JAMES SMITH, and Others, Appellants.—*Shadwell—Abercromby.* No. 38.
BANK of SCOTLAND, Respondents.—*Murray—Walker.*

Writ—Testing Clause—Statute 1681, *c.* 5. *and* 1696, *c.* 15.—Circumstances under which (affirming the judgment of the Court of Session) objections to a bond of caution, that it had not been signed at the time or place, nor before the witnesses mentioned in the testing clause, were repelled.

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2D DIVISION.
Lord Pitmilly.

IN 1794 Alexander Paterson was appointed agent of the Bank of Scotland at Thurso, and found caution for L.5000. Early in 1804 he was required by the Bank to find additional caution for L.5000, which he accordingly agreed to do. The cautioners who consented to become bound were the appellants, James Smith, George Swanston, Harry Bain, John Sinclair Gunn, and the Reverend Patrick Nicolson, (who was now dead, but was represented by his son, Alexander Nicolson). A formal bond of caution, written on one sheet, and consisting of four pages, was then prepared by the secretary of the Bank, and transmitted to Paterson, in order to be signed by him and the cautioners, which was accordingly done by their subscribing the last page. The testing clause was then filled up; and from it the bond appeared to have been signed by Swanston and Gunn at Thurso upon the 22d of June, and by the other cautioners on the 23d. The signature of Bain was stated to have been attested by two persons of the name of M'Phaul and Quoys, and those of the other cautioners by Phineas Ryrie and Stewart Ryrie. The bond was thereupon sent by Paterson to the secretary of the Bank at Edinburgh, who, observing that it was subscribed only on the last page, immediately returned it to Paterson, with instructions that it should be signed upon each page. This was accordingly done on or about the 11th July; but no notice was taken of it in the testing clause.

In consequence of this bond, Paterson was allowed to act as agent for a few weeks thereafter, when it having been discovered that his affairs were in great disorder, and it being alleged that he had been guilty of malversation, he was removed on the 17th of August, and the books and cash were, in presence of the cautioners, delivered over to one of the officers of the Bank. On making inquiries, the appellants conceived that the Bank had been aware that, for some time previously, Paterson had incurred large arrears, and that the object of obtaining the new bond was to secure payment of them. They therefore resolved to resist implement of their bond; and with that view brought a suspension and

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reduction of it, on the ground that, previous to Paterson's removal, it had not been duly delivered; that it had not been duly executed according to the Acts 1681, c. 5. and 1696, c. 15.; and that, at all events, it had been obtained from them by means of fraud.

The Court having, on the 15th May 1806, repelled the reasons of suspension and reduction, the appellants entered an appeal to the House of Lords; and on the 16th June 1823, their Lordships pronounced this judgment:—'The Lords Spiritual 'and Temporal in Parliament assembled, find, That the deed 'in question, if not impeachable upon other grounds, is to be 'considered as a delivered deed; and find, that the appellants in 'this case ought to be allowed to make proofs of the circum-'stances by them alleged as ground for reducing the deed in 'question as unduly obtained by concealment or deception, if 'the deed is valid, according to the statutes of 1681 and 1696: 'And it is therefore ordained and adjudged, that the cause be 'remitted back to the Court of Session in Scotland, to recon-'sider the same as to the validity of the deed, as the same may 'be affected by the said statutes, or either of them, having re-'gard to the nature of the deed; and that the Court do proceed 'in reconsidering the same as to them shall seem meet, and ac-'cording to their practice: And it is farther ordered, that in case 'the said Court shall, upon such reconsideration, adjudge that the 'said deed is valid, if duly obtained, that the petitioners be 'allowed a proof of the circumstances by them alleged as afford-'ing grounds for reducing it as unduly obtained as aforesaid: 'And it is farther ordered and adjudged, that, with these find-'ings and directions, the said Court do review the several inter-'locutors complained of in the said appeal, and proceed upon 'such review as to the Court shall seem meet and just.'

The case having then returned to the Court of Session, and having been remitted to Lord Pitmilly, his Lordship appointed the appellants to give in a condescendence of what they averred in relation to the execution of the bond. Accordingly a condescendence, in these terms, was lodged:—'1*mo*, The bond in 'question was not subscribed upon the first, second, and third 'pages, till after it was sent the second time from Edinburgh, 'which was long after the dates mentioned in the testing clause.

'2*do*, Even the last page of the bond was not signed upon 'either the 22d or the 23d days of June, as stated in the testing 'clause, nor at the places which are there specified. George 'Swanston and John Sinclair Gunn, who are said to have sub-'scribed at Thurso upon the 22d of June, did not subscribe till

'the 24th of June, which was a Sunday, and then they were not 'at Thurso, neither was there any more than one witness present 'on the Sunday when they did subscribe. June 4. 1824.

'3*tio*, The subscription of Patrick Nicolson, who died several 'years ago, if it be genuine, was adhibited without any witnesses 'being present, either at the subscription of the last or the pre-'ceding pages.

'4*to*, The additional subscriptions of Mr Swanston and Mr 'Gunn were not adhibited before the witnesses mentioned in the 'testing clause, or any other witnesses at all.

'5*to*, Francis Quoys, who is said to be a witness to Mr Bain's 'subscription, was at London, or at least out of Scotland, before 'Mr Bain's additional subscription took place; and there was 'only one witness present when Mr Smith subscribed the first, 'second, and third pages.

'6*to*, That Phineas Ryrie, one of the alleged witnesses to the 'whole subscriptions, except Harry Bain's, neither saw the obli-'gants subscribe, nor heard them acknowledge their subscrip-'tions: That Stewart Ryrie, the other alleged witness, in Pater-'son's office folded down a paper, and asked him to put down 'his name as a witness, which he did without knowing or being 'told what the paper was.'

On advising this condescendence, with memorials, his Lordship allowed the appellants 'a proof of the 6th article of their con-'descendence, and all facts and circumstances relative thereto, 'and to the defenders a conjunct probation thereanent; but 'found the other articles of the condescendence irrelevant, and 'refused to allow a proof thereof.' At the same time his Lordship issued the following note of his opinion:—'It seems proper to 'explain in a note the grounds of the above interlocutor. 1*st*, 'Though asserted by the pursuers, and admitted by the defen-'ders, as well as proved by written evidence, that the first, 'second, and third pages of the bond were not signed till after it 'was returned from Edinburgh for that purpose, and after the 'dates mentioned in the testing clause, this appears unimportant; 'because it would not have been a relevant objection to the 'bond that the first three pages were not subscribed at all; it 'being found, that the Act 1696 does not extend to writs consist-'ing of one sheet only. Many authorities for this are quoted in 'the memorial, in addition to which a very express authority 'will be seen, Elchies' Report of Robertson *v.* Kerr, and also 'in his notes in that case, voce *Writ*. 2*d*, The averment, that 'some of the subscriptions to the bond were not adhibited at the

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'; time or at the places mentioned in the testing clause, appears
'also to the Lord Ordinary to be not relevant in the present
'inquiry; because the Acts 1681 and 1696 contain no provision
'with regard to the time and place of subscribing deeds. These
'two remarks embrace the first five articles of the condescen-
'dence. *3d*, With regard to the sixth article, the Act 1681
'requires, that the witness shall see the party subscribe, or hear
'him acknowledge his subscription. That the party afterwards
'admits to the Court that he signed the deed, will not be sufficient
'cient to overcome the want of the solemnity of signing before
'witnesses, or acknowledging the subscription to subscribing
'witnesses required by the statute; and this is proved even by
'the reasoning in the case quoted for the Bank, of Richardson *v.*
'Newton, 28th February 1811. The Lord Ordinary, therefore,
'must allow a proof of the pointed averment in the sixth article;
'but the proof is before answer, and reserving every objection
'to the credibility of the instrumentary witness, if it is intended
'to establish by his parole testimony a fact which is contra-
'dicted by his subscription to the deed adhibited under the
'statutory penalties.'

Both parties having represented, his Lordship issued a note, in which he stated, that he remained 'of his former opinion as 'to the relevancy of the sixth article of the condescendence, and 'the irrelevancy of the others. With regard to the sixth article, 'he has looked through the former papers, and does not observe 'that the averments in the six articles were pointedly made be-'fore the case went to the House of Lords, so that the Court 'had no opportunity of judging of their relevancy. The sum-'mary of the decision of Richardson *v.* Newton, in the Faculty 'Collection, seems inaccurately expressed.

