PRESENT,

THE FIVE LORDS COMMISSIONERS.

1830. March 10.

STEWART v. FRASER.

On a motion for a New Trial, incompetent to call the Jurors to prove that they cast lots for their verdict.

THIS was a reduction of the sale of the estate of Belladrum, on the ground of misrepresentation. After various proceedings in the Court of Session, the case was sent to the Jury Court. The case was tried on the following

ISSUES.

"Whether, during the summer and autumn "of the year 1826, and at what time in that "period, the pursuer agreed to purchase from "the defender the estate of Belladrum, and to "pay for the same the sum of L. 80,000?

"Whether the pursuer was induced, by the "misrepresentation of the defender, in regard "to said estate, to enter into the said agree-"ment?"

At a late hour on the 23d December 1829, the following verdict was returned.

VERDICT—"That the pursuer, by letter

"dated 4th August 1826, offered the defender "L. 80,000 Sterling for the estate of Bella- "drum, which offer was accepted by the defen- "der by letter from him to the pursuer, dated "8th August 1826. Find also that the said "purchase was further confirmed by contract "of sale entered into between the said parties "on the 17th day of the same month of August "1826. And on the second issue, find for the "defender."

Jan. 20, 1830.

Notice having been given of a motion for a rule to show cause why the verdict should not be set aside, 1*st*, On the ground that the jury had cast lots for their verdict; 2*d*, Because the verdict was against the evidence.

LORD CHIEF COMMISSIONER.—It appears to the Court that this must be decided by the practice in England, and there is a case solemnly decided in 1805, (which was read in Court,) which is so decisive, that it appears to us we cannot receive the evidence of the jurymen upon which the motion is founded. If, however, parties insist on being heard, it is not for the Court to say they will not hear them; but I thought probably gentlemen at the Bar might have held this case decisive, and as it is not men-

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tioned by Mr Grant in his work on New Trials, I thought it better to state it now.

The Court adjourned, that counsel might consider the case mentioned by his Lordship.

Feb. 2, 1830.

When the case was again moved, certain affidavits were produced in support of the motion,

LORD CHIEF COMMISSIONER.—It is clear that if the charge against the jury can be made out by extraneous evidence, other than the oath of jurymen or hearsay, it is quite competent; and with this view the Court wish the officers of Court, who had charge of the jury, to be examined, that we may have before us all the evidence on the subject. It also appears to us more satisfactory to have them examined *viva voce*, that they may be subject to cross-examination.

This course was accordingly followed.

Feb. 3, 1830.

Cockburn, in support of the motion.—This verdict ought to be set aside, 1*st*, As improperly and illegally pronounced; 2*d*, If it is to be received, then, as contrary to the evidence and the justice of the case.

The jury are sworn to return their verdict according to the evidence; but they entered into an illegal compact to decide by lot. The

relevancy of the objection will not be disputed, and I offer to prove the fact according to the law of Scotland. If this were a purely Scotch case, I would call the jurymen; and if they plead a privilege, I would then argue the question; but it is said this is the time to meet the objection, and that it depends on English practice. I demur to this application of the practice of England, though I admit, and found on the analogy, as its better practice is in our favour. One of the defects of trial by jury in England, stated by Blackstone, applies here. By the later practice, indeed, they reject the only evidence of the fact to impeach the verdict, though they admit it to punish the jurymen. They fine the jurymen for a profligate verdict, but hang the man convicted by them.

3 Blac. Com. 381.

The present case being the first here, ought to be decided according to justice and right reason, and we are the less disposed to adopt the English rule, though the Judges resolved that it is the law, because we find the opposite rule to have prevailed a few years before. The case in 1805 is admitted to be a change of the law, and that it is made on the ground of expediency or convenience. We think the opposite decision expedient, though undoubtedly it is not free from danger, but much the greatest danger is in protecting an unprincipled jury.

Fowler Com. Dig. 495. Mellish *v.* Arnold. Bunbury, 51. Aylett *v.* Jewel, 2 Bl. Rep 1299. Parr. *v.* Seames, Barns, 438. Hale *v.* Cove, 1 Strange, 642.

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In cases of crime, a party when called as a witness is bound to speak, and why is there protection here? There is nothing in the statutes on the subject, and it is essential to the justice of the case to have this verdict set aside. There is no limitation as to the evidence by which this is to be proved, and the Court is bound to do justice to the parties.

The English law is not applicable to us, and there cannot be direct cases on the point in Scotland, but there are some bearing on the question. There was a case for setting aside a cognition tried at Glasgow, where jurymen were called; and in a case in the First Division, where a jury had been called to value land, they were examined by a Sheriff, and this was not disapproved of by the Court.

Graham *v.* Newlands, 3 Mur. Rep. 531.

Forbes, &c. *v.* Magistrates of Aberdeen, Feb. 11, 1809.

There is extraneous evidence of the fact, and even by the law of England this would be admitted.

But the verdict is contrary to evidence, and the justice of the case. The note of particulars, containing the number of acres in the estate, and whether they were arable, pasture, or in wood, may not have been the sole inducement to purchase, but it was *an* inducement, and it misrepresented the fact on which the bargain proceeded.

LORD CHIEF COMMISSIONER.—It is the desire of the Court that both grounds which have been opened should be fully argued and replied to.

I hope it will be attended to on the affidavits that there are two views in which they are to be taken. *First*, Whether they afford a ground for the Court holding that what is surmised was done; *Second*, Whether they afford a ground for farther inquiry, by calling the jurymen, if the Court come to be of opinion that they can be called. In some parts of the able argument we have heard, it seemed to be held that they afford sufficient evidence that the jury cast lots for their verdict.

Skene, for the defenders.—This motion was made on a ground which affects the conduct of the jury in returning their verdict, and also as being a verdict against evidence. These are essentially different, the one being, that there was no trial, the other, that the jury mistook the evidence. The relevancy of the first cannot be doubted; the only doubt is on the evidence by which it is to be proved. The evidence now before the Court does not give rise to the question, as the inference drawn

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by the agent is founded on facts in which he is contradicted by others. The verdict being regularly returned and on oath, you must hold, that, if any proposal for casting lots was made, it was rejected. The only suspicion raised here is on the affidavit of the agent of a party, and it would be extremely dangerous to proceed on it. In one of the cases in England, the oath of the attorney was held not sufficient; and here affidavits are not evidence. No material fact can be rested on the evidence of an agent, except as to instructions for deeds, where he is a necessary witness. In one case in England, though it was proved that the proposal had been made, the Court held that it had not been acted on.

