

PATERSON
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a question of fact, any observations I make, are merely for your consideration.

As to *solatium*,—If you are satisfied that you give the sum which the pursuer has lost, this is all to which, in my opinion, he is entitled. It appears to me a mere question of accounting; but this also is matter for you to consider; and if you give *solatium*, I trust you will do it with moderation.

Verdict.—“ Found for the pursuers, damages L.1000.”

Jeffrey and S. More for the Pursuer.

Baird and Cockburn for the Defender.

(Agents, *James Lyon*, and *James Gentle*.)

PRESENT,

LORD CHIEF COMMISSIONER.

ERSKINE v. ERSKINE.

REDUCTION of the assignation of a lease, on the grounds of death-bed, and of the granter being incapable of knowing the contents of the deed.

1819.
July 16.

Found that a person was of sound mind—that a deed was signed on the day inserted in the testing clause—and that it was not proved, that at that time the person was ill of the disease of which he died.

DEFENCE.—Negative to both grounds.

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ISSUES.

“ 1st, Whether, at the time the deceased
“ William Erskine signed the assignation
“ under reduction, he was of sound mind, and
“ capable of understanding the nature of
“ said deed ?

“ 2d, Whether said deed of assignation
“ was subscribed by the said William Erskine,
“ upon the 2d day of August 1815, the date
“ it bears, or was so subscribed upon the 7th
“ day of August thereafter, or at a subse-
“ quent period ?

“ 3d, Whether the said deceased William
“ Erskine was ill of the disease of which he
“ died, at the time of his subscribing the said
“ deed ; and whether he was at kirk or mar-
“ ket after so subscribing ?”

The late William Erskine, the grandfather of the pursuer, acquired from Sir Charles Halket, a lease for 99 years, of a small portion of ground in the village of Cairnyhill. In August 1815 the pursuer's father assigned to Robert Erskine the remaining years of the

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lease, and his son brought the present action to have the assignation set aside.

A document produced to prove collateral facts received, though not stamped.

The first piece of evidence produced for the defender, was a missive of a date prior to the date of the assignation.

Cay, for the pursuer.—When this was produced in the Court of Session, we stated that it was forged, and they withdrew it from process. It is not stamped.

Cockburn, for the defender.—In the Court of Session, we rested on this as giving a good right, in which case it must be stamped; but, here we merely rest on it as a letter.

LORD CHIEF COMMISSIONER.—The only question is, whether this document is sufficient to prove facts and circumstances relative to this transaction. It is not rested on as a conveyance, otherwise it would have required a stamp; but I do not consider a stamp necessary, where the document is only produced to prove a fact or circumstance relative to another transaction. It is, however, open to the pursuer, in reply, to impeach the authenticity of this document, as he might the credit of a witness. The object of producing it seems to

be, to ascertain that the transaction had begun at the date of this document.

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*Cockburn*, for the defender, maintained—  
The pursuer has failed to prove the first and third Issues. The presumption always is in favour of sanity. As no evidence has been offered to prove of what disease Erskine died, a verdict must go for the defender. On the second Issue there is only one witness, which is not sufficient in law; and it would be most dangerous to allow the recollection of a single witness to cut down a regular deed, which bears to have been executed on the 2d day of the month. A witness for us will swear that the deed was filled up and signed on the 2d, and the account paid on the 3d.

*Cay*, in opening the case, and in reply, stated the facts and the general outline of the law of death-bed, and admitted that there was a difficulty in the case, but maintained that it depended on the comparison of a witness on each side; and that his witness swore to a detail of facts in which he could not be mistaken; the other merely swore in general terms. It was not necessary to prove the disease, as it was admitted that Erskine never recovered.

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LORD CHIEF COMMISSIONER.—In this case the first Issue is out of the question ; and therefore it will be better to find upon it for the defender ; and on the third, the evidence, if there is any, is of such a nature, that it appears to me there ought to be a finding upon it also for the defender.

Every deed is held to be good ; but it may be reduced if it is clearly proved that the maker of it was ill of the disease of which he died, and that he died within sixty days, without having been at kirk or market. But here there is no proof of the illness : it is only proved that he had gravel ; but he was going about the doors.

The only question, therefore, is, whether the date is false ? There has been evidence on both sides ; but the evidence of the instrumentary witness called for the pursuer, only raised a presumption that the deed was not signed on the 2d.

An instrumentary witness may legally be called to prove what took place at the time of signing a deed, but his evidence, when it differs from the deed, is to be considered in reference to a solemn deed regularly executed. In addition to this, in the present case there is a distinct witness, and three documents

which ascertain the date of the deed to be correct.

What appears decisive in this case is, the presumption that a deed is executed of the date it bears—the evidence of the writer as to drawing the deed, and filling up the testing clause—the charge for the stamp, and the expences attending the deed—and the receipt dated on the 3d, for the sum so charged.

It appears to me that the deed is verified; and if that is your opinion, you may find for the defender on the second Issue also.

If you find on these for the defender, I wish you to state in terms, that Erskine was of sound mind, and that there is no proof that he died of the disease of which he was ill at the time of signing the deed.

Verdict.—The Jury found that Erskine was of sound mind, and capable of understanding the nature of the deed—that the deed was signed on the 2d August—and that it was not proved, that at the time of subscribing, he was ill of the disease of which he died.

*Cay* for the Pursuer.

*Cockburn* for the Defenders.

(Agents, *John Johnston, junior, S. S. C.,* and *Hotchkiss* and *Tytler, w. s.*)

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