second parties — that the parochial board were not tied down and restricted to the statutory remedy, but might proceed by way of ordinary action.

The question then comes to be, whether any grounds in equity exist for exemption? I confess there do not apppear to be any to my mind. There was certainly no *mora* on the part of the board, for the statutory notice was annually given to the municipality. The result of the arbitration was a decreet-arbitral against the second parties, and that result points to them as the cause of the delay and non-payment of the rates found to be due. The town council alone were to blame, and no delay would have occurred had it not been for the objection raised by themselves—an objection subsequently by the result shown to have been without due foundation.

Lord Gifford—I concur. The only difficulty I felt was as to the question under the statute, which seemed at first to have something in it, but the second parties failed to show that the special remedy provided by the Act was the sole one, and so at once the question became one of equity.

This was just a statutory debt, and when a debt is due, either by virtue of a statute or *ex contractu*, interest follows as a matter of course—nay when a debt is statutory it stands, I think, in a more favourable position than a contract debt. It would, again, be a great hardship on the other ratepayers were persons allowed to delay payment without incurring the penalty of interest, for this would amount to allowing those who have wrongfully delayed payment to make a gain thereby. No doubt the rate of the interest is a different matter, but some interest is the rule, and 2½ per cent. is about the lowest rate we could allow as a just increment. I accordingly acquiesce in your Lordships' opinions without any difficulty.

The Court answered the question in the affirmative, and allowed interest at the rate of 2½ per cent. per annum on each assessment from the date when it became due.

Counsel for First Party—Dean of Faculty (Fraser) — Rettie. Agents — Curror & Cowper, S.S.C.

Counsel for Second Parties—M'Laren—Mackay. Agents—White-Millar, Allardice, & Robson, S.S.C.

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*Wednesday, June 4.**

SECOND DIVISION.

[Lord Craighill, Ordinary.

CUMMINGS *v.* MACKIE AND OTHERS (SKEOCH'S TRUSTEES).

[*Ante*, p. 268]

Writ—Witness—Statute 1681, *cap.* 5—*Acknowledgment of Subscription.*

Where a party who was not present at the time of signing, afterwards subscribes as witness to the signature, it is sufficient compliance with the provisions of the Statute 1681, c. 5, if he receive from the granter of the writ an acknowledgment of his signature, in whatever manner given, whether by words or by acts.

Jury Trial—Bill of Exceptions—Issue—Statute 1681, *cap.* 5.

Where the following issue was sent to trial:—"Whether A B and C D, the alleged witnesses to the said trust disposition and settlement, or either of them, did not see the said W S subscribe the same, and did not hear him acknowledge his subscription?" and the presiding judge directed the jury in law that "if there be at the time of the witnesses subscribing any sufficient acknowledgment by the party of his signature, in whatever form that acknowledgment may have been made, that is all which is required," counsel for one of the parties excepted to the ruling, on the ground that the direction, even if good law, was inappropriate to the special issue. *Exception* (*dub.* Lord Ormidale) *disallowed.*

This was an action at the instance of Mrs Jane Skeoch or Cumming, and her husband John Cumming, against John Mackie and others, accepting and acting trustees under a trust-disposition and settlement executed by the deceased William Skeoch on April 3, 1878, in which the pursuers sought to reduce the said disposition. The grounds of reduction were sufficiently set forth in the first plea-in-law for the pursuers:—"(1) The deed called for being to the great hurt and prejudice of the pursuers, the same ought to be reduced, in respect that—1st, At the date thereof the said William Skeoch was of unsound mind and incapable of making the same, and the same is not his deed. 2d, The said deed was impetrated from the said William Skeoch while in a weak and facile state of mind, by undue and improper pressure and influence exercised over him, and by fraud and circumvention. 3d, The said deed was granted under essential error. 4th, The alleged signature of the said William Skeoch to the said deed was neither made nor acknowledged in presence of the instrumentary witnesses, and the witnesses did not subscribe as such in presence of each other. 5th, The said deed is also vitiated and erased *in substantialibus*, and is defective in the solemnities required by law, and is otherwise defective and insufficient as a valid legal instrument."

