upon the general provisions to that effect as expressly transferred under section 32 of the Roads and Bridges Act, it incorporates section 94 of the old Act directly into the new Act as a section that applies to magistrates of burghs, including, of course, the Magistrates of Glasgow. And there, again, if that section had stood alone, the obligation was clearly transferred.

But it is in these words that the Magistrates find the ground for maintaining the right they propose to enforce under this notice—in these words of section 123, that section 94 is to be incorporated as applicable to these roads "except in so far as inconsistent with the provisions of any general or local Police Act in force therein, within the burgh or burghs situated or partly situated within the same." The Magistrates, referring to these words, say that they do find within their Police Act something which is inconsistent with the provision that they shall maintain this road. I have been unable to find any clause of that kind. What would be necessary in order to create an inconsistency of that kind would, I think, necessarily be some provision in regard to the maintenance of public roads, or of those walls which had hitherto belonged to the road trustees. Nothing of that kind is pointed to. The Magistrates refer to a clause in the Police Act which practically has no relation to roads whatever, but is introduced in a branch of the Act which has been repeatedly before the Court—I mean the 27th branch of the Act, which relates to "Buildings—their erection, alteration, and use," and which contains a number of municipal regulations of great value affecting the maintenance of works and buildings, the protection of dangerous buildings, and sanitary and other requirements. In one of these clauses, viz., section 84, there is a provision that "the master of works may, by notice given in manner hereinafter provided, require any proprietor or occupier of a land or heritage to fence the same, or repair any chimney-stalk or flue, or any chimney-head or can, or any rhone, signboard, or other thing connected with or appertaining to any building thereon, which appears to be dangerous, to his entire satisfaction." It appears to me that this section has no possible application to such a case as that now before us. Its main purpose is to prevent danger with reference to buildings, danger to the lieges from insecure buildings or chimneys, and to provide for proprietors on the side of a road or street fencing such insecure buildings if it be found necessary to fence the same,—obviously to prevent the public suffering from any danger that might arise from the insecure or dangerous state of such buildings. But there is nothing in that section, as it appears to me, that contemplates such a case as we have here, where the danger does not arise from the insecure condition of some building, but arises from the fact that this road is an embanked highway, and one embanked high above the ground, and if not fenced by a proper wall there will be a risk to the lieges. It appears to me that the cases in which this section has been considered hitherto—the cases that were cited in the argument—have no application to a question like the present. The short and clear answer to the Case presented by the Magistrates is, I think, a twofold one. In the first place, that these walls were the property of the trustees, and are now the property of the Magistrates, and if their road requires embanking or keeping up, I do not think there is anything in this Act that entitles the Magistrates to call on a neighbouring proprietor to be at the expense of doing so. But there is a further answer, that while the section refers to notice, it was intended to guard the public from danger arising from something dangerous on the neighbouring ground, but the danger which the public requires to be guarded against here is danger on the road itself. It appears to me that those who have charge of this road, and to whom it practically belongs, are the persons to fence the public against that danger under the Roads and Bridges Act, as they are the persons who undertook the obligation of the old trustees to do so.

Upon these grounds I am of opinion that the questions submitted to us in this Special Case ought to be answered entirely in favour of the first parties.

Lord M'Laren concurred.

The Lord President was absent.

The Court found and declared that the second parties, as coming in place of the Shotts Road Trustees, were bound to erect and maintain retaining and parapet walls or fences at the sides and along the top of the embankment on which the Carntyne Road runs, at the places coloured red on the copy of the Ordnance map produced.

Counsel for First Parties—Trayner—H. Johnston. Agents—Henderson & Clark, W.S.

Counsel for Second Parties—J. P. B. Robertson—Lang. Agents—Campbell & Smith, S.S.C.

Friday, February 6.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

STIRLING-STUART *v.* MONTGOMERIE AND OTHERS (STIRLING CRAWFURD'S TRUSTEES) AND ANOTHER.

Writ—Probative Deed—Signature of Granter—Signature by Stamp—Act 1540, *c.* 117.

A subscription to a deed by means of a stamp is invalid, such stamping not being a subscription in the sense of the Act 1540, c. 117.

Writ—Execution of Codicil—Illegible Signature—Superinduction—Reduction.

A testator who from an affection of the hand seldom wrote, and sometimes when obliged to write found it necessary to touch up with the pen the signature he had made, executed a codicil to his will which was subsequently challenged, on the ground (1) that the subscription was illegible, and (2) that it had been touched up with the view of improving it by the testator or some one with his authority outwith the presence of the instrumentary witnesses. It was proved that the signature, though illegible to a stranger, was recognised as the testator's by those who knew his writing, and the touching up

outwith the presence of the witnesses was not proved. *Held* that the signature was good and the codicil valid.

Succession — Testament — Implied Revocation— Duplicate Deed.

A testator who had signed a codicil to his will, thinking, owing to a misconception, that it was not validly executed, executed another, which was an exact duplicate of it. This duplicate proved to be itself invalidly executed. *Held* that the first executed stood unrevoked.

The late William Stuart Stirling Crawfurd, Esq. of Milton, Lanarkshire, died at Cannes, France, on the 24th of February 1883. He left no issue, but was survived by his widow Caroline Agnes, Duchess-Dowager of Montrose. His nearest collateral relatives were the pursuer of this action, James Stirling Stirling Stuart of Castlemilk, his brother consanguinean and heir-at-law, and Mrs Helen Maitland Stirling or Everard, wife of Henry Everard, Esq. of Newbold Lawn, Leamington, his sister consanguinean. The deceased, who was the elder brother, succeeded many years before the date of this action, on the death of his father Captain Stirling of Milton, to the entailed estate of Milton, a property of great value in Lanarkshire, while the pursuer succeeded to the other family estate of Castlemilk, in the same county, which was also entailed. Under the entail of Milton the pursuer, failing issue of Mr Stirling Crawfurd, was the heir entitled to succeed to him in that estate, but in 1853 Mr Stirling Crawfurd, who was then unmarried, disentailed that estate with consent of the pursuer and Mrs Everard and her son. The pursuer alleged in this action, however, that he then got an undertaking from his brother that the order of succession to Milton would not be changed.

Mr Stirling Crawfurd on 21st October 1853 executed a trust-disposition and settlement by which he conveyed his whole estate *mortis causa* to Henry Everard, his brother-in-law, William Stirling of Keir, his cousin, and John Dundas, Clerk to the Signet, as trustees for the various purposes therein set forth. These were, *inter alia*, failing heirs of the testator's body, to convey the estate of Milton to the pursuer and the heirs of his body, to be held under the fetters of a strict entail, and to make over the residue of his estate to the person who should succeed to Milton.

Mr Stirling Crawfurd married the Duchess-Dowager of Montrose in 1876. Prior to this event an antenuptial contract was entered into between the parties, whereby various provisions were secured to her Grace in the event of her being the survivor. On the day on which his marriage took place Mr Crawfurd executed various codicils confirming his trust-disposition, and making additional bequests to his wife, as well as giving numerous legacies to parties named therein.

