Friday, February 10.

REID AND OTHERS *v.* HENRY.

Writ—Testament—Subscription by Notary—Notary's Docquet—Holograph. A testament which purported to have been executed notarially *held* invalid, in respect that the notary's docquet was not written by himself.

Observed that the notary's docquet, along with his subscription, and not his subscription alone, constitute the legal equivalent of the testator's subscription.

This was an appeal from the Commissary Court of Banff. The late James Fraser died on 10th September 1869. Mrs Henry presented a petition to the Commissary of Banff to be decerned executrix dative *qua* one of the next of kin of James Fraser. The petition was opposed by James Reid, John Macdonald, and William Lamont, who produced what purported to be a will by James Fraser, dated 8th July 1869, in which he appointed Macdonald and Lamont his executors, and Reid his universal legatee. Mrs Henry took exception to the validity of the will on a variety of grounds—*inter alia* on the ground that, while the will bore to be subscribed by a notary, the docquet was not in the notary's handwriting.

The Commissary-Depute (GORDON) refused the petition, holding that the will, being *ex facie* valid, was a good title to object till it was reduced in a competent Court.

On appeal the Commissary (R. B. BELL) recalled the interlocutor of the Commissary-Depute, finding that the objectors had no title, and preferring the petitioner to the office of executrix-dative; the ground of the decision being, that the notary's docquet not being holograph was a fatal defect in the will.

The objectors appealed to the Court of Session.

KEIR, for them, argued—There is no statutory provision or rule of law that the docquet of a notary requires to be written by himself. No doubt such is the usual practice, the docquet being so short that it is not worth while to bring a clerk. Even the universality of the practice would not prove that it was a necessary solemnity. Nothing can be more universal than the insertion of the place and date in the testing clause of a deed, yet these are not essential. Even supposing there to have been an irregularity in the execution of the will, it is competent for the Court to have it corrected, as they did in a much stronger case—*Traill*, Feb. 27, 1805, F.C.

The SOLICITOR-GENERAL and ADAM, for Mrs Henry, referred to the following statutes and authorities:—1540, c. 117; 1579, c. 80; Act of Sederunt, 21st May, 1688; Craig, Lib. II., Dieg 7, § 21 (Baillie's edition, p. 246); Bell on Testing Deeds, p. 171 and 232; Duff's Feudal Conveyancing, p. 13, § 4; Menzies' Lectures, p. 110; Bell's Lectures, I., p. 40; Birrell M., 16,846 (Lord Kilkeran's report).

At advising—

LORD PRESIDENT (after narrating the facts)—The will bears to have been executed by a notary. The docquet is admitted to be not holograph of the notary. This is one of the cases where one notary and two witnesses are sufficient; but everything else which the law requires to give validity to a notary's subscription for a party is just as necessary in subscription by one notary as by two. Certain things the law absolutely requires to make a subscription by a notary equivalent to that of the party. Authority must be given by the granter to the notary—intelligently given, by a person made aware of the nature of the deed; that authority must be given in presence of two witnesses, who are the instrumentary witnesses of the deed; and all these facts must be explicitly set forth in the docquet of the notary; further, the authority must be given at the very time the notary subscribes, otherwise there would be no evidence that the granter had not changed his mind. The witnesses sign not only as witnesses to the deed, but as persons who have witnessed the procedure between the granter and the notary; they accordingly subscribe as witnesses to the truth of what is contained in the docquet. The words of Lord Kilkerran in regard to the case of *Birrel*, June 18, 1745, M. 16,846, are very instructive; there a deed, the docquet of which did not expressly bear that the granter ordered the notary to sign for him, was held ineffectual. Lord Kilkerran observes—"Witnesses to a deed signed by notaries are not only witnesses to the subscription of the notary, but also to the command given him, both which the witnesses attest. And as witnesses are neither bound, nor supposed in any case to know what is contained in the body of the deed, they attest no more than what is in the docquet. The authority, also, to notaries must be given at the very time of executing the deed, for till then there is *locus pœnitentiæ;* and, for anything that could appear from the face of the deed in question, it might have been written many days before signing. The docquets bearing *pro illo subscribo* was nothing; for, though it may be true that the notary could not with truth say so without authority, yet that was but his assertion, which, whether true or false, is the very question, as no fact was asserted in evidence of such authority, the truth of which the witnesses were to attest." In short, the notary's docquet, along with his subscription, and not his subscription alone, constitute the legal equivalent to the granter's subscription. In Falconer's report of *Birrel*, M. 16,847, there is a good observation recorded:—"That in the body of the writ the notary speaks not, but the party; and the thing to be attested is, that the party has spoke at all." Keeping in mind, then, the importance of the docquet, it is clear that, unless it is holograph of the notary, there is no sufficient security that then and there the notary subscribed for the granter—*i.e.*, wrote the docquet and added his signature.

An inspection of this very deed illustrates the importance of the rule. Although it is only admitted that the docquet is *not* written by the notary, one can see that it is in the same handwriting as the body of the deed—viz., of John Macdonald, one of the executors. Probably, then, the deed and docquet were written at the same time, and it was not till afterwards that the notary and witnesses were called in, I do not found my judgment on this; I merely put it as a good illustration of what was sought to be guarded against by the rule of law which requires the notary to write the docquet himself, and to write it at the time he adds his signature.

