PRESENT,

LORDS CHIEF COMMISSIONER AND PITMILLY.

SMITH *v.* KNOWLES.

1824. May 19.

A new trial granted, a person having acted as a Juryman who had been tried, convicted, and punished by the Court of Justiciary.

THIS case was tried at Aberdeen before Lord Pitmilly on circuit. A rule was obtained by the defender on the pursuer to show cause why there should not be a new trial.

Jeffrey, for the pursuer.—The first ground of the motion is the rejection of Davidson's deposition in a different cause, taken years before. By all authorities, a writ is not evidence, unless a witness swears to the facts.

Burnett, p. 500. 2 Hume, p. 122.

The second, that there were only eleven jurors, is more novel, as a person sat on the Jury who had been rendered infamous by a conviction in the Court of Justiciary.

There is no precise definition of *infamia juris*, or when or how it became law. The objection ought to have been stated at the time.

There is no *dictum* or decision extending this disqualification to Jurymen; all the authorities apply to witnesses, and it applies only where the person is really infamous. This

SMITH
v.
KNOWLES.

Grant on New Trials, 37, 44, and 45.
Burton *v.* Thomson. 6 Bac. Abr. 661 and 663.
Bailie *v.* Brysson, Vol. I. p. 340.
Menzies, 1790.
Sharp, July 1820.
(Reported by Watson,) p. 16.

was a special Jury, and the question is, whether a person, convicted of such an offence, is capable of being a jurymen by consent? The party must show that he did not know the objection at the time of the trial. In the Exchequer, a verdict has been taken from eleven Jurymen, one having died during the trial; and in the Justiciary Court, the decision holding minority sufficient to set aside a verdict, was not unanimous.

LORD CHIEF COMMISSIONER.—Is this gentleman a Justice of Peace? If so, it is material to know whether there has been a new commission since his trial, and if there has, whether he has acted as a Justice?

LORD PITMILLY.—There is a case in Dallas, where a person is restored to the capacity of being a juryman. The statute 1681, c. 18, and Bankton's observations upon it, ought to be examined.

May 24.

2 Hume 301 and 471.
Stat. 1551, c. 19.
Burnett, 400, &c.
Ersk. 789.
1 Phillipps, 28.
Stat. 1681, c. 18.

Moncreiff, for the defender.—Infamy is the consequence of conviction by a Jury of any of the higher crimes, and of the *crimen falsi* in all its branches.

This person was tried on the statute 46,

Geo. III. c. 69, and at common law, and confessed a fraud and imposition, and merely denies that it was for his own emolument.

This was a moral, not a physical defect, and we cannot be too late in stating it. An alteration of the status is part of the punishment, and could not be taken off by consent. In Sharp's case, the objection was sustained, though a minor may be a witness.

2 Sir G. Mackenzie, 43.
1 Bankton, 273, Stat. 1696.
Acts of Sederunt, 6th July 1739, 11th February 1763, 11th August 1773.
Dallas, p. 658, &c.

The deposition of a witness (who was since dead) was rejected, on the ground that it was in a different process, but as it is competent to prove what a dead person said, *a fortiori*, a solemn deposition must be good.

LORD CHIEF COMMISSIONER.—But it is given as evidence in the cause, and is not produced as a record, but as evidence of what a dead man said.

Moncreiff.—They must hold the recollection of the commissioner as preferable to the record. In criminal cases, proof of confession frequently goes of consent, and Mr Burnett thinks it ought to be admitted. In the English law, there is matter bearing upon this, and by statute, a deposition before the coroner is evidence to the Jury.

2 Hume, 391.
Burnett, 497.
Tait's Law of Ev. 409.
1 Phillipps, 250, 251, and 374.

1 Phillipps, 250.

SMITH
v.
KNOWLES.

June 2, 1824.

LORD CHIEF COMMISSIONER.—This case was ably argued, and the Court have taken time to consider, and I shall now state the general result of my opinion, leaving it to Lord Pitmilly to go into the detail.

This motion is grounded, first, on the rejection of the deposition of a witness taken in another cause, no witness having been examined as to it at the trial. It is said we ought to receive it, and that it is stronger than the hearsay of a person since dead, which is competent.

It is the rule, that such evidence is competent, but that rule is not to be extended beyond the letter. When a witness is called to prove what the person said, there is a witness present upon oath to be examined on all the circumstances in which the declaration was made; but, in the present case, it is a bare deposition, and as that is not within the letter of the rule, I am of opinion that there was no error in rejecting it.