Upon the 14th and 22d of February 1881 respectively Mr Stirling Crawfurd executed at Cannes, where he had a residence, the two codicils brought under reduction in this action. The codicil of the 14th narrated the settlement and codicils, and bequeathed to the Duchess, in addition to her jointure and the testamentary provisions in her favour, the sum of £120,000 sterling, which sum he directed his trustees to raise out of his estates of Milton and others in the county of Lanark, paying the same to her, if she survived, for her absolute use and behoof. The other codicil, that of 22d February, was simply a duplicate of that of the 14th. The following passage from the note of the Lord Ordinary explains how the codicils came to be executed in duplicate—"Mr Campbell, the London solicitor of the Duchess of Montrose and Mr Stirling Crawfurd, received written instructions from Mr Stirling Crawfurd for the preparation of a codicil which should put the Duchess in the position of receiving an annuity of £5000 a-year from his estate. By a second letter Mr Campbell was directed to alter the codicil so as to give the Duchess the absolute control of the money. The instructions were signed by a stamp, which was Mr Stirling Crawfurd's usual mode of signing letters and cheques, a mode which he had been compelled to adopt in consequence of his right hand being affected by a paralytic tremor when he attempted to write. Mr Campbell, who understood that the bequest was to be of a capital sum which would produce an annual return of £5000, prepared a codicil, bequeathing to the Duchess the sum of £120,000, charged upon the heritable estate of Milton, and sent this codicil by post, addressed to Mr Stirling Crawfurd's residence at Cannes. Mr Stirling Crawfurd signed the codicil on 14th February in presence of two friends, Mr Augustus Savile and Mr Savile's brother, since deceased, who signed the deed as witnesses, but did not fill in the testing-clause. The codicil was sent by post to Mr Campbell, who received it within forty-eight hours after its execution. Mr Campbell in his examination stated that he was under the impression that according to the law of Scotland a testing-clause must be filled in at the time of execution. Under the influence of that impression he had caused a duplicate of the codicil to be prepared and sent to Mr Stirling Crawfurd, with a letter desiring that the codicil should be re-executed, and that the testing-clause should be filled up in the presence of the instrumentary witnesses. He about the same time caused the codicil of 14th February to be endorsed 'Not used—Incorrectly signed,' and to be put away in a box containing papers of Mr Stirling Crawfurd. The second codicil was accordingly executed by Mr Stirling Crawfurd on the 22d February in presence of two witnesses, but in executing it the testator impressed his signature with his stamp as I have already stated. The testing-clause was completed under the direction sent by Mr Campbell, and the completed instrument was sent to Mr Campbell by post."

The pursuer Captain James Stirling Stirling-Stuart of Castlemilk, as heir-at-law and general representative of his brother, brought this action to reduce these codicils, against the testamentary trustees and the Dowager-Duchess of Montrose, the widow and executrix.

His material averments were—At the time of his marriage and during its subsistence Mr Stirling Crawfurd was in feeble health and partially paralysed. The pretended codicil of 14th February 1881 was not duly executed by Mr Stirling Crawfurd. The writing at the foot of each page by way of subscription could not be recognised as his signature. The codicil was not in fact subscribed by the said William Stuart Stirling Crawfurd. If any part of the writing forming his alleged signatures was written by him, the whole was not so written. Further, the sub-

scriptions, if and in so far as written by him, were not written by him unaided by any other person, but, on the contrary, his hand was led or guided by some other person or persons. Further, the said codicil was cancelled or superseded, and was not intended by Mr Stirling Crawfurd to be operative as a testamentary writing; it was endorsed in the handwriting of the said John Thomas Campbell, the London solicitor who prepared it, with the words "Not used—incorrectly signed," and at the time of the testator's death the testing-clause had not been filled up, and the endorsation mentioned stood undeleted, but the testing-clause was afterwards written in, the endorsation deleted, and the deed, along with the subsequent codicil alleged to have been executed on 22d February 1881, recorded in the Books of Council and Session on 19th March 1883. The pretended codicil of 22d February 1881 was prepared because of that bearing to be dated 14th February 1881 having been inept. The one of 22d February contained no reference to that of 14th February, but proceeded precisely as it would have done had the earlier deed never been prepared or been destroyed. *As to the second codicil* the pursuer averred—The said second codicil was not duly executed by Mr Stirling Crawfurd, the signatures thereto not being wholly the writing of the said Mr Stirling Crawfurd. The said codicil was not in fact subscribed by the said William Stuart Stirling Crawfurd. If any part of the writing forming his alleged signatures was written by him, the whole was not so written. Further, the said subscriptions, if and in so far as written by him, were not written by him unaided by any other person, but, on the contrary, his hand was led or guided by some other person or persons. By the law of France, in which country both codicils were executed, they were invalid. According to said law, a will or codicil to receive effect must either be holograph of the maker or executed before a notary according to form of law. Neither of the said codicils was holograph or was so executed before a notary.

The defenders denied that at the time of his marriage, or during its subsistence, Mr Crawfurd was in feeble health, and they averred that he resided at Cannes in winter as he owned a property there, and that he was in the habit of taking long walks daily, and also riding exercise; that some years before his death he had an affection of the muscles of his right hand which gave his hand a shaky appearance and rendered his signature difficult to read. In consequence of this he had a brass stamp made bearing his signature, which he used for signing cheques, letters, and deeds, but that he occasionally used a pen.

With reference to the codicil of 14th February 1881, the defenders alleged as follows:—"It was duly executed by the deceased, who signed it with a pen, unaided by anyone, in presence of two intimate friends who were paying him a visit at the time and who signed as witnesses. The said codicil was duly and validly executed in accordance with the law of Scotland and also with the law of England. Explained that the codicil had been prepared and engrossed for signature in the office of Mr Campbell, on the instructions of Mr Stirling Crawfurd, but on its return from Cannes duly executed, Mr Campbell, who was under the impression that the testing-clause required to be filled up by one of the witnesses at the time of signing, had the codicil re-engrossed for signature. The marking on the back of the codicil of 14th February was made by Mr Campbell's clerk, in error, and without the authority or knowledge of the testator, and it was deleted and the testing-clause duly filled up before the codicil was recorded.

As to the codicil of 22d February, the defenders averred that it was executed by the deceased by adhibiting his signature, by means of his brass stamp (engraved by his orders, and forming a reproduction of his writing before it became affected), in the presence of the subscribing witnesses. They maintained that such a signature was effectual and valid according to the law both of England and Scotland, in one or other of which countries he was domiciled, and they referred to 24 and 25 Vict. c. 114, sec. 1, whereby it is enacted that the will of a British subject made out of the United Kingdom (whatever be his domicile at the time of making it, or of his death) shall as to personal estate be held well executed if made according to . . . the laws in force at the time of making it in that part of Her Majesty's dominions where he had his domicile of origin. Scotland was the domicile of origin.

The pursuers pleaded, *inter alia*—"(2) The said pretended codicil of 14th February 1881 not having been signed by the said William Stuart Stirling Crawfurd, it should be reduced or declared inoperative. (4) The pretended subscription to the said last-mentioned codicil not being wholly in the handwriting of the said William Stuart Stirling Crawfurd, or he having been assisted by another person in making the said pretended subscription, the said deed ought to be reduced or declared inoperative. (6) The said pretended codicil of 22d February 1881 not having been signed by the said William Stuart Stirling Crawfurd, the same ought to be reduced."

