

of papers, is objected to in so far as it exceeds £13.

BALFOUR, for the pursuer, argued—(1) this objection is withdrawn; (2) the print of documents was unnecessary, and was not used at the trial. All the necessary documents were contained in the pursuer's print. Besides, by Act of Sederunt, 18th July 1850, the Lords "declare that in future they will allow, under the conditions after-mentioned, to the successful party the expense of printing the documents actually produced and used at the trial; but in order to check undue expense, direct the clerk at the trial to mark on the margin of the print, for the use of the auditor, the documents actually produced, and the auditor to examine such print with a view to see whether deeds have been unnecessarily printed at length, or accounts and other papers unnecessarily printed when nothing turned on the terms of the same; and, further, the Lords direct the party who means to claim such expense to apply for and obtain from the judge trying the cause, a certificate as to the extent to which such print was necessary, and direct the auditor to tax the account according to such certificate, so far as he finds that it rules the matter." The conditions here prescribed had not been complied with by the defenders; (3 and 4) these fees are excessive; (5) the witness referred to was not examined; (6) this charge is excessive; (7) the expense of three counsel should not be allowed against the pursuer (*Campbell's Exrs. v. Campbell's Trs.*, 19th June 1866, vol. ii. p. 89); (8) the expense of precognosing and paying witnesses not examined is not a fair charge against the pursuer; (9) the copies referred to were unnecessary.

SHAND, for the defender, replied—The print, though not used at trial, was necessary for instructing counsel, and is chargeable (*Forbes v. Dunbar*, 22 S. J. 582). The Act of Sederunt was not pleaded at the audit. If it had been, the diet would have been adjourned, that the necessary certificate might be obtained. The sums referred to in the 6th objection were all actually disbursed; the documents were very numerous. There is no absolute rule that three counsel are never to be allowed at a trial (*Walker*, 19th July 1862, 24 D., 1441). In this case three were necessary, and the pursuer himself had three. The expenses of witnesses not examined should be allowed. Although the only issue taken was fraudulent impetration, yet the record contained also averments of facility which the pursuer might have proposed to prove, and which it was necessary that the defenders should have evidence to rebut. These averments were only withdrawn at the trial.

The LORD PRESIDENT—The first objection is not insisted in. The next is to the charge of £66, 1s. for a print. It is said this is not to be charged at all, the print for the pursuer having been sufficient, but there was no communication made to the defender of the pursuer's print. Then it is said the print is longer than was necessary. Lastly, it is said it was not submitted to the judge. The words of the Act of Sederunt no doubt make this a condition precedent to the expense being allowed, but it has not been the practice. I have only done it once. At all events, I don't think it is too late to look into the matter yet, and I will do so. The next objection is that the fees for consultation are too large. In such a matter there must be some discretion left with agents. I think we cannot sustain that objection. Then there is the account in regard to the execution of the diligence for recovering documents.

The sum no doubt seems large; but the auditor has not interfered with the details. We are asked to allow a slump sum of £100; but assuming Mr Kerr's charge of £76 to be correct, that would leave only £24 for the other expenses. I don't think we can deal with the charges in that way. I think there is a great deal in the observation that there was an allegation of facility on record. I don't think, although this was not put in issue, that the defender could well have objected to it being made an element in the investigation; and if so, he was entitled to prepare to meet it in his defence. The next question is as to the expense of a third counsel. I hold it to be a general rule that only two counsel are to be allowed as against the opposite party, and that it is always necessary to make an exceptional case in order to justify the expense of three. It is said that here there were three on each side. I don't think there is anything in that. In another branch of this case, I think I have seen five counsel on one side, but this expense of course cannot be charged. The question is, whether this was a case in which it was reasonable, looking to the nature of the allegations on record, to have three counsel; and I am of opinion that it cannot be regarded as otherwise than an exceptional case. Lastly, as to the witnesses not examined, it is the fact that their examination was rendered unnecessary by the course the pursuer took with his case, and I don't think we can sustain that objection either.

The other Judges concurred, and the case was continued till Tuesday, when

The LORD PRESIDENT stated that he had examined the print, and he was of opinion that the charge for it should be allowed.

The objections were therefore all repelled, with expenses.

Agent for Pursuer—Alex. J. Napier, W.S.

Agents for Defender—Hill, Reid, & Drummond, W.S.

