No. 68. Sir JAMES DUFF, Appellant.—*Warren—Thomson—Moncreiff.* EARL of FIFE, Respondent.—*Gifford—Clerk—Cranstoun—Jeffrey—Murray—Cockburn.*

Title to Pursue—Writ—Stat. 1597, *c.*185.—Held,—1.—(affirming the judgment of the Court of Session,) That a party who was served heir of line to the granter of an entail and trust-deed, was not prevented from reducing them by the existence of a prior entail and trust-deed, under which he was called as an heir of entail, but excluded from possessing during his life; and,—2.—(reversing the judgment,) That blindness was not per se a legal incapacity from signing a deed; and that such deed being ex facie probative, it was incumbent on the party objecting to show that it had not been executed in terms of the statutes.

July 17. 1823.

2D DIVISION.
Lord Pitmilly.

THE late James Earl of Fife succeeded in 1765 to entailed estates belonging to the family, and during the course of his life acquired by purchase extensive landed property, the titles of which he took to himself in fee-simple. His immediate younger brother was the Honourable Alexander Duff, who had a son, James, the present respondent. The Earl had no lawful issue; but he had a natural son, Sir James Duff, the appellant.

In 1789 his Lordship executed an entail of his fee-simple estates, by which he disponed them 'to myself and the heirs-male 'of my body; whom failing, to Alexander Duff, my eldest bro-'ther-german, and the heirs-male of his body; whom failing, to 'George Duff, my second brother-german, and the heirs-male of 'his body; whom failing, to Ludovic Duff, my third brother-'german, and the heirs-male of his body;' whom failing, a series of twenty-two nominatim substitutes, and the heirs-male of their bodies; 'whom all failing, to the other heirs-male of the deceased 'William Duff of Braco, my father's cousin-german; whom fail-'ing, to the heirs whatsoever of my body; whom failing, to the 'heirs whatsoever of the bodies of the haill heirs of entail and 'substitutes above specified, according to the order above set 'down; whom failing, to my own nearest heirs and assignees.' He reserved to himself full power to make such alterations as he thought fit; and it appeared that he had intended at the same time to execute a relative trust-deed, for the purpose, inter alia, of limiting the right of possession of his brother Alexander, and his son, the respondent; but no such deed was actually executed till 1797. In that year he conveyed the rents of his estates to trustees for payment of his debts, and subject to a declaration that his brother Alexander and the respondent should, during their lives, be restricted to an annuity, not to exceed £1000, and that the trust should subsist during their respective lives.

On the 28th of November 1801 he executed another trust-deed,

by which he disponed his estates, both heritable and moveable, to the appellant, Sir James Duff, for purposes similar to those in the previous deed; but it was provided 'that this present trust 'shall also subsist and be effectual, to all the intents and purposes 'herein expressed, during the whole lifetime of the above-designed 'Sir James Duff; or, in the event of his death before the purposes 'of this trust are carried into effect, for and during the space of 'two years from and after the period of all the said debts and ob-'ligations, funeral charges, legacies, and donations, and whole pur-'poses of the trust of every kind, being fully cleared, extinguish-'ed, and fulfilled in pursuance of these presents; and I hereby 'supersede and suspend all right, title, and interest whatsoever 'competent to the heirs and substitutes of entail called or to be 'called to succeed to me in the said lands, estates, and property 'above described, by virtue of the deeds of entail above speci-'fied, and any other deed or deeds of entail to be hereafter exe-'cuted by me, for and during the whole period of subsistence 'of the present trust, as above expressed: Declaring that the 'whole rents, maills, profits, casualties, and issues of the said 'lands, estates, and property, shall, during the foresaid space, 'exclusively belong to and be intromitted with by my said 'trustees or trustee surviving and accepting as aforesaid; whom 'failing, as before mentioned.'

July 17. 1823.

In both of these trust-deeds he reserved to himself full power to revoke and alter at pleasure.

On the 7th of August 1802 he executed a declaration and obligation, proceeding on the narrative of the deed of entail in 1789, and relative trust-deeds in 1797 and 1801, and that he was determined to exercise the powers therein reserved to him. He then introduced this clause:—'Therefore wit ye me to have acknow-'ledged and declared, likeas I do hereby testify, acknowledge, 'and declare, that the foresaid trust-disposition and settlement 'executed by me as above mentioned, and the whole clauses, ob-'ligations, provisions, powers, stipulations, conditions, and declar-'ations therein conceived, shall, in addition to the periods of en-'durance therein and before specified, remain, subsist, and be 'effectual to and for all the ends, uses, intents, and purposes 'therein expressed, during the whole lifetime of James Duff, my 'nephew, son of the Honourable Alexander Duff of Echt, my 'immediate younger brother, in the event of his surviving me, 'and succeeding to the other entailed estates and property, inde-'pendent of those specified and described in the said trust-dispo-'sition and settlement, by and in virtue of the deeds of entail 'executed by the deceased William Earl of Fife, my father; and

July 17. 1823. ‘I hereby seclude and debar the said James Duff from ever succeeding to, or holding possession of the whole or any part of the lands, estates, and property belonging to me, and described in the foresaid trust-disposition and settlement, by virtue of the deeds of entail, or any other deed or writing whatsoever executed or to be executed by me, calling the said James Duff to the said succession, in any manner of way; all which deeds of entail executed or to be executed by me, with all right, title, and interest whatsoever competent to the said James Duff, or the heirs and substitutes of entail, are hereby declared to be also superseded and suspended, and rendered ineffectual during the whole lifetime of the said James Duff accordingly. And further, I hereby give, grant, and confer to and upon the said trustees or trustee named and appointed by me in the foresaid trust-disposition and settlement, (but under the revocation expressed in the deed of alteration executed by me as above mentioned,) surviving and accepting as aforesaid,—whom failing, as before mentioned, all and whatsoever further powers and authority which may be essential, requisite, and necessary for their and his remaining fully vested in the said lands, estates, and property therein described, and for continuing and preserving the said trust thereby created entire and undiminished in their and his persons or person, to and for the ends, uses, intents, and purposes therein expressed, during the whole lifetime of the said James Duff, in addition to the periods of endurance therein and before specified, and that equally and effectually, and in the same manner as if the said trust, and the provisions and stipulations thereof, had been declared to subsist and remain effectual and obligatory, during the lifetime of the said James Duff, in the foresaid trust-disposition and settlement itself; and I hereby bind and oblige myself, my heirs and successors, to make, grant, subscribe, and deliver to and in favour of my said trustees or trustee, surviving and accepting as aforesaid, whom failing, as before mentioned, all writs and deeds which may be requisite and necessary for carrying my intention into full and complete effect, to all intents and purposes whatever; and I hereby declare that these presents shall have reference to, and be held to make a part of, or an addition to the said trust-disposition and settlement above recited.’

By the same deed he declared, ‘That as it may be of importance that the said Honourable Alexander Duff and James Duff, and other heirs of entail and substitutes succeeding during the subsistence of the trust, should, immediately upon the succession

'to the foresaid lands and others opening to them respectively, 'complete titles in their persons to the said lands and others un- 'der the entail, and obtain themselves publicly infeft therein; and 'that they should afterwards concur with the trustees under the 'foresaid trust in granting charters, precepts of clare constat, and 'other writings, to vassals in the said lands and others, present- 'ations to churches, tacks or leases, heritable bonds, and the like;' July 17. 1823.

he appointed them to make up titles in their own persons, and concur with his trustees in granting charters, &c. to vassals and others. He afterwards, on the 23d of November 1805, addressed a letter of directions to his trustees, giving them certain orders as to the administration of his estates.

Subsequent to this period, the Earl acquired additional lands, and he formed the resolution of executing a new trust-deed, and a new deed of entail. Accordingly, on the 7th of October 1808, he made two deeds of that description, by which he recalled all those previously executed by him; 'but declaring and providing 'always, that if, by reason of any legal objection to these presents 'in any way other than by a revocation by myself, or by my au- 'thority, the same should not be effectual, but should be reduced 'or set aside in whole or in part, then the said former trust-dis- 'position, deed of alteration, declaration and obligation, and let- 'ter of directions, shall still remain in full force, in so far as these 'presents may be effectual, but not otherwise, and no further.' By the trust-deed he conveyed his whole estates and effects to the appellant Sir James Duff, Thomas and Richard Whartons and Stewart Souter, Esqrs., declaring that the appellant should be a sine quo non. Into this deed he also introduced a clause in the same terms as that above quoted, excluding his brother Alexander and the respondent from the possession and enjoyment of the estates during their respective lives. By the deed of entail he destined the estate to himself and the heirs-male of his body; 'whom failing, to the Honourable Alexander Duff of Echt, my 'eldest brother-german, and the heirs-male of his body; whom 'failing, to Lieutenant-General Sir James Duff of Kinstair, and 'the heirs-male of his body;' whom failing, to the heirs of entail in the deed executed in 1789, among whom were the heirs-female of his brother Alexander, and the heirs-male of his body.

These two deeds were of great length, each extending to upwards of eighty pages, and each of them had a testing clause in these terms:—'In witness whereof I have subscribed these pre- 'sents, written upon this and the eighty-one preceding pages of 'stamped paper by James Gibb, clerk to William Inglis, writer 'to the signet, at Duff-house, the 7th day of October 1808 years,

July 17. 1823.

'before these witnesses, Alexander Forteath Williamson and 'George Wilson, both residing at Duff-house,—the place, date, 'and witnesses' names and designations being written by the said 'George Wilson.' On each page accordingly there was subscribed his Lordship's signature 'Fife.'

On the 12th of November of the same year he executed a deed altering in some respects the trust-disposition of the 7th of October 1808, but declaring that in other respects it should subsist and be effectual. The testing clause of that deed of alteration was in these words:—'In witness whereof these presents, written on this 'and the three preceding pages of paper legally stamped, by the 'said Stewart Souter, at my desire, are subscribed by me at Duff-'house the 12th day of November 1808 years, before these wit-'nesses, Alexander F. Williamson and George Wilson, at Duff-'house.'

His Lordship soon thereafter went to London, where he died on the 26th of January 1809, in his 82d year. He was succeeded by his brother Alexander, who was, by the above deeds, excluded from the enjoyment of the trust-estates. No reduction was brought by him of these deeds, and the trustees immediately entered into possession in virtue of them. Earl Alexander died in April 1811, and his son, the respondent, then obtained himself served as nearest and lawful heir in general of the late Earl James. In that character he brought an action of reduction in 1814, in which he called for the deeds of trust and entail of the 7th of October 1808, and concluded that they should be reduced, on the ground, first, That the late Lord Fife, at the time of executing the deeds, was blind to such a degree as to be incapable of distinguishing objects, and it was therefore legally incompetent for him to execute such deeds by his own subscription; and that he could only legally do so by the intervention of two notaries and four witnesses; second, That his Lordship was assisted in making his subscriptions to the said deeds; third, That the deeds had not been read over to him at the time of signing them; and, fourth, That one of the instrumentary witnesses did not see him subscribe, nor hear him acknowledge his subscription.

Against this action the trustees gave in these defences:—

'1. The pursuer has no title to insist in the present action, in 'respect that he has no legal interest to set aside the deeds there-'by challenged, any interest which he might otherwise have had 'being cut off by previous deeds, particularly by a trust-disposi-'tion and settlement executed on the 28th November 1801; a 'deed of declaration and assignation executed on the 7th August '1802, and a letter of directions written on the 23d November

'1805, all by the said deceased James Earl of Fife, and not 'challenged in the present action; and by the express terms of 'the trust-deed now challenged it is declared, that in case it shall 'happen that by reason of any legal objections, or in any way 'other than a revocation by the granter, the said trust-settlement 'shall not be effectual, the former deeds shall still remain in full 'force, in so far as the said settlement may not be effectual. As 'the effect of reducing the deeds called for in this reduction could 'only be to revive those former settlements, by which the interest 'of the pursuer is wholly excluded, it is evident that he has no 'interest to prosecute the reduction, and consequently no legal title 'to insist;—and, 2. Even supposing that the pursuer had a sufficient title and interest to insist in the reduction, the deeds called 'for are not liable to challenge on any ground whatever, and the 'reasons of reduction libelled are entirely without foundation.' The Lord Ordinary repelled 'the preliminary defence of want 'of title and interest in the pursuer to insist in the present action,' and appointed him to give in a condescendence of the facts he alleged in support of his reasons of reduction; and to this interlocutor the Court, on the 16th of January 1816, adhered.* July 17. 1823.

Thereafter the following issues were prepared, approved of, and remitted to the Jury Court:—

1st, Whether, at the date of the deeds under reduction, viz. on the 7th of October 1808, James Earl of Fife deceased was totally blind, or was so blind as to be scarcely able to distinguish between light and darkness? and whether the said Earl was at that time incapable of reading any writing, written instrument, or printed book? and if at that time he could discover whether a paper was written upon or not?

2d, Whether the said deeds were read over to the said Earl previous to the said Earl's name being put thereto? and if so, in presence of whom? and if read over to the said Earl as aforesaid, whether they were all, or any of them, read to him at one and the same time, or at different times? and if at different times, whether they were deposited and kept in the room in which they were read, during the whole period which elapsed from the commencement of the reading till the name of the said Earl was put to them as aforesaid, or where they were deposited?

3d, Whether the said Earl's name was put to the said deeds, or any of them, by having his hand directed to the places of signing, or led in making the subscription? or if the said Earl was as-

---

* Not reported.

July 17. 1823. sisted, and if so, in what manner he was assisted, in making his subscription?

4th, Whether the said Earl put, or attempted to put, his name to the said deeds, or any of them, at one and the same time, or whether any period of time intervened? and if there were any interval or intervals of time between the said acts, whether the said deeds, and all of them, were in the possession or custody of the said Earl, or were in the possession or custody of any other person, during such intervals of time?

5th, Whether the said Earl put his name to the deeds under reduction in presence of the two instrumentary witnesses, or either of them? or did acknowledge his subscription to them, or either of them, or at what period he made such acknowledgment?

6th, Whether the said Earl was, until the dates of the deeds under reduction, or at a later period, a man remarkably attentive to, and in the use of transacting every sort of business connected with his estates, and in the practice and habit of executing, and in fact did execute, deeds of all sorts connected with his own affairs, by subscribing the same with his own hand, and without the intervention of notaries?

7th, Whether the said Earl took means to ascertain that the deeds under reduction, alleged to have been signed by him, were conform to the scrolls of deeds prepared by his agents under his special direction, and what were the means he took to ascertain the same?

Upon these issues the Jury returned the following verdict:—

As to the first issue, That James Earl of Fife, at the date of the deeds under reduction, viz. on the 7th of October 1808, was not totally blind, though he could scarcely distinguish between light and darkness. The said Earl was at that time incapable of reading any writing, written instrument, or printed book. He could not at that time discover whether a paper was written upon or not.

As to the second issue, That the said deeds were read over, previous to the Earl's name being put thereto, in presence of Stewart Souter and Alexander Forteith Williamson, or one or other of them. It is not proven whether they were all read to him at one and the same time, or at different times, but one was read at the time that the deeds were signed. There is no proof whether they were deposited and kept in the room in which they were read, during the whole period which elapsed from the commencement of the reading till the name of the said Earl was put to them as aforesaid, or where they were deposited.

As to the third issue, That the said Earl put his name to the

said deeds, by feeling for the finger or fingers of another person on the spot for signature, and was no otherwise assisted than as above described. July 17. 1823.

As to the fourth issue, That the said Earl put his name to the said deeds at one and the same time.

As to the fifth issue, That the said Earl put his name to the deeds under reduction in presence of one instrumentary witness, viz. Alexander Forteith Williamson; but it is not proven that the said Earl did acknowledge his subscription to George Wilson, the other instrumentary witness.

As to the sixth issue, Proven in the affirmative.

As to the seventh issue, That the only means which the said Earl took to ascertain that the deeds under reduction were conform to the scrolls of deeds prepared by his agents under his special directions, were his having heard the said deeds read over to him.

Lord Fife then applied for a new trial on the second issue, which having been granted, the Jury returned this verdict:—That in respect of the matters of the said issue, it has not been proven that the deeds under reduction were read over to the said Earl of Fife previous to the said Earl's name being put thereto.' The case having then been returned to the Lord Ordinary, he pronounced this interlocutor:—' Finds that a person about ' to execute a deed of importance, who, at the time of the exe- ' cution of it, is, in the words of the verdict in this case, ' not " totally blind, though he can scarcely distinguish between light " and darkness, and is incapable of reading any writing, written " instrument, or printed book,' and cannot discover whether a ' paper was written upon or not, and who can only put his name ' to the deed by feeling for the finger or fingers of another per- ' son on the spot for signature, is not only entitled in law, but ' ought to execute the deeds by means of notaries and witnesses, ' in terms of the act 1579, cap. 80; but finds that there is no ' sufficient authority in the law of Scotland for concluding that ' a deed signed by a person in the situation above described, in ' presence of two witnesses, in the usual manner, is null, or can ' make no faith, provided the deed be proved to have been dis- ' tinctly read over to the granter, in presence of the witnesses, ' immediately before the subscription is made, in order to afford ' that degree of evidence which the law requires, and which is ' plainly necessary to show that the deed given to the granter to ' subscribe is truly, in all its parts, the deed which he intended ' to execute: Finds that the fact of the deed subscribed by a ' blind man having been read over to him in presence of the wit-

July 17. 1823.

'nesses before subscription, is not a fact which is to be presumed 'in law from the attestation of the witnesses to the fact of his 'having subscribed the deed, but that the fact of the reading 'over must be proved by the user of the deed when it is disputed: 'Finds that it has been established by the verdict of the Jury 'on the second trial, that it has not been proven that the deeds 'under reduction were read over to the said Earl of Fife pre-'vious to the said Earl's name being put thereto, and finds that 'the deeds are on this ground reducible: Therefore sustains the 'reasons of reduction, and reduces, decerns, and declares in terms 'of the libel.'

To this interlocutor the following note was subjoined:—

'It is proper for the Lord Ordinary to explain in a note why 'he has not taken notice in this interlocutor of the separate ob-'jection to the deeds under reduction, on which a great deal of 'argument is bestowed in the memorial, founded on the allega-'tion that the late Earl of Fife did not acknowledge his subscrip-'tion to George Wilson, the instrumentary witness, who was not 'present when the subscription was adhibited. The Lord Ordi-'nary's opinion on this point is, that the presumption of the law 'is, in this particular case, in favour of the deeds; but as it has 'been established by the verdict that the granter of the deeds 'was incapable of reading any writing, and could not discover 'whether paper was written upon or not,—and as it has also been 'established by the verdict that the Earl put his name to the 'deeds in presence of one only of the instrumentary witnesses, 'so that the acknowledgment of his subscription to the other in-'strumentary witness, which is presumed to have been made, 'must have been made by a person who could not see the sub-'scriptions (upwards of 160 in number) intended to be acknow-'ledged by him,—the Lord Ordinary thinks that the manner in 'which the subscriptions are attested, gives rise to an important 'objection against the validity of the deeds. If the verdict had 'established that the deeds remained in the actual personal pos-'session of the granter till after the time when the acknowledg-'ment of the subscriptions may have been made, the objection 'alluded to would have been the less important. If, again, the 'verdict had borne that the deeds were taken out of Lord Fife's 'hands immediately after the subscriptions were written, and be-'fore his Lordship had an opportunity of meeting with Mr. Wil-'son, and of acknowledging his subscription to him, the objec-'tion to the attestation of the subscription would have appeared 'more formidable, if not decisive. In referring to the case of 'Coutts against Straiton, Lord Bankton makes an important ob-

'servation, in a passage not noticed in the memorials, B. 1. tit. 11. sect. 38.' July 17. 1823.

Both parties having represented, his Lordship reported the case on informations to the Court, 'in respect of the great importance of this case in point of law, and that although the opinion expressed by the Lord Ordinary in the interlocutor represented against remains unaltered, yet it will be more convenient for the Court, and more for the advantage of the parties, that the whole cause should be stated and argued in one paper on each side.'

On advising these informations, the Court adhered to the interlocutor of the Lord Ordinary, 'in so far as it sustains the reasons of reduction of the trust-disposition, and reduces and decerns as to these deeds.' Against this interlocutor a short petition was lodged by the trustees; and leave having been given to put in a full one, this was done by the appellant Sir James Duff alone, the other trustees having withdrawn from the contest; and on advising it, with answers, the Court, on the 30th of November 1819, adhered. *

Sir James Duff then appealed, and contended,—

1. That the respondent, Lord Fife, had no title or interest to insist in the action, seeing that, as he had not attempted to reduce the prior trust-deeds, by which he was excluded from the possession of the estates, and as it was declared that if those in question were set aside, the prior deeds should revive, and have full effect; and as the action was brought by him, not in the character of heir of tailzie under the entail of 1789, but as heir of line of the late Earl James, he could derive no advantage by setting aside the present deeds, and consequently had no interest to do so.

2. That, by the statute 1579, c. 185, it was enacted, that all deeds of importance 'sall be subscribet and seillet be the principal parties, gif they can subscryve, utherwise be twa famous nottaries, before four famous witnesses, &c., utherwise the saides writtes to mak na faith.' That by this enactment, therefore, it was expressly declared, that if the party could subscribe, the deed must, under the penalty of nullity, be signed by him, and not by notaries; and that it was only in the case where the party could not subscribe that it was lawful to have recourse to the assistance of notaries: that it was proved, not only by the terms of the verdict, but by other written evidence in process,

* See Fac. Coll. 30th November 1819, for the opinions of the Judges.

July 17. 1823.

(to which it was perfectly lawful to refer, so far as not inconsistent with the verdict,) that the Earl came within the general rule, as being able to subscribe his name, and had actually done so to the deeds in question: that although it was established that he was so blind as not to be able to distinguish the paper on which he wrote, yet there was no rule prescribed, either by statute or by law, declaring that a blind person should not be allowed to subscribe, if he had the power of doing so; and that although the circumstance of being blind might be of importance in a question of fraud, yet no such averment had been made in this case.

3. That as the deeds were ex facie executed in terms of the statutes, and therefore were of themselves probative, it was incumbent on the party attempting to set them aside, and founding on objections not appearing on the face of them, to establish positively by evidence those objections, whereas the verdict merely found that those circumstances which it was necessary for the respondent to establish were not proven, which amounted merely to an answer by the Jury of ignoramus.

On the part of Lord Fife it was answered,—

1. That, before inquiring whether his title and interest to insist in the action were cut off by the previous deed of entail and relative trust-deeds, it was necessary for the appellant to show that *he* had such a title and interest in these deeds as to give him a right to make the objection: that by these deeds the appellant had no right whatever in the lands as an heir of entail, but merely as a trustee: that it was his duty in that capacity rather to concur with the respondent in setting aside the entail and relative trust-deed in question, as thereby other substitutes and other burdens were introduced, to the prejudice of those for whom he was trustee, and who had right under the former entail; but that, supposing the appellant was entitled to make the objection, still the respondent had both a good title and interest:—first, Because, as he had been served and retoured heir of law of the late Earl, he had an unquestionable title to reduce every deed executed by him affecting the estates, and prejudicial to the heir, on any competent ground of law, and of course to set aside any one whereby his access to the estates might be impeded, provided the deeds not brought under reduction did not absolutely exclude him, and gave an absolute right to his opponent, which in this case they did not:—second, Because the respondent was expressly called as an heir of entail under the former deed, in the character of heir-male of the body of his father, and the trust-deed did not deprive him of that character, but merely suspended his right to *enjoy* the estate, and to enter to *possession* of it; and accordingly he was or-

dained to make up titles to the property, so that, as an heir of entail, he would be entitled, among other rights, to be enrolled as a freeholder, and to object to subsequent deeds on any available ground: —and, third, Because although the respondent was no doubt heir of tailzie under the former deed, yet, as he also possessed the other character of heir-at-law, he was entitled to bring his action upon either of these titles which he thought fit. July 17. 1823.

2. That at common law a party who was blind could not legally sign a deed,—a rule which had been established both from the expediency and necessity of the case:—that writing was an art to which it was essential that there should be a mind to direct, a hand to execute, and an eye to see; and although substitutes had been contrived for the hand where it had been lost, yet, where there was no mind to direct, or no eye to see, it was impossible to say that the party was possessed of the art of writing, so as to exercise it to any legal effect; and therefore a person who was deprived of sight fell within that class who were unable to subscribe their names according to law, so that the intervention of notaries was requisite.

3. That although the deeds were no doubt ex facie probative, yet, so soon as it was established that Lord Fife was blind, they lost the character of probative, and the onus probandi that they had been read over to his Lordship, and subscribed in presence of the witnesses, or his subscription acknowledged to them, fell on the appellant; and even, therefore, if blindness was not of itself an absolute incapacity to the execution of a deed, it at least required the supporter of the deeds to show by evidence that they had been executed in terms of law.