The issues for the trial of the case as finally adjusted (*ante*, p. 268) were as follows:—"(1) Whether Malcolm M'Lean and John Gordon, the alleged witnesses to the said trust-disposition and settlement, or either of them, did not see the said William Skeoch subscribe the same, and did not hear him acknowledge his subscription? (2) Whether at the date of the said trust disposition and settlement the said William Skeoch was in a weak and facile state of mind, and easily imposed on," &c.

The case went to a jury on the 4th and following days of March 1879, Lord Craighill being the presiding judge. His Lordship in charging the jury directed them in point of law, with regard to the first of the above issues, that "if there be at the time of the witnesses subscribing any sufficient acknowledgment by the party of his signature, in whatever form that acknowledgment may have been made, that is all which is required." Pursuer's counsel excepted and demanded that his Lordship should direct the jury "that the witnesses must have heard the party acknowledge

*Decided May 30, 1879.

by his own spoken words his subscription;" and on his Lordship refusing so to direct, pursuer's counsel excepted to the ruling. The jury found for the defenders on both issues.

The pursuer's bill of exceptions subsequently came to be heard before the Second Division, and also a motion at his instance for a new trial, on the ground that the jury's verdict was contrary to the weight of the evidence led. Their Lordships granted a rule on the defenders to show cause, and heard the two motions at the same time.

It was argued for the pursuer, in support of his exceptions, that the true interpretation of the Statute 1681, cap. 5 ("concerning probative witnesses in writs and executions") was that the acknowledgment by the granter to a witness who had not seen him sign must be by his own expressly spoken words, and that Lord Craighill's direction to the jury was therefore faulty in point of law. The principles laid down by Dickson on Evidence, sec. 695, and Bell on Testing of Deeds, p. 272, were not sound law.

Authorities—*Morrison* v. *MacLean's Trustees*, Feb. 27, 1862, 24 D. 625; *The Earl of Fife's* case, October 29, 1816, 1 Murray 88—Nov. 30, 1819, F.C. —July 17. 1823, 1 Sh. Apps. 498—Dec. 22, 1825, 4 S. 335—May 22, 1826, 2 W. and S. 166; Bell's Lect. 52; Menzies' Lect.; Erskine's Inst. iii. 2, 13; Bell's Principles, sec. 2226; Bell's Comm. (M'Laren's Ed.) i. 341; Tait on Evidence, 90 *et seq.*; More's Lect. ii. 295; Ross' Bell's Law Dict. 453; Ross' Lect. 149; Sir Geo. Mackenzie on the Statute 1681, c. 5.

The defenders argued—There was nothing in the statute nor in subsequent decisions or authorities by which the acknowledgment necessary was limited to expressly spoken words; it might be made in any sufficient way—see also Lord Eskgrove's opinion on the case of *Balfour* v. *Applin & Steel*, quoted in Bell on Testing of Deeds, p. 251 *et. seq.* On the rule to show cause, the defenders submitted that the weight of the evidence on which the verdict proceeded was in their favour.

At advising—

Lord Justice-Clerk—The point here raised is an interesting one, the more so as I am not aware of any direct authority upon the law as laid down by the presiding judge. The point has been often mooted, but there seems to be no decided case in which it has been given effect to. The law which his Lordship intended to lay down to the jury is this—"The Act 1681 requires that where the witness does not see the granter subscribe, the latter must, in order to authorise the witness in signing his name, acknowledge his signature in his presence, but there is no necessity for a verbal acknowledgment provided that the acts or other indications used are such as to leave no doubt upon the jury's mind." That was the legal proposition which he laid down to the jury, and I cannot say that it was defective in law. There is sufficient authority for it, and it seems to be in conformity with the statute; for the words there are—"That no witness shall subscribe as witness to any partie's subscription unless he then know that partie and saw him subscribe, or saw or heard him give warrand to a nottar or nottars to subscribe for him, and in evidence thereof touch the nottar's pen, or that the partie did at the time of the witnesses subscribing acknowledge his subscription; otherwise the saids witnesses shall be repute and punished as accessorie to forgerie." Therefore the Act provides only that at the time of the witness' subscribing the granter shall acknowledge his subscription, and the only inquiry which can now take place is the simple one—Did the witness, or did he not, receive from the granter an acknowledgment of his subscription before signing. There is certainly a danger (as the Dean of Faculty pointed out) in admitting any doubtful words or deeds as sufficient, but I think that even acts, if they be sufficiently clear, would amount to acknowledgment under the statute. If this be so, his Lordship was quite right. Lord Craighill does not say that anything in the way of acknowledgment is sufficient, but "if there be at the time of the witnesses subscribing any sufficient acknowledgment by the party of his signature, in whatever form that acknowledgment may have been made, that is all which is required." It may be made by words, which is the commoner and less ambiguous method, or by acts, in which case they must be more precisely and carefully scanned. That is my view of the general proposition raised in this issue. As applied to Act of Parliament, his Lordship's view seems to be sound, but I am not prepared to say what modifications might have been necessary had the case been presented in a more precise and specific form. If it had been a case of acknowledgment by acts only, I should have desiderated some allegation of the kind of transaction which took place, and the kind of act to be set up as importing acknowledgment, but as it is we have enough, and on the face of it there is no ground to sustain this exception. It is clear that the testator did acknowledge his subscription by words, although he did not directly say "that is my subscription," and a testator may acknowledge his signature in many ways without expressly saying that.

