Friday, November 12.

SECOND DIVISION.

[Lord Curriehill.

NOBLE *v.* NOBLE.

Testament—Power to Test—Physical Incapacity—Guiding Testator's hand.

A deed granted by a person between seventy and eighty years of age was sought to be reduced, after a lapse of fourteen years, on the allegation that he was labouring at the time when the deed was executed under physical incapacity to sign his name. On a proof being led, the evidence showed that the granter was "very shaky" and feeble, and one of the persons present at the time of signing deponed that he had "steadied" the granter's hand by holding his wrist. The witness positively denied having "led or guided" the hand, but expressed an opinion that the granter could not have signed unless his hand had been steadied. *Held* that the deed was good.

This was an action at the instance of Alexander Noble, a fisherman at Fraserburgh, the grandson and heir-at-law of the late Alexander Noble senior. The action was for reduction of a disposition of property at Braehead, granted in 1857 by the pursuer's grandfather in favour of his second son Andrew Noble, the uncle of the pursuer. Andrew Noble had also granted subsequently another disposition and assignation of the same property in favour of George Noble, and reduction of this also was asked in a supplementary action, there being further, in the original action, conclusions for declarator, removing, and count and reckoning for the rents. The actions were conjoined. The leading question now before the Court was the validity of the execution of the first disposition by Alexander Noble senior, the allegations being that his hand was led while subscribing it, by John Dunlop, then clerk in the office of Lewis Chalmers, the law-agent who had prepared the deed.

A proof being allowed, it appeared that Alexander Noble senior was an old man between seventy and eighty years of age when the deed was granted, that he had throughout life been addicted to intemperate habits, and that he was very shaky. He was very feeble, being able to walk only with difficulty. From sundry bonds granted by him, he appeared in early life to have been able to sign his name with ease. John Dunlop, who was called as a witness, deponed *inter alia*:—"Alexander Noble came to execute that deed. It was duly prepared for his signature. He was very shaky at the time. He asked me if I would steady his hand, and I did so. I steadied it by taking him by the wrist. (Q.) Was it above the wrist? (A.) I really cannot particularise at this date exactly where I placed my hand, but it was so as to steady his hand while he made his signature. (Q.) You think, from what you remember, that it was by the wrist? (A.) I should not have the slightest hesitation in saying so; but I would not have taken hold of it otherwise, as I should have been leading his hand. (Q.) You were aware that it was wrong to lead his hand? (A.) Certainly. (Q.) And you are certainly aware that you did not do so? (A.) I have not the slightest hesitation in saying that I did not do so. I in no way helped to form the letters of his signature. The signature I see on that deed was all done by Noble himself in presence of Mowat and Fraser. Every letter of the signature was old Noble's own formation. I may here remark that if I had led this man's hand, I should certainly have made a better signature than the one now before me. So far as I recollect, the operation of signing his name took some little time—I should say a quarter of an hour or twenty minutes. It was decidedly a work of labour. He stopped very often in the course of his formation of the letters. I think that the ink of one part of his signature may have had time to dry before the whole was finished." On cross-examination, the witness deponed—"(Q.) Do you think he could have signed the deed without being steadied? (A.) I certainly should say that he could not, otherwise he would not have asked me to have steadied it for him."

Fraser and Mowat, the instrumentary witnesses to the deed, who both were clerks in the employment of Mr Lewis Chalmers when it was signed, and were present at the signature, were examined as to what took place. Fraser deponed—"I could not say exactly that Dunlop led his hand; but I know that his hand was very shaky, and that he could not have signed his name without being assisted by Dunlop. I could not say whether his hand was held above or below the wrist. I think it was below, but I am not certain. All I know is that it was with very great difficulty and great labour that that signature was attached. (Q.) But you have no reason to say that his hand was led in any way? (A.) It was steadied. (Q.) It was not used to form the letters? (A.) It may have been. My impression is now that he was assisted. (Q.) Do you think that the hand was guided at all? (A.) My impression is that it was, but I could not say distinctly at this distance of time. (Q.) It is mere impression? (A.) I could not speak to it positively. I did not think of it at the time, because I did not understand those matters then. (Q.) But it is your impression now in thinking back upon it? (A.) Yes, from the long time that took place in getting the signature attached. (Q.) Don't you think that if the hand had been led it would have been done in a much shorter time? (A.) I know that the hand was steadied, and my impression is that it was led, from the time he took. (Q.) You have no other reason except from the time he took to complete his signature? (A.) No. (Q.) It is not from anything you saw except the steadying of the hand? (A.) I cannot say."