The House of Lords pronounced this interlocutor:—'The 'Lords find, That, under the circumstances of this case, notwith-'standing the defect in sight of the Earl of Fife, proved upon 'the issues formerly tried in this cause, the signature of the in-'struments in question by notaries was not required by the sta-'tute of 1579, and that the signature of the Earl of Fife was the 'proper signature to give effect to those instruments, according 'to the true intent and meaning of the statute: that the signa-'ture of the Earl of Fife appearing on the face of the said instru-'ments, and the instruments being apparently attested by two 'witnesses, the instruments apparently so signed and attested are 'in law probative deeds; and that to impeach such instruments 'as probative deeds of the Earl of Fife, the pursuer was bound 'to prove that the witnesses, or one of them, did not see the Earl 'of Fife subscribe the said instruments respectively, or hear him 'acknowledge his subscription thereto: that to impeach the said

July 17. 1823. ‘ instruments respectively, though in law probative instruments, ‘ as the deeds of the Earl of Fife, on the ground that the Earl of ‘ Fife did not know the contents of such instruments respectively ‘ when he subscribed the same respectively, and that therefore the ‘ same were not respectively the deeds of the Earl of Fife, the ‘ pursuer was bound to prove that the Earl did not know the ‘ contents of such instruments respectively when he subscribed ‘ the same respectively: that it is not a solemnity required by law ‘ that the said instruments respectively should have been read ‘ over to the Earl of Fife at the times of the execution thereof ‘ respectively, or at any other time or times, and that, if such in- ‘ struments respectively were duly executed and attested by the ‘ Earl, and in law probative instruments, the knowledge of the ‘ Earl of the contents thereof respectively must be presumed, un- ‘ til the contrary should be shown; but that proof that the said ‘ instruments respectively were not read over to the Earl of Fife ‘ at the time of the execution thereof, is evidence to be received ‘ that he did not know the contents of such instruments respect- ‘ ively, but that such evidence is not conclusive evidence that he ‘ did not know the contents of such instruments respectively, in ‘ as much as his knowledge of the contents of such instruments ‘ may be proved by other evidence from which such knowledge ‘ may be inferred: that execution by the Earl of Fife of the in- ‘ strument purporting to be a deed of alteration of the deed of ‘ trust-disposition, sought to be reduced, supposing such deed of ‘ alteration was executed and attested according to the statute, ‘ and that the Earl knew the contents thereof, is evidence to be ‘ received to prove that the Earl of Fife did know the contents of ‘ such trust-disposition and deed of entail respectively at the time ‘ when such trust-disposition and deed of entail appear on the ‘ face thereof to have been signed by the said Earl: that the ver- ‘ dicts of the several Juries upon the several issues directed by ‘ the Court of Session were in some respects inconsistent, and are ‘ insufficient to warrant the interlocutors reducing the said instru- ‘ ments of trust-disposition and deed of entail respectively: that ‘ the question properly in issue on the summons of reduction was, ‘ whether the instruments sought to be reduced, though appar- ‘ ently probative instruments, and as such to be received as the ‘ deeds of the Earl of Fife, were respectively the deeds of the ‘ Earl of Fife? that the proof of facts to show that the instru- ‘ ments, though probative instruments, were not the deeds of the ‘ Earl of Fife, ought to have been given by the respondent in ‘ support of his action for reduction of those instruments as pro- ‘ bative deeds. It is therefore ordered and adjudged, that the

July 17. 1823.

'said several interlocutors complained of in the said appeal, in so 'far as these relate to the title and interest of the pursuer to in- 'sist in the present action, be, and the same are hereby affirmed; 'and, in other respects, that the said interlocutors be, and the 'same are hereby reversed. And it is further ordered, that the 'Court of Session in Scotland do direct an issue to try whether 'the instruments of trust-disposition and deed of entail, both 'dated the 7th day of October 1808, sought to be reduced, being 'in law probative instruments, were not, or either of them, was 'not the deeds or deed of the Earl of Fife; and whether the deed 'of alteration of the 12th day of November 1808, being in law a 'probative instrument, was not the deed of the Earl of Fife; and 'that, upon the trial of such issue, the burden of proof that such 'instruments respectively were not respectively the deeds or deed 'of the Earl of Fife, ought to be upon the respondent seeking to 'reduce the same. And it is further ordered, that the respond- 'ent be the pursuer in such issue, and the appellant defender; 'and that, upon the trial of such issue, the said several instru- 'ments be produced, and be received as probative instruments, 'to be impeached by the respondent by such evidence as he may 'be advised to offer touching the same, and that thereupon the 'appellant be at liberty to offer such evidence as he may be ad- 'vised to offer in support of such instruments respectively; and 'for that purpose, that the appellant be at liberty to offer the 'deed of alteration of the 12th day of November 1808, as evi- 'dence in support of the instrument of trust-disposition and deed 'of entail of the 7th day of October 1808, so sought to be re- 'duced, if the appellant shall think fit so to do. And it is fur- 'ther ordered, that, after the trial of such issue, the Court of 'Session do proceed further in the cause as shall be meet.'*

LORD CHANCELLOR.—My Lords, it is not to be supposed, that, in rising at the end of a hearing upon a case, in itself a case of very great value, and certainly of very great importance, I should be about to apprise your Lordships how, in my humble judgment, you ought to act; but feeling this case to be one that I profess distresses my mind more than almost any case I ever had to deal with judicially, it does occur to me, that perhaps it may not be improper to say a few words upon it at this moment. I will not enter at this moment into the consideration, whether, upon the true interpretation of the statutes with respect to the administration of justice in Scotland, this House could or could not now direct a more

---

* See, as to the future progress and ultimate decision of this case, 4. Shaw and Dunlop, No. 241. 242. 497, and Wilson and Shaw's Appeal Cases, May 22. 1826, p. 166.

July 17. 1823.

general issue, or any issue, with a view to determine the question between these parties? But, unless I mistake the nature of the case, if there had been an issue directed, or if there were now to be an issue directed, in the terms in which those Courts in which I have sat are more in the habit of sending issues,—I mean a Court of Equity,—the issue that probably would have been directed would be an issue in terms somewhat like these,—namely, Whether the deeds sought to be reduced were the deeds of Lord Fife? That would have let in every objection whatever. It would have permitted a discussion before a Judge and a Jury upon the meaning of the statutes which speak of persons who cannot write; and the opinion and the direction of the Judge would have been to be given to the Jury, whether, according to the true intent and meaning of those statutes, a blind man, who can write extremely well, is nevertheless to be considered as a person who cannot write, so as to subscribe a deed? I say who can write extremely well, because it is a singular circumstance, that if you were trying the fact of my Lord Fife's having signed those deeds by a similarity of hands, you would have nothing to do but to look at that roll which now lies upon this table, on which his Lordship did subscribe the oaths and declarations, and so on, in the same year 1808, and the similarity of that writing is in truth a very strong proof—I do not mean to say a legal proof—that is another way of putting it,—but a very strong proof that the signatures of those deeds were Lord Fife's signatures. My Lords, if the Judge had directed the Jury, by telling them that, within the true intent and meaning of the statutes, a blind man cannot write, one party might have excepted to his opinion in point of law. If he told them he could write, the other party might have excepted to his opinion in point of law. So again, (to take another part of the case,) if it should turn out to be the law of Scotland, that a blind man is a man who, nevertheless, may subscribe, then another question would arise, whether, when a blind man subscribes a deed, it must be proved either that the deed was read over before the witnesses who attested it, or that it was read over at some other time; and that such reading might or not be considered as satisfactory proof that it was his deed—that which he subscribed? Upon that the opinion of the Judge might have been given to the Jury; and it would have been incumbent upon the Judge to have informed the Jury upon whom the proof lay that the deed was read. In which opinion he must likewise have been called upon to declare whether those deeds were ex facie probative or not, with a view to get at that question.

My Lords, if the reading is a statutory solemnity, he would have been bound to have told the Jury that it was a statutory solemnity. If it is not a statutory solemnity, he must have informed the Jury that it was not a statutory solemnity. So again, with respect to the acknowledgment of the subscription, if the question had arisen, upon the trial of the issue, whether it was his deed or not, it would have been incumbent upon the Judge to have said upon whom the onus of proof lay. The result, undoubtedly, would turn upon the whole of these, not that you would have had a verdict finding that this was not proven, or that that was not pro-

ven, but that you would have had a verdict declaring what the fact was; and on all these points, or most of these points, the counsel might have tendered to the Judge a bill of exceptions, which would have brought the matter (applying the act of Parliament to the subject) before the Court of Session, and there might have been an appeal from the bill of exceptions to this House. July 17. 1823.

Now, the difficulty that strikes me, (supposing we should find that we have authority to grant another issue, and supposing it should be thought fit, upon which I state myself merely hypothetically,)—but supposing we should find that we have authority to grant another issue, and supposing another issue should be granted, I profess I have not, at this moment, (speaking with all deference,) the least hope that this cause will be nearer a conclusion than it was at the time this summons was brought into the Court of Session; because, when one comes to look at the different opinions of the Judges in other cases—when one comes to look at the different opinions of the Judges in this case—and when one comes to look at the state of the law, as we find it in Mr. Bell's book;—looking to every thing which has passed since 1790, and the terms in which the different acts are expressed, it appears to me matter of absolute certainty, that, on the general issue upon this part of the case, every point might have been brought before this House by bill of exceptions, exactly in the same state, and for exactly the same species of discussion as we have now had.

My Lords, there is another thing in this case which distresses me exceedingly, and that is this:—The summons calls for a reduction of the deeds both of October 1808 and November 1808; but the Lord Ordinary, in his judgment, having given, in great good sense and propriety, (whether with good legal judgment, is another consideration,) his reasons, reduces all the three deeds,—the two deeds of October 1808, and the deed of November 1808. This he does after the trial of the issues; he therefore must have taken for granted that the issues had tendered something about that deed of November: but I cannot find, in the terms of those issues, that there is a direction to try any thing relative to the deed of November. He must have reduced the deed of November on some ground that he found in the principles on which he reduced the deeds of October 1808. Then, when the matter comes before the Court of Session, the Court of Session reduces the deeds; that is, they sustain the interlocutor of the Lord Ordinary, so far as the interlocutor of the Lord Ordinary reduces the deeds of October 1808. What the effect of that is,—whether that operates to remit again to the Lord Ordinary to consider the effect of the deed of November 1808, is a matter that will require your Lordships' consideration; but it is certainly to me a very singular circumstance, that we are not able at this moment to collect what we are to do with that deed, except by taking into consideration the sort of reasoning I am humbly suggesting to your Lordships upon this subject; and, to be sure, if you are to bring in facts and circumstances as evidence whether a blind man knew his deed; or if it is to be taken as a fact that he did alter, by an effectual deed executed in November 1808, the deeds

July 17. 1823.

which he had executed in October 1808;—the fact that he did effectually alter in November 1808 the deeds which he had executed in October 1808, cannot be stated without one's supposing, at least, that that would afford some evidence for the consideration of a Jury, that he did understand the deeds which he so altered.

My Lords, the first question that arises in the case is this, (and I take the liberty to mention it to your Lordships, because I am myself the person that suggested it,) that if the law of Scotland—I mean the act of 1540—the act of 1579—the act of 1681, and any other acts which have been alluded to, are to be so interpreted, that if a man is blind, he is therefore within the intent and meaning of these acts—a person who cannot write—then there will be no issue in fact to be tried but whether Lord Fife was blind. But that issue in fact could not have been directed, because one of the singularities in this case is, that if we affirm this judgment, (and I am not now stating whether we shall affirm this judgment or not,) we must reverse many of the opinions which have been expressed by the Judges upon this very case; because the question, whether a person who is blind is a person within the intent and meaning of those statutes which I have been alluding to, is a question on which (five Judges sitting to determine it) three have found that such a man can write within the intent and meaning of the statutes, and two of them have said such a man cannot write within the intent and meaning of the statutes. The consequence of that would have been, that if that had been the only point before the Division, that there being a finding of the Judges who were of opinion that Lord Fife was a man who could write, though blind, there would have been no necessity upon that judgment to send an issue whether he was blind, if it was the opinion of the Court, that, though he was blind, he could in point of law subscribe within the meaning of these statutes.

My Lords, I have analysed these judgments as well as I can, and I will mention them, because I know means will be taken (and I am anxious that means should be taken) to set me right, if I am wrong in my statement of facts. I apprehend that Lord Craigie and the Lord Justice-Clerk were of opinion that he could not subscribe in consequence of being blind; but that Lord Robertson, Lord Glenlee, and Lord Bannatyne were of opinion that he could, notwithstanding his being blind; and that, therefore, the opinion of the Court was, that he was a party who was enabled to write, within the intent and meaning of the statutes. I will just call your Lordships' attention, very shortly, to the words of these statutes; and here, without entering into that question, which was a little agitated between Mr. Clerk and Mr. Warren, as to what the Roman law had to do with the law of Scotland, I think nobody can possibly deny, that the doctrines of the Roman law have, to a very considerable degree, been introduced into the law of Scotland, not because it is the Roman law, but because the people of Scotland thought proper to make it part of their own law, as some of the doctrines of the Roman law form part of the law of this country, also by adoption, in the same manner. But, if your Lordships look to what were the cautions and

guards that were put upon blind men's deeds in the Roman law, I think you will collect from the cases on the table, in the year 1794, in reference to the case of Ross *v.* Aglianby, that the cautions the Roman law used, in respect of deeds executed by blind persons, were cautions so grave, and amounting to such securities, that it is quite ridiculous to suppose that the act of the Scottish Parliament in 1540 was meant to adopt just as much, and no more, of those cautions than it does adopt, if blind men were to be considered as men who cannot write; for all that this statute says is this—(and, by the by, it uses the word 'subscription,' and the word 'writing,' as pretty nearly synonymous, and that is an observation which, in some measure, bears upon the language of subsequent statutes.) —It says, c. 117, 'It is statute and ordained, that, because mennis seales 'may of adventure be tint, quhairthrow great hurt may be generitt to 'them that awe the samin; and that mennis seales may be feinzied, or put 'to writinges after their decease, in hurte and prejudice of our Soverain 'Lord's lieges: That, therfore, na faith be given in time cumming to any 'obligation, band, or uther writing under ane seale, without the subscrip- 'tion of him that awe the samin, and witnesses; or else, gif the partie 'cannot write, with the subscription of ane notar thereto.' So that there was to be one notary and one witness—a ceremonial which fell very far short indeed of what was required under the Roman law. July 17. 1823.

My Lords, in 1579 the next statute, c. 80, passed, which is necessary to be considered. There it was 'statute and ordained, be our 'Soveraine Lord, with advise of his Three Estates in Parliament, that all 'contractes, obligatiounes, reversiones, assignationes, and discharges of 'reversiones, or eikes thereto, and generallie all writtes importing heri- 'tabil titil, or utheris bandes and obligationes of great importance;' (and your Lordships will find in that book of Mr. Bell's, which has been so often referred to, what are considered 'obligations of great importance,' and what are not considered 'obligations of great importance,') 'to be 'maid in time cumming, sall be subscrived and seilled be the principal 'parties, gif they can subscrive, utherwise be twa famous notars, befoir 'four famous witnesses, denominat be their special dwelling-places, or 'sum uther evident tokens, that the witnesses may be knawen, being 'present at that time, utherwise the saidis writtes to make na faith.'

The statute of 1681, c. 5, is very much commented upon. It is in these words: 'Our Soveraign Lord considering that, by the custom in- 'troduced, when writing was not so ordinary, witnesses insert in writs, 'although not subscribing, are probative witnesses, and by their forget- 'fulness may easily disown their being witnesses: For remeed whereof, 'his Majestie, with advice and consent of the Estates of Parliament, doth 'enact and declare, that only subscribing witnesses, in writts to be sub- 'scribed by any partie hereafter, shall be probative, and not the witnesses 'insert not subscribing; and that all such writts to be subscribed here- 'after, wherein the writter and witnesses are not designed, shall be null, 'and are not suppliable by condescending upon the writter, or the desig- 'nation of the writter and witnesses; and that no witness shall subscribe

July 17. 1823.

'as witness to any parties' subscription, unless he then know that partie 'and saw him subscribe, or saw, or heard him give him warrand to a no- 'tar 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 sub- 'scribing, acknowledge his subscription.' Your Lordships will permit me to call your attention to the words I have just read, because they describe witnesses of two sorts—the one, a witness who saw the party subscribe—the other, a witness who heard the party acknowledge his subscription; and it is not to be forgotten in this case, that it is an admitted fact that one of these witnesses, Wilson, did not see the party subscribe his name;—whether he heard him acknowledge his subscription, is a fact, with reference to which, it seems to me that I am authorized, by the finding of the Jury, to say no more than that it is not proven either the one way or the other; and it seems a form of finding which they have in the law of Scotland, particularly in criminal cases, I think, having the effect in criminal cases, with respect to the party, of acquittal, as to punishment, however it may bear upon him, more or less, in point of character. I believe I am correct in that. With respect, therefore, to this civil case, all which can be said upon it is, that it is not proven that he acknowledged his subscription. Your Lordships will see the materiality of the distinction between its being proven that he had acknowledged his subscription, or its being proven that he had not acknowledged his subscription; or, of its not being proven, whether he did or did not acknowledge his subscription,—'otherwise the saids witnesses shall be 'repute and punished as accessorie to forgerie.'

Now, if your Lordships will look at the summons in this case, and if you look at the condescendence in this case, I think you will find, both in the summons and the condescendence, not merely a statement of facts, on the ground of which, if proven or not proven, the deeds ought to be reduced, but a great deal of general reasoning mixed up with the statement of facts, for the purpose of showing the danger of blind men being permitted to execute deeds without attending to certain solemnities or ceremonies; and here I take a distinction between what is called a statutory solemnity, and a circumstance to remove doubt—deed or no deed of the party. For instance, in this case, I will say—for I think all the Judges were agreed upon this—although some say that executing before notaries and witnesses is not required in the case of a blind man, yet all say, if I understand the effect of their judgment—that it must be proved that the deed was read. They all say that; but upon whom the proof lies, becomes an extremely material question; and it seems to be an extremely material question here, because, with respect to the verdict as to read or not read, all which is found is, not that it was read—not that it was not read. (I put out of my consideration for the moment the finding upon the seventh issue.) The finding upon the second issue finds; not that it was not read to him, but that it is 'not proven' that it was read. If that be so, then it becomes a most material question upon whom the proof of reading lies? And that has necessarily introduced another

question, Whether the reading is a statutory solemnity? Now, my Lords, that a mind like mine, weak and infirm as it is, should be extremely distressed upon that, is very natural; because not only the Judges in this case differ upon that, whether reading is a solemnity necessary in the case of a blind man or not; but if you will look back to the doctrines of the Judges in the case of Ross *v.* Aglianby, you will find that they differ just as much upon that point, in that case of Ross *v.* Aglianby, as the Judges differ upon that point in this case. Some of them are of opinion that if it is not a solemnity, then the onus is one way—if it is a solemnity, the onus is the other way;—of proving the affirmative in the one case, and the negative in the other. Your Lordships, therefore, will have to look at this case as a case not in which you know whether these deeds were read or not, unless you can come to a conclusion upon the seventh issue, which will be inconsistent with the last finding upon the second issue,—not upon the ground that it is proved that it was read, or that it is proved that it was not read;—but if you are to look at the case as a case in which it has not been made out that the deeds were read, and that if those who insist upon the benefit of the deeds have laid upon them, by the law of Scotland, the obligation to prove that the deeds were read, and they have failed in making that proof, your Lordships' judgment must be one way: If, on the other hand, the objectors to the deeds are the persons to make out that they were not read, your Lordships' judgment probably must of necessity be the other way. July 17. 1823.

There is another matter which is likewise extremely distressing in this case; and that is, with respect to the acknowledgment of the subscription. And here, when one speaks of a writ being probative, it will have to be considered whether an instrument executed by a blind man is probative, in the exact sense in which you say that a writ executed by a man in possession of his power of sight, and his other faculties, is probative, if ex facie it be regularly executed; and your Lordships will have to consider, with reference to this point, that as to one of those witnesses purporting to be a witness to the signing, it is admitted now in the pleadings, I think, that he did not see the party sign. It is also clear as to that witness, that there is not even an allegation that that witness saw him sign. There is an allegation that that witness heard him acknowledge his subscription; but then the question will come to be this—supposing, on the ex facie of the deed, it is a deed that is to be probative till it is objected to, without further proof than the production of it, if those circumstances are satisfactorily proved that a man has attested it, as if he were present at the execution of that deed, who was not present at the execution of that deed; and the additional circumstance that the party was blind is proved, then the question will be, whether the quality of probative is not so far destroyed by the proof of the circumstances I am alluding to, as to throw upon the other side the necessity of proving that the deed was read? Upon that point I need not state to your Lordships, that there is a very considerable difference of opinion among the Judges.

July 17. 1823.

With respect to the fact of the acknowledgment of subscription, that appears to me to be an extremely material part of the case; because, with respect to that, seven of the Judges have expressed an opinion—three of them without qualification, my Lord Justice-Clerk speaking of it with diffidence, undoubtedly; but the inclination of his opinion is this—that those deeds, in this very case, are to be taken as deeds where the onus of proving the non-acknowledgment of the subscription lay upon those who object to the deeds; and, therefore, when your Lordships come to consider how the law stands in that respect, you will have to determine whether the judgment of the majority of the Judges in that respect is right or wrong; because the necessity of determining that arises upon the form in which the Jury have found the issue, namely, that it is 'not proven' either the one way or the other. With respect to the acknowledgment of the subscription, if the onus of proving that the subscription was acknowledged lay upon those who produced the deed, then the opinion of the majority of the Judges is wrong. If, on the other hand, the onus of proving the subscription was not acknowledged lay upon the other party, the opinion of the majority of the Judges is right.

My Lords, under all these circumstances, therefore, I protest to your Lordships, that this does appear to me to be a case which requires the utmost consideration, the most patient attention, and the most anxious endeavour, if we possibly can in this place, to settle what the law is, before it ought to be sent (if it ever should be sent) to any farther trial before a Jury; and I advert, for a single moment, to the reason I gave originally, that I am quite confident there is no issue which could be sent, which would not place this case in exactly the same state as it was when the summons was first brought in the Court of Session. That is a thing which ought to be avoided, if it possibly can; and all I can pledge myself to the House for is, that, with the utmost anxiety, I will give the best consideration I can to the case. My Lords, I confess I look also to this case with something of fear and trembling, because I know so little of what has been the practice of Scotland with respect to the execution of deeds and other instruments by men who have not their eye-sight. Mr. Bell states, that it is very extraordinary, that down to the case of Ross *v.* Aglianby, they had not any case upon the subject; but I may venture to say, I think, that if the practice is that the deeds of blind men should be executed by notaries and witnesses according to the statute, the very circumstance that such is the practice ought to have considerable weight upon our minds. If, on the other hand, the practice is not so, it is impossible to describe what may be the mischievous consequences of our laying down this doctrine at this day. If we are by that to give a sanction to a doctrine which will thwart all antecedent practice, and may bring into dispute the validity of settlements and of instruments of every species that have been known in Scotland, where I presume it does happen, as it does in England very frequently, that men who have not the best advice are obliged to execute such instruments. My Lords, the general consequences of this case impose upon us the duty of nar-

rowly considering it before we presume to state an opinion upon it, as well as the particular difficulties which occur in consequence of the conflicting opinions of all the Judges, whose opinions we have been able to see in the course of the argument, or to read in the books to which we have been referred. So much for that view of the case. There is one other point, and that is really the only point with respect to which I can represent to your Lordships at present that my mind is in that state of comfort, that I may fairly say I have not the least doubt, and that is, whether Lord Fife had a title to pursue? I am very clearly of opinion that he had a title to pursue; and that is the only point on which I can tell your Lordships at this moment that I have no doubt.

LORD REDESDALE.—My Lords, I feel it to be highly proper that the most mature consideration should be given to this case, before your Lordships come to a decision, when I look at the consequences which may follow from the decision, arising out of the unfortunate situation in which my Lord Fife stood. My Lords, if solemnities are required with respect to the execution of deeds by a blind man, such as have been contended for on the one side on the hearing of this appeal, I know not what deeds of Lord Fife this may not overturn—deeds which have been acted upon for years, and on which the rights of many other persons may depend. I conceive, that in almost all cases your Lordships ought to be extremely deliberate in your judgment, because, whatever you determine, with respect to the law of the country, becomes an authority scarcely to be questioned. It may be questioned, perhaps, in the extent of it, but with respect to itself, it becomes, in some degree, equivalent almost to a legislative enactment; and, therefore, your Lordships ought not to decide hastily upon any case, but you ought deliberately to consider what is to be the effect of your decision, not only upon the particular case, but upon other cases, if it involves any question which may affect the cases; and for that reason, I think that you ought seldom to decide without taking some time for consideration upon the subject.

