs, and would have had no hesitation in transacting business with him; his manner was very gentlemanly. Witness thought him, of any thing, resolute in supporting any opinion he might have formed.

Cross-examined by the Dean of Faculty—Was discharged from the Commissariat in 1815, at the general reduction. There was a charge against witness in Portugal, but he was honourably acquitted; he was sent by the Commissary-General to London, when he was then replaced, and sent to America; never heard what the charge was against him; was taken prisoner when in rear with the baggage. "On your oath, Was your being taken prisoner the only charge made against you? I am not aware of any other charge having been made against me."

*Mrs Grant*, niece of the late Lord Seaforth, and wife of Mr Grant, Episcopal clergyman at Aberdeen, examined by Mr Maitland—Is a daughter of Mrs Mackenzie of Breda. Was acquainted with Kenneth while he resided with Mr Kennedy in Aberdeen; he might be then about 19. This acquaintance continued for three years. Her brothers were companions of Kenneth, and he visited at her mother's house frequently. Kenneth was a good looking lad, dressed well, and had no appearance of idiocy in his face. Was herself about 19. Kenneth was rather a favourite with her mother. Witness visited at Mr Kennedy's very frequently, being an acquaintance; saw Kenneth there as well as others; never observed any thing in his understanding or manner that led her to think him imbecile, or to betray any deficiency. He read at that time like themselves; saw nothing in his manner of reading that led her to think he did not understand. Kenneth was a good tempered boy; he associated with her brothers, and joined in all their amusements. Witness never saw him run about the streets like an idiot. She has walked through the streets with him herself, and never saw him followed by crowds of boys. Witness saw Kenneth again in 1816 at her own house at Portsoy; when he called on her at this time he was very much improved in manners and appearance. He staid about an hour, and conversed on the subject of their former residence at Aberdeen, just as any other acquaintance would have done, and she observed not the least indication of imbecility in his conduct. Witness saw him in her own house again, immediately after his marriage, when he invited witness and her husband to dine with the marriage party at the inn. They went. The party consisted of Kenneth and his lady, Major Monro, Miss L. Roy, and herself and husband. Kenneth sat at the foot of the table, and conducted himself like any other gentleman. He was happy, and in good spirits, and left Portsoy that night. Witness asked him to return in two or three days to dine with her, and she invited a number of respectable friends, Major Dunbar, Miss Dunbar, and others, to meet him. He came, and his deportment was the same as on the previous occasion. Witness never observed any thing in his conduct or behaviour to make her think him a man of weak mind. It was that of a person of ordinary capacity.

Cross-examined by the Dean of Faculty—All her brothers were acquainted with Principal Macleod's family. Witness is not aware that Kenneth visited there.

Re-examined by the Lord Advocate—Witness has a brother in the 25th regiment. The brothers who were companions of Kenneth are dead. Her youngest brother was a child, and by no means a companion for Kenneth.

*Dr Fergusson*, surgeon, Aberdeen—Knew Kenneth Mackenzie when he resided at Aberdeen with Mr Kennedy; was then in practice. Witness first met Kenneth at the Rev. Mr Robertson's; Kenneth visited witness's house frequently in a friendly way; conversed with him on the ordinary topics of the day; as a medical man, he considered he conducted himself very prudently; witness never could find fault with any thing he did; never observed any deficiency in his intellect, which would have been the last thing witness would have formed an idea of; was always dressed very genteelly, and like a young gentleman; his manners were altogether like a young gentleman; had been with him at balls and other places, where he conducted himself with more prudence than most young men; Mr Robertson was a very

honest and worthy man; was retired, but the company he kept was very respectable; Mr Robertson had a daughter, who was at that time a widow, Mrs Affleck; Kenneth's disposition was of a sanguine temperament, tenacious of his opinion, honest-hearted, and not likely to be controlled; Mr Kennedy chiefly associated with his own congregation, who were chiefly of the poorer class.

Cross-examined by the Dean of Faculty—Mr Robertson is a Berean minister; witness never heard him preach; witness's daughter was married to Mr Grant Manford in November last.

*Mrs Strachan*—Resided in Aberdeen in 1807 and 1808; witness's husband was then a manufacturer, in a good way of life, but has since been more unfortunate; witness's family then visited Mr Robertson; witness knew that Kenneth visited at Mr Robertson's, who had a daughter, Mrs Affleck, who was then living with her father; remembers having a party at her own house, at which Mr Robertson and family were present; witness resided at Denbrae; there were several other persons besides the Robertsons at this tea party; Mr Kennedy called for Kenneth, and took him away; Kenneth had been with the party about twenty minutes before he was taken away; nothing particular occurred on that occasion, and no purpose of marriage was talked of between Kenneth and Mrs Affleck. Witness never thought, or had reason to think, there was such a purpose of marriage; Kenneth left Aberdeen immediately thereafter; witness did not see him again; never heard till a good while after that a report of the purpose of marriage was current, and did not believe it; Mrs Affleck was in her widow's dress on that evening; Mr Robertson was a respectable person; Mr Affleck was a writer in Stonehaven.

Cross-examined by Dean of Faculty—Saw Mr Kennedy on the occasion of the tea party, but cannot say what passed. Witness's house entered by an outside stone stair. There was no music in the house at that time; but there was during the course of the evening. Does not know if Mr Kennedy came up the stonestair, and is positive that no allusion was made about a warrant, or about the town officers; first saw him in her own lobby, but does not recollect the conversation. No mention was made of the marriage. Witness did not deny that Kenneth was there. After Mr Kennedy spoke, her husband did not come to them. Witness had no conversation with Mr Kennedy; no, not any. Kenneth did not leave the house without his hat. Mr Kennedy did not ask for it. Witness got it for Kenneth from another room before he left the house.

By the Lord President—Witness's maid called her out to Mr Kennedy, and she then brought Kenneth out herself. Witness invited Dundonnell to the party while at Mr Robertson's house, a night or two before. The invitation was entirely from witness. Does not know that Mr Robertson or his daughter made any arrangement to bring Kenneth with them.

*Mrs Brown, or Affleck*—Is daughter of the late Rev. Mr Robertson; witness was first married to Mr Affleck; was a widow living with her father in 1807 and 1808. Her father was for many years clergyman of a particular sect, for about forty years, and visited respectable persons at Aberdeen. At this time witness was acquainted with young Dundonnell, but does not recollect how long; it might be about three or four months before he left Aberdeen. Witness first saw him in Mrs Duncan's, who rented a part of her father's house. Mrs Duncan's mother had been a servant at Dundonnell. In that way witness got acquainted with Kenneth. There was nothing in the way of courtship between witness and Dundonnell. He never proposed marriage, either in jest or seriously. Witness swears positively he never did. Witness recollects visiting in the house of Mrs Strachan, who was then in good circumstances. Recollects being at a tea party at which Kenneth was present; Kenneth left very soon; was not longer there than half an hour; Mr Kennedy and Mrs Cheyne came and took him away. Merely saw Mr Kennedy and Mrs Cheyne standing in the lobby; never saw Kenneth after that. Did not go there for the purpose of being married to Kenneth; witness had no more idea then of being married to Kenneth, than she has now of being married to the Lord Advocate (laughter); Kenneth never raised such an expectation. Witness never heard of such a report till some time after.

[Letter of Mr Niel Kennedy of 30th March 1808, which states that Kenneth persisted in denying the marriage, was here adverted to by counsel.]

*Rev. James Grant*, minister of Nairn.—Was at college at Aberdeen; knew Kenneth about 1806 and 1807, or 1807 and 1808; saw him frequently in company with the family of Mackenzie of Breda, with whom he saw him almost invariably. Witness saw him frequently with other young men, and also with Principal Macleod's boys. Witness has talked with Kenneth as one boy will do with another, but was not intimate with him. Kenneth was particularly neatly dressed. His manners were quite becoming, and like any other young man. There was nothing particular about him, excepting being a stout lad. Saw him often at the college dances, which were held, without ladies, every Saturday night, but were under the sanction of the professors. Kenneth conducted himself perfectly becomingly. Witness never saw any thing particular in the behaviour of the boys to him. They never called him a fool, or followed him on the streets. Witness saw him again in Edinburgh in June or July 1817, at Mr Æneas Macbean's, at a dinner party, which consisted of six or seven gentlemen. He did not join much in the conversation. He sat next witness, and conversed a little with him. Kenneth had just then returned from France; and as it was then a very interesting period, witness was curious to know something of the state of France; and to his inquiries, Kenneth answered as distinctly as any other man would. Had a distinct idea of every thing he had seen, and the jaunt seemed to have given him perfect pleasure.—Did you consider him, from the opportunities you had of judging of his character, as a person of perfectly sound intellect? I had no such opportunity of observation as to enable me to come to that conclusion.—Supposed he was like any other person; there was nothing peculiar about him, except that he was a big man. Saw nothing differing in him from other people; his manners were perfectly gentlemanly, and he asked witness to drink wine with him, as any other gentleman would have done.

*Mr Brown*—Now resides at Belfast, as agent for Geddes and Kidston. Witness resided in Peebles in 1812; was a magistrate there in 1812. Remembers the Ross-shire militia being there. Two of the officers, Kenneth and a Mr John Mackenzie, lodged with witness for about six months; during which Kenneth was absent for a month at Pennicuik. Witness saw him every day, and got intimately acquainted with him.—[The Court at this period of the trial became so excessively crowded as to require the passages to be cleared, as considerable interruption had been experienced, owing to the noise occasioned by the crowd which thronged them.]—Witness kept a shop, and supplied Kenneth with ordinary articles while he resided with him. He associated with witness's family on his return from the mess in the evening, and occasionally joined witness's parties. He was stout, and dressed very well, but not more particularly than other officers; his manners were gentlemanly, and he behaved with propriety. Witness saw nothing in him differing from other persons, and considered that his judgment and intellect were as good as witness's, if not better; witness formed that opinion of him from observation. He took the newspapers in the morning, or employed himself with a book. Saw nothing offensive about his eating. Witness remembers the dinners given by the magistrates of Peebles to the officers of the Ross-shire militia; Kenneth sat three or four persons distant from witness, and behaved with perfect propriety. He had his particular feelings and partialities like others; witness knows he did not like Dr Borthwick, and spoke disrespectfully of him. He made purchases at witness's shop himself in most instances; had an account against him in this way. His servant occasionally bought articles; Kenneth was owing witness L.5, which he remitted in the month of August through Mr Urquhart; but cannot condescend whether to witness or to Mr Urquhart, an ensign in the regiment.

Cross-examined by the Dean of Faculty.—Were you aware he had formed an attachment to the daughter of Mrs Cairns, the postmistress? I rather think he had formed a partiality for Miss Cairns.

Re-examined.—The freedom of the town of Peebles was conferred on all the officers.

Major Cumming Bruce was senior major of the Inverness-shire militia in 1815 and 1816, and was in command at Forres; Kenneth was then a captain,

and performed his duty like the other officers. Witness sent him to Fort George in command of a detachment; Captain Gordon was previously in command, but was recalled in consequence of irregularity of conduct, and was replaced by Captain Mackenzie, who was next in rotation.

By the Court—Witness would not have sent him had he thought him incapable of duty.

Kenneth made out all his own reports. Witness never had occasion to find fault with him. Did not know him very intimately. Does not remember any thing particular about him from the other officers. He was occasionally joked and laughed at for being fat.—Did he take that joke like a good-natured man? I don't consider him a good-natured man, but rather in temper and disposition a sulky man. Had occasion to find fault with him for some trifle, thinks it was for being absent from parade, and witness was surprised a good deal at the temper he displayed. Witness never thought it necessary, or had occasion to pass him once over in time of duty from incapacity. He appeared to be a person perfectly capable of conducting the ordinary affairs of life. Witness would have no objection whatever to enter into a transaction, or of buying a horse from him; he was as much alive to his business as most men. Captain Mackenzie was known to be in expectation of the Dundonnell estate, and had more money than most of the other officers; but witness never had occasion to know that he was liable to be plundered by the other officers. Witness never imagined he required any caution with regard to his own interest. He was smartly and particularly well dressed, and a bit of a dandy. His manners were particularly smooth, and he had a great deal of Highland politeness about him.—If he had been a neighbour of your's in the country, would you have associated and transacted the usual business of a country gentleman with him? I should not have objected; I entertained no opinion of his intellect other than that he was capable of managing the ordinary affairs of life, although I considered him a stupid man. Witness had asked him to dine with him along with the other officers. Witness is not aware that superstitious feelings are common with the better classes in the Highlands. These are only to be found among the common people. It is common in those remote places to have idiots attaching themselves to the houses of persons of property, who may look upon them partly as subjects of compassion, and partly of sport.

Cross-examined by the Dean of Faculty—Captain Mackenzie was, in his opinion, below par in understanding.

Re-examined—He was not so far below par in understanding as to be easily imposed upon. He was one below the average of intellectual ability, but witness did not consider him incapable of managing his own affairs.

Cross-examined—Kenneth was with the regiment in 1815 only a few months, which was all witness saw of him.

*Captain Walker*—Was adjutant of the Inverness militia. It was his business to take charge of the orderly book; Kenneth joined the regiment in February 1813, and remained till the corps was disembodied in 1814; it was re-embodied again in 1815, and disembodied again in March 1816. During these times Captain Mackenzie conducted himself in the ordinary way as an officer; witness heard no complaint that he could not discharge his duty on the score of unfitness. Captain Mackenzie was sent to Fort George with a detachment in November 1815, and relieved the officer stationed there. Captain Mackenzie remained there until some time in the beginning of February 1816. Witness never saw him passed over when his duty came; knew Captain Mackenzie was a member of the mess, and acted as president and vice-president when it came to his turn, and discharged his duty like his brother officers; never saw him treated with disrespect, or as an incapable or weak creature. Witness dined with him afterwards at Seabank, and met with respectable company there; Captain Mackenzie conducted himself with sense and propriety. Witness was at Portsmouth when Captain Mackenzie was brought before a court-martial. [Here the clerk of court read the sentence of the court-martial for having a ball without permission of the commanding officer, of which he was honourably acquitted.] It is the custom in the army, when an officer is to be tried by a court-martial, that he remains under arrest till the sentence is given; and Captain Mackenzie remained under arrest some time previous to the 17th June 1814, and he continued under arrest for about two months thereafter. Witness remembers being reviewed by the Allied Sove-

reigns on the 25th of June 1814, and at that time Captain Mackenzie was under arrest, and consequently could not attend that review. Witness had an entry on his record which showed that Captain Mackenzie was a member of a general court-martial, and he was quite sure he had it recorded that he was president of a court-martial.

Cross-examined by the Dean—Captain Mackenzie's defence was conducted by Mr Minchen. It was rather witness's belief that Paymaster Macgregor of that regiment might be with him part of the time. There were not many reviews in 1814, and the ordinary place of review was on Southsea Common. Witness does not recollect of his falling into the rear on one occasion.

By the Court—His situation is in the rear, and if Captain Mackenzie had fallen into the rear, he must have known it.

By the Dean—In point of understanding and strength of mind, he was in the ordinary way.

*Dr Mackintosh*, physician in Edinburgh—Saw Kenneth Mackenzie in Valenciennes, in 1816 he thinks. Kenneth stated to witness that he promised to witness's mother to call and see the children, his parents being intimate with her. Sometimes saw him two or three times a-day, but cannot tell how long he remained there; would not swear that he remained for a week or a month. Kenneth told him every thing regarding his family, and conversed on the want of comforts in that country, in comparison to the comforts of his own country. When a stranger was present, he would not speak at all; and on such an occasion he walked with him half an hour and never opened his lips; and the moment they were alone, Kenneth began to speak to witness. He was a man about eighteen or twenty stone weight at the time. Witness wished to show Dundonnell some marks of attention, and when walking with him begged to borrow a gig from a Captain Mackintosh to take a friend of his to Condé, who, seeing Dundonnell in witness's arm, concluded that he was the friend whom he intended to take with him in the gig. Captain Mackintosh politely refused, thinking, no doubt, of the springs of his gig, (great laughing,) and on Dundonnell particularly. Dundonnell said nothing, but witness felt his sides shaking with laughter; and after Captain Mackintosh had gone, he said to witness, "Do you think the man was mad, to lend you his gig, as he must have known that I was the friend whom you meant to take to Condé?" Witness would have no hesitation in buying or selling with him, as he seemed to be an honest-looking man.

*Lieutenant Dunbar*—Remembered Kenneth in the Inverness-shire militia. The regiment was at Hillsea Barracks; Captain Mackenzie performed his duty as well as any other officer in the regiment, and witness never observed any deficiency or stupidity in his manner of conducting himself. Sometimes subalterns make up the reports of the officers; has not seen it done, and never employed subalterns to do it for himself. Captain Mackenzie attended the mess, and was treated with respect; has known him join in the conversation, having sat by him, and conversed with him. Captain Mackenzie took his turn of duty as president or vice-president at the mess, and he performed his part like the rest; the duty of the regiment was very hard, as the posts were at considerable distances from each other. In Portsmouth, Captain Mackenzie associated with respectable families. Witness was with the regiment when it came to Inverness in 1814; it was disbanded and embodied again in 1815; they were both in the regiment at that time, and Dundonnell continued to live in society with the officers. Captain Mackenzie gave parties, and behaved like any other gentleman, and paid attention to his guests. Never saw any thing in him that exhibited extraordinary deficiency of intellect. He was not a clever man, but he was capable of transacting ordinary business. Kenneth received company at Seabank, and witness was there about 1816, and remembers having a conversation with him about his relations; said that his mother and brother had prejudiced his father against him, whom they had persuaded to go to Inverness for the purpose of making a deed to give the property past him to his brother. This conversation happened after his father's death; he expressed himself with great warmth against his mother and brother, who he declared would never receive a sixpence from him; saw him frequently after this; he was always a clean man in regard to his dress; would have no hesitation in entering into ordinary transactions of business with him, and does not think



he would have over-reached him. He was a man of a very resolute mind, and very obstinate; thought he had sense enough to make a will, or enter into any bond.

*Serjeant-Major Robertson*, Inverness-shire militia—Had occasion to see the way the officers did their duty; Captain Mackenzie did the ordinary duty like any other officer; attended parade, and drilled, and mounted guard like the rest. Witness is now in business in Inverness; would have had no hesitation in transacting business with him as with any other man.

*Serjeant Clark*, Ross-shire militia—Knew Dundonnell very well. Kenneth first belonged to Captain Mackenzie of Strathgarve's company, and witness was then attached to the company to which Kenneth belonged. Captain Mackenzie did his duty like any other officer. Serjeant Daniel Clark belonged to the same company, but attended the awkward men, and attended parades, but not with the company.

*Mr Minchen*, solicitor—Lives at Gosport; is extensively employed at courts-martial; was Captain Dickenson's assistant at the late memorable trial. Remembers of the Inverness-shire militia being at Portsmouth, and knew Captain Mackenzie well; was requested by a friend of the Captain's to call upon him, as he was then under arrest; he did so, and the Captain stated to him that he was put under close arrest by orders of Major Hume, and that he was about to be brought before a court-martial, and wished witness's assistance on the occasion. Witness applied to the Deputy-Judge Advocate for information of the charges, and next day got an authenticated copy of them, which enabled him to discuss with Captain Mackenzie as to what was necessary. From the Captain he received all the communications which were necessary to be imparted to witness. These communications were first between witness and the captain alone; and afterwards witness had communications with those gentlemen to whom the Captain referred; and witness communicated with most of those gentlemen in the presence of Dundonnell. He gave witness all the information and instructions necessary for conducting his case entirely from his own lips.—Having got your instructions to prepare for the trial, did you attend the trial for him? I attended as his friend by the permission of the court, which is the custom on these occasions; it is a matter of favour to allow a person to be assisted—leave was asked and leave was given. The court-martial adjourned at two o'clock; the first day of the trial was on Friday the 17th of June 1814; the second on Saturday the 18th, and the third on Monday the 20th, upon which day witness delivered the defence for Captain Mackenzie. That defence was prepared by me, receiving from the Captain the various suggestions he had to give.—Did he, during the trial, make any suggestions to you with respect to questions to be put to witness? Frequently, and on other occasions as to the nature of the evidence to be adduced, and made them most judiciously, most aptly; and I owe it to his memory to say, that in all the cases which I have conducted, have seldom met with one from whom I received more assistance on such an occasion. He made that remark not only to be observations during the trial, but to all the communications before and after, from the first communication to the last. He never met with one with whom he was better satisfied, and his communications always came judiciously and sensibly. This trial happened at the time the royal sovereigns came to Portsmouth, and the court was more crowded in consequence. Witness read the defence, as it was his general rule, as well as that of his professional brethren, to do so. He recollected but one case in which he did not do so; the defender requested to do so himself, and it would have been better that he had not. At this time there was a partner in the banking-house of Goodwin and Company; at this time he was senior partner. Next to him there was a partner of the name of Carter, who is now dead. Knew that Captain Mackenzie visited in respectable families, and also in Mr Carter's, Dr Leed's, and others; and was universally respected and esteemed. The idea that he was a man of defective intellect never entered his mind, till informed that he would be required in evidence. Mr Carter had several daughters; he understood that Captain Mackenzie had a partiality for one of them. Mr Carter told him so, and he seemed to be very much pleased with it. Mr Carter was a respectable gentleman, and not likely to marry his daughter to a fool.

*Mrs Major Grant*, widow of Major Grant, authoress of "Sketches of Scotland," and other works—Resides in London; her husband held a company in the Inverness-shire militia nearly five years. She was in Portsmouth, and knew the late Dundonnell intimately, and was very often in his company, and had a good deal of conversation with him on ordinary topics. She had ample opportunities of forming an opinion of his mental capacity. He was a very excellent man, and though not of brilliant talent, certainly of respectable character. She never remarked any thing in him to lead her to suppose that he was deficient in intellect. She had occasion to know that he gave parties, at which she was always present; she conducted several of these parties, and he conducted himself like a perfect gentleman. He was a very large man; she heard a talk of an attachment between him and Miss Carter, and it never occurred to her that a match would have been unsuitable or improper from his character. He dined repeatedly with her and her husband, and she never discovered any thing remarkable in his eating. He was temperate. She had heard him talk of his brother, and he considered himself as injured by him. He considered himself as an injured man; and he spoke of it as such. She should consider him warm in his attachments, and firm in his resentments. She saw him in London in 1824, after the regiment was disembodied. He continued quite the same man; he conversed upon old topics. She thought his memory tenacious; she does not think he said any thing about his brother at that time.

Cross-examined by the Dean of Faculty.—She did not write his letters; she assisted him in one letter to Miss Carter. She was positive, to the best of her knowledge, that she did not write any others. She generally wrote her husband's letters. In the letter to Miss Carter, she merely assisted in the style of it.

Re-examined.—Dundonnell brought the letter to her written, and consulted her whether it was a right one, and she merely altered the style of it. In substance it was a proper and reasonable letter for the occasion.

*William Sinclair*.—Was once a grieve at Dundonnell, and was seven and a half years in Mr Mackenzie's service; went there in 1819; he received his directions from him about the work, and never consulted with any body else; Mrs Mackenzie took no charge of the farm-work; Dundonnell paid him his wages with his own hands; Dundonnell saw him almost every day, and looked at the work that was going on; the times he went to look at the work were in the harvest time, in summer, in spring, but not in winter, or wet weather; and he would ask of witness what was going on; witness kept the people to their work according to Dundonnell's order; other gentlemen in whose service he had been, gave him directions as the laird did; he was as sharp as any man who was ever above him; one of his tenants went to the market about the cattle; but when the drovers came to the house he sold to them himself; he understood the work about the farm, and gave directions about the planting; the servants behaved properly to him, and he exercised power over them; there were two kitchens in the house, the black kitchen and the white kitchen; as grieve he was advanced there; the dancing went on in the white kitchen; Dundonnell was there seeing them dance; he had seen other gentlemen there besides; Tulloch was there; Millbank and Ord were there; has seen Thomas Mackenzie there; Dundonnell had many cocks and hens, more than common; witness told the laird on one occasion that he had nothing to give them; the laird told him to get corn for them, as they were more profitable to him than dogs or horses; had seen *amadans* (idiots) at the house; the laird kept them for charity; did not know if he made sport with them; the laird had a servant of the name of Campbell who behaved very well to Dundonnell; never heard the laird say any thing about him.

*Jean Kerr*, formerly a cook at Dundonnell.—Was cook with Mr Mackenzie of Ord for a year and a half. Mr Mackenzie is brother-in-law to Thomas Mackenzie. Witness went to Dundonnell's service two months before he came from France, and remained there till his death, and for half a year after that event. There was a good deal of company at Dundonnell. Witness had seen many gentlemen there, and among them Mr Davidson of Tulloch, Mr Mackenzie of Cromarty, Allangrange, Colonel Burgoyne, Dr Nair, Lochend, Struie, &c. &c. Dundonnell sat at the foot of his own table on all occasions

when company was there. When the minister or catechist came round, Dundonnell was most attentive to his religious duties; he made the servants attend, and, when away, account for their absence. Witness did not attend, having no Gaelic; in consequence, Dundonnell used to sit down beside witness, and read, and explain the Bible and New Testament, which he did rationally. He was a religious man. Thomas was much about the house. Witness does not know whether Dundonnell was fond of Thomas or not. He spoke very little about him; witness heard nothing further than Dundonnell saying, "Why does he come to me when any difficulty comes on him?" Dundonnell was very sober; witness never saw him intoxicated; had never seen Mr Thomas more intoxicated than he could take care of himself; there were many fowls about the house, but they were useful for the kitchen; and had she not been there, there would not have been so many, as she was a good hand at rearing them; there were more than 500. There are two kitchens, the white and the black; the one for out-door servants, who met in the old, or black kitchen. Balls were given sometimes to the servants in the white kitchen; Dundonnell sometimes attended. Gentlemen never came there without being in the kitchen; has seen Thomas there. Witness has seen idiots at the house. There was one Elizabeth Macrae who belonged to the property, but she was not always in that state; when well, she was employed at her needle. She sometimes went to other houses, and to Ord, where she had a house of her own. There was a person called Touterman, who was employed at out-door work, and sometimes in carrying peats. Witness remembers General Brown being there, but only recollects him once; he was there for a week or a fortnight; never saw him do any thing particular; he would go through the exercise with the lads; never saw Allangrange going through the exercise, or any of the other gentlemen; if any of the lads were in sight, the gentlemen would look and laugh at them. Rory M'Leod, an idiot, lived on the estate. Witness does not know if he was foster-brother to Dundonnell. Has seen messengers come to the house seeking Thomas more than once. Witness once saw messengers seeking the old mother. There was a man-servant of the name of Campbell; witness never heard Dundonnell saying any thing particular about Campbell. Witness knows he liked him very much; this did not last the whole time she was there, as Dundonnell was sometimes angry with him. He was first displeased at Campbell courting the girl Mary Urquhart, and next for taking up with a chambermaid of the name of Janet Ross. Dundonnell was angry, and spoke to him on the subject; independently of these occurrences, he liked Campbell as a servant, and said he would never feel himself comfortable if Campbell left his service. Old Mrs Mackenzie of Dundonnell could not speak Gaelic. A few of the house servants from the low country could speak English, but mostly all the servants about the doors spoke Gaelic, and nothing else.

*Peter Macintyre*—Was in the service of old George of Dundonnell for ten years before his death, and remained after Kenneth succeeded. Was shepherd. The stock might be from 600 to 1000 sheep. When Kenneth succeeded he took the charge of, and superintended the business of the sheep. He also attended at the shearing, and gave directions about sales and the portion of stock going to market. Kenneth seemed to know as much as his father about these matters. The father took little charge about the sheep in witness's time; Kenneth attended more than his father did. Mrs Mackenzie took no charge, and never picked out, or directed what widders should be taken for the house. Witness always did this. Witness was with Kenneth for six years. Kenneth also took charge of the sales of wool. Witness has seen him selling it himself. Much improvement went on at Dundonnell after Kenneth succeeded, in planting, building, &c. Dundonnell took a great charge of the planting, and gave strict orders to prevent the sheep from injuring it. He attended also at hay-time and harvest. The servants and tenants principally spoke Gaelic, some of them had no English at all; a few from the low country spoke English; there were two kitchens, a black and a white; Dundonnell saw the tenants in the white kitchen frequently, and was treated by them as respectfully as any other gentleman about the house; the servants and tenants always took off their hats to him; witness never saw any one making a joke or laughing at Dundonnell; there was a good

deal of poultry; witness could not say how many; but did not think there were more than 300; witness never saw him pay any marked attention to them; indeed, he was fond of every beast he had; witness has seen Dundonnell throwing from a trough barley or oats to the fowls; there was a fool there called Bell Macrae, who could work at times; she used to dance, but never excepting when others were dancing; witness has seen Thomas and other gentlemen come in and laugh at her; the servants used to dress her with ribbons; and witness has seen various persons put on any part of her dress which might fall off in dancing; has seen General Brown; thinks once or twice; the General thought himself a great soldier; he remained about a week; did not see Dundonnell make sport with him; Dundonnell appeared sometimes not so gracious with Thomas as brothers ought to be; he told witness Thomas had tried to defraud him of his own rights; Dundonnell said he would do the same to him; and that Thomas should never have a clod of the property as long as he lived; witness thinks this was in September 1821; this conversation took place twice at any rate; witness cannot recollect when the second conversation took place, when Dundonnell said Thomas shall never have the property; Dundonnell was a charitable man, and allowed the fools to be on the property where they could only get a mouthful of meat.

Cross-examined by the Dean of Faculty.—Dundonnell was absent for some months before witness left his service in 1824. Thomas was there, and remained the greater part of the time. Thomas took charge of the property; there was no difference between witness and Thomas; witness gave notice to Thomas he was to leave, before Kenneth returned. Thomas gave witness no charge at all; witness has been on the police establishment in Edinburgh, and been twice discharged.—After being put back, who applied for you?—[A number of questions were here put to witness regarding the circumstances attending his discharge from and reponement in his situation in the Police, which the witness appeared to wish not to answer, alleging that the Police Court alone was cognisant of such matters.]—Being further interrogated, Did Mr Macbean apply for you? I suppose he did.—Did Mr Roy apply for or know that Mr Macbean applied for you? I cannot tell.—How did Mr Roy know you were dismissed? He happened to meet me on the streets. Witness never applied to Mr Roy. Witness was replaced in about a month after his discharge.

*Mr James Laing*—Has been factor on the estate of Mr Hay Mackenzie of Cromarty for eighteen years. Cromarty has some lands in the parish of Lochbroom. A portion of it, the farm of Achtascauld, comes within pistol-shot of the mansion-house of Dundonnell. The family of Dundonnell has had the farm till within a few years. At the father's death there was a lease current which had only a few years to run. It was supposed to be a liferent lease, but the lease had been mislaid. Thomas applied for a lease of these lands soon after his father's death, and a missive letter was granted, but was not extended into a lease. Thomas never got possession, as old Dundonnell's lease was discovered, and Kenneth continued to possess it as tenant after his father's death. Witness had occasion to be at Dundonnell during Kenneth's possession of the farm in 1819 or 1820, on a business excursion, to perambulate the march between the two estates. Witness was there for part of a day, and communicated with Kenneth himself. Had a conversation on the subject of the farm, which he understood intelligibly and distinctly. Did not see Mrs Mackenzie on that occasion. Was there again in 1825 with Mr Hay Mackenzie for two full days. After the expiry of the lease, Dundonnell held the lands for a year or two. A dispute took place about the rent, which was L.200 per annum. Dundonnell said it was too much, and that he could not afford to give so much, but offered L.100 odds. Cannot recollect the sum, but the transaction was not then closed. Mrs Mackenzie closed the bargain by writing him from Ullapool, and Dundonnell's offer was accepted of. Nothing occurred to lead witness to think Dundonnell's mind was deficient or imbecile. He appeared capable of conducting the ordinary affairs of his estate. On these occasions there was no interference with Mrs Mackenzie. Cannot recollect her saying a word on the subject.—[Shown three letters ad-

dressed to Kenneth on business, which witness identifies.] Addressed them to him as a man capable of conducting his own business.

Cross-examined by the Dean of Faculty—Witness was not aware of the existence of the lease to old Dundonnell till after his death, and advertised the farm to be let, which in consequence was let to Thomas.—[The Solicitor-General here produced a letter from Kenneth to Mr Macbean, of 17th June, about this farm, which was read.]

**KENNETH MACKENZIE, Esq. of Dundonnell, to ÆNEAS MACBEAN, Esq. W. S.**

Wednesday afternoon.

Date on the back, 18th June 1817.

MY DEAR SIR—As I perceive my brother Thomas is now here, I request you will take the opportunity of waiting upon him, to express how much I feel hurt in his taking advantage of me, by inducing me to write a letter, which I am given to understand may be detrimental to my interest; as also the part he has acted with regard to the farm of Achtascaill, which, unless he withdraws, will make me, with regret, have no communication with him whatsoever; and in a way he little thinks, I will be upsides with him and all his advisers, and therefore I would recommend him not to irritate me, if he consult his own interest. I remain, my dear Sir, yours unalterably,

(Signed) **KENNETH MACKENZIE.**

*Mr Robert Tulloch*, merchant, Fort-George—Formerly held a commission in the local militia, and filled the situation of barrack-master at Fort-George, from October 1813 to May 1815. In the latter year a detachment of the Inverness-shire came. It was commanded by Captain Gordon, who was succeeded by Dundonnell. Witness became acquainted with Kenneth, who visited in his family; in witness's opinion he was perfectly sane, and perfectly capable of managing his own affairs. Dundonnell talked to witness regarding Thomas, and mentioned at that period how he had been used by his family; and if he ever had the power, none of them should ever possess it. He seemed very determined, and a resolute man in his own opinion. Witness saw him frequently, and had extensive intercourse with him.

