PRESENT,
LORD CRINGLETIE.

ANDERSONS *v.* JEFFREY.

1826.
July 18.

Finding that a deed was destroyed after the death of the maker of it, without his directions or authority.

AN action for proving the tenor of a trust-disposition and deed of settlement alleged to be destroyed after the death of the granter.

ISSUE.

" It being admitted that a deed of settlement
" was executed by the late Hugh Anderson, the
" father of the pursuers, and that the same does
" not now exist;
" Whether the said deed of settlement, and
" any codicils added thereto, were or were not
" destroyed, with the knowledge, or by the di-
" rections or authority of the deceased?"

Skene opened the case for the pursuer, and stated, That the deed was executed in 1807, and a codicil added in March 1816; that some of the family wished to alter the deed, but the granter being *in extremis* this was impracticable, and the eldest son took it to Edinburgh to consult counsel, and on his return it was destroyed. This made the heritable property descend to the eldest son, who possessed it for three years, and

ANDERSONS
v.
JEFFREY.

at the end of that period executed a deed, replacing some of his relations in the same situation as they had been in his father's deed; but this having been done within a short period of his bankruptcy, the trustee for his creditors brought a reduction of it on the act 1681, as a conveyance to a conjunct and confident person without just or necessary cause. In this action the Court held it necessary to prove the tenor of the former deed, and we submit to the Court that the judgments in the reduction, and the examination of havers, being between the same parties, and in fact the same cause, are evidence in this cause.

It is impossible that the deed could be destroyed by the father, or even by his direction; for if he directed the opinion of counsel to be taken, then we must hold that this opinion was to be acted on, and the opinion given was, that the deed should not be destroyed.

Incompetent to give in evidence in one case an interlocutor pronounced in another between the same parties.

When an interlocutor of Lord Alloway in the reduction was produced, in which his Lordship found it instructed by the oaths of havers that the settlement had been destroyed after Mr Anderson's death.

Cockburn objects, It is in another cause not conjoined with this.

Jeffrey.—This cause arises out of the reduction, and is a mere step in it; the subject and the parties are the same, and this interlocutor is necessary to show the matter still in dispute.

LORD CRINGLETIE.—I wish to know the authorities for admitting in one cause evidence taken in another. It appears to me impossible to lay this opinion of Lord Alloway as to the destruction of the deed before the jury; they must judge for themselves.

Cockburn.—This is clearly inadmissible. The parties are not the same; but if they were, a party may make an admission in one cause as a thing of no consequence, which he is by no means bound by in another, where it is of consequence.

Jeffrey.—The defender is a party in both processes, and the ultimate question is the same in both. In England it is incompetent to produce a verdict against a stranger, but here the party objecting is the same. 1. Phillipps, 319. Russel *v.* Cunningham, 13th February 1664, Mor. 14028. Town of Edinburgh *v.* Earl of Lothian, 9th January 1675, Mor. 14029. Duke of Gordon *v.* Lady H. Gordon, 2d November 1748, Mor. 14045.

The parties expected a judgment in the re-

ANDERSONS
v.
JEFFREY.

duction, but the Court sent this issue, which is rather awkwardly expressed, and is conclusive of the point.

Cockburn.—If this is produced as a verdict or judgment, and is *probatio probata*, then there is no use in this trial.

LORD CRINGLETIE.—I cannot hold the judgment of Lord Alloway as conclusive, or admit it to trammel the jury. If this is to be held *probatio probata*, it is most extraordinary that this issue should have been sent to try whether the deed was destroyed with the testator's knowledge, or by his authority.

It was then proposed to put in the deposition of Mr Crawford, the writer to whom the son had applied, and who had been examined as a haver, but was since dead.

Spence *v.* Clark, 3 Mur. Rep. 454.

Mr Cockburn at first objected, that the examination, being taken in the reduction, was inadmissible; but afterwards withdrew his objection. But when the answers to the revised condescendence in the reduction were put in, he objected that it was not evidence against him, as it might not be his interest in one case to contest points which were important in another. Mr Jeffrey admitted that he was not entitled to produce a

Answers to a condescendence in another cause admitted as evidence that the party made the admission, but not as conclusive of the fact.

general pleading, but answers to a condescendence were not of that nature, and, being in another cause, was of no consequence, as he might prove an extrajudicial admission.

LORD CRINGLETIE.—In the Court of Session, in one case the declaration of a bankrupt was held evidence against his creditors, and this must be held the declaration of the party signed by his counsel; but I do not think it such an admission as excludes proof of it being untrue. It only proves that the party made the admission.

The letter of a trustee on a bankrupt estate not admitted as evidence against his successor.

When copies of letters which passed between one of the pursuers and a former trustee for the creditors of James, the eldest son, were produced,

Cockburn and *More* objected.—These were written with a view to compromise a dispute, and they are not admissions of a party, but the private letters of the trustee. The former trustee is not a party, and we are not to be affected by his acts, as, instead of giving these to his successor in office, he gave them to his opponent.

Jeffrey.—If they were written with a view to a compromise, they cannot be produced, but this is not the case. They must be produced, as they are statements by a party of facts con-

ANDERSONS
v.
JEFFREY.

sistent with his own knowledge, and important to the cause.

LORD CRINGLETIE.—It is clear, that, if this is a confidential correspondence, the trustee ought not to produce it. The former trustee is not here; and this is opposed by the present trustee. I do not think they are evidence against the present trustee. It is a very delicate question, however, and the difficulty is, that, though the Court cannot compel the production, yet how can it shut its eyes when the letters are produced?

An agent in one cause inadmissible as a witness in another arising out of it, except as to the execution of a deed.
Gilchrist *v.* Dempster, 3 Mur. Rep. 364.
M'Neill *v.* M'Neill, 3 Mur. Rep. 150.
Carmichael *v.* Tait and Fraser, 7th Dec. 1822.

