SUTTON, ... APPELLANT (*a*).
AINSLIE, ... RESPONDENT.

1852.
9th May.

Where a proposed witness resides out of the Scottish jurisdiction—his deposition upon commission may be read without proving at the trial that he is then absent, and that his personal attendance cannot be procured.

If however it be shown that the proposed witness, though usually resident elsewhere, is at the time of the trial actually within Scotland, his deposition cannot be read without previously proving that his personal attendance is impossible.

If it be a case of temporary absence, or of age, infirmity, or sickness, the deposition of the proposed witness cannot be read till the disability has been proved.

Where a Judge's direction to the jury, though not faultless, was on the whole calculated to meet the justice of the case—exception disallowed.

The recommendation of a Judge to the jury is equivalent to a direction.

ON the 19th March, 1851, before Lord *Murray* and a jury at Edinburgh, an issue came on for trial between the above parties upon the question whether a certain bond in the pleadings mentioned had been granted in consideration of losses at play.

The counsel of the Respondent proposed to give in evidence depositions taken upon a commission which had been issued for the examination of witnesses resident in England, and consequently out of the jurisdiction of the Scotch Court.

The counsel of the Appellant objected that the depositions could not be read until it was first proved that the witnesses could not be present at the trial, or that the Respondent could not procure their attendance.

Lord *Murray* repelled the objection; and the depositions were read.

Thereafter Lord *Murray* charged the jury.

The counsel of the Appellant excepted to the charge "in respect that his Lordship, though called upon to do so, refused to tell the jury that the Appellant was not bound to prove the consideration given for the bond, and that the presumption was that it was given for value until the contrary was established."

The jury returned a verdict for the Respondent.

Lord *Murray*, on the occasion of signing the bill of exceptions, added the following memorandum of what had taken place at the trial:—

I did not give the direction to the jury in the precise terms which the counsel for the Appellant required or suggested; but I recom-

(*a*) Reported Second Series, vol. xiv. p. 184.

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mended them to find for the Appellant, unless it had been proved by the Respondent that the bond had been granted in consideration of money won at play, or due in respect of losses at play.

On the 13th December, 1851, the First Division disallowed the exceptions, and found the Appellant liable in expenses. Hence the present appeal.

The question as to reading the depositions turned entirely on the practical construction to be put upon certain Acts of Sederunt or rules of Court, passed under the authority of Parliament, and consequently, as it was contended by the Appellant, having the same force as if they had been Acts of the Legislature.

The first of these was an Act of Sederunt of the Court of Session and of the Jury Court in Scotland dated the 9th of December, 1815, whereby it was ordered as follows:—

§ 22. That when it shall be made out upon oath, to the satisfaction of the Jury Court, that a witness cannot attend on account of age or permanent infirmity, or is obliged to go into foreign parts, or shall be abroad, and not likely to return before the day of trial, it shall be competent to examine such witness by commission, on interrogatories to be settled, and to read the same in Court to the jury.

The examinations, however, by commission were not to be used except where the witnesses "were incapable of being examined in Court at the trial.

By another Act of Sederunt, made under the same authority, and bearing date the 29th November, 1825, it was ordered as follows:—

§ 28. That when it shall be made out upon oath, to the satisfaction of the Jury Court, that a witness resides beyond the reach of the process of the Court, and is not likely to come within its authority before the day of trial, or cannot attend on account of age or permanent infirmity, or is obliged to go into foreign parts, or shall be abroad and not likely to return before the day of trial—it shall be competent to examine such witness by commission. And it being established at the trial, to the satisfaction of the Court, by affidavit or by oath in open Court, that such witness cannot attend owing to one or other of the causes aforesaid, it shall be competent to read

to the jury the evidence so taken, subject to all just legal exceptions to its admissibility.

§ 59. That when commissions are granted for the examination of witnesses to be kept *in retentis*, the depositions shall not be used unless it be established at the trial on oath that due inquiry has been made after such witnesses, and that they cannot be found within Scotland, or are disabled by permanent infirmity from attending the trial.

By a third Act of Sederunt of the 16th February, 1841, made by the Court of Session alone (the Jury Court having by this time merged in the Court of Session), it was ordered as follows :—

§ 17. That when it shall be made out upon oath, to the satisfaction of the Court, that a witness resides beyond the reach of the process of the Court, and is not likely to come within its authority before the day of trial, or cannot attend on account of age or permanent infirmity, or is labouring under severe illness, which renders it doubtful whether his evidence may not be lost, or is a seafaring man, or is obliged to go into foreign parts, or shall be abroad and not likely to return before the day of trial, it shall be competent to examine such witness by commission ; and it being established at the trial, to the satisfaction of the Court, by affidavit or by oath in open Court, that such witness is dead or cannot attend owing to absence, age, or permanent infirmity, it shall be competent to use at the trial the evidence so taken, subject to all legal objections to its admissibility. And that when one party obtains a commission to examine witnesses and does not use the evidence obtained under it, the other party may use it, provided he satisfies the Court at the trial that he could not bring the witness or witnesses whose evidence he proposes to read.

