transaction; and if there are subordinate purposes in the trust-deed, the allowance for managing the whole would be too large for that limited object. It has not been made out that it is competent to examine him.

The other Judges concurred, and the exception was disallowed.

PRESENT,

THE THREE LORDS COMMISSIONERS.

DICKSON *v.* TAYLOR.

1816. November 1.

THIS was an action of damages by Mr Dickson, of the Calder coalwork, against the manager of another coalwork, for enticing, carrying away, harbouring, and detaining a collier.

If a collier, under an engagement with one party, enter into an engagement with another party, that party is bound to turn him off as soon as he becomes acquainted with the prior engagement.

DEFENCE.—The defender never, by himself or others, attempted to seduce a collier under engagement at another work. Nor did he harbour or detain the one in question, knowing him to be under engagement.

Gray Russel, a collier, was engaged at the Calder coalwork, to turn out 720 carts of coals; after turning out about 80 carts, he engaged

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himself to the defender, who, as is usual, sent a cart for Russel's wife and furniture.

ISSUES.

"1. Whether, upon the 2d of March 1814, "or about that time, Gray Russel, a collier, "was under contract or engagement to serve "the pursuer, by working as a collier at the "coalworks?

"2. Whether the defender, upon the 2d "of March 1814, or about that time, knowing "of the engagement of the said Gray Russel, "did, by himself or by others, acting by his "authority, entice or seduce the said Gray "Russel to desert the service of the said pur-"suer, during the subsistence of the said en-"gagement?

"3. Whether the said defender did retain "the said Gray Russel in his service, and did "employ him as a collier, after he knew of the "said Gray Russel's engagement, as aforesaid, "with the pursuer, or after the said engage-"ment had been intimated by the said pursuer "to him the said defender."

An unstamped contract cannot be given in evidence, but a witness, one of the parties to it, may look at it, to refresh his memory as to its contents.

The first witness called for the pursuer was underground overseer of the Calder coalwork, who swore that he had engaged Gray Russel

to turn out a certain quantity of coal. A written paper was then shewn to him, and he was asked if it was the contract he entered into with Russel. An objection was taken that it was not stamped; and, on the other side, it was contended that it was good, as a memorandum of what took place at the time.

LORD CHIEF COMMISSIONER.—We can take nothing from the contract unless we take the whole.

The witness having sworn that he had the memorandum before him at the time of entering into the agreement, was allowed to look at it.

It was then proposed to adduce Gray Russel.

Cockburn.—There may be an objection to his admissibility, at least to his credibility; he has an interest to confirm the story of the pursuer, and throw the blame of his leaving his work on the defender. It is a material circumstance affecting his credit, that, in his examinations before the Sheriff, his declarations are directly in the teeth of each other, and he has thus committed perjury, at least in a moral point of view.

Credibility of a witness is not a preliminary subject of inquiry. The law-agent, without a power of attorney from the party, cannot grant a release to a witness.

Jeffrey.—His credibility is not a prelimina-

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ry inquiry. As to his interest, Mr Fisher, the agent and son-in-law of the pursuer, is ready to release him from any consequence of his evidence.

LORD CHIEF COMMISSIONER.—We cannot enter on the question of his credibility now. The only inquiry is his interest, and from this the pursuer ought to have come prepared to release him.

It is only the party having interest who can give a release. One by Mr Fisher is not binding on Mr Dickson. If Mr Dickson held a bond, *he* only could release the debtor.

If a power of attorney were produced, then we might allow it, but we cannot judge of his powers in any other way.

A person who is liable in damages, whichever way his evidence is given, is a competent witness.

It has occurred to the Court that the witness may be considered as not having an interest. Though he was enticed, still he will be liable in damages; he is therefore liable whichever way his testimony is given.

But, before examining him, he must be warned that he is not protected from the consequences of his testimony.

LORD GILLIES.—Questions *in initialibus* ought to refer to the admissibility, not to the credibility of a witness. In proof on commission, it has been common to allow questions

which relate to credibility, but this was on the ground that the objections might go to admissibility.

