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wholly out of view, and neither that sum nor the jointure she might have had, can afford you any criterion in judging of the amount of damages. I do not think the damages should be great; at the same time, they ought not to be merely nominal.

Verdict for the pursuer, damages L. 900. *

*Jeffrey* and *Cockburn*, for the Pursuer.
*Grant* and *P. Robertson*, for the Defender.

(Agents, *Donald M'Intosh*, W. S. and *James Robertson and Son*, W. S.)

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PRESENT,

THE THREE LORDS COMMISSIONERS.

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1816. Oct. 29, 30, 31.

# JAMES EARL of FIFE *v.* The TRUSTEES of the late JAMES EARL of FIFE and Others.

REDUCTION of a trust-deed and deed of entail subscribed by the late Earl of Fife.

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29th November 1816.

* On an application in the Court of Session for expences,

*Grant*, for the defender.—The expences in the Jury Court necessarily follow the verdict for the party. But, if your Lordship is of opinion that sufficient compensation has been awarded, there is nothing to take away the power (formerly possessed) of regulating the question of expences in this Court.

LORD ALLOWAY.—I know no case in which damages have been awarded, where expences have not followed of course.

'The grounds of reduction were, That the granter laboured under a defect of sight, which rendered him incapable of executing such deeds, except by the subscription of notaries; and that one of the instrumentary witnesses was not present when his Lordship subscribed the deeds, nor did he acknowledge his subscription to that witness.

DEFENCE.—The pursuer has no title to insist in the action, as his right is cut off by a prior deed. If he had a title to insist, the deeds are not liable to challenge on any ground whatever.

'In the Court of Session, Lord Pitmilly sustained the pursuer's title; and on the 16th January 1816 the Court, on advising a petition and answers, adhered. After a condescendence and answers had been given in, revised, and amended, the Court approved of the following

ISSUES.

" 1. Whether, at the date of the deeds un-
" der reduction, viz. on the 7th of October
" 1808, James Earl of Fife deceased, was total-
" ly blind, or was so blind as to be scarcely able
" to distinguish between light and darkness?
" And, Whether the said Earl was at that time

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" incapable of reading any writing, written in-
" strument, or printed book? And if, at that
" time, he could discover whether a paper was
" written upon or not?

" 2. Whether the said deeds were read over
" to the said Earl previous to the said Earl's
" name being put thereto; and if so, in pre-
" sence of whom? And if read over to the said
" Earl, as aforesaid, whether they were all, or
" any of them, read to him at one and the
" same time, or at different times? And if at
" different times, whether they were deposited
" and kept in the room in which they were
" read, during the whole period which elapsed
" from the commencement of the reading till
" the name of the said Earl was put to them
" as aforesaid, or where they were deposited?

" 3. Whether the said Earl's name was put
" to the said deeds, or any of them, by having
" his hand directed to the places of signing, or
" led in making the subscription? Or if the
" said Earl was assisted; and if so, in what
" manner he was assisted in making his sub-
" scription?

" 4. Whether the said Earl put, or at-
" tempted to put, his name to the said deeds,
" or any of them, at one and the same time;
" or whether any period of time intervened?

" and if there were any interval or intervals of
" time between the said acts, whether the said
" deeds, and all of them, were in the possession
" or custody of the said Earl, or were in the
" possession or custody of any other person
" during such intervals of time?

" 5. Whether the said Earl put his name to
" the deeds under reduction, in presence of
" the two instrumentary witnesses, or either of
" them? or did acknowledge his subscription
" to them, or either of them? or at what pe-
" riod he made such acknowledgment?

" 6. Whether the said Earl was, until the
" dates of the deeds under reduction, or at a
" later period, a man remarkably attentive to,
" and in the use of transacting every sort of
" business connected with his estates, and in
" the practice and habit of executing, and in
" fact did execute, deeds of all sorts connected
" with his own affairs, by subscribing the same
" with his own hand, and without the inter-
" vention of notaries?

" 7. Whether the said Earl took means to
" ascertain that the deeds under reduction, al-
" leged to have been signed by him, were con-
" form to the scrolls of deeds prepared by his
" agents under his special direction, and what

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"were the means he took to ascertain the same?"

If a witness can attend the trial, his deposition taken to lie *in retentis* cannot be read to the Jury.

The deposition of Wilson, one of the instrumentary witnesses, had been taken in the Court of Session to lie *in retentis*; and he was called as a witness at the trial.

*Clerk*, for the pursuer, stated—His former deposition ought to be cancelled. We understand it to be the rule of Court, that when a witness can attend the trial, his deposition is not to be *used*. Comparing it with his present statement is a use, and a bad use of it; but if not destroyed, the witness is entitled to have it read over, and the Jury must hear it.

*Thomson*, for the defenders.—In the Criminal Court the witness is entitled to have the precognition destroyed, but this rule does not apply to the Court of Session; it is a different question whether it is to be destroyed or merely withheld from the Jury. This Court has no right to touch the deposition.

Act. Sed. 9th Dec. 1815, § 23.

LORD CHIEF COMMISSIONER.—The 23d section of the act of sederunt provides that depositions taken to lie *in retentis* shall not be used if the witness can attend the trial. We can only say that the deposition is not to go before

the Jury. Taking the deposition was not our act, and we have no power over it.

LORD PITMILLY.—In point of expediency this deposition ought to be cancelled; and if this question shall be brought forward at any future period in the Court of Session, I shall then give a favourable hearing to the application to have it cancelled. The *viva voce* statement by the witness is all that can go to the Jury.

LORD GILLIES.—I am of the same opinion.

This witness swore, that after his examination in the Court of Session, he was dismissed by the trustees from his situation as factor on part of the estate.

LORD CHIEF COMMISSIONER.—It is incompetent to investigate the reasons of this.

Mr Ware, who had been examined on commission, exhibited excerpts from his father's books.

*Grant*, for the defenders, objected,—This is incompetent, the books ought to have been produced; even if produced, they are not evidence against a third party.

*Clerk*.—This may be law in England, but there cannot be the least doubt that it is not so here. Every day, witnesses produce excerpts on

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oath from books, and they are good evidence, though perhaps not the strongest.

*Thomson.*—It is of consequence to have the judgment of the Court on this question with reference to other points of this case. If the objection be sustained at present, I do not mean to avail myself of it, but shall move the Court that these excerpts be read.

LORD CHIEF COMMISSIONER.—The Court will not decide an abstract point when the parties depart from it. The law of Scotland must be the rule; but in all civilized countries, the rules for ascertaining truth and excluding falsehood must be the same.

It is a matter of serious consideration whether these excerpts are evidence.

The deposition of Colonel Bartlet, which had been taken to lie *in retentis*, was then offered, to which it was objected, that it had been taken before the condescendence was given in, and while parties were debating the title of the pursuer.

