succumbed on 16th August thereafter: Find said staging was put up under the superintendence of the foreman carpenter in the employment of defenders, the witness Phillips: Find that negligence in the construction of the staging has been proved: Therefore sustain the appeal and recal the interlocutor appealed against, and decern against the defenders for payment to the pursuer of the sum of £50 sterling, with interest thereon at the rate of £5 per centum per annum from the date hereof till payment: Find the pursuer entitled to expenses in this and the Inferior Court."

Counsel for the Pursuer—Salvesen—Clyde. Agents—Coutts & Palfrey, S.S.C.

Counsel for the Defenders—C. S. Dickson—Moncrieff. Agents—Drummond & Reid, W.S.

Tuesday, March 12.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

CAMPBELL *v.* PURDIE, &c.

Writ — Testament — Docquet — Justice of Peace—Conveyancing Act, 1874 (37 *and* 38 *Vict. c.* 94), *sec.* 41.

Held (*aff.* judgment of Lord Kincairney) that a testament signed for the testator by a justice of the peace was invalid, because the docquet was not holograph of the justice, and that the defect could not be remedied after the testator's death.

The Conveyancing Act of 1874 enacts by sec. 41—"Without prejudice to the present law and practice, any deed, instrument, or writing, whether relating to land or not, may, after having been read over to the grantor, be validly executed on behalf of such grantor, who, from any cause, whether permanent or temporary, is unable to write, by one notary-public or justice of the peace subscribing the same for him in his presence and by his authority, without the ceremony of touching the pen, all before two witnesses, and the docquet thereto shall set forth that the grantor of the deed authorised the execution thereof, and that the same had been read over to him in the presence of the witnesses. Such docquet may be in the form set forth in Schedule 1 hereto annexed, or in any words to the like effect."

Mary Ann Vandal Campbell or Mackenzie died on 13th September 1893, leaving a settlement dated 3rd March 1893, by which she left her whole means and estate in trust to Mr Duncan Paterson, S.S.C., Edinburgh, to be paid over by him, after payment of debts, &c., to John Purdie, Edinburgh, whom failing to his wife Isabella Fairbairn or Purdie. The settlement was executed for the deceased by Mr James Colston, a Justice of the Peace for Edinburgh, as she had never been taught to write, in the presence of Andrew Aiton White and James Johnstone Scott. The docquet was not holograph of the Justice of the Peace, but was written by Andrew Aiton White, who was the writer of the deed itself. The deed with the docquet was subscribed by Mr Colston and the two witnesses, all in the presence of the deceased.

On 5th March 1894 Donald Campbell, who stated that he was next-of-kin of Mary Ann Campbell, raised an action for reduction of the settlement against John Purdie and Mrs Purdie, and the executor under the settlement. He pleaded, *inter alia*:—"(1) The docquet to the said settlement not being holograph of the Justice of Peace, the said settlement is invalid, and of no effect in law. (4) The defect in the notarial execution founded upon being an omission of an essential solemnity, and not a mere informality of execution, cannot now be cured."

The defender averred that both the deceased and the Justice were under the belief that the whole legal solemnities needed for the legal execution of the deed had been complied with, and that the Justice was prepared to insert a holograph docquet now, there being sufficient space for the purpose.

The defender pleaded—"(2) The settlement in question having been executed with all the legal formalities requisite in the circumstances, the defenders should be assoilzied. (4) Any defect or informality in the legal solemnities being still capable of being validly supplied, the defender is entitled to an opportunity of having the same supplied, and upon its being supplied, the deed ought to be sustained as valid and effectual to all intents and purposes."

On 1st December 1894 the Lord Ordinary (KINCAIRNEY) granted reduction in terms of the conclusions of the summons.

"*Opinion.*—The settlement of the late Mary Ann Vandal Campbell, which bears to have been executed on her behalf by a Justice of the Peace on 3rd March 1893, is sought to be reduced on various grounds, and, among others, because the docquet of the Justice of Peace is not holograph. That is admitted, and the defenders now propose that the Justice of Peace should write a holograph docquet above his signature, and above the signatures of the witnesses.

"A subscription by a Justice of Peace on behalf of a person unable to write was made competent by the 41st section of the Conveyancing Act 1874, which provides that 'without prejudice to the present law and practice, any deed . . . may, after having been read over to the granter, be validly executed on behalf of such granter who . . . is unable to write by one notary-public or justice of the peace subscribing the same for him in his presence and by his authority . . . all before two witnesses, and the docquet thereto shall set forth that the granter of the deed authorised the execution thereof, and that the same had been read over to him in the presence of the witnesses. Such docquet may be in the form set forth in Schedule 1, hereto

annexed, or in any words to the like effect.' The settlement therefore depends for validity of execution on that section.

