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of Mr. Thomas Jackson, it is unnecessary to determine whether the objections to the vote of Dr. Flint ought to be sustained. And further find, that Mr. Thomas Jackson was duly and legally elected Professor of Natural Philosophy in the place of the said Dr. John Rotheram deceased. And it is further ordered and adjudged, that the case be remitted back to review the several interlocutors complained of, having due regard to these findings, and to give effect to the same.

For Appellants, *Sir Samuel Romilly, Henry Erskine.*
For Respondents, *Wm. Adam, Ad. Gillies, James Wedderburn.*

NOTE.—Unreported in the Court of Session.

[Mor. Dict. 16824.]

WM. DANIEL ARTHUR FRANK of Deptford, only lawful Son of John Frank, who was the lawful Son of William Frank of Bughtrig, in the County of Berwick, } *Appellant;*

JAMES FRANK and WM. FRANK, . *Respondents.*

House of Lords, 10th June 1809.

REDUCTION OF DEEDS—INCAPACITY—FRAUD—PROOF—INSTRUMENTARY WITNESSES, ADMISSIBILITY OF—DISQUALIFICATION FROM INTEREST—EXECUTION OF DEED.—Circumstances in which the following points were decided, and affirmed in the House of Lords:—1. That the granter of the deed was of a sound disposing mind at the time he executed the settlement challenged. 2. That the instrumentary witnesses were competent witnesses for the pursuer; reserving all objections to their credibility. 3. That the deed fell to be sustained as regularly executed, although one of the witnesses *ex intervallo* deponed that he did not see the granter subscribe, or hear him acknowledge his subscription. 4. That the act, nor the practice under the act, did not require that the witnesses should adhibit their subscriptions in the same room with, and in the presence of the granter. 5. That a party, in whose favour a bond of annuity was at same time executed, was an incompetent witness for the defender, on the ground of interest.

Charles Frank held the estate of Bughtrig, under a deed executed by his father, containing a simple destination to a

certain series of heirs, without any prohibition against altering the course or order of succession.

After his father's death, Charles succeeded as eldest son called under the deed. His father left other sons, John, (the father of the appellant), Robert, James and William, his brothers, and two daughters.

Charles, the eldest, was not born in wedlock, but was legitimated by the subsequent marriage of his parents. His other brothers and sisters were born in lawful wedlock.

In consequence of some attempts made on the part of his younger brothers to question his right to succeed to the estate, on this account his feelings had been estranged from them, and he accordingly altered the destination contained in his father's settlement in favour of his brother James, and the heirs of his body, whom failing, to Ensign James Wright, a grandson of his father's eldest sister; whom failing, to Colonel Brown, and passing over the family of his brother John, and his other brothers and sisters.

At the time he executed this deed he was much given to habits of indolence and intemperance, and from these his health had been made precarious, and his temper somewhat peculiar and uneven. Feb. 8, 1791.

It was in these circumstances he employed a writer, of respectable standing in Dunse (Mr. Turnbull), and gave him directions to make out a settlement as above described, and a bond of annuity to his maid servant, Janet Smith, and they were duly and regularly executed in the presence of Joseph Brown, his principal tenant, and James Tod, a labouring servant, called in to witness and attest the execution of the deeds. He survived the execution of these deeds for a period of three months, and died on 17th May 1791.

The appellant raised the present action of reduction to set aside the settlement so executed, on the following grounds: 1st. That it was false, forged, vitiated and erazed *in substantialibus.* 2d. That it proceeded upon a false narrative, and was subscribed by a person who had no power to grant it. 3d. That Charles Frank's father had executed a destination of succession to his estate, in which the pursuer (the appellant), his grandson, was called immediately after his uncles, who had no title to alter the same to his prejudice. 4th. The settlement was granted without any just, necessary, or onerous cause, on the 8th February

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1791, while Charles Frank was on his deathbed, and labouring under the disease of which he died. 5th. The said assignation and settlement alleged to have been granted by the said deceased Charles Frank on the 8th of February 1791 was not subscribed by him before the witnesses therein mentioned, nor did they see him adhibit his name thereto, nor hear him acknowledge his subscription to the same; on the contrary, they were ordered to go out of the room while he is said to have subscribed it, whereby it is *funditus* void and null, &c. 6th. The said settlement or other deed was elicited and impetrated by the defenders or others through gross fraud and circumvention, and to the pursuer's hurt and lesion. 7th. At the time the said settlement was executed, Charles Frank was in a state of weakness and imbecility, incapable of knowing what he was about, and easily circumvented and imposed upon.

