

Walker Vs. Whitwell

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Court : House of Lords

Decided On : Dec-15-1915

Judge : Lord Earl Loreburn, Lord Dunedin, Lord Atkinson, Lord Shaw of Dunfermline & Lord Wrenbury

Appeal No. : [1915] UKHL 6

Appellant : Walker

Respondent : Whitwell

Judgement :

Earl Loreburn.-I do not propose to enter in detail upon the various Acts and decisions in Scotland which have been discussed at the Bar, because they are to be fully considered by those of your Lordships who are specially familiar with the law and practice. I shall merely offer to your Lordships certain considerations arising out of the facts of this case which appear to me of general importance.

There is ground for supposing that, owing to an erroneous view of the law, Dr Walker was neither empowered nor expected to attest this will as a witness at all. Manifestly an attestation by anyone merely interposing of his own accord would be nugatory, but it is not, in my opinion, necessary to prove an express request by the testator. Wills are often made by persons who are quite clear as to their intentions, and signify them by their signature. If such a person engages a solicitor or a friend to help him in making his will, the circumstances might quite well be such as to

warrant a conclusion that he impliedly authorised the procuring of witnesses to see him sign and attest his signature in order to carry out his governing intention, though he may not have been himself acquainted with the law. But that is not this case.

Questions have been raised as to the authority of a witness to sign *ex intervallo*. This point does not arise here because it also is superseded by the other point, namely, that the signature was after the maker of the will had died. I will only say that the opinion of the Court of Session in *Frank v. Frank*, namely, "there never ought to be any considerable interval; yet, when such a case occurs, it must be judged of upon its whole circumstances," seems to me very wise and just and of very general application. A long interval, if unexplained, ought to be fatal, though I should call the quarter of an hour which was the period in that case a short interval. But any real interval calls for explanation. It may be that weeks or months will prove no impediment to the validity of an attestation, as, for example, if a request to sign from the maker of an unattested deed is proved. It is not easy to lay down a rule more precise than that which I have cited from *Frank's* case.

In my opinion, however, the real point in this appeal is that Dr Walker, whose complete integrity is unquestioned, adhibited his signature after the death of the maker of the will. There has been much difference of opinion in the Court of Session. I come to the conclusion that the appeal must be allowed with much regret, because I believe that the deceased lady intended to dispose of her property in terms of this will; and with some misgivings, because I am differing from eminent Judges, though sustained by other high judicial authority.

But what I feel most strongly is this. Every civilised system of jurisprudence (at least all that are known to me) requires certain definite solemnities before allowing a testamentary disposition to have effect, as that it must be holograph or duly attested. The opportunity for fraud is so great, the temptations of self-interest are so liable to distort even an honest recollection, and the hardship so manifest if a man's fortune is disposed of by loose proof, that it has been judged necessary to insist upon certain precautions, or a choice of certain precautions. It is quite true that a neglect, perhaps only accidental or springing from ignorance, as is indeed

this case, may frustrate a perfectly honest will, and thus cause the very mischief which these precautions were intended to avert. That risk is inevitable and must have been foreseen. But it is held better that a few instances of that kind should occur, rather than admit the flood of uncertainty which must follow if simple rules be relaxed. I am very sorry for it in this case, but let us see what might be the result of relaxing principle to meet the hardship of this case.

Dr Walker is a perfectly honourable man, but everybody is not like Dr Walker. Suppose it were admitted that a person who in fact witnessed the execution of a will by the maker of it could, after the maker's death, adhibit his signature. Seeing that the signature is by statute necessary to the validity of the will, it would remain at the pleasure of the witness whether or not the will should become operative; for surely no Court could compel him to sign if he were not so disposed. How long may he reserve his decision whether he will or will not validate the document? Is he at liberty to make terms and require some different arrangement of the deceased's estate? No Court would, I presume, allow him to keep the price, if he were dishonest enough to stipulate a price for adhibiting his signature. But would a will, the validation of which had been obtained by corruption, be enforced by a Court? Why not, if the argument be sound that the sole value of attestation is to comply with a formal statutory requirement, and that the fact of the maker's signature and the fact that the witness witnessed that signature are the real things which have to be proved? If that be so, then it would be due to the maker of the will and the beneficiaries under it to enforce the document, however corrupt might have been the transaction which got rid of the statutory obstacle. Why should the subsequent corruption of a witness affect an innocent legatee's rights?

The signature of the attesting witness is the statutory evidence required. But in my mind it is something more. It is essential to the document being a will at all. No one who is not alive can make a will. When Mrs Walker died this document was not properly attested. It was not a will. The lady died intestate so far as this piece of paper was concerned. I say nothing about testing-clauses and the statutes and decisions in regard to them. There is no Act of Parliament authorising anyone to convert what was an ineffective piece of paper at this lady's death into a valid will after her death by adhibiting his signature. With all respect, I cannot agree with the

decision in Tener's case, which has been seriously doubted in Scotland for years. I do not think we are bound to extend the ancient doctrine about testing-clauses so as to allow one person to be the arbiter whether another person's testament is to be valid, or to declare that a lady who was intestate when she died became testate afterwards by reason of someone else's signature.

Lord Dunedin-(In his Lordship's absence his opinion was read by Earl Loreburn).- This is a petition presented in terms of section 39 of the Conveyancing Act of 1874, which prays the Court to declare that a certain testamentary writing was duly subscribed by Mrs Walker, as maker thereof, and by Mabel Hayward and John William Thomson Walker, as witnesses attesting the subscription of the said Mrs Walker.