"In *Irvine* v. *M'Hardy*, 5th February 1892, 19 R. 458, a subscription by a justice of the peace of an assignation to a lease was held invalid because the docquet was not holograph of the justice of the peace. The only distinction between that case and this is, that in that case the deed was an assignation of a lease and in this case it is a settlement. But the 41st section of the Act, on which the validity of both subscriptions must depend, makes no distinction between testaments and other deeds.

"In *Henry* v. *Reid*, 19th February 1871, 9 Macph. 504, a testament, signed by a notary and two witnesses, on behalf of a blind man, was held invalid because the docquet was not holograph. The Act of 1874, enabling a justice of the peace to act in this respect, places him in the position of a notary.

"I am bound to hold these cases conclusive to the effect that it is essential to the validity of a subscription of a settlement by a justice of peace for a testator who cannot write, that the docquet of the justice of the peace be holograph.

"The defenders seek to assimilate the case to that of a testament executed by a minister for a testator unable to write, in which case, it was said, the formalities required by statute and custom were to some extent dispensed with. But supposing that to be so, there is no reason for holding a justice of the peace to be in the exceptional position of a minister. The statute classes him with a notary-public.

"The defenders quoted a somewhat singular case—*Traill* v. *Traill*, 27th February 1805, M. 15,955—where a testament had been, with the authority of the testator, signed by a minister with the testator's name, and the Court allowed the minister to annex an attestation, as a notary, of his having subscribed the testament, and that having been done they sustained the deed.

"That case regarded the execution of a settlement by a minister, the validity of which depends mainly on custom, not on statute; not by a justice of peace who has nothing but statutory authority. The circumstances were entirely different from those in the present case, and, besides, I am free to confess that I greatly doubt whether that judgment would be repeated if the same circumstances recurred.

"The defenders did not contend that the defect could be remedied in the manner provided by section 39 of the Conveyancing Act 1874, and it is clear, from the case of *Irvine* v. *M'Hardy* that that is so.

"I think that the proposal to write over the signature a holograph docquet is quite inadmissible. What is equivalent to the subscription of the granter is not the signature of the notary, but that along with the docquet attested by two witnesses, and it is not open to doubt that the notary's docquet and signature must both be written at the time when the testator gives the notary the requisite authority.

The defender reclaimed, and argued—The 41st section of the Conveyancing Act began with the words "without prejudice." . . . This showed that if so disposed a person might take advantage of all existing laws, but the section provided a complete system of executing deeds notarially with additional securities not required by common law. Therefore the securities of common law were not required, and it was not right to read them into the section, which only said "subscribe"—a word which an ordinary person would understand to mean "sign." The case of *Traill* v. *Traill*, quoted by the Lord Ordinary, showed that where a testament had been, with the authority of the testator, signed by the minister with the testator's name, the Court allowed the minister to annex an attestation, as notary, of having subscribed it, and then sustained the deed. That case was directly in point, for there was no reason why the privilege extended to a minister when acting as notary should not also be extended to a justice of the peace. The Justice here was prepared to fill in the docquet. This case was distinguishable from *Irvine* v. *M'Hardy*, for that was a case of two competing assignations where a third party would be affected, and the rules as to the solemnities required would be therefore rigorously applied. But this was a case of a testament, and was therefore specially favoured by old common law—see statutes 1540, c. 117, 1555, c. 29, 1579, c. 80. Moreover, here the irregularity could still be cured, and that could not be pleaded in *Irvine*. In the case of *Henry* v. *Reid* no consideration was given to *Traill's* case, the authority considered was very scanty, and it was not till 3 years before the passing of the Act of 1874 that it was decided that a notary's docquet must be holograph. Since then the 1874 Act had been passed to amend the old law with regard to the solemnities necessary to the execution of deeds. For styles of docquets see Carruthers' Book of Styles, 1702, p. 284; Erskine's Inst., App. 4.

Argued for the pursuer—The case of *Henry* v. *Reid* was on all fours with this; there too it was urged that the docquet might be amended, and the case of *Traill* was cited to support the proposition. The law had not been changed in this respect by the 1874 Act, as was shown by the case of *Irvine* v. *M'Hardy*. It was true that the latter case was one of an assignation, but there was no distinction—as regarded this solemnity—between an assignation and a testament. In the schedule to the Act no distinction was drawn between justices, notaries, and ministers, and therefore there was no distinction as to deeds. The case of *Traill* was adversely criticised by More in his Lectures, vol. ii. p. 149, as one that should not be followed; and in any case ministers were in a different position from justices. Further, there was an insuperable difficulty against the proposed rectification of the docquet at this date in sec. 41 of the 1874 Act, which enacted that the various formalities must be gone through "in the presence of" the granter of the deed.