My Lords, in the present case, questions have arisen, which are of the utmost consequence with respect to every instrument, not executed by a blind man only, but every instrument executed by any person. You are to consider what was the effect of the first statute which appears upon the statute books upon the subject, and what was the law before the statute 1540. If I am to collect what the law was before the statute 1540 from the statute itself, I should conclude that sealing was the stamp which gave the authority to the particular instrument that it was the instrument of the party; and the advantage that might be taken of the law standing in that manner, made it necessary to have a further regulation upon the subject. As writing had then become more common, and the signature of persons capable of writing was a mode of proof better far than the proof by the seal, which might be counterfeited, as indeed writing may be counterfeited, but not with so much ease perhaps, and the seal applied without the knowledge of the party, which seems to

July 17. 1823.

be the reason given by one of the statutes, it was thought advantageous to ascertain whether the party, whose deed it was alleged to be, had really delivered it as his deed, by requiring his signature to be affixed to it, wherever he could affix his signature. Now, my Lords, for what purpose was this required? for the purpose of showing, by comparison of hands, (for there could be no other purpose,) that this was the instrument of the party. If, therefore, a person is capable of so writing, that there can be a comparison; and if this can be shown to be the instrument of the party, then, I take it, the essence of the statute requiring subscription is complied with; and I take the principle to be laid down in the case where the signature was by initials, that being the known signature of the party; and it is upon that principle that that case appears to me to have been decided.

My Lords, there is a rule in the law of Scotland, rather stronger than it is in this country, with respect to instruments executed apparently with the solemnities required by the statute, and it is considered an advantage in the law of Scotland, (and without considering whether it is or not, such unquestionably appears to be the settled law of Scotland,) that an instrument produced, which, upon the face of it, is an instrument executed according to the form of the statutes, when produced, has faith given to it, in the first instance, as the deed of the party; but, my Lords, a question arises here, upon a fact which is dehors the deed, namely, the blindness. The party being blind is a circumstance not appearing upon the deed, and which cannot appear upon the deed; and it is from that circumstance that there exists in this case something dehors the deed, that gives a colour to the case which it would not otherwise have. Other circumstances might be of the same description—for instance, insanity—that is a matter dehors the deed. A deed might appear to be perfectly executed; but when you produce evidence of insanity—insanity before the deed—insanity continued after the deed—that is a circumstance which destroys, to a certain degree, as I conceive, the probative effect of the deed. Then, my Lords, in the case, for instance, of insanity, it may be alleged it was executed in a lucid interval. If insanity is once proved before and subsequent to the execution of the deed, though not carried to the very point of time when the deed was executed, then the proof of insanity, in the first case, being upon the person to impeach the deed, the proof of lucid interval must lie upon the person who supports the deed.

Now, my Lords, these considerations have weighed very much in my mind in the course of the investigation of this case; and I think we ought to look to it with a view to all such cases, because we are to look to the very principle upon which we are now to decide, whether this is or is not to be considered as the deed of Lord Fife. If I look to this circumstance, of the degree of credit due to the instrument as the deed of Lord Fife from the signature—when I look at this roll—when I compare this roll with the fac-similes which have been produced, with respect to the execution, I should have no hesitation in saying, that, if I

had seen Lord Fife put his hand to this roll, and had afterwards seen the instrument which is now in Court, I should have had no hesitation in saying, that I believe the signature to that instrument was the signature of Lord Fife. But, my Lords, that may not decide the whole of the question; it may decide that with respect to the formality required as a solemnity, according to the statute, but it will not decide the question, whether this is to be deemed the deed of Lord Fife? With respect to the question, whether it is to be deemed the deed of Lord Fife, this is a thing that is to be considered:—Was Lord Fife acquainted with the contents, and the operation of that instrument, at the time he put his name to it; and did he receive that assurance which he ought to have received, that that was an instrument with the contents of which he was so acquainted? In the execution of instruments by persons who have the perfect use of their eye-sight, especially of those persons who are very ignorant of the legal operations of the deeds, a deed must necessarily be executed, in a great degree, in the confidence which the party has in the person who prepares it. If a deed is capable of being executed by a blind man, by his subscription, or even by notaries, whether he really and truly knows the contents and effect of that deed, must depend very much upon the confidence that the individual must have in the persons who are about him at the time, who compare the deed, and read the deed; and the knowledge he himself may have of the contents of the deed when read. It therefore seems to me that much requires to be considered, upon the whole of the statement in this case, what is the degree of knowledge of the contents of a deed, which every person who executes a deed is supposed to have, blind or not blind; and in that view, I must confess that it appears to me that the subsequent deed of November has not been sufficiently attended to, in the view in which I now consider the subject, namely, so far as it may tend to show that Lord Fife had knowledge of the contents of the deed of October—for that is the use, as it appears to me, and the only use which the deed of November is capable of. I do not conceive, from the form of the instrument, that the deed of November operates at all as a deed of conveyance;—not at all; and if the deed of October did not operate as a conveyance, the deed of November could not operate as a conveyance; but the deed of November may, as it seems to me, be used to show that the deed of October did operate as a conveyance, by showing that Lord Fife did know what were the contents of the deed of October. My Lords, the question, whether the deed of October is to be considered as the deed of Lord Fife or not, is a question, therefore, as the noble and learned Lord who has addressed you has observed, which is complicated, of law and fact; that it is one of extremely difficult decision, extremely difficult for a Jury to decide. If an issue had been directed in a form which would have brought the whole question before them, with respect to the law of the case, they must have necessarily depended very much on the direction of the Judge; and then they must have had to apply, with a considerable degree of attention, the law so declared to them, to the facts which were before them; and

July 17. 1823. perhaps it would have been very difficult to draw a satisfactory conclusion.

My Lords, the result, however, upon the whole, is a very serious one, and involves another question, whether, if the instrument appears executed in all the forms, upon what appears upon the view of the instrument itself, would it not therefore be probative, according to the law of Scotland?—and there is matter of doubt only, whether other circumstances do not occur dehors the deed, which may tend to invalidate the presumption, whether that presumption is not in law still in favour of the instrument? That I take to have been a part of the argument strongly urged on the part of the appellant in this case; and I thought very ably urged, whether, if the instrument, upon the face of it, (put out of the question blindness, if that fact was not proved,) the instrument itself being upon the face of it probative, then the presumption of law is, that which ought to decide upon matters which are only doubtful, with respect to any thing dehors the deed. That is a consideration which I wish very much to determine in my mind before I adopt it; but I think it is very material to consider whether that is not a consideration to be adopted; but is founded, as it was insisted upon, in what has been considered as the law of Scotland.

My Lords, we have heard much of the Roman law in this case. I apprehend that no argument can be derived from the Roman law; for it is perfectly clear that the law of Scotland, previous to the statute of 1540, when sealing was used as a means of giving that authenticity that the instrument required, by the application of the seal of the party to the instrument itself, that that has no connexion with that which is considered as the Roman law upon the subject; and, indeed, if your Lordships will look through the statute upon this subject, you will see that the custom is expressly considered as that which had created the law upon the subject previously to the statute of 1540—meaning, as I apprehend, the ancient common law of the land, which, as a written law, there is no trace of.

My Lords, I believe I have now exhausted all that may be material to say at this moment,—the great object which I have in view being to prepare your Lordships to discuss in your own minds the various questions which necessarily arise in this case—to consider the importance of the case that it must decide—what is to be the rule of law in future, with respect to the execution of deeds by persons who are blind; and with respect to one point of the case—the only one I shall now attend to—I mean the acknowledgment of the signature before Wilson: With respect to that part of the case, that will apply to deeds generally, whether executed by blind men, or persons not blind. My Lords, the form of the attestation to the instrument imports that the instrument was signed in the presence of Wilson; and the noble and learned Lord who has already addressed you has adverted to that; but, my Lords, I apprehend that that is the constant form of attestation, and we ought not to infer from that that Wilson has attested what was not in law to be considered

as the fact; for the law having permitted the attestation upon the acknowledgment of the signature, and the form of attestation being the common form of attestation, it does not strike my mind that that very materially alters the case. I am sure it would invalidate half the deeds that are executed in this country, because ninety-nine times out of a hundred, I believe, the acknowledgment of the handwriting is the thing which, with respect to one of the witnesses, very often is that which gives authenticity to the instrument. It is clear the statute referred to that very circumstance. One of the witnesses saw the name written; the other did not see his name written. Now there must have been two different attestations, if it had been conceived that it should have been exactly as the fact supposes; for I think there would be danger in holding, that the form of attestation had any effect with respect to the credit that is to be given to the instrument, derived from the attestation; the fact being, that Wilson did not see the party execute it, but having heard the party acknowledge the subscription, whether that is not equivalent to the fact of seeing it? I conceive it will be my duty, having said thus much, to consider the whole of the case; and whenever I shall come to a decision upon it, I am sure it will be a decision in fear and trembling; for, whichever way I may decide the case, I shall have great doubt what may be the future consequences. Whatever your Lordships may decide, must stand as the rule, in a considerable degree, of the Court below in future cases, and as the law of the country, unless the Legislature think fit to declare that the law is otherwise. July 17. 1823.

With respect to the title to pursue, I see no difficulty. The same character of heir, in my mind, gives my Lord Fife a title to pursue. He has a title to pursue, for the purpose of voiding the deeds, and prior deeds; but for no other purpose. Having voided this deed, he will have a right to void others; but independent of that, supposing they were to stand, he has still a right in the character of heir-at-law. He has, I apprehend, the legal estate in him, under the former deeds; he is the person in whom the estate must be, though the beneficial interest is taken out of him by the understanding of former deeds. But be that so, still, if he has an interest as the ultimate heir, he may pursue; and therefore I cannot conceive that there should not be a right in him to pursue, however remote the interest he may have may be, and however problematical; but if it was for no other purpose than to remove this deed, in order to get at the others—and I do not conceive that he is bound, in the shape of reduction, to reduce the other instruments; at the same time, any proceedings he thought fit, from interested motives of his own, to adopt, to homologate those instruments,—I do not see why he might not do it.. The circumstances of prior deeds might be such as to induce the heir to reduce the subsequent instruments, and homologate them. I do not see there can be any objection to it upon that ground.—Adjourned.

Lord Chancellor.—My Lords, your Lordships having appointed the further consideration of the cause of Sir James Duff and others, appellants, and James Earl of Fife, respondent, to be entered upon this

July 17. 1823. morning, it would have been extremely satisfactory to me, as I have no doubt it would have been to your Lordships, if I could have represented the case to stand before you in such circumstances, and in such a point of view, as that your Lordships should proceed at once to give a final judgment upon it. The case, however, is a case of so much importance, and, as it appears to me, a case of so much difficulty, that I find it necessary, first, to state to your Lordships the facts of the case; and, secondly, to bring under your Lordships' consideration what it may be fit to do with respect to the doctrines which are contained in the interlocutors complained of.

My Lords, the view I have taken of this case obliges me to say, in the outset, that I cannot hope to make further progress in the course of this morning, than to state the circumstances of the case, and to state generally what are the considerations that will require your Lordships' attention, meaning on Friday morning, with your Lordships' permission, to go through the examination of the several cases which relate to the doctrines that are laid down in the present case, with a view to see what it may be fit to do with the present case, if we can neither affirm nor reverse the interlocutors complained of—what we are to do with a view to bringing the case to that issue to which it ought to be brought, consistently with your power as a Court of Appeal.

The cause originated by a summons, which your Lordships will find to be a summons to the following effect:—I state the effect of it, because it cannot be necessary, I think, to go through the reading of the whole of the instruments which are stated in that summons, two of which, I think, bear date in October 1808, and one (which appears to me to have been hardly noticed, although it deserves very great notice and attention,) of November 1808.

The summons of reduction is a case in which the Earl of Fife is pursuer, against Thomas Wharton and others, defenders. It calls for the reduction of the deed of the 7th of October 1808, which deed it sets forth at full length. It then states another deed of the same date, the 7th of October 1808, the one of which it calls a trust-disposition and settlement, and the other it calls a deed of entail; and then it mentions a deed of the 12th day of November 1808, which it represents as a deed of alteration on the foresaid trust-disposition and settlement executed by the deceased Earl. It then calls for all other instruments relating to this entail, particularly stated; and it prays a reduction of all those instruments, that they may be declared to be of no avail, for the following among other reasons:—'First, That the trust-disposition and settlement, 'the deed of entail, and also the deed of alteration'—I beg your Lordships' particular attention that it prays the reduction of the deed of alteration, as well as the reduction of the trust-disposition and settlement, on the ground that 'the said deeds and other writings called for are vitiated 'and erased in substantialibus'—because they have not been executed according to the solemnities required by law. Secondly, it calls for the reduction of those instruments, including the deed of alteration, as not

having been subscribed before and in presence of the two persons who appear to have subscribed their names thereto as instrumentary witnesses, and that those persons did not hear the Earl of Fife acknowledge his subscription to either of the three deeds. It then alleges a third reason of reduction, namely, that many years before the time of executing the trust-disposition and settlement, the deed of entail, and the deed of alteration, the Earl had become blind: that when the deeds were executed, he was blind to such a degree, that he could hardly distinguish between light and darkness: that he was totally incapable of reading the deeds, or any writing or instrument whatever, or any printed book, or even of distinguishing, by means of sight, between one object and another; so that one deed might have been placed before him for another, and signed by him for such other deed, while it was impossible for him to know the difference. Your Lordships observe, the form of this allegation is, that he was blind, and incapable of reading deeds; and then they state as the consequence, not what was done, but what might have been done; so that one deed might have been placed before him for another, and signed by him for such other deed, while it was impossible for him to know the difference; and yet the said trust-disposition and settlement, and the deed of entail, and the deed of alteration, were executed by the Earl of Fife, without the assistance of notaries. This third reason, therefore, seeming to import that because the execution of them by the Earl of Fife in his circumstances might lead to imposition, the deed ought to have been executed with the assistance of notaries. The fourth reason is, that the Earl of Fife, being blind as aforesaid, was assisted in subscribing the trust-disposition and settlement, the deed of entail, and the deed of alteration, by a person who directed his hand to the place where he was to sign each page of the deeds, and to the places where he was to sign certain marginal notes written on different parts of the deed of entail: that the person told his Lordship when the pen wanted ink, and filled the pen with ink when it was wanted, the said James Earl of Fife being incapable, from blindness, of executing the deeds without such direction and assistance:—this fourth reason for reducing the deeds, meaning, therefore, to hold out, that if such was the case in that respect, and such his incapability of writing without this direction of his hand, and other circumstances, it ought to be reduced. Then follows the fifth reason:—'That the trust-disposition and settlement, and the deed of entail, and 'the deed of alteration, were not read over to the Earl of Fife, before sub-'scribing, in the presence of the two instrumentary witnesses.' And if that reason went no further than the words which I have read, it would seem to be implied, that unless the deeds were read over to the Earl in the presence of two instrumentary witnesses — if they had been read over to the Earl by twenty persons, one after another,—the deed would not have been a good deed. Then follows, however, another allegation, which is most material:—'That the said James Earl of Fife had no 'means of knowing what were the contents of the said three deeds, or 'of the marginal notes, before he signed them: that the said deeds, or

July 17. 1823.

'other deeds in their place, were read over to the said James Earl of Fife 'at different times; and between the different readings they were laid 'aside, and he had no means of knowing that the same deeds were 'brought back and read to him, or that the whole was read, or that no 'alteration was made upon the same between the different readings; and 'the said deeds, or other deeds in their place, were subscribed by the said 'James Earl of Fife at different times, and between the times of sub-'scribing they were laid aside, and that he had no means of knowing 'that the same deeds were brought back to him to be subscribed, or that no 'alteration was made upon the same between the different subscribings;' and therefore the summons prays, 'that for this and' (according to their terms of pleading) other reasons to be proponed at discussing hereof, the trust-disposition and settlement, the deed of entail, and the deed of alteration, with all instruments consequent upon them, should be reduced. Then there are the usual terms of praying the reduction, and likewise making the payment of sums of money, for the reasons usually stated in the Courts of Scotland.

My Lords, with the first defence that was taken to this summons I shall not trouble your Lordships a single moment. It is, however, a defence which was urged certainly with very great ability, and which was met again on the other side with very great ability by the counsel who wrote the papers on each side;—I mean the allegation in defence, that the pursuer had no title to pursue. As I shall be obliged to detain your Lordships, I fear, a considerable time upon the other parts of the case, I will merely refer your Lordships to what is stated upon that subject, only stating that I am satisfied the judgment in the Court below is right upon that point; and that the pursuer, for those reasons which are stated, and others, must be taken to have a good title to pursue. That being disposed of, your Lordships will find that the course which the things have taken is what I am now about to represent to your Lordships.

The preliminary defence of want of title and interest in the pursuer to insist in the present action being disposed of, Lord Pitmilly, by the interlocutor which is the first appealed from, appointed the pursuer 'to 'state in a condescendence, in terms of the act of sederunt, the facts 'he alleges and offers to prove in support of his reasons of reduction; 'allows the defender to see and answer the condescendence when given 'in; the answers to be framed also in terms of the act of sederunt;' and to this interlocutor his Lordship adhered, upon advising a representation and answers. The cause then proceeded, further, to the extent of an interlocutor being pronounced by the Lords of Session. There had been a petition on the part of the trustees brought before the Lords of the Second Division. They refused the petition, and adhered to the interlocutor complained of. This brought the cause before his Lordship upon the merits of the grounds of reduction, and there are various grounds of reduction stated in the condescendence. I believe it may be the best thing I can do to read it to your Lordships, or the substance of it. It is in these words:—'In obedience to the preceding interlocutor,

July 17. 1823.

'the pursuer condescends and says, first, That at and for several years 'before the dates of the trust-disposition and settlement, the deed of en-'tail, and deed of alteration under reduction, the deceased James Earl of 'Fife had become blind.' My Lords, I interpose here for a single moment an observation, the effect of which struck me very much in the outset of this matter, and I confess I have never been able to find a very satisfactory answer—that if the Court were of opinion that a blind man is, within the effect and meaning of the Scotch statutes, a man who cannot write, and that therefore the deed of a blind man should be executed in the same way as a deed is required to be executed by a man who cannot write—that in as much as those deeds certainly are not executed in the way in which the statute requires deeds to be executed by a man who cannot write, if the true and clear interpretation of the statutes is, that a blind man cannot write, the moment it appeared in evidence that Lord Fife was a blind man, there must have been an end of the cause. Second, 'That the blindness of the deceased Earl of Fife was occasioned by 'cataracts which had been formed in his eyes, or by some other disorder, 'which cataracts or disorder had been observed so early as the year 1798 'or 1799, or at least long before the dates of the deeds under reduc-'tion.' The third fact stated in the condescendence—I need not read it at length to your Lordships—is a fact alleged to show to what extent, and to what degree, this blindness went. Then there is this allegation:—'That the blindness of the said deceased Earl of Fife was such, that it was 'impossible for him to know by means of sight, or by any other suffi-'cient means, that deeds of any description, which might be read over, or 'might be pretended to be read over to him, were read over according to 'the true words or contents of such deeds.' Fifth, 'That the trust-dis-'position and settlement, and deed of entail, are each of them of enor-'mous length'—(this reasoning is unquestionably true)—'are each of 'them of enormous length, consisting of a great number of separate 'sheets.'

Then, having stated so much as to the blindness, they go on to state, that the deeds under reduction were not read over to the Earl of Fife in presence of instrumentary witnesses. This reasoning seems to intimate, that if they had been read over by any number of other persons, the want of reading in the presence of the instrumentary witnesses would be fatal to the deeds. Then they further state, 'That the said deeds 'were not read over at one and the same time, but were read over, or 'pretended to be read over, at different times; and in the intervals 'they were laid aside and deposited in a room different from that in 'which they had been read, or pretended to be read: that the Earl 'could neither know that that which was read was truly read, nor that, 'when the readings commenced after the intervals, the same paper or 'deed was brought back to him, in order to have the reading thereof 'continued; but, from his extreme blindness, every reading might have 'been wrong, without his knowing it; and, from the same cause, those 'parts of the papers which had been read might, during the interval,

July 17. 1823.

'have been changed without his knowing it: that it required the Earl 'to be employed for a number of separate days or intervals successively 'in subscribing or attempting to subscribe the said sheets which are 'now stitched together, and compose the trust-disposition and settlement 'and deed of entail under reduction: that when the Earl was employed 'in subscribing or attempting to subscribe the deeds, he had no means 'of knowing the contents of the same.' Then it states, as a tenth fact in the condescendence, the consequence of its being read, and in the manner that is before alleged in the summons; and then, as to the eleventh, 'That in subscribing or attempting to subscribe the said deeds, the Earl 'of Fife had no means of knowing that they consisted of the same sheets 'of paper which had been read over, or had been pretended to be read 'over to him, the deeds or sheets of paper having in the intervals, as 'aforesaid, been laid aside, and the Earl, from being blind, having 'no means of distinguishing whether they were the same writings, or 'other writings of different tenor and contents, that were returned to him 'to be subscribed: that even in the course of the subscriptions, or pre-'tended subscriptions, which occupied many separate days or intervals, 'the deeds, or important sheets thereof, might, in consequence of the 'Earl's blindness, have been changed upon him without his knowledge; 'and that after he supposed that the whole of the subscriptions were 'completed, and that the deeds were fully executed, he could not know 'by means of sight, or by the evidence of his own senses, or by any other 'means than the information of others, that the writings which he had 'subscribed were of the tenor and contents which had been read to him, 'if they were so read: that the blindness of the Earl was such that he 'could not distinguish his own subscription from any other subscription, 'or any other writing, nor could he distinguish whether there was writing 'of any sort upon any paper exhibited to him: that he could not ac-'knowledge his subscription from personal knowledge, in consequence of 'the defect of his sight; and could make no such acknowledgment, but in 'reliance upon what he might have been told by others.'

My Lords, upon so much of the condescendence as I have read, I would observe to your Lordships, that this species of pleading partly consists of argument and reasoning on what may be the consequences in respect of fraud and imposition, if a blind man is to execute a settlement in the manner in which it is contended Lord Fife executed this. Whatever may be the consequences—however open to fraud and to imposition—if the law does allow a man to execute—(I am now putting it without stating any opinion upon it)—but if the law does allow a man to execute in the way in which Lord Fife executed this instrument, that may be an exceedingly good reason for changing the law, in order to prevent blind men from being imposed upon by those means, and in consequence of its being found that all this reasoning is extremely just. But unless the law is so now, that a blind man cannot execute an instrument, because such and such consequences may follow from instruments being executed as this instrument was executed by Lord Fife, it is one thing to alter by le-

gislation, and quite another thing to declare how the matter stands in judgment at this moment. July 17. 1823.

My Lords, the next allegation has a material connexion with what passes afterwards in this cause, namely, 'that while the Earl was em-'ployed in subscribing or attempting to subscribe the said deeds or sheets 'of paper, George Wilson, one of the instrumentary witnesses, was em-'ployed upon the Earl's business in another room—the charter-room 'and neither saw the Earl subscribe, nor did he afterwards hear him ac 'knowledge his subscription;' and this is certainly a very material allegation with reference to the sufficiency of the execution of the instrument, and with reference to a question, or two questions perhaps, which arise in the consideration of this question, namely, upon whom it lies to prove that Wilson did not see the Earl subscribe, and that he did not afterwards hear him acknowledge his subscription—whether it lies either upon the one party or the other party—whether the result of the trials, and the effect of the verdicts, which I shall have occasion to advert to by and by, prove decisively, as they ought to do, how that fact stands.

Then there is another allegation, 'that after the said deeds, or sheets 'of paper composing the said trust-disposition and settlement and deed 'of entail, were subscribed or pretended to be subscribed by the Earl, 'they were brought to the charter-room by Stewart Souter, one of the 'defenders in this process, who desired Mr. Wilson to fill up the testing 'clause, and sign his name as one of the instrumentary witnesses: that 'it did not occur to either of them at the time that it would be irregular 'for Mr. Wilson to sign as an instrumentary witness, without having seen 'the Earl subscribe the deeds, or having heard him acknowledge the sub-'scription thereto; and that Mr. Wilson accordingly did, agreeably to the 'request of Mr. Stewart Souter, sign his name as an instrumentary witness 'to the said deeds: that the said Earl was not present when the said Stew-'art Souter brought the said deeds to the charter-room, nor when he made 'the said request to Mr. Wilson, nor when Mr. Wilson subscribed as 'an instrumentary witness; nor did the said Earl, either at that time or 'afterwards, either directly or indirectly, acknowledge in the hearing of 'Mr. Wilson that he had subscribed the deeds.'

My Lords, to this condescendence an answer was put in by the trustees, in which they state with respect to the blindness—that is, in answer to the first, second, third, and fourth articles of the condescendence which relate to the blindness—'The defenders, without admitting, but denying 'the relevancy thereof, deny the truth of the facts therein stated, and 'aver that, at the dates of the several deeds under reduction, the de-'ceased James Earl of Fife had not become blind: that his sight was to 'a considerable degree enfeebled by age or otherwise, but that he con-'tinued to enjoy the powers and use of it to a sufficient degree to enable 'him to read and to write: that he did in fact continue both to read and to 'write long after the dates of the deeds under reduction, and in particular 'that his power and use of sight were such as to enable him legally and ef-'fectually to execute any deed without the intervention and assistance of

July 17. 1823.