Strong, &c. *v.* Carleton, &c. *supra*, p. 25.

LORD CHIEF COMMISSIONER.—There has been a case of this sort decided in your favour.

The parties did not insist in the objection, and the deposition was read.

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Competent to prove verbal extrajudicial statements made by a defender.

Mr Forbes, who had been secretary to Lord Fife from 1796 to 1799, swore that Mr Souter, one of the trustees, had requested him to docquet his factory account, and said he would not go on longer unless commissioners were appointed, as Lord Fife was blind. Mr Grant objected to this as hearsay, but in answer it was stated to be unquestionable evidence, as Mr Souter was a defender, and it was accordingly allowed.

Competent to prove by parol evidence what a deceased person said.

Robertson, a witness for the pursuer, swore that his brother (since dead) had been in Lord Fife's service in 1801 and 1802. He was then desired to state what his brother said had passed in conversations between Lord Fife and him.

*Grant.*—This is not evidence; it is hearsay and incompetent. There is no case, or writer of the law of Scotland, who states this to be evidence.

*Clerk.*—If the law on this subject be the same in all civilized countries, the doctrine here maintained cannot be law in England; but if it be law in England, it is *not* law in Scotland. This evidence may not be the best, but it is competent, and the Jury will allow it the weight it deserves.

LORD CHIEF COMMISSIONER.—In a case of

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such length as this is, I am sorry that time should be occupied with discussions as to the admissibility of testimony, and therefore could wish to avoid entering into an exposition of the principles which lead me to think this evidence inadmissible; but I think it of vast importance that it should be understood, that if admitted it was not done without having the point discussed and decided. I am also averse to pronounce any decision which may lead to a bill of exceptions on any proceeding collateral to the main business of the case, but I think myself called upon to state, that, in my opinion, this testimony is inadmissible. The principles of the law of Scotland and England, I conceive, must be the same as to the general rules of evidence.

For the purpose of securing truth, I take it to be a first principle, that the truth of evidence must be supported, in all Courts, by the sanction of an oath, and that without this it ought not to be submitted either to a Judge or Jury. Every fact ought to be so supported, and there is no reason applicable to one case that does not apply to all.

Is the evidence offered so secured? You have this security, that the witness will tell, to the best of his recollection, what his brother said; but where is the security that his brother

told him truly what passed between him and Lord Fife? If this fact is to be rested on by either party, it is of importance to have its truth secured in the manner I have mentioned. That there are particular cases in which hearsay is admitted I know, but I need not enter into these; here the simple fact offered to be proved, is a communication from Lord Fife to a person deceased. I have no doubt this witness will speak the truth, but we have not the common method of ascertaining the truth of the facts stated, by examining the witness who stated them. It therefore follows, that this is one of the misfortunes of human life; if you lose your witness you lose your fact.

It appears to me, that, according to the rules of right reason, and according to the laws of Scotland, we can give no more credit to the hearsay of a dead than of a living witness; the death adds nothing to the hearsay, for the deceased was not called upon to collect his mind under the sanction of an oath. I therefore entreat the assistance of my brethren to steer me out of this difficulty, for I cannot help thinking, that, if sifted to the bottom, it will be found that the law of Scotland does not admit a rule so directly tending to produce injustice, and so liable to create the admission of false

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facts; especially after so much evidence of a higher nature has been adduced.

LORD PITMILLY.—After what I have heard, I cannot but express my opinion with the utmost deference. There are two questions here, 1*st*, Is this evidence admissible? 2*d*, What is its weight if admitted?

In my opinion the evidence is admissible by the law of Scotland. But in determining the weight due to it, when received, it must be remembered that it is not evidence given on oath by Robertson of the facts alleged, but only evidence on oath by the witness Robertson's brother, that Robertson, when not on oath, made such a statement, and the evidence is admitted because Robertson is dead.

LORD GILLIES.—I am of the opinion last delivered; but must state it with great diffidence, especially after what I have heard from your Lordship.

It appears to me that hearsay is objectionable on two grounds.

1*st*, That it is not the best evidence, as the person ought to be called who made the statement; and to this principle effect is given by the law of Scotland, which rejects hearsay when the person is alive whose words are to be proved.

*2d*, That it is evidence not upon oath.

In proving conversations with a person since deceased, the original statement is not upon oath; but the witness called is upon oath, and swears that the deceased made the statement. In England, this is inadmissible; and probably, if the forms in this country had been the same, this might also have been the law here. In this country, the evidence being decided on by Judges, they were, or at least thought themselves, capable of giving greater and less weight as it deserved to different species of evidence. The view might probably have been different if the forms had been different, and the evidence had been decided on by a Jury. To distinguish between different kinds of evidence is a task difficult even to a man accustomed to it all his life, and must be infinitely more difficult to those who are only called on occasionally.

It appears to me that we must admit the evidence. It belongs to the Jury, under the direction of your Lordship, to appreciate its weight. We are bound to believe the witness. They must judge of the weight due to what his brother told him.

LORD CHIEF COMMISSIONER.—The Court decide by a majority for the admission of the witness. Though the decision is contrary to

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the opinion I expressed, I do not regret the course I have followed, as it has drawn forth the opinions just delivered. *

*Clerk.*—We wish this case to be returned to the Court on its own merits, not on any incidental point. We shall, therefore, withdraw the witness.

A witness producing letters on his examination in chief, cannot, on his cross-examination, be called on to produce other letters, but may be examined as to the business proved.

A witness for the pursuer, on his examination in chief, having produced a letter from Lord Fife, was asked, on his cross-examination, if he had more letters from Lord Fife? It being understood that these letters were as to other matters, an objection was taken to the question as not cross to the examination in chief.

LORD CHIEF COMMISSIONER.—From what has been decided to be the rule of cross-examination, he is not bound to produce them.

He was then asked as to Lord Fife's capacity for business.

LORD CHIEF COMMISSIONER.—By the strict-

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* It is understood that his Lordship, in a subsequent case at Dumfries, on 19th July 1817, where a similar objection was taken, stated,—That he thought it most desirable that the case should be solemnly argued and decided in the Superior Tribunal, he himself not considering that it should be allowed to rest on what passed in Lord Fife's case.

est rules of cross-examination, you may ask him as to the business which has been proved on the examination in chief, but are not entitled to put a general question as to Lord Fife's capacity for business.

Forteith Williamson, one of the instrumentary witnesses, was asked if he heard Lord Fife acknowledge his subscription to Wilson? When cross-examined, he was desired to describe the circumstances attending the execution of the deeds.

A witness being asked by one party if he *heard* the granter acknowledge his subscription, may be called on by the other party to describe the circumstances in which the subscription was made.

