1793. *July* 9.

WILLIAM DANIEL ARTHUR FRANK, and his Tutor *ad litem*, *against* JAMES FRANK, and Others.

No. 30.

Instrumentary witnesses may be examined as to the facts of their having seen the granter subscribe, or heard him acknowledge his subscription.

Act 1681. C. 5.

Charles Frank disponed his estate of Bughtrig to James Frank and others, passing by William Daniel Arthur Frank, his heir-at-law.

In a reduction of his settlement, at the instance of the latter, the reasons insisted on were, 1*mo*, That the instrumentary witnesses did not see the granter adhibit, nor hear him acknowledge his subscription; 2*do*, His mental incapacity.

After several witnesses had been examined upon the whole cause, the pursuer proposed to bring forward the instrumentary witnesses in suppport of the first ground of reduction. This being objected to, the Lord Ordinary took the cause to report on minutes, and a hearing in presence was ordered, when the defender

Pleaded: The essence of every writing is the will of the party, and to secure its authenticity, various regulations have been adopted. For this purpose, originally the seal of the granter, afterwards his subscription in the presence of witnesses, was required, 1540, C. 117. As the subscription of the witnesses, however, was not declared necessary, the validity of every deed depended upon parole testimony; and indeed the Court were accustomed to allow even the names and designations of the witnesses, when omitted in the body of the deed, to be proved in this manner.

It was the object of the act 1681, to prevent the uncertainty arising from this practice, by rendering the evidence of the due execution of deeds altogether independent of parole proof. It states in its preamble, that it was intended to remove the evil arising from witnesses, through forgetfulness, denying that they were present at the execution of the deed. It makes any omission in point of solemnity fatal to its validity; it declares, that subscribing witnesses only shall be probative, and that witnesses subscribing without seeing the granter subscribe, or hearing him acknowledge his subscription, shall be punished, as accessory to fogery. It is evident, therefore, that the subscriptions of the witnesses were meant to be *probatio probata* of the fact which they attest. No other witnesses can be examined with regard to it, and no credit could be given to instrumentary witnesses denying *ex intervallo*, what they had solemnly attested to be true, at a time when they could not possibly be mistaken.

The fact which subscribing witnesses attest, cannot make a deep impression on their minds; and when it is considered, how apt, even when their is no fraud in the case, any man, particularly a man of low education, (and the witnesses adhibited even to the most important deeds are generally of that description), is to convince himself that he has not seen what he does not recollect to have seen, the danger of allowing their examination must be evident.

Witnesses attesting a falsehood may be punished as accessory to forgery; it never therefore could be meant that their guilt should be probative by their own oath.

As to the practice of the Court, no weight can be given to questions upon deeds executed prior to the act 1681, and as little to those where instrumentary witnes-

ses have been examined on acts before answer; but in no case has this objection been repelled. In the case 25th June 1760, Farmer, No. 71. p. 16849. instrumentary witnesses were allowed to depone, that they had not heard the notaries get authority from the granter to sign for him; but there, as well as in the late case of Lothian, (not to mention that the latter went upon different grounds), they were not called on to contradict their own attestation, because the docquet was silent as to the facts wished to be proved by their evidence. No. 30.

The law of England is agreeable to the doctrine here maintained, 11th May 1768, Burrow, vol. 4. p. 2224.

Answered: Before the act 1681, parole proof was uniformly admitted; Erskine, B. 3. Tit. 2. § 11; and if so material an alteration as its total exclusion had been intended, the act would have contained an express enactment to that purpose.

Witnesses might forget that they were present at the execution of the deed. The statute, as its preamble bears, was intended to remedy this evil; Ersk. B. 3. Tit. 2. § 13. But it is not said, that their subscription shall exclude all further proof; on the contrary, they are declared to be the only witnesses whose evidence may be taken.