'public notaries.' Then, in answer to the fifth article, they say, that 'it 'may be sufficient to refer to the deeds themselves produced in process.' In answer to the sixth, seventh, and eighth, they say, 'that the deeds 'under reduction, executed by the Earl on the 7th day of October 1808, 'were read over to him in presence of Alexander F. Williamson, one of 'the instrumentary witnesses, and Stewart Souter, his confidential factor: 'that these deeds were thereafter duly signed by the Earl in presence of 'the said persons: that the deeds so read over to his Lordship were the 'same deeds which he thereafter proceeded to sign: that no fraud was 'practised to substitute one paper, or one sheet of paper, for another; and 'that no such fraud could have been practised in this case with any greater 'facility or chance of success, than in every other case where the aid of con-'fidential men of business in the preparation and execution of deeds is 'employed.' To the ninth article the defenders make answer, 'that the 'said Earl had sufficient means to know and be assured of the contents 'of the deeds which he actually subscribed.' Then they say, that with respect to the fifth, sixth, seventh, eighth, and ninth articles of the condescendence, 'they are to be understood as making these answers with-'out admitting, but, on the other hand, denying the relevancy of them.' To the tenth they say, 'that in subscribing the deeds under reduction, 'the Earl received no assistance, or, at any rate, none of a kind or degree 'to indicate any legal incapacity to execute such deeds without the in-'tervention of public notaries.' In answer to the eleventh and twelfth articles, (which are in substance the same with articles fourth, seventh, and eighth,) 'they refer to the answers already made to those former 'articles; and, in answer to the thirteenth, they deny that the said Earl 'was unable to distinguish his own signature, and acknowledge it as 'such.' With respect to the fourteenth, fifteenth, and sixteenth, they say, 'that George Wilson, one of the instrumentary witnesses, was not 'present when the said Earl subscribed the deeds under reduction, but 'that his subscription was duly acknowledged by the said Earl in his 'presence.' Then they further state, that 'if the condescendence for 'the pursuer appears to be relevant, proof ought to proceed at Edinburgh.'

My Lords, this condescendence and these answers forming the state of the pleadings, so far as I have proceeded, the appellant states in his Case, that with respect to all these grounds of reduction, three only have become the subject of serious consideration. The first, 'That the 'deeds of the Earl could not have been validly executed without the in-'tervention of public notaries.' The second, 'That the subscriptions of 'the Earl had not been adhibited, or duly acknowledged, in the presence 'of the instrumentary witnesses.' And the third, 'That the deeds had 'not been read over in the presence of the witnesses; and that the Earl 'had no certain means of knowing what were the contents of the deeds 'immediately before he signed them.'

My Lords, it appears that it was thought advisable to send these matters to the Jury Court; and in this country, I apprehend, if we had had a case of this sort in our Courts, which have both legal and equitable

July 17. 1823.

jurisdiction, and if it became necessary to ascertain whether this deed was the deed of Lord Fife, a very simple issue would have been directed—namely, to try whether it was the deed of Lord Fife or not. And, on the trial of that issue, every question would have been competent for the parties to have gone into, either by way of establishing the deed, or reducing it—the soundness of mind—capability of sight, and manner of the execution—who were and who were not present at the execution—in short, every circumstance that went to give validity to the deed, or to fix invalidity and nullity on the deed, might have been adverted to in the evidence which might have been produced, either to prove the affirmative of the issue, or to support the negative of the issue,—it being open, of course, to the parties to have excepted to the opinion of the Judge, or to have brought the question of any misdirection before the competent tribunal. It is impossible, on the other hand, for me to say, that there might not be very sufficient reasons for the Court of Session taking the course they did take; because it does appear to me, as far as I am able to judge on looking into this case, that it would have been very difficult—very difficult indeed, considering what is to be found in cases antecedent to this with respect to the doctrines of law, for the first Lord Commissioner sufficiently to know what was the law, with respect to which most of the great Judges who have had occasion to discuss the cases before this have differed so much, that it is difficult now to say what was the law prior to the trial of this case. They seem, therefore, to have taken another course of proceeding, and accordingly the gentleman who calls himself Clerk of the Jury Court first penned the following issues; namely, 'Whether, at the date of the deeds under re-'duction, viz. on the 7th of October 1808, James Earl of Fife deceased 'was totally blind, or was so blind as to be scarcely able to distinguish be-'tween light and darkness; and whether the said Earl was at that time 'incapable of reading any writing, written instrument, or printed book; 'and if at that time he could discover whether a paper was written upon 'or not?' The first question embodies, your Lordships see, three questions, all of which go to the same effect; namely, whether, quoad hoc, (if I may so express myself,) the Earl was to be considered as a blind man; or whether he was to be considered, being blind, the same as an unlettered man?—for the man who cannot write is to be considered pretty much in the same situation as the man who cannot read, except that he may be quite sure that the paper originally before him has not been abstracted from him. 'Secondly, Whether the said deeds were read over to the 'Earl previous to the Earl's name being put thereto, and if so, in pre-'sence of whom; and if read over to the Earl as aforesaid, Whether 'they were all, or any of them, read to him at one and the same time, or 'at different times; and if at different times, whether they were depo-'sited and kept in the room in which they were read, during the whole 'period which elapsed from the commencement of the reading, till the 'name of the said Earl was put to them as aforesaid?'—or where they were deposited. 'Thirdly, Whether the said Earl's name was put to

July 17. 1823.

'said deeds, or any of them, by having his hand directed to the places of 'signing, or led in making the subscription?'—or if the Earl was assisted, 'and if so, in what manner he was assisted in making his subscription?— 'Fourthly, Whether the said Earl put, or attempted to put, his name to 'the said deeds, or any of them, at one and the same time; or whether 'any period of time intervened; and if there were any interval or 'intervals of time between the said acts, whether the said deeds, and all 'of them, were in the possession or custody of the said Earl, or were in 'the possession or custody of any other person during such intervals of 'time? Fifthly, Whether the Earl put his name to the deeds under 'reduction in the presence of the two instrumentary witnesses, or either 'of them; or did acknowledge his subscription to them, or either of them, 'or at what period he made such acknowledgment?'

My Lords, after this, the amended answers were given in to the condescendence of the Earl of Fife, and those amended answers do require attention. They state, 'that the late James Earl of Fife was a 'man of strong natural understanding, originally intended and bred for 'the Bar'—I suppose this is to prove that he was a man of strong understanding—'before the decease of an elder brother,—of eminent talents 'and capacity through life, for the conduct of ordinary business—of constant activity and vigilance in the management of his own affairs, and 'indefatigable in the direction and execution of the plans he had formed 'for enlarging and improving his estates, and for settling them upon his 'heirs and successors, and adjusting and executing the deeds for that 'purpose, in the mode which he had conceived to be the most expedient 'and desirable.' I hope your Lordships will excuse me the tediousness which belongs to the reading of all these matters; but it is of some importance that it should be understood what are the differences between the form of pleadings in England and Scotland, for more reasons than one, to which I do not wish to refer. 'That at the dates of the deeds 'under reduction, and downwards till near the period of his death, the 'late James Earl of Fife continued to possess, without diminution, all his 'mental faculties, and to exercise, without abatement, all his habits of 'activity and anxious vigilance in the direction and conduct of his affairs: that during some of the latter years of his life, whether from 'age or other causes, his powers of vision were considerably impaired; 'in consequence of which, in the perusal of printed books, as well as of 'manuscript papers, he was usually in the practice of availing himself of 'the aid of some confidential persons whom he retained in his service, 'and upon whose honesty and discretion he placed reliance; but that 'he was by no means blind, as is alleged in the first, second, third, and 'fourth articles of the pursuer's condescendence: that he retained the 'powers of sight in a degree sufficient for all ordinary purposes in the 'conduct of business, as well as for the purposes of society; and in particular that he possessed the powers of reading and of writing, and continued occasionally in the practice both of reading and of writing, whenever it suited his inclination or his objects to do so: that he was in the

July 17. 1823.

'constant practice of executing deeds of all sorts connected with his own affairs, in the same manner as other men possessed of the ordinary powers and faculties required by law for that purpose: that on no occasion had he ever recourse to the attestation of public notaries, instead of the usual modes of personal subscription; and that in no respect whatsoever was the said Earl disqualified for the legal and effectual execution of deeds in this manner: that the deeds under reduction were carefully and deliberately framed and prepared by the Earl, or by his ordinary agents under his Lordship's immediate orders and superintendence: that in all their clauses and provisions, these deeds had been minutely and anxiously considered by his Lordship, and that they contained and expressed his enixa voluntas in the settlement of his affairs at the date of their execution: that the deeds so prepared, and finally adjusted, were read over to the Earl in the presence of one of the instrumentary witnesses, and Souter, his confidential factor: that these deeds were thereafter duly signed by the said Earl in presence of the said persons: that the deeds so read over to his Lordship were the same deeds which he thereafter proceeded to sign: that as it has not been alleged that any fraud was practised to substitute one paper or one sheet of paper for another, so no such fraud could have been practised in this case with any greater facility of success, than in every other case where the aid of confidential men of business in the preparation and execution of deeds is employed: that the Earl had sufficient means to know and be assured of the contents of the deeds which he actually subscribed: that, in subscribing the deeds under reduction, the Earl received no assistance, but wrote the whole subscriptions with his own unassisted hand: that the Earl was able to distinguish his own signature, and to acknowledge it as such: that George Wilson, one of the instrumentary witnesses, was not present when the Earl subscribed the deeds under reduction, but that the subscription was duly acknowledged by the Earl in his presence.'

My Lords, I believe I am not inaccurate, but if I am, I shall be able to correct that inaccuracy presently; but I believe that Wilson was not present when the Earl subscribed the deeds; and, with respect to the acknowledgment of the subscription, the effect of the verdict is, that it is not proven. What that means in such a case, it may perhaps be of some importance to have very well understood.

My Lords, this condescendence and these answers consist partly of allegation of fact, and partly of allegation of reasoning; partly of allegation of reasoning as to what may be the consequences of acceding to the doctrines insisted upon by the pursuer with respect to various deeds and instruments executed by Lord Fife, and various deeds and instruments executed by other persons under similar circumstances. In rightly considering pleadings of this nature, difficulties sometimes arise to a person whose views of pleading are so exceedingly narrow as those of the person who has now the honour to address your Lordships.

There were additions made to this condescendence of the Earl of Fife, in which he states that these answers are irregular in point of form, and 'are calculated for no other purpose than to throw the cause into confu-

July 17. 1823. 'sion;' and he represents them as otherwise open to a great variety of objections which, in our forms of pleadings, we should have thought extremely clear.

My Lords, there was afterwards a minute given in on behalf of the Earl of Fife, under the leave of the Court, and he says 'that the granter 'of the deeds was, at their date, in such a state of blindness as to ren- 'der him legally incapable of executing them; and, in the second place, 'that the instrumentary witnesses did not see him subscribe, or hear 'him acknowledge his subscription.' This was bringing the thing to a point; because, if he was blind, and therefore incapable, by his own signature, of executing an instrument—if that be the construction of the statute, which I shall have to read to your Lordships by and by, whether they did see him write, or did hear him acknowledge his subscription, would be an inquiry not very useful, if the fact were, that being blind, he was therefore incapable of executing them. If, then, he was incapable of executing them by subscription, then it becomes a very important question whether the instrumentary witnesses saw him subscribe, or heard him acknowledge his subscription; and it becomes likewise a very material question, upon whom it is that the burden of proof is cast by the law—upon which party it is? The allegation is, 'that the instrumentary 'witnesses did not see him subscribe, or hear him acknowledge his sub- 'scription.'

My Lords, after the pleadings had been closed on both sides, the Court were pleased to direct that there should be seven issues; and those seven issues were in the following form:—'1st, Whether, at the date of the 'deeds under reduction, viz. on the 7th October 1808, James Earl of 'Fife deceased was totally blind, or was so blind as to be scarcely able 'to distinguish between light and darkness? and whether the said Earl 'was at that time incapable of reading any writing, written instrument, 'or printed book; and if at that time he could discover whether a paper 'was written upon or not? 2d, Whether the said deeds were read over 'to the said Earl, previous to the said Earl's name being put thereto; 'and if so, in presence of whom; and if read over to the said Earl as 'aforesaid, whether they were all or any of them read to him at one and 'the same time, or at different times; and if at different times, whether 'they were deposited and kept in the room in which they were read, 'during the whole period which elapsed from the commencement of the 'reading, till the name of the said Earl was put to them as aforesaid, or 'where they were deposited? 3dly, Whether the Earl's name was put 'to the deeds, or any of them, by having his hand directed to the places 'of signing, or led in making the subscription? 4thly, Whether the Earl 'put, or attempted to put, his name to the deeds, or any of them, at one 'and the same time, or whether any period of time intervened; and if 'there were any interval or intervals of time between the acts, whether 'the deeds and all of them were in the possession or custody of the Earl, 'or were in the possession or custody of any other person during such 'intervals of time? 5thly, Whether the Earl put his name to the deeds

July 17. 1823.

'under reduction, in presence of the two instrumentary witnesses, or 'either of them? or did acknowledge his subscription to them or either 'of them? or at what period he made such acknowledgment? 6thly, 'Whether the Earl was, until the dates of the deeds under reduction, or 'at a later period, a man remarkably attentive to, and in the use of trans-'acting every sort of business connected with his estates, and in the practice 'and habit of executing, and in fact did execute, deeds of all sorts con-'nected with his own affairs, by subscribing the same with his own 'hand, and without the intervention of notaries? 7thly, Whether the 'said Earl took means to ascertain that the deeds under reduction, alleged 'to have been signed by him, were conform to the scrolls of deeds pre-'pared by his agents under his special direction, and what were the means 'he took to ascertain the same?'

These issues were directed to be sent to the Jury Court, and the Jury Court returned the following verdict:—'That James Earl of Fife, at the 'date of the deeds under reduction, viz. on the 7th of October 1808, was 'not totally blind'—that is, in October 1808—there is no mention of November 1808; though, to be sure, it is hardly possible that his power of seeing could have increased during that time—'was not totally blind, 'though he could scarcely distinguish between light and darkness: that 'the Earl was at that time incapable of reading any writing, written in-'strument, or printed book. He could not at that time discover whether 'a paper was written upon or not.' So that, whether he was blind or not, they do not find. 'As to the second issue, that the deeds were 'read over previous to the Earl's name being put thereto in presence of 'Souter and Williamson, or one or other of them;' but the verdict does not find which. Then they go on to state, that 'it is not proven whether they 'were all read to him at one and the same time, or at different times; 'but one was read at the time that the deeds were signed.' Your Lord-ships observe, that the finding is, that it is not proven whether they were read at one and the same time. Perhaps I do not very well understand the practice in the Courts in Scotland in these matters; but I do under-stand that it is a very familiar thing in the administration of the Criminal Courts of Scotland, on the trial, whether a person is guilty or not guilty, for the Jury not to say guilty or not guilty in many cases, but to say 'not 'proven—that is to say, that they are satisfied of neither the man's in-nocence nor his guilt—that they cannot find him guilty, and do not choose to find him not guilty; but they find that his guilt is not proven. Now, according to our law, what is not proved does not exist. Whether this same sort of practice obtains in matters of civil question, or whether it was ever meant to obtain in the finding of Juries in civil cases under the new institution of the Jury Court, is a point that is certainly worthy of consideration; and it seems to be a very material question when you are to ask yourselves upon whom does the onus probandi lie? Because, if the onus probandi lies upon me, and if I can get no further than 'not 'proven' that the thing was so and so, I have not carried the onus pro-bandi on my shoulders with perfectly good effect. This, however, is a

July 17. 1823.

matter which must be made the subject of much more observation. 'That 'it is not proven whether they were deposited and kept in the room in 'which they were read, during the whole period which elapsed from the 'commencement of the reading, till the name of the Earl was put to 'them as aforesaid, or where they were deposited.' As to the third issue, 'That the said Earl put his name to the deeds, by feeling for the 'finger or fingers of another person on the spot for signature, and was no 'otherwise assisted than as above described.' As to the fourth issue, 'That 'the said Earl put his name to the said deeds at one and the same time.' As to the fifth issue, 'That the Earl put his name to the deeds under re-'duction in presence of one instrumentary witness, viz. Alexander For-'teith Williamson; but that it is not proven that the said Earl did ac-'knowledge his subscription to George Williamson, the other instru-'mentary witness,' which never has been altered to this moment. As to the sixth issue, 'Proven in the affirmative.' As to the seventh issue, 'That the only means which the Earl took to ascertain that the deeds 'under reduction were conform to the scrolls of deeds prepared by his 'agents under his special directions, were his having heard the deeds 'read over to him.'

Now I do not find in the subsequent proceedings that this finding that the deeds had been read over to him, as a means of ascertaining that the deeds under reduction were conform to the scrolls of deeds prepared by his agents under his special directions, has been displaced, except by what took place upon the second trial with respect to the second issue. I think it then becomes a question, Whether this is still to stand as part of the finding of one Jury, displaced or not displaced by a contrary finding of another Jury,—both findings being before the Court, whether they are to be considered the one as overruling the other, or to be considered as two findings inconsistent with each other? They are two findings, out of which you cannot find satisfactorily what is the fact to which they relate.

My Lords, after this a motion was made for a new trial, upon the ground (if I recollect this part of the case rightly) that some evidence had not been given which ought to have been given. It is not material, but the Court directed, in consequence of that application, that there should be a new trial upon the second issue; and when they came to consider how that new trial was to take place, the pursuer, the Earl of Fife, insisted that the trustees should begin and be required to prove affirmatively. The trustees, on the other hand, insisted, not that they were to prove affirmatively, but that the matter was to go on in the shape of the negative of the issues which had been directed. The Court did not think fit to alter the terms of the issues. It is alleged on the one side—certainly not admitted on the other—that this is some evidence of the understanding of those who advised the Earl of Fife, that more of the onus probandi lay upon him than had been considered. That, however, I shall take occasion to refer to hereafter.

My Lords, upon this trial a question arose with respect to the direc-

July 17, 1823.

tions of the learned First Lord Commissioner of the Jury Court as to the effect of some evidence that was offered; and a bill of exceptions was tendered, the consideration of which bill of exceptions afterwards came before the Division of the Court of Session; the opinion of which was, that matters were right; but whether they were right or wrong, still it is immaterial, because there is no appeal from the bill of exceptions to us; and there being no appeal from the bill of exceptions to us, we cannot enter into the question, whether the Judge against whose direction such bill of exceptions was tendered was right or wrong.

The finding in consequence of the second trial was this:—'That it has 'not been proven that the deeds under reduction were read over to the 'Earl of Fife, previous to the Earl's name being put thereto.' So that we have, upon the finding of the first Jury upon the seventh issue, 'that 'the only means which the Earl took to ascertain that the deeds under 'reduction were conform to the scrolls of deeds prepared by his agents 'under his special directions, were his having heard the said deeds read 'over to him;' and by the second Jury we have the finding in the words I have just mentioned to your Lordships, namely, not an allegation in such a form as it would be in our law. Whether the effect is or is not different will remain to be considered, arising out of the particular circumstances. The finding in the one case that I have read, in respect of the second issue, is positive that he had heard the deeds read over to him; in the other it is, that it had not been proven that the deeds under reduction were read over to the Earl, previous to his name being put thereto.

My Lords, after this verdict the matter came on before the Lord Ordinary, my Lord Pitmilly, as I take it he was Ordinary again; and as he was pleased to state this upon the subject, it is material that your Lordships should attend to this interlocutor. That, I observe, was on the 24th January 1818. In the fourth interlocutor his Lordship says, that 'having considered the mutual memorials for the parties in this cause, with 'the whole process, finds that a person about to execute a deed of im-'portance'—(your Lordships know that under the statute there is a distinction between an ordinary deed and a deed of importance,)—'who, at 'the time of the execution of it, is, in the words of the verdict of this 'case, not totally blind, though he can scarcely distinguish between light 'and darkness, and is incapable of reading any writing, written instru-'ment or printed book, and cannot discover whether a paper was written 'upon or not, and who can only put his name to the deed by feeling for 'the finger or fingers of another person on the spot for signature, is not 'only entitled in law, but ought to execute the deeds by means of no-'taries and witnesses, in terms of the act 1579, c. 80; but finds that 'there is no sufficient authority in the law of Scotland for concluding 'that a deed signed by a person in the situation above described, in pre-'sence of two witnesses, in the usual manner, is null, or can make no 'faith, provided the deed be proved to have been distinctly read over to 'the granter in presence of the witnesses, immediately before the sub-

July 17. 1823. ‘ scription is made.’ By the words ‘ the witnesses’ there, I understand his Lordship to mean the witnesses making the attestation; ‘ in order to ‘ afford that degree of evidence which the law requires, and which is ‘ plainly necessary to show that the deed given to the granter to subscribe ‘ is truly in all its parts the deed which he intended to execute.’

My Lords, so far as I have read the interlocutor of this very learned Judge, your Lordships observe that he states, that a person having this degree of blindness which made him unable to see how to write, is not only entitled in law, but ought to execute the deeds by means of notaries and witnesses, in terms of the act 1579, c. 80; and therefore one question which your Lordships will have to decide, and which you must decide, is, Whether a person in the situation and circumstances in which my Lord Fife stood in the exercise of his faculties, is a person alluded to at all by that statute of 1579? ‘ But finds that there is no sufficient autho- ‘ rity in the law of Scotland for concluding that a deed signed by a per- ‘ son in the situation above described, in presence of two witnesses, in ‘ the usual manner, is null, or can make no faith, provided the deed be ‘ proved to have been distinctly read over to the granter, in presence of ‘ the witnesses, immediately before the subscription is made, in order to ‘ afford that degree of evidence which the law requires, and which is ‘ plainly necessary to show that the deed given to the granter to subscribe ‘ is truly in all its parts the deed which he intended to execute.’ I here also understand his Lordship, the Lord Ordinary, to be still proceeding upon the notion that this statute of 1579 does embrace the case of a person in my Lord Fife’s circumstances. ‘ That the fact of the deed ‘ subscribed by a blind man having been read over to him in presence of ‘ the witnesses before subscription, is not a fact which is to be presumed ‘ in law from the attestation of the witnesses to the fact of his having ‘ subscribed the deeds’—that is, that the mere fact of his having subscribed the deeds is not to be taken as a ground of presumption that they had been read over to him in the presence of witnesses; ‘ but that the ‘ fact of the reading over must be proved by the user of the deed when it ‘ is disputed: Finds that it has been established by the verdict of the ‘ Jury on the second trial, that it has not been proven that the deeds ‘ under reduction were read over to the said Earl of Fife, previous to the ‘ said Earl’s name being put thereto; and finds that the deeds are on ‘ this ground reducible.’ Now this last finding appears to me perfectly consistent; because, if my Lord Pitmilly was of opinion, and if that opinion was right—that the burden of proving that the deed was read over lay upon the person who was the user of the deed—and if he was right in stating that the fact of the reading over was not to be presumed in law from the attestation of witnesses of the fact of his having subscribed the deed—(in whatever sense you take the words ‘ has not been proven’)—if he was right in saying, that in as much as that had not been proven by the user of the deed, the consequence was, that the deeds were upon that ground reducible; but what his opinion would have been, if in point of law he had thought that the burden was upon those who quarrelled the

deed, and sought to reduce it, to prove that it had not been read over;— what his opinion would have been, either as the law to be deduced from the facts of the case, or what his opinion would have been upon the construction of the words 'that it has not been proven,' appears to me to be that which we cannot at all infer from any thing which appears upon this interlocutor. July 17. 1823.

My Lords, the Lord Ordinary then goes on to state this note:—'It is 'proper for the Lord Ordinary to explain in a note why he has not taken 'notice in this interlocutor of the separate objection to the deeds under 'reduction, on which a great deal of argument is bestowed in the memo- 'rial, founded on the allegation that the late Earl of Fife did not acknow- 'ledge his subscription to George Wilson, the instrumentary witness who 'was not present when the subscription was adhibited. The Lord Or- 'dinary's opinion on this point is, that the presumption of the law is, in 'this particular case, in favour of the deeds; but as it has been established 'by the verdict that the granter of the deeds was incapable of reading 'any writing, and could not discover whether paper was written upon or 'not,—and as it has also been established by the verdict that the Earl 'put his name to the deeds in presence of one only of the instrumentary 'witnesses, so that the acknowledgment of his subscription to the other 'instrumentary witness, which is presumed to have been made, must 'have been made by a person who could not see the subscriptions (up- 'wards of 160 in number) intended to be acknowledged by him, the 'Lord Ordinary thinks that the manner in which the subscriptions are 'attested, gives rise to an important objection against the validity of the 'deeds. If the verdict had established that the deeds remained in the 'actual personal possession of the granter till after the time when the 'acknowledgment of the subscriptions may have been made, the objection 'alluded to would have been the less important. If, again, the verdict had 'borne that the deeds were taken out of Lord Fife's hands immediately 'after the subscriptions were written, and before his Lordship had an op- 'portunity of meeting with Mr. Wilson, and of acknowledging his sub- 'scription to him, the objection to the attestation of the subscriptions 'would have appeared more formidable, if not decisive. In referring to 'the case of Coutts against Straiton, Lord Bankton makes an important 'observation in a passage not noticed in the memorials.'

