tee, by the disposal of which the money was realised. So soon as it is discovered that no such security was ever granted by the defender, his whole case falls to the ground. The alleged repayment never was made, and must still be made by the defender.

On these grounds, I think the judgment of the Lord Ordinary should be affirmed, so far as it decerns against the defender in terms of the conclusions of the action. But I rather think that the findings of the Lord Ordinary do not represent with sufficient accuracy the process of reasoning by which this conclusion is reached.

Lord Ordinary's interlocutor substantially adhered to.

Agents for Defender and Reclaimer—Mackenzie, Innes & Logan, W.S.

Agents for Pursuer and Respondent—M'Ewen & Carment, W.S.

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*Tuesday, December* 6.

## SECOND DIVISION.

### HILL *v.* ARTHUR.

*Deed—Testing Clause—Omission of Name of Writer—Judicial Production—Act* 1681, *c.* 5. A testamentary writing was written by the doctor of an infirmary for a man on his deathbed, who subscribed it before witnesses. It was probative in every respect, except that the writer was not designated.

Thereafter the widow of the deceased was confirmed executrix *qua* relict, and produced the deed before the Commissary in that process. Ten years afterwards, a conditional legatee under the said testamentary writing brought an action against the widow founding on the deed, which was produced in process. The writer was still alive. *Held*, that the judicial production of the deed terminated the implied mandate in the person to whom the deed had been delivered by the granter to fill up the testing clause, and that the deed must be held null, under the Act 1681, cap. 5.

This was an appeal from the Sheriff-court of Lanarkshire in an action at the instance of Hill and his mandatory against Mrs Arthur, as executrix of her deceased husband Thomas Hill, for a conditional legacy left to the pursuer by a testamentary writing executed by the deceased Thomas Hill. Thomas Hill, on the day of his death, 17th September 1856, executed the testamentary writing in question in the Royal Infirmary of Glasgow. It contained the following clause:—"In the case of my son Edward Hill not arriving at his majority the £75 sterling which I leave to him are to be equally divided between my wife Alice Ann Hill or M'Can and Thomas Hill, son of James Hill, and now residing in County Down, Ireland." It concluded:—"I sign these presents on this seventeenth day of September, One thousand eight hundred and fifty-six, in the presence of George Rainy, doctor of medicine, Glasgow Royal Infirmary, and William Taylor, porter, Glasgow Royal Infirmary." It did not, however, contain the name of the writer, but was in point of fact written by Dr Rainy. The defender Mrs Arthur was thereafter confirmed executrix-dative *qua* relict of the deceased, and the testamentary writing in question was signed as relative to her oath to the inventory of the moveable estate, and recorded in the Commissary-court books. Edward, the son of the deceased, died on the 4th December 1858 before reaching majority, and on 3d July 1868 the pursuer brought the present action for the half of the sum of £75 due to him under the testamentary writing on the death of Edward.

The defender pleaded—(1) That the testamentary writing was invalid, in respect that it was neither holograph nor tested; and (2) that even if it were, the deceased had left no funds out of which, after payment of debts and preferable claims, the legacy could be paid.

On 11th November 1868 the Sheriff-Substitute (DICKSON), on the motion of the pursuer, and on his statement that he had not previously had access to the testament of Thomas Hill, and that the person who wrote it was still alive, allowed him to have the testing clause completed, reserving all objections competent to the defender.

