[19th *March* 1840.]

(No. 4.)

JOHN REID, Appellant.[1]

[*Lord Advocate (Rutherfurd) — Sir W. Follett.*]

ISAAC BAXTER and others (Reid's Trustees), Respondents.

[*Pemberton — James Anderson.*]

Writ — Stat. 1540, *c.* 117. — *Stat.* 1579, *c.* 80. — A party was able to write, and was in the practice of subscribing writings requiring his signature: his eyesight, however, was so defective, that he could not read any written document, nor decypher a signature attached to it, although at the time when he signed his own name he could infer, from general appearances, that he had adhibited his subscription, but not by his mere vision decypher the same afterwards. Under these circumstances he executed, by the intervention of notaries, a trust testamentary disposition and codicils: — Held (affirming the judgment of the Court of Session), that the deed was not liable to objection in respect of its execution; that the form of execution adopted was good; that the party might, if he pleased, execute the deed by his own signature, but that he was also at liberty to resort to the assistance of notaries.

Practice.—Parties by a joint minute agreed to take judgment upon a certain admitted state of facts: — Held, per Lord Chancellor, to be incompetent to refer to documentary evidence previously produced in process, in support of statements made at the hearing. (See p. 70.)

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[1] Rep. 16 D., B., & M., 273; Fac. Coll., 13th Dec. 1837.

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2d Division.

Lords Ordinary
Cockburn and
Cuninghame.

In 1833 the appellant, as the son and nearest lawful heir of John Reid his father, now deceased, brought a reduction of a testamentary trust disposition, and of two codicils thereto, executed respectively in the years 1822, 1825, and 1830, in favour of the respondents, as granted to the lesion of the appellant.

The ground of reduction libelled was, that the writings were executed by the interposition of notaries at periods when the granter was able to write, although labouring under defective vision. The Court (7th July 1835), upon report of the Lord Ordinary as to the mode of preparing the cause for judgment, remitted to the Lord Ordinary to direct the preparation of the draft of an issue or issues relative to the special facts in dispute betwixt the parties. But the following joint minute was in the mean time settled by both parties, as containing the facts upon which the judgment of the Court should proceed:—" 1. That the late John Reid, at the " date of the deed and codicils in question, could sub- " scribe his name, and was in the practice of subscribing " it to writings requiring his signature: 2., that the said " John Reid was, at the dates aforesaid, not totally " blind, but that his sight was so defective, that he could " not read any written document, nor decypher the " signature attached to it, although able at the time of " his own subscription to infer from general appear- " ances that he had affixed it, but not by his mere " vision to decypher the same afterwards."

The Lord Ordinary Cockburn (24th December 1836) authenticated this joint minute as part of the record, and as sufficiently fixing the facts, and ordered cases, with which Lord Cuninghame (by whom his Lordship

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was succeeded as Ordinary) made avizandum to the Court.

The Lords of the Second Division, upon advising the cases, the counsel not desiring to be further heard, pronounced the following interlocutor: — 13th December 1837. "The Lords, on the report of Lord Cuning-"hame, having advised this process with the cases for "the parties, and heard counsel thereon, repel the "reasons of reduction in so far as founded on the deeds "in question having been executed by means of notaries "and not by the subscription of John Reid the maker, "and to the same extent sustain the defences and "decern, and find the pursuer liable in expenses in "so far as incurred in reference to this point," and, quoad ultra, remitted to the Lord Ordinary to dispose of matters in the cause not material to the present question.[1]

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[1] *Lord Glenlee.*—"I am so satisfied with the decisions formerly pro-"nounced upon the point here involved, that I need not go into a "discussion of the argument stated. There are certain decisions referred "to by the defenders in the last page of their case. One of these is "most important and decisive. But on the opposite page to that on "which the case of Littlejohn stands, in Morrison's Dictionary, there is "the case of Ogilvie, 14th March 1612 (M. 16829), where it was held, "in regard to a man who could write, but chose to call in notaries, and "where nullity was alleged, without the deed being impugned, that this "was not sufficient to make the deed null.

"Then Veitch v. Horsburgh is decisive. It was objected that the "granter could write. The Court repelled the plea, that the party had "not signed with his own hand; and as there was no offer to impugn "the deed as false, the action was dismissed; and the Court went so far "as to hold it was incumbent on the party to show that the granter was "'letted,' as they call it, from writing at the time.