Mowat deponed—"The granter's hand was not led or assisted in adhibiting his signature otherwise than that Mr John Dunlop steadied it by holding his arm above the wrist. To the best of my recollection all that Mr Dunlop did was simply to steady the arm of the granter when adhibiting his signature."

It was admitted that the deed under reduction was in the terms in which the granter desired to execute it.

The Lord Ordinary pronounced an interlocutor finding, *inter alia*, "that while the said Alexander

Noble senior was writing his name at the end of the said disposition and assignation, John Dunlop, the clerk in the office of Lewis Chalmers, the law-agent who had prepared said deed, held the said Alexander Noble's hand about the wrist, and supported his said hand and assisted him to write his name." His Lordship accordingly reduced the deed.

In a subjoined note the Lord Ordinary, after narrating the facts of the case, proceeds as follows:—"The main question then is, was the disposition of 25th November 1857 truly executed by Alexander Noble himself? Now, there have been called as witnesses the two instrumentary witnesses to the deed, Fraser and Mowat, and Mr Dunlop, who was managing clerk to Mr Chalmers, the solicitor in whose office the deed was prepared. All of these persons were present when the deed was executed. Mr Dunlop says that he was aware the deed was to be executed, that Alexander Noble senior had been frequently coming about the office and giving instructions for it, and that on the day of the execution of the deed he came to the office in a very shaky condition and asked him, Dunlop, to steady his hand while signing the deed. Dunlop says he assisted Noble by taking hold of him about the wrist so as to steady his hand while signing. Then he goes on to explain that he would not have taken hold of his hand because then he would have been leading, and he was quite sure that he did not in any way lead or help the hand in making the signature, and that all the signature was Noble's own. The other witnesses who were present, Mowat and Fraser, are not quite at one about that. Fraser says his impression is that the hand was guided by Dunlop. Mowat says that the hand was held above the wrist, and that Dunlop merely steadied it, but did not hold the hand. It is not proved that the deed was read over to Noble before execution.

"Now the question is, in that state of matters, was there such assistance given by Dunlop to Alexander Noble in signing this deed as to nullify it? There is no case, so far as I am aware, precisely the same as this, but there are circumstances in two of the reported cases, viz., *Moncrieff* v. *Monypenny*, M. p. 15,936, affirmed, Robertson, p. 26; and *Falconer* v. *Arbuthnot*, M. p. 16,817, and Elchies *voce* Writ, No. 26, which are very similar to those of the present case. The fullest and best report of the facts of *Falconer* v. *Arbuthnot* is contained in the report by Elchies, from which it appears that sundry bonds were granted at different times, some at one month and some at two months before her death, by a lady who was blind or paralytic and shaky. The subscription of the old lady being quarrelled, it was proved that in granting any receipts to tenants she was in use so far to take the assistance of her son, who commonly led her hand. As to the bonds quarrelled, some of the witnesses said that he held her by the wrist; others that his hand was upon hers; others that he only held the end of the pen. None of the witnesses heard the bonds read over to her, but she said to them that the papers had been read to her, and therefore she desired them to witness her subscription. But as she was so blind that she could not read any of them herself, and for anything that appeared in the proof, bonds of another tenor, or for different sums, might have been read, so that there was no evidence that she knew what was signed—the Court reduced them all. Now, in that case it was not proved distinctly what the amount of interference was; but it was one of three things—either that the wrist was held, or that the hand was held, or that the pen was held. And the mere taking by the wrist seems to have been considered as sufficient assistance to prevent the signature from being held as the true signature of the party. In the case of *Moncrieff* v. *Monypenny*, it appears from the report in Mor. p. 15,936, that the granter George Moncrieff had signed his christian name 'George' and 'Mon,' the first three letters of 'Moncrieff,' and that he could not from weakness finish the subscription, whereupon the writer of the deed assisted him. The depositions of the witnesses as to what was the actual amount of assistance given are not set forth in the report, but the judgment seems to have proceeded upon this, that he was assisted by the hand being steadied or supported. In the argument for the pursuer, which was sustained by the Court, the defender's argument, which was repelled, is thus commented on:—'As to the pretence that fixing his arm could not direct his fingers, whose motion only frames the letters, they oppone the witnesses' depositions that he could not have perfected the subscription without that'—*i.e.*, without fixing the arm—'for he began to stagger, and the syllable "Mon" is a downright scribble.' The Lords having advised the depositions and debate, sustained the reasons of reduction, and found them both relevant and proved, and therefore reduced the testament. The interlocutor is given in the report of the Appeal Case, Robertson's Appeals, p. 26, whereby, on 15th November 1710, the Court found 'that the testator did not complete his subscription, but that his hand wavering he was supported by the writer, who assisted him to write the last syllable, and therefore declared said will null and void.' In the appellant's argument, where he is treating of the evidence, he says that the will had been written out according to the directions of Moncrieff; but Watson, who was the writer of the deed, perceiving his hand to waver, took him by the 'shackle bone,' and supported his hand while he wrote the rest of his name. Nevertheless, the Court found that the taking of him by the 'shackle bone,' and supporting him by the hand while he wrote his name, was such assistance as to compel them to declare the deed null and void.