If we turn to the practice on the point, there is not a single work on conveyancing which does not state the practice to be what I have laid down. When there are two notaries, the old practice was for each notary to write his own docquet. In later times the first notary writes his docquet in

full; the second appends his signature with words importing an adoption of the statement of the first notary. That is the only exception, if it can be called an exception.

LORD DEAS and LORD ARDMILLAN concurred.

LORD KINLOCH—I am of opinion, with the Commissary of Banff, that the testament of James Fraser is null for want of due execution; the notary's docquet not having been written by the hand of the notary.

It appears to me the just construction of the statutes, and of the practice which has followed on these, to hold that the notary's docquet is part of the subscription of the notary, statutorily substituted for the subscription of the party. The testing clause of the deed is expressed in the usual form, setting forth that the deed is "subscribed by me, at Port-Gordon, on the 8th day of July 1869 years, before these witnesses, Alexander Clark, mason, and Thomas Hay, farmer, Slackend, near Port-Gordon." There then follow, in place of the subscription of the party, the notary's docquet and signature. I consider these together to form the substituted subscription authorised by the law. I think the docquet must as much be written by the notary as his signature; for I think all equally part of his subscription, and all equally requisite to be written by his own hand. This I conceive the clear conclusion to be drawn from legal principle; and I think it is supported by the practice of the country, as evidenced by the authorities.

It was argued, that where two notaries subscribed, the docquet was only written by one; and that so in the case of the other the principle now contended for was set at nought. But it appears from the authorities that the old practice was for each of the notaries to append a separate docquet; and that the custom of both subscribing one docquet is of modern introduction. The practice is now sanctioned by usage; but is not to be extended; and I do not think affects the principle. The same authorities lay it down that the docquet is in such a case always written by one of the notaries. The case now to be dealt with is a case in which only one notary was necessary, and one only acted. Both principle and practice, I think, require the docquet to be in the notary's own handwriting in such a case.

I would only add, to prevent mistakes, that my opinion is strictly limited to the case actually before us, of a notary subscribing for a party; and does not apply to the case of other notarial acts or attestations. On these I at present give no opinion.

Appeal dismissed.

Agent for Appellants—George Andrew, S.S.C.
Agent for Petitioner—James C. Baxter, S.S.C.

Saturday, February 11.

MAGISTRATES OF GLASGOW *v.* HAY (COMMON AGENT IN THE BARONY LOCALITY).

Process—Teinds—Expenses of Common Agent—Locality—Interim Scheme. Held that the common agent in a process of augmentation and locality was entitled to payment of his expenses after the interim scheme of locality had been made up and approved of, and that he was not bound to wait until the objections had been disposed of and the interim scheme become final.

Farther *held* that the principle upon which he was then entitled to payment of his expenses was the same as that which entitled the ministers to immediate enjoyment of their augmented stipend, and that the rule by which the expenses were to be divided among the heritors was the same as that whereby the augmented stipend was allocated—namely, the interim locality.

And consequently *held* that suspension of a threatened charge on a decree for expenses in name of the common agent was incompetent, any objection to his account common to all the heritors being disposable of at taxation of the account; and any objection to the scheme of division peculiar to individual heritors being necessarily dependent upon the questions raised under the interim scheme of locality.

This was an action of suspension at the instance of the Magistrates of Glasgow of a threatened charge under a decree for expenses, pronounced in favour of the respondent, as common agent, by the Teind Court on 10th June 1870 in the barony process of locality.

It appeared from the statements of parties that in the year 1864 a process of augmentation, modification, and locality had been raised by the ministers of the Barony Parish of Glasgow. Along with their summons the ministers lodged a rental of the parish in which the several rents of each heritor were distinguished. The total rental of the parish was stated therein at £1,224,032, 11s. 11d. By interlocutor of the Court of Teinds, dated 21st December 1864, the whole heritors were held confessed upon the ministers' rental, except Mr Crawford of Milton, and a few others who combined with him in objecting to it on the ground that the building rental or yearly value, and not the agricultural or true teindable value, of their lands had been taken. A remit was made by the same interlocutor to the Lord Ordinary on Teinds to prepare the case. The ministers' rental, except in so far as modified by these objections, which were given effect to by the Lord Ordinary, became the proven rental. The total rental of the parish is stated in the scheme of the proven rental at £1,164,735, 5s. 11½d., and the teind at £232,947, 1s. 2d. 3-10ths. This scheme was approved of by the Lord Ordinary on Teinds on 31st January 1866, and avizandum made with it to the Court. It was found, however, that the proven rental thus made up was altogether useless as a teindable rental, inasmuch as it was simply a copy of the valuation roll of the parish as well as of the burgh of Glasgow, which is not within it, and included an immense number of names of parties who were not liable in stipend, and had never paid any. The complainers, the Provost, Magistrates, and Town Council of Glasgow, are heritors in the parish, and neither they nor any of their co-heritors appeared to oppose the augmentation. On 31st January 1866 the Court of Teinds advised the scheme of the proven rental and the prepared state, and after hearing counsel for the ministers and for the Crown as titular, granted an augmentation of 12 chalders to each minister, to commence with crop and year 1864. A remit was at the same time made to the Lord Ordinary on Teinds to prepare localities. On 22d June 1866 the respondent, William Bremner Hay, who had been elected com-