made for him or her. In that way he escapes the obligation to pay either the sum in the policy or the alternative sum of £2000 to the marriage-contract trustees if they accept the provisions contained in his settlement. In fact, he says to them, "If you choose to take the third part of the residue of my estate, you may, but you can get nothing else." The trustees of course must elect to take the larger provision made for his daughter; it is their duty to do so, and therefore the conclusion is irresistible that the trustees are entitled to take one-third of the residue of the estate, and can claim no part of the policy assigned in the marriage-contract.

LORD CRAIGHILL and LORD RUTHERFURD CLARK concurred.

The Court pronounced this interlocutor—

"Answer in the negative the first of the questions therein stated, and answer the second question in the affirmative: Find and declare accordingly," &c.

Counsel for the First and Fourth Parties—Mackay—Jameson. Counsel for the Second and Third Parties—D.-F. Mackintosh—Graham Murray. Agents—Webster, Will, & Ritchie, S.S.C.

Friday, March 9.

SECOND DIVISION.

[Sheriff-Substitute, Ayr.

DUNCAN'S EXECUTORS *v.* DUNCAN.

Writ — Authentication — Will — Signature on Erasure—Onus of Proof.

The signature upon a will, written on a printed form, and *ex facie* probative, was ascertained after the testator's death to have been written on an erasure. This fact was not mentioned in the testing clause. The will was found in the repositories of the deceased, where he had kept it for nine years, and it was proved that he intended it to be effectual.

In a competition for the executorship of the deceased, the will was challenged on the ground that the existing signature on the will had not been adhibited in the presence of the witnesses. It was not disputed that the testator had on one occasion duly subscribed the deed before the witnesses. *Held* that the deed being *ex facie* duly attested and probative, the *onus* lay upon the person challenging it, and that this had not been discharged.

John Duncan, ship-carpenter, Saltcoats, died on the 22d of September 1885. In his repositories was found a settlement executed by him on the 1st of January 1876. By this deed he bequeathed to his wife Martha Barclay or Duncan, and her heirs and assignees, his whole estate, heritable and moveable, and nominated and appointed her as his sole executor and universal intromitter with his moveable means and estate. The testing clause of the deed was in these terms —"In witness whereof I have subscribed these presents, written (in so far as not printed) by Robert Barclay, ironmonger at Kilwinning, this 1st day of January 1876, before these witnesses, James Hendrie, ironfounder in Kilwinning, and John Henderson Peacock, grocer in Kilwinning. "James Hendrie, *witness.* "JOHN DUNCAN. "John Henderson Peacock, *witness.*"

The signature "John Duncan" was written on an erasure. The deed was on a lithographed form which the deceased had purchased in Glasgow.

The deceased left no issue, and was survived by his widow, and by his brother and next of kin Alexander Duncan. The latter died on 31st October 1886, and this petition was presented by his executors praying to be decerned executors-dative *qua* representatives of the next of kin of his deceased brother John Duncan. The widow Mrs Martha Barclay or Duncan claimed her husband's whole estate under the settlement above mentioned. The petitioners challenged the validity of the deed, averring (1) that it was vitiated *in essentialibus*, and was *ex facie* inept, in respect that the signature "John Duncan," alleged to be that of the deceased, was wholly written on an erasure; (2) that the witnesses did not see the deceased adhibit his alleged signature, and that he did not acknowledge the same to be his subscription in their presence.

The facts of the case appear from the opinions *infra*.

The petitioners pleaded—"(1) The petitioners being now the representatives and in right and place of the said Alexander Duncan, now deceased, in and to the moveable succession of the said deceased John Duncan, are entitled to be decerned his executors-dative as craved. (2) The deed founded on by the defenders being *ex facie* vitiated and invalid, the petitioners are entitled to have the same disregarded or set aside."

The defender pleaded—(1) The deed founded on by the defenders being *ex facie* valid and probative, must receive effect until it is reduced by an action in the Court of Session. (2) The action is irrelevant and incompetent in this Court, in respect that its object is to set aside the said deed. (3) The defender Mrs Martha Barclay or Duncan being the executor-nominate appointed under the said disposition and settlement of the said deceased John Duncan, and the petitioners having no right or title to the office, decree of absolvitor in this petition should be granted in the defender's favour, with expenses, and confirmation in favour of the defender, as executor-nominate foresaid, should be granted, as applied for by her."