The circumstances which gave rise to the petition are as follows:-Mrs Walker, who was a domiciled Scotchwoman, had executed a trust-disposition and settlement in ordinary form, which, after certain legacies, left her whole moveable and heritable estate to be divided equally among her whole children, the issue of a predeceasing child taking the parent's share. She appointed Harry Walker, a son, and James Thomson as executors. Shortly before her death, being in London, she expressed a wish to alter her settlement, and sent for her son, Dr John William Thomson Walker, who resided in London. He wrote at her dictation, on the 25th June 1913, on a sheet of letter-paper, a document, which on the envelope which contained it he designated as a codicil, but which was in reality a new will, by which, after certain bequests, she divided her whole property equally among all her living children; but she excluded her grandchild, Henry Edward Leatham Whitwell, who as issue of a daughter predeceased would have taken his parent's share under the old trust-disposition and settlement. Mrs Walker signed this document in the presence of Dr Walker and of Mabel Hayward, a nurse. Mabel Hayward then subscribed as witness to the signature of Mrs Walker. No other signature of a witness was appended, because Dr Walker was under the impression that one witness to the signature of a testator was sufficient to make a valid will. He also thought that, being a beneficiary under the will, he was inadmissible as a witness. The sheet of paper and the envelope were handed by Mrs Walker to another son, Harry Walker, and by him sent to the family lawyers in

Scotland. Mrs Walker died on the 1st July. Acting on advice the family lawyers sent the document on the 24th July to London to Dr Walker, and on 25th July Dr Walker subscribed as a witness; his designation as well as the designation of Mabel Hayward being subsequently appended by one of the solicitors.

The present petition is as already set forth and is presented by the whole of the surviving children. It is opposed by the infant grandchild, through his father as his guardian. The question thus raised was undoubtedly ruled by the decision of the Second Division in *Tener's Trustees*. As, however, the soundness of that decision had been doubted by Lord

M'Laren in *Brownlee v. Robb*, the case was sent to seven Judges, with a view to the reconsideration of what had been decided in *Tener's Trustees*, which was a judgment of three Judges only. The result has been to disclose a sharp cleavage of judicial opinion, four learned Judges having pronounced in favour of and three against the validity of the document.

I shall follow the example of the Court below and consider the question in the first place apart from the Act of 1874.

By the law of Scotland writings may be looked on as divided into two classes, viz., deeds and informal writings. I use the word deed, though it has no technical meaning different from writing or writ. A deed is a writing which to be effective must be authenticated as the deed of the granter. If the deed is holograph and signed it is so authenticated. But if it is not holograph what must be its authentication? The law on this matter is statutory. By statute various requisites are made necessary, and these requisites are always spoken of as solemnities. A deed without the requisite solemnities is not an authenticated deed. In Lord Stair's time the matter was still in the making. Indeed, the Act of 1681 is generally understood to have been drafted by him. 1681 was the date of the first edition of the *Institutions*. That year he was removed from the presidency of the Court of Session, he had to fly to Holland in 1682, and was not restored to the presidency till 1689. But already by Bankton's time the matter is looked on as fixed. He says (vol. I., p. 330):-“Writings require certain solemnities or formalities without which they are null.” Erskine (III. ii. 19) says:-“The Acts 1579, 1593, and 1681, declare

expressly that all deeds which are destitute of the solemnities thereby required shall bear no faith in judgment; or that they shall be null, and not suppliable by any condescendence; the natural import of which expression is, that they cannot produce an action against the granter, or be pleaded as evidence before any Court to his prejudice. Agreeably to this interpretation, it has been adjudged by sundry decisions that such deeds could not be supported by the most pregnant proof that could be offered in their favour." Duff, Feudal Rights, p. 3, says:-"The mode of attesting or authenticating deeds consists in the solemnities introduced by statute." And lastly, Menzies (at p. 80 of the new edition), says:-"Solemnities are thus the legal tests of the validity of deeds."

I have laid stress on this matter because I cannot help thinking that it is here I find the root of the divergence of opinion which exists between the learned Lord President and those who disagree with him. The Lord President looks upon the deed as the deed of the maker so soon as the maker has attached his signature thereto, subject, doubtless, to the subsequent ceremony of attestation, which is in his view a mere matter of evidence, though by statute only provable in a certain way, viz., by subscription. In the view of the others, a deed is not made an authenticated deed by anything short of the prescribed solemnities. In other words, so far as signature is concerned, in a deed not holograph, a signature is nothing, an attested signature is everything. With that view I agree.

The only difficulty arises, I think, from what has been decided first as to the testing-clause, and secondly as to the result if the subscribing witnesses append their signature *ex intervallo*.

Now, it is quite true that *prima facie* all solemnities would seem to stand on the same footing, or, in other words, that the absence of any would be fatal. And inasmuch as some of the solemnities consist in the designation of the writer, the mention of the number of pages, and the designation of the subscribing witnesses, all of which matters find their appropriate mention in the testing-clause, it would logically follow that a deed without the testing-clause was an incomplete deed, and null; and it would follow as a logical corollary that, unless the maker of the deed saw to it that the testing-clause was filled in at the time of subscription of himself

and the witnesses, no one else should have the power to render valid that which *ex hypothesi* was invalid when it left the hands of the maker. Long decision has, however, settled this otherwise, and it is settled beyond possibility of recall that a testing-clause may be filled up *ex intervallo*, even though the maker of the deed may have died before it was filled up. But at the same time this has been recognised as anomalous and contrary to principle, and can, I think, only be supported as upon long usage. It is a true case of *communis error facit jus*. But in such a case it does not follow that the principle will be extended to other cases. That it is an anomaly has often been recognised. Lord Campbell in this House, in the case of *Cunningham v. M'Leod*, said: "With respect to the testing-clause, I must own I was very much shaken indeed by the argument we heard, because, looking at the statute of 1685, it is very difficult to say that this mode of proceeding, if it were *res integra*, would be justified by it. ... Upon such a point I think that usage, even in the very teeth of an Act of Parliament, must be considered as entirely decisive." And Lord Neaves, in the case of *Hill v. Arthur*, says: "Powers have been claimed over a testing-clause, which are very extensive, and, in my opinion, not a little anomalous." When a proceeding is, as this is, justified by practice and practice alone, it is, in my view, inadmissible to extract there-from a logical principle which is perforce to be applied to cases said to be similar.

