

been very little used. Will be glad to furnish any information required. Waiting reply, we are yours respectfully."

The whole record is framed upon the same footing, that the pipes were required for a specific purpose, viz., the conveying water to a turbine wheel. But it turned out that the delay which did take place did not prevent the pursuers from driving the turbine wheel, because the works were not in a condition to be set agoing before the 7th of February 1874 when the pipes were delivered. But besides the turbine wheel, the pursuers had another wheel on a higher level, driven by the same stream of water, which after going over the higher wheel descends to the lower level, and the plan was that in the course of its descent it was to be conducted through the pipes to the turbine wheel. It is suggested that the upper wheel might have been used, and that if the pipes had been delivered in due time the pursuers might have been enabled to work the upper wheel and that part of the mill known as 'the wing.' The way in which the pipes were to be used so as to enable the pursuers to work the upper wheel was this—The height of the upper wheel was so great, and the fall of water therefrom so perpendicular, that to allow that water to fall down unenclosed would have imperilled the whole foundation of the mill, and the pursuers say that if they had had these pipes they could have constructed with them a sort of tail race, whereby to diminish the force of the fall. Now it is plain, in the first place, that that idea is not to be found within the record.

But although not in the record, the omission might be got the better of by an amendment. But besides this, there is nothing in the evidence to show that if they had got the pipes they could have made this use of them. They must show, first, that possession of the pipes would have enabled them to work the wheel; secondly, that they intended to make that use of them; and thirdly, that they could so have used the pipes and worked the upper wheel to a profit, for otherwise they cannot show damage sustained from want of the pipes. Is there evidence of these three points? On the question whether the pursuers could have worked the wheel in this way there is some doubt on the evidence, but as to whether they intended to do so there is no doubt that they never entertained such an idea. On the third point, the evidence on the one side that it would have led to a loss and not a profit, is uncontradicted, so I cannot concur in the part of the Lord Ordinary's interlocutor, in which he finds:—"that, in consequence of the defenders' failure to supply the pipes, the pursuers were unable to work that part of their mill known as 'the wing' from 25th December 1873 to 11th February 1874, and that they have thereby sustained loss, injury, and damage, for which the defenders are responsible; finds that said damage amounts to the sum of £64 sterling."

The principle on which the Lord Ordinary assesses damages is very fair, but the foundation on which it is based is unsupported. But the question remains, what is to be our verdict on the breach of contract which has been proved, and which I think necessarily leads to an award of damages. No contract can be broken even in regard to time without giving rise to a claim for damages, greater or less according to circumstances. If I were directing a jury I would tell them that if a contract had been made and broken

they must award some damages. If they thought that the pursuers had trumped up a case, then nominal damages should be awarded, but something more substantial if they had suffered inconvenience and trouble.

The latter is the view which I take. I think that the pursuers were no doubt put to inconvenience and trouble, so I suggest that we shall give a verdict for the pursuer, with damages to the amount of £10.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming note for the defenders against Lord Curriehill's interlocutor, dated 31st December 1874.—Recal the said interlocutor; find that in September 1873 the defenders sold to the pursuers certain pipes for the use of the pursuers' cotton mill at Eaglesham; find that the defenders failed timeously to deliver the said pipes in terms of the said contract, and that they were not delivered till 7th February 1874; find that the defenders thus committed a breach of contract, to the loss, injury, and damage of the pursuers; assess the damage at £10 sterling; decern against the defenders for the said sum of £10; in respect of the tender No. 6 of process, find the pursuers entitled to expenses prior to the 10th July 1874, and find the defenders entitled to expenses subsequent to that date; allow accounts of the expenses now found due to be given in, and remit the same, when lodged, to the Auditor to tax and report."

Counsel for the Pursuers—Balfour and Brand. Agent—A. Kirk Mackie, S.S.C.

Counsel for the Defenders—Dean of Faculty (Clark) and M'Kechnie. Agents—Finlay & Wilson, S.S.C.

Tuesday, June 15.

## SECOND DIVISION.

[Lord Shand, Ordinary.]

M'DOUGALL AND OTHERS *v.* M'DOUGALL.

St. 1540, c. 117; 1579, c. 80; 1598, c. 179; 1681, c. 5; 1874, sec. 68—Entail—Testing Clause—Erasure.

Held that it is not necessary, under pain of nullity, to insert in the testing clause of a probative deed the full names as well as the designations of the instrumentary witnesses.

The pursuer in this action, the heir of entail in possession of the estate of Ardencaple, Argyllshire, sought declarator that the deed of entail under which the estate was entailed in 1758, and other relative deeds, were invalid and null, and ought to be set aside. The defenders were the heirs next succeeding under the entail. The case turned upon the effect of erasures in the testing clause of the deed of entail of 1758. The clause was expressed as follows:—"In witness whereof these presents are wrote on this and the seven preceding pages of stamp paper, by Charles Mackenzie, clerk to William Budge, Writer to the

Signet, and subscribed by me at Carbane, the twenty-third day of June One thousand seven hundred and fifty-eight years before these witnesses John M'Corquodale, schoolmaster in the island of Seil, and Alexr. Dow, Residenter in Carbane, tutor or guardian to the children of John M'Dougall, tacksman of Carbane." It appeared that the letter "r" of the word Alexr., the surname Dow, and the letter "R" at the beginning of the word Residenter, had been superinduced on an erasure. The pursuer contended that this vitiated the deed of entail and subsequent conveyances, and that he was entitled to possess the estate in fee simple.