Tuesday, Nov. 20.

LAMONT v. JOHNSTONS.

Bill—Acceptance. A bill accepted by an old woman, her hand being led by another, sustained as a good obligation, the holder having proved that she had authorised her hand to be led, and that she was at the time in full possession of her faculties.

Personal Bar—Act of Grace. A party was incarcerated on a Sheriff Court decree, and when in prison executed a disposition *omnium bonorum* in favour of his creditor. He thereafter raised a reduction of the decree. Plea that he was barred by the disposition *repelled*.

This was a reduction of certain interlocutors of the Sheriff-Substitute of Lanarkshire at Airdrie (Mr Logie), and of the Sheriff (Sir A. Alison).

The pursuer's wife was a daughter of the late Mrs Agnes Rankin or Brown residing at Cnapel-hall. The defender Mrs Johnston was her sister. By her settlement Mrs Brown conveyed to the pursuer and certain other trustees, who did not accept, her whole means and estate, with directions to divide the residue into five equal parts, one of which was to be paid to the pursuer's wife and another to Mrs Johnston.

In 1864 the defenders Mrs Johnston and her husband raised an action of count and reckoning against the pursuer in the Sheriff Court, in which they claimed £30 as Mrs Johnston's share of the residue. The pursuer averred that his whole re-

ceipts from the estate amounted to £76, 18s. 4d., while his disbursements amounted to £79, 6s. 8d., so that there was a balance due to him by the estate of £2, 18s., 4d. But in bringing out this balance he credited himself with a sum of £50 contained in an acceptance by Mrs Brown to him dated in 1859; and in regard to it it was averred by the Johnstons—"The said bill or acceptance is false, forged, fabricated, vitiated, and erased, *in substantialibus*, and of false date;—at the time it bears to have been granted, the truster was in a state of both mental and physical imbecility, and it was not signed by her. The said Archibald Lamont did not advance or pay to the truster the said sum of £50, and she was not due to him, at the time of her death, the said pretended bill or acceptance, or any sum whatever."

The Johnstons thereafter lodged a minute in which they proposed improbation of the said bill, and a proof having been led, the Sheriff-Substitute pronounced this interlocutor:—"Having heard parties' procurators on the import of the concluded proof in the improbation, and made avizandum with the cause: Finds it proved that the words 'Agnes Rankin' are not the genuine signature of the late Mrs Agnes Rankin or Brown to the bill dated 25th August 1859, and forming No. 9/11 of process, the hand of the said Mrs Agnes Rankin or Brown having been led by William Lamont, defender's son, at signing said bill, and therefore improbates said bill *quoad* Mrs Brown's alleged signature as acceptor: Grants warrant to and authorises the Clerk of Court to pay over to the pursuer the sum of five pounds sterling consigned by her in the improbation, and decerns." An appeal against this interlocutor was dismissed by the Sheriff.

An accounting thereafter was gone into on the footing that the pursuer was not entitled to take credit for the £50; and ultimately the Sheriff-Substitute decerned in favour of the Johnstons for £14, 13s. 9d., as their share of residue, and £16, 0s. 2d. of expenses of process. This decree having been extracted, the pursuer was incarcerated thereon on 8th August 1865, and he has been in prison ever since. The pursuer having brought this action of reduction, the defenders pleaded as a preliminary defence that the pursuer was barred from suing the action, in respect of his having, when in prison, executed under the Act of Grace a disposition *omnium bonorum* in favour of the female defender for behoof of herself and of all his other creditors. The Lord Ordinary (Kinloch) repelled this plea, and his interlocutor was acquiesced in.

Thereafter a record was made up and closed, and after a debate the Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 20th March 1866.*—The Lord Ordinary having heard parties' procurators, and made avizandum, and considered the proceedings, finds it proved that the signature 'Agnes Rankin,' on the bill No. 31 of process (No. 9/11 of Sheriff Court process), was adhibited by the act of William Lamont leading the hand of the deceased Mrs Brown: Finds it proved that the said deceased Mrs Brown instructed the said bill to be drawn out in order to be subscribed by her; that she authorised the said William Lamont to lead her hand in subscribing the same, and that she thereafter acknowledged the bill as granted by and binding on her: Finds, in point of law, that, in these circumstances, the said bill was a valid document of debt against the said Mrs Brown and her representatives; and that the pursuer, Archibald Lamont, is entitled to take credit for the

amount of the same, with interest, in accounting with the defenders for his intrusions with her estate as her trustee: And appoints the cause to be enrolled, in order to judgment being pronounced therein in accordance with these findings.