In a condescendence, these several grounds were restricted to two, the fifth and seventh; namely, 1st. As to the execution of the deed before the witnesses; and, 2d. As to weakness and imbecility of the granter.

A proof was allowed on these heads, in the course of which the pursuer (appellant) tendered the instrumentary witnesses, in order to prove that they were not present when Mr. Frank signed the deed, and that they did not hear him acknowledge his subscription. To this it was objected, 1st. That, to admit such evidence, was to admit parole to contradict writing, and the most important of all writing, the execution of a deed which is a judicial act. 2d. It was also incompetent, because, by the act 1681, c. 5, it is declared, "That no witness shall subscribe as witness "to any party's subscription unless he then know that "party, and saw him subscribe, or saw or heard him give "warrant to a notary or notaries to subscribe for him, and, "in evidence thereof, touch the notaries' pen; or that the "party did, at the time of the witnesses subscribing, ac-"knowledge his subscription, otherwise the said witnesses "shall be repute and punished as accessary to forgery."

The Lord Ordinary thought this question of so much importance as to report it to the Court. The Lords, of this
July 10, 1793. date, pronounced this interlocutor: "Having advised the "foregoing minutes of debate, and heard parties procura-"rators thereon, they repel the objections stated to the "examination of the instrumentary witnesses, and allow

" them to be examined accordingly; reserving all objections " to the credibility of their depositions as accords "*

The proof proceeded, and the instrumentary witnesses were examined.

Janet Smith, in whose favour the bond of annuity had been granted, was tendered by the defenders as a witness; but the Court, on objection, disallowed her to be examined, on the ground of interest.

When the proof was finally concluded the Court pronounced this interlocutor:—" The Lords having advised Dec. 2, 1794. " this cause, libel, defences, writings produced, and proof " adduced, and whole procedure, and having heard parties " procurators thereon, repel the reasons of reduction, and

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* Opinions of the Judges, (*upon the Proof tendered.*)

Lord President Campbell said:—" This question regards the admissibility of instrumentary witnesses to disprove the due execution of the deed. The question of credibility is very different from that of admissibility. In all cases of the kind, the instrumentary witnesses have uniformly been examined, see Sibbald *v.* Sibbald, 18th Jan. 1776, Mor. 16906; Farmer *v.* Myles and Annan, 25th June 1760, Mor. 16849; case of Dr. Gibson *v.* Weir of Kirkwood, Session Papers, vol. 40, No. 9, (unreported), case of Hardie of Rosehall, Session Papers, vol. 48, No. 16, (unreported); case of Maxwell *v.* Mrs. Lowthian, 3d July 1792, Mor. 16853. Even in England it appears from the case of Goodtitle *v.* Clayton and others, reported by Burrow, vol. iv. p. 2225, and in other cases there alluded to, the witnesses are uniformly examined. Their evidence may be necessary to make out fraud, force, incapacity, &c., and, with a view to these grounds of challenge, independent of the statutory objection, it is competent to ask, 'Did you see him? Were you 'present? What did he say?' &c. It is admitted on all hands, that *non memini*, or even a dry negative unattended with circumstances, would be insufficient. It is of terrible consequence, says Lord Mansfield, 'that witnesses should be tampered with to deny 'their own attestations.'"

Lord Justice Clerk (M'Queen).—" If the party who executed the deed himself, were to bring the instrumentary witnesses to disprove it, there might be a personal exception. But the other party may adduce them. *Socii criminis* are admissible, though, if they please, they may object to swear *in suam turpitudinem*."

Lord Craig.—" I am of same opinion."

Lord Monboddo.—" I am of same opinion."

Lord Henderland.—" I am of same opinion."

Lord Abercrombie.—" I am of same opinion."

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"assoilzie the defenders, and decern."* On a reclaiming petition, which was ordered to be answered, the Lords adhered.

* Opinions of the Judges, (*upon the Merits.*)

LORD PRESIDENT CAMPBELL said:—"Three different questions arise, 1st. Alleged incapacity. As to this it is plain from the proof that the granter lay under no incapacity, and was of a disposing mind. It is equally clear that no undue means were used in obtaining the deed.

"2d. That the witnesses did not see him subscribe, or hear him acknowledge his subscription. As to this the *onus probandi* lies on the pursuer. They have put their names to the deed, which is *prima facie* evidence that it was regularly done, and although, no doubt, there may be room for improbatory evidence, yet this must be very strong and decisive, as it would be very dangerous to cut down deeds *ex facie* regular, upon doubtful or equivocal testimony, whether of instrumentary witnesses or others. So the Court thought in a late case, Steel, &c. 25th June 1794. (Unreported.)