Thereafter, on 19th March 1869, he pronounced another interlocutor, finding that the testamentary writing being now filled up in the testing clause, repelled the defence that the writing was neither holograph nor tested. He observed in his note:—"The judgment sustaining the validity of the document in question, although the testing clause has been completed *ex intervallo*, proceeds on the principle that a party executing a deed with a blank in the testing clause, gives a mandate to the party in whose hands he places the deed to complete it according to law. That principle has been applied in numerous cases—viz., *Drury* v. *Drury*, 1753, M. 16,936; *Bank of Scotland* v. *Telfair's Creditors*, 1790, M. 16,909; *Dick's Trustees* v. *Dick*, 1798, Hume's Decs., 908; *Blair* v. *Earl of Galloway and Others*, 15th November 1827, 6, S. D. 51; *Leith Banking Company* v. *Walker's Trustees*, 22d January 1836, 14, S. D. 332; *M'Leod* v. *Cunningham*, 1841, 3, D. B. M. 1288, affirmed 5 Bell's App. Ca., 210; *Shaw* v. *Shaw*, 1851, 13 D. B. M. 877; *M'Pherson* v. *M'Pherson*, 1855, 17 D. B. M. 357; *Rait* v. *Primrose*, 1859, 21 D. B. M. 965. The defender urged that the cases in which the testing clause has been sustained, when completed *ex intervallo*, were cases of onerous deeds, whereas the document in question is not so, but is testamentary. The Sheriff-Substitute, however, has not found anything in the decisions to indicate that a distinction in this respect exists between onerous and gratuitous deeds. On the other hand, the tendency of the law is to support, and even to favour, testamentary writings, Stair, 3, 8, 34; Erskine, 3, 2, 23; *Buchanan* v. *M'Artey*, M. 16,955; *Bog* v. *Hepburn*, M. 16,960; *Stewart* v. *Ashley*, 16,857; *Hardie* v. *Hardie*, 6th December 1810; *Rintoul* v. *Boyter*, 1833, 5 Deas and Anderson, Rep. 215, affirmed 6 W. and S. 394. It is true that the authority of these cases as to testing clauses completed *ex intervallo* has been somewhat shaken by *M'Neille* v. *Cowie*, 1858, 20 D. B. M. 1229; but as there is no judgment of the Court overruling them, the Sheriff-Substitute has deemed it his duty to follow them in this case. He has been the more disposed to do so on account of the circumstances that the document was produced by the defenders, because this circumstance indicates at least *prima facie* that it was placed in the hands of the female defender, as custodier, and with the view of its being completed, and made a valid deed, and also because there is nothing on record to indicate that the deceased, either when he subscribed the document or afterwards, intended that

it should be ineffectual. The Sheriff-Substitute does not anticipate what may be his judgment in the event of a proof being led as to the circumstances connected either with the subscription of the document or the defender's custody of it. The fact that the document in question was produced before the Commissary, and docqueted accordingly on 17th December 1856, was founded on by the defender as amounting to registration, and bringing it within the rule that writings cannot be completed in the testing clause after registration. The Sheriff-Substitute, while recognising the rule referred to, cannot, either on principle or in conformity with the decision in *M'Pherson* v. *M'Pherson, supra*, regard the mere production in question with reference to the female defender's appointment as executrix as bringing the case within this rule. Nor does he consider that the production of the document by the defender in this cause amounts to an effectual bar to the testing clause being completed, for *ex hypothesi* it lay in her hands for the purpose *inter alia* of being completed, and under an implied mandate from the testator to have it completed. Her non-completion of it timeously was a neglect of the testator's directions, as involved in that mandate, and she ought not to be allowed to profit by her own act of producing it in process incomplete, and so defeat the testator's intentions, and impair the pursuer's interest, for her own advantage."

Thereafter, on appeal to the Sheriff-Depute (BELL), the record was opened up, and the following plea was added by the defender:—"The addition made to No. 6–2, without prejudice as aforesaid, cannot be held as part of the document, in respect it is incompetent to complete the testing clause of any gratuitous undelivered deed, more especially of a *mortis causa* deed, after the death of the granter, and after it has been recorded in the Commissary-court books, and the Commissary has held, as he did, No. 6–2 to be no will or testament."

After a proof the Sheriff-Substitute granted decree in terms of the conclusions of the summons.