Cross-examined by the Dean of Faculty—Have you the misfortune to have a law-suit? None, sir.—You had the misfortune to have a sequestration against you—who was your agent? Mr Roy.—Who was your country agent? Mr Manford.—Do you happen to know that Mr Manford's father was barrack-master at Fort-George? Yes, he succeeded me in 1815, and is there still. Dr Roy was garrison-surgeon there, and for a considerable time.

*Andrew Williamson*, cabinet-maker, Inverness—Remembers Dundonnell living at Seabank; he took his furniture from witness. Received the order from Dundonnell himself, who came into the warehouse and selected it himself. It was selected judiciously and with good taste. Dundonnell went about this like an ordinary man who knew a good bargain from a bad one. Witness would have had no objection to transact business with him.

Cross-examined by the Dean of Faculty—The account commenced in October 1815, and ends in September 1816, and amounted to L.486, 2s. 1d.; the other account was of a subsequent date.

*Angus M'Donald*—Was gardener at Dundonnell; went there in December 1824, and remained till December 1826. Saw the laird immediately on going there; got directions from him to carry on the work. He frequently came into the garden. The laird gave minute directions as to sowing various seeds—the principal directions about the garden—and not Mrs Mackenzie. Has heard him giving directions about trenching and other matters. Has seen two or three fools there. Recollects a woman there one Sunday morning when Millbank was there. Heard a noise in the garden, and saw the laird and three gentlemen. Millbank was making the idiot chase a peacock. On coming out, saw Millbank make the idiot run round the house. Dundonnell was not far from them. Did not see her jump over any thing, or jump up.

*Dr Robertson*—Is a medical man in the north; was acquainted with Dundonnell, which began at Inverness in 1815, where witness resided for about six months; Dundonnell and witness slept in the same room. The intimacy

continued as long as witness remained in the county of Ross. Was of opinion that he was a man of fair average as to sense. Has heard Dundonnell read newspapers and novels intelligibly; has received notes of invitation from him to dine, and one particular letter describing a complaint. It was a sensible communication. Has seen him make out receipts for medicine in 1818. On one occasion, Dundonnell objected to the price of an article, as being cheaper at Tain than at Dingwall. The laird has pointed out his fowls to witness, especially a particular kind of pigeon; heard him say the fowls were useful, and that he might spend his money more ridiculously on horses and dogs. Has heard him speak of his brother several times. Recollects on one occasion, at Inverness in particular, when he mentioned that Thomas had been the cause of dissension in his family, and he had attempted to get him (Dundonnell) disinherited. Last conversation was in 1818; the purport was his determination that his brother should not inherit a foot of the property if he could help it. [Shewn the note of instructions.] Has no doubt of his capability to make a will; but witness cannot answer for the note now shown, which he never saw before.

*Mr Hay Mackenzie* of Cromarty—The family estate is near Dundonnell; has visited it during the late proprietor's life-time, first in 1825, and staid two or three days. The factor, Mr Laing, was with him; and Colonel Oswald, on the second occasion. Witness saw very little of Dundonnell; was on a fishing party, but breakfasted and dined there; it did not strike witness at the time that Dundonnell was at all deficient in intellect; witness wrote him once or twice on the subject of a farm, and now identifies the letter shown him. Had no scruple in visiting or entering into transactions with him; he did not converse much, but what he said was perfectly sensible. Does not recollect any thing about the poultry; it made no impression on witness; after the visit was over, it never occurred to witness he had been visiting a kind of idiot, and never heard his capacity doubted till after his death.

By the Court—Dundonnell was a very large, corpulent man at that time.

*Colonel Burgoyne* of the Royal Artillery—Was in Scotland in 1820, and visited Dundonnell; he remained for six days. Captain English of the Engineers, and Captain Wood of the Artillery, were with witness; spent the forenoon in shooting, but breakfasted and dined with the landlord; he conducted himself in a very kind and gentlemanlike manner, and took a common share in the conversation; nothing occurred to make witness fancy he was a man of weak intellect. Mr and Mrs Mackenzie appeared perfectly happy; witness saw nothing which would have prevented him from entering into any transaction with Dundonnell.

*Alexander Cameron*, clerk to Mr John Thomson, accountant, Inverness—Was clerk to Mr Cameron, writer, Dingwall, factor on Dundonnell's estate; was sent by Mr Cameron to collect the rents. Went first in 1824 or 1825; witness might be a week at Dundonnell at each time, when a collection of rents was made. Mr Cameron, Dundonnell, and the ground officer, Maclean, attended. Dundonnell took a part in the business; there were accounts against the tenants, and contras for value given to the laird. The grievance examined the credits, as some part of the rents Dundonnell kept himself; the rest were for the trustees. Witness assisted the laird in the collection of that part; Dundonnell gave his assistance—had a very good memory. Witness's second visit was in May 1825, when Dundonnell directed him to get a rental book, into which the rents of the reserved property were entered. Witness was a week on second visit, and returned again in December 1825. Witness would not have known what particular payments had been made without Dundonnell's assistance. Saw nothing in his conduct to justify imbecility of mind. Witness was at the funeral dinner of the late Dundonnell. Does not recollect any particular toast being given by Mr Roy. Did not hear the health of Thomas, but heard the "Roof Tree" given. Roy sat at the foot of the table, but witness thinks that the toast was given from some person at the head of the table, and not near where he sat. Witness sat on Mr Roy's left hand. To the best of his recollection, does not think it proceeded from Mr Roy. Witness recollects Mr James Gillanders being at Dundonnell, but he was not present at the collection of the rents. Mrs Mackenzie might have casually come into the room, but no appeal was ever made to her for any explanation.

Cross-examined by Dean of Faculty—Does not recollect being engaged with

any business with Mrs Mackenzie. Met Mr Gillanders there on one occasion when witness was engaged on business with Mrs Mackenzie.—Whether, after this time, were you engaged with Mrs Mackenzie some time during the day before dinner? Thinks this was but for one day, but cannot be sure.

Re-examined.—The business was about an action in the Court of Session. Witness got the information he required principally from Mrs Mackenzie. The statement being read to Dundonnell, he got very angry. Witness read over the information he had obtained, with which Dundonnell expressed himself satisfied, and signed the document.

*Dr Wishart*, physician in Dingwall—Knew the family of Dundonnell, and saw Kenneth when young; saw him again at his father's funeral, which he joined at the Muir of Ord; dined there, but could not say who dined, being at a back table; was called in to attend Dundonnell on his deathbed; what he said to witness was sensible; he was in the last stage of dropsy; and so much depressed that he had little conversation with him; he asked Mrs Mackenzie to inquire of him how Sandy Mackenzie's wife was; he staid there about three days; Dr Adams was there at the time; went away, thinking he could be of no use, as the patient was under proper management.

Cross-examined.—He saw nothing to indicate, at the funeral of old George, that Kenneth and Thomas were on bad terms; he was never sent for to attend Kenneth but on one occasion, and was stopped at Garve; knew no other cause of being stopped than that Dundonnell was so far better that it was unnecessary for him to proceed; did not know whether any other medical gentleman attended or not. Had heard of Dr Adams being there, but whether professionally or not he could not say.—What mean you by saying that what he said to you was sensible? He desired Mrs Mackenzie to ask for Sandy Mackenzie's wife, and that was the principal thing that passed. Sandy was a servant in Dundonnell's employment; witness left the patient because the case was hopeless; he innoculated Kenneth when five or six years of age, and never saw him after that till his father's interment, and had no opportunity till he saw him on his deathbed to judge of his capacity; was not introduced to him at his father's funeral; Thomas was present when Dundonnell was on his deathbed.

*Dr Mair*, physician in London, son of Governor Mair of Fort George—Lived at Fort George, and was well acquainted with the family of Dr Roy for twenty years, a family of the first respectability; knew the late Dundonnell; saw him first at Seabank; was at Dundonnell in 1819, and remained about a week; was there again in 1820, and remained about three weeks; was there again in 1821, and remained about ten days; discovered no defect in his intellect; he was living happily and comfortably with his wife; asked him to attend a young woman of the name of Aby Mackie; and the laird was anxious for him to attend her, which he did at his particular request; he was at Dundonnell when Colonel Burgoyne, Captain English, and another gentleman, were there; saw Dundonnell read the newspapers; did not know that he read them regularly; heard him speak on the Queen's trial, and stated his opinion upon it like a man of sense; heard him several times speak of his servant Campbell in terms of high commendation.

*Mr Turner*, accountant—Was partner with Mr James Scott of Edinburgh, trustee on the estate of Dundonnell; witness is now trustee, and has made a valuation of the estate; present rental is L.1088; the public burdens of the property amount to L.163. Part of the gross rental arises from the furniture of the house, estimated at L.25. After the burdens and rent of furniture are deducted, a nett rental is left of L.900. The heritable debts upon the estate amount to L.8000; the legacies, estimating the legacy to Dr Ross's family, which is payable and bears interest from the period of his decease, at L.4000, amount to L.8000, and the value of the annuities to L.7772. The total amount of all the debts, burdens, &c. is upwards of L.23,000. In 1826, the deficiency of the rent, after payment of public burdens, jointures to widows of deceased proprietors, and interest of debt, was L.68; in 1827, L.111; in 1828, L.60. At twenty-seven years' purchase, and taking the debts and all the burdens together, there would only be a reversion of L.500 on the estate.

Cross-examined by the Dean of Faculty—A part of the property was sold for L.16,000, to pay off some of the heritable and personal debts. The sale was effected by Mr Scott as trustee for behoof of the creditors. Mr Scott, or witness,

as trustees, were responsible for the application. The whole was properly applied. No portion of the L.16,000 was ever given in loan either to Mrs Mackenzie or to Mr Roy. Mr Roy was merely paid his business accounts.

Re-examined—No part of the L.500 a-year stipulated to be paid to Mrs Mackenzie during Dundonnell's lifetime was, in point of fact, paid to her during the subsistence of the trust to Mr Scott or witness. Witness has had occasion to see the accounts of the various factors and agents employed by Dundonnell from 1817 downwards, and can positively say that no such payments are entered in these accounts as made to Mrs Mackenzie, from the year 1817 to the death of Dundonnell. [After some discussion on valuation, witness was ordered to produce a note of results of the application of the funds to the extinction of the heritable and moveable debts, and the names of the creditors.]

Mr Alexander Scott, of Trinity, W. S. called. He was objected to by

Mr PATRICK ROBERTSON—We understand that the object of calling Mr Scott is to prove by him something for the purpose of discrediting Mr Mackenzie of Millbank's evidence, viz. that he stated to Mr Scott that he was a subscriber for carrying on the present action. It is quite clear, therefore, that the object of the present examination is to discredit the testimony of Mr Mackenzie. Now, is it competent, when a party has perilled his case on an examination *in initialibus*, and upon which he was found an admissible witness, to bring another to discredit the testimony to which he has sworn? This goes to the foundation of the whole principles of evidence. The law of Scotland has not yet permitted it to be competent to examine a third party to disprove what has been stated on oath, by the fact of establishing something which the witness had said when not examined on oath.

SOLICITOR-GENERAL—It was expressly said, and given as one reason for permitting Millbank's examination, that if Millbank made any statement here on oath which we could contradict, we should be at liberty to do so; and on that we abstained from pressing the matter. Mr Mackenzie has stated on his oath that he did not hold a particular conversation with this witness, and Mr Scott is now adduced in order to proceed to contradict this statement, and the jury are entitled to take and view every contradiction.

DEAN OF FACULTY—As to the alleged understanding, nothing could be more distinctly stated than the grounds of the objection which I took. What the opposite party wish, is to ask Mr Scott whether he did not hold a conversation with Millbank regarding this matter, and in that way to object to Millbank. A witness may deny or affirm many things when not on oath that he would not deny or affirm when on oath. Millbank has been examined on oath in the cause, and he cannot now be contradicted in regard to what he said on his examination *in initialibus*. This would be irreconcilable with the first principles of law in Scotland.

LORD PRESIDENT—My brother and I are agreed that it is quite competent to examine the witness. Scott may not be speaking truth any more than Millbank. It is just the old Scotch repro-bator.

Examined in chief—Witness was acquainted with Mr Mackenzie of Millbank. Previous to last trial, had a conversation with him about subscribing to a fund to enable the pursuer to carry on the action against Mr Robert Roy. There were two conversations between them, one in April 1828, upon which occasion Millbank said he was going to attend a consultation at Mr M'Queen's, as a meeting was



to be there of the friends of Mr Thomas Mackenzie ; the purpose of which meeting was either to revise the summons or to consult in regard to the case. Witness asked him what he had to do with the case ; he replied that many of the country gentlemen had subscribed a sum of money to enable the pursuer to carry on the action. It was witness's decided impression that Millbank was a subscriber. The second conversation was about twelve months afterwards, when Millbank applied to witness to arrange between him and Mr Roy ; witness said that it was impossible that they could be on good terms, or that witness could be of any avail. His reason for saying so he stated to be, that he understood that he was one of Mr Thomas Mackenzie's supporters, and had subscribed for that purpose. Millbank desired him to say that he had no hostility towards Mr Roy, and had done nothing more in regard to the case than other county gentleman. Millbank did not expressly say that he had subscribed, but he did not deny that he did. During the former trial, he had a conversation with him, after he had given his evidence, but not regarding the subscription.

Cross-examined by Mr P. Robertson—On the first conversation, Millbank said he was going either to revise the summons or to consult about the case.—[The Dean of Faculty proposed to tender, either at the close of the case or now, the evidence of the two agents in this case, in reference to the above evidence, or do it afterwards in replication.]

*Governor Mair* of Fort George—Is a colonel in the army ; was perfectly acquainted with the whole family of the late Dr Roy. The character of the family is as respectable as that of any family he ever knew in any part of the world, and most remarkable for their becoming and pious conduct.

*Alexander Mackenzie*, late banker, now writer in Inverness—Knew the late Kenneth Mackenzie, and Thomas his brother, and the late George the father. Remembers the death of George at Inverness, and he took the whole charge of the funeral. Had been his agent for many years before. An unkind feeling existed between the two brothers. On the day of the funeral there were two parties attached to the brothers ; the one stood on the one side of the street, and the other on the other. Witness requested both parties to walk up stairs to assist in carrying down the remains, but could get neither of them to do so, and was obliged to employ the undertaker's men to do it.

Cross-examined by the Dean of Faculty—Kenneth's mother was at the time at Lochbroom ; knew the family intimately ; was a banker at Inverness twenty-two years ; Kenneth came from college to his office, and he employed him in the copying of letters and running of messages, and always thought him an ordinary boy ; and when grown up, thought he had the understanding that any young man should be possessed of.—[Shown letter of 14th November 1816, identified it as written by his clerk, and autograph of witness, and addressed by him to Thomas.] Being desired, he read the following paragraph from the letter :—“ When I saw the Captain at Seabank, as already mentioned, he assured your mother and me that he never authorized either Macbean or Macandrew to take the protest against me for not delivering up the papers ; and that he had only authorized Macbean to get copies of such as were absolutely necessary to make up his titles, by serving him heir at Edinburgh ; and my own real opinion is, that Dr Ross and Macbean are playing to one another's hands, and taking all these steps without the consent or approbation of poor Kenneth, who, since his father's death, has shewn himself little short of a person that should be cognosced.” Witness thought that Kenneth acted a most extraordinary part, in turning his back on his mother, his brother, and himself, and could not understand the reason of such conduct. The expression cognosce is a common expression which we have in the Highlands, and that is the reason for his so using the word.—Shown a memorandum of date 11th July 1814, addressed to the father, which witness identifies as holograph of him. The first paragraph says, “ From a letter lately received, and which is herewith sent, Mr Mackenzie is afraid that the Captain is running in debt. Mr Mackenzie did not think it prudent to answer the letter, which, in point of fact, is the production of a third person. Dundonnell will make his own use of this letter, which Mac-kenzie sends in confidence.”

*Mr John Macandrew*, solicitor, Inverness, and partner of Mr Campbell, called.

**DEAN OF FACULTY**—My Lords, I will undertake to instruct that Mr Macandrew, the witness about to be called, is the partner of the agent in this case, who acted in precognosing witnesses, and in bringing them for examination. Mr Gibson Craig was found disqualified as a witness in a case for a similar reason.

**SOLICITOR-GENERAL**—It is no objection to our witness that he is partner with the agent in the case, if it was agreed between them that he had nothing to do with the case. If I had a partner who wished to take a case that I should not undertake, I should not prevent him from doing so, although I would have nothing to do with it.

Mr Macandrew was called, and examined *in initialibus*.

Witness carries on business under the firm of Macandrew and Campbell. Recollects that there was some arrangement between witness and partner, that in the present case nothing should be done by his partner under the firm of Macandrew and Campbell. It was distinctly understood that witness should draw no share in the profits arising from the agency of this case.

Examined in chief.—Is agent for Macintosh of Macintosh, for Glengarry and others; has an extensive business at Inverness; became agent to Kenneth in October 1816; continued his agent till November 1824; and after that had very little concern with his affairs. Had a good many transactions of importance, and to a considerable amount in money, with him. Had been for days together at Dundonnell; twice in 1819, twice in 1820, twice in 1821, collecting the rents. Dundonnell was generally present when he was settling with the tenants, and assisted. During witness's absence, it was customary to take payment partially and in kind; and by his memory, which appeared to be extraordinary with regard to those transactions, assisted witness in settling with the tenants. Found him very accurate in the information he gave, from there being no difference between him and the people. These transactions went to considerable minuteness, and were spread over a large space of time. He had many conversations with Dundonnell on general subjects, and also on matters of course; and he appeared to be a person of good sense, and capable of managing his own affairs. First business meeting was at Seabank, shortly after the father's death. Dundonnell spoke about his brother and family affairs, and seemed to be offended at the pursuer. There were a great many litigations connected with the different branches of the father's succession. In November 1816 Dundonnell left Seabank and went abroad, as he had debts, and some of his creditors were pressing him, and he went south to raise funds to settle with them. He spoke to witness of several family transactions, and suspected that some parties connected with the family were urging his creditors to take steps against him. Dundonnell spoke as if his brother had given him cause of offence. He said to witness that he was aware of an intention to get him disinherited. He named his mother, and gave witness to understand that the deed was to have been in favour of the pursuer. Witness first heard of the deeds of settlement in October 1819. First mention of it was made to witness by Mr Macbean, who asked him to go to Dundonnell to take an infetment; and stated that Dundonnell might speak to him about scrolls which he had sent to him. Dundonnell and witness were in one of the rooms, and Dundonnell took out the scrolls and was looking over some parts of them, and then put a letter of Mr Macbean's into witness's hands, which witness identifies. Being shewn the scrolls, he also identifies them. Nobody was with them at the time. He seemed displeased with Mr Macbean for making out the scrolls different from what he wished, as there had been names introduced into the deeds, contrary to his instructions. He pointed out to witness what he had struck out with the pen. Saw him write on the margin; one of the markings on the margin was leaving L.20 to Campbell, L.2000 to his brother-in-law. There were other markings on the margins, which witness stated were in Dundonnell's writing. Observes Kenneth's initials at the word "my brother-in-law," in his handwriting. Is quite certain that he saw him marking the L.20 to Campbell, but is not certain as to the other. After reading Macbean's letter, witness said that it was a good advice; when Dundonnell said that he was determined

that neither his brother nor his family should inherit the estate. Witness said he should employ some other agent, to which Dundonnell said he did not see how Macbean should not do it. Witness suggested Mr Stuart of Dunearn as a proper person. He then asked witness to send the scrolls as altered by him to Mr Stuart, and to give him the scroll of a letter which he would write to Mr Stuart at his leisure. On suggesting that he should make his sister's children his heirs, he said he thought he did better for them by leaving them L.6000 than giving the estate to one. On Mr Roy's name being mentioned, witness said that Mr Macbean's recommendation was a proper one, upon which Dundonnell said, "Aye, Robert is of that way of thinking; he wrote to me himself." It is witness's opinion that he had Mr Roy's letter in his hand at the time. He said he did not see what occasion Roy had to refuse to take the estate, and that, if he persisted, he would find somebody else that would be glad to get it; and that if his mother and brother could have helped it, he should not have had the estate himself. Mrs Mackenzie looked into the room during the conversation; but on Dundonnell saying "we are on particular business, Isabella," she walked away; nobody came in while they were speaking on the subject. Mrs Mackenzie, in an after part of the day, asked if her husband had been speaking about the settlement, and said she hoped to God he would make no settlement excluding his nearest relations. Witness said that Dundonnell was the best judge. He thought that her statement was candid and true. He took away the scrolls, which were sent to Mr Stuart a short time after. He was at Dundonnell in December 1819, and mentioned that he had transmitted the scrolls. Dundonnell said that he had not written to Stuart; that he was thinking over the subject, and had not made up his mind. Dundonnell spoke to him about them in August 1820, and said that he wished to make an alteration, to enable the heir to borrow money on the estate, if it was necessary, or to sell a part of it, as it was so far in debt. They conversed on its being necessary for himself to sell a part of the estate. It was much burdened; and as the original deed proposed by Mr Macbean was a strict entail, a sale could not have been effected under it. Note of instructions and paper regarding the legacies, which were shown to witness, he acknowledged to be in his own hand-writing, of date 17th August 1820, and which were made out by witness. He had made a scroll of the import of his conversation with Dundonnell, from which he made out the instructions upon which he was to act. He first proposed to reduce the legacies to his sister's children, but on witness's recommendation he allowed it to remain, and added L.1000 to his nameson Kenneth. Mr Roy came to the door at the time, and wished to retire. "Come away, Robert," said he, "we are speaking of my settlements." Mr Roy said that if he was resolved on the settlement, he begged of him to put his letter into Mr Macandrew's possession. Dundonnell called to his wife for Robert's letters, and took out two, and read them to witness, who folded them in a blank sheet of paper, and Dundonnell addressed the cover to witness. He did not recollect if Mr Roy said any thing further about them. Witness was satisfied that Dundonnell perfectly understood the deeds. He was again there in December 1820, or January 1821, and apologised to Dundonnell for not having the scrolls. He wrote to Mr Stuart, and got the drafts in the course of post; and in August following they were made out in terms of the instructions. He carried the scrolls with him to Dundonnell, and gave them to him, and desired him to satisfy himself that they were according to the instructions; he saw him looking over the former scrolls, which implied his perfectly understanding them; he was not present when they were executed; Mr Roy was present two or three days during the time he was there; they were absent two or three days during that time, and returned at night, except upon one occasion, when they slept a considerable way down the property; he cannot bring it to his recollection that he had any communication with Mr Roy upon these deeds; he had some recollection of speaking about the terms of Mr Macbean's letter of August 20, on that day or the day after, but he does not recollect the import of that conversation; his clerk Manford was at Dundonnell at the time, and the only instruction he gave to him was to be particular in seeing them properly extended and executed; Dundonnell had a cash credit at Inverness; the drafts were printed and operated on by witness; he was bound for the payment of the interest; and the reason of having the drafts printed was to enable him to operate on the cash credit.

Cross-examined by the Dean of Faculty—Mr Roy did not, as far as the witness recollected, speak to him on the subject of the instructions he had got from Dundonnell about the settlement; Dundonnell proposed to him to prepare the deeds, and witness told him that it would be better for him to take the advice given by Mr Macbean; very soon after the marriage he began to correspond with Mrs Mackenzie on business, while they lived at Seabank; he was appointed factor in 1819, about the time he was at Dundonnell; Mr Macbean proposed it to him, and he thinks that Mr Roy was present in his office before he went to Dundonnell in 1819; it was witness's practice to enter deeds at the time that the stamp-paper was purchased. He carried the instructions with him, but does not recollect whether they were sealed up by him. The letters that Mr Roy desired to be preserved must have been sealed up; but not the instructions, that he recollects. Shown an envelope which he recollects was put upon Mr Roy's letter and Mr Macbean's. It contained the following docket on the back—"Delivered 17th August 1820, and knowing it to contain documents intrusted to my care, I did not think it necessary to open it." After the instructions were prepared, he received no other from Dundonnell, either verbally or in writing. Witness thinks that he compared the deeds with Manford after they were extended. He knew they were signed on different days. There was a dance on one of the evenings; but he cannot connect together the signing of the deeds and the dance. He had a distinct impression that they were compared by him and Manford, and he recollects that some addition was made to the testing clause. He desired Manford to take care that Campbell should not be a witness, as he was a legatee; and that is all he knew about it. He had no conversation with Dundonnell about the deeds, before he left him, and had no communication with Mr Roy. He cannot tell how long he was at Dundonnell after the deeds were signed; he thinks two nights after they were compared. Mr Roy was not aware from him that the scrolls were carried there. He thinks it is probable that Mr Roy might have known for what purpose Manford was there, but his impression is, that he had no communication with him on the subject. Had he been in Mr Roy's situation, he would have endeavoured to get information, and he presumed that Roy knew. Shown printed copy of letter, dated 1st October 1819, from Roy to witness, which says—"I have also written Dundonnell; I have told him that I had spoken to you on the subject of his settlements, and that I wished a letter of mine should be shown you." Witness recollects the letter, and gave it up. He tried if he could trace in his recollection that he spoke to him on the subject, but he could not.

Re-examined by Mr Solicitor-General—During the time he managed the estate as factor, he never paid to Mrs Mackenzie, or to any body else, her provision of L.500. Shown the printed draft, which he said was drawn in that form for convenience; the form of that account was got from the accountant of the bank. Dundonnell might have drawn in the usual way had he chosen.

Cross-examined by the Dean of Faculty—It was a form to satisfy the bank. It was bound up in the same way as a bank book.

The deposition of Janet Ross, residing in Cork, was then read, which stated in substance that the deponent had been a servant with Mr Kenneth Mackenzie of Dundonnell. That she entered his service on the 3d June 1819, and quitted it in 1821. Acted as housekeeper for two years, and as lady's maid to Mrs Mackenzie for six months afterwards. That Mr Roy was received by Dundonnell with kindness and cordiality. That Dundonnell was very much attached to Mrs Mackenzie's family. All the members of Mrs Mackenzie's family conducted themselves with affection and regard towards Dundonnell. He was treated with respect by his domestics. That his orders were attended to, and no servant ever disputed them. That the late Dundonnell was much attached to Campbell his servant, and treated him with much indulgence. Witness knows that Campbell was courting Mary Urquhart, the factor's daughter, which Dundonnell was angry at, and prevented, as he was afraid of Campbell's leaving his service. Campbell always treated his master with respect. Dundonnell himself managed his own affairs. Has seen him during election time, with money in his hands, and settling with the tenants. Has never seen or known that Mrs Mackenzie ever interfered in his affairs. That she considers Dundonnell to have been a religious man. Has seen him read the Bible. That a post-bag came once a-week to Dundonnell, which

Dundonnell regularly opened himself, and in his absence it was opened by Mrs Mackenzie; but this was seldom. That Mr and Mrs Mackenzie were very much attached to each other. That Dundonnell was not a fool, though not by any means a strong minded man.

The Court adjourned at eight o'clock till Friday.

## FRIDAY.

The Court having met at ten o'clock, continued the examination of the evidence for the defender.

*Sir William Gordon Cumming* of Altyre, Baronet—Was acquainted very intimately with the family of the Roys, and did not believe that there was a more respectable man or family between Spey and Esk. A fool was left to witness by descent.

*Mr Aneas Macbean*, writer to the signet, Edinburgh—Was acquainted with the late Kenneth Mackenzie of Dundonnell, and was his established agent from 1816 to 1822. Robert Roy was an apprentice of his, and began business for himself in 1822, and on that occasion witness's agency ceased, and was transferred to Mr Roy; previous to 1816 did some little business for the pursuer. In 1814 he was agent for Kenneth's brother-in-law, Dr Ross, who wrote to him about some claim that Kenneth had against Major Hume, in regard to some damages arising out of a court-martial. Witness had Kenneth's own mandate to take up the case, and recovered some damages. Witness thinks that there was an apology addressed to Kenneth from Major Hume. [Major Hume's letter of apology was then read.] Witness recollects Dundonnell living at Seabank in 1816, and the father's death about September of that year. Major Monro of Poyntzfield came to witness to say, that Kenneth wished to consult him about some settlements that the family wanted the old man to make before his death. Witness said that Major Monro's friend, Kenneth, ought not to sign any paper without him seeing it. Witness after that went to Banff, and received a letter from the Major, requesting that he should accompany Dundonnell to the funeral, and see the repositories opened. Witness could not go, but afterwards he went to Inverness, being applied to by Major Monro to take charge of Dundonnell's business altogether. His then agent, banker Mackenzie, refused to give up the papers without a mandate. In order to get possession of the titles, witness had to institute legal proceedings, and a variety of actions ensued. Remembers Dundonnell being at Edinburgh in November 1816, as he was then threatened with diligence by his creditors, and had applied to witness to raise money to pay the debts, which could not be accomplished till the titles were made up, and this could not be done till they were got from banker Mackenzie, and the pursuer, who was also in possession of some of the titles, refused delivery, and Dundonnell remained in Edinburgh for some days and went to London, and from thence to Paris, as there was no likelihood of getting the papers at the time. Witness received several letters from him when abroad, upon which he acted, and wrote to him in return, and treated him as a man fit to be treated with. Dundonnell returned to England in March or April 1817, and came to Scotland about the end of June; witness had to do with his affairs in the interim. When he was north in April following, he got the creditors to give him time, and also by the advice of Mr John Clerk, now Lord Eldin, he got his titles completed by means of an adjudication in implement to enable him to borrow them; he got a loan of L.6000 from Mr Davidson of Tulloch, the draft of which bond was prepared by his agent, Mr William Mackenzie, in the usual way, and infetment made upon it, and the loan got. Witness was informed that Kenneth was about to be married, and witness received directions to exclude Thomas from the succession, and the draft of the marriage settlement was prepared on that footing. Witness was sorry that this should be the case, and endeavoured to bring about a reconciliation between the brothers. Dundonnell afterwards took alarm again, and went to Dunbar; witness at length got a meeting arranged, and the brothers came into personal contact, and shook hands. In consequence, witness received directions to alter

the settlements, and to introduce Thomas into the destination. Dundonnell was an obstinate man when he took a resentment, and difficult to move, and he had appeared to have taken a strong dislike to his brother. Dundonnell held his brother to have violated a condition in regard to a settlement to his sister, which displeased Dundonnell. Another cause of displeasure was the pursuer continuing to keep the stocking on the farms of Dundonnell, and thereby preventing Kenneth from laying down the crop; and witness recollects having received a letter from Dundonnell's factor, Dr Ross, stating that he could not get a peck of meal for the servants while Thomas retained possession of the Mains. Another of the principal causes of Kenneth's displeasure with his brother was in regard to the farm of Achascauld, on the Cromarty estate, upon which there was a current lease which they had failed to recover, and Dundonnell knew that Thomas was concerned in withholding the lease. The pursuer removed his stocking from the Mains, and put them on this farm, and it became necessary to have another action for removing it. Witness got Kenneth to agree to put Thomas into the marriage-contract. He was acquainted with Dr Roy's family, which was very respectable, and was consulted about the contract. L.500 a-year was settled upon Mrs Mackenzie, to which provision Dundonnell had decidedly made up his mind. At the time, he was upwards of L.6000 in debt; and from his expensive habits, witness consulted with Mr John Clerk, now Lord Eldin, about securing in the contract some provision in the family, to put it past the creditors. Dundonnell understood it, and was pleased with the proposal, which was at the suggestion of counsel. There was nothing unusual in the practice. Witness had frequently done so, and has always declared that the annuity should be paid to the wife independently. There is a style for this in the books. Witness does not think there was any cordial reconciliation between the brothers; the breach appeared to him to increase. Remembers receiving instructions from Dundonnell about his last settlement in the year 1819, which instructions, he thinks, he received in a letter from Roy. He proceeded to prepare the draft of a settlement, but not according to the instructions; his object was to bring in Thomas's family to the succession. Witness disapproved generally of one brother disinheriting another, as in a few years they might be reconciled; and he had another reason, that Roy was his apprentice, and he did not like to make a deed in which he was permanently interested. Witness was never actuated by the belief that Dundonnell was a weak, foolish person, and never imagined it. He despatched the drafts to Dundonnell himself, and also wrote to Roy on the 13th of December. The deed did not excite surprise, after he heard of it; as new cause of offence had been recently given. Dundonnell appeared to have an affection for Mrs Ross. He was shy towards strangers, almost to silence. Witness had occasion to do a great deal of business for Dundonnell; at same time he would mention, that he had not many opportunities of seeing him; only about six times in Edinburgh, and as many in the country; but he had seen him often enough to know if he was an idiot. He never had occasion to know any person who started back from dealing with him on the ground of imbecility. He knew that Thomas's agent would not pay L.1000 on witness's receipt, till he got Kenneth's receipt. He had no opportunities of knowing whether Kenneth was an educated person; but he could say that he was a gentlemanly man. When he sent the draft, he explained his reasons for deviating from the note of instructions, in a letter to Mr Roy. He relied on Mr Roy seeing the settlement executed, and had always the highest opinion of him.

**Cross-examined by the Dean of Faculty**—Witness gave an obligation to procure Dundonnell's receipt for the loan above referred to within a given time, and upon that stipulation the loan was advanced. Witness identified extracts in his correspondence with Dr Ross in the action against Major Hume. Major Monro was with Dundonnell at Inverness; he was with him in Edinburgh in 1816. The communications he had with him were chiefly through Major Monro, who went abroad with him in 1816, and returned with him in 1817. When the communication was made in regard to the form of marriage-contract, the Major was also present. Witness identifies a letter addressed by him to Kenneth in Paris, on 31st Jan. 1817, in which there is a postscript addressed to Major Monro, as follows:—

“ MY DEAR MONRO—I merely use a corner of Dundonnell’s letter to say that I have encroached on your province of MENTOR, by recommending strict economy and prudence in expenditure. Another such sum we cannot expect to get, until after Whitsunday; and I have no doubt you will urge upon our friend the abstaining from all purchases or outlays at present that are not absolutely necessary.”