"Every legal presumption is for authenticity, and it has even been doubted whether instrumentary witnesses can be at all admitted, to give evidence contrary to their attestation. See the argument in the minutes of debate. In the case of Baillie *v.* Baillie (unreported), which was compromised, the evidence was very strong and conclusive, see Session Papers, vol. 48, No. 26. That of Brown *v.* Chalmers (unreported) was a case of incapacity and undue influence, &c., Session Papers, vol. 48, No. 78. The case of Farmers *v.* Myles, &c., 25th June 1760, (Mor. 16849), was not well decided, the proof was there of a doubtful nature, and the Court ought to have sustained the deed. The case was not well argued. In a late case, Scoon *v.* Scoon, 18th Feb. 1792, (unreported), the Court sustained an execution, although the witnesses swore that they did not see the copy actually delivered, being at the distance of some yards, and without the wall of the house; but as it clearly appeared that the witnesses were near at hand, and nothing unfair was intended, the Court thought it would be dangerous to give way to their evidence *ex post facto*, contrary to the attestation, when it was possible that they had no distinct remembrance of the fact, or perhaps did not give much attention to it at the time.

"In the present case, the witnesses having been sent for purposely, and actually introduced into the room, it is incredible that they should have been instantly dismissed, without waiting a few minutes till the business was done; and if they were in the room, and had an opportunity of seeing what was going on, which they have accordingly attested under their hands, and have also proved by Turnbull

Against these interlocutors the present appeal was brought to the House of Lords by the pursuer.

Pleaded for the Appellant.—1st. At the time when the deed under challenge was executed, as well as for some

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the writer, and in part by one of the witnesses themselves, it would be very dangerous to cut down the deed upon the negative testimony of the other witness, who may have been tampered with since, and evidently exaggerates in some of the circumstances.

"3d Point. That the instrumentary witnesses adhibited their subscription in another room, and not in the presence of the party. This is a statutory requisite in England, by § 5 of the statute of Frauds, 25 Charles II. cap. 3. But there is no such clause in the act 1681. The case there mentioned in Bacon's Abridgment, vol. v. p. 509, does not apply to our practice. The words, 'at the time 'of the witnesses subscribing,' in the act 1681, are introduced into that part of the clause only which relates to the acknowledging the subscription. If they have not seen the party subscribe, they ought, when called in to sign as witnesses, to hear him acknowledge his subscription; but if they have actually seen him put his name to the paper, they cannot make any doubt of the fact; and even if the words 'at the time of,' &c. should be considered as applying to both cases, it would be a very strict and judaical construction of the act, to hold, that if either the party himself should happen to walk into the next room, or if the witnesses should happen to do so, before adhibiting their names, the whole transaction must fall to the ground. The act does not mean that it should all be done *unico contextu*, the party and witnesses being in presence of one another, and never losing sight of the paper for a moment; nor has any such rule been understood in practice; for it very often happens that there are two or more parties to a writing, such as a mutual contract, and the writer who is entrusted with the formal part of the execution, sends perhaps two of his clerks, first to one party, and then to another, to see them adhibit their subscriptions, and then the witnesses sign their names, perhaps in presence of the last subscriber only, or perhaps in presence of neither; and last of all, the testing clause is filled up.

"It is true, there ought to be no great interval of time and place; and it is a circumstance to be attended to, in a charge of fraudulent or collusive dealing, that the witnesses and parties have lost sight of one another, before the business is fully completed; but not being of the nature of a statutory solemnity, it is one of those extrinsic circumstances which will have its effect, along with others, in a case depending on evidence, but will not *per se* be conclusive.

"No testing clause ever bore that the party saw the witnesses

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time before and after that date, Charles Frank, the testator, who during his whole life had been a person of a most irregular and eccentric character, evidently tending to derangement, was not in a state of sound mind, and that the proof adduced, establishes this. This deed, likewise, was contrived and executed in circumstances peculiarly suspicious. For a year and a half at least preceding its date, the testator Frank, was entirely secluded from the presence and society of all his relations, and of almost every acquaintance of his own rank. He was surrounded merely by

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subscribe, or that they subscribed in his presence; and this shows that it is not an essential requisite.

"The law of Scotland has abundance of checks against fraud in the execution of deeds, and there is little occasion for the introduction of more; but if it be thought necessary to superadd any check of this kind, it ought to be done by special regulation, to have effect only in future, for the giving it a retrospect would make great havoc upon deeds and writings already executed, and therefore would be highly unjust."

LORD ANKERVILLE.—"As to the first question, namely, Incapacity, there is no sufficient evidence of it. But, 2d, I am of opinion that the legal solemnities have not been observed in this case. The witnesses did not see him subscribe, nor hear him acknowledge his subscription. 3d. Point.—I likewise think that this (witnesses subscribing the deed as such in another room) was an irregularity."