The defenders pleaded, *inter alia*—"(3) The codicils libelled having been duly executed by the testator, decree of absolvitor should be pronounced. (4) The said codicils should receive effect, seeing that they remained unrevoked, and are subsisting testamentary writings of the deceased."

The Lord Ordinary allowed a proof. The material facts proved are fully detailed in his Lordship's opinion.

On 4th April 1884 he pronounced this interlocutor—"Finds (1) that the codicil of 22d February 1881 is not well executed according to the law of Scotland, but that the pursuer has no interest to reduce that instrument; (2) that the codicil of 14th February 1881 is well executed, according to the law of Scotland, being the law of the testator's domicile of origin; and that the codicil of 14th February 1881 was not revoked or cancelled by the granter, and that the same is a valid and effectual testamentary writ of the deceased Mr Stirling Crawfurd: Therefore assoilzies the defenders from the conclusions of the action, and decerns, &c.

"*Note.*—In this action Mr Stirling-Stuart, brother consanguinean and representative of the deceased Mr Stirling Crawfurd, sues for reduction of two codicils executed by that gentleman, which are dated respectively 14th and 22d February 1881. The two codicils are expressed in identical terms, being copies of the same draft, and they

are brought under reduction on the same technical ground, namely, that the signatures adhibited to these instruments are not the genuine subscription of Mr Stirling Crawfurd. The objection to the codicil of 14th February is, that the original signature of Mr Stirling Crawfurd being illegible, had been written over by some person unknown to make it legible. It is further contended that this codicil, if it is the testator's writ, has been revoked, cancelled, or otherwise rendered ineffectual by the execution of the codicil of 22d February. The objection to the codicil of 22d February is, that the signature to it is an impression from a stamp which Mr Stirling Crawfurd was in the habit of using, and is therefore not a subscription such as is required by law.

"An objection was also stated to the codicil of 14th February, on the ground that the testing clause was filled up after the testator's death, under circumstances in which his authority for doing so ought not to be presumed. But it is unnecessary that I should consider this point, because the codicil bears the designations of the instrumentary witnesses appended to their signatures by themselves, and the codicil is therefore well executed under the recent statute if it is not open to objection on extrinsic grounds.

"(1) I shall consider first the objection to the codicil of 22d February, because it is only in the case of that instrument being displaced that it becomes necessary to consider the objections which have been stated to the codicil of 14th February.

"On this subject I may say at once that I do not consider it to be attended with difficulty. It is a question of Scotch statutory law, and the requirement of the statute is clear. The Statute 1540, c. 117, requires that every deed shall be authenticated by the granter's subscription. The meaning of this enactment is, as I read it, that the granter shall adhibit his subscription in manuscript, that is, he shall form the letters constituting his subscription by a continuous act of writing; and while it may not be essential that this shall be done with a pen, I think it is essential that the letters should be formed by the hand and not by way of impression from an engraved stamp or die. An impressed signature, in our law, is no better than an engraved or printed signature. I know that the law of England permits the execution of deeds by stamping in the presence of witnesses, but that law differs from ours in allowing execution or subscription by a mark. A stamped subscription may be good as a mark, or perhaps as a seal, but neither of these modes of execution is valid by our law; and I am clearly of opinion that an impressed copy of the granter's signature is not subscription in the sense of the Scottish statute. In the present case it is proved by the evidence of one of the instrumentary witnesses that Mr Stirling Crawfurd's signature to the codicil of 22d February was impressed by a stamp. The surname Stirling Crawfurd is evidently a copy from the same stamp which is affixed to the bundle of cheques which were given in for comparison. The letters "W. S.," the initials of his Christian name, are in manuscript, but it is not proved that they were written in presence of the instrumentary witnesses, and it is therefore not necessary to consider whether a subscription begun in writing and completed by a stamp would constitute a legal subscription. In the result, I find that the codicil of 22d February does not form part of the will of Mr Stirling Crawfurd.

"(2) I shall now consider whether the codicil of 22d February while ineffectual as a will is equivalent to a revocation of the codicil of 14th February, assuming that the codicil of 14th February is not open to objection on the grounds of defective execution. The question arises in this way—[*His Lordship here explained how the codicils came to be executed in duplicate, as already quoted*].

"On the question of implied revocation, I heard a very able argument, to which I have been anxious to give the most careful consideration. It was contended by the Solicitor-General for the pursuer that the first codicil (that of 14th February) never was at any time the will of Mr Stirling Crawfurd; that it was sent to Mr Campbell incomplete, for the purpose of being completed; and that on receiving the opinion of Mr Campbell that the codicil was incorrectly executed, Mr Stirling Crawfurd abandoned the intention of completing it, as is shown by the fact of his having executed the second copy in the way which he thought sufficient. Thus, according to the pursuer's argument, the original transcript of the codicil was discredited, and ceased to possess, if it ever possessed even provisionally, the attributes of a document expressive of the testator's will. Now, I am not prepared to say that this argument is logically unsound, but I think it is unsound as applied to the facts of the case. I can conceive of such a case as a testator writing out a will before he had finally made up his mind to execute it, and putting his name to the paper, not for the purpose of execution, but merely to indicate that this was a draft in his handwriting, or for some purpose not intelligible to persons of ordinary business habits. If it could be proved (though I do not quite see how this could be proved) that in such a case the writing was not intended to be a testamentary writing, a court of equity would probably be well founded in refusing to recognise it as such. But in the present case there cannot be the smallest doubt that when Mr Stirling Crawfurd signed the codicil of 14th February he intended it to have a testamentary operation. I asked Mr Savile the question, and he answered that Mr Stirling Crawfurd executed the codicil as his testament. It was not in the least necessary that the codicil should be delivered to anyone in order that it should have a testamentary operation. Nevertheless, the fact that the testator immediately sent it to his solicitor, coupled with this statement of the instrumentary witness, is evidence—and to my mind conclusive evidence—that he meant it to have a testamentary operation. The codicil being executed with the intention that it should take effect as such would from the moment of execution become an effective testamentary instrument, and would continue to have such effect until it was taken out of the way by the act of the testator—that is, by cancellation, or by the effect of a subsequent revoking instrument. Its effect could not, according to all the authorities, be taken away by a mere intention in the mind of the testator that the codicil should not subsist, and still less by his belief (subsequently induced) that the codicil was affected by some legal flaw rendering it ineffective. I am therefore unable to accept either of the suggestions

that the codicil was never effective in the testator's intention, or that, if effective, it lost its effect by reason of the testator's belief or intention that it should no longer subsist. The question remains whether the codicil was revoked by the execution of a subsequent codicil (that of 22d February) expressed in identical terms. I am not sure whether the affirmative of this proposition was maintained. To me it appears untenable, for, in the first place, the codicil of 22d February contains no clause of revocation, and there is no inconsistency in the two instruments from which a case of implied revocation could be reared up. The suggestion of inconsistency as applied to the case of duplicate instruments is something like a contradiction in terms, and in the absence of any express clause of revocation I can only regard the second duplicate as confirmatory of the first in case the first should from any cause be insufficient to pass the property.

