PERTH.

PRESENT,

LORD CHIEF COMMISSIONER.

ROBERTSON *v.* FERGUSON.

1820. May 4.

Damages claimed for executing diligence for the full amount of a debt, after agreeing to accept of a composition.

AN action of damages for executing diligence for the full amount of a debt after agreeing to accept of a composition, and for repayment of the balance.

DEFENCE.—The creditors did not accept of the offercd composition.

ISSUES.

The Issues were, 1*st*, Whether the defender accepted of a composition offered by the pursuer to his creditors?—2*d*, Whether the pursuer tendered good security? and Whether, after this offer, the defender poinded goods and effects of the pursuer?—3*d*, Whether the defender agreed to accept of the security offered?—4*th*, Whether the pursuer tendered payment of the amount of the composition?

ROBERTSON v. FERGUSON.

To entitle a party to give parol evidence of the contents of a written document, he must have called for production of the document.

The first witness called for the pursuer, was asked by the counsel for the defender, whether a state of debts was laid before a meeting of creditors?

LORD CHIEF COMMISSIONER.—If you called upon the other party to produce this document, and they refused to do so, you may give evidence of its contents, but otherwise the testimony is incompetent.

A witness not entitled to look at notes, unless made by him at the time the transaction occurred.

A witness, on his cross-examination, was about to refresh his memory by looking at a note.

LORD CHIEF COMMISSIONER.—A witness may speak from a note made at the time, but cannot look at notes made some time after. I doubt if you can examine the witness as to a meeting, the result of which was reduced into a solemn writing. If you intend to prove that all the pursuer's creditors acceded, you must produce and prove the writing, as the best evidence. The defender may then rebut this, by proving that others not contained in the writing, were creditors.

At the conclusion of the evidence for the pursuer, Mr Keay suggested that no case was proved.

ROBERTSON v. FERGUSON.

LORD CHIEF COMMISSIONER.—This is certainly a very defective case. Things are not done at the proper time. Before bringing a case, a party ought to inquire whether he can prove it, and if he cannot, ought not to bring the action. Agents too ought to prepare their testimony earlier. In the present case there is some evidence, and you may make such remarks upon it as you think proper. There is *prima facie* evidence of good security having been offered, and there is evidence to go to the Jury on the tender of that security.

Murray opened the case for the pursuer, and stated, that a composition was offered, and accepted by all; that good security was offered; and the Jury would judge whether it was not refused in the hope of obtaining an undue advantage.

Keay.—The pursuer was a year too late in offering the security. This was not execution of summary diligence; and it would be monstrous to subject the defender in damages for the fault of the pursuer. The first Issue is out of the question, as the defender was present. The question is, if good security was found? and all agreed that it was not.

ROBERTSON v. FERGUSON.

The cautioner was changed from the one first offered, which would have been sufficient to vitiate the agreement; and instead of a negotiable document, the pursuer offered one signed by a mark.

LORD CHIEF COMMISSIONER.—In this case, the pursuer complains that the defender pointed and sold his goods, after agreeing to accept of a composition. The answer is, that the composition was accepted, on condition that good security was found, and that all the creditors acceded. If these were the conditions, and not complied with, the original agreement was at an end.

As the agreement is established, the question is, whether the conditions were complied with? If a party enters into a composition to be accepted on good security, and no objection is stated in time, the security must be held good, unless the defender shews it bad; but if the security is changed, the burden of proof is shifted to the pursuer, and he must shew the security good. The objection to the bill offered is, that it is signed by a mark; and though a marksman may bind himself, it requires the subscription of witnesses.

The cautioner must not only be sufficient, but the document binding. I doubt if it was

proved that the cautioner was sufficient; and I state to you, as clear law, that this document is not binding, and therefore the security is not good. In these circumstances, you are to make up your minds whether the conditions have been complied with. On the third Issue, the fact of the agreement is made out; and if all the creditors were present and agreed, it is not necessary that they should all sign at the time, but might do so afterwards. But where is the evidence that all the creditors agreed, and signed at any time?

If the leaning of your minds is the same with mine, you will find for the defender; but it is only in point of law that you are bound by my opinion. The fact is entirely with you. If you find damages, I conceive they ought to be very small.

Verdict—"For the defender on all the Issues."

A. Murray for the Pursuer.
Keay for the Defender.

(Agents, *J. M'Gregor*, and *Ro. Cargill*, W. S.)