No. 19.

Sir JAMES DUFF, Appellant.—*Fullerton*—*Tindal.* The EARL of FIFE, Respondent.—*Keay*—*Murray.*

Witness—Writ.—Held (affirming the judgment of the Court of Session), that it is a valid ground of reduction of a deed, that one of the instrumentary witnesses neither saw the granter subscribe nor heard him acknowledge his subscription.

Process—Bill of Exceptions.—Question raised and considered as to what is the proper subject and shape of a bill of exceptions, and what amounts to a direction by the Judge, or only an expression of opinion, or mere obiter dictum?

May 22, 1826.

2D DIVISION.

Lord Pitmilly.

ON the 7th of October 1808, the late James Earl of Fife executed a trust-deed, by which he conveyed his whole fee-simple estates to certain trustees, to be held by them till a certain period, 'and in the event of the said period arriving during the 'lifetime of all or any of the said Sir James Duff, the Honour-'able Alexander Duff of Echt, my immediate younger brother-'german, and of James Duff, eldest lawful son of the said Ho-'nourable Alexander Duff; then, and in that event, this pre-'sent trust shall also further subsist and be effectual, (except in 'the cases after mentioned,) to all intents and purposes, during 'the whole lifetimes of the said Sir James Duff, the Honoura-'ble Alexander Duff, and the said James Duff, and the longest 'liver of them.' On the same day, and in relation to the trust-disposition, the Earl executed a deed of entail of the lands therein mentioned, by which he disponed them 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,' &c. Both of these deeds (which were of great length) were subscribed on each page by the Earl, and to each of them there was subjoined this testing clause:—'In witness whereof, I have 'subscribed these presents, written upon this and the 81 prece-'ding pages of stamped paper, by James Gibb, clerk to William 'Inglis, writer to the signet, at Duff House, the 7th day of Oc-'tober 1808 years, 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 the 12th of November of the same year, the Earl executed another deed, by which, in certain particulars, he altered the trust-deed; 'but declaring always, that the said trust-'disposition and settlement above recited shall stand, subsist, 'and be effectual, to all intents and purposes, in all its heads,

'tenor, and contents whatsoever, except in so far as regards May 22, 1826.
'the alteration and innovation thereof herein before specified.'
The testing clause of this deed was thus expressed:—'In wit-
'ness 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 witnesses, Alex-
'ander F. Williamson and George Wilson, at Duff House.'

The Earl died on 6th January 1809, and was succeeded in his titles and entailed estates by his brother Alexander, who was excluded by the trust-deed from the enjoyment of the trust-estates. Earl Alexander died in 1811, and was succeeded by his eldest son, James (the present Earl of Fife), who also was excluded by the trust-deed from any beneficial interest in the estates therein mentioned. Of that deed, and of the relative deed of entail, and of the deed of 12th November 1808, he, as heir-at-law of the late Earl James, brought an action of reduction, on the ground that they had not been duly tested, and, in particular, that they had not been read to the Earl at the time of signing them, and that one of the instrumentary witnesses neither saw him subscribe them, nor heard him acknowledge his subscription. On these and other points special issues were sent to a Jury, who returned a verdict, finding, inter alia, that the deeds had not been read over to the Earl when he subscribed them, and that it was not proven that he had acknowledged his subscription to George Wilson, one of the instrumentary witnesses. The Lord Ordinary decerned in the reduction, in respect it had not been proved that the deeds were read over to the Earl before signing them, and the Court adhered to this interlocutor, in so far as it decerned in the reduction. Against these interlocutors Sir James Duff of Kinstair, the defender in the action, presented an appeal, and the House of Lords pronounced a special judgment, which concluded by ordering, 'that the Court of Ses-
'sion in Scotland do direct an issue to try whether the instru-
'ments of trust-disposition and deed of entail, both dated the
'7th October 1808, sought to be reduced, being in law pro-
'bative 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 1818, 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
'of the Earl of Fife, ought to be upon the respondent seeking

May 22, 1826. 'to reduce the same. And it is further ordered, that the re-
'spondent be the pursuer in such issue, and the appellant de-
'fender; and that upon the trial of such issue, the said several
'instruments be produced and be received as probative instru-
'ments, to be impeached by the respondent by such evidence as
'he may be advised to offer touching the same; and that there-
'upon the appellant be at liberty to offer such evidence as he may
'be advised 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
'evidence in support of the instrument of trust-disposition and
'deed of entail of the 7th day of October 1808, so sought to be
'reduced if the appellant shall think fit to do so.'

Accordingly, this issue was adjusted, and laid before a Jury;
'Whether the instruments of trust-disposition and deed of en-
'tail, both dated the 7th day of October 1808, sought to be redu-
'ced, being in law probative intruments, 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 November 1808,
'being in law a probative writ, was not the deed of the Earl of
'Fife?'

At the trial, the pursuer (the Earl of Fife) rested his case on two grounds. He averred, in the first place, that George Wilson, whose name appeared as one of the instrumentary witnesses to the deeds of the 7th October 1808, had signed these deeds without having either seen the Earl subscribe, or heard him acknowledge his subscription; and he adduced evidence to prove this fact. He then maintained, in the second place, that in this situation Wilson could not be considered as in law an instrumentary witness; and that the deeds being thus only subscribed by a single witness, whereas two were requisite, were null and void, so that the legal result was, that these two instruments, not being properly executed, could not be held in law to have been the deeds of the Earl of Fife.

The defender (Sir James Duff) led no evidence, but maintained the reverse of these propositions in point of law, and contended, 1st, that although Wilson had signed without having first seen the Earl subscribe, or heard him acknowledge his subscription, this formed no legal objection to the deeds, which therefore were valid and effectual, and to be held in law as the deeds of the Earl; and, 2d, that the evidence adduced by the Earl of Fife was sufficient to show that there had been a virtual acknowledgment, to be implied, by necessary and fair inference, from the acts of the parties at the time.

No evidence was adduced relative to the deed of 12th November 1808, and the Lord Chief Commissioner having addressed the Jury, two separate bills of exception were tendered by the defender as to two parts of his charge to them. On the first question, his Lordship directed the Jury, 'that if they were satisfied 'that the evidence given on the part of the pursuer established 'that the granter of the deed had not acknowledged his sub- 'scription to the witness, who did not see him subscribe the said 'deed, to find by their verdict that the said deed was not the deed 'of the Earl of Fife; and did then and there tell the Jury, that 'the law required, in cases in which a witness does not see the 'granter of a deed sign the deed, that he must acknowledge his 'subscription to such witness, otherwise the deed is void in law, 'and therefore is not the deed of the granter.' May 22, 1826.

His Lordship, in the next place, after observing, 'that in this 'case he was of opinion, that there was undoubted evidence (and 'it was admitted) that there had been no acknowledgment by 'words to the witness, who did not see the Earl sign,' he stated to the Jury, 'that in considering any other acknowledgment, 'it was his opinion the acknowledgment must be clear and 'explicit; and that he had not found any case in which a vir- 'tual acknowledgment or equipollent had been sustained; but 'that it was not necessary to carry the doctrine so far in this 'case, as, according to the evidence of the two witnesses called 'by the pursuer, (if they, the Jury, believed either of them,) 'it did not appear that there was any acknowledgment either 'express or virtual.' This having been excepted to by the defender's counsel, his Lordship put the above direction in writing, which he read to the Jury; it stated, 'that they were to consider what he read to them as his directions on the part of 'the case which related to the alleged acknowledgment of the 'subscription to the said deeds by the said Earl;' and 'that 'if they believed either of the witnesses, he was of opinion that 'there was no acknowledgment by the said Earl of his said 'subscription to the deeds of the 7th October 1808, to the said 'George Wilson, in which case the said deeds were not the deeds 'of the said Earl, and they would find so by their verdict.'

The Jury then returned a verdict, by which, 'in respect of 'the matters proven before them, they find that the instruments 'of trust-disposition and deed of entail, both dated the 7th October 1808, were not the deeds of the Earl of Fife; and in 'regard to the deed of alteration of the 12th day of November '1808, they find for the defender.'

The exceptions were settled, and made the subject of two

May 22, 1826. separate bills.* Each of these was presented to the Second Division; and in each their Lordships, on the 22d December 1825, pronounced this judgment: 'The Lords having advised this bill 'of exception with the relative proceedings and writings referred to, and heard the counsel for the parties viva voce, disallow 'the bill, and find the respondent entitled to the expenses incurred in the discussion of said bill.'†

Lord Glenlee observed, In relation to the general point stated in the first bill, the simple question here is, whether a deed, in which one of the instrumentary witnesses has neither seen the granter subscribe, nor heard him acknowledge his subscription, per se, bears faith or not? I must confess, that I have always understood it to be a settled question, that where nothing has followed on such a deed, it bears no faith. It is a very different question, when a great deal has been done by the parties on the faith of the deed, whether benefit can be taken of the nullity, or reduction allowed. No nullity, arising from defect of solemnity, can be greater than that from the want of the subscription of the party. Yet disability to bear faith on this ground may be removed by homologation, as in the case of a contract of marriage, unsubscribed by one of the parties, but followed by marriage; or of a tack not probative under the act of 1681; if possession follows, the landlord is not entitled to set it aside: but he is so, even although he admits his subscription, if the tenant has not entered. If a general rule can be laid down as to such cases, it is of this description, that where a party has given forth a deed out of his hand as fair and regular, and binding on him, and has dealt with the world on the footing of its being binding, if he attempt to reduce it on latent nullities, known only to himself, and arising from his own act, as signing without the presence of witnesses, reduction would not lie—and this was, in fact, the case of Smith. But no such grounds for repelling the reasons of reduction apply here, where nothing whatever has been done. The only question is, whether the deeds in this case, vi instrumenti alone, bear faith? and I have no doubt that they do not bear faith, independent altogether of the act 1681. Where there are only two witnesses, and one of them did not see, nor hear acknowledgment, the testing-clause is false, and we must take the case as if the testing-clause had borne that the subscription was before a single

* As these bills are very largely quoted, and commented upon by the Lord Chancellor. reference is made for their contents to his Lordship's observations.

† See 4 Shaw and Dunlop, Nos. 240, 241.

witness; and unless one witness to a deed is sufficient, the exception cannot be sustained. May 22, 1826.

Lord Pitmilly.—I have been intimately acquainted with this case from its commencement, and have been present at most of the proceedings, as Lord Ordinary to the case;—at three trials in the Jury Court, and at part of the proceedings in the Inner-House. It is of importance, with reference to the question now before us, and with reference to that part of the judgment of the House of Lords which has been noticed in the pleadings, to keep in mind the proceedings as to the authentication, by instrumentary witnesses, of the deeds executed by the late Earl of Fife.

The summons contains a conclusion of reduction, on the distinct and separate ground, that the witnesses did not see or hear, &c.

There were seven issues on the first trial—one (the fifth) was directed to this part of the case.

It was thus ascertained, and has never been disputed, 1st, that one of the witnesses did not see the Earl subscribe the deeds; and, 2d, it was found not proven that the Earl acknowledged his subscription to this witness.

This verdict, of not proven, was the subject of much observation in the course of pleadings in the Outer-House, before me, when the case returned to me, in order that the verdict might be applied. The authorities, Stevenson *v.* Stevenson, Campbell *v.* Robertson, Blair *v.* Allan and Peddie, &c. on which the counsel have now argued the case, were all of them, at that time, laid before me. But I held, that, on the supposition of the Earl's signature being the proper mode of authenticating the deeds, the deeds were probative; and therefore, the onus that Wilson did not hear an acknowledgment, lay on the pursuer of the reduction.

Many important remarks appear to have been made on this view of the case in the House of Lords; and all the argument was fully in view when judgment was pronounced. I ought here to mention, that the argument on the question, whether a deed is null where the subscription is not acknowledged, is not to be found in the informations or appeal cases. These are confined to the point of onus probandi, and to the effect of the verdict of not proven.

The judgment of the House of Lords begins, by finding the signature of the Earl his proper signature, and then proceeds,—'And the instruments being apparently attested by two witnesses,' &c. 'Apparently attested,' is a most accurate expression,

May 22, 1826. as the subscription of a person adding the word, 'witness,' to his name, does not constitute him what the law calls and considers a witness, unless he actually saw the granter subscribe, or heard him acknowledge his subscription at the time. The person subscribing as witness, is, in the case supposed, an apparent witness, that is, he appears on the face of the deed to be a witness, but he may not be a witness in law or in reality.

Such having been the grounds on which the case was remitted to try the general issue, whether the deeds were the deeds of the Earl of Fife, I own I was surprised when I learned it was to be maintained, that although it should be proven the Earl of Fife did not acknowledge his subscription to Wilson at the time Wilson subscribed, yet that the deeds were valid.

Several of the authorities which have been referred to on this point, were quoted on the trial, and the Court, which sat full, had no doubt; the industry of counsel has added other authorities since, and I think the opinion of the Court strengthened by these additional authorities.

The defenders are forced to adopt a radical mistake as to our system of authenticating deeds. They hold, that a witness is a person who is to attest the subscription of the granter, and that if he can do so, no matter by what means; and that it is no substantive objection that the witness neither saw the granter subscribe, nor heard him acknowledge his subscription.

Now, a witness does not attest a subscription as a signature which he can attest from his knowledge of the hand-writing. He is never asked or appealed to as to this. What he attests is, that he saw the granter subscribe, or, by the latitude introduced by the act 1681, that he heard the granter acknowledge his subscription. When either of these points is made out, the law holds the subscription to be genuine.

If the defenders' theory were just, the question put to a witness, in the event of challenge of the deed, would not be, 'Did 'you see the granter subscribe, or hear him acknowledge his 'subscription?' But, 'Is that his hand-writing and subscrip-'tion?' In Frank's case, in the case of Steel, and in this case, such would have been the nature of the inquiry, and the import of the questions put. A witness thus interrogated, might answer in one case from having seen the party subscribe—in another, from having heard an acknowledgment—and in a third, from his knowledge of the hand-writing, though he had neither seen the granter subscribe, nor heard him acknowledge his subscription.

According to this theory, it would only be in criminal prose-

cutions under the act 1681, that the question, 'Did the witness 'see,' &c. would be relevant. But in a civil question, the question to the witness would be, 'Is this the signature of the 'party?' May 22, 1826.

Now, we may appeal to the proceedings in all the cases referred to, as proof that this line of interrogation would not have been held relevant, or been permitted.

And, in fact, in the great majority of cases, witnesses called upon to speak to subscriptions which were adhibited at a distance of time, could not attest these subscriptions, from a knowledge of the hand-writing. All a witness can tell is, that he sees his own subscription to the deed as witness, and this fact, as was expected by the legislature, in passing the act 1681, assists his memory to enable him to say that he either saw the party subscribe, or that the party acknowledged his subscription. The preamble of the act 1681 states, that 'By the custom introdu-'ced 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;' —that is, by their forgetting that they saw the party subscribe, or that he acknowledged to them his subscription, may disown that they were present at the subscription, or heard it acknowledged.

The common method of attesting the subscription of a party is, that the writer of the deed sends two clerks to witness the subscription of the party, who was probably unknown to either of them before, and with whose hand-writing they are unacquainted—they stand by while he subscribes, or if he has already put his name to the deed, he acknowledges his subscription, and they subscribe as witnesses. If such documents, of which there are hundreds attested by every writer's clerk or apprentice, were brought forward, at the distance of thirty or forty years, the witness recognises his own subscription, and from this, recollects that he was present and saw the party subscribe, or that the party acknowledged. In all probability, he has no knowledge or recollection of the hand-writing.

Put the case of a witness not knowing the hand-writing of the party subscribing, and the witness not seeing the subscription, but merely hearing it acknowledged: The witness cannot attest a subscription which was acknowledged to him in such circumstances. He merely attests the acknowledgment, which may be true or false, for anything he knows.

There is a host of authorities in support of this doctrine.

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1st, The opinions of three institutional writers, M'Kenzie, Bankton, and Bell.

2d, Express decisions, in which deeds were set asside on this precise ground.

3d, Many cases, in which the relevancy was admitted and proof allowed; and,

4th, Some, in which it is expressly laid down, that the 'non 'memini' of instrumentary witnesses is not sufficient to cut down the attestation by signature.

In the case of Smith of Olrig, there seems to have been a defect of evidence to cut down the testing clause.

I shall not enlarge farther. The case is of importance, and requires research and attention to trace the system,—but when this is done, it is not difficult for a Judge, who attends to decided cases, and respects the system which the wisdom of our ancestors has devised and perfected, to form a decided opinion.

Lord Alloway.—As I concur in general with the opinions that have been delivered, it might be unnecessary for me to say anything. But as, from the importance of the case to the law of Scotland, and especially to that department of it of which we have most cause to be proud, viz. the execution and effect of written deeds, it is perhaps right that every Judge should give his opinion in this case, mentioning the authorities and grounds upon which that opinion is founded.

This case has been long before your Lordships, and you have had occasion to consider it in different views. As it is the first time that I have had occasion to consider it, I was anxious to examine minutely the terms of the remit by the House of Lords, and the very long and full speech of the noble Lord, upon whose motion that judgment was pronounced, which is prefixed to the judgment itself. And I must say, that I have never perused any legal document whatever, exhibiting the same great legal talent, the same research, the same great anxiety, or almost over-anxiety, upon the part of the Judge to attain the true legal views of the case. And it is certainly a matter of the greatest astonishment and wonder to me, that, amongst all his other judicial and his political avocations, he had time to compile a treatise so perfect as that which is contained in the 113 printed pages preceding the judgment. In short, I consider it one of the most singular and able judicial expositions which I have ever perused.

I shall begin, therefore, by calling the attention of the Court to certain parts of that remit, as originating those questions which it is now the duty of the Court to determine.

I find that, in England, it is necessary that the testator execute the will in the presence of the attesting witnesses, and that this is absolutely necessary to give it effect.—See Lord Chancellor's Speech, p. 54. In short, that it must be subscribed in the presence of three witnesses. And again, upon p. 91, the subscription is the thing to be attested. May 22, 1826.

The law of Scotland proceeds upon the same principle. The two witnesses to the deed attest, that they saw the testator subscribe, or heard him acknowledge his subscription; and if they were not present, and did not see the testator subscribe, or hear him acknowledge his subscription, the deed is good for nothing. In the judgment of the House of Lords, where the whole of this learned reasoning is embodied into abstract findings, it is stated as a subject of investigation, whether the witnesses, or one of them, did not see the Earl of Fife subscribe the instrument, or hear him acknowledge his subscription thereto. And with this explanation, the general remit was made, to try whether this was the deed of Lord Fife or not.

The question is, therefore, whether, by the law of Scotland, if one of the instrumentary witnesses did not see the party subscribe, or hear him acknowledge his subscription, the deed so subscribed can be an effectual deed,—and whether the direction given by the Judge in the Jury Court was sound law or not.

I conceive that it was sound law: and I confess that I have imbibed the prejudices which are imputed to our predecessors, and to the different authorities referred to. I conceive, that, by the law of Scotland, it was at all times necessary that the witnesses attesting the subscription should be present, and see the subscription they attest, or that, posterior to the act 1681, they should hear the party acknowledge his subscription.

Now, this can be stated in a very short and simple proposition. By the law of Scotland, it was necessary, long before the act 1681, that every deed should be attested by two witnesses. It seems an absolute solecism to maintain, that although it is necessary that the subscription of every deed should be attested by two witnesses, the subscription of two persons as witnesses, who were not present, could possibly have that effect. It may be a very different question what kind of evidence is to be admitted, in order to ascertain whether the witnesses were present or not, and the effect of that evidence. But if it be admitted, or established, that the witnesses were not present, or that only one of them was present, then I conceive that this deed is not the deed of the granter, subscribed before witnesses, that

May 22, 1826. can receive any faith or effect in judgment, and that it is null and void.

It is a matter, more of curious than of important investigation, to trace the progress of the law, as to the testing of deeds after the discovery of the Roman Code at Amalphi. But, be this as it may, I think it has been demonstrated (what indeed seems to be the opinion of Craig, of Walter Ross, and of Mr Bell) that we derived all our securities, as to subscription of deeds, from the Roman Law; and that our great statute, 1681, is almost a literal transcript from the Roman Novella, 73.

At all times, witnesses seem to have been necessary, whether the deeds were effected by seals or subscriptions. The quotations from all our old authorities, as far back as they reach;—the Reg. Maj., Craig and Balfour, instruct, that witnesses were absolutely necessary. The progress towards maturity in the execution of our deeds, was, by 1540, c. 117, declaring that no faith should be given to evidents sealed, unless the party subscribed thereto and witnesses; or, if the party could not subscribe, by the subscription of a notary.

Then the statute 1579, c. 80, ordains, that all deeds and writings of importance should be subscribed and sealed by the principal party, if he could write, and if he could not, by two notaries, before four famous witnesses.

And then the statute 1593, c. 179, expressly ordains, that the writer insert his name in the body of the writ.

Matters stood upon these statutes for nearly a century, until the whole system was perfected and completed by the statute 1681, which has been stated to be the work of Lord Stair, the greatest lawyer that this country has ever produced.

Now, it is a very important consideration to examine how our lawyers, before the act 1681, considered this subject. From the most early period of our law, of which we have any record, and for centuries preceding the act 1681, deeds, if not subscribed or sealed before witnesses, could receive no faith; and it seemed to be a fatal objection, that the witnesses, or either of them, had not been present at the subscription. If this was the case before the act 1681, the objection was even more powerful after that statute was passed, which only rendered the former law more perfect, although it authorised the attestation of witnesses to a deed to whom the granter had acknowledged his subscription,—whereas, formerly, the witnesses must have seen the party subscribe.

The Reg. Maj. book ii, c. 38, expressly states, that a testa-

ment must be made before two witnesses, who can be fit wit- May 22, 1826.
nesses.

Craig refers to the Reg. Maj., and lays down the same doctrine with regard to all writings of importance.

And Balfour states, p. 368, c. 36, that evidents or writs make no faith, if there be not two witnesses at the least.

Mackenzie lays down the same doctrine, in the most decided terms, in his Observations, not only upon the act 1681, but also upon the preceding statutes; and even mentions the reduction of a deed, by a lady who had not subscribed it in presence of witnesses, and assigns that case as one of the causes for that statute.

And Mr Erskine, in speaking of the solemnities of written obligations by our law, expressly lays it down, B. iii, t. 2, § 7, that it was necessary that two witnesses were truly present; and this observation he makes in considering the act 1540.

In short, it was not seriously disputed that two witnesses were as essentially necessary for supporting a writing or evident, before the act 1681, as posterior to that period; although, previous to that time, from 1540 downwards, there seems to have been a considerable uncertainty in the decisions of the Court, with regard to the mode of receiving evidence, as to the witnesses who were present, by condescendences and otherwise. Yet these very decisions, so old as the period of Durie, and even before that time, recognise, beyond all doubt, the competency of establishing, by parole evidence, whether or not the witnesses were present and saw the party subscribe.

I will not enter into the details of these authorities, but shall refer to Mr Bell's 2d Lecture, p. 33, which appears to me to contain the general result of all these cases.

In the same lecture, he also mentions the cases of the Duke of Douglas, reported by Kilkerran, and Urquhart of Meldrum against the Officers of State, which, although decisions of the las tcentury, related to deeds which had been executed far beyond the existence of the statute 1681.

There are two cases, however, which, on account of their very great importance, must be taken notice of. For, although one of them was decided the year after the passing of the statute 1681, and the other three years after, I conceive that they relate to deeds which had been executed long before the passing of that act.

I allude to the case of Stevenson *v.* Stevenson, November 1682, where the Court found a bond null, in respect one of the witnesses deponed that he did not see the party subscribe. If the shortness of the report in that case be any objection, look

May 22, 1826. at the case of Blair *v.* Peddie, in 1684, within three years of the passing of the statute.

Mr Bell, p. 240 and 241, takes notice of this as a very severe case. But it seems to have escaped that acute writer, that this must have been a decision upon a bond executed before 1681; as this is a mere action of damages against a person, on account of his having subscribed a bond as a witness, without his having seen the party subscribe, and which had been reduced on that account, and that any acknowledgment prior to the statute 1681 could have no effect in authorising the attestation. So that, whether these decisions in 1682 and 1684 are held to proceed upon deeds executed prior to 1681, or posterior thereto, they seem to be equally important and decisive.

Before considering the decisions and authorities since 1681, it is necessary to take shortly into view the plea of the defender.

He holds, that if the deed be, ex facie, executed in terms of the statute 1681, it is a probative deed, and cannot be challenged, unless upon the head of forgery.

Now, just consider the question under this view. It is an essential requisite in the act that the witness know the party who subscribes, and whose subscription he attests. Your Lordships have repeatedly proceeded upon this ground.

Thus, in the case of Campbell *v.* Robertson, it was expressly found, that one of the witnesses not knowing the person subscribing, and whose subscription he attested, the bond was null, and this was an express decision upon the statute 1681.

And, in another case, collected by Dalrymple, Walker *v.* Adamson, (Bell, 279,) the Court proceeded on the same ground, although, from the evidence, the decision was contrary.

Now, if the witness is good for nothing, unless he knew the party, which is quite clear, in what way could any third party, trusting to the bond, know whether the witness knew the party or not? In the same way, how could he know whether the witness was a pupil or not, that being also a fatal objection? Or, in what way could he discover whether any objections applied to the witness?

In short, it is impossible to provide, by any human sagacity, against these risks; and the person in whose favour the deed was granted, had certainly better means of ascertaining that the witnesses were actually present at the execution, than that the deed had been witnessed by a pupil, or by a person not knowing the subscriber.

Now, it is established law, that the slightest error in the de-

signation of a witness may prove fatal to the deed:—A person named Robert instead of John; a person named Thomas instead of Francis; a person named Hillock, his common appellation, although he subscribed Hill—All these, and a variety of other objections, have been found perfectly fatal to a deed, although the subscription was never denied. These cases depended upon this principle, that by the act 1681, two witnesses were indispensably necessary, and that they should be properly designed in the deed. All this, in one sense, is mere matter of form, to secure two witnesses, and that they should be perfectly known, from their designations being inserted in the deed. May 22, 1826.

But can this be compared to the case where there is only one witness present, although another person may have been prevailed on afterwards to subscribe as witness? This would, indeed, be making substance yield to form, if, where two witnesses were absolutely necessary, one should be held as sufficient, the other one not being present. If this were the case, the act 1681 might be thrown into the fire, as then a deed might be effectual, although not subscribed in the presence of either of the attesting witnesses, or without either of them having heard the party acknowledge his subscription. For, supposing that the deed did, ex facie, bear to be subscribed in the presence of two witnesses, and may, in that respect, be held as a probative deed; yet, it is surely competent to instruct, that these witnesses were not present, or that one of them was not present, although, from the deed being ex facie probative, the onus probandi must lie upon the party challenging the deed. It seems utterly impossible to maintain such a ground as this, without maintaining that witnesses to a deed are totally unnecessary. I therefore conceive, if the fact be established, as it is by the present verdict, that one of the two witnesses was not present when the deed was subscribed, and never heard the granter acknowledge his subscription, this circumstance must be absolutely fatal to the deed.

Consider the vast number of cases that have been decided by the Court upon this principle. For, although it is stated that a number of these were in small cases, to which the attention of the Court had not been particularly directed, until the later cases, yet I hardly know such a body of authority upon any one point, whether arising from the opinions of institutional writers, or from decisions of this Court. Really, all our institutional authorities seem to be agreed.—See M'Kenzie's observations upon this very statute.—Mr Erskine holds it as absolutely necessary

May 22, 1826. that two witnesses were truly present at the subscription.—Bankton, B. i. t. 2. sec. 28.—Bell's Lectures.—Ross's Lectures.

There are no less than seven cases, before the case of Balfour and Applin, expressly acknowledging this principle, that the deed was null, if it was proved that one witness only had been present, or had heard the subscription acknowledged.

Then comes the important case of Balfour *v.* Applin and Steel, which is stated at great length by Mr Bell (see p. 246), and who has most fortunately preserved the opinions of the Judges upon it. There a proof was allowed, which was a decision in law, that if the facts had been proved, the deed must have been annulled; and the whole question turned upon the effect of that proof.

It cannot be denied that that case was very fully and ably argued. One of the witnesses, who was expressly called to see the deed subscribed by Mr Steel, admits that he was in the room with the other witness, but says, that he did not see Mr Steel subscribe; and he does not recollect whether Mr Lindsay, the writer, desired him, in Mr Steel's presence, to subscribe as a witness, although he stated, that when he was subscribing as a witness, Mr Steel was looking at him.

Now, as he was in the room, there was great reason to believe, that, from his position, he must have seen Mr Steel subscribe; and, if he was desired by Lindsay to subscribe, as to which Bett's evidence is a mere non memini, and Mr Steel was sitting and looking at him, at the same table, when he subscribed as witness, there cannot be the smallest doubt that this was a witness under the statute, and Bett's deposition was held as a mere non memini. See Lord Henderland's opinion, Bell, p. 250.

This point was again most fully considered in the case of Frank (Bell, 254 and 255); and upon a hearing in presence, the competency of examining the witnesses was decided unanimously; and Lord Eskgrove, who had taken the cause to report, from doubts he had entertained as to the competency of the proof, declares that he was satisfied the decision was right. It was of no consequence how the evidence turned out; and it resolved into a non memini so indistinct, that there was no evidence, nor even any reason to presume, from the testimony of the witness Tod, that he was not in the room at the time that Frank subscribed, as it was proved that the execution of the deed had been delayed until he arrived, and that he was in the same room when the deed was executed, and so situated that he might have seen Mr Frank subscribe.

Your Lordships have the whole opinions given by the Court in that case, as preserved by Mr Bell; and there is not one Judge who doubts the relevancy of the proof, and that the objection is effectual, if it could be made out. May 22, 1826.

Indeed it cannot be seriously maintained, for a moment, that, either according to the statute 1681, or according to the consuetudinary law of Scotland, or any statute that has ever been passed, one witness is sufficient to support a deed, although the other witness is no witness at all, from not having been present.

In short, I consider that this view of the case is supported by every authority; and even those cases where the Court found that the evidence was not sufficient to reduce, are complete authorities to show, that if, by the evidence, it had been instructed that only one witness had been present, or heard the party acknowledge his subscription, it must have been fatal to the deed.

In the great variety of cases referred to by counsel, sometimes the Court, upon advising the evidence, have annulled the deed, and sometimes have supported it. But all these were mere decisions upon the evidence; and one and all of these cases, of which such numbers have occurred since the act 1681 passed, are express judgments upon the point of law, that the deed must be null, if the subscribing witnesses were not present, or did not hear the party acknowledge his subscription.

I therefore completely concur with the opinions given by your Lordships.

Lord Justice-Clerk.—The bills of exception that were tendered to the charge of the presiding Judge, at the Trial of the Issue directed by this Court, in obedience to the judgment of the House of Lords, have been argued on both sides with great ability, learning, and research, and we are now called upon to determine, Whether both or either of these bills have raised any legal objection to the law laid down to the Jury, and ought to be allowed?

Taking the first bill in order, the question to be determined is, whether the direction in law contained in it, is well founded?

Although our attention must be mainly directed to the provision of the act 1681, as peculiarly applying to the objection which was taken to the validity of the deed of the Earl of Fife (and which, according to the express words of the judgment of the House of Lords, as well as from the clear principles of law applicable to the point, it was undoubtedly incumbent on the pursuer to prove had not been complied with), yet it is certainly

May 22, 1826. proper to keep in view, what were the previous state of the law and the statutory regulations, for the authentication of Scottish deeds.

That those rules have been introduced and borrowed from the Roman law, and especially in requiring witnesses, in the authentication of deeds, 'quia præsentibus eis confectum est documentum,' in the language of Justinian, I am disposed to concur in opinion with the views of the pursuer's counsel, (and it certainly is a proposition firmly fixed in that law,) that the witnesses there requĭred, should be persons present, and who know and can attest the truth of what they witness. In regard to a testament, this is expressly laid down in the Regiam Majestatem: 'Debet autem testamentum fieri coram duobus vel pluribus viris clericis vel laicis, vel talibus, qui testes inde idonei esse possunt."

This of itself is sufficient to put an end to the theory, that presence and personal knowledge of the maker of a deed, is no essential characteristic of the witness who attests it.

The earliest statute, 1540, c. 117, in contemplation of the evil that men's seals may be feigned, provided that no faith be given to any deed, 'without the subscription of him that awe the 'samen, and witnesse,' or else the subscription of a notary, if the party could not write.

Here subscription seems required, even of the witness, who must be presumed as present at the execution, though, in practice, it unaccountably was not at first required.

The act 1579, c. 80, required the writs to be subscribed and sealed by the principal parties, if they can write, otherwise by two notaries, before four famous witnesses, denominated, by their dwelling-places, or other evident token, that the witnesses may be known, 'being present at that time, otherwise the said writs 'to make no faith.'

Now, though there is an ambiguity regarding the latter provisos extending to the case of a party subscribing, it is certainly most important, that Mackenzie, Bankton, and Erskine, hold it as clearly implied; and, though there may have been varying decisions on the point, it seems impossible to question, that the presence of witnesses, at the execution of the deeds, was held indispensable.

The act 1593, c. 179, required the writer's name and designation 'before the inserting the witnesses therein,' under the pain of making no faith in judgment.

Now, surely, there was here an understanding in the legislature, that witnesses should be insert, in regard to all sorts of deeds.

But, to remove all ambiguity, and to provide for the evil of witnesses insert not subscribing, and to do away with any practice that had arisen of their not being designed, and also of allowing them to be condescended on, the act 1681 was passed. May 22, 1826.

But this act went farther to declare who alone should thereafter be deemed probative witnesses, and to define who, in fact, those described as witnesses insert and subscribing, truly were, in the eye of law; and in order to render this most important enactment complete, while it granted the indulgence of allowing the party to acknowledge his subscription to the witnesses at the time of their subscribing, it annexed, as a penalty, to any one assuming that character, contrary to the will of the legislature, that he should be punishable as accessory to forgery.

I can by no means accede to the argument, that this penalty only attaches where the deed is in fact a false instrument. I think, on the contrary, that a new species of the crimen falsi was here established; and that the guilt is incurred by doing what is here in reality prohibited.

It is, however, maintained, that no nullity is annexed to the violation of this part of the statutory enactment; and that it would be dangerous to create it. As to the danger from the objection being latent, it is no greater than many others that would be fatal to witnesses.

It may as fairly be contended, that the sanction of nullity of a deed, is not annexed to the provision in the first member of the enactment of the statute, in declaring, 'that only subscribing wit-' nesses, in writs to be subscribed by the party hereafter, shall ' be probative, and not the witnesses insert not subscribing,' in not repeating the sanction of the previous act.

But I cannot help considering, that this is putting an unwarrantable criticism upon it. The whole of its enactments must be taken together; and it appears perfectly fair to consider what is the true meaning of what the act declares to be the characteristics of the probative witnesses it has described.

Now there is an explicit declaration in both parts of the act; and the deviation from either, must be attended with the same effect.

The latter part must, in fact, be held to ride over the whole enactments of the statute; and if it had preceded the rest, although it was not followed by declaring the deed null, there seems no reasonable ground to doubt that such must still be its effect.

A person who is not in the predicament pointed out by the framer of the act, is declared not to be one of the witnesses that

May 22, 1826. it speaks of; and unless it is to be held that it is unnecessary to have a deed authenticated by witnesses at all, there arises on the face of the act 1681, combined, it may be, with the former state of the law, a manifest declaration of nullity or invalidity of the deed so imperfectly executed.

As to the theory, that notwithstanding the positive terms of the enactment, nothing is to follow, unless the deed is actually proved to be a false and forged instrument, and that the witnesses required to it were for the purpose merely of detecting such forgery—I cannot accede to it, and I have seen no authority for such a construction of the statute.

I have seen as little authority for holding, that the statute meant to leave to witnesses to satisfy themselves as to the genuineness of the deed, and the subscription of its granter, from any sources they may think proper.

I think the act, on the contrary, defines, in the most explicit terms, the only legitimate authority on which witnesses are warranted to sign or attest a deed. When witnesses subscribe, without either seeing or having the subscription acknowledged—they leave the deed without witnesses at all—as none but such as the act defines are the witnesses recognised by law.

Independently, therefore, of authorities, such appears to me to be the fair result of a due consideration of the act 1681, when taken in conjunction with the previous statutory regulations.

But on such a point as this, it is certainly of the greatest importance to attend to the opinions of institutional writers, and the decisions of the Court, in cases where the invalidity of deeds has been expressly maintained on this ground; and certainly I never saw a point, regarding which the stream of authorities and decisions ran more manifestly in one uniform course.

I consider it quite unnecessary to go through these authorities minutely, especially as it was finally admitted that they lie all on one side.

But the authority of M'Kenzie, when commenting on this very statute, which had been passed in his own time, is certainly one of great weight, as it is impossible to doubt that he holds it as a fixed point, that a witness, signing without having complied with the requisites of the statute, will be liable in damages, if a reduction proceeds ex eo capite. Here there is no possibility of surmising that a doubt existed in his mind, that a non-compliance with the act inferred a nullity.

The opinion of Bankton, which is not contradicted by Stair or Erskine, is also a strong and explicit authority to the same effect.

And, lastly, we have Mr Robert Bell's opinion as to the nullity, though he thinks it is not created by the act 1681, as to which he seems wrong. May 22, 1826.

But to these are to be added the opinions of those great and eminent Judges, who delivered their views of the law in the various cases in which proofs have been allowed, that the instrumentary witnesses did not see the granter subscribe, or hear him acknowledge his subscription. For, as to the feeble attempt to do away with the effect of such cases, in which the objections so taken were repelled for want of the due measure of evidence, from the proofs having been allowed before answer as to the relevancy, it cannot possibly avail, as such a course of procedure never could have been adopted, had a doubt been entertained of the relevancy or effect of the challenge, if established.

We have, then, in those cases, the authority of Lord Justice-Clerk Braxfield,—even Eskgrove (though at first jealous of allowing the instrumentary witnesses to be examined), Henderland, as well as those eminent Judges who decided the cases of Young, &c. in 1761 and 1770, and Lord President Campbell, whose words, in giving his opinion in the case of Frank (according to Mr Bell's report), are most important and decisive.

He says, 'The two questions in this case arise upon the act '1681; and the first is, whether you have evidence that the in-'strumentary witnesses did see the granter subscribe, or hear 'him acknowledge his subscription? for, if you have not suffi-'cient proof of that, you must set aside the deed.'

As to decisions, beginning with that of Stevenson in 1682, one year only after passing the act, down to the case of Condie, they are all directly of the same import, and show clearly, that where the evidence was complete, the deed was annulled;—and in fact that no question was ever raised as to what the effect would be, of the deviation from the statute being established.

The case of Blair and Allan *v.* Peddie, in 1684, is a most important one. 1st, It shows, that improbation was the course adopted, as to the form of action in such cases. This is expressly stated in Falconer's report of the case. 2d, He also states, that on Blair's having deponed, 'that albeit he was a subscribing 'witness in the bond, yet he did not see the granter subscribe 'the same; upon whose deposition, the bond being declared 'null, and to make no faith,' action of damages was raised and sustained against the witness, and decree given. No more express decision on the point can be conceived than this is.

It would be a useless waste of time to travel through the other cases, all of which I have examined with attention, and I find they are exactly as referred to.

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I may just notice, as a decisive answer to the idea, that a separate challenge on the head of falsehood is requisite, that Elchies observes, in the case of Philips *v.* Crichton, that 'till the deed 'be improven, there can be no punishment of the witnesses,'—clearly applying the remark to the species facti then under consideration, of a party having procured witnesses to sign, before the party had subscribed the deed. And there the Court expressly found it relevant to reduce the bond, that the instrumentary witnesses did not see or hear the granter acknowledge his subscription.

The case of Macphail is also a decisive authority to show, that even the admission of the signature of the party does not at all remove the objection arising from the statute.

This is farther illustrated by the case of Young *v.* Ritchie, in 1761, where a bond was found not probative, because the witnesses subscribed before, and not after the party.

The case of Young *v.* Glen, 2d August 1770, as noticed by the counsel for the pursuer for the first time, is also most important.

As to all those cases in which proofs have been allowed, and evidence found insufficient, I need say nothing. They all proceed on taking it as fixed, that if the fact was proved, the nullity of the deed must follow.

I concurred in the judgments in the cases of Condie and Smith of Olrig, and have never entertained any other view of the law applicable to such cases, than what I am now expressing.

Both of these cases were of a very special nature, and I need not now dwell on their circumstances. It was, however, on the deficiency of the evidence that the judgments in both mainly proceeded; though, in the case of Smith, some views were no doubt thrown out, tending to support the pleas which the defenders have urged in this case.

But in the case of Condie, no such doubts were stated, and one of the strongest opinions for reducing the deeds there, was that of my Lord Craigie, who stated, that his opinion in the case of Smith of Olrig had been misunderstood: As to the indication of opinion contained in the judgment of this case in the House of Lords, I think it would be unbecoming to say much. It certainly must, however, be admitted, that that judgment contemplated the challenge of Lord Fife's deed, on the very ground we are now considering.

As to what evidence shall be sufficient to support an objection of this nature, I must continue always to think it ought to be clear and decisive; and that every presumption in law requires that such evidence should be most thoroughly and rigidly sifted.

That is, however, the province of the Jury, under the direction of the Judge who has to try such an issue. But, holding the fact to be clearly established, that the instrumentary witness to a deed neither saw the granter subscribe, 'nor did the party, 'at the time of the witness's subscribing, acknowledge his sub-'scription,'—that deed is, in my opinion, null in law, and any other conclusion would render the act 1681 altogether nugatory. The direction, therefore, given by the Lord Chief Commissioner to the Jury, as excepted to in this first bill, was correct, and the bill of exceptions ought to be disallowed. May 22, 1826.

In reference to the second Bill of Exceptions,

Lord Glenlee observed,—If the objection had been, as stated in the exception that was taken before the Jury retired, and without the subsequent statement that was then put in writing by the Judge, and read by him to the Jury, as his charge on the subject, we would have to consider a case different from the one before us. What the Chief Commissioner said, just amounted to this,—I have certain opinions on the matter—a certain opinion as to the acknowledgment required by law; but it is unnecessary to give any direction in point of law here, and I state my opinion on the facts in evidence, as to which it is your province to judge. Because, whatever is acknowledgment to any one, it is no more than that the granter of a deed wishes him to subscribe witness to his subscription. And the amount of the whole is, that the Lord Chief Commissioner withdrew the opinion which is complained of, giving no direction at all, in point of law, as to acknowledgment.

Lord Pitmilly.—Before saying anything on the merits of the question raised, it is proper that I should explain the principles on which the bill was framed, and particularly why the narrative of part of the evidence was introduced.

When exception is taken to the direction of a Judge in law, on part of the case, it is necessary for the information of the Court, who are to judge of the exception, 1st, To state as much of the evidence as must be known to show the circumstances in which the direction was given. 2d, To abstain from giving the rest of the evidence which might lead to an opinion on the whole cause, and not on the particular point.

Recent as the institution of Jury trial is in this country, there is authority for this. In the case of Clark against Callender, an objection was taken to parole proof offered, as incompetent. The objection was sustained. And there was a verdict for the defender, as the pursuer led no proof. A bill of exceptions was taken. The bill does not give any account of the

May 22, 1826. proof offered, whether as to the bargain, or rei interventus, or what. The exceptions were over-ruled here, and when the case went to the House of Lords, it is understood that the style of the bill was complained of. It was said, that it should have specified the precise nature of the evidence offered and rejected.

This led to more particular inquiry as to the proper form of bills of exceptions in such cases. There are probably many English cases, but I cannot be expected to be informed as to many. I derived my knowledge on this subject, from the case of Fabrigas against Moyston, 1773. State Trials, Vol. XX. p. 190.

This was an action of damages for false imprisonment, and banishment out of Minorca, by a native, against the Governor. The pursuer had been imprisoned, and banished for exciting disturbance, and improper conduct. The defence was, that the proof of Moyston being governor, with certain powers, ought to have excluded such a claim in a British Court. Justice Gould, however, over-ruled the defence, and L.3000 damages were given.

A bill of exceptions was taken, and in it (1.) all the evidence of the defender being governor, on which he relied, was narrated; but (2.) no part of the other evidence in the case. I must remark, that the 'plea' of the Governor is stated in the bill and 'replication,' so that the point was distinctly explained without the evidence. Still, however, the evidence on which the Judge relied, was given, and not quoted, but narrated.

It was much more necessary, in this case, to have some of the circumstances stated in which the doctrine as to virtual acknowledgment was laid down. (1.) That if anything took place, it was in the Charter-room where Wilson subscribed. (2.) That one of the witnesses says, Lord Fife was not there—the other, that he came in, but was in a particular situation;—and, (3.) That Lord Fife was nearly blind.

As to the merits of the exception, I need say little. I shall not enter on the criticism of the words 'equipollents' and 'virtual,' stated by counsel. I agree with those acting for Lord Fife.

But the broad and strong ground of the answer is, that it is an attempt to lay hold of a part of the charge—an obiter dictum, which the Judge thought unimportant, and plainly excluded from his direction. It would be difficult, indeed, to charge a Jury, were such an attempt to be successful.

The exception, as taken at first, was confined to a few words, without taking what preceded and what followed—thus, 'that 'an acknowledgment, when a witness had not seen a party sign 'a deed, must be clear and explicit, and that he had not found

'any case in which a virtual acknowledgment, or an equipol- May 22, 1826.
'lent, had been sustained.' But the observations made were very different. See quotation on the same page of the bill, a little farther down.

The defender's Counsel admitted that the doctrine of the Lord Chief Commissioner applies to an acknowledgment otherwise than by words. If this had not been seen at first, I should think the bill of exceptions would not have been taken.'

But, at all events, there was no direction to the Jury as to virtual acknowledgment. The observation made was, that it was not necessary to lay down a direction on the subject, and the obiter dictum flies off.

Lord Alloway.—I entirely concur in the opinion expressed by your Lordships, upon the second bill of exceptions; and Lord Pitmilly has expressed so fully my sentiments upon every point, that it would be unjustifiable in me to detain you.

Perhaps the term 'equipollents' used by the Judge in addressing the Jury, was not the term best adapted to the circumstances of the case; but a Judge, in delivering an extemporaneous opinion, may surely be excused for using a term, although another more accurate might have occurred to him in his study. But independent of this altogether, it was certainly in the power of the Judge to correct his statement, lest it might, in any respect, have been mistaken, or have misled the Jury; and, accordingly, his Lordship completely corrected this in the after part of his charge to the Jury, by stating that the acknowledgment must be clear and explicit, but that even that doctrine did not apply to the present case, 'as, according to the evidence of 'the two witnesses called by the pursuer, it did not appear that 'there was any acknowledgment, either expressed or virtual.'

I am satisfied, therefore, from the circumstances stated in the bill of exceptions itself, that the direction was sound, and that there are no grounds for the bill of exceptions.

Lord Justice-Clerk.—As to the second bill of exceptions, tendered on another part of the charge to the Jury—in the view that it occurs to me, it will not be necessary to say much.

Though pretending to no peculiar knowledge as to the proper form of bills of exceptions, I am very clearly of opinion, that they can only be taken to directions in point of law, which are given for the consideration and guidance of a jury; that matter of observation, upon the general or particular bearings of the evidence, cannot be excepted to on the ground of misdirection; and that a particular member of a sentence cannot be excepted to, without the context, and what is absolutely necessary for its

May 22, 1826. due understanding being taken along with it. In short, that a charge is not to be judaically interpreted.

Now, keeping these observations in view, and giving to the passage in the learned Judge's charge its fair and obvious meaning, there seems no ground for maintaining, that any direction, in point of law, was actually given to the Jury for their guidance in the formation of their verdict, in the passage of the charge that is in reality the foundation of the bill of exceptions.

For I cannot hesitate in holding, that it is to the words which were put in writing, and read to the Jury, we are bound to attend; and that it never can be held as a valid ground of exception, the catching an accidental expression that may drop in the hurry of speaking.

Now, see what were the words used? Whether the preceding observations are, or are not, to be held as a correct exposition of the law, or whether some degree of greater precision or explanation of the sense in which the terms are used, might not have been requisite, in order to prevent all ambiguity, had it really been intended to direct the Jury on this point, it is; in fact, unnecessary to inquire. Because it is quite clear, that the concluding expressions sufficiently explained, that the case was considered as one to which any such doctrine was inapplicable; and that it was unnecessary to carry it so far in this case, 'as, 'according to the evidence of the two witnesses called by the 'pursuer—if they, the Jury, believed either of them, it did not 'appear there was any acknowledgment, either express or virtual.'

This being the state of the fact, it does not appear to me, that it can fairly be maintained, that the law, as to any equipollent for the acknowledgment required by law, or as to the effect of a virtual acknowledgment, was given as a direction to this Jury; or, that there is any ground for holding, that it may have influenced their verdict.

I think it, therefore, unnecessary to say more, than that this second bill of exceptions ought also to be disallowed.

Against these judgments separate appeals, applicable respectively to the two bills of exceptions, were entered to the House of Lords.

Appellant.—1*st Point.*—The special ground of nullity, that the Earl did not acknowledge his subscription to the instrumentary witness George Wilson, who had not seen him sign, upon which it has been found that the deeds of the 7th of October 1808 are not the deeds of the late Earl of Fife, does not rest

either on the practice of the law of Scotland, or on any of the statutes prior to the act 1681. There is a marked and important distinction between the absolute nullity of a deed and its mere insufficiency, unless supported by extraneous evidence to attest the consent of the granter to its contents. This is to be found in our statutes, and in our decisions. Prior to 1681, the deeds in question would not have fallen, in consequence of the nullity now found fatal. But neither does the statute 1681, giving it a fair construction, sustain the specific ground of nullity at issue—and the cases which appear inconsistent with this view are either inconclusive, or do not bear a reference to the true meaning of the statute. The direction in law, therefore, of the Judge, which necessarily implied, that when the witness had not seen the party subscribe, it was necessary that he should hear the acknowledgment of the signature to the witness, was clearly erroneous. No rule could be more dangerous, or more hostile to the act 1681. It is unwarranted in law, and destructive in practice, of the security of every right founded upon written evidence, to say that the deeds must be null, because it is proved that one of the instrumentary witnesses did not receive his information as a witness in one particular form, that of express acknowledgment. If the signature of two witnesses appear on the instrument, and these witnesses knew that the granter had actually signed the deed, that is sufficient.

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Respondent.—The necessity of the actual presence of instrumentary witnesses at the moment when the granter signed, or of hearing the acknowledgment of the signature, is a fixed point in our law. The witness attests by his subscription, not merely the fact that he knows the signature of the granter to be genuine, but that he saw that genuine signature voluntarily adhibited—or afterwards, that it was voluntarily acknowledged to be genuine. There is no instance of a deed being supported by the instrumentary witnesses signing it, and then coming forward and stating, that although they did not see the granter sign it, or hear him acknowledge his signature, they are ready to declare judicially that they know the deed to be authentic. The danger that may arise from the force given to instrumentary witnesses, affords no reason for denying effect to a rule of law, implied in, and sanctioned by all the Scotch statutes upon the subject, the practice of two centuries, and the commentaries of the institutional writers. Indeed, the real danger is of an opposite description. The direction, therefore, by the presiding Judge of the Jury Court, with the concurrence of the other Judges, was warranted in law.

May 22, 1826. *Appellant.—2d Point.*—The direction of the Judge, both in form and substance, imported an instruction to the Jury upon a point of law involved in the general issue submitted to them, and was calculated to affect materially their conclusion on the evidence. His Lordship's obvious meaning was, that if an explicit acknowledgment—an acknowledgment expressed either by words or positive signs—was disproved, the deeds must be held not to have been the deeds of the Earl of Fife. But this is in the face of the statute 1681, and of the construction it has received in practice. A virtual acknowledgment is in law quite sufficient to validate the attestation of a witness.

Respondent.—No such direction was given as alleged by the appellant. The Lord Chief Commissioner rested his charge on grounds quite different from a rejection of virtual acknowledgment or equipollent. His Lordship held it unnecessary to inquire into the legal effect of virtual acknowledgments or equipollents, because the evidence showed there had been no sort of acknowledgment whatever. But even had a direction on the subject of virtual acknowledgment been given, the direction would have been sound in point of law. For although acknowledgment by signs may be sufficient, because that, like words, conveys the mind of the granter to the witness, yet equipollents —acts which do not amount to acknowledgment at all, but of equal force—will not support a deed, and that was the import and substance of that part of the charge, represented as a direction to the Jury.*

The House of Lords pronounced this judgment in both cases, that in respect they 'do not think it necessary to pronounce any 'judgment upon the objections which have been stated in the 'course of the hearing of this matter, to the bill of exceptions 'annexed to this appeal, by reason of there being another bill of 'exceptions tendered on behalf of the same party, annexed to 'another appeal, or by reason of objections taken in matter of 'form, this House being of opinion, that the Lord Chief Com-'missioner's directions to the Jury, as stated in the bill of ex-

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* In the course of the debate at the Bar, an objection was raised by the House, that the exceptions ought not, in point of form, to have assumed the shape of two separate bills of exception, but that there should have been one bill and one record; and that, besides, they were not explicit, as it did not appear to what deed or deeds reference was made—the term deeds being employed generally, while there were three deeds in question. The discussion of the case was therefore interrupted, with the view that this error might be remedied, by still presenting the substance of the exception in one bill. A new bill was accordingly drawn up by the parties, to obviate these objections, but it was not founded on, as the Lord Chancellor afterwards thought it preferable to proceed with the record in the shape in which it had been brought up.

'ceptions, annexed to this appeal, could not be justly excepted May 22, 1826.
'to; and therefore, it is ordered and adjudged, That the said
'petition and appeal be, and is hereby dismissed this House;
'and that the said interlocutor therein complained of, be, and
'the same is hereby affirmed: And it is further ordered, That
'the appellant do pay, or cause to be paid, to the said respond-
'ent, the sum of £50 for his costs, in respect of the said appeal.'

LORD CHANCELLOR.—My Lords, with reference to the value of the property in question, to the points which have been under discussion before your Lordships, this is certainly a very important case: at the same time, I must say, that unless I mistake entirely the whole doctrine of bills of exception, the difficulty rests more upon the manner in which this case has been brought before this House, than on any question which presents itself to my mind, about the law of the case.

The cause began by a suit, which was instituted for the purpose in effect of annulling two deeds of the 7th October 1808., There was another deed executed in the month of November 1808, which, upon the face of it, appears to have made an alteration of one of the deeds of October 1808. In the course of the litigation which took place in the Court of Session in Scotland, the Court thought proper to direct seven issues. The first issue was, 'Whether, at the date of the deed 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 read-'ing any writing, written instrument, or printed book; and if at that 'time he could discover whether a paper was written upon or not?' The second issue was, 'Whether the said deeds were read over to the said 'Earl previous to his 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 depo-'sited? Thirdly, 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 assisted; and if 'so, in what manner he was assisted in making his subscription? Fourth-'ly, 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 pe-'riod 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 and custody of the said Earl, or were in the possession 'or custody of any other persons, during such intervals of time? Fifth-'ly,' (and I beg your Lordships' attention to the fifth issue, because it appears to me, that the Court of Session, when they directed these issues,

May 22, 1826. must have had in view, that it was of importance that they should have an answer to so much of the question contained in the fifth issue, as relates to the acknowledgment of the subscription to the witnesses,) 'Whether the said Earl put his name to the said 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? Sixthly, 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 estate; 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 hands, and without the intervention of notaries? Seventhly, 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?'

These issues were tried: And as to the first issue, the Jury found, 'that 'James, Earl of Fife, at the date of the deeds, under reduction, viz. on 'the 7th 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 said Earl's name being put thereto, in presence of Stewart Souter and Alexander Forteath 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.' Your Lordships are aware what is meant by the expression in a Scotch proceeding, 'that it is not proven.' Our law holds, that that which is not proven does not exist; but there is an understanding in the Courts of Scotland, as I take it, that, by using these words, they do not mean to negative positively the existence of that which they say is not proven; but that the thing may exist, though it be not proven to them. The verdict proceeds—'There is no proof whether they (the said deeds) '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 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 Earl put his name to the deeds 'at one and the same time. As to the fifth issue, that the Earl put his 'name to the deeds under reduction in presence of one instrumentary 'witness, viz. Alexander Forteath Williamson; but it is not proven that 'the 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 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.' May 22, 1826.

My Lords, there was a bill of exceptions taken to the proceedings upon that trial, which was disallowed by the Court of Session. The case then came to be discussed before the Lord Ordinary, on the effect of the verdict. The pursuer, as the Case represents, maintained three distinct propositions as grounds for reducing the deeds: 1st, That they were not, as the law requires, where the granter is blind, attested by two notaries and four witnesses, with the usual formalities that are observed when deeds are executed in that form; 2d, That the deeds were not, as the law requires when the granter of a deed is blind, read over to Lord Fife before signing, and that there was no evidence that he was informed of the contents of those deeds; 3dly, 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.

My Lords, the Cases upon your table then state what was the interlocutor pronounced by the Lord Ordinary upon this occasion, and the course of the proceedings in the Court of Session. Your Lordships will not be surprised, I think, that in a case of this importance there was an appeal to this House; and it appears that counsel were heard upon it nine days, I think, in this House:—A circumstance, perhaps at this time a little worthy of notice, because, when persons are complaining that causes are not decided, they are apt to forget that some of them may be of a tolerable length; and I may refer to this, as an occasion on which, I think, I may venture to say, that those Lords whom you are pleased to distinguish (though they may not always preserve the distinction) as being both noble and learned Lords, never did take more pains to offer to your Lordships their humble advice, as advice you ought to act upon, than they did in that case. I may take the same liberty of stating, indeed I am afraid I must call it repetition, that I lament, for my own sake, to have seen in print, upon the table of this House, in the course of the present session, (I allude to the case of Gordon against Robertson,) a statement made to the Court of Session in Scotland, that I advised this House to proceed according to the law of England in a Scotch case. I see many gentlemen, of whose knowledge, and learning, and conduct in their profession, I cannot speak so highly in their presence as I really esteem them, but I am anxious, in their presence, to state what I mentioned the other day in the presence of English counsel, that I am extremely glad to observe, that even in that same judgment, as delivered by me at the conclusion of it, there is that which is quite irreconcilable with any such idea; and that, in another report of the case, it does not appear that any such expression ever fell from me; and in this period of my professional life, I can declare, and that with as much sincerity as I ever stated anything in relation to any transaction of my life, that from the first to the

May 22, 1826. last of that which I have had judicially to deal with, Scotch cases, it has been matter of the utmost anxiety to me to recollect that I am an English lawyer; that it is my duty to guard myself against the prejudices or notions which, as such, I might entertain; and that I am called upon judicially to declare my opinion as a Scotch lawyer, if I may so express it, sitting in the Court of Session by appeal. It may have been my misfortune, and if it has been my misfortune I greatly regret it, that against those prejudices and partialities, or whatever you may be pleased to call them, which an English lawyer, travelling through more than half a century, may have imbibed, he may not have sufficiently guarded himself. But that, in the exercise of that duty, I have felt that anxiety, and have been influenced by it, I must take upon myself, for the sake of my own judicial character, most solemnly to declare.

My Lords, I will take the liberty of noticing again, that to which I adverted the other day*—the expression which is to be found in the judgment of one of the Lords of Session, with whom I have fought many hard battles as counsel at that Bar, I mean my Lord Hermand; wishing, as one man far advanced in years, to be most kindly remembered by a man whom I have known in the profession. I observe he states, at the end of his speech, 'suppose that the landlord had inserted in his articles and 'conditions he refers to, that the tenant should hang himself the last year 'of the lease, I should be glad to know what the Lord Chancellor, or 'any person, would say to that?' Now, to that question I should be very ready to give my learned friend an answer; but as it does not appear to me to have been very regular to put that case in a court of justice, I shall take the liberty of not giving an answer to it, till I meet my old friend out of a court of justice.

My Lords, I certainly gave great consideration to this case when it was before your Lordships, and I availed myself of an opportunity of looking into the papers in the case before the judgment was pronounced: and undoubtedly we miscarried most grossly, I think, in our judgment, if it can now be contended, that a deed is not to be acknowledged, at least in some way or other acknowledged, to a witness who did not see the granter subscribe it. Our notion was, that instead of sending these various issues, the facts might be contained in one issue, provided the law was properly declared in the judgment directing that issue; and accordingly the House determined, 'that under the circumstances of this case, not-'withstanding the defect in sight of the Earl of Fife, proved upon the 'issues formerly tried in this cause, the signature of the instruments in 'question by notaries was not required by the statute 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 sta-'tute; that the signature of the Earl of Fife appearing on the face of the 'said instrument, and the instruments being apparently so signed and 'attested, are in law probative deeds; and that to impeach such instru-

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* See next case, Ogilvie v. Dundas.

'ments, 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.' Now, it is very singular, if this House was of opinion that there was no occasion to hear him acknowledge his subscription thereto, that they should have stated that as one means of impeaching the instrument; because, that could not be an effectual means of impeaching the instrument, if it was clear that there should be no acknowledgment at all. I do not now lay any stress upon the word 'hear,' because, supposing there can be an effectual acknowledgment, still the matter would come to exactly the same conclusion, as it appears to me, upon the bill of exceptions. The judgment proceeds—'that to impeach 'the said 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 sub-'scribed 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;' so that your Lordships' judgment went to this,—that if it were proved by witnesses that the deed was executed, the Earl of Fife must be understood to know the contents of it, and that it lay upon those who meant to impeach the deeds to prove the want of a due attestation, or to prove the want of knowledge of the contents;—'that it is not a solemnity 'required by law, that the said instruments respectively should have 'been read over to the Earl of Fife.' I remember great pains were taken by those who came to that conclusion; because the Earl of Fife, being as it were blind, no one can doubt, that one looks with great anxiety to the fact, whether a blind man knew the contents of the instrument. However, the House held, '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 instruments respectively were 'duly executed and attested by the Earl, and in law probative instru-'ments, the knowledge of the Earl of the contents thereof respectively 'must be presumed, until 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 respectively; but that 'such evidence is not conclusive evidence that he did not know the con-'tents of such instruments respectively, inasmuch 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 instrument purporting to be a deed of alteration of the deed 'of trust-disposition, sought to be reduced, supposing such deed of altera-'tion was executed and attested according to the statute; and that the 'Earl knew the contents thereof, is evidence to be received to prove that

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May 22, 1826. ‘ 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.’ There are two propositions of law, your Lordships observe, laid down here:—The one, that the fact of not reading the deed over, is evidence to be received that he did not know the contents, but not conclusive evidence:—The other is, that an alteration by a subsequent deed, referring to the contents of the former deed, is evidence that he knew the contents of the former deed, because, if he knew the alteration he was making, that is evidence that he must know the contents of that former deed.

Then this House found, ‘ that the verdicts of the several Juries upon ‘ the several issues directed by the Court of Session were in some re- ‘ spects inconsistent, and are insufficient to warrant the interlocutors re- ‘ ducing the said instruments of trust-disposition and deed of entail re- ‘ spectively: That the question properly in issue on the summons of re- ‘ duction was, whether the instruments sought to be reduced, though appa- ‘ rently probative instruments, and as such to be received as the deeds of ‘ the last Earl of Fife, were respectively the deeds of the Earl of Fife.’ An issue, whether they were or were not the deeds of the last Earl of Fife, must, of course, include all facts that could be received in evidence, to show they were his deeds, consistently with the law of Scotland, as far as that law prescribes the solemnities that are to be observed in order to make the deeds correct. Then your Lordships proceeded to find, ‘ that ‘ the proof of facts, to show that the instruments, though probative instru- ‘ ments, 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 instru- ‘ ments, as probative deeds. It is therefore ordered and adjudged, that ‘ the said several interlocutors, complained of in the said appeal, in so ‘ far as these relate to the title and interest of the pursuer to insist in the ‘ present action, be, and the same are hereby affirmed; and, in other re- ‘ spects, that the said interlocutors be, and the same are hereby reversed. ‘ And it is farther ordered, that the Court of Session in Scotland do di- ‘ rect an issue, to try, whether the instrument 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 respondent be the pursuer in such ‘ issue, and the appellant defender; and that upon the trial of such issue, ‘ the said several instruments 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 ap-

'pellant be at liberty to offer such evidence as he may be advised to offer May 22, 1826.
'in support of such instruments respectively;' that is, that the other party should have an opportunity of impeaching them, and that that evidence impeaching them was to be answered by evidence on the other side. Then your Lordships observe, that the deed of October having been followed by the deed of alteration in November 1808, the judgment goes on to state further, 'for that purpose,' that is for the purpose of supporting such instruments of October, 'the appellant be at liberty to offer the 'deed of alteration of the 12th day of November 1808, as evidence in 'support of the instruments of trust-disposition and deed of entail of the '7th day of October 1808, so sought to be reduced, if the appellant shall 'think fit so to do.'

My Lords, attending to the effect of this judgment, there are two leading points, if I may so express myself: The one is, whether the deed was properly attested; the other is whether my Lord Fife knew the contents of the former deeds. With respect to the first, if it be the law of Scotland, that where there is a witness whose name is annexed as an attesting witness, and it is clear that that witness did not see the granter of the deeds subscribe them, that witness must have an acknowledgment made to him by the granter, either by word or what is here called virtually; and by another term not easily explained, 'an equipollent' acknowledgment: then, to be sure, if the deed of November 1808 is only to be taken as an acknowledgment by Lord Fife, that he was aware of and knew the contents of the instrument, when he executed the deed in October 1808, that would not bear at all upon the fact, Whether he did or did not say to Mr Wilson (who is a subscribing witness to it), or Whether he did or did not otherwise virtually acknowledge to him, that that deed of October 1808 was his deed; because his executing the deed of November 1808 (unless that was accompanied by some declaration) could not possibly be such an acknowledgment to Mr Wilson, who had subscribed the deed of October 1808, but not in the presence of Lord Fife. There is, however, no proof at all that Lord Fife had told him that he had executed that deed, or in any way acknowledged it as his instrument. With respect to the second point in the issue, namely, Whether my Lord Fife knew the contents of the deeds of October 1808, his execution, duly proved, of the deed of November 1808 might be most material evidence. It appeared, therefore, to be material to lay it before the Jury, that the issue might be tried; and it was open to the defender upon this trial to produce the deed of November 1808, not merely for the purpose of letting the Jury see the instrument (the validity of which they were to try), but for the purpose of calling upon the Jury to say that my Lord Fife knew the contents of the deeds of October. Provided they could prove the due attestation of the deeds of October 1808, they might offer that deed in evidence to show that Lord Fife, in November 1808, knew the contents of the deeds of October 1808; and therefore, laying a probable case and a strong case before the Jury, to show that blind as he was (if it was made out that he understood the deed

May 22, 1826. of November 1808), he must know the contents of the deed of October 1808. But, my Lords, if on the trial of this cause they did not think proper to avail themselves of the liberty so given, by producing it (the cause being got to that state that they might have produced the deed of November 1808 as evidence to the Jury), then I apprehend they never can make anything relative to that deed of November 1808 a part of the subject of the bill of exceptions:—And here give me leave to say (begging again to protect myself as far as I can from being supposed to act on English ideas in a Scotch cause), in a suit of this nature, in which trial by jury is introduced, we must advert a little to the principles and the practice of English law, with reference to that subject. If my recollection is right, and it has been refreshed by an excellent friend of mine, by a reference to the act of Parliament, it is extremely material, in the inception of this business about trial by jury in Scotland, to mark the distinction that the legislature has thought proper to make between new trials and bills of exceptions; because if there is anything that appears upon these bills of exceptions, that ought to have been, or could have been, made a subject of an application for a new trial, let it be remembered what a degree of mischief we shall do in judgment, if, after the legislature has said there shall be no appeal on the refusal or grant of a new trial, you can agitate the same matter in the shape of a bill of exceptions, exactly as if there had been a motion for a new trial in the Court below. Great care must therefore be taken upon that subject.

My Lords, the parties go to the Jury upon this, and the trial proceeds, and these bills of exceptions both being taken, I understand, by the same party, relating to the matter, or part of the matter of the direction of the Judge as to the same point; and what is somewhat new to me, one at least of those bills of exceptions does not state what it was that the Judge said. The other does state what it was that he said. The form in which these bills of exception come to us strikes me as a little extraordinary. The form of them has not, however, in Scotland been considered as liable to objection, for the Judges of the Jury Court have signed both these bills of exceptions; and one great difficulty here, and perhaps the most material, is to know how to reach the matters (as we English lawyers say) upon the record. The first bill of exception states the issue directed. It states, in the usual form, that the Jury came together; 'That the said defender did not adduce any evidence on his part 'at the trial;' that the two instrumentary witnesses had given certain testimony, and that 'upon this testimony of the two subscribing witnesses 'to the said deeds, the Lord Chief Commissioner observed to the Jury, 'that it was their duty and province to consider and make up their 'minds on the credit that was due to the witnesses; that he thought it 'right to observe, that the witness George Wilson came to disaffirm 'his own solemn act; that his testimony must, therefore, be weighed 'with all the suspicion which attaches to a witness standing in such cir-'cumstances; that they must likewise weigh the credit due to the tes-

'timony of the other witness, Alexander Forteath Williamson:—That 'in directing the Jury as to the said Earl's alleged acknowledgment of 'his subscription to the said deeds, the Lord Chief Commissioner did 'tell the Jury, that when an attesting witness has not seen a granter of a 'deed sign the deed, the granter of the deed must acknowledge his sub- 'scription to the person who attests the deed, otherwise the deed is void 'in law: That in this case he was of opinion, that there was undoubted 'evidence (and it was admitted), that there had been no acknowledg- 'ment by words to the witness, who did not see the Earl sign.' Your Lordships will observe, that in the judgment of this House, the species of acknowledgment pointed at is 'hearing.' I state the case, however, without any influence arising from that observation, for the present. It then proceeds, 'And the Lord Chief Commissioner did then observe to the 'Jury in effect as follows:—That in considering any other acknowledg- 'ment, that it was his opinion the acknowledgment must be clear and 'explicit, and that he had not found any case in which a virtual acknow- 'ledgment, or equipollent, had been sustained; but that it was not ne- 'cessary to carry the doctrine so far in this case, as, according to the evi- 'dence of the two witnesses called by the pursuer, if they, the Jury, belie- 'ved either of them, it did not appear that there was any acknowledgment 'either express or virtual: That the Counsel for the said defenders did 'except to the said direction—in respect that the said Lord Chief Com- 'missioner had delivered it as his opinion to the Jury, "that an ac- "knowledgment, when a witness had not seen a party sign a deed, must be "clear and explicit, and that he had not found any case in which a vir- "tual acknowledgment, or an equipollent, had been sustained."' Your Lordships observe, this opinion consists, if I may so express myself, of these statements,—that an acknowledgment when a witness has not seen a party sign a deed, must be clear and explicit, and that he (the Lord Chief Commissioner) had not found any case in which a virtual acknowledgment, or equipollent, had been sustained;—but that, in this case, it did not appear that there was any acknowledgment, either express or virtual. It is not easy to expound this direction quite satisfactorily, because if there has been no such thing as a virtual acknowledgment, one does not understand what necessity there was for considering whether that could be sustained, unless it was clearly equivalent to an express acknowledgment. The Lord Chief Commissioner, however, considering that 'The direction of a Judge, given to a Jury, could not be separated 'into parts, but must all be taken together, and must be construed 'with the context, and have the sense put upon it, that arises out of the 'observations which accompany it, and that a particular sentence, pas- 'sage, or expression, cannot be selected and stated by itself, as constitu- 'ting the direction of a Judge, objected to the exception as taken; and 'to secure against any misconception as to the meaning of his direction, 'the Lord Chief Commissioner did then and there put his direction in 'writing, and read it to the Jury, as next herein set forth:—"That in "this case, he was of opinion, that there was undoubted evidence (and it

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May 22, 1826. " was admitted), that there had been no acknowledgment by words to " the witness, who did not see the Earl sign: That in considering any " other acknowledgment, he told the Jury, that it was his opinion, the " acknowledgment must be clear and explicit, and that he had not found " any case in which a virtual acknowledgment, or equipollent, had been " sustained." '

Now, taking the meaning of that to be, that if there were no acknowledgment by words, there must still be an acknowledgment somehow or other, made out by some evidence, which must be clear and explicit,—that is to say, that supposing the individual not to say, 'I acknowledge this 'to be my deed,' he must still use some other word, or do some other acts, which, the Jury might say, would have the same effect as if he said, 'I do acknowledge this to be my deed;' if it was still an explicit acknowledgment on his part, I agree in that which was so stated, if it was meant to be said, that any other acknowledgment, except an express declaration, must be an acknowledgment as clear and explicit as an acknowledgment directly in words would be. As to the effect of that acknowledgment, the Lord Chief Commissioner went on to say, that 'he 'did not find any case in which a virtual acknowledgment, or equipollent, 'had been sustained, but that it was not necessary to carry the doctrine so 'far in this case, as, according to the evidence of the two witnesses called 'by the pursuer, if the Jury believed either of them, it did not appear that 'there was any acknowledgment, either express or virtual.' Now I apprehend if a Judge goes on to do that, which I believe may sometimes be as useful a part of the exercise of his duty as any other, namely, to give his opinion upon the effect of the evidence, what he says as to the effect of the evidence is not the subject of a bill of exceptions. The Jury may adopt his opinion, or they may refuse to adopt his opinion. If they act upon his opinion, and in virtue of his direction find a verdict contrary to the effect of the evidence, that forms the ground of a motion for a new trial, but it does not form the ground of a bill of exceptions.

The learned Judge says, It is not necessary for you to carry the doctrine so far in this case, whether, if there were a virtual or an equipollent acknowledgment, it would or would not do in law, as to which he says, I have found no case establishing that it will do; but he accompanies that with stating, that whether that would do, or would not do, there was not, in his opinion, evidence either express or virtual; and when the cause was tried, there was no interposition on the part of the counsel contending against my Lord Fife. There was no interposition on their part to say, 'we desire the question, whether there was such evidence, should be sta-'ted to the Jury, as the question on which they are to decide;' but the learned Judge in so stating himself must be understood, according to our habits and practice, to be stating his own opinion, and leaving them to judge, without saying further, whether they think that opinion right. If they had been of opinion that there was no acknowledgment by word, but that there was that which they thought equal to an acknowledgment by word,—that is, if they believed the witnesses, and thought that was the

conclusion they ought to draw from their testimony, they were at liberty to do so. The truth therefore, I think, is, that the Judge just stated, that upon the evidence there is nothing which can be called an acknowledgment, particularly in the case of a blind man; there is nothing which can be said to be an acknowledgment on his part to that individual witness that he had subscribed that deed; but there is another question, a question of law, whether such an acknowledgment is necessary to the validity of the deed; or putting it in other words, whether the absence of such an acknowledgment infers nullity of that deed, is a pure question of law. The bill of exceptions then goes on to state, 'that he did then tell the Jury, that if they 'believed either of the witnesses, he was of opinion, that there was no 'acknowledgment by the said Earl of his said subscription to the deeds of 'the 7th October 1808, to the said George Wilson; in which case, the 'said deeds were not the deeds of the said Earl, and they would so find 'by their verdict; that the Jury did thereupon find a verdict for the pur-'suer, by delivering it as their verdict "that the instruments of trust-dis-'position and deed of entail, both dated the 7th day of October 1808, 'were not the deeds of the Earl of Fife."' May 22, 1826.

Your Lordships will observe upon what I have now read (which is the whole of the statement in the bill of exceptions), that the deed of November 1808 was never tendered as evidence on their part; but it is stated, that the counsel for the defenders 'did except to the directions of the 'Lord Chief Commissioner, in so far as it related to the acknowledgment 'by the said Earl to the said George Wilson of his subscriptions to the 'said deeds; and insisted that the said pursuer was not entitled to reco-'ver a verdict on the said issue, in respect that the deeds of the 7th Oc-'tober 1808 were the deeds of the said Earl; and the said counsel did 'then and there propose to the said Lord Commissioner to sign the said 'bill of exceptions, according to the form of the statute in such case 'made and provided,' and that accordingly he did so sign it;—so that that which is here insisted by the Counsel is, that the pursuer was not entitled to recover a verdict upon the said issue, in respect that the deeds of the 7th October 1808 were the deeds of the said Earl. Whether that is the language which ought to have been put into a bill of exceptions, may, I think, admit of some doubt; because it does not state the grounds on which they insisted that they were the deeds of the Earl. I apprehend, that the way in which we should state it here (if we meant to insist that the deed was a good deed, or that nullity was not to be inferred, by reason that there was no acknowledgment of that deed by the Earl of Fife to this witness), would be, that he was entitled to recover a verdict on the issues, in respect that the deed of the 7th October 1808, notwithstanding the Earl's signature had not been proved to be written in the presence of the witnesses, and notwithstanding the absence of such evidence of acknowledgment, was the deed of the Earl.

My Lords, the other bill of exceptions appears to me to be open to the same difficulty, because it does not appear that one single word of about nine-tenths of what was said by the Chief Commissioner is inserted, and

May 22, 1826. I apprehend, that every part of what falls from a Judge, with reference to that topic which forms the subject of the bill of exceptions, ought to be stated on the bill of exceptions. These bills of exceptions afterwards came before the Judges of the Court of Session. But the Division which had this matter before them for their consideration, unanimously overruled these bills of exceptions.

Now, my Lords, with respect to anything I might observe upon the bills of exceptions and the form of them, I think the matter to be attended to, may be stated thus. First, that we should endeavour, and take a great deal of care, if we can consistently with what is the law relative to bills of exceptions, to get at the justice of the case. On the other hand, it is of very great importance certainly, that in this, I think, the first bill of exceptions which comes to us, at least I do not recollect any other, there may have been some in my absence,—but it appears to me, that in respect of this the first bill of exceptions which comes to us, it is of very great importance that we should take a great deal of care, that it is put into that form which is right, because this may be brought as a precedent with respect to bills of exceptions in future. I think it cannot but have occurred to your Lordships in hearing the argument, that there has been a great deal stated, that might be properly enough addressed to this house as a ground for granting a new trial, but which does not appear to apply itself very well to a bill of exceptions. The case has been very ably argued, and in conformity to what I said in the beginning of the few words I have addressed to your Lordships, I beg again to say, that according to my experience, the knowledge of the gentlemen who practise at the Scotch Bar, as well as the knowledge of the Judges on the Scotch Bench, is such as entitles both of them to the highest respect. I have always thought so, and am happy to have an opportunity of declaring so.

My Lords, in dealing with this case, we must take great care that this House is not involved in the execution of duties, the casting of which upon your Lordships may lead to a great deal of irregularity and mischief. At the same time, I should be very sorry if this case were to be decided anyhow upon a want of form in these two bills of exceptions, if by any manner of stating the matter upon the record, we could prevent that, and could prevent any impropriety in the forms of the bills of exceptions forming a precedent. My Lords, that is a circumstance that very much embarrasses me, because my mind having been fully as much engaged in the consideration of this cause when the judgment of this House was given in the year 1823, as ever it was engaged in the consideration of any subject on which it was my duty to deliver my opinion as a Judge, I confess, I feel great satisfaction in reading the language in which the Judges of the Court of Session, when these bills of exceptions were carried before them, stated their sentiments with respect to what is necessary as to the acknowledgment of a deed by the granter of that deed; and if the real exception meant to be taken in this case, is, that there is no necessity for the granter in some way or other acknowledging the deed to the witness who has subscribed, but has not subscribed in his presence,—if that be the real

ground of these bills of exceptions,—I am not one who can concur in think- May 22, 1826.
ing that a sufficient reason to affect the judgment. In truth, when you look at what passed here in the year 1823, and having gone through it, if you come to analyse all the parts of it; if you look at the printed Cases on the tables; if you look at the issues brought before the Court by the parties; and if you look at the language in which you thought it necessary to express your judgment;—it does appear to me, I own, that there is an insurmountable difficulty in contending now, that by the law of Scotland, where a man is a subscribing witness to a deed, and who did not see the party subscribe, or has not in some way or other had a clear acknowledgment from him that he executed that deed, does not infer a nullity. With these observations, my Lords, I shall endeavour to apply myself to the difficulties which arise upon the form of these bills of exceptions; and if on the great and material point anything suggests itself to me which ought to alter the opinion I have expressed, I shall not fail to intimate to your Lordships that alteration of opinion; but I do not at present think it likely I shall have any such alteration of opinion to state. I now beg to move your Lordships, that the final judgment stand over to the third day after the meeting of this House after the approaching recess, that is to say, Friday se'ennight.

Ordered accordingly.

LORD CHANCELLOR.—My Lords, a case has lately been argued before your Lordships, involving a question of considerable importance; and also a question with respect to the form in which the matter was brought before us,—I mean the case of Sir James Duff against my Lord Fife. It will be in your Lordships' recollection that the title of certain estates depended upon the question, whether two deeds of October 1808, and one deed of November 1808, were the deeds of the late Earl of Fife. When this case was formerly before your Lordships, you came to the resolution that those instruments were to be considered as probative instruments; and that the individual who insisted that they were not the deeds of the Earl of Fife, was bound to prove that they were not to be considered as the deeds of the Earl of Fife. It is unnecessary for me again to go through the various circumstances under which it was considered that those deeds respectively were not to be considered necessarily as valid deeds, though they were to be considered as probative instruments. Your Lordships' judgment, which sent back the matter to the consideration of the Court of Session, pointed out, with great particularity, what other proof was to be taken, which should or should not be considered evidence for the purpose of proving the fact, either negatively or affirmatively. The matter came on afterwards to be tried, and that trial has produced the bill of exceptions, the substance of which I am now about to state to your Lordships.

My Lords, there are two appeals, and, according to the Act of Parliament, to each appeal is annexed a bill of exceptions, and I apprehend that this act of Parliament was founded upon an analogy to what is required in the English law, namely, that the record, when brought up here,

May 22, 1826. must bring up the whole matter. There is a bill of exceptions in the Court below, and error being imputed to the judgment in the Court below, the record brings up the whole matter. In this case two bills of exceptions having been taken (which it seems has been adopted by a supposed analogy to our mode of proceeding);—there are two appeals, each bringing up a bill of exceptions, and I take notice of that circumstance, because a great objection has occurred in the course of the argument, not only upon the point, whether the Lord Chief Commissoner gave an improper direction to the Jury Court; but whether we have got these matters before us in such a way that we can either affirm his directions, as having been proper and material, or negative his directions, as having been improper.

Now, my Lords, there is no doubt, I apprehend, that in the case of a bill of exceptions, according to our proceedings, we would have had only one. But a bill of exceptions may contain more than one objection to the direction of the learned Judge, who gives his opinion in point of law, on the admissibility of evidence on the trial; and likewise, what is more distinctly under the head of doctrine of law, there may be exception more than once to what a Judge says in his direction to the Jury. But yet, according to our notions of practice, all those exceptions are recorded in one bill of exceptions. I have not been able to find any instance in which the different objections are stated in more bills of exceptions than one. If that were the course, it would seem to follow that if there were three or four or five points in which the judgment was thought to be wrong, there might just as well be as many bills of exceptions as amount to the number of errors that were imputed to it. In this case the bills of exception are those which I have now in my hand; they are both taken by the same party. The first bill of exceptions is in the following terms: 'Whereas by a special interlocutor, pronounced by the Lords of the Se-'cond Division of the Court of Session in this cause, bearing date the 10th 'of March 1824, their Lordships appointed the following issue to be sent 'to the Jury Court, to be there tried by a Jury, viz. whether the instru-'ments of trust-disposition and deed of entail, both dated the 7th 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 twelfth day of November 1808, 'being in law a probative instrument, was not the deed of the Earl of 'Fife.' Your Lordships will recollect the verdict does not dispose of that; but that is not a matter with which we have now to do; and it will be in the recollection of the noble and learned Lord now sitting at the table, that this House thought it right to give to the party, who insisted that the deeds of October 1808 were the deeds of my Lord Fife, a liberty to produce the deed of the 12th November 1808 (which was a deed of alteration of those of the 7th October 1808) in evidence, if they thought proper to support the deeds of October 1808 as the deeds of my Lord Fife. They did not think proper to tender that instrument of November 1808 in evidence, either for that purpose or any other purpose; but the non-production of that deed, and the liberty to produce it as evidence, is not

that which can form the proper matter of a bill of exceptions; there is no doubt about that. Then the bill of exceptions goes on to state the usual form of the swearing the Jury, and so on, which may be passed over, and 'that the said defenders did not adduce any evidence on their part, at the 'said trial, that the said deeds of 7th October 1808, in the first issue 'mentioned, were signed by the said Earl on the morning of the 7th Octo- 'ber 1808, in the breakfasting-parlour, or low parlour of Duff-house, soon 'after the hour of breakfast: That the two subscribing witnesses to the 'said deeds, Alexander Forteath Williamson, and George Wilson, were 'both examined on the part of the pursuer, and did both give in evidence, 'that the said George Wilson did not see the said Earl sign the said deeds.' Your Lordships will recollect that it was very much discussed at the Bar before the remit was made to the Court of Session, what the law required in order to render that which was a probative instrument a good deed of the party, whose probative instrument it was—I mean with respect to the attesting witnesses—and this House were of opinion, that if the instruments appeared to be properly attested, the instrument was therefore probative; but, on the other hand, that if it could be shown that the granter of the deed did not subscribe in the presence of witnesses, or, subscribing in the presence of one of the witnesses, that if he (the granter) did not acknowledge to the other, that that instrument was his deed, there would not be any sufficient attestation, and the direction of this House was expressed accordingly. I mention that fact, having looked back to all the Cases we had on the table on the former occasion, and it thence appears that we had that under our very anxious consideration; and if I had any doubt at all, I think it would be expressed most properly thus, that instead of using the words, 'did acknowledge it to be his deed in the pre- 'sence of witnesses,' it is stated in your Lordships' judgment, 'did hear him 'acknowledge it:' that is, 'the other witness did hear him acknowledge it 'to be his deed,' it being contended in the papers upon the former occasion, that there should be either express acknowledgment by hearing, or a virtual acknowledgment; and the circumstance of the liberty to give in evidence the deed of November 1808, must have been a liberty that was open to that consideration.

The bill of exceptions then proceeds:—'And it was further given in evi- 'dence, by both the said witnesses, that the said George Wilson did not 'hear the said Earl acknowledge his subscription to the said deeds; and 'that the said Earl did not make any verbal acknowledgment of his 'subscription to the said two deeds to the said George Wilson.' I stop for a moment to remark here, that if the counsel for Sir James Duff thought proper to offer in evidence the instrument of November 1808, as amounting to a virtual acknowledgment on the part of the Earl of Fife, of the instrument of October 1808, *that*, without something more presented to the Jury, could afford no ground for supporting those deeds.

One of the said witnesses, Alexander Forteath Williamson, gave in evi- 'dence, that the said deeds, after they had been signed by the said Earl 'in the breakfasting-room, or low parlour in Duff-house, as aforesaid, and

May 22, 1826. ‘ then and there attested by the said Alexander Forteath Williamson, who ‘ saw the said Earl sign the said deeds, were taken by one Stewart Sou- ‘ ter, a factor, or man of business employed by the said Earl, to a room ‘ in the said house, called the Charter-room: That the said George Wil- ‘ son gave in evidence, that the said Stewart Souter, in the forenoon of the ‘ said 7th day of October 1808, did bring the said deeds into the Charter- ‘ room, and did then and there dictate the testing-clause to him, the said ‘ George Wilson, who wrote it in scroll to the dictating of the said Stewart ‘ Souter; and that the said Stewart Souter, after the scroll was written ‘ as aforesaid, did dictate the testing-clause from the scroll; and that he, ‘ the said George Wilson, did write the said testing-clause to such dicta- ‘ tion on the said deeds, and, at the same time, did put his name to the ‘ said deeds, as a subscribing witness; and that, during all the time the wit- ‘ ness was employed as aforesaid, or at the time the said witness put his ‘ name to the said deeds, as a subscribing witness as aforesaid, the said ‘ witness never saw the said Earl come into the said Charter-room, and ‘ that he the said Earl did not come into the said Charter-room during ‘ the time aforesaid :’ Your Lordships will just allow me to put you in mind, that the state of the Earl's eye-sight was such, that he could not discover what the instrument was, although undoubtedly your Lordships were of opinion, and most rightly of opinion, that a blind man might well execute a deed. ‘ That the said Alexander Forteath Williamson gave in ‘ evidence that the said Earl, after signing, parted with the said deeds, and ‘ they were taken from him as aforesaid, by the said Stewart Souter, in ‘ the low parlour aforesaid, and that the said Earl never came in contact ‘ again with the said deeds, until after the said George Wilson had put his ‘ name as subscribing witness to the said deeds: That the said George ‘ Wilson gave in evidence, that he was bred to business as a writer, with ‘ Mr Young, writer in Banff; that in the year 1804, he entered into the ‘ service of the late James Earl of Fife, as a factor or clerk, and continued ‘ in that service until the death of the said Earl: That he had often at- ‘ tested deeds of the said Earl, as a witness to the said Earl subscribing ‘ the deeds; that he had often done so, when he had not seen the said ‘ Earl subscribe the deeds, which he attested as a witness; and that, on ‘ such occasions, he never heard the said Earl acknowledge his subscrip- ‘ tion to him, George Wilson, in those cases in which he did not see the ‘ said Earl sign the deeds which he attested: And the said Alexander ‘ Forteath Williamson gave in evidence, that within a short time after he ‘ had attested the said deeds as aforesaid, he, the said Alexander For- ‘ teath Williamson, went to the Charter-room, where he found the said ‘ George Wilson writing at the window, to the dictating of the said Stewart ‘ Souter: That the witness placed himself at the side of the fire-place, ‘ which was on the opposite side of the room from the desk where the other ‘ witness was writing to the dictating of the said Stewart Souter, as afore- ‘ said: That he, the said Alexander Forteath Williamson, conjectured ‘ that the said Stewart Souter was dictating the testing clause to the said ‘ deeds; but that he, the said witness, did not hear any of the words that were

'spoken by the said Stewart Souter: That after the said Alexander For- May 22, 1826.
'teath Williamson was in the Charter-room, the said Earl came into the
'said room, and sat down on a chair, at the opposite side of the fire-place
'from that where the witness stood: That the said Earl was placed at
'the same distance as the witness from the desk where the said Stewart
'Souter was dictating to the said George Wilson: That the witness did
'not hear Lord Fife acknowledge his subscription: That if Lord Fife
'said anything, he had no recollection of it, or of anything addressed at
'all, by Lord Fife to Wilson—if anything, he does not recollect it—or
'that anything was addressed to the said Earl,—and that the said Earl
'was not in a situation to hear the dictating which was taking place at the
'desk in the window: That in regard to the eye-sight of the said Earl,
'it was admitted by the counsel on the part of the defenders, that the said
'Earl, at the date of the said deeds, was not totally blind, though he could
'scarcely distinguish between light and darkness, and was at that time
'incapable of reading any writing, written instrument, or printed book,
'and could not discover whether a paper was written upon or not.' This
was the whole of the testimony.

The bill of exceptions then states, 'that upon this testimony of the
'two subscribing witnesses to the said deeds, the Lord Chief Commis-
'sioner observed to the Jury, that it was their duty and province, to con-
'sider and make up their minds on the credit that was due to the wit-
'nesses: That he thought it right to observe, that the witness, George
'Wilson, came to disaffirm his own solemn act;—that his testimony must,
'therefore, be weighed with all the suspicion which attaches to a witness
'standing in such circumstances: That they must likewise weigh the cre-
'dit due to the testimony of the other witness, Alexander Forteath Wil-
'liamson: That in directing the Jury as to the said Earl's alleged ac-
'knowledgment of his subscription to the said deeds, the Lord Chief
'Commissioner did tell the Jury, that when an attesting witness has not
'seen a granter of a deed sign the deed, the granter of the deed must ac-
'knowledge his subscription to the person who attests the deed, otherwise
'the deed is void in law: That in this case, he was of opinion, that there
'was undoubted evidence (and it was admitted), that there had been no
'acknowledgment by words to the witness, who did not see the Earl
'sign. And the Lord Chief Commissioner did then observe to the Jury,
'in effect as follows:—That in considering any other acknowledgment,
'it was his opinion, the acknowledgment must be clear and explicit,
'and that he had not found any case in which a virtual acknowledgment
'or equipollent had been sustained;'—(What is the exact meaning of this
last sentence, it is perhaps difficult to determine, but it appears to me in
the result not to be material.) 'But that it was not necessary to carry
'the doctrine so far in this case, as, according to the evidence of the two
'witnesses called by the pursuer, if they, the Jury, believed either of
'them, it did not appear that there was any acknowledgment, either ex-
'press or virtual: That the counsel for the said defenders did except to
'the said direction—In respect that the said Lord Chief Commissioner

May 22, 1826. ‘ had delivered it as his opinion to the Jury, “ that an acknowledgment, “ when a witness had not seen a party sign a deed, must be clear and expli- “ cit, and that he had not found any case in which a virtual acknowledg- “ ment or an equipollent had been sustained.” But the Lord Chief Com- ‘ missioner,’ (and in this he appears to me to have taken quite the right course,) ‘ considering that the direction of a Judge given to a Jury, could ‘ not be separated into parts, but must all be taken together, and must be ‘ construed with the context, and have the sense put upon it, that arises ‘ out of the observations which accompany it, and that a particular sen- ‘ tence, passage, or expression, cannot be selected and stated by itself, as ‘ constituting the direction of a Judge, objected to the exception as taken; ‘ and to secure against any misconception as to the meaning of his direc- ‘ tion, the Lord Chief Commissioner did then and there put his direction ‘ in writing and read it to the Jury, as next herein set forth:—“ That in “ this case he was of opinion, that there was undoubted evidence (and “ it was admitted), that there had been no acknowledgment by words to “ the witness, who did not see the said Earl sign: That in considering “ any other acknowledgment, he told the Jury, that it was his opinion, “ the acknowledgment must be clear and explicit, and that he had not “ found any case in which a virtual acknowledgment or equipollent had “ been sustained; but that it was not necessary to carry the doctrine so “ far in this case, as, according to the evidence of the two witnesses called “ by the pursuer, if they, the Jury, believed either of them, it did not ap- “ pear that there was any acknowledgment, either express or virtual.”’

My Lords, it was admitted at the Bar, and very properly admitted at the Bar, that it does not form the matter of a bill of exceptions, that a Judge gives an opinion with respect to the evidence, which opinion is not the true result of the evidence; that a matter of that kind might be the ground of a motion for a new trial, but is not a ground for a bill of exceptions.

The bill of exceptions proceeds: ‘ That after reading what immediately ‘ precedes to the Jury, he told the Jury, that they were to consider what ‘ he read to them as his directions on the part of the case which related ‘ to the alleged acknowledgment of the subscription to the said deeds, by ‘ the said Earl: And the Lord Chief Commissioner did then tell the ‘ Jury, that if they believed either of the witnesses, he was of opinion that ‘ there was no acknowledgment by the said Earl of his said subscription ‘ to the deeds of the 7th October 1808, to the said George Wilson; in ‘ which case, the said deeds were not the deeds of the said Earl, and they ‘ would so find by their verdict: That the Jury did thereupon find a ver- ‘ dict for the pursuer, by delivering it as their verdict, “ That the instru- “ ments of trust-disposition and deed of entail, both dated the 7th day of Oc- “ tober 1808, were not the deeds of the said Earl of Fife.”’ Your Lordships perceive this is a passage which is open to the remark, that the learned Judge made no observation on the deed of alteration. That, however, is not a part of the bill of exceptions. ‘ But the counsel for the defenders did except to ‘ the direction of the Lord Chief Commissioner, in so far as it related to

'the acknowledgment, by the said Earl, to the said George Wilson, of his subscription to the said deeds, and insisted that the said pursuer was not entitled to recover a verdict on the said issue, in respect that the deeds of the 7th October 1808 were the deeds of the said Earl. And the said counsel did then and there propose to the said Lords Commissioners to sign the said bill of exceptions, according to the form of the statute in such case made and provided: And thereupon the said Lords Commissioners, at the request of the said counsel for the said defenders, did respectively sign the said bill of exceptions, pursuant to the said statute in such case made and provided, on the said 9th day of March, in the year of our Lord 1825, and in the sixth year of his present Majesty's reign.' May 22, 1826.

Your Lordships observe, that the ground of exception is this, that they excepted to the direction of the Lord Chief Commissioner, in so far, and so forth. Now, as I understand this exception, it is this,—that the Lord Chief Commissioner was wrong in telling the Jury that there must be an acknowledgment to Wilson as one of the witnesses. With respect to what the Lord Chief Commissioner stated as to the virtual acknowledgment, it is this,—that he was of opinion upon the evidence, it being admitted, that there was no express acknowledgment in words, that if they (the Jury) believed those witnesses, or either of them—though his opinion was that there was no proof, for he only states it thus—though he was of opinion there was no proof of acknowledgment by the Earl of his subscription to the deeds of the 7th October 1808 to Wilson, it was unnecessary to go into that, because if the Jury believed those witnesses, or either of them, there was no acknowledgment, either express or virtual.

It appears, therefore, upon this bill of exceptions, that the Judge informed the Jury there was a great irregularity and great impropriety in having this deed attested without an acknowledgment being made, and that non-acknowledgment to one of the witnesses entailed nullity upon the deed. I feel very much satisfied with the circumstance that my noble and learned friend happens to be present upon this occasion, because I think we were both satisfied upon the former hearing, that either the witness must subscribe in the presence, or there must be some acknowledgment of the party that it was his deed. That proposition may be said to have undergone consideration in this House twice, and I humbly state it to your Lordships (not being unwilling to state that it was an erroneous opinion if I felt it to be so),—and I state it, notwithstanding all that I have heard urged at the Bar, to establish that it was not necessary there should be an acknowledgment of the deed to the witness, who did not subscribe in the presence,—that, in my opinion, it was necessary there should have been such acknowledgment; and that if there was no such acknowledgment, the want of acknowledgment does entail nullity upon the deed; and that therefore this direction was right.

My Lords, the other bill of exceptions by the same party not stating, as it ought to do, the whole of the directions of the learned Judge, says this: 'The said counsel for the said defender contended, that although the

May 22, 1826. 'Jury should be satisfied that the evidence given on the part of the pur-
'suer established that the granter of the deed had not acknowledged his
'subscription to one of the witnesses who did not see him subscribe the
'said deed, that the said deed was not null, but was a good and valid
'deed, and the deed of the said granter the Earl of Fife; and the said
'counsel did then and there insist that there must therefore be a ver-
'dict in favour of the defenders in respect to the said deeds; but the
'Lord Chief Commissioner did direct the Jury, if they were satisfied that
'the evidence given, on the part of the pursuer, established that the
'granter of the deed had not acknowledged his subscription to the wit-
'ness, who did not see him subscribe the said deed, to find, by their ver-
'dict, that the said deed was not the deed of the Earl of Fife; and did
'then and there tell the Jury, that the law required, in cases in which a
'witness does not see the granter of a deed sign the deed, that he must
'acknowledge his subscription to such witness, otherwise the deed is void
'in law, and therefore is not the deed of the granter.' It ought not to pass without observation, that the party (who is the same party as to the other bill of exceptions) does not in this bill of exceptions state wholly what was the direction of the learned Judge. Either the intent of this is to bring before the House the very same point; or if it was to bring before the House another point, it might have formed part of the same bill of exceptions; and one great difficulty that has arisen, has been to know what is to be done in point of form with the two bills of exceptions brought up. It appears to me, that the proper mode of disposing of them is to take notice that this objection in form had occurred, and that it was not necessary for the House to determine, whether the objections to the two bills of exceptions could or could not be supported, inasmuch as it did appear that such and such was the direction of the Lord Chief Commissioner, and the House was of opinion that that direction was right. It will require some special words to take care that the House shall not be understood to have determined that the objection to bills of exceptions thus brought before you, may not deserve consideration if any such matter should again occur; but being in possession of the merits of the case, and taking care that this shall not form a precedent for authorising this particular species of proceeding, unless your Lordships are of opinion that the direction of the learned Judge was wrong, it appears to me it will be right to determine in the manner I have suggested. I shall consider farther of the precise form of the proposition, and shall probably trouble your Lordships farther upon it when the House shall meet on Monday morning.

LORD CHANCELLOR.—My Lords, your Lordships have had before you, in the case of Sir James Duff *v.* the Earl of Fife, two appeals, which came before this House under very singular circumstances. Your Lordships will recollect, without my calling to your Lordships' attention the circumstances which took place upon the former appeal, what passed in this House, and the judgment which this House gave with respect to the trial of a certain issue. That trial has been had, and the appellant, Sir

James Duff, has brought up to this House two appeals, and to each of them a bill of exceptions appended according to the act of Parliament—the Court of Session having overruled these bills of exceptions. May 22, 1826.

My Lords, in the course of the hearing at the Bar, a considerable difficulty occurred with respect to the form in which these appeals were brought before us. I believe I may venture to say (speaking in the presence of noble and learned Lords well acquainted with the subject), that where there is a bill of exceptions in our Courts here, the record which is brought up containing the bill of exceptions may certainly contain several heads of exceptions; but I am not aware of an instance of two bills of exceptions having been brought up by different appeals—which is like bringing up two records—nor am I aware, that according to our modes of proceeding, where a direction is given by a Judge which is excepted to, you can split that direction into two parts, and take two exceptions to it. That, however, seems to have been done in the present case. My Lords, I should extremely regret (if your Lordships are satisfied with respect to the law upon the subject), that the case should go back on any such point of form; and, therefore, with a view to save the precedent, I would propose to your Lordships, that in each of these appeals the following judgment should be pronounced, namely, to declare that this House does not feel it necessary to pronounce any judgment upon the objections which have been stated in the course of the hearing of this matter to the bill of exceptions annexed to this appeal, by reason of there being another bill of exceptions tendered on behalf of the same party annexed to another appeal, or by reason of the objection in point of form,—this House being of opinion that the Lord Chief Commissioner's directions to the Jury, stated in the bill of exceptions, cannot be justly excepted to. The effect of this will be, to affirm the judgment complained of: and then to adopt the same form in the other appeal. That will save the point, I think, with respect to the precedent. Upon looking at the bills of exceptions, the direction in point of law, stated in the one, appears to be a part of that stated in the other. It does not appear to me that the Lord Chief Commissioner's direction is objectionable. I do not apprehend that if the observation of the Judge relates to the effect of the evidence,—not that I mean to intimate that that which was stated to the Jury upon the effect of the evidence in this case, can be represented to be wrong—but if it were, I do not apprehend that that would be the proper subject of a bill of exceptions. It might be a proper subject for a motion for a new trial; but it appears to me that no Jury could reasonably disagree, if the opinion of the learned Lord Chief Commissioner was correct, that if they believed either of the witnesses, there was no express acknowledgment of the deed of my Lord Fife to the witness of the name of Wilson; nor, on the other hand, if they believed either of the witnesses, could it be said there was any virtual acknowledgment. Upon the whole, justice appears to me to have been done, and if this sort of judgment will save the objection that might have been made in point of form, which it appears to me it will, I think it will be right to give that kind of judgment in both cases. I think we ought in each of these cases to give £50 costs.

May 22, 1826.

Appellants' Authorities—3. Reg. Maj. 8.—Town of Edin. March 11, 1630. (14500.) 1540, c. 117. 2. Ersk. 2. 7. 1579. c. 80. 1581. c. 4. 1593. c. 179.—Novell, 73. 4. —Sheriff, July 8, 1622. (16877.)—Colvill, July 15, 1669. (16882.)—Falconer. Feb. 3, 1665, (16883.)—Dow, Jan. 4. 1668. (16884.)—Cunningham, Dec. 5, 1665. (17019.)—Sharp and Maxwell, Feb. 2, 1710, (17027.)—Ogilvie, Feb. 22, 1676, (16860.)—Dishington, March 12, 1628. (17015.)—Duke of Douglas, Jan. 6. 1747. (17035.)—Weir, Nov. 29, 1609. (17011.)—Redpath, June 24, 1611. (Ib.)—Hay, June 7, 1709. (17025.)—4 St. 20. 22.—Bell on Testing Deeds, 272, 246, et seq. and cases there.—Buchan, June 26, 1823.—(Shaw and Dunlop, vol. II. No. 410.)—Smith *v.* Bank of Scotland, 1821.—(House of Lords, 1824.)

Respondents' Authorities.—Novell 73. de Inst. de Caut. et Fidel.—Reg. Maj. 2. 38.—1540. c. 117.—1579, c. 80.—1681, c. 5.—Mackenzie's Obs.—Kilk. in D. of Douglas, Art. 8. *v.* Writ.—Bell on Testing of Deeds.—1. Bank. 11. 28. and 10. 229—3. Ersk. 2. 7.—Stevenson, 1682, (16886.)—Blair and Peddie, 1684. (13942.)—Campbell, Nov. 1698. (16887.)—Phillips, June 13, 1738. (Elchies, Nov. 10, *v.* Witness.)—Shaw *v.* M'Phail, (mentioned A. S. Feb. 6, 1765.)—Young and Ritchie, Feb. 2, 1761. (17047.)—Walker *v.* Adamson, June 8, 1716. (16896.)—Sibbald, Jan. 18, 1776. (Bell, p. 245.)—Frank, June 10, 1809. (F. C.)

J. CHALMER—SPOTTISWOODE and ROBERTSON, Solicitors.

No. 20.

SIMON TAYLOR OGILVIE, Esq. Appellant.—*Shadwell*—*Buchanan.*

BARBARA DUNDAS and MARGARET LINDSAY, and Others, Respondents.—*Adam*—*Keay.*

Right in Security—Heir and Executor.—A husband, possessed of property in Jamaica, having, by marriage-articles, bound himself to secure to his wife, in case of her surviving him, an annuity of £400, payable out of his Jamaica estates; and binding himself, in the event of purchasing lands in Scotland, to take the titles to himself and wife in joint fee and liferent, in further security of the annuity; and having bought lands in Scotland, but having taken the titles to himself and his heirs alone, and having died,—Held (reversing the judgment of the Court of Session), 1. that the annuity constituted a proper burden on the Jamaica estate, and not on the Scotch estate; and, 2. that a party taking the former under a testamentary deed, had no relief against the heir succeeding to the estate in Scotland.

May 22, 1826.

2D DIVISION. Lord Mackenzie.

THE late George Ogilvie resided for many years in Jamaica, and acquired in that island a large property called Langley. He was a native of and returned to Scotland in 1785, and soon after married Barbara Dundas. By the marriage-articles he bound and obliged himself, and his representatives, to pay her, in case she survived him, an annuity of £400, 'in lieu and bar of 'dower, which annuity is to be secured and made effectual on 'the said George Ogilvie's estate, plantation, and sugar-work, 'called Langley estate,' &c.; and accordingly he engaged, 'within 'three calendar months from the time of subscribing the present articles, to execute, subscribe, and deliver to George Dundas, Esq. of Dundas, brother-german to the said Barbara Dundas, or to any person to be named by him, a legal and formal 'deed of settlement with the said Barbara Dundas, or proper