I now come to what has been decided as to the adhibition of the witnesses' subscriptions *ex intervallo*. Undoubtedly the correct practice, as will be found laid down in all the text books, is for the witnesses to adhibit their subscriptions then and there, when they either see the maker sign or hear him acknowledge his subscription. *Ex necessitate rei*, a moment of interval must elapse after either of these things before they can subscribe. What if that moment is prolonged and becomes a definite space of time?

The leading case on the subject is that of *Frank*, decided in 1795, and affirmed in this House in 1809. The reasons for judgment in the report in *Morison* bear that subscription of the witnesses in presence of the granter is not prescribed by the Act of 1681, and that "although there never ought to be any considerable interval, yet, when such a case occurs, it must be judged of upon its whole circumstances."

I do not propose to examine the cases which followed Frank, because that has been done with accuracy by Lord Johnston in his judgment in the Court below. There is authority, in my opinion, for the proposition that an interval which showed that the signing of the witnesses was not practically a continuous transaction at the signing of the deed by the maker would be fatal-(Duff, Feudal Rights, p. 16). I do not think it necessary to make up one's mind on that matter. The existence of the statute of 1874 makes it unnecessary. It is sufficient for the present argument to note that no case of the adhibition of a signature of a witness after the death of the maker of the deed arose till Arnott v. Burt, which was, however, decided on other grounds; and that the first authority for the validity of such a proceeding is to be found in Tener's Trustees-the decision which this case was sent to a Court of seven Judges to reconsider. I ought, however, to notice that in Arnott's case Lord Justice-Clerk Moncreiff approaches the question, which he moots without deciding, from a point of view which I have already, in alluding to the judgment of the Lord President in this case, indicated as, in my opinion, erroneous. It will be remembered that Arnott's case was before the Act of 1874. After mentioning the case of Frank the Lord Justice-Clerk proceeds as follows (at p. 70):-“For my own part I should not be prepared to say absolutely that the mere fact of the instrumentary witnesses signing after an interval was of itself a sufficient ground for setting aside a probative deed. My impression is the other way, but only with this proviso, that there appear in the circumstances leading to the delay reasonable cause, and an absence of elements of suspicion. If witnesses follow so loose a course as to delay their subscription for a considerable period, it lies with the person who brings forward the deed to explain the circumstances in which the delay took place, and to shew that these circumstances raise no suspicion as to the good faith of the deed itself. As to the question whether witnesses can subscribe after the death of the granter, I do not think it necessary to come to an absolute conclusion on that matter. On the one hand, it may be said that, as the witnesses only attest the fact of subscription by their signatures, it does not matter when they do so, for the fact remains the same. Death cannot alter the fact of the subscribing. But, on the other hand, the concurring facts of the lapse of an interval and of the death of the testator are material elements.”

Now, this method of looking at the question seems to me to err in two particulars. First, it treats the signatures of the subscribing witnesses as a matter of evidence only, and not of solemnity. And secondly, it construes "the circumstances" which are to be looked into in terms of the judgment in Frank's case, as only circumstances which bear on the point whether the deed as finally produced was truly the same deed as was signed by the granter. I think the expression "the circumstances" has a wider meaning, and one of the circumstances to be inquired into is whether the subscribing witness had a right, when he did subscribe, to subscribe as a witness to the signature of the maker of the deed, and, in particular, whether he can have such right when the maker has died before he subscribes. Now that the witness, who is qualified by having seen the maker subscribe and heard him acknowledge his subscription, is only entitled to sign at the request, express or implied, of the maker, seems to me plain. The perfecting of the deed by authentication is the maker's affair and no one else's. What right could any third party have to thrust himself forward as a subscribing witness in invitum of the person who has it in his option to complete the deed or to leave it unfinished? And, indeed, the learned Judges who pronounce in favour of the validity of signature by witnesses after the death of the testator seem to me to admit this position when they shrink from saying that the signature of a witness who observed the signing by stealth would do. It is nothing to the purpose to say, as Lord Gifford said, that there is no *invocatio testium* in our law. All that that truly means is that there is no formality connected with the setting of witnesses to their work of subscribing. None the less, it is in obedience to the desire of the maker that they do so subscribe. It seems to me to follow, first, that before they subscribe the maker could interpel them from subscribing, and second, that as their subscription is in accordance with a continuing request which must be held as repeated every moment till subscription is effected, the continuing request necessarily fails when by death the person who is bound to make it can no longer act by way of request either express or implied.

Some stress is laid by learned Judges on the fact that there may be gathered in the circumstances of the present case a sort of general mandate of the testatrix to Dr Walker to do what was necessary to make a valid will. The same idea is expressed, I venture to say even more crudely, by the Lord Justice-Clerk in

Tener's case, when he says: "We cannot doubt that if Mrs Tener had thought that two witnesses were necessary she would have desired Mr Tener to sign. He was entrusted to do all that was necessary to make the deed effectual, and as to his competency as a witness there is no question." That seems to me tantamount to saying the testatrix made an ineffectual will, but, had she known the law, she would have made an effectual one; therefore the ineffectual will should be held to be effectual. But, after all, what was this general mandate to Dr Walker to do? Doubtless it was to do everything he could to help the testatrix to make a will; but it could not be a mandate to him to make a will for her, for that is impossible in law. Yet that is what the so-called mandate comes to, for if Mrs Walker died with an unauthenticated will-or, in other words, intestate-if Dr Walker can by adhibiting his signature make the will authentic, it is he who makes her testate, and not she herself. And whether he chooses to do so or not depends upon his volition, not hers. Admittedly he cannot be compelled to adhibit his signature. In the present case the parties are above suspicion. But the question is a general one. Why, in another case, should not the witness say, "Which of you two parties who gain or lose respectively by the will if valid-which of you will give me the best terms to sign or refrain from signing"? My opinion, therefore, is that, apart from the Act of 1874, the will left by Mrs Walker was unauthenticated and invalid.