Proof of the subscription of the magistrate, on a declaration emitted in the inferior Court, does not render it evidence.

Gray Russel had emitted certain declarations before the Sheriff, which *Mr Cockburn* stated to be contradictory, and wished to produce before his examination, but was informed that it was not yet the proper time for doing so.

After the witness was examined and dismissed, the LORD CHIEF COMMISSIONER observed, That his declarations had not been proved. *Mr Cockburn* stated, That, as they were not signed, it became necessary to prove them in some other way.

A witness who was afterwards called for the pursuer swore, on his examination in chief, that a paper shown him was the original minute of the inferior court. *Mr Cockburn*, for the defender, asked him, on cross-examination, if the subscription at the declarations was the magistrate's subscription?

LORD CHIEF COMMISSIONER.—You may be entitled to prove the magistrate's subscription, but this will not render the declarations evidence.

No other proof was offered of them, and they were not produced.

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TAYLOR.

Forsyth, in his opening speech for the pursuer, stated,—Enticing away a servant was a ground of action by the Roman law; it is so by the law of England; and the Court, by sending this issue, show that it is a ground of action by the law of Scotland.

6 Comyn. Dig. 375. Blake, 6 T. R. 221.

Cockburn contended, The defender did nothing improper; he did not know of the previous engagement; he was bound to send for Russel and his family, and to protect him after he entered on his work, or be liable to him in damages for breach of contract. To found the claim of damages in this case, you must find that the defender maliciously and improperly retained Russel.

LORD CHIEF COMMISSIONER.—It is proved that Russel was engaged to turn out a certain quantity of coals; the pursuer was therefore entitled to say to all the world that he was engaged to him.

The second issue I do not consider proved; and, therefore, the only question is, if he was retained by the defender? This undoubtedly means, if he was improperly retained, that is, after it was known that he was engaged to another.

From the moment the defender knew of the engagement, he was bound to turn Russel off; and the concealment of his former engagement, on his part, would have been a complete answer to any claim of damages at his instance.

If you are of opinion that the defender retained him after he knew of the prior contract, you will find damages due, but will be cautious in fixing the amount. The evidence on this last point is defective, and it is dangerous to trust to general calculation. At the rate stated, this coal-work would yield a profit of L.16,000 per annum.

Verdict, "Find the first and third issue, for "the pursuer; and the second, for the de- "fender. Damages L.25."

Forsyth and *Jeffrey*, for the Pursuer.
Cockburn, *Cuninghame*, and *Maconochie*, for the Defender.

(Agents, *D. Fisher* and *Alexander Youngson*, W. S.)

In this case a motion had been made by the pursuer, in July, to have the place of trial altered from Glasgow to Ayr, as the proceedings had taken place in that county. This was resisted, on the ground that the desertion took place in Lanarkshire, and the first application was made to a Justice of Peace there.

LORD CHIEF COMMISSIONER.—The Court of Session, in the first instance, fix the place of trial, and send the process to the

PRESENT,

LORDS CHIEF COMMISSIONER AND GILLIES.

HADDAWAY *v.* GODDARD. *

1816. November 4.

Damages assessed for assault and battery.

THIS was an action of damages for an assault and battery, and to have it found and declared,

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proper clerk in this Court. The pursuer may give notice of his wish to change the place of trial, but it must be to some other town on the same circuit, or to Edinburgh. The leaning of the Court, in this infant state of the institution, will be to try as many cases as possible in Edinburgh. There are not a sufficient number of counsel who travel circuit, and the expence of carrying counsel there, in this case would be much greater than bringing witnesses here; and expence and inconvenience are the only grounds stated for changing the place of trial. As the Court will sit again before November, and many witnesses cannot be necessary in this case, the Court think the trial ought to be here.

To this the defender objected, but the pursuer preferred a trial here to one at Glasgow, and the 1st of November was accordingly fixed.

* It was proposed to send this and the following case to be tried by the same Jury.

Baird and *Cockburn*, for Goddard, objected.

LORD CHIEF COMMISSIONER.—It can only be done by consent of parties.