At advising—

LORD ADAM—In this case the late Mrs Campbell or Mackenzie was desirous of making a will, but as she could not write she got the assistance of Mr Colston, a Justice of the Peace, and two law-clerks. Mr Colston was authorised by Mrs Mackenzie to execute the docquet, and the docquet was written out by one of the law-clerks, and it was then signed by Mr Colston as a Justice of the Peace on behalf of Mrs Mackenzie.

The questions then arise:—Is this deed, which has been executed in the manner stated, a good and valid deed? And if not, can it now be put right by the Justice of the Peace affixing a holograph docquet? It was argued to us that a deed executed in the manner this deed has been executed was valid under the Act of 1874, and also valid under the law and practice prior to that Act. As regards the Act of 1874 the question is conclusively settled by authority. The objection, that a signature by a justice of peace to a docquet which is not holograph is not a valid subscription in terms of the Act has been sustained by the unanimous judgment of the Court in two cases, viz., *Henry* v. *Reid* and *Irvine* v. *M'Hardy*. In the case of *Henry* v. *Reid* it was decided that a will, in which the docquet was not holograph, was not a good will. This case was followed by the case of *Irvine* v. *M'Hardy* in 1892, after the passing of the Conveyancing Act of 1874. In that case the deed in question was the assignation to a lease, but unfortunately the docquet was not holograph, and it was decided that it required to be so. It was there decided that the words "by one notary-public or justice of the peace subscribing the same for him," in the 41st section of the Act of 1874, did not mean the subscription only of his name, but meant subscription in the old sense that the docquet as well as the subscription should be in the handwriting of the person signing. If, then, we are to follow these decisions, this will is not good, at least as regards the Act of 1874. As regards the question whether this is a good will according to the law and practice prior to 1874? I know of no authority to the effect that prior to 1874 a justice of the peace had any authority to act as a notary at all, and so this position is, I think, quite untenable.

As to the possibility of curing the defect in this deed by now inserting a holograph docquet, where the law requires certain conditions to be followed, it is necessary, in order to make a valid deed, to conform to them. If that be so, how then can this deed be set up now by a new docquet after the lady's death? The Act of 1874 is conclusive as to this; it required the docquet to be subscribed by a justice of the peace in the presence of the party. As she is now dead that cannot be done.

LORD M'LAREN—I think it is desirable to consider the question which has been argued, both independently of the authorities, and as it is controlled by them.

The case is one of a deed executed by a justice of peace as in place of a notary, in accordance with the provisions of the Conveyancing Act of 1874, but the question is probably the same as if the deed had been notarially executed in the strict sense of the term. It was suggested that a justice, not being a lawyer, might be entitled to deviate slightly from the strict regulations prescribed, without invalidating the will; but I cannot see anything to justify this view, or that any distinction is taken between the case of a notary-public and the case of a justice of the peace acting under the authority of the Conveyancing Act of 1874 as regards the requirements for attestation. Moreover, a justice would presumably acquire some experience in that branch of law which he has to administer, and he has the statute to guide him. But the real question to consider is, whether it is essential to notarial attestation that the docquet should be holograph, and whether this applies to wills as well as to deeds,

Before the enactment of the Statute 1579, c. 80, it sufficed for the execution of a deed, where the granter was unable or could not trust himself to append his signature, that it should be executed by one notary before two witnesses, and I think that the exception in favour of wills which may be signed by one notary before two witnesses was justly ascribed by Mr Campbell to common law, for this reason, viz., that the statute was intended to apply primarily to important obligatory deeds, some of which are enumerated in it, while the rest are included in the phrase "and others of great importance." The distinction is intelligible enough, that the Legislature did not consider wills as obligations of importance for which two notaries and four witnesses would be required. Moreover, the presence of so many persons by the bedside of a dying man would necessarily be so disturbing that the Court would not extend the statute to the case of wills, unless the words of the statute were clear. It will be observed that the Statute of 1579 says nothing as to docquets, but only re-duplicates the persons whose presence shall be necessary for attestation of the fact that the maker of the deed was present and gave authority to the notary, and leaves the form of the docquet under the previous law unaffected. So, too, the Statute 1555, c. 29, which regulates the "sealing and subscriptions of reversions and writs" did not alter the old form. Now, it may be that at common law the docquet might either be holograph or attested by two witnesses; all the requirements as to name and designation, &c., are statutory, but at common law they might be proved subsequently. There is great force, I think, in Mr Campbell's argument that at common law notarial docquets, even if not holograph, might be held good, because the subscription of the witnesses might be considered as applicable to it—I mean they may be considered to be instrumentary witnesses as well as witnesses to the fact of the necessary authority being given. But then the law was considered very carefully in the case of *Henry*, and there it was unanimously