*Clerk* objected,—This is not a cross-question.

*Thomson*.—This is very important. The case is sent to try if Lord Fife acknowledged his subscription; and there may be facts and circumstances attending the signature, inferring acknowledgment. They ask as to verbal acknowledgment; we may surely ask as to circumstances. This rule as to cross-questions will become extremely inconvenient if it is so rigidly enforced.

*Clerk*.—I never heard of acknowledgment by facts and circumstances. They may examine as to the acknowledgment, but not to other matter. The witness on our questions might give a full account of the case, to entitle them to put cross-questions.

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LORD CHIEF COMMISSIONER.—It is decided, that if this question is not cross it cannot be put, but the Court must decide whether it be cross. The rule is established, but there is no expediency in drawing it tighter than necessary. This was an instrumentary witness; he is called by the pursuer to prove part of what took place at executing the deeds, and is asked whether he heard Lord Fife acknowledge his subscription. In common sense, is it not cross, to ask him to state what took place at the time?

LORDS PITMILLY and GILLIES expressed their concurrence in this opinion.

The witness was afterwards asked if Wilson came into the room while they were engaged with the deeds?

*Clerk*.—They have twice admitted that Wilson was not present at signing, and are not entitled in this way to raise doubts on the subject.

LORD CHIEF COMMISSIONER.—If this was contrary to the admission of the party, the Court would not allow it; but they have never admitted that Lord Fife did not acknowledge his subscription.

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A person interested in one part of a letter, is not entitled to call for the disclosure of confidential communications made to a law agent in another part of it.

Mr Inglis, a witness for the defenders, had been agent for the late Lord, from 1806 till his death. He exhibited a number of letters, which he submitted to the Court he was not bound to produce, as he had given excerpts of all that related to the deeds in question.

*Clerk.*—We shall be satisfied with copies of such as are properly evidence in this cause, but submit they are irrelevant.

*Grant.*—The pursuer seems to forget the nature of this cause. They are certainly relevant under the sixth issue.

LORD PITMILLY.—You may establish his attention to business by parol evidence.

LORD CHIEF COMMISSIONER.—The defenders are to make out the contrary of the pursuer's proposition, that these deeds may not be the deeds of Lord Fife, and you are entitled to examine Mr Inglis as to that part of the correspondence which goes to establish that they are the deeds of Lord Fife. There are two issues which must be kept in view, the sixth and seventh. To the sustentation of the sixth it is not necessary to call for private letters. Parol testimony will establish this as well as letters. So far as letters are necessary to make out the seventh issue, you are entitled to have such parts of them as relate to that business, but

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you must not inquire into such business as Lord Fife wished to conceal, and on which he was entitled, both during his life and after his death, to shut the mouth of his confidential agent.

A party may require a witness to produce writings, but must prove them before they are admitted as evidence in the cause.

Mr Inglis swore that he had a bundle of letters from Lord Fife during the latter period of his life, and produced a statement of his affairs, being allowed to wafer up part of it, as not relative to this question.

*Clerk.*—They are not entitled to produce papers in this way, to be afterwards read to the Jury.

LORD CHIEF COMMISSIONER.—They are proving his capacity and constant employment in his affairs, and desire Mr Inglis to produce a paper bearing to be a statement of his affairs. They mean to prove Lord Fife's notes upon it, and it will then be evidence.

Mr Inglis, and Mr Souter one of the trustees, produced a number of deeds and papers, executed in the same manner as those under reduction; one of them a copy of a paper sent to Lord Fife.

*Clerk* objected,—A great mass of papers has been produced, but they are not evidence.

Who knows if Mr Inglis's communication was ever read to Lord Fife?

LORD CHIEF COMMISSIONER.—The writings must be proved before going to the Jury. They are merely producing the papers at present; they will afterwards prove his knowledge and intention with regard to the transactions, if they do not think his Lordship's signature and the evidence now adduced of themselves sufficient on the subject. This copy is produced only to shew that Lord Fife was attentive to business, not to prove the contents of the paper.

F. Williamson swore that one of the papers produced by Mr Inglis was written by Mr Souter, and signed by Lord Fife.

Whether, when a certain degree of blindness has been proved, the Court will hold that the signature of a party is sufficient proof that he was made acquainted with the contents of the deed.

*Clerk.*—Lord Fife was blind. They must prove that it was read to him before he signed it. If, as they say, they are only proving his activity, it is of little consequence; but this is a paper connected with these deeds, and proves them genuine, so far as this sort of proof goes. They say his signing and putting notes on the other documents shews that he knew their contents, which is assuming the question we dispute in this reduction.

LORD CHIEF COMMISSIONER.—The Court cannot allow an instrument to be read unless it

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is brought home to Lord Fife. The holograph writing is brought home to him by being proved, and may therefore be read to the Jury, to shew his capacity; but, after such a degree of blindness has been proved, this paper cannot be read, as there is no proof that he dictated it, or that it was read to him.

*Grant.*—The question is, if it was necessary to read it?

*Clerk.*—They assume, (contrary to the fact,) that he could see.

LORD GILLIES.—Were the letters produced yesterday proved to have been read to him? One to Miss Gordon, I think, was not.

LORD CHIEF COMMISSIONER.—This is a very delicate question, and I wish to hear farther argument upon it. The difficulty is, that in this case the writer (Mr Souter) cannot be a witness; and the question is, whether, in that situation, the signature should not raise the presumption that Lord Fife was made acquainted with its contents? It is, at the same time, of great consequence that the Court should not hold any thing as proved till the Jury have found so.

*Mr Clerk*, after some farther discussion, waved the objection.

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One counsel having begun the examination of this witness, and another on the same side continued it, the LORD CHIEF COMMISSIONER observed, That the counsel who commenced an examination ought to continue it throughout.

The counsel who commences an examination of a witness ought to continue it throughout. Rules and Orders of Jury Court, § 53.

An objection was taken to a paper, that it was a copy; but it being stated that it was a regular extract, it was received without farther discussion, and without proof of the subscription.

A chartulary kept by Lord Fife's man of business was produced, to prove that he had granted a precept of *clare constat*, and did not sign it by notaries. It was afterwards shewn to a witness, who had been his law agent previous to 1806.

A witness may look at a chartulary, to refresh his memory, but it is not evidence of the charters contained in it.

LORD CHIEF COMMISSIONER.—This is not the best evidence; it is only a copy, and cannot be received as proof of the deeds contained in it. The originals ought to have been produced.

*Grant.*—It is proof that these deeds were prepared by this witness; he may look at it to refresh his memory, as he might look at his own books, for the same purpose.

This was allowed.

The witness having stated that, during the time he was Lord Fife's agent, he never thought of advising him to authenticate deeds by nota-

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ries, as he did not consider him blind; was asked, on his cross-examination, if he would have given this advice if he had considered him blind?