My Lords, there was a representation against this interlocutor, and then the Lord Ordinary, 'in respect of the great importance of this case 'in point of law, and that although the opinion expressed by the Lord 'Ordinary in the interlocutor represented against remains unaltered, yet 'it will be more convenient for the Court, and more for the advantage of 'the parties, that the whole cause should be stated in one paper on each 'side, than that mutual petitions should be given in, which might be fol- 'lowed by two sets of answers, makes avizandum with the cause to the 'Lords of the Second Division; and ordains the parties to prepare, print, 'and box informations.' Then he pronounced an interlocutor which related only to the preparing, printing, and boxing informations.

July 17. 1823. My Lords, the matter came before the Court afterwards, and they were of opinion, upon the whole—some for one reason, and some for another reason—that the deeds should be reduced. They give different reasons for the reduction of the deeds, and I think they give reasons which it is extremely difficult to reconcile to each other; and, upon the whole, I believe I may venture to represent them very much thus to your Lordships: One doctrine which is sought to be maintained is, that a blind man is a person who, according to the acts of the Scotish Parliament, cannot subscribe by testamentary witnesses; and if that doctrine be true, there is an end of the question. They say that he ought to have executed by notaries and witnesses; and if I understand the opinions that have been laid before your Lordships in what are called 'Notes of the 'Judges' Opinions,' I think I may represent to your Lordships, that with respect to the executing by subscription, Lord Craigie and the Lord Justice-Clerk were of opinion that he could not execute by subscription: that Lord Glenlee, and Lord Robertson, and Lord Bannatyne were of opinion that he could execute by subscription: that with respect to reading, all of them, I think, held that reading was not a statutory solemnity. My Lords, I see that a distinction is taken in the book of a very learned writer—I mean Mr. Bell—between a statutory solemnity and a consuetudinary solemnity, which being interpreted, I should state myself thus:—That a consuetudinary solemnity is required by common law, and is not required by the statute law; but still that which is required by the common law must be as much attended to as if it was required by statute; but I think they are all of opinion, that though it may be a solemnity, it is not a statutory solemnity. Then with respect to the necessity of proving reading where the party is proved to be blind, Lord Glenlee, Lord Robertson, and Lord Bannatyne are of opinion that when the party is proved to be blind, the reading must be proved; and the Lord Justice-Clerk seems to be of opinion also, that if he could subscribe,—that is to say, if the statute does not consider a blind man as a man who cannot write, which it is his opinion that it does,—but if the statute does not consider a blind man as a man who cannot write, and if therefore he could write, the reading must be proved; but he is not very decided, I think, in the opinion which he gives, whether the reading must be proved or not. Lord Craigie is clearly of opinion, that if he could subscribe, according to the true intent and meaning of the statutes, it was not necessary to prove that they were read to him; and with respect to another question, whether it was necessary that they should be read to him at the time of subscribing, there is great difference of opinion among the Judges. I have not collected the opinion of each exactly as to that point; but there is great difference of opinion as to the fact, whether they must or must not be read at the time of subscribing.

My Lords, with respect to the question upon whom the onus probandi is of reading in case of a blind man, Lord Glenlee, Lord Robertson, and, as it seems to me, Lord Justice-Clerk, are of opinion that it is upon the defender. Lord Craigie is of opinion that if the party

July 17. 1823.

could subscribe, it must be upon the pursuer; and Lord Bannatyne makes an observation which applies to the different findings by the second Jury and the first Jury, as to the reading over, which are inconsistent with each other. He says it is fixed by the verdict, that he took no other means of ascertaining that the deeds under reduction were conform to the scrolls of deeds prepared by his agents under his special directions, than his having heard them read over to him; but he does not consider this as satisfactory evidence of that fact, and there he leaves it.

My Lords, with respect to the question upon whom the proof of acknowledgment lies, the pursuer, as I collect the opinions, is called upon to prove the negative by Lord Glenlee, Lord Bannatyne, and Lord Craigie, if the party could subscribe. The Lord Justice-Clerk and Lord Robertson state considerable doubts upon the subject. However, it does appear, that taking all these different opinions together, in order to determine whether, on all the grounds taken together, it could be determined that those were or were not the deeds of the late Lord Fife, some of the Judges so holding for one reason, some so holding for another reason, they find, as I understand the case—(if I am wrong in that, I shall be glad now to be set right, and beg I may be set right)—that the reasons of reduction of the trust-disposition and deed of entail—that is, of the deeds of October—are good; but the interlocutors have neither reduced nor supported the deed of alteration of November. And with respect to the deed of alteration of November, either the matter has been altogether overlooked, or it is to be considered as a matter that is sent back to the Lord Ordinary, in order there to be dealt with as there it ought to be. Perhaps, my Lords, it was the intention to send it back to the Lord Ordinary, to be there dealt with as it ought to be dealt with; but here the observation has occurred to me from the beginning of this cause, and which I have never been able to remove from my mind, nor am I now able to remove it from my mind, namely, that the summons here, being a summons of reduction with respect to all the instruments, it should seem to persons whose minds are influenced by the considerations which affect the mind of an English lawyer, that if the deed of alteration of November 1808 was a deed properly executed by Lord Fife, in as much as that is a deed of alteration of the instruments of October 1808, it seems to me a most extraordinary thing that it could be said—(I mean, supposing the statutes themselves, as to the modes of execution, do not sweep away the whole)—but it seems to me a very extraordinary thing that that deed of alteration, which I cannot see was laid before the Jury at all, should not itself be taken to be some evidence that the party who was altering the deed knew something about the contents of the deed that he altered. I should have thought myself it would not have been an improper mode of proceeding to have had an issue directed upon that deed, as well as the other deeds, and to have had it considered what was the effect of that deed. I mean, if the question with respect to the statutes left the Court open to consider what evidence it might afford under the seventh issue, that he had understood the contents of the deeds he executed in October, that

July 17. 1823. being put as a question, and the Jury being left to determine that he did thoroughly or not thoroughly understand the deeds which he had so altered—that, I say, certainly does raise a very considerable doubt in my mind at this moment.

Your Lordships will see that there are a great many questions you have now to decide. One is, whether this matter has been satisfactorily tried? Another is, supposing it not to have been satisfactorily tried, what course of proceeding is open to you, regard being had to the fact that you are a Court of Appeal, and regard being had to the effect of the two acts of Parliament with respect to the trial by Jury? If your Lordships could be satisfied that it was a wholesome way of proceeding—(I am not now examining whether it is or not)—but if you could be satisfied that it was a wholesome way of proceeding to direct another trial upon the general issue whether those deeds, or each or any of them, were the deeds of Lord Fife? I am afraid that if you sent it down in that shape, the consequence unquestionably would be, that, with all the differences of opinion which are recorded in the notes with respect to this case, and which, I think, your Lordships cannot but trace in some of the antecedent cases I shall have occasion to observe upon presently, in all probability the consequence would be, that the issue being so directed, some such directions would be given upon the trial of that issue as would lead to bills of exceptions, and those bills of exceptions would get to the Court of Session upon those matters which would be matter of such differences of opinion; and that difference of opinion would bring the cause back again, in all human probability, to this House, in order to have those doctrines of law which would be to be agitated, first, in the Jury Court; secondly, by the bill of exceptions; and, thirdly, reconsidered here with as little of influence from the prior decision as they influence the consideration of the case now before your Lordships: Therefore, first of all, if it is right that you should—(with reference to which I will say nothing to-day)—if it be right you should have this more satisfactorily tried, the first question will be, whether you can take that course consistently with the two acts of Parliament? and, secondly, whether, if you can take that course consistently with the two acts of Parliament, it would be right for you, by certain findings, prefacing the direction of such an issue, to state what are the opinions of this House with respect to many of those doctrines which have been discussed in the Courts below; and that is a consideration which also must be attended to in another point of view, namely, that if it is wholesome and competent for you so to act, you will have to consider how far the matters which would be the subject-matter of other findings have, or have not, already met with discussions in the Court below. All these are certainly open to very serious questions.

My Lords, upon the question itself, whether a blind man can execute by subscription—if it were thought fit to have what the Scotish Courts call a comparatio literarum—if the writing be of consequence, it might be of importance to have your Lordships' roll of Parliament sent down, because the signature of Lord Fife, almost immediately before this, is al-

most a fac-simile of the signatures to be found to these deeds; but that I throw out of this question.

My Lords, what is the law with respect to the execution of an instrument by a blind man? If the Scotish statutes do not in terms decide that, I think you can hardly enter into that question satisfactorily, without looking a little to what is the law in other countries; for though the law of England is not the law of Scotland—though the Roman law is not the law either of England or Scotland with respect to this point, yet the doctrines of law are to be found in the law of England, and in the Roman law, so far as they are doctrines founded on good sense. When you are considering what is the law of Scotland, if you cannot find it in the consuetudinary law before the statutes, or cannot find the law as dictated by the statutes, I say that then the law of other countries is to be looked at with reference to that subject. It is astonishing how very little is to be found in the law of Scotland upon the subject;—it is astonishing how very little is to be found in the law of England upon the subject;—and it is quite clear, that neither by the law of England, nor by the law of Scotland, can it be contended that all the cautions which were required by the Roman law have ever been required.

With respect to the law of England, you will find that in the law relating to real estate, or the law relating to personal estate, very little is to be found in our books. With respect to the law relating to real estate, Blackstone appears to me to have drawn this as a conclusion from what he finds upon this subject:—'I proceed now to the fifth requisite for 'making a good deed—the reading of it. This is necessary wherever 'any of the parties desire it; and if it be not done on his request, the 'deed is void as to him. If he can, he should read it himself; if he be 'blind or illiterate, another must read it to him. If it be read falsely, it 'will be void, at least for so much as is misrecited, unless it be agreed 'by collusion that the deed shall be read false, on purpose to make it 'void; for in such case it shall bind the fraudulent party.' My Lords, the material expressions here are—'This is necessary wherever any of 'the parties desires it; and if it be not done on his request, the deed is 'void as to him. If he can, he should read it himself; if he be blind or 'illiterate, another must read it to him.' Now, your Lordships will permit me to observe upon this passage, that it certainly is not a passage that intimates any necessity for those persons reading it to him who are the subscribing witnesses. It may be a caution, and an extremely wise caution, to do so, but that is not required by the doctrine laid down in this passage; nor am I aware, as an English lawyer, that if it could be proved by other evidence that he perfectly knew the contents of the instrument, it would be necessary to prove the precise act of reading in the presence of the subscribing witnesses, because I apprehend that the act of reading is only evidence that he understood it; and though it may be extremely difficult to find other evidence so satisfactory as the act of reading, yet if there was other evidence offered to a Jury satisfactory upon that head, I apprehend they would be perfectly well justified in finding that that was

July 17. 1823.

his act; and there may be many reasons why a blind man may choose to execute a deed or a will, without having it read in the presence of the subscribing witnesses. Your Lordships, however, will find some doctrine upon this in Lord Coke's second report, and the eleventh report, which is material to be attended to. In the second report I find this:—'In this 'case three points were resolved: 1st, That if a man not lettered be 'bound to make a deed, he is not bound to seal and deliver any writing 'tendered to him, unless somebody be present who can read the deed to 'him, if he requires the writing to be read to him; and if the deed be in 'Latin, French, or other language, (which the party who is to execute 'the writing doth not understand,) in such case, if the party demands that 'one should read and interpret the writing to him, and none be present 'that can read and expound the tenor of the same in that language that 'the party who is to deliver the deed understands, there the party may 'well refuse to deliver it: so it is, although the man can read; yet if the 'deed be indicted in Latin, French, or other such language as the party 'who is to execute cannot understand, if he demands that the writing be 'read or expounded to him in such language as he may understand it, 'and nobody be there to do it, the party may refuse to deliver it.' There is then a point put, which I confess appears to me to be pretty hard doctrine. A man had read a deed, and required time for counsel to inform him whether the deed was right; but a judgment is stated in which that liberty and that opportunity was refused as that which he was not entitled to.

There is another passage to be found in Piggot's case in Coke's eleventh report, in which Thorpe, Justice, says, (and this is a very material passage,) 'Every deed ought to have writing, sealing, and delivery; and when 'any thing shall pass from them who had not understanding but by hear-'ing only, it ought to be read also; and it is true that he who is not let-'tered is reputed in law as he who cannot see, but hear only, and all his 'understanding is by his hearing; and so a man who is lettered and can-'not see is, as to this purpose, taken in law as a man not lettered: and 'therefore if a man is lettered and is blind, if the deed is read to him in 'other manner, he shall avoid the deed, because all his understanding in 'such case is by his hearing, as it was resolved in the case of one John 'Shuter.' Your Lordships will observe, that Thorpe, Justice, does go so far as to state, that when any thing shall pass from a man who understood by hearing only, it ought to be read also. What is to be the evidence that it was read, certainly is quite another matter of consideration.

My Lords, there is another case which is material in the law of England, which I see they had in Scotland, and in which perhaps it is not much more easy to reconcile what is said by the different Judges in England, than it is to reconcile all that has been said by the different Judges in Scotland on this point, and that is a case to be found in the second volume of Bosanquet and Puller. There 'the testator being 'eighty years of age, and blind, in July 1801 applied to a friend of the 'name of Davis to make his will, and dictated every word himself, making

July 17. 1823.

'a devise in favour of the lessor of the plaintiff, who was his stepdaughter, 'and lived with him, to the disadvantage of the defendant, his son. After 'the will was written by Davis, the testator went into the room where 'the lessor of the plaintiff, with other persons, was, and desired Davis to 'read it over, and then said, 'Now, Nancy, are you satisfied?' Davis 'then took the paper away with him, to get it copied; and when he 'brought it back fairly copied, two months afterwards, the testator made 'an alteration in it.' (You see it was brought back two months afterwards, and the testator made an alteration in it, which alteration was considered by the Court here as a very material circumstance, though that is taken no notice of by the Court below.) 'The testator made an alter-'ation in it, and perfectly understood what he was doing. After the 'alteration made in the will, it was executed by the testator in the pre-'sence of Davis and the three attesting witnesses named by the testator. 'The will was not read over in the presence of the attesting witnesses 'before it was signed by the testator, but was merely placed before him 'in their presence, and executed.' Now, in passing, my Lords, let me observe, the will was open to every objection almost in point of reasoning, to which either the will in this case may be exposed, or to which the wills in former cases, (in which the Judges held the language I shall have occasion to state to your Lordships by and by,) antecedent to that, were open; because the will having been copied from another paper, was not read over in the presence of the subscribing witnesses, which has been thought by many of these Judges to be necessary. It might have been altered over and over again; and he did not know whether it had or not, by reading it at the time of the execution. If he knew it at all, it must be by other evidence; and therefore this case, in which it was held that the will was good, seems to me to be an affirmance that, in the law of England, other evidence than reading at the time may be received, to prove that the testator did understand the instrument he executed. It is stated in the report, that it was not read at the time of the execution; and the Lord Chief Baron on the trial having held that this was sufficient proof, Mr. Justice Heath says this—(and let me not name that learned Judge, without stating that I had once the honour of sitting with him in the Court of Common Pleas fifteen months, and I cannot do justice to my own ideas of his great professional knowledge—I was quite surprised at it:) 'The statute of frauds only requires that the testator shall execute 'the will in the presence of the attesting witnesses; and in ordinary cases, 'when that is done, all is done that is necessary to be done.' My Lords, this passage is material to be observed, because your Lordships will have presently (attending to the Scotch statutes) to see whether they require any thing more than the attestation of the subscription. 'It is true that 'frauds are sometimes practised, and it was with a view of preventing 'these frauds that the statute directed the will to be signed in the pre-'sence of the attesting witnesses. In the case of a blind man, stronger 'evidence would be required than the mere attestation of signature.' Your Lordships will see by and by what the other Judges say; 'but

July 17. 1823.

'in this case there was that stronger evidence which the peculiarity of 'the case seems to call for.' The 'stronger evidence' to which the learned Judge alludes, is the alteration that he made in the will, and the circumstance of his question to his stepdaughter, whether she was satisfied when it was read over? 'In the course of the argument, sufficient 'attention has not been paid to the distinction between what shall be 'deemed a literal compliance with the provisions of the statute, and what 'sufficient proof to rebut any imputation of fraud. The question of 'fraud is for the Jury entirely, and here they found the will to be a valid 'will. The Lord Chief Baron was of that opinion at the trial, and I 'agree with him. Great inconvenience would arise from any rule re-'quiring the wills of blind men to be read over in the presence of the 'attesting witnesses, nor would the mere reading to them be a certain 'guard against fraud, since it might be read falsely. No authorities from 'the civil law have any force or application in this case.'

Mr. Justice Rooke holds the will to be good; and he says, 'If a fair 'ground for presuming fraud were laid by the evidence, the circumstance 'of the testator being blind would most materially strengthen that pre-'sumption.' Mr. Justice Chambré says, 'This question must be decided 'by the provisions of the statute of frauds. Now it does not appear that 'the Legislature, when they passed that statute, had in their contem-'plation executions of wills by blind men. Testators are generally very 'averse to have their intended disposition of property made known in 'their families before their deaths; and blind men, who stand so much 'in need of attention from their relatives, would probably be peculiarly 'averse to it. The remainder of their lives might, in consequence of such 'disclosures, be rendered completely uncomfortable; at all events they 'might produce great discord in families. There cannot be a doubt, that 'if this were an instrument by deed, or any other written engagement, 'the mere signature of the party, though blind, would be deemed a 'sufficient execution; and the only thing to be proved would be, that 'the blind man was imposed upon.' He does not state upon whom that proof lay; but he observes, 'In this case that fact is completely estab-'lished by an unimpeached witness, who took instructions from the 'mouth of the blind man himself, and wrote them down.' He holds, therefore, that the mere signature of the party, though blind, would be deemed a sufficient execution, and the only thing to be proved would be, that he was imposed upon.

My Lords, with respect to the doctrines of our Courts, it has invariably been held that a blind man cannot execute. Swinburne has held the contrary; but his notion goes a long way towards establishing that the instrument must be read over. Whether he means by that, that there must be direct proof of the reading, or whether he means satisfactory proof that the testator knew the contents, which he might know by its having been read over at a time when there might be no witness to prove the fact, seems to be left open to a doubt from which I have taken some pains in vain to relieve myself.

July 17. 1823.

My Lords, in this state of things, your Lordships have now to look back to the various cases which were decided before the present case was brought into the Court of Session. It will be impossible for me to go through all those cases in the course of this morning, nor am I equal to the execution of it. One case, however, I will dispose of at this moment, which I can dispose of, not merely from reading the papers, but my recollection of it—I mean Lothian's case. I had the honour to be counsel in that case; and unless my memory deceives me very much, it is the very case which has so often led me to conceive that it was not quite a good rule in this House to affirm a judgment, without giving the reasons for the affirmance. In that case there were several things relied on to beat down the validity of the instrument. There were points such as there are in the present case; and in the case signed by the counsel there were what may be represented as admissions of very great importance in support of the judgment which has been pronounced—that is, admissions by counsel who signed the case. When it was argued at the Bar, it was argued (unless my memory deceive me) at very great length; but I am perfectly convinced that case was decided—I think it was in 1794, when Lord Loughborough was Chancellor, (but my Lord Thurlow attending,)—it was decided upon satisfactory proof—that is, proof which they thought satisfactory. I believe I argued at the Bar that there was no imposition at all, and I was extremely dissatisfied at their being satisfied; but they thought there was satisfactory proof that Lothian had been imposed upon; and, on looking at the case, it is very difficult to say that there is not some proof that he had been imposed upon. I am confident the case went upon that ground, and was not decided upon the doctrines of law that are involved in the present case.

My Lords, if you look back to the antecedent cases which are stated in the publication of Mr. Bell, a very eminent writer on the Scotch law, we have, according to him, not only the opinions of counsel on some of the points, but the doctrines of the Judges in some of those antecedent cases; and I think I cannot speak without attending to the fact, that I ought never to speak of the Scotch Judges but with respect, when I say, that if you look to the different judgments that are given, you will find there are doctrines laid down by those Judges which they could not themselves maintain afterwards—that there are doctrines which they afterwards disclaimed—and that there is one of the questions which will fall to be decided in this case, which they did not decide.

My Lords, the questions that it will be my duty to trouble your Lordships with on Friday will be, Whether Lord Fife was a man (as Lord Pitmilly says) that was entitled and ought to execute by notaries and witnesses? or whether, on the other hand, because he was blind, he was a person who, within the intent and meaning of these statutes, could not write? That, my Lords, is one point. The next point to be considered will be, Whether, by the law of Scotland, reading is a statutory solemnity? That, I apprehend, must also be decided by looking at the words of these statutes. The next question will be, If it is not a statutory solemnity,

July 17. 1823.

is it what Mr. Bell calls a consuetudinary solemnity?—an expression with reference to which I have endeavoured to give some explanation already. In the next place, If it be not a statutory solemnity, but a consuetudinary solemnity; or if it be a statutory solemnity, and a consuetudinary solemnity; (though I do not see how it can be a statutory solemnity, unless reading is likewise a statutory solemnity), the next question is, Upon whom lies the proof that it was or was not read? Another question will be, If there must be proof that it was read, and you have decided upon whom lies that proof, which of the Judges is, in your Lordships' opinion, right?—those who hold that it must not only be a reading by some person, but that it must be a reading in the presence of the witnesses who are to attest,—or those who hold the contrary? Another question is, Whether acknowledgment be a statutory solemnity, (and your Lordships will attend to the words of the statutes when I read them); and if acknowledgment be a statutory solemnity equal to subscription, or tantamount to it, then, Whether an instrument (supposing a blind man to sign it) being on the face of it probative, the proof that there was such an acknowledgment lies upon the party who is using the deed; or whether, on the other hand, the proof that there was not such an acknowledgment lies upon the person who is impugning it? There are other considerations that I do not trouble your Lordships with stating; but after we have got through all these, the question then will result to this, Whether your Lordships are satisfied that the judgment ought to stand? If it does stand, and if your Lordships are of opinion the judgment cannot be maintained on the ground on which it has hitherto been sought to be supported, What is the mode in which it is open to you to proceed, and what is the best course of proceeding?

Having, my Lords, said thus much for this day, I shall, merely for the sake of saving your Lordships' time on Friday, read to your Lordships to-day the statutes which are principally in question. I need not state to your Lordships, that in early times the seal of the party was sufficient evidence of the execution; but in the Parliament of Scotland in 1540 there is a statute which says, (c. 117)—'That na faith be given 'to evidentes sealed, without subscription of the principal or notar.'—'It 'is statute and ordained, that because mennis seals may of adventure be 'tint, quhairthrow great hurt may be genered to them that awe the sa-'men; and that mennis seales may be feinzied, or put to writinges after 'their decease, in hurte and prejudice of our Soverain Lord's lieges; 'that therefore na faith be given in time cumming to ony obligation, 'bonde, or uther writing under ane seale, without the subscription of him 'that awe the samen, and witnesse; or else, gif the partie cannot write, 'with the subscription of ane notar thereto.' The only words here that I apprehend can include a blind person, are, 'gif the party cannot write.'

My Lords, the next statute is the statute of 1579, which is entituled, 'Anent the subscription and inserting of witnesses in obligationis, and 'utheris writtes of importance.' Your Lordships know that in the law of Scotland there is a perfect distinction as to what are considered as

writs of importance. ‘ Item, It is statute and ordained be our Soveraine ‘ Lord, with advise of his three estaites in Parliament, that all con- ‘ tractes, obligationes, reversiones, assignationes, and discharges of rever- ‘ siones, or eiks thereto, and generallie all writs importing heritabil titil, or ‘ utheris bondes and obligationes of great importance to be maid in time ‘ cumming, sall be subscrived and seilled be the principal parties, gif they ‘ can subscrive, utherwise be twa famous notars, befoir four famous wit- ‘ nesses, denominat be their special dwelling-places, or sume uther evident ‘ tokens, that the witnesses may be knawen, being present at that time; ‘ utherwise the saidis writis to mak na faith.’ Here the argument by which it must be contended that blind persons are to be considered as within the meaning of this statute, must turn upon the words ‘ gif they ‘ can subscrive.’ If a blind person can be shown by the law of Scotland, antecedent to these two statutes, to have been considered as a person, though he could write ever so well, not to be able to subscribe or write, then, to be sure, the statutory language will bear interpretation from the consuetudinary law which existed before the statutes. On the other hand, if that cannot be shown, it will be for your Lordships to say whether these two statutes requiring men so to subscribe can be taken of necessity, or by fair construction, to refer not to all such persons as shall subscribe, but to such persons as, having their eyes open, must be taken to have seen what they subscribed.

July 17. 1823.