The Sheriff-Substitute (PATERSON) on 9th June 1887 pronounced this interlocutor — "Before answer, allows to the defender Mrs Duncan a proof that the deed of settlement was subscribed by the granter or maker thereof, and by the witnesses by whom the deed bears to be attested; and to the pursuers a conjunct probation."

"*Note.*—The signature 'John Duncan' on the alleged settlement appears *ex facie* of the deed to be written or partly written upon erasure.

"The defender Mrs Duncan now asks a proof under the 39th section of the Conveyancing Act, 1874; and a nice and novel question arises as to whether a deed the granter's subscription to which is on erasure, is 'a deed, instrument, or writing subscribed by the granter or maker thereof, and bearing to be attested by two witnesses subscribing,' to which the provisions of that sec-

tion as to informality of execution and proof apply. As the language of the statute seems sufficiently general to cover such a case, the Sheriff-Substitute has allowed a proof, although feeling considerable doubt as to its competency."

The Conveyancing and Land Transfer Act, 1874 (37 and 38 Vict. cap. 94), section 39, enacts—"No deed, instrument, or writing subscribed by the granter or maker thereof and bearing to be attested by two witnesses subscribing, and whether relating to land or not, shall be deemed invalid or denied effect according to its legal import because of any informality of execution, but the burden of proving that such deed, instrument, or writing so altered was subscribed by the granter or maker thereof and by the witnesses by whom such deed, instrument, or writing bears to be attested, shall be upon the party using or upholding the same, and such proof may be led in any action or proceeding in which such deed, instrument, or writing is founded on or objected to, or in a special application to the Court of Session or to the Sheriff within whose jurisdiction the defender in any such application resides, to have it declared that such deed, instrument, or writing was subscribed by such granter or maker and witnesses."

The Sheriff-Substitute, after proof, pronounced this interlocutor on 7th September 1887—"Finds in fact that the signature 'John Duncan' to the testamentary deed is superinduced on erasure; that the defender Mrs Duncan has failed to prove that the signature 'John Duncan,' at present adhibited to the said testamentary deed, was the signature attested by the two subscribing witnesses: Finds in law that the deed is invalid, and the nomination therein of 'Martha Barclay or Duncan, my wife, to be my sole executor,' is ineffectual: Finds in fact that the pursuers George Brown and others are the executors-nominate of the deceased Alexander Duncan, who was one of the next of kin of the deceased John Duncan: Finds in law that as representing the next of kin of the deceased John Duncan they are entitled to the office of executor: In respect of these findings decerns the pursuers George Brown and others executors-dative *qua* representatives of the next of kin to the deceased.

"*Note.*—It would appear from the evidence that the deceased John Duncan signed the testamentary deed in question in presence of the two attesting witnesses on 1st Janaary 1876, and that the deed remained in his custody from the date it was signed until the date of his death, 22nd September 1885, and that he intended the deed to be effectual after his death.

"The presumption, however, is that the signature adhibited by him in presence of the witnesses has been subsequently erased, and the present signature superinduced on the erasure.

"If the present signature is not the signature which was attested by the witnesses, it is thought that the deed is in law invalid, although Mr Duncan may have believed and intended it to be effectual. The signature being on erasure, and no mention being made of this in the testing-clause, the deed is *ex facie* improbative, and it is questionable whether the 39th section of the Conveyancing Act 1874 applies to such a case, and whether extrinsic evidence is admissible to prove that the present signature on erasure was the signature attested by the witnesses—*M'Laren* v. *Menzies*, July 20, 1876, 3 R. 1151

"Assuming, however, the competency of the proof allowed, the defender Mrs Duncan has failed to establish that the present signature was the signature adhibited by the deceased in presence of the attesting witnesses. It is extremely improbable that this printed form purchased by John Duncan shortly before the deed was signed on 1st January 1876, should have erasures at the place where the testator was to sign—erasures corresponding respectively in dimensions with the testator's signature 'John' and 'Duncan,' and made after the form was lithographed, as is shown by the deletion of parts of the lithograph guiding line, and the superinduction of a pencil line below the place of signature.

"The proof that the deceased kept the deed in his own custody, and up till the last regarded it as his settlement, negatives the suggestion that the erasure of the original and superinduction of the present signature was done by any hand but his own, at least without his authority. What induced him to do this it is unnecessary for the decision of this case to determine.

