[30*th July* 1840.]

JOHN KEDDER or CALDER, Appellant.[1] (No. 11.)

[*Lord Advocate* (*Murray*)—*Sir W. Follett.*]

Mrs. ISOBEL REID and others, Respondents.

[*Attorney General* (*Campbell*)—*Dr. Lushington.*]

Et e contra.

Writ — Vitiation. — In a mortis causa disposition of lands the letters "ohn" in the word "John," the Christian name of the apparent disponee, were written on erasures throughout the body of the deed. It was admitted, that the word "James" had stood in place of "John" throughout. In the testing clause, after the words "are subscribed," there were inserted the words "in favour of "the said John Kedder my son," but no notice was therein taken of the erasures which existed in the body of the deed: — Held (affirming the judgment of the Court of Session), that the deed was invalid.

Proof — Writ. — Held (affirming the judgment of the Court of Session) incompetent to allow proof by the writer and instrumentary witnesses that important words in a deed were written upon erasures in presence of the grantor, before or at the time of his subscribing the deed, and that the testing clause was filled up in his presence.

Writ — Testing Clause. — Observed per Lord Brougham, "The practice of postponing the filling up" (the testing clause) "is greatly to be discountenanced, and where it "is necessary after execution to take notice in the testing "clause of an erasure or alteration, such testing clause

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[1] 12 S., D., & B., 681, and 13 S., D., & B., 619; and Fac. Coll.

" should not be filled up, unless accompanied with some " act by the maker of the instrument, evidencing that he " was conusant of the notice in the testing clause."

Costs.—There cannot be a cross appeal merely as to the question of costs.—See p. 218.

1st Division.

Lords Ordinary Moncreiff and Cockburn.

THE late Mr. James Kedder of Daviesdykes executed a mortis causa disposition, purporting ex facie to be in favour of a natural son, John Kedder, but the christian name of the apparent grantee, with the exception of the initial letter " J," was written on an erasure in the body of the deed. In two places the word " junior " formed part of the designation, a term inapplicable to the party whose name appeared over the erasure. The testing clause ran thus: " In witness, &c., these pre- " sents, written upon this and the two preceding pages " of stamped paper by James Naismyth, apprentice " to William Hamilton, written in Hamilton, are sub- " scribed by me, in favour of the said John Kedder, " my son, at Daviesdykes, &c., before these witnesses, " the said William Hamilton, David Marshall, esq., " of Mill-land, and the said James Naismyth, writer " hereof." No erasure occurred in the testing clause, but no reference was therein made to any erasure in the deed.

An action of reduction was brought by the respondents, who are distant relations and heirs-at-law of the grantor of the deed, in November 1830, on the ground that the name John was written on an erasure throughout the deed, except in the testing clause, which bore, " subscribed by me in favour of the said John Kedder, " my son, at Daviesdykes, this 6th day of October " 1810," &c. The appellant was described as residing at Kirkhall; and although the grantor had other two

illegitimate sons, James and Thomas, neither of them resided at Kirkhall.

It was admitted that the word "John," throughout the deed, had been originally written "James;" but it was alleged that the mistake was noticed by the grantor when the deed was read over to him, and the name written correctly in the testing clause, and corrected throughout the other parts of the deed in the testator's presence before signing.

Statement.

Lord Moncreiff, before whom the cause originally depended, found that this latter averment might be competently proved by the writer and instrumentary witnesses, but the Court, on 24th June 1834, altered, and found that such proof was not competent.

The case having come to depend before Lord Cockburn, as junior Lord Ordinary, his Lordship (9th December 1834) pronounced this interlocutor:—

"Finds, that the deed of 6th October 1810, sought "to be reduced, is invalid, and therefore reduces the "same, as also the instrument of sasine following there-"on, and decerns: Finds the pursuers entitled to the "expenses incurred by them in discussing the re-"ductive conclusions: Appoints an account thereof to "be given in; and, when lodged, remits the same to "the auditor to tax, and report: Quoad ultra, appoints "parties to be heard."[1]

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[1] The above interlocutor was accompanied by the following note:—
"The summons contains conclusions for removing and for past "profits. It is in reference to these that the Lord Ordinary has ap-"pointed the parties to be heard, as these matters have not yet been "discussed, and could scarcely be so till the validity of the deed should "be finally determined. As to the reduction, the Court having decided "that the evidence which Lord Moncreiff had directed to be received is "inadmissible, the deed must be considered strictly by itself, and no "regard can be paid to the moral probabilities urged on either side.

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Thereafter, on 16th December 1834, his Lordship, " having heard parties procurators on a motion by the " pursuers for a decree of removing, refuses the motion,