The Lord Ordinary (SHAND) pronounced the following interlocutor:—

"*Edinburgh, 28th January 1875.*—Having considered the cause—Finds that the letter 'r' of the word 'Alexr,' the surname 'Dow,' and the letter 'R' at the beginning of the word 'Residenter,' in the testing clause of the bond of tailzie bearing to be granted by the now deceased John M'Dougall of Ardencaple, dated the 23d day of June, and recorded in the Register of Tailzies the 10th, and in the books of Council and Session the 16th days of August, all in the year 1758, mentioned in the conclusions of the summons, have been superinduced on an erasure: Finds that the said letter and words so superinduced must be presumed to have been written after the said deed had been signed and completed, and must be taken *pro non scripto*: Finds, therefore, that the said deed contains in the body thereof the designation of one witness only, and was at its date, and now is, null, by virtue of the statute 1681, chapter 5: Finds, decerns, and declares in terms of the first alternative of the declaratory conclusions of the summons; and in respect the whole of the deeds sought to be reduced other than the said bond of tailzie have been expedie in virtue of that deed, and proceed thereon, decerns in terms of the reductive conclusions of the summons, but in the circumstances finds no expenses due.

"*Note.*—The question raised in the present action must be decided without reference to the provisions of section 39 of the recent Conveyancing (Scotland) Act, 1874, the action having been raised in June 1874, while the statute, which did not come into operation till 1st October, contains (section 68) a saving clause as to all depending actions.

"From an inspection of the bond of tailzie of 1758 which forms the subject of the action, I am satisfied that the word 'Dow' and the letter 'r' of the word 'Alexr' which precedes it, and the letter 'R' at the beginning of the word Residenter following, have been written on the deed after erasure; and accordingly I have not thought it necessary to order a proof of the pursuer's averments on this subject. A careful inspection of the deed in good light must, I think, lead to this conclusion. Enough of the original writing on the surface of the paper on which the superinduced word and letters are now found remains to lead to the inference that, in place of the superinduced word and letters, the word 'Alexander' had originally been written. The clause in this way seems, as originally written, to have omitted any surname of the second witness. To supply this defect the last part of the word 'Alexander,' consisting of the letters 'ander,' has been erased, as appears from the surface of the

paper by looking along it, and on the erased surface there has been superinduced—(1.) The letter 'r' to complete the word 'Alexr;,' (2.) The surname 'Dow;,' and (3.) The small letter 'r' beginning the word Residenter has been converted into a capital letter. If there were any doubt as to the erasure, there certainly can be none I think as to the superinduction, and the legal effect of vitiation in either way is the same. The part of the deed vitiated, whether the vitiations have arisen from the erasure and superinduction, or superinduction on writing below, must be read *pro non scripto*.—*Gollan*, 1 Macph., House of Lords Cases, 66 *Monro v. Johnston*, 18th December 1868, 7 Macph., 250; and *Hamilton v. Menteth*, 1st December 1824, 3 S. (N. E.) 245.

"Assuming that the word and letters above mentioned are to be held *pro non scripto*, it follows that the testing clause contains only the name and designation of one witness. It must be assumed that the superinduced word and letters were added after the deed was completed; and in the absence of the word and letters which have been superinduced the name of the alleged witness has not been mentioned in the deed.

"The Act 1681, chapter 5, provides, *inter alia*, 'That only subscribing witnesses in writs to be subscribed by any partie hereafter shall be probative, and not the witnesses insert not subscribing; and that all such writs to be subscribed hereafter, wherein the writer and witnesses are not designed, shall be null, and are not suppliable by condescending upon the writer or the designation of the writer and witnesses;' and after certain other provisions the statute concludes, 'and that in all the said cases the witnesses be designed in the body of the writ, instrument, or execution respective, otherwise the same shall be null, and make no faith in judgment nor outwith.'

"The effect of this provision was to render it necessary, under pain of nullity of the deed, that not only should the witnesses subscribe, but that they should be designed in the body of the deed or testing clause. In the present case only one witness is named and designed, omitting the erased words and letters. The designation of another person is also given, but no name, and at least surname. It appears to me, in these circumstances, that the deed does not fulfil the requirements of the statute, and that it is therefore a nullity.

"It is maintained by the defenders that under the statute it is not necessary that the subscribing witnesses should be named in the body of the deed, but that it is sufficient if they be there designed, as the names may be properly ascertained by a reference to the signatures of the witnesses appended to the deed. The first answer made to this contention is that the statute, in requiring the designations of the witnesses to be given in the testing clause, by necessary implication requires the names to be also there stated, because the names are truly necessary to the designation. The statute places the writer and witnesses in the same position. Both must be designed, and it is evident that in the case of the writer the name must be given; and it rather appears to me that it is essential that, in like manner, the names of the witnesses should be recorded. This view is supported by the decisions in the case of *Douglas, Heron, and Co. v. Clerk*, 1787, Mor. 16,908, and *Abercromby v. Innes*, 15th July 1707, Mor. 17,022, in both of which

