reference to the situation of the defender being the man of business who wrote it.

WATSON v. HAMILTON.

Verdict—"For the defender on the first issue."*

Jeffrey, Skene, and *G. G. Bell,* for the Pursuer.
Moncreiff, Cockburn, and *Ivory,* for the Defender.
(Agents, *Gibson & Oliphant,* W. S., and *Wm. Dallas,* W. S.)

PRESENT,

THE THREE LORDS COMMISSIONERS.

WATSON v. HAMILTON.

1824. Dec. 6.

Findings—as to the capacity of a person to judge of the effect of certain deeds—as to their being her free and voluntary acts—as to her settling accounts—and explaining the reason for calling notaries.

IN this case, which is reported at p. 29 of this volume, the Court of Session sent five "New "and Additional Issues."

Whether Mrs Noble "was in such a state of "mind as enabled her to judge correctly with "regard to the effect of the said deeds, as de- "priving her of all power of revoking or alter- "ing the same?" Whether the deeds were her "free and voluntary acts?"—"or obtain-

* A minute was given in, agreeing that a verdict on this issue should be held to exhaust the question.

WATSON v. HAMILTON.

" ed by the undue influence of the defenders?" Whether, subsequent to certain dates, she " set- " tled accounts with Mr Hamilton?" Whether, at the date of the deeds, she " could " write or subscribe those deeds?" Whether she explained to the notaries her object in making use of their professional assistance, or " did " express her assent to, or acquiesce in such " explanation, if any such was given in her " presence?"

Incompetent to give in evidence a petition presented to the Court of Session.

After several witnesses were examined, it was proposed to give in evidence an answer to a petition in the Court of Session, as showing a *prima facie* case against the defender.

LORD CHIEF COMMISSIONER.—It is impossible to receive this. Where parties are warned to state facts for the purpose of having them fixed by admission, it may be competent to produce the averment, but it is not competent to give, as proof of a fact, admissions in an argumentative paper.

The counsel for the defender having expressed an intention to present a Bill of Exceptions,

Cockburn, for the pursuer, consented to the

passage being read, though he considered it illegal, new, and highly dangerous.

A trustee, though nominally a party, received as a witness.

When Mr Hamilton Ritchie was called for the defender,

Jeffrey and *Forsyth* for the pursuer object.—He is, and all along has been a party, and is liable for expences—he is a near relation of the party; it is only where there is an unavoidable penury that near relations are admissible.

Young *v.* Allison, Vol. II. p. 229. Ersk. iv. 2. 24.

Whigham, for the defender.—We admit, that, as trustee, he is a defender; but the rule on this subject has been relaxed. This person is a mere nominal trustee and party, and has no interest. This is a case where the general rule ought to be deviated from *ex necessitate*. In Elliot's case he was admitted; and in the cases of Howden and Bell the witness was admitted.

Reid *v.* Gardyne, July 10, 1813. Yule *v.* Yule, Feb. 28, 1755. M. 16765. Tait's L. of Ev. 375. Falconer *v.* Falconer, July 13, 1750, M. 16761. M'Latchie *v.* Brand, Nov. 27, 1771. M. 16776. Scott *v.* Caverhill, Dec. 19, 1786. M. 16779. Spence *v.* Howden, Vol. II. p. 167. Bell *v.* Bell, Vol. II. p. 132. Cowan *v.* Cowan, July 10, 1813.

LORD CHIEF COMMISSIONER.—I am very anxious that this case should go to the Court of Session without any incidental question occurring to prevent that Court from getting at the merits; but this does not affect my opinion as to the admission or rejection of the witness. There are four objections to the witness

WATSON
v.
HAMILTON.

E. of Fife *v.* Tr. E. of Fife. Vol. I. p. 128, &c. Reid *v.* Gardyne, July 10, 1813.

—that he is a trustee—a defender—a relation —and was agent in the deeds. With respect to the first, I think the decision in Lord Fife's case sufficient to settle the point where there is no interest, and Reid and Gardyne is an express authority on the point. The second objection is quite different, the witness being a defender, and liable for the expences, he is interested, and that has always been held a good objection.

With regard to the other objections, when taken together, they seem sufficient, as the *penuria* does not arise from the nature of the case, but out of the conduct of the party. With regard to the case of Spence and Howden, the father was received from necessity.

In the present case, his liability in costs, and near relationship, cannot be got over.*

Circumstances in which evidence was admitted that a person had put her mark to accounts as settled.

An account was produced, and a witness called to prove that Mrs Noble put her mark to it as a settled account.

Jeffrey and *Forsyth* object.—It is incom-

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* On the 8th February 1825, the Second Division of the Court of Session "unanimously held that there was no such "necessary *penuria testium* as to remove the objection to "Ritchie's admissibility."—3 *Sh.* & *Dun.* 511.

petent to prove by a witness that there was a written settlement of accounts; and it is against all the law of Scotland to hold this a probative instrument. A mark is only admitted *in re mercatoria*. When the sum is above L. 100 Scots, the deed must be tested.