"The evidence of Mrs Duncan, however, suggested to the Sheriff-Substitute a possible explanation. She depones that when he showed her the deed on the night of the day on which it was signed—'He said he thought shame of his signature beside the other signatures as he was not a good writer.' She adds—'He was not in the habit of practising his signature during the three years after our marriage (12th June 1875). I never saw him practising his signature during that time, but I have seen him practising his signature since he ceased work.'

"It is possible if not probable that it was because the deceased was dissatisfied with the appearance of his original signature adhibited before the witnesses, and thought he might make a better signature when alone and unobserved, that he erased the original signature, and superinduced on the erasure the present signature.

"The only case (so far as the Sheriff-Substitute is aware) in which a similar question has been raised is the case of *Stirling-Stuart* v. *Stirling-Crawfurd's Trustees*, February 6, 1885, 12 R. 610, and there it seems to have been assumed, that if the signature to the deed, although adhibited by the testator, was not substantially the signature attested by the witnesses, the deed would have been invalid.

"The Sheriff-Substitute regrets that the effect of the judgment which he feels bound to pronounce is to frustrate the intentions of the testator."

The defender appealed, and argued—(1) It was certain that the deed was once duly signed by John Duncan in the presence of witnesses. Was there anything to suggest that the present signature was not the one put before them for attestation? The appearance of the erasure was quite against an *ex post facto* alteration by the truster. It was highly improbable that he would erase his signature in order to re-write it. The more probable theory by far was that there was an erasure already existing on the lithographed form at the time when he signed it. But (2) taking the argument on the assumption that his signature was on an erasure, and that that was not mentioned in the testing clause, it was quite fallacious to apply to such a case

the legal presumption applicable to an erasure occurring in the body of the deed, or which was held in *Gibson* v. *Walker*, June 16, 1809, F.C., *aff.* April 20, 1811, 2 Dow's App. 270, to apply to the case of an erasure occurring in the name of one of the attesting witnesses. No statute could be found and no decision of the Court where a person was forbidden to sign his name on an erasure if he pleased. Indeed, his right to do so had been recognised by Lord Mackenzie and Lord Fullerton in *Grant* v. *Stoddart, &c.*, February 27, 1849, 11 D. 860 and 866. There was no forgery suggested here, and the whole doctrine of erasure was inapplicable to anything written by a man himself. Once establish that and then there was no room for the so-called presumption, for he could not fail to have been conscious that he was signing on an erasure. Further (3) the Sheriff-Substitute had acted rightly in allowing proof under the 39th section of the Act of 1874. It was said that an improbative deed conld not be set up or restored by extrinsic evidence. But even if this were an established rule with reference to what was contained in the body of the deed, here again the rule was not applicable to its signature—*Stirling Stuart* v. *Stirling Crawfurd's Trustees and Executrix*, February 6, 1885, 12 R. 610. (4) The import of the proof was that this was the signature actually subscribed before the attesting witnesses on 1st January 1876.

The petitioners replied—On the face of the deed the signature was written on an erasure. That fact should have been noticed in the testing clause. This having been neglected, the deed was vitiated *in essentialibus* and absolutely void. But further, it was an improbative deed, the presumption in law being that it was not the deed subscribed by the truster before the attesting witnesses on 1st January 1876—Ersk. Inst., iii, 2, 20; Bell's Lect. on Conveyancing, ii., 70; *Gibson* v. *Walker*, *ut supra*. (2) Such a deed could not be set up or restored by extrinsic evidence—*Shepherd* v. *Grant's Trustees*, January 24, 1844, 6 D. 464—opinions of Lord Wood and Lord Justice-Clerk Hope; *M'Laren, &c.* v. *Menzies*, July 20, 1876, 3 R. 1151. The Sheriff-Substitute had taken a wrong view of the 39th section of the 1874 Act. This deed could not be said to be a writing "subscribed by the granter or maker thereof," and bearing to be attested by two witnesses subscribing," to which the provisions of that section as to informality of execution and proof applied.

At advising—

Lord Young—This is a question in regard to the validity of a will, the testator's signature to which appears to be written on an erasure. It is a regularly attested will. Now, I think the party founding upon it would be entitled to prevail by force of the instrument itself, in the case of nothing adverse being established. It is *ex facie* a good deed, and that none the less because the signature of the maker is upon an erasure. The erasure might invite inquiry, but if nothing is established adverse to the deed by that inquiry, beyond the fact which appears without inquiry —that the signature is on an erasure, which you can see by mere inspection—I am of opinion that the deed must prevail.

