1794. *December* 2. JAMES YORKSTOUN and Others, *against* MARY GRIEVE.

No. 75.
In the case of a deed executed by a person who can neither read nor write, it is not necessary as a statutable solemnity, that the docquet of the notaries should bear, that it was read to the granter in presence of the witnesses.

On the death of Jane Ferguson, who could neither read nor write, two settlements were found in her possession, one in favour of Mary Grieve, dated in 1783, the other dated in 1791, in favour of James Yorkstoun and others. The docquet to the first bore, that she gave the usual authority to the notaries to subscribe it for her, "touching our pen in presence of the said witnesses, the deed having been first read over to the said Jane Ferguson." The docquet to the last was in these words: "At the desire of the above named Jane Ferguson, who declared she could not write, I James Gibson, notary-public, and notary in the premisses, have subscribed the same for her, she having delivered the pen to me, for that effect, before the above named witnesses, and of the said date."

It was objected for Mary Grieve, That the posterior settlement was void, in respect the docquet did not bear, that it was read over to the granter before the witnesses; which, it was contended, was not only indispensable in common sense, because otherwise it was impossible to know, whether it was really the deed the granter meant to execute; but was also, in fact, on a fair construction of the statutes 1540, C. 117., 1579, C. 80., 1681. C. 5. an essential statutable solemnity.

Both these propositions were controverted by James Yorkstoun, and the other legatees.

The arguments used on both sides were the same in substance with those stated in the report of the case of the trustees of Ross against Aglianby; No. 74. p. 16853.

The question came before the Court in an action of multiplepoinding, brought by a debtor of the testatrix.

The Lord Ordinary pronounced the following interlocutor: In regard that the docquet of the notary annexed to the last settlement executed by Jane Ferguson, does not bear, that the said setlement was read over to the said Jane Ferguson, in presence of the witnesses subscribing, finds, That the said tsstament, as wanting that solemnity, cannot be sustained as a written testament; but finds, That if it can be established by parole testimony, that the said settlement, notwithstanding of this omission in the docquet, was actually read over to said Jane Ferguson before the witnesses, that then it may be sustained as a verbal testament, to the amount of £100 Scots; and allows James Yorkstoun and others to prove, that it was read over, and that the testator approved of the same, and allows the defender a conjunct probation thereanent."

But, on advising a reclaiming petition for Yorkstoun and others, with answers, it was

Observed on the Bench: The reading the deed of a person who is blind, or who can neither read nor write, in presence of the granter and witnesses, is not a solemnity required by statute to be mentioned in the docquet; but it may be often necessary, that such reading should take place as a precaution against fraud, and that the witnesses may be able to establish the fact, if called upon so to do.

The Court unanimously " repelled the objection in point of form to the notary's docquet to the last will and testament in favour of the petitioners." No. 75.

Lord Ordinary, *Monboddo.* Act. *R. Hamilton.* Alt. *D. Cathcart.*
Clerk, *Pringle.*

R. D. *Fac. Coll. No.* 136. *p.* 310.

1799. *December* 18. ROSINA STODDART and Others, *against* JAMES ARKLEY.

No 76.
Act. 1579. C. 80.

Deeds of a testamentary nature need be signed by one notary and two witnesses only, where the granter cannot write.

It is not necessary that the notary's docquet should bear, that the deed was read over in his presence.

Diana Kerr, wife of James Arkley, having died without surviving issue, Rosina Stoddart and her other nieces made a claim against her husband for a portion of the goods in communion, as nearest of kin to the deceased.

In bar of their claims, he produced a deed, bearing: " It is contracted, agreed, and matrimonially ended between the parties following, to wit, James Arkley, tenant in Muirburn, in the parish of Kirkliston, on the one part; and Diana Kerr, his spouse, on the other part; that is, although the said parties have for several years been married, yet there has been no contract of marrage, or other deed, hitherto entered into by them, so as the succession to their means and effects might have been regulated upon the dissolution of the said marrage by the death of either party; therefore, to supply that defect, they have mutually agreed to enter into and execute these presents, in manner following: The said James Arkley, for the love, favour, and affection he has and bears to the said Diana Kerr, his spouse, hereby gives, grants, dispones and makes over, to and in favour of himself, and the said Diana Kerr, his spouse, in liferent, and the child or children that may happen to be procreated of the said marrage, in fee; whom failing, to the longest liver of him and his said spouse, and to the heirs, executors, and assignees of the said longest liver, all goods, gear, debts, and sums of money, household furniture, and every other species of executry funds, (heirship-moveables included), that shall pertain and belong to him at his death," &c.; with power " to do any act and deed that any executor nominate can do by the law of Scotland."

Diana Kerr, by the deed, settled her moveables on her husband, precisely on the same terms.

It was added: " For which purpose they hereby nominate and appoint the survivor of them two the sole executor, universal legatar and intromitter with the goods and gear of the predeceased," &c. " And further, it is hereby agreed to by both parties, that whatever heritable property may be acquired by both parties during the standing of the marriage, the rights thereof shall be taken and conceived in favour of them two in liferent, and the child or children of the marrage in fee; whom failing, to the longest liver of themselves two, and the heirs and disponees of the said longest liver whatsoever."

The deed was subscribed by Arkley, and by a notary, in presence of two witnesses, for Diana Kerr, (the docquet bearing), " who declares she cannot write, and she having delivered the pen to me."

The parties acquired no heritable property after executing the deed, and, at the date of it, they had a lease of a house and three acres of ground granted in favour