HARKNESS
v.
HARKNESS.

DUMFRIES.

PRESENT,

LORD CHIEF COMMISSIONER.

1821.
September 14.

HARKNESS *v.* HARKNESS.

Found that a deed was truly dated—that one party was of sound mind, and not labouring under the disease of which he died; but that the subscription of the other party was not genuine.

REDUCTION of a postnuptial contract of marriage.

ISSUES.

"1*st*, Whether the deed in process, bear-"ing to be a postnuptial contract of mar-"riage between the late John Harkness in "Burnside of Poolmuir, and the defender, "Janet Burgess, or Harkness, and bearing to "be dated the 12th day of January 1811, "was subscribed by the said John Harkness "on the said 12th day of January, or on or "about the 12th day of February 1811, or "upon a day subsequent to the 5th day of the "said month of February, and within 60 days "of his death, which is admitted to have taken

"place on the 5th day of April of the said "year?

"*2d*, Whether, at the time of signing the "said deed, the said John Harkness had con- "tracted and was labouring under the dis- "ease of which he afterwards died?

"*3d*, Whether the name of Janet Burgess, "the defender, subscribed to the said deed, is "the true and genuine subscription and pro- "per hand-writing of the said defender; or "Whether the hand of the said defender was "led or directed when she made the said sub- "scription?

"*4th*, Whether at the time the said John "Harkness subscribed the said deed, he was "of a sound and disposing mind, and capable "of understanding his affairs?"

Whigham opened the case for the pursuer, and admitted, that when regularly executed, a deed was the best evidence of its own date, and that for a long period it was incompetent to examine the instrumentary witnesses, but since 1793, that point has not been mooted.

Forsyth, for the defender.—This is a most important question; whether a solemn deed is to be cut down on the faith of the slippery memory of witnesses.

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Jeffrey.—This is decided against the defender.

LORD CHIEF COMMISSIONER.—The only thing the Jury or I have to do with, are the facts; and you have only to apply yourself to the proof of these facts.

Forsyth.—It is said the hand was led; but there is only one witness to this, and he an instrumentary witness, which is incompetent; 1540. c. 117, and 1681. c. 5. An instrumentary witness may now be examined, but his credit is brought in question. Frank *v.* Frank, 3d March 1795, M. 16,824, Aff. 10th June 1809; Falconer *v.* Arbuthnot, 23d June 1750, M. 16,759; Bell, Test. Deeds, p. 101; Setton *v.* Setton's Trustees, Vol. I. p. 9.

Jeffrey.—There are here substantially only two questions, Whether this person's hand was led? and Whether the deed was signed on 12th January. It is said an instrumentary witness swearing against his subscription, is infamous; that is a fit point for the honest mind of a Jury.

LORD CHIEF COMMISSIONER.—This is a most important question in many points of view, and requires minute attention. There is no doubt, that since the case referred to,

instrumentary witnesses may be examined; but their evidence must be narrowly examined, and weighed in the nicest scales. This observation applies to a great part of the case; and keeping this in view, and that we have nothing to do with the law of the case, we must consider the Issues. The question in the first is, Whether this deed was signed of the date it bears? and if you are of opinion that it was, it will take the case out of the law of death-bed, and render it unnecessary to find on the second.

This date is impeached, on the evidence of the instrumentary witness; but are you to take his loose testimony, that he does not *think* the deed was signed on that day, (especially when he does not mention any other) to cut down a deed, the veracity of which he certified by his signature? Are you to believe the fact correctly done; or are you, on such evidence, to set aside a solemn instrument protected by the legislature?

On the second Issue, the evidence also appears to me too loose to be rested on; but if you go along with me on the first, it is not necessary to make a return on this.

The fourth Issue Mr Jeffrey has most properly given up; but upon the third, the evi-

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dence will require your most particular attention, to ascertain whether this was her genuine subscription, or if her hand was led.

This woman is stated by the witnesses to be a person not in the habit of writing,—that on one occasion she attempted to write, but could not; and that on more than one solemn occasion, she said she could not write; and this is evidence, independent of the instrumentary witness.

If you are of opinion that the instrumentary witness is confirmed by concomitant circumstances, you must find accordingly; but if there is doubt, you must rest on the solemn deed. In this case, I do not think the evidence can be rejected as that of a single witness, there being facts and circumstances in support of it. It is in evidence that this woman since wrote her name; and it is stated, that this was given to the agent for the defender; and that if now produced, it would shew that this is not her writing. You will consider this, and give it due weight. On the others I have expressed a clear opinion; but that is not to controul you, as you are to find according to your view of the evidence.

Verdict.—"The Jury found that the deed

" was executed on the 12th January: That " John Harkness was not then labouring under " the disease of which he died: That the " name Janet Burgess was not her true sub- " scription; and That Harkness was of a sound " and disposing mind," &c.

MARQUIS OF TWEEDDALE v. BROWN.

Jeffrey and *Whigham* for the Pursuer.
Forsyth for the Defender.

(Agents, *Archibald Crawford*, W. S. and *James Smail*, W. S.)

JEDBURGH.

PRESENT,

LORD CHIEF COMMISSIONER.

MARQUIS OF TWEEDDALE v. BROWN.

1821. Sept. 18.

Damages against a tenant, for mismanagement of his farm.

AN action of damages against a tenant, for ploughing during the last year of his lease, more of his farm than he was entitled to have under corn crop.

DEFENCE.—A denial of having done any thing during the occupation of his farm, which entitles the pursuer to damages.