

don't much found on the case of Fraser, Dec. 2, 1835, 14 S. 89, where a person's factor was allowed to sign for him. But there are two cases, the decisions in which, I think, I cannot support on any other ground than that on which I rest this case—that it is the creditor for the time being who is to lodge the accounts and to sign them. The one is the case of Stirling's Trustees, May 23, 1862, 24 D. 993; the other is that of Hopkins, March 11, 1851, 13 D. 958. In Hopkins, the next heir lodged a minute of consent, and the Court delayed judgment till that was considered. But the next heir had no power to authorise such decree; and the Court would never have pronounced that decree, unless they had thought it quite clear that the persons who signed the accounts were the creditors. I cannot reconcile either of these two cases with any other principle than this.

LORD DEAS—I concur. One of the objects of this Act of Parliament is, as set forth on the face of it, public benefit. It is an ameliorating statute. And this case must be settled in the way we read a statute of that kind. Another of its objects is for the encouragement of heirs of entail to make improvements. It would be a great discouragement that by the death of the heir in possession a day or so before Martinmas in any particular year the whole amount expended on improvements made in that year should be lost. A third observation is, that as regards the signature of these accounts, strict compliance with the statute is impossible. The question occurred in the case of Hopkins, and there the Lord Ordinary seemed to think the case was to be decided on the consent of the next heir. It again occurred in Fraser, in which during the lifetime of a party the subscription was adhibited not by the party but by his factor, and that subscription was held sufficient. The question was again considered by the Court in Stirling's Trustees, where the question was raised as to the signature of trustees under a trust-settlement by a party for behoof of his creditors. An observation was made there by the present Lord Justice-Clerk, with reference to that case of Fraser, to the effect that it would be very dangerous to call that decision into account. But I look upon this as a clearer case than any of them; for supposing that the direction in the statute was to be read as imperative, it does not follow that it would be necessary to restrict subscription only to cases where the signature is adhibited by the person himself. There might be a party who could not write, either from blindness or from not having been taught to write. It would be reading the statute very strictly to hold that a party who could not write could not subscribe a document in the ordinary way. But the present case was one which no legislator could provide for. I come to this conclusion from a fair construction of the statute. The only perplexity I have had arises from an observation of Lord Curriehill in the course of the debate, that an heir of entail in possession has always the option either to burden the entailed estate or not as he pleased. There is very little ground here for supposing that the Marquess would not have burdened the succeeding heir of entail. But there might be cases; and that raised a difficulty in my mind in applying the principle. But I think the procedure adopted here must be held to indicate, in the absence of proof to the contrary, that the Marquess did not mean to give the heir of entail the benefit of this, but to give it to his executors. All that the 9th and 11th sections of this Act require was done. The Marquess, before he

began to execute the improvements, gave written notice; and the import of this whole procedure was that he intended to lay out money on improvements, and become a creditor of the succeeding heir. I think it is clear that he exercised his option; and in the absence of proof to the contrary, I think there is sufficient to show that he did not mean the heir of entail to get the benefit, but his executors. And if that be so, the executors come into his place, and are entitled to do all that he could do himself.

LORD ARDMILLAN—The ground on which I rest my opinion is, that the subscribing of the accounts is not an *actus legitimus* in course of the procedure necessary for ascertaining the intention of the person. I think the provision in the Act as to subscription is for the purpose of authentication, and is not intended to serve as a declaration of the intention of the party. He gives notice of his intention when he gives the notices required by the statute; and he does not leave matters entire; he goes on. It is not for completion of his intention that he is called on to subscribe. The Marquess died on 8th November. By statute, the accounts were for the year preceding Martinmas, and up to that term, and must be subscribed within four months after Martinmas. It was impossible for the Marquess to subscribe the accounts up to Martinmas. I think that unless we are compelled to hold the act of subscription under the statute as a party's own personal act, for which we can have no substitute, we are entitled to hold the subscription of his executors as sufficient.

Their Lordships accordingly recalled the interlocutor of the Lord Ordinary, and repelled the fifth plea-in-law for the defender.

Agents for Pursuers—Davidson & Syme, W.S.

Agents for Defender—Adam, Kirk, & Robertson, W.S.

JURY TRIAL.

(Before Lord Kinloch)

LAWSON v. FERGUSON.

Proof. In a trial of an action for breach of promise of marriage, held (per Lord Kinloch) that a party could not ask a witness what he had been told by himself on a particular occasion.

In this case the following issue was sent to trial:—

“Whether, in or about the month of December 1865, the defender promised and engaged to marry the pursuer; and whether the defender has wrongfully failed to implement the said promise and engagement, to the loss, injury, and damage of the pursuer?”

Damages laid at £1000.

In the course of the evidence it was proposed by the counsel for the defender to ask one of his own witnesses what the defender had said to him on a particular occasion.

MILLAR for the pursuer (**BURNET** with him) objected that the question was incompetent.

GIFFORD, for the defender (**MAIR** with him), urged that as the defender was not a competent witness in a breach of promise of marriage case, the evidence proposed should be allowed.

Lord **KINLOCH** sustained the objection.

The jury, after an absence of three hours, returned a unanimous verdict for the pursuer; and by a majority of 9 to 3 assessed the damages at £50.

Agent for Pursuer—W. S. Stuart, S.S.C.

Agent for Defender—W. Officer, S.S.C.