I therefore think that on both points his Lordship was right. I shall not go into the authorities, but I may state that the *Earl of Fife's* case is on the whole unfavourable to the pursuer, and that I have looked there in vain for the slightest indication that express words are essential to fulfil the Act of Parliament. If they be clear and explicit, although inferential, I think they are sufficient. I shall not touch on any other authority; the whole question is raised and stated precisely by Bell on the Testing of Deeds.

I am therefore for refusing the bill of exceptions on this head, and in coming to the second question, a corollary of the first—whether the law laid down by the judge was not misleading as applied to the issue in question— I shall not disguise that as a verbal criticism it appears to have some weight. But I am inclined to think that the real point put to the jury was put to them under the statute, and that whatever is held to fulfil the statute warrants the negativing of the issue and a verdict for the defenders. Now, I think the substance of the statute has been fulfilled, and we could hardly mend the issue if we were to try.

In regard to the motion for a new trial, I think it is hopeless. It is true the evidence does not at all tend one way, but all the doubtful matter was fairly before the jury. From the words used at the time (although there is some conflict of evidence as to these), and from the whole circumstances of the case, I am satisfied that if it be pos-

sible to prove acknowledgment by words importing such a meaning, the thing has been amply done. We cannot now go back upon the jury's verdict.

On the whole matter, I am for refusing the bill of exceptions, and also the motion for a new trial, and for discharging the rule already granted.

Lord Ormidale—In regard to the motion for a new trial on the ground that the verdict given was contrary to the weight of the evidence, I entirely concur with your Lordship. It is a matter for the jury to decide, and unless they have gone flagrantly wrong it is not the practice of the Court to differ from them on mere questions of evidence, especially in a jury question proper, such as this, and where the judge has concurred with the jury, as he does here. No doubt there is here some evidence which may have been, and probably was, severely criticised by the jury, and which might have led to a different result; but since the whole case was fairly before them I am unwilling to disturb their verdict. I therefore concur in discharging the rule and refusing the pursuer's motion.

I have thus far assumed that there was no law in the matter, but objections have been taken to the directions given by the presiding judge. And here I confess I have felt a difficulty which is not yet wholly removed. We must look at the issue, and judge of the law according to that; that is always the proper course. The issue is sent for the judge to explain to the jury, and right or wrong the issue sent is not then to be criticised by him. He must explain it, and direct accordingly. Now, I agree with your Lordship's views as to the general law applicable to the testing of deeds, and I will not enter upon the authorities quoted further than to remark that I do not get from them this law—which would be necessary for the pursuer's success—that no acknowledgment save oral sound from the testator is sufficient. But does the issue admit of this general law? It is a very specific one—[*reads the issue*]. But the judge takes it thus—he lays down that it is of no consequence whether the witness Gordon did or did not hear the testator acknowledge his signature (there is no doubt that he did not see him sign) provided the jury be satisfied that in some other way the testator did acknowledge it to him. Now, does this answer the issue? That is my difficulty; and it is rather hard to obviate it. Lord Craighill clearly did not tie down the jury to the simple question whether Gordon did or did not hear the testator acknowledge; and by so doing, was he not rather putting a new face on the matter? It is suggested that the issue might yet be amended. I think it could only be done by putting this one in its place, "Did Gordon hear, or did he not?" and parties could then go to trial on this definite question. As it was, I certainly think the jury may have been misled by his Lordship's direction in law. I have great difficulty in sustaining that direction; but as I understand that all your Lordships are of a different opinion, and look upon the issue as really less specific than I have done, I am loath to dissent from your Lordships upon a critical and technical objection, although I considered it my duty to state the difficulty which occurred to my mind.