"But further, the second codicil cannot be a revocation of the first, because the pursuer has successfully maintained that the second codicil is not the act of the testator. I am aware that questions somewhat resembling this have been raised in other cases, and so, for example, where a deed contains an effectual revoking clause, but is not effectual as a deed of conveyance, it is perfectly intelligible that the effect of such an instrument may be intestacy. But in the present case I am reducing the codicil of 22d February *in integrum* as not being the deed of Mr Stirling Crawfurd, and whether this decree be well or ill-founded I could not, without manifest inconsistency, hold that the codicil of 22d February, which in my view has no legal existence, is effectual for any purpose whatsoever. If, however, the codicil of 22d February shall eventually be held to be well executed, the pursuer's case will in no way be improved, because that codicil, if set up, would carry the property in dispute away from the pursuer.

"(3) In the preceding part of my opinion I have assumed that the codicil of 14th February is well executed, but as indicated in the outset the genuineness of the subscription adhibited to that codicil is disputed, and I must now consider the objections which have been stated to it. These are, stated shortly—(1) That the subscription at the end of the deed is illegible; (2) that the initial letters 'W.S.' have been prefixed in a different hand, and outwith the presence of the instrumentary witnesses; and (3) that the remainder of the signature has been written over in a different hand, so that the original subscription can no longer be read. It is also made a point that the signatures on the first and second pages of the deed are illegible, though they are not said to be written over. But as the codicil is all contained in one sheet of paper, it appeared to me that, provided the subscription to the last page were held to be well executed, the objection stated to the legibility of the previous signatures was of no consequence.

"The evidence on this subject admits of being very shortly stated. Mr Augustus Savile, the surviving instrumentary witness, states in effect that the codicil was subscribed by the testator in his presence, and in the presence of his brother, in the ordinary way, and that it was then attested by the witnesses in conformity with the requirements of the laws of England and Scotland. At the beginning of his cross-examination Mr Savile stated that the testator did not take a very long time to subscribe his name—not longer than might be expected of a man with a trembling hand. His belief was that the subscriptions were written continuously, and were not touched up by the testator in the presence of the witnesses. It appeared to me, however, as the result of the cross-examination, that Mr Savile had no very distinct recollection as to Mr Stirling Crawfurd's manner of writing, though he perfectly recollected having seen him sign the codicil in his library on the 14th of February, and recognised the subscription as being in the handwriting of Mr Stirling Crawfurd. It was explained by another witness, Mr Campbell, that Mr Stirling Crawfurd's hand, which was sufficiently steady for other uses, became very shaky whenever he attempted to write, and that the agitation of his hand was increased by the consciousness that anyone was looking at him. Such being the case, I can well believe that Mr Savile, while a witness to the general fact of his subscription, would abstain from watching the action of the testator's hand in a way that would be embarrassing or that would increase the difficulty under which the testator laboured in forming his signature. It is therefore quite possible that Mr Stirling Crawfurd may have touched up his signature here and there, and may even have added the initial letters that we find there after he had written the body of his signature, and yet that Mr Savile may not have observed that this was being done. Mr Campbell states that it was Mr Stirling Crawfurd's habit to touch up his signature, and it is possible that Mr Savile may have observed the touching up at the time it was done, but without attaching any importance to it, in which case it is the most unlikely thing in the world that he should remember the circumstance when examined about it three years after the event. The material point in Mr Savile's testimony is, that he recognises the signature which he sees as being the same which he attested when he put his name to the codicil in February 1881.

"On the other side the case rests mainly on the evidence of two experts, who say, as the result of careful examination, that the signature has been re-written, and in their opinion by a different hand. I have also been furnished with a large number of signatures of Mr Stirling Crawfurd, executed at different times, while his hand was affected by paralysis, for the purposes of comparison. No medical evidence was adduced on either side as to the effect of this particular form of paralysis (described as scrivener's palsy), but some indications as to its effect are given by the other signatures of Mr Stirling Crawfurd which I have examined, and to which I shall immediately refer.

"I have felt this part of the case to be a subject of great difficulty, but its consideration has been simplified by the conclusion to which I have come. With respect to the objection of illegibility, I think that this objection must be absolutely rejected. Our law does not recognise subscripton by mark, and it follows that everything put upon a deed by a person who has not learned to write, and who for that reason cannot form the letters of his signature, is a bad subscription. I should further be prepared to hold that something put upon a deed by a person who is able to write,

but which he has not tried to form into a signature and which is not recognisable as a signature, is bad. But if the granter of a deed has acquired the art of writing, and if he writes down what he means to be his signature, honestly endeavouring to write his name according to his ability, this, I think, is to be accepted as a subscription, even although it should be illegible. Undecipherable signatures are by no means unfrequent, and the signatures of illiterate persons are often more easily read than those of persons largely engaged in correspondence. Can it then be maintained that there is one kind of illegibility which does not vitiate a subscription, and another kind which will have that effect? If this be so, there must be some criterion for distinguishing between the two kinds of illegibility, but I know of none, and no satisfactory distinction was suggested in argument. The only test that I know is, that the subscriber must have the capacity to write his name, and that the characters which he puts upon the paper must be placed there with the intention of constituting his subscription. If this be the proper test then, the objection to the legibility of Mr Stirling Crawfurd's signature disappears.