Here the Sheriff very properly allowed inquiry. A proof was taken, and I take the import of that proof to be as is expressed by the Sheriff in his note. I take that the more readily because his judgment is adverse to the deed, and contrary to the view at which I have arrived. I do not take what he says in the first paragraph of his note because it is his opinion, but because it is my own. It is his opinion also, although I differ from him upon some legal questions so far as regards the import of the evidence. He says—"It would appear from the evidence that the deceased John Duncan signed the testamentary deed in question in presence of the two attesting witnesses, on 1st January 1876, and that the deed remained in his custody from the date it was signed until the date of his death, 22d September 1885, and that he intended the deed to be effectual after his death." This deed then was signed by the testator in presence of the two attesting witnesses, and it was never revoked by him—for that is included in the statement that it remained in his custody till the date of the death of the testator, and that he intended that it should have effect.

Now, that in my opinion would be a sufficient reason or ground for our judgment—that it was a genuine, well-executed instrument, according (as the Sheriff has found) to the import of the evidence, that it was kept by the testator in his custody till the date of his death, and that he never revoked it. In these circumstances it seems to me that the deed must receive effect. If the instrument itself has gone amissing, so that you require to establish the contents of it, resort may be had to the form of process which our law has established to meet that case—a proving of the tenor. But here the very deed which was well executed is before us. It was kept by the testator till his death, and was never revoked by him. No proving of the tenor, therefore, is necessary. Why then should not a well-executed deed receive effect? I put the case in the course of the argument, Suppose the signature had been torn off? What, in the absence of any evidence the law might allow, would be concluded from the fact of the signature being torn off I do not need to inquire. But the fact that the signature has disappeared from the deed in any way, invites inquiry as to how it disappeared—*quo animo?* If *animo revocandi*, then the deed is revoked—it is gone. But if it be established that it has disappeared without any intention of revoking it, the testator meaning it to have effect in the last moments of his rational existence, then the disappearance of the signature could have no effect at all. If he had scraped it out—torn it off—tried some liquid to see the effect of that in removing writing or stains, that in the absence of inquiry might lead to conclusions as to the *animus* with which the thing was done. But if inquiry is made, and the result is that there is found to have been no intention to revoke, then the deed must have effect.

That in my opinion is a simple and sufficient ground of judgment—that this deed was well-executed, and was never revoked. Whatever may have happened to it physically or mechanically, it remained in the testator's repositories unrevoked till the day of his death, and he intended in the last moments of rational existence that it should be effectual as his testament. I say I think we must give effect to it on that simple view.

But we have had the doctrine of erasure pressed upon us. I confess that I have always regarded our law of erasure as mischievous. I have never regarded with equanimity that law of erasure. I do not think it will prove mischievous here, but it has proved mischievous in a great many cases. It is peculiar to our law, and with all our excellencies we have our peculiarities, which are more or less regrettable. But there are peculiarities in every system. But this is a peculiarity of ours, and I do not know the equal of it. I know as great and as mischievous peculiarities in other systems, but not exactly anything like this. Did any of us in the course of his practice and experience ever find that doctrine of erasure operate otherwise than mischievously? The result of it is I think to defeat and not to permit justice. Did you ever know it to operate otherwise in any of the cases, except indeed in the case of entails? We know that when entails prevailed to a larger extent than they do now, it was almost a profession to hunt up entails and try to find an erasure, and then bring a reduction of the deed on the ground that there was an erasure *in essentialibus*. Such things were hailed enthusiastically, and were generally received with great favour. The doctrine of erasure was founded upon this nervous apprehension, that the party who had possession of the deed had fraudulently vitiated it in his own favour—that he had got it into his possession, and that the fact that a material part of it was written on an erasure presumed what I have indicated, unless, indeed—and the "unless" is very instructive as to the wisdom of our ancestors, very great in many respects, but not so great all round—unless mentioned in the testing-clause. That was the notion on which the doctrine was founded, that the deed was vitiated after execution in the presence of witnesses. But the testing-clause is always written after execution. It may be written in by the holder of the deed at any time he likes. Deeds have we know been sustained with the testing-clause written by the holder, in virtue of the power implied in his holding the deed. Therefore the person who vitiates a deed in his own favour has only, in the exercise of the power allowed to him by law, to mention that that was written on an erasure, and that makes it all right. That was the wisdom of our ancestors on this matter of erasure—great wisdom as we have reason to know in many respects—but I repeat not all-pervading any more than our own. It is a little ridiculous when you come to think it over that a deed may be set aside on the notion of the fraudulent vitiation of it by the holder, only because he has omitted to put into the testing-clause, which he probably wrote himself, that he had done a certain thing. He had, I repeat, probably written the testing-clause himself. He might have written it at any distance of time after the execution of the deed. But that that was the foundation of the doctrine, that it was not just *positivi juris*, but founded on that rational or irrational consideration, intelligible enough no doubt, is plain from the exception to it, that exception being that if a part of the deed, longer or shorter, a word or words, was proved to be in the handwriting of the maker of the deed, then the erasure was of no effect. Why? Because that fact made it certain, and it might be proved by extrinsic evidence that there was no fraudulent or improper vitiation by the holder. If the word or words written upon erasure were proved to have been in the handwriting of the maker of the deed, and that could only be by parole, that excluded the notion on which the whole doctrine was founded, namely, that there had been fraudulent vitiation. But then the signature of the maker of the deed, if it is admitted to be genuine, must of necessity be in his own handwriting. And the notion of the fraudulent vitiation by the testatator in his own handwriting of his own will is the most extravagant supposition I ever heard of. Therefore when it appears that the foundation of this doctrine of vitiation by erasure is as I have stated, it cannot possibly have any application to a signature.

