No. 22. cautioner; Andrew owned he was resting owing, and he as principal, and with him his father as cautioner, bound and obliged themselves; and it was tested thus, "I have written and subscribed these presents, before these witnesses;" so that Archibald the father's subscription was not attested.

At advising the bill and answers, observed on the Bench, That this precise objection had been repelled, 14th February, 1712, Orr against Wallace; and 15th January, 1734, Gilmour against the Representatives of Pollock.

The Lords repelled the objection.

Act. *R. Craigie.* Alt. *H. Home.* Clerk, *Kirkpatrick.*

D. Falconer, v. 2. No. 238. p. 322.

1749. *November* 30. CROSBIE and PICKENS *against* PICKEN.

No. 23.
Case of a person accustomed to subscribe only by initials, writing his name at length from a copy, or upon marks drawn on the paper for his direction.

In February 1742, the deceased Robert Picken, weaver in Glasgow, disponed to Janet Crosbie his wife in life-rent, and to Marion his daughter in fee, with the burden of £100 to Barbara his other daughter, an adjudication at his instance of certain tenements in Glasgow for the accumulated sum of £493. 14*s.* Scots; of which disposition Robert Picken his son did, after his father's death, obtain a decree of reduction in absence.

The relict, and her said two daughters, pursued a reduction of this decree; in support whereof, Robert Picken the obtainer of it, objected to the disposition as null, in respect that though it bore to be subscribed his father Robert Picken, and had his name thereto subjoined *ad longum*, yet in fact he never could write, nor ever used to subscribe otherwise than by the initial letters of his name R. P. A conjunct probation was allowed as to the manner in which the disposition was executed, and with respect to the defunct's having shown the disposition in his life-time, as had been alleged for the defender.

It appeared upon the proof, that the defunct had been in use to subscribe only by initials; and a variety of writs, no less than 25 or 26, in the small matters in which he was in use to deal, as also three indentures to which he was a party, all signed by his initials, were exhibited, some of them but a short time before, and others of them after the date of this disposition: And some of the witnesses deponed, that on one or other of these occasions he had said, "that he could sign no better, and that R. P. had cost him much good money." On the other hand, of three instrumentary witnesses, one only was alive, who deponed that he saw the defunct subscribe the disposition, and that he wrote his name as it now stands at the deed, from a copy laid before him. It was also proved, that the defunct had shown the deed to several of his friends and acquaintances, to whom he expressed his satisfaction in what he had done by it.

Upon advising this proof, the Lords, upon July 22, 1749, "Sustained the disposition, and reduced the decree," several of the Lords being *non liquet.*

No. 23.

The subscriptions to the several pages were written so fair, that one could hardly think it possible they could be done by one who never wrote before more than the two initials of his name, while yet the only instrumentary witness alive swore he saw him sign it, and the dead witnesses are in law approbatory. Upon which ground it was, that, however suspicious the deed might appear, the majority gave their voice for sustaining it.

The defender reclaimed; and the Lords having advised bill and answers of this date, "Found the subscription to the disposition void."

The ground on which they so found was, that where a man cannot write, it is statuted, that he shall subscribe by notaries; and that a man cannot be said to write, who can only put down letters from a copy laid before him, and that if such subscriptions were sustained, it would follow that there could be no place for improbation of them *comparatione literarum*, as so many copies the person should follow in subscribing, there would be so many different subscriptions.

But the pursuers having in their turn reclaimed, the Lords, upon January 12, 1750, "Returned to their first interlocutor, repelled the objection to the deed, and reduced the decree."

The majority now considered, that, by the like rule, that a man cannot be said to write, who, from a copy laid before him, sets down the letters of his name, much less can a man be said to write, who can only set down two letters; yet such subscription by initials is daily sustained; *2do*, It was said every body of experience in business must have observed in many instances, that where people were anxious to have a deed unexceptionable, much time has been spent in getting the granter to set down his name at length; *3tio*, One of the Lords put the Court in mind of a case in 1739, Anderson against ———, where a testament subscribed by the defunct's name at length was sustained, notwithstanding it appeared upon proof, that he had never been in use to subscribe otherwise than by initials; and, *4to*, The same ground on which the first interlocutor had proceeded, the evidence of the only living instrumentary witness, and the force the law gives to the attestation of the dead witnesses, was again resorted to.

The defender again reclaimed; and having alleged a new discovery made of the draught of a pin, over which the letters were said to have been drawn, and from thence taken notice of an expression of one of the witnesses not before understood, but to which this was said to be a key, viz. "That when the defunct showed him the disposition, he the witness told him that he was afraid the disposition would not stand good, and pressed him to have it wrote over again with the subscription of notaries to it; the Lords, upon the 25th January, 1750, without ordaining this petition to be seen, "Appointed the witnesses to be re-examined upon the way and manner how the deed in question was subscribed, and refused a commission."