I now turn to the Act of 1874; and there I think the point is a very short one.

By section 38 several solemnities are, as solemnities, swept away. Section 39 goes still further, and dispenses with all formalities-which I take to be equal to, or at least to include, solemnities. But it does so under one sanction, viz., that you can still prove that the deed was signed by the granter and by the subscribing witnesses. That is to say, that as to these two matters (excluding the rules as to insertion of designations) it leaves the law where it was. Subscribing witnesses must be witnesses who did subscribe in the way in which by the old law they alone could do. Therefore, if I am right in the former part of my opinion, they must be witnesses who subscribed (being duly qualified by having seen the maker subscribe or heard him acknowledge his subscription) in obedience to the continuing request, express or implied, of the maker. But Dr Walker was not such a witness; therefore the proof necessary cannot be forthcoming. I have not dwelt

on the fact that Dr Walker, so far from having been either asked, expressly or impliedly, to act as an instrumentary witness, expressly excluded himself from all intention to act as such. His change of attitude was made after the death. This point accentuates the argument, but I do not think it alters it.

My Lords, I have troubled you with observations at such length only because of my respect for the opposite views which have been expressed by the majority of the learned Judges in the Court below. Were it not for that I should have been content to express my concurrence with the opinion of Lord Skerrington, who has dealt with the whole matter with extreme lucidity and in a manner which coincides exactly with the views which commend themselves to my humble judgment. I think that the appeal should be allowed and the prayer of the petition refused.

Lord Atkinson.-I concur.

Lord Shaw of Dunfermline.-I concur. Mrs Isabella Thomson Walker, whose usual residence was at Newport in Fifeshire, Scotland, executed in London a document which bears to be a testamentary writing. The date of the signature was 25th June 1913. The document was written to her dictation by her son, Dr Walker, and she signed it in the presence both of Dr Walker and of Mabel Hayward, a sick-nurse. Miss Hayward in Mrs Walker's presence subscribed the document as a witness. It was then put by Dr Walker in an envelope and marked "Codicil to Will, 25.6.'13." On 29th June another son of Mrs Walker sent the document to the family solicitors in Scotland. Dr Walker was apparently of the opinion that the document, to be a valid will, required only one witness. A week after signing, namely, on 1st July 1913, Mrs Walker died. On 24th July, more than three weeks after her death, legal advice having been asked upon the subject, Dr Walker signed the document as a witness. The solicitors appended designations to Miss Hayward's and Dr Walker's signatures.

The respondents presented a petition under section 39 of the Conveyancing Act, 1874, to have it declared that the deed was subscribed by the granter, Mrs Walker, "and by the said Mabel Hayward and John William Thomson Walker as witnesses attesting" the granter's signature. In one sense it is true that the document thus brought before the Court is a document "bearing to be attested by two witnesses

subscribing,” but it is admitted that the document must be judged of on the footing that one witness subscribed after an interval and after the death of the granter, and that the question must be determined on these facts, and was not in any manner concluded by the appearance of the deed when produced in Court. As Lord Skerrington says in his careful and lucid judgment in the Court below, “there is no doubt upon the evidence that the codicil, the formal validity of which is in question, truly represents the final testamentary intentions of the testatrix, and that the irregularity in its execution arose from no hesitation on her part and from no want of good faith on the part of the persons who attended upon her.”

The question in this case is whether the codicil, which was defective at the time of Mrs Walker's death by reason of having her signature attested by only one witness, was validated by Dr Walker's signature being appended after the interval mentioned and after her death. It is maintained by the respondents that the Conveyancing Act of 1874 covers such a case as the present, and that what occurred was equivalent to an informality of execution in the sense of that Act; an informality which could be rectified under the statutory provisions, and the deed thus rendered in all points a valid and probative instrument. The statute will be referred to presently.

A survey of the Acts of the Scottish Parliament bearing upon the execution and authentication of deeds reveals points which, though of archaic interest, are, of course, remote from the exact issue to be determined in the present case. Apart from a special treatise like Bell on the Testing of Deeds, the survey is made among the institutional writers by Erskine, III. ii. 6, et seq., and by all the lecturers on conveyancing. Among the many references to the Acts occurring in decisions of learned Judges of the Court of Session, the brief and compendious narrative given by Lord Deas in *M'Laren v. Menzies* takes a leading place; while the historical learning of Mr Walter Ross in the elaborate chapter on “the testing-clause,” contained in his lectures on the law of Scotland, will always remain notable.

The principal Acts begin with 1540, chapter 117. Prior to this date deeds were sealed, not signed. The art of writing was little known. The sword was more

practised than the pen, and it would have been difficult readily to find witnesses, except in ecclesiastical circles, who could sign their own names. As Professor Ross says: "The art of penmanship gradually advanced, but was altogether confined to the clergy.

