EARL OF FIFE
v.
EARL OF FIFE'S
TRUSTEES.

PRESENT,

THE THREE LORDS COMMISSIONERS.

EARL of FIFE *v.* EARL of FIFE'S TRUSTEES.

1825.
March 9.

Finding, that an instrumentary witness not having seen the subscription of a party to a trust-deed and deed of entail, or heard the same acknowledged, rendered them not the deed of the party.
See Vol. I. p. 89, &c.

CERTAIN issues were tried in this case in October 1816 and March 1817, and the verdicts returned to the Court of Session. An appeal was taken from the judgment of that Court, and the Lord Chancellor remitted the case, with instructions to try the following issue.

ISSUE.

"Whether the instruments of trust-disposi-
"tion and deed of entail, both dated the 7th
"day of October 1808, sought to be reduced,
"being in law probative instruments, were not,
"or either of them was not, the deeds or deed
"of the Earl of Fife? and whether the deed
"of alteration of the 12th day of November
"1808, being in law a probative instrument,
"was not the deed of the Earl of Fife?"

The pursuer produced evidence to show that Wilson, one of the instrumentary witnesses, did not see the deeds of the 8th of October

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signed by the Earl of Fife, and that he did not hear the Earl acknowledge his subscription. As to the deed of November, no such evidence was given. The defender did not give any evidence.

Cockburn, for the pursuer.—The question in the issue is simple, but there are various ways in which this may not be the deed of Lord Fife. The signature may be forged, &c., or, though there may be no imposition, and he may have intended to execute the deed, he may not have done it legally. This is apparently a probative deed, and law presumes in favour of its validity, but if we prove that it was not regularly executed—that Wilson, one of the witnesses, was not present when it was signed, and that the signature was not acknowledged to him, then the fact overcomes the presumption. Indeed, the admission that the witness did not see the granter sign is sufficient, as a blind person cannot acknowledge a subscription.

But it is said, that, by the act 1681, this defect does not render the deed null, but that it merely subjects the witness to a penalty. This is a point for the Court, and, therefore, I submit to them that it must either be decided or reserved.

There are two classes of cases, from which I wish to separate the present—the one is where there has been *rei interventus*—the other where the granter is alive, and comes and acknowledges his subscription, in which case, there is a personal objection to his challenging the deed.

It is admitted that the deed is null, provided the name of the witness is not subscribed, but it is said to be good, provided his name is there, at whatever time and place it may have been added. But 1540, c. 117, requires a real witness to the signature, and 1579 secures the insertion of his name in the deed, and the subsequent acts secure their being known. From 1579 to 1681, there are many cases of deeds being reduced on account of the absence of the witnesses; and the question now is, whether the act 1681 alters the nature of a witness. Practice has explained what is meant by *witness* in the statute, and the clause enacting the punishment has remained a dead letter.

Sir Geo. Mack. Obs. on 1681—Bank. I. 11, 28—Ersk. III. 2. 13—Stevenson *v.* Stevenson, November 1682, M. 16886—Blair *v.* Peddie, Feb. 12, 1684, M. 13942—Young *v.* Ritchie, Feb. 2, 1761, M. 17047. —Bell on Testing Deeds, 239.

Another more numerous class of cases is

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that where the deed was not cut down, because the *fact* was not made out—but if the other party are right in their construction, the Court ought to have refused a proof of the fact.

Syme *v.* Donaldson, Nov. 23, 1708, M. 16713—Edmonstone *v.* Edmonstone, Dec. 6, 1749, M. 16901—Young *v.* Glen, Aug. 2, 1770, M. 16905—Sibbald *v.* Sibbald, Jan. 18, 1776, M. 16906—Frank *v.* Frank, July 9, 1793, and Nov. 3, 1795, M. 16822—Condie *v.* Buchan, June 26, 1823. 2 Sh. and Dun. 432.

Against all these is the single case of Smith *v.* Bank of Scotland, 25th January 1821; in which, however, the House of Lords expressly reserved this point. In Naismith *v.* Hair, the testing clause stated that the deed was signed and *sealed*—the Court held the want of the seal a nullity.

After Mr Cockburn concluded, Lord Pitmilly mentioned the cases of Campbell *v.* Robertson, Nov. 1698, M. 16887, Walker *v.* Anderson, June 8, 1716, M. 16896, where the deeds had been set aside, because the witnesses did not know the granter.