deeds were found to be null because of errors in the Christian name of the witness as given in the testing clause, although the designation was in terms which correctly applied to the person who signed as witness. It is farther against the defenders' view that it should be left to the accident of the form in which a witness may sign, whether his Christian name should appear in the deed or not. In many cases the witnesses sign their Christian names, and even a second name, by initials merely, and it is only in the testing clause that the proper name and designation of the witness is to be found. But apart from this view, and even supposing it could be held under the statute that the designation of a witness without his name given in the testing clause would be sufficient, at least it must be apparent from the clause that the designation applies to the subscribing witness. Thus the testing clause might bear that the deed had been signed 'before the two subscribing witnesses, both clerks to A.B., solicitor in Edinburgh.' In such a case it might be maintained that the deed contained the designations of the two witnesses who were identified as subscribing it, and that their names could be ascertained from their subscriptions. In the present case there is nothing to identify the designation of the second witness with Alexander Dow, who subscribed the deed as a witness. The testing clause does not profess to design any one who subscribes, and may refer to one who had seen the deed signed, but had not himself subscribed it as a witness. There is nothing to identify the designation with a subscribing witness, and so the subscribing witnesses are not designed.

"I am not aware that any case substantially the same as the present has occurred; but the unvarying practice, in conformity with the statute, has been to give the names and designations of the witnesses in the testing clause, a practice with which the deed in question professes, but fails, to comply, and this practice strongly shows that the specification in the testing clause has been always deemed essential. In two cases deeds have been sustained in which the testing clause did not expressly bear that the parties mentioned were witnesses, but in both cases the witnesses who subscribed were named and fully designed in the testing clause, and it was evident that the only purpose for which their names there occurred was to designate them as witnesses.—*Doig v. Kerr*, 1741, Mor. 16,900, and *Wemyss v. Hay*, 5th June 1821, 1 S. (N. E.), 51. In these cases there was a compliance with the provisions of the statute in giving what is here wanting, the names and designations of the witnesses. In the case of *Gibson v. Walker*, 16th June 1809, F.C., affirmed 2 Dow's Appeals 270, the deed was held to be null because the signature of the witness was written on an erasure, although his name and designation were given in the testing clause.

"Holding the effect of the statute to be clear, the only difficulty I have felt in the case has arisen from the case of *Morton v. Hunters*, 10th December 1828, 7 S. 172. From the report of that case it appears that one of the several objections to the instrument of sasine was that the name of one of the witnesses was written on an erasure in the body of the instrument, but it is added, 'it was subscribed by him, and it was not alleged that he had not been present.' The report bears that the Court 'disregarded the objection as to the wit-

ness,' and no more notice of the subject occurs in the discussion of the case. What was the particular ground on which the Court proceeded, or whether this particular objection was strongly pressed, does not appear. It may be that from an inspection of the deed the Court was satisfied that no erasure had occurred, or the view may have been adopted that in the case of instruments of sasine, which depended for their validity on their being recorded immediately after their date, and where the record supplied a check against alterations, the same strict rules in regard to vitiations were not held to apply. There is an obvious distinction between such instruments and ordinary deeds in this respect, that the witnesses, at least down to the statute of 1845, did not, as in the ordinary case, attest the execution of the instrument, but subscribed as witnesses, testifying that the acts referred to in the instrument had been done. Various writers have referred to the indulgence shown by the Court to irregularities occurring in these instruments. Professor Menzies states (last edition, p. 578), 'the Court will not interfere with an instrument of sasine on account of obvious blunders, inaccuracies, or ungrammatical expressions in the body or in the notary's docquet, provided it contain effectual attestation that the essential things were done, and this may be assumed as a principle under the new form as well as the old. We shall not occupy time in citing numerous cases.' In the case of *Douglas v. Chalmers*, being one of a series of cases reported by Tait, 5 Brown's Sup. 588, the reporter adds the following note:—'In all the above cases the Lords proceeded upon this principle, that when it appeared *ex facie* of the instrument that the thing was done, and that sasine was in reality given, blunders or mistakes in extending the instrument ought not to annul the sasine, and accordingly in many cases sasines labouring under defects have been sustained both by the Court of Session and House of Peers which at a more early period of our law, especially before the introducing the register of sasines, would not have been sustained.' There is a similar note by the editor at page 227 of the second edition of Bell's Treatise on Completing the Title.

"This favour to instruments of sasine is probably the explanation of the decision in the case of *Hunter*, and a reference to the session papers shows that much reliance was placed on the fact that the deed as recorded in the register of sasines corresponded with the deed challenged. In the answer on this point reliance was placed on the fact that it was not alleged 'that any alteration had been made upon the instrument since it was completed and sent to the record.' I do not think that the decision in the case of *Hunter* can be held as nullifying the words of the statute with reference to a deed which witnesses have signed in order to attest its execution by the granter. The subscribing witnesses must be designed in the testing clause.

"Assuming that the statute applies, and that the deed must be held to have been null after it was completed, in consequence of the want of mention in the deed of the name and designation of one of the witnesses, it was not maintained by the defenders that anything that has since occurred could make the deed valid now.