A military people would not submit to the acquisition of such an inactive employment; and therefore, though agreements might then be formed into writing, that writing could not be connected with the parties, so as to authenticate its being their proper act and deed." Deeds had accordingly been sealed. The statute of 1540 recognised the injury that may result from the loss of seals, and that "mennies seales may be feinzied or put to writings after their decease." It was accordingly enacted that "na faith be given in time cumming to ony obligation, band or uther writing under ane 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." In the course of the same century, namely, in 1579 by chapter 80, and in 1593 by chapter 179, further statutory provisions were made on the subject. The former Act provided that deeds should be subscribed and sealed "be the principal parties, gif they can subscribe, utherwise by twa famous notars befor four famous witnesses denominat 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 latter statute provided for the designation of the witnesses being inserted in the deed. It is curious that, while the number of witnesses who should attest the subscription of a notary is named, the number of witnesses to an ordinary subscription is not set forth. Stair, in dealing with this subject, alludes incidentally to the poverty of the country and to wills being, accordingly, so few in number; and he says, III. viii. 34: "The effect of testaments being so small, the solemnities thereof are no other than what are requisite to accomplish any other writ; for two witnesses suffice, and if the testament be holograph it is valid." All the authorities recognise that the words "and witnesse" in the Act of 1540 must be read in the plural and that two witnesses were required.

It is unnecessary to refer to enactments or statutory provisions other than those which deal with the subscription of granter and witnesses. The ruling statute on

that subject still is the Act of 1681, chapter 5. It recognised that, by the practice of the country, deeds had been held sufficiently authenticated if there had been witnesses to the fact of the subscription of the granter, although the witnesses themselves had not subscribed; and it proceeds:-“Considering that by the custom introduced when writing was not so ordinary, witnesses insert in writs, although not subscribing, are probative witnesses, and by their forgetfulness may easily disown their being witnesses.” The statute accordingly enacts and declares “that only subscribing witnesses in writs to be subscribed by any partie hereafter, shall be probative, and not the witnesses insert not subscribing.” It was further declared “that no witness shall subscribe as witness to any partie's subscription, unless he then know that partie and saw him subscribe, or saw, or heard him give warrand to a nottar, or nottars to subscribe for him, and in evidence thereof touch the nottar's pen, or that the partie did at the time of the witnesses subscribing acknowledge his subscription; otherwise the said witnesses shall be repute and punished, as accessorie to forgerie.” There are other provisions with regard to the filling up of witnesses' designations, andc.; but the careful provision of this Act of Parliament was that deeds had to be subscribed by the granter and by the witnesses also, and that without this essential the deeds should, in the language of various old statutes, make “na faith” in judgment, or be null. Testamentary writings (except holograph wills) and other deeds were all in the same category in this particular.

Other nullities from the lack of certain formalities there were. These matters were the subject of numerous decisions by the Courts in Scotland, and to these it is not in point to refer, but the results were such that remedial legislation by the Act of 1874, about to be referred to, was passed. The essentials just mentioned, however, namely, subscription by granter and subscription by witnesses, remained, and still remain, essentials of the deed. The Courts in Scotland, while constrained in many instances to give effect-as of course-to the statutory provisions with regard, for instance, to the signature upon each page, to the mention of the writer's name, and to the filling up of the designation of witnesses, did show not infrequent signs of an effort in the direction of a judicial remedy against what might otherwise have been considered an unbearable bondage. This explains, for instance, the case of *M'Leod v. Cunninghame*, affirmed in this House, in which the testing-clause gave the witness's name as Crammord, whereas the

witness himself had signed as Crammond, and the case of *Bank of Scotland v. Telfer*, in which the witness's name was entered in the testing-clause as Gibson instead of Dickson. A modern instance of correction on similar lines is the case of *Richardson's Trustees*, where the name of a witness Robertson or Roberton had been confounded. In the last case advantage was taken of the provisions of the Act of 1874, and Lord M'Laren said that a blundered testing-clause was an informality of execution. But the former cases also indicate that, even apart from the Act of Parliament, Courts of Justice were struggling in their judicial sphere towards the same result by repudiating a meticulous technicality.

By the Conveyancing (Scotland) Act, 1874, great relief was given against consequences of nullity attached to the omission of technicalities under former statutes. Sections 38 and 39 have been referred to. In Lord Deas's words in *M'Laren v. Menzies*, "If I read the modern statute law rightly, including section 38 of this statute of 1874, a deed is now probative, on the face of it, if three requisites are complied with-1st, if there are subscribing witnesses; 2nd, if these witnesses are either designed in the deed or testing-clause, or their designations are added to their subscriptions before the deed is recorded for preservation, or is founded on in Court ... 3rd, if the deed be subscribed by the granter on the last page in the case of a deed on one sheet only, or subscribed by him on each of the sheets or pages in the case of a deed written on more than one sheet." The second and third cases need not be referred to. But with regard to the first, Lord Deas's opinion is this:

"If the first of these requisites be omitted-that is to say, if the deed does not bear to be attested by at least two witnesses-no remedy is provided. The objection is necessarily fatal to the deed." I am distinctly of opinion that that is still sound law, and is still the rule with regard to the attestation of deeds in Scotland. By section 38 of the Act of 1874 the objections as to the writer or printer not being named or designed and the number of pages not being specified disappear altogether. These things are no longer necessary. The objection that the witnesses are not named or designed in the deed also disappears if the names and designations are appended before the deed has been recorded or founded on in a Court; but section 38 in no way deals with or limits the necessity for the subscription by the

witnesses themselves, as under the former law, or alters the law in that particular. On the contrary, as I read section 39, the informalities of execution which are there referred to are informalities of execution of a deed upon whose face the essentials of a good deed appear, namely, subscription by the granter and attestation by two witnesses subscribing. Granted that these things are there, there may be many informalities of execution; as for instance, from there being several pages of the deed, from the signature or signatures being on erasure, from the name or names having been misspelt in the testing-clause-all these things fall within the phrase, "informality of execution," and are subject to rectification and relief, so as to achieve the result that, notwithstanding the slips, andc., to which I have referred, the Court may declare that the deed was nevertheless a good deed. But I am of opinion that, until the writing has been signed both by the granter and by the witnesses, it has not achieved the status of a writing with regard to which Courts of law are permitted to rectify informalities of execution.