*Thomson* objected.

LORD CHIEF COMMISSIONER.—This is incompetent. It would be giving an opinion on the point of law to be decided by the Court of Session.

It was proposed to put into the hands of the Jury a *fac simile* of a number of Lord Fife's subscriptions.

*Clerk*.—They ought to have communicated this to us.

LORD CHIEF COMMISSIONER.—Even the consent of parties would not, in my opinion, be sufficient to entitle us to send this to the Jury. Without consent it is impossible.

Whether a party who puts cross-interrogatories to a witness can insist on the deposition being read.

A witness had been examined for the defenders on commission.

*Clerk*.—We put cross interrogatories to this witness, and are entitled to have the deposition read. It is part of the procedure of Court.

LORD CHIEF COMMISSIONER.—This is said to be part of the evidence in Court. It is the same as a witness cited but not called. I doubt if you can compel a party to produce it, if he

chooses to withhold it; but, if it would be evidence in the Court of Session, I feel a difficulty in rejecting it.

*Mr Clerk* did not insist, and the commission was not opened.

Substance of the most material parts of the evidence adduced.

From the evidence adduced, it appeared that Lord Fife had, for several years, laboured under a defect of sight from cataract, which at last had rendered him almost entirely blind. Several instances were proved of his applying to others for information, that he might not, in company, appear to be blind; but he made frequent mistakes, occasioned by want of sight, and instances were proved of his acknowledging himself blind.

He had consultations with oculists, who advised couching, but the operation was not performed. These and other professional gentlemen swore that they would not recommend such an operation while any useful sight remained; and they would not advise it so soon in a man who had not to earn his livelihood as on one who required the use of his eyes for his support.

He continued to subscribe deeds of various descriptions; this, it appeared, he did by feeling for the finger of the person who pointed to the part of the paper where the subscription

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was to be made; or sometimes by the use of a piece of stick laid along to direct his hand.

With regard to the execution of the deeds in question, it appeared, that there had been various communications with his law agents relative to the preparation of the deeds; and that they were sent to Duff House about ten days before they were subscribed.

On the day they were subscribed, Lord Fife asked Mr Souter, his factor and trustee, if they should have another spell at them? to which he assented, and Wilson, factor on part of the estate, and one of the instrumentary witnesses, soon after this question, left the room.

Forteith Williamson, the other instrumentary witness, swore, that he or Mr Souter read the deeds to Lord Fife; one of them he thought was read on the day they were signed, but he could not specify the length of time occupied in reading it, nor could he recollect on what day the other was read.

After they were signed, they were carried by Mr Souter to the charter room, where Wilson signed as witness, and filled up the testing clause to the dictation of Mr Souter.

Williamson swore that Lord Fife came into the room while this was going on, and sat down on his usual seat, Wilson's back being to him.

On the other hand, Wilson swore that he did not see Lord Fife on that occasion, and that he never at any time heard Lord Fife acknowledge his subscription.

The LORD ADVOCATE, in opening the case to the Jury, said, The question is, Whether Lord Fife was blind? but, in order that the Jury may understand the application of the verdict to be returned by them, it is necessary to state the law as to the subscription of deeds.

When a person cannot read writing, so as to be able to recognise his own subscription, the law has provided a way in which he may execute a deed by the intervention of notaries and witnesses, who not only authenticate the subscription, but also the fact that the granter was made acquainted with its contents. This never was doubted till 1751, when it was questioned; and it is said Lord Braxfield (when at the bar) held it questionable, but he retracted this opinion on the Bench. In General Grant's case, (not reported,) Lord Meadowbank would not allow the point to be stirred.

Falconer *v.* Arbuthnot, 9th Jan. 1751. Kilk. 616. M. 6842.

In the case of blind persons, the law, though it in general gives credit to its own officers, does not even hold that sufficient, but, in addition, requires four witnesses. In this case, it

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is admitted that even one of the two witnesses did not see Lord Fife subscribe, and we shall prove that he did not acknowledge his subscription. If the deeds were ever out of his hands, it was impossible for him to do so, as he could only say he was told it was his subscription, but could not speak from his own knowledge.

*Thomson*, on the other side, stated,—Though the Jury are not to judge of the law, yet it is very important that they should be aware of the effect their verdict is to have. This is an action to cut down deeds for the want of a statutory solemnity, though *ex facie* regular, and executed by a man who felt, and was entitled to feel, that he was capable of executing them. Lord Fife was notorious for his attention to business, and continued to execute all sort of deeds in the same manner, down to the day of his death. He shewed the greatest anxiety about the deeds in question; and it will appear from his correspondence, that he was well acquainted with their contents; besides, he had them in the house for several days before he signed them, which he employed in having them read and re-read.

Bell's Test. Deeds, 241.

In this country, a deed *ex facie* regular requires no evidence to support it, but is better

than any number of witnesses. There is a presumption so strong in its favour, that at one time it was denied that an instrumentary witness could be brought to swear against his subscription.

In the case of Frank this was allowed, but with the strongest doubts; it was held that the witness must be supported by circumstances, and the deed was sustained, though the witness swore, that he neither saw the granter subscribe, nor heard him acknowledge his subscription.

Frank v. Frank, 9th July 1793, and 3d March 1795. M. 16822 and 16824. Bell's Test. Deeds, 254.

There are two questions; the one, what is sufficient proof that the solemnities have not been complied with; the other, what is sufficient proof of acknowledgment? The proof of the first lies on the pursuer. With regard to the second, when the witnesses are aware that the subscription is genuine, verbal acknowledgment is not necessary; and, if the granter of the deed is aware that the instrumentary witnesses are signing it, and does not prevent them, this is acknowledgment.

Steel, 24th Jan. 1794, quoted in Bell's Test. Deeds, 140 and 246.

Wilson swears that he did not see Lord Fife sign, and that his Lordship did not acknowledge his subscription; but this is in opposition to his own signature; and Williamson swears that Lord Fife was in the room at the time when

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Mr Souter was dictating the testing clause, and while Wilson was signing. The defenders are entitled to have the advantage of the regular execution of the deed, to explain the contradictory evidence.

It is said notaries should have been employed. In former times, the mode of authenticating writings was by seals, or by giving instructions to a notary, who drew the deed in his own name. These gave rise to gross frauds, and the remedy was introduced first by 1540, enacting that they should be subscribed as well as sealed; but many being unable to write, a less perfect method of authenticating them was introduced. In 1579 it was made sufficient that the deeds be subscribed by notaries and witnesses, but they were "to mak na faith," "*gif they* (the granters) *can subscrive.*" The statute was only intended to provide a method of authenticating deeds when the party could not write, but does not apply to a case like the present, where he "*can subscrive.*" In the case of Clark, the deed was challenged, because the person could subscribe. Neither Lord Stair nor any author of his time had any idea that blindness was a disqualification. Lord Elchies reports Falconer's case more fully than Kilkerran, and shews that it was a complicated case.