"Apart from the provisions of the recent Conveyancing Act, which seems to follow from the

decision in the case of *Shepherd v. Cheyne's Trustees*, 6 D. 464, and 6 Bell's Appeals, 153, that neither the lapse of time nor the completion of titles and possession which has followed on the bond of tailzie can prevent effect being given to the challenge now made. In that case Lord Chancellor Cottenham, after stating the reasons for holding the deed of entail to be null on account of the erasures it contained, proceeds—"But if there was in truth no disposition, no conveyance (for this is the effect of the vitiation of the deed), it is not easy to understand how there could be a ratification. To give effect to this supposed ratification would in fact be not to ratify, but to make a disposition for the grantor—a disposition which he himself had not made."

"These words apply expressly to the present case. Assuming the bond of tailzie to have been null under the statute, no ratification of it by making up titles or possession could make it valid or effectual. It wants the requisites of a deed, and being null, such actings as have followed on it cannot rear it up into an effectual instrument. It is admitted that the pursuer is heir of line of the grantor of the alleged deed, who was proprietor of the estate in question. This being so, he seems to be entitled now to take up the estates, on the footing that they were not well disposed by the bond of tailzie, and are still *in hereditate jacente* of the alleged grantor of that deed. Looking to the nature of the question, and the necessity, for the sake of the pursuer's title, to have the present question tried in a litigated cause, I do not think the case one in which expenses should be given."

The defender reclaimed.

Authorities cited—Stat. 1593, c. 179; 1681, e. 5; *Gollan*, 1 Macph., H. of L. 66; *Monro*, 7 Macph., 250; *Hamilton*, 3 S. (N. E.) 245; *Douglas, Heron, & Co.*, M., 16,908; *Abercromby*, M., 17,022; *Dog*, M., 16,100; *Wemyss*, 1 S. (N. E.) 51; *Morton*, 7 S., 172; *Hamilton*, 8 Macph., 233; *Duff*, p. 21. *Menzies*, p. 124. *Bell on the Testing of Deeds*, p. 39.

At advising—

**LORD JUSTICE-CLERK**—This is an action of reduction brought for the purpose of setting aside a bond of tailzie, dated in 1758, on the ground that it was not duly executed and authenticated in terms of law. It is alleged by the pursuer that in the testing clause of the deed what purports to be the surname of one of the instrumentary witnesses, and one letter of the abbreviation of his christian name, is written on an erasure; whence he deduces the conclusion, to which the Lord Ordinary has given effect, that the bond is vitiated *in essentialibus*, and is devoid of the solemnities required by the Act 1681, c. 5.

Of the existence of the alleged erasure, and the extent of it, there is substantially no dispute. The full text of the testing clause is as follows:—"In witness whereof these presents are wrote on this and the seven preceding pages of stamp paper by Charles Mackenzie, clerk to William Budge, writer to the Signet, and subscribed by me at Carbane, the twenty-third day of June one thousand seven hundred and fifty-eight years, before these witnesses, John M'Corquodale, schoolmaster in the island of Seil, and Alexr. Dow, Residenter in Carbane, tutor or guardian to the children of John M'Dougall, tacksman of Carbane." The name "Dow," the final "r" of the abbreviation "Alexr,"

and the initial R of the following word "residenter," are unquestionably written on the erased portion of the instrument.

Thus three questions arise:—

1. What is the import of the words used in the testing clause as effected by the erasure?

As to this matter I agree with the Lord Ordinary.

We must read the clause as if the word and letters in question were left blank. We are not to supply anything to fill the vacant place, but to read the part of the clause which is not vitiated as if the clause itself contained nothing else. That part of the testing clause, therefore, must be read as follows:—"Before these witnesses, John M'Corquodale, schoolmaster in the island of Seil, and Alexr., esidenter in Carbane, tutor or guardian to the children of John M'Dougall, tacksman of Carbane." The partial erasure of the initial letter of residenter does not affect the sense, and is of no importance. The second instrumentary witness is therefore not named—at least not fully or effectually named in the testing clause.

2. The second question is—Is this clause vitiated and erased *in essentialibus*? is it an essential requisite, to render the deed effectual, that the instrumentary witnesses should be named as well as designed in the testing clause.

I am of opinion that the insertion of the names of the instrumentary witnesses in the testing clause is not a solemnity required by law, and that there is no Act of the Legislature, and no judicial decision on the authority of which we can affix the penalty of nullity to the omission. It is true that the usual style of such clauses bears the insertion of the names as well as the designations of the instrumentary witnesses; that it has been the custom of conveyancers to insert them; and that their teaching has prescribed this form as the safest, most distinct, and simplest mode of pointing out the person whose designation follows. But we must look to the statutes to find what matters are essential in this respect. The question is not now mooted for the first time; and although it has never been decided, I have formed a clear opinion that neither the letter nor the policy of the Act 1681, c. 5. made the naming of the instrumentary witnesses in the testing clause essential to the validity of a deed, but that it is sufficient if they be designed therein.

The course of Scottish legislation on the execution and attestation of deeds was very simple. I have no intention of going over the statutes, which were fully commented on from the bar, and are familiar. As writing became more common, attestation by sealing was disused. The Act 1540, c. 117, seems by its words to make the subscription of attesting witnesses essential; but neither this statute nor that of 1579, c. 80, although they from time to time were so construed, enacted in express words that this should be so. Neither was it customary to design the witnesses named, but not subscribing, in the body of the deed. The first statute which contained any peremptory provision in regard to the execution of deeds was that of 1593, in regard to the writer of the instrument, as to whom it was enacted that "all original charters, contracts, and all other writs and evidents to be made hereafter, shall make special mention in the hinder end thereof, before the inserting of the witnesses therein, of the name, surname, and particular

remaining place, diocese, and other denomination, of the writer of the bodies of the foresaid original writs and evidents, otherways the same to make no faith in judgment nor outwith the same in time coming."

