
 PRESENT,
 THE THREE LORDS COMMISSIONERS.

 SETTON v. SETTON'S TRUSTEES.

1816.
 February 24.

THIS was a reduction and improbation of a trust-disposition and deed of settlement by the late Adam Setton, of the Glasgow and Dumbarton Glasswork.

Several grounds of reduction were stated; the fifth was, that the name of Mary Johnston, one of the instrumentary witnesses, was a forgery. Lord Gillies, Ordinary, appointed parties to give in articles improbatory and approbatory, in order to a proof of that ground; reserving consideration of the others, and of the pursuer's title to pursue. When given in, his Lordship held these as a condescendence and answers; and after reporting to the Court, approved of the following

The subscrip-
 tion of an in-
 strumentary
 witness having
 been written
 by a third
 party, while
 the witness
 merely touched
 the pen, found
 not a genuine
 subscription.

ISSUE.

“ Whether the name of *Mary Johnston*,
 “ subscribed as an instrumentary witness to a
 “ writing produced in this cause, and entitled,
 “ *Disposition and Deed of Settlement by Mr*
 “ *Adam Setton*; and purporting to have been
 “ executed at Glasgow, on the 4th day of

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“ March 1814, is a forgery, or the true and
“ genuine subscription and proper handwriting
“ of the said Mary Johnston ? ”

Macleane, one of the instrumentary witnesses, was a clerk in the glasswork, and it appeared from his deposition, that, after subscribing his own name as one witness to the deed, Mary Johnston, Setton's servant, was called in as the other. As she was not in the habit of writing, it appeared from his deposition that he wrote the words “ Mary Johnston, witness,” while she touched the pen in token of approbation.

Mary Johnston, when called as a witness at the trial, stated, that, with assistance, she signed the deed in question, but did not recollect whose hand was next the paper when she signed. She did so to please Mr S. then very ill, and Maclean said none could object as she did not.

Being called on to write her name in Court, it was objected that she might not be able to write in such a situation ; but the Lord Chief Commissioner said, this is not a valid reason for excluding the experiment, but may be matter of observation for the counsel to the jury.

It is competent, in a Reduction and Improbation, to read to the Jury the deposition of a witness examined on commission.

The pursuer offered in evidence the deposition

tion of Maclean, who, on account of bad health, had been examined on commission at Glasgow.

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Moncreiff objected. It is in all cases a delicate matter to lay a proof taken on commission before a jury. In a reduction and improbation, it is incompetent. The Court of Session would not have granted a commission, as the action contains conclusions of a criminal nature. The answers of the witness may subject *him* to a criminal prosecution. The pursuer ought to delay his case till the witness recovers.

Stair, IV. 20,
22.
Form of Pro.
Court of Ses. I.
302.
Hume, I. 232.

LORD CHIEF COMMISSIONER—It is for the interest of litigants, that, in some instances, the Court should grant commissions to examine witnesses on interrogatories. This is done, not as the best mode of examining, but as the best that can be employed in the circumstances of the case. Here the commission was at first refused, the affidavit not stating the illness of the witness to be of a permanent nature ; but, on a certificate to that effect, Lord Pitmilley most properly granted the commission. It is not, therefore, a case in which the trial should be put off, in hope of the recovery of the witness, as it is proved, and not contradicted, that his illness is of a permanent nature. The

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other witnesses might die, or come into a situation that required their examination on commission. The pursuer, in bringing on his case, has done no more than he was fully entitled to do.

The objection, that a man is not bound to criminate himself, is personal to the witness. The commissioner would inform him on this subject. It is an objection to his evidence being taken, if he makes the objection, not to its being read, if it is given.

The examination of witnesses *in præsentia* must, I conceive, in the other Court, be regulated by circumstances, and I have no doubt that they would grant a commission if a certificate was produced to them, stating a witness to be unable to attend, and his illness to be of a permanent nature.

LORD PITMILLY.—I entirely concur in this opinion. In the Court of Session I would grant a commission if it was made out that the witness could not attend. Every evil must have a remedy; and if I am satisfied that the witness cannot be brought into Court, I must grant commission, because injustice would be done by refusing it.

Crosbie and
Picken, v.

Cranstoun, in his opening speech for the

Crosbie, Nov. 30, 1749. M. 16814. Pringle v. Keill, Feb. 1735, M. 16110. Robertson v. Young, Dec. 20, 1744. Falconer v. Arbuthnot and Others, Jan. 9, 1751, M. 16817.

pursuer, said he would prove that the hand of the witness had been led, so that this was not her signature, (Crosbie, &c.) and he cited many cases where the *party* had been assisted in subscribing his name, and the deeds were set aside. The present case is much stronger, as there is a choice of persons who may be witnesses.

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Moncreiff argued, for the defender, That the cases mentioned on the other side were decided on the principle that the law had pointed out a mode of rendering a deed valid, when the party could not write. The question here is not whether the deed is valid, but, is this Mary Johnston's subscription? and she swears that *she wrote it* with assistance. He then mentioned a number of instances in which the degree of assistance would not render the writing invalid.

1681, c. 5.

LORD CHIEF COMMISSIONER.—In this issue the term forgery does not mean the criminal act of forging another person's signature, but whether it is such a fabrication as to render the signature not the true and genuine subscription of Mary Johnston. If, therefore, you think it made out that it is not the genuine subscription, you will find so.

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Mary Johnston is a respectable and honest witness. She says she had long given over writing her name, and the other witness in substance gives the same account. If you compare Maclean's subscription with the words Mary Johnston, you will find they are written by the same hand, with the difference occasioned by her touching the pen at the time he wrote her name. If you compare this with what she wrote in Court, you can only come to one conclusion. She does not recollect how she held the pen, but Maclean swears that he wrote the words, and she touched the pen in token of giving her consent. This is positive testimony, in opposition to her want of recollection, and seems to me to establish the writing to be that of Maclean, and not of Mary Johnston.

The Jury found, “ That the subscription
“ Mary Johnston, adhibited to the deed refer-
“ red to in the issue, is not the true and genu-
“ ine subscription, and proper hand-writing, of
“ the said Mary Johnston.”

Cranstoun and Henderson for the Pursuer.

Moncreiff for the Defender.

(Agents, *James Smaill* and *John Thorburn*.)