1540, c. 117.

1579, c. 80.

Clark *v.* Laird of Balgonie, 3d Jan. 1683. Harc. 253. Pr. Falc. 21. M. 16837.

Coutts *v.* Stratton, 21st June 1681. Stair. M. 6842. Falconer *v.* Arbuthnot, 9th Jan. 1751. Kilk. 616. Elch. 520. M. 16817.

There is no change in the law on this subject since Stair's time, and there have been recent cases within the last seven years supporting it; Grant of Ballendalloch, not reported.

In Waddell's case, also not reported, he never had been accustomed to write. There is no case of a deed cut down solely on the ground of blindness. It is impossible to fix any point at which a man must begin to use notaries. As the law is to be decided elsewhere, it is necessary to return a special verdict.

The pursuer has failed in making out his case; he has not even proved blindness.

*Clerk.*—It is said that in the late cases of Waddell and Grant the deeds were sustained, though the parties were proved blind. From every page of the proof in these cases it is clear they were not blind. The First Division of the Court have gone farther, and found, that, though the party could see, yet if he could not read writing, he ought to use notaries. Almost every person who retains the eye-ball can distinguish light from darkness, and it is not disputed that Lord Fife could to the last distinguish light from darkness, but he was blind to any useful purposes; this is the meaning of total blindness in the issue, and the Jury,

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upon this evidence, must find that he was totally blind; he could not detect imposition, or substituting one deed for another, which is the reason of the law. Even if properly tested, these deeds could not be sustained; but in their present form they are mere waste paper. The whole facts as to the deeds being read and signed, rest on the evidence of one witness, and he a suspicious one.

Steel and Lindsay, Bell's Test. Deeds, 246.

The case quoted on the other side rather makes against them, for there the man looked attentively at what was doing, and, if improper, would have prevented it.

LORD CHIEF COMMISSIONER.—After three long days of anxious attention to this case, I shall not waste time by much introductory statement. But the importance of the case, and the novelty of the institution, cannot here be overlooked. The cases hitherto have been few, yet they have been tried in a most satisfactory manner, owing to the attention of the Juries, and to the precision with which the other Courts have stated what they wish ascertained. They have hitherto been chiefly general issues; this is a case of issues requiring special findings as to each issue. I must detail and apply the evidence applicable to each issue, in their or-

der, that you may see clearly on what proof your special findings are to rest.

On the one side there has been much law stated, and it has been met by a partial statement of it on the other; this, though not regular, was not to be checked, but the question of law is not for this Court.

In the act of Parliament and act of sederunt, there are provisions for discussion of the law of the case elsewhere; the facts only are to be ascertained here.

There are two methods of making a return upon them, either by returning specially the facts which are proved, to be drawn up hereafter in the form of a special verdict, or by giving a particular answer to each of the questions in the issues. The last of these is perhaps the best in this case, and most conformable to the wish of the Court sending the issues.

The numbering of the issues is of no consequence, but it is necessary, in point of sense and meaning, to attend to the division of them. 1*st*, They refer to the blindness; and, 2*d*, To the facts attending the execution of the deeds.

The first issue applies not only to total blindness, but to degrees of blindness, and in fact contains four distinct issues. As the Court have not sent it in the general form *blind or*

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*not*, but have expressed various degrees, we cannot ask a general return, unless you are of opinion that he was stone blind, which supersedes consideration of the others.

Mr Clerk contends that the blindness proved is total blindness; that being so blind as scarcely to distinguish light from darkness is total blindness, and should be so found. But this cannot be taken to be the meaning here; for the issue shews, that what the Court meant by total blindness was the absence of all power of distinguishing light from darkness, as it is put in the alternative,—"or was so blind as to be scarcely able to distinguish between light and darkness."

In proof of his blindness, Lord Fife's own acts and even his declarations are evidence. He was the only person who could know with certainty.

It is proved that couching was recommended in this case as the only cure, and the medical gentlemen agree that they would not recommend that operation so long as useful sight remained; and that they would not advise it so soon in the case of a man of fortune, as in that of one who depended on his eyes for his support.

As to the 1st Issue.—If you think he was

totally blind, then you may find in general for the pursuer on this issue; if not, then it is better to make a return to each of the questions it contains.

2d Issue.—On this the counsel differ as to which party is bound to prove. The proof of this issue depends on the testimony of Forteith Williamson, the only witness called; he was left in the room for the purpose of executing the deeds; and if you credit him, then you will find that they were read in presence of him and Mr Souter, and then put in a black box.

We are of opinion that his testimony, though a single witness, should be left to the Jury; because it is supported by facts and circumstances; and if the gentlemen at the bar are dissatisfied, they may except to this direction.

If the deeds were read over, then the point of law arising out of that fact is superseded; if not, then the point of law arises.

There is no proof where they were deposited, or whether there was any interval between the times of signing.

3d and 4th Issues.—As to these there is proof that his hand was directed to the place of signing, but not led, and there was an actual putting, not a mere attempt to put his subscrip-

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tion; but the act of signing also depends on the evidence of Forteith Williamson.

5th Issue.—This on one side is said to be purely a question of law, and on the other a question for a Jury. We are of opinion that the acknowledgment is a matter for your consideration; whether it was a verbal acknowledgment or by facts, must equally depend on your opinion of what has appeared in evidence.

As to the first branch, there is no evidence of a direct verbal acknowledgment. As to the second, Lord Fife may have come into the room while the testing clause was dictating and Wilson signing as witness. It will here be better to find specially the facts as they appeared in evidence, leaving it to the Court of Session to judge of the law, and to decide whether in law these facts amount to an acknowledgment. *

6th and 7th Issues.—You cannot doubt Lord Fife's attention to business. There is no proof of the deeds being compared with the scrolls; indeed Williamson swears that he never saw the scrolls.

This case is of great consequence to the

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* The LORD CHIEF COMMISSIONER stated particularly, in this part of the case, the terms in which the Jury might find the facts as to what passed at the time Wilson subscribed as a witness.

parties, and so is it to the law of the country; but in the return to be made from this Court, it is of the greatest importance that we should not step beyond our province, but confine ourselves to what is remitted to us.

If the whole of this case had been sent to this Court upon one issue, there is no Judge sitting here who would have been bold enough to decide the point of law, but would have asked a special verdict; and your finding specifically on each issue will amount to that.

*Grant* requested to know if he was correct in thinking that his Lordship had directed the Jury to find that the deeds were not read over, if they did not believe Forteith Williamson.