"The matter of the illegibility of the subscription is, however, important to the pursuer's case in another view; because it is necessary to assume that the signature as at first written, was illegible in order to account for it being re-written, as the pursuer thinks it was. Now, on the question of fact, whether the signature at the end of the codicil has been re-written, the recollection of Mr Savile, the instrumentary witness, is in direct opposition to the evidence of the experts. In this conflict of opinion I am inclined to place considerable reliance on the evidence of my own eyes, which I conceive to be not only competent but trustworthy evidence in a question of this kind. I examined the original signatures to the codicil with great care when they were exhibited in Court, and compared them with the photographic copies which were put in for reference. Since the proof was taken I have looked at every signature of Mr Stirling Crawfurd contained in the bundle of deeds and cheques (I except, of course, the stamped signatures) which were put in for reference. I formed the opinion, from inspection of the codicil in Court, that certain parts of the signature had been re-written, and the impression remains unaltered after subsequent and careful examination of the photographic copies. The question is, how and when were these alterations made? The pursuer's case is, that the alterations were not made by Mr Stirling Crawfurd in presence of the instrumentary witnesses, because it is materially impossible that the initial letters 'W. S.,' which are clear and firm, and possessed of a certain character, can have been designed by the hand which formed the original signature. I should be unwilling to accept this conclusion, because it seems to imply that within the few hours during which the codicil remained in Mr Stirling Crawfurd's custody someone with his consent had altered his signature. Of course, if the alterations were made without the testator's consent they would not invalidate his signature. Certainly a will is not to be set aside because someone unknown to the maker chooses to tamper with his signature. But the suggestion is, that this was done with Mr Stirling Crawfurd's consent, and therefore that the will was not subscribed in terms of the statute. Now, if I had been obliged to form an opinion after my inspection of the signatures to the codicil, and one or two other signatures which were shewn to me in Court, I should have had very great difficulty in holding that the initial letters 'W. S.' were Mr Stirling Crawfurd's handwriting. But after examining the other signatures which were put in evidence, that difficulty had in a great measure disappeared, and I am now of opinion that it is possible, and even probable, that these letters, as well as the other alterations appearing on the signature, were made by the hand of the testator. It is enough, in my view, that they may possibly have been formed by his hand, because the presumption of law is in favour of authenticity, and there is no evidence to the contrary. The initial letters have the character of Mr Stirling Crawfurd's handwriting, especially the letter 'W.' Even Mr Blackley, Mr Stirling Crawfurd's factor, who disbelieves in the authenticity of the signature as it stands, admits that the 'W' may have been written by Mr Stirling Crawfurd; and while he demurs to the 'S' as being unlike the testator's signature, it appears from the evidence of Mr Campbell that the testator had no uniform mode of forming the initial 'S' of his signature, and it is evident to the eye that the 'W' and 'S' were formed at the same time and by the same hand. As regards the initial 'S,' I find on my examination of the signatures in process that the testator varied very much in his mode of writing that letter, sometimes using the form of a small manuscript 'S,' and sometimes, as in his codicil, using a form approximating to a printed 'S.' In the signature under consideration this letter 'S' has undoubtedly been written over part of the original 'W,' and I think by an upward stroke of the pen. A letter written under such conditions, and with the intention of obliterating another letter, would not necessarily be the same as the writer's ordinary signature. Yet the 'S' in question is not very dissimilar from the one in the engraved stamp, which I must assume to be a characteristic signature. As to the other touches, the 'l' in Stirling and the 'C' and 'f' in Crawfurd, there is really nothing characteristic about them. They might have been made by the testator as well as by any other person. But the grand objection to these letters, according to the pursuer's argument, is their steadiness in comparison with the rest of the signature. Now, it is on this point that I have derived aid from the deeds produced for comparison. I find that in several instances where the signatures bear marks of extreme unsteadiness of hand, and are indeed almost undecipherable, particular letters, and especially the initial letters, are regularly formed, and are unaffected by tremor. I refer to the following amongst others—Feu-contract dated 25th October 1881, signature to page 1; feu-contract dated 31st July 1880; feu-disposition dated 28th November 1881, signature to page 2. This is a very remarkable instance. Not only is the signature generally illegible, but it is a sort of triple signature, being written in three lines, one under the other, representing three ineffectual attempts to form the letters of the surname. Yet the initial 'W,' which bears a striking resemblance to that of the signature under reduction, might have been made in

perfect health, the strokes being rounded and clearly cut, and the letter completely formed. This letter, in my opinion, was written after the rest of the signature, and in substitution for the imperfect 'W' to the right, which is struck out. Among the cheques which are signed in manuscript I may refer to the fifth in the order in the packet, which is dated February 4, 1880, and is in favour of Mr H. R. Sherborne. Here the 'W,' although not so well formed as the one last referred to, is formed in straight and perfectly steady strokes. The 'W' of the second signature of the codicil in question is like it, though not so well formed. In the opinion of the expert witnesses the wavy line running through the word 'Crawfurd' in the signature to the codicil was written by another hand after the completion of the signature. I think, on the contrary, that this wavy or indeterminate line was the original signature, and that the dashes across the two names indicating the principal letters were put in afterwards. Such are the 'l' in Stirling, the 'f' in Crawfurd, and the two dashes after the 'f' which indicate the letter 'u.' It is not impossible that these were put in by the testator, and if they were put in at the same time they constitute an integral part of his signature. Although there is no medical evidence, it is in evidence that Mr Stirling Crawfurd's hand only became unsteady when he attempted to write, and I can well believe, from the character of his other signatures, that this unsteadiness of hand was attended by momentary intermissions in which he was capable of prefixing an initial or dashing in a significant letter into the otherwise confused scrawl which constituted his signature. Of course it is possible that these emendations may have been made by the testator *ex intervallo* when he was not excited by the presence of witnesses to his infirmity. But it is not necessary that I should give an opinion as to the effect of emendations so made. It may be a question of degree. The stroking of a 't' or the dotting of an 'i' after the witnesses had left would hardly be regarded as material alterations on a signature. In the present case there is no evidence whatever of alteration *ex intervallo*, and as I see from other signatures to probative deeds that the deceased gentleman was capable of forming single letters which bear no marks of weakness, I must assume that in the present case the evidence of the instrumentary witness is correct, and that the signature as we see it was all one act, though not in my opinion one continuous act of subscription.

"If, as the pursuer states, he consented to the disentail of the estate of Milton on the assurance that the succession would not be altered to his prejudice, his case is a hard one, but I am not trying any question involving obligation or good faith. In the view I take of the case the material question is, whether the codicil of 14th February 1881 was well executed according to the law of the testator's domicile of origin, which is admitted to be in Scotland, and whether that codicil is a subsisting instrument? As I have found affirmatively on both these points, it follows that the defenders are entitled to absolvitor."

The pursuer reclaimed, and argued—The codicil of 14th February was bad on three grounds—(1) That that which was appended to it was not a signature in any sense of the word; (2) that the subscription was not a signature by the person alleged to have executed the deed before witnesses as required by the law of Scotland; (3) that, as shown by the fact of a substituted codicil having been made, Mr Stirling Crawfurd had discarded this as one of his testamentary writings. As to what was required in the way of signature, see Bell's Conveyancing, i. 31, and then the case of *Wilson*, reported in Hume, 912, and *Crosby* v. *Picken*, M. 16,814. The signature as it now stood was an unwitnessed signature, because the testator, not satisfied with the sufficiency of his signature as made before witnesses, amended it in private. The evidence of the surviving testamentary witness that no touching up took place was of little avail, and only showed he was mistaken, as the superinduction was distinctly visible, and the signature was thus invalid.—Act 1672, cap. 21; *Scott* v. *Sceales*, February 5, 1864, 2 Macph. 613. Could this signature be called one continuous act of penmanship? If not it was bad, as there was no case here of an acknowledgment of a subscription. This could not be called a properly authenticated deed, as the major part of it was superinduced, especially the letters "W" and "S." The case of *Moncrieff*, M. 15,936, illustrated the necessity of completing the subscription in full in one handwriting. Under the Act of 1540, cap. 117, sealing was dispensed with as a solemnity, and subscription required instead. Now, could this writing in any way be called a subscription in the sense of the Act of 1540?—See as to this *Din* v. *Gillies*, 18th June 1813, reported in note to *Weir*, 22d June 1813, F.C. The whole writ as it stood on page 3 must be taken as Mr Stirling Crawfurd's signature. To subscribe a deed on only one of its pages would not do—*Dempster*, M. 16,947; *Nasmyth* v. *Hare*, July 27, 1821, 1 Sh. App. 65; *Crosbie* v. *Wilson*, June 2, 1865, 3 Macph. 870. The superinduction was probably by Mr H. Savile, the deceased instrumentary witness, who at the time was signing numerous documents for Mr Crawfurd. On the question of cancellation—Consider of what papers Mr Stirling Crawfurd's will consisted? It did not include the codicil of 14th February, because it was superseded by the codicil of the 22d February. The testator never intended the first codicil to be a part of his testamentary writs.