I will now refer to the practice adopted in Scotland of giving effect to the statutes.

It is plain, to begin with, that the testing-clause which precedes the signature of the granter is not filled up before he signs. To do so would be to make it speak prophetically treating a thing as done which has not yet been done, instead of, as it ought to speak, historically, recording the fact of signature and attestation as they occurred. Between the closing operative words of the deed and the signature on the last page a blank is left, so that that record may be filled in-the record of the signature, of the attestation, and, if the parties wish it, name, place, date, and the like. It is familiar knowledge that where a deed has to be signed by a number of people, there may be some delay in getting the testing-clause filled up. The deed is sent from place to place-in the usual case accompanied by the ordinary schedule, in which information is to be filled up as to when and where it was signed, and who the witnesses were. As the result of this information, and necessarily after the lapse of a little time, the testing-clause is filled in. The information in the testing-clause has, of course, to be correct. If not, the consequences of nullity on various points were made clear by the old Scottish statutes, and these are the subject of the amendment of the law in 1874 as above described.

While it was from the nature of the case necessary (and I use the word “necessary” notwithstanding the language of Lord Campbell in *Cunninghame v. M'Leod*) that a certain interval of time should elapse between the signatures of the granter and witnesses and the filling up of the testing-clause, no such necessity existed to prevent or hamper the contemporaneous signature of witnesses with granter. One has, however, to admit, although it may be with some regret, that by a few decisions of the Court such contemporaneous signature was not insisted on, but, on the contrary, deeds were upheld where a certain interval of time occurred. Such decisions-from Frank onwards-seem to have been always accompanied with much shaking of the head. The danger of abandoning the regular practice of the witnesses signing at the same time as the granter is over and over again insisted upon, and many pronouncements of a hortatory character are made by Judges and also by text writers. There probably has been no department of the law in which the decision in one direction has been so copiously accompanied by a wholesome warning in another.

At first the leak in the salutary practice of contemporaneous signature was very small. In the case of Frank, the interval was a quarter of an hour. After nearly a century, namely, 1892, the case of *Thomson v. Clarkson's Trustees* occurred, and the interval allowed was three-quarters of an hour. In the case of *Tener's Trustees* a great interval of time elapsed between the signature of a certain deed by Mrs Tener, whose signature was attested at the time by only one witness, and the adhibition of the signature of the second witness. She signed on 24th October 1876. She died on the 3rd November, and it appears that the second witness's signature was only placed upon the deed more than two years thereafter. While it is too late to go back upon the cases of Frank and *Thomson v. Clarkson*, I am clearly of opinion that *Tener's Trustees* was wrongly decided, and that upon both points, namely, upon the point of the interval of time and also upon the point of the death of the granter before the attestation of one of the witnesses. I think both of these things should have been fatal to the deed. I shall refer to the case in a moment, but I may observe that it has never been accepted with satisfaction by the legal profession in Scotland. Lord M'Laren voiced this feeling in *Brownlee v. Robb* .

In the case of Frank, by reason of the extreme illness of the granter of the deed, the two witnessess who had seen him sign went into the next room in order to avoid disturbing the patient. They signed the deed within a quarter of an hour, there being no doubt whatever that it was the deed they had just seen signed in fact. Yet even in sustaining that deed the Court went out of its way to remark,-“There never ought to be any considerable interval, yet, when such a case occurs, it must be judged of upon its whole circumstances.” Under this dictum it is plain enough that a great deal of looseness might be admitted. But it is to the credit of the legal profession in Scotland that such looseness does not seem to have entered into practice; and when Thomson v. Clarkson's Trustees occurred, the interval, as I have said, that was under discussion was three-quarters of an hour. The testatrix signed a deed on the 5th March; on the following day her solicitor sent two clerks to her house, and they heard her acknowledge her signature. This was, of course, correct procedure under the Act of 1681. They, however, did not then and there sign as witnesses, but they took the deed back to the solicitor's office and signed it there. It was the same deed, undoubtedly, that they had heard acknowledged. They were carrying out the express wish of the testatrix implied in the purpose for which she made her acknowledgment.

In my opinion, the ratio of Frank's and Thomson's cases is this-that the signature of the witnesses and of the granter was part of one and the same continuous transaction. They were not decided, nor meant to be decided, upon any other ground, and the law of Scotland would have been in an extremely loose condition if they had been. In Thomson (at p. 61) the Lord Justice-Clerk refers to the Act of 1681 and says, “I am of opinion that this signature by the witnesses was a signature ‘at the time.’ I hold that these words must be read in a reasonable sense, and that ‘time’ is not the same thing as ‘moment.’ I hold that where a signature is acknowledged, and the deed is at once conveyed by the witnesses to the lawyer's office, and there signed by them within half an hour or so, and without the deed ever being out of their hands, or any other business being done by them in the interval, that such signature fulfils the statutory requirement of being ‘at the time.’ Such a case seems to me to be quite different from one in which there has been an interval in a true sense, where the piece of business has been set aside, other things done, and then the attestation of the witnesses taken up of new and at a

different time.” Lord Rutherford Clark (at p. 62) states broadly that “in the case before us the subscriptions of the witnesses were not adhibited ex intervallo.”