On appeal the Sheriff-Depute pronounced this interlocutor and note:—

"*Glasgow, 11th August* 1870.—Having heard parties' procurators on the defenders' appeal, and made avizandum with the proof, productions, and whole process, finds that the document No. 6–2, which is dated 17th September 1856, was at the death on said date of the late Thomas Hill, by whom it bears to be signed, improbative, ineffectual as a testament, and null under the provisions of the Act 1681, cap. 5, in respect the writer of the deed was not then named and designed in the testing clause: Finds that it is settled by a series of decisions that a party who has received delivery of a deed duly signed, but defective in the testing clause, is entitled even after an interval of years, and after the death of the granter, to insert or procure the insertion of a complete testing clause, and thus to validate the deed, but this only provided the deed has not previously become the ground of a solemn legal act, or has not been made the foundation of a judicial demand. Finds that the said document, No. 6–2, was in the pursuer's possession, and also in that of the female defender, and her man of business, for some time after the death of the said Thomas Hill, but no attempt was then made to complete the testing clause, and the pursuer and John M'Cann, the other person named in the document as executor, refused to administer under it: Finds that, on the footing that Thomas Hill had died intestate, the female defender, on 22d October 1856, procured herself decerned executrix-dative *qua* relict of said deceased, as is instructed by the testament dative No. 6–1: Finds that the present action was not raised till 3d July 1868, and its conclusions are founded on the narrative that the female defender is executrix of her late husband, Thomas Hill, or vitious intromitter with his estate, and that a conditional legacy of £37, 10s., bequeathed to the pursuer by the alleged will in question, had opened to him and become due and payable two years after the death of Thomas Hill by the death of the preferable legatee, his son Edward Hill: Finds that it was *inter alia* pleaded in defence that the alleged testament was of no force or effect in respect of the want of the necessary statutory solemnities, and that the female defender had in consequence been decerned only executrix-dative *ab intestato*: Finds that in support of those averments the document itself was produced, together with the said testament-dative on 16th July 1868: Finds that after the record had been closed the pursuer moved for leave to have the testing clause completed by the addition now appearing therein, beginning with the words 'these presents' to the end, and by interlocutor of date 11th November 1868, the Sheriff-Substitute granted the said motion 'before answer, and reserving all objections competent to the defenders to the validity of the said document, on the ground that the testing clause thereof has not been timeously completed:' Finds that a proof was afterwards allowed, and a new record having been first made up by condescendence and defences, and by the interlocutor under appeal, it has been found that the completing of the testing clause was competently allowed on the said 11th November 1868, that it has been completed accordingly, that the testament is effectual, and that it validly bequeathed the legacy to the pursuer, which has now vested in him; and, in respect of these findings, the defenders' first and second pleas in law are repelled; Sustains the defenders' appeal against said findings; and finds on the contrary, that in the circumstances of the case no alteration of or addition to the document of No. 6–2 could be competently made either *propria motu* of the parties, or under the authority of the Sheriff-Substitute, so late as November 1868, or could have the effect of making said document, which was previously improbative and null, probative and valid, and this in respect *first*, that the document had already been produced in the Commissary-court, and deponed to by the female defender as the only writing of a testamentary character left by the deceased, in virtue of which oath she was confirmed executrix-dative *qua* relict; *second*, in respect a judicial demand had been made in this process by the pursuer on the deed as it stood, he having previously had an opportunity, of which he did not avail himself, of getting the testing clause completed timeously; and *third*, that it was at all events *extra vires* of an Inferior Court to sanction the alteration or addition, whatever might have been the powers of the Supreme Court thereanent: Therefore sustains the two pleas in law which were repelled by the Sheriff-Substitute, recalls the interlocutor appealed against, assoilzies the defenders, and finds the pursuer liable in expenses, allows an account thereof to be given in, and remits the same to the auditor of Court to tax and report, and decerns.