The object of the statute was not only to secure the authenticity of the granter's subscription, but to afford evidence of his will; and it is not disputed, that instrumentary witnesses may be examined as to every circumstance which does not strike against the truth of their own attestation. But if it be competent to ask an instrumentary witness, whether the deed was extorted from the granter, and he should answer he did not know, it must also be competent to enquire into the cause of his ignorance; if he should say that he was absent, he would thus contradict his own attestation.

Besides, if their evidence is excluded, every deed, however fraudulently obtained, if *ex facie* regular, must be supported; for in such cases care will be taken that no person shall be present, except the parties and the instrumentary witnesses.

Socii criminis are admitted as evidence even in criminal trials, reserving all objections to their credibility. No more is asked in the present case. A deed otherwise unexceptionable would not perhaps be set aside solely by the evidence of the instrumentary witnesses; but where fraud is alleged, their evidence may safely be taken in support of the other circumstances of the case.

In the case, November 1682, Stevenson, Sect. 4. *h. t.* at a period when the act 1681 must have been well understood, a bond was set aside, because one of the instrumentary witnesses deponed he had not seen the granter subscribe. They have often been examined since; and if the same objection has not been repelled, it shows that the point must have been considered as so clear that it was unnecessary to state it.

Observed on the Bench: It has been the uniform practice to examine instrumentary witnesses, and the objection only goes to their credibility. But as their evidence may involve them in the punishment of accession to forgery, they may,

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if they think proper, decline answering any question which tends to criminate themselves. If at a distance of time they should depone that they did not recollect, or even if they should deny the fact they have attested, their evidence, *per se*, probably would not be held sufficient to set aside the deed. The case quoted from Burrow is not inconsistent with this opinion. Respectable persons only should be employed as witnesses.

The Lords unanimously "repelled the objection to the examination of the instrumentary witnesses, reserving all objections to the credibility of their dispositions."

Lord Reporter, *Eskgrove.* Act. *Dean of Faculty, W. Erskine.*
Alt. *Solicitor-General, W. Murray.* Clerk, *Menzies.*

D. D. *Fac. Coll. No.* 70. *p.* 152.

1795. *March* 3.

WILLIAM-DANIEL-ARTHUR FRANK, and his TUTOR *ad litem*, *against* JAMES FRANK and Others.

No. 31.

A deed, *ex facie* regularly executed, sustained, although one of the instrumentary witnesses, when examined *ex intervallo*, deponed, that he did not see the granter subscribe, nor hear him acknowledge his subscription.

It is not essential, in point of solemnity, that the witnesses should subscribe *in presence* of the granter, or that the deed should never be out of their sight, in the interval betwixt his

In the reduction of the settlement of the estate of Bughtrig, executed by Charles Frank on the 18th February 1791, the instrumentary witnesses were examined soon after the interlocutor of the 9th July 1793, *(supra)* allowing their evidence to be taken; and the proof on the whole cause being concluded, a hearing in presence took place, when the pursuer, besides endeavouring to establish that Charles Frank was in such a state of mental imbecility as to be incapable of making a settlement, contended, that the deed was defective in point of solemnity:

1*mo*, Because one of the instrumentary witnesses did not see the granter subscribe, nor hear him acknowledge his subscription;

2*do*, Because the instrumentary witnesses did not subscribe in presence of the granter, but in an adjoining room, and after the deed had been for some minutes out of their sight, and in possession of the writer of it.

Besides the granter, who was confined to bed, the persons supposed to be present at the execution of the deed, were the writer and instrumentary witnesses; a maid-servant was likewise at the door of the room. Of these, Tod one of the witnesses, and servant to the granter, deponed, That he did not see him subscribe, nor hear him acknowledge his subscription; that just as he was entering the room, and before he had got far enough to be able, from the situation of the bed, to see the granter, he was desired by the writer to go into an adjoining room, which he accordingly did. The evidence of the maid-servant was supposed by the pursuer to support his account of the matter. On the other hand, the writer declared, that he did not begin the execution of the deed till the arrival of Tod, who had been sent for on purpose to be a witness; that Tod, from modesty, stood near the door; but that he (the writer) would not have gone on with the opera-