But then it is said that this is a tested deed. It is not relied on as a holograph deed, but as a tested writing; and it must appear that that very signature is not only the signature of the testator, but was adhibited by him in the presence of those witnesses, and if it is established that he took it out and then put it in again subsequently, that deed is gone. That is what is said. Well any law to that effect would in my view be deplorable, I would almost say abominable. But I do not think that that is our law. We were referred to one case, and it was a very instructive one upon this subject—the case of *Grant* in 1849 (11 D. 860)—where there was a deed regularly attested, but some parts of it were in the maker's handwriting, and vitiations of those parts of his handwriting were held as having no effect on the deed itself, it being certain that those alterations in his own handwriting had not been put there improperly by anybody else. So that if the doctrine of erasure is to have any application to signatures at all you must take the doctrine as it is applied to other portions of the deed, to the effect that if you have security that the deed is genuine, and has not been vitiated, you must give effect to the deed. Now, here you have perfect assurance that this will is genuine, if that is the testator's signature, and if so it is clear that it has not been vitiated to his prejudice, or to the prejudice of his successor, whether the testator wrote the signature on an erasure or not.

Now, I have expressed these views somewhat crudely I daresay, because it was not in my mind that I was to give my opinion first. In the view that it is established that the signature when the witnesses signed was not upon an erasure, whereas it is upon an erasure now, so that for some explicable or inexplicable reason the testator scratched out what was there and wrote his signature over again—in that view I am of the opinion which I have expressed, that the deed is nevertheless a valid deed, and is entitled to have effect. But I think it right to say that it is not in my opinion proved that that signature is not the very signature which was adhibited in the presence of the witnesses to this deed.

On the whole matter I am of opinion, and that clearly, that this will is valid, and entitled to have effect given to it.

Lord Craighill—I am of the same opinion. I am of opinion that the will in question is a probative deed. It is signed by the testator. In regard to that there is no controversy. The party objecting to the will must prove that it is not a genuine signature. There are witnesses

who attest the signature, and supposing that it were necessary for the parties founding on the will here to say that the signature which was attested by the two witnesses was this very signature, I think they would succeed in their purpose with the aid of the evidence brought forward in this case. But in regard to that, I do not think it is on the party founding on the deed to prove that all was regularly done in the execution of the deed by the party himself and the witnesses. It is for those who object to the will to show that there was any irregularity sufficient to invalidate it. I think it is a probative deed in the sense of the statute. The issue in such a case is not whether the signature of the maker of the deed is written on an erasure, but whether the signature is the genuine signature of the maker of the will. Now, the ordinary presumption when there are portions of a deed written on an erasure cannot apply here. Once it is established that the testator's name was put to the deed, and that all was done according to law, and that the deed remained in the custody of the maker of the will long after its execution in a regular manner, then I think it is entirely immaterial to enter upon an inquiry as to how the erasure came to be there. There seems to have been an erasure, but the testator put his name upon that erasure. He simply chose to do so, and he was quite entitled to do so. It was his privilege to put his name anywhere he liked so far as erasure is concerned. The fact of its being on an erasure does not destroy the effect of the signature. It is good to all intents and purposes if he chooses to act in that way.