"Now, I think that these judgments, and also the judgments in other cases, which will be found noted in Menzies, p. 105, all proceed upon general grounds of policy, viz., that it is extremely dangerous to allow any interference with a person in the act of signing a deed. It is not necessary to hold that a general support may not be given to the body of the granter; he may be propped up with pillows, or perhaps even supported by the arm of another, so as to enable him to assume an attitude convenient for writing, but any interference with or approach to his hand is an amount of assistance which the law will not tolerate. It is obviously impossible to draw the line nicely between support to the wrist and support to the hand, and if the hand of another approaches, or is in contact with the hand of the party who is supposed to execute the deed, there

is room for a very great deal of dangerous manipulation. The duty of the agent of the granter in such a case is to call in the assistance of notaries, in terms of the statute. It is said that the granter of the deed in question, Alexander Noble, had given instructions beforehand for the preparation of the deed, and that several people knew that he had intended to make this disposition of his property; but that goes for nothing. In the report of the case of *Falconer* v. *Arbuthnot*, in Morrison, 16.817, it is stated that the bonds were reduced, "notwithstanding the deeds appeared rational, and that some evidence was brought of her intention to give some donations to her grandchildren.' And it will also be found that that case proceeded upon this general ground that the Court would not enter upon the question whether there had been any imposition upon the part of the beneficiaries, and that interference with parties signing deeds cannot be allowed. 'The Lords were in noways moved by the argument brought by the pursuer to prove imposition, but they thought there was the utmost danger in sustaining these deeds in those circumstances, whatever reasons there might be to think there was no imposition in this case; yet the law suspected, and even presumed it.'

"On these grounds, then, I think that the deed here ought to be set aside." . . .

The defenders reclaimed.

Authorities cited—*Moncrieff* v. *Monypenny*, M. 15,936, aff. Rob. 26; *Falconer* v. *Arbuthnot*. M. 16,817, Elchies *voce* "Writ." 26; *Wilson*, Hume 912; *Ballingall*, Hume 916; Menzies' Lectures on Conveyancing, 105, and cases there noted.

At advising—

Lord Ormidale—I have come to the conclusion, and without much difficulty, that the interlocutor of the Lord Ordinary in this case cannot be sustained; and I may briefly state the considerations by which I have been influenced in arriving at this result. In the first place, it seems to me to be clearly established that there was not on the part of any of those who were present an improper motive or any improper conduct, and the same may be said of those persons in whose favour the deed was granted. If there had been room for suspicion of fraud or of undue influence, that would have formed a very material element in the case, but it was distinctly admitted at the bar that the terms in which we have the deed presented to us are the very terms in which the granter desired to execute it, and further, that the granter has not been tampered with in any way, or by any one.