"It would be difficult after this, and there being no decision to the "contrary, to hold the execution of this deed bad. These old decisions "were pronounced by judges who lived nearer the period of the enact-"ment, and must therefore be presumed to have known more about the "matter. It seems to be taken for granted, in the pursuer's argument,

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Appellant's Argument.

The pursuer appealed.

Appellants.—1. The execution of deeds in Scotland is matter of statutory regulation.[1] The general rule sanctioned by statute is, that persons having the power of writing shall authenticate their deeds by attaching to them their own subscription. The only exception is that introduced by statute 1579, c. 80., which allows the aid of notaries to those who are absolutely incapable of writing. Mere want of sight, or incapacity to read writing, does not entitle parties to depart from the rule, which prefers even subscription by initial letters, where parties have been in use so to sign[2], to execution by notaries. The judgment of the House of Lords in the cause of Sir James Duff v. The Earl of Fife, 17th July 1823[3], in substance determined that a blind person who can write is, in regard to the execution of deeds, exactly in the situation of any other person who can write, and that subscription by the party is "the proper mode" of subscription. There, Lord Fife the maker of the deeds, was so blind as to be unable to read any writing or print, or to know whether paper was written on or not, and so in the same situation as Reid in this case. [LORD CHANCELLOR.—What is meant by the words in the minute "able to infer from general appearances," &c.?] Although the party had not clearness of vision sufficient to decypher, yet that he had sufficient vision to see

"that signing by notaries was unknown 200 years ago; but that is not "the fact. I am for sustaining the defences. The other Judges con- "curred."—Rep. in Fac. Coll.

[1] Statutes: 1540, c. 117; 1579, c. 80; 1681, c. 5.

[2] Piery v. Ramsey, 9th Jan. 1628, Mor. 16801, and other cases in Mor., voce "Writ;" and Weirs v. Ralstons, 22d June 1813, Fac. Coll.

[3] 1 Sh. App. 498.

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that he was tracing on the paper, what, if the ink failed not, would be the letters of his name; and though at the time he might know there was something he had been writing, he would not, at a short interval, be able to recognize it. [LORD CHANCELLOR.—To see that something was written, but not be able to distinguish what?]

Besides, he actually could write well, as appeared from the productions in his handwriting in process. [Mr. *Pemberton*, for the respondents, objected that the facts as admitted in the joint minute, precluded any reference to other documents or evidence in the cause. The LORD CHANCELLOR held that these documents could not be referred to.]

The opinions of Lords Eldon and Redesdale[1], in Lord Fife's case, must now be held in practice as having settled the law, that a party similarly situated ought properly to execute his deeds by his own subscription, and not by notaries.[2] [LORD CHANCELLOR.—Is it any part of the appellant's case, that a blind man who can write must sign with his own hand, and is not entitled to call in notaries. Lord Fife's case is different, for there it seems only to have been held, that a blind man may sign with his own hand.] To hold that a man who can write may call in notaries, would be to act contrary to statute, which directs that if he can write, he shall do so with his own hand.

Farther, it is material that the present challenge is at the instance of a third party, namely, the heir to whose prejudice these unilateral deeds were granted. It is not

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1 Sh. App. 498, passim, to 565; Bell on Testing of Deeds, sect. 5, p. 149.

2 Tait on Evidence, 3d edit. p. 58—61.

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like a party to a contract quarrelling his own act; and hence the cases of Veitch, of Littlejohn, Ogilvie, and others[1] relied on by the respondents, which were cases of parties, in fraudem of their own act, seeking to set aside deeds granted by them, do not apply.

2. Even if notarial subscription was in the circumstances competent, the deeds are not duly executed, in respect that the notarial docquets do not set forth a reason for the execution by notaries sufficient to warrant such execution.[2] Every notarial attestation ought to set forth that the party was unable to write; that being the only case in which notarial execution is sanctioned by statute, and it having been held indispensable in practice, that the fact of inability to subscribe should appear on the notary's docquet.[3]

Respondents Argument.

Respondents.—1. It is not necessary to carry the argument so far as to contend, that a party who is under no disability may execute his deeds by the aid of notaries; but certainly there will be no inconvenience from leaving it to the option of the party. The terms of the statute are not imperative, but merely directory; and when the mode pointed at is not made imperative, to be done under the sanction of nullity, the objection

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1 See post, p. 73.