Lord Gifford—I agree with your Lordship in the chair on both branches of the case.

The first question is, Whether we shall allow or disallow a bill of exceptions, and these exceptions may be considered, first, abstractly, in reference to law; and second, particularly, in reference to this issue.

First, then, I agree with your Lordship that we are quite entitled for all that has come and gone to affirm that the acknowledgment may be legally made in any sufficient way. I think the Lord Ordinary's ruling correct in abstract law; it really is just the words of the statute—"the party did at the time of the witnesses subscribing acknowledge his subscription." This is all the Act provides. The pursuers would have us insert "in words," but there is no such expression used. It is only required that there be no doubt of the acknowledgment really having been made. Now, a party may acknowledge his signature in various ways—by words, which is the ordinary way—but if he cannot speak, what then? The pursuer would say 'then not at all' but suppose a man unable to speak should write down his acknowledgment and point to his signature, or should speak on his fingers as dumb men do, surely that would be good in law. Why should we insist upon the word "hear"—a word, I think, expressly excluded from the statute. Lord Craighill ruled that "if there be at the time of the witnesses subscribing any sufficient acknowledgment by the party of his signature, in whatever form that acknowledgment may have been made, that is all which is required." I think that is good law, and I am for disallowing the exception; and as to the ruling which the pursuer asked, to the effect that "the witnesses must have heard the party acknowledge by his own spoken words his subscription," I think his Lordship was right to refuse so to rule. It would have been against the statute, I think, and the cases cited by the pursuer appear to me to go against rather than for him. I was unable to find in the authorities which Mr Nevay quoted anything to establish the proposition that the acknowledgment must necessarily be verbal.

Secondly, as to the issue, and the proposition that the direction though abstractly right may have misled the jury, I am disposed to think that the issue was meant to be one framed under the statute, and that as a fair interpretation the general question was to be tried, whether the witness had heard or received an acknowledgment from the testator. Still, I should be by no means averse to see the issue amended, for this is just the meaning of the 29th section of the recent Court of Session Act 1868. This section was just intended to avoid delay in going over the same question again and again. At the same time, such a course does not seem to be necessary here.

As to the motion for a new trial, I can add nothing to what your Lordships have said except this, that the weight of evidence seems to me to be much more with than against the verdict pronounced by the jury.

Lord Craighill—Three questions have here been raised—1st, as to a new trial; 2d, whether the law laid down was good, quite apart from the terms of this issue? and 3d, whether the law, though abstractly good, was appropriate to the issue or not?

As to the 1st, I entirely agree with what your Lordships have said.

As to the 2d, I was of opinion that nothing

had ever been said or done either in the House of Lords or in this Court by which the interpretation of the Statute 1681, cap. 5, is limited; and the question remains simply—Did the witnesses see the granter subscribe, or if one of them did not, did he hear him acknowledge his signature? And the question of fact for the jury was just this—Was the acknowledgment, if any, a sufficient one? So far as the statute goes, and so far as the cases cited go, I see no authority for the pursuer's view, but rather authority against him. I therefore hold the law which I laid down to be, viewed abstractly, good.

The 3d point remains—Allowing it to be good law, is it law to introduce into this trial in accordance with this issue, or was the issue so expressed as to include only acknowledgment by word of mouth? I did not take the latter view. The case, as I thought, was taken to trial on a general issue set forth upon record as to the sufficiency of the execution of the deed—whether or not it was duly signed and executed by the testator, and was or was not deficient in the solemnities required by law. This was the question sent to the jury. The inquiry was—"Did one or other of the witnesses fail to see the testator sign, and if so, did he or did he not receive from the testator any sufficient acknowledgment of his signature?" If words are the only legal form of acknowledgment according to the law of Scotland, then there is only one question possible, but if a granter may acknowledge by any form sufficient, then the issue must be so read as to include the double question.