Another consideration of importance is the length of time which has elapsed without any challenge of the deed. The pursuer lived in the same place, and it must be taken for granted that soon after the granter's death this deed was seen both by the pursuer himself and by other interested parties. But an interval of no less than fourteen years is suffered to pass, and no challenge of the deed during that long period is attempted. The pursuer then has himself to blame, and the consequences of the delay must fall upon him if there have arisen in this interval any defect or obscurity in the evidence, or any failure of memory on the part of the witnesses.

What then was the issue which the pursuer undertook and was bound to establish? It simply came to be that the settlement in question was not the deed of the granter. The Lord Ordinary has found that the witness Dunlop "held his hand about the wrist, and supported his hand and assisted him to write his name," and on this ground his Lordship has set aside the deed. Now I am willing to take Dunlop's own story, for he at least must have known better than any one else what really did occur. [*His Lordship here read from the proof, as quoted above.*] The witness evidently distinguished between "leading and steadying" the hand, and acted on that distinction at the time. I think that the authorities afford room for such a distinction, and that provided the hand be not led in the formation of the letters it is quite competent to steady it. That it is legitimate to give some degree of support and aid is admitted, and we may compare with this the well-known case of Lord Fife, who, being blind, nevertheless executed a deed by means of the aid of another person, who put down his finger on the spot on the deed at which the signature was required, when Lord Fife signed his name after having felt for the finger, which acted as an index, and thus gave him such assistance as enabled him to do that which, without aid, would have been entirely beyond his power. In short, if the assistance in signing a deed stops short of guiding or leading the hand in the formation of the letters, or some of them, it ought not to found a good objection to the validity of the execution. I do not think the present case amounted to such guiding—indeed, it would be very difficult, if not impossible, to guide a man's hand by grasping his wrist. The case of *Moncrieff* v. *Monypenny* was decided against the validity of the deed because there was leading of the hand, while in that of *Falconer* v. *Arbuthnot*, blindness, according to the then existing doctrine of the law, rendered a person incapable of subscribing; that doctrine has, however, been overturned by more recent decisions, especially that in Lord Fife's case, to which I have adverted. I cannot therefore help thinking that the Lord Ordinary has allowed himself to be too much influenced by the cases cited in his note, which referred rather to a time when the art of writing was comparatively less known and practised than at present, and when fraudulent attempts were more frequently made to impetrate deeds from those who could not write.

After careful consideration, I am of opinion that no sufficient cause has been given for reducing the deed in question, and therefore that the interlocutor of the Lord Ordinary should be recalled, and the defenders assoilzied.

Lords Justice-Clerk and Gifford were of the same opinion.

Lord Neaves absent.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming notes for the defenders against Lord Curriehill's interlocutor of 24th May 1875, in the conjoined actions, Recal the said interlocutor, and assoilzie the several defenders from the conclusions of the respective summonses against them, and decern; find the pursuer liable in expenses to

all the defenders, and remit to the Auditor to tax the same, and to report."

Counsel for Pursuers — M'Laren — Gloag. Agent—D. H. Wilson, S.S.C.

Counsel for Defenders—Adam—Asher. Agents Pearson, Robertson, & Finlay, W.S.

Friday, November 12.

FIRST DIVISION.

[Lord Young.

AUGUSTUS TOWILL & CO. *v.* THE BRITISH AGRICULTURAL ASSOCIATION (LIMITED).

