Thursday, February 1.

SECOND DIVISION.

[Lord Craighill, Ordinary.

STEWART *v.* BURNS.

Writ—Testing Clause—Instrumentary Witness—Sale—Rei interventus.

An agreement was entered into in January between two persons in presence of three other persons for the sale and purchase of a licensed public-house, the purchaser to obtain possession at the ensuing Whitsunday. The agreement was committed to writing by one of the three persons present, in duplicate, and both copies were signed by the seller and purchaser, but were not attested. The seller and purchaser each retained a copy. The seller, at the purchaser's request, warned her tenant to remove at the Whitsunday term, and the purchaser leased the house to another tenant, with entry at that term. Thereafter the purchaser, because his tenant failed to obtain a license for the public-house, repudiated the contract. The seller then had a testing clause added to her duplicate of the missive of sale, and caused the three persons who were present when it was signed to adhibit their signatures as witnesses. This was not done until four months after the execution of the missives. In an action at the instance of the seller against the purchaser for implement, the Court, while holding that sufficient *rei interventus* had followed on the contract to render it binding on both parties, were unanimously of opinion that the testing clause in the seller's duplicate missive was filled up and the signatures of the witnesses adhibited competently, and that the missive was therefore a probative document.

This was an action for implement of contract brought by Mrs Stewart, Canongate, Edinburgh, against George Burns, horse-dealer there, in the following circumstances:—The pursuer was proprietor of a public-house with flat above in the Grassmarket, Edinburgh, which in January 1876 she advertised for sale in the following terms:—"Grassmarket, Licensed House, &c. To be sold by public roup, within Dowell's Rooms, at two o'clock afternoon, the Licensed Shop No 1 Grassmarket, as presently occupied by Mr Spence, with flat above, let to a separate tenant, entering from No. 3 Grassmarket, and also from the Vennel, with yard and cellars behind. Rent, £80. Feu-duty nominal. Upset price, £1000." On 13th January 1876 the pursuer and defender met in a shop in the Canongate, and the pursuer agreed to sell, and the defender to purchase, the subject at the price of £1400. When the agreement was entered into there were present George Brechin, a painter in Edinburgh, John Bowles, a brother of the pursuer, and William Stewart her son. George Brechin was requested by the parties to put the agreement in writing, and he accordingly drew out the following missive—"*Edinburgh, 13th January* 1876—I, George Burns, hereby offer Mrs Elizabeth Stewart Fourteen hundred pounds sterling for properties consisting of Licensed Shop No. 1 Grassmarket, Edinburgh, and the whole of the flat first floor above the same entering by No. 3 Grassmarket, and also entering by the Vennel, all as presently owned by her. Which offer is hereby accepted by the said Mrs Elizabeth Stewart. ELIZABETH STEWART.—GEORGE BURNS." This missive was written out by Brechin in duplicate, and both copies were signed by the pursuer and defender, each of whom retained one.

After the contract was concluded the defender let the subjects to a Mr Storrie, with entry at the ensuing term of Whitsunday 1876, and thereafter he requested the pursuer to warn Mr Spence, who was then tenant in the subjects, to remove at the same term. Mr Spence thereupon purchased a shop on the opposite side of the street. Both Spence and Storrie applied to the magistrates for a license, the former for his new shop and the latter for the subject purchased by the defender, and the Magistrates granted Spence's application, but refused Storrie's.

On the 12th May the defender intimated to the pursuer that the bargain was not to go on. He averred (1) that it was a condition of the purchase that he should receive the premises at Whitsunday as licensed premises; and (2) that the pursuer was to blame for the failure of the defender's tenant to get a license for his premises, inasmuch as she had concealed certain dealings between her and Spence which, upon being laid before the Licensing Court, induced the magistrates to prefer Spence to Storrie.

After the defender's repudiation of the contract the pursuer got George Brechin to fill in a testing clause in her duplicate of the agreement above the signatures of her and the defender; and George Brechin, John Bowles, and William Stewart signed as witnesses.