The question here is, Whether you will order the jury to attend and give evidence? There is nothing in the affidavits proving that the jury are ready to admit that they were guilty of this great offence. Suppose they refuse to come when ordered, or if one or two come, are they to convict the others of perjury, and render them infamous? In England it was decided in 1805 with much deliberation, and on a view of all the cases, that jurors could not be called; and in questions of this nature, as in cases of insu-

1 Bos. and Pul. N. R. 326.

Hamilton v. Hope, 4 Mur. Rep. 255.

rance, it is competent to refer to decisions in England. We are prepared to show, that what is now proposed is even more inconsistent with the law of Scotland than of England.

There is no trace of the admissibility of any such evidence in any of our authorities, as referred to by Baron Hume; and I am not aware of any case in which a *socius criminis* who admitted himself guilty of perjury was received as a witness. Jeffries would not receive this in the trial of Oates. The law of Scotland has a horror at perjury. This is much stronger than if the application had been to correct the verdict on the spot.

Howell's State Trials, Vol. 10, p. 1185.
Vol. 19, p. 633.
2 Hume, ch. 15, 1471, c. 47. 1475, c. 63.
2 Hume 270.

2. Supposing this a true verdict, it is said to be contrary to evidence; but there was evidence to balance, and the Court will not interfere. The pursuer was bound to prove that he purchased on the note of particulars, and that he altered his calculations in consequence of seeing it; but the reverse was established; and we showed that he did not buy on calculation but advice. It is no slight misrepresentation which will be sufficient, but must be such as goes to the foundation of the bargain; and we are not bound to show that the verdict is right on the calculation. It was a fair jury question, whe-

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ther he bought on the calculation or advice, and the jury decided it.

March 3, 1830.

Jeffrey, D. F.—It is candidly admitted that the allegation is relevant; that, if proved, it is fatal to the verdict; and that the English decisions are not binding as authority here. This question turns partly on the form of process, and partly on the law of evidence; and in neither of these have the statutes introduced the law of England. That law is introduced in cases of treason, but not so in civil cases. By the statutes as to jury trial, a verdict may be set aside when it is essential to the justice of the case. We have been wronged by a verdict; and when we seek redress, we are met by an objection to part of the evidence. It is said affidavits are not allowed by the law of Scotland, and that an agent is an incompetent witness. Agents are not witnesses in the matter remitted to probation, but they are competent in this, which is informing the Court of an irregularity in the trial of a cause. I demur to an affidavit being in Scotland proof of any important fact; it is merely solemn information to the Court of facts, which a party are ready to prove.

The question then arises, Whether the *rea-*

sons of the *recent* law of England are such as to exclude this inquiry. Authorities were promised, but not given, to fortify the English decision; and the only reference was to a *dictum* of Baron Hume, but that refers to a written verdict in a criminal case. Reference was also made to the old statutes for punishing jurors; but it is clear from Mr Hume's work, that the common mode of proving the offence was by the jurymen. In a case in M'Laurin, doubts are expressed on this subject. *Any* solemn deed may be reduced on the ground of fraud, except a verdict in a criminal trial.

2 Hume, 224. 2 Hume's Tr. 270 Nicol. Maclaurin, Cr. Ca. 381.

In this case the allegation is relevant, and the injury great; but an objection is taken to the evidence, and at rather an early stage. It is said the jurors are incompetent, as they must admit themselves perjured; but that is an inaccurate use of the term perjury.

2 Hume, 137.

The rule excluding this evidence is founded on a short-sighted policy, as all inquiry cannot be prevented. The dignity of the Court is already violated by the surmise of such a proceeding, and unless there is an absolute barrier to inquiry in the slightly considered, and rashly adopted, reasons of policy which have been referred to, then justice to the party is the first point. Where *socii criminis* are received,

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and where the *reason* of the English decision is not sufficient, this application is not to be refused on the ground of inconvenience.

On the question of the verdict being contrary to evidence, it is clear that the note of particulars runs through the whole bargain; and is it to be conceived that the same sum would have been offered if the party had been aware that the note was erroneous nearly to half the estimated rent?

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LORD CHIEF COMMISSIONER.—In this case a rule to show cause why there should not be a new trial, was granted by the Court. Cause was shown, and we have heard a reply.

The motion is grounded on two points,—*First*, It is said that the affidavits and testimony given before the Court, render it proper to examine the jury whether they cast lots for their verdict; *second*, It is said that the verdict is contrary to evidence.

In the whole circumstances, it would be a vain pretence in me did I not say that I felt considerable anxiety; as it is the first time in this Court that any serious charge has been made against the jury, and which in its nature must prove very prejudicial to the institution. This charge must have affected all the Court, but was

peculiarly distressing to me, who, for fifteen years, have had my attention at all times and places directed to this subject, and this is the first time that any thing has occurred materially affecting this essential part of the institution.

This has been argued at the Bar as a question of evidence, and it is said that it must be decided by the law of Scotland. If it were a question of evidence, I would accede to this, as I have always held, that, in questions relative to the legal rights of parties, the rule of the law of Scotland, not England, must regulate. But the frame of the institution is borrowed from England,—the number and constitution of the jury,—their unanimity or agreeing in their verdict,—the redress of error by motions for new trial, and by bills of exception,—the proceeding by special cases, and special verdicts,—in short, all the machinery is English, and reference must on these points be made to English cases. I shall not dispute about words, as to whether the English cases are binding, as the true question is, not whether we are bound by decisions pronounced in England, but whether we shall depart from the practice of a wise nation on a matter of this sort?

If this were a question of evidence, I think I could show, from the course of practice as to

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the admission of accomplices, and a man not being bound to criminate himself, that the law and practice of the two countries is precisely the same, or so nearly the same, as to make it impossible to come to a different conclusion on the question now before us. But this is not a question of evidence; it is a question as to the constitution of the jury, and that constitution stands in the way of the question of evidence. I do not, however, rest the distinction on the practice of the two countries further than to say, that the question cannot be supposed to have arisen in the Criminal Court of Scotland, where the jury decide by a majority.