My Lords, the only other statute which has been referred to is the statute of 1681, which does not appear to me to bear very strongly upon this—that is, ‘ concerning probative witnesses in writs and executions.’—29th August 1681.—‘ Our Soveraign Lord, considering that by the ‘ custom introduced when writing was not so ordinary, witnesses insert ‘ in writs, although not subscribing, are probative witnesses, and by their ‘ forgetfulness may easily disown their being witnesses; for remeid where- ‘ of, his Majestie, with advice and consent of the estates of Parliament, ‘ doth enact and declare, that only subscribing witnesses in writs to be ‘ subscribed by any partie hereafter shall be probative, and not the wit- ‘ nesses insert not subscribing; and that all such writs to be subscribed ‘ hereafter, wherein the writter and witnesses are not designed, shall be ‘ null, and are not suppliable by condescending upon the writter, or the ‘ designation of the writter and witnesses: And it is further statute and ‘ declared, that no witness shall subscribe as witness to any partie’s sub- ‘ scription, unless he then knew that partie and saw him subscribe, or ‘ saw or heard him give warrand to a nottar or nottars to subscribe for ‘ him;’ (there is nothing here about ‘ writing,’ your Lordships observe,) ‘ 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: And seeing writting is now so ordinary, his Majestie, with ‘ consent foresaid, doth enact and declare, that no witnesses but subscrib- ‘ ing witnesses shall be probative in instruments of seisin,’ and various other instruments which are here mentioned, ‘ and that none but sub-

July 17. 1823.

'scribing witnesses shall be probative in executions of messengers, of in-
'hibitions, of interdictions, hornings, or arrestments; and that no execu-
'tions whatsoever to be given hereafter shall be sufficient to infer inter-
'ruption of prescription in real rights, unless the same be done before
'witnesses present at the doing thereof, subscribing: And that in all the
'saids cases the witnesses be designed in the bodie of the writ, instru-
'ment, or execution respective; otherwise the same shall be null and
'void, and make no faith in judgment, nor outwith.'

Now, my Lords, upon all these statutes together, your Lordships will find the opinions of the Judges both in the present case, and the opinions of the Judges in other cases which have been stated to your Lordships. They have gone the length certainly, in other cases, of holding that the reading to the party was a statutory solemnity, or they call it a solemnity which must be proved by the attesting witnesses; and being proved by the attesting witnesses, one Judge of great eminence, whom I have always heard spoken of during the 20 years I have been concerned in Scotch causes inside the Bar, and the previous time when I was concerned in them outside the Bar—I mean Macqueen—went the length of holding, not only that the attesting witnesses should be witnesses to the attestation, but to the reading; and that the fact that they were witnesses to the reading should be stated in the docquet. It was found out afterwards that that opinion could not be maintained without oversetting many decisions, and that opinion has not been since abided by. Upon the whole, the doctrines with respect to what are proper modes of executing instruments by blind perons, or persons unlettered, your Lordships will find, have shifted from time to time—have been from time to time considered in very different points of view by Scotch Judges—even in this case have been considered very differently by different Judges; and that we are now in this state, namely, that if the situation in which this matter is brought before us allows us to decide what is the law of Scotland —not what it was, but what it is—it will become necessary for your Lordships to record your opinions upon these doctrines, that they may be a guide in future. Let me say again what I have often said before, that if any body supposes that I ever have—(I hardly know what word to apply to it)—that I ever have thought of altering the law of Scotland instead of pronouncing the law of Scotland, he is totally and absolutely mistaken. It has fallen to my lot, after great consideration on the points, to find it impossible to agree in some judgments which have been under review here; but if I have mistaken at all, it has not been in attempting to alter the law of Scotland, but in deciding what is the law of Scotland. The forms of that law, I think, might be changed much for the better; and it may be my duty, when measures are brought before your Lordships, to state that they may be changed much for the better in point of substance and certainty; but when I am considering questions, not as one of your Lordships' House sitting in Legislature, but sitting here as a Judge, I hold it to be my bounden duty to deliver the opinion which I deliberately form upon the state of the law, as I conceive it to stand. I always regret if my view of it differs from those opinions for which I have a very great

respect; but while repudiating the idea of any intention to alter the law in judgment, I feel it my duty to give the opinion that I form, even if it is subject to the pain of its not agreeing with the opinions of those I highly respect. July 17. 1823.

My Lords, I will, with your Lordships' permission, proceed on Friday morning to examine the different opinions which have been given, and which are to be found in the books upon the subject, and then to make some observations upon the judgment to be pronounced by your Lordships, which I hope will close the trouble which I shall have to give to your Lordships.—Adjourned.

LORD CHANCELLOR.—My Lords, having, when we last met, stated at great, but I hope not unnecessary length, the circumstances of this case, I will take the liberty of commencing what I have to state to-day by calling your Lordships' attention back for a single moment to the state of the proceedings. The circumstances of the case may be found in the summons, the condescendence, the defence, and the answers to the condescendence; and it seems to me I do not represent too much to your Lordships, when I say that they contain not merely facts to be proved or disproved, but they state also reasonings upon the convenience and inconvenience, and danger and hazard, and so on, of instruments being executed in the manner in which they aver these instruments were executed. The pleadings to which I refer led to the issues which have been directed, and to which I must call your Lordships' attention once more, by pointing out particularly what those issues appear to have established, and what they appear to have left not established or in doubt, and what they appear to have found consistently or inconsistently.

My Lords, the first verdict is, 'that James Earl of Fife, at the date of 'the deeds under reduction, was not totally blind, though he could scarcely 'distinguish between light and darkness; that he was at that time inca- 'pable of reading any writing, written instrument, or printed book; that 'he could not at that time discover whether a paper was written upon or 'not.' Now it seems to me, that with respect to that finding, whether it expresses so much or not, is not very material, but that we may safely conclude that he was blind. If your Lordships should not think you are justified in determining that he was totally blind, still, with regard to such a case as that under your Lordships' consideration, it will be very much in the same state as if he was blind, because it has found that he was incapable of reading.

Then the next issue was this, 'Whether the deeds were read over to 'the Earl previous to the Earl's name being put thereto, and if so, in pre- 'sence of whom; and if read over to the Earl, whether they were all 'or any of them read to him at one and the same time, or at different 'times; and if at different times, whether they were deposited and kept 'in the room in which they were read, during the whole period which 'elapsed from the commencement of the reading till the name of the 'Earl was put to them as aforesaid, or where they were deposited?' The return to this finding is this, 'That the deeds were read over, previous

July 17. 1823. ‘ to the said Earl’s name being put thereto, in the presence of Stewart ‘ Souter’—(that, I think, is the gentleman who is found to have a patrimonial interest under the deed), ‘ and Alexander Forteith Williamson, or ‘ one or other of them :’—a very singular finding, we should think in this part of the country. The finding expresses ‘ that the deeds were ‘ read over in the presence of Stewart Souter and Alexander Forteith ‘ Williamson, or one or other of them ;’ but the Jury, who find that they were read over in the presence of those persons, have not found in the presence of which of them—a circumstance which, one should think, would very well be in the knowledge of the Jury, if they were proved to be read to one. ‘ That it is not proven whether they were all read to him ‘ at one and the same time, or at different times ; but one was read at ‘ the time the deeds were signed. There is no proof whether they were de- ‘ posited and kept in the room in which they were read, during the whole ‘ period which elapsed from the commencement of the reading till the name ‘ of the said Earl was put to them as aforesaid, or where they were de- ‘ posited.’

With respect to the third issue, they find ‘ that the Earl put his name ‘ to the deeds by feeling for the finger or fingers of another person on the ‘ spot for signature, and was no otherwise assisted than as above de- ‘ scribed.’ As to the fourth issue, they find that the said Earl put his ‘ name to the deeds at one and the same time,’ or, as they would express it in the text-books, unico contextu.

With respect to the fifth issue,—Whether the Earl put his name to ‘ the deeds under reduction in presence of the two instrumentary wit- ‘ nesses, or either of them, or did acknowledge his subscription to them ‘ or either of them, or at what period he made such acknowledgment,’— the verdict finds, ‘ that he did put his name to the deeds under reduction ‘ in presence of one instrumentary witness, viz. Alexander Forteith Wil- ‘ liamson ; but it is not proven that the Earl did acknowledge his subscrip- ‘ tion to George Wilson, the other instrumentary witness.’ My Lords, I pray your Lordships’ attention to these words : ‘ But it is not proven ‘ that the Earl did acknowledge his subscription to George Wilson, the ‘ other instrumentary witness.’ And I take leave to call your Lordships’ attention again to those words, which I humbly requested might be given the other day, because hardly any thing said here fails of travelling across the Tweed, and of being very much misrepresented elsewhere—‘ It is not ‘ proven that the Earl did acknowledge his subscription to George Wil- ‘ son, the other instrumentary witness.’—Now upon that I observe with the utmost confidence, that if a Jury in this country were to return a verdict in these words, if the question addressed to them was, whether it had been proven that he did so and so, they would have been very well entitled to return a verdict in these words, that it had not been proven ; but if the question put to them was, whether he had acknowledged his subscription, they would have returned that he did not acknowledge his subscription ; for whatever is not proved is taken not to exist ; and it seems not improper, the first time we have a case here of a finding of a

Jury on a case of very great importance, to remark the circumstance; though I understand, in the criminal law of Scotland, where they do not find guilty, and where they have a disinclination to find not guilty, they are in the habit of saying not proven, and the person who is under trial is therefore, in contemplation of law, considered not to be guilty; yet, on the first appearance of such a verdict as this in a civil case, it did occur to me that I was not stepping very much out of the situation in which I stand, if I stated that here at least we do not perfectly know at this moment—(information may be given us upon that point by the Court of Session in Scotland)—but we do not know, according to our forms, whether that which they only said was not proven is to be taken merely as a thing not proven, or a thing not existing. July 17. 1823.

My Lords, the sixth issue was this:—'Whether the Earl was, until 'the dates of the deeds under reduction, or at a later period, a man re- 'markably attentive to, and in the use of transacting every sort of business 'connected with his estates, and in the practice and habit of executing, 'and in fact did execute, deeds of all sorts connected with his own affairs, 'by subscribing the same with his own hand, and without the interven- 'tion of notaries?' The inquiry made in this issue is an inquiry that perhaps has not a direct and immediate connexion with the question which was before the Court, and is now before your Lordships, unless it is to be taken in the way which I am about to point out to your Lordships, that issue being found in the affirmative. The finding is, 'That 'the Earl was in the practice and habit of executing, and in fact did 'execute, deeds of all sorts connected with his own affairs, by subscribing 'the same with his own hand, and without the intervention of notaries.' That is a fact which must convey to your Lordships, as far as I can look at that fact, that it may be of great importance what is to be the decision of the present question; because, if the fact be that the subscription of the Earl of Fife, in the manner in which that subscription is made here, is not available to give efficiency to the deed, then you are to recollect that this person having been for a long period of years very much in the same state as he was at the time he executed those deeds, on the same ground on which you deny validity to these instruments, you must deny validity to many other acts of the Noble Lord. To what extent that might go, one should not very much have inquired into, unless it had been thought necessary to make that inquiry in directing these issues; but it is of some degree of importance, I think, when your Lordships come to look at the cases which have been decided in the Court of Session—in some of which it was held that the reading over was a solemnity—and in others in which it was held that it must be noted in the docquet that the deed was read over; and when you call to mind that by and by, when it was found that that holding would destroy a great many deeds executed by a nobleman who was blind—I mean the late Duke of Montrose—that was a doctrine the Court of Session did not think fit to abide by. It is a question whether deeds, not only of the Earl of Fife, but deeds of many others, executed under the advice of lawyers,

July 17. 1823. may not be most largely affected by a decision, that where a man is blind and cannot read, but where, though a blind man, he can write, he is not at liberty to execute by his subscription, but must employ two famous notaries (according to the act of Parliament) and four famous witnesses.

My Lords, then follows the seventh issue, and upon that seventh issue the finding is this: 'That the only means which the Earl took to ascer-'tain that the deeds under reduction were conform to the scrolls of deeds 'prepared by his agents under his special directions, were his having 'heard the said deeds read over to him.' So that the Jury who first tried this, expressly assent that he had had the deeds read over to him; and upon this seventh issue no new trial was granted. The verdict, therefore, of the first Jury upon that fact is no otherwise disturbed than it can be taken to be disturbed by inference drawn from the finding upon the new trial of the second issue. I have before stated to your Lordships what the second issue was upon the motion for the new trial. The Jury found, in terms the exact meaning of which I certainly am not sufficiently informed of, but which I should hold to amount to very little indeed as matter of finding, if it were on an English record—'that 'it has not been proven that the deeds under reduction were read over 'to the Earl of Fife, previous to the Earl's name being put thereto.' This is certainly a negative finding by this Jury, and it is in direct contradiction to what the former Jury had found upon the trial of the seventh issue. It is impossible to state that they are consistent with each other; and it will be for your Lordships to consider whether you can be satisfied that, there having been this latter trial, you are called upon to pay any attention whatever to what is found upon the seventh issue on the former trial.

My Lords, such being the state of the facts, I will put your Lordships in mind again of Lord Pitmilly's interlocutor, after discussion on the three principal points of the objection to the deeds, namely, 'First, That 'they were not, as the law requires where the granter of a deed is blind, 'attested by two notaries and four witnesses, with the usual formalities 'that are observed when deeds are executed in that form. Secondly, 'That the deeds were not, as the law requires where the granter of a 'deed is blind, read over to Lord Fife before signing; and there is no 'evidence that he was informed of the contents of those deeds. Thirdly, 'That the deeds were not executed in terms of the act 1681, in regard 'that one of the two pretended instrumentary witnesses did not, as the 'act requires, either see the granter subscribe, or hear him acknowledge 'his subscription,'—as to which the finding upon the issue is, that it was not proven that he did so; and that opens to a question which I shortly adverted to the other day, namely, upon whom, according to the law, the onus probandi is, that the Earl did acknowledge his subscription? Whether the instrument was in that state in which the law of Scotland would consider it as a probative instrument, to have faith given to it, until those who sought to reduce it proved that that faith ought not to be given; or whether, on the other hand, according to the law of Scot-

land, the user of the deed, though it be probative, is bound to prove the fact which the probative writ of itself in general cases records? Or whether, on the other hand, the person who seeks to reduce the deed is not to take upon himself the onus probandi that that fact, which the instrument so produced alleged and considered to be established, is in truth not the fact?. July 17. 1823.

My Lords, when this case came before Lord Pitmilly, his Lordship, whose authority certainly is very high, stated as a doctrine of law, and he finds, 'that a person about to execute a deed of importance, who, at the 'time of the execution of it, is, in the words of the verdict in this case, 'not totally blind, though he can scarcely distinguish between light and 'darkness, and is incapable of reading any writing, written instrument, 'or printed book, and cannot discover whether a paper was written on or 'not, and who can only put his name to the deed by feeling for the finger 'or fingers of another person on the spot for signature, is not only en-'titled in law, but ought to execute the deed by means of notaries and 'witnesses, in terms of the act 1579, c. 80.' Your Lordships will permit me to point out to you, that here are two propositions in fact brought forward in this finding,—the one, that a person in his circumstances is *entitled* in law to execute the deed by means of notaries and witnesses, in terms of the act of 1579, c. 80; and if the question were now only, whether he was entitled in law so to do, the necessary inquiry would be, whether the act of 1579 does apply to a person in those circumstances, capable of writing and subscribing? With respect to the other proposition, it is not only that he is *entitled* in law so to execute an instrument, but that he *ought* so to execute the instrument; and an observation, I think, fell from the Lord Justice-Clerk, which I observe in the notes of the Judges, which appears to my observation quite applicable to the case, namely, that if he ought to execute it so, the finding whether he is entitled to execute it so or not does not signify; because, if he ought so to execute it, he must so execute it in order to give it validity, and then that second proposition, which, in my humble consideration, includes the first, as the Lord Justice-Clerk puts it, brings forward this question, whether that act of 1579 makes it incumbent upon a blind man who can write to subscribe in the mode pointed out? Whether he has executed other deeds or not, may be matter of very useful consideration, if you are considering what the Legislature ought to do; but whether the act of the Legislature, by the statute of 1579, has made a person who is able to write incapable of executing a deed by subscribing, or whether he must, under the exigency of that act, if he means to execute a valid deed, execute it, not by subscription, but by notaries in the presence of four witnesses?

My Lords, the Lord Ordinary, however, goes on further to find, 'that 'there is no sufficient authority in the law of Scotland for concluding 'that a deed signed by a person in the situation above described in pre-'sence of two witnesses in the usual manner,'—that is, by his own subscription,—'is null, or can make no faith, provided the deed be proved to

July 17. 1823.

'have been distinctly read over to the granter in presence of the wit-
'nesses, immediately before the subscription is made, in order to afford
'that degree of evidence which the law requires, and which is plainly ne-
'cessary to show that the deed given to the granter to subscribe is truly
'and in all its parts his deed which he intended to execute.' Now, my Lords, taking this proposition, according to the terms in which it is expressed, to be strictly true, it goes to a certain extent to contradict the proposition in the first finding, that he ought to execute the deed by means of notaries and witnesses, in the terms of the act of 1579; because, if there be no sufficient authority in the law of Scotland for contending that a deed signed in the manner which is stated in this second finding—that is, a deed subscribed by the party, and proved to have been distinctly read over to the granter in the presence of the witnesses immediately before the subscription,—affords that degree of evidence which the law requires, and which is necessary to show that the deed given to the granter to subscribe is truly and in all its parts his deed which he intended to execute. This must be taken to be a proposition, affirming that the law of Scotland affords no authority whatever for stating that if a blind man subscribes a deed, and that deed is read over to him in the presence of the attesting witnesses immediately before his execution of it, that will not be a good deed; and yet the statute of 1579 must be a direct negative upon that proposition, if it be true that a blind man, though the deed is read over in the presence of the witnesses and immediately executed, is brought under that statute, and is entitled, and ought to execute the deed with two notaries and four witnesses.

Your Lordships here also observe, that the Lord Ordinary says, 'that
'there is no sufficient authority in the law of Scotland for concluding
'that the deed signed by a person in the situation above described, in
'the presence of two witnesses in the usual manner, is null, or can make
'no faith, provided the deed be proved to have been distinctly read over
'to the granter, in presence of the witnesses, immediately before the
'subscription is made.' Now, one great defect in this finding (if I may presume to use that expression, meaning only a defect in this sense, that it does not inform my mind sufficiently upon the subject,) is this, that I want to know where there is an authority in the law of Scotland for saying that it shall be bad, unless it is distinctly read over to the granter—and not only unless it is distinctly read over to the granter, but unless it is distinctly read over to the granter in the presence of the attesting witnesses, immediately before the subscription is made. When I say where is the authority? I do not mean to say—far from it—that there are not to be found in the different statements of Judges upon cases that have arisen, the opinions of some, that the deed should be read over to the granter—that it should be read immediately before the execution—that it should be read in the presence of the witnesses. I am very far from saying there is not that species of authority which requires great attention, and is entitled to much respect, considering what has fallen from the lips of Judges who have had these cases to consider; but then I say, there is

that same species of authority on the other side, and I wish to know where is the decision which renders necessary the condition which is required in this second finding, in order to authorize you to say, that if a blind person subscribes, and that subscription is attested in the presence of two witnesses, the deed would be null and void if it is not read over in the presence of those witnesses, and read over immediately before the execution of the instrument. July 17. 1823.

My Lords, the next finding is, 'that the fact of a deed subscribed by a 'blind man having been read over to him in presence of the witnesses be- 'fore subscription, is not a fact which is to be presumed in law, from the 'attestation of the witnesses to the fact of his having subscribed the deed, 'but that the fact of the reading over must be proved by the user of the 'deed, when it is disputed.' Your Lordships here then observe, that this finding with respect to the having the deed read over is stated here to be—that this is not a fact which is to be presumed in law from the attestation of witnesses to the fact of his having subscribed the deed. In the first place, this proposition, I apprehend, means to assert that it is a solemnity, if not required by the statute, yet absolutely required by some other authority, (which, I apprehend, must be some consuetudinary authority, or the authority of the common law,) that it should be read over. And, secondly, that this proposition is meant to negative the possibility of a blind man sufficiently knowing the contents of an instrument, unless it is so read over—that he cannot know the contents of it in any other way. This, your Lordships see, is quite a distinct proposition from its being read over in the presence of witnesses; for, consistently with this, it might be read over, and the two witnesses then called in to attest the execution; but this lays it down as a proposition that it must have been read over to him, and that, because it must have been read over to him, the person who is to use the deed is to prove that it was read over to him. That likewise is pregnant with another position, which is, that though the deed should be ex facie probative, yet it is necessary that the person who produces that deed, ex facie probative, shall prove something else, in order to give it faith in the first instance, and that it is upon the user of the deed, and not upon the person who is seeking to reduce the deed, to show that the reading which was necessary was attended to, and that the instrument was read to the party.

Then, my Lords, he goes on further to state, 'that it has been estab- 'lished by the verdict of the Jury on the second trial, that it has not 'been proven that the deeds under reduction were read over to the Earl 'of Fife previous to the Earl's name being put thereto.' Now, as Lord Pitmilly here finds that it has not been proven that the deeds under reduction were read over to the Earl of Fife previous to the Earl's name being put thereto, nothing can be stated with more propriety—(if I may thus presume to comment upon the propriety or impropriety of the findings of any learned Judge)—nothing can be stated with more propriety than this, when that learned Judge had, in the finding immediately preceding this, stated that the onus probandi that the deed was read over

July 17. 1823.

was upon the user of the deed, he very distinctly goes on to say, that it has not been proven that the deed was read over;—that is to say, that he who was using the deed, having taken upon himself the burden of proving that the deed was read over, has not proved that the deed was read over; therefore, as against him, it must be taken that the deed was not read over, whatever sense I put upon the words—' that it was not proven.'

Then follows, my Lords, what I read the other day, which I will state again, that the interlocutor of the Lords of Session ' reduces the trust-' disposition and the deed of entail, and remits to the Lord Ordinary to ' hear the parties on the other conclusions of the libel, and to do thereanent ' as he shall see cause.' Now, I repeat the observation which I took the liberty to make the other day upon this, by saying that the summons in this case not only calls for a reduction of the trust-disposition and the deed of entail, but it likewise calls for a reduction of the deed of November 1808, (that deed being a deed which alters the instruments of October 1808, those instruments which are here called the trust-disposition and the deed of entail); the latter instrument certainly not being, if I recollect it rightly, an instrument of conveyance, but being nevertheless an instrument professing to make an alteration in the former instruments; and if it is to be considered as referred back to the Lord Ordinary to do what he may think fit and just to be done in reference to this deed of November 1808, it being then to be concluded, I suppose, that because the deeds of October 1808 are thus reduced, he is then, ex consequentia, to reduce the deed of November 1808. But then it becomes a question, Whether that deed of November 1808 is not a very material deed indeed, with reference to the deeds of October 1808, unless you are to say that it is of absolute necessity that the deeds of October 1808 should have been read over to the testator in the presence of the witnesses, because he was blind; or should have been executed by notaries, with the attestation of witnesses, because he was blind; and in either way of putting it, it will become necessary to pay some attention to that deed of November 1808, as evidence in the cause, both as evidence with regard to the validity of the instruments of October 1808, provided you make out that there was a sufficient knowledge of the contents in the person executing those instruments, and also for another reason, that that deed might have been good evidence on the trial of the issues, in which it appears to me, as far as we are informed, never to have been spoken of. If I am wrong in that, I should be glad to have it stated now, but I cannot find that it was. I am not now on the question to whom it is to be imputed that it was not produced and acted upon before the Jury; but I do not understand it to have been brought forward in evidence in any way. If I mistake that fact, I consider that a circumstance of so much importance, I should be glad to be corrected in it by those who know more accurately how the fact was.

My Lords, it was not my intention to say one word more than I have said to your Lordships about the Roman law, or the law of England; I will say but one word, and that is only to repeat, that it is impossible to say that the deeds of a blind man in Scotland are required either by the statute, or by any thing else we have heard of, to be executed in the same

July 17. 1823.

way as the Roman law required a testament to be executed. I do not know what inference can be drawn from any thing which can be stated to be the law of England, repeating only, that I do not want to have the law of Scotland made like the law of England; that is a perfect mistake of any intention of mine; but what can be drawn as matter of common sense from the Roman law, or that can be drawn as matter of common sense or judicial consideration, with reference to common sense from the English law, may be fairly considered, and if you have statutes in pari materia, those also may be fairly enough looked at.

Now, I will call your Lordships' attention to one statute respecting wills—our statute of frauds, as it is called—it is the 29th of Charles II.—that says, 'That all devises shall be in writing, and signed by the party 'so devising the same, or by some other person in his presence, and by 'his express directions, and shall be attested and subscribed in the pre-'sence of the said devisor by three or four credible witnesses, or else they 'shall be utterly void and of none effect.' Now, my Lords, I do not apprehend, that, according to the law of England,—whatever may be to be found in dicta or in judgment, on giving opinions where they have, or where they have not sustained wills,—that if you prove in the case of a blind man that he had signed a deed because he could write, or if you prove that he had signed a deed, because you prove the attestation of his signature by three witnesses, for it is his signature that the statute requires the witnesses to attest; in that case, I should apprehend, primâ facie, that is a very good will; and to illustrate what I have to say upon that, and to show your Lordships the consequence if you do not find that to be a good will, let me refer your Lordships for a single moment to a case which was mentioned the other day from Bosanquet and Puller.—My Lords, that was a case in which the testator, being eighty years old, and blind, in July 1801 applied to a friend of the name of Davis to make his will, and dictated every word himself, making a devise in favour of the lessor of the plaintiff, who was his stepdaughter, and lived with him, to the disadvantage of the defendant, his son. After the will was written by Davis, the testator went into the room where the lessor of the plaintiff, with other persons, was, and desired Davis to read it over, and then said, Now, Nancy, are you satisfied? Davis then took the paper away with him to get it copied, and when he brought it back 'fairly copied, two 'months afterwards, the testator made an alteration in it;' but he could not by his eyes at all determine whether that paper was the same paper or not, 'and perfectly understood what he was doing;'—that understanding he could not have by the means of his eyes, for eyes he had none to make use of.—'After the alteration made in the will, it was executed by 'the testator in the presence of Davis, and the three attesting witnesses 'named by the testator. The will was not read over in the presence of 'the three attesting witnesses, before it was signed by the testator, but 'was merely placed before him in their presence, and executed;'—and this was held to be a very good will of a blind man.