"*Note.*—The Sheriff feels that there is some

nicety in this case. A certain laxity of practice has crept in, which, though permitted, has always been regretted by our Courts, as to the period within which a testing clause may be completed; but the Sheriff is not aware of any case in which the barriers, which here present themselves to such completion, have been successfully overleapt. The learned Sheriff-Substitute, in his excellent work on Evidence, says (sec. 727) the testing clause may 'not be completed after the party has raised action or execution upon the deed, or has placed it beyond his control in a public register.' Mr Tait, in his work on Evidence, says (p. 104) 'after a judicial demand has been made upon a deed, or when it becomes the ground of a solemn legal act, a rectification of the testing clause is not admitted.' Mr Bell, in his Lectures on Conveyancing, says (vol. 1, p. 223) 'the right to add a testing clause to a document must in each case be held as depending on its own circumstances, and the power of addition to, or alteration in, the testing clause is at an end after the deed has been made the subject of an interlocutor, and equally so when, being entered in a register for preservation or execution, it is permanently in the custody of the keeper of the register.' See also to the same effect, Duff on Conveyancing, p. 19. In the case of the *Tutors of Dick*, November 21st, 1798 (Hume's Dec., p. 908), which was founded on by the pursuer, the Court held it competent to fill up the testing clause of a contract of marriage after the death of both the spouses, but the report at the same time expressly states that the deed was not produced in judgment until the clause had been filled up by the agent for the pursuers. On the other hand, the rubric in the case of *Brown*, March 11th, 1809, F. C., is, 'The Court will not grant warrant to fill up or amend the testing clause of a deed, even in favourable circumstances, after the death of the granters, and after the deed has been presented for recording.' In the case of *The Bank of Scotland*, February 17th, 1790, Mor. p. 16,909, it was admitted in the pleadings for the party maintaining the right to complete the testing clause that this could only be done 'at any time before the writing is made the subject of litigation, when the rule is that *pendente lite nil innovandum*.' The case of *M'Pherson*, 7th February 1835, which at first sight seems to have rather a contrary tendency, will be found on examination to have gone a good deal on the speciality that there had been homologation. The circumstances in the present instance are greatly more unfavourable. For a period of twelve years after Thomas Hill's death, the document, No. 6–2, was *ex confessu* ineffectual as a testament, and in the interval had been used as evidence in the Commissary-court, that Hill had died intestate, without any opposition on the part of the pursuer, who knew of the existence of the writ, and had had it in his custody; the female defender was decerned executrix-dative *qua* relict, and was undisturbed in that office all the above time. The pursuer then raises this action, founding on the invalid writ, and concluding against the defender, as if she had been executrix-nominate. The writ is produced, and the record is closed without objection, and then, for the first time, the pursuer craves to be allowed to make an *ex post facto* addition to the document, which is entirely to change its character. On a similar motion being made to the Sheriff of Ayrshire in the case of *Brown*, above quoted, he found it 'incompetent for him to interfere in a question of this kind, reserving to the petitioner to apply to the Court of Session for remeids as accords.' It is conceived that in point of form this was a proper course, but upon the merits, if it were competent to entertain the motion in this Court, it is thought that the attempt *post litem motam*, and after all that had taken place since Hill's death, to raise a dead instrument into life, came too late."

The pursuer appealed.

SCOTT and BRAND for him.

BALFOUR in answer.

At advising—

LORD JUSTICE-CLERK—Although the pecuniary amount involved in this case is not large. the questions which have been raised under it are of very considerable importance to the law.

The testator in this case died on the 17th of September 1856, having, it appears, on the same day signed, in the Royal Infirmary of Glasgow, a testamentary paper, which was found by his widow after his decease. This document is said to have been prepared by Dr Rainy, the physician to the Infirmary, and bears to be attested by him and another witness, the porter to the Infirmary. It had, however, no testing clause naming the writer, in terms of the Act 1681, and was therefore improbative.

The existence and terms of the writing seem to have been made known to the relatives soon after the funeral. The widow applied to the Commissary Court for confirmation as executrix *qua* relict, and in that application she produced this defective deed in October 1856.

The pursuer of this action, alleging that he was entitled to a legacy under this writing, as conditionally instituted to the testator's son, raised the present action in 1868 against the widow, founding on the alleged will, and concluding for payment of this legacy. The record was closed on a minute of defence on the 14th July 1868, and on the 16th the defender produced the document, which was found on inspection to be defective and improbative. On the 11th of Nov. 1868, the Sheriff-Substitute pronounced the interlocutor which substantially raises the question in dispute. The Sheriff having recalled that judgment and assoilzied the defender, we have now to decide on the pursuer's appeal. I am of opinion that the judgment of the Sheriff is right, and that the course adopted by the Sheriff-Substitute in permitting the testing clause to be filled up was entirely incompetent.