What I have to state relating to the constitution of the jury is independent of their number, or the necessity of their agreeing in their verdict. The constitution, so far as it relates to the sacred nature of a verdict when given, is the same in both countries, but, supported as I am by such great authorities on each side of me, I shall not go with minuteness into the question as it relates to the rules in Scotland. Whatever discrepancies there may have been, Baron Hume speaks sound sense when he says, in the passage referred to at the Bar, that the utmost danger and uncertainty would be the consequence if questions were to be raised against

the verdicts of juries by examining the jury themselves after their verdict was delivered and the jury discharged and separated, and liable to be influenced elsewhere. Here the jury consists of twelve—they must agree in their verdict—their time of deliberation is limited to twelve hours—this was introduced for the wisest purpose, as at the time trial by jury was introduced into Scotland there was a strong feeling that unanimity in the jury might render a sacrifice of conscience necessary. That can never be necessary here; and we are freed from the ridicule which has been cast on England that strength of body, not of conviction, decided the verdict.

In reference to this question the constitution of the jury may be viewed in three points; 1*st*, Their mode of receiving information; 2*d*, Of deliberating; 3*d*, Returning their verdict and recording it. The first is all in public, and is wisely so, as the institution could not go on satisfactorily without this. It secures attention and correct behaviour during the longest trials. But jurors are not like us to deliberate in public. With respect to Judges, it is proper that their judgments and the reasons for them should be discussed in public, but jurymen are unaccustomed to public discussion, and require quiet

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retirement, and it is essential that they should not be interrupted from any quarter. At first the views of some may be crude till aided by the others, and they are not to be spied in the steps by which they come to agree. If juries are not fit for distributing justice, unless their deliberations are under inspection, then the country is not fit for trial by jury.

As to the English cases, it is essential that they be well considered, and I am satisfied, that, notwithstanding all the research which has been employed in them, they have not been so fully brought forward as they might have been, and it is fit the principle should be better sifted. It appears to me that the cases have never been fairly before any court, and that the later cases have merely enforced the original decisions. I have gone through the argument of counsel and the cases minutely, and shall state the result. The first case was Lord Fitzwalter's in 1675, in which it is merely stated that the verdict was to be set aside, as the jury had cast lots; but there is nothing in it to show that the jury were examined; and the circumstances tend to show that they were not, as they were punished. The case was under Lord Hale, and the presumption is, that every thing was regular. The next case

is that of Fry *v.* Hardy, of which there are several reports, but the best is that by Sir Thomas Jones, and in this case the jury were not examined. The only others till the cases reported in Strange is the case of Mellish *v.* Arnold in 1721 in Bunbury, and there is no evidence that in it the jurors were examined. The next case is that in Strange's Reports, Hale *v.* Cove, in which it does not appear that there was any examination of the jury, and it is cited in the case of Vasie *v.* Delavel in 1785, when Lord Mansfield refused to receive the affidavit of the jurors—but in 1735, in Parr *v.* Seams, and in 1736, Phillips *v.* Foster, in Barns's Notes, the affidavits of the jurors are, for the first time, received. In the case of Aylett *v.* Jewell, in 1779, reported by Sir W. Blackstone, the Court seem to have intended to examine the jurors, but did not. The next case is the one which was decided by Lord Mansfield in 1785, who went to the original cases, and refused the affidavits. In that case, and in the one decided by Sir J. Mansfield in 1805, they resort to the original principle of the law of England—they do not introduce a new rule, but return to the old law, which had been improperly deserted.

In the case in 1805, all the Judges concurred;

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and at that time Lord Ellenborough was at the head of the Court of King's Bench, and of the Common Law of England; and it is not unworthy of notice, though a minute circumstance, that he, as counsel, moved for the admission of the affidavits in 1785, which would draw him to consider the cases previously decided; but even, with the impression which is made by cases at an early period of professional life, he agreed with the other Judges, who disregarded the cases reported in Barns, and returned to the original rule, when the wisdom of the Court held that the jurors could not be examined. I have alluded to

Bunbury, 51.

the case of Mellish and Arnold in 1721, but omitted to state the particulars. In that case the Court were satisfied by extraneous evidence that the jury had got a large sum of money. This case establishes the principle, that if the misconduct is proved by other evidence, the verdict will be set aside—it also establishes that if the jury come to exculpate themselves, the Court will receive them—but inculpation and exculpation are in a very different situation. What goes to establish a verdict may be received, but what goes to defeat it will be rejected. The rule is held so trite in England, that in 1828, when Mr Brougham moved for a rule, as in the present case, Lord Tenterden said, You

do not move on an affidavit of a juryman? and Mr Brougham acquiesced.

This brings us to the consideration of how far there is any danger in following these decisions, or, if I may use the expression, whether expediency should lead us to swerve from the practice as established in England. In something less than 200 years, within which period the practice of granting new trials has become more frequent in England, there have been seven or eight cases where this point has been mooted. In two of these the jury have been examined, and in the others not. Has rejecting this inquiry, I may ask, injured the course of justice, or weakened the confidence of that country in their juries? In this country, where I have always reported favourably of the juries, is it probable that they will put on a different character now, especially when they know that they will be relieved in twelve hours, if they cannot then agree?

The right to examine the jury having been stated at the Bar, and earnestly enforced, I have thought it right thus fully to consider it on general principle, as it is our duty, not only to administer justice, but to give satisfaction in its administration. But I must now view this as a question of fact; and how does it stand?

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The verdict was regularly given; there are two affidavits, and the examination of the officers on which this motion is founded. I shall not say any thing on the point of the affidavit being by the agent, but shall go at once to the facts stated in his affidavit, and upon which it is said we ought to examine the jury. The first fact sworn to by Mr Shepherd is, that a hat was called for, but in this he is not confirmed, as the officer proves that all the hats and great coats were given them, but that one hat was not found till after they were released. Though I have no doubt, Mr Shepherd's conviction is honest, this proves that he had not correctly observed the fact. The next is, that he heard tearing of paper, and in this he is confirmed by the officer, who also adds that he heard them say take or call the votes. The next is the noise of a pen on paper. The tearing of paper, and the writing is accounted for by the jury having written their verdict, and the hearing the noise of writing, would not be accounted for by their having merely written the letters P. and D. for pursuer and defender on two slips of paper. If, therefore, I thought the evidence of the jury could be given, I would say that in this case it ought not to be given, as the facts sworn to are

not sufficient to raise the question of their admissibility.

