

TESTAMENT.

15955

The Lords found, " that the will 1763, and the deed of procuratory of the same date, so far as referred to therein, form a valid and effectual settlement of Walter Bowman's real estate in England, and personal estate wherever situated."

No. 32.

For Henderson, *Solicitor General Blair.* Agent, *James Thomson, W. S.*
 For Wilson, *Craigie.* Agent, *Wm. Keyden, W. S.* For Melvilles, *D. Douglas.*
 Agent, *Alexander Duncan, W. S.* Clerk, *Gordon.*

Fac. Coll. No. 73. p. 165.

1805. February 27.

TRAIL against TRAIL.

John Trail, a small tenant in the county of Aberdeen, and Elizabeth Trail, his wife, executed a mutual testament, bequeathing to the survivor the whole of their little wealth. The testing clause is in these words: " In testimony whereof, we have subscribed, pronounced, and declared these presents, (written on this page by Mr. William Fraser, Minister of Tyrie,) to be our last will and testament, this 18th day of June, 1801 years, in presence of Charles Connan, and John Law, in Rickerstoun, and James Trail in Nether Bryndlie, witnesses specially called; and the above named and designed Elizabeth Trail declared she could not write, and put a pen into the hand of the above named and designed Mr. William Fraser, earnestly requesting that he would subscribe her name for her. This she did in presence of the above named and designed witnesses, place and date as above.

(Signed) JOHN TRAIL.
 ELIZABETH TRAIL.

" *Charles Connan, Witness.*

" *John Law, Witness.*

" *James Trail, Witness.*"

Elizabeth Trail having died, (24th June, 1802) without issue, the validity of this testament came to be discussed between her husband, and her sister Isobel Trail, her nearest of kin.

The Commissary of Aberdeen pronounced this interlocutor. " In respect it admitted by John Trail, that the name Elizabeth Trail, subscribed to the testament produced, is not of the hand-writing of his deceased wife, therefore finds said testament unavailable; prefers the defunct's nearest of kin to the office of executor."

A bill of advocation was presented, and passed.

The Lord Ordinary reported the cause; and the Court remitted it back to his Lordship, to supersede it till the Minister annex an attestation, as a notary, of his having subscribed this testament, and then that his Lordship should sustain it.

It appeared, that a practice had prevailed in the part of the country where this originated, of subscribing testaments in the same way as had been done here. Even at a certain period of our law, one very solemn act, the resignation *ad remanentiam*, was executed in this very way: The act 1555, C. 38. requires, that if the vassal cannot write, the procuratory shall be " subscribed, with his hand at the

No. 33.

A Minister having subscribed a testament with the testator's name instead of his own, on being required to do so by a person who could not write, the testament sustained, upon the Minister attesting the fact in the character of a notary.

No. 33. pen, led by ane authentic notar." A testament is a privileged writ, in so far that where the party cannot himself write, only one notary before two witnesses is required to supply this defect, contrary to the provisions of the act 1579, C. 80, which requires two notaries and four witnesses for all deeds of importance. A parish minister has by custom been allowed to perform the office of a notary in the execution of a testament; Ersk. B. 3. Tit. 2. § 23. The only object of the notary's subscription, is the identification of the paper containing the will of the deceased; and this is completely obtained here, if it be ascertained, that the Minister subscribed the name of Elizabeth Trail by her express mandate, given in presence of the witnesses. This can be yet done by the attestation of the Minister to that effect. For, as it would have been sufficient, if he had subscribed his own name in these circumstances, it would be unjust to defeat the will of the deceased, by his having adopted another method, when the proper one can yet be resorted to.

Lord Ordinary, *Glenlee.* For Advocate, *Wolfe-Murray.* Agent, *James Fraser, W. S.*
 Alt. *Gillies.* Agent, *J. Peat.* Clerk, *Home.*

F.

Fac. Coll. No. 199. p. 446.

Particular Clauses in Testaments; See **CLAUSE.**

Testaments executed abroad; See **FOREIGN.**

Where to be confirmed; See *FORUM COMPETENS.*

Conveyance of an Heritable Subject in Testament; See *QUOD POTUIT NON
 FECIT.*

See **APPENDIX.**