The argument maintained on the part of the appellant was mainly rested on that long series of decisions which have established that, when a deed *ex facie* probative is produced and founded on, it is not a relevant objection to it to allege that the testing clause was filled up after the execution of the deed. I do not, however, think that these authorities afford the slightest support to the procedure which has been followed here. In all these cases the deed was *ex facie* probative; in this case the deed produced to the Sheriff was *ex facie* null; and the only question we have to consider is whether the judge could do anything but treat it as a nullity. That it was so, is, I think, established by the plain words of the Act 1681, and by a long course of subsequent decisions.

The Act 1681 attaches nullity to all writs in which the witnesses as well as the writer are not designed, declaring their designation not suppliable by condescendence.

It is true, as Mr Ross in his Lectures very clearly

explains, that for a considerable period after the Act of 1681, the Court in several cases relaxed the strictness of this provision, and allowed a proof *aliunde* of the name of the writer of the deed. Some, however, of the authorities he infers to related to deeds executed before the statute of 1681. The earlier decisions, however, were conflicting on this subject. Fountainhall reports a case in 1704 (*Kirkpatrick*, M. 17,022), in which a bond was found null which wanted the name of the writer, though a most pregnant proof was offered that a person condescended on wrote the bond, and who was produced in Court to depone upon the fact. The conflict of decision continued for more than half a century; but before the end of the last century the law was absolutely fixed that even the admission of the execution by the grantee himself would not supply the want of the requisites of the statute. In the case of *Macfarlane* v. *Grieve* (M. 8459), in 1793, in which a host of conflicting decisions were quoted, a party having granted a lease by a deed, defective as wanting the writer's name, was allowed himself to reduce the deed on that ground before possession had followed. There was some difference of opinion on the Bench, but the report bears that the majority thought that no deeds whatever were probative but those executed with all the formalities required by statute. The point has never been questioned since, as far as I am aware, and in the case of *Lockhart*, in February 1815, was held as conclusively fixed.

Now, the plain inference from these authorities is, that a deed without the name and designation of the writer is a nullity, and must be so regarded by courts of law. But here the Sheriff has permitted this statutory defect to be supplied, neither by evidence led before himself nor by the custodier of the deed (both of which would have been incompetent), but by a third party, on extrajudicial information obtained by himself outwith the presence either of the Court or the opposite party. If this were competent, the provision of the statute 1681 might be blotted out of the statute-book; for if this defect can be supplied by one party under an allowance like this, how much more should it be competent to the Court to supply the defect by testimony led before itself.

The Sheriff, I think, misapprehends the import of the authorities in regard to filling up a testing clause. All these cases proceed on the assumption that if the defective deed be judicially produced it can never thereafter be touched. This proceeds not on the maxim "*Pendenti lite nihil innovandum*," but on the fact that the writing is judicially seen and known to be a nullity, and that the implied mandate in the person to whom the deed is delivered by the granter to fill up the testing clause, is terminated by its judicial production. It is too late, then, to say that the Court will not look behind a probative deed. The deed is not probative, but is null, and must therefore be treated as such.

The case of *Brown*, referred to by the Sheriff, is precisely in point; and I propose that we should decide in conformity with that decision.

Lord Cowan—The defect in this writing as it originally stood was the omission in the testing clause of the name and designation of the writer. This is required by the statute 1681, c. 5, re-enacting the provisions contained in the prior act of 1593. The Act 1681 enacts that all writs wherein the writer is not designed shall be null, and that the omission shall not be suppliable by condescending upon the writer or his designation; otherwise the statutory penalty is, that the writ shall make "no faith in judgment or outwith the same." Consequently, the writ in question, when executed on 17th September 1856, was null, and could have no effect on the succession of the testator. And in that state it continued till the institution of the present action in July 1868, or rather till November thereafter, when, under the sanction of an interlocutor of the Sheriff-Substitute, the statutory defect was supplied—under reservation of all objections to the competency and effect of the alteration thus sanctioned.

The record and proof establish that the deed was written by the medical gentleman who attended the testator when in the Infirmary, on the very day on which, after his removal to his own house, he died. It contained a testing clause mentioning the date of subscription and the names and designations of the two witnesses before whom it was executed, and by whom it was subscribed. The case, therefore, is not one where a blank was left for the testing clause. It is the case of a writing supposed to be complete when executed, but which laboured under the statutory nullity of not containing the name and designation of the writer.