Suppose the jury could be examined, what becomes of their private communication? If their communication is not to be private, then they ought in all cases to be watched by those who can give correct evidence on the subject; and would the legislature be disposed to subject them to this? If, at the end of fifteen years' trial, the country has not confidence in its juries, then the country is not fit for trial by jury. This is all I have to offer on the question of setting aside the verdict on this ground, or, as the Dean of Faculty said, on the point of examining the jury. On this point, my voice decidedly is for discharging the rule.

On the second ground, on which the motion is rested, viz. That the verdict is contrary to evidence, I do not think the case was put in all the views in which it might be presented, and that, therefore, we ought to have a farther hearing on this point by one counsel on each side; but this cannot be till May. I shall, however, state the points to which the argument ought to be directed.

The written note of particulars on which this turns is not, in fact, met by contrary evidence, but is avoided by stating, that the sale did not

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proceed upon it, but that the pursuer acted on the advice of Mr Fraser of Fingask; and the question is, Whether the advice supplanted the note?

On the 1st of August, the pursuer writes under the impression of the note; on the 2d, Fingask, being ignorant of the note, writes, advising him to give L. 80,000; on the 4th, the pursuer offers this sum without mentioning the note; on the 7th the defender writes to him; and, on the 8th, the pursuer answers, concluding the bargain. Then, at a subsequent period, a minute of sale is entered into. The meeting for this purpose was on the 17th, and was in consequence of a letter from the defender on the 14th. Just before the minute of sale is entered into, a paper is given to the pursuer, dated also on the 14th, which revives the note of particulars, and goes through a number of the statements in it, but does not mention the number of arable acres. The question is, Whether this was not an act on the part of the defender which revived the note as his act, and whether the note or the advice of Fingask was the inducement to purchase? Whether, though it may not have been the ground of the offer, it was brought forward before the conclusion of the sale, to influence the mind of the pursuer?

LORD PITMILLY.—As I concur in the opinion now delivered, it is unnecessary for me to go into detail; but I shall say a few words on the law of Scotland, as it bears on this interesting question, Whether a jury, after having gone through the solemn ceremony of delivering their verdict in presence of a Judge, declaring it to be their verdict, and witnessing its being recorded, it is competent for them, *ex intervallo*, to challenge it as improperly obtained?

The mere statement of this question is sufficient to show that there is a radical error in supposing that an answer to it is to be found in the common rules of the law of evidence; and that, if there is nothing in that law to exclude the jurymen as witnesses, the question must be answered in the affirmative. If it did not appear at first sight that this is not a question on the law of evidence, we should be satisfied on this point by looking into our law books, where there is a long enumeration of the qualifications and disqualifications of witnesses. This is the case both in Phillipps and Tait; but there is not a word in either of these works, especially in this part of them, on the competency of jurymen impugning as witnesses their own verdict.

If this were a common question in the law of evidence, I see much difficulty in excluding the

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testimony; for though it would be received with much suspicion, still it is difficult to say that it is incompetent. We admit instrumentary witnesses, though they are liable to the pains of forgery. I could not go along with this part of Mr Skene's argument, and feel a difficulty, in this view, of rejecting the testimony.

There are *situations*, however, in which persons, though admissible on ordinary principles as witnesses, yet, on higher grounds, cannot be admitted or called upon to give evidence. A Judge in a supreme court is in this situation, and if in a subsequent trial it is necessary to ascertain the facts, he is not to be called on or permitted to give evidence. In one case tried before your Lordship, this was permitted by consent of both parties, and it being stated that the parties were taken by surprise if it was not allowed; but on that occasion the Court laid it down distinctly that it would not again be allowed. Though he is the best witness, he is not permitted to give evidence, but the case of a juryman is infinitely stronger. The reason of the exclusion is, that subjecting a Judge to cross-examination, &c. would prove prejudicial to the administration of justice; and this principle applies more strongly to the case of jurymen if they are to be allowed to impugn their verdict. If their

Harper v. Robinson, 2 Mur. Rep. 385 and 404.

evidence of such a proceeding is allowed, there is no end to it; for though in this case, it is said they all cast lots, and that they will prove it, still the same must apply to a part, or even to one casting lots for the verdict he is to give. This, if admitted, would put an end to all security in verdicts. We must trust to the integrity and intelligence of jurymen; and were we to permit this examination, it would give a fatal blow to this mode of trial. Expediency controls the common rules, to the effect of admitting objectionable witnesses, and also of refusing unobjectionable. A *socius criminis* is admitted contrary to the common rules. These rules bend to expediency—to public policy; and though, by the common rules, Judges and jurymen would be admissible, on the ground of public policy they are not admissible.

On this subject it is unnecessary to refer to authority, when none is brought against it. The only authority is the case of the Magistrates of Aberdeen, 11th February 1809, referred to by Mr Cockburn, and that case appears to me to be on the other side. In that case, the jury had not gone before the Judge and delivered their verdict, but the clerk had gone privately to the Judge, and it was decided that that was not a good verdict, and that the jury might be

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examined on the subject. But there is more direct authority than this in Mr Hume, and the doctrine he states is confirmed by two decisions referred to. I have no doubt that juries were occasionally called before the Privy-Council; but I do not think this militates against the view we take of the subject; and in a question as to intercourse with the jury, they have been examined. But in these the Court followed out the act 1587.

2 Hume, Com. 2d Edit. 412. M'Laurin's Crim. Cases, No. 78 and 61.

But there is no case where they have been allowed, with the approbation of the Court, to impugn the verdict after acknowledging it. There was one case which has not been referred to, where at Glasgow it was stated, two days after the verdict was returned, that five of the jury had not been sworn. This was certified to the High Court of Justiciary, and in the hurry of the Circuit, the Judges examined the jurymen, but on reviewing the case, the Court disapproved of this, and sustained the verdict. The verdict was sustained on the ground, that the record was not to be questioned. It is admitted by Mr Skene that this is a relevant objection. I think something might have been said on this subject; but taking it as relevant, I rest on the case at Glasgow as proceeding on a different principle. It will be seen from the

Burnet Cr. Law, 477. Case of Hannay in 1809.

report in the appendix to Mr Burnet's work, that the Lord Justice Clerk and Lord Meadowbank both disapproved highly of the examination, and this is the only case in which the thing was done, and there it was disapproved of.

