April 18. 1825. shall feel it my duty to vote for its being affirmed; and when one looks at the nature of the case, I think we certainly cannot affirm it without giving the costs occasioned by the respondents having been brought here. I would therefore move your Lordships that this judgment be affirmed, with L.100 costs.

Appellant's Authorities.—A. S. June 14. 1799; Taylor, Dec. 1820; A. S. Nov. 9. 1590.

J. CHALMER,—Solicitor.

No. 16.

JAMES WEMYSS, Appellant.

HUGH HAY, Esq. of Morton, Respondent.

Writ—Testing Clause—1681, *c.* 5.—Held, (affirming the judgment of the Court of Session), That a testing clause, naming and designing certain persons who signed as witnesses, but not expressly stating that they were witnesses to the subscription of the granter, was effectual.

April 19. 1825.

2D DIVISION. Lord Pitmilly.

THE late John Hay, Esq. of Morton, in the county of Fife, executed a deed of entail, by which he conveyed his estate to his nephew, John Hay, whom failing, a series of substitutes. The entailer died in 1775, and was succeeded by his nephew, who made up titles in virtue of the entail, and possessed the estate till his death in 1799. The respondent, Hugh Hay, was his son and heir, and thenceforth enjoyed possession, without interruption, as his heir-apparent, till 1815. On the 26th of May of that year the appellant, James Wemyss, the grand-nephew and heir-at-law of the entailer, brought an action of reduction of the entail, in respect of the testing clause being defective, and that the deed had been executed on deathbed; but this latter question did not enter into the present discussion. The testing clause was thus expressed:—'In witness whereof (written on this and 'the eleven preceding pages of stamp paper by David Fraser, 'writer in St Andrews) I have subscribed these presents, con- 'sisting of this and the said eleven preceding pages, and marginal 'note on the fourth page, and to the deleting of part of a word 'in the ninth line, and another part of the said word in the tenth 'line of the fifth page, counting from the bottom, before signing; 'John Bower, son to Patrick Bower, bookseller in St Andrews, 'and the said Patrick Bower and David Fraser. (Signed) JOHN 'HAY. John Bower, witness, Patrick Bower, witness, David 'Fraser, witness.' The defects in this clause which were mainly relied on were, 1st, That neither the place nor date of the granter's

subscription were inserted; and, 2dly, That it was not stated that the persons who signed the deed as witnesses were those in whose presence it was executed. The Lord Ordinary pronounced this interlocutor:—'The Lord Ordinary having heard parties' procurators, and considered the process and productions, repels the reasons of reduction in so far as they are founded on the omission in the testing clause of the deed of entail to mention the place and date of the granter's subscription; also repels the reasons of reduction founded on the fact that the persons who sign the said deed as witnesses are not designated as witnesses, nor said to be such in the testing clause, in respect the designations of these persons is given in the testing clause, and that each of them adjects the word "witness" to his subscription. In so far, therefore, as concerns the objections to the deed as not duly tested, and as defective in the legal solemnities, sustains the defences, assoilzies the defender, and decerns; but with respect to the reason of reduction founded on an allegation that the deed was executed on deathbed, in respect that the date of the subscription does not appear from the testing clause, ordains the defender, before answer, to give in a condescendence, in terms of the Act of Sederunt, stating in what manner he offers to prove, 1st, The date of the deed under reduction; and, 2dly, The date of the granter's death, and what his averments are on both these points.' Against this judgment (except in so far as it related to the question of deathbed) the appellant reclaimed, and, on advising his petition with the answers, the Court, on the 27th June 1816, adhered. The appellant then presented another petition, on advising which, with answers, the Court appointed the cause to be heard in presence of the whole Judges; and thereafter the Lords President, Hermand, Balmuto, Succoth, Balgray, Gillies, Pitmilly, Alloway, and Cringletie, transmitted to the Second Division this opinion:—'The above Judges are unanimously of opinion, that in the testing clause in question, the requisites of the Act 1681, cap. 5. have been sufficiently complied with, for the reasons stated in Lord Pitmilly's interlocutor.' At this time it was not requisite that judgment should proceed according to the majority of the consulted Judges; and, when the case came on for advising, there being three Judges of the Second Division who considered the clause defective, and two in favour of it, their Lordships, on the 12th November 1819, altered, sustained the reasons of reduction, and decerned in terms of the libel, but found no expenses due. The respondent then reclaimed, and the Court, on the 31st January 1821, altered,

April 19. 1825.

April 19. 1825. and returned to their interlocutor adhering to that of the Lord Ordinary; and to this judgment they adhered on the 5th June 1821, by refusing a petition without answers.*

Wemyss appealed.

Appellant:—By the statute 1681, ch. 5. it is declared, 'that 'all such writs, to be subscribed hereafter, wherein the writer 'and witnesses are not designed, shall be null, and are not sup- 'pliable by condescending upon the writer, or the designation 'of the writer and witnesses.' But the deed in question does not, even with the aid of the names subscribed, shew with certainty who the subscribing witnesses truly were, and therefore the deed is null and void. But, further, it is declared by the above statute, 'that in all the saids cases the witnesses be de- 'signed in the body of the writ, instrument, or execution respec- 'tive, otherwise the same shall be null and void, and make no 'faith in judgment, nor outwith.' In the body of the writing, however, of the present deed, no mention is made of witnesses at all, and consequently, on this separate ground, the deed is also null and void.

Respondents.—It is not denied that the signature of the granter is genuine, nor that those which are adhibited with the word 'witness' annexed to them are truly the subscriptions of the persons mentioned in the body of the writ. But there is no law which provides that the testing clause of a deed shall be in any one form rather than in another; and therefore the question comes to be, Whether the statutory requisites have been complied with? If they have been so in substance, this is all that is necessary; and it will not be disputed, that if the mere preposition 'before' had been inserted, the deed would have been unobjectionable. The statute does not require that the party shall sign in presence of the witnesses. It is sufficient if he acknowledge his signature to them; and therefore it is not necessary to say that the deed was executed in presence of witnesses. All that is required is, that the witnesses should be named and designed in the body of the writ. But the clause begins with the attestation, 'In witness whereof I have subscribed these 'presents;' and as the whole clause, including the names adhibited to it, must be taken into view, and as each of the persons who subscribe state that he was 'witness,' it necessarily follows, that these persons (who are mentioned in the body of the writ) were

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* See 1. Shaw and Ballantine, No. 56.

the witnesses to the subscription attested by the granter to have been made. Accordingly, this point was so decided in express terms in the case of Doig against Kerr.* April 19. 1825.

The House of Lords ordered and adjudged, 'that the appeal 'be dismissed, and the interlocutors complained of affirmed; and 'it is further ordered, that the cause be remitted back to the 'Court of Session to proceed therein upon the points not de- 'cided by the interlocutors hereby affirmed, as shall be just.'

Appellant's Authorities.—1681, c. 5.; 1540, c. 17.; 3. Ersk. 2. 11.; Bell on Testing Deeds, p. 45.; 1. Jur. Styles, 13. and 24.; 1. Bankton, p. 333.; 1. Ross, 142.; Graham, Dec. 26. 1752, (16,902.); Archibalds, Nov. 17. 1787, (16,907.); Douglas, Heron and Company, Nov. 28. 1787, (16,908.)

Respondent's Authorities.—Duke of Douglas, Jan. 6. 1747, (Kilk. p. 610.); 1579, c. 80.; 3. Ersk. 2. 11.; 1593, c. 175.; 1681, c. 5.; Dronnan, July 26. 1716, (16,869.); Ewing, July 30. 1739, (1352.); Gray, July 5. 1710, (16,892.); Durie, March 9. 1753, (16,936.); Doig, Jan. 9. 1741, (16,900.); Clarke, July 17. 1752, (3806.); Paterson, Jan. 16. 1784, (3807.)

J. RICHARDSON—J. CHALMER,—Solicitors.

DAVID MORRISON and Others, (TURNBULL'S Trustees), Appellants. WILLIAM ROBERTSON, Respondent. No. 17.

Submission.—Circumstances under which (affirming the judgment of the Court of Session) a decree-arbitral, alleged to be ultra vires, and containing an error calculi, was sustained.

GEORGE TURNBULL, merchant in Perth, and William Robertson, merchant in Blair-Gowrie, entered into a joint adventure April 26. 1825.

2D DIVISION. Lord Cringletie.

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* It is stated by the respondent, that recently before the death of the granter he consulted Mr M'Queen, afterwards Lord Braxfield, as to whether the clause was objectionable, and that he received an opinion recommending a new deed as a prudent measure; but 'as to the second objection, which is an objection to the "testing 'clause," in so far as it wants the words, "before these witnesses," I do not think that 'the objection is relevant to annul the deed, because, as is very properly observed in the 'memorial, the enactment of the statute 1681 is literally complied with. The instru- 'mentary witnesses do, in reality, subscribe the deed, and subscribe themselves as 'witnesses, and those who subscribe as witnesses are likewise named and designed 'in the deed itself, which is all that is required by the foresaid statute.' He also stated, that a similar opinion had been given by Mr Campbell, afterwards Lord President; and that the entailer was only prevented, by being then on deathbed, to execute a new deed; and that although Lord Robertson was at first against the validity of the clause, he afterwards was satisfied that it was unobjectionable.