The pursuer pleaded, *inter alia*—"(1.) A valid and effectual contract of sale of the said subjects having been entered into between the pursuer and the defender by the foresaid minute or missive of sale executed by them, the defender is bound to implement and fulfil his part thereof. (2.) *Separatim.* The contract of sale libelled having been followed by *rei interventus*, the same was thereby rendered effectual and binding on the parties. (3.) The said subjects having been sold unconditionally, and without any warranty, express or implied, with reference to the licence, the defender is not entitled to refuse to implement the contract on the ground of withdrawal of the said licence. (4.) The licence having been withdrawn from the said premises in consequence of the proceedings on the part of the defender, or, at all events, on grounds for which the pursuer is not responsible, the defender is bound, notwithstanding the withdrawal, to implement the said contract. (5.) The defender's pleas with regard to (1) the validity of the missives, (2) the alleged essential error on his part, and (3) the pretended fraudulent concealments on the part of the pursuer, cannot be maintained by him in the present action."

The defender pleaded, *inter alia*—"(1) The missives between the parties being informal, the defender is entitled to absolvitor. (2) The missives having been made out in duplicate, and delivered as completed documents, in the state of the defender's duplicate the pursuer's subsequent additions to her duplicate, without the defender's knowledge or consent, are of no effect. (3) The proposed purchase being conditional, and the

pursuer being unable to transfer the premises as licensed premises, the defender is entitled to absolvitor. (4) The licence having been lost by special causes, for which the pursuer is responsible, the defender is entitled to absolvitor. (5) The missives, in any event, implied warrandice that the pursuer knew of nothing and had done nothing likely to prevent a licence being obtained by the defender, or any tenant from him; and the said warrandice not having been made good, the defender is entitled to absolvitor. (6) The defender having been induced to enter into the said missives 1, by essential error caused by the pursuer, and 2, by the pursuer's fraudulent concealment of material circumstances, he is entitled to absolvitor.

On 9th November 1876 the Lord Ordinary, after a proof, pronounced the following interlocutor:—

"... In the first place, and with reference to the first plea in law for the pursuer, and the relative counter-pleas for the defender, finds as matter of fact—(1) That at a meeting between the pursuer and defender on 13th January 1876 the defender agreed to purchase from the pursuer, and the pursuer agreed to sell to the defender, the premises in the Grassmarket of Edinburgh which are described in the summons, and thereupon the writing No. 9 of process, as it was before the signatures of witnesses were adhibited and a testing clause was introduced, and the writing No. 16 of process, were subscribed by the pursuer and the defender; (2) that immediately after subscription the said writing No. 9, as it was when signed by the parties, was delivered to and carried away by the pursuer, and the said writing No. 16 of process was delivered to and carried away by the defender, and both the pursuer and defender then understood and believed that by the signature and the delivery of these writings a contract for the sale and purchase of the said premises had been effectually concluded; (3) that, as delivered and carried away, neither the writing No. 9 of process, nor the writing No. 16 of process, was signed by witnesses or contained a testing clause, and it was then neither intended that either of these writings should be subscribed by witnesses or that a testing clause should be added, the signatures of witnesses, as well as of a testing clause, being at the time considered by the pursuer and the defender to be unnecessary; (4) that George Brechin, John Bowles, and William Stewart, the three persons whose names now appear on the said writing No. 9 of process as instrumentary witnesses, were present when the said agreement between the pursuer and the defender was concluded, and saw the said writings subscribed by the pursuer and by the defender, but none of them were specially called or required at the time when the said writings were signed by the parties to be a witness to their subscriptions; and (5) that the defender having subsequently repudiated the bargain, the said George Brechin, John Bowles, and William Stewart, thereafter—that is to say, sometime in May 1876, on the application of the pursuer, and without communication with the defender, signed as witnesses the said writing No. 9 of process, which was the pursuer's duplicate, and the said George Brechin, by whom the body of the said writings had been written, wrote above the signatures of the pursuer and the defender the testing clause which now appears in that document: Finds as matters of law that, the facts being as above set forth, there is nothing in the circumstances of the case upon which the validity of the said writing No. 9 of process, produced and founded on by the pursuer as a probative writ, can be successfully impugned: In the second place, and *separatim*, with reference to the second plea-in-law for the pursuer, finds as matter of fact (1) that, after the said contract had been concluded as aforesaid, the pursuer, at the request of the defender, warned the tenant of the shop No. 1 Grassmarket, which is the more valuable part of the premises in question, to remove therefrom at the then ensuing term of Whitsunday 1876; (2) that the defender granted a lease of the said shop to a new "tenant for a period of years from said term, but this lease, with the consent of the defender, was renounced before said term of entry, in consequence of a renewal or transfer of the licence for the shop having been refused by the licensing court; and (3) that the said shop is now, and since Whitsunday last has been, without a tenant or occupant: Finds as matter of law that, the facts being as above set forth, *locus pœnitentiæ* is excluded, even on the assumption that the said writing founded on by the pursuer is not entitled to faith as a probative writ: In the third place, and with reference to the other pleas of parties, except the fifth plea, which not being insisted in has been already repelled, and the seventh, consideration of which is meantime delayed; finds, as matters of fact, (1) that the said contract was not entered into by the defender under essential error; (2) that the said shop No. 1 Grassmarket was a licensed shop at the date of the said contract; (3) that it was not a condition of said contract that the licence then held by the tenant of said shop should be transferred to or renewed in favour of the defender, or the tenant of the defender; and (4) that the pursuer did nothing to prevent, and at the time of the sale knew nothing to prevent, the transfer or renewal of said licence: Finds as matters of law that, the facts being as above set forth, the grounds on which the said contract is impeached by the defender cannot be maintained; therefore repels the defences, and finds, declares, and decerns in terms of the first conclusion of the summons; reserving meantime judgment upon the subsequent conclusion, in which decree for damages is sought in the event of the defender's failure to implement the said contract, which has now been found obligatory," &c.