'The Lord Ordinary desires the cause to be enrolled, that 'before he disposes of the representation and answers, the parties 'may explain the following particulars:—1*st*, The pursuers' 'averment as to Patrick Nicolson's subscription is materially 'varied from what it was in the condescendence. It is there 'said, that Nicolson's subscription "was adhibited without "any witnesses being present." It is now said in the pur-'suers' representation, p. 8. "that the subscribing witnesses "did neither see Nicolson subscribe, or hear him acknowledge "his subscription." If the pursuers maintain this new averment, 'or assert any thing as to Nicolson's subscription which does 'not fall under the six articles of the condescendence, they must 'state their averment briefly in an additional condescendence,

'with which they may come prepared to the Bar. *2dly*, As to the defenders' plea of rei interventus, the facts are not sufficiently explained, and the parties are so greatly at variance about them, that the Lord Ordinary cannot at present decide upon it. The proof as to the execution of the deed being before answer, this defence of rei interventus will be kept entire; but farther explanations of the facts may be made at the Bar, so as to enable the Ordinary to determine whether this point should be decided at present, or how it should be disposed of.' June 4. 1824.

Parties having then been heard; his Lordship appointed the appellants to lodge an additional condescendence in regard to the subscription of Nicolson, and the respondents to condescend as to their plea of rei interventus. Accordingly, the appellants, in their additional condescendence, averred, 'that neither Stewart Ryrie nor Phineas Ryrie, who are stated to have been the instrumentary witnesses, were either present at the subscription of Mr Patrick Nicolson, deceased, nor did Mr Nicolson acknowledge his subscription to them, or desire them, or either of them, to subscribe as witnesses thereto.'

The Lord Ordinary then pronounced this interlocutor:—'Having particularly attended to the terms of the remit from the House of Lords, by which this Court is appointed, in the *first* place, to consider the validity of the deed in question, as the same may be affected by the statutes 1681 and 1696, finds, That it is proper and necessary, in carrying this remit into effect, to investigate, by means of a proof, every averment made by either party which may appear relevant in considering the validity of the deed, as the same may be affected by the statutes referred to: Finds, therefore, that as the sixth article of the pursuers' condescendence still appears to the Lord Ordinary to contain a relevant and important allegation on the subject; and as the additional condescendence for the pursuers also appears to be relevant, a proof ought to be allowed before answer of the sixth article of the original condescendence, and likewise of the additional condescendence; and that when the import of the proof comes to be considered, it will then be proper, at the same time, to determine with regard to the defenders' plea of rei interventus, as to which a parole proof is not desired; and also as to the defenders' plea, that the pursuers are barred personali exceptione from objecting to the validity of the deed, and that the deed is to be considered as of the nature of privileged deeds: On these grounds, and reserving the defences now alluded to, to be disposed of when the proof comes to be con-

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'sidered, refuses the desire of both representations, and adheres 'to the interlocutor represented against; and of new allows the 'pursuers a proof of the sixth article of their original condes- 'cendence, and also a proof of their additional condescendence, 'and of all facts and circumstances relative thereto; and allows 'the defenders a conjunct probation thereanent.'

The appellants having reclaimed to the Court, in regard to the rejection of the five first articles of the condescendence, their Lordships, on the 22d of February 1816, adhered. Having again reclaimed, the Court, 'before answer, allowed a proof to 'the appellants of what they can adduce with regard to the exe- 'cution of the deed in question,' and also as to the plea of rei interventus; but as no decision was pronounced on this latter point, it is unnecessary to take any farther notice of it. A proof was then taken by an examination of the instrumentary witnesses. Those who had attested the subscription of Bain were Quoys and M'Phaul, the latter of whom was now dead, and the deposition of Quoys was emitted after the lapse of fourteen years from the execution of the deed. The material part of that person's testimony is subjoined in a foot-note.*

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* 'Interrogated, Whether the words "Francis Quoys, witness," appearing at the said 'bond, is the proper handwriting of the deponent? depones affirmative, to the best of 'his knowledge. Interrogated, Can the witness mention the day, and at whose request 'he subscribed as witness to the said bond? depones, That he cannot condescend upon 'the day that the said bond was signed by him as witness thereto, but that his subscrip- 'tion was adhibited thereto at the desire of Mr Paterson. Interrogated, Can the wit- 'ness from recollection say whether it was in June or July that he so subscribed wit- 'ness to the said bond? depones negative. Interrogated, Where did witness subscribe 'the said bond? depones, That it was subscribed by him in the shop of William Bain 'and Company of Wick, of which he was then a partner. Interrogated, Was there 'any one present on that occasion? depones, That there were several people then in the 'shop, whose names the deponent cannot condescend upon. Interrogated, Was Mr 'James Macphaul present on that occasion? depones affirmative. Interrogated, Did 'Mr Macphaul subscribe the bond also as a witness at the same time with the de- 'ponent? depones affirmative. Interrogated, At whose request did Mr Macphaul so 'subscribe? depones, That he cannot say for certain whether the said Mr Macphaul 'was asked particularly, and individually, by Mr Paterson to subscribe the said bond as 'a witness; but the deponent did understand that the said Mr Paterson, when he came 'within the counter, with the said bond in his hand, asked the witness to subscribe the 'same: That this application was addressed to the said Mr Macphaul as well as to the 'deponent. Interrogated, Did Mr Paterson at that time mention to the deponent and 'Mr Macphaul what the paper was which he asked them to subscribe? depones negative. 'Interrogated, Was Mr Harry Bain, whose subscription the deponent is said to have 'witnessed, present on that occasion? depones, That he does not recollect whether Mr 'Bain was then present, among the many persons who were then in the shop; but the 'deponent did not remark him as having been there present. Interrogated, Did the 'deponent, previous to his signing the bond as above, see the said Mr Harry Bain adhibit

The signatures of the other cautioners were attested by Phineas Ryrie and Stewart Ryrie, the former of whom was examined under an incidental warrant two years after the execution of the deed, and the latter at the same time with Quoys. The material parts of their depositions will be found in a foot-note.* June 4. 1824.

'his subscription to it? depones negativé. Interrogated, Did Mr Bain, at any time 'previous to the deponent subscribing as a witness, acknowledge to him that he had 'subscribed the said bond? depones negativé. Interrogated, Did the deponent see the 'said bond or paper which he so subscribed as a witness on any other occasion, either 'before or since, till it was now shewn to him? depones negativé. Interrogated, Is 'Mr James Macphaul still alive? depones negativé.'

* Stewart Ryrie being interrogated, 'Whether Phineas Ryrie, whose name the depo-'nent now sees at the bond as an instrumentary witness, saw the obligants subscribe, 'or heard them acknowledge their subscription? depones, That Phineas Ryrie sub-'scribed the bond before the deponent adhibited his subscription; and he is certain 'that, when Phineas Ryrie so subscribed it, no person was present except the depo-'nent. Depones, That the bond always remained in the deponent's custody, except 'on two occasions, when it was taken by Mr Paterson in order to be subscribed by 'Patrick Nicolson and Harry Bain on the fourth page. And depones, That after the 'bond had been subscribed by all the parties except Harry Bain, the deponent one 'evening called Phineas Ryrie into the Bank-office in Thurso, and there Phineas 'Ryrie adhibited his subscription in the presence of the deponent, no other person 'being present. Depones, That the deponent asked Mr Paterson who he should wish 'to be the other instrumentary witness besides the deponent; and Mr Paterson having 'suggested Phineas Ryrie, the deponent called in the latter, and the bond was subscrib-'ed by him, as above-mentioned. Depones, That Phineas Ryrie subscribed the bond 'at the deponent's request: That he does not recollect particularly what conversation 'passed; but he has no doubt that Phineas Ryrie was aware that the writing subscrib-'ed by him was a bond. Depones, That the deponent was present when Alexander 'Paterson, James Smith, George Swanston, and John Sinclair Gunn, subscribed the 'said bond. And depones, That when these four parties so adhibited their subscrip-'tions, Phineas Ryrie was not present.'