Now, I desire to ask what would have been the case with that will, if doctrines we have heard of were doctrines in our law—it does not signify

July 17. 1823.

whether they are doctrines in our law or not with reference to the Scotch law, save that, if you are left in doubt by the text of the Scotch law, what is the construction of it—if you are left in doubt whether blind men are within the intent of the words used which do not in words mention them at all—I should be glad to know what would have been the consequence if these circumstances had taken place? Here were three attesting witnesses; if these three attesting witnesses had survived the testator, all they could have said was this—'We were called into the room; the 'paper was laid before this blind man; he signed it, and we, according 'to the statute, attested his subscription.'—'Was it read over to any one 'of you?'—'No, we do not know a word of it—it was perhaps the pur- 'pose of the testator to take care that we did not know one word of it.' But then it is said—'Here was Davis to prove, that, two months before 'the testator dictated, and he took down what was to form the will—that 'two months afterwards he brought the same paper to the testator, and 'told the testator it was the same paper, for the testator himself could 'not determine whether it was the same paper or not, and that he made 'an alteration in it.' There is this difference, that in this case he made the alteration in the identical paper; in the case before your Lordships, the alteration was made by another instrument—not an immaterial circumstance. But how is this to go, if the attesting witnesses happened to die before the will was to be proved? You prove their handwriting; and the law, which presumes every thing to be rightly done till the contrary is shown, determines that to be a good will; but if our law turned on the same words as are in the Scotch statutes, and under them it was held that you must prove it to be read over, there is no person who could prove that except Davis; and suppose Davis had died, who could prove it at all?

It has now been determined in the case of Yorkstoun *v.* Grieve, in Scotland, that reading is not a solemnity—that the reading need not be in the docquet; the reading, therefore, the witnesses do not attest, and what the witnesses do not attest cannot be taken to be true by proving the subscription of the witnesses. You will infer that the witnesses saw every thing rightly done which the witnesses are to attest; but if reading is not necessary—if reading is not a solemnity required by the common or the statute law, the witnesses are not to attest it, whatever was the opinion, in Aglianby's case, of many respectable Judges, that the reading must be noted in the docquet of attestation—that has been overruled since;—the reading, therefore, need not be attested in the docquet of attestation; and the consequence of that is, that if reading be a thing necessary to be proved, it is not proved by the mere attestation of the witnesses, who expressly state that they never heard one single word of the will read. Your Lordships see, therefore, that if we were to introduce this rule into the law of England, we should be shaking wills, dispositions, and so on, which have never been held to be subject to any doubt whatever, or to any observation, further than this, viz. that the proof of reading over the will to a blind man is, because a blind man may be so

much more easily defrauded, and so much more easily imposed on, than a man who can see; and I look upou an unlettered man to be very much in the same circumstances, except that his eyes will enable him to identify the paper better than a blind man's feeling can do. I look upon them to be very much in the same situation, that the want of that care, and caution, and attention, would be a circumstance of very great weight, if you were imputing fraud and imposition; that then, undoubtedly, connected with other circumstances, it does come to be a circumstance and a fact of great weight, and of great consequence, that, in the case of a man who cannot read himself, it shall be shown that the instrument was not read over to him; but I have no conception that that is required in our law. I may be wrong; but if I am, I have been in this error many years. I have always considered, that if the Jury can be satisfied that the testator knew the contents of the instrument, that will be a good instrument, notwithstanding his want either of learning or of eye-sight.

Now, my Lords, in looking at the different propositions which have been stated in this finding of Lord Pitmilly, and which I must understand to be affirmed by the Court of Session, I certainly approach the consideration of them with all the fear and apprehension that necessarily belongs, and that ought to belong to, and to affect the mind of a person not very conversant with Scotch law, in dealing with propositions laid down by a Lord Ordinary of very great eminence, and affirmed by Lords of Session of great experience; but I must look at this, not only with reference to the question of law, but how the facts have been established,—whether they have been or not sufficiently established by the verdicts, upon the clear establishment of which facts those legal doctrines have been propounded and stated.

My Lords, in this view of the case, as the question before us must be, Whether we shall stop here and affirm this judgment at once, or whether we shall proceed? I really might say no more at present to your Lordships than this, that I do not find my mind so informed by the verdicts upon these issues, that I can with confidence apply any doctrines to findings expressed as these are, and that, if it is necessary to have the facts fully established, it does appear to me that there must be further investigation with respect to the actual circumstances of this case, and more especially regarding what has or has not passed with reference to this deed of alteration in November 1808. There, my Lords, I might stop, advising your Lordships simply to put it into a course of further inquiry; but, my Lords, I do not think that will be a useful proceeding, and I do not know whether it would not be better at once to affirm the judgment than to stop there; for I am quite sure, that, whether you direct an issue, supposing you can do it under the statutes, or whether you direct the Court of Session to direct another issue, by directing a general issue, always recollecting that where a fact is to be tried under the authority of the Jury Court in Scotland, it is a fact to the trial of which the presiding Judge must apply the law of Scotland with respect to the doctrines generally, and the law of Scotland with respect to evidence; and recollecting that this is a

July 17. 1823.

case in which the law of Scotland, with respect to the doctrines generally, and with respect to evidence, requires to be extremely well considered. I am exceedingly apprehensive, indeed, I may fairly say I have no doubt, that if, without findings by this House, issues were to be directed, whether those were all the deeds of Lord Fife, or issues directed on all the three deeds, whether these were the deeds of Lord Fife or not, the matter would be, in all human probability, so discussed as not to be satisfactory, and there is no blame imputable to any body that it would be so discussed; because, when your Lordships look to what fell from the Judges in Lothian's case, commonly called Aglianby's case—when you look to what has fallen from the Judges in other cases—when you look to what has fallen from the Judges in this very case, in the notes on your Lordships' table, I think any man might very fairly say, it is one of the most difficult things in the world for a Judge to determine, at Nisi Prius, what is the doctrine of the law of Scotland in respect to how a blind man must execute his deeds.

Then, my Lords, I look at the case in this point of view:—First, Is it necessary there should be further investigation? Secondly, If it is necessary there should be further investigation, in what form and manner should that investigation be made? And I have looked at this latter question with a great deal of anxiety, for this reason among others: I may mistake the fact, and I have no hesitation in saying I may mistake the fact, as to what have been the points of law that have been already discussed in the Court of Session. Now I mention that for this reason, will your Lordships allow me, after having had experience in these matters as much as, in all probability, I can have, and which certainly has been more than any person who has had to administer justice in Scotch matters ever had, who has presided on your Lordships' Woolsack, taking into account the great number of years in which I was concerned in arguing the cases of Scotch suitors at your Lordships' Bar—But I have always been of opinion (and I take the liberty in the close of life to state it) that there has been a great difficulty in appeals in this view, that you begin with a summons which states a great variety of reasons of reduction; when they come to the end of it in the Court of Session, they say 'sustain the reasons of reduction.' It may be that they find, in that language, 'sustain the reasons of reduction,' in many many cases, where perhaps one of the very reasons for reducing the deeds so stated in the summons they think a sufficient reason; but if that sufficient reason could not have been established in point of fact, you will find, by looking at the notes of their judgment, that with respect to all the other reasons they did not mean to sustain them;—they either meant to say nothing about them, or in many cases they would have assoilzied the defenders, because they could not have sustained those reasons of reduction.

Now, my Lords, that a practice of that kind does generate a great deal of legal proceeding is to be expected; but I feel my difficulty in so stating it, as to remove the possibility of any suspicion that I am treating the Judges of the Court of Session without that great respect I know to be

due to great and honourable men. My Lords, I think the House of Lords is in some measure to blame for it; for, when a cause has come here, if you look at the judgment here, you will find this House has fallen into the same course: it has sustained generally the reasons of reduction, or has denied generally the reasons of reduction; and if your Lordships look back to some cause which was heard twenty years ago, and refer to the book upon your table, you will find there a sustaining of reasons of reduction, on which perhaps not one word was said in the cause, or if one word was said in the cause, they were considered reasons for which you would not reduce; but you have said generally, 'sustain the reasons of reduction;' and then there has come a cause from Scotland, in which it was argued in the Courts below, that they ought to sustain every doctrine of law contained in the summons, because the House of Lords sustained generally the reasons of reduction. The learned Judges there say, that is not the meaning of sustaining the reasons of reduction; they are not content, and it is very natural they should not be content with that, after what has passed in this House, and then comes an appeal founded upon this. 'You sustained all the reasons of re-'duction in a case fifteen years ago; here is one of the reasons for re-'ducing, found in this case, on which we proceeded in that case; and 'therefore, as you sustained all those reasons fifteen years since, sustain 'this one reason now, and decree accordingly.' The consequence of that is, we say, 'No, that has been the form of entering the judgment; but 'we did not mean to sustain one half of those reasons of reduction.' That has, therefore, I confess, appeared to me to be a practice which might be very usefully altered;—of course, however, we should be very careful not to alter our mode of proceeding without good reason. But I cannot help thinking we have been making some little progress, which I hope may be useful to stating in the judgment of this House, what are the reasons on which we proceed, and not only that, but of course, as flowing out of that, what are the reasons on which we do not proceed. July 17. 1823.

But, my Lords, I must make another observation, and that is, that it has happened that causes have been determined here, some lately, in which, upon looking at the papers upon the table, you found what perfectly satisfied your minds, either that the judgment should be reversed, or that it should be affirmed, or that it should be altered; and you have then stated why you reversed, why you affirmed, and why you altered. No sooner is the judgment pronounced, than you have had it stated, 'This is a new view of the case—this proceeds upon a discussion of the 'doctrine, not one word of which was stated in the Court below;' and undoubtedly, if you are not a Court of original jurisdiction, it is very much to be wished, that all the views of the case on which you proceed should have been first discussed in the Court below, the consequence of which is, that there is a remit made of the cause in some cases:—well, what is the effect of that? Why, my Lords, before the person who has now the honour to address your Lordships is three months older, he has communications made to him that this practice of remitting does occa-

July 17. 1823.

sion such expense to the suitors, and so on, that it is to be hoped it will not continue. If, therefore, the House suffers itself to be affected by the intimation that the cause has not been considered on such a point in the Court below, and remits, the expense of the remit, the delay of remit, the increase of appeals, (for it is sure to come back again, after being considered below,) are complained of. If, on the other hand, you look at the case, as you are entitled to do, in reference to every thing which is in the cause, whether it is taken notice of in the Court below, or not taken notice of, every thing which ought to be discussed at your Lordships' Bar, whether it is discussed at your Lordships' Bar or not discussed, I say you are entitled to consider it, and that it is better, the question being for decision before the House—it is better, upon the whole, the House should decide the whole of the matter at once, and it must be for those who have not brought forward the discussion of such matters at all before the House, upon the record laid upon its table, to account for the circumstance—that the case had not been heard, and not been determined in that particular point of view.

I am aware there may be very many important cases on the law of Scotland, where the House would remit for its own information; but in those cases where the House would remit for its own information, it remits, because it is a duty to the public to take care, that in matters of Scotch law and Scotch doctrines, if the point is a very material point, it should have the very best information it can possibly have; but that is quite a different thing from stating that such and such a point was not considered below.

My Lords, I have made these observations, because, if your Lordships should be of opinion that there should be any further investigation of these matters, it is not perhaps an improper preface to what I have to say further upon the subject, that I have endeavoured to look to what have been the points which have been argued in the Court below in this case; and unless I mistake what have been the points which have been argued in the Court below in this case, I think the view that may be taken of this case by your Lordships does not go one iota beyond the points which have been so considered in this particular case in discussion in the Courts below.

My Lords, the first point is, is it necessary that a blind man should execute these instruments by two notaries and four witnesses?—and here do not let me be supposed again to speak with disrespect, either of the Court of Session or the Jury Court. My Lords, I know too well how difficult it is, even in this part of the island, where we are very conversant with the proceedings which are to take place before a Jury, when a Court both of Law and Equity is directing its proceedings;—I know too well the difficulty of being quite sure that one is quite right in those directions; forbearance of observation, therefore, would peculiarly belong to me upon such a subject; but a man must totally forget every thing which is likely to happen, if he supposes that you can send an issue down to trial in Scotland, and that they should be enabled so to model proceed-

ings there as you can in this country, where that means of trial has been had for centuries.

To be sure, in this country, if the Judges had been of opinion that a man who was blind was a man who could not, within the intent and meaning of this act of Parliament, write, and if there was no dispute whether he was blind or not—if one party said he was blind, and the other party admitted that he was blind, the Court would say, what have we to do but construe the statute? If, on the other hand, they denied that he was so blind—that he, Lord Fife, who had been executing, as the Jury found, all sorts of instruments by writing, was so blind as to be within the intent and meaning of the statutes, a man who could not write, if they denied the fact, you have nothing in the world to do but to try the fact, whether he was so blind as to be blind within the meaning of the word, according to the interpretation of the Scotch law, which would be a proper fact to be tried. But, on the other hand, after that one issue was tried, if the law of Scotland be, that a blind man is a man who cannot write, but who must use the subscription of notaries, and the attestation of four witnesses, in order to give effect to his deed, the moment it was found one way that he was not blind, or the other way that he was blind, there would have been an end of the cause as to that; because then it would follow, that within the intent and meaning of the statute, he was a man who had executed the deed, not by notaries in the presence of four witnesses, but by a subscription of his own, which, though a subscription in writing, was nevertheless not a subscription in that way of putting the case within the intent and meaning of the act of Parliament. In a general issue, all this might have been considered—might have been brought before the Court by bills of exception; and, finally, according to the terms prescribed by the act of Parliament, brought before this House.

Then, my Lords, the first question is,—Is a man blind, as I may state Lord Fife to be—a man who cannot write, within the intent and meaning of these statutes? My Lords, there is another way of putting that. Is he a man, who, before these statutes, would, by the common law of Scotland, have been under a disability upon the subject? I confess I have found no authority for that. On the contrary, that appears to me to have been so little understood, that the case of Coutts *v.* Straiton, which occurred in 1681, very much about the time of one of these acts, I think, contradicts that idea altogether.

Then the question, my Lords, must arise, first, upon the acts of the Parliament of Scotland. My Lords, the first statute which has been argued upon is the statute of 1540. Previous to that statute, I think, one might state without the authority of the statute itself, that for which it is sufficient authority, that a person might execute a deed, not by subscribing it, (in which case the doctrine about comparatio literarum, and so on, would apply,) but by merely sealing; and I have looked with some degree of diligence, but certainly with no effect, to find out whether there was any difference between a blind man sealing and a man who could see sealing. I can find nothing which leads me to a conclusion upon that, no doctrine laid

July 17. 1823. down upon it, nor no case decided upon it; and when I state all this negatively, I do it for the purpose of being informed, if it shall appear to those who hear me that I have in my researches missed any thing which is to be found upon this subject. That statute is in these words:—'Item, 'It is statute and ordainit, that because menys selis may of aventure be 'tint, quhairthrow gritt hurt may be generatt to them that aw the samin, 'and that mennis seales be feinzied, or put to writings after their deceis, 'in hurt and prejudice of our Soveraine Lorde's lieges: That therfore 'na faith be given in tyme cuming to any obligation, band, or other writ-'ing 'under ane sele, without subscription of him that awe the samin and 'witnesses, or ellis, gif the party cannot write, with the subscription of 'ane notar thairto.' Now, my Lords, upon the subject of the party signing, you will find a case, which I cannot immediately refer to, (being without my glasses, very much in the case of the late Lord Fife at this moment,) in which it is expressly stated by one of the Judges, that the statute makes no distinction between a blind man and a man who can see, provided he can write, and then he lays down this doctrine:—'We 'never can carry the requisites of the statutes further than the statutes 'themselves direct; the act is silent as to this particular; therefore, we 'should be making a new requisite which the statute does not make, and 'that we Judges have no authority to do.'

Now, my Lords, I am ready to agree, and it is for that reason I have so repeatedly desired to be corrected if I am incorrect—I am ready to agree, that if it can be shown by decision before this statute, or by decision subsequent to this statute, that a blind man was to be taken as a man incapable—if it can be shown that before this statute there was a difference between the execution of blind men and men who could see, so as to raise the distinction that one should be considered as not being able to write, and another should be considered as a man who could write, notwithstanding he could not see;—if that distinction can be shown, it will certainly go a great way to authorize one to say that when the statutes spoke of one who could not write, they spoke of a person who might be distinguished as a blind person, able to write, and yet not able to write in what I may call the common law of Scotland; and a person who being able to see was to be taken as a person who could write.

My Lords, the next statute, and the only other of any importance, is that which discontinues the custom of writing deeds by pasting the sheets of paper one to another, and allows the writing book-wise; for there are decisions upon that statute which go to what is considered to be requisite to be in the attestation, and what they do not consider as requisite to be in the attestation. There will be found in Mr. Bell's book a long discussion upon what are to be noted in the attestation of deeds that are written book-wise. Your Lordships recollect the statute requires that a deed written book-wise shall be signed on every page of it; and questions have arisen how far the fact of signing on every page is to be matter in the attestation, and that likewise is to be decided upon the question, what is a statutory solemnity?

July 17. 1823.

Then, my Lords, the next statute which has been considered material is the statute of 1681. Now, there does not appear to me to be in that statute one single word upon this subject. 'Considering, that by the 'custom introduced when writing was not so ordinary;' so that this statute of 1681 seems, as matter of history, to show that when the statute of 1540 was made, writing was not an ordinary thing among the lieges of Scotland. They can write now extremely well; but that does not appear to have been the case in the year 1540. 'Witnesses insert in writs, 'although not subscribing, are probative witnesses, and by their forget-'fulness may easily disown their being witnesses;'—and it proceeds, 'for 'remeid whereof, it is enacted and declared, that only subscribing wit-'nesses in writs to be subscribed by any party hereafter shall be proba-'tive, and not the witnesses insert not subscribing; and that all such 'writs to be subscribed hereafter, wherein the writer and witnesses are 'not designed, shall be null, and are not suppliable by condescending 'upon the writer, or the designation of the writer and witnesses: And it 'is further statuted and declared, that no witness shall subscribe as a 'witness to any party's subscription unless he then knew that party and 'saw him subscribe, or saw or heard him give warrant to a notary or no-'taries to subscribe for him, and in evidence thereof touch the notar's 'pen; or that the parties did, at the time of the witnesses subscribing, 'acknowledge his subscription.' Your Lordships observe these words: 'That the parties did, at the time of the witnesses subscribing, acknow-'ledge his subscription, otherwise the said witnesses shall be repute and 'punished as accessary to forgery.' Now, upon reading this, it does not appear to me that there is one word in it which can alter the state of the question upon the construction of the original statute of 1579; and it does appear to me, I confess, on looking at the English statutes and the Scotish statutes, that the subscription is the thing which the party is to attest; and it is very clear that if a person can see, the subscription is the thing he is to attest, and because the party can see, and seeing—provided, I mean, he is a lettered man—can read, there is no doubt that the presumption of law is that he knows the import. The question is, as it seems to me, looking to this upon the authorities, whether reading in the presence of the witnesses, or reading in the case of a blind man, is that which, if it cannot be presumed, can or cannot be proved by any thing but the actual proof of the fact of reading—that is to say, if it can be proved, however satisfactorily, that a blind person executed an instrument who had been or who had not been, but particularly who had been in the habit of subscribing instruments though he was blind, and multitudes of instruments which he fully understood, though it could be proved that not one of them was read to him;—yet if the Jury could be satisfied that he perfectly understood what he was executing, all the proof is short of giving validity to those instruments, unless there is a specific proof by some one that that instrument had been read over to him. Now, my Lords, I do not mean to say that on looking into the notes in Lothian's case, which I had the honour to argue at the Bar, that there

July 17. 1823.

was not, to put it fairly, admission by the counsel at the Bar under their signature; and though I forget at this moment with whom I had the honour to be counsel, I have no doubt you will find, on reference to the Cases, that they were men of high professional character at the time; and though I do find that into the bargain in the doctrine laid down by the Judges, as the notes are given to the world in Mr. Bell's work, there is a great deal there said, from which you would imply that the instrument must be read. I admit that there is: But, my Lords, in the next place, there is a great deal to be found in those books, with respect to which the different Judges who gave their opinions at that time certainly differed very widely as to what will or will not give validity to the instrument of a blind man. There is certainly a great deal of that case, which, unless I misunderstand the subsequent cases, the Judges have found it very difficult to abide by; and in this I am confirmed when I look at the notes of the Judges in the Court of Session in the present case, and when I recollect that in the case of Yorkstoun *v.* Grieve they have in a great degree overlooked the doctrine of that case, which had been maintained by a man of no less authority than the Lord Justice-Clerk of that day. Let it be observed, however, that Lord Braxfield, in an opinion of his given in the year 1770, has not the least difficulty that a blind man may subscribe. I do not know whether he does not go further, and say that the deed ought to be read over; but that a blind man may subscribe was the opinion he gave in the year 1770. His opinion ought to be taken on the two points; reading he seems to require—that I admit; but the deed being read, he says blindness is no objection.

My Lords, on looking at the notes of the doctrines of the different Judges whose opinions have been cited in the present case, and which opinions have been laid on your Lordships' table, there is hardly one single point with respect to this case in which they agree. Upon the point, whether subscription of a blind man will do, the majority are of opinion that it will do—that it is sufficient. On the point of reading, the majority are of opinion that the instrument must be read; but then as to whether the instrument must be read in the presence of the witnesses, or whether the instrument need not be read in the presence of the witnesses, provided it is read over in any other person's presence, on that point also they differ most materially; and as to whether reading is a solemnity within the statute, a large majority of them are of opinion that it is not a solemnity within the statute;—and there again, if you are to look to the opinions of the Judges in order to determine what is the law upon the subject, you have not only to go through that unhappy conflict which belongs to the question, which is the best opinion of modern Judges; but if you look to the opinions of the Judges in Aglianby's case, you will find there was a difference of opinion among the Judges. Lord Justice-Clerk, I recollect, (I do not mean the present Lord Justice-Clerk, but the Lord Justice-Clerk at the period of the case of Aglianby,) was of opinion the reading must be mentioned in the docquet.

July 17. 1823.

No doubt, it is a very imprudent thing ever to let a blind man execute a will, without seeing that it is read over in his presence; but there are many many cases where, according to that case in Bosanquet and Puller, that thing will not be fit to be done in the presence of the witnesses. He may say, the very reason I call for you, who are strangers, to be witnesses is, that none of my family may know what I am doing; and Mr. Justice Chambré puts that in this case. He says it is often the object of men advanced in life to take care that their families shall not know what they are doing; and it is particularly the object perhaps of blind men, who must owe to those about them the whole comfort of their future life, not to put them into the possession of the disposition of their property to take place at their death.

The question, I apprehend, then, with respect to this reading, really comes to this—Is reading a solemnity, or is it not? If it be a solemnity, nothing can dispense with it. If you can show that in the common law it was necessary in the case of a blind man, I am then ready to admit that these statutes ought not to affect that doctrine of the common law one way or the other, for they do not take away the necessity of applying the common law by any means; but, on the other hand, if reading be not a solemnity—if it be nothing more than that which a cautious man would endeavour to obtain the effect of, if the testator thought proper to have it read in their presence—if reading is one species of evidence, and only one species of evidence, and the want of that species of evidence be a most important circumstance—perhaps I might state it the most important which can be stated, when you are inquiring whether a party knew what he was doing, or whether, on the other hand, he has been imposed upon—if it is to be put in that way, let the difficulty be what it may of establishing a will where reading is not proved—if it can be shown by other means that the testator knew what he was doing, I apprehend that evidence which produces that satisfaction in the minds of the Jury, is just as good evidence to support that will as the specific fact of reading.