Moncreiff, for the defender,—There is here no allegation of fraud or facility, or that the late Earl was not fully aware of the contents of

the deed; but the pursuer goes upon the narrow ground, that one of the instrumentary witnesses was not present at the time the deed was subscribed; and that the Earl never, in words, acknowledged his subscription.

The points of law decided are enumerated by the Lord Chancellor, and it is then laid upon the pursuer, to show that the late Earl did not know the contents of the deeds, but this he has not attempted, and the presumption is, that he did know them.

There are two views of the authorities, one entirely for the Court, the other mixed with the fact. I submit to the Court that, supposing the whole fact alleged by the pursuer to be true, it does not warrant the conclusion that this was not the deed of Lord Fife.

In 1540, there is nothing of this, and what is said in 1579 of the witnesses being present, applied to subscription by notaries, where the authority to subscribe must be proved. The act 1681 does not require the presence of the witnesses, only they must *subscribe*, and be *designed*, and there is a penalty if they subscribe without complying with its provisions.

There are only three cases on this subject: that of Stevenson is so short, that we cannot discover the grounds on which it proceeded—

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that of Blair was a case of forgery—and Campbell's, if it is any authority, shows the absurdity of such a plea, as it is clear the import of the statute was misunderstood, and the case is reprobated. Smith *v.* Bank of Scotland is the only case where the point has been decided, and that is in our favour.

The object of the statute was to prevent fraud,—this would encourage it. Sir George Mackenzie is in our favour; and it is clear the object of the act was to enable a person to prove a deed against a party denying his subscription. The object of the statute was to support a true deed, as well as to cut down a false one.

The only direct evidence, in this case, is the instrumentary witness who comes to swear against his own act, as his subscription is an attestation that he either saw the subscription made, or heard it acknowledged—all Judges have agreed that such evidence is to be most narrowly sifted.

Walker *v.* Adamson, June 8, 1716, M. 16896—
—Balfour *v.* Aplin and Steel, Bell Test. Deeds, 140—

LORD CHIEF COMMISSIONER.—The judgment of the Lord Chancellor cleared away all this, and we are not here trying a case of fraud.

Moncreiff.—Condie's case in 1823, and Smith's in 1821, are the most important for me on the proof.

It is said to be impossible for a blind person to acknowledge a subscription, but if that is the case, there is no use in this trial, as it is admitted that the witness was not present. The statute was intended to support, not cut down, a probative deed, and here there is abundant acknowledgment to satisfy the statute. Even as Wilson states it, the case is not near so strong as Condie's case, and he is contradicted by other witnesses.

Smith *v.* B. of Scot. June 25, 1821. Condie *v.* Buchan, June 26, 1823. 2 Sh. and Dun. 432.

LORD CHIEF COMMISSIONER. — After so much ability has been shown on both sides, and when so much law has been stated to the Court, and so many cases of fact rested upon, as if one case of fact could clear up another, it is necessary for me to warn you that you have only to attend to the issue, and that, on the deed in November, there being no evidence given, you will find for the defender.

It is unnecessary to detail the history of the case, farther than to say that it was carried to the House of Lords, and that this issue was directed, which is the technical method of expressing what you have to try. If this entail

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is a nullity, it cannot be the deed of Lord Fife—if it is not executed according to the form of law, it is no deed, and, therefore, it is not his deed.

The question is not whether, physically, he put his signature to this paper, but whether it is a legal deed? This is not the issue of the party, but was prepared in the House of Lords, and, in directing it, the Lord Chancellor anxiously states that this writing is a probative deed. Why is it so anxiously stated, that this is probative? The reason is, that, by the law of Scotland, a probative instrument bears faith every where, unless it is set aside. It is good, but is voidable, and the question here is, whether, on all the circumstances of the case proved, it is void? The law you must take as direction, not as reasoning; but you will consider the evidence, and there must be such credible evidence as satisfies you that the pursuer has made out the burden of proof, the whole of which lies decidedly upon him. It is agreed, in this case, that Wilson, the witness, did not see the deeds subscribed; and, therefore, the point to be proved is, whether the Earl acknowledged his signature to him?

Here the first question is, Was it vocally acknowledged? It is admitted that the sub-

scribing was not seen, and it is proved that there was no vocal acknowledgment. This is a second step the pursuer has made, which reduces the case to one of acknowledgment by facts and circumstances. The question is, whether the pursuer has brought such evidence as satisfies you of the non-acknowledgment? I cannot draw the conclusion that there is no evidence on the part of the pursuer, and therefore I submit Wilson's testimony to you; it must, however, be strictly examined, but, as he swears positively, if you believe him, the verdict must be for the pursuer.