The case which was much canvassed in the case of Thomson v. Clarkson was Hogg v. Campbell . It was there held that it was not a valid objection to the testing of a deed that the two witnesses who had each heard the granter acknowledge his subscription were not in presence of each other when they did so. In particular, the statement of Lord President Colonsay (at p. 855) has been much cited. “There is no case that I am aware of to this effect, that a witness who attests a signature by reason of the acknowledgment of the party may adhibit his signature ex intervallo after that acknowledgment is made. The statute requires that he shall sign at the time the acknowledgment is made, and very properly, because there might be very great difficulty in knowing whether it was the deed he acknowledged.”

The cases of Thomson and Hogg were cases, not of signature before witnesses, but of acknowledgment of subscription before them, and accordingly with regard to the simple case, namely of signature before witnesses, the case of Frank, in which an interval of a quarter of an hour was allowed, stands practically alone, subject to this, that I think the judgment of Lord Kyllachy in Thomson's case was of a general character. “I do not think,” said his Lordship, “that under the Act of 1681, witnesses were entitled to subscribe ex intervallo, and I am not prepared to differ from Lord Colonsay on that point, but I do not think that here the subscription was made ex intervallo. The proceeding was, I think, continuous.” If that very learned Judge meant his language to be used as applicable generally to the attestation of deeds, and I think he did so, then I respectfully agree with him.

The truth is that prior to the case of Tener's Trustees, the legal profession in Scotland held, and in my opinion rightly held, that the statute prescribed contemporaneous subscription by granter and witnesses, that nothing else was safe if the deed was to be a probative deed, and that the one exception to this rule was the exception of the adhibition of the witnesses' signature as part of one and the same continuous transaction, in the most limited period and under the most exceptional circumstances, such as the case of Frank might exemplify.

I think it right to state my opinion as to the attestation of deeds in Scotland from another point of view, and upon a more general survey.

I. By the law of Scotland a probative deed is the subject of solemnities of execution, and the witnesses as well as the granter are participants in these solemnities. This language is embedded in our law. "All obligations," says Mr Erskine, III. ii. 6, "reduced into writing, though grounded on contracts which are effectual without writing, require by the law of Scotland certain solemnities to give them legal effects." And referring generally to the old Scottish statutes he says, III. ii. 19, "The Acts 1579, 1593, and 1681 declare expressly that all deeds which are destitute of the solemnities thereby required shall bear no faith in judgment; or that they shall be null, and not suppliable by any condescendence." The most pregnant proof was of no avail nor even a reference to oath. Other elements going to the making up of the solemnities may have been introduced under the sanction of the pains of nullity, and the Act of 1874 may have excluded them from the list or may have given facilities with regard to rectification. This has been already discussed. But, with regard to the granter signing and each witness signing, that is a solemnity in which each is a participant. No probative deed can exist without that solemnity.

II. It is involved in this truth that, until each of the participants in the solemnity has performed his function the deed remains improbative, and furthermore, that no witness is entitled to be a participant in that solemnity merely by reason of his accidental presence, or it may be his surreptitious presence. When the granter signs the deed no person has the right to become an attesting witness unless and until he has the assent, expressed or implied, of the granter to sign as such. This cuts at the root of the proposition that a person can become an attesting witness if only he saw the signing in fact, whether the granter knew that fact or not, or assented to him signing or not. I think such a proposition to be as unsound as the practice upon it would be dangerous. On this hand the authorities are really not doubtful. Even in Tener's case Lord Justice-Clerk Moncreiff says that subscription "before a casual, an accidental, or a concealed witness may not amount to subscription as required by the statutes." Why would this be so if the fact and the truth were that they did see the granter subscribe? It must be because the witness

is, as I have put it, a participant in a solemnity, and cannot be such a participant unless with the consent of the principal party to that solemnity, namely, the granter of the deed whose signature he attests. The moment one gets away from that, all sorts of difficulties and grotesque and anomalous results become possible. It is true that in the judgment of Lord Rutherford Clark in Thomson v. Clarkson's Trustees, his Lordship did say, "It requires no more than that the witnesses shall have a warrant in fact and truth for what they attest. They have such a warrant if they saw the granter subscribe or heard him acknowledge his subscription." I observe that in the majority of the judgments of the Court below, and especially in the judgment of the learned Lord President, this is the view which prevailed. If Lord Rutherford Clark's judgment stood upon that isolated passage I should venture humbly to disagree with him; but I feel certain that Lord Rutherford Clark would have been the last to assent to the proposition that his judgment was meant to imply any dispensation of the assent of the granter. I think that is the true meaning of his Lordship's next sentence; "If the subscription to the deed be the subscription of the granter, and if the witnesses were warranted in attesting that fact, there is nothing lacking in essentials." The essentials of a warrant to attest the fact of the subscription did not, I feel assured, exclude in the learned Judge's mind the granter's assent to which I have referred. If it did, it would be committing Lord Rutherford Clark to the curious position that a deed signed by a man in what he conceived to be the solitude of his study could be reared up into an attested deed by the signature afterwards of persons who had peeped through the window, and in fact and in truth seen him sign. Such are the consequences of abandoning what I believe to be the cardinal principle that the witnesses can only sign if, with the granter's assent, they participated in the solemnity required by law.

III. I have said that a person cannot be an attesting witness unless and until the granter assents. And I would now add that he alone can be an attesting witness who, at the time he signs as such, does so with the granter's assent. He cannot attest unless and until he has that assent, and he must attest only when and while he has that assent.

