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his handwriting existed years before the death of the testator; the witness saw it in a place where it was natural that it should be, and at the time she mentioned to the other witness that she had seen it. As to the contents, they are not the question before you, but simply whether this is the deed she saw some years before his death; and if you, the jury, are of opinion that it is, you will find for the pursuer on a case to be made up.

Verdict—"Of consent, the jury found for "the pursuers, subject to the opinion of the "Court of Session, on a case to be settled by "the parties."

Hope, Sol.-Gen., and *Neaves*, for the Pursuer.
Skene and *Bell*, for the Defenders.
(Agents, *James Morgan*, and *Thomas Deucher*.)

PRESENT,

LORDS CHIEF COMMISSIONER AND CRINGLETIE.

1830.
July 16.

MASON *v.* MERRY.

Finding for the defender in a reduction of a deed.

REDUCTION of a contract and other writings, on the ground of force and fear—that the contract was not read to the party—that the name

was traced by another person—that the witnesses did not see the subscription, or hear the party acknowledge it—that the deed ought to have been subscribed by notaries.

DEFENCE.—The allegations are not true—the deed was reasonable, and is fortified by prescription—the pursuer has no interest, as she is bound to maintain the purchaser in his right.

ISSUE.

"Whether the contract No. 3 of process, "dated 20th March 1787, bearing to be a con-"veyance of certain subjects, situate in the "city of Glasgow, to Marion Brown, widow "of the late James Crawford, meal-dealer in "Glasgow, was not the deed of the pursuer?— "or,

"Whether the pursuer homologated or ac-"quiesced in the said contract?"

Aytoun opened for the pursuer.—This is a reduction on the ground of fraud and circumvention, and the want of formalities required by law; the pursuer was left at nine years of age without a relation to protect her, and from the terms of her contract of marriage, fraud is to be presumed. The only deed here is the con-

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tract, and the law is clear, Ersk. B. 4. T. i. § 27. She could not write, but her name was traced with pencil. By 1579, c. 80, notaries must sign when a person cannot write. The first issue is ours, the second is for the defender; but before making out homologation, it must be established that the fact was known to the party.

In a question whether a pursuer could write, incompetent to prove that she said to a witness that she could not, but the acts of the witness may be proved.

A witness having stated, that the pursuer could not write, and that he wrote for her, was asked what she said. An objection was taken to proof of any thing said by her, especially at a distance of time.

LORD CHIEF COMMISSIONER.—This may be got at in a different way, by asking him as to the act—why he did it, and showing by his own knowledge that she could not write; but if it was at a distance of time from the deeds, I should think it of little importance.

Books rejected as not lodged eight days before the trial.

An objection was also taken to the production of certain books by a clerk in Sir W. Forbes and Company's Bank, not having been lodged eight days before trial.

LORD CHIEF COMMISSIONER.—It is of very little importance here; but I think the objection good.

Cockburn opened for the defender and said,

It was a case much more for the Court than the jury, as, if such a case were sustained, it was a dangerous precedent. The deed was regular, and the presumption in its favour; and this cannot be got the better of by whining about poverty, or statements as to fraud and circumvention, which is not the ground of reduction here. The question turns on the defective execution of the deed; and the pursuer hopes, at the distance of forty years, to get quit of a deed, because she says her name was tracéd with pencil before she wrote it, though the deed was sanctioned by her husband; and she said to the witness that it was her deed. This reduction is attempted to be made out by calling a witness, certainly not of the first credit; and they refuse to call the most respectable man of business under whose eye the deed was executed.

If one witness were sufficient to cut down a deed, no deed is safe; but here he is not only solitary, but will be contradicted by a witness above all suspicion. A party is not entitled to take advantage of her own fraud; and the long silence is sufficient proof of homologation.

When the agent who framed the deed was called,

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Jeffrey, D. F., objects.—He is interested, as he is personally liable, if the deed was not properly executed.

Cockburn.—It was found in the case of Frank not to be a good objection to a witness that he is liable in an action.

The agent who had charge of the execution of a deed, challenged on the ground of irregularity in the subscription, admitted as a witness.
Condie *v.* Buchan, June 26, 1823, 2. Sh. and Dun. 432.
Frank *v.* Frank, 9th July 1793, and 3d March 1795, Mor. 16822 and 16824.

LORD CHIEF COMMISSIONER.—That was a case in which the House of Lords reversed the judgment of the Court of Session. In the present case, we are of opinion that he is not incompetent as an agent, and that he has no such interest as excludes him.

Jeffrey, D. F., in reply, said,—He could not abandon the case without some observations. The circumstances were suspicious, and afford the ground for laying hold of any legal nullity, and tracing the name renders it null. There is no proof of homologation, as the party must know the nature and extent of the right at the time he homologates.

LORD CHIEF COMMISSIONER.—The only observations which I shall make are applicable to the first issue, as evidence of homologation has not been gone into.

The question here is one requiring the great-

est possible attention ; and the pursuer is bound to prove, by the strength of her own evidence, that this is not her deed, before the Court and jury can be called to attend to it.

This is a deed which, being regular, is probative by statute ; and, to get the better of it, there must be such clear and distinct evidence as leaves no doubt on the mind. In this case, at such a distance of time, and the party knowing of the deed, it would require the strongest evidence.

It was matter of grave consideration whether a witness to a deed should be received, who comes to cut down his own solemn act ; but for several years it has been the practice to examine the witnesses to the deed ;—in this character the witness for the pursuer comes to undo what he attested to be regular. He says he knew it irregular, but that it was no business of his. It has been said that such a witness is admissible, but not credible. I think it is better to say that his evidence is to be scrupulously examined ; and here we must consider whether there is any thing to support this single witness, who comes to disaffirm his act.

His Lordship then stated the circumstances and the evidence as to the pursuer not being

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able to write, and said it amounted to a presumption; but that the evidence of the agent on the other side was clear and direct, and went to support a deed and the law, against the evidence of a person in the situation of the witness for the pursuer who came to undo his own act.

Verdict—"For the defender."

Jeffrey, D. F., Clephan, and *Aytoun,* for the Pursuer.
Cockburn, and *D. M'Neil,* for the Defender.
(Agents, *Aytoun* and *Greig,* W. S. and *Thomas Darling,* S. S. C.)

PRESENT,

LORDS CHIEF COMMISSIONER AND CRINGLETIE.

1830.
July 19.

HAMILTON *v.* ANDERSON, &c.

Damages against a party, his agent, and the messenger, for executing diligence against a son, on a bill accepted by his father.

THIS was an action of damages for wrongous imprisonment against a party, his agent, and the messenger, for apprehending the pursuer on diligence raised on a bill accepted by the pursuer's father.

DEFENCE.—The pursuer acted as if the bill had been his—the agent gave no instructions to the messenger—the messenger acted in the execution of his duty.