The other ground of the motion is, that a person not fit to be a Juryman was allowed to sit on this Jury, and that it was tried by eleven, instead of twelve jurors. The question here is, how far the person is disqualified from being a juryman, having been tried, convicted, and

punished on his own confession? This admissibility depends not on the punishment, but on the nature of the crime, and the question is, whether it infers *infamia juris?* I have looked at the indictment to ascertain the crime, and being of the nature of *crimen falsi*, all the authorities agree that *infamia juris* follows.

The next question is, whether this disqualification applies to Jurymen? The statute 1681, and others, go to establish, that *infamia juris* disqualifies persons from being Jurymen, and even if they did not, the analogy would go far to establish it. A person convicted of such a crime cannot be a witness—he has got into such a relation to civil society, that he is not to be believed on his oath; and that a Juryman is on oath, is too clear to require illustration. I therefore hold him disqualified.

This leads to the question, how far the act of parties, by acquiescence or consent, rendered him a fit Jurymen? Consent of parties can do a great deal, but in the question as to the competency of a Juryman, the Court must be a party as well as the pursuer and defender. There was a case in this Court, where a writer to the Signet was taken as a Juryman, but then the Court, as well as the parties, consented to this, and the disqualification was taken off.

Hepburn *v.* Cowan, Vol. I. p. 262.

SMITH
v.
KNOWLES.

The disqualification of writers, was from a fear of perplexing the juries with subtilties of law; but, in the present case, if the Court were to dispense with the objection, it would, to a certain extent, be granting a pardon, which the Crown alone can do. This would be contrary to law; there ought, therefore, to be a new trial.

The next question is, upon what terms it should be granted? And, as Lord Pitmilly was satisfied with the verdict, and thinks justice was done, and as the new trial is granted on a technical objection, I think it ought to be on payment of costs.

Moncreiff.—We were not heard on this point.

LORD PITMILLY.—That is always part of the merits. I entirely concur in the opinion delivered; but, as reference has been made to me, I shall state the grounds of my opinion more in detail, and refer to some additional authorities, which have confirmed me in my opinion, though I was satisfied with those referred to by counsel.

As to whether there was here a conviction of a crime inferring infamy, if ever there was

SMITH v. KNOWLES.

a charge amounting to *crimen falsi*, this is one,—the party is accused of eight different acts,—on these he is found guilty and convicted by a Jury. His confession is qualified by the addition, that it was not with the view of putting the money in his pocket, but to benefit a poor old woman. The indictment charges it as for his own purposes; but, from the terms of the confession, I must hold that it was not. That, in a moral point of view, in some degree alters the nature of the charge, but does not alter the nature of the crime. It was said the punishment was light,—he had to pay 100 guineas, and was imprisoned for four months; and we knew at the time, that he would rather have had a longer imprisonment than paid the money; but the punishment does not alter the crime.

The authorities referred to by Mr Moncreiff, are quite sufficient to remove this person from being a Juryman. It is true they do not apply directly to Jurymen, but both Sir George Mackenzie and Bankton state that the objection may be transferred from witnesses to Jurymen. There are many cases of witnesses, and in that of Black, which was not referred to, the person had lived for years in a respectable situation, when his punishment was

Black *v.* Brown, Dec. 22, 1815.

SMITH
v.
KNOWLES.

Brodie's Case, 1788.

Bell and Mortimer's Case.

not known, and yet the Sheriff, the Lord Ordinary, and the Court, all held him incompetent. In Brodie's case in 1788, it was doubted how far even a pardon took off the incapacity, and it was not till the case of Bell and Mortimer, that it was held to rehabilitate.

3 Blac. Com. 370.
2 Hale's Pl. of Cr. 271.

The case of a Juryman is much stronger than that of a witness, and there are many objections to a Juryman that would not apply to a witness. Blackstone and Hale hold, that a pardon renders him a competent witness, but not a Juryman. These are invincible, though I think our own authorities sufficient.

If a party, convicted of such a crime, can never again sit as a Juryman, how can consent of parties cure this defect? The Court must be a party; or rather they ought to be informed of it and sanction it. But how could the Court consent to this? It would be assuming the prerogative of Royalty. But the affidavit shows that there was no such consent; and had it been stated to me, I never would have allowed such a Juryman to sit. I am happy to see that his designation is changed from what it was in the indictment, as that is an apology for the Sheriff having returned him.

As the case went well,—as the party knew

SMITH
v.
KNOWLES.

something of the objection, and was bound to know it,—I think the trial should be given on payment of costs.