IV. The proposition that at the time when the witness signs he has the assent of the granter to do so as a witness fits, and fits entirely, with the other and main

proposition which is being developed, that the entire solemnity of execution is one continuous process, and that in the eye of the law no interval occurs. This was so in the case of Thomson v. Clarkson, in which in the language of Lord Rutherford Clark, "the subscriptions of the witnesses were not adhibited ex intervallo, in the sense in which I think the Lord President used that expression" in Hogg v. Campbell . I pause to say that while Thomson's case was one of the acknowledgment of the signature before witnesses to which the language of the statute "at the time" of course applies, I can see no reason for considering the Act as more strict in the case of an acknowledgment of a signature than in the case of visibly observing it. I agree in terms, if I may do so, with Lord Skerrington's remark, "if a witness who hears a person acknowledge his signature is required by the Act of 1681 to subscribe his name unico contextu, no reason can be suggested why a witness who sees the granter subscribe should be entitled to sign his name ex intervallo."

V. All the above propositions hold good, notwithstanding any conjectures or conclusions which might be formed as to the testator's or granter's intention, and no testator or granter has with regard to them any dispensing power. I observe in the judgments of the majority of the Court below a reference more than once to the intentions of Mrs Walker. Such considerations are tempting, but perilous. If they were permitted, the principle of them would apply not only to wills or deeds signed by one witness instead of two, but also to deeds signed without witnesses, and-for it must be logically so-to documents not signed at all. There are many documents with regard to which no doubt can exist that they express, say, the mind of a testator, but they cannot be lifted into the testamentary or the probative region unless the solemnities of law have been complied with. It would, in my humble opinion, be ludicrous, as well as dangerous, to permit law Courts to turn an improbate into a probative deed, because they were of opinion that the granter meant the one to be as good as the other. I have already remarked upon the exhortations which accompany, in all the law books and in very many of the decisions, the comments upon the case of Frank. But the case of Tener's Trustees shows how little such exhortations mean, and how loose a practice would become if the requirements of the law were not conformed to-the solemnities completed in one continuous transaction and with the necessary assent as I have above set

forth. So far has this gone in the present case that I observe that Lord Salvesen says that it rather appears to him that any person interested in the incomplete will—that is, in a will with only one witness, would be entitled to demand an opportunity of signing as a witness “and so completing the document, the execution of which he in fact witnessed,” and he goes on to say that he does not know whether he might not be ordered by a Court of law to affix his signature as a witness. I totally disagree with any such propositions, and I conclude my summary of the law by two observations which directly bear upon these.

VI. If it be sound that the assent, express or implied, of the granter is necessary at the time when the witness signs as such, and that the solemnities are part of one continuous transaction, then the impossibility of a witness affixing his signature after the death of the granter, and so rendering the deed probative, becomes clear. We are not in the philosophical or psychic but in the civil and legal sphere, and in that sphere the assent of the granter cannot be given at the time when the witness signs if at that time the granter be dead.

VII. Lastly, I am not at present able to figure any case in which the attestation by witnesses is other than a voluntary act or can be compelled by law. Indeed, it follows from what I have said that assent of the granter being required, at the time of their subscription, to witnesses signing, it is always open to the granter to withdraw his assent in the course of the continuous transaction, and it is always open for the witnesses to decline to append their names, with the consequence that others may do so, if they can be obtained. I see no reason to give any countenance to the idea that compulsion and sanctions of law can invade this voluntary sphere.

I may, in conclusion, point out that in regard both to contracts and to wills the results otherwise might be of an extraordinary description. The possession of improbativ documents, and even their existence, would leave a state of affairs in which, apart from the will of the granter, each document could be reared up into a valid and probative writing. And with regard to testamentary arrangements, a person dying without having made a will could have a will made for him by attestations made after his death. These might be adhibited by reason of a variety

of considerations, or, as I gather the suggestion to be, even by force. I disagree with the whole of this reasoning. I respectfully adopt Lord Kinnear's language in *Campbell v. Purdie*, that all this is quite inadmissible on the general ground "that a will cannot be executed after the death of the testator."

Lord Wrenbury.-If the interlocutor under appeal is right this lady died intestate on the 1st July and became testate twenty days later, when her son attested the document. This is impossible. The only escape from this conclusion lies in the view which I understand the Lord President to have taken. That view is that the deed *mortis causa* became operative when the lady signed and the one witness attested, that the attestation of the other witness was required only by way of evidence to render the deed probative, and that such evidence may be given as no doubt it may, after the death of the granter. If this view is right it must be true as much of both witnesses as of one of them. The view must necessarily be that, so soon as the lady signed, the deed became operative, and when the witnesses, or the second of them, subsequently signed, it became probative. As I understand, by the law of Scotland, as already explained in detail by two of your Lordships, the deed is not operative so soon as the granter signs, but is operative so soon as the deed is completed with the solemnities in law required. One of these solemnities is that the granter must sign and two witnesses must attest. It is not necessary in the present case to consider whether the solemnity will have been observed if the witnesses attest *ex intervallo*. I do not doubt that attestation after some intervallum will suffice. There must always be some intervallum, although if the witnesses sign immediately after the granter has signed the intervallum

will be very short. The question here is whether the solemnity has been observed when, during the intervallum, the death of the granter supervenes. It is obvious that in such case the solemnity has not been observed during the granter's lifetime. The deed, therefore, was not a deed when the granter died. It is impossible that it can become for the first time her deed after she is dead.

In the course of the argument I asked the respondents' counsel whether he discriminated between probative and operative. He answered that he did not. It is obvious that to support his argument he must discriminate. This House will not

hold him bound to that answer. His argument is, and must be, that this deed was operative during the lady's lifetime, although it did not become probative until after her death. He cannot say that it was probative until both witnesses had signed; he must say that it was operative before the lady died.

The whole point of the case is to determine whether the attestation of the witnesses is merely evidential or is a necessary solemnity of execution. According to the law of Scotland it is the latter. It follows that this appeal succeeds.

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