carried that subject to the eldest son, as heir of the marriage, exclusive of all the other children. The distinction betwixt heirs of a marriage and children of a marriage is now well understood in our law. When an heritable subject is provided in a contract of marriage to the heir of a marriage, the law points out the eldest son to be the heir; in the other case, the maker of the deed excludes the legal succession, and the younger children are admitted to an equal share; and it was said that the case of Scott did not contradict the doctrine, because it was circumstantiate. No. 73.

"The Lords adhered."

Act. *M'Queen.* Alt. *Geo. Cockburn.*

J. S. ter. *Fac. Coll. No. 65. p.* 111.

1792. *July* 3.

TRUSTEES of GEORGE ROSS *against* SARAH AGLIANBY.

No. 74.

In deeds executed by persons who are blind, with the assistance of notaries, it is necessary, that, at the time of executing, they be read over in the hearing of the granters, before the witnesses.

Richard Lowthian, who had amassed a fortune of £70,000, died at the age of ninety. During the latter years of his life, being afflicted with blindness, he used to employ notaries in the execution of his deeds.

In this manner, in the course of ten years preceding his death, which happened in 1784, he had executed a number of settlements, the last of them dated in 1783, in favour of Sarah Algianby his wife, to whom he had been married fifty years. The notaries' docquets, it is to be remarked, without mentioning that the deeds were read over to Mr. Lowthian, ran in the usual style, thus: "De mandato prædicti Richardi Lowthian, scribere, ut asseruit, nescientis, pennamque tangentis, nos —— —— notarii-publici ac co-notarii, in præmissis specialiter requisiti, pro illo subscribimus."

He had no children; and his heirs at law were Ross his nephew, and two nieces. In the name of certain trustees, Ross instituted an action of reduction of those deeds, on various grounds, but chiefly that of an alleged essential defect in the mode of executing them, in consequence of their not being read over at the time; a circumstance which ought not only to have taken place, but should have appeared from the docquet. In support of this reason of reduction, it was

Pleaded: If a person, when possessed of sight, and able to read, subscribe, before witnesses, a deed, though not holograph, or one that is holograph, though not in their presence; the evidence of consent, essential to every deed, will be legal and complete. But if the granter be ignorant of letters, and still more if he be deprived of sight, it will avail little that a deed be produced, as having been executed by notaries at his desire, unless there be evidence afforded, that the deed was read over to him in such a manner that he was able fully to understand it. This is a plain dictate of common sense, and needs no aid from authorities, which, for the same reason, are hardly to be looked for.

No. 74. In the Roman law, a special provision was made for the security of blind persons executing testaments, by a constitution of Emperor Justin, thus: "Ut carentes oculis, per nuncupationem suæ condant moderamina voluntatis, scilicet præsentibus testibus; tabulario etiam, ut cunctis ibidem collectis, primum ad se convocatos omnes, ut sine scriptis testentur, edoceant; deinde exprimant nomina specialiter heredum, et dignitates singulorum, et indicia, ne sola nominum commemoratio quicquam ambiguitatis pariat; et ex quanta parte, vel ex quot unciis in successionem admitti debeant; et quid unumquemque legatarium seu fideicommissarium adsequi velint: omnia denique palam edicant quæ ultimarum capit dispositionum series lege concessa. Quibus omnibus ex ordine peroratis, uno eodemque loco, et tempore, sed et tabularii manu conscriptis sub obtentu testium, et eorundem testium manu subscriptis, dehinc consignatis tam ab eisdem testibus, quam a tabulario, plenum obtinebit robur testantis arbitrium. At cum humana fragilitas mortis præcipue cogitatione perturbata, minus memoria possit res plures consequi; patebit eis licentia, voluntatem suam, cui velint scribendam credere; ut in eodem loco postea convocatis testibus, et tabulario, re etiam patefacta cujus causa convocati sunt, etiam chartula promatur, quam susceptam testatori recitabit tabularius, simul et testibus; ut ubi tenor eorum cunctis innotuerit, elogium ipse suum profiteatur agnoscere, et ex animi sui quæ lecta sunt, disposuisse sententia; et in fine subscriptio sequatur testium, necnon omnium signacula tam testium quam tabularii;" L. 8. Cod. Qui test. fac.