"W. PENNEY.

"*Note.*—The Lord Ordinary thinks it proved that the hand of Mrs Brown was led by William Lamont when her signature was attached to the bill; and if the case was that of a probative instrument, unsupported otherwise, the Lord Ordinary would have no doubt that the signature was invalid, and the instrument ineffectual.

"But the case is that of a bill; and must be so dealt with. The Lord Ordinary considers it proved by the evidence of William Brown, the son of the deceased, and who, for aught that appears, stands indifferent between the parties, that his mother instructed him to get the bill drawn out by Mr Torrance, writer in Hamilton; saying that she had got the loan of money from the pursuer's wife, and mentioning £50 as the sum to be put in the bill. He adds—'She had all her faculties and memory at that time.' It is further proved, as the Lord Ordinary thinks, that, after bringing the bill so drawn out to the pursuer's house, Mrs Brown asked the pursuer's son, William Lamont, to lead her hand; and the signature as it now appears was adhibited in this way, with her full assent and authority. The bill is signed 'Agnes Rankin,' and not Agnes Brown; but the deed, of which No. 35 is a copy, shows that she sometimes signed by her maiden name even in a probative instrument. It is proved by William Brown that she afterwards said—'She had made defender all right now;' which can only be attributed to the transaction of granting the bill. Robert Martin, who was married to a granddaughter of Mrs Brown, depones that 'she said she had got the loan of money from defender's wife, and that she saw her time was coming to an end; and that she was anxious to settle up with defender; that she got her son William to get a bill drawn out by Mr Torrance, of Hamilton; and if she had it once signed she would be at peace. She also said on another occasion, a few days thereafter, that she had got the bill signed. She also said that William Lamont was present, Mary Graham, and defender's wife. This second conversation took place in her own house. She said she had given the bill to the defender.' Janet Graham gives corroborative evidence.

"The Lord Ordinary considers this sufficient to set up the bill as a valid document of debt. It is trite that a signature, which would be held invalid in a formal instrument, will be effectual on a bill, if proved to have been authorised or adopted by the party whose signature it is. A bill may in such circumstances be effectually signed by a mark, which is, properly speaking, no signature at all. Even a forged signature may become effectual by adoption. If one person sign another's name (which is very common amongst uneducated, and sometimes done even by educated persons), that other will be bound by the subscription, if proved to have authorised it. The authority by Mrs Brown to the bill being signed as her bill, and her approbation of the signature afterwards, seem to the Lord Ordinary undoubted. If William Lamont had with his own hand written the words 'Agnes Rankin,' this would have been enough to bind Mrs Brown, if done by her express authority. The Lord Ordinary cannot see that the case is different because the words were written by Mrs Brown's hand, led, at her request, by William Lamont.

"It was said that there was no evidence of the pursuer having been in circumstances to make the alleged advances. This would be at best a presumption merely. But, in point of fact, there is evidence, not merely that the pursuer or his wife had means out of which an occasional advance might be made, but that such advance was actually made by them to Mrs Brown. Mrs Brown herself said so; and there is direct corroboration of the statement in the testimony of Robert Martin.

"The Lord Ordinary is of opinion that the defenders have entirely failed to establish that Mrs Brown was in such a state of mind as to incapacitate her from engaging in such a transaction.

"It was pleaded that, at all events, the bill could only be regarded as constituting a legacy, and was therefore ineffectual. But the Lord Ordinary cannot accede to this view. The bill is accepted as payable 'three days after date,' and as granted for value received. It might therefore have been put in force against Mrs Brown during her life. However the pursuer might feel barred in honour from so enforcing it, the Lord Ordinary cannot give to any surmise on this subject the effect of nullifying the express terms of the instrument.

"W. P."

The defenders reclaimed.

