

No. 30.

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 ease 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:

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

2do, 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-

tion, if he had not understood that the witness might, from his situation, have seen the granter subscribe. The other instrumentary witness recollected Tod's arrival being announced, and that he stood a little aside, in order to make way for him; but that he did not look round to see if he was actually present.

It was admitted by both parties, that immediately after the deed was subscribed by Mr. Frank, the witnesses retired into an adjoining room, to which they were soon after followed by the writer, who brought the deed along with him; and that they then adhibited their subscriptions to it. It was not quite fixed what time elapsed between the witnesses retiring and their being joined by the writer; at most, it did not exceed a quarter of an hour.

From the whole circumstances of the case, both parties drew a conclusion favourable to themselves on the first objection to the execution of the deed.

In support of the second, the pursuer

Pleaded: Both the words and spirit of the act 1681 require the deed should be subscribed *unico contextu*, and in presence of the granter. It prohibits the witnesses from subscribing, "unless they then knew the party, and saw him subscribe, or heard him give warrant to a notary, and in evidence thereof touch the pen, or that the party did at the time of the witness's subscribing acknowledge his subscription." It will not be disputed, that if the witnesses should not adhibit their subscriptions for a week or month after it was signed by the granter, or his subscription acknowledged by him, the deed would be ineffectual; yet, if it is not essential that they should subscribe in presence of the granter, it seems impossible to draw the line.

The strict observance of the statutable solemnities, is, besides, particularly necessary with regard to a deed executed *mortis causa*. Indeed, one great object of their introduction was to protect dying persons from the frauds of those around them. It is easy, however, to see with what facility such fraudulent practices might be carried into effect, and one deed substituted in place of another, if it were competent for witnesses to subscribe *ex intervallo*, and after the deed had been out of their sight. This objection is accordingly supported by the law of England, 29th Cha. II. C. 3. § 5.; and of Rome, Voet, Lib. 23. T. 1. § 6.; and although there are no decisions of this Court directly in point, the necessity of deeds being completed *unico contextu*, is established in cases where notaries subscribe for the principal party; 23d January 1624, Macmorran against Black, *infra h. t.* 20th March 1633, Cow against Craig, *infra h. t.* 27th December 1711, White against Knox, *infra h. t.* 1st July 1767, Rollands, *infra h. t.*; 6th December 1695, Elliots against Riddell, No. 59. p. 16838.; and in mutual contracts, *vide supra h. t.*

Answered: The solemnities required in the execution of deeds depend entirely on statute-law, there is therefore no reasoning by analogy from the laws of one country to those of another. In England, an express statute (29th Cha. II. C. 3. § 5.) has established, that the witnesses must in certain cases subscribe in presence of the granter,; and if the same had been intended by the act 1681, it would have expressly declared so. All that that statute requires, however, is, that the witnesses should see the granter subscribe, or hear him acknowledge his subscrip-

No 31.
and their sub-
scriptions.

Act. 1681.
C. 5.

No. 31. tion: Accordingly, in practice, it is not understood to be essential, that deeds should be subscribed by the witnesses in presence of the granter. On the contrary, it is very common, in cases where there are several parties to a deed, for the man of business to put it into the hands of two of his clerks, who carry it round to the different parties, and after getting it signed by them *seriatim*, subscribe themselves as witnesses once for all to the whole subscriptions.

The Court (one Judge only excepted) were clearly of opinion, that Mr. Frank was capable of making a settlement; that the deed under reduction was executed agreeably to his intention; and that no improper means had been taken to obtain it. Indeed none of the persons favoured by it resided near the granter, or knew any thing of its execution.

On the other objections, it was

Observed on the Bench: When a deed is *ex facie* regularly executed, there arises a strong legal presumption in its favour; and it lies upon him who attempts a reduction of it, to establish his objection by legal evidence. Judging from the whole circumstances of this case, it is not proved that Tod did not see the deed under reduction signed by Mr. Frank. On the contrary, it rather appears that he was in the room, and in a situation where, if he had chosen, he might have seen him subscribe it. It must therefore be presumed, notwithstanding his deposition, that he did so. It would be extremely dangerous to set aside a deed, *ex facie* fairly and regularly executed, upon the evidence of an instrumentary witness, unless it be completely corroborated by other circumstances, particularly when that evidence is given *ex intervallo*, and when a wrong account of the matter, whether from the design or want of recollection, may be suspected.

The act 1681 does not require, in point of solemnity, that the instrumentary witnesses should subscribe in presence of the granter, or that they should not lose sight of the deed in the interval betwixt his and their own subscriptions; nor has it been so understood in practice. The presumption of law is, that witnesses will not subscribe a deed unless they are satisfied of its identity; and although there never ought to be any considerable interval; yet, when such a case occurs, it must be judged of upon its whole circumstances.

The Lords, (4th December 1794), by a great majority, “repelled the reasons of reduction;” and on advising a reclaiming petition, with answers, they “adhered.”

Lord Ordinary, *Eskgrove*.
W. Erskine.
 Clerk, *Menzies*.

D. D.

Act. Lord Advocate Dundas, Dean of Faculty Erskine,
 Alt. Solicitor General Blair, Geo. Ferguson, W. Murray.

Fac. Coll. No. 173. p. 374.