Witness identified the copy of the memorial laid before Mr Clerk in regard to the marriage-contract; also identified a letter written by him to Dundonnell, on the 19th February 1820; but the address on the back is not in his handwriting; did not think it was Mr Roy’s. Dundonnell’s agency was recalled from witness in January 1822. He always understood that whenever Roy entered as W. S. he would have the whole business of Dundonnell. Witness was not aware that Mr Roy took any particular charge of Dundonnell’s business while employed in his office; witness does not think he would do it; he is not aware that there are 60 or 70 letters written by Mr Roy on Dundonnell’s affairs, and not as his clerk, between 1819 and 1822. If his apprenticeship was out by that time, he might have done so without any impropriety, although the agency was still in witness’s hands. Witness thinks that a paper shown to him regulating the agencies is in the handwriting of Mrs Mackenzie. Identifies an excerpt from his book of postages of letters relative to his letters with Dundonnell; twelve letters appear to have been received by him from 1816 to 1818. Identifies a letter to Dundonnell in June 1819, subjoining a form of mandate to advertise a farm; that letter was for selling part of the property. Identifies a letter from Dundonnell in Mrs Mackenzie’s handwriting, but signed by Kenneth. Shown another letter, which witness did not think to be Dr Ross’s handwriting, which was a valued rental of the estate. He cannot say if it passed through his office. Answer to a condescendence put into witness’s hands passed through his office. Dundonnell’s papers were kept in boxes, and no inventory was made of them when they were given up; it was necessary only to take a receipt for the title-deeds. At the time witness executed the marriage-contract, he executed a settlement in favour of Thomas, which has been since stamped. Dundonnell objected to the expense of stamps, as he wanted to avoid court lawyers.

Re-examined by Solicitor-General.—The rental of the estate was supposed to be L.1500, and the sum settled on Mrs Mackenzie was supposed to be what the lady would be entitled to at any rate. When he wrote the postscript to Major Monro, he thought the Major might have considerable control over Dundonnell in preventing him from spending money unnecessarily, as he thought the Major did the out-of-door business generally, in consequence of the compulency of Dundonnell. He thought the Major stood in awe of Kenneth, who was a good mimic, and used to quiz the Major. Witness would have required a mandate from any client; he could not sell any man’s property without it.

The Solicitor-General produced Mr Roy’s indenture, the discharge of which is dated 7th June 1820. He then put in the following documents :—54 letters holograph of Dundonnell; 81 signed by him, but not holograph; 577 letters addressed to him by third parties; 95 deeds to which he was a party; 74 bills signed by him, extending in value to nearly L.12,000; 215 receipts signed by him, of which 33 are holograph, covering a value of L.3500; 70 receipts granted to him by other parties to the amount of L.3700.

The following letters, principally holograph of Dundonnell, were then read :—

LETTER—KENNETH MACKENZIE, Esq. of Dundonnell, to Mrs GILLANDERS, Castle Street, Inverness.

*Aberdeen, 24th January.*

(Post-mark, *Aberdeen 25th Jan. 1808.*)

MY DEAR AUNT—I take the liberty of writing you those few lines to inform you of my present situation, which I hope you will not be offended at me for acquainting you. I was at my cousin Abey marriage, who married, Wednesday last, one Mr Chyne, a very rich man, and set away immediately for Edinburg. I went along with them 30 miles, and was not willing to part with them. My uncle left Aberdeen this very day. My dear Aunt, I have not heard from my father since Mr K. came; the cause of it I do not know. I am very ill situated at present with Mrs Kennedy—God knows how—I have no life with her,—she has left me so broken-hearted, that I think my very life a burden on the face of the earth. I have not acquainted my father of it; even suppose I should do it, he would not believe it;—many a one did not meet with such difficulties as I have put an end to their life.—The only worthy friend I have has Mrs Mackenzie, Breda, who is a very kind friend. I don't know what I would do for her. I wish to know your advice what I shall do, for whether my father gives me leave or not, I shall not stay here longer, because I intended to write you about it. My whole desire is the army; a commission is very easy gotten just now; and if my father does not get it, I shall not refuse an offer I have just now; however, I have three months notice, and if you don't approve of it, mention it in your letter to me, say to a friend. I should have written my cousin Frank, but something always put me out of the way of writing him; however, few likes him so well as Kenneth does. Whether he believes it or not, that is my mind all at once. I trust you will write, Dear Aunt, in the course of the next week at farthest. I have nothing more to say just now. Give my compliments to my dear cousin Frank, to Miss Abigal, and Alexander, and all enquiring freinds. I am your faithful freind till death, (Signed) KENNETH MACKENZIE.

Excuse my bad writing and spelling. Direct to Mr Kennedy charge.  
*Mrs Gillanders, Castle Street, Inverness.*

LETTER—KENNETH MACKENZIE, Esq. of Dundonnell, to Mrs MACKENZIE.

*Dundonnell, 18th November 1823.*

MY OWN DEAREST ISABELLA,—I received both your welcome letters nearly at the same time, which made me quite happy to find you were well, for I dreaded something when Kenny Brown did not make his appearance before. Muckle Bell came bouncing into the parlour, where my mother and I were going to take a nap after dinner,—I thought it was my own dear Isabella that had come. Bell is always the first to make the most minute enquiries after you of all you left, for I believe her the swiftest of them all. *Little Kenny* is quite well—Granny and him great friends,—she makes as much about him as some other person I know;—there is none like Kenny in my mother's opinion, he is so affectionate, and so attentive, she never saw the like of him. Tom left here upon Friday last for Findon—he has a severe boil upon his cheek since you left here—I hope you had none of them. You will be sorry to hear that the George of Ullapool was lost upon the English shores,—two of crew drowned, and four saved; one of them that was lost, was an aunt's son of muckle-nosed Rory—the other from Ullapool, two fine young lads they were; one of them that was saved is a son of Duncan Roy at Airmach, brother to the lad that was saved in this loch. The poor Big Strath merchant has lost his wool, for it was on board of the George, so that I am obliged this day, owing to the quantity of butter for smearing, to send down the country for Irish butter, six stone. I am going to send to Findon, till Tom gets it.—Black Taylor is to send also,—there is not a pound to be had in the country. We are getting a great deal of small herrings—some boats get six or seven barrels, the Doctor's yair got 150 barrels in one night—Friday last. My sister made me send for two horse-loads, which I did;



they could not get them all disposed off in one day, and, before the next morning, came the people around—stole upwards of eighty barrels of them—only think of their greed. How truly sorry I was to hear of serious accident that befel *Robert*. I trust he is greatly recovered by this time. I am so happy to find you so gay as to have been at the harvest home ball—our own one was stupid enough. Mrs Mackenzie, Findon, is put Bell Mackie mad—she is got a spider gown, white petticoat; you never saw such an idiot as she is with it. I am so happy at hearing Mem is so well,—long continuance to her,

Our crop of potatoes will be in to-night or to-morrow at farthest, an miserable it is. I think I have given you all my news. You say you wished Campbell to have come, should have come I would have turned him back again. I have not missed his absence in any way, and have been as well attended to as he could have done. Miss Mackie is the only one that misses him, and if was here, poor little Kenny would not be so well attended to—she is very careful of him, to do her nothing but justice, for she is well watched about him. I trust in God you will be home next week at events, and acquainted me when I shall send the baggage horses. I hope you will spend a night with Tom, and call at Arcan' cottage and Miss Clune's. My mother joins me in love to you, Mem, Lucy, Mrs Fraser. Remember me to the Tulloch's. You will bring some yards of prints. I need not mention any thing, you will think of all these things yourself. Now my dearest dear Isabella, from your affectionate husband,

(Signed) KENNETH MACKENZIE.

*P. S.*—All the lasses send their blessings to you, Flora Kate. Vitriol and potashes, Mary says, are wanted. My love and blessings to, and a kiss from Kenny, and a thousand from Kenneth Mackenzie. Miss Baby is arrived at Manse.

LETTER—KENNETH MACKENZIE Esq. of Dundonnell, to  
Mrs MACKENZIE.

*Findon, 25th February 1824.*

MY DEAREST ISABELLA—I have almost despaired of your coming here, and going to set off for Treetown. Campbell has returned this morning, and left Mem quite well. I had a letter from *Robert*, and, as usual, no alternative but Scott left to us; but I am determined he or no one shall have the management of my business, as long as I can sell off every rig of land sooner than be in his reverence or mercy. My dear Isabella, I long very much for your arrival, as you are the only comfort left to me, and trusts that poor little Stirky is better, and will be able to come along with you. I went on Saturday to visit my old, good, and kind friend, Major Munro, who hugged and kissed me, to astonishment of his little wife, who is a kind little soul, free of all affectation or pride. I was quite delighted with them both, and such a beautiful little baby—it like a painted doll. I thought we would back here to dinner, but that was quite out of the question. I hardly could get away the next day, but with the promise of returning to spend some days with on our return. She is the one of all yet I have seen you would be most at ease with. Tom Ord was with me. She is most accomplished little creature. I had received from Captain Sinclair, and pressed me hard to spend a day with him, but you know that I would decline that then on Sunday, rather than return earlier than usual to dine here. We went the length of Cromarty to visit Cleopatra, who was so kind that she was near to devour me with kisses. I cannot tell you the attention they paid me. We visited Mr Macdonald, the clergyman, and was not at home—he went to see Montgerald, who is not likely to live any time. Mrs Macdonald was very kind, and said how her husband would regret he was not at home. They inquired kindly for my mother, and she was amissing. Now, my dearest Isabella, I hope you will be here immediately, for I shall be quite out of humour till you arrive, and impatient till I hear of you. Give my love to mother, Miss Baby, poor little dear Kenny, Ballea, Jean Cook, and all the rest. May God bless you is the sincere prayer of your affectionate though cross,

(Signed) KENNETH MACKENZIE.

I retained Sandy Grant till now, as going to leave here; it is time, now two

o'clock. Mind to poor Flory, Peggy Bain, and all; the God bless you, my dear. (Signed) KENNETH. All here under this roof, join in kind love to you all.

LETTER—KENNETH MACKENZIE, Esq. of Dundonnell, to  
Mrs MACKENZIE.

*Dundonnell, Sunday Afternoon.*

MY DEAR ISABELLA—The shock to me was very great, as you may suppose;—my poor little darling to be no more, has distressed me very much, and the cause of her departure from this world of troubles, has, in every way, distressed me more and more. I am now, thank God, a little more composed than when they left me. I am afraid my poor mother will never get over the shock—and to think of her poor mother, the tidings will have a bad effect upon her—I am sure I am sadly distressed;—what a cause of thankfulness to me, that you are with my mother on this distressing occasion. You will be so good as send Mary with little Abey up, as there will be no way for her down. Oh may God bless you for your kind consideration for them in distress. I am your ever affectionate husband, though distressed at this moment,

(Signed) KENNETH MACKENZIE.

LETTER—KENNETH MACKENZIE, Esq. of Dundonnell, to  
Mrs MACKENZIE.

MY DARLING ISABELLA—I am so happy to see you in such health and spirits, that it makes myself much better. Oh may He that is able to strengthen the soul and body, give you peace, love, and happiness, with your ever affectionate,

(Signed) KENNETH MACKENZIE.

LETTER—KENNETH MACKENZIE to Miss MACKENZIE, London,  
(now Mrs MEAD.)

*Fourhouse Barracks, 16th December 1813.*

MY DEAR COUSIN—I received your kind letter some days ago, which gave me a great deal of pleasure to hear from one who has always befriended me; I had several letters from my father since the death of my brother Sandy. Poor man, he is in the greatest distress, and begs of me to quite the army and comfort them. Oh, what changes. Providence, I hope, will open his eyes, and shew him what he is heaping up money for his children that may never enjoy it; he sees his folly now, when, alas, it is *too late*, showing and indulging some of his children in every comfort, and leaving others to doo the best they can for themselves. Providence saw too well that he did not care what would become of me, and he always expressed himself in that foolish way, and that will always make me think less of his friendship now, not but I should like my parents, but they have used me *crusely*, and never would hardly allow me the comforts of life. They never asked me *before* to go and see them, and I shall now make them feel the *distance* they keep me at. Sandy died upon the night of the twenty-first, and your cousin; Mrs Ross, was delivered of twins upon the night of twenty-six, and are both doing very well. The one of the boys is called Sandy, and the other the Doctor's father, Donald to name; she is doing quite well, both she and the boys; I hope they will be a comfort to her and us all. She complains very much of her father's *unnatural conduct* towards her. She has never repined nor given him the smallest trouble since she married; he never as much as given her a *pound* since she left him, nor did he settle anything as yet upon her, so you see what a parent he is; but I am determined *not* to quite the *army* to live like a slave with him; no, I should sooner do *aney thing* than be in *his reverence*, and show him that I have a *spirit* above them, to go cringe to them now. No doubt, but I shall have plenty of *professed friends now*, that spoke of me in a different way *before*; I shall always treat them with indifference; he did not tell me who was at the funeral, nor aney thing about it; my sister seems anxious that I should come and see

her; no wonder, only think of me being four years from home, and being so near them, and my father never asked me to come; and if I go now, it would be only for four months. I am in great haste just now. I hope you will write me soon. I remain, my dear cousin, your very affectionate,

(Signed) K. MACKENZIE, Capt. INVR. M.

P. S.—Excuse haste.

LETTER—MR THOMAS MACKENZIE TO KENNETH MACKENZIE, Esq. of Dundonnell.

*Teanassie Cottage, 12th April 1819.*

MY DEAR BROTHER—According to your desire I purchased you four cows at Captain John Mackenzie's sale at Ardvail, and trust they arrived safe and gave satisfaction; they certainly were amongst the best, and would have bought the number you wanted, but that I could not get so many suitable for you. I enclose the account which was rendered me of them, and beg you may remit me your acceptance for the same, as they are pushing me to render them bills for the amount of my purchase.—(I would have given them my acceptance for your purchases, but that you told me you preferred to render your own.) Mr Urquhart rendered me an account, which I beg leave to enclose you, being for the grazing of the two little horses, I really think is ridiculous, being more than they are worth;—the first year's grass he makes the charge for, was given me by John Maclean, Auchinivie, and I really take upon me to say, 'he had not your sanction for making the charge, at all events, for what is beyond *time or reason*.

I am going to ask a favour of you, which I hope you will grant me, as you may rest assured you will be perfectly safe in so doing; at all events, I trust you will not be offended at my requesting it, 'That you enter as one of my securities, in a cash-account which I propose getting with the British Linen Company, for L.600,' as I am on the eve of taking another farm, which it will cost me a considerable sum to stock. If this is agreeable to you, it will be doing me a favour; if not, you will please let me know in the course of post, so as I may make arrangements to get some other friend to do it for me, but I certainly would prefer having you as one of the number, to any other person.

I was glad to hear, by Urquhart, that you was getting quite stout, and that you were all improving in health. Our poor mother has been very ill when I was in the Highlands, but is now beginning to recover. I fancy you would have heard that hopeful Aby served a *Summons* upon her mother, Alexina, and *Meg Clunas*, for pretending to keep away her clothes, which she ordered to be sent to Castle Hill, and they had her letter desiring the same to be done, and Sandy Post signed it as proctor, and Tom Paterson for his *spouse*; they are all love together, living in the greatest style. The maid is sent away to Edinburgh, in a way that promise much future happiness to Aby, and filling up the vacant space in the cottage. Anne and Dody are well, and unite with me in kindest regards to you, Mrs Mackenzie, and Miss Patty; and I remain, my dear Kenneth, your's affectionately,

(Signed) THOS. MACKENZIE.

LETTER—MR THOMAS MACKENZIE TO KENNETH MACKENZIE, Esq. of Dundonnell.

*Inverlael, 24th May 1822.*

MY DEAR BROTHER—A report having been made up by the accountant, in the process of Count and Reckoning, at the instance of Dr Ross and his wife against me, for payment of her share of the estate or personal property of our late father, I find that there is a claim against you for the half-year's rent of the estate, and other items, of which you have annexed a copy, amounting in all to L.999, 18s. 6d.

When this matter was laid before Mr Cranstoun, he gave it as his opinion that you were liable for the same; and this opinion is further fortified by the report of the accountant. In this situation, I trust you will be perfectly satisfied of the justice of the claim, and direct your agent to settle the same with me, as soon as possible.

This is absolute necessary in my present situation, especially as Dr Ross has arrested all my funds, which has proved most injurious to my credit, and been attended with much loss.

I never could have any objections that he should get what is truly due to him, in right of his wife; but I consider it extremely hard, that all my funds should be locked up without doing the Doctor the least service.

I beg to hear from you, p. bearer, who I send on purpose with this letter, so to know your determination. With best wishes to you and Mrs Mackenzie, I remain, my dear Kenneth, affectionately your's,

(Signed) THOS. MACKENZIE.

(Addressed) *Kenneth Mackenzie, Esq. of Dundonnell.*

Amount of the Rental of the estate of Dundl.	- - -	L.1428	0	0
	A half,	- - -	714	0
Interest from Martinmas 1816 to Whity. 1822,	- - -	- - -	196	7
			L.910	7
Half of Taxes for crop 1816	- - -	L.33	16	6½
Interest to Whitsunday 1822,	- - -	8	16	0½
			42	14
73 Barrels potatoes, at 7s. 10d.	- - -	L.28	14	10
80 Do. lime, at 2s.	- - -	8	0	0
Interest from Martinmas 1816 to Whitsun-	- - -			
day 1822,	- - -	10	2	1
			46	16
			L.999	18
			6½	

I have got a promise of some fowls for you from Mr Nicol.

(Addressed) *Kenneth Mackenzie, Esq. of Dundonnell, Dingwall.*

LETTER—GEORGE MACKENZIE to Captain KENNETH MACKENZIE.  
*Dundonnell, 31st January 1814.*

MY DEAR KENNETH—I received your letter of the 8th January, and hearing from you again, and your being in health, gives your mother and me the greatest joy and pleasure, that any thing in this world can give, though, my dear Kenneth, you seem to misinterpret what I wrote you or meant, in my last letter to you. I never supposed any thing I said was true; and I sincerely think, those who might have said it was incendiaries more than friends; so, my poor Kenneth, rest fully assured, that your mother or I never gave the least belief to it, and I hope you'll always conduct yourself with prudence and becoming sense, and though we had the misfortune of losing your beloved brother, I hope and trust in God you'll endeavour to come as nigh to him in prudence and behaviour as you can, and shew the world you have good natural parts; though you have not his parts or abilities, yet still you may act prudent and be a good countryman, and be thought of by those you associate with, and manage your own affairs with prudence, which will always make you be thought of—so give up every thought of my not being equally fond of you as I have been of your dr. beloved brother, who left this world universally beloved and esteemed by all ranks of people—and I hope this will be the case with you, if God spares you. I was uneasy at not hearing from you sooner—yet still we are happy to hear from you by last post, our communication with Dingwall being shut up with a great fall of snow. Your not thinking of marrying this young lady you allude to confirms your good sense to me, and I hope you'll always keep yourself a single man, and not engage yourself in the least with such by word or write, or any other way—it's hard saying what sort of a woman she might turn out in point of fortune or otherwise,—and if you live for any time, you may look for such, as a woman with seven or eight thousand is quite common to be had in several places, where the man shews he can support her—I mean, has a fortune of his own to challenge such. We are like to have a peace, and I think Britain can have it on their own terms; so, consequently, the militia will be reduced, so you'll remain as you are, till we see what will be done or March passes; and if the militia is kept up, you and I will think whether or not you'll abide by them any longer, as your mother and I wishes much to see you here or March passes, if the weather is good, and will obtain three months for leaf from your friend Colonel F. W. Grant, with

whom I dined three years ago in Inverness. We are all in this house as well as could be expected; we daily get up, but for a month we have an uncommon fall of snow; never had longer since my memory,—we have not crossed this hill for weeks past. Our provender is very scarce—almost done—and the harm not yet over. We got a small break this day. I hear frequently from Thom; he makes a good use of his present opportunity, and he is with a very good man, with whom he continues till June 1st, being then twelve months. I saw Lieutenant Macleod here at your brother's interment; you are much obliged to him; he gives you a great character; he lost his wife about a month ago; he went to join his regiment, and carried his eldest boy with him. I have no news but what you see in the papers. Highfield and Allangrange were the only gentlemen from the Low Country that attended at your brother's funeral. The banker and Ord was called. Ord could not attend, and the banker was at Edinburgh, otherwise would have been here. We had then a storm of snow. Friends of Kirktown all well, and all our neighbours around us, they are often coming to see us. Your friends at Inverness, through the country, are well. Your mother desires your kindest love to you, in which I join to our good friend Capt. Monro, may you and him in our sincere wish. I remain, my dear Kenneth, your affectionate father, to serve you,

(Signed) GEORGE MACKENZIE.

*P. S.*—Be sure to write me every second post. Your mother join me in offering you and Captain Monro the compls. of the season, and a good spring, attended with health and happiness.

The following passages from the re-revised condensation of the pursuer were also read:—

He was not only destitute of the ordinary acquirements for a person in his station, but was considered by all who knew him as a mere fool, destitute of such natural capacity as was necessary for the management of the ordinary affairs of life.

He conducted himself there, at Aberdeen, however, in so very silly a manner, and got into such low habits, proffering marriage to common prostitutes, that it was found absolutely necessary to bring him back to Dundonnell, where he remained for some time. He first obtained a commission in the Ross-shire, and afterwards in the Inverness-shire militia; but while in those regiments, he was not only incapable of comprehending or going through the ordinary military duties of his station, but in his whole conduct he continued to exhibit the utmost silliness; and he was regarded and treated by his brother officers, and all who knew him, as a mere fool. His mind also became weaker and weaker, by continued habits of low debauchery.

At Fort George he was inveigled into a marriage with the said Isabella Colina Roy. This marriage was not approved of by his mother, or indeed by any of his relations, who considered that a person so weak in mind ought not to marry.

He exhibited a state of mental incapacity both negatively and positively. He took no management of his affairs, wrote no letters, and read no letters addressed to him. These were always opened, read, and answered by his wife, by whom every thing was managed without consulting him. He engaged in no pursuit of any kind, and took no interest in the ordinary affairs of life. He spent the greater part of his time in the kitchen and servants' apartments, with his own servants, with whom he associated and held all such confidential communications as he was capable of making, and to whom he made all his complaints. His chief, and almost his sole employment, was in the feeding and rearing of poultry, for which he used occasionally to obtain grain by stealth. He usually kept upwards of two thousand cocks and hens; and his greatest delight was to have many of them about his person, perched on his head, or on his breast, in which plight he frequently received visitors.

He used to shed tears and take to bed when any of his favourite fowls died, and, in short, in his whole conduct, he exhibited the most drivelling and childish imbecility.

Mrs Mackenzie also shewed every attention to the pursuer.

Although Dundonnell was living in affluent circumstances, yet Roy and his sister, taking advantage of Dundonnell's weakness, impressed upon him a contrary belief, and kept him in a state of intimidation, by falsely holding out that messengers were in search of him, in order to apprehend him for debt.

The following excerpt from the summons, page 13, was likewise read:—

He was under the complete influence and control of the said Mrs Isabella Colina Roy or Mackenzie, his wife, who surrounded him with creatures of her own, and kept him in a state of such perfect thralldom, that he was incapable of resisting any measure which she thought proper to dictate to him, however contrary to his inclinations, even when such measure was within the limits of his capacity. That in keeping the said Kenneth Mackenzie in this state of subjection and thralldom, the said Isabella Colina Roy or Mackenzie was aided and directed by her brother, the defender, Robert Roy, a person towards whom the said Kenneth Mackenzie entertained the greatest dislike, and for whom he expressed the utmost apprehension and abhorrence. That the foresaid deeds, which had the effect of disinheriting the pursuer, the only brother of the deceased, and the representative of an ancient family, and of giving the benefit of the succession to the said Robert Roy, a total stranger to the blood of the deceased, were prepared by the instructions and under the directions of the said Robert Roy, acting in conjunction with his said sister, and without any instructions at all from the said Kenneth Mackenzie.

This closed the evidence for the defender.

#### The DEAN of FACULTY.

May it please your Lordships. Gentlemen of the jury. That you can have arrived at this stage of the case without some impression, and some inclination of opinion, is not in the nature of things, and would argue that you are deficient in that intelligence and conscientious attention which you have exhibited in the course of this case. But until you hear the reply of the pursuer, the case on which you are to deliberate is not fully before you: and you will remember that the defender himself has told you, and justly, that the reply of the pursuer is essentially necessary for the right understanding of the case which you are to try. I wish in the outset to tell you, that neither you, nor, I am persuaded, the Court, can yet know the irresistible strength of the pursuer's case; for, on the evidence and productions of the defender, there arises a view of this case so irresistibly clear, that I shall consider my own intellect as gone if I cannot carry it home with conviction to your minds—a view which you have not yet been called upon to consider, and which has not yet been presented to the Court. It is only when the case is closed, and when you are enlightened and aided by the directions of the Court—calculated and intended not to fetter and control, but to assist you—it is only then that you are in a situation to proceed fitly to discharge the most solemn and important duty that can devolve on man—to administer faithfully and righteously, justice between man and man.

There is much in this case of statements and misrepresentation that have been introduced by the defender, which I think foreign to its merits. You are told, as if that were to bolster up the case, that appearance is made here, not only for the defender

Mr Roy, but for the trustees who are defending the deed of Dundonnell, to whom it is said guilt must attach by your verdict—as if you were to be withheld and deterred from stamping your opinion on these infamous deeds by being told that the uncles and relatives of Roy were trustees acting under them. What have we to do with their notions or opinions more than with those of any other defenders in the case? You have been told also that, after all, this estate is not worth the contending for—and (after it has been in the management of Roy and the trustees for years,) that it is loaded with debt, and that there is an annual deficiency, and that the matter in dispute is not worth the contention. We take our risk. We are desirous to recover the estate of Dundonnell, knowing that in the day of reckoning we shall not fail to be benefited. The defender is struggling to retain it, and you may be assured that it is an object sufficiently important to both parties. Mr Roy, forsooth, so says *his* counsel, would be perfectly ready to surrender and give up the estate—he is willing to throw up the name and prospects of Mackenzie of Dundonnell, or any benefit that he could hope to get from it; but alas! for the unfortunate Roy, the trustees, we are told in the same breath, and by *their* counsel in his other character, cannot do it; the other defenders won't join in this notion; and so, when you are told of Roy's willingness to give up the estate on the one hand, on the other you are shown its absurdity by being told that it cannot be done. Roy is said to have at stake the interest of character. He has so. And you will see in the course of the examination of the evidence how he will come out, even on his own evidence, pure or tainted, from the history of the concoction of the deeds in question.

On some important points the Solicitor-General and I are agreed, or rather on some important principles; in regard to other still more important principles we widely differ. I admit that under the issue which you are to try I must satisfy you that these deeds are *not* the deeds of Dundonnell. I undertake that burden, and I come before you in that predicament. I admit that. It holds of every deed that appears to be regularly executed—even the deed of the most notorious lunatic that walks the streets—even of General Brown himself—every deed, I say, that appears to be regularly executed by any man who has not been cognosced, has this presumption in its favour, if so executed. Again, I admit, in the fullest terms, that every man in the possession of his property—and in possession of the mind which law and reason require for its disposal—has the most uncontrolled right to leave it to whomsoever he chooses: however ungenerous may be his act, however obnoxious to all the feelings of human nature, if he has the mind requisite to exercise his judgment, his right to dispose of his property as he pleases is unquestionable. All this I freely admit. But what do we gain by all these views that form the subject of so much declamation? Is not the question for you to try, whether the deceased was in the mind that enabled him to execute such deeds, and whether they are *not* the deeds of Mackenzie of Dundonnell? We are now not in the question of presumption, but in the trial of the fact.

Yes ; but under this issue there is another and a most serious and weighty question. You have not merely to try the case in regard to the capacity of Dundonnell to make a will—you have not to try the case in regard to his capacity to understand *certain* propositions, or to exercise his mind with reference to any simple matter that may be laid before him for this purpose ; but whether, taking the whole way the deeds were set about, this particular instrument—these settlements of his estate—these deeds which he was made to sign—whether *they* were understood and comprehended by him, and whether he had mind for the particular acts he founded. Not that I mean to say that it was necessary that he should understand the legal phraseology more than any other man, trusting as to what is matter of form, not matter of substance, to the respectability of the men of business whom he employs. But you will have to consider whether all that is here, which is matter of substance,—that which is the volition of the party, the act of mind,—namely, the destination and settlement of the property—whether all this was understood by this man ; and if you doubt of that—if he did not understand the thing done by *these* deeds, it is of no consequence to tell me that he was of a disposing mind. Very recent cases have occurred in the House of Lords where the judgment was given in favour of the pursuer in a similar action, wherein it was found by the jury that the testator was of sound and disposing mind, and also that he did *not know or comprehend* the nature and object of the *particular* deeds which he was made to execute. One of these cases is Russell against Watson. To the extent of the benefit given, to the extent of the object upon whom these benefits are to be conferred, to the extent of the powers given under these deeds, of the dependency of the one act on the other—of the rationality of the deed done, in short, in so far as the consequences of the act are concerned ; all these things you know it is essential that you should understand, before you yourselves can say that you comprehend any particular deed you are made to sign.

On what grounds, then, are you to measure the capacity ? There we differ as widely as parties can differ. The defender says you must prove Dundonnell a natural born, complete, slavering idiot, without a glimmering of reason or sense, incapable of expressing the ordinary feelings of human nature, except those likings and dislikings which seem to be the only measure, according to the opposite party, of the portion of intellect necessary to one of the most important acts of a man's life ; or you must prove, the defender says, that if there was great facility, that there was also great circumvention and imposition in the way in which the deeds were obtained, and that no degree of imbecility short of absolute idiocy, which was his counsel's continual expression, is sufficient of itself to destroy the will of a man's affairs. It was stated that it was enough if the man had likes and dislikes, and that no degree of *imbecility* in the ordinary sense of the term—no degree of facility and weakness short of idiocy was sufficient to destroy the deed without *fraud* or *imposition* being actually proved. That I shall be able to show the imposition and circumvention, from the defender's productions, as to the way the deed was obtained, I have



not the smallest doubt: but I demur to his doctrine that every man, removed in the slightest degree above the condition of the idiot that walks an object about the streets, is capable of disposing as he pleases of the property that is left to him—of sundering and destroying some of the dearest rights in human nature, and of creating the utmost misery and degradation, because, forsooth, he is removed but one degree above a common idiot! I cannot conceive anything more monstrous, more dangerous, more alarming to the interests of mankind, than such a doctrine as this; and I ask you, what safety is there for some of the best interests of human life, and most sacred claims of human affections, if you were to allow these views to overpower your common sense, and admit that a mind but one degree above idiocy is sufficient to enable a man to say, I will leave the estate and honours of the house of Hamilton to a man, a stranger to the blood, and a stranger to the name of that princely house? That is not the view which the law entertains,—that is not the language of common sense. I do not mean to trouble you with more than about two sentences in all on this branch of the subject, and only for the purpose of showing you the principles of law by which such matters are settled. It is a judgment delivered by Lord Tenterden in the House of Lords, upon the 16th March 1829, aided by the powerful mind of Lord Plunkett, in the case of Ball and Manning, where it is said,

“It is for your Lordships to say whether it is not contrary to common sense and sound reason to hold that such a degree of understanding as would enable a person to learn the letters of the alphabet when taught, and to read a paper when presented to him, which children of three years old are able to do, is to render him capable of executing a deed. Of late years the inquiry has always been in law, whether the person is of such sound mind and memory as to be capable of knowing the effect and consequences of his acts? That is the very question the learned judge in the outset mentioned to the jury as the question for their consideration—was he of sound mind or not? He is quite correct in telling them that it is not necessary he should be without any glimmering of reason; that would be to make him an idiot, which cannot be done here, either according to ancient or modern practice of the law.”

Observe how these words tally with the very words of a most intelligent medical witness whom we examined in this case—and whose expression as to Dundonnell's incapacity of judging of the consequences of his acts, was rediscrined by the Lord Advocate as the pedantry of his profession, and as an absurd test of the capacity to make a deed. It is the test of the Chief Justice of England—“Was he of sound mind or not, *capable of knowing the effect and consequences of his acts?*” the judge says; and still more so surely does this apply, if it turn out to your satisfaction that in the preparation of these deeds he was not left to act for himself. Then he goes on to say—“And that as one test of such incapacity, the jury were at liberty to consider whether he was capable of understanding what he did, by executing the deed in question, when its general purport was fully explained to him.” Surely that is a correct test of the ability of the party. Whether he is able to understand a particular paper presented to his mind, whatever it may be, is a test of his general competency and general

ability. But what is of more consequence, it is the best test in trying whether that particular paper was truly his act and deed.