STRACHAN, for them, argued—The Sheriffs were right in improbating the bill as not bearing the genuine signature of Mrs Brown. It was established, in point of fact, that the signature was adhibited by leading the hand; and it was not disputed that in the case of an ordinary probative writ this signature would be bad. But such a mode of subscription was not sanctioned by custom or recognised by the Court in the case of bills any more than of probative writs. Wherever it has been dealt with by the Court it has been repudiated as a nullity, and in the absence of authority to the contrary this must be held to apply to bills. In place, therefore, of there being a genuine signature to the bill in question, it stood in the same position as if it had never been subscribed. Then it was established that no value had been given for the bill, and that the grantor, who had been paralytic for years and was almost blind and weak-minded, did not understand the nature of the transaction. The same principle applied here as ruled the decision in the case of Pringle, M. 16810, where the bill was held to be invalid. But it was said that this would have been a good bill if, in place of having her hand led, Mrs Brown had given instructions to sign for her. What difference then did it make that the letters were formed by leading her hand? There were various important distinctions between the two cases. Signing by procurator was well known and recognised by the Court, while subscription by leading the hand was repudiated as a nullity. In the one case there was a signature rendered binding by proof of authority, in the other there was in law no subscription. There was an intelligent expression of the will in the giving of authority, but not in the mechanical formation of what, to a person who cannot write, must be unintelligible characters. To sanction the innovation proposed by the pursuer would give facilities not for commercial transactions but for fraud and circumvention.

SCOTT, for the pursuer, was not called upon.

The Court unanimously adhered, with expenses.

THE LORD PRESIDENT—I think this case is sufficiently established. It is pretty clear that the signature was adhibited by the old lady, assisted at her own request by another. She could write, but had an unsteady hand. No doubt some of the

evidence for the pursuers in the Court below is of a very singular kind. One witness says that the signature to the trust-deed is like the deceased's handwriting, and that she was not fit to have written the signature to the bill; but on cross-examination he admits that he himself cannot read writing or write. But I think the witnesses on the other side who saw the bill signed are speaking the truth. The next question is—Did Mrs Brown understand what she was doing? It is said the bill was granted for money advanced, and I think there is sufficient evidence to support that statement. An attempt was made to show that Lamont had not the means of making the advances. But although his wages were small, he and his family seem to have been thrifty people, and there is proof of actual advances amounting together without interest to nearly £50. Then there is proof of her own acknowledgment to that effect. I think it is quite clear on the whole case that the old woman knew what she was doing, and that she granted the bill for the advances which had been made to her.

LORD CURRIEHILL concurred.

LORD DEAS—The law of the case is just this. This document did not constitute a bill which could be made the foundation of summary diligence or passed in the circle; but it was a good enough document to constitute the debt in an action raised for the purpose. I think, in the circumstances, it was necessary for the party founding on it to prove that the acceptor authorised her hand to be led, and that she had then all her faculties about her, and also that the advances were made; but I think he has proved all that.

LORD ARDMILLAN concurred.

Agent for Pursuer—D. F. Bridgeford, S.S.C.

Agent for Defenders—Jas. Renton, jun., S.S.C.

PATTON v. MINISTER OF CRIEFF.

Res Judicata—Valuation of Teinds—Surrender.

In a question as to whether certain lands were included in a decret of valuation of teinds, plea of *res judicata* repelled.

This was a question betwixt Mr Patton of Glenalmond and the minister of Crieff in the locality of that parish. The teinds of Glenalmond were valued in 1636, and the lands of Corrymuckloch are now part of the lands of Glenalmond. The common agent in the locality reported, however, that Corrymuckloch was not included in the decret of valuation of 1636, and that the real rent of it was £340, of which one-fifth was £68.

Mr Patton lodged objections to this report, and a record was made up and closed betwixt him and the minister on the question. Mr Patton averred that in 1636 Corrymuckloch was part of Glenalmond. The minister averred that it was not. But Mr Patton also pleaded that, whatever the state of the fact, the question was *res judicata*. It appeared that an augmentation had been awarded in 1839, when a remit was made to the clerk to prepare a locality, whereupon Mr Patton and his late brother lodged a minute of surrender in these terms:—

"In these circumstances, the condescenders hereby surrender the foresaid proportion of the valued teind of the lands of Glenalmond localised in last locality upon their part of these lands, being to the extent of £78, 4s. 3d. Scots thereof, for the use of the minister of Crieff, for the last half of crop 1838, when his stipend under the present locality commenced, and in all time coming, reserving their relief against the representatives