2 Tait on Evid., p. 16, et seq.; ibid. p. 131; Moncrieff v. Monypenny, 15th July 1710, Mor. 15936; Robertson v. Young, 22d Dec. 1744; Elchies' Dic., v. "Writ," No. 18.; Falconer v. Arbuthnot, 9th Jan. 1751, Mor. 16517; Buchan v. Gouk, 1762, 5 Bro. Supp. 640.

3 Primrose v. Dury, Mor. 14326; Mackintosh v. Inglis and Weir, 17th Nov. 1825, 4 S. & D. 190; Williamson v. Urquhart, 23d July 1688, Mor. 16838; Philip v. Cheape, 26th July 1667, Mor. 16835; Bell's Lect., p. 170; M'Kenzie v. Burnett, Feb. 1688, Mor. 16838; Burell v. Moffat, 18th June 1745, Mor. 16846. See Kilk. Observations, and also Elchies' and Falconer's reports of the case.

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ought to be overruled. So it was held in England, in a case under a commission of enclosures, Casamaijor v. Strode[1]; and so in regard to neglect of statutory solemnities in the Reform Act by the revising barristers. It may be assumed, that the law was clear up to Lord Fife's case.[2] Now the question there was, whether a deed actually subscribed by a party although blind, and being ex facie a probative deed, was necessarily not the deed of the party, simply because he had executed the same by his own subscription, and without the aid of notaries. Although it was held by the House of Lords, that the subscription of a party who can write and who actually did write was a good subscription, it by no means follows that a subscription by notaries under such circumstances is not a good subscription, or that a party who can go through the mechanical operation of signing his name, but without being able to see what he is signing, must subscribe his deeds with his own hand, and is not entitled to the protection of notarial subscription. The opinions of Lords Eldon and Redesdale do not sanction any such doctrine; and indeed it would be strange if they did, for the effect of it would be plainly to make the statute provide for something which would directly defeat its object. The authorities generally are conclusive against the proposition maintained by the other side.[3]

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[1] 2 My. & K. p. 706; 5 Sim. 87. [2] 1 Sh. App. 498.

[3] Merry v. Dunn, 21st Nov. 1835, Fac. Coll.; 10 S., D., & B., 555; Cod. lex 8, Qui test. facere possunt, 1 Ross' Lect. 158; Craig v. Collison, 19th Jan. 1610, Mor. 16828; Picken v. Crosby, 22d July 1749, Mor. 16814; Elchies' Dict., v. "Writ," No. 25; Falconer v. Arbuthnot, 9th Jan. 1751, Kilk. See MS. Notes of Lord Drummore in respondent's appeal case in Fife cause; Ross v. Aglionby, 11th June 1794, Fac. Coll. App.; Yorkston v. Greene, 2d Dec. 1794, Fac. Coll.; Mor. 16856; Coutts v. Straiton, 21st June 1681, Mor. 6842; Grant v. M'Pherson,

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2. The objection to the form of the docquet is not made part of the record, and is immaterial, no particular style being requisite in the docquet, and it being sufficient that it appear that the notary authenticated the deed at the desire of the party.[1]

Judgment deferred.

Ld. Chancellor's Speech.

LORD CHANCELLOR.—My Lords, this is a question which is reduced to a very short point, depending upon a state of facts agreed to between the parties, and which formed the ground for the judgment in the Court below. The case is stated very fully in the printed papers.

The object of the suit is to raise the question as to the validity of an instrument executed by John Reid; and the circumstances under which the deed was executed, and the state of John Reid at the time of executing the same, are to be found in the admissions to which I have alluded, and which I will now read to your Lordships. (His Lordship read the minute set forth in the preceding statement.)

These facts are important, from the provisions of two Scotch acts of 1540 and 1579. The first (1540, c. 117.) provides, " That na faith be given in time cumming to " ony obligation, band, or uther writing under ane

23d June 1812: Littlejohn v. Hepburn, 8th Dec. 1608, Mor. 16826; Ogilvie v. Din's Heirs, 14th March 1812, Mor. 16829; Veitch v. Horsburgh, 23d January 1637, M'Dougall, eo die, Mor. 16834; Sheil, 4th July 1739, Mor. 17033.

[1] Dallas v. Paul 13th Jan. 1704, Mor. 5677, 5679, and 16839; Maver v. Russell, 10th July 1710, Mor. 16841; Gordon v. Murray, 21st June 1765, Mor. 16818; Ersk. 3. 9. 8.