But, my Lords, we must go beyond that, adverting again to this, that the findings upon these Juries are inconsistent upon that fact; for one Jury says, yes, they were read over—and another Jury says, no, they were not read over; and you have those inconsistent findings to act upon. Another question arises, upon whom lies the necessity of proving that there was reading? Provided reading be not a solemnity noticed in the attestation of witnesses, but be a circumstance so absolutely essential, that unless it is proved that that circumstance is one part of the evidence in the cause, the instrument ought not to be available. Now, here is again a very great difference of opinion; some of the Judges say it is upon those who seek to reduce the instrument to show that that did not take place,—while others of them say, in the language of Lord Pitmilly, that the user of the deed must prove that. Now, my Lords, I cannot help thinking, after all the reflection I have thrown upon this subject, that the question will take this turn. If the subscription of a blind man be a good subscription, because he is to be taken to be a man who can

July 17. 1823.

do what he does in his own right—if the subscription of a blind man is to be taken to be a good subscription, although there is no subscription by two famous notaries in the presence of four famous witnesses, and if reading be not a solemnity, then it does appear to me, (it may be an error, but I cannot get the better of it,) that the instrument is in itself probative—that is to say, that in as much as if you produce in the case of a man who cannot write an instrument subscribed by two notaries, attested by four witnesses, that instrument is probative—that is to say, that the presumption is in favour of it. I want to know if a blind man can sign because he can write—why it is not to be taken that he can write, if the subscription be a sufficient subscription, and the attestation a sufficient attestation?

Then we have a difference of opinion among the Judges. Some of them think this a probative writ, and that the onus probandi lies upon those who seek to reduce it to prove that it was not read. If reading be not a statutory solemnity, but if it be a circumstance of evidence, if it be a fact, without which you will not give effect to a probative writ, the question is, upon whom is the burden to lie that it was or was not read? Why, my Lords, it is said this is proveable by evidence. It is proveable by evidence; but the misfortune of the case is this, and a circumstance which deserves most serious attention with respect to instruments, if you put it upon those who seek to reduce the deed to prove the negative, you are putting that upon them which they may not be able to establish. In the first place, they may be able to establish that by evidence which some of the Judges say, and which others deny to be necessary, that it was not read in the presence of the attesting witnesses. But, my Lords, put it the other way, what is to be the case? For instance, if it be the law that it need not be read in the presence of the attesting witnesses, but that it must be read in the presence of somebody or other, what is to be the case with respect to a blind man? Now I will put this case to your Lordships: I will suppose, for instance, that Providence thought fit to afflict me towards the close of my life with blindness; that notwithstanding I could write extremely well, and so forth; and that having lived throughout now a very long life on terms of intimacy and affection with my right honourable friend who sits at the other end of the table, and I had Scotch property to dispose of, and was a Scotchman; that I was to say to him, 'You know what provisions 'I have made for my respective children hitherto. You know what I 'have done for A., you know what I have not done for B., you know 'what I have done for the person who may be left a widow, and so on; 'I do not like that strangers should know what I have done, or contem-'plate to do. Will you, therefore, be so good as to make the scroll of 'my will?' My noble friend brings it to me, and I, in acting upon it, act very much upon the confidence I have in that he has executed my purposes. I will take it, a great deal more passes between the two individuals, one of whom I have had the honour of naming, than probably would pass between them; for, as an Englishman making an English will,

I should have no difficulty in saying, 'Have you drawn this out accord- July 17. 1823.
'ing to my intentions?'—'Yes—but you will have it read over.'—'Why
'should I?' I repose confidence in you; you tell me you have given such
'a one so and so, and have given so and so, and put in, God knows how
'many provisions.' I might turn round—and it is not a very unimportant anecdote, that I heard Lord Mansfield say that he had scarcely ever read a deed that he executed in his life—I suppose that referred to his English deeds; what he did as to his Scotch deeds I cannot tell;—but I will suppose the noble Lord reads it over;—that after the reading it over to me, I desire him to be so good as to keep it till a particular day when I mean to execute it;—he brings it, and I execute it before three witnesses who know nothing of the contents of it, as to which it is my intention that they should know nothing of the contents of it, and I subscribe it, and they attest my subscription, for that is all they attest. The noble Lord predeceases me, which I hope will not be the case. What is to be proved? Those who are to claim after my death can only prove it was read over by giving other evidence to satisfy the Jury that I knew the contents of it, and I really do not know how more can be done. It is stated on the one hand, that blind men may be liable to imposition, which they certainly may, and so may men who see, though not so liable to imposition; and when it is stated on the one hand, that they may be liable to that sort of imposition, let it be admitted on the other hand, that if all this is required of them, nobody can tell whether that which he intends will have validity or not, and how long it will have validity. In some of the papers in this cause, they say, to be sure, when it is an old instrument, you are to presume all this;—but I do not know how to get at that; if reading be a solemnity, the reading must be attested, and it must be in the attestation clause that it was read over. If all the witnesses were to die, the moment they were dead all they had attested would be presumed to be read, because they had attested it; but if the reading need be in the presence of the witnesses, or it must be in the presence of the witnesses, but need not be part of the attestation, I do not know how it is to be proved, unless you will take for granted without any evidence whatever that it was so. If you will take for granted, without any evidence whatever that it was so, if there be evidence satisfactory to the minds of the Jury who are to try the fact whether it was his deed or not, validity may be given to the instrument—so it appears to me.

But, my Lords, to return,—the question will be, whether, if the subscription of a blind man is a subscription according to the law of Scotland, and there is an attestation such as the law of Scotland requires to an instrument which can be subscribed by the party, whether that instrument is not therefore in itself probative, and whether the onus of showing that the person was imposed upon, or the onus of showing whether it was not read, (if that is to be taken as conclusive evidence,) is not to be thrown upon those who quarrel with the instrument. You have authority both ways, and I confess, on the best consideration I can give

July 17. 1823. the subject, I think the onus probandi ought to be on those who seek to reduce the instrument.

My Lords, there are other points in the case. Upon the whole, it comes to this, (for I can put it in no other way,) Are you satisfied, upon these imperfect and inconsistent findings, and upon the doctrines stated in these interlocutors, that these interlocutors of the Court of Session ought to be affirmed as to those two deeds, recollecting what has or has not been done with respect to that instrument of November 1808, and recollecting how important a circumstance it was in our English case, that the testator altered the will, and that the alteration was taken as a circumstance of evidence that he knew what he was about in respect of the will itself—recollecting what has or has not passed with respect to this deed of November 1808—are you or are you not satisfied to close this matter as the Court of Session has closed it, and as the Lord Ordinary may close it, with respect to this instrument of November 1808; or do you or do you not think,—regard being had to the nature of these findings,—that the matter requires further investigation; and if it does require further investigation, what is the form in which you will direct that further investigation to be made, and what issues will you direct on the points requiring that further investigation? Your Lordships will be pleased to consider, whether, amongst all those conflicting doctrines, if a general issue, or one or more special issues, are sent to the Jury Court to be tried, where so much doctrine is involved, you are satisfied that your best mode of proceeding would be to send it to the Jury Court, without any determination before you send it there as to the legal doctrines; or whether you are prepared to make up your minds, after all you have heard in this cause, to state, in the present stage of it, your opinion upon those legal doctrines which have already been discussed in the case, and which you are therefore probably competent to determine?

My Lords, with a view of taking the case in the latter mode, I have endeavoured, with the assistance of a noble and learned Lord, to put upon paper that which I may wish again to consider between this and Monday morning; for nothing can be so important as these findings.—I have put down on paper what are the doctrines which I consider as the doctrines of the Scotch law, meaning again and again to consider, till we finally decide whether that is the proper shape in which to put it; but preparing this, in order to have it before us, in case your Lordships should be disposed to consider it in the view I have taken of the case, will assist your Lordships if you should be so disposed. I have endeavoured, with the concurrence and the assistance of my noble and learned friend, to lay before the House some of those findings, which, I think, must be maintained as part of the Scotch law; and, having done so, I will propose now, with your Lordships' leave, that this case be considered further on Monday.

My Lords, I cannot finish what I have taken the liberty to submit to your Lordships, without stating, that I do look upon this as one of the most important cases which we have ever had in this House. I cannot

help saying further, that I claim for this House the recollection of the public, that when we are deciding matters here, we are doing it under an obligation of the highest and most sacred nature, recollecting that what we do decide here is irrevocably decided, and therefore that we are bound to take care—to take abundant and sufficient care—to take over-abundant care, if I may so express myself,—that doctrine is not laid down in your decisions, to which you shall be afraid to apply the character of law irreversible only by Parliament hereafter. My Lords, this is a most important reason for your Lordships deliberating much always before you decide;—it is the duty of every Judge to do so, in every Court in which the justice of the country is administered; but if there be an obligation of greater weight to be laid upon any persons who are concerned in the administration of justice than another, it is upon those who are administering justice here; they desert their duty if they do not decide in defiance of all that can be observed upon it, according to their own opinions; they desert their duty if they ever venture to decide, without having formed those opinions by so much of deliberation as will give them the satisfaction of knowing, after the decision is made, that however other persons may quarrel with it, they have honestly and laboriously endeavoured to decide aright.

My Lords, this case is not only of importance with respect to the individual, but it is of great importance with respect to a class of men as unhappy as any whose interests we have to take care of; I mean those who, by human disease and infirmity, and old age, are rendered unable to protect themselves; it is our duty, as far as the law will allow us, to protect them, and to enable them to make their wills without restrictions which that law does not impose. If the law imposes those restrictions, we must in our judgment apply them; but do not let us take upon ourselves to make restrictions with respect to testamentary dispositions of persons which the law has not applied to persons in that state to which I have now alluded.

Having troubled your Lordships thus far, as far as I am concerned in this matter, I beg, with your Lordships' leave, to postpone the further consideration till Monday morning; at the same time, in a case of this great importance, as the noble and learned Lord has, I know, applied his mind very anxiously to the consideration of it, perhaps it might save your Lordships' time on Monday, if at this moment the noble and learned Lord would be pleased to state what occurs to him.

Lord Redesdale.—My Lords, after what has fallen from my noble and learned friend, I will trouble your Lordships with a very few words upon this case.

The instruments in question are impeached by the summons before your Lordships on two grounds;—1st, That the instrument is not a probative instrument, in consequencc of the late Earl of Fife being deprived of the means of seeing, being in the situation of a blind person; and, 2dly, That this circumstance induces a suspicion of fraud, which is suf-

July 17. 1823.

ficient to avoid the instrument, unless that suspicion of fraud is rebutted by proof of circumstances. Now, my Lords, what is it that constitutes a probative instrument by the law of Scotland? It is where those solemnities which are required by positive law to give validity to an instrument have been complied with. If those solemnities have not been complied with, however it might be the intention of the party to execute the deed, and that the deed should have effect, however consistent it might be with his intention, if those solemnities of law are not complied with, the deed is null and void.

My Lords, whether the solemnities of law have been complied with or not is to appear upon the face of the instrument; for if, on the face of the instrument, it appears that those solemnities have been complied with, then, I apprehend, it is what in the Scotch law is termed a probative instrument.

Now, my Lords, though an instrument may appear on the face of it to be a probative instrument, it is yet capable of being impeached,—that is, it may be impeached on this ground, that the instrument, though apparently a probative instrument, was an instrument imposed upon the person who executed the instrument, and that it was therefore an instrument which was a fraud upon that person; and here it must be assumed, that the ground upon which this instrument is sought to be impeached, supposing it to be a probative instrument, is, that it was a fraud upon the Earl of Fife—that the Earl of Fife did not know what he was doing when he subscribed that instrument.

My Lords, with respect to the question, whether a subscription by a blind man who can write is a proper subscription by the law of Scotland, I am strongly impressed with the opinion that it certainly is, and that that is the mode of executing an instrument which the statute intended; for, my Lords, you will see what was the purpose of the statute in requiring subscription, instead of sealing the seal of the party,—being formerly the circumstance by which it was supposed to be the deed of the party. The statute says, the seal may be feigned;—the statute says, the seal, though the true seal of the party, may be affixed after the death of the party; therefore the statute directs subscription by the party. For what purpose can that be, but because the handwriting of the party is a thing of itself incapable of proof, and cannot be put after the death of the party:—the true handwriting could not,—and if it was not the true handwriting, it must be a forgery. My Lords, it is therefore, in my humble judgment, clear that the signature of this instrument by the Earl of Fife was the proper mode in which he was to execute such an instrument; and I am of opinion, that the signature of the Earl of Fife being affixed to that instrument, it was capable of evidence that that was not his signature. Evidence might be brought to prove that it was totally dissimilar from his signature; but there is no pretence of such evidence,—there is no pretence for the supposition that the signature was not the signature of the Earl of Fife; on the contrary, the summons of reduction supposes it to be the signature of the Earl of Fife, and alleges

circumstances with respect to the manner in which that signature was affixed by the Earl of Fife to the instrument: It supposes that the instrument was brought before the Earl, but that he did not know what were the contents of that instrument to which he so put his signature;—that is, that the proper means were not afforded to him of knowing what were the contents of that instrument; that, from the manner in which it was subscribed, the whole of the instrument not being subscribed at one time, in the same room, and so on, one instrument may have been substituted for another; it is not pretended that he did not mean to sign an instrument, but whether he intended to sign this instrument.

Now, my Lords, to what does that all resolve itself, but to a question of fraud, or suspicion that the persons who were then surrounding Lord Fife put before him an instrument which he did not mean to execute, instead of an instrument which he did mean to execute? And that must be the ground and substance of the charge which is brought against this instrument, that there was put before him an instrument which he did not mean to execute, instead of an instrument which he did mean to execute. Why, my Lords, in the execution, by every man having his sight,—a man who is incapable of understanding the contents of a legal instrument, or a person not learned in the law, the instrument is brought to him, and he is told this instrument is to dispose of his property so and so; he cannot, by his own knowledge, know precisely whether that instrument executes his purpose or not, but can that instrument be avoided on that ground? No. You must presume that he did know the effect and purpose of that instrument, unless it is positively shown that a fraud was practised upon him in that respect. It might be the easiest thing in the world to deceive a man who was making his will. He proposes to devise an estate for life, and to entail the property;—he devises to a man for life to trustees to preserve contingent remainders, and then to the heirs of his body. An unlettered man might suppose that the person to whom he gave the estate for life had only an estate for life, and no longer; whereas the construction of law of that instrument would be giving an estate tail, which would enable him immediately to dispose of the property; therefore, my Lords, it is impossible that, in the execution of any instrument whatsoever that is at all an instrument such as the most ignorant person cannot understand, that there must not be a degree of confidence in the persons who prepare that instrument for execution. Why, my Lords, I am sure for myself I have repeatedly executed instruments without having read those instruments, or hearing them read. As a trustee, that has been my practice. I have the misfortune to be engaged in many trusts; I have desired the deed to be laid before an attorney, whom I trust for that purpose; he reports to me that the instrument is properly prepared, and such a one as I ought as trustee to execute. I execute that deed on the confidence that I repose in that person. Many and many a deed have I executed in that way, without reading over the instrument. Perhaps I inquire particularly what it is that the instrument contains; what it is that I am required to do: but I do not read

July 17. 1823.

the deed, and I dare say every person in the country has done the same as I have, namely, executed without reading; therefore, my Lords, I hold it would be the most dangerous thing in the world to allow an inference such as is attempted to be raised in this case, to put it upon the user of the deed to rebut any presumption of this kind.

My Lords, I say, in this case, if this deed has the solemnities required by the statute, and is, according to the Scotch law, a probative instrument, those who seek to reduce the instrument must show that there existed some extraneous circumstances, from which it is to be demonstrated that Lord Fife did not mean to execute that instrument. That he meant to execute an instrument cannot be doubted; but then the question is, did he mean to execute that instrument? Now, my Lords, if he did not mean to execute that instrument, it might be because a fraud was practised upon him. I apprehend the law of no country presumes fraud. Fraud is a thing which must be proved; and those who mean to impeach an instrument on the ground of fraud must prove that fraud. It is not the law of one country only, but the law of every country, that fraud must be proved. Statutory regulations are provided to exclude fraud, and if those statutory regulations are not complied with, though there was no fraud, though a man meant to execute the instrument, though he perfectly knew what was contained in the instrument, though he had read it over a hundred and a hundred times, if the statutory solemnities are not complied with, that instrument has no validity in law. Then the necessary conclusion from that is, that if the statutory solemnities are complied with, the instrument, prima facie, is a probative instrument, and is to have faith given to it, until it be shown that it deserves no faith; and there is no ground on which it can be shown that it deserves no faith, but on the supposition that an instrument, different from that which the man intended to execute, was placed before him, and that he was prevailed upon to execute one instrument when he intended to execute another.

Now, my Lords, does it appear in this case, from any thing found by the Jury, or which has been suggested in idea, that Lord Fife meant to execute an instrument different from that which has been laid before your Lordships? It is clear he meant to execute an instrument. If the solemnities required by law are complied with, I say the presumption of law is that he meant to execute that instrument; and it would be most dangerous indeed if it was not the presumption of law that he meant to execute that instrument. It is clear, therefore, to my mind, that whoever attempts to impeach an instrument under such circumstances, the impeachment of that instrument must lie upon the person so seeking to set aside that instrument.

My Lords, it is open to the party seeking to set aside the deed to show that the granter did not mean to be party to such a deed as has been executed; it may be shown that he was not a party to the deed: that may be proved, or may be extracted from the witnesses; they may perhaps be led, on examination, to admit the fraud—to admit, for instance, that the instrument Lord Fife executed was a different instrument from that he

meant to execute. The witnesses, indeed, would not meet with much credit, for they would be confessing their own infamy. However, it might still be done; it might be shown by other evidence, as in the case of Aglianby, that the man was imposed upon in the transaction, that he did not know what he was doing. The truth was, in that case there was a deficiency almost of faculties in the person. There was no pretence of deficiency of faculties in Lord Fife. The only ground upon which this instrument is impeached is this, that it does not appear but that Lord Fife might have executed an instrument which was not the instrument which he meant to execute, though he meant to execute an instrument. Now, my Lords, I conceive that the proof of that must necessarily lie upon those who impeach the instrument, that it must be taken to be the instrument he meant to execute, unless the contrary is shown by evidence. July 17. 1823.

Then, my Lords, consider the effect of the subsequent deed of November altering the trust-deed. My Lords, is there any doubt, that if he executed that instrument as a probative instrument, and it was a probative instrument, that is most important to show that no fraud was practised upon him in respect of the instrument. When a man says, the instrument I have executed does not convey that which is now my meaning upon the subject, can there be a stronger presumption that he knew what was the meaning of the instrument he had executed? He executes an instrument by which he alters a part of the disposition; the second instrument was executed and attested, and if he knew what he was about when he executed that, can he have executed it without a confidence in his own mind that the instrument he had previously executed was an instrument prepared according to his intentions? My Lords, I conceive, therefore, that the law of Scotland, and the law of every country, must, in case of fraud, proceed exactly on the same ground. Fraud is every where the same. The provisions that are made by statute to prevent fraud are positive provisions, and, whether fraud existed or not, must be complied with. But if those provisions are complied with, then, if fraud is imputed to an instrument, with respect to which those provisions are complied with, the presumption must be in favour of the deed; and the presumption being in favour of the deed, and the evidence of any fact which would tend to impeach the deed must be produced by those who seek to set it aside.

My Lords, when we look in this case to the finding of the Jury, we find that on the trial of the first issues that were tried, the Jury expressly found that the deed was read over to the Earl of Fife; they expressly found that on another of the issues which had the same tendency. A new trial was granted, and it was granted on this ground, that only one witness proved the fact that it was read over to him. That was proved by a witness who deposed that it was read over in the presence of that witness and another person; but that other person, it seems, stands in a situation with respect to the instrument, (being one of the trustees of the trust-disposition,) that he is not capable of being examined as a witness; —the single evidence of one witness is not sufficient, in the law of Scotland, to establish a fact. Now, my Lords, though the evidence of one

July 17. 1823.

witness is not sufficient, in the law of Scotland, to establish a fact, is not the evidence of such a witness sufficient to rebut the contradictory testimony, and at least to throw it as matter of doubt before a Jury? But there is no evidence that it was not read over; on the contrary, all the evidence which exists upon the subject is that it was read; and yet there being no evidence that it was not read to him, the Jury have found that it was not proven that it was read—that is, that it was not proven, because, according to the law of Scotland, two witnesses were necessary to prove that fact. My Lords, is that sort of negative finding to overturn an instrument which is in fact probative, and which is to have effect, unless matter has been shown to avoid its effect? My Lords, if the reading is not a solemnity required by statute—is not a solemnity required by law, but is merely a circumstance from which it is, or is not to be inferred, that the instrument was the instrument which the party intended to execute; then, I say, finding it is not proven upon that issue is finding nothing at all.

My Lords, let us advert a little to what must have been the state of things before this act. Why, my Lords, almost all deeds were formerly in Latin, executed by persons who did not understand the Latin language; even if they understood the operation of law upon the words used, they did not understand the Latin language. My Lords, we find it said that if a question arises, whether a man is required to execute a deed which is presented to him, if the deed is in Latin, he has a right to have it explained to him before he is compelled to execute it; it must be explained to the party if it is in Latin, because he is not to be supposed to understand the Latin language: but what is the presumption of law in the absence of all proof? The presumption of law is, that it was fairly explained to him, unless the contrary is shown; and if he executed the deed without requiring it to be explained to him, would you therefore avoid that deed? That, if it were established, must extend not simply to a deed of this description, but to a deed upon contract; and your Lordships will at once see how far that will go. If Lord Fife had signed a contract for the purchase of an estate, he might, according to the principle of this case,—at least I am not aware of the answer to it,—have avoided that contract on the ground that he was blind, and therefore might be imposed upon; for that is the ground upon which this case is presented to your Lordships;—that it is to be presumed that an instrument, executed and attested by witnesses in due form, was not the instrument he intended to execute, because, being blind, it is not proven that it was read over to him.

My Lords, it does appear to me that some of the principles upon which the decision in this case have proceeded are so dangerous to the public, and would lead, if carried to the utmost, to such an extent, that, upon that ground alone, it is absolutely necessary this case should be reviewed. The manner in which the learned Lord on the Woolsack has proposed it should be reviewed, appears to me well adapted to the purpose of bringing before the Jury that case which may be properly brought before them, and which I take to be the only true question in this case, supposing the

deed to be a probative deed; that is, whether Lord Fife, meaning to execute a deed, a fraud was practised upon him, and another deed substituted instead of that which he meant to execute; for if it is not proved that a fraud was practised upon him, and another deed substituted instead of that he meant to execute, this deed, in my humble judgment, cannot be set aside. July 17. 1823.

LORD CHANCELLOR.—My Lords, since I had the honour of last addressing your Lordships, I have endeavoured to execute that purpose which I mentioned the other day as desirable to accomplish; and recollecting what is the extreme importance of this case, it appears to me that it may not be improper that your Lordships should permit me to tender this paper as the judgment proposed to your Lordships, and that the matter should be taken into consideration again on Wednesday or on Thursday. In the mean time, this paper being inspected by both parties, I am the rather anxious that that should be so, because it occurs to me to recollect (unless I mistake the fact) that, in what fell from myself, there was one point to which I did not advert—I mean with respect to the acknowledgment by the late Earl of Fife of the subscription; and care has been taken in this paper, that while it is proposed to your Lordships to express that the onus probandi that there was no such acknowledgment falls upon the pursuer, yet it is fit it should be clearly stated here, that it is competent to the defender to prove that the acknowledgment was made. If the acknowledgment was not properly made, it will be no difficult matter to prove the negative. At any rate, this paper contains an allusion to that circumstance, which I forgot to make in what I stated to your Lordships the other day. My Lords, at present, therefore, I shall trouble your Lordships no further than by delivering this paper, and desiring that it may be copied, and that both sides may have an inspection of it, with a view to stating any thing they may wish to represent upon the subject.

My Lords, I cannot conclude this without saying—(I hope there is no occasion for saying it, but it will do no harm)—that the case has been argued at the Bar without any observation falling from any body upon the conduct of the parties, either those who are pursuers, or those who are defenders. I hope nothing that can form matter of reflection on either has fallen from any person who has had the honour of addressing your Lordships. I know nothing of the kind fell from my noble and learned friend. I can say for myself, that it was the thing the farthest in the world from my wish that any thing of that kind should fall from me. A circumstance makes it perhaps not improper that I should say, that I do not think that Lord Fife would have done his duty to himself if he had not instituted this cause, and that it is on his part a very honourable cause to institute; and, on the other part, I think that the persons claiming under the deed would not have done their duty if they had not resisted this suit; and that there appears to be no imputation whatever on the moral conduct or the honour of any person whatever concerned.

July 17. 1823. *Appellant's Authorities.*—(1.)—Ayton, Feb. 5. 1742, (14935.)—(2.)—1541, c. 117; 1579, c. 185, or c. 80; Vin. Inst. 292; 3. Heinec. Antiq. 10. 18; 6. Cod. 21. 1; Couts, June 21. 1681, (6842); 1. Bank. 11. 3; Falconer, Jan. 9. 1751; 2. Elch. *voce* Writ, No. 26; Bell on Testing Deeds, 205. et seq.; 2. Bos. and Pul. 2. 17; Peake, N. P. 148.

Respondent's Authorities.—(1.)—Hamilton, Dec. 21. 1621, (7799); Mar, June 23. 1612, (7798); Ballantine, Jan. 5. 1675, (7807.)—(2.)—Falconer, Jan. 9. 1751, (16817); Ross, June 11. 1794, (582); Bain *v.* Belshes, not reported; Wilson *v.* Pringles, May 13. 1814, not reported.

J. CHALMER,—SPOTTISWOODE and ROBERTSON,—Solicitors.

(*Ap. Ca. No.* 26.)