As to the deposition of the witness, it appeared to me difficult at the time, and more difficult when so ably argued, but I still think I was right in rejecting it. We will receive evidence of what a dead man said, but will not stretch it beyond what is fixed. The admission by the party was merely that this was a true document, and nothing more. If the witness had written a letter, there is no authority for holding that it would have been evidence after his death, though a letter may be said to be better than proof of what he said. I have looked into a recent very clear and distinct book on our law of evidence, which states, that such a deposition can only be received by consent. The only authority upon which the reception of this rests, is a *dictum* of Mr Glassford, which he states without reference to authority. On the whole, I think the decision was right.

Tait's Law of Ev. 409.

Jeffrey and *Gordon*, for the Pursuer.
Moncreiff, *Cockburn*, and *Hunter*, for the Defenders.

SMITH
v.
KNOWLES.

1824.
Oct. 6.

ABERDEEN.

PRESENT,

LORD PITMILLY.

NEW TRIAL.

A road-trustee received as a witness, though a nominal party, the clerk to the trustees being called as a defender.

THE case was again tried at Aberdeen before Lord Pitmilly; what follows, is taken from a note furnished to me by a young friend who was present at the second trial.

When Mr Crombie was called as a witness, *Jeffrey*, for the pursuer, objected, He is a road-trustee; and their clerk being called as a defender, renders all of them defenders.

Moncreiff, for the defenders.—We admit that he is a road-trustee, but we only call him to prove the deposition of Davidson, as he took it. There was no right to make the trustees parties, and the former verdict was not taken against them.

Gordon.—We object to the witness as a party, as he decided this case *de facto* and *de jure*; and is, therefore, not merely a nominal defender. Davidson was his witness,—he acted as trustee, and first gave evidence before his brother trustees, and then judged of it.

SMITH v. KNOWLES.

LORD PITMILLY.—I see nothing to exclude this witness. The action is substantially against Mr Knowles. The clerk of the trustees is called merely in point of form; and if the trustees had moved to be assoilzied, they would have been so. What has been said as to Mr Crombie's proceedings, would go to his credit, not his admissibility.

Circumstances in which a deposition of a witness in a different cause was received as evidence.

The witness was then called, and stated, that he had taken the deposition, which was shown to him in Court, and that it was correct. The deposition was then tendered.

Jeffrey, objected, and said, This question was partly argued, but not decided on the application for a new trial. It is a new question, for it has never been held that a deposition in another cause was evidence. In the Criminal Court, there is no hint of the possibility of any written statement except a dying declaration being received.

Case of Macgregors, 4 Hume Com. 226.

The parties in this case had no *persona standi* in the other; and Mr Crombie cannot speak to the nature of the evidence, only that it was correctly taken down. There is no precedent, and, in England, it would be rejected.

1 Phillipps, 229.

Moncreiff.—When the question was before

SMITH
v.
KNOWLES.

the Court, they thought the deposition admissible if a witness had been called to prove it authentic. This is much better proof than what the witness said, as there can here be no doubt either of the words used, or that he was serious in using them. There is no judgment against receiving such a deposition even in the criminal law. Burnett, in quoting Macgregor's case, says, there are strong grounds for admitting it. The deposition before a Coroner is admitted in such a case; and the rule in England is directly the reverse of that stated on the other side.

Burnett, p. 496.
Hume, (note.)

1 Phillipps, p. 230.

Gordon.—The question is, if a judge can transfer a deposition from one case to another? The passage in Hume proves that he may, and Burnett and Tait are of the same opinion.

4 Hume, 226.
Burnett, 405, and 497.
Tait, 409.

LORD PITMILLY.—It is not necessary to state all the grounds of my decision on this delicate and important question, which I am sorry to be called on to decide. There are many doubts as to the expediency of the law of Scotland in regard to receiving evidence of what a person, since dead, has said. On the former trial, no living witness was produced; but, on the present occasion, Mr Crombie has proved that Davidson said what the deposition

contains. It would be difficult to make the distinction of not receiving this deposition, while we admit evidence of what the person said to Mr Crombie or any one else casually in conversation, and not on oath. Mr Crombie swears, that Davidson swore to these particulars, and if I could not reject evidence of what he swore, how can I reject this?

J. Gordon and *Jeffrey*, for the Pursuer.
Moncreiff and *Lumsden*, for the Defender.

PRESENT,

THE LORD CHIEF COMMISSIONER.

MACLEOD *v.* MACLEOD.

1824. June 21.

Finding that a person had not been put in possession of the whole of a farm let to him.

Incompetent to ask the opinion of a witness, except as a man of science.

THIS was an issue sent by the Court of Session to ascertain whether the pursuer had been put in possession of the whole of a farm let to him, and if not, what loss he had suffered by not being put in possession of the whole.

The first witness for the pursuer was asked, whether, in a Highland farm of several miles in extent, a hundred acres of arable ground was more valuable than the same number would be in the low country.