I think that the *Earl of Fife's* case supports my view, and that there never has been any limitation of the general words of the statute. On the whole matter, I am of opinion that the exceptions should be disallowed, and I concur entirely in the views taken by your Lordship in the chair.

The Court accordingly disallowed the exceptions, and discharged the rule.

Counsel for Pursuers—Dean of Faculty (Fraser)—Nevay. Agent—Robert Broatch, L.A.

Counsel for Defenders—Guthrie Smith—Gebbie. Agents—Adamson & Gulland, W.S.

Thursday, June 5.

SECOND DIVISION.

[Lord Adam, Ordinary.

HOWDEN AND OTHERS (HALDANE'S TRUSTEES) *v.* THE ELGIN AND LOSSIEMOUTH HARBOUR COMPANY.

Right in Security—Mortgage—Public Company—Action for Repayment of Principal of Money Lent to a Public Company—Stat. 8 *Vict. c.* 17 (*Companies Clauses Act* 1845), sec. 54.

In virtue of powers conferred by their incorporating Act, a harbour company borrowed various sums of money upon the security of the rates and duties payable to the directors. In the mortgages granted by the company there was no express obligation to repay the principal sums. A later Act was passed in which it was again provided that all rates and duties granted by the Act, and all rents and other moneys which should come into the hands of the company in virtue of the Act, should be made subject and liable to the payment of all sums of money borrowed or then due by the company. This Act also incorporated the Companies Clauses Act 1845, the 54th section of which provided that in such mortgages as the one in question, if no time were fixed for the repayment of the principal sum, the creditor might after twelve months call it up upon six months' notice. *Held*, in an action for repayment of the principal sums, that the 54th section of the Companies Clauses Act applied, and that the pursuers were entitled to decree, it being no answer that a decree might be purposeless as against such a company.

In this action, the pursuers Thomas Howden and others, trustees of the late Miss Isabella Haldane, claimed payment from the Elgin and Lossiemouth Harbour Company, incorporated by the Elgin and Lossiemouth Harbour Act 1856, of two sums of £1000 contained in mortgages dated November 1854, granted by the Harbour Company to various parties, by whom they had been assigned to Miss Haldane, in whose right the pursuers were, with interest at 5 per cent. from May 1878 till payment. The defenders were incorporated under the Act 4 and 5 Will. IV. c. 86, by the name of "The Stotfield and Lossiemouth Harbour Company." By the 49th section of that Act the directors were empowered to borrow such sums of money as were necessary for the purposes of the Act upon security of the rates and duties payable in virtue of the Act. The 50th section of the Act provided—"That the interest of the money that shall be borrowed on the security of the rates as aforesaid shall, from the time the said money or any part thereof shall have been advanced, be paid half-yearly to the several parties entitled thereto, in preference to any interest or dividends due and payable by virtue of this Act to the proprietors of the said company, or any of them, and shall from time to time be fully paid and discharged or provided for before the yearly or other interests or dividends due to the said proprietors, or any of them, shall be paid."

This Act was repealed by an Act passed in 1856 (19 and 20 Vict. c. 67). By the 2d section of that Act the previous Act of 4 and 5 Will. IV. c. 86 was repealed. By the 7th section of the latter Act it was provided that all rates and duties, and all rents and other moneys coming into the hands of the company under and in virtue of the Act, should be subject and liable to the payment of all sums of money borrowed on security and due and owing on the credit of the first recited Act, and of all interests due or that might become due thereon. And by the 12th section it was further provided, *inter alia*, that all debts and moneys which before the passing of the last-mentioned Act were due or owing by the company under the first-mentioned Act should, with all interest (if any) due or to accrue thereon, be paid by, or be recoverable from, the company under the Act second above mentioned.

By the 3d section "The Companies Clauses (Scotland) Act 1845" (8 Vict. c. 17), and "The Lands Clauses Consolidation (Scotland) Act 1845" (8 Vict. cap. 19) were incorporated. The 9th