Burnet, App. p. 70.

There is another case of the same nature, where a juryman was incautiously examined, but not on oath, and in that case there was a host of other evidence. I believe that case followed the precedent of that of Menzies in 1790.

Sharpe in 1820.

On the authority of Hume—of the cases,—and on principle, I have not a doubt that this evidence is inadmissible, according to the sound principles of the law of Scotland, and were it admitted, the consequence would be most prejudicial to this institution, and to the administration of justice.

Even if our law was not so express as I think it is, the English authorities would be satisfactory. I never had a doubt on the subject, and my only difficulty has been to keep my mind disengaged, and to attend to the arguments offered. On the whole, I think it inadmissible, and that it would be most prejudicial to the ends of justice to admit it.

I also concur in thinking that we should hear farther on the other point, before proceeding to decide it.

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LORD GILLIES.—If it was unnecessary for Lord Pitmilly to say much, it is still less necessary for me, as I concur entirely in all that has been stated by your Lordship, and by him. I concur in the opinion, that this is not a question of evidence, but practice, and I thought, and still think, that, in a matter of this sort, English cases are almost as binding here as in England. This case presents itself in a new point of view on the affidavits, as it does not appear to me that the affidavit of Mr Shepherd amounts to what could be called presumptive or *prima faciæ* evidence. I cannot even say that it raises any very strong suspicion, as the circumstances are much done away by the facts sworn to by the officers of Court. He is a man of integrity, and swears to his belief; but that is not sufficient, as the grounds on which he rests the conclusion do not amount, in my opinion, to a *semi plena probatio*. Were we, on this affidavit, to allow the examination, it would amount to this, that we must in all cases admit it on proof of the belief of a party or his agent. In general, an affidavit ought to be made to a fact sufficient to set aside the verdict.

It was said that instrumentary witnesses were examined; but their case, and that of a juryman, is very different. They may be witnesses or not

as they choose; but jurymen must attend. If proof is admitted that all the jury cast lots, where is it to stop? Suppose one juryman is bribed, or that one went on the opinion of another, are they to be examined? Such a principle would prove fatal to the institution. I therefore concur entirely in the opinion delivered.

On the other point, I think that there should be farther argument.

There was a case tried where I was the Judge, and where jurymen were examined, but there was no room for the present question. It was a reduction of a cognition, and the allegation was, that the person was a rogue, and feigned himself mad; but in that case the persons who were on the first jury were called, not as jurymen, to support or do away the verdict, but as persons acquainted with the man cognosced. It was a clear case, and the man having been before the first jury, and not being produced to the second, I said they ought to find for the defender.

Graham *v.* Newlands, 3 Mur. Rep. 531.

LORD CRINGLETIE.—I heartily concur in the opinions delivered, and my difficulty was the same as that felt by Lord Pitmilly, to keep my mind disengaged. On the principles of the law of Scotland, if there were no other autho-

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rity on which to reject it, I think this inadmissible. A jury is to be kept apart—inclosed—and are so sacred, that, if any one went with them, the verdict is null; they are debarred from intercourse with all mankind; and their verdict is held to be truth. In this case the jury delivered their verdict, and declared it theirs, and after this, and after they have had intercourse with others, are they to be allowed to annul their verdict? It would be contravention of the whole system; and I concur in the principle that it is incompetent. When there was an assize of error, they must examine the jury; but if this was competent on general principles of law, there was no use for a statute; and why was the Act 1471 passed?

I concur also as to hearing farther argument on the other point.

LORD MACKENZIE.—As I agree in the result, I shall not go into detail. I agree as to the affidavits and other external evidence, that what is sworn to is perfectly consistent with the fact, that there was no misconduct on the part of the jury; and the question comes, whether, in these circumstances, the Court can order the examination of the jury to annul their verdict. I doubt, if this objection goes merely to

granting a new trial, it would go the length that there was no verdict. If this were admitted, I see no limitation of time within which a verdict may not be questioned; and I do not know if a judgment following on it would confirm it; and I suppose it would require forty years to cure it. It is plain that in a question of this sort there is no limitation to acts of misconduct,—one may swear that *he* misconducted himself, which, if disclosed before the verdict is returned, might render it null. Would you allow one to swear that he drew lots for what he was to say? This would be contrary to the nature of this or any other institution where the deliberation is private.

If this were an open question,—if there were no authorities on the subject,—I should feel extreme difficulty in admitting any proceedure on such an allegation, especially by calling the jury to impeach their own verdict. In 1787, the rule was laid down in this country, and it is clear that at the time this Court was established this was also the rule in England. If, then, it had been intended to fix a different rule here, would not the legislature have altered this at the time it copied from England the other grounds for granting a new trial? But there is no indication that our proceedings in

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this matter was to differ from the laws of both England and Scotland.

On the other point I concur.

A New Trial granted, the Jury not having given due weight to a material piece of evidence.

During the Summer Session, the case was again brought before the Court, and, though I was not present when the New Trial was granted, the following note may be relied on.

LORD CHIEF COMMISSIONER.—The question, whether there was actual misrepresentation, is not one which it is necessary to consider, because it is allowed, and was sufficiently established at the trial, that a paper entituled, Note of Particulars, did represent this estate to be very different from the result brought out by admeasurement. Therefore, as to the fact of there being misrepresentation, I shall not say more.

The question as to the influence of that misrepresentation upon the transaction between the parties, is this,—The pursuer contends, that the representation in the note of particulars was a material inducement with him to make the purchase. He does not confine himself to its being the sole inducement, but to its being an inducement, and a most material ingredient in leading him to make the purchase. The defender contends that the note of particulars,

and the representation in it, is to be entirely excluded from the transaction, and that the sale must be held to have been made in consequence of the advice of Mr Fraser of Fingask. So there is an exclusive proposition maintained, viz. that the note of particulars did not induce the purchaser to make the bargain; and the jury have found by their verdict, that it did not induce the pursuer to make the purchase.