It is material in weighing his testimony, to consider that he comes to give evidence against his own subscription, and, therefore, his credit is to be most anxiously weighed. I can quote here the authority of the Lord Chancellor. Lord Mansfield and Lord Kenyon said they must admit such a witness, but that they would not believe him. But the Lord Chancellor said (on sounder ground) that he would receive such a witness with the utmost jealousy and anxiety to sift his testimony.

It is a most important step setting aside a deed, and is not to be done on loose grounds. It is impossible for me to say that Wilson's conduct is quite correct, and he is in the situa-

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tion described by the Lord Chancellor; but still you must consider what credit is due to him in the circumstances in which he comes before you. You will consider his appearance—the circumstances in which he stands—the fact having been brought to his recollection at a recent date—his having given the same evidence nine years ago—and, on the whole circumstances, you will consider whether his evidence is to be rejected. He is not here a single witness, but if he were, there are circumstances making it proper to submit his evidence to you. But there is another witness, in some respects, in a similar situation, and as his testimony differs, from the other, as to Lord Fife coming into the room, the whole evidence will require much consideration. There are a number of other witnesses brought to speak to other facts, and they vary in certain points, which proves that they are not in combination, it being a trite observation, that witnesses agreeing in minute and unimportant circumstances shows previous concert.

You will consider the situation in which the testimony is given. We are now in 1825, and these witnesses are speaking to facts which took place in 1808, and if you think this sufficient to account for these differences, then the testimony goes to support Wilson. The

day on which the facts happened was a marked one, being the day following the last rent-day Lord Fife ever attended. They knew that the deeds were going forward, but there was nothing particularly to draw their attention to the facts which they state, and there is a remarkable discrepancy in their testimony as to Sir James Duff being there at the time. Still there is nothing, on cross-examination, or otherwise, affecting the characters of the witnesses, and if you credit them, their evidence tends to support Wilson's evidence.

On consideration of the statutes and decisions, we are all of opinion, that, if the signature was not acknowledged, the deed is not good in law. This leads to inquire what in law is an acknowledgment? I lay it down to you, that the acknowledgment must be clear and explicit. How does it stand here? There is undoubted evidence, (and it is admitted,) that there was no acknowledgment to the witness in words. With respect to any other acknowledgment, in my opinion, it must be clear and explicit, and I have not found any case in which a virtual acknowledgment or equipollent has been sustained. But it is not necessary to carry the doctrine so far in this case, as, according to the evidence of the two instru-

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mentary witnesses, if you believe either of them, it does not appear that there was any acknowledgment either express or virtual. Suppose Lord Fife was in the room with Wilson, still it is admitted now, in terms of the verdict given at the former trial, that he was blind—he sat near the fire—Forteith was as near Wilson, and he did not hear the dictating the testing clause; and, in these circumstances, it would be going far to say that the signature was acknowledged, but you are to say whether it was or not.

This is a plain dry question for a Court of Justice, and you are not to consider it in reference to the nature of the deeds, or the propriety of the provisions which they contain. It is a probative deed on the face of it, and, as such, law leans to support it; but if the witness neither saw it subscribed, nor heard or obtained a distinct acknowledgment, then your duty is to draw the conclusion, that the late Lord left a nullity behind him, and that there should be a verdict for the present Lord.

Thomson.—We beg to except to the direction:

1. That if there was no acknowledgment, there was no deed.

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2. That acknowledgment must be clear and explicit.

His Lordship then read to the Jury his directions upon the point in the terms above stated.

Verdict—" Finding that the instruments of " trust-disposition and deed of entail, both " dated the 7th day of October 1808, were not " the deeds of the Earl of Fife; and with regard " to the deed of alteration of the 12th day of " November 1808, they find for the defend- " ers."

J. A. Murray, Jeffrey, Cockburn, and *Robertson,* for the Pursuer.

Thomson, Moncreiff, and *Fullarton,* for the Defenders.

(Agents, *Walter Cook,* W. S., and *James Jollie,* W. S.)

PRESENT,

LORD GILLIES.

DICKIE *v.* DICKIE.

1825. July 12.

Finding for the defenders in an action of wrongous imprisonment brought by a person sent to a mad-house.

AN action of damages against a brother of the pursuer, and the medical person who granted a certificate—the Sheriff, and several other in-