Hence it was admitted by the defender that the rationality or irrationality of the deed done is a matter of the highest importance in such a case as the present, not abstracted indeed from the evidence of capacity; but it was admitted that the rationality or irrationality, taken in connection with the whole evidence of the case, is most material in the consideration of the question before you. It was stated that the *causes* of the feelings which lead to the acts done are wholly immaterial to the case; but how the rationality is to be judged without the causes or motives which are supposed to have affected the mind of the granter, and to have led an intelligent man to the acts done, is beyond my comprehension. The *causes* are most important, because they go to decide whether the feelings entertained were rational or not—whether he was capable of exercising that reflection and judgment which would show that he was actuated by a motive reasonable in itself, or indicating the exercise of rational intellect. The matter of preference, the likes or dislikes, a sort of affection for one person and aversion to another,—where are they so strong, except where reason, judgment, and every thing else is weak? Have you ever seen an idiot that had not the strongest dislikes and the strongest predilections?—who would not be found to say, “I hate such a person, and I like another; I will withhold what I have from this person, and give it to another; one laughs at me, the other coaxes me, is good to me, feeds me;”—the idiot may not be incapable of entertaining—of expressing such feelings. But that is not understanding the effect and consequences of his acts, which is necessary to give him that disposing mind, without which the free right of disposal of property would be a curse, if it were not so restrained by law

But there is another principle, and a principle of vital importance in judging of such a question as is now before you. The man must be left in the free right of disposing of his property. But there is an important jealousy of law and common sense entertained against the interference or agency of the parties interested in the deed; and a jealousy stronger than it is possible for my words to convey to you, but which your own feelings will enable you to understand, when that party who is *assisting* and *interested* in its preparation is a person of the *legal profession*:—I say so emphatically, because of the confidence which is placed in him. The opportunities of imposition to such a person are numberless and incalculable. The unlearned cannot defend themselves against his skill—the unwary are an easy prey from their trust in him, and have no protection against his wiles and contrivances. He sets about the matter with a view to the day of trial—his letters are prepared for the purpose of subsequent exhibition—he has the prospect of challenge before his eyes—and he has the means of preparing every thing with a view to subsequent investigation. The unlearned man is wholly in the hands of the cunning attorney, and the prospect and interest of others are fearfully at stake when his means and opportunities and powers of imposition are aided by his experience and knowledge; and it is impossible to figure the risk and danger

that would arise if you did not entertain the highest jealousy against an attorney who tries to get a settlement in his own favour when no one is present to interfere, and who selects the agent to prepare the deed, thereby disinheriting all the man's own relations, and leaving his property to others who are strangers to his blood, his country, his connexions, and friends. It is impossible for you to entertain that jealousy too strongly; and when such a person is present and privy to the whole transaction, and when no one can tell what passed, or give you a hint of the dialogues that took place, as in this case, between Dundonnell and the disinterested Roy, the law requires from the person supporting the deed undoubted, clear, conclusive evidence, not only of the man's natural capacity, but that in the preparation of his deeds he did know and understand what they are intended to effect. In the courts where these matters are well meditated, and every word of the judge well considered, it has been ably stated by the judge, Sir John Nicol, whom my learned friend quoted. "The cases thus show how extremely jealous the law is to protect the unwary against undue influence and control. . . Where that relation of confidence exists, and where the party frames the instrument for his own advantage and benefit, every presumption arises against the transaction. As in the case of an interested witness, it is not necessary to prove falsehood;—a court of law will not hear him at all. So, in the case of such an executor, it is necessary to prove fraud and circumvention—he must remove the suspicion by clear and satisfactory proof."

Again. "Now then commences the most important branch of the case—the origin of the act itself—the proof of which act (from the view already taken of the history) requires to be clear and direct. There are, indeed, some subsequent grounds of suspicion, which reflect back upon this part of the transaction, additional reasons for examining the evidence with vigilance, and for requiring strict proof.

"The court, under the circumstances already referred to, cannot accept opinions, and inferences, and conjectures. It must have direct testimony from witnesses above exception, speaking from undoubted recollection of facts; and it must have the facts themselves stated, so as to enable it to judge for itself, whether those facts show volition, and full understanding, and knowledge of the act done." But I like to quote far better the emphatic language and strong sense of Lord Braxfield, grappling with such a case as this, and see how he sets forth his views on such a subject.

"Had this deed been executed in the way that deeds commonly are, and in which they ought always to be executed, it would have been impregnable. But it is in proof, and even without any proof it must be obvious, that a man 85 or 90 years of age, although he may not be incapable of disposing, will certainly be more liable to imposition than one in the vigour of his days. I had occasion to observe, in Fyfe's case, which was lately decided, that I never like to see the person principally favoured, principally active in bringing about the deed; and in that case you reduced the deed chiefly upon that ground."

So also Lord President Campbell in the same case,—

"I am of opinion with Lord Henderland, that there was nothing wrong en-

the part of Mr Lindsay; and you I asked to say, whether I thought Mr Bell in a capacity to have made a will? I would answer, that he was; we have no evidence against it; and had all the circumstances necessary for enabling him to judge of this matter been brought before him, I would have sustained the deed. But I think with the Lord Justice Clerk, that, although there was neither fraud nor incapacity, he did not understand the effect of the deed."

Then, Gentlemen, I say to you in the outset that the primary and most important part of this case is the origin and history of this settlement, which cannot be disjoined from the other evidence in the case. In the first place, then, let us see what statement the defender has deliberately put on record as to the origin of this business. The Solicitor-General tells you, indeed, that you ought not to attach importance to such statements, which may have their rise in the misapprehension of counsel. I am sure you will not listen to such a subterfuge on the day of trial, in order to escape from a statement which could not have come but from the breast and lips of Roy himself. What statement then has he given of the origin and nature of this settlement? I entreat you to weigh with all solemnity his statements; the full import and meaning of which you could not have known in the opening of the case. "The defender's intercourse, in the meanwhile, with Dundonnell was neither frequent nor extensive. He scarcely knew him previous to his sister's marriage; and it was only in the course of a short visit in Autumn 1819, two years after, that they could be said to have become acquainted. Except upon this occasion, for a few days in each following autumn, and in spring 1822 and 1824, they never personally met.

"It was in the course of that first visit in 1819 that Dundonnell put into the defender's hand a written note of instructions, which he directed him to transmit to Mr Æneas Macbean, then his agent, containing the heads of a settlement of his entail in favour of the heirs of the marriage, then of the defender, and other heirs substitute, under burden of his wife's liferent, and certain legacies and provisions." Nothing could have been more unexpected to the defender than this communication. This is the question for you to try. The truth or the falsehood of this statement "he remonstrated at the time! but was told it was not a matter for his consideration; that Dundonnell had well reflected upon it, and that his decision was decisive to exclude his brother and his family, and to settle upon his sister's family sufficient provisions in money." And, again:—"It was in these circumstances that the defender, on the 19th day of February 1820, wrote a second letter to Dundonnell, urging him to recal his intentions with respect to his settlement, and not to visit upon the children of the pursuer, or of Dr Ross, the displeasure he may have felt against their parents. To this letter, which was received, no answer was returned; and Dundonnell, except once in the following autumn, slightly in conversation, never referred to the subject again." It was when he was present with Macandrew, at the preparation of the instructions in autumn 1820, that he states that Dundonnell, "from great aversion to address a stranger on the subject of his settlements, as to which he had made up his own mind without consulting any body, he had

power written to Mr Stuart." And then again he states, "Upon that occasion Mr Mackenzie resumed the subject of his settlement; and having made some alterations, particularly with respect to the legacies, he executed a regular minute of instructions, dated the 17th of August 1820; which minute, and a relative letter he delivered to Mr M'Andrew, desiring him to get back the former scroll, and to have the deeds immediately extended and executed, in terms of these last instructions. Mr Macandrew was again north, in December 1820 or January 1821, but he had not found leisure, in the meanwhile, to prepare the deeds; and in apology to Dundonnell, who expressed anxiety on the subject, he pleaded the multiplicity of his engagements, promising to extend them immediately on his return to Inverness, and to transmit them with a clerk, for the purpose of execution. Dundonnell expressed a desire to delay the execution of the deeds till Macandrew himself should come with them; but it was not till August 1821 that he had any opportunity of returning to that part of the country, when he brought with him the deeds under reduction, which, after being maturely considered by Dundonnell, were executed of the dates mentioned, namely, on the 27th and 28th of August 1821." "During all this period the defender had no communication whatever with Mr Macandrew on the subject of these deeds. He never saw the draft of the deeds—he never saw the deeds themselves during Dundonnell's life—he never even was informed that they were actually executed!!! I shall prove that Roy selected this Macandrew as the agent, and that Dundonnell never saw the drafts of the deeds."

I have put these statements before you at the very outset; for I do maintain that the case depends on the truth or falsehood of this detail of the origin of these statements. We can have no witnesses on this part of the case. There was none present to aid or assist Dundonnell. But Roy has deliberately detailed what passed and occurred. If that detail is palpably and shamefully false—full of hypocrisy and deception, and contradicted by all the evidence in the case—then you enter upon the inquiry with this overwhelming fact, that the defender has attempted to clear himself by deliberate and most premeditated falsehood.

Now, let us consider the nature of the statement he has thus given of the origin of deeds. I must say that the ingenuity of the Lord Advocate had rather a ludicrous effect, when exercised, setting forth in fancied dialogue to one witness what might have passed, and what might not have passed at the time. With a view to ascertain what explanations from a disinterested and upright man of business might have enabled Dundonnell to understand the note of instructions which Roy has produced, as evidence of the deeds being Dundonnell's. For instance, "If I said will you prefer your brother? No; I do not choose that. Will you prefer your sister or her family? No; and so on, going over the paper bit by bit." Is not this perfectly ludicrous, when, in this case, Roy tells you that Dundonnell put the note of instructions, drawn up as you see it, into his hand? And the question is not, whether he could be made to understand it bit by bit, but in truth, and justice, and ho-

nessy is, did he write or originate that paper of instructions, and was he capable of doing so. In the first place, Roy tells you that the note of instructions was put into his hands—that Dundonnell had resolved upon the subject—that Roy remonstrated, but Dundonnell's resolution was taken, and decisive; and all these explanations and dialogues, by which Dundonnell was to be made to understand his note of instructions, are utterly unnecessary, and at variance with Roy's case. Mrs Mackenzie! Is she the person that was to put together the unconnected ideas of her husband? What has she stated in the same invaluable document which I have referred to—in the defences? The statement for her is put on record, that she knew nothing of his settlements or their tenor, and that she was not aware that they were executed at all. "The only intimation she had of it was in spring 1824, when, in the course of arranging some matters, with the intention of their going to London, Dundonnell showed her a sealed packet, which he said contained his will, but gave no further explanation." Thus Roy and all say the instructions were Dundonnell's, and the settlement his act and will. Do you then believe that the written note of instructions was prepared by Dundonnell and given to Roy? If you cannot get over that,—if you are not morally convinced that he did understand and frame and compose that paper—there was fraud, there was falsehood, and there was iniquity in the first concoction of the business. The statement is, that Roy knew nothing of the deeds at all, and that Mrs Mackenzie deprecated the notion in 1820 that any settlement should be made excluding the heir, and they cannot shake themselves clear of these deliberate statements.

Now for the note of instruction. It is said to be Dundonnell's, put by him into Roy's hands; it is said to be his own composition—that it is written by him—and that it bears his signature. I risk the case on this. Compare that note of instruction with all the holograph documents of Dundonnell produced, and from that inspection, you will see the *difference*, not only in point of capacity, but in point of handwriting, from any genuine and unquestioned paper of his, and I am persuaded that you will arrive at the conclusion at which I have arrived, that Dundonnell's pen never could have written that paper. Compare every line and letter of it; compare the formation of every letter of it; look at it carefully and minutely; and although, at first, it is a careful imitation, you will see at the last line how the *current hand of the lady gradually glides in at the end of it*, and how different that is from the beginning. Test it by this—go over all the writings said to be Dundonnell's genuine composition—try the genuineness of this note of instructions by a comparison alike of his style and his handwriting—and if you cannot get over this first stage of the business, then I feel there is an end of the case, and my victory is gained. What says Miss Gillanders? She tells us that Mrs Mackenzie could write so like Dundonnell that no one could know the difference. What says Mr Mackenzie of Keppoch? He received a receipt, signed in Dundonnell's name, which he rejected, because he knew that Dundonnell *could not have signed it*, not being then in the low country. What says Mr Robertson of

Polchoir when the lady said that certain letters were written to him by Dundonnell? "No," says he, "they were not written by Dundonnell," and a smile was the only answer which he received. With these indications accidentally coming out of the lady's powers of writing, and with her habit of writing for the lazy laird, you will be prepared to try and test it. Do you steadily compare that paper with the writings of Dundonnell, and in particular look to the handwriting of that memorable sentence said to have come from the pen of this excellent specimen of an intelligent country gentleman, "I shall carefully revise it!" Look at that part of the handwriting, compare it and satisfy yourselves, if you can, that the paper was either written or prepared by him.

The note of instructions was put into the hands of our witnesses, and we put the question, "Was Dundonnell capable of understanding that paper?" Did the opposite party venture to ask such a question on this subject of any one of the witnesses whom they examined? Did they venture so to test the opinion of their witnesses as to Dundonnell's capacity? It was, indeed, shown to one of the defender's witnesses, who said that he could not answer for the note now shown, and that he had never seen it before, and he was sent out of the box as quickly as possible. Not to one witness did they put the question. It is said that Dundonnell had reflected on this matter before he gave the paper to Roy, and that remonstrance was unnecessary, as his mind was made up. Roy does not pretend to say, in his defence,—My learned friend, the Solicitor-General, did not say, that Roy went through the process of explaining the note of instructions. Roy and the Solicitor-General equally repudiate the ingenious defence of the Lord Advocate, who exhausted his powers of expression, and puzzled the witnesses by carrying them through long imaginary dialogues as to the meaning of the different parts of this paper, which he supposed had passed between Dundonnell and some unknown and unheard of disinterested and honest man of business with whom Dundonnell consulted, and in whom he relied. Such is not the statement of Roy. He says that Dundonnell was capable of understanding it—that he was a man of bright and brilliant intellect, looked up to by the whole country—capable of every thing—capable, as Macandrew says, of *revising the deeds*, (this smells a little of the shop,) and of altering them in a way that some men of business could not have done—with such precision, accuracy, and skill—with the lines altered in such a way as will excite your admiration, wonder, and surprise. What are the terms of the picture drawn of Dundonnell? They have described Dundonnell in choice figurative expressions, characterised by the powerful expression of the Solicitor-General, and the classical elegance of my friend Mr Rutherford.

You heard these descriptions read. Roy says, therefore, that Dundonnell composed this paper unaided and unassisted. That is his case. He must stand or fall on that. You have heard the evidence. You will examine that paper and his letters, and you will judge for yourselves.

There is another paper which has disappeared, and which has

not been found in his repositories, and that is a very important document. Every trivial note and scrap that has been written has been anxiously preserved, well docketed on the back in the handwriting of the lady, and all found at the opening of the repositories; but the original of the *minutes as to the legacies*, has not been recovered. But, says the defender, he put into my hands a certain note of instructions, and of *certain legacies and provisions*. Roy does not pretend to say that he assisted him in the preparation of that note of legacies; if he did, what will you think of that preparation? It is supposed by the Lord Advocate, that all that was necessary to make a man understand it, was previously explained by Robert Roy, and that there was nothing more to be done but to put it into the language of the law. That never will do; for if these two papers were manufactured by the party intrusted, you will not take them to be the actual deeds of the man. Besides, Roy regrets that explanation. His case is, Dundonnell prepared and gave me fully drawn up this paper as to the legacies, of which we have Roy's copy. I need not read over the expressions of the legacies to you, which the medical gentleman, whom we have examined, told you he could neither understand nor originate, and far less reflect on their import and consequence.

But there are some other things to notice, and which I beg that you will carry along with you. Dundonnell, it is said, *verbally* added (very odd that this should not have also been put into the paper of legacies when he was to send the instructions to the agent in Edinburgh), that Campbell was to have an annuity of L.20, if he continued in his service at his death. Is that in the *note of instructions of 1820 prepared by Macandrew*? We shall see. The defender says that this servant he could not do without; but Dundonnell himself says, in one letter, that he could do well without him; and that he did not want him. Where, I ask, are the letters in which they say there are expressions of kindness towards Campbell? I will give my learned friends liberty to read them, to produce one of them if they can. There is not, I say, one word expressive of kindness to Campbell in any one of the letters which he had written.

Thus the whole of these pretended instructions from Dundonnell rest entirely on the integrity of Roy. But if you are satisfied that his statements are utterly false and unworthy of credit, and if I raise reasonable doubts as to the incapacity of Dundonnell, it will not do to place reliance on what passed between Roy and Dundonnell, and to take the settlements as the deeds of the latter, because he had the assistance, and aid, and advice, and explanations of Robert Roy. You will not, I think, choose to trust Dundonnell's capacity and mind, into the hands and keeping of Roy.

Let us see the proofs of the integrity of Roy. On the 5th September 1819 he writes to Mr Macbean. Now Roy tells in the record in this case, that he earnestly remonstrated with Dundonnell when he first received the announcement of the latter's "unexpected communication." Very natural that he should; if he had been acting honestly, and if Dundonnell truly originated these settlements. But when does the statement that he had remonstra-



ted first appear in the correspondence? When he first writes to Macbean, on the 5th September 1819? When he is telling him in that first letter how Dundonnell had given him the paper of instructions, does he then add, as part of the facts which had occurred, that he had remonstrated as to such a settlement? No, gentlemen. Not a word about these pretended remonstrances in the first letter. There is no mention of them until after he found he had mistaken the man with whom he was dealing, for Mr Macbean spurned to execute these deeds. In this letter of 5th September 1819, does he say that he remonstrated with Kenneth? Not one word. "The subject about which he expresses most anxiety is his settlements. I annex copy of the letter of instructions written out by himself. (Mark that.) I shall, in case of accidents, keep the principal till I have an opportunity of delivering it to you personally. I also annex a note of the legacies, the original of which I likewise hold. He desires that the scroll may be ready for him by the time I go back there, which you know must be in twelve days hence at furthest. But it is quite indispensable that you too should make arrangements for going there from Inverness. So then the assertion that Dundonnell himself wrote out and composed this paper, and gave it in the state we have it to Roy, is not the inadvertent statement of council. It is the assertion to Macbean at the moment, and the subterfuge by which, at the day of trial, he would attempt to get out of that assertion, can have no weight whatever with your minds. Then he goes on to say, "I wish that his letter may sufficiently explain his intentions. You will observe that in it I am named after the heirs of his marriage, reserving power to alter. Now, although he is fully determined on excluding Thomas altogether," (not a word about the children of Thomas), "yet it is only for the present, and from personal and temporary reasons, that he passes by Dr Ross's children. One of them, I am confident, will ultimately be his heir; and you will require to keep this in view in directing the clauses of entail against the heirs afterwards to be named, and also in making the clause reserving power to alter, as to the heritage, as ample as possible." This is Roy's account of it. This stranger to Dundonnell—this irresistible, winning, fascinating, stranger, suddenly caught his fancy, and succeeded in getting the destination of the estate. This was the surprising thing no doubt to Mr Macbean—this is the reason why he did not choose to complete the settlement. It was only when Roy was stopt by the answer of Mr Macbean in his rash dreams of success, that he began to think how others might view the project—that he found it necessary to proceed, by endeavouring to preserve for the day of trial evidence of the remonstrances he pretended to address to Dundonnell. All the notice he takes of the terms of the settlement to Mr Macbean, is, that one of Dr Ross's children will ultimately be his heir. But Mr Macbean, as you know by his letter, would have nothing to do with the deed:—Take it on what motive you choose; whether he thought Dundonnell would be the better of a mentor, which you find he thought would be proper for him when in France; or that he did not choose to be

the framer of a deed in favour of his own apprentice ; whatever was the motive, Macbean shewed Roy that he did not choose to be instrumental in framing such a deed. But Macbean does that which shows real evidence of the way in which you are to appreciate Dundonnell—this well-educated man, this expounder of the sacred Scriptures ! Dundonnell, forsooth, writes these instructions, and you are to believe that Macbean swallowed them at once as *his actual directions*. And what does Macbean do?—Frame the deeds in terms of these directions?—the instructions of an intelligent strong minded man ? No such thing. Macbean made another deed. Nay, as if to mark how little he regarded any thing craving to be the instructions of this client, you will remember Macbean would not admit the Solicitor-General to put the question to him,—“ Did you frame these scrolls in consequence of these instructions ? ” “ No ; but in consequence of a communication I made a different settlement, and I sent the settlement which I wished to recommend.” He sends the deeds preferring Thomas’s heirs, and Dr Ross’s heirs, without bringing in that wonderful insinuating person—that object of the partiality of Dundonnell—Mr Robert Roy ! Is not this, then, gentlemen, real evidence of the way this man was treated and viewed by all who came in contact with him. Do you think an agent would so treat his client, a strong minded, self-willed resolute man—whose actual written directions, elaborately and technically formed, he believed that he had received, to substitute the deed he recommended, for the one the client directed ? Impossible. But this gives us important and convincing real evidence of the light and estimation he was truly regarded in at the time, and shows how his intellect and capacity were received or respected. Is not this also the very way in which Macbean, acting as he says, partly for the lady, dealt with him as to his manner of settlement ; for you have what is said to be written instructions from Dundonnell, to settle L.400 a year upon her as jointure ; and the deed sent north by Macbean, per favour of Robert Roy, for the wedding day, contains the celebrated settlement of L.500 a year on her, during her husband’s life.

Then comes the *work of preparation for trial* in those cunning, hypocritical letters, devised with a view to the day of trial, and carefully preserved, in order to be appealed to as proof of Ross’s disinterested and eloquent remonstrances. There is a letter from Roy on the 12th September, which has already been quoted, in which he says that he is looking most anxiously for a letter from Mr Macbean on the subject, and he intimates the day on which he is to pass through Dingwall. Then comes Mr Macbean’s letter to Mr Roy, stating that neither Thomas’s nor Dr Ross’s children should be overlooked, &c., (as formerly quoted) ; and on the 16th September he sends a copy of that letter to Dundonnell, and states that the *reasons* which induced him to recommend an alteration in the instructions had been mentioned in his letter to Mr Roy of the 13th. The *reasons* ! Is there a *single reason* given in that letter to Mr Roy ? There is no reason ; there is nothing, “ except that I think that they *should not* be excluded.” I ! The agent !! This

is the summary way in which he treats his client Dundonnell at the time. But Roy, who, in the confidence, the rashness of youth, and the exuberant overflowing cupidity with which this matter was gone about, had not fully estimated either the opinions of others, or the character of Mr Macbean, then thinks it necessary, *for the first time, to write a remonstrance*, and on the 21st September 1819, he, *for the first time, states* that he *had* remonstrated with Dundonnell. Is it not inconsistent with the original statement in the letter of the 5th September, in which not a word is said about it, and in which he gives it as the sole act of Dundonnell? On the 21st, he tells Mr Macbean he is going that day to Dundonnell; and would he not have an opportunity to communicate with the laird when he went there, without troubling himself with writing a remonstrance? But it was desirable to impress Mr Macbean with the notion that he was acting on his suggestions, who told you that he *had not a doubt that what he warned the party to do would be fully attended to*. But Mr Roy, as I told you, thinks it necessary to impress Mr Macbean with the purity of his motives; and he addresses a letter to Dundonnell on the very day he was going there, of which he sent Mr Macbean a copy. Wonderful and astonishing proceeding! He is going to travel to Dundonnell that very day, and the post is merely a foot-runner from Dingwall to Dundonnell once a-week. On the very day he leaves Fort-George he sends an elaborate, fine feeling, well-turned letter of remonstrance to Dundonnell, and we prove him by his letters to be in Dingwall on the day on which it arrives there; and we have proved that this letter is taken out of the Post-office, and carried by a *friend* to Dundonnell, which occasionally happened; and you will judge whether Roy carried it there or not. Has not the defender's evidence proved it to you, that so desirous was he to prepare matters for the day of trial, that he causes Macandrew, in 1820, to ask for and preserve this letter of remonstrance which he had thus addressed to Dundonnell. Macandrew says that Dundonnell, at Roy's desire, asked it from "Isabella," and she produced it from her repositories, and it was carefully sealed up. For what purpose? For no other purpose than the same for which Manford desired Fraser to make his memorandum, and for that purpose for which the entry was made in his diary, part of which only the witness wished to give. (The Dean read the letter of 21st September, and commented on it.)

Again, Roy says in his Defences, that *no answer was returned* to his remonstrance, in order to create the impression that Dundonnell was so bent on the exclusion of his relations, that he would not deign to notice Mr Roy's remonstrance. Disgusting and base hypocrisy! He went to Dundonnell—we prove him to be there; he says he is to be in Dingwall upon the 22d, the day the letter passed through; and he puts in his defences that no answer was returned to this letter of remonstrance, to make you believe that Dundonnell treated it with contempt—that he had made up his mind upon the subject—and that he had never deigned to answer this elaborate epistle, which, if it ever was put into the hands of the poor ignorant Dundonnell, was at the very time when we have proved (what he little thought could be thus traced) *that he was in the house with Dundonnell*.

The Solicitor-General expressed indignation at our imputing to Roy, the purpose of preparing and preserving evidence of his own purity;—contrivance he justly said which a man acting honestly would not dream of. But the facts prove this contrivance and anxious preparation, and Macandrew's evidence demonstrates and detects it: For he says that Mrs Mackenzie had the letter of remonstrances, and that Roy at the time desired that Macandrew should preserve them, that he might be prepared against the day of trial, *which has come*. So it is, that cunning and overdone acting commonly fails! So it is, that what is set about with falsehood and deceit is detected on the day of open investigation, and that all these flimsy veils, which were worked and weaved and put together to cover the real character of the transaction, are torn asunder by the force of jury trial!

What is the next stage in these proceedings? Roy deliberately states on Record, that from the first to the last, he never communicated with Macandrew on the subject of these deeds, and Macandrew (of whom more before I have done with him) to aid his friend, this Macandrew positively swears to you that he never remembered Roy speaking to him, or communicating with him, on the subject of these deeds. He said that Macbean did. Macbean! who said he never heard more of the matter after his own letters to Dundonnell and to Roy. Wonderful and astonishing, that they should not have attempted to confirm that circumstance by the testimony of Macbean! I beg you to observe, what we have recovered *only recently*, a letter from Roy to Macandrew. Remember what I told you of the jealousy with which the law looks at the interference of an interested party, more especially if he be of the profession of the law. The letter is dated East Crag, 1st October 1819, of which the following is an extract:—

“ I have also written Dundonnell. *I have told him that I had spoken to you on the subject of his settlements, and that I wished a letter of mine to him should be shown you. I have begged of him to consult with you, and it will be most satisfactory to me that he does so.* I am not sure that I explicitly mentioned that an order for £50, in favour of Urquhart, will perhaps be given on you. I trust you will have funds; but really I don't think you should pay it till he is fairly off. That was the condition on which it was promised. Dundonnell will show you his reference to Mr Murray, and his resignation. I beg to offer many apologies for so unceremoniously deserting your hospitable board yesterday. Sincerely yours, ROBERT ROY. P. S. Will it not be necessary that Dundonnell gives a mandate to some person to act for him at the freeholders' meeting? The parcel with the titles is unsealed.”

What think ye now, Gentlemen, of Roy and Macandrew. Roy never spoke to Macandrew! “ I do not remember that he ever spoke to me on the subject of the deeds”—Swears Macandrew! And here is written proof that Roy had selected Macandrew as the very agent to whom he trusted the furtherance of the settlements.

Selected Macandrew!—Aye—But he took care first to *secure and fee* him for his work.

On the 2d October, it appears from a letter of Mr Macbean at Inverness, that Roy and he had appointed Macandrew factor to Dundonnell, with a salary of £35 a year. Roy got Macbean to accede to the pro-

posal, and from that letter it appears that poor Kenneth had never previously heard of such an arrangement. Macbean writes to Kenneth, saying it had been the spontaneous act of Roy and himself, and Kenneth for the first time is told that he was to be saddled with him. This is the man who hated lawyers—who did not like to pay the stamp because he hated lawyers. He is saddled with a factor—this man to whom I thought the notion of the profession was a sort of abhorrence, and who was capable to transact his whole business. This is the way he is treated. Here again you have real evidence of the light his own agent viewed him in. Mr Macbean writes, that he thought it necessary to inform him what had been done. I think it was. But can you now not fully appreciate the fact that Macandrew is selected by Roy as factor on the estate, with a salary of £35 a-year. The terms of the factory are peculiar.—Most peculiar and extraordinary. This factory is equal to a cognition, or interdiction of the unhappy man. You heard them read. He is deprived of even the semblance of the power of management. It appears this factory was fully acted upon. Dundonnell was not even left to collect his rents in this remote and distant part of the Highlands, without a factor or clerk being sent to assist him. And yet, to render the farce more absurd, you are now gravely called upon to believe, that though the factor sat by, Dundonnell was fully up to the business, was most acute and active at such settlements, and really did the whole business, which the factor or his clerk, regularly travelled 60 or 70 miles merely to witness. Marvellous inconsistency! But this factory, and the way it was got up and intimated—Is not that another proof of the manner in which he was treated and played upon by these people.

The next stage of the business which we come to is Mr Macandrew. He goes to Dundonnell within three weeks of the time he had been appointed factor. I mean to grapple with the case, on the ground of the perjury of that man, and I do not mean to disguise it. He was selected by Roy, and Roy had communicated with him before. They tell you that Macandrew had no interest in it. Has it not occurred in every case of the sort, where fraud and circumvention are brought home conclusively against the agent—that originally the latter appears to have had, or is proved to have had no sufficient interest, perhaps, at first to account for positive fraud or subsequent perjury—that he embarked in the business merely out of good nature, and that he got involved in it by degrees. But Macandrew has now at stake the same interest as Roy has. He has at stake the interest of *character*—He has all to lose. He must satisfy you of the part he acted—He must clear himself. What opinion he may have had originally of Dundonnell's capacity, is not the point. He is now the agent who carried through, under Roy, these deeds. If not the deeds of Dundonnell, he is ruined and dishonoured for ever. This, then, is the interest of Macandrew. He is too deep in the business now to draw back. He must swear himself clear or falls with Roy. You already have a specimen of how he begins. I say to you, that unless you can believe every word Macandrew has sworn to, there is falsehood in

the case. Before I am done with him, I am persuaded that you will not believe one single word of that man's testimony.

We come now to Mr Macbean's scrolls. Mr Macbean prepared scrolls of entail, and Dundonnell, *Macandrew says*, made alterations on them *in his presence*. In the first place, look to the original document, and compare the hand-writing of the alterations in these scrolls with other writings of Kenneth's in the year 1819, and see if there is any thing in these scrolls more than a most awkward clumsy imitation of Dundonnell's hand-writing. Then consider what the alterations are. Look at them yourselves. I speak to any of you who may be most accustomed to and experienced in business. Set yourselves down with the scrolls of this entail, and I ask you to try if you could make those alterations that Dundonnell is said to have done here. This is a technical deed—not a common note of instructions; and it is *altered* with the *utmost skill*, so as to be *adapted in style to the new purposes* he had in view. It is the *elaborate composition of an experienced conveyancer*, that *Kenneth undertakes to alter and convert into a different deed of settlement*. Could any of you do it? Macandrew himself was not able to do it, and he had to get a new scroll made out; and yet with the experience and accuracy of a man the most expert in the juridical style book, poor Kenneth sat down and adapted this deed to his new object and purpose! He sits down with the precision of a man of business, and strikes out all the technical expressions, putting his signature opposite his alterations, and stops at the word "Robert Roy," without the slightest inaccuracy, even of a single letter! My belief is, that the poor man, if he ever saw these scrolls, or was induced to write any thing at the desire of others, believed that he was making Roy merely a trustee. *It requires to read the altered scroll most critically to see that he is not made a TRUSTEE. Look at it with this view.* But Macandrew says, *that he saw these alterations added by Kenneth*, and of this we shall have something to say afterwards. Give me your attention in going over Macbean's scrolls, as they are supposed to have been altered by Dundonnell; and the first thing that strikes me as suspicious is a great number of corrections, wholly verbal and critical and useless, as if to amend the style or improve the grammar of these scrolls; "shall" is converted into "should." The words "in future" and similar words, are introduced without any other object than as just to appear to leave traces of Dundonnell's hand-writing. Then, in reference to the description of the lands, which are said to be *before* described, Dundonnell is made to delete the word *before*, and put in *therein and after specified*,—referring to a narrative of the contract of marriage before-mentioned—a degree of precision which it is ludicrous to ascribe to him. Again, in referring to the succession of the eldest heir-female throughout the whole course of succession, Dundonnell is made to introduce the words "either above or after specified," a degree of accuracy which might have escaped many of the most critical men of business. Then, as I hinted, in coming to mention that the trustees were to hold "in trust for the use and behoof of," there followed the heirs of the body of Thomas, whom Macbean had put in, then

Mrs Ross and her children, whom failing, to Robert Roy ; the precise and accurate Kenneth is made to score out all the words after " for the use and behoof of, " including, with unerring skill, the particle " to, " so as to make it read, the *use and behoof of Robert Roy* ; and where this deletion occurs and ends, there appears the initials " K. M'K. " Again, at a subsequent part of the deed, in declaring the trust to be under the burden of the liferent to his wife, he is made to add, " and of L.200 to the heir. " Now, gentlemen, take these scrolls yourselves,—try if you could have *studied and understood so thoroughly the structure and style of the deeds, and could have altered them as skilfully as Dundonnell.* Next, I put it to you as matter of credibility, whether a country gentleman, wishing the scroll altered according to *directions, would have attempted to do that himself,* even as to the technical parts of style, or would have given directions for that purpose, especially when he had Mr Macandrew beside him to receive his directions and to make the alterations. Thus it is that cunning detects itself. But further, compare attentively the handwriting of these pretended alterations by Kenneth, with all the letters on the table written by him about that period, and you will see it is more like the awkward hand of Kenneth as a boy, than the smaller hand of his advanced years. I urge this point upon you with the utmost earnestness, and with perfect confidence. The imitation is too clumsy to deceive you, and not even the direct testimony of Macandrew will overcome the conviction which I am sure the comparison I am now urging will produce on your minds.