The law of England, in like manner, seems to require, that the will of blind persons should be read in their hearing, and acknowledged by them; Swinbourne, Of Testaments, part 2. § 11. p. 96. ed. 6.

With regard to the law of Scotland, which, in questions not depending on feudal principles, leans much to that of Rome; the statutes which regulate the formalities of writings, without bearing any express reference to the deeds of blind persons, evidently imply the necessity of reading them at the time of executing. Thus the act of 1681 requires, that the witnesses to deeds executed by the intervention of notaries "shall see or hear the granter give warrant to the notaries to subscribe for him." And this mandate must be specified in the docquet, so as to be attested by the witnesses; 18th June 1745, Berril against Moffat, No. 69. p. 16846. But if the granter be blind, and the deed be not read over in his hearing, and in presence of the witnesses, it is impossible for them to know that it is really that which he meant to authorise; Ersk. B. 3. Tit. 2. § 23. Now in fact the deeds in question were not so read over. And at any rate this circumstance, essential in constituting the mandate of the notary, is not mentioned in the docquets, an omission fatal to the deeds.

Answered: The solemnities required by the law of Scotland in authenticating by notaries the deeds of persons who cannot subscribe for themselves, may be resolved into these two particulars; 1*st*, That the notaries and witnesses should see and know the party whose deed is authenticated; and, 2*dly*, That they should hear or see him give warrant to the notaries to subscribe for him, he at the same time touching the notary's pen.

No. 74.

In the application of these solemnities to deeds, the law has made no distinction, whether the party is only disqualified for writing, or is also disqualified for reading. The reading of the deed is not required as a solemnity in either case. A blind man may dictate his own will, or he may give directions in a single sentence for executing what he wills; and without any reading in the first case, and without any formal reading in presence of notaries and witnesses in the other, the deed will be sufficiently certain and formal.

Whether a deed executed by a blind person has been at all read or understood by him, so as to become his will, is a matter of fact to be inquired into. But it is not a solemnity essential to the validity of the deed.

It could not therefore be inserted in the notary's attestation, which ought to contain the report only of what is essential *de solennitate*, such as the touching of the notary's pen; Office of a Notary-Public, p. 308.

As to the law of England; nothing more is requisite, by that law, than that there shall be proof before the court where the challenge is brought, that the will is read over to the granter, although not in presence of the witnesses; Burn's Eccl. Law, No. 1. part 2. Tit. Wills.

Perhaps the reading of a deed in presence of two notaries and four witnesses might be a proper solemnity to be established in deeds executed by blind persons; and other additional safeguards may be easily figured. But the sole question here is, what the law of Scotland has already established, not what solemnities the legislature may yet introduce.

The cause was advised, after a hearing in presence.

The opinion of the Court seemed to be, that in the case of a person who is blind, unless the deed presented in order to be executed were at the time audibly read over, (which in point of fact appeared in the present instance to have been omitted), it could not be certainly known whether it truly was that which he meant to warrant the notaries to subscribe for him; and therefore that the witnesses could not then be in a condition to attest, as is required by the statute of 1681, that such a warrant was truly given.

One of the Judges observed: When writing is *de essentia*, the want of it cannot be supplied by parole proof. The authority given to the notaries must appear *ex facie* of the deed, as an essential part of the writing. In the case of blind persons, the reading of the deed is absolutely necessary to constitute that authority, and as such must be expressed in the docquet. If it be omitted, as here, the defect, being essential, cannot be supplied.

The Lords sustained the reasons of reduction of the settlements executed by the deceased Richard Lowthian; and found, that the destinations therein contained in favour of the defender, Mrs. Sarah Aglianby, are void and null, and to be held *pro non scriptis*.

Act. *G. Fergusson, Tait.* Alt. *Rolland, Honyman, Corbet.* Clerk, *Menzies.*

S. *Fac. Coll. No. 219. p. 459.*