So stood the law in 1681, and the statute passed in that year had in regard to witnesses two objects, and two only; the first to make their subscription essential, and the second to make it necessary to design them in the body of the writ, at the hinder end, as the Act 1579 expresses it. The contract in the language employed in the Act 1593, in regard to the writer of the deed, and that used respecting witnesses in that of 1681, is very significant.—"That only subscribing witnesses shall in future be probative, and that all writs to be subscribed hereafter wherein the writer and witnesses are not designed shall be null, and are not suppliable by a condescendence." The naming of the writer was essential, because otherwise he could not be known. The name of the witnesses appeared from their subscription, and therefore all that was necessary was so to design them as that they might be known and discovered. Mr Robert Bell, in his treatise on the Testing of Deeds (p. 39), has pointed out with considerable acuteness that these provisions were not intended so much to regulate the authentication of deeds, as to provide by the subscription of witnesses for a practical aid to their memory in case the deed should be challenged, and by their designation to afford a ready means by which they might be identified and traced.

On the words, therefore, of the Act 1681 I should have little hesitation in coming to the conclusion that the statutory nullity applied only to the absence of the designations of the witnesses. I am confirmed in that view by the opinion expressed by the writer I have already referred to, who is the only commentator who has discussed this question. His remarks are full and interesting; and although as a lecturer on conveyancing he directs the practitioner to name as well as to design the witnesses in the testing clause, he indicates a very clear opinion that the omission of their names is not a statutory nullity. Lord Stair, with his usual accuracy, says—"By a late statute, Parl. 1681. c. 5, writs after that statute prove not unless the witnesses subscribe and be designed."—(iv. 42, 3.) One or two of our writers have assumed that the witnesses should be named in the testing clause; but none of them have discussed the question.

There are only two cases which throw light on this question; but both are instructive. They are the cases of *Doig*, M. 16,900, and that of *Wemyss v. Hay*, 5th June 1821, F. C. They were both of the same character. The persons whose names appeared as subscribing witnesses were named and designed in the testing clause, but the clause did not bear that the deed was subscribed before them, or mention that they were witnesses in any way. I have looked at the session papers in *Wemyss'* case, in which these questions, and in particular the case of *Doig*, are largely discussed. The deed was ultimately sustained in both these cases, although, as far as usage or practice was concerned, the omission was as flagrant as that of the names of the witnesses.

Thirdly, assuming that it is not essential to mention the names of the subscribing witnesses in

the testing clause, it is beyond all doubt necessary that they be designed. Now, although here some one, whose name was intended to occupy the blank in the deed, is sufficiently designed as residenter in Carbane, and tutor or guardian to John Macdougall's children, the question arises whether it clearly appears that the person so designed is the instrumentary witness. It is here that the difficulty of the case rests.

Now, had there been any substantial variance between what appears of the witness' name in the testing clause and the signature to the deed, the case would have been ruled by a long series of authorities, which settle that an error in the name of the witness designed, or a variance between the name in the testing clause and the name subscribed, is fatal; for then the designation is made to apply to some one other than the subscribing witness; and here it may be contended that the subscribing witness is not "Alex," but "Alexr Dow"—who may be a different person—the view is plausible, and not without aid from some of the decided cases. But, on the whole, I think it is too strained and technical. Holding the erased part of the deed to be left blank, I think it clear that the word "Alex" is, and was intended to be, the Christian name of the second instrumentary witness, whose surname is omitted: that it accurately corresponds in sound with the actual signature: that there is thus identity between the person designed and the person subscribing: and that, without having recourse to conjecture or influence, it sufficiently appears that Alexr Dow the instrumentary witness is designed as residenter in Carbane, and tutor or guardian to John Macdougall's children. The case in this respect differs by contrast from that of *Callender*, 2 Macph. 291.

**LORD ORMDALE**—This case is one of nicety and difficulty, and all the more that, notwithstanding the numerous decisions which have been given in regard to the execution and testing of deeds, none of them appear to be exactly in point.

The Lord Ordinary has correctly stated the circumstances in which the disputed question has occurred, and both parties were agreed as to them. The deed of entail, called a bond of tailzie, is dated the 23d of June, and recorded in the Register of Tailzies the 16th of August 1758. It is not said, and there is no reason for supposing, that there has been any tampering with the deed after it was recorded; and since then, down to the raising of the present action in June of last year, it appears to have been held and acted upon as in all respects valid and unobjectionable. It has not, however, been maintained by the defenders that the objection now taken to the regularity of the testing clause of the deed, if good in itself, is barred by lapse of time, or for any other reason. The question therefore to be determined is, whether the objection relied on by the pursuer is so formidable and unanswerable in itself as to be fatal to the deed.