And the witneses having been re-examined, and the petition coming to be advised, 28th November, 1750, with answers now given in, the Lords, by a narrow plurality, "Adhered to their second interlocutor of the 30th November, 1749, finding the deed void and null."

No. 23. What the Lords at this time chiefly went on was, That it appeared that the granter, who had never before signed but by initials, had written his name *ad longum* upon scores which another had drawn with a pin, which specialty may be thought to take the case out of the general point, which the Lords had formerly proceeded on.

At the same time, some in their reasoning carried the matter very high. It was argued in the petition, that a subscription by initials must have been sustained, in respect of the proof, that it had been the granter's custom so to subscribe, and if so, that he needed no directory to write those initials; and his adding the following letters of his name, though with the assistance of a draught made by a pin, could not derogate from the faith of the initials. It was said, in answer, by some of the Lords, that no subscription by initials was good; which others could not agree to, after so many judgments of the Court, sustaining subscriptions by initials, when proof was brought of the party's custom of subscribing in that manner.

Kilkerran, No. 19. *p.* 614.

*** This case is reported by D. Falconer:

Robert, son of Robert Pickens, weaver in Glasgow, obtained a decreet in absence, reducing a disposition by his father, of his heritage, in favour of Janet Crosbie his wife, and Marion and Barbara Pickens his daughter; of which decreet the disponees insisted in a reduction reductive.

This disposition appeared signed with the full name of Robert Pickens, whereas he had always used to subscribe by initials; and at this time wrote his name from a copy laid before him: It further appeared from a proof brought on an application for that purpose before the last interlocutor, that the letters had been marked out with a pen or wire; which marks he followed in his subscription.

Pleaded for Robert Pickens, parties that cannot write, are appointed by law to make use of notaries, in executing deeds; and this person who could not write his name, a copy having been laid before him, and besides these letters marked out, could not be said to be capable of writing; *2dly*, The danger of forgery requires that people preserve an uniformity of subscription, that their subscriptions may be compared: And as this man used to subscribe by initials, it had been better he had not varied his practice.

Pleaded for the disponees, The man could write, and has subscribed his name; and if his initials would have been sufficient, the adding the other letters cannot make the deed worse: There is also as much opportunity of comparing with his other subscriptions, as if the initials only had been set down.

Observed, That for favour of commerce, subscription by initials, by ignorant people, had been sustained to notes and bills; but it might be doubted if a disposition of heritage so subscribed could be sustained.

The Lords varied in their judgments, but on the last proof found the subscription void. No. 23.

Act. *Boswell et Hamilton Gordon.* Alt. *Miller et Swinton.* Clerk, *Kirkpatrick.*

D. Falconer, v. 2. No. 168. p. 198.

1751. *Jan.* 9. FALCONER *against* ARBUTHNOT and Others.

No. 24.
Subscription of a blind person not sustained.

Several bonds granted by the Lady Phesdo to Arbuthnot of Fordoun and others her grandchildren, having her subscription adhibited to them, after she was so blind with age that she could not see to subscribe, and where it was proved that Fordoun led her hand when she adhibited her subscription, were upon that ground reduced; notwithstanding the deeds appeared rational, and that some evidence was brought of her previous intention to give some donations to her grandchildren.

At pronouncing this interlocutor, the Lords were nowise moved by the arguments brought by the pursuer to prove an imposition, but they thought there was the utmost danger in sustaining deeds in those circumstances. They also thought that L. 8. C. Qui test. facere possunt, was founded on solid principles; that therefore a person blind, or so blind as the Lady was, could not legally sign but by notaries, and that a publication of her will *coram tabellione et testibus* was necessary, for the reason given in fine, D. L. 8. That whatever reasons there might be to think there was no imposition in this case, yet the law suspected and even presumed it. That farther, one's subscribing, by having his hand led, is illegal, dangerous to sustain in any case, especially so in this.

Kilkerran, No. 20. p. 616.

1752. *December* 7. STEPHEN BROOMFIELD *against* JOHN YOUNG.

No. 25.

In an action for implement of a minute of tack pursued by Broomfield, Young the tenant objected, that the minute was null, for that it did not bear that the marginal notes had been signed before witnesses; the words of the testing clause being, "Before these witness, Robert Brown tenant [in] Ednam, and John Fish of Castlelaw, writer hereof, and witness to the marginal notes also." Now, since "writer hereof, and witness to the marginal notes also," cannotbe applied to Brown, Fish must, in all propriety of speech, be held to be the single witness to the subscription of the marginal notes; which therefore can bear no faith in judgment; and consequently that mutual contract, whereof they are a part, must also be null.

Answered for Broomfield: The writer of the deed imagined that the word *witness* might be used in the plural number, as appears from the testing clause above recited; and this explication being once admitted, the marginal notes will seem properly attested.