In this imperfect state the deed was found by the testator's widow, the defender, immediately after his death; and at a meeting of the relatives on occasion of the funeral, a few days afterwards, was produced by her, along with the deceased's bank-book. It was then taken possession of by William M'Gill, the mandatory for the pursuer, and by him a copy of it was taken, and the deed itself was in his custody for several days. He then returned it to the defender, and by her it was given to Mr Lawson, the agent, by whom her title to the deceased's estate as executrix-dative *qua* relict was made up. In expeding the confirmation in her favour he exhibited the deed to the Sheriff-Commissary, and in his official attestation, dated 17th October 1856, it is noticed as "the letter or testamentary writing referred to in the affidavit to the inventory" made by the defender of her husband's personal estate. Farther, the inventory and relative oath were recorded on 17th October 1856, and the allegation in the record is that the document in question also was recorded in the Commissary Court books of Lanarkshire at the same time. This last statement, however, has not been made the subject of proof, and cannot be held to be admitted.

The defender intromitted with the estate as executrix, and continued to do so without interruption or remonstrance until the institution of this action, at a distance of twelve years. A demand is now made upon her for a conditional bequest alleged to have been conferred upon the pursuer by the writing, with interest at 5 per cent. from December 1858, when the condition was alleged to be purified by the death of the testator's son. The foundation of the claim is stated to be the writing executed by the deceased in September 1856, the contents of which no doubt became known to the pursuer by means of the copy which the individual, now his mandatory, had taken at the time of the testator's death. The defender produced her title as executrix. She also referred to the testamentary writing founded on, as an improbative deed, and not executed according to law. The record is thereupon closed, and the deed was produced two days thereafter, viz., on 16th July

1868. On 11th November 1868 the Sheriff-Substitute heard parties, and issued an interlocutor of that date, which found, *inter alia*, "that the said document is not regularly tested and probative, in respect that the name of the writer is not mentioned;" but by a subsequent finding, in respect that the document was stated to have been in the hands of the defender, and that the pursuer had never had access to it from the testator's death "until it was produced in process," the pursuer was "allowed to get the testing clause of the said document completed within ten days," reserving objections to its validity and effect. Of this allowance the pursuer availed himself; and thereafter, as allowed by the Sheriff, a new record was prepared, under which the proof was taken, and the interlocutor was pronounced which is now under review.

The Sheriff-Substitute gave effect to the deed as having been legally completed and the statutory defect removed by the words having been added to the deed which set forth the name and designation of the writer; but this interlocutor was recalled by the Sheriff, and the writing founded on held to be invalid, and its defect not legally removed, and the defender assoilzied from the action.