Phineas Ryrie being interrogated, deponed, 'That he paid very little attention to 'the subscriptions, and cannot say that it was from any knowledge of their being 'genuine that he put down his name as a witness, having been chiefly influenced 'thereto by his situation as a servant in the office, and a belief that they were the 'true subscriptions of the parties. Interrogated, In what place did he subscribe the 'said bond? depones, That he subscribed it in the Banking-office at Thurso. Inter-'rogated, Was Stewart Ryrie, Mr Paterson's clerk, or any other person, present with 'him when he signed the bond? depones, That the said Stewart Ryrie was then pre-'sent, and no other person, so far as the deponent recollects. Interrogated, At whose 'desire did he subscribe his name to the said bond? depones, That it was at the 'desire of the said Stewart Ryrie that he did so. Interrogated, Does he recol-'lect who were the parties obligants in the said bond? depones, That he does not 'recollect. Interrogated, When he signed his name to the said bond, did he observe 'any names of the granters of it, and did he know these granters? depones affirma-'tive. Interrogated, Does he recollect to have seen any of the said persons sign the 'bond, or did they, or either of them, acknowledge their subscriptions to him? de-'pones negativé to both parts of the interrogatory.'

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On advising memorials and the proof,—

Lord Glenlee observed, that where witnesses subscribe, without having seen the granter sign, or heard him acknowledge his signature, the statute did not render the deed null, but only subjected the witnesses to punishment. The deed might, no doubt, be liable to be challenged on the head of forgery, but if there be no such challenge, and it bears ex facie the statutory solemnities, it is a good deed. In the present case, however, it was unnecessary to decide this general point, because, as this was a cautionary obligation, and the signatures were admitted to be genuine, it did not require the solemnities of the statute.

Lord Craigie agreed with Lord Glenlee. There are cases where writing is essential as a solemnity, and others where it is not; among the latter of which is that of a cautionary obligation. If a party admit, or do not deny, an averment that he became a cautioner, that is sufficient to bind him; and therefore the obligation in question is effectual, without regard to the Act 1681. But even supposing it were a deed falling under the statute, I concur with Lord Glenlee. The statute prescribes a certain form of writing; but it does not declare, that if the witnesses do not see or hear the granter sign or acknowledge his signature, that it shall be null. All that it enacts is, that the transgressing witnesses shall be punished. I consider that parole evidence is inadmissible to contradict what appears on the face of the deed; but even if it were so, I am clear that the testimony of the instrumentary witnesses is not sufficient per se.

Lord Bannatyne coincided with Lord Craigie, as to the distinction between different kinds of deeds, and as to there being no necessity for the bond being tested, in terms of the statute. He had also great doubts as to the admissibility of the instrumentary witnesses, except to prove the signature of the granter in the event of its being disputed; but he thought it quite incompetent to examine them in order to contradict their own signatures.

The *Lord Justice-Clerk* was of opinion, that a proof that the witnesses neither saw the parties sign nor acknowledge their signature, was competent and relevant; but he thought it was not sufficient where it consisted merely of the evidence of the instrumentary witnesses. If the fact were proved by satisfactory evidence, he was of opinion that the deed would be null. The statute lays down a code of regulations for the authentication of deeds, and if any one of them were violated, then the deed would be null. The two clauses in the statute are not unconnected.

The first enacts, that no one shall subscribe but such as have seen the granter sign, &c. A witness, therefore, who has not complied with this enactment, is not a witness in terms of the statute. His Lordship however stated, that as the signatures were here admitted, and as the proof was quite unsatisfactory, he could not hold that the allegations of the cautioners were established. June 4. 1824.

Lord Robertson was of opinion, that as the subscriptions had not been made in terms of the statute, they were equal to no subscription at all, and therefore that the deed was null.

The Court, therefore, on the 25th January 1821, 'repelled the 'reasons of reduction, in so far as founded on the statute 1681; 'found the defenders entitled to the expenses incurred by them 'in discussing that part of the cause which related to that sta-'tute;' and found it unnecessary to investigate farther, or to decide the plea founded on a rei interventus; but allowed the appellants to give in a condescendence of what they averred in relation to the bond having been obtained by fraud and deception.*

Against these judgments the appellants entered an appeal, in support of which they maintained,—

1. That as the bond, at the date of its execution, had only been subscribed on the last page, it was not effectual; that there was no foundation for the plea, that as it consisted of only one sheet, the subscription on each page was not requisite; and that as the signatures on the other pages had been adhibited at a subsequent period, the objection could not thereby be removed.

2. That the interlocutors were erroneous, in so far as it was held irrelevant to allege that the bond had not been executed at the time and place there mentioned; for although the statute 1681 did not specially require that either of these circumstances should be mentioned, yet they were material and relevant to the inquiry as to whether the witnesses had seen the subscription, or heard it acknowledged.

3. That the bond was a deed falling under the statutes, and it was an erroneous construction of them to maintain, that if the requisites of the statute were not complied with, the witnesses were only liable to punishment, and that the deed was nevertheless effectual. And,

4. That as it had been repeatedly decided that the instrumentary witnesses were admissible, and as their testimony com-

* Not reported.

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pletely established the allegations, the deed ought to have been reduced.

On the other hand it was maintained by the Bank, that the interlocutors were well founded,—

1. Because the averment, contained in the 1st and 2d articles of the appellants' condescendence,—that some of the subscriptions to the bond were not adhibited at the times or at the places mentioned in the testing clause,—is utterly irrelevant in the present question. It is not essential to the validity of a deed that it should set forth the time and place of subscribing; the Acts 1681 and 1696 contain no provision whatever with regard to the date of deeds; and the appellants have not alleged that a false date was inserted from any fraudulent motive.

2. Because the averment contained in the 4th and 5th articles of the said condescendence, with regard to the subscriptions on the three first pages of the bond, are also utterly irrelevant. In a deed consisting only of one sheet, the subscription of the last page is sufficient to render it valid; and, therefore, there would have been no room for any objection under the Act 1696, c. 15. even if the three first pages had not been subscribed at all.

3. Because the averments contained in the 3d and 6th articles of the said condescendence, and in the additional condescendence, would not, if proved, constitute a nullity under the Act 1681, c. 5.; and are utterly irrelevant in the present case, where the deed is ex facie perfect in every legal solemnity, and where the granters do expressly acknowledge that their subscriptions are genuine. When an obligation, ex facie regularly executed and attested, is delivered to the obligee, the obliger stands pledged for its validity, and cannot be heard in a Court of Justice to plead that it labours under a latent defect, attributable to his own fraud, ignorance, or negligence.

4. Because the testimony of the instrumentary witnesses, even supposing that it might be competently resorted to, is not corroborated by any other evidence; and in itself by no means warrants the conclusion, that the witnesses did not, in point of fact, either see the parties subscribe, or hear them acknowledge their subscriptions.

5. Because, even if the writing were altogether informal, the cautionary obligation would be good against the appellants, who admit their subscriptions, and do not deny that the obligation set forth in the deed is precisely the obligation which they undertook.

6. Because the deed in question is a privileged deed, the par-

ties to it being many, and they being presumed to have been wit- June 4. 1824.
nesses to the subscriptions of each other.

The House of Lords 'ordered and adjudged, that the appeal 'be dismissed, and the interlocutors complained of affirmed, with 'L.200 costs; and it is further ordered, that the cause be re- 'mitted back to the Court of Session, to proceed therein as may 'be just and necessary.'

LORD GIFFORD.—My Lords, There is a case, which undoubtedly is one of very considerable importance—the case of Smith and others *v.* The Bank of Scotland. My Lords, this is the second time this case has been before your Lordships; and therefore I will take the liberty, as briefly as I can, of stating to your Lordships the circumstances of this case.

My Lords,—It appears that, in the year 1794, Alexander Paterson was appointed agent of the branch of the Bank of Scotland at Thurso, and that he then found security, as it is called in Scotland, to secure the Bank for his transactions in that character, to the extent of L.5000. It appears, that in the year 1804, having continued their agent up to that period, some of the sureties having in the mean time died, he was called upon to give additional security, to increase the security from L.5000 to L.10,000. He felt a little difficulty about it, and he wrote to the Bank, stating, that as his bond was most unexceptionable, he hoped the directors would not desire any thing more than to find the additional security, and that he would give a new security to the extent of L.5000 more as soon as circumstances would permit; and, accordingly, he proposed as his sureties for this additional sum of L.5000, the following gentlemen—Mr James Smith, Patrick Nicolson, George Swanston, Harry Bain, and John Sinclair Gunn. My Lords, accordingly the bond was returned, as it was supposed, regularly executed by those gentlemen; but there being found a supposed informality in the execution of it, namely, that they had only signed their names to the last page of the sheet upon which the security was written, and it being supposed in some quarter, that by the law of Scotland it was necessary that, though written on one sheet, the signatures should be affixed to each page; the bond was returned for that purpose, and this gentleman continued as the agent of the Bank at Thurso, from that period until the year 1806.

