PRESENT,

THE THREE LORDS COMMISSIONERS.

HEPBURN *v.* COWAN.

1817. July 14.

Found that a subscription to a bill was the true and genuine hand-writing of the pursuer.

THIS was a reduction improbation of a bill accepted by the pursuer; and also a suspension at his instance. The principal ground of reduction was, that the alleged subscription of the pursuer was a forgery.

ISSUE.

"Whether the name of George Hepburn, "the pursuer, subscribed as acceptor to a bill "for L. 700, dated Musselburgh, 16th Feb- "ruary 1815; purporting to be drawn by John "Cowan upon the said George Hepburn, "farmer, Blackdikes, be the true and genuine "subscription and proper hand-writing of the "said pursuer, adhibited by him to the said "bill?"

When this case was called on for trial, a sufficient number of Jurymen did not appear

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to form a special Jury, and there were no common Jurymen summoned.

LORD CHIEF COMMISSIONER.—If the party pray a *tales*, they may have it; indeed, if there were other Jurymen summoned, the Court might order it. It will be necessary, in future, to summon a number of common Jurymen to prevent this recurring; if parties consent, the Jury may be filled up by any persons now in Court.

This was done accordingly.

LORD GILLIES suggested that the parties should give in a minute consenting to this, which was the more necessary, as one of the *tales* was a writer to the signet, who, by statute 55th Geo. III. c. 42, § 36, are not liable to be returned to serve on Juries.

A document ought not to be read till it is proved, unless the terms of it are necessary to make the case intelligible;—but the Court will not decide whether it is admissible till it is tendered in evidence.

Erskine, in opening the case for the pursuer, was proceeding to read from letters quoted in the pleadings, when he was interrupted by Mr Jeffrey.

LORD CHIEF COMMISSIONER.—The practice is, for the Court not to interpose in this stage of the cause, and decide the admissibility of evidence, on its being opened by counsel. But, unless the words of a document are necessary to explain the case, it is better to describe the

nature of the document than to read its words. By following this mode, ample justice will be done to the case on the present occasion. All cases are better opened by description than by detail, but this must be left to the discretion of counsel, and cannot form a rule of Court.

When the letters were tendered in evidence,

It is competent to prove an offer of compromise made in the course of litigation.

Jeffrey objected,—It is incompetent to plead against a party, a private and confidential offer to buy his peace.

Smyth, *v.* Pentland, May 20, 1809.

Clerk stated,—These letters were quoted in the articles improbatory, and were not ordered to be withdrawn; they are, therefore, before the Jury.

LORD CHIEF COMMISSIONER.—With respect to their being quoted in the articles improbatory, that would not be sufficient, as those articles are not before the Jury.

The solid ground for receiving them is, that this is not an attempt to buy his peace, but a transaction in the course of litigation; it, therefore, will not impinge on the case of Pentland.

A receipt was offered in evidence, to which Mr Jeffrey objected, that it was not proved;

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the witnesses having only said, that the writing was like the handwriting of the party, but not that they believed it to be his.

LORD CHIEF COMMISSIONER.—There is sufficient *prima facie* evidence to induce the Court to submit this to the consideration of the Jury. A witness can only speak to his opinion of a writing, and this being one of only a few words, the difficulty of proving it must be much greater. *Comparatio literarum* being admissible by the law of Scotland, the Jury will have an opportunity, in this case, of comparing the writing with the admitted writing of this person.

The pursuer brought no proof of the forgery either by writing-masters, engravers, or those who knew the hand, but rested his case on the difficulties in which the party was, and the improbability of his being possessed of so large a sum; he also rested on a comparison of the handwriting. It was proved that his handwriting varied very considerably. The agent for the East Lothian Bank produced a number of checks, many of which he said he would hardly have answered if he had not seen them written; but he said that he should not have doubted the subscription to the bill in question,

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and would have discounted it so far as the name was concerned.

The LORD CHIEF COMMISSIONER stated,—That there was evidence that the handwriting was genuine, and if there was any question of law, that a general verdict would raise the question of law in the other Court. After mentioning the facts proved, he left it to the Jury to say whether they agreed with him in thinking that the handwriting was proved; and, if so, that they would find for the defender.

Verdict for the defender.

Clerk and *W. Erskine*, for the Pursuer.
Jeffrey and *J. Campbell*, for the Defender.
(Agents, *Hay Donaldson*, W. S. and *Arch. Campbell*, W. S.)

1818. February 10.

Expences found due to the defender.

Campbell, of this date, moved for expences to the defender.