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"seale, without the subscription of him that awe the "samin and witnesse, or else, gif the partie cannot "write, with the subscription of ane notar thereto." The second act (1579, c. 80.) is nearly similar in terms, with, however, one difference; it enacts, "That all con- "tractes, obligationes, reversiones, assignationes, and "discharges of reversiones, or eikes theirto, and gene- "rallie all writtes importing heritabil titil or utheris "bandes, and obligationes of great importance, to be "maid in time cumming, sall be subscrived and seilled "be the principal parties, gif they can subscrive." In the second act the words, "cannot write," which are to be found in the first, are changed for "gif they can "subscrive." And the provision in the second act is, "Utherwise be twa famous notars, befoir four famous "witnesses, denominate be their special dwelling places, "or sum uther evident takens that the witnesses may "be knawen, being present at that time, utherwise the "saidis writs to mak na faith."

The question is, whether, under these acts, the instrument in question, which was subscribed, not by the party himself, but by notaries, as provided for by the act of parliament, is to be invalid, in consequence of its not having been subscribed by the party himself. The proposition on the one side was that it was valid, and on the other it was said that that proposition was capable of being urged to consequences which were not a little startling. It was said that if that mode of subscribing be permitted, it would be impossible, at almost any time, or under any circumstances, to object to an instrument because it was executed before notaries. But, on the other hand, your Lordships will observe what argument may be

raised. The proposition contended for on the other side would lead to this conclusion, that a party absolutely blind must still execute the document by himself, for although he was not capable of seeing, if he was capable of writing, (as all persons who have ever been capable of writing before they are blind must be capable of doing to a certain extent after they become blind,) he would still be bound to execute the instrument by himself. It is quite obvious that this would open a door to great fraud, for if he was obliged to execute an instrument by himself under such circumstances, it would by no means follow that he was subscribing the document which he intended to subscribe; another might be put before him, and he would be quite incapable of knowing whether the document to which he did subscribe his name was the document he intended, or was another fraudulently imposed upon him.

In the short view I propose to take of the authorities it will not be necessary to consider what may be the rule in cases other than that which is now before your Lordships; and I shall therefore avoid doing so, the more especially as I believe it is a dangerous practice at all times to go into the consideration of what would be the rule in other cases unless you are compelled to do so. We have here the fact admitted, that the party, although able to write and subscribe his name, was not able to read writing afterwards, — that his sight was so defective that he could only know from the general appearance of the paper that he had subscribed a document.

Now there are statutes of ancient date regulating this matter, and if any real doubt exists as to the construction of them, it would be well that we should look to the

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construction which has been put upon them from the time when they were passed, and to the practice which has grown up as the consequence of such construction. It will be desirable to consider these circumstances before your Lordships decide upon the case; for if you should lay down a rule of law different from that which has been in ordinary operation for a long period, you might by such a judgment invalidate the titles of property, and interfere materially with the interests of those who are concerned with property in Scotland.

I should have thought that there was no great difficulty in the case, if this question had arisen for the first time,—if we had had to put a reasonable construction for the first time upon those statutes, without any previous decisions having existed. It appears to me to be a strong proposition to say, that, according to the meaning of the statutes, a party may be said to be capable of subscribing his name when he is not capable of reading the document which he has to subscribe, or the name when he has subscribed it. But we need not necessarily discuss what might be the construction if the question were entirely new; for from the earliest period after the passing of the acts, your Lordships will find that the construction put by the Courts of Scotland has been, that a party under circumstances similar to those which now exist was at liberty to use the interposition of notaries.

Before adverting to those authorities, the question may be naturally asked, what authorities there are to be found in support of the proposition of the appellant? What decisions are there in the Scotch law to show that a person not capable, from want of sight, to read a

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document, is yet to be the person who must subscribe it, and is not to be at liberty to avail himself of the assistance of notaries? There is not one case in favour of such a proposition. On the other hand, there is a variety of cases, in some of which it has been decided, and in others it has been assumed, that where a party could not read, he was at liberty to avail himself of the interposition of notaries. Picken v. Crosby in 1749; Falconer v. Arbuthnot, in 1751; and Ross v. Aglionby, in 1794, (ante p. 72.) all decided directly, or they all indirectly assumed, such to be the rule of law. The older cases of Craig in 1610, of Ogilvy in 1612, of Veitch in 1637, and Sheil in 1739 (antea, pp. 72 and 73), seem to me also to support the proposition.