The defender reclaimed, and argued—There was no mandate here to fill up the testing clause. There was no intention to sign before witnesses, but their signatures *ex intervallo* were adhibitted, and that too when Burns was refusing to implement. For such a course there was no authority.

Authorities—Erskine, iii. 2. 20, iv. 2. 27; Dickson on Evidence, i. 731, § 39; *M'Neillie & Cowie*, July 8, 1858, 20 D. 1229; *Shaw* v. *Shaw*, March 6, 1851, 13 D. 877; Duff on Feudal Conveyancing, 16 Menzies' Conveyancing, 3d ed. 114; *Hamilton*, June 19, 1713; M. 16,734; *Home*, June 1730, M. 16,898; *France* v. *Frank*, June 10, 1809, M. 16,824; 5 Pat. App. 278; *Allan* v. *Gilchrist*, March 10, 1875, 2 R. 587; *Walker* v. *Milne*, June 10, 1823, 2 S. 338; *Church of England Insurance Co.* v. *Wink*, July 17, 1857; 19 D.

1085; *Clason* v. *Harvie*, June 25, 1844; 6 D. 1201; *Cowles* v. *Gale*, November 13, 1871; 7 L. R., Ch. 12; *Hill* v. *Arthur*, December 6, 1870, 9 Macph. 223; *Veasey* v. *Malcolm's Trs.*, June 2, 1875, 2 R. 749; *Sutherland* v. *Hay*, December 12, 1845, 8 D. 283.

Argued for the pursuer—The real difficulty here is whether it is any objection to witnesses signing *ex intervallo* that the party has repudiated. *Frank's* case fixed the legality of the signature *ex intervallo*. The only ground really for preventing such a course would be that the deed did not embody the agreement. There was no *locus pœnitentiæ* whatever.

Authorities—37 and 38 Vict. (Conveyancing Act, sec. 39), *Bell* v. *Bell*, 3 D. 1201; *Sinclair* v. *Weddell*, June 13, 1867, 5 Scot. Law Rep. 601.

At advising—

Lord Justice-Clerk—This is a case which raises points of some importance, although the facts are simple enough.—[*His Lordship narrated the facts as given above*]. The entry to these subjects was to be at Whitsunday 1876, and the action is brought by Mrs Stewart to compel implement of the contract between Burns and herself. His reply is that there never was a concluded agreement, and this again is met by the pursuer's production of an *ex facie* probative agreement. Burns says the testing clause and the witnesses' signatures were appended *ex intervallo*, and that moreover even after he had refused to go on with the bargain, at a time indeed when there was *locus pœnitentiæ*. The answer to this is twofold—first, that witnesses may sign at any time if they saw the parties adhibit their signatures; and second, that there was *rei interventus* on the part of the defender Burns.

