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will be established by finding a shilling, I think it will be better to find that sum, which will form a precedent for other cases.

Verdict for the pursuer, damages 1s.

Jeffrey, R. Bell and *Skene*, for the Pursuer.
(Agent, *W. Bell*, w. s.)

PRESENT,

LORDS CHIEF COMMISSIONER AND GILLIES.

1824. March 16.

Finding for the defender on a question of death-bed, and for the pursuer on a question as to the validity of a deed signed by a blind witness.

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REDUCTION of a deed signed by notaries, on the ground, that the granter was on death-bed, and that one of the instrumentary witnesses was, and is blind.

ISSUES.

" It being admitted that the disposition " and assignation under reduction was exe- " cuted on the eighth day of September 1821, " and it being admitted, that Isobel Cunning- " ham died on the fifth day of October 1821,—

" 1. Whether, on the said eighth day of " September, the said Isobel Cunningham had " contracted the disease of which she after- " wards died?

"2. Whether the said disposition and assig-
"nation, bearing date the eighth of September
"1821, was not the deed of the said Isobel
"Cunningham?"

The first witness called was the instrumentary witness, who was ninety-three years of age, but remarkably distinct,—he stated that he was blind at the time of signing, and that it was by hearing alone that he knew what was doing when the notaries signed,—that the deed was read before it was signed, and he stated the general import of the deed. It was then proposed to read the deed to him.

LORD CHIEF COMMISSIONER.—Is there any objection to this? If the witness could see, he might read the deed, and, on the same principle, this witness may have it read.

When Alexander Robertson in Linlithgow was called, the defender objected that *David* was the name in the list.

An error in a list, in the Christian name of a witness, sustained as an objection to his being called.

LORD CHIEF COMMISSIONER.—There is one case where I admitted a witness, though the Christian name in the list was erroneous, but that was in a small town, and I cannot say that the same rule applies to Linlithgow.

Beatson *v.* Drysdale, Vol. II. p. 152.

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When the pursuer closed his case, the LORD CHIEF COMMISSIONER observed, The Court is of opinion, that there is no case on the first issue to submit to the Jury, the evidence being so indistinct and defective; but that this did not prejudice the question on the second, which was of great importance.

1681, c. 5. Campbell *v.* Robertson, Nov. 1698, M. 16887. Stevenson *v.* Stevenson, Nov. 1682, M. 16886. Blair, Nov. 1683, M. 6765. Davidson *v.* Charteris, Dec. 12, 1738. M. 16899. Meek *v.* Dunlop, June 18, 1707, M. 16806. Stair, B. IV. t. 42, sect. 9. Farmer *v.* Myles and Annan, June 25, 1760, M. 16849. Tait on Ev. 79. Bell on Test. Deeds, p. 265. Walker *v.* Rep. of Adamson, June 8, 1716, M. 16896. Frank *v.* Frank, July 1793, M. 16822. Sibbald *v.* Sibbald, Jan. 18, 1776, M. 16906. Bell, p. 245.

Monteith opened the case, and stated, That he would prove the deed to have been executed on death-bed. That a witness to a deed, signed by notaries, must see the party touch the pen; and, in this case, one of the witnesses was blind,—he must also know the party, and be able to read his own signature.

Moncreiff, for the defender.—There is no case on the first issue, and, on the second, the presumption is in favour of the deed, till the contrary is proved. The blindness of the witness, along with circumstances of fraud, might prove the deed not genuine. But this deed was fairly executed in terms of the acts 1681, c. 5, and the prior act 1579. The clause declaring that the witness must see the subscription, does not bear the sanction of nullity, but merely declares, that he is to be held accessary to forgery, which must mean, if the deed is forged. The cases mentioned will not bear out the plea

Balfour *v.* Apline and Steel, Jan. 24, 1791.

of the other party. That of Myles, is a bad decision, and has been reprobated. Campbell's case will not avail them; and Stevenson's and Blair's are so short, that the circumstances cannot be known; and there are several where the reverse was found; where it is held, that the case must be decided on the whole circumstances.

The witness was present, and heard the authority given, and the statute does not require him to see the pen touched,—the passage from Stair is against them, as the fact of touching is presumed. The question is, whether this is the true and genuine deed of the party, and this cannot be doubted.

LORD CHIEF COMMISSIONER.—The case has been most ably argued, and I would not now interfere before hearing the evidence for the defender, but for a remark made upon the issue, which applies also to the case of Lord Fife, and to keep the matter correct, both at the bar and with the Jury. The precise position of Lord Fife's case, as it bears upon the present one, is this,—suppose all the points in that case decided, except the acknowledgment of the subscription,—what would then be the meaning of the issue which the Second Division has

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sent? Is it, or can it be meant, whether, in the popular sense of the terms, these were the deeds of Lord Fife? Every thing goes to show, that this is not the meaning of the issue; but that the question is, whether, in point of law, these deeds were not the deeds of Lord Fife, the subscription not having been acknowledged.

In the present case, the question is of the same nature, and the issue is not sent with the view of ascertaining the fact, but whether this is her deed executed according to law. The way to bring that clearly out, is for the Jury to find for the pursuer, or to return a special verdict.

LORD GILLIES.—There can be no doubt this is the meaning of the issue, as it never was disputed that it was her deed; the only question was, whether it was legally executed?

Jeffrey.—The question here is not whether this woman put her name to the deed, &c. All must be presumed regularly done, except in so far as we impeach it, and there can be no doubt that we have made out the defect upon which we found,—the blindness of the person subscribing as witness.

(To the Court.)—If, then, the deed is null in law, the simplest way to dispose of it, is by giving the direction in law, and getting a verdict against it. Cases have been referred to where the deeds were supported, as it was possible the witness might have seen, but in these the question always was, the credit due to the witness. It is said, the statute 1681 was intended to punish forgery; but the whole clauses of the statute must be looked at, and the witnesses must either see the party sign, or hear him acknowledge a subscription which they see.

LORD CHIEF COMMISSIONER (*To the Jury*).—On the first issue there must be a verdict for the defender.

On the second, as it is a question of law arising out of the facts proved before you, the best way to dispose of it is to find for the pursuer.

Verdict—On the first issue for the defender. On the second, a special verdict was returned, finding that the witness was present and heard the deed read, and authority given to the notaries, &c., but that his sight was so deficient,

MACFARLANE v. YOUNG, &c.

that he could not see the person touch the pen.

Jeffrey and *Monteith*, for the Pursuer.
Moncreiff and *Robertson*, for the Defender.
(Agents, *G. Napier* and

On the case being returned to the Court of Session, the Lord Ordinary found, that he was an inhabile witness to the notorial deed of settlement, and reduced accordingly.

July 3, 1824.
3 Shaw and Dunl.

PRESENT,

THE LORD CHIEF COMMISSIONER.

1824.
May. 15.

MACFARLANE *v.* YOUNG, &c.

Damages claimed by a prisoner in a jail for assault and maltreatment by the governor and turnkeys.

AN action of damages by a prisoner for debt, against the governor and two turnkeys of the Edinburgh jail, for general maltreatment while in prison, for assault and confining the pursuer two days without food, and without sufficient clothing, or any bed or bed-clothes.

DEFENCE.—The pursuer was acting in violation of the rules of the jail, and the defender was performing his duty when the alleged assault was committed.