Cockburn.—The question is not whether the settlement was just or was in writing, but whether there was a settlement, and this witness was present and made a note of it at the time.

LORD CHIEF COMMISSIONER.—Would the subscription of her name not be sufficient? In all business with which I am acquainted, the subscription of the party is held sufficient, though I do not say that the point has been decided. In this case, the party could not write, and where a party can only put her mark, I am unwilling to decide that it is not sufficient.

LORD PITMILLY.—This is not a question in a reduction of a regular settlement of accounts; but whether it is competent under this issue. In answer to the issue, it does appear competent, especially as a witness swears that this is the settlement to which this person came.

Jeffrey, in opening the case, and *Forsyth*

WATSON
v.
HAMILTON.

When additional issues are sent, it is competent to refer to the record of the former trial.

in reply, stated, That the Court of Session did not think the return upon the former issues sufficient to exhaust the case.

LORD CHIEF COMMISSIONER.—This is not like a case where the verdict is set aside, and a new trial granted. You are quite right to refer to the record of the proceedings.

Jeffrey.—The return ought to be special as to her capacity, &c. as to this not being her free and voluntary act, and that she did not examine the accounts which is implied in settling them.

Cockburn, for the defender, contended, That the legal presumption was in favour of the deed, and that the former trial settled the case; that this woman was old, and that the defect in her sight and hearing explained most of the facts proved; she naturally applied to her nephew, and though he may be held an incompetent witness for us, he was not so for them. Both deeds were equally irrevocable, as the first was delivered, and contained no power of revocation. The question is not whether she understood the deeds, but whether she was capable of understanding them? The meaning of the third issue is not very evident, and both parties are indifferent as to the fourth.

LORD CHIEF COMMISSIONER.—The verdict on the former issues was not sufficient to satisfy the minds of the Court of Session, and, therefore, they sent the present issues. You will therefore endeavour to lay this matter quiet, by giving specific and distinct answers to each issue, unless your verdict on the first renders a verdict on the others unnecessary; and I trust the verdict on the present issues will not produce any difficulty to the Court of Session, when judging of it along with the verdict on the former issues.

On the fourth issue, as the pursuer did not prove it, you may find for the defender. We are of opinion, and you are to take our explanation, that the fifth does not mean whether she explained the nature of the deeds, but whether she explained the reason for calling the notaries; and, on the evidence, it appears that she did explain, &c. and it is unnecessary to find on the alternative in the issue. On the third, it is proved that she put her mark, and it is desirable to re-echo, as nearly as possible, the terms of the issue.

On the first issue, it would have been desirable that a more technical term than "correctly" had been used; but the question is, whether she understood the popular part of the

WATSON v. HAMILTON.

deed? and you must judge, from the whole evidence, (which his Lordship referred to,) whether she did understand it?

The language of the second issue, which seems to have been taken from the summons, is also too indefinite, and is not technical legal language. A deed that is probative, must be held to be the free and voluntary act of the party, till it is challenged on some *legal* ground of nullity, and I have not found any authority for the use of "undue influence" as a sufficient ground for reducing a deed. There is, indeed, a case where these terms are used by the editor of the Dictionary of Decisions, but, in that case, the finding by the Court was, that there was no *fraud*. You must, therefore, have evidence to satisfy you that there was fraudulent influence used to induce her to sign, and if you are of opinion that there was fraud, you will make a return in terms of the issue, but if you are satisfied that there was no fraudulent dealing or influence, you will find the other way. There is no evidence of any particular acts to influence her, but the case is rested on her weakness—the nature of the deed, &c.

Verdict—That Mrs Noble was not in such a state of mind as to enable her to judge cor-

rectly with regard to the effect of the deeds, as depriving her of the power to revoke: That they were not her free and voluntary acts: That there was not sufficient evidence of undue influence, and no evidence of her settling accounts, or being able to subscribe; * and that the reason she gave for using notaries, was, that she could not see to write.

Forsyth, *Jeffrey*, and *More*, for the Pursuers.
Cockburn and *Whigham*, for the Defenders.
(Agents, *Andrew Paterson* and *Alexander Goldie*, W. S.)

PRESENT,

THE LORD CHIEF COMMISSIONER.

RUTHERFORD v. BAIRD.

1825. Jan. 31. Finding for the defender, on a question as to his liability in payment of an account of law expences.

AN action by a law-agent for payment of the expence of defending the late Mrs M'Kinnon on her trial.

DEFENCE.—The defender did not employ the pursuer, nor did he subsequently render

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* His Lordship directed the Jury to reconsider their verdict before returning one of not proven; but on reconsideration they adhered.