I am inclined to sustain both pleas. I think that we are bound to look at this missive, because it appears to be a probative document. Indeed nothing relevant has been alleged against it. It is now settled law that it is not essential for a witness to sign in the presence of the granter of a deed, but that he may sign at any time. The object of the subscription of witnesses is merely to make it certain that that really was done which the deed bears to have been done. Now here there is no pretence whatever that the thing was not really done as the witnesses attested it. One of them (Stewart) was representing his mother on the occasion, and the other was the person who himself wrote the agreement. I do not deny that there appears at first some nicety in the question whether such an addition could be made after Burns' repudiation of the contract, but when closely scrutinised that is seen to be in reality a *petitio principii*, for if there were no *locus pœnitentiæ* Burns could not resile, and I think that *locus pœnitentiæ* was entirely excluded.

In a word, the signatures of the witnesses did not alter the position of the contracting parties in any way, they merely altered the evidence of a transaction which truly occurred.

It is not, however, in this case necessary to base our judgment upon that ground, for we have in *rei interventus* ample materials for deciding the question. Burns had every opportunity for knowing his position if he did not do so, and he acted as proprietor, turning out one tenant and replacing him by another, and yet after all he seeks to escape from his bargain. I am for deciding in favour of the pursuer, and finding that there was a concluded contract here between the parties, or at any rate that on the defender's part there was sufficient *rei interventus* to set up a contract.

Lord Ormidale—As to the question of form, whether or not this is a probative writ, I do not think that in holding it to be so we interfere in any way with established rules. It is said that the witnesses were not specially called as such at the date of the adhibition of the signatures. I think it is enough if the witnesses were present and saw the parties sign, or had come and heard them acknowledge their signatures. Then the question comes to be, Can the witnesses adhibit their signatures after an interval, in this case of four months? Now, taking the question step by step, we find—(1) It is settled law that the testing clause of a deed can be added at any period before the deed is produced in judgment. I doubt the soundness of the view that the testing clause is thus filled up on the principle of mandate, because a testing clause can be filled up after the death of the granter, which would involve a mandate remaining in force after the death of the mandant. (2) It is also settled law that a witness does not require to adhibit his signature at the same time as the principal parties. It has been suggested that here the lapse of time had been too great, but it seems to me a very difficult matter to measure the period, if a period is allowed at all, and I cannot rely upon that view.

It may be, I think, here assumed that Burns intimated his repudiation before the witnesses signed, though the record is not clear as to that. That being assumed, however, it is urged that a bar was presented to the signature of the witnesses. But it is to be observed that Mrs Stewart did not interfere with what had occurred; she only got the witnesses to testify to the truth of what had actually taken place, and did not thereby affect the nature of the transaction itself, and accordingly I am disposed to regard that objection as unfounded were it necessary for the disposal of the case.

If it were necessary for the decision of this case, I should not hesitate to decide this point in the pursuer's favour, but we have enough *rei interventus* to bar the defender from resisting successfully the call to pay now made. Mrs Stewart at Burns' request warned out her tenant, and he put in another, and tried to get a renewal of the licence in favour of his new man. All this quite barred him from resiling.

Lastly, it is said Burns must be held to have bargained for a licensed house in making so high an offer as he did; but the answer to that is that Mrs Stewart had no means of giving a guarantee that a new licence would be obtained, and therefore could not have bargained on that footing. To make out such a case would require something very special, and this I cannot find. On the whole matter I concur with the Lord Ordinary.

Lord Gifford—I am of the same opinion, and upon both the grounds stated by your Lordships.

The Court adhered.

Counsel for Pursuer—Fraser—Strachan. Agent—Alexander Gordon, S.S.C.

Counsel for Defender—Vary Campbell. Agent—Hugh Martin, S.S.C.