In considering this case, the evidence on which it depends should be distinctly characterized and well understood. On this part of the case (the inducement) there is not one single iota of parole evidence. The only testimony by a witness is that of Mr Fraser of Fingask; and his evidence was taken on commission. So that even that evidence appeared in writing, and therefore can undergo no variance in looking at it now and at the trial. The other parts of the evidence are letters, and some very few documents. All these may be resorted to in the very same state in which they appeared at the trial. They can make no different impression, then or now, other than what arises from the mode of reasoning on the facts they represent.

It is necessary that dates should be particularly attended to. The first piece of evidence, in

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point of date, is a letter of the 27th July 1826, from Mr Fraser of Fingask to the pursuer, in which he intimated, that Mr Fraser, the defender, intended to sell his estate of Belladrum. It is contended, on the part of the defender, that his advice was the pursuer's inducement to make the purchase. The parties were brought together by a letter of the 29th of July 1826; and on the 30th, there was delivered by the defender to the pursuer, what is called the note of particulars. It was delivered to Mr Stewart by Mr Fraser, the seller of Belladrum, in the house of Fingask, but, as appears from Fingask's testimony, without any intimation to him that the paper was delivered. It was taken home by Stewart, who, at the meeting had stated, that he was ready to give L. 70,000 for Belladrum. It appears that Fingask had instructed him, that he might bid from L. 70,000 to L. 80,000; and if he came up to that sum, he would not make a bargain that either he or his family would regret. He took the paper with him to his residence near Nairn; and after its being forty-eight hours in his possession, he writes a letter on the 1st of August, saying that he was ready, in consequence of having perused the note of particulars, to bid L. 75,000. Belladrum receives this

letter on the immediately following day, offering L. 75,000, induced by the note: Belladrum sends this offer to Fingask, and asks him to make a communication again to Mr Stewart. Belladrum then writes a long letter, dated the 2d of August, upon the subject to Stewart. Now, in this letter, he takes no notice whatever of the note of particulars; yet it is an answer to the letter which mentions the note as the inductive cause of the offer of L. 75,000. The note is thus allowed, by this silence on the part of Belladrum, to remain on the mind of Mr Stewart, the pursuer, as a representation of the particulars of the estate;—there is nothing said to vary its operation on his mind;—the defender does not repudiate the note;—he does not say that you ought not to have rested your calculation on the note; he does not say that doing so was altogether foreign to his purpose; he does not repeat what, it is said, he mentioned at the meeting, that it was merely made up to give information to a bank for a loan, and was never intended as the data for a purchase. He says nothing about it at all,—but allows the note, at this date, to remain, to have what influence it may on the mind of the pursuer.

The next step in the case is, that Mr Stewart, the pursuer, made a second offer, ad-

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vancing to L. 80,000; and, on that occasion, he does not again mention the note, but there is an expression in the letter containing that offer which deserves to be attended to. It is dated the 4th of August. The expression is, "Taking "all the matter relative to this subject into con- "sideration, I offer you L. 80,000." Then all the matter, it should seem to me, must refer to all that had been made the subject of consider- ation,—whatever had been represented by Fin- gask,—whatever the pursuer derived from his own knowledge of the estate, or the impression which the appearance of the estate might have made upon him,—whatever had come from the perusal of the note of particulars, for the note had not been withdrawn from consideration, it had not been repudiated, but had been allow- ed to remain to make an impression, and to operate together with the other inducements. No answer was sent to this letter of Stewart's of the 4th of August; and he wrote again to the defender on the 7th of August, requesting that he would come to a determination respect- ing the sale. On the 8th of August, Belladrum writes, accepting of the L. 80,000, and making some subordinate observations. In this letter, he allows the note of particulars to remain pre- cisely where it was; he does not remove any

impression made by it. In a day or two after, on the 10th of August, Mr Stewart, the pursuer, writes to Belladrum, the defender, requesting a general view of the public burdens on the estate, saying, they did not appear in the note of particulars. Here the note of particulars is again brought under the view of the seller by the purchaser, as a document to which he had made reference. Then comes the question, and it is most material indeed to consider it, How the seller considered this request, and what he does in respect to it? He sends a most minute statement of the burdens, more than was required, not only stating usual public burdens, but the assessed taxes; still he does not in this letter, which is written on the 13th, (a delay caused by his being absent from home when the letter of the 10th arrived at Belladrum,) make any observation with regard to the note of particulars. Here then, is a letter advancing a step further, in which the note is specifically referred to again by the pursuer. The defender returns an answer as to the matter inquired about, but he makes no observation upon his reference to the note of particulars, derogatory of its authority. This is a little more than mere want of repudiation, because it is a second instance of its being brought

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under the notice of the defender, as an instrument to which the pursuer was in the habit of referring. In this situation matters stand till Mr Stewart is desired by Mr Fraser to come to his (Fraser's) house, or to receive him at his (Stewart's) residence near Nairn, for the purpose of concluding a minute of sale. This ends in a meeting at Wilson's Hotel in Inverness. They met on the 17th August. A minute of sale is there drawn out, and that minute makes the concluding part of the transaction; whether this minute is to be set aside, depends on the Court of Session, and they depend on the verdict of a jury.

It appears that, on the 14th of August, Belladrum drew up a memorial of observations on the note of particulars; that memorial is not delivered till the day of meeting, (the 17th;) nor do I mean to attach any unfairness to this delay. It is put into the hands of the purchaser before the minute of sale was begun to be drawn out. That memorandum appears on slight inspection, as well as by minute examination, to be a memorandum prepared at the instance of Belladrum, or by himself, upon the note of particulars. It was made matter of considerable observation at the trial. I will not pretend to say from recollection, that I am,

at this distance of time, master of all the ways in which it occurred to my mind at that time; but this I feel, that it did not occur to my mind in the prominent way it has done since, as to its effect on the note of particulars. I treated it chiefly as referable to the inaccuracy of value of the estate as represented in the note of particulars. Now, by attending to this memorandum with repeated and minute deliberation, I am led to consider it as a paper advancing a most material step beyond any yet stated respecting the note of particulars. In the first letter, the note is not repudiated by the defender; in the second instance, it is not mentioned by him at all, although it is twice represented in writing as a paper to which the pursuer had reference in considering the amount he should offer. Then, notwithstanding the letter of the 13th, in which the defender makes no allusion to the note of particulars, we find that he had, on the 14th of August, completed the preparation of this memorandum, produced on the 17th. It is prepared by the defender as a commentary on the note of particulars, which is now no longer not repudiated, but is recognized and commented on in all its parts, with the exception of two items. It does not take notice of the woods, nor the thinnings,

