Verdict—" For the pursuer on the 1st Issue, and for the defenders on the 2d and 3d.

ROBERTSON v. BAXTER.

Clerk, Jeffrey, and *J. Campbell,* for the Pursuer.
Forsyth and *Cockburn* for the Defenders.

(Agents, *W. Dallas,* w. s. and *D. Fisher.*)

PRESENT,

LORD CHIEF COMMISSIONER.

ROBERTSON *v.* BAXTER.

1821. Feb. 14.

Finding for a defender on an Issue, whether the pursuer was, by fraud and circumvention, induced to sign a deed to his *enorm lesion.*

REDUCTION of a deed by the pursuer, ratifying one which his father had executed on death-bed.

DEFENCE.—The deed by the father was a proper deed, and the pursuer voluntarily executed the one under reduction.

ISSUES.

" Whether the pursuer was induced, by " fraud and circumvention on the part of the " defender, or those acting for her, to sign

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" the deed tested, this day of March, one " thousand eight hundred and ten years, ratify- " ing the death-bed deed of settlement of his " late father, William Robertson, cowfeeder " in Canongate, dated eleventh July 1808, " without knowing or being aware of the con- " tents of the said deed of ratification, to his " great hurt and *enorm lesion?*

A counsel not being furnished with sufficient information to enable him to conduct a case, not a sufficient ground for delaying a trial.

When the case was called for trial, Mr More, for the pursuer, moved to have it delayed, and to have another agent appointed for the pursuer, as, from the imperfect information furnished, it was impossible for him to conduct the case, and that, if any proceeding took place, it must be in absence of the pursuer.

Cockburn and *Alison* for the defender.—It is want of a *case*, not of an agent, which makes the pursuer wish delay.

LORD CHIEF COMMISSIONER.—To entitle me to put off the case, there must be a satisfactory reason stated, and an affidavit that it could not be known before the last day of Term. I have looked through the papers; and the witnesses in the list appear to me to be persons who probably know the facts of the case. I am very ready to do any thing

that the law will allow me to do, in order to get at the justice of the case. But the Act of Parliament is imperative; and the affidavit must state, that the agent abandoned the case so late, that the motion could not have been made during the Term. If the case goes on in absence of the pursuer, the defender must satisfy the Court that he has a case; and perhaps, on that ground, he may consent to delay. But as he seems determined to go on, the pursuer must either consent to a verdict going against him, or proceed in the state in which it now stands.

Two letters were offered in evidence.

Cockburn objects.—They are offers to adjust the case.

Incompetent to give in evidence an offer to compromise a case.

LORD CHIEF COMMISSIONER.—If they are for the purpose of compromising the case, they cannot be read, whether they were written before or after the action was raised.

Cockburn, for the defender, said—The simple case here is, whether a man signed a particular deed through fraud; and if he did, whether it was to his hurt. The pursuer, in a case of this sort, must bring the

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strongest proof, as he is going in the face of his own solemn deed.

Brownlee, in opening the case for the pursuer, stated the facts from which he inferred the fraud; and in reply stated, that the property was admitted to be of considerable value.

LORD CHIEF COMMISSIONER.—I cannot allow matter to be stated to the Jury that is not proved. The defender insists that you must prove fraud *and* enorm lesion. You did not prove any thing as to the value of the property; and you cannot now call on them to make any admission as to the value.

(*To the Jury*).—In this case there has been some unnecessary delay, by the discussion as to the agent; for the evidence has been brought forward with as much advantage as it could have been, had the case been put off. The only evidence, to be sure, of value, has been brought by the defender; but it seems to have been omitted by the pursuer from design, not from want of preparation.

This case comes from and returns to the Court of Session, and both fraud *and* enorm lesion must be proved, to entitle the Court to

interfere, and the Issue must be taken all together.

It is said, the want of the day on which the deed was signed, is a circumstance inferring fraud. But though in this there is a want of precision, the insertion of the day is not required by the statute prescribing the formalities of deeds.

The instrumentary witnesses were dead before this case was brought; but it cannot be said to be delayed till all were dead, as one person was alive at the date of the summons, who had been present at the execution of the deed. The case, however, now rests on the testimony of a witness, who is brought to swear to a conversation he heard ten years ago, in a spirit shop, between the writer of the deed, and one of the witnesses.

In considering this account of what the writer said, you will attend to the time of the day, the testimony of the other witnesses, and the book of the agent containing his account, which, as he is dead, is evidence, or at least admissible to try the truth of the witness's memory.

Evidence of what a dead witness has said is admissible, but it is the weakest evidence, and not of itself sufficient to prove a fact.

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In a case of this sort you must have clear proof that this was not the act of the pursuer, but an imposition upon him. If you think it proved that he was asleep at the time the deed was prepared and read, that implies fraud; but if the facts and circumstances support the hearsay, you will find for the pursuer.

It is not every inequality that will make out *enorm lesion*; and what would be so in one rank, might not be so in another. This is a question for a Jury on all the facts and circumstances. The value of the property must be kept out of view, as even if this deed were set aside, the pursuer would not come into possession, but would merely be in a situation to call in question his father's settlement.

Verdict for the defender.

Brownlee, for the Pursuer.
Cockburn and *Alison*, for the Defender.

(Agents, *John Sommerville, jun.* and *Nath. Grant.*)