LORD JUSTICE CLERK (M'QUEEN.)—"1st. Point.—I think there was neither incapacity nor fraud here. 2d. Point is a more delicate question. To call a witness to combat his own handwriting or attestation, is open to many objections. After the lapse of time his memory may be frail. The witness may be tampered with. As to the third point, it is usual in practice; and there is nothing in the act against it."

LORD ESKGROVE.—"1st. Point.—No incapacity. 2d. Point.—The *onus probandi* lies with the objector; but I think no sufficient evidence has been adduced,—Case of Steel."

LORD SWINTON.—"Turnbull, the agent, who wrote this deed, is a man of character. I agree as to the first two points. But my difficulty is as to the third point. There is no good reason for any interval here."

LORD DREGHORN.—"I doubt as to the insanity."

LORD DUNSINNAN.—"The statute, as to the last point, seems to support the opinion that they must be present at the time; and perhaps inquiry should be made as to the practice on this subject."

President Campbell's Session Papers, vol. 77.

domestic servants. During this period of his imbecility, Janet Smith, one of these servants, possessed over him an unbounded influence, which she employed in gratifying her deep-rooted resentment against his whole family. She prevailed upon him to exclude them all, and their descendants, from the succession of his estate for ever, with the single exception of the original liferenter, who was not the heir at law, and who had been for many years resident in India. 2d. It was clearly ascertained by the evidence, positive and real, before stated, that James Tod, one of the instrumentary witnesses, did not see, and could not have seen, Charles Frank, the testator, subscribe the deed under challenge; nor did he hear him acknowledge his subscription. The fact being thus established, the necessary conclusion is, that this deed must be declared irregular and improbative, and must be set aside under the authority of the statute of the Parliament of Scotland in the year 1681, c. 5, already cited. Nor can it be a subject of regret that the deed thus exposed to a statutory objection, should be declared void, because the result will be, only to open the succession to the heir at law, who, according to the expression of Lord Raymond, "is favoured in all courts." Besides, in this case, the heir at law was the person intended by the testator himself—an intention often declared by him to others for many years before his death. Instead of which intention taking place, (in consequence of the death of James Frank during the dependence of this cause), the estate must now go to mere strangers.

Pleaded for the Respondents.—1. Because it appears from the evidence that the deed now in question contained such a destination of the estate of the deceased as he had long contemplated; that he was of sound and disposing mind when he gave instructions for the execution of this deed; and that those instructions were the spontaneous dictates of his own mind, and not brought about by the importunity, solicitation, or suggestion of any person whatever. 2. Because the deed prepared in consequence of these instructions, was duly executed by the granter when of a sound and disposing mind; and, 3d, It was duly attested by the subscribing witnesses, with all those forms and solemnities which the law of Scotland requires in such cases.

After hearing counsel, it was

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Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellant, *Henry Erskine, Wm. Erskine, Ar. Fletcher.*

For the Respondents, *Sir Samuel Romilly, Joseph Murray.*

CATHERINE GORDON, Spouse of WALTER STUART, Excise Officer at Cairnton (a Pauper), and him for his interest, } *Appellants;*

AGNES TOUGH, Widow and Disponee of WILLIAM GORDON, deceased, in Links of Arduthie, near Stonehaven, } *Respondent.*

House of Lords, 13th Feb. 1810.

TRUST—PROOF—PAROLE.—ACT 1696, c. 25.—Circumstances in which a trust was allowed to be proved by facts and circumstances, and the correspondence of the parties, in regard to a lease granted to the trustee *ex facie* absolute. Affirmed in the House of Lords.

The farm of Arduthy was let on a long lease to John Tough, and, several years thereafter, he subset to the respondent's husband, the deceased William Gordon, those parts of the farm called the Bog of Arduthy, the Muir, the Whiteley, and the Puttieshole. Mr. William Gordon did not obtain possession of the whole of this farm at one time, a small part of it, for which he was to pay the yearly rent of £8, was let to him in the year 1781; and another part, called the Muir of Arduthy, was set to Mr. Gordon, by a missive, at the rent of £11. 4s. for a period of 47 years from Martinmas 1783. Thus the total rent which Mr. Gordon was to pay to Mr. Tough was to be £19. 4s. annually, for a very long lease of the lands.

In the year 1784, finding that particular business would render it necessary to go to London, and leave Scotland for several years, Mr. Gordon arranged his lease matters so that, in his absence, no attempt should be made to carry off his property, in payment of debt which he was owing, and, to carry out his views, he resolved, as was alleged by the respondent, but denied by the