" Now, it is admitted that the word John is written upon erasures, " except where it occurs in the testing clause, and that the erased word " was James. This erasure occurs in the most important part of the " deed, the name of the disponee, and is in every part where this name " is; and the sole question is, whether the objection arising from the " vitiation has been legally removed by the testing clause? This clause " declares, that 'these presents' are subscribed by the granter 'in favour " 'of the said John Kedder, my son,' and the specification of John in " this clause is said by the defender to be a sufficient legal correction of " the error and of the vitiation in the body of the instrument, especially " as a christian name was not necessary, and as the deed contains words " (such as, 'residing at Kirkhall, my son') which adequately denote the " person meant. But here the granter, whether necessarily or not, chose " to designate his disponee by the christian name, and has thus made the " word essential. Now the testing clause is not only inadequate, but, " in reference to legal precedent, it is dangerous as a substitute for the " original use of the right name, or as a correction of this essential " erasure; because, so far as appears from the deed, there is not enough " to exclude the supposition that James may have been the person truly " meant,—that this word may have been erased, and John put in after " signature,—and that the testing clause may have been made to suit " the instrument thus altered; and as testing clauses are generally filled " in after subscription, this may often be done. There is said to be a " legal presumption, that testing clauses are written before subscription; " but any such presumption must be controlled by the circumstances " appearing on the instrument. Now the two last words of this testing " clause, viz. 'writer hereof,' though they were superfluous, have evi- " dently been added after the granter's signature, and by a different " hand. But independently of this, the very mode in which the alleged " error has been attempted to be corrected, seems inconsistent with the " idea that it was discovered prior to subscription; because, if it had " been known, it is scarcely credible that it would not have been cor- " rected fully and directly, and by express words, especially as there was " a whole page left clear, instead of merely slipping in the word John, " without even noticing any erasure. But assuming the clause to have " been written before the granter signed, it does not follow from any " thing it contains, that the word James had been previously erased. " Even 'the said John,' which is what the defender relies on, does not " establish that there was such a name in the deed at any time; for, that " word being on an erasure, is in law not there at all. There are cases " where a slighter defect has proved fatal; but none where one so strong " has been disregarded. The subsequent filling in of testing clauses " being legal and usual, it is impossible not to see the consequences of

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"in respect that the interlocutor reducing the deed is "not final, and the defender states that he means to "reclaim."

The respondents reclaimed against this last interlocutor, and the appellant against the interlocutor of 9th December.

Judgment of Court, 6th Mar. 1835.

The Court, on the note for the appellant, pronounced this interlocutor:—"Adhere, except as to expenses; "alter in that respect, and find no expenses due." And on the note for the respondent pronounced this interlocutor:—"Alter the interlocutor reclaimed against, "and decern in the removing prayed for; quoad ultra, "remit to the Lord Ordinary to hear parties, and to "do further in the cause as shall be just."[1]

"allowing one name to be changed for another, by erasing the one first "inserted, and then without openly noticing this putting a new name to "fit it into the testing clause."

[1] *Appellant's Authorities.*—(*As to vitiation.*) Keillor v. Thomson's Trustees, 3 S. & D. 396; Ersk. b. iii. tit. 9. s. 8; Stair, b. iv. tit. 42. s. 19; Adam v. Drummond, 12th June 1810, Fac. Coll.; Wright v. M'Leod, 8th Feb. 1672, Mor. 11440; Lockhart v. Hamilton, 5th March 1706, Mor. 16939; Livingston v. Napier, 3d March 1762, affirmed 11th March 1765, 31 Lords Jour. 71; Gordon v. Brodie, 20th July 1773, 5 Bro. Supp. 587; Douglas v. Chalmers, 3d March 1762, ibid.; Henderson v. Dalrymple, 6th March 1776, Hailes's Dec. 695; Hamilton v. Lord A. Hamilton, 24th Jan. 1824, 2 S. & D. 640; Gordon v. Earl of Fife, 9th March 1827, 5 S. & D. 517, (but as to authority of that case, see post, p. 207); Gaywood v. M'Eand, 19th June 1828, 6 S. & D. 991; Morton, 4 W. & S. 379; E. of Cassillis, 9 S. & D. 663.—(*As to competency of parole proof.*) 3 Jurid. Sty. 12; Frank, 9th July 1793, Mor. 16822; Hepburn v. Lyall, 14th Dec. 1672, Mor. 12273; Hamilton v. Sinclair, 16th Dec. 1621, Mor. 16925; May v. Ross, 23d Feb. 1667, Mor. 12279; Pittillo v. Forrester, 22d Nov. 1671, Mor. 11,536; Johnstone v. Johnstone, Feb. 1688, Mor. 17063; Livingstone v. Nairne, 19th Feb. 1702, Mor. 12282; Arrot v. Garden, Feb. 1730, Mor. 12285; Durie and Doig v. Durie, 9th Feb. 1754, Mor. 16,938; Bank of Scotland v. Creditors of Telfer, 17th Feb. 1790, Mor. 16,909; Bell's Test. Deeds, p. 234; Swaney v. Bank of Scotland, 12th Dec. 1807, Fac. Coll.; Beveridge, 13th July 1822, 3 Murr. 10; M'Leod, 21st June 1824, 3 Murr. 432; M'Kellar, 28th May 1828, 4 Murr. 543.

Respondents Authorities.—(*As to parole proof.*) Bell's Test. Deeds,

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John Kedder appealed, and there was a cross appeal for costs; but the judgment was affirmed, on the grounds stated by the Lord Chancellor and Lord Brougham. The opinions of their Lordships will be found in the report of the next case,—Earl of Strathmore v. Sir J. D. Paul and others, No. 12, post, p. 189.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors, in so far as therein complained of, be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is also further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be and is hereby remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

DEANS and DUNLOP—SPOTTISWOODE and ROBERTSON, Solicitors.

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p. 104 to 121; Master, 4 T. R. 320, 2 H. Black. 141; Murchie, 1st July 1797, Mor. 1458; Hamilton, 1st Dec. 1824, 3 S. & D. 345; Thomson on Bills, 206; Innes, 10th March 1827, 5 S. & D. 559, and 2 W. & S. 637.