My Lords,—Mr Paterson falling into difficulties, and the sureties apprehending that a demand would be made upon them for this L.5000, they presented a bill of suspension, on the ground that their obligation extended only to the transactions of Paterson subsequent to its date, and that on those transactions he was not indebted to the Bank to the extent of L.5000. And they also brought an action of reduction, that is, an action to get rid of the security,—to reduce it, as it is termed by the law of Scotland, on the ground that the bond should

June 4. 1824. be set aside in toto, as not having been regularly executed according to the statutes of 1681, cap. 5., and 1696, cap. 15.; as also, upon the ground that it had not been duly delivered prior to Paterson's removal from the agency; and another ground on which they sought to have it reduced was, that it had been improperly or fraudulently obtained.

My Lords,—In this action, on its coming before the Court on the 15th of May 1806, they pronounced an interlocutor, repelling the reasons of reduction, and assoilzieing the defenders, and they found the pursuers liable in the full expense of extract, but in no farther expenses, and decerned: the result of that decision was completely in favour of the Bank of Scotland, that it was a valid and subsisting security. Against that there was a reclaiming petition; and the Court having still adhered to their former decision, the case was brought by appeal before your Lordships' House in the month of June 1813: and it appears by extracts which have been published in an appendix to some of these proceedings, containing the opinions at that time delivered by the Lord Chancellor, and another noble and learned Lord who assisted him upon that occasion, that they thought, upon the question of the delivery of the deed, it had been well delivered; but they thought there were other points in the case which had not been sufficiently considered by the Court below; and therefore they remitted the case back to the Court, their Lordships pronouncing the following judgment:—'That the deed in question, if not impeachable 'on other grounds, is to be considered as a delivered deed;' therefore they put an end to that question, 'and find, that the appellants in this 'case ought to be allowed to make proof of the circumstances by them 'alleged as grounds for reducing the deed in question, as unduly ob-'tained by concealment or deception, if the deed is valid according to 'the statutes 1681 and 1696; and it is therefore ordered and adjudged, 'that the cause be remitted back to the Court of Session in Scotland, 'to consider the same as to the validity of the deed, as the same may 'be affected by the said statutes or either of them, having regard to 'the nature of the deed; and that the Court do proceed in reconsider-'ing the same, as to them shall seem meet and according to their prac-'tice: And it is further ordered, that in case the said Court shall, upon 'such reconsideration, adjudge that the said deed is valid if duly ob-'tained, that the petitioners be allowed a proof of the circumstances 'by them alleged, as affording ground for reducing it as unduly ob-'tained as aforesaid: And it is further ordered and adjudged, that with 'these findings and directions, the Court do review the several inter-'locutors complained of in the said appeal, and proceed upon such 'review as to the Court shall seem meet and just.'

Your Lordships perceive, that by this remit the Court below were first to consider, whether this deed was properly executed within the meaning of these statutes: if they were of opinion it was properly executed, it was then ordered, that a proof of the circumstances should be allowed to the appellants in this case, to reduce the deed if they could,

on the ground that it had been unduly obtained, which was a perfectly different question, and could not arise if the deed was an invalid deed in other respects. June 4. 1824.

My Lords,—On this case going back, the appellants presented a petition to the Court, in the month of July 1813, which petition was remitted back to my Lord Pitmilly, who after hearing Counsel at considerable length on the subject of the remit, pronounced the following interlocutor:—'Appoints parties to give in memorials upon the point 'as to the validity of the deed, as the same may be affected by the 'statutes 1681 and 1696; and appoints the pursuer to give in the me- 'morial on his part, accompanied with a condescendence, in terms of 'the Act of Sederunt, of the facts he avers and offers to prove in sup- 'port of his averment.'

In obedience to this interlocutor, the appellants, who are the sureties for this gentleman, gave in a condescendence, setting forth that some of the subscriptions to the deed were not adhibited at the time and place mentioned in the testing clause; that no witnesses were present at the subscriptions on the three first pages; and in the sixth article they offered to prove, that Phineas Ryrie, one of the alleged witnesses to the whole subscriptions, except Harry Bain, neither saw the obligants subscribe, nor heard them acknowledge their subscriptions; that Stewart Ryrie, the other alleged witness, in Paterson's office folded down a paper, and asked him to put down his name as a witness, which he did without knowing or being told what the paper was. In the answers to this condescendence the respondents admitted, that the deed was originally subscribed only on the fourth and last page, and was afterwards returned to Paterson, with instructions that it should be subscribed by the co-obligants on all the pages, in presence of their respective witnesses. With regard to the other articles of the condescendence, the respondents denied that they were either true or relevant.

My Lords,—On this, mutual memorials were lodged, and on the 12th of May 1814 the Lord Ordinary pronounced the following judgment, which is the first interlocutor appealed from, now, to your Lordships. (His Lordship then read the interlocutor and the note of the Lord Ordinary. See ante, p. 267.)

My Lords,—Against this interlocutor mutual representations were given in, upon which the Lord Ordinary gave out the following note on the 15th of November. (His Lordship then read the note and relative order. See p. 268.)

My Lords,—The cause was accordingly called, and the Counsel for the respondents was heard upon their plea of rei interventus; but as the Counsel for the appellants was called to the Inner-House, the Lord Ordinary pronounced the following interlocutor on the 1st of March 1815:—'Appoints the procurator for the pursuers to give in an ad- 'ditional condescendence of what he asserts in page 8. of his repre- 'sentation, as to the subscribing witnesses neither having seen Nicol-

June 4. 1824. 'son subscribe, nor heard him acknowledge his subscription; and 'farther, appoints the procurator for the defenders to put in a conde- 'scendence on his part, of what he has stated this day at the Bar in 'support of his plea of rei interventus; both condescendences to be 'lodged on or before Tuesday next, with certification.'

My Lords,—In consequence of this, a condescendence was put in by the respondents, and an additional condescendence on the part of the appellants; and on the 19th of May the Lord Ordinary pronounced an interlocutor, also appealed from, which is to this effect:—'Finds, that 'it is proper and necessary, in carrying this remit into effect, to investi- 'gate by means of a proof of every averment made by either party, 'which may appear relevant in considering the validity of the deed, as 'the same may be affected by the statutes referred to: Finds, there- 'fore, that as the sixth article in the pursuers' condescendence still 'appears to the Lord Ordinary to contain a relevant and important 'allegation on the subject, and as the additional condescendence for 'the pursuers also appears to be relevant, a proof ought to be allowed 'before answer of the sixth article of the original condescendence, and 'likewise of the additional condescendence; and that, when the import 'of the proof comes to be considered, it will then be proper at the 'same time to determine with regard to the defenders' plea of rei inter- 'ventus, as to which a parole proof is not desired, and also as to the de- 'fenders' plea, that the pursuers are barred personali exceptione from 'objecting to the validity of the deed, and that the deed is to be con- 'sidered as of the nature of a privileged deed: On these grounds, and 'reserving the defences now alluded to to be disposed of when the proof 'comes to be considered, refuses the desire of both representations, and 'adheres to the interlocutor represented against; and of new allows the 'pursuers a proof of the sixth article of their original condescendence, 'and also a proof of their additional condescendence, and of all facts 'and circumstances relative thereto; and allows the defenders a con- 'junct probation thereanent.'

My Lords,—An application was then made to the Lord Ordinary to allow the oath of Stewart Ryrie, one of the instrumentary witnesses, who it was alleged was about to go abroad, to be taken to lie in retentis; and on the 19th of May an interlocutor was pronounced by the Lord Ordinary, by which he allowed the pursuers to prove by the oath of Mr Ryrie the whole facts and circumstances averred by them, and all other facts and circumstances relative thereto; and allowed the defenders a conjunct probation thereanent, and granted diligence against Mr Ryrie to the effect foresaid. My Lords, there was a representation with respect to the examination of Stewart Ryrie to lie in retentis, and after hearing Counsel upon that point, the Lord Ordinary pronounced as follows:—'The Lord Ordinary having heard parties' pro- 'curators, finds, that the said Stewart Ryrie's examination and evidence 'can only proceed and be taken as to the facts and circumstances allow- 'ed to be proved by the former interlocutors, and interlocutor of the

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'Lord Ordinary of yesterday's date upon advising representations and 'answers for the parties, and with this explanation allows the examina- 'tion of Stewart Ryrie to proceed.'