I am of opinion that the interlocutor of the Sheriff, and the reasoning on which it proceeds, is impregnable. There is no question that the testing clause of a deed left blank at the time of the granter's subscription and execution before witnesses may be subsequently filled up by a party lawfully in possession of the deed, or interested in it, while unrecorded and not produced in judgment, and still under his control or in his custody. The decisions in the cases referred to of *Dick's Trustees* v. *Dick*, *Blair* v. *The Earl of Galloway*, *The Leith Banking Co.* v. *Walker's Trustees*, and of *Shaw* v. *Shaw*, are all of that character. In the last of these cases the Lord Justice-Clerk (Hope) stated, "We hold that a party having received delivery of a deed duly signed, is entitled to insert a testing clause whenever that is necessary, if, as is the case here, there be sufficient space left for its insertion," and "it is no objection that the parties were ignorant of the necessity of a testing clause." And the lapse of twelve years might have been no objection to the testing clause in this writ being made complete: for in the case of *Blair* a period of thirty-two years had elapsed between the date of execution and the filling up of the testing clause. Farther, it appears from the decisions in the *Bank of Scotland* v. *Telford*, 1790, and *M'Leod* v. *Cunningham*, 1841, that an omission or error in writing out the testing clause may be remedied so long as the deed is in the custody or under the control of a party who would have been entitled to fill up the clause had it been altogether blank. The principle upon which these rules have been recognised in practice has been variously stated. By some it is regarded as founded on presumed mandate by the granter to the party to whom the deed has been delivered, or as a procuratory *in rem suam* to the effect of enabling him to fill up and do what was needful as regards the testing clause, so as to make the deed complete. By others, and, as I think, more justly, the principle is stated to be founded on the terms of the statute, which only requires that the deed when produced in judgment shall be in conformity with the statutory requisites, thereby rendering it irrelevant to enquire when those requisites, as regards the testing clause, had actually been complied with. In this view the deed, unless offered to be impugned on the ground of forgery, is entitled to have faith in judgment, but not otherwise. And hence it is that when once exhibited judicially, or made the foundation of a claim, or put upon record by parties interested in its preservation, or entitled to found on it judicially,—the deed must be judged of as it stands, and cannot, even under judicial sanction, be permitted to be altered so as to remedy a statutory defect through which it is declared to be entitled to no faith. No more remarkable instance of this can be found than occurred in the case of *Brown*, 11th March 1809, where the defect was the omission of the name and designation of the writer and witnesses. The Court refused to authorise any correction on the deed after it had been recorded. And subsequently, on 8th February 1811, in a process of reduction of this writing brought by the testator's heir and next of kin, the Court refused, on the motion of the disponee, "to sist process till the testing clause of the deed under reduction is completed in terms of the statute." The deed was reduced, and it is important to notice what is stated to have been held on the bench, viz., "that to authorise the addition prayed for would truly be to allow a condescendence on the name and designation of the writer, which the Act 1681 expressly forbids."

The application of these principles to the present case is manifest. In the first place, this writing was produced in 1856 before the Sheriff-Commissary by the executrix-dative, no doubt, but still was referred to by her in her oath to the jury, which was put on record in the Commissary Court books, and, as observed by the Sheriff, it was in virtue of that oath that she was decerned executrix-dative. But, in the second place, were it doubtful that thiswas in itself enough to debar subsequent alteration of the deed, the very fact that in this process the demand of the pursuer was made upon the terms of this writing, a copy of which was in his hands, or in those of his mandatory, and that in defence to the action the writing was produced in support of the plea that it was null under the statute, and was entitled to no faith in judgment, brings the case within the operation of the principle on which all the decisions have proceeded. The deed has been produced in judgment. After this it was quite *ultra vires* of the Sheriff-Substitute to allow the statutory defect to be remedied. The only competent judgment following on the finding that the deed was defective in the statutory solemnities was to hold it entitled to no faith, and to dismiss the claim founded on it by the pursuer. Nor can I hold that there is any specialty in the present case which can sanction so unusual a procedure as sisting process that the defective deed might be made valid by additions to the testing clause. The defender, it is said, had the custody of the deed all along. It may be so. She was, as executrix-dative, the legitimate custodier of it, especially after its production in the Commissary Court. Its existence had not been concealed by her. The pursuer's mandatory had seen it at the time of the funeral in 1856. It was produced by the defender in order that it might be read to those present on the occasion, and his own statement is that he read it accordingly. A copy of it also was taken by the mandatory, and I have no doubt,—although the question does not seem to have been put to him,—that it was from that copy the pursuer got his information of the legacy in his favour which it contained, and for which he brought

this action. Whether the pursuer might have taken proceedings against the defender to force her to exhibit the document, and, having got it into his possession, have taken steps to get the defective testing clause remedied, I will not say. I can see many strong grounds on which such an action for exhibition might have been resisted, at all events, to the effect of the pursuer being allowed to alter and remedy the statutory defect. No such course was followed by him. The writing was judicially produced, and its defect judicially found, After that I apprehend it to have been at once unsupported by practice and contrary to the statute to make any alteration on it. In all essential respects I concur in the interlocutor and note of the Sheriff. I shall only add that the case of *M'Pherson*, 1855, proceeded entirely upon specialties, and cannot be held in any respect to trench upon the principles fixed by the other decisions.

LORDS BENHOLME and NEAVES concurred.

Appeal dismissed.
Agent for Appellant—James M'Caul, S.S.C.
Agents for Respondent—Henry & Shiress, S.S.C.