Argued for defenders—The codicil of 14th February was well executed; it was probative, and the witnesses had been specially called in to witness the signature. The evidence of the experts was of little value, the more so as Mr Stirling Crawfurd's signature varied so much. The final signature was sufficient, as the document was contained on a single sheet of paper, but the whole three might be looked at to show that there were certain characteristics apparent in them all. Mr Crawfurd was in the habit of touching up his signature, and so this was not an ordinary case of superinduction. The various signatures in process showed that the testator's hand had certain marked characteristics; and though a stranger might not be able to read it, those who knew the signature could recognise it. With reference to the alleged "touching up," much depended on what was done and by whom. There was no evidence that the initials "W. S." were not all there before the alleged superinduction took place. If the elements of a good signature were there to begin with, it must stand, unless

the touching up went the length of cancellation. Under the Act 1672, cap. 12, there must be in a valid signature an initial letter of a Christian name. If, then, there was one of Mr Crawfurd's initials of his Christian name legible, that was sufficient to constitute a good subscription. If the writing were intended by the writer to pass as his signature, then the deed would stand.

On the question of whether if this was a signature it was duly witnessed—To undo the effect of the signature the pursuer must get rid of the testing-clause. *Prima facie*, that clause applied to the writing as it stood, and the alleged superinduction could not diminish its effect. The alleged superinductions were unnecessary, and could not invalidate a previously good signature. There was nothing in the case of the nature of revocation, nor of an intention by the testator to cancel his first codicil—*Kirkpatrick*, 1 R. (H. of L.) 37; Williams on Executors, i. 1515.

At advising—

LORD PRESIDENT—The pursuer here, who is the heir-at-law and general representative of the deceased Mr Stirling Crawfurd, seeks reduction of two codicils to the trust-deed and settlement executed by Mr Stirling Crawfurd on 21st October 1853.

The one of these codicils is dated the 14th February and the other the 22d February, both of the year 1881.

It is set out in the summons that both the codicils are in the same terms, and they bear that Mr Stirling Crawfurd bequeathed to his wife, the Dowager-Duchess of Montrose, if she should survive him, in addition to the jointure settled upon her Grace, and in addition to the other settlements, the sum of £120,000, which sum he directed his trustees, in the event specified, to pay to his widow for her absolute use and benefit. It was not contended by the defenders that these two codicils are to be regarded as double legacies; on the contrary, it is quite apparent that the one is simply a repetition of the other, and that the testator is only dealing with one sum of £120,000.

But the pursuer assails both these codicils on the ground that they are badly executed, and in dealing with the objections which have thus been taken the Lord Ordinary naturally proceeds to consider the second codicil first, because if the objections to it failed, then there would be no necessity to deal with the other document. As to the codicil of the 22d February, I agree with the Lord Ordinary in thinking that it is bad by the law of Scotland, as not being conform to the Statute of 1540, cap. 117, which requires that every deed shall be authenticated by the granter's subscription. What we have here is admittedly the impression of a stamp, which can in no way be viewed as a subscription within the meaning of the statute.

This brings us, then, to the consideration of the codicil of 14th February, and to the question whether any valid objection has been stated to it.

In the course of the argument three objections were taken to this document. The first of these was that the signature upon the third page was not a subscription in the proper sense of the word.

The whole instrument happens in this case to be contained in a single sheet of paper, and while the signatures upon the first and second pages are useful for the sake of comparison, that upon the third page is the only one of real importance. As to this last subscription there can be no doubt that it has a singular resemblance to the other subscriptions of Mr Stirling Crawfurd which have been put in process; indeed, it is impossible to look at his various subscriptions as presented to us in cheques, leases, and other writings to which his written signature is appended, without seeing the striking resemblance between them and that now under consideration. If, then, this signature is to be judged by a cursory examination, there can be no doubt that it was written by Mr Stirling Crawfurd; indeed, it is more than probable that no-one else than he could possibly have written it.

It appears from the evidence that Mr Stirling Crawfurd could not sign his name without a certain nervous trembling, which caused his writing to look scrawly and irregular, and anything like overlooking him while so engaged would no doubt make matters worse. He was therefore in the habit, we are told, of going over his signature, and touching it up when that was necessary. Now, all this completely corresponds with what we see here, and what has been described to us exactly coincides with what has been done.

But it is said, then, that if we attempt to read this signature upon the third page of the codicil apart from the other subscriptions, it is illegible, and upon that account therefore the deed must be set aside. As thus stated the proposition is much too wide to be accepted. Illegible subscriptions are, I fear, not uncommon, arising from a variety of infirmities, such, for example, as affectation. Thus we see men of the highest ability sign their names in such a way that those who happen to see the writing for the first time would find it next to impossible to make out the writer's name. Is a document thus signed to be as a consequence rejected? That would, indeed, be a very dangerous doctrine to lay down, and one which I for my part cannot accept. Surely, then, it makes no difference because the illegibility is the result of infirmity. Mr Stirling Crawfurd undoubtedly made this signature, and he was in the habit of representing his name in the manner in which we now see it. We are also told, and we can see from a comparison of the different signatures, that the letters are "W. S. Stirling Crawfurd." So, without going further into this branch of the argument, when once we know the nature of Mr Stirling Crawfurd's infirmity, and become familiar with his signature, one cannot but be satisfied that the writing on the third page of this codicil is his subscription, made by his own hand, and that it bears a close resemblance to his other signatures. Upon that account therefore it is impossible to maintain successfully that this is not a signed deed.

The second objection taken by the pursuer is that only a part of the signature was written in the presence of witnesses, or, in other words, that the signature as we now see it was not properly tested. Now, this objection rests upon very narrow grounds. We are here dealing with the testing of a deed, and when a deed duly tested according to the statute is laid before us the *onus* lies on the challenger of showing that the deed is improperly tested. No doubt the signature in the

present case is, as the Solicitor-General called it, not one continuous act of penmanship, but whether it was touched up at the time or subsequently is matter for inquiry. If not for the evidence of Mr Savile the contention of the pursuer would be hopeless indeed. Mr Savile says that Mr Crawfurd wrote continuously just like any other person; that he did not take an extra long time to sign his name; and that he did not go over with his pen any part which he had already written. Upon all this the witness speaks with considerable confidence. Now, it must be kept in mind that Mr Savile is speaking of an event which happened three years before the time at which he gave his evidence, and while there can be no doubt that Mr Savile honestly believed what he was saying, it may reasonably be doubted whether he watched Mr Crawfurd so closely as to be able positively to say that no one of the letters in this signature was touched up or gone over with the pen. The Lord Ordinary makes a conjecture in his note with which I concur, namely, that Mr Savile, knowing Mr Stirling Crawfurd's nervousness, would probably avoid standing too near to him at the time he was signing his name, and that while in the act of writing Mr Stirling Crawfurd might easily go over certain letters with the pen without Mr Savile being aware of the circumstance. Now, as I have already said, I think that there is a great deal of weight in that observation of the Lord Ordinary's. The pursuer has in this case to make out that this superinduction was made outwith the presence of the testamentary witnesses, and with Mr Crawfurd's consent, because if made without his consent, it can, as a matter of course, have no effect. It is said that there are certain letters in this signature which could not have been written as part of the original subscription, and were not in fact written by Mr Stirling Crawfurd. If the "W. S." preceding Stirling Crawfurd were not written by the testator, by whom were they written? Clearly the pursuer must show, if he is to succeed, by whom these letters were written.