But the scroll of the trust-deed, gentlemen, exhibits alterations even more useful for the object I have in view, and which, fortunately, exhibits one marking, which, as I have just observed, detects in the most irresistible manner the perjury of Macandrew. The scroll of the trust as to the moveables, first introduces among the trustees, as if in Kenneth's hand-writing, " Rob. Roy, my brother-in-law, unless he is heir ; " but that exception, " unless he is heir, " is oddly enough struck out in different ink. Then, in the middle of the deed, in making over every thing to the trustees, Kenneth is made to " except the Mains and house which my wife is to have while my widow. " Again, in giving the majority power to act, he is made to add, " with Robert, *unless he is heir,* " which is *not struck out.* Opposite to a provision of L.1000 to the heir of Thomas, Kenneth is made to add exactly in the very terms in which a man of business would make such a notandum, " this to fall altogether if my sister or her children succeed ; " yet what that means, I defy any one to explain. Then there is a marginal addition " to Alex. Campbell, if in my service at my death, L.20 a-year, K. M'K. " Then there is a most extraordinary addition for a country gentleman. It is declared, in a *very technical* clause, that the trust " is to be *subsist* until debts, legacies, &c. are paid, and the purposes of this trust fully accomplished. " And in the middle of this *clause* the skilful, calculating, reflecting experienced, Kenneth, is made to introduce the words " *or the creditors are satisfied with other security,* K. M'K. ; "!! a proviso which might have occurred to an experienced man of busi-

ness as a natural termination of the trust, but which it is rather too much to ascribe to the individual whose history and absurdities you have had so fully exhibited.

But, gentlemen, attend to what I am now going to mention. In the general conveyance of moveable property to the trustees, Macbean had included, *inter alia*, "household furniture, plate, books, plenishing, crop, stocking, farming utensils, and hail out-sight and insight plenishings." These particular words Kenneth is made to strike out with the utmost accuracy, and to write opposite "This to my wife, the heir to get one-half at a valuation, according to my letter, K. M'K." "According to my letter"!! You will see how the fabrication, as well as Macandrew's perjury are detected by one of those oversights which seem designed to baffle the wiles of cunning, and to detect villany and falsehood. Macandrew swears that these alterations were made in autumn 1819, in his presence, or produced by the laird at that time, with some of the alterations, and the others made in his presence. He swears to the time positively, autumn 1819. Macandrew takes the scrolls away with him. He sends them to Stewart, and he gets them back after the instructions of August 1820 are written. It is clear that the laird never saw them again, and these alterations are sworn by Macandrew to have been all made by Dundonnell when the latter gave him the scrolls in October 1819, and seem to have been written in his presence. Now, gentlemen, mark what I have to state. "The heir to get one-half at a valuation, ACCORDING TO MY LETTER." Now, the letter of instructions in 1819, does not contain any such provision, or a single word or hint to that effect. It is the letter of instructions in August 1820 which contains this stipulation in favour of the heir. Can you doubt, now, of the perjury of Macandrew, or believe that Kenneth ever wrote one word of these alterations which Macandrew swears were adhibited in the scrolls in October 1819, when no such letter containing any such provision as that referred to was in existence. Does not this detect the fabrication most completely? Is it not clear, that the markings had been put down in order to be passed off as Kenneth's, while Macandrew was not sufficiently up to the details to know at what time he should swear they were made, or had not been sufficiently tutored to this point? Gentlemen, I put this to you as complete and irresistible detection. Nothing can be clearer. Macandrew has fixed the time beyond all dispute. The alterations on the scrolls were made at the first interview he had with Dundonnell on the subject, and before the scrolls were sent to Stuart. That is indisputably Macandrew's positive, distinct, unequivocal assertion. And now it appears that one of these alterations refers to a paper which was not in existence till August 1820—could not have been made before the date of the letter of August 1820—and, beyond all doubt, could not have been made by Kenneth at all; for Macbean's scrolls he parted with in October 1819, with this very alteration upon it, as Macandrew says, and never saw these scrolls again—not even when



the deeds were executed in 1821. The scrolls which he is *then* said to have seen, were the clean scrolls prepared by Macandrew of the deeds which were to be extended, and not Macbean's scrolls.

Now, examine what I have now urged upon you with the utmost jealousy—scrutinize it thoroughly—and the more you do so the more will conviction be brought home to your minds, that this is a conclusive and irresistible detection of fabrication and perjury. I must not leave this part of the case without calling your attention to other parts of Macandrew's testimony. Macandrew, you will observe from your notes, makes out Dundonnell to be an excellent man of business—most accurate in the settlements with his tenants—of good sense, and full capacity to manage his own affairs—conducted himself with sense and discretion at Seabank, where you have heard the account of his extravagance, folly, and absurdities—understood all his litigations, &c. Yet this is the very man who never would trust Dundonnell to collect any of his rents, or settle with any of his tenants, without his own aid or that of his clerk, and who never left him even to write a receipt, and hardly intrusted him even to sign one.

Macandrew, however, thinks it necessary to tell you, that *he did not wish to have the charge of the execution of the deeds, and recommended Stuart. Very strange this. Dundonnell is a man of sense—known firmness of character—universally acknowledged capacity for business—with just cause of offence against his brother, who had, to the conviction of all the country, properly entailed disinherison on himself—and yet no man of business likes to have any thing to do with the matter. Why not?—if all had been as Roy says Macandrew cannot give an intelligible reason for declining the honour and employment of making the laird's settlements—not a common step on the part of a country writer. Macandrew says, I told him he had better take a gentleman in Edinburgh, as Macbean advises. Now M'Bean gives no such advice. This is clearly a mere pretext on Macandrew's part, to try to gain credit by not being forward in engaging in the business. But after the letter from Roy to him in October, before Macandrew went to Dundonnell in autumn 1819, this pretext is too gross hypocrisy—for Roy had been corresponding with him on the very subject of the deeds, and Macandrew could have shewn no repugnance to the matter, else he would not have been made factor, or sent to Dundonnell. See what account Macandrew gives you of his client, and their interview. He says Dundonnell agreed to send the scrolls to Stuart, "and asked witness for the scroll of a letter, which it might be proper to write to Stuart." Indeed! Is this the strong-minded sensible man—*composing the technical instructions for his own deeds—revising and altering Macbean's scrolls with so much skill to adapt them to other purposes, and yet asking the scroll of a letter to desire an agent to extend the scrolls so altered? Is it not strange that Roy also thought it necessary to put before him, in the letter of 19th February 1820, the very words he wished him to copy? Is not this inadvertent admission by Macandrew real evidence of the man's weakness? But then, says Macandrew, "I**

suggested one of Mrs Ross's family as the first heir,"—very strange, by the way, if the client was so obstinate and resolute, and after he had told the witness that he was much offended with Macbean for similar suggestions!—you will judge of Macandrew's credibility as to this. Then the Laird answered, "He thought it better to give them £6000 among them, than to give one the property." Conceive the absurdity of this, and see how these made up stories prove themselves to be false. Could he not have given the £6000 to the younger children of Mr Ross, and the estate to the eldest, or to one of them. Was it better for them to leave that estate to a stranger? Why, if Dundonnell had said this, he was uttering nonsense, that shewed he did not know the consequences of his acts. Then the witness gave us a beautiful story of Kenneth turning his wife out of the room, to prevent her interfering in his business, which contrasts finely with the picture you have of all the business with Macandrew being done wholly by correspondence with the lady; and Macandrew then gives us a pathetic exclamation from the lady, that she hoped to God he would not exclude his own relations. Generous sympathy! How unfortunate that her influence was lost, from the resolute character and strong hatreds of her husband. Then Macandrew tells us another very singular story. Roy, you will remember, makes out the instructions in August, 1819, to have been fully considered; and Dundonnell's *resolution fixed, before* he gave the paper to Roy, or spoke on the subject. Remonstrance was vain. Then in October or November 1819, Macandrew finds him equally obstinate and dogged. The scrolls are sent to Stuart. But he never writes to desire Stuart to extend them; and Macandrew tells us that in December of that year, when he went there, he found that Kenneth *had not made up his mind*. Very singular this, after all that Roy tells us of his rooted and fixed resolution. Then Macandrew gives us the details of the scene in August 1820, when Roy is present and assists at the preparation of the instructions—this Roy who dared to put on record that he never communicated with Macandrew on the subject—and Macandrew makes Kenneth desire Mrs Mackenzie to bring out Roy's letters, which are then put up and given to Macandrew to preserve as proofs of Roy's great integrity, urgent remonstrances and uniform disinterestedness, in trying to prevent the execution of deeds, as to the progress of which he has told us he knew nothing, and took no interest.

I will comment on what Macandrew says as to the *execution* of the deeds presently. But bear in mind, I beseech you—as it is essential and vital to the question as to the deeds—that Macandrew repeatedly said that he got *no other instructions, verbal or written, after August 1820—none whatever*—that he *extended the deeds from these instructions*—that he gave the clean scrolls to Kenneth in 1821 to read, and that *he had no conversation with him then or at any time* as to the contents of these new scrolls, or of the extended deeds. He *had no such conversation—gave the laird no explanations*. The deeds were given to Dundonnell as *made in terms, and in implement of, and in compliance with the instructions of*

August 1820. That is fixed beyond dispute by Macandrew; and you will presently see its unspeakable importance to the main question in this case,—are the deeds executed truly the acts of Dundonnell, or of Roy and Macandrew.

Macandrew sent Mr Macbean's scrolls, as altered, to Mr Stuart. How did Roy know that these deeds were not executed? He had been enquiring about them, and in a subsequent letter he again opens the communication. Now, how and from whom did Roy hear of this, that the deeds were not executed. From Dundonnell? He does not pretend that; and the commencement of this letter *proves the reverse*. Indeed not a letter from Dundonnell to Roy as to any matter of business is produced. From Macandrew? Then, where is the letter? They *profess to give us them all* and yet *no such letter* is among them. From Mrs Roy Mackenzie? Indeed! If that is so, then I refer you to the passage in which she declares she never heard of the settlements, and only knew in 1824, accidentally, that Kenneth had made a will—a statement, by the way, proved to be false, (at least if Macandrew is to be believed in any thing), since she had the keeping of Roy's letters about this very settlement. And here let me remark, as a most singular fact, that, among the several thousand productions made, we have never been able to recover one single letter from Roy to his sister, or from her to him. But from whom had he heard that Dundonnell had not executed his proposed settlements? not from Stuart; for there is a letter from the latter, saying he never knew why the packet had been sent to him. Then from whom? Plainly from Macandrew or his Sister. And, at all events, this letter in February 1820 from Roy shews his knowledge of every thing as to the progress of these deeds, and proves that he was watching and superintending their execution and completion. The scrolls were sent to Mr Stuart to be extended, and Roy knew that they were not extended or executed, and he thinks it necessary to open, by letter, the communication alluded to, which letter is one of those that were subsequently preserved by the defender against the day of trial. What is the use of again opening the communication upon the subject, and telling Dundonnell not to disinherit his brother? could he not have left Dundonnell alone? for if Kenneth executed no deed, *Thomas succeeded by law to the estate*—the thing which Roy *pretends* that he wished; but he proceeds to urge him to make these settlements, pretending that he was anxiously desirous that Thomas should succeed him in the estate, and consider the terms of this letter.

“Edinburgh, Saturday, 19th February 1820.

“MY DEAR DUNDONNELL,

“Will you forgive the liberty I take in writing you on a subject to which it is very painful for me to allude to, for many reasons, of which it is not the least that it subjects me to the appearance of indelicacy and selfishness. But after anxious consideration, I consider it my duty, and therefore I do it.

“It occurs to me, from your not having completed your settlements, that you are now satisfied of the propriety of altering them; although, from feeling a delicacy towards me, you cannot bring yourself to destroy hopes which you may think your previous unexpected and unsolicited intentions may have raised. If this is your feeling towards me, believe me it is not right. It would afford me real satisfaction, that all differences between you and your brother were removed;

and if it is your desire to make him, or, at all events, his child, your heir, and they have a right to expect it, why will you hesitate to say so? You know how frequently, and how strenuously I have urged the propriety of this. I repeat, I shall be sincerely delighted to hear that all obstacles to it are at an end. It cannot disappoint me, for I have never for a moment allowed myself to calculate, or think on it; and add to this, without imputing vapidity to me, that from my habits of self dependence, I am better qualified in all probability to support myself than him, in whose place you put me.

“I beg that you will reflect again on these things, and then write Macbean with your own hand,—your own lazy hand shall I call it,—as I intend making Thomas, (or, at all events, Thomas’ son), my heir, you can have no objections to complete my settlements. You will therefore get the deeds from Mr Stuart, and copy them out with that alteration, leaving all the others I have made on the deeds. Robert is a *sine qua non* trustee; and Mrs Mackenzie must get the Mains and moveables, as I at first distinctly directed.” Or if you do not wish to write Mr Macbean on the subject, write in these terms to Stewart, or to Macandrew, bidding him get it done; or if you are not fully determined what to do, write requesting him to copy out the deeds which were sometime ago sent him for that purpose, making over my property to trustees; but as I have not made up my mind as to the heirs, leave that part in such a way as that any heir I may afterwards name can succeed, in terms of the entail.’

“I cannot help again apologizing for writing you on this subject. You know well that with yourself it originated, and rather than that there should be a chance of your for one instant suspecting me of an interested motive in what I have now done, I would just add one request to that of entreating your instant attention to this letter, viz. that with the exception of leaving me a trustee for my favourite sister, you would entirely strike out my name from your settlements.”

(The Dean made various remarks on this letter as he read it.)

And here, gentlemen, let me point out to you a piece of real evidence of no small moment. Dundonnell, it is said, was bent on executing these settlements—determined to exclude Thomas and his family—resolute in all his determinations—a strong hater—offended with Macbean, says the Solicitor-General, because he did not carry into effect his directions—had carefully revised the scrolls—was finally determined on their immediate execution. Now the scrolls, all corrected by himself, are sent by his directions to Stuart, and he is to write to say what is to be done. Yet, *that he never does*, and the scrolls lie eight or ten months with Stuart. Thus, this is the only occasion, in the whole history of the preparation and progress of the deeds, when either Roy or Macandrew or both are not at the elbow of Dundonnell; and this is precisely the time, and the only time, when *nothing whatever is done*. He was left to himself, without either of these expert agents beside him, and he never dreams of writing to Stuart, not even though Roy so anxiously reminds him of doing so, and gives him the form and words of a letter, which he might copy over. Can you doubt then, when you find him never moving except when Roy is with him, that Roy was truly the prompter, or rather the real actor, and that all that is done is solely what Roy did, or got the simple, unwary, unreflecting and weak, Kenneth to do.

Now come the instructions in August 1820, which you will find a most material part of the case. I think this part of the case will convince you that these settlements are not the deeds of Dundonnell.

You will observe, in the first place, that we have Roy proved to have been present at the preparation of these instructions—in the

room, and assisting Macandrew. I need not repeat the suspicion and jealousy with which the law views such interference on the part of the individual mainly interested. I chiefly notice this to shew the base falsehood of his pretended ignorance of the progress of the deeds, and of the assertion that Macandrew and he never had any communication during the whole period as to their preparation or execution.

Now, in his defences, Roy expressly says that Macandrew prepared the deeds in terms of those instructions of August 1820. Bear in mind that Macandrew swears to you that he had no other instructions, verbal or written, AFTER August 1820. The instructions of 1819 he never saw. Let us take the deeds, and see whether they don't differ in most important points from these instructions in 1820, which the defender has produced, in support of his case, as the instructions by which they were directed, and which Macandrew says were the only instructions he had received after the drafts I have already spoken to, which were laid aside, and were not the basis of the deeds actually executed. From August 1820 Macandrew says he got no other instructions. Follow me in this detail, and judge whether these deeds were the volition, the acts, the mind of Dundonnell, or the mind of the party and agent preparing and concocting them.

I shall explain to you the entail. There is a destination of the lands, and an *apparent* prohibition against sale. A clause directing the parties called to bear the name and arms of M'Kenzie of Dundonnell, and *this* is fenced with the proper clause. Then there is a prohibition against selling or burdening the estate, but without the proper clauses to make it effectual. There is another clause which says, that "in case the said Robert Roy shall, in order to *disappoint the full meaning and intent* of these presents, sell the said lands, he shall be obliged to employ the price towards the purchasing of other lands," &c., as if it was likely that Dundonnell, anxious to preserve the family estate, should yet leave to Roy the power to defeat his own meaning and intent. This is not very like the deed of the Highland laird, though very convenient for the Edinburgh writer.

Now, Macandrew in his evidence tells you that Dundonnell, in August 1820, said he wished an alteration made, and resolved *so far* to alter his former plan, as to allow the heir to borrow money on, or sell the estate. He spoke of the expediency or necessity of a sale; he said that the legacies were considerable, the debts were increasing, and that there was a necessity for a sale; and Macandrew's way of accounting for this strange result of Dundonnell's deed,—who was afraid, you are told, that the estate might pass to a stranger if he trusted it to Thomas—is leaving it to Roy, and giving him the power of selling every acre of the estate of Dundonnell, and to invest the money in the house in Edinburgh, if he pleased, where he is carrying on his business as a writer. Is not this a singular thing? Macandrew tells you that Kenneth understood all these matters. But if all this really passed,—if Kenneth held these learned disquisitions in conveyancing with Macandrew, and gave him all these minute directions as to the very clauses

in the deed, and as the way in which the *entail* was to be altered,— Can you believe that this important part of the instructions would not be contained in the minute of August 1820. Now, the instructions in 1820 do not contain a single word of all these the most material part of Kenneth's alleged directions, which Macandrew thought it to be necessary to reduce into writing at the time, in the presence, and with the aid of Roy. Can you account for this omission, consistently with the truth of Macandrew's statement? It is incredible. This is the only departure from the form of the entail as proposed by Macbain; and yet this, the most material, part of the directions is omitted, by the accurate and cautious writer sitting down in his employer's presence to reduce these instructions to writing. But I am not surprised at Macandrew *now* trying thus to account for so extraordinary a part of the deed. He has probably heard me on his conduct before, and he now knows the observations he must meet and try to obviate. He has so framed the deed, as to allow the man to sell the whole estate, and re-invest the money any where he chose—in the Lowlands, where he would have been free from that indignation which is boiling in Ross-shire, or in any way which he might find for his own interests.

Macandrew now well knows he must try to make out this part of the deed to be the act and will of Dundonnell himself. But he is convicted by the written instructions of August 1820, which contain not a word of all these learned and accurate directions from Dundonnell as to the peculiar nature and character of the entail; and so he *now* says, that this material part of his instructions was *verbally* given.

The instructions of August 1820 as to the estate, are as follows :

“SIR,

“After taking about twelve months to consider of my intended settlements, I have resolved to make very considerable alterations, and therefore I request you will get back the copies sent to Mr Stuart, and prepare a new settlement, appointing Dr Roy, Dr Adams, Mr R. Roy, Captain Campbell, Mr Mackenzie of Strathgarve, Mr Alexander Anderson, and yourself, trustees, with all usual and necessary powers; with directions to the trustees to pay over to Mrs Mackenzie, in liferent, the free yearly rents of the property after paying interests, &c. &c.; and 2dly, to pay off debts and legacies,—Mr R. Roy to be a *sine qua non* trustee. I wish a *simple destination* of the property to the heirs mentioned in the scroll entail, as altered with my own hand, and the *legacies specified in a separate paper*, to be engrossed in the deed, and *which legacies are also different from those directed to be mentioned when the scrolls were prepared.* I am, &c.”

Now, Gentlemen, compare this with Macandrew. *A simple destination*, says the letter of instructions. *An entail* says Macandrew, but leaving out some of the fencing clauses given by Macbain, and allowing a power to sell, but under obligation to invest. If that had been the case, how could the instructions have been framed as they actually are. The instructions *do not contemplate an entail* at all. The deeds *profess* to be an anxious entail—but with the loop-hole for Roy, which Macandrew says the laird specially intended for Roy's benefit. But after all, the deed which Macandrew executed is not the deed which any man could have framed in consequence of these pretended verbal instructions. What was the use of the power

of sale? Why, he was bound to re-invest every sixpence of it beyond the legacies and debts specified there for which, as entail is debt, the estate could have been sold; so that it is not a power given merely to sell the whole estate, but an obligation to re-invest every sixpence except what was necessary to pay off the burdens.

The clauses here said to be for Roy's relief to pay off debts and legacies by sales—and yet he is bound to re-invest all the surplus price of the lands he sells. See how the contradictions expose the falsehoods in the case. There is another fact which strongly affects my mind. Macbean you know would not prepare a deed in Roy's favour. But he prepared a *correct strict entail—tight and binding—* such a deed as a man of his skill would prepare in order to secure the family estate. But the Inverness agent and Roy went take the deeds of the experienced Edinburgh conveyancer. Macandrew says he wrote to get back Macbean's scrolls, and yet he did not use them. The one was intended honestly to preserve the old family estate of an ancient and honourable branch of the high blood of Kintail. That did not suit the purposes of Roy. The estate in the *Highlands* was of little value to him. He had no affection for the soil, and the country he well knew would spurn the foot of the intruder, and its hills never echo to his hated name. Hence his object was to secure the means of purchase elsewhere, where he might not encounter the strong feelings of abhorrence of the warm hearted clansmen of Dundonnell. Hence the deeds executed put this in his power. But can you believe that Dundonnell—*if* the man, Roy says he was—had this in view. He disinherited his brother forsooth, lest he should sell and squander the estate—*which* by the way an entail would have prevented,—and yet he deliberately leaves to the Edinburgh apprentice to sell this same estate, and re-invest the price of the inheritance of the family any where he chose.

Let us next compare the *instructions* of August 1820 *as to the legacies*, with the *legacies in the deed* said to have been extended in terms of these instructions, and without any other directions, verbal or written.

*First*—This paper of instructions as to the legacies is a very formal and regular paper, being duly witnessed and tested. It was the result you know of considerable discussion, as Macandrew pretends, with Dundonnell, at which Roy was present, and the amount of the legacies is said to have been specially discussed and canvassed. Now this paper was Macandrew's only warrant for the extended deed. Of that he has given us the clearest proof. The importance of this paper is rendered much greater by the concluding words of the instructions as to the estate, viz. "and the legacies *specified* in a *separate* paper to be *engrossed in the deed*, and which legacies are also *different* from those directed to be mentioned when the scrolls were prepared." Now then the legacies in the separate paper of August 1820 were to be engrossed in the extended deed, and these legacies are specially mentioned as *different* from those which had been intended at the time, the scrolls, (that is Macbean's) which are here referred to, had been prepared. Hence Macandrew had no warrant for the legacies but this paper of instructions of Au-

gust 1820. The legacies in Macbean's scrolls are declared to be different from those subsequently intended. Hence Macbean's scroll, or any marking on it could not be his warrant. The instructions of 1819, Macandrew says, he had never seen. He declares himself that the instructions of August 1820 were his only warrant,—that the deeds were extended in terms of them—that he had no other directions, verbal or written—and that he had no conversations with Dundonnell as to the contents of the intended deeds when he gave him the new scrolls in the year following in August 1821. Now then observe. In this paper of instructions as to the legacies, *Campbell is not mentioned in any way whatever.* Nay, Macandrew takes him as an instrumentary witness to that paper, which shews that he had never been named as a person in the least degree interested in the settlements, or as intended to be favoured. Yet in the extended deed there is the annuity of L.20 a-year to Campbell. How is this to be explained. What warrant had Macandrew for introducing this suspicious name? Is it not extraordinary that this should be the case with regard to the provision for an individual whom I am sure you must believe is the very last that could ever have been included in any wishes of Dundonnell. How came Macandrew to include Campbell. You will not find in the whole case, or in any of the documents, any explanation of this. How came he in writing out the new scrolls for the deed at Inverness to include Campbell. Remember that he had no directions as to the legacies, except the paper of August 1820, and that in the other paper of instructions of the same date, the legacies are specially declared to be different from those intended in Macbean's scrolls. It is thus made inevitably clear, that for this legacy Macandrew had no warrant whatever, and that between the deed and the pretended instructions, there is a most remarkable and unwarrantable disconformity as to this important particular. This fact is the more striking, because Manford tells you that the scrolls for these deeds of 1821 were drawn out at Inverness, very shortly before the execution of the deeds, about a year after the instructions of August 1820, and during the interval Macandrew has sworn to the fact that he had no instructions, verbal or written. Have any of you then, the slightest doubt, that this deed was truly the work of Macandrew and Roy, and not of Dundonnell. Roy was at Inverness, in his way down to Dundonnell, and you will presently see that the deed differs in other respects in a still more flagrant manner from Macandrew's pretended instructions. To secure and propitiate Campbell was essential for Roy's purpose. The lady's motives to secure this I need not expose; but even if Roy was ignorant of that disgusting part of the case, he had the strongest motives to purchase Campbell's silence. Campbell was the only domestic from the low country who had been in the service of Dundonnell. He had been there during the whole period since the marriage, and he could have fatally unfolded the habits, and propensities, and childishness, and imbecility of Kenneth. It was essential, therefore, on every account, to secure him in the interests of those by whom these deeds were concocted, and hence you will easily see how it



came about that Campbell was included for an annuity in the deed, though not mentioned in the paper of instructions.

This paper of instructions for the legacies of August 1820, leaves "to Rob. Roy L.1000 sterling, with interest, from the term after my decease." What does the deed contain? "To Rob. Roy, writer in Edinburgh, my brother-in-law, the sum of L.2000 sterling, payable within three years after my decease, with legal interest thereafter during the non-payment." Observe this remarkable discrepancy. The legacy is *doubled in amount*, and *altered in conditions*. By whom, then, or by what warrant? Macandrew says he had none but the instructions of August 1820; yet he scrolls this deed at Inverness, a few days, as Manford says, before going to Dundonnell, with a legacy of double the amount to Roy. Now Roy passed through Inverness to Dundonnell in August 1821, and had communication with Macandrew. Can you doubt then, that this deed is truly the act wholly of Roy and the agent, and not of poor Dundonnell.

This is not all. The instructions of August 1820, do not contain—neither of them contain—*any provision for a payment to Roy as the heir during the life of the widow*; on the contrary, the instructions of the 17th August, 1820, direct the trustees to pay over to Mrs Mackenzie, the *free yearly rents* of the trust-property. But the deed contains a positive direction to pay to the heir, or in other words, to Roy, an annuity of £200 during the life of the widow. What can you say to this striking disconformity? Is not this another clear proof, that the deed was wholly the concoction of Roy and Macandrew, who made the deed exactly as the former chose, without the least reference even to their pretended instructions.

Thus the deed contains striking variances from the instructions in regard to the provisions as to Mrs Mackenzie.

There is another most important clause inserted as to the power of revocation, which is limited in a very peculiar manner, and with a view that displays considerable cunning. Roy's original letter in 1819 to Macbean, had declared, that the *most ample power of revocation* should be reserved. Macbean had accordingly prepared the clause, reserving power to revoke in proper and effectual terms. In the paper of instructions of August 1820, the only notice of this is a *general reservation* in the paper as to the legacies. Now, what occurs in the trust deed for the payment of the legacies? The trust deed first contains a power to alter; then declares, that the deed, if not altered, shall have the effect of a delivered evident, though found in the testator's repositories; and that no revocation shall be inferred by implication;—all this is matter of common style and frequent occurrence. There is in it nothing unusual. But then there follows this most marvellous and extraordinary clause, "And in particular, that *no deed of settlement or destination of my estates, shall be deemed a revocation of this trust, in whole or in part, unless such revocation is specially expressed therein.*" Gentlemen, you will see at once the object of this cunning, most unusual, and singular clause. Its effect was just this,—if poor

Kenneth had ever escaped out of their hands, and under good advice, arising from some confused and dreaming recollections of his own that he had been made to sign deeds, had executed any recal of any former settlement of his estate, they still hoped by this most singular and unparalleled clause, which no one could have contemplated or guarded against, to *save the trust deed and all the legacies from the risk of revocation*. Only conceive the absurdity of the intention and views which this clause imputes to Dundonnell. If he was to disinherit his brother, and leave the estate away from him and his children, and away from his sister and her children, with a view to prefer the relatives and connections of his wife, it was very natural to burden the particular party, who was to succeed to the estate, with numerous and large legacies to the whole clan of the Roys. But is it not equally clear, on the other hand, that if the resolution to exclude Thomas had been altered, and Kenneth had ever been advised to recal any such destination of the estate, and to leave to his brother the inheritance of their forefathers, it would have been most inconsistent that *all the legacies to all the Roys should equally subsist*, as if the estate had gone to Robert Roy. Yet this might easily have been the result. If the friends of the family had been able to extricate poor Kenneth from the toils of this designing crew, and if he had been induced as a precaution to recal any settlement he might have made of the estate, no adviser—not the most skilful and sagacious of those now present—could have dreamt of such a singular and unusual clause as this; and this trust-deed, with all the legacies to the whole connections of the wife, would have remained as a ground of claim against the rightful heir of the family. Can you doubt that this most unusual and remarkable clause was inserted through the cunning of Roy, and for the very purpose I have now explained? Do you believe that poor Dundonnell could have meant so to fetter and tie himself, or that he could have understood this very peculiar clause? What I am now commenting upon is *all addition to Macbean's scroll*, where there is not to be found a suggestion for such a qualification. How came this clause then into Macandrew's scroll? Was it matter of accident? Had the truant and unreflecting fingers of Manford copied it by chance from some other deed? Or is there a style for clauses of revocation peculiar to Inverness? What say you to this? Is it accident—inexplicable coincidence—or is it the work of Roy—of that practised systematic fearful spirit of cunning and design with which the preparation of these deeds for years was carried on? Read the clause for yourselves, compare it with Macbean's scroll, which Macandrew says he had, and judge whether, when the new scrolls were made in August 1821, this singular deviation was made without object or design.

Gentlemen, I have now finished this part of the case. I give it to you as almost independent of the whole evidence as to the incapacity of Dundonnell. I take the deeds, in order to shew you that they were the act of the party chiefly interested, and his agent—not the acts and deeds of Dundonnell—that they were fabricated, manufactured, and got up by Roy and Macandrew, even to

any pretended instructions framed, exactly as they chose, and that the unhappy victim of their contrivance their cunning and their deception, knew nothing of the import and the contents, and the provisions of these deeds. I put this view before you with a feeling of confidence which I hardly know how to express. I desire the court to examine and sift and scrutinize it with the utmost rigour and jealousy. I leave it, without fear, to the examination to which their knowledge and experience can subject it. I urge it upon you with all the earnestness in my power—vehemently and boldly calling upon you to test, by personal examination of the documents, every word I have said—study and compare the handwriting ascribed to Dundonnell in these scrolls, and in the original instructions of 1819—spend the remaining time you have for deliberation in this task—rely upon it, it is the most important part of the anxious inquiry which you are now on your oaths to answer. Then study the different papers of instructions—reflect upon Macandrew's testimony—compare the instructions with the deeds—spend the night, if necessary, in these inquiries, and I know that such examination will produce the most complete and unhesitating and firm conviction that these deeds are not the acts and will of Dundonnell.

I have put this part of the case before you on the distinct ground of the perjury of Macandrew. If you believe that witness—if you believe one-tenth part of what he said had passed between the late Dundonnell and himself, there is an end of my case—you must decide against me—I am not entitled to your verdict. But if you do not believe Macandrew—if the detection and exposure of him has been complete and irresistible in any one of the points I have most urged, then the defender's case is false—reliance on the integrity of Macandrew or Roy is at an end—you must throw aside the whole agency of Macandrew as the tool and instrument by which Roy's purposes were accomplished, and then I am sure of your verdict, without almost any aid from the overwhelming evidence as to the imbecility of the deceased.

Next for the account given of the execution of the deeds. And here the circumstances said to attend the execution of these deeds are most extraordinary and unexampled. Macandrew trusts the execution of these important deeds to a boy who had never previously had any similar charge—does not even desire to see them when executed, and Manford, of his own accord, seals them up without shewing them to his master—nay, though one day intervened between the execution of the two deeds, Macandrew, though proved now to have been in the house the night of the ball, never thought of looking at the first deed to see whether it was correctly executed. There is something very strange in this story. Whether they thought the poor simple laird could be made more easily, and with less distrust, to sign deeds which this boy put before him, or whether the whole story is utterly false, it is difficult to say. That the account is most extraordinary is manifest, and I saw that it struck with surprise both you and the Court, when Manford gave his testimony, and Macandrew's evidence has only increased the cause for surprise. And the account of the manner in which the laird ac-

tually signed the deed, and Macandrew's inattention to that important part of the business, is rendered still more remarkable by Macandrew's alleged solicitude and unusual precautions about every other part of the business after he arrived at Dundonnell in August 1821. He had drawn out he says fair scrolls of the deeds in terms of the instructions of August 1820. These scrolls he took to Dundonnell in August 1821—gave them to Kenneth, and desired him to read and examine them, and satisfy himself if they were according to his wishes and instructions. Macandrew had no conversation with him as to the contents, and gave him no explanations. Macandrew then desired Manford to get the scrolls extended, and to have the deeds executed. Macandrew says he and Manford compared the extended deeds with the scrolls. Whether there was time to do that, considering Macandrew's absence, I think may well be questioned, and Manford was singularly indistinct, and yet confident on that point. The scrolls are said to be marked "*Approved, K. M<sup>c</sup>K.*" no ordinary precaution I think to be taken, when the man of business was on the spot, and when the laird was so capable of giving orders and directions. Yet Macandrew took no charge of the *execution* of the deeds, and did not even know till he saw them lately that they were executed on different days. Macandrew however was yet at pains, he says, to tell Manford not to have Campbell as a witness—a most important fact, for you remember that Campbell is a witness to the letter of instructions in August 1820, as to the intended legacies,—which proves that Macandrew had not *then* dreamt that he was to receive a legacy, and yet the said Campbell is among the legatees in the extended deeds, though not in the instructions, for the very annuity given to him by Roy's addition of Kenneth's alleged verbal direction in the instructions 1819, which Macandrew swore he never saw.

