but it is a satisfaction to my mind, that I do not consider the debt constituted till judgment is pronounced.

HENRY v. EVANS.

LORD PITMILLY.—I am of the same opinion. I thought a Bill of Suspension might have been competent, but I am relieved on the ground stated; and if we are to go to the merits, I agree that the debt is only constituted at the date of the verdict.

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## PERTH.

PRESENT,

LORD CHIEF COMMISSIONER.

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## HENDERSON *v.* GARDYNE.

1820. September 27.

DECLARATOR of right of property.

Found that a piece of ground had been possessed exclusively by the pursuer and his predecessors, for forty years.

DEFENCE.—The ground in question was common to the pursuer and defender.

ISSUE.

"Whether, for forty years and upwards, "previous to the 10th day of April 1818, the

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" pursuer, William Henderson of Grange, of " Barry, and his predecessors and authors, or " their tenants, or persons deriving right from " them, have possessed, as his exclusive pro- " perty, the small *brae*, or piece of ground, " situated in the parish of Barry, and county " of Forfar, being about 150 feet in length, " and 15 in breadth at its broadest part, " situated at the south-eastern extremity of " the field called Lawshade, of Grange, of " Barry, the property of the pursuer; and " bounded on the north and west by the said " field; on the east, by the road leading " from the village of Barry to Barrymuir; " and on the south, by the lands belonging " to the heirs of Alexander Hunter of Bals- " kelly? or, Whether the said *brae* has been " possessed as the common property of the " pursuer and defender?"

A witness excluded, there being an error in the christian name inserted in the list.

The first witness called for the defender, was Mrs Marjory (Margaret) Mill, residing at Monifieth.

*Jeffrey.*—There is no such person in the list of witnesses.

*Cockburn.*—The names are the same, but she is sufficiently designed as Mrs Mill, residing at Monifieth.

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LORD CHIEF COMMISSIONER.—The principle on which lists are given is, that the party must have such notice as will afford him an opportunity of inquiring into the character of the witness.

In the circumstances of this case, the inquiry might have been made, and the witness discovered, without much trouble to the agent; but in a populous parish it might be impossible to make the inquiry; I therefore cannot say that she ought to be examined. This case has been long enough in dependence, for the agent for the defender to have ascertained correctly the names of his witnesses; and every one knows that Margaret and Marjory are not the same name.

*Mr Jeffrey* objected to reading the evidence of a witness who had been examined on commission. The Lord Chief Commissioner referred to Lord Fife's case, Vol. I. p. 92, as directly in point.

A witness excluded, the list in which his name was inserted not being served on the opposite agent eight days before the trial.

An objection was taken to another witness, that the list in which his name was contained had been served on the pursuer's agent, within eight days of the trial.

LORD CHIEF COMMISSIONER.—The Act

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of Sederunt appoints the lists to be served four and eight days before the trial; and as there is no specialty in the present case, all the principles apply. It is only in a case of surprise, or some extraordinary circumstances, in which the Court would exercise the power given by the Act of Sederunt.—Whyte *v.* Clark, Vol. I. p. 235.

A witness admitted notwithstanding a slight error in the name of her place of residence.

A witness being examined *in initialibus*, stated that she was servant to A. B. at *Dey-house* or *Dearws*. An objection was taken, that in the list it was called *Dey*.

LORD CHIEF COMMISSIONER.—This is quite different from the case just decided. The error in the name of the witness might mislead, but I do not think the inaccuracy here founded on could. This appears to me to be drawing too fine, but if I am wrong in admitting the witness, gentlemen know how to get it put right.

The deposition of a witness in a question before a Sheriff, relative to the same piece of ground, admitted as evidence, the witness being dead.

In a possessory question before the Sheriff, as to this piece of ground, a witness had been examined, who was since dead. On his deposition being produced,

*Jeffrey*.—It must first be proved that it was sworn, who were present, &c.

*Cockburn.*—This is a judicial proceeding. LORD CHIEF COMMISSIONER.—This is the original examination, and contains the signature of the Judge. This must be held true, unless disputed; and it is admitted that it is not forged. There was much discussion before admitting proof of what a dead person had said; but it was decided that this is an adminicle of proof, though not much to be relied upon. It was admitted in the cases of Lord Fife, and Clark and Thomson, Vol. I. p. 95, and p. 181; and under the authority of these cases, I must admit it here.

*Forsyth* opened the case, and stated the facts he would prove; but maintained that he was not bound to prove an absolute exclusive possession, as there might be trespasses by the other party.

*Cockburn* maintained, that the Jury were bound to decide according to the evidence, whether the possession was exclusive, or whether it was common.

*Jeffrey.*—The defender has not proved a *joint* possession; and the right of the pursuer is therefore undoubted. He has a manifest interest; and the claim of the defender is vexatious.

HENDERSON
*v.*
GARDYNE.

LORD CHIEF COMMISSIONER.—It is to be regretted that so much time is occupied by a subject of so small value; but parties are entitled to a decision of their rights, and we must hope that the decision will put a final termination to this dispute.

In cases of this sort, there cannot be evidence only on one side, as there must be some sort of intrusion, otherwise a party would never think of making a claim. On weighing the whole evidence, you must say whether the possession was exclusive; and it will assist in your consideration of the parol testimony, if you attend to the evidence of facts and circumstances, and whether the acts done were inconsistent with the idea of the property being common.

If you think it proved that any part of this brae was ploughed by the pursuer, without interruption, or that he was allowed to put off the cattle of the defender, and put on his own, this is inconsistent with a commonable right.

Verdict for the pursuer.

*Forsyth* and *Jeffrey*, for the Pursuer.

*Cockburn* and *W. R. Robinson*, for the Defender.

(Agents, *D. Fisher*, and *James Carnegy*, W. S.)

HENDERSON
*v.*
GARDYNE.

1821.
May 16.

The expences of a law agent in attending a view, and part of the fee paid to counsel, disallowed.

*Forsyth* and *Jeffrey* moved for the expence incurred by the agent in attending the view, and also for part of the fees paid to counsel, both of which had been struck off by the Auditor.

LORD CHIEF COMMISSIONER.—It is unnecessary for Mr Cockburn to answer, though this is both a delicate and important question. In this Court, there have been more views during six years, than in the home circuit in England for 30 years; and in the Report to Parliament, I have stated what appeared necessary on the subject. At a view there ought not to be any discussion; it ought to be confined to the shewer; and therefore there ought not to be any charge for the attendance of a law agent.

As to the fees to counsel, the question is delicate and difficult, as the bar do not travel circuit; and there is an increasing disposition to try cases here.

But the Court mean to confirm what has been done; and they wish to establish the distinction of an account as betwixt party and party, and party and agent, which the auditor

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has been attempting to fix ever since his appointment, and which is essential in this Court.

## GLASGOW.

PRESENT,

LORD CHIEF COMMISSIONER.

1820. Oct. 2.

## SMITH *v.* PULLER.

Question as to the liability of a person for the debts of a mercantile company.

DECLARATOR to have it found that the defender was a partner of, and liable for the debts of, George Puller & Co.

DEFENCE.—A denial that the defender was a partner, or is liable for the debts of the Company.

ISSUES.

"1*st*, Whether, in the business of bleach-
"ing carried on at Gateside, near Barrhead,
"in the county of Renfrew, from the year
"1816 to the year 1819, under the partner-
"ship firm of George Puller & Co. it was un-
"derstood between the defender, William