Case 9.
Fountain-hall, 15 July 1710.
Forbes, 14 July 1710.

Katherine Moniepenny, Widow, - - *Appellant;*
John Brown, and Iſabel his Wife, - - *Reſpondents.*

15th *May* 1711.

Teſtament.—A teſtament executed *in extremis* reduced, where the teſtator's hand was ſupported and aſſiſted in writing the latter part of his name.

THE reſpondent Iſabel, ſiſter to the late George Moncrieff of Sauchop, and John Brown her huſband, brought an action before the Court of Seſſion for reduction of Mr. Moncrieff's laſt will and teſtament as not having been duly executed. It bore date the 19th of November 1707, the day of Mr. Moncrieff's death, and by it great part of his perſonal eſtate was bequeathed to the appellant his widow, whom he appointed executrix. A proof was taken in this action, by which it appeared that the deceaſed, whoſe diſorder was a conſumption, on the ſaid 19th of November, the day of his death, gave directions to one Watſon for drawing the will, and approved of it when read over to him; that he wrote part of his name to the will, (George Mon) but was aſſiſted in writing the latter part, which differed from the mode in which the deceaſed had been accuſtomed to ſpell his name; and that he died a ſhort time afterwards.

The Court on the 14th of July 1710 "declared the ſaid teſta-"ment null and void, the ſubſcription not being finiſhed by the "deceaſed without aſſiſtance, nor executed according to law." And by a ſecond interlocutor on the 15th of November 1710, the Court "found, that the teſtator did not complete his ſubſcrip-"tion, but that his hand wavering he was ſupported by the writer, "who aſſiſted him to write the laſt ſyllable of his name, and "therefore declared the ſaid will null and void."

Upon the appellant's petition witneſſes were re-examined upon this point, whether they had heard the teſtator acknowledge his ſubſcription after the will was ſigned; and the Court by their interlocutor on the 3d of February 1711 "found this not proved, "and therefore adhered to the former interlocutors, and reduced "the ſaid will."

Entered, 22 March 1710-11.

The appeal was brought from "a decree of the Lords of "Council and Seſſion of the 14th of July 1710, and the affirm-"ance thereof the 3d of February following."

Heads of the Appellant's Argument.

The will is in itſelf a moſt juſt and equal diſpoſition of the perſonal eſtate of the teſtator. All the witneſſes agree, too, that the teſtator was of perfect and ſound judgment, and that he moſt diſtinctly gave directions to Watſon to write the will as it now ſtands, and named and ſent for the particular perſons that he wiſhed to have as witneſſes to the execution of it. And Watſon having written out the will according to theſe directions, he read the ſame to the teſtator, who being aſked if he was pleaſed therewith,

with, anſwered he was very well pleaſed: that thereupon the teſtator ſigned the ſame, and wrote *George Mon* without any aſſiſtance; but Watſon perceiving his hand to waver took him by the "ſhackle-bone," and ſupported his hand while he wrote the reſt of his name; yet ſince he lived ſome time after ſigning the ſaid will, and had ſo fully given directions for having it drawn in the manner it now appears, it ought to be eſteemed his deed, and duly executed by him. And though there was ſome little variation from the teſtator's uſual mode of ſpelling, indulgences of this kind ought always to be allowed to dying perſons. Nor is it of any moment that the witneſſes did not hear the teſtator acknowledge his ſubſcription; that is only requiſite, where witneſſes are not preſent when a deed is ſigned: but in this caſe, the four witneſſes heard the teſtator give directions to write the will, heard him approve of it when read to him, and were preſent in the room and *ſaw* (*a*) him ſign, which is all that the law of Scotland requires.

The laws of all nations have agreed in this, *ut ultima voluntas defuncti ſortiatur effectum*, and therefore ſeveral things neceſſary to complete deeds *inter vivos* are diſpenſed with in wills, where the principal thing is the indication of the teſtator's purpoſe.

Heads of the Reſpondents' Argument.

In matters of this nature the law does not regard intention as ſufficient, though never ſo carefully expreſſed, if that intention was not reduced to a complete and formal act. The teſtament in queſtion can never be deemed to have been completed by the teſtator himſelf, ſince the ſubſcription was not finiſhed by himſelf, and the laſt part of it appears to be of a different hand, and more regularly written than the firſt part of it; and the name is ſpelled in a different way from what the teſtator had been accuſtomed to, and in the manner it is written by Watſon in the body of the will. It was further not executed according to law, for though there were four ſubſcribing witneſſes, yet three of them could not poſitively depone that they ſaw the teſtator ſign the will from his poſition in bed, neither did they hear him own his ſubſcription, after it was ſigned; and without one of theſe, by the law of Scotland no will or deed can be complete. "Si quæramus an valeat "teſtamentum, in primis animadvertere debemus, an is qui fecerit "teſtamentum, habuerit teſtamenti factionem; deinde ſi habue-"rit, requiremus, an ſecundum regulas juris civilis teſtatus ſit." Digeſt. L. 28. t. 1. 1681, c. 5.

Whatever favourable interpretation wills may receive, when once ſolemnly completed, it is abſolutely neceſſary that the rules of law in the execution of them ſhould be exactly obſerved.

After hearing counſel, *It is ordered and adjudged, that the petition and appeal of Katherine Moniepenny be diſmiſſed, and that the decree therein complained of be affirmed.* Judgment, 15 May 1711.

For Appellant, *P. King.*
For Reſpondents, *Tho. Lutwyche.* *James Graham.*

(*a*) The reſpondents ſtate that the witneſſes *did not ſee* him ſign. The fact appears from Fountainhall to have been, that they ſaw him take the pen in his hand, but from his poſition in bed Watſon only ſaw what followed.