Then Macandrew swore most positively that he had no communication whatever with Roy as to the execution of these deeds—nay, he tried to say that Roy was not aware of their execution. That was too gross even for Macandrew, and at last—you remember with what reluctance it was wrung out of him,—he admitted that he *presumed* that Roy *conjectured* and *knew* what Manford was shut up about in the small parlour when extending the deeds, and *knew that they had been executed*. Who can doubt it—or if Macandrew had adhered to his assertion that Roy knew nothing of what was going on, he being in the house at the very time, would you have given credit to him for one moment?

Now for Manford's account of the execution of the deeds, and his part in this precious scene! He says he got the scrolls from his master, with directions to have them extended. He knew Macandrew to be the confidential man of business of the family—that the deeds had been long in preparation—and he got the scrolls after this intelligent country gentleman is said to have examined them, and marked them "*Approved*" with his initials. Was not this a sufficient warrant for the writer's apprentice to assume that the deeds were fully authorised and considered by the client? What apprentice would ever have thought of requiring more or tak-

ing any step to see if the client understood what his own master had thus given him to extend as marked approved by the client? Might not this be considered the best proof that the laird understood them? But Mr Manford must needs *read over* the *extended* deeds to the laird!! and he tells you that such is the *usual way in which he does business*, and that the entry in his diary is the usual way in which he records the business which he does. Manford is acquainted with the Roys, and the postscript of his letter shows his intimacy with Mrs Mackenzie. He states that he read over these deeds to Dundonnell *without special instructions to do so*, as an ordinary part of his business. Now, Gentlemen, you are not ignorant of such matters. Is this a natural or usual proceeding—to read over to an intelligent man the deeds, the scrolls of which he had marked as approved. There is one circumstance which ought to be attended to, that whether he gave them to Dundonnell or to Mrs Mackenzie when they were executed, he cannot say. He says that he sealed both the deeds up immediately. He tells you that he could get nobody but the man Fraser to witness the deeds. Now, we have it proved that there was a ball that night in the house, and that the neighbouring families from Lochbroom, Ullapool, and other places, were present; but in place of getting any of the gentlemen who attended the ball to sign them, he gets Fraser to witness the execution of the deeds,—a fitting man for such a purpose. He *instructs Fraser to make a memorandum of his having signed the deeds*, and he tells him,—you remember with what reluctance that was extorted out of Manford,—that the object of keeping a memorandum of this transaction *was in case of being called upon to give an account of it afterwards*. He thinks it necessary to give these precautions to Fraser about a deed to which he says he paid no more attention than to any other he had executed.

Manford kept a diary, and I beg you will attend to this. They arrive at Dundonnell by the diary upon the 23d; on the 24th they were quite busy getting the deeds of settlement arranged for Dundonnell; on the 25th, which was Saturday, they were occupied busily in getting the trust-deed and deed of settlement by Dundonnell extended. Is not this a proof that they were both extended that day? for not a word farther is spoken or said on the extension of the deeds. Then, on Sunday, they were long of getting up; then, on the 27th, “this day remarkable at Dundonnell for two things; *first*, the execution of the trust-deed regulating the legacies; and *secondly*, the anniversary of the laird’s marriage. We danced till six o’clock in the morning, and then went to bed.” These entries, he said, were not kept fuller than all others of a similar nature; and there was nothing particular about them! Now, what follows? Upon the 28th, “this day nothing particular or amusing happened; I got the deeds of settlement executed; *went through the regular form of explaining to the witness the nature of the deeds, and previously reading them over to the laird who had already marked ‘approved’ on the scrolls.*” He went through, he says, the *regular form of explaining to the witness the nature of the deeds. Explaining the nature of the deeds to the witness!* and

does Manford come here to tell you *this is the regular form!* The witness must see the subscription; but explaining the nature of the deeds to the witness is perfectly preposterous. You all know this to be absurd. Thus over preparation defeats itself. The boy Manford—ignorant, inexperienced, and self-sufficient, sets about making his record, to afford all the aid in his power to his valuable friend Roy—and by way of superabundant proof of the openness with which these deeds were set about, actually records that he explains to the stupid carpenter the nature of these private and confidential settlements—that stupid witness, as he described him, to whom he thought to be necessary that very day, to give the direction to make a memorandum, lest he might forget so *unimportant* an event in his *busy* and *anxious* life, as having heard the settlements of Dundonnell fully explained to him. Let us follow him, however, through the regular form of explaining the deeds, and previously reading them over to the laird. Mr Manford in his diary refused to read on; and went on to swear that the rest of the entry in the diary *had no relation to this case*. No relation to *this cause!* Has it no relation to the credit of this witness, and will not this single paragraph, which the discriminating Manford so resolutely withheld, be utterly fatal to these deeds when you attend to it? It contains this most extraordinary sentence,—entered on the day of the execution of the last deed, and following immediately the notice of its execution,—“a *very pleasant* conversation took place betwixt Roy and I with regard to remaining with Mr Macandrew. To this I made no objection, provided I got what would keep me in Inverness. Every time I see Roy he always inspires me with hopes with regard to my future prospects. Much am I indebted to him and his family.” A pleasant conversation took place! At what time? *When this deed was signed in favour of Roy!* He had hopes it seems of being promoted to Mr Macbean’s office, through the influence of Roy! And he swore that the hopes he was inspired with were the influence of Roy with Macandrew as to the salary he was to get! All this, too, entered the very day in question, for he swore that the following entries were made on the next day at Garve, where he went the following morning. Mr Roy, it seems, asked him if he had any intention of leaving Mr Macandrew; and when I asked him whether Mr Roy might have spoken in his favour, he told me he *could not recollect*. You remember—I am sure none of you will ever forget to your dying hour, the exhibition he made in the box—the reluctance he had to read these passages, which had been *carefully papered over*,—the discovery of which he opposed before the Lord Ordinary by separate counsel—his pretended inability to read the important words, till I helped him out from the copy I had in my hand. You remember all this—yet he swore the passage was *wholly immaterial!* Immaterial! *It is conclusive of the whole case.* It proves the agents with which Roy worked. It proves the arts he was taking to prepare and tutor and fit them for his work. It shews how deeply and intensely he was watching the progress of the agent’s business at this important period, and the feverish anxiety with which he grasped at that moment to make the lad, selected to deceive the unwary Kenneth, look to him

for his future prospects and advancement in life. See how this passage of the diary shews the feelings in his mind when the lad was selected for the concoction of these deeds, and the feelings in the mind of Manford at the very time he was performing the task assigned to him. We have got at last this speaking real evidence wrung out by the strong hand of the law, by the force of jury trial.

Observe, further, the important fact that Manford, before this period, had not been intrusted with the execution of any deed of importance, with the exception of one, which was merely a supplementary deed, executed by a Mr Macpherson; and all that was said in the diary as to it, was merely that he had come to Ord and got Mr Macpherson's deed executed. This is the gentleman who tells you that this entry was not framed for a particular purpose and view; and that he meant to record nothing with the view of its being seen; and yet the other entries which he gives you are mere short dry statements. I was astonished at the earnestness with which the Lord Advocate pressed this in his cross-examination, making Manford explain, at great length, that these memorable entries were altogether matter of accident, and not fuller or more anxious than any others in his diary. None were read to us to justify this statement. Then I desired to turn to the other entry as to Macpherson's deed. And you see how meagre, short and dry it is—making a striking contrast with the record of the proceedings at Dundonnell.

We come to Fraser. He says that Dundonnell *proposed to read the deeds over to him*. If that man swears true, he has proved the incapacity of Dundonnell. Do you believe that he would have desired the extended deed to be read over to Fraser, the man that Manford tells you was the stupid carpenter. Does it cohere? Is it reconcileable to their theory? If ever they were signed at all, it is reconcileable to our theory, that this poor weak man would have signed any thing put before him, and was most likely to have said, in the simplicity and weakness and childishness of his nature, that they had better explain the papers to his associate and friend the house-carpenter. Again, Dundonnell not only on the day the first deed was signed, but again on the following day, when the second deed was signed, desired again the deed to be read over to Fraser. Is this possible, if he had been a man of common capacity, and had been told the day before by Manford that it was unnecessary. Besides, only observe the absurdity of this scene. Manford tells you that he read over each of these long deeds to Kenneth before they were severally signed. Fraser came into the room just as Kenneth was going to sign each. And yet we are to believe that Kenneth gravely proposed and seriously wished, each day, to have the whole deed again read over to the carpenter called to witness the deed. Manford records that he explained to Fraser the nature of the deeds. Fraser swears that he made the memorandum that night; and what is the explanation which he gives? It is that he signed *two title-deeds*; and the memorandum that he swears to states this. Further, he swears that he *saw* the words *title-deeds* written on the top of the deeds, which he signed, when he was

standing behind the chair of the laird. I do believe, gentlemen, that he did see this written on the top of the deeds which he signed. The man is not so stupid as Manford represents him to be. His memorandum is well written, and it has only one ill-spelt word; the word *approved*, which he spells with only one *p* instead of two. Manford says that he explained the nature of the deeds to him. How then had Fraser written down in his memorandum, "*two title-deeds?*" My opinion of the transaction is, that it is not impossible that papers were laid before the laird with that word appearing on the face of them. How else can you explain it? Could he have mistaken the one for the other, more especially if the nature of the deeds were explained to him? He was not speaking from the memorandum when he saw the word *title-deeds* written upon it, because he swears to the fact of what he saw at that time. This part of Fraser's testimony is of incalculable importance. You remember the extraordinary reluctance he exhibited to answer the question whether he had seen any words written at the top of the deed. He remained silent, you know, for a long time; when compelled to answer, he had *no doubt as to what he had seen*, and admitted that he had seen the word *title-deeds* written on each deed. He durst not draw back from that; for he knew that we had his memorandum, bearing date the very day of the last deed being signed. Why, then, was he reluctant to answer? Why, he knew very well by this time that the circumstance about the *title-deeds* was fatal to the case; for coupled with that term being in his memorandum, made at the time, it proved irresistably alike the deception practised by Manford upon himself, and the deception practised upon Dundonnell. Manford says, he explained to the witness the nature of the deeds, and has recorded that in his diary. Now, Fraser's testimony proves this to be false; for Fraser declares he saw "*title-deeds*" on the top of the papers thus signed; and the memorandum which he made at the time records that fact. What are you to say, then, as to Manford and his diary, in which he represents himself as explaining to Fraser the nature of these deeds. Then as to the unfortunate Kenneth. How strikingly does not this incidental fact in the evidence open up to view the deceit practised upon him, and the devices by which this simple, indolent, good-natured halfling had been made to do whatever these parties chose. If these deeds were ever signed by Kenneth at all, I have not a doubt that papers were placed before him with the term *title-deeds* apparently affixed to them, and that his signature was obtained by stratagem to instruments of which he knew not the import or the purposes, and which he was utterly unable either to originate or comprehend.

The view of the case which I have now given you, does not supersede, but on the contrary, gives additional importance to the evidence of *incapacity*. And I begin, as with a vital part of the case, with the opinion of the father, before any questions arose as to the incapacity of his son Kenneth. It was no trifling matter for the father to express himself as he did in regard to his son's incapacity;—it was no light feeling which could lead the father to write in the



way he did as to his son's folly, defect of judgment, imbecility and general incapacity. We have his letters containing the bitterest feelings known to the heart of man, and wrung out of his afflicted heart, when lamenting over the grave of his promising son. He is deploring the weakness of the one, who then became the head of the family. Look at these letters and judge for yourselves, when you are told that our witnesses are not to be believed, who swear that at the time of the eldest son's death, he expressed to them his opinion of Kenneth's intellect, and that they are unworthy of credit, because they are infected with the Ross-shire clamour; look, I say, at the contemporaneous letters of the father, expressing those very opinions which the witnesses have sworn to. In reference to this part of the case, observe the evidence with what my learned friends, curiously enough, concluded their case. They *commenced* with a powerful and plausible statement of the *cruelty* of the father, which was said to have depressed the mind, and deadened in early *life* the faculties of his ill-treated and neglected son, and they *concluded* with a most tender-hearted affectionate letter from the father to poor Kenneth, trying to rouse him in his own opinion; giving him every encouragement, and wishing him to return to his home; while in the preceding moment they *shut the proof* as to Kenneth's *sense*, by reading that memorable epistle to Mrs Mead, in which he talks of the cruelty of his father, and writes to his gossiping cousin as to the ill-usage from his parents, on which she had been expatiating, in a style like a sheepish schoolboy, but perfectly ludicrous as a proof of sense on the part of a grown captain of militia, the heir of a Highland family, and a man capable, it is said, of conducting his defence in a court-martial. I need not again read this childish absurd letter, conclusive, I think, of Kenneth's imbecility. The poor silly young man seems to have delight in finding his cousin affecting compassion for him, and repeats, as if it was a manly and fine thing, the idle stories about his parents' harsh usage, which this lady had, for what purposes I know not, but most improperly and scandalously been instilling into his mind for years. There are many such letters, the defender tells you, teeming with proof of the father's kindness towards Kenneth. I admit that there are. But then that only adds more importance to the letter of the father, which we have, lamenting the want of capacity and judgment in his son. There is his letter of the 9th of April 1808, to Banker Mackenzie, in reference to Kenneth's escape from the marriage at Aberdeen.

“DEAR SIR,

“ I had letters late last night from Sandy, of the 1st and 2d April, and a letter from brother Simon from Nairn; and you may verily believe me, that my wife and I are greatly distressed since we received them; and, by what Simon writes me, he came to consult you upon the business. I have only to say, that nothing ever distressed us in the manner this unlucky affair has; but still we have hope, that our friend's counsel and plan may, with God's assistance, turn out better than we expect. Therefore, I run the bearer express, in order that you may detain this unlucky youth at your house, till I arrive, and till I concert with you and his uncle what is to be done. This is in the event he has left Nairn; and if not, I wrote his uncle by this express to keep him there, and

not let on that I am going. I shall be at your house, (God willing) Wednesday or Thursday at farthest. My distressed wife joins me in kind compliments to you and family. And I remain yours, &c."

And again, on the 29th September, he writes in a letter to the same person, "I am presently very much distressed with my leg, and my son Kenneth's conduct has given me much concern; and I still build on your advice how to proceed with him, or in what manner to dispose of him. I am grieved and ashamed for what of trouble you and Mrs Mackenzie have had by him while with you. In short, I do not know what to say or do regarding him."

On the 13th December, 1813, he writes in the most feeling terms to Kenneth, after the death of his son Alexander.

"MY DEAR KENNETH,

"The sudden and afflicting death of our dear brother, which was announced to you last week by the Doctor, could not fail to overwhelm your mind with the deepest distress, in which you may readily believe that his distracted parents richly participate. What comfort have we but to see our dear children doing well, and settled around us respectably in the world,—when these hopes are disappointed or blasted, what remains to us in life but lamentation and regret. Impressed with these melancholy reflections, it is with the greatest grief and surprise that I now learn by a letter from Tom, that you have come to the rash resolution of extending your services in the army to the line, and are just on the eve of setting out for Holland, the scene of active, and no doubt, bloody operations. Let me entreat of you, my dear Kenneth, to give up every idea of this measure, and to lie by in the country during a little time, until I shall be able to make arrangements for your comfortable and respectable settlement at home, an event I have much at heart. I never meant that you should lead a military life,—you know how much our family has already suffered from its connection with the army. And though I thought that a few years of your time might be agreeably and profitably spent in forming the correct and economical habits of a soldier, I did not intend that you should go abroad amidst the dangers and difficulties of a military life. Allow me now to desire that you will make up your mind to leave the army, and look forward to a settlement in your native land; you know how happy your mother and sister will be to see you, and you may fully rely upon every effort in my power to promote your comfort and best interest. Write to me immediately on receipt. Your mother unites in kindest good wishes. I am, dear Kenneth, your most affectionate father."

Of the same date there is the following letter to Banker Mackenzie.

"MY DEAR SIR,

"I received your esteemed letter of the 7th, and I am most sensible of the regard you bore to my dear beloved child, who always had the greatest respect and esteem for you and family; *his loss in my poor family can never be made up.* This being the case, I'll have to lament his death all the days of my life. His poor mother has a daughter who will always be a comfort to her; but all the sons and daughters in the world won't make me forget his loss or merit. He spoke of you at his last. I am not able to write. Please pay Mr John Mackenzie the things called for by me for the funeral, and other things sent for Mrs Mackenzie, and nothing else. I fear Kenneth has gone to Holland. I wrote Kindace to stop him; *he is a silly senseless boy; never studies his company or credit.* I fear Mrs Mackenzie is at Dr Roscoe. I send the discharges enclosed. I remain, my dear Sir, your afflicted friend."

Then we have another letter of the father's to the same person, dated 20th August 1814, in which he says :

“ I understand Kenneth stays at your house, long may you live to be of service to your friends. Kenneth, no doubt, is a well-wisher of yours, and so he should ; and had he taken any of your counsels, he would have been useful to himself, and a pleasure to his friends. I have not heard from him for five months past, which was not the case with Tom, who wrote me regularly every fortnight. I am happy you remitted him the L.40, as also the L.100 to Mr Kenneth, W. S. I am surprised Tom has not made his appearance here or now, as I ordered him to hire horses from Inverness. I hope you will be so good as order Kenneth here how soon they are disembodied, as it is to be on the 24th. As to the settlement of my family affairs, I cannot positively determine, till I form in my own mind an idea of the young men ; and as to the letter you enclosed me, I do not know what pretention or cause for asking such, but mere dissipation and folly, and till a proper atonement is made to me, for lavishing more than his pay as a Captain, and furnishing him money at different times,—it was rather more than should have been done ; and I am determined to abide as I am with respect to money matters.”

Again we have his letter of 20th August 1815, to Banker Mackenzie, in regard to Kenneth's conduct in taking the farm of Seafield, in which he says :

“ Kenneth's conduct since he went to Aberdeen, next to Inverness, and formerly to the Ross-shire Militia, and then got in by favour to the Inverness Militia, and now a second time in the Inverness Militia, which he never told me he intended going, or did ever he tell me, he was going to Inverness the time he went, or never asked my commands ; so I refer to yourself as a friend, if he acted as a dutiful child. His taking the farm you allude to, seems to me that he is not in his proper senses, or that he has done, or got done, what cannot be reversed ; but, whatever is behind the curtain, or is fixed on Kenneth, time will tell, but I rely on your letting me know every circumstance, or what induced him to take such a farm, or if you know or heard of his marrying any one in the town or neighbourhood of Inverness, or while at Portsmouth ; but I shall take care that he shall not be bettered one penny sterling, by me or my order, till such time as he shews me, and the world that knows me, that he reclaims ; and even should that be the case, he will have but a poor chance of ever enjoying what belongs to me if I can ; so please let me hear from you in course, and weekly if you please regarding him. I send the receipts enclosed. As to the bill, one of them is to be dated the 12th November for L690, payable in twelve months, the other for L.265, payable twelve months after date, being the 12th November. I remain, in haste, and in bed, as the bearer goes off, Dear Sir, your ever obliged humble servant, &c.”

And after all this you are told, that the father was cruel, and that Kenneth was a prudent man. You recollect, Manford's father-in-law, Fergusson, told you, he was *more prudent* than *most* young men. In regard to this foolish transaction, we have another letter from the father to his son Thomas, dated 11th Dec. 1815, which states :

“ I have no news in the world to amuse you with, but what will surprise you a good deal to hear, that your brother Kenneth has taken the farm of Seabank, without letting me know, or the banker, *as he says himself*, nor had his mother or I a letter from him since he left Portsmouth.—His conduct surprises us, and the banker says the same ; however, I suppose, he means to marry, *if not married*. He has collected at Seabank a number of Lochbroom servants—John Kenneth's daughter from Ullapool ; Isabel Bain, the smith's daughter, that served John Bain in Corehail ; a cook-maid, Allan M'Lachlan, that married Aby Miller, for his grieve, John Frazer, (Rachel's son,) and a lady servant, being six in number, at Seabank. His regiment was sent to Forres about a fortnight ago, and as I am told, he comes frequently to Seabank, so that he must have something in

view, which the banker says, he is not known to; however, his misconduct will not hurt you in the least, whatever it may better you. He never consulted me in any point, and so will appear by him. If God spare you, you must hold yourself in readiness to leave Woolford early in March for Lochbroom, and whatever is necessary for clearing your accounts, and travelling expences north, you'll let me know, so as I may remit the same to you, and what would purchase a decent horse, saddle and bridle, &c."

There are many other letters from the father expressed even in stronger terms. These Mr Robertson read to you and I will not repeat their contents. You will remember them. At this part of the case I wish to refer to the evidence of the witnesses who speak directly to the father's opinion. Look at the testimony of Mrs Clunas, Alexander Stronach, Montcastle, all of them speaking distinctly to the opinion of George of Dundonnell, who did not die till Kenneth was 26 years of age. These witnesses had full opportunities of knowing his sentiments regarding him. The letters of the father will shew you that their evidence was no posthumous discovery, brought up now for the first time by the indignation of the people of Ross-shire; but that it is consonant with every part of our evidence, as to the opinion of Kenneth's father.

Now, before going further, let me call on you to observe the powerful and important point which this part of the evidence gives to us at starting. Our challenge cannot be represented as an invention after Kenneth's death by his zealous clansmen. You enter upon the case with the opinion of the father stamping imbecility upon him, and predicting that he would be utterly unfit in after life to take any charge of his affairs, or to preserve the estate from ruin. Let us now look at the evidence of Kenneth's imbecility in the early part of his life, and prior to his leaving Aberdeen. Take first the Rev. Mr Neil Kennedy: *You cannot have forgot one word of what he said. What is said against this gentleman's evidence? An encouraging letter forsooth is quoted against him which he wrote in 1805, to the father about Kenneth, saying, that he "did not want sense."* Will this expression, written at that time, make you believe, that he came to this Court to commit deliberate perjury on oath? Remember, that he is the witness of all others who, as to the early periods of Kenneth's history, had the most undoubted opportunities of observation and knowledge. There is no witness to be put in the balance with him in these respects. *Perjured he may be—mistaken he cannot be;* and to this alternative you must bring your minds in weighing his testimony. His was no casual observation. Niel Kennedy cannot be mistaken. But is there no *real evidence* as to this part of the case to confirm the testimony of Mr Kennedy? What does he speak to? Does he not tell you the story of his marriage, and the way he treated him as a weak, stupid, senseless person? The Solicitor-General says, that the attempt to make a low or a foolish marriage, was no proof that Kenneth was an idiot. We never said it was. It is not merely to the story of the marriage to which we appeal, but mainly to the whole circumstances of that affair,—the way he set about it, his making Mr Kennedy's maid his confidant—the obvious proof of

illness exhibited in every stage of the business, the manner in which he was treated by Kennedy and Mrs Cheyne as a simple foolish childish lad—whom they carried off with them and treated like a great baby, not surely like a young man of 18, who even if thwarted in such a purpose by his tutor, was not likely to have submitted to have been treated like a mere infant in the presence of so many people. But if I understand what the defender's point at here, this is all a dream on the part of Kennedy. Indeed? Have you not the letter of Niel Kennedy, written the next day, 30th March 1808, to his father, the existence of which letter he was not aware of till I shewed it to him? And in what particular does that differ from his evidence, except in one very slight circumstance, which is, that in the letter, he says, that Kenneth persisted in denying the marriage; and in his evidence that Kenneth did not deny it, but that he said nothing whatever about it. But Mrs Strachan, in whose house this scene was going on—the woman herself to whom he was going to be married, are brought to contradict this. Kennedy swears that Kenneth was at first refused to him, till he threatened that he would send for town officers to force him from the house. What says the letter written the next morning? It states, that it was with much difficulty they gave him, and not till he threatened a warrant to have him apprehended. Mrs Strachan denies it, of course. She could not have been expected to admit it. Kennedy says, that Kenneth left his hat. She was obliged to admit this, and, that she went into the house and got it. Is not that circumstance conclusive as to the truth of Kennedy's statement, that Kenneth was truly taken out of the house as a boy at the beck of his tutor. Does not Mary Matheson say, that Kenneth told her of the marriage, and upon this she went with Mrs Kennedy to a particular place to find him? and does not Mr Kennedy go to the nearest relation of the family for the purpose of procuring her assistance? Is not this corroborated by the evidence of John Mackay, who tells you of Kenneth's trying to get away from him, and get back to Aberdeen, when he was conveying him to his uncle at Nairn.

Then as to the state of his intellect when at Aberdeen, or any progress he made there, you have most conclusive testimony from the Rev. Mr Finlay, whose appearance and manner of giving his testimony, you cannot have forgotten—a gentleman of eminent character, of the highest respectability, and totally free from the suspicion of being biassed by local prejudices or Highland feelings of clanship. That gentleman spoke in the most decided terms to his general imbecillity and original defect of mind. He told you that he could never make him comprehend the simplest operations of arithmetic. The Lord Advocate thought he had found in Mr Finlay a witness worthy of being put to the test of those fine spun distinctions and metaphysical discussions on the understanding, which made some of his questions amount in length to a tolerable long discourse. But what was the result. Mr Finlay came most triumphantly and victoriously out of that contest of talent. And he is another witness which *could not* have been *mistaken* as to Kenneth's

capacity. Another witness tells you, that he was called foolish Kenny at Aberdeen; and Mr Troop says, he was followed about the streets; and that respectable individual adds, that he was once caricatured in the shops. These witnesses you have corroborated by Dr Bayne, who knew him at Aberdeen. Take the witnesses against these. You have Manford's father-in-law, who speaks to his prudence. You have Mrs Mackenzie of Breda, who said, she did not think Mr Kennedy's a proper place for Kenneth, though it turns out her own daughters were constantly there. I venture to oppose the evidence of the father against her, and against them all. Observe the difference of these opinions, and judge for yourselves.

I come now to Kenneth's letters. I thought by the way you were to get a number of Kenneth's class fellows, to bear proof to his capacity. You were told by the Solicitor-General, that he was a chosen associate in the house of Principal Macleod at Aberdeen, and of this you have no farther proof, than that one witness tells you, that he believed he saw him playing with the Principal's boys; and will you take this as sufficient evidence that he was a chosen associate in that family, in opposition to the testimony of Mr Kennedy. But you are told, that Mr Kennedy would not admit that he was known to Mrs Mackenzie of Breda, and that Mrs Kennedy admits it; but this proves nothing, but that there was no made up story between Mr Kennedy and his wife. My notion of Kenneth's mind is, that the time he was at Aberdeen was the brightest period of his capacity. He was then undergoing close drilling. Rev. Dr Bryce of Calcutta was then teaching him 5 or 6 hours a-day. He had been under Rev. Mr Finlay for several hours a-day also, and under Mr Cruden and Mr Maclean, who could make little or nothing of him. This was the period of life when he was likely to work most; and you will find, that his letters deteriorate from 1808, while his character and manners improve. His letter in January 1808 to Mrs Gillanders, is not the letter of an understanding lad of 18 years. It is that of a weak, silly, senseless boy, complaining of his situation at school.

— "MY DEAR AUNT,—I take the liberty of writing you these few lines to inform you of my present situation which I hope you will not be offended at me for acquainting you—I was at my Cousin Abey marriage who married wednesday last one Mr Cheyne a very rich man and Set away immediately for Edinbury. I went along with them 30 miles and was not willing to part with them. My Uncle left Aberdeen this very day. My Dear Aunt I have not heard from my father since Mr K came the cause of it I do not know I am very ill situated at present with Mrs Kennedy God *knows how I have no life with her, she has left me so broken hearted that I think my very life a burden on the face of the Earth.* I have not acquainted my father of it. even suppose I should do it he would not believe it, *many a one did not meet with Such difficulties as I have put an end to their life.* The only worthy friend I have has Mrs Mackenzie Breda who is a very kind friend I dont know what I would do for her I must tak now your advice what I shall do for whither my father gives me lieve or not I shall not stay here longer because I intended to write you about it. My whole desire is the Army a Commission is very easy gotten just now and if my father does not get it I shall not refuse an offer I have just now. However I have three month's notice and if you dont approve of it mention it in your letter to me SAY TO A FRIEND. I should have written my Cousin Frank but something always put me

out of the way of writting him. How few likes him so well as Kenneth does whether he believes it or not, that is my mind all at once. I trus you will write Dear Aunt in the course of the next week. at farthest I have nothing more to say just now Give My Compliments To My Cousin Frank to Miss Abigal and Alexander and all enquiring friends

Your faithful friend

Death

(Signed) KENNETH MACKENZIE

Excuse my bad  
writing and ill }  
spelling.

Direct to Mr Kennedy charge.

My learned friend said, that the severity of the Kennedies was enough to "*drive intellect out of him.*" You remember the expression. Where is the tutor who has not been complained of in the letters of the pupil? I pity the tutor or the master whose character is to depend on the representation of the pupil. But of this alleged severity, we have not a vestage of evidence. Not a tittle. This letter is an astonishing proof, to be sure, of intellect in a lad of 18!! "many a one did not meet with such difficulties as I have put an end to their life." The letter itself proves imbecility of mind. There is another letter, holograph of Kenneth to Miss Mackenzie, now Mrs Mead, dated January 1808, which is written in the same style, and makes the same complaint. There is nothing that I desire more, than that you study and ponder over these letters, as I conceive this to be a vital part of the case, and contrast them with those *written by the wife*, and *signed by Kenneth*, and I am much mistaken, if you can rise from the consideration of his letters with the impression, that he framed or originated the deeds in question. The following is in his letter to Mrs Mead: "She has made me so broken hearted that I think my life a burden." God help the poor lad that would say so because he was not comfortable at school.

We have another letter of Kenneth's to the same person, dated the 5th of June, 1813, in answer to one from her of the 20th March. I shall first present to you some excerpts from her letters, that you may see the nature of her correspondence with Kenneth. The following is from her.

"I am sure some of our friends could have got you an appointment under his (Lord Moira's) protection and patronage through the *countless friends*; it would have been the making of you at once, and made you quite independent of our *stingy friends* in the north. You may well say, they have no thought. You and I have experienced that; but your mother is certainly a poor advocate for any little spark of friendship that your father is possessed of. She might do a deal of good unknown to him if she inclined it, both to her own and others; but her ideas are very confined and unnatural, I am sorry to say. Do you know, I wonder at your sister naming her little daughter after her. She never was an affectionate mother to any of you but her dear Sandy. What are they doing with Tom? I am sure he's lost in that country,—he'll be quite a stranger in the world. Well, they wont save much by that. We need not envy them for all they have; I dare say we are happier.

"Another reason I have to recommend it to your consideration is your unrelenting friends; if ever you get in debt, you may look in vain for their aid, if you were ever so much in need. I wish you had drawn L.50 on your father instead of L.15, it will be all the same 50 years hence. When they have so little feeling for you, you ought to have none on them,—*pitiful set they are.*"

There are other letters in the same strain from this lady to Kenneth. I should hope this is a sufficient specimen, without reading more of such disgusting effusions. This is the letter of Miss Jane Mackenzie, now Mrs Mead, the girl who lived in the house of Kenneth's father, enjoying his hospitality and friendship, and who endeavoured to poison the mind of the son against the parents. This is the girl that comes before this Court to tell you what she thought of the character of the parents. Will you pin your faith to her testimony? I never, in the course of my experience, saw so disgraceful letters, full of the most abominable feelings with regard to filial duty. This is the person who comes before you as a judge of the sacred relation between parent and child! This is the witness that is to put down the Kennedies and my friend the Rev. Mr Macdonald, who is celebrated as a preacher all over the Highlands. No wonder that poor Kenneth writes a fitting reply.

In the former letter which I read to you addressed to Mrs Gilmasters, of *January 1808*, you will recollect, he commences with encomiums on the marriage of his cousin, Mrs Cheyne, then newly married, and states his affection for her, and his unwillingness to part with her. Observe how he writes of her in 1815. (The Dean here read a part of a letter from Kenneth to Mrs Mead in 1815, in which he abuses Mrs Cheyne, and speaks of her unkindness to him at Aberdeen). Here is real evidence that Mrs Cheyne believed in the marriage he was about to enter into in Aberdeen, and that Kenneth bore her ill-will for what she done in *March 1808*—or it is evidence that Kenneth had no mind of his own, and echoed back whatever Mrs Mead wrote to him.

Now, Gentlemen, we have two letters of Kenneth to Banker Mackenzie. They have already been read, and I will not trouble you with the reading of them again. He complains of his father not approving of his establishment at Seabank, although he had never consulted the father on setting it up. I ask, was it a proof of sense, that he bought £400 worth of furniture from Mr Williamson in Inverness, in the course of the first year, without asking his father's leave; and £200 worth after, when he had no means to do so of himself. But, said Mr Williamson, he made excellent bargains; and he was quite ready to deal with him. No doubt, he thought the better of Kenneth that he purchased £400 worth of furniture from him the first year, and £200 worth after. This establishment, Gentlemen, was in fact the most senseless, the most preposterous, weak, ignorant, foolish piece of business you can possibly conceive. Besides this piece of folly, you have Mr Macbean stating, that when Kenneth's affairs came into his hands, his debts amounted to £6000, contracted in the course of two or three years, and when he had nothing. This is a proof of the man being able to manage his own affairs. Look at his other letters—for instance, those to his wife. Don't these confirm all his habits? In looking at these letters, I beg you to read them attentively. He talks of Isabel Maccrae, the idiot, and of her being hoisted up and down in famous style. This is a precious thing to adduce as evidence of the character, habits, and occupation of Dundonnell. The letters he writes



to his wife are full of the most paltry, silly stuff; and there is nothing in them to prove intellect or strength of mind. But, says the Solicitor-General, a very sensible man may write much nonsense to his wife. Certainly. But then these are the very letters which the defender has produced as proof of Kenneth's judgment, talent, and capacity. There is one letter I refer to you, in which he begs that Campbell may not be sent back to him, as he was much better without him.