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nor is there any reference to the difference between the arable land sold, and the arable land actually existing. Omitting those items, it is the object of this memorandum to show, that the note had contained statements under, rather than over, the truth; and in one place he says, that it may be necessary to state these particulars in order to prevent after differences. Here then is a recognition of the note, nearly three weeks after it had been passed over in silence. It is the defender who brings it forth again as a document for consideration by the pursuer, as a representation of the estate. It is evidence of the highest character that any case admits of. It is the defender's own deliberate act explaining and amplifying the character of the document, and setting forth the object he had in communicating on it to the pursuer. It proves, by his own deliberate act, that he, (the defender,) considered the note of particulars of great importance in the sale of the property; must it not then be taken as an inducement to the pursuer to purchase?

I have not been able, from the moment of the trial down to the present time, to relieve my mind of the impression, that the jury overlooked this view of the case; that they did not take a correct view of all these circumstances.

And they went on a ground they ought not to have gone on, when they excluded the note of particulars from the inducement to purchase.

This memorial on the note of particulars, proves, by the act of the seller, what he thought of it, as calculated to influence the purchaser.

All this is of importance, especially when applied to the statement made with respect to the alleged advice of Mr Fraser of Fingask. No doubt, Fingask advised the purchase ;—no doubt, he was anxious for a sale. He had more motives for this than one. No doubt, he knew the estate, and represented its advantages to the purchaser in the course of the transaction. No doubt, the second offer was made by the advice of Fingask, without his mention of the note, and that Stewart did not then refer to it. From thence, there is a strong presumption, that this advice had a share in bringing the purchaser to a determination ; but not that the note of particulars should be put entirely out of the question, and the advice made the only ground of the verdict. Upon that, the question arises ; Is a jury right who act on a presumption, and exclude evidence of this high nature from their consideration, and from making a component part of their verdict? Can it be allowed that this note of particulars had no influence, and

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was not an inducement in making the purchase of Belladrum?

On all these grounds I have no hesitation in saying, that this case ought to be tried again. I shall only farther observe, on two points, which must always occur in the anxious consideration necessary in granting new trials. The first is, Has general justice been obtained by this verdict? The question is not, whether the purchaser has had a good or bad bargain, but whether he was induced, by such and such means, to enter into the purchase. The justice of the case consists in our being able, here, a delegated Court, to send back to the principal Court, issues on which we can conscientiously say there has been a correct finding. If we feel convinced that there has not been a correct finding, we ought to say, that this case must be tried again, in order that another jury may give a correct verdict. The other is a general point, Whether there will be any encroachment on the province of the jury? I do not mean to enlarge on this topic, because the same consideration is brought under our notice in every case of new trials. But if ever there was a case safe from the risk of that encroachment, this is it: There is no parole testimony,—nothing in the appearance of wit-

nesses,—nothing in the way in which they gave their evidence, or in their character, or the contradictory nature of their testimony. None of these matters, all of which it is more peculiarly the province of a jury to judge of, could have had any influence on the present occasion. Upon the question of misrepresentation and inducement, it is all written evidence, so that there is a security against even the appearance of an encroachment upon the province of the jury. I do not mean, however, to insinuate, that, had the same testimony come in the shape of oral evidence, and had the same facts been brought forward in that way, I would not have drawn the same conclusion; but it is a satisfaction to my mind, and it may be to that of the other Judges, that there is this additional consideration for granting a new trial, even although we could not otherwise have considered it to be an encroachment on the jurisdiction of the Jury.

Lords Pitmilly, Gillies, and Mackenzie, expressed their concurrence in this opinion.

LORD CRINGLETIE.—I regret that I am single on this occasion, but, as duty cannot be dispensed with, I will state my reasons for being

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so. The issue is, " whether," &c. and the question is entirely, whether the note of particulars so much relied on by Mr Stewart misled him to make this purchase; or whether he would not have made it if the note had never existed? It being my opinion that he would, I should have concurred in the verdict; and the plea for setting it aside, being that it is contrary to evidence, I must be excused for giving my vote against the motion. When we look at the correspondence in this case, I cannot see how it is possible to do otherwise.

The first suggestion with regard to the purchase is made by Mr Fraser of Fingask, and his letters prove him to have been more the friend and ally of Mr Stewart than of Belladrum.

[His Lordship then quoted several passages from the correspondence, to prove that he was so, and to shew that Mr Stewart acted on his advice, both before and after seeing the note of particulars, and that after Belladrum refused the offer of L. 75,000, Fingask again advised the pursuer to offer L. 80,000.]

From this correspondence, I cannot draw any other conclusion than that it was by Fingask's advice he made this offer. We have no reason whatever to suppose that Belladrum did not

give every proper explanation when he delivered the note. What he says justs comes to this, If you look on the note as a correct measurement, or any thing else of the kind, you will not make that use of it which was intended; but if you wish for a measurement, there is a person at present employed in making a survey of the property.

There is no statement in the memorandum which can warrant us in supposing that Belladrum considered the note of particulars to have been founded on by Mr Stewart; and it does appear to me that the purchase was made, not by the misrepresentation of the seller, but by the advice of a person who had been factor on the estate for fifteen years in absence of the proprietor.

But it has been urged that there should be a new trial, because the verdict is contrary to the opinion of the Court, and that the evidence being written, the conclusion from it must at all times be the same; but does it follow that every one is to be of the same opinion, though the evidence remains the same? There may be as good ground for difference of opinion on written as on parol testimony. I do not see why the Judges should decide on this, more than on the parol evidence, as both were laid before the

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jury for their decision; and if this is to be decided entirely according to the opinion of the Judges, it ought not to have been sent to the jury. But there was conflicting evidence; and are the jury not to decide in such a case? I apprehend that most unquestionably they are.