held that a testament executed notarially was invalid because the docquet was not holograph. That must be taken as very strong authority, and even if it had been open to reconsideration, as all law resting upon only one decision must be, it was again considered in *Irvine* v. *M'Hardy*, and was held to be in point and to apply to the 1874 Act.

In the circumstances, as the parties have brought the case before the Division which gave these decisions, I must conclude that we are bound to follow their authority, since there is no doubt as to their application to the case. Had these decisions not been in point, more weight might have been given to the arguments which have been advanced in favour of the validity of the will, but we are precluded from considering these.

LORD KINNEAR—I am of opinion that the question is ruled by the decisions in the cases of *Henry* v. *Reid* and *Irvine M'Hardy*. Both of these cases are binding on us, and we cannot consider any argument against them as though the point were still an open one.

The only question therefore is whether this case is distinguishable from them, and I agree that it is not. The chief ground given by Mr Campbell for distinguishing this from the case of *Irvine* is, that the rules regulating the execution of wills are not so rigorous as those relating to deeds executed *inter vivos*, but that proposition does not apply to *Henry* v. *Reid*, where the question was whether a testament signed on behalf of a blind man was invalid because the docquet was not holograph.

The other ground of distinction was that in the case of a testament any defects of execution might be supplemented by allowing the justice, after the death of the testator, to write in the docquet, and this was justified by the authority of the case of *Traill*. I agree that this is quite inadmissible, both because it is against the express terms of the Act of 1874, which says that the granter of the deed must be present, and also on the more general ground that a will cannot be executed after the death of the testator. I think Professor More's criticism of the case of *Traill* is well founded.

The LORD PRESIDENT was absent.

The Court adhered to the interlocutor of the Lord Ordinary.

Counsel for the Pursuer—Strachan—A. M. Anderson. Agent—John Veitch, Solicitor.

Counsel for the Defenders—W. Campbell—M'Lennan. Agent—D. W. Paterson, S.S.C.

Tuesday, March 12.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

LAIRD *v.* SECURITIES INSURANCE COMPANY, LIMITED.

Insurance—Insurance of Money Deposited with Bank—Conditions of Policy—Default of Payment — Reconstruction — Assignation to Assurer of Claim of Assured.

The pursuer, having lent money on deposit-receipt to an Australian Bank, insured the deposit with the defenders, an insurance company, who guaranteed payment of the deposit with interest, if the debtors made default in repayment of the deposit for more than twenty-one days after the date named in the receipt. The policy was subject, *inter alia*, to the condition that the asssured on receiving payment should hand over to the assurers "the deposit and all his rights in respect thereof." The deposit was due to be paid on 15th May 1893. On 4th April the bank suspended payment. On 26th April a scheme of compromise was sanctioned by the Court of Victoria, which transferred the liabilities of the bank to a new company. On 19th June this scheme was approved, with certain alterations, by the Appeal Court.

Held (*aff.* judgment of Lord Wellwood) that the bank made default by failing to repay the deposit when it became due, and that the pursuer satisfied the condition of the policy by offering to transfer the deposit and his rights in respect thereof as then existing, and was therefore entitled to a decree for the amount of his deposit-receipt.

On 28th June 1889 the trustees acting under a trust-disposition and settlement of James Coutts, Corstorphine House, Corstorphine, deposited a sum of £1000 in the Commercial Bank of Australia. The deposit-receipt was payable on one year's notice, with interest at 4½ per cent. On 6th May 1892 the trustees gave notice to the bank that the deposit would be uplifted upon 15th May 1893. On 17th May 1892 the trustees insured the sum deposited and interest thereon in the Securities Insurance Company, Limited, 26 Old Broad Street, London. The policy of assurance, which was signed by the secretary and two of the directors, was in the following terms:—"Whereas . . . trustees of the late James Coutts . . . (hereinafter called the assured) sometime since deposited with the Commercial Bank of Australia, Limited (hereinafter called the debtors) one thousand pounds, at interest at the rate of £4½ per cent. per annum . . . and the assured are desirous of being insured by the above-named company (hereinafter called the assurers) in manner hereinafter appearing, and have paid to the assurers the sum of one pound five shillings,