Is this a proof that he had any affection for Campbell, or that Campbell was an attendant, who was particularly necessary to this poor man. There is one expression in one of these letters from the wife to him, that I like, "Should you wish to write to Robert, if he does not come, Mem (I do not know who this means, except it was Mrs Roy, Mrs Mackenzie's mother) will be happy to clerk for you, I am sure." "Mem will be happy to clerk for you!" I just refer to this little fact that comes out in the defender's productions, coming out of their own hands, to shew you what passed in the interior of that house, and how Kenneth's letters were commonly written. There are more of these letters from Kenneth to Mrs Mackenzie, and I have no objection to every word of them being read, and to your taking your estimate of him from his letters. (The Dean then read many of these letters, which are printed in the Appendix, and commented on them as conclusive proofs of Kenneth's want of capacity.)

There are two or three letters of his that are of a different description certainly; but even on these I found with some confidence—I mean the letters which he wrote in spring 1817, when he was in London and France. You recollect, that Mr Macbean says, that Major Munro, of Poyntzfield, went with him to London and France. Mr Mackenzie, of Kippoch, proves that the Major was with him. We think this man, Gentlemen, to be an important personage in the history of Kenneth. Poyntzfield was with him, I say, in London, from whence two letters were written, one to Dr Ross and another to Mr Macbean. I admit, that they are sensible letters; but my belief is, that they were the composition of Poyntzfield, or that Kenneth was assisted by him in the writing of them. Do you but compare these letters with the other holograph letters of Dundonnell, and see if in sense, understanding or business, it is possible that they could have been written by him? I am ready to peril the case on a comparison of any of the other letters in Kenneth's hand writing with the two or three, two I believe, written on business, at the time Poyntzfield was travelling with him. The latter plainly is the letter of a very shrewd, clever man—sharp in matters of business—expert in discussing questions relative to the conduct of others, and able to answer all Macbean's views as to several law suits. These letters are most palpably not the letters of the same man who wrote all the others in Kenneth's hand writing. The difference is most striking—far too remarkable to be reconcilable with the notion that the former are the productions of Kenneth. Read the whole carefully your-

selvca, gentlemen; and I leave the result fearlessly to your judgment—reminding you merely of the letter from banker Mackenzie to Kenneth's father, which I made the witness read part of, and in which, adverting to some letter from Kenneth on some business, he speaks of it as plainly the production of some third party, and treats it as one Kenneth was incapable of writing.

Poyntzfield you see, for some time had a general charge of Kenneth. He introduced him to Macbean—directed the latter in Kenneth's business—and was plainly understood by the latter to be his protection when abroad. It is a curious fact, that Mr Macbean, in one of his letters to Kenneth, addressed to the Hotel de Baston Rue de Vivienne, Paris, adds the following postscript to Poyntzfield :

“ MY DEAR MUNRO,

Edinburgh, 1st February 1817.

“ I merely use a corner of Dundonnell's letter, to say that I have encroached on *your province of Mentor*, by recommending strict economy and prudence in expenditure. Another such sum we cannot expect to get, until after Whitsunday; and I have no doubt you will urge upon our friend the abstaining from all purchases or outlays at present that are not absolutely necessary.”

Is this reconcileable with the notion that Poyntzfield was, as Macbean says, under awe with Dundonnell? Is it not on the other hand consistent with our theory that Poyntzfield had a charge over him, as a person not fit to be trusted by himself, and consistent with the notion that Kenneth stood in awe of Poyntzfield,—“ I have encroached a little on your province of *Mentor* !” —Does not this single word, *Mentor*, shew the opinion that Kenneth's man of business entertained of his client, when he was obliged in this way to give him what any other person would have considered a kind of insult, in a postscript to the very letter which he had addressed to him? I know that Macbean, speaking from his present recollections, says he meant nothing by this, except that Poyntzfield was to give him good advice. It may be so. But I think this little word betrays a great deal; and it certainly opens up a different view of the footing on which Dundonnell and Poyntzfield stood, very different, indeed, from the parole testimony of Macbean. I like much this letter written at the time. I think it speaks volumes—the more so as it is utterly unexpected, from the account that Mr Macbean now gives us of the man from the impressions and recollections under which he is now speaking. Does not Mr Mackenzie of Keppoch, whose veracity you cannot doubt, prove that when he was in London, when Kenneth got up for the purpose of going to see some exhibition, that Poyntzfield prevented him, telling him, that if he did go the Cocknies would humbug him, as sure as he was living! This is a proof, at least, that Poyntzfield did not choose to trust him out by himself at that time; and it is quite consistent with our theory, that in the two letters alluded to, he must have been assisted by Poyntzfield. The defender has not thought fit to call Poyntzfield. In our proof he was only mentioned incidentally. But, from Macbean's testimony, it appears that no one could know Dundonnell so well. He lived with him

constantly—transacted business for him—was the medium of communication with his agent—travelled with him—in short, took charge of him. And yet though Macbean's testimony brings this person so prominently forward, and shews that Poyntzfield had the most undoubted means of knowing Kenneth thoroughly, yet he is not brought forward by the defender. If he could have supported the case of the defender, rely upon it they would rather have called Poyntzfield than many of the witnesses who scarcely ever had seen Kenneth, except in the most casual manner. This leads me to observe, that, on considering carefully Macbean's testimony, you will find that he seems to have had hardly any communications with Kenneth, in which Poyntzfield either did not assist, or was not wholly the medium of advice or direction. I dare say, at this distance of time, Macbean cannot separate the friend from the client, and that his recollections are mainly of what passed when Poyntzfield was presented or transacted the business. But then the omission to call Poyntzfield is the more remarkable. There cannot be a doubt that his testimony, if you had believed him, and if he could have confirmed Macbean, would have been decisive. I think the omission to call him is as important in our favour.

What my learned friends are to make of that ostentatious parade of letters and papers, which they have produced, I cannot make out. The Solicitor-General ran over a great number of documents, by which he wishes to prove that Kenneth was treated as a man capable of managing his own affairs. Could not the same thing be said of any person as to whose deed a question ever arose *who had not been cognosced?* Kenneth was not cognosced, and letters were accordingly addressed to him, whether he understood them or not; for if he did not, others did. Have you seen one instance during the preparation of all these deeds, and in all his business transactions, in which he was not assisted by men of business? What, then, is the use of throwing down on the table that great bundle of papers? what purpose is it to serve? When a man is not cognosced, he is, no doubt, considered by the world *sui juris*, and because transactions are carried on with him, money lent to him, rents paid to him, in all which transactions he had *invariably*, I say *invariably*—there *not* being *one exception*—the assistance of expert men of business by whom every thing is transacted, is he on this account to be considered as capable of conducting the ordinary affairs of life? The Solicitor-General made a very solemn appeal to you and the court in regard to these deeds, declaring that justice would not be done, if they were not all considered. It was his business, gentlemen, to explain them, and shew how they bear on the case. The appeal is idle. You are not bound to understand what the defender does not take the trouble of explaining. Why did they not shew some transaction of business, in which Kenneth acted for himself. I say there was not one. Nay, in the most ordinary matters, he was always assisted and protected, or rather superseded by agents. He was not left to do the simplest matters by himself, and he was incapable of doing even the simplest. Take the innumerable receipts for rent, they are almost all of them holograph of the lady, or of

the factors, with the exception, I believe, of about sixteen, and these are *the most wretched scrawls you can conceive*. They are not even full receipts — a sort of voucher for some trifling sum, and his signature; which the tenant takes, and, of course, the thing stood if the factor found nothing wrong. But, gentlemen, it appears beyond dispute that Kenneth was assisted in doing the minutest trifles, in a way and to an extent that never occurs in the ordinary circumstances of life, in cases where there is no incapacity or permanent infirmity. You recollect the abstract we put in, and which was taken as correct, of what appears to be the result of the productions. Here it is, and I beg your attention to it. (Here the Dean made remarks on the abstract, already printed in the evidence). I do not say that all this proves incapacity; and I must say that the Solicitor-General appeared to be much pushed for matter of observation when he represented many parts of our case, such as these facts stated in this abstract, the letters to his wife which we read, and many other matters noticed by Mr Robertson, as brought forward by us as direct proofs of incapacity. I cannot think my brother serious in so treating this part of the case. We do not mention these matters as proof of imbecility. But all these productions have been made by the defender, to shew how acute and sensible Kenneth was, and how much he did and wrote himself. And we bring forward what I have alluded to, in order to shew that the productions justify no such conclusion, and that, in truth, Kenneth had assistance in the merest trifles, to an extent perfectly consistent with our theory.

By the way, I omitted to allude to two letters, after the marriage in 1817, read by the Solicitor-General, from Kenneth to his brother, which he said shewed much sense. So they did. They were most excellent, sensible, prudent letters. But my learned friend inadvertently omitted to mention, or rather had purposely not been informed by the defender, that these two letters are written by the wife, (among those admitted to be so,) and only have Kenneth's signature. Hence of themselves they prove nothing.

Another important part of this case is the alleged causes of such settlements. I shall take first the question of the law suits which have been stated as a cause of offence to Kenneth, against my client. It will not do to say that likes and dislikes are quite sufficient to support the deeds, and that it is enough that Kenneth could entertain such. In judging of capacity, the rationality of the acts were admitted to be of importance; and when the deeds are ascribed to causes of offence operating on the mind of Kenneth, you must see that they were such as would operate on a reasonable mind — on a mind endowed with ordinary understanding, and capable of judging of the consequences of his acts. You must be satisfied that he could form an opinion as to the grounds of offence, on which he is said to have disinherited Thomas; and in judging of the capacity of the man, it is certainly not immaterial to consider whether the supposed causes of offence were such as would have influenced the mind of any human being, possessed of ordinary understanding and rational feelings. The first law suit was one of this description — and remember

the account of this transaction. Mr Macbean was agent on the one side, and he tells you that Thomas drove them into this litigation. It was a law suit raised by Dr Ross against Thomas and the trustees of the father. Now Mr Macbean, the agent of Kenneth, is the agent of Dr Ross in this process, and he pursues the claim against Thomas for the sister's share of the last half year's rent of the estate, which had been found to belong to Thomas; and they say that this litigation was a just and reasonable cause of offence entertained by Kenneth against Thomas. Now, how could Thomas pay that sum to Mrs Ross unless he received it from Kenneth? And you will remark, that Macbean was agent not only for Mrs Ross, but also for Kenneth, who, he knew, must pay the claim. Will that be considered a reasonable cause for the exclusion of Thomas? An idiot might have taken it up as a cause of offence, but no sane man would. Will you then say that he could judge of the consequence of his acts if he were such a person? Mr Macbean told Kenneth that he thought the claim well founded, although Mr Boy does not chuse to think so. That money was not paid till November 1826.

I must read to you some of the documents as to this law suit, for they contrast strikingly with the testimony of Mr Macbean and the account he gives of these law suits, and it will serve to show you how little the feelings of poor Kenneth had to do with these matters. There is a letter from Mr Macbean, to Dundonnell, dated 12th February 1818,—“ My dear Sir, I have a letter from Messrs K. and J. Mackenzie, your brother's agents, *in which a demand is made upon me for the half year's rents for crop, and year 1816, to which he says, as his father's executor, he is entitled.* Your brother adds, that ‘ I hope Mr Macbean will pay this, without any disagreeable steps being taken, which, in the event of his not complying must be the case.’ *I had heard that a reconciliation had taken place between you which pleased me much, but this intimation does not seem consistent with it.* I will require to consult your counsel on the matter, and if the executor has a right to it let him have it. With compliments to Mrs M., yours truly.” (Signed) ‘ ENNES MACBEAN.’ Now, at this time, you will remember, Mr Macbean was the agent for Mrs Ross, was in that capacity judicially insisting against Thomas, as the productions prove, to pay to her her share, that is, a moiety of this half years rent; and, further, Mr Macbean knew perfectly well that this claim, on the part of Thomas, or in other words, on the part of his other client, Mrs Ross, was perfectly well founded, the sum being due by Kenneth, who had drawn that rent. But he disputes the claim on the part of Kenneth in opposition to Thomas, and he urges the claim on the part of Mrs Ross against Thomas, and yet poor Thomas is the party upon whom the claim of all this is to fall. With what justice you will perceive from another letter by Mr Macbean to Dundonnell, dated 29th April 1820.—“ I lately handed to Mr Macandrew a *fresh demand made by your brother, Mr Thomas, for upwards of L.700, as half years rent of the Dundonnell estates, which he says belongs to the executor and not to you, and what was uplifted by you after your father's death.* When Mr Macandrew has ascertained and written to me regarding the

' facts, and the practice as to the farms and rents, I shall lay the whole before counsel for advice. My present impression is, that the demand is well founded.'

Then a submission of this claim was entered into in 1821 to Mr Cunningham, who, in 1826, found the sum to be due.

There are two material letters of Roy's about this time, which are very important documents. On the 1st of August 1825, Roy writes to Kenneth in the following terms:—

"MY DEAR DUNDONNELL,

Edinburgh, 1st August 1825.

"I cannot express how much I am disappointed at not hearing from you in answer to my recent letters about your brother's claim in the submission. (The arbiter fixed Wednesday to decide, and it was after an earnest application that it was agreed to defer for a short time.) Since my last letter, a new claim has been given in, claiming a great deal more, and the amount becomes now a matter of most serious consideration. I am persuaded you will see how reasonable it is that I should earnestly entreat you to furnish me yourself with this information, and no one can do it better. You see, that otherwise I will be placed in the situation of one carrying on a law suit between two brothers on excellent terms with each other, and will be sure to be blamed by both parties. You will not, I am sure, do me so much injustice. Go over each one item, many of which I never heard of, and never expected to hear of from the time that has elapsed; and without information from yourself, it is quite impossible that justice can be done you."

There is another letter of Roy's, dated the 20th of August 1825, and which, I must say, is a creditable letter to Roy, except in so far as it is contrasted with his conduct here.

"MY DEAR DUNDONNELL,

20th August, 1825.

"Regarding the submission with your brother, you may be assured I will do every thing in my power; and as the matter is so near a decision, I certainly think you ought to take the arbiter's opinion on the subject. I have always considered your brother's claims good, so far as they go, and I shall be disappointed indeed, if they do not turn out to be so. I shall prepare your answer as carefully as in my power, and send you a copy of it. But in this dispute, allow me, my dear Dundonnell, to remind you, that it is not now in your brother's power to prevent the discussion, since his creditors have got hold of it. He would give offence to them, were he not to give information even against you, in prosecuting the claim. And you must not therefore blame him, but them, nor allow any hostile feeling to him to be occasioned by it. I own I am particularly anxious to impress this on you, as nothing would more disappoint me than to see the good understanding between you, that now exists, impaired. It was for many a day my wish to bring it about, and it affords me much satisfaction to see it, and you must not allow the demands of his creditors against you to interfere with it."

I read these letters to demonstrate to you how false is Roy's present story of the rooted dislike of Kenneth to his brother, of the notoriety of his aversion, and of the general expectation from his uniform conduct to Thomas, that he would disinherite the latter. As to the matter of dispute in this action, it was a marvellous proof of sense on the part of this man to disinherit his brother, because Macbean, his own agent, insists on having from Thomas the share of the half year's rent for Mrs Ross, and Thomas says, "How can I pay this to Mrs Ross except you, Kenneth, pay it to me?" Oh! but says the opposite party, dislike is enough— and Mr Macbean says, that it did not surprise him that this litigation gave offence to Kenneth. His impressions now are not as valuable as

the impressions which he had in 1820, when he said to Kenneth that the claim was well founded. In every one of these law suits he was unsuccessful, and found liable in expenses; and what agent would ever tell you that he was in the wrong?

Then as to second lawsuit, it was a marvellous offence, it seems, that Thomas would not give up the Mains! Dr Ross was factor, and he complains bitterly of this, and they raised a process against Thomas before the Sheriff, praying to have Thomas turned out. The Sheriff *dismissed the action, with expenses, as groundless and uncalled for.* (The Dean here read the judgment.) Now, all this happened when Kenneth was abroad, in the winter of 1816 and 1817. And hear what Banker Mackenzie said in his letter of the 14th November 1816, addressed to Thomas, my client:—"My own real opinion is, that Ross and Macbean are playing to one another's hands, and taking all these steps without the consent or approbation of poor Kenneth, who, since his father's death, has shown himself little short of a person that should be cognosed." This, in fact, is not a bad account of the whole transaction. 3. Observe the next wonderful cause of the alleged offence. They say that Thomas Mackenzie knew of the lease which his father had from Mrs Hay Mackenzie, and Macbean says that the transactions of all the other parties were to be identified with Thomas. Did they venture to show to you, that the lease was obtained from Thomas? Mrs Hay Mackenzie did not even know of its existence. The farm was openly advertised to be let, and where was the harm of Thomas taking that farm? There was no litigation between Thomas and his brother. Mrs Hay Mackenzie believed the father's lease to be expired, and acted on that belief. Thomas was not the cause of this. On the contrary, Mrs Hay Mackenzie was obliged to pay large damages to Thomas, above L.300, for not being able to give him the lease of this farm. What is the next process? the 4th. It is a summons of exhibition raised against Banker Mackenzie and the trustees—and not against Thomas. Roy says in this defence, that Thomas was a party to this action. That is false: he had nothing to do with it. *Again*, they found on a process of multiplepoinding, (the 5th,) raised by *George's* trustees, acting under the deed of 1809. In that action, claims were stated by Macbean on the part of Kenneth against Thomas, which were dismissed with expenses. In that action, Mr Thomas Mackenzie, W.S. was the agent for my client, and very naturally applied to Macbean for payment of his account, which Mr Macbean seems to consider a very weighty offence. The Solicitor founded upon the two letters of Mr Thomas Mackenzie to Mr Macbean as calculated to irritate Kenneth. Why it was a matter wholly between the agents. Macbean had promised to pay and did not. There is no proof that Kenneth even saw these letters, or knew any thing about them.

This is the history of these lawsuits, which were so much dwelt on, especially by Mr Macbean, as showing the immense litigation Kenneth was involved in by his brother—how ill the brother acted—how vexatious were these lawsuits—and justly Kenneth was displeased. You have heard the amount of them. He certainly was

embarked in the course of a few months by Macbean in about as many lawsuits as ingenuity could devise—utterly unprofitable, utterly unprovoked, and ending in signal discomfiture. No doubt Mr Macbean, who of course acted for the best, says he was quite right, and that Thomas was quite wrong, and his advisers very unreasonable. That is very natural. But Mr Macbean is the last person qualified to form an *impartial* opinion on that point, and I think betrayed in his manner pretty unequivocally his feelings, as the unsuccessful agent who had originated all these lawsuits.

The history of these lawsuits has been fully detailed by my learned friend Mr Robertson in his opening speech; and if the knowledge and experience of the Judge who is to charge you in this case can detect an error in our statements, I give up the case. It has also been stated by the opposite party, that *Thomas endeavoured to secure* a deed in his own favour to the exclusion of Kenneth, and that this was another cause of the hostility that existed between the brothers. Now I ask, where is the proof of Thomas having endeavoured to get any such deed? I have not heard a question put to any of the witnesses upon this point. Oh! but say the defenders, Kenneth believed it. What, in the name of God, have we to do with the alleged belief of Kenneth! except as proof of sense on the part of Kenneth. Banker Mackenzie speaks to the unkindly feeling that existed between the brothers at the funeral; on that point, he is not confirmed by a single witness, and I think you will not attach much weight to his testimony when you compare his opinion of Kenneth with the letter of 16th November 1816, (embodied in his evidence) written after the funeral of George.

But, says my learned friend, this deed, the cause of so much hostility between the brothers, was carried into effect—a deed, *leaving the lands not included in the marriage contract*, to Thomas, to the exclusion of Kenneth. Gentlemen, you remember that statement—dont you? If, by accident, they have forgot to put in this deed, I shall let them do it yet. Gentlemen, the statement of the Solicitor-General on this part of the case surprised me much. I cannot conceive how Roy could have ventured to instruct him, that any part of the free heritage was left to Thomas. There is not the slightest foundation for such a statement—not the slightest. (One of the counsel for the defender here said, an heritable bond had been left to Thomas.)—Dean. No—not so. Not one. The deed leaves him none—he got none. I again offer to allow them to give evidence of this new statement, if they have forgot to do so. The whole matter is an invention by Roy. There is no such thing as an heritable bond left to Thomas, neither lands nor an heritable bond. Put in such a deed, if there is such a deed in existence, and I will give up the case. I say the deed executed was a deed of moveables, wholly and exclusively of moveable property, leaving his moveables to Thomas under burden of legacies, &c. Now, Gentlemen, is the eldest son the person to whom the moveable property is left as well as the landed estate? (Something was again said by the Counsel for the defender.) Dean. This must be



brought to a point. I say neither lands nor heritable bonds were left to Thomas. Shew the deed that my learned friends speak of—I do not wish to take any advantage of them, and I will allow them to produce it yet. I understand well enough why Roy gave them this most groundless information as to a deed, leaving lands or heritable bonds to Thomas. He had instructed them to dress up a case about Kenneth's right to challenge his father's deed, and that advantage was taken of him in granting a letter not to challenge the deed executed by his father on death-bed. Unless the deed had left land or heritable bonds to Thomas, Kenneth had no right of challenge whatever—none in this world—Roy knew no advantage was taken,—the letter was merely a matter of respect, dictated by friends of the family—nothing was left past Kenneth—there was no attempt to leave the estates or any heritable bonds to Thomas, though the father undoubtedly had wished to tie up Kenneth from the conviction of his utter unfitness to remain at the head of the estate. But no such deed ever was made. The father's settlement merely disposed of the moveables, as I have already said. And was this a rational cause of offence on the part of Kenneth, that he did not get the moveable property to which by law he was not entitled, and which you know in Scotland is hardly ever left to the heir of the landed estates. Oh! but there is a glorious theory which the defenders have! The deed as to the moveables was made in favour of Thomas, to the prejudice of the favourite object of Kenneth's affection, Mrs. Ross, who did not get her share—who did not get what she ought to have got, although she succeeded in her claim at law. . . . And what is the result? Kenneth is said to have taken up the most rooted aversion to Thomas, because Mrs. Ross and her children did not get their share of the executry. . . . How did that motive operate on the mind of Kenneth? He disinherits Thomas and his infant children, and he *excludes Mrs. Ross and her children* from the deeds he executes against Thomas. . . . Wonderful consistency! But, says my learned friend, through the medium of Macandrew, Kenneth said he would do far better for Mrs. Ross and her children. Instead of giving the estate to one, said he, I give £6000 to be divided between them. Indeed! Could he not have given the estate to one of the Rosses, and the £6000 to be divided amongst the others? What nonsense is this mode of reasoning! . . . "Because you acted harshly to Mrs. Ross, I disinherit you, Thomas, and your infant child, in the birth of whom both myself and my wife have expressed ourselves in our letters in the most affectionate terms, and for the same reason, I leave the estate past my sister Mrs. Ross and her children, for your cruelty to whom I disinherit you!"

Another thing alleged by Roy as one of the causes of the disinherison of my unfortunate client is, that his habits of profligacy and drunkenness shocked his *pious and religious brother*. . . . An attempt was made to prove that such were his habits. You cannot but remember this from its complete failure. When the question was asked of one of the servants of the house, if ever she saw him in a state of intoxication at any of the convivial parties? Her

answer was, that she had never seen him in a worse way than that he could take care of himself, but might have once seen him tipsy at a Highland evening rejoicing. Was any thing like habits of drunkenness proved against him? No. Or of Kenneth's feelings on that ground. Not even an attempt. What then do you think of the character of Roy, who comes here to-day to try to keep that estate to the exclusion of the natural heir, which he obtained in the way which has been already described and proved to you, by instructing his counsel to make so disgraceful a statement, and attempting to support it in the miserable and revolting manner exhibited to you! I have too much serious work to perform in this case, to give way to the feelings of indignation which boil within me, when I think of this part of Roy's case. It will cover him with infamy whatever is the result of this trial, and in that be his punishment.

They then proceed to say, that Thomas could not take care of the estate—that he was a spendthrift—that it would all fall into the hands of his creditors; and that in order to prevent it passing into the hands of strangers, and to prevent the ruin and disappearance of the family of Dundonnell—Kenneth knew that he could not trust it to his brother, and on this account he not only disinherits his brother and his children, but he disinherits his favourite sister and her family;—AND WHAT IS THE RESULT? You heard the account of the evidence given by the witnesses—you heard the statements of the witnesses speaking of the bitter grief which the father expresses at the prospect of the estate coming into the hands of one by whom it would be ruined. And now I say what is the result? Is the father's prediction verified or not. The defenders close their case by calling in an accountant, to prove to you that after making what they call a rational settlement and suitable provisions for the fair objects of Kenneth's affection, that there remains but the fragment and ruin of this ancient inheritance; and that in the hands of this very Kenneth, the estate has disappeared—the family is gone—and the words of the father sealed by the facts which the defenders themselves have proved. Yet, to preserve the estate from Thomas, forsooth, the prudent, calculating, shrewd, provident Kenneth, leaves it to others by the deeds before you. What a picture does not this give of the defender's cause—what a satire on the eloquent declamation of his counsel. But how have the debts on the estate been contracted? Kenneth succeeded to it free and unincumbered; and Mr Macbean tells you, that L.6000 were contracted in the course of almost the first year. Lands to the value of L.16000 were sold. He entails the name and designation of Mackenzie on the estate, and now it is bankrupt; and to prevent it going into the hands of my client, he leaves it to Robert Roy. They try to prove that it is not even worth the acceptance of the Edinburgh apprentice beginning life. What is Roy's account of the matter? That if he did not take it, Kenneth said some other person would be glad of it. Is this the language of a sensible man?

Another important and remarkable fact is, it is a remarkable thing—that they have not attempted to prove by any one witness, or by the production of any document, affection or partiality by

Kenneth to any one to whom legacies are left, or to the person to whom the estate is left. Not one expression of kindness. Will you then disbelieve the evidence of the witnesses when they tell you that he spoke of Roy in terms of aversion? Will you believe that Ninian Jeffray swore to what he believed an untruth? Will you believe that Miss Gillanders came here to perjure herself, when she told you that Dundonnell spoke of him in terms of aversion. The defenders were dared and provoked and defied to prove the alleged affection or partiality on the part of Kenneth to Roy, yet they have not attempted to do so. Take the evidence of those who spoke of the kindly footing he was on with Thomas. It is admitted by Macintyre,—who was dismissed from the police, who told you that he supposed that Macbean applied for his appointment to his situation there,—who said he could not tell whether Roy applied for him, but that he was replaced in about a month after his discharge,—it is admitted by this man, that Thomas was left in charge of the property of Dundonnell in the absence of his brother Kenneth. Is this a proof of his predetermination to exclude Thomas from the inheritance? Gentlemen you cannot believe that it is. Then you have the numerous letters, in the handwriting of the wife to Thomas, expressive of the utmost affection and kindness towards Thomas and his family.

Then take the evidence of his feelings towards Campbell. This is a serious part of the case. I do not wish to dwell on it. But how it is to be got rid of by the supposition made by my learned friend I know not. Look at the evidence of the various witnesses who spoke of his dislike towards Campbell—John Mackenzie, Mary Mackay, and Monkcastle. Examine still more the evidence of Cheyne Mackenzie and Gillanders. They were both lads at the time they were at Dundonnell, but not the less likely to communicate what they observed; and not the less likely persons to whom a man such as Kenneth, who associated with the servants, and spoke to his lowest dependants on some of his most important business, would freely communicate and unburden his mind. Cheyne Mackenzie, an interesting straight forward witness, giving his testimony without the least self-sufficiency, and who has not been contradicted,—he tells you that he thought it his duty to state to Dundonnell a circumstance of great impropriety that he saw between Campbell and Mrs Mackenzie, and he swore to you that that suspicion was not new to the mind of Dundonnell. Then the evidence of young Gillanders, as fine a looking young man as you could wish to see in a witness box—Do you believe that he and Gillanders would put in jeopardy for ever their immortal souls, which, if that which they uttered was false, they have done, I had almost said beyond the hope of redemption. Perjury! Human experience cannot give an instance of perjury more black and horrible than that which these youths have committed, if their testimony is false. On this part of the case your minds must be made up, and I am sure you will give to their testimony the deliberation,—the conscious and just deliberation which it becomes intelligent and sensible men to give.

As to the remaining part of the case, I will not fatigue you by

going over the evidence of incapacity at length. I will only call your attention specially to the evidence of three witnesses of considerable importance, and which I think conclusive. Dr Borthwick was two years in the regiment with Dundonnell, and so was Dr Campbell. Remember the talent with which they gave their evidence—the precision and accuracy with which they expressed their opinion and view as to the extent of the mental imbecility of Kenneth. Then look at the evidence of Dr Bayne, which was given with a degree of accuracy, and precision of language, which I have seldom heard in any witness box. He said that Kenneth's mind was so obtuse, that he did not think he could plan or originate a scheme of settlement or comprehend a deed. Dr Campbell said, that he was not capable of combining a series of propositions, or of understanding their mutual relations or combined tendency—that he might have understood a single proposition if exceedingly simple, but that he could not have composed or revised any deed. You have this gentleman confirmed by a witness to whose evidence I must recal your attention, Mr Collins, one of the principal clerks in the accountant's office of the British Linen Company, who had been for years in Inverness, and who had no connection with the Ross-shire prejudice or clamour. He gave his evidence with the utmost talent, and recollect what he said as to the extent of Kenneth's capacity.

As to Dundonnell's habits, you have them irresistibly proved, and I desire no better circumstance to show you the difference when in the presence of his dependents, or of those of whom he stood in no awe, and in the presence of strangers, than the concluding part of Mr Macbean's testimony, *that to strangers he was exceedingly shy and reserved*. It was Mrs Mackenzie's object, for her own sake, to keep him respectable, that he might not distress her by his appearance in the society of strangers; but in his letters, and on the evidence of the witnesses that have been produced; you have complete proof of the fact of his general habits being confirmed. But Millbank is not to be believed, it seems, who speaks of Kenneth amusing himself on a Sunday forenoon with the idiot, and causing her to jump over a stick. This evidence is confirmed by Mr Robertson in every respect. It is all an invention, however, says the Solicitor General. But what is somewhat extraordinary, the opposite party bring Angus Macdonald to speak to this very scene; but, he says it was Millbank that made her dance, and not the Laird. The evidence, however, is so far of importance, that it proves that Millbank was not the inventor of the scene to which he bears testimony; and when you come to contrast this evidence with others, you will have no difficulty in judging whether it was Millbank and Robertson or Kenneth that made her dance.

Besides this, scenes were spoken to in Penrynuck, which you cannot but remember, of a similar nature with that which Millbank describes as happening at Leith. And Mrs Cairns speaks of a foolish courtship in Peebles by Dundonnell of her daughter; and tells you that her daughter would not listen to him, having a decided aversion to him, alleging as a reason, that *she never would*

*marry a man that she would be ashamed of,*—that he was a silly innocent man, every body who knew him said that.

The only important testimony for the defender is the evidence of Mr Minchin. There is not the slightest doubt on my mind, that he believed every thing that he uttered; but I cannot admit that he is free from the fallibility that may be predicated of the judgment of every man. He says the facts are fixed in his recollection, by the circumstance of the Allied Sovereigns being at Portsmouth at the time of the court-martial which has already been alluded to, and he was glad that he had so sensible a client to deal with, while conducting his case upon so important and imposing an occasion, when numerous strangers might have been present. But he may have been mistaken in his recollections. In particular, he was pleased with him more than any client he ever met with, and why? because he did not annoy him with questions or remarks. I can tell you, gentlemen, that the best client with which any counsel can be brought in contact with, is a man who never opens his mouth, nor interferes with you in the management of his case. When Mr Minchin was conducting and reading over the defence of Captain Maekenzie, I have not a doubt that the real fact to be, that what left an impression upon his mind of the capacity of his client, was in truth the result of his being unusually passive and silent, and giving him little or no trouble. But it seems that Mr Minchin got from him the information that he wished. Now let us see what that information was? Why it was a ball which had taken place at Portsmouth in Kenneth's barrack-room, and that he was desired to stop it; and the sentence of the court-martial proves, that when Captain Maekenzie knew that the order had been given, that he stopped the ball as soon as he could. I can hardly conceive a more simple transaction. I repeat, that I think it was one of the simplest, and most ordinary matters that could come before any court of investigation. I have not the smallest doubt that Kenneth was competent to give that information to Mr Minchin to enable him to prepare his defence.

Gentlemen, I do not think it necessary to enter more fully into the general evidence as to incapacity. (The Dean then shortly resumed the view of the case he had pressed in the previous part of his speech, and then concluded, In going over the whole case, deliberately paying attention to what you shall hear from the Court, you will set about your sacred duty with those conscientious feelings by which I know that you will be guided. I doubt not the result. You cannot know the overwhelming interest—the anxious hours and sleepless nights which the management of this case has caused. But you will, I think, believe with what sincerity I pray to God to guide you to a just, to a righteous judgment. Whatever that verdict may be, I will ever acknowledge that it proceeds from a full and fair and conscientious deliberation of the case.

The Lord President asked the Jury whether they would wish him to commence his charge then, in which case they would have to retire to deliberate late at night, or whether they would wish now to adjourn, and to hear the charge in the morning, when they would have the whole day before them for deliberating upon their verdict.

The Jury proposed to adjourn.

SATURDAY.

**LORD PRESIDENT.**—Gentlemen of the jury, before proceeding to make any remarks to you upon the merits of this case, I now beg in the name of the court, and of the parties, and of the country, to return you our united thanks for your patient attention to this case, and for the good humoured manner in which you have submitted to the inconvenience—the great inconvenience—you have been put to in being separated from your families and from your business for such a length of time. Your attention to this case has been most exemplary; and whatever your verdict may be, though of course it cannot be satisfactory to both parties, I am sure that neither party can say that they have gained or lost their cause from want of patient and constant consideration on your part.