If the letters "W.S." were not put there by Mr Stirling Crawfurd, then it falls upon the pursuer to show that they were put there by his authority, otherwise they can have no effect in the present inquiry.

But suppose the letters "W. S." were taken away. No doubt an "S" is still wanting to make the signature as we usually find it, yet withal what remains is a perfectly good subscription. Therefore, as regards this second objection, the pursuer has been unable to prove his case; the *onus* lay upon him to show that the deed was untested, and he has failed to discharge that *onus*.

The third objection taken by the pursuer is, that this codicil was not one of Mr Stirling Crawfurd's testamentary papers at the time of his death. Now, this objection arises from the circumstance that another codicil, in exactly the same terms as the one we are now dealing with, was subsequently executed by the testator. It is a little startling to have this second codicil, which I have already disposed of, revived again. Still it is the foundation of the pursuer's case.

The circumstances connected with the preparation and execution of this second codicil are fully stated by Mr Campbell, the late Mr Stirling Crawfurd's London agent, in his evidence. It appears that Mr Campbell thought that the first codicil was bad because the testing-clause had not been filled up at the time of subscription. He wrote accordingly to Mr Stirling Crawfurd, and enclosed another codicil in exactly the same terms as the first, and this latter codicil Mr Crawfurd executed by means of his stamp, and thereby rendered it of no avail. The first codicil had been returned to Mr Campbell, who laid it aside as being in his opinion no longer required, and caused his clerk to mark upon the back of it the words, "Not used—incorrectly signed." This codicil is, however, an instrument of Mr Crawfurd's, and I have yet to learn why it should not stand. It was originally an act of his will disposing of a part of his estate, and being so until recalled *habili modo* it must receive effect. But take the latter codicil, and suppose it came in place of the former, does it recal the former? On the contrary, it confirms it. Had there been in the latter document anything of the nature of a revocation, then there would have been more room for the pursuer's argument, but then the deed which was intended to revoke the former having been found to be itself bad, what would have been the pursuer's position in these circumstances? But it is needless to enter into such speculations, because the effect of this second codicil (though in itself bad) is only to confirm and make more sure what was done in the first. A tested act requires for the purposes of revocation something more formal than mere intention. It requires an act. Now, I look in vain for anything of that kind here, and the conclusion at which I arrive is, that this codicil of 14th February is to be held as part of the testamentary deeds of the late Mr Stirling Crawfurd.

I am therefore for adhering to the Lord Ordinary's interlocutor.

Lord Mure—I am of the same opinion upon all the points to which your Lordship referred, and as the Lord Ordinary and your Lordship have entered very fully into the various questions raised in this case I shall make my observations very short.

I think that the Lord Ordinary was right in the mode in which he dealt with these two documents by taking the latter first and so clearing the way for the consideration of the codicil of 14th February 1881. It is clear that we cannot look at the second codicil, because not being executed as the law requires it is impossible for us to consider whether the testator intended it to cancel the former one. Nor is the circumstance that Mr Stirling Crawfurd executed a second codicil in compliance with the advice of his law-agent any evidence that he intended to put aside or recal the first as an expression of his will. Mr Campbell's evidence, so far as it goes, shows most clearly, I think, than in jotting on the back of the first codicil the words "Not used—incorrectly signed," he did so upon no instructions from Mr Crawfurd, but entirely of his own accord and for his own information. That being so, there was nothing in all this to show any intention upon Mr Crawfurd's part in any way to cancel the first codicil by means of the second. Therefore, so far as the pursuer's allegation regarding cancellation goes, I think the evidence is undoubtedly defective.

With regard to the legibility of the testator's signature, I agree with what your Lordship said, that once you know the name it is possible to

follow the different letters. No doubt the signature is difficult, indeed almost impossible at first sight to follow, but whenever you know the name it becomes clear enough, while his friends who knew his handwriting had no difficulty in at once pronouncing it to be his signature. Thus his agent Mr Campbell says—"I had no difficulty in recognising the signature to the first codicil as Mr Stirling Crawfurd's signature written with a pen." It is not alleged by the pursuer that Mr Stirling Crawfurd did not go through the ceremony of putting his name to this document, but it is suggested that certain letters in the signature are superinduced, and the letters "W S" are chiefly relied on in support of this averment. There is no doubt that these two letters are in a firm hand, and so far differ from the rest of the signature, but it is not necessary to decide whether these letters were superinduced or whether they were written at the same time as the rest of the signature or not, because they may be put aside out of consideration and yet a sufficiently good signature remains, and one that in all respects resembles the others which have been put in process. Besides, no evidence has been offered that this superinduction, if it took place at all, was done outwith the presence of the testamentary witnesses. The evidence of Mr Campbell is directly to the opposite effect, and suggests that any signs of going over which the writing may present was probably done at the time the codicil was signed. He says—"It is very difficult to say with reference to Mr Stirling Crawfurd's signature, because having a very shaky hand, with his hand moving back and forward he sometimes got one letter over another, and I have seen him from time to time after he had signed his name put a dot here and a stroke there. My impression is that he has gone back after he has signed and done something more to different parts of the signature."

Upon the whole matter, therefore, I agree with your Lordship that the interlocutor of the Lord Ordinary should be affirmed.

Lord Shand—By this action questions are raised as to the validity of both codicils. As regards the second, I agree with the Lord Ordinary in thinking that it is not well executed according to the law of Scotland. If, however, we had differed from the Lord Ordinary in any of the other parts of the case it would still have been open to the parties from their averments on record to have argued the question of the testator's domicile, and all that might have followed therefrom. It is sufficient, however, that the testator's domicile of origin was Scotland, for by the Act 24 and 25 Vict. (c. 114), sec. 1, it is provided that—"Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same, or at the time of his or her death) shall, as regards personal estate, be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of Her Majesty's dominions where he had his domicile of origin." The first codicil is therefore good if executed according to the law of Scotland. The objections which have been taken to this codicil are of a purely technical kind, for the testator's instructions to his law-agent as to the nature and amount of the bequest are of the clearest description, and the deed prepared by Mr Campbell is exactly in terms of these instructions. Mr Stirling Crawfurd had, after he received the deed, ample time to read it over and to see whether it had been prepared in compliance with his instructions. Presumably it was so, for the witnesses were called in and the testator formally appended his signature, and after the instrumentary witnesses had duly signed the deed it was transmitted by Mr Crawfurd to his law-agent. Now, in the face of all this, it would require evidence of the clearest and most convincing description to show that the testator had failed in carrying out his intention.