Sale—Contract, Constitution of—Principal and Agent

A sale of a quantity of bones was conducted by two firms of brokers duly authorised to bind their principals. The brokers of the sellers wrote to them on 14th November, " . . Please transmit warrant and order for delivery, at same time confirming sale," and the brokers of the buyers wrote to their constituents that confirmation by the sellers was awaited. The sale-note granted by the sellers' brokers, dated 14th November 1873, bore, "Payment cash on delivery, less 2½ % in 14 days as usual." On the 15th the sellers wrote to their brokers in answer to their letter of the 14th, "The payment clause should be cash in 14 days (before delivery, if required) less 2½ discount." The buyers refused to agree to this alteration in the terms of the contract, and on 19th November intimated that they considered the contract cancelled. In an action by the sellers against the buyers for implement of the contract and for expense incurred in storing the bones, through the defenders' delay in taking delivery, the Court (*reversing* Lord Young, and *dissenting* the Lord Probationer, Lord Rutherfurd-Clark) assoilzied the defenders in respect (1) that, owing to the actings of parties, the contract was one requiring confirmation by the principals, which was not obtained, and (2) that the terms of the sellers' letter of 15th November imported a material variation in, and therefore rescinded, the contract.

In this case Augustus Towill & Co., merchants, Liverpool, sued the British Agricultural Association (Limited), corn, seed, and manure merchants, Leith, for implement of a contract, said to have been entered into between Sollit, Hill, & Co., brokers, Hull, for the pursuers, and John Harland & Co., also brokers there, for the defenders, for the sale of a quantity of ancient bones, amounting to some 400 tons, in terms of the following sale-note:—

"36 *High Street, Hull,*
"14*th Nov.* 1873.

"Sold to the British Agricultural Association (Limited), Leith, for account of Messrs Augustus Towill & Co., merchants, Liverpool, per Messrs Sollitt. Hill, & Co., Hull,

"About 350 to 400 tons (more or less) ancient bones, now laid in Bilton's and Winter's warehouses here, at £6, 10s., say six pounds ten shillings, per ton of 20 cwt., weighed and delivered free to craft here at the respective warehouses.

"Payment cash on delivery, less 2½ per cent. in 14 days as usual.

"Should buyers require three weeks to get them away, to have this privilege, any dispute arising on this contract to be settled by arbitration as usual. "JOHN HARLAND & Co."

The summons concluded, further, that the defenders should be ordained to take delivery of the bones, and to pay the expense of their storage since the completion of the contract.

The pursuers further averred—"The defenders were bound by the contract to take delivery of the said goods at the latest in three weeks after the date of the contract, that is, by the 5th December 1873, and they were thereby bound to pay the price within a fortnight thereafter, that is, by 19th December 1873."

The following answer for the defenders to article 1 of the condescendence shows the position taken up by them:—"Denied. Explained that there were certain negotiations for a sale, but there never was any concluded contract of sale. As to the sale-note signed by Messrs John Harland & Company, dated 14th November 1873, it is explained that its terms were not agreed to by the pursuers, who, on the contrary, intimated to Harland & Company, their selling brokers, that they would not complete the contract except on a certain condition. This condition was that a certain amount must be paid in exchange for warrants — a condition which was intimated by Harland & Company to the defenders by letter dated 17th November 1873. On receiving this intimation, the defenders, by letter to Harland & Company, dated 18th November 1873, refused to agree to the conditions proposed. and thereafter by letter to Harland & Company, dated 19th November 1873, the defenders intimated their adherence to what they had written on the 18th, adding that they would be pleased to hear of any new proposals the pursuers had to make. Thereafter the pursuers made certain new proposals, as contained in the following letter, written by them to Messrs Sollet, Hill, Company, and communicated by them to Harland & Company:—

'*Liverpool, 19th November* 1873.

'We have now before us your favor of y'day, confirming your telegram received late last evening, and in reply we are rather surprised Messrs Harland & Co. should decline to make a payment to a/c the bones, p. Jno. Robinson, against the warrants. Their principals are well aware of the usage, and always act up to it. At the same time we have no desire to be as strict as they would be, and will hand over the warrants on payment of £1500 to account, or let you have the warrants—you shipping the bones in our name and to our order, and the buyer to pay an approximate amount against each B/Lading. We cannot do fairer. A. TOWILL & COY.'

"On 20th November 1873, Harland & Company communicated this letter to the defenders, who on the 21st wrote to Harland & Company saying —'We now decline having anything further to do with the parcel.' If Messrs Harland & Company pretended to conclude on behalf of the defenders a contract of sale, they did so not only without authority from the defenders, but in