Gentlemen, without detaining you farther, I shall proceed at once to state to you such remarks as I think may incline you to a right verdict in this case. There is not much law in this case; it is exceedingly simple; and in the little law there is, the parties do not materially differ; at the same time, in some points they do differ; and therefore it is proper that I should make such remarks to you as will lead you to apply the facts. It was well stated to you by Mr Solicitor General, that in the law of Scotland in regard to the settlement of property, it is the will of the testator that the law first looks to. If a man has not been restrained and prevented by entail, and is otherwise of a disposing mind, and observes the forms prescribed by law, it is the undoubted law of this country that he is at liberty to dispose of his property as he pleases; and what his motives may be for doing so, neither you nor I, nor any person, has the least right to enquire, except in so far as these motives may be indicative of the capacity of his mind. And it is only failing such settlement by the testator, that the law declares to whom his property shall then devolve.—In that case, the law points out certain persons in his succession, who shall have his property; but if he choose to make a settlement, and has capacity to do so, he may, if he please, disinherit the only child of his own body. I have next to state to you, as undoubted law, and it is common sense, that where a man's deed does appear, all the presumptions of law are in favour of the validity of that deed, and of the capacity of the testator; and any person who challenges such a deed must prove to the satisfaction of a jury who are to try the question, or to the court before which it comes, that in fact or in law, or both together, it positively is not to be held the valid deed of the testator.

I must differ entirely from the doctrine that was stated to you by the Dean of Faculty, that if there be a doubt in this case, you must find that the deed is not valid; that is not the law; and it is not what the pursuer undertook to prove; he came here, not to raise doubts in your minds, but to prove to your satisfaction, that this is, not in law nor in fact the deed of Dundonnell. But, then, gentlemen, on the other hand, it is just as true, in order to prove that it is not to be held a valid deed by Dundonnell, that it is not necessary to prove

absolute idiocy, nor the want of capacity altogether to manage a man's ordinary affairs. The question is, whether the man had sufficient capacity and soundness of mind to make the deed which he did make, and which is under challenge; and, therefore, in that respect, I do not agree in the law as laid down again by Mr Solicitor-General. If it can be shown that the testator had not the capacity to originate or to understand the nature of the particular deed which he did make, it is of no consequence, although he may have had capacity to make another deed. On that question I perfectly agree with the opinion which was referred to on the part of the pursuer, and partly read to you, expressed by my Lord Chief Justice Tenderden in the case of Ball and Manning, in which I see he is supported by Lord Plunket, now the Lord Chancellor of Ireland; and though I cannot pretend to express myself in the good language he has done, I give you that opinion not only as the law of England and Scotland, but as the law of common sense, which must be the law of this and of every other country. [Here the learned judge read the judgment of Lord Tenderden in the above case, shewing that "the inquiry of late years has always been in law, whether the person is of such mind and memory as to be capable of knowing the effect and consequence of his acts? And that, as one test of such incapacity, the jury were at liberty to consider whether he was capable of understanding what he did by executing the deed in question, when fully explained." ] Now, gentlemen, I must state to you as undoubted law, that in judging of the capacity of a man to make a will or a settlement, most certainly you are not to require—and there is no necessity for you requiring—the same degree of capacity that it is necessary for him to have in making a bargain between man and man, by which he himself may be raised or may be ruined. For example, a man who is to make a bargain must needs know the value of the thing that he is to make a sale of, the quality of it, the quantity of it, and the relative price which he ought to pay or receive. That may require a very considerable degree of judgment according to the nature of the transaction or the thing that is to be bought or sold; but certainly there I do fully agree with Mr Solicitor-General, that in order to make a valid settlement, much less mind will do than is necessary for the other. A man who makes a bargain with other men must be on a footing with them, and ought to be on a footing with them, and capable of judging by his own understanding what he is about; he must act by his judgment, and by his judgment alone, excepting when influenced by mere feeling and affection. A man, for instance, may be induced to give, as a *pretium affectionis*, three or four hundred guineas for a horse for a particular purpose, that another man would not give fifty for, and perhaps he is not worth more; but in the making of a settlement, a man has not so much occasion for judgment as for feelings, affections, predilections, and antipathies. But still, however, there must necessarily be at the same time such a mind as is always sufficient to judge, not only of wills in general, but to know the particular nature and consequences of the will he is to make. I have already stated to you that the motives that may have

actuated a man in making his settlement, are not relevant in judging of the validity of that settlement, excepting in so far as these motives may have the effect of determining his capacity. Of these motives I shall speak afterwards.

As to the degree of capacity which Dundonnell possessed, there is much contradictory evidence; and, gentlemen, I acknowledge to you that, from the opportunity which the adjournment of last night has afforded me to consider this case, I have come to be of opinion that there is less necessity to canvass very minutely that evidence than I thought formerly. And if I were here sitting as the sole judge, as my Lord Chancellor is in the Court of Chancery, or Sir John Nichol in the Ecclesiastical Court, in judging of deeds of this kind, or were it to be determined by my opinion singly, I would almost be disposed to throw the whole of that testimony overboard on both sides. Gentlemen, the opinions of a man's capacity or character, when so totally opposed to each other as in this case, I think it probable, that in both cases they are overcharged, and the parties themselves have pressed their averments on both sides farther than it was necessary for them to go. I think that the pursuer has attempted to prove too much—that Mr Kenneth Mackenzie was of lower intellect than he was, or than it was necessary for him to prove him to be; and I think on the other hand, the defenders have averred him to be, and attempted to prove him to be, a much wiser man than we find that he certainly was. There is one thing perfectly clear, that there could have been no flagrant report in the country with regard to his incapacity, because, in the first place, you have the Lord Lieutenant of one county and the Lord Lieutenant of another giving him commissions in their regiments of militia, and the commanding officers receiving and retaining him in their regiments without remonstrating that he was unfit and unqualified to discharge his duty.

In the next place, he is transferred and promoted from the Ross-shire militia, where he was a subaltern, to the Inverness-shire, where he got a company. These are two adjoining counties, and there is no doubt that the regiments were acquainted with each other, and I think that there could be no report of any consequence as to his total want of fitness for his duty. As a Captain in the Inverness-shire Militia he was received, and he continued to live with the officers until the regiment was disbanded in 1814. He was again received into the regiment when it was embodied in 1815. I shall here mention some other things which occur to me in the evidence regarding his military life, although not in the order of time. It is unnecessary for me to waste your time by going minutely and verbatim into the notes which I have taken; the result is this, that some of the officers said he discharged his duty fairly, and others that he could not, and was prompted. There are some parts of his duty that the commanding officer could see whether he discharged well or not, and there are other parts of it, when the regiment was standing in line, when he neither could know nor see whether he acted of himself or was prompted by the serjeant behind him; and nobody could



know that but the serjeant and one or two near him; and when the word of command was given from the front, the serjeant standing behind him might have to tell him how to obey it.

Then comes a remarkable affair which is not easily decided. It is said, that at the great review before the Allied Sovereigns, he was considered so notoriously incapable of doing his duty, that he would be a disgrace to the regiment, and that some of the officers hurried him out of the ranks behind a hedge, and afterwards on their return bundled him into a post chaise, and conveyed him back to Portsmouth. That neither is nor can be true, for it is proved, that he could not be in the ranks at this review, as he was under arrest at the time, in consequence of the charge brought against him, for which he was to be tried by a court martial. I should have said, and told you, that the witnesses must have been palpably perjured, if I did not see that a solution of the difficulty, whether easy or not I do not know, may be given, which, if correct, will save them from the charge of perjury, by supposing that they must have been mistaken in seeing him in the ranks. It is not impossible, that, from motives of curiosity to see that great review, he should have broke his arrest, and gone to see it, thinking that he should not be known; and having been discovered by some officers of the regiment, who knew that by such conduct he was guilty of a much more serious crime than that for which he was under arrest, they hurried him behind a hedge that he might not be seen by his commanding officer, and thereby saved him from losing his commission, and perhaps something worse. This is probable, and I state it to you as a solution of the difficulty, because I am never willing to believe that witnesses are guilty of perjuring themselves; and if this is not the case, these witnesses must be perjured.

Then I come, gentlemen, to the trial before the court martial; and there you have the evidence of a gentleman beyond the possibility of suspicion, I mean Mr Minchen. It is impossible to doubt one word of what he said as to his impression at this moment, and as to his belief of what was his impression then. But at the same time, when you consider the nature of the charge that was made against him—that it was a simple fault—a ball that he had given without the leave of his commanding officer, and not having stopped it at once when word was sent him to do so; it was at the best a very simple piece of business to explain. It required no Solomon to tell Mr Minchen what were the facts of the case—that the ball was not exactly stopped at the time; but it was done as soon after as Dundonnell could possibly dismiss the company, and the court martial founded upon this in their verdict. The best thing that a man can do under any such circumstances is to be passive, and leave the conducting of his case in the hands of his counsel. When I practised in the Court of Justice, many a man would have hanged himself, I believe, if I had put all the questions he suggested; and the most judicious thing that a client can do is to trust his defence to his counsel, and to interfere as little as possible. But Dundonnell did suggest questions at the time which Mr Minchen considered as judicious, and he acted upon them.

That being the case, in so far as the capacity of Dundonnell was concerned, I go back now to his early state at Dundonnell, when under the charge of his father, and under the tuition of Mr Kennedy, and the time he spent under Mr Kennedy at Aberdeen. The evidence of the Rev. Mr Kennedy is there very strong indeed. In that evidence you are told of the incapacity of Kenneth, and it must have been so in reality, and not taken up from after impressions and surmises. It must, therefore, have been the impression of both the Mr Kennedys at the time, because we see that their testimony is corroborated by letters of the father written at the same period. Now, in 1808, this gentleman was about 19 years of age; and what can you think of a lad of 18 or 19, whose father, in writing to his elder brother, said that he kept him at Aberdeen that he might be able to read and spell. After this it is impossible to doubt that this man's understanding was, at least, greatly below par. The account that is given by the other tutors at the time is also corroborated by the impression of his own father. If you wish me to read to you any of the evidence of the Kennedys, I shall do so; but I am sure it has made a considerable impression on your mind, and I shall take your wish whether I shall read it or not. (The jury replied "No.")

Now, then, we come to a remarkable fact at Aberdeen—the story of the intended marriage. The counsel for the defenders did not pretend to deny that there was some foundation for the story; but he gave it a most ingenious turn, by saying it was invented by Dundonnell himself, in order to get out of the restraint and tuition of Kennedy. Whether it was so or not, can be but conjecture on the part of any of us—for there is no proof of it; but it is no impeachment of Kennedy's veracity. He acted upon it, he was afraid of it, at least, and there is real evidence of this in his letter to the father, which has been read. Well, gentlemen, there is another circumstance of real evidence arising out of this proof, that entirely corroborates Mr Kennedy's testimony. It seems that this poor young man, if he was going to be married, does not seem to have had a distinct idea to whom he was going to be married. The story he told to Mary Mathieson, and which she communicated to Mr Kennedy, is, that the bride was to be a Miss Forbes; for she and Kennedy went to the house of Miss Forbes, but did not find him. Besides, Miss Forbes was privy to it; for she said, "It is not here that he is, but at the house of Mrs Strachan,"—and it is Miss Forbes that directs them to that house. There is here a chain of circumstances which amounts to real evidence; for Kennedy did not know any thing about Mrs Strachan. It does not appear that he knew that Kenneth visited there; and Miss Forbes could not have directed him to that house, except she knew or heard that there had been something going on between Dundonnell and Mrs Affleck. Accordingly, Mr Kennedy and Mrs Cheyne go to the house of Mrs Strachan; and it is admitted that they found him there and took him away. Took him away! A young man then of nineteen—took him away under the arm like a child, and led him down stairs! What would any young man of nineteen say to conduct such as

this? He would say to Mr Kennedy, "Come in Sir, herè am I at a party in a respectable man's house, or, if you wont come in, I wont go out. Am I to be told by you what I am to do, or where I am to go." Would any young man, who had the spirit or common sense of a young man of his age, have done or acted as he did? observe also that he is carried away in such a hurry that his hat is left behind. And here the testimony of Mr Kennedy is corroborated by Mrs Strachan; and the trifling difference betwixt them signifies nothing in the case. Whether right or wrong, Kennedy had placed most implicit belief in the story—for he instantly confined Kenneth, and sent him off next day with a confidential man to his uncle at Nairn. So much for Kenneth's capacity.

After that he went into the militia; and it is distinctly proved, that whatever became of his understanding, he improved in his habits and manners as far as a very uninformed mind could go. As to the degree of learning at which he arrived, it must have been very small indeed. The Rev. Mr Finlay and all his other tutors have told you, that they could make nothing of him—that he never made any progress—and Mr Kennedy, which was natural, wrote to his father that "he was rather better at his arithmetic"—that "he did not want sense"—but that he was idle." I think you can hardly suppose that Mr Kennedy, in writing thus to the father, who was sufficiently awake to the incapacity of his son, would hurt his feelings by making any further allusion to that son's imbecility.

Then Kenneth settled at Seabank, after leaving the militia; that certainly was a very foolish scheme. But that wont prove his incapacity or imbecility. Many—many a young laird is foolish and extravagant and spends more in his father's lifetime than he ought to do. If that were to be taken as a mark of capacity, it would go very far to render incapable most of the young lairds of the country; and, therefore, I should have thought little of that circumstance had it stood alone. At that time he had contracted debts to the amount of £6000; but that marks nothing but extravagance—and that is no mark, God knows, of incapacity. But then you're told that at Seabank he first showed, to an extravagant degree, his fondness for poultry. Now that, by itself alone, I should have thought no mark of want of capacity. Every man has his peculiar foibles and affections. One man loves horses and dogs—another fowling and fishing—another golfing—another, like myself in former days, archery—and so we all of us have our respective amusements; and, therefore, the mere number of poultry, even to the amount of a thousand or more, might have existed, and proved nothing. But it is not the mere love of poultry, but it is what is sworn to by a number of witnesses—and which you must believe, unless they are perjured in the most wilful manner—the way in which he amused himself with them, that is extraordinary. It has been sworn to you by several witnesses that he not only occupied himself in feeding them, of which I should have thought nothing, but he laid himself down in the dirt, and allowed them to hop on him, feed on his person, and dirty his clothes; and in short

they made almost a roosting post of him. So here you have a strong fact sworn to, and about which it is impossible for the witnesses to be mistaken, unless they perjured themselves beyond the possibility of belief. Think of the state in which the tailor found him when taking his measure, who said he was so dirty that he could not handle him—that he wished him to clean himself, and he would not; and he was obliged to take his measure the best way he could in that state.

Then you are told also that at Seabank he showed a great propensity to believe in witchcraft, and in charms, and I don't think that was at all denied; but then it was justified by the assertion, that everybody in the Highlands believed in these, and that it was so extremely common as to be no mark of incapacity. That the lower orders, and some of the higher orders, may entertain such a belief, I have no doubt; but that it should be as common in the high as in the low orders, I do not believe. But still when we come to talk of this man's capacity, it is singular that the belief in witchcraft and charms should be united in the same person with the love of poultry and childish amusements. Take either by themselves, there is not much in them, but when you see two such circumstances together, it must be considered singular. But he seems to have carried his belief very far indeed, in allowing an old woman to tie strings about his naked thighs, and to sew a particular kind of stone into the waistband of his breeches, in order to produce particular effects. This is carrying belief in witchcraft a little farther than I ever heard of a gentleman in his rank having done.

Then he is married, and you have the contract of marriage which was executed on that occasion. Whether there be such a form of contract in our style books, I know not. It is long since I gave over taking my law from style books; but this only I can say, that in the course of my practice as a lawyer I have revised some hundreds of contracts, and in the course of my experience as a Judge, I have had to judge of a hundred besides, at least a great number: but such a contract of marriage I never saw in Scotland. I know that in great families in England it is not uncommon in the husband to settle an annuity on his wife during the marriage, under the name of what is called pin-money; but I never heard of a marriage in England, however opulent the husband might be, where pin money equal to more than one-third of the income of the estate was allowed. We are told that it was not as pin-money, or having it at her own disposal, that this settlement of L.500 a-year was made on Mrs Mackenzie, but that it was with a view to secure a suitable provision not only for Mrs Mackenzie but for Dundonnell himself, that the settlement of L.500 a-year was made—an arrangement deemed necessary, it is said, in consequence of his extravagant habits. If this was the case, it was an ingenious contrivance of the agent here, who had no authority whatever by the instructions of Dundonnell, and which did not originate in his mind. I am surprised that this circumstance was not noticed. You have the note of instructions, which are holograph of Dundonnell. Now, what is his direction?

"My wife to have no more from the rents than L.400 in case of children, a hundred more if none."

These are his instructions for a jointure, and a jointure only; and there is not the least evidence of the smallest communication having passed between him and his man of business, other than these instructions on the subject, till you find the contract drawn out. Instead of this jointure, he is bound

"To make payment to the said Isabella Roy, his promised spouse, yearly, and each year during all the days of her life, not only during the subsistence of the present marriage, but after his, the said Kenneth Mackenzie's, decease, in case she shall survive him, and there being issue existing of the present marriage. But which restricted sum shall be again extended to the foresaid annuity of L.500, in case of the death of all the children of this marriage, during her life, the said restriction or increase respectively to become payable at the first term of Whitsunday or Martinmas thereafter, and that free and exempted from all burdens and deductions whatsoever."

Now, here is evidence of the way in which this gentleman's men of business treated his instructions, and how they managed the deeds for him. How it would have been effectual had it come into contact with the creditors, is a doubtful point. But it is nothing to the purpose; here are his instructions for a jointure manufactured into an obligation during the whole subsistence of the marriage; and it is a curious fact, that Mr M<sup>r</sup>Bean, the agent in the contract of that marriage, goes directly in the face of these instructions.

Now I come to that part of the case, where, if I had been sitting as sole judge, and the determination depending upon me, I should have begun and ended—I mean to the concoction and manufacture of the deeds; and the first thing here to be noticed is, that the very first appearance of these deeds in the memorandums or scrolls is in the hands and person of Roy, the defender. Now, here I must state to you, as was forcibly stated by the Dean of Faculty, that the law has an extreme jealousy of the interference of any party materially interested in a deed, in the concoction of that deed, and especially if that person be a man of the law, and in the confidence of the testator. I do not remember the opinion of Lord Braxfield, and President Sir Islay Campbell, in the case referred to by the Dean of Faculty, but well I remember that most acute and able Judge, Lord Braxfield, stating in another case after it had been determined by the Court of fifteen Judges, that he never knew a will to stand good that a writer or a lawyer cooked for himself. Let us see what is the account given of the manner in which Roy received these instructions.

"The defender's intercourse, in the meanwhile, with Dundonnell, was neither frequent nor extensive. He scarcely knew him previous to his sister's marriage, and it was only in the course of a short visit in autumn 1819, two years after, that they could be said to have become acquainted. Except upon this occasion, and for a few days in each following autumn, and in spring 1822 and 1824, they never personally met."

Then what does he say :—

“ It was in the course of that first visit, in 1819, that Dundonnell put into the defender's hand a written note of instructions, which he directed him to transmit to Mr Æneas M'Bain, then his agent, containing the heads of a settlement of his estate in entail, in favour of the heirs of the marriage, then of the defender and other heirs substitute, under burden of his wife's liferent; and certain legacies and provisions. Nothing could have been more unexpected to the defender than this communication.

Now, it is singular that this gentleman, who was so rooted and obstinate in his resentment, was so very sudden in his affections; for supposing him to have the fixed intention of disinheriting his brother and his family, is it not strange, that in the course of this short visit, hardly acquainted with Mr Roy, he took such an affection for him as to make him his heir in preference to the other numerous acquaintance that he had in his own neighbourhood, and among his own clan and kindred? I say nothing of the indelicacy of Mr Roy in permitting himself to be his mouth-piece on that subject. If he gave him such a paper of instructions, Mr Roy should have said, I can have nothing to do with it; in the first place, it is most indelicate for me to interfere with it; and, in the second place, it will vitiate and taint the very act you are going to do. Instead of that, he takes the paper, and transmits it to M'Bean, who receives it certainly without any authority from Kenneth, and he must have taken it on the word of Roy alone, but this is of little consequence. Mr Macbean acted with great propriety and honour, and refused to execute the settlement; he thought it right and proper, if Dundonnell chose it, to execute a settlement, but he made it in favour of the natural heirs; and so returned the scroll to Dundonnell; and we hear that Dundonnell was exceedingly offended at the alterations, although he took no offence at the alterations made in the marriage contract. There the matter rested; there the matter might have rested, and for any thing you or I can know, there it would have rested, if Roy had not interfered again. It is stated to have been Roy's wishes, and his remonstrances, and his advice to Dundonnell, seconded by the advice of his master, Mr Macbean, that the estate should be allowed to go, failing the heirs of his marriage, to the families of his brother and brother-in-law? What occasion, then, had Mr Roy to thrust himself into this matter any more? If he wished the estate to go to the pursuer, why, then, Dundonnell had the scrolls of a deed to that effect; and if he did not execute a deed, the law declared that it should go in favour of his brother and his brother's family, and, therefore, if Roy was sincere in his wishes, why did he not let the matter rest where it was? Dundonnell might have sent back the deed to be extended, or have got any writer at Dingwall or Inverness to extend it, and he could have executed that deed which Roy tells you was the desire of his heart; and if he did not, the law carried the estate as Roy wished it to go. But after waiting some time, Roy thrusts himself into the business again, volunteers to write to Dundonnell to tell him that he finds he has not executed the settlements—reminding him of the precarious nature of human life, and that he was liable to sudden attacks, and therefore he ought to execute his settlements. Roy puts the machine in motion again—there he is

again the instructor of a settlement by a man whom he tells you was rooted in his aversion to his brother, offended at Mr Macbean for not wishing to give the estate to Roy, and determined to do so. Strange conduct indeed if Roy was serious in his wish! What business had he to interfere? The thing was already in the best possible train to accomplish his wish. There was a deed to be executed in favour of Thomas, and if not executed, the law carried the estate to him.

In consequence of this, Dundonnell is again set in motion, and new instructions are given to Macandrew; and strange to say, here you have Roy present again at the deliberation. For it is in evidence that while Macandrew and Dundonnell were conversing about this settlement, the wife came into the room, and Dundonnell said to her, "Isabella, we are on business; go you away." Then came Roy, and he seems to wish to retire, but Dundonnell calls him back, and tells him he is about his settlements, and he accordingly comes into the room. What passed we cannot know; but there he is personally and palpably present at the concoction of these new instructions which were to convey the estate to himself. Here we see that hitherto not one step was taken in the preparation of these settlements in which Roy was not concerned, and an active party, doing that of which the law is so jealous—the interference of a party interested in the deed, and the preparation of it—and that party a man of the law in the confidence of the testator. Macandrew said that Dundonnell had corrected Macbean's scroll partly before he saw it, and partly in his own presence. We have no account that Roy was sent out of the room, and therefore it must be presumed that these instructions were made also in his presence. And here, strange to say, as was pointed out by the Dean, Macandrew imitates the conduct of Macbean, and takes upon him to make an alteration in the deed, not authorized by the instructions he had received; for in the instructions I think it is stated that the legacy to Roy was only to be £.1000 payable at his death; but the deed gives him £.2000, payable three years after that event, with interest. I know that in an ordinary case where no such question as this arises, it is undoubted law that you are not entitled to look back to previous instructions, because the law presumes to the last moment that a man may alter his mind—but we are talking here in favour of a party concerned, and the manufacturer of the deeds; or at least he interferes infinitely more than a party is allowed in law to do. Then in the instructions sent by Dundonnell, and tested and witnessed, there is a note of the legacies, in which the legacy to Campbell is not included: but in the deed there is a legacy to Campbell—a farther alteration in these instructions. Then as if Roy had actually been intending that all these things, apparently done for him, should ultimately tend to prevent the estate going to himself, he comes on the stage again—he contrives, most foolishly and absurdly for himself, to be at Dundonnell when the deeds are executed. Not one step is taken in the preparation, progress, or execution of these deeds, in which Roy is not more or less implicated—he kept out of the way to be sure when they

were executed—he and Macandrew went away on some expedition, and it is stated that they were absent one night, and at least part of two days—and yet I dont see how that could well be, because Manford and Macandrew swear that they had a distinct impression that the deeds were positively compared by Macandrew. How does that accord with their absence? I dont see how these two facts accord with each other. That the deeds were compared by Macandrew, is doubtful, and he may be mistaken; but be that as it may, the deeds are extended by Manford, the clerk or apprentice of Macandrew.

Now, Macandrew was in the confidence of Roy, and he had previous communication with him about these settlements, because there is produced a letter from Roy to Macandrew, dated 1st October 1819, in which he says that he told Dundonnell that he had spoken to Macandrew about his settlements; and just before this, Mr Macbean and Roy had agreed among themselves that Macandrew should be factor on the estate of Dundonnell. Therefore, I say that Macandrew is to be considered here, not only as the agent of Dundonnell, but the confidential agent of Roy the defender also; and it wont do to say that he kept out of the way, and that the deeds were extended by Manford the apprentice—the master and clerk or apprentice are one and the same.

We now come to the execution of the deeds. Manford swears, and I daresay it is a fact, that he went in search of another witness, and brought in Frazer. Now, Macandrew was obliged to admit, that although he had no conversation with Roy on the subject, Roy must have known something about it. It is hardly possible to suppose that he did not know, when he saw Macandrew coming up with the array of stamped paper; and when he went away, leaving Manford in the house with the stamped paper, it is no great stretch of charity to suppose that Roy was well aware of the deeds. If he was aware of what was going on, then he should have remonstrated. But did he call in any of the family or friends of Dundonnell? Did he call in his sister to back him, and say, “Good Heaven, my dear sister, what is going on here?—is this man going to execute this insane deed in my favour? I have remonstrated against it; Macbean has remonstrated; and yet here are Dundonnell and Manford, with stamped paper, ready to execute it—let us try to prevent him from being guilty of this piece of injustice.” No such thing. Roy is perfectly passive; he is in the neighbourhood, and in the house, privy, as Macandrew supposes, to what is going on, and he allows the deeds to be extended and executed in his favour.

Then comes Manford’s account and his diary. There is nothing uncommon in keeping a diary, and nothing particular; but what is the entry in the diary? It stated that, after the execution of this deed, he had a very pleasant conversation with Roy; that he was much obliged to him, and that he had great hopes and expectations from him, and so on. And then he tells you that, in case any after question should arise upon the subject, and in case Fraser should be called on in regard to the execution of these deeds, he

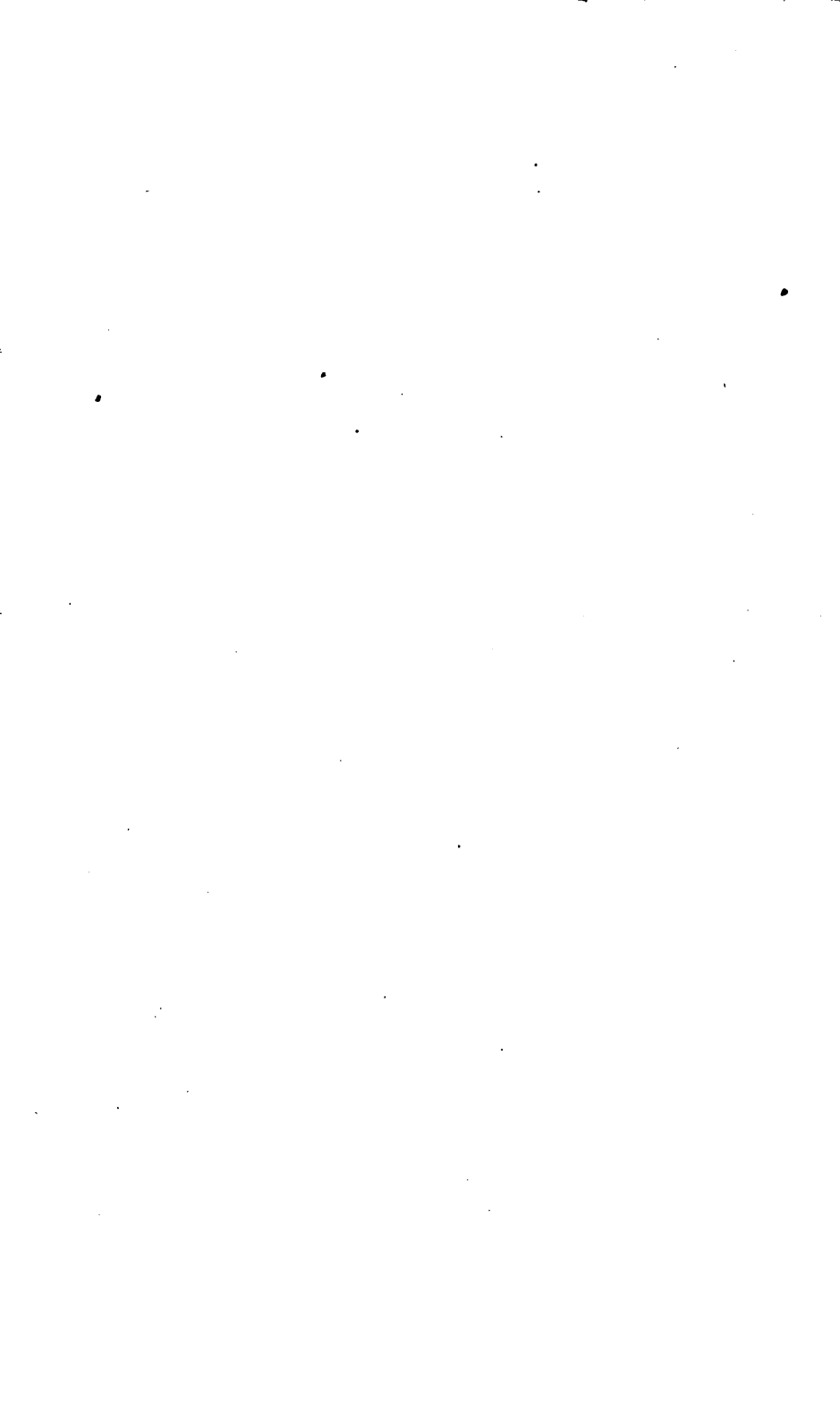


advised Fraser to take a memorandum of the circumstance ; and he mentioned, as one of his chief reasons, that this was the first deed he had seen witnessed by an uneducated countryman. Very likely he supposed that Fraser was so, but Fraser by no means appears to be so ; for his memorandum is well written, and well spelt, excepting one word, the word *approved*, which has one *p* instead of two. Manford told him to take a memorandum of the deeds which he had witnessed ; and what is the memorandum that Fraser takes ? it is, that he had witnessed the execution of *two title-deeds*. Fraser was not so far uneducated that he could have mistaken a title-deed for a settlement. He positively stated that he thought he saw at the head of the deeds, when leaning over the chair of Dundonnell, the word "*title-deed*" written ; and it was that circumstance that made him put *title-deed* into his memorandum ; that is an extraordinary circumstance—a very extraordinary circumstance. How he came to see, or thought he saw, that written on the top of the deeds, it is impossible to know. He says now that he rather thinks he was mistaken, but he was not mistaken when he put that down in his memorandum. Then there is another extraordinary circumstance. Manford swears that Fraser came in only after Dundonnell had commenced, and was in the act of signing the deeds, at least the first deed ; and yet although Dundonnell had begun to sign the deed without Fraser being present, or knowing about the matter, Manford swears that when he did come in, Dundonnell proposed that it should be read over to Fraser. A strange inconsistency is this, and betrays a complete ignorance of business, in the first place, going to sign the deed without the witness being present, and again that the witness should hear it read over. This the law requires only in the case of a blind man executing a settlement. You yourselves, gentlemen, have, no doubt executed deeds, and you would never think of informing the witness whether it was a deed of settlement or not. And what is still more extraordinary, is, that although Dundonnell had been told that it was not necessary, he actually made the same proposition at the signing of the second deed, which is not a great proof of the capacity or memory of Dundonnell.

Now, gentlemen, I am drawing to a conclusion, and I repeat to you what I have said before—if I had been to determine this case according to my own judgment, I should have begun and ended with the manufacture of these deeds and the part that Roy took in them ; for if Mackenzie of Dundonnell had had twice or ten times the capacity that he had, I think there was here interference on the part of Roy in the concoction of the deeds in his own favour, that would have vitiated them. As to what passed afterwards, I shall not say one word—it can neither make matters better nor worse. After these observations from me, which I think may be of use, it is for you to consider the question. Remember it is for you ultimately to determine this case, and not me. You will consider what I have said, but give it no more weight than what you think necessary to give it. If you are of opinion, on taking the whole circumstances together, that the

capacity of Dundonnell such as he had, and the interference of Roy, such as it was—taking all these circumstances together, if you think that they cannot be considered as the genuine, proper, and legal deeds of Dundonnell, you will find for the pursuer; but if, on the contrary, you think there was no improper interference on the part of Mr Roy, and that there was capacity on the part of Dundonnell, you will find your verdict accordingly. Gentlemen, I am sure, that, after the attention you have given to this case, be your verdict what it will, it cannot but be satisfactory to the country; for if ever a case was ably managed on both sides, and deliberately considered by a jury, it is this.

The jury retired at twelve o'clock, and at half-past two the Lord Chief Commissioner received their "**VERDICT FOR THE PURSUER,**" which was hailed by the audience with strong marks of approbation. His Lordship returned thanks to the Jury for his learned brother and himself, for the patient attention which they had given to the case; and stated that their verdict was agreeable to the opinion which his learned brother and himself had formed.





~~APR 1987~~

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