But it has been said that this is not Mr Stirling Crawfurd's signature—that it has been touched up, and virtually re-written. It would be a somewhat startling doctrine that because certain letters had been gone over with the pen, and an "i" dotted or a "t" stroked, that upon that account the genuineness of the signature was to be called in question. It is by no means an uncommon thing for people to go back upon what they have written to improve or complete some letter or word. Is that then to invalidate the writing?

It would indeed be perilous if such writs, *ex facie* genuine and tested, were to be set aside because one of the testamentary witnesses had declared that the signature was one continuous act of penmanship, and it should turn out upon close examination that the testator went back upon his signature and here and there touched it up.

But the pursuer here asks the Court to say that this signature was touched up outwith the presence of the witnesses, and by Mr Crawfurd's authority. Suppose it were so, the deed would be invalidated only if there was no signature there at the time when the deed was witnessed, while I for my part am very clear from the evidence that there was a good signature originally there. Nor was anything done in the transmission to Mr Campbell to vitiate the deed in any respect. The marking made upon the back of it by Mr Campbell's instructions cannot in any way affect its validity, and no clause or deed of revocation was at any time executed. We cannot therefore assume that because in compliance with his agent's request Mr Crawfurd signed a second codicil he thereby intended to revoke the first. He obeyed his agent's instructions in signing the second codicil, but his opinion as to the invalidity of the first need not necessarily have coincided with that of his agent. If the second deed was executed under an erroneous notion that the first was bad, that circumstance would surely never cause the first to be set aside.

There was a case to which we were not referred which somewhat resembles the present, reported in 1 Hag. Const. Causes, p. 377 *Richard Moresby*. The circumstances in this case were these:—The widow of a Lieutenant Moresby, as his sole executrix and universal legatee, applied for probate of his will, dated 21st January 1821. The testator had left this country for Peru in command of a merchant ship, which was captured by

pirates, and though soon retaken, a number of papers were lost, among them the will. The testator while at Bolivar was attacked with illness, and fearing to die intestate he sent for a notary and four witnesses, and made a nuncupative will in their presence, leaving everything to his wife. Mrs Moresby proved the nuncupative will in Lima, and administered the deceased's effects in Peru. The will which was supposed to be lost was subsequently found. The question was whether the nuncupative will superseded a prior written will executed in England. The Court granted probate, as both the wills contained nearly the same disposition, and gave the whole property to the wife. I think that the facts of that case somewhat resemble those of the present, and accordingly upon the whole matter I think we ought to adhere to the Lord Ordinary's interlocutor.

The Court adhered.

Lord Deas was absent.

Counsel for Pursuer—Lord Adv. Balfour, Q.C. —J. P. B. Robertson—Graham Murray. Agents —Graham, Johnston, & Fleming, W.S.

Counsel for Defenders—Sol.-Gen. Asher, Q.C. —Mackintosh — Pearson. Agents — John Clerk Brodie & Sons, W.S.

Friday, February 6.

FIRST DIVISION.

[Lord Fraser, Ordinary.

MACALPINE *v.* LANG AND ANOTHER.

Apparent Heir—Act 1661, *c.* 24—*Bond and Assignation in Security—Creditors of Ancestor.*

An apparent heir granted a bond and assignation in security over heritable estate which he inherited from his father. The bond was for a full advance immediately made, and was dated after the expiry of one year but before the expiry of three years after the father's death. *Held* that the bond, being onerous was not reducible, under the Act 1661, c. 24, at the instance of one of the father's creditors.

This was an action of reduction, under the Act 1661, c. 24, of a bond and assignation in security.

The Act 1661, c. 24, provides—"That the creditors of the defunct shall be preferred to the creditors of the appearand heir in time coming as to the defunct's estate; providing always, that the defunct's creditors do diligence against the appearand heir, and the real estate belonging to the defunct, within the space of three years after the defunct's death. . . . And because it were most unreasonable that the appearand heir when he is served and retoured heir and infeft *respective*, should for the full space of three years be bound up from making rights and alienations of his predecessor's estate; and yet it being as unreasonable that he should dispone thereupon immediately, or shortly after his predecessor's death, in prejudice of his predecessor's creditors, he having year and day to advise whether he will enter heir or not; therefore it is hereby declared that no right or disposition made by the said appearand heir, in so far as may prejudge his predecessor's creditors, shall be valid, unless it be made and granted a full year after the defunct's death."

The pursuer of this action, Thomas Macalpine, was a creditor for £165 of the deceased James Smart, brick and tile manufacturer, his debt being constituted by a promissory-note dated 27th July 1878, payable two years after its date.

James Smart died on 4th February 1879. On his death, Mrs Smart, his widow, and James Smart, his eldest son, entered into possession of the brick and tile works, a dwelling-house in Edinburgh, and generally the whole estate of the deceased. No title was made up by James Smart junior, the heir, to the dwelling-house. Mrs Smart and James Smart junior thereafter carried on the brick and tile works, along with Campbell Murray, under the firm of Smart & Murray.

By bond and assignation in security dated 3d August and 27th September and recorded 1st October 1880, Mrs Smart, James Smart junior, and Campbell Murray acknowledged themselves to have borrowed from John Lang and James Mitchell, for the use and behoof of the firm of Smart & Murray, the sum of £600, and in security James Smart junior, as eldest son and heir-at-law of the deceased James Smart, with consent and concurrence of Mrs Smart, disponed the dwelling-house in Edinburgh, which was already bonded but over which he had a reversionary right. The £600 was a full advance for the security given.

The estates of the firm of Smart & Murray, and of the individual partners, were sequestrated on 13th December 1880.

This action was raised by Macalpine on 20th October 1882. The pursuer contended, *inter alia*, that the bond was reducible under 1661, c. 24. Defences were lodged by John Lang and James Mitchell, the grantees of the bond.

The Lord Ordinary (Fraser), on 2d July 1884, found that the bond was not challengeable under the Act 1661, c. 24, and assoilzied the defenders.

"*Opinion.*—It is said by the pursuer that this bond is challengeable under the Act 1661, c. 24, in respect that it was granted within three years of the father's death, to the prejudice of the pursuer, a creditor of the father. The father died on 4th February 1879, and the bond was recorded on 1st October 1880—thus being within the three years, but beyond one year from the father's death. The Lord Ordinary is of opinion that the bond being granted for an instant advance more than one year after the father's death, though within the three years, it is not challengeable under the Act. The clause of the Act bearing upon this case is not the first part of it but the second. The first enactment is—'That the creditors of the defunct shall be preferred to the creditors of the appearand heir in time coming as to the defunct's estate; providing always, that the defunct's creditors do diligence against the appearand heir, and the real estate belonging to the defunct, within the space of three years after the defunct's death.' This clause refers to a competition between the general creditors of the ancestor and the general creditors of the apparent heir—which is not the present case. It falls under the next enactment, which is as follows:—'And because it were most unreasonable that the