On the whole matter I agree with Lord Young.

Lord Rutherfurd Clark — I also am of opinion that this is a good deed. But I think in disposing of the case we must attend to the requisites with respect to the execution of deeds. This is not a holograph deed, and therefore the signature of the party is of no avail as making the deed a valid deed, unless it be duly witnessed in terms of the statute. Accordingly, I take it the objection on the part of the pursuers necessarily goes to this, that the signature, although genuine, was not witnessed by the instrumentary witnesses, and if that fact were proved, or if it were to be presumed, then I think the objection would be a good one.

The question is whether that fact has been proved, or whether it is to be presumed. *Ex facie,* the deed is quite regular and in order, and would receive effect as a probative deed. But our attention is called to the fact that the signature of the testator is written upon an erasure. The signature is so written. If the pursuer were to allege that the signature so appearing on an erasure was not the signature of the testator, then of course he would be allowed to prove it just as he would be allowed to prove that fact whether it was on an erasure or not. But as he does not allege that the signature that appears on the deed is not the genuine signature of the testator, he virtually admits that it is his genuine signature. Any such proof, then, as I have indicated is out of the question. Then we come back to see what is the effect of the deed, with the fact admitted that the signature that appears on the deed is the genuine signature of the testator. But further, the signature so appearing on the face of the deed—and I am speaking of what appears upon the face of the deed—is duly witnessed in terms of law, and therefore although there is an erasure in the deed in the place I have mentioned, we have a probative deed which must receive effect by virtue of the proof, or the admission which comes in place of the proof. Now, the only objection that can be stated in these circumstances is the one I have already mentioned, that the existing signature was not affixed in the presence of the testamentary witnesses—that there was a previous signature which may have been adhibited in the presence of the witnesses, but that this particular existing signature was affixed by the testator in his own closet, or at all events in the presence of no witnesses, or outwith the presence of these witnesses. As I said, I think that that, if it were proved, would be a fatal objection, or a formidable objection—I think probably fatal. But then the question is, who is to prove it? On whom is the *onus* of the proof? Again, for the reasons I have already given, and from the fact that this is a probative deed, and must receive effect as such, the *onus* necessarily falls on the party objecting to it. Then the whole question comes to be, whether the fact is proved on which the objection depends? I think we would require very clear proof indeed to enable us to sustain this objection, and I am not in the least disposed to hold that this objector has proved the fact on which his case depends. I do not think the evidence comes near a proof of what he says. As there is no presumption in his favour, the deed must receive effect.

Lord Justice-Clerk—I entirely concur in the result, and that without any difficulty. That the name of the testator is written on an erasure is admitted, but the question is whether that fact although it is not mentioned in the testing-clause is necessarily fatal to the authenticity of the signature and the deed. On that matter I am not disposed to find fault with our ancestors, or the work they did. The question is, whether the law of erasure applies to this particular case? On the merits of our ancestors I have nothing to say, because any opinion we may pronounce on that is not of the least consequence as far as our judicial labours are concerned. For our ancestors I may say that they did their work well, and particularly their conveyancing work — better than any other ancestors that I know of, whatever may be our views with regard to the existing state of matters.

With regard to this matter of the erasure, my view is that erasure is not fatal to the deed, even although it is not mentioned in the testing-clause. It is an element of proof that may be and has been overruled. I should just like to read an extract from the opinion of Lord Mackenzie in the case of *Grant* v. *Stoddart,* 11 D. 860, where there was an erasure, and there was writing upon the erasure. Lord Mackenzie says—"It is a narrow case, however, and different from any that has occurred yet, for the deed is not all holograph, part of it only is so, viz., that which is upon erasure. But I think that is enough, for a party may make a deed partly holograph and partly tested, and such a deed be valid. All that is holograph of it is just like other holo.

graph writings, and such writings are valid whether written on erasure or not. A man may if it suits his fancy scrape off writing from a paper, and write his own deed upon the part erased, The part here written on erasure being holograph is of itself probative." And Lord Fullerton says he adopts Lord Mackenzie's opinion as to erasures in the deed. He adds—"Those erasures I do not hold to be fatal."