LORD CHIEF COMMISSIONER.—There is no evidence that they were read over.

*Grant.*—We apprehend that though *we* could not, they might have called Mr Souter, the other witness, and on this ground we hope your Lordships will forgive us for presenting a bill of exceptions.

LORD CHIEF COMMISSIONER.—Certainly; but the Court here can only found on the evidence given.

The Jury found, "As to the first issue,

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" that James Earl of Fife, at the date of the " deeds under reduction, viz. on the 7th of " October 1808, was not totally blind, though " he could scarcely distinguish between light " and darkness. The said Earl was at that " time incapable of reading any writing, writ- " ten instrument, or printed book. He could " not at that time discover whether a paper was " written upon or not. As to the second issue, " That the said deeds were read over previous " to the said Earl's name being put thereto, in " presence of Stewart Souter, and Alexander " Forteith Williamson, or one or other of " them; it is not proven whether they were " all read to him at one and the same time, or " at different times, but one was read at the " time the deeds were signed. There is no " proof whether they were deposited and kept " in the room in which they were read during " the whole period which elapsed from the " commencement of the reading, till the name " of the said Earl was put to them as aforesaid, " or where they were deposited. As to the " third issue, That the said Earl put his name " to the said deeds by feeling for the finger or " fingers of another person on the spot for sig- " nature; and was no otherwise assisted than " as above described. As to the fourth issue,

"That the said Earl put his name to the said "deeds at one and the same time. As to the "fifth issue, That the said Earl put his name "to the deeds under reduction in presence of "one instrumentary witness, viz. Alexander "Forteith Williamson; but it is not proven "that the said Earl did acknowledge his sub- "scription to George Wilson, the other instru- "mentary witness. As to the sixth issue, "proven in the affirmative. As to the seventh "issue, That the only means which the said "Earl took to ascertain that the deeds under "reduction were conform to the scrolls of "deeds prepared by his agents under his spe- "cial directions, were his having the said deeds "read over to him."*

*Lord Advocate, Clerk, Jeffrey, J. A. Murray, Cockburn,* and *Robinson,* for the Pursuer.

*Thomson, Grant, Fullerton, Mackenzie,* and *Moncreiff,* for the Defenders.

(Agents, *W. Cook,* W. S. and *James Jollie,* W. S.)

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1816. Dec. 6.

A new trial granted of the second issue.

The Lord Advocate applied, in the Court

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* This trial lasted three days; each adjournment took place with the consent of parties; and, by the same consent, the Jurymen were permitted to go to their own homes.

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of Session, for a rule on the defenders to shew cause why a new trial should not be granted of the second issue.

1*st*, On the ground of misdirection by the Judge, who stated, that if the Jury believed Forteith Williamson, then they would find the deeds read over, though he was the only witness to that fact.

2*d*, That the verdict was not supported by legal evidence. The testimony of one witness is not evidence.

The circumstances of the case do not support his testimony, and the verdict shews the defective nature of the evidence given, as it finds the deeds read in presence of *one* or *other* of two individuals.

Dec. 21. The Court were agreed in granting a new trial on the second issue. All the Judges gave it as their opinion, that it was proper to leave the evidence of Forteith Williamson to the Jury, for though a single witness, there were concomitant facts and circumstances to render his evidence legally admissible. But they thought there was not with it, sufficient evidence to support the finding on the second issue, as to the deeds having been read over to Lord Fife previous to his signing.

On the 8th February 1817, an application was made by the pursuer to the Court of Session, to make the trustees pursuers in the new trial. The Judges agreed in opinion, that the 39th section of the act of sederunt did not regulate the present question; and that sufficient grounds had not been stated for changing the situation of the parties.

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Act. Sed. 9th Dec. 1815, § 39.

## NEW TRIAL.

PRESENT,
THE THREE LORDS COMMISSIONERS.

1817. March 2.

Of this date, the new trial of the second issue, viz. whether the deeds were read over, &c. proceeded.

At a new trial it is incompetent to state the evidence given by a witness at the former trial.

In opening the case for the pursuer, *Mr Clerk*, to shew the Jury why he had no confidence in Forteith Williamson, and as a reason for not calling him as a witness, was proceeding to state the evidence given by him on the former trial, when he was interrupted by *Mr Grant*, for the defender, on the ground that he was not entitled to state any suspicions of the witness, as one of inferior credit.

LORD CHIEF COMMISSIONER.—Mr Clerk

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must not state the former evidence of this witness, but is entitled to the full benefit of the statement that the Court granted the new trial on the ground that the former evidence was insufficient. It is necessary to know that the new trial was not granted on the ground of misdirection, where the Court allow it, *ex debito justitiæ*, but that it was on account of the insufficiency of evidence, where granting a new trial is matter of discretion. The witness must be received here as any other witness; the evidence at this trial must proceed on its own basis.

The witness was afterwards called, and examined for the defender.

When one of a number of issues is sent to a new trial, the return of the former Jury to the other issues may be held as facts at the new trial.

A witness called for the pursuer was asked a question as to the state of Lord Fife's eyes.

LORD CHIEF COMMISSIONER.—The whole of the former verdict is final, except in so far as it is disturbed by this trial of the second issue; the question, therefore, is unnecessary.

A trustee who is to have a reasonable remuneration for his trouble in executing the trust, is an incompetent witness in support of an entail of lands, which it is the principal object of the trust to manage.

Mr S. Souter was called as a witness for the defender.

*Jeffrey*, for the pursuer, objected on two grounds.

1. It is not calling a mere nominal trustee to support the right of the real party, but it is calling him to support his own title as trustee.

2. He has a patrimonial interest, as he is to have a reasonable compensation for his trouble. This, by the opinion of counsel, has been fixed at L.350 per annum, and he has, besides, a large factor's fee.

It may perhaps be said, this objection only applies to the trust-deed, but the trust-deed and deed of entail are, in fact, one and the same.

*Thomson.*—There is here a great *penuria testium*, and if the Court are compelled to reject this evidence, they must do it with regret. Being nominally a defender is no valid objection to tutors and trustees. This witness is admissible in any question as to the estates, and being called in support of the trust-deed does not vary the question.

Interest is in general a good objection, but this case does not fall under the general rule. By the trust-deed, he is only entitled to a reasonable remuneration for the time, skill, and industry he bestows. Counsel have fixed what is a reasonable sum, and we have the opinion of the most eminent Chancery lawyers on the

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clauses of this deed, that in England it would not disqualify the witness.

Nothing has been said to shew any interest he has in the deed of entail. The trust-deed is independent of it, and may stand, though the entail be cut down.