A witness was called who, it was said, had acted as agent in the original cause. The witness was examined *in initialibus*.

Cockburn.—He has a direct interest in the cause, as he shares in the profit; but he may be examined to the execution of the deed.

Jeffrey.—He is a necessary witness. In Gibson's case he had advised the action, but gave up upon seeing that he would be required as a witness. The objection of agency is not one of interest, but partiality. He is not agent in this cause.

LORD CRINGLETIE.—The only dificulty here

is from the previous part of this cause, in which the witness was the proper agent, and was the sole director, and in which he could not have been examined. This, though a separate cause, arises out of the reduction, and depends on the same facts; and though this cause has been conducted by his partner, yet in the situation in which he stands in reference to both causes, I consider him subject to the contamination of partial counsel, and that he is interested to support this cause. This contamination is radical, and I cannot separate the one from the other. But it is admitted that he may be examined as to the execution of the codicil and the state of Mr Anderson's mind at that date, and I have no hesitation in admitting him to that extent.

Circumstances in which it was found incompetent to prove the instructions given for writing a letter.

In the course of his examination the witness was asked, What instructions did James, the son, give you when you wrote the letter, 16th April 1816?

Cockburn objects,—I appear for the trustee for his creditors, and though I admit the letter, I cannot be affected by what James either said or did. He could not be called as a witness for his mother or brother, and it is still less competent to prove what he said. Can a bankrupt be allowed to ruin his creditors by what he chooses to say?

ANDERSONS
v.
JEFFREY.

Jeffrey.—It is competent to prove the transaction by this witness, and also what James said. Had he been solvent, he would have been the party in the cause; and being insolvent does not vary the principle.

LORD CRINGLETIE.—There are two questions, Whether this is a witness to be received on the points? and whether the points may be proved? I doubt if the witness is admissible to prove this. If he had been called to prove a fact, that he saw the testator throw the deed into the fire, or that he saw the embers of it after it was burned, the case might be different; but this is to prove statements by an interested party. I at first hesitated, and thought him admissible to prove the instructions for the letter; but as the letter is now admitted, I am inclined, on the whole, to hold him inadmissible to prove any statements by James.

A bankrupt not a competent witness as to matter affecting the bankrupt estate. Lindsay *v.* Chapman, 23d Feb. 1826. Glendinning *v.* Brown, Dec. 8, 1814. Smith *v.* Bank of Scot. Dec. 7, 1826.

When the bankrupt was called,

Cockburn objects,—He has an interest or bias which disqualifies him. According to the opening he destroyed the deed, and kept possession of the property for years, and within six months of his bankruptcy he attempts to cheat his creditors on the plea of duty and affection.

Simpson *v.* Macfarlane, and Gibsons *v.* Marr, 3 Mur. Rep. 194 and 263.

Jeffrey.—I admit that he was guilty of a great impropriety, and in one sense of a fraud, in destroying the first deed; but the execution of the other was meritorious. Where there is *penuria testium* near relations are admitted in secret transactions.

LORD CRINGLETIE.—I have no doubt on the subject. In many cases the oath of the bankrupt is taken, but that is on a reference. I have not a notion that he is competent as a witness.

The mother and brother-in-law were then called, but rejected on the same principle.

The mother and brother of a bankrupt inadmissible as witnesses to prove matters affecting the estate.

Cockburn, in opening for the defender.—It is a relief to find that the pursuer has failed in attempting to prove not one but a succession of frauds. The old man was absolute proprietor of the deed, and the legal presumption is, that he destroyed it; and there is no motive which his family could have to do so but what would equally influence him.

LORD CRINGLETIE.—You have been so long detained that I shall make as few remarks as possible. From the issue you will think the case simple; but there has been much legal

ANDERSONS
v.
JEFFREY.

discussion in which, if I was wrong in my decisions, the Court will correct them. You have only to judge of the evidence before you, and must attend to the fact. It is admitted that the father executed a settlement; and it is proved that he added a codicil a short time before his death, in order to secure the share of one of his daughters whose husband became bankrupt. He died in April 1816; and it appears from the after correspondence that his son delayed making up titles. In 1819 the son executed a deed conveying away his property; and having become bankrupt, the trustee for his creditors brought a reduction on the statute, and the questions upon it are, Whether he was solvent; and whether it was without just and necessary cause? The Court postponed consideration of the first question. On the second it was said that there was a deed by the father; and the Court of Session held, that, to prove that there was just and necessary cause, the existence of that deed must be established, and that it contained the same provisions with the one by the bankrupt.

The question here is, Whether the deed existed after the father's death, and whether he left orders to destroy it? On these questions, the circumstances in which it was executed are

of importance, and particularly the codicil being added a short time before his death, since it is not probable that he would add a codicil to a deed which he meant to destroy. Its being sent to Edinburgh is also important, and the purpose of it being sent. It is also of consequence to ascertain whether it was the original deed, or a copy which was sent; because if it was the original it proves that it was in the bankrupt's hands; and as it is pretty well made out that he had not returned home at the time of his father's death, it could not be destroyed by the father.

Is there then any proof that he directed it to be destroyed? In point of law, I say to you that there is no evidence of such direction. You are therefore to take the whole circumstances into consideration, and make up your minds whether it was in existence after the death of the father.

Verdict—"That the deed was in existence "after the death of Hugh Anderson, and that "it was destroyed without his directions or au- "thority."

Jeffrey and *Skene*, for the Pursuer.

Cockburn and *More*, for the Defender.

(Agents, *C. J. F. Orr*, w. s. and *W.* and *A. G. Ellis.*)