Now, in the present case there are only two alternatives presented. It must be borne in mind that this will is mostly a printed form. It may have had an erasure on it when the testator purchased it. That is suggested, and I think it a probable enough suggestion, for in my view it has not in any view been proved to be untrue. The other suggestion is a good deal more fanciful. There is no doubt that this is the man's signature, but then it is said that he was very vain about his writing, and afraid of his signature not being sufficiently well written, and that after he had written his signature in presence of the two testamentary witnesses he erased it and wrote it over again. I think that is a very fanciful and improbable proceeding, because a man could hardly expect his second signature written on an erasure to be so good as his first written on plain and smooth paper. I think the balance of proof is against that, and consequently that there is fair reason to believe that the erasure may have been on the paper when the signature was made.

Now, that I think is sufficient for this case, and I am therefore of opinion that the Sheriff's judgment should be recalled.

The Court pronounced this interlocutor—

"Find in fact (1) that the deceased John Duncan signed the disposition and settlement mentioned in the record on 1st January 1876 in presence of two attesting witnesses, and that the deed remained in his custody from that date until his death on 22nd September 1885; (2) That he intended the deed to be effectual: Find in law that the deed is valid and effectual: Therefore sustain the appeal: Recal the judgment of the Sheriff-Substitute appealed against," &c.

Counsel for the Appellant—Asher, Q.C.—R. V. Campbell. Agent—A. Kirk Mackie, S.S.C.

Counsel for the Respondents — Sol.-Gen. Robertson — Wallace. Agents — Webster, Will, & Ritchie, S.S.C.

Friday, March 9.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

SMITH & SON *v.* WAITE, NASH, & COMPANY.

Sale—Turnip Seed—Error in Description—Breach of Contract—Damages.

One firm of wholesale seed merchants sold to another 100 bushels of Old Meldrum green-top yellow turnip seed, under the condition that they "give no warranty, express or implied, as to description, quality, or productiveness, or any other matter, of the seeds they send out, and they will not be in any way responsible for the crop. If the purchaser does not accept the goods on these terms, they are at once to be returned." The seed was re-sold by the purchaser to various persons, and on the crops coming up it was discovered that the 100 bushels had consisted partly of Old Meldrum and partly of tankard turnip seed, in the proportion of three of the former to one of the latter. In consequence of this, claims of damages were made by the persons who had sown the seed against the merchants from whom they had bought, and they in turn brought an action of damages against the original sellers. It was proved that the tankard seed was not suitable for the district where it was sown, and that the two kinds were undistinguishable until the crop had come up.

Held that the conditions of sale above quoted were sufficient to protect the defenders from such a claim of damages.

This was an action by William Smith & Son, seed merchants, Aberdeen, against Waite, Nash, & Company, seed merchants, London, concluding for £2500 damages for breach of contract.

The case arose out of a contract for the sale of turnip seed in the following circumstances:—On 30th October 1885 the defenders wrote a letter to the pursuers containing a list of seeds (among them Old Meldrum green-top yellow turnips), and quotations of the then respective prices.

On 3rd December 1885 the pursuers wrote to the defenders stating that they wanted "100 bushels real true Old Meldrum green-top yellow turnips," and offering 16s. per bushel if assured of the quality, to which the defenders replied—"We can book you 100 bushels Old Meldrum turnips at 18s. per bushel nett."

On 17th December the pursuers again wrote in these terms—"In reply to yours of 11th inst. if the Old Meldrum green-top yellow turnips offered are of a really reliable stock we will take 100 bushels at your original offer, viz., 17s. per bushel. This referred to the quotation sent on 30th October 1885.

On 19th December the defenders acknowledged receipt of the order, adding that it would receive their earliest and best attention.

On all their letter paper, cards, and invoices the defenders had printed the following—"Terms of sale.—Messrs Waite, Nash, & Company give no warranty, express or implied, as to description, quality, productiveness, or any other matter, of any seeds they send out, and they will not be in any way responsible for the crop. If the purchaser does not accept the goods on these terms they are at once to be returned."

Following upon the letter of 19th December the defenders forwarded to the pursuers early in March of the following year 100 bushels of turnip seed invoiced as "Old Meldrum green-top yellow turnips," of which the pursuers took delivery. The pursuers then re-sold it to various merchants in Aberdeenshire and the north-eastern counties of Scotland, by whom in turn it was retailed to a large number of farmers and others in the same district.

It was proved that the seed which was delivered