But then it is said that those last-mentioned older cases do not apply, inasmuch as the question in all of them was raised with the party himself, who had executed the document, and who, to avoid the consequences of his own instrument, had set up the defective execution in answer. It is true that the party in all those older cases had executed the document by the intervention of notaries; and on being called upon to perform his own agreement he had resisted doing so, on the ground that the deed he had executed was not executed according to the provisions of the statutes, and that it was consequently void. In all those cases the defence was overruled. An attempt was therefore made to exclude those cases from your Lordships consideration, on the ground that in all of them it was the personal objection of the party himself to his own deed being enforced against him, and that he must be looked upon as an individual endeavouring to defeat the consequences of his own act

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by a technical objection. But how was the Court competent to know what was the conduct of the party without in the first place receiving the document in evidence? If the right to be enforced depended upon a written document which the law required to be duly executed, the Court was obliged to receive the document in evidence, in order to know whether it was or not a valid deed, and thus the validity of the execution was under the consideration of the Court.

The case of Coutts v. Straiton, in 1681, (antea, p. 72.) seems to me to be of more weight than any of those relied on by the appellant. That was a case in which the question before the Court was, whether a party was at liberty to sign a document with initials, (one question being, whether initials could constitute a sufficient signature,) and it was stated that the party was so far blind as not to be capable of reading the writing. The Court held, that it was a good instrument. There are thus concurrent decisions, showing that a party although blind might properly subscribe an instrument, (even if that signature was in initials,) either by his own signature or by the intervention of notaries.

Some of those cases do not appear to have been sufficiently brought under the consideration of the Court, or attended to by the Judges, when the case of Lord Fife (antea, p. 69) arose. That case came before the Court of Session for judgment upon proof, by the verdict of a jury, that the late Lord Fife, the party executing the deeds sought to be reduced, was nearly in a state of total blindness; and the Court held, that the deeds executed were not well executed, in respect that the party had subscribed his name thereto, whereas he

ought to have required the intervention of notaries. But this House reversed the judgment of the Court of Session, in so far as it proceeded on that ground, and held, that if the party could so sign the instruments, the execution of these might be valid, notwithstanding his state of blindness.

The only ground by which the appellant has attempted to support his case is, the judgment of this House in the case of Lord Fife. It was with a view to consider whether that judgment was inconsistent with the others which had preceded it, and whether it necessarily rendered the subscription of the deeds in the present case bad, that I suggested to your Lordships the propriety of adjourning the consideration of the present case. I have since gone through all the cases. I have examined all that was said in the case of Lord Fife, both by Lord Eldon and by Lord Redesdale, and I do not think that there is any thing in that case which says, nor any opinion expressed laying down the law to be, that a person under the circumstances here admitted is not at liberty to resort to the mode of notarial execution. In coming to the conclusion that the party might himself subscribe, it was not necessary to decide that he was not entitled to resort to notaries.

It appears then that for two hundred years there is no direct authority for the proposition now contended for by the appellant; but on the contrary a series of decisions the other way. In Veitch v. Horsburgh, (antea, p. 73,) the construction put upon those statutes was, that a person with that degree of want of sight which exists here was at liberty at all events to execute by the intervention of notaries; and against that deci-

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sion nothing has been relied on, but the opinions supposed to have been expressed in this House in Lord Fife's case, which did not decide this point, but decided in a manner quite consistent with the allowance of this mode of execution.

A variety of evils might arise from your Lordships laying down a rule not consistent with the former decisions; and before doing so, there would be matter deserving of serious consideration, even if there was more in the case of the appellant than I think there is. On the other hand it does not seem to me that any difficulties will arise from the adoption of the course which I shall recommend to your Lordships. I have therefore come to the conclusion, which I shall now state to your Lordships, that the form of execution adopted under these circumstances is good; that the party may under these circumstances, if he pleases, execute the deed by his own signature; but that he is also at liberty to resort to the assistance of notaries. Under these circumstances, and as it was an unanimous judgment of the Court below, I shall move your Lordships that the judgment of the Court below be affirmed with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutors, so far as therein complained of, be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is also further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be remitted

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back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

Richardson and Connell — Archibald Grahame, Solicitors.