LORD CHIEF COMMISSIONER.—The Court are decidedly of opinion, that this is an interest so direct as to exclude Souter as a witness. If he was merely a trustee, the Court of Session might have authorized his examination, but he is not merely a trustee, he has a pecuniary interest depending on the validity of the deeds under reduction, and he is called to give evidence to support the deeds.

As the law of England has been alluded to, I may mention, that though the Chancellor will extend his authority to order, in some cases, the examination of witnesses inadmissible at common law, yet he will not do so in the case of last will.

Buller's N. P. 7th edit. 233. b.

The question of interest is stated by Buller, J. to be, whether the witness can gain an immediate advantage from the event of the suit. This is the law of common sense, and must be as much the law of England.

The law holds that justice cannot be done if

the evidence arises from sources tainted by interest. The amount of the interest is nothing; the only question is, if the interest of the witness is affected by the event of the trial; and that it is so in this case is manifest.

LORD PITMILLY.—I entirely concur in this opinion, and may add, that all our authorities prove that S. Souter could not have been an instrumentary witness to this deed, on account of his interest under it; and the parties shew that they knew this, by getting Wilson to subscribe. The nearest relations might have been instrumentary witnesses, but S. Souter could not. How, then, can the defenders think of supporting the deed by his parol testimony?

A naked trust would not have disqualified him, but he was agent in getting these deeds executed; and a trustee or tutor cannot be a witness if he has taken a particular interest in the business on which his evidence is required.

See Reid *v.* Gardyne, 10th July 1813.

I entirely concur in all that your Lordship has stated, and mention these as additional grounds for rejecting this evidence.

On a suggestion from the bar, the LORD CHIEF COMMISSIONER observed, that the Court saw no grounds for separating the deeds.

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It is a direct, not a contingent interest, that disqualifies a witness.

The next witness called was Forteith Williamson.

*Jeffrey* objected, 1. He is interested to support these deeds, as there was a legacy left him by Lord Fife only the year before their execution; and he holds a factory under the trustees.

2. He has been a most active agent, and we shall prove other facts, materially affecting his credit.

LORD CHIEF COMMISSIONER.—Agency is a separate objection, and if you mean to rest on it, you must prove it by the witness, or other testimony. This is not the time for deciding on this objection; the evidence of the agency must first be laid before us; but, if you fail in making it out, we are clear that the interest is not such as to disqualify this witness.

*Grant* objected,—The alleged actings were before the witness was cited.

Witnesses were then called to prove the agency. The first called had been in Court, and heard Mr Jeffrey's speech, and was rejected, though it was maintained that he was a competent witness, not having heard any part of the evidence. After examining another witness, the Court were clearly of opinion that the agency was not proved.

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It is incompetent, by parol testimony, to prove a witness guilty of crimes, with the view of disqualifying or discrediting him.

*Mr Grant* then suggested, That it was irregular to state any thing affecting merely the credit of the witness, when LORD GILLIES observed, That if there was no objection to his *admissibility*, then he must be called.

*Clerk* argued, That, when it can be done, objections are stated both to admissibility and credit; before the witness is called, that if he is objectionable, he may be received *cum nota*.

LORD PITMILLY suggested, That this appeared to be the proper time for stating the objections, and the Court could then judge whether the objections went to the admissibility or credibility of the witness.

*Mr Jeffrey* then proceeded to state a number of objections, and accuse the witness of a number of crimes, which it would be improper to detail, as he was interrupted by Lord Gillies.

LORD GILLIES.—With deference, I think we have heard a great deal too much. Mr Jeffrey must be aware that he cannot be allowed to prove his statements, and in that situation, it appears to me impossible to allow the statements to be made.

LORD PITMILLY.—I concur entirely in the opinion given. Neither general nor special objections of this sort can go to proof. Both

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the witness and the party might be injured by allowing such a proof. No proof of this sort is competent; and if the other party wish to answer the statement, I think they are entitled to do so.

*Thomson*.—The statement is as new and surprising to us as to the Court, and we can only give it a flat contradiction.

LORD CHIEF COMMISSIONER.—I feel great difficulty in delivering an opinion in this case, as the rule of the law to which I have been most accustomed differs from the law of Scotland.

If I had been to follow the lights which I possess, the course would have been to call the witness, then to call others to swear that they would not believe him on oath. The statements made of particular facts would not have been allowed in evidence, as a man is not supposed to come prepared to rebut particular facts; but he is supposed to be ready, on all occasions, to support his character in general.

*Clerk* then stated, By this decision I am cut out of every method of impeaching the credit of a witness, as, by the law of Scotland, general questions, of the sort mentioned, are inadmissible. I must, therefore, present a bill of exceptions, and protest for reprobators, which

will entitle me to prove the facts, if the witness shall be guilty of falsehood.

After the witness was examined, *Mr Clerk* stated his wish to prove the former testimony of the witness, to which *Mr Thomson* did not object, though he would have no opportunity of observing upon it.

LORD CHIEF COMMISSIONER.—It is clear that where the point is ruled by the law of Scotland, by that law we are bound. There seems no rule against bringing witnesses in reply to contradict the testimony given. These may be examined to facts that took place at the time, or to prove the evidence at the former trial. What the witness said judicially may be fixed, but it is incompetent to prove extrajudicial statements.

His former evidence may be proved by examining the shorthand writer, and by reference to the Judge's notes, I have known the notes by the Judge held sufficient, but the most ordinary practice is to put the shorthand writer on oath. This will shew that this Court, as well as the Court of Session, is provided with a remedy for correcting contradictory testimony. The evidence may now be called, and then Mr Jeffrey will observe upon the whole case.

This evidence, however, was not called.

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*Thomson* contended,—The Jury must presume that the deeds were read from their being ten days at Duff House before they were signed, as well as from Lord Fife's extreme suspicion and attention to business. The pursuer undertook to prove that the deeds were not read; and if he had proved that other deeds were substituted, then his plea would be triumphant. But he has shrunk from his allegation, and merely wishes to raise a presumption that they were not read at the time of signing. It is of no consequence at what time they were read.

*Clerk*, in opening the case, and *Jeffrey*, in reply, maintained,—The Jury are not to try whether it was competent for the late Lord to execute the deeds in the way he has attempted, or whether he must do it by notaries and witnesses. The simple fact for their consideration is, whether the deeds were read over? It is not necessary to take the alternative, that they were or were not read; there may be no proof one way or other. Proof of a negative proposition is in most cases impossible; and if it was necessary in this case to prove it completely, then the case is not made out. If a person who can see signs a deed, he is presumed to be acquainted with its contents,

and can only challenge it on the ground of fraud; but if he is blind, it is necessary to prove that he was made acquainted with its contents. There is the strongest probability that the deeds were not read. The length of time they were in preparation, Lord Fife's bad health, his signing other deeds without having them read, all shew the improbability of their being read.