Erskine, for the pursuer, said,—If expences be given as a matter of course, as the counsel on the other side seems to suppose, it is unnecessary to oppose the motion.

LORD CHIEF COMMISSIONER.—You may show cause why they should not be given.

Mr Erskine then entered into considerable

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detail to show that the action was brought *bona fide*; and though he was not now entitled to say the pursuer's name was forged, still he maintained that the sum in the bill was changed, and, in such circumstances, expences ought not be given till the case should be finally decided.

LORD CHIEF COMMISSIONER.—The only question seems to be, whether we are to give costs at present or after Lord Gillies has finally disposed of the other branch of the cause, and decided whether this document is interpolated. The only question sent here was the forgery; and if that had been the only question in the Court of Session, the case would have been finally settled. If we were to go into the other question, it would be giving an opinion on the point depending before Lord Gillies.

LORD GILLIES.—The defender will undoubtedly be entitled to his expences in this Court in whatever way the suspension is disposed of. The only question, therefore, is, whether the costs are to be given now or afterwards?

After some observations from the bar,

LORD CHIEF. COMMISSIONER said,—There

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Act Sed. 6th March 1817 § 1.

can be no doubt that costs are a matter of discretion. We derive our authority from the Court of Session by Act of Sederunt founded on the act of Parliament, and therefore cannot go higher than the source from which that authority flows. It is clear that, as the verdict is applied, this case is within our jurisdiction. It is the common law of the Court, that where a verdict is in favour of a party, expences go with it, unless special circumstances can be stated against it. The question is, whether this is an exception from the general rule; and whether enough is stated to make us refuse expences?

In the Court of Session a distinct and separate allegation of forgery is made; that question is sent here, and if the verdict had been the other way, it would have finished the case. The verdict was against the pursuer; there is no motion for a new trial; it is impossible now for any tribunal to alter that judgment. It is said the case may be decided in the Court of Session against the defender, but no decision there can alter the judgment on the verdict. If by the judgment on the verdict the right to the expences is established, and cannot be altered, for what purpose are we to suspend them till the end of the cause?

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According to form and justice, I think the defender entitled to costs, and to have them now.

LORD GILLIES.—I perfectly agree, and shall only say I cannot understand a party *bona fide* denying his own subscription.

The expences were found due.

March 5. The defender not having called any witnesses, the clerk who taxed the account struck off the expence of citing and bringing the witnesses to town. This was objected to on the part of the defender, and a remit was subsequently made to the clerk, to report the number of witnesses necessary to substantiate the defence.

June 18.

The expence of two witnesses allowed to the defender.

The report was, that two witnesses were sufficient in support of the defence, and that, on this principle, L. 1, 6s. only should be added to the account as formerly taxed.

Mr Erskine having no instructions to oppose the motion, Mr Campbell said,—The Court would, of course, give him full expences.

LORD CHIEF COMMISSIONER.—If no ground be stated, I will confirm the report by the clerk.

Campbell.—The case, as stated by the pur-

suers, was a very complicated one; and from the number of witnesses cited for him, we had every reason to believe he would attempt to prove the defender guilty of a concerted fraud, and that the subscription was not the pursuer's handwriting.

In fact, when the precognition was laid before Mr Jeffrey and myself, we recommended that two witnesses in addition to the original list should be cited.

LORD CHIEF COMMISSIONER.—This is a difficult question, and the Court have taken time to consider, with a view of establishing a general rule. The first impression on my mind was, that, when no witnesses were called by a defender, the expence ought not to be allowed. I did not think an analogy could be drawn from the Court of Session, but from Courts constituted as this is. But, after much inquiry, and after consultation with my brethren, and finding that it is a matter of discretion in the Court of Session to grant or refuse expences, I am satisfied that the order made in this case was the proper one. The clerk has complied with that order, and has reported that L. 1, 6s. ought to be allowed, as the expence of the defender's witnesses.

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This is objected to, and it is said, there were other parts of the case requiring a number of witnesses to be cited. There was no discussion here of any other part of the case. The whole case was determinable, and was, in fact, determined by proof of the handwriting; with which, from the Bank clerk being among their witnesses, the defender must have been, or ought to have been acquainted.

Counsel having recommended that a greater number of witnesses should be cited, renders it more difficult for the Court to make the observations that occur to it.

With reference to cases, in general, however, I must observe, that agents, and particularly counsel, when they are consulted, ought not to try how many witnesses they can cite, who know any thing of the matter, but with how few they can prove their case.

His Lordship then confirmed the report by the clerk.