I am not much acquainted with English law; but I am sure that, according to the spirit of that law, we cannot say that this verdict is contrary to the evidence. Before a new trial is there granted, it must be shown that the verdict is contrary to all the evidence; and it must be so clear that it is impossible for any one to think otherwise. Wherever there is ground for a doubt on the import of conflicting evidence, there is no instance of a new trial being granted, particularly where the verdict is consistent with justice. Allowing a new trial in this case is contrary to practice, and a dangerous attack on the privileges of the jury. I have not only looked into Mr Grant's book on New Trials, but also the authorities referred to; and it is laid down in one and all of them, that a verdict is not to be disturbed where it is consistent with justice, even although contrary to the opinion of the Court. In Ashers's case, the rule was discharged. Lord Kenyon has laid it down, that where the jury may have had something

to go on, the question is, whether their verdict is agreeable to justice, and if so, it will be sustained. Even objections in point of law have in some instances been got over to support a verdict.

Where is the justice of this case? It is said the pursuer founded on the note of particulars, and it is clear that that note was not consistent with truth. But what is Belladrum's conduct when he found that the pursuer rested on it? He writes immediately, allowing the pursuer to resile if he either considered himself to have been imposed on, or that he had paid more for the estate than it was worth. When this is refused, must we not hold that the pursuer had a good bargain.

By the law of Scotland no such claim is competent, as for a diminution of price on account of the subject purchased not being worth the money paid, or agreed to be paid for it. The law is, that the subject must be abandoned, or the price of it paid. All our authorities are agreed that there is no such action recognized as that of *quanti minoris* in the Roman law, and if Belladrum had here taken his position, the present question could not have occurred. The pursuer would have been told, you must either give up the bargain or abide by it. I do

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not know how Belladrum was led to enter into this question; but it appears to me that we shall be giving a decision against law and justice if we disturb this verdict. This is what in England would be called a hard case.

I am sorry to be obliged to differ from your Lordships; but it is impossible for me to give a vote contrary to my understanding, and contrary to my conscience.

LORD CHIEF COMMISSIONER.—The effect of what has been delivered by the majority of the Court is, that there must be a new trial. I have not the least intention of resuming any thing on the merits of the question. But I have to observe, that it has always been my wish to bring matters to such an understanding in the Court, on all subjects, by discussion and intercourse, as to produce agreement in opinion. I can never fail to recollect, what ought to be impressed on every mind, the great benefit which justice derived by Lord Mansfield's pursuing this plan. That illustrious Judge, in the great question of literary property, mentions this in a way to show the advantage which justice derives from the Judges advising together; and Sir James Burrows, his reporter, by his remarks in another case, where a second

difference of opinion arose, states with what correctness and purity these discussions and conferences had been conducted. Lord Mansfield says, that he had presided in the Court seventeen years, and that this was the first instance of a difference of opinion.*

I am sure there is not a more conscientious

* Lord Mansfield says,—This is the first instance of a final difference of opinion in this Court, since I sat here. Every order, rule, judgment, and opinion, has hitherto been unanimous. That unanimity never could have happened, if we did not among ourselves communicate our sentiments with great freedom; if we did not form our judgments without any prepossession to first thoughts; if we were not always open to conviction, and ready to yield to each other's reasons.

We have all equally endeavoured at that unanimity upon this occasion; we have talked the matter over several times; I have communicated my thoughts at large in writing, and I have read the three arguments which have now been delivered. In short, we have equally tried to convince, or be convinced, but in vain. We continue to differ; and whoever is right, each is bound to abide by, and deliver that opinion which he has formed upon the fullest examination.—Millar v. Taylor, Burrow's Rep. Vol. 4. p. 2395.

It is remarkable, that, excepting this case, and another, (the preceding,) there never has been, from the 6th November 1756 to the time of the present publication, (1770,) a final difference of opinion in the Court in any cause, or upon any point whatsoever. It is remarkable too, that, excepting these two cases, no judgment given during the same period, has been reversed, either in the Exchequer Chamber, or in Parliament; and even these reversals were with great diversity of opinion among the Judges.—Burrow's Remarks on the case of Perrin, &c. v. Blake, Vol. 4. p. 2582.

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Judge, or one who is more desirous to meet the ends of justice, than the learned Judge who now dissents from us. I shall only add this, and no more, which is, that the learned Judge has referred to some of the views taken of cases of new trial in England, and to some other matters which relate to the discretion used there. To this I shall make no detailed reply now; but it is my duty to say, that I cannot help believing, that, on full consideration, it will be found, that the precise purview of these cases has not been rightly understood. It would ill become me to have said any thing of this kind, had it regarded a question of Scotch law; but where it is upon the law of England, the case is different. In the law of all countries, those who have practised in the particular law, acquire an understanding of the cases, especially in matters depending on discretion, which no course of reasoning, or reading, can adequately supply. Possessed of this, in relation to the law from which this system is taken, I cannot admit that there are any grounds whatever for inferring that we have, in the most distant degree, infringed upon the privileges of the jury.

Mr Skene.—It has been hitherto the practice to grant new trials only on payment of costs.

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The Dean of Faculty.—I know of no such general rule: I rather think the ordinary practice is to divide the costs.

Mr Skene.—Most indisputably not.

Order given for a New Trial on payment of costs.*

Jeffrey, D. F., Hope, Sol.-Gen. and *Cockburn*, for the Pursuer.
Skene, Buchanan, and *Robertson*, for the Defender.
(Agents *Carnegie & Shepherd.*)

PRESENT,

THE LORD CHIEF COMMISSIONER.

CRAWFORD *v.* MILL, &c.

1830. March 15.

Damages to the relation of a person deceased, against the farmer of the Post-horse Duty, for having wrongfully stopped a coach conveying company to a funeral.

AN action of damages against the tacksman of a toll-bar and his servant, and the farmer of the post-horse duty and his servant, for stopping one of the mourning coaches attending the funeral of the pursuer's brother.

DEFENCES for the farmer of the post-horse

* The case was again tried on the 28th and 29th December 1830, when the following verdict was returned:—"Find on "the 1st issue, that, on the 4th of August 1826, the pursuer of-"fered to purchase from the defender the estate of Belladrum "at L. 80,000,—that, on the 8th of August, this offer was ac-"cepted, and, on 17th August, the contract of sale was signed "—on the 2d issue find for the pursuer.