In opposition to this probability there is only one witness, unsupported by circumstances; indeed, the other Court held that his former evidence was not so clear and distinct as to be capable of being supported by circumstances.

LORD CHIEF COMMISSIONER.—This is a case of great importance in point of stake, and also in point of precedent, and as a fair specimen of trial by Jury.

Formerly a number of issues were sent, now there is a single point; but it is proper to refer to the former case so far as to make this intelligible, and in so far as it is evidence in this case. At the former trial Forteith Williamson was the only witness to the reading of the deeds; and though the Second Division of the Court of Session thought we did right in sending his evidence to the Jury, still they thought

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that a different conclusion ought to have been drawn from it by the Jury.

The case comes back to us on the evidence of the same witness, and now there is less proof of the deeds being read than formerly, as the witness does not now recollect circumstances which he stated on the former trial. This evidence is not to be excluded, but it must be weighed in golden scales. It is important to consider that perfect consistency in recollection is not to be expected, and rather shows a story made. On the other hand, a person fabricating a story will, as in the present instance, merely state the general fact, without mentioning particulars.

In this case the only witness who could be brought to contradict the statement is Stewart Souter; he could not be a witness for the defenders, though he might have been for the pursuer; his counsel not calling him, is not, however, to be held conclusive against the pursuer.

The pursuer rests his case on the presumptions that the deeds were not read,—from Lord Fife's advanced age,—his severe disorder,—his inability to attend long to business at one time,—his disposition to sleep,—the short time within which the deeds were executed after they were sent north,—his habit of signing

deeds without having them read,—his requiring particular passages of the deeds in question to be read,—and from Wilson not having heard any part of them read.

We cannot take the summons, condescendence, &c. as correcting the issue; but when they contain deliberate statements and not mere argument, and are put in proof, they are proper for the consideration of a Jury. Several of the articles in the condescendence and answers were properly read, but I am not sure how far it is warrantable to draw a conclusion from a statement made merely because it is not distinctly denied. All the probabilities ought, however, to be kept in view; and amongst these you must consider, whether, after a long correspondence on the subject,—after so much pains and anxiety in the preparation,—it is probable that the deeds would be read over before signing.

It is extremely important that we should return to the other Court a finding which they can apply along with those found on the former trial, but the Jury are not on this account to stretch their consciences beyond the evidence; and though it is desirable to find that they were or were not read, still it is quite competent to find that it is not proved one way or other; but as this is by no means desirable, I

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trust you will consider well before you make this return.

If you be of opinion that they were not read, this supersedes consideration of the other parts of the issue; if you are of opinion that they were read, you will then also say whether it must not have been at different times. At all events, you may find they were not read in presence of the instrumentary witnesses.

Verdict,—"That it was not proven that the "deeds had been read over to the Earl of Fife "before his signature was affixed thereto."

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1817. May 23 & 30, and June 3.

The bill of exceptions, on account of rejecting Mr Souter as a witness, came on for discussion in the Court of Session.

*Grant* and *Thomson* argued,—Mr Souter being nominally a defender is no valid objection; Yule *v.* Yule, 28th February 1755, M. 16765; Reid *v.* Gardyne, 10th July 1813. A trustee is in a similar situation with a tutor when he does not act as agent; Scott *v.* Caverhill, 19th December 1786, M. 16779; Earl March *v.* Sawyer, 21st November 1749, Kilk. 600, M. 16757. In England, where the rules in general are stricter, this has been carried

farther by Lord Hardwicke; 1 Williams, 290. Interest he has none; the sum is a mere remuneration for his trouble; it is not a vested interest, which he can enforce in law; Downing, Ambler, 592. Agents for merchants come very near this; Dixon *v.* Cooper, 3 Wilson, 40, (1769;) Benjamin, 2 Hen. Bl. 590; Champion *v.* Atkinson, 3 Keble, 90. These apply, as the law of evidence does not depend on municipal regulation, but on the principles of right reason; Sim and Scott *v.* Donaldson, 23d November 1708, Forbes, 281, M. 16713. Members of burghs are competent; Hospital of Leith *v.* Town of Kinghorn, 11th January 1576, M. 16651; Town of Inverness *v.* Forbes, 13th June 1672, Stair, II. 84, M. 16675; Mackenzie and Fraser *v.* Town of Inverness, 14th June 1709, Fount. 502, M. 16717. Unless one or other of the objections is good, they cannot be taken together; and though Souter were not competent as to the trust-deed, he is undoubtedly competent as to the deed of entail.

*Jeffrey* and *Clerk*, on the other hand, maintained,—The two deeds are in fact the same, and the objections are to be taken in connection. He is a defender,—a trustee brought to support the trust-deed,—he is connected with the cause and the execution of the deeds,—has

Gray *v.* ——, 1752, Kilk 603. M. 16764.

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Scott *v.* Caverhill, 19th Dec. 1786.
M. 16779.

been present at and given partial counsel at all the investigations and at the first trial, and has a pecuniary interest.

Elliot's case in 1786 is shortly reported, and appears to have been one of mere agency.

A certain laxity of practice has been introduced, and witnesses inadmissible at common law have been examined by the Court, from an understanding that Judges, by long practice, are capable of judging of the weight due to such testimony; but the case is different when it is to be submitted to a Jury, who have not had that experience.

LORD JUSTICE-CLERK.—It is not necessary to go at large into this case. I formerly threw out a hint that we ought to order the examination of this witness, but on seeing the whole circumstances, I am satisfied it is impossible.

His interest is so manifest, direct, and palpable, in the trust-deed, that he cannot be received; but in considering his interest, it is impossible to throw out of view his character of defender, or another, which might not *per se* have been sufficient, that he is the person under whose eye and superintendence these deeds were executed.

On the distinction taken between the deeds, the preamble clearly shows that it was one

transaction; and if there are subordinate purposes in the trust-deed, the allowance for managing the whole would be too large for that limited object. It has not been made out that it is competent to examine him.

The other Judges concurred, and the exception was disallowed.

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PRESENT,

THE THREE LORDS COMMISSIONERS.

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## DICKSON *v.* TAYLOR.

1816. November 1.

THIS was an action of damages by Mr Dickson, of the Calder coalwork, against the manager of another coalwork, for enticing, carrying away, harbouring, and detaining a collier.

If a collier, under an engagement with one party, enter into an engagement with another party, that party is bound to turn him off as soon as he becomes acquainted with the prior engagement.

DEFENCE.—The defender never, by himself or others, attempted to seduce a collier under engagement at another work. Nor did he harbour or detain the one in question, knowing him to be under engagement.

Gray Russel, a collier, was engaged at the Calder coalwork, to turn out 720 carts of coals; after turning out about 80 carts, he engaged