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## *Wednesday, December 7.*

### CAMERON *v.* SCOTT.

*Master and Servant—Notice of Dismissal. Held* that a yearly farm-servant had received a timeous notice of dismissal forty days before the actual termination of his engagement (26th May), and that he was not entitled to notice forty days before the legal term of Whitsunday (15th May).

William Cameron sued his late master, John Scott, farmer, Lochslin, Ross-shire, for £38, 6s. 8d., being his wages, &c., for the year from Whitsunday 1870 to Whitsunday 1871, the pursuer alleging that he was, from the term of Whitsunday 1869, cattle-man or cattle-herd to the defender, down to the term of Whitsunday last, when he was, on the requisition of the said defender, obliged to leave his said service, on account of a warning to that effect received by him from the defender on the 8th day of April 1870, but which warning was not timeously made or given to the pursuer.

The letter dismissing the pursuer was as follows:—

"Mr William Cameron. *Lochslin, 8th April* 1870.

Dear Sir,—I hereby give you notice that I do not require your service past the 26th day of May 1870.—Yours truly, JOHN SCOTT."

The Sheriff-Substitute (TAYLOR) pronounced the following interlocutor:—"In respect the pursuer admits that notice was given to him on the 8th of April last that his services would not be required by the defender after the 26th of May following, when his engagement admittedly expired—Finds that the contract between the parties was thus legally terminated, and therefore assoilzies the defender from the conclusions of the action, and decerns: Finds him entitled to his expenses.

"*Note.*—If the law is correctly found in the interlocutor, it is unnecessary to consider the defence that all parties have not been called, or to require proof of the defender's averment that the pursuer had earlier notice of the termination of his engagement than that admitted to have been given on the 8th of April.

"The pursuer's contention is, that the notice given to him on the 8th of April was too late, though forty-eight days before his term, the 26th of May; and that he was entitled to consider himself re-engaged on the 4th of April, forty days before 15th May, the legal term of Whitsunday, because notice had not, as he alleges, then been given to him. He pleads that, notwithstanding that his engagement ran from Whitsunday to Whitsunday old style, custom entitled him to forty days' notice of its termination, counting from Whitsunday new style.

"The length of the notice required to terminate a servant's engagement is not prescribed by any statute, but practice has fixed it at forty days, on the ground that that is the notice required between landlord and tenant for terminating the contract of lease. The Act of 1555, regulating the warning of tenants, required the notice to be given forty days before Whitsunday, even though the term of removal were at a different term—*e.g.*, Martinmas, or the separation of the crop from the ground. Whitsunday in that Act meant Whitsunday old style—the only style then observed. It is true that from the introduction of the new style in 1752, it was held that the terms of the Act by which the change of style was effected required that warning of removal to tenants should be given forty days before Whitsunday new style, though the term of removal was Whitsunday old style, or some other term; and it has been said that custom extended this rule to notices between master and servant. It is believed, however, that there never was a decision of the Court to the effect that notice between master and servant given forty days before the actual term to which the engagement ran was not sufficient. But, however this may be, the rule as between landlord and tenant, requiring warning to be given in every case forty days before the legal term of Whitsunday, has now been altered by statute, the Sheriff Courts Act of 1853 allowing a summons of removal to be raised at any time forty days before the actual term of removal, so that when the 26th of May is the term of removal, it is now competent to terminate the tenancy by a summons of removing served on or before the 15th of April. That being so, it follows that if the former rule, requiring forty days' notice before Whitsunday new style to be given between landlord and tenant, though that should not be the actual term of removal, was by custom applied also to master and servant, the change of the rule as regards the former must extend to the latter also, and that it is now sufficient to give a servant, whose term is, as here, the 26th of May, notice on or before the 15th of April. If it were otherwise, a tenant warned by a summons served on the 15th of April to remove from his farm on the 26th of May would be left with all his servants on his hands, though having no farm on which to employ them, if he did not give them notice on the 4th of April, a time when he may have had no knowledge that he was not to be continued in his farm. This would not be a desirable state of things for either master or servant, and cannot be assumed to be the law."

The pursuer appealed.

TRAYNER for him.

M'LENNAN in answer.

At advising—

The LORD JUSTICE-CLERK—In this case I concur