Mr. *Rolt* and Mr. *Moncreiff* were heard for the Appellant. The *Solicitor-General* (Sir *F. Kelly*) and the *Solicitor-General for Scotland* (Mr. *Inglis*), for the Respondent. The following cases were cited :—*Willox* v. *Farrell* (*a*), *Haddaway* v. *Goddart* (*b*), *Seton* v. *Seton* (*c*), *Aitcheson* v. *Patrick* (*d*), *Scott* v. *Gray* (*e*), *Wight* v. *Liddell* (*f*), *Armstrong* v. *Leith* (*g*), *McKay* v. *McLeod* (*g*).

(*a*) 10 Second Ser. 807. (*b*) 1 Murr. Jury Rep. 150.
(*c*) 1 Murr. 9. (*d*) 15 Shaw & D. 360.
(*e*) 4 Murr. 61. (*f*) 4 Murr. 328, and 5 Murr. 47.
(*g*) 12 Shaw & D. 440. (*h*) 4 Murr. 278.

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Lord Chancellor's opinion.

The LORD CHANCELLOR (*a*):

My Lords, there are two questions here for your Lordships' consideration. One turns upon the Acts of Sederunt, and the other relates to the charge of the Judge to the jury.

With respect to the Acts of Sederunt, it is well to observe that where Rules of Court are sanctioned by Parliament, we should consider what regulations were in force previously, and which ought not, without some sufficient ground, or some good authority, to be upset; and the construction of them should be such as the Court itself, exercising the power delegated to it, would have intended to put upon the words that are used.

Now the Act of Sederunt of 1815 does not provide for the case of persons resident abroad, although it does provide for the case of persons resident in Scotland, but who have gone abroad, and, from some cause, are not likely to return.

This view of the Act of Sederunt of 1815 explains the cases which have been cited upon it, which were cases relating to a disability arising from illness, and having no bearing on the disability which arises from permanent residence abroad; and in these cases of illness there cannot be a doubt that it must be proved at the trial that the witness is absent from the cause stated, otherwise the depositions cannot be read to the jury. Those cases, however, do not much affect the question which your Lordships are here called upon to decide.

That question arises upon the Acts of Sederunt of 1825 and 1841. Now the Act of Sederunt of 1825 provides expressly for the case of a witness who is resident abroad. It is not correct to say that the terms of the Act of Sederunt of 1825 are, in all respects, the same as those of the Act of Sederunt of 1841;

(*a*) Lord St. Leonards.

because there is a considerable change of phraseology, and I am by no means satisfied that the alteration was not intentional. But as far as I can understand the cases (which are somewhat obscurely and vaguely reported, particularly the case of *McKay* v. *McLeod* (*a*)), the opinion seems to be, that if the witness be resident abroad, and do not appear at the trial, the fact of his non-appearance is sufficient to prove that he is out of the jurisdiction; and is a sufficient ground for reading his deposition; unless it be shown by the other party that he is in fact in Scotland on the day of trial.

The Act of Sederunt of 1841, as I have said, is different in its terms from that of 1825. It includes cases that are not provided for in the Act of 1825, and it avoids the generality of the Act of 1825. I have, however, no hesitation in saying that the Act of 1841 is so vaguely expressed and so much open to doubt that I am not surprised that this case should have been brought to your Lordships' house, in order to try the question; it being difficult to imagine, if either construction had been adopted, that it might not have been supported.

If a man resides abroad, and means to reside abroad, he is of course not in the jurisdiction; he is out of the law of Scotland. You may then take his evidence, on interrogatories; at the trial you need put in nothing but that evidence. If, however, the other party knows that the witness has come within the jurisdiction, he can make an objection.

On the other hand, suppose it is only a case of temporary absence, or of age, infirmity, or sickness; you must prove the particular disability at the trial, and then the deposition may be read.

What I have stated to your Lordships is open certainly to doubt. But then I ask you to look at

(*a*) 4 Murr. 278.

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what has been the universal understanding of the very learned Judges who, I may say, were unanimous in their opinion upon the subject, under whom this very Act of Sederunt was framed, and by whom the law is administered daily and hourly? It would require the strongest case to induce this House to reverse a reasonable construction and a practice which has never been departed from; that practice too forming, I may say, the law of the Court, and having been acquiesced in by the Bar, and the entire legal profession in Scotland.

My Lords, the next question relates to the charge of the learned Judge at the trial; and here I confess I should have been better satisfied if he had made the charge he was desired to make in point of law; for this bond, in the outset, required no proof of consideration. But I cannot now, upon mere technical grounds, disturb his Lordship's charge, which, under the circumstances, was, I conceive, not insufficient for the proper disposal of the case.

It has been argued that it was a miscarriage to have given the jury a "recommendation" instead of a direction; but when a Judge is presiding at a trial, his recommendation to the jury is but another name for a direction.

If, then, the "recommendation" be regarded in the light of a direction, I apprehend there will be the less occasion for your Lordships to overrule the decision appealed from.

Upon the whole, I advise your Lordships to affirm this judgment, but without costs.

Interlocutor complained of affirmed.

ROBERTSON & SIMSON—SPOTTISWOODE & ROBERTSON.