My Lords,—The appellants then gave in a representation against this interlocutor of the 20th of May 1815, praying his Lordship to authorize the commissioner to examine Ryrie, not only on the points admitted already to probation, but also on all circumstances relative to the rei interventus. Upon advising this representation, the Lord Ordinary pronounced an interlocutor of the 23d of May, which is also appealed from, by which he found, 'that the interlocutor of the 19th 'current, with regard to the examination of Mr Stewart Ryrie, in so 'far as it allowed the pursuers a proof of the whole facts and circum- 'stances averred by them by the oath of Mr Ryrie, instead of limiting 'the proof to the sixth article of their condescendence, and to their 'additional condescendence, proceeded from a mere mistake of the 'clerk in the hurry of business in writing out the interlocutor in the 'Court, as was explained by the Lord Ordinary at the calling of the 'cause next day, when the mistake was discovered while the ex- 'amination was going on;' then he finds that it was necessary, in order 'to enable the pursuers to examine Mr Stewart Ryrie, on the 20th 'current, on the sixth article of their condescendence, and on their 'additional condescendence, to pronounce the interlocutor of the 19th 'specially authorizing them to do so, and to seal up his deposition 'to lie in retentis; because, although a proof in general had been 'allowed of the same date of the sixth article of the condescendence, 'and of the additional condescendence, yet as it is still competent for 'the defenders to reclaim against the interlocutor allowing a proof, 'Mr Stewart Ryrie could not have been examined on the 19th with- 'out special authority from the Lord Ordinary, and the Lord Ordinary 'would not have authorized the examination without ordering it to be 'sealed up;' therefore he found, 'that the proposed examination of 'Mr Ryrie, with regard to the alleged rei interventus, would be alto- 'gether irregular, in respect no proof has been allowed or even de- 'manded by the defenders, who plead rei interventus, and no articulate 'condescendence of the facts alleged on either side have been given 'in; and in respect also that it is not so much as alleged by the pur- 'suers, that the facts which they offer to prove on this subject by the 'testimony of Mr Ryrie may not be known to many other persons. 'On these grounds, refuses the desire of the representation for the 'pursuers, and adheres to the interlocutor represented against.'

Against these interlocutors of the Lord Ordinary, in so far as they refused to allow a proof of those articles of the condescendence relative to the subscriptions on the three first pages of the bond, and the time and place of subscribing, the appellants gave in a reclaiming petition. On the other hand, the respondents gave in a petition against these interlocutors, in so far as they allowed a proof of the additional condescendence, and of the sixth article of the original condescen-

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dence. In the reclaiming petition on the part of the appellants it was maintained, that the words of the statute 1696, cap. 15. were quite general, and therefore applied to this deed. But upon advising this petition, with answers, the Court was of opinion that the provisions of the Act 1696 were applicable only to deeds written upon more than one sheet; and they accordingly pronounced an interlocutor refusing the petition, and adhering to the interlocutor complained of.

My Lords,—Against this there was a second reclaiming petition, but the Court, on the 4th of July 1816, pronounced the following interlocutor:—'The Lords having advised this petition, with the answers, 'refuse the petition, and adhere to the interlocutor complained of:' and thus the objection founded on the Act 1696 was finally overruled,—they thought there was no objection to this instrument, and that it did not fall within it. Then, my Lords, a petition was given in for the respondents, by which it was maintained, that the validity of the deed was not affected by either of the statutes 1681 and 1696; and farther, that, at all events, as Paterson had been continued in the agency, and had carried on the transactions of the office to a great extent on the faith of the bond in question, all challenge under the statute was barred rei interventu. Upon advising this petition, with answers, the Court being desirous that the facts on which the plea of rei interventus was founded should be ascertained, pronounced, on the 23d of February 1816, the following interlocutor, by which they appointed the parties 'to give in mutual condescendences, in terms of 'the Act of Sederunt, of the facts which they aver and offer to prove 'as to the alleged rei interventus, and that on or before the first box-'day in the ensuing vacation; and to give in mutual answers to the con-'descendences on or before the second box-day in the same vacation.'

My Lords,—That order was complied with, and their Lordships, on the 4th of July, pronounced another interlocutor, by which they allowed the parties 'to withdraw their mutual condescendences and 'mutual answers already given in by them, and appoint the Governor 'and Company of the Bank of Scotland to give in, on Saturday first, 'an articulate condescendence, in terms of the Act of Sederunt, of 'the facts which they aver and offer to prove in support of their plea 'of rei interventus, with a view to an issue on that point being sent to 'be tried in the Jury Court; and they farther appointed the sixth 'article of the condescendence for the pursuers, already in process, 'to be printed.'

My Lords,—This case came again before the Lords of Session, and on the 12th of November 1817 they pronounced this interlocutor. They allowed 'the depositions lying in retentis to be opened up and 'printed, reserving all objections against the same; and instead of an 'issue to be sent to the Jury Court as formerly proposed, before 'farther answer, allow the parties to bring what other proof they 'can adduce with regard to the execution of the deed in question,

'and the plea of rei interventus as stated in the papers; and to both 'parties a conjunct probation.' June 4. 1824.

My Lords,—After that, on the joint note of the parties, the Court pronounced as follows:—'The Lords having heard this joint note, 'circumduce the term for proving, appoint parties to print the proof 'led, and give in memorials thereon on the first box-day in the ensu-'ing vacation, under an amand of L. 4. Sterling; and reserve conside-'ration of the objection to the admissibility of the witness Paterson, 'until the memorials come to be advised.'

Finally, my Lords, it came again before the Court on the 25th of January 1821, when they pronounced this interlocutor:—'The Lords 'having resumed consideration of the remit by the House of Lords, 'with the mutual memorials for the parties, writs produced, proofs 'adduced, and whole proceedings in this cause, and advised the 'whole, repel the reasons of reduction in so far as founded on the 'statute 1681: Find the defenders entitled to the expenses incurred 'by them in discussing that part of the cause which relates to that 'statute; allow an account of these to be given in; and remit to the 'auditor to tax the same and report; and reserve to the parties all 'other claims with regard to expenses till the issue of the cause: 'Find it unnecessary to investigate farther, or to decide the plea found-'ed on a rei interventus: Find it also unnecessary to decide the question 'as to the opening of the sealed oath of Alexander Paterson; and, al-'lowing it to be received as evidence, appoint the pursuers to give in an 'articulate condescendence, in terms of the Act of Sederunt, of the 'facts which they aver and offer to prove as grounds for reducing the 'deed in question, as unduly obtained by concealment or deception, 'and that within twenty days, under an amand of L. 2. Sterling.'

My Lords,—It is against these interlocutors that the present appeal has been brought to your Lordships' House. The effect of these interlocutors is this, that the Court below have decided that the deed is not impeachable either under the statute of 1696 or the statute of 1681. My Lords, the question upon the statute of 1696 was abandoned at the Bar; it was agreed at last, as I understand, that the decision of the Court of Session was right as regarded the statute of 1696,—that this deed having been written on one sheet of paper, the statute was sufficiently complied with by being signed on one page of that deed. It is unnecessary, therefore, to trouble your Lordships with any observation upon it. Had it been a point contended for at the Bar, I should have had no difficulty in concurring with the Court below, that this deed did not fall within the statute of 1696; and if any doubt could have been raised upon the construction of that statute, I apprehend the amount of authorities, and the generally received opinion in Scotland on the construction of that statute, would be most important—that that current of decisions would establish the construction of that statute in Scotland, which I am sure your Lordships would have had great hesitation in disturbing, for we hardly know

June 4. 1824. what might be the consequence of disturbing decisions on the construction of that statute. If your Lordships had been of opinion these decisions had put a wrong construction upon that statute, of course it would have been the duty of the House to express that opinion. However, on the statute of 1696, I apprehend, all question was abandoned at your Lordships' Bar; and if not abandoned, I think your Lordships would have no difficulty in affirming the decision upon that question.