The testing clause is set out in the 12th article of the pursuer's condescendence. It will be seen that there are inserted in it the name and designation of the writer of the deed, the place where it was executed, the number of pages on which it is written, and that it was subscribed before and in presence of witnesses. The clause also bears, as it now stands, that the deed was subscribed by

the grantor before and in presence of two witnesses whose names and designations are stated in the ordinary way. But it is alleged by the pursuer that the name of the witness Alexr. Dow is vitiated, excepting the first part of the first name, by being either erased or circumduced in such a way as to destroy its authenticity; and accordingly that the name of one of the two witnesses requisite to the due execution of the deed must, in respect of the decisions in the case of *Golan* and the other cases referred to in the note of the Lord Ordinary, be held *pro non scripto*; and if so, that this is a fatal objection to the validity of the deed. On the other hand, however, it must be kept in view that the deed bears the subscription in due and ordinary form not only of the grantor, but also the subscriptions of "John M'Corquodale, witness," and "Alexr Dow, witness." As regards John M'Corquodale, no objection has been taken to the way in which his name and designation are inserted in the testing clause, which is so far, therefore, free from any irregularity; and as regards the other witness Alexander Dow, although his name, except Alexr, being vitiated by erasure or circumduction, must be held not to be in the testing clause, the designation, as there inserted, "Residenter in Carbane, tutor or guardian to the children of John M'Dougall, tacksman of Carbane," is not vitiated in any way; and that this designation must be held to apply to the subscribing witness Alexr Dow is, I think, abundantly clear. It cannot possibly be held to apply to the other witness M'Corquodale, for his designation is otherwise given in the testing clause, and neither can it, I think, be fairly or reasonably held to apply to any one else but Alexr. Dow, seeing that he subscribes the deed, and adds to his subscription "witness." It might be different if the effect of the vitiated words in the testing clause was to entitle the pursuer to read anything he pleased in their place, even to the destruction of the deed; but in reference to any contention like that the Lord Chancellor observed, in the case of *Golan*, cited by the Lord Ordinary, that "such a proposition is, in my judgment, unsupported either by principle or authority." The only and utmost effect, therefore, of the vitiation which here occurs is to cause the vitiated words to be held *pro non scripto*.

Assuming, then, that the bond of tailzie in question bears in the testing clause, taken in connection with the subscriptions, all the requisites of a deed regularly executed and authenticated, the pursuer's objection to its validity cannot be entertained, but, on the contrary, must, in my opinion, fall to be repelled.

But, it was argued, and this was in reality the sole point attempted to be made by the pursuer, that it is a statutory injunction, under the sanction of nullity, that the names and designations of the witnesses, as well as of the writer of the deed, must be inserted in the testing clause. I am not satisfied that this is so. Without going over all the old Scots Acts relating to the execution and authentication of deeds, I believe I am correct in saying that those having any material bearing on the present question, and which were chiefly, if not exclusively, relied on by the pursuer, were the Acts 1593, cap. 179, and 1681, cap. 5. The former decerns and declares that deeds "Sal make special mention in the hinder end thereof, before the inserting of the witnesses therein, of the

name, surname, and particular remaining place, diocese, and other denomination of the writer of the body of the foresaid original writs and evidents; otherwise the same to make na faith in judgment or outwith in time coming." There is here, it will be observed, a clear distinction drawn between the writer of a deed and the witnesses to it. As to the former, special mention must be made of his name, surname, and designation under the sanction of nullity. But as to the witnesses it is assumed that they are also to appear in some form or other in the hinder end of the deed after the names and designations of the writer. But how this is to be done, or whether the designations merely, or the names as well as the designations of the witnesses are to be inserted, is not stated; nor has the sanction of nullity of the deed, declared in reference to the want of the name, surname, and particular designation of the writer, any application to the witness. It was argued, however, that any obscurity or defect in this respect in the Act 1593 is cleared up and supplied by the subsequent Act of 1681, which declares that "All writs to be subscribed hereafter, wherein the writer and witnesses are not designed, shall be null, and are not suppliant by condescending upon the writer, or the designation of the writer and witnesses." But here, as in the Act of 1593, a distinction necessarily arises between the writer of the deed and the witnesses, for although both are apparently put on the same footing, it neither is nor can be so in reality; for while no designation of the writer can be given without mentioning also his name, seeing that his name could not be otherwise discovered, and therefore a designation without application to any individual would be obviously worthless, the matter is quite different as regards the witnesses, seeing that a testing clause, although it makes no mention of their names, would be perfectly good and unobjectionable if, for example, it bears that the deed was executed before "the witnesses subscribing, both advocates in Edinburgh:" the testing clause would in this way, although it did not contain the names, but merely the designations of the witnesses, leaving their names to be seen in their subscriptions, be perfectly unobjectionable. Accordingly the Act 1681 cannot be held to refer, so far as the witnesses are concerned, to anything more than their designations.

It may be said, no doubt, that in the present instance there is no express allusion in the testing clause to the witnesses subscribing, and, therefore, that, as regards the subscribing witness Alexr. Dow, the connection between him and the designation "Residenter in Carbane, tutor or guardian of the children of John M'Dougall, tacksman of Carbane," does not exist. But it appears to me that this is a view of the matter which cannot be entertained, and that, on a fair and reasonable construction of the Act 1681 it must be held that the designation which has just been quoted, seeing that it could not apply to the witness John M'Corquodale, who is otherwise well designed, must be held to apply to the other witness who subscribes himself "Alexr Dow, witness," and to no one else.

If the view I have now explained be correct, it follows that the objection taken by the pursuer to the bond of tailzie in question is ill founded. And this is a result which I think is sufficiently supported by the authority of Mr Bell in his well-known Lectures on the Testing of Deeds, pub-

lished in 1795. He says (p. 77 of his work), in reference to the Act 1681, and what it requires to be inserted in the testing clause, "that it is not the name of the witness which is required, and the want of it which is declared to be a nullity; the Act understands that the witness is to subscribe, and it therefore requires no more than his designation, and you will observe that the Act speaks in a way very different of the writer and of the witnesses. It says the defect 'shall not be supplyable by condescending on the writer or on the designation of the writer and witnesses.' The reason is obvious—without the name of the writer his designation could give no information, whereas the designations of the witnesses, joined to their subscriptions, prove fully what the Act meant to establish. We should therefore be apt to infer that in those cases where the designation may be given without naming the witnesses, the want of the names in the testing clause will be no nullity; and that where the true designation is given, and the witnesses have actually subscribed, an error in the name of the witness, as inserted in the testing clause, ought not to prove fatal to the deed." That it is only the designations of the witnesses which the Act 1681 requires to be inserted in the testing clause, and that there is a distinction in this respect between them and the writer of a deed, appears to me also to be illustrated by the cases of *Doig v. Kerr*, 9th January 1741 (Mor. 16,900) and *Wemyss v. Hay*, 5th June 1821 (1 Sh. 47), the judgment in the latter of which, of this Court, was affirmed by the House of Lords 26th April 1825 (1 Sh. and Wilson, p. 141). In these two cases an objection to the authentication of a deed, to the effect that the testing clause, although it contained in the end of it the names and designations of two persons, did not state that these two persons were witnesses to the execution of the deed, or what they had to do with it, was repelled in respect that this defect was sufficiently cleared up by a reference to the signatures of the persons who signed the deed as witnesses, and who appeared to be the same persons as those named in the testing clause. The cases of *Douglas, Heron & Co. v. Clerk and Abercromby v. Innes*, referred to in the note of the Lord Ordinary, does not appear to me to be in point at all, for in both of these cases the testing clause and the subscriptions of these witnesses were not only not reconcilable, but positively contradictory. The case, again, of *Gibson v. Walker*, also referred to by the Lord Ordinary, not only materially differs in its circumstances from the present, but was decided very much on the ground that the deed there in question had been fraudulently tampered with after its execution. I agree, however, with the Lord Ordinary in thinking that little is to be derived from the case of *Morton v. Hunter*, although its tendency appears to me to be rather in favour than otherwise of the defenders' contention.

With these explanations, and on the ground that the designation in the testing clause, "Resident in Carbane," is sufficiently connected with Alex. Dow, who signs the deed as a subscribing witness, and as in this way the deed in question contains all that the Act 1681, c. 5 requires for its authenticating, I am for altering the Lord Ordinary's interlocutor in this case, and in place thereof for repelling the reasons of reduction and assailing the defenders.

LORD GIFFORD—I have come, though not without difficulty, to be of opinion that the view taken by the Lord Ordinary is too strict, and I think that neither the words of the statute of 1681, and of the other statutes which prescribe the requisites necessary for the authentication of deeds, nor the principles fixed by decided cases, compel us to hold that the deed before us is vitiated *in substantialibus*, and therefore null.

It is observed by the Lord Ordinary, and I think the observation well founded, that no case has yet occurred substantially the same as the present. No case has been cited, and I am not aware of any case in which the question now for decision was really raised, so that, numerous as the decisions have been upon these old statutes, we are now to decide apparently for the first time whether it is necessary, under pain of nullity, to insert in the testing clause of a probative deed the full names as well as the designations of the instrumentary witnesses.

The question arises in the present case from the circumstance, about which there is no dispute, that the surname and part of the Christian name of the second instrumentary witness are written upon an erasure. The fact of erasure, and of superinduction upon the erased portion of paper, is admitted, and indeed is evident from inspection of the deed itself, and the question is, What is the legal effect of this erasure?

Now, in the first place, I think the rule is sufficiently established by the authorities, some of which are cited by the Lord Ordinary, that words or parts of words written on an erasure are simply to be held as *pro non scripto*. At least this is the general rule, for there may be exceptions, as in the case of very extensive erasures, which might alter the whole nature of the deed, but the general rule, I think, applies here. It was suggested that the Court are entitled or bound to fill up the erased portion with any possible words, or to imagine and insert words which, had they stood where the erasure is, would have vitiated the deed. For example, in the present case, to suppose that where the name "Dow" now stands on the erasure some other name such as Tod or Smith were inserted, and this of course would vitiate the deed. I am of opinion, however, that this is far too malignant a proceeding to be adopted as a rule of law. Of course if fraudulent vitiation is alleged and proved, the deed may always be cut down as in a reduction, but it is quite a strict enough rule in cases like the present to hold all words on erasures *pro non scripto*.

Applying this rule, the testing clause runs thus, "Before these witnesses, John M'Corquodale, schoolmaster in the Island of Seil, and Alex.

resident in Carbane, tutor or guardian to the children of John M'Dougall, tacksman, of Carbane." The signature of the second witness is "Alex. Dow, witness." The question is, Is the statement in the testing clause enough in reference to the second instrumentary witness? I think it is.

The leading statute is 1681, cap. 5, which contains the enactment cited. It provides that "writes to be subscribed hereafter wherein the writer and the witnesses are not designed shall be null, and are not supplyable by condescending upon the writer, or the designation of the writer and witnesses." The previous statute (1593, cap. 179) had required the insertion of the "name, surname

and particular remaining place, diocese, and other denomination of the writer of the body of the fore-said original writs and evidents." Now I think it clear, even taking the Act 1681 alone, still more taking it in connection with the previous Act of 1593, that the writer of the deed and the witnesses thereto are dealt with in a very different manner. In the case of the writer he must be named by name and surname as well as designed, but the witnesses, who under the statute must always be subscribing witnesses, always require to be designed. And the reason is clear, for the mere designation of the writer, whose name nowhere appears, would do little or nothing towards pointing him out, but if the designations of the subscribing witnesses are given then both their names and designations are disclosed upon the very face of the deed. The statute seems very carefully expressed, so as to make nothing a statutory requisite but what is absolutely necessary, and we are not to multiply statutory requisites, the want of which is to infer a nullity, by mere implication. On this point I entirely adopt the reasoning of Mr Robert Bell in his lectures on the Testing of Deeds, a book of the very highest authority in conveyancing, even if the writer had merely given his opinion, but I think his reasons are really unanswerable. Mr Bell's opinion seems to be confirmed by the passage in Stair, where he says, speaking of the Acts in question, that the name of the writer, and the designations of the witnesses are *de substantialibus*. Other and later conveyancing authorities were referred to, who seem to place writer and witnesses in the same category, so that the names as well as the designations of both should be inserted in the testing clause. But besides the observation that these conveyancers were pointing out the safe and proper course to be adopted, and were not considering what would be the barest compliance with the statutes, I think it quite clear that none of them had the present question in view. None of them take up the question as Mr Robert Bell does, and none of them in the slightest indicate that either his reasoning or his opinion were unsound.

The Lord Ordinary seems to concede that the mere insertion of the names is not *inter essentialia* as a solemnity, as in the case he puts where the testing clause bore that the deed was signed "before the two subscribing witnesses, both clerks to A. B., solicitor in Edinburgh." I do not doubt that such a testing clause would be quite sufficient although the names of the witnesses could only be learned by looking at their subscriptions; and if this be true, it really is enough for the decision of the present case, for although we had a very ingenious argument to the contrary, it seems to me to be quite plain that the witness who is insert in the testing clause as "Alex <sup>resider in</sup> Carbane, tutor or guardian to the children of John Macdougall, tacksman, of Carbane," can be no other than the witness who subscribes Alex. Dow. The other witness is quite clear, because he is both named and designed; and I think it a most forced and violent reading,—indeed, as I said before, a malignant reading,—to hold that the "Alex" who signs as witness is a different person from the Alex who is designed in the testing clause. Indeed, in one view, he is both named and designed in the testing clause. His Christian name is given, though not his surname, and I don't think it matters that his Christian name is given in a contracted form,

especially when it happens that this is the very same contracted form in which he signs.

I need hardly add that in the present question, which relates to mere formalities of authentication, we are no way bound by any analogy drawn from the strict rules of interpreting an entail. The deed happens to be an entail, but in the present question we deal with it as if it had been an ordinary disposition or an ordinary agreement. It is plain, also, that all questions as to challenging or impugning the deed as false are left entire. We only deal here with its *ex facie* regularity. I am therefore for sustaining the deed as duly tested in point of law, and this leads to absolvitor from the present action.

LORD NEAVES concurred.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming note for Hugh M'Dougall and Others against Lord Shaud's interlocutor of 28th January 1875: Alter the said interlocutor; repel the reasons of reduction; assoilzie the defenders from the action, and find them entitled to expenses, and remit to the Auditor to tax the same and to report, and decern."

Counsel for Reclaimer—Solicitor-General (Watson) and Trayner. Agent—P. S. Beveridge, S.S.C. Counsel for Pursuer—Dean of Faculty (Clark) and G. Smith. Agents—Mitchell & Baxter, W.S.

Saturday, June 26.

## SECOND DIVISION.

A. V. B.

*Testament—Succession—Restriction on Marriage.*

A testator having left certain shares in his succession with this proviso "in the event of any of my said daughters being married her share of said profits shall lapse and fall into the residue of my estate."—*Held* that this was a valid condition and not an illegal restraint upon marriage.

*Observations (per Lord Justice-Clerk)* on the English law as to conditions antecedent and subsequent, and their non-applicability to Scotch law.

*Special Case—Expenses.*

Circumstances in which *held* that there was no such ambiguity in the testator's deed as to entitle the party questioning its intention to expenses out of the trust-estate.

This was a Special Case, presented for the opinion and judgment of the Court by Mrs A., daughter of Mr B., the testator, of the first part, and by Mrs B., the widow, and by the other unmarried daughters of the testator, as parties of the second part.

Mr B. died on 8th October 1873. He was twice married, and was survived by his second wife and by the following children, viz.:—By his first marriage two sons and three daughters, Mrs A. being the youngest; and by his second marriage six children, all in minority. Mrs A., the party of the first part, was married on 21st December 1871. The other two daughters of the first marriage are unmarried.