My Lords,—The other question is undoubtedly one of the highest importance, arising upon the construction of the statute of 1681; but, my Lords, before I state to your Lordships that statute, I cannot help remarking on the manner in which this question is brought before this House. It is admitted by these gentlemen, that they subscribed that deed: that is distinctly admitted. It appears, my Lords, that in consequence of that bond having been transmitted to the Bank of Scotland, this gentleman was continued in his agency, and till he fell into difficulties; and when these cautioners and principals were called upon to indemnify the Bank, not the least intimation was given by them of any informality in this instrument. The instrument was sent to Mr Paterson to be duly executed; and your Lordships will find it was returned to the Bank of Scotland in a letter written by Mr Ryrie, who was at that time engaged as a servant or clerk to Mr Paterson, who wrote this letter on the 11th of July 1804, for his employer Mr Paterson, to the secretary of the Bank of Scotland:—'I wrote you 'on the 4th current, and have your favours of the 23d ult. and 3d 'current; the first two bills L.33. 11s., the latter covered one ditto 'L.48. 6s. and my additional bond of caution, which I now enclose 'fully executed. I formerly thought it was only necessary to sign the 'last page:'—it having been returned in consequence of a supposed informality, in only the last page having been signed, that he and the other parties might affix their names to each page, in order that all doubt on that question might be removed. It is returned with this letter written by the clerk of Paterson, and signed by this Mr Stewart Ryrie, one of the attesting witnesses to that instrument which is returned executed. The Bank of Scotland conceiving, therefore, they had a valid security from this gentleman, continued to employ him as their agent and factor until his insolvency, and until several years after the date of this instrument, and then its validity is called into question upon this ground: and, my Lords, I cannot help thinking, with great deference to the Court below, whether it might not have been successfully argued below, that under those circumstances there was that personal exception to Mr Paterson, and to those cautioners, that having acknowledged the execution of the bond, and Mr Paterson being permitted, in consequence of the execution of that bond, to continue as agent of the Bank, it was not competent for them afterwards to set up this fraudulent execution, if it be an improper execution, this fraud on the part of the agent against the Bank, after they had

acted upon his security in the way I have stated to your Lordships. Undoubtedly, supposing your Lordships should be of opinion this interlocutor ought not to stand, the Court would let the Bank into any proof of circumstances which took place subsequent to that, to render these parties liable; but the first question which occurs to me is, whether it be competent for these parties to allege their own fraud, or their own neglect, or their own omission, or whatever it might be, against the Bank of Scotland, who had been lulled into security by the apparent execution of this instrument, and had, in consequence, permitted Mr Paterson to continue as their agent. I have thought it necessary to state thus much in the outset. This, my Lords, is not alleged to be a fraud, if the instrument be not duly executed; not any imposition practised upon the cautioners, or upon Mr Paterson; no undue conduct is alleged on the part of the Bank of Scotland with respect to the execution. I throw out of my consideration another allegation in this summons of reduction, upon which no decision has yet taken place, nor any proof—I mean that of undue means used towards these sureties, and towards Mr Paterson, in procuring this instrument, which is a subsequent question, if your Lordships should be of opinion that, under the circumstances, this instrument ought not to be impeached on the other grounds; but I say, as far as the execution is concerned, it is proved to have been sent down to Mr Paterson on the part of the Bank, that he and those cautioners might duly execute it; the bond was returned to the Bank apparently duly executed; and therefore no fraud, no imposition, no negligence was practised on the part of the Bank towards these gentlemen with respect to the execution of the instrument.

But then, my Lords, they say that, by the effect of the statute of 1681, they have laid sufficient evidence before the Court below, to shew that this instrument was not duly executed, and that therefore it is a nullity; and that consequently, whatever were the other circumstances, it cannot be enforced.—My Lords, I say this is a most important question, not only as affecting this case, but all the titles in Scotland; for the question is neither more nor less than this, When parties have received from other parties grants and conveyances of estates, apparently duly executed, that execution being intrusted to the granter, no fraud or imposition practised upon him, Whether it shall be competent, after a lapse of years, for persons who have appended their names to those instruments, thereby attesting that they have seen those instruments duly executed, afterwards to come forward, and by the testimony of those very persons themselves, to destroy the validity of those instruments on which the parties have been enjoying their estates, or giving credit to their agent? I say, my Lords, this is a most alarming question to all possessing property on titles in Scotland. If they have made it out by satisfactory evidence, undoubtedly it is not the province of your Lordships to make laws; we can only adjudicate upon the law as it is; and if there be a defect in the law,—that must be remedied, not by your

June 4. 1824. Lordships sitting in your judicial character, but by your Lordships sitting in your legislative capacity, as a branch of the Legislature.

Now I will call your Lordships' attention shortly to the statute of 1681, and the anterior statutes on the subject of the execution of deeds.—My Lords, one of the earliest statutes upon this subject is the statute of 1540. The title of the Act is, 'That na faith be given to 'evidentis selit, without subscription or notarie.' 'Also, it is statute 'and ordainit, that because menys selis may be aventure be tint, quhair-'throw gritt hurt may be generit to them that aw the samin, and that 'mennis selis be fenzied or put to writings efter thair deceis, in hurt 'and prejudice of our Soveraine Lorde's leiges, that therefore na faith 'be given in tyme cuming, to any obligation, bond, or uther writing 'under an sele, without subscriptione of him that awe the samin, and 'witnesses, or ellis, gif the party cannot write, with the subscription of 'ane notar thairto;' and undoubtedly the object of this and the subsequent statutes, is to protect parties supposed to execute deeds against frauds which may be practised against them.

The next is the statute of the year 1579, which is entitled, 'Anent 'the subscription and inserting of witnesses, in obligations and other 'writs of importance.' 'It is statute and ordained, that all contractes, 'obligations, reversiones, assignations, and discharges of reversiones, 'or eiks thairto, and generally all writes importing heritable title, or 'otheris bondis and obligations of great importance, to be made in 'tyme cuming, sall be subscrivet and seillet be the principal parties, 'gif they can subscryve, otherwise be twa famous nottaries, befor 'four famous witnesses, denominated be their special dwelling-places, 'or some other evident token that the witnesses be known, being pre-'sent at the tyme, otherwise the saides writtes to mak na faith.'

Then comes the statute on which the objection is taken, the statute of 1681, which I will take the liberty, as it is not very long, of reading to your Lordships:—'Our Sovereign Lord, considering that, by the 'custom introduced when writing was not so ordinary, witnesses in-'sert in writs, although not subscribing, are probative witnesses, and 'by their forgetfulness may easily disown their being witnesses;'—your Lordships see it was to guard against the forgetfulness of witnesses,—'for remeid whereof, his Majesty, with the advice and consent of the 'estates of Parliament, doth enact and declare, that only subscribing 'witnesses in writs, to be subscribed by any party hereafter, shall be 'probative, and not the witnesses insert not subscribing; and that all 'such writs to be subscribed hereafter, wherein the writer and witnesses 'are not designed, shall be null.' Now your Lordships perceive, that in this Act of Parliament it is expressly enacted, 'that writs and 'deeds of this sort, to be subscribed hereafter, wherein the writer and 'witnesses are not designed, shall be null, and are not suppliable by 'condescending upon the writer or the designation of the writer and 'witnesses;' so that undoubtedly it is necessary, in instruments within this Act of Parliament, that the writer, that is, the maker of the instru-

ment, and the witnesses, shall be designed in the instrument, otherwise it shall be null. Then it goes on: 'It is further statute and 'declared, that no witness shall subscribe as witness to any parties' subscription, unless he then know that party, and saw him 'subscribe, or saw or heard him give warrant to a nottar or nottars 'to subscribe for him, and in evidence thereof touch the nottar's 'pen, or that the party did, at the time of the witness subscribing, 'acknowledge his subscription, otherwise the said witnesses shall be 'repute and punished as accessorie to forgerie.' Now, as I have already stated to your Lordships, it is obvious, that the object of this Act of Parliament was to secure, as far as possible, the parties who appear to have executed an instrument against any fraud which might be practised against them; the object therefore of the Act was in favour of those persons; and undoubtedly, if the evidence in this case is to cut down the execution of an instrument, it will, instead of protecting against fraud, be the means of producing the greatest frauds, not on the parties executing deeds, but on persons acting on the faith of deeds appearing ex facie to be regularly executed: 'And seeing 'writing is now so ordinary, his Majesty, with consent foresaid, doth 'enact and declare, that no witnesses but subscribing witnesses shall 'be probative in instruments of seising;'—and so on: 'And that 'none but subscribing witnesses shall be probative in executions of 'messengers, of inhibitions, of interdictions, hornings or arrestments,' —and so on: 'And that in all the said cases the witnesses be de-'signed in the bodie of the writ, instrument, or execution respective, 'otherwise the same shall be null and void, and make no faith in 'judgment, nor outwith.'

Having read to your Lordships the Act of Parliament, I will now call your attention to the instrument in question, which is set out in the appendix to the proceedings below. It is a bond by Mr Alexander Paterson, the agent of the Bank of Scotland, and of other gentlemen, whose names I have mentioned to your Lordships, five in number. It is unnecessary for me to trouble your Lordships with the contents of it, but the conclusion of it is in these words:—'In witness 'whereof, these presents are written upon this and the preceding 'pages of stamped paper, by Robert Clark, clerk to Alexander Keith, 'writer to the signet, and subscribed as follows:—videlicet, by us 'the said Alexander Paterson, James Smith, Patrick Nicolson, 'George Swanston, and John Sinclair Gunn, all at Thurso the 22d 'day of June 1804 years, before these witnesses, Phineas Ryrie, 'cooper in Thurso, and Stewart Ryrie, clerk to me the said Alexander 'Paterson; and by me the said Henry Bain, at Wick the 23d day of 'June, year foresaid, before these witnesses, James M'Phaul and 'Francis Quoys, both merchants in Wick:' Then there are the signatures of the parties, and then there are signatures of those four persons, as witnesses to the signatures, 'Phineas Ryrie, witness, Stewart Ryrie, 'witness, James M'Phaul, witness, Francis Quoys, witness:' And then,

June 4. 1824. my Lords, as I have stated to your Lordships, this bond, so upon the face of it duly executed in terms of the statute, the Bank of Scotland being in utter ignorance that any informality had taken place in the execution of it, is transmitted in that letter I have read by Mr Paterson to the Bank of Scotland: but now they say, that notwithstanding ex facie it appeared to be duly executed, they have a right to impeach this instrument, on the ground that the requisitions of the statute were not complied with.

My Lords,—A great deal of argument has been employed, and it has been very ably urged, that supposing it had been established by evidence that this bond had not been duly executed according to the provisions of this statute, still the statute has not expressly made the instrument null and void; and undoubtedly, in the terms of this statute, it does not, as applied to this branch of it, make the deed in express terms null;—it makes it null, if the party executing it, and the witnesses, are not designed duly in the instrument, for it expressly enacts that the deed shall be null; but when it goes on to enact, 'that 'no witness shall subscribe as witness to any parties' subscription, un-'less he then know that partie, and saw him subscribe, or saw or heard 'him give warrant to a nottar or nottars to subscribe for him, and in 'evidence thereof touch the nottar's pen, or that the partie did at 'the time of the witness's subscribing acknowledge his subscription, 'otherwise the said witnesses shall be repute and punished as ac-'cessorie to forgerie;' undoubtedly, in that part of the Act, there is no express declaration, that if they did not know the party, or see him subscribe, and so forth, the deed shall be null; there is no express enactment upon that subject: and undoubtedly a great difference of opinion appears to prevail in the Court below on the construction of that statute; various cases have been cited, from which there appears to be a fluctuation of opinion.

My Lords,—A case may arise in which it may be necessary to discuss that question; but there is an anterior question in this case, whether the evidence is sufficient and satisfactory that the execution did not take place. My Lords, I have taken the liberty of going minutely through this case, which is not usual in a case where it is my intention to conclude with moving the affirmance of the judgment; and I have done it because it is a case of great importance. It was a question competent to the Court below, and is now competent to your Lordships, whether the evidence does establish satisfactorily to your Lordships' minds, that sixteen years ago this fraud was committed, (for a fraud it was upon the Bank of Scotland, if this deed was not duly executed); where this fraud is set up by the party executing the deed, not that he himself was defrauded, not that he himself was deceived, but that this sort of conduct took place with a view to defraud the Bank of Scotland; and where the parties, at the time, acknowledged that they did duly subscribe that which they affected now to state they did not in the manner required by the Act. The evidence ought,

in my opinion, to be overpowering, supposing the Act to allow of the construction contended for, before a Court upon such evidence sets aside a deed; for the decision must be productive of the greatest mischief. It would, I am persuaded, produce a great alarm in Scotland, if parties, on such a case as this, could be deprived of the benefit they are supposed to derive from deeds properly executed.

My Lords,—Who are the witnesses in this case? The only witnesses are the parties who under their own hands have stated, that they saw these gentlemen subscribe, and who are designed in the terms of these Acts of Parliament—I say, that witnesses under such circumstances, if they are competent witnesses, are to have their evidence looked at with the greatest suspicion; and your Lordships ought to be fully satisfied, not only by their evidence, but by corroborative proof. It ought to be most overwhelming evidence before your Lordships attend to such testimony. With respect to Mr M'Phaul, one of the witnesses, he is unfortunately dead: he cannot be produced by the Bank of Scotland to contradict Mr Quoys. Mr Quoys chooses to say,—I will read his deposition to your Lordships,—he says, 'that his name, 'appended as a witness, is his own writing, to the best of his knowledge.' This is certainly deponing in a most extraordinary manner. He is asked to depone, 'whether the words, "Francis Quoys, witness," appearing at 'the said bond, is the proper hand-writing of the deponent? depones 'affirmative, to the best of his knowledge.' Why, my Lords, he could not have any doubt whether it was his writing or not,—the fact could be answered, ay or no, by any honest man—he could know, without any qualification, whether it was his writing or not. 'Can the witness 'mention the day, and at whose request he subscribed as witness to the 'said bond? depones, that he cannot condescend upon the day that 'the said bond was signed by him as witness thereto, but that his sub-'scription was adhibited thereto at the desire of Mr Paterson. Can the 'witness from recollection say, whether it was in June or July that he 'so subscribed *witness* to the said bond? depones negative. Where 'did witness subscribe the bond? depones, that it was subscribed by 'him in the shop of William Bain and Company of Wick, of which he 'was then a partner.' This gentleman, then a partner with this Mr Harry Bain, subscribes it in the shop of William Bain and Company. He is asked, 'whether there was any one present upon that occasion?'—he says, 'there were several people then in the shop, but he cannot tell 'their names.' He is then asked, 'was Mr James M'Phaul present on 'that occasion? Yes, he was. Did Mr M'Phaul subscribe the bond 'also as a witness, at the same time with the deponent? he answers in 'the affirmative. At whose request did Mr M'Phaul so subscribe? he 'depones, that he cannot say for certain. Then he is asked, was Mr 'Henry Bain, whose subscription the deponent is said to have wit-'nessed, present on that occasion? depones, that he does not recollect 'whether Mr Bain was then present among the many persons who were 'then in the shop: he did not remark him as having been then present.

June 4. 1824. 'Did the deponent, previous to his signing the bond as above, see Mr 'Harry Bain adhibit his subscription to it? depones negative. Did Mr 'Bain, at any time previous to the deponent subscribing as a witness, 'acknowledge to him that he had subscribed the bond? depones nega- 'tive. Did the deponent, at any time previous, or at the time of sub- 'scribing as a witness, shew Mr Bain the bond? he replies negative,'— and so forth.

Now, my Lords, a remark has been made—and I think in such a case the utmost criticism is to be employed on such a deposition—he only recollects that he did not see Bain subscribe; he might have heard him acknowledge his subscription at the very instant he was subscribing it, which would have done; but, my Lords, without going into this minute criticism, here is Mr Quoys—a single witness after the death of the other witness Mr M'Phaul, Mr Quoys having subscribed his own name—comes, after a lapse of many years, and depones undoubtedly, in the year 1818, negatively to Mr Bain's (supposing his testimony goes to that effect) subscribing in his presence; then, I say, it was quite competent for the Court to say, under those circumstances, No, we will, in acting on the credit of Mr Quoys, rather give credit to his signature at the time, than to his testimony at the expiration of so many years, and after the death of the other witness, who might have contradicted him as to that fact, and whose attestation shews he was present: and I think, therefore, the Court have done perfectly right in saying, We think much more credit is due to the attestation of this gentleman to this bond, acted upon by Mr Paterson and the cautioners, than if we were, at the distance of 14 or 15 years after the transaction, to suffer this person to come forward and prove his own fraud, and his own improper conduct, by stating that he had affixed his name to that which was an untruth. The Court below have thought that they were fully justified, as I think they were, in not permitting the testimony of this single witness, particularly when uncorroborated by any collateral circumstance, to cut down attestation as far as regards Mr Harry Bain.

Then, my Lords, with respect to the other part of this transaction, you have the testimony of Mr Stewart Ryrie. Independently of the circumstances connected with the execution of this bond, when you look at Mr Stewart Ryrie's subsequent conduct with respect to this gentleman Mr Paterson—independently of his coming now to negative his own subscription to the instrument—the greatest suspicion attaches to the credit of that gentleman; for he does admit that, subsequently, in his conduct with Mr Paterson, he was a party to the concealment and the fraud practised by this person, Mr Paterson, on the Bank of Scotland. I say, therefore, my Lords, the testimony of this Mr Stewart Ryrie is to be looked at with the greatest suspicion. He says, with respect to Mr Nicolson, that he did not see Nicolson subscribe the bond. 'Interrogate, If he saw Patrick Nicolson subscribe the said 'bond? depones, that he did not. Interrogate, If before the witness 'adhibited his subscription, or at the time of adhibiting his subscrip-

'tion, he heard Mr Nicolson acknowledge that the words "Pat. 'Nicolson" were written by him? depones, that he did not.' Your Lordships will perceive that they put the question to him directly, 'If before the witness adhibited his subscription, or at the time?'—which was not the question put to Mr Quoys;—he depones, that he did not hear Mr Nicolson acknowledge that the words 'Pat. Nicolson' were written by him. 'Interrogate, Whether Phineas Ryrie, whose 'name the deponent now sees at the bond as an instrumentary witness, 'saw the obligants subscribe, or heard them acknowledge their sub-'scriptions? depones, That Phineas Ryrie subscribed the bond before 'the deponent adhibited his subscription; and he is certain, that when 'Phineas Ryrie so subscribed it, no person was present except the de-'ponent.' Then he goes on to state, 'That the bond always remained 'in the deponent's custody, except on two occasions, when it was taken 'by Mr Paterson in order to be subscribed by Patrick Nicolson and 'Harry Bain, on the fourth page; and depones, That after the bond 'had been subscribed by all the parties except Harry Bain, the depo-'nent one evening called Phineas Ryrie into the bank-office in Thurso, 'and there Phineas Ryrie adhibited his subscription;' and so forth. Then he goes on to state some other facts relative to this instrument. And with respect to Mr Phineas Ryrie he states, 'That he did sub-'scribe a bond of caution, granted by Mr Paterson and others to the 'Bank of Scotland, as a witness; but he did not read the said bond, nor 'was he acquainted with its contents.' Then he is interrogated, 'At 'what period did he adhibit his subscription to the said bond? depones, 'That he cannot recollect the precise day, but thinks it may have been 'towards the end of June or 1st of July 1804. Interrogate, In what 'place did he subscribe the said bond? depones, That he subscribed 'it in the banking-office in Thurso. Interrogate, Was Stewart Ryrie, 'Mr Paterson's clerk, or any other person present with him when he 'signed the bond? depones, That the said Stewart Ryrie was then pre-'sent, and no other person.' Then he is asked, 'Does he recollect 'who were the parties obligants in the said bond? depones, That he 'does not recollect. Interrogate, When he signed his name to the 'said bond, did he observe any names of the granters of it, and did he 'know these granters? depones affirmative. Interrogate, Does he re-'collect to have seen any of the said persons sign the bond, or did they, 'or either of them, acknowledge their subscriptions to him?'—Now, my Lords, it has been observed, the question is put to him, 'Does he 'recollect to have seen any of the said persons sign the bond, or did 'they, or either of them, acknowledge their signatures to him?' and the answer is negative to both parts of the interrogatory, 'that is, that 'he does not recollect to have seen any of the said persons sign the 'bond:' And to the subsequent part of the question, as to the fact whether, to his recollection, they, or either of them, acknowledged their subscriptions to him—that they did not. Cases have been mentioned to shew that the mere non memini should not be sufficient to cut down an

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instrument to which the party has actually affixed his name as a witness; and this gentleman's testimony on that subject only amounts to non memini. But with respect to this testimony, as well as that of Mr Stewart Ryric, I think, under the circumstances of this case, their testimony is to be looked at with the greatest suspicion, in the absence of any proof, and in contradiction to their own signatures so many years ago. I am of opinion that the Court were fully justified, with respect to their testimony, as well as that of Mr Quoys, in rejecting that testimony, seeing that the parties have acknowledged their subscriptions; that they have done perfectly right in saying, that the bond is not impeachable upon that ground.

I have been anxious to state to your Lordships, at much greater length than perhaps I ought to have done, the facts of this case, because undoubtedly I did think it one of the most important cases on which I have had the honour of delivering my sentiments since I have attended your Lordships' House; for it is material not only in a case like this, but, with reference to the validity of every instrument in Scotland, it is of the utmost moment. There is remaining that question on which I do not pretend to give an opinion to your Lordships; I mean upon the construction of the statute of 1681, which, whenever the case shall fully call for it, is a question undoubtedly deserving the fullest consideration; I mean whether that statute does, under the circumstances there stated, actually nullify the deed, or whether it only leaves the parties to the punishment of being accessaries to forgery,—if parties can be accessaries to forgery where no forgery is committed, which is another very important question in the cause,—the parties themselves admitting this is their own instrument, and that they executed it with their eyes open. But leaving these important questions to be decided by your Lordships, or by the Court below, whenever a case shall call for it, whatever may be the result of the opinion of the Court on the construction of these statutes, it is sufficient for the present occasion to state, that the evidence in this case has not been satisfactory to my mind, as it was not to the mind of the Court below, as proving that these deeds were not executed with all the formalities required by the statute: and I must, under these circumstances, move your Lordships to affirm the judgment of the Court; and, considering the nature of the question, considering the nature of the proceedings complained of, by parties who executed this deed, with a full knowledge of the contents, I mean as far as this question is concerned, who appended their names to this instrument, and who now come forward, after a lapse of a great many years, through the medium of those very witnesses who at that time solemnly attested the execution of, by putting their names to, the instrument, solemnly to deny that they had seen that done which they attested by their subscription—I do think, considering the nature of the objection raised by this appeal, that your Lordships ought to indemnify the respondents for the costs they have been put to in having this case brought to your Lordships' Bar.

My Lords,—The case undoubtedly must go back again, because there is that other question behind, whether the deed has been obtained by undue means? which I understand is left quite open to the parties after the proceeding on the validity of the instrument shall have been disposed of. The simple question now is, Whether there is sufficient evidence to cut down this deed under the statutes of 1681 and 1696? The case must go back for the appellants to see whether they can make any thing of the other reason of reduction, namely, that they were deceived by the nature of the instrument, and the manner in which it was procured from them. That question undoubtedly will be open on the remit; but as far as the present appeal is concerned, I shall propose to your Lordships that this interlocutor be affirmed, with costs. June 4. 1824.

Appellants' Authorities.—Stevenson, Nov. 1682, (16,886.); Blair, Feb. 12. 1648, (13,942.); Campbell, Nov. 1698, (16,887.); Syme, Nov. 23. 1708, (16,713.); Walker, June 8. 1716, (16,896.); Young, Aug. 2. 1770, (16,905.); Frank, July 9. 1793, (16,882.); Swany, Dec. 12. 1807, (No. 7. App. Writ); Richardson, Nov. 28. 1811, (F. C.).

Respondents' Authorities.—Valence, July 14. 1709, (16,930.); Ogilvie, Feb. 21. 1711, (Ib.); M'Downie, July 1. 1712, (16,931.); 3. Ersk. 2. 14.; 1. Bank. 2. 45.—Robertson, Jan. 7. 1742, (Elchies, voce Writ); Williamson, Dec. 21. 1742, (16,955.); M'Donald, Feb. 14. 1778, (16,942.); Peter, Feb. 19. 1795, (16,957.); 4. Burrough, 2224.; Bell on Testing Deeds, 246. and cases there.

A. MUNDELL—J. CHALMER,—Solicitors.

(Ap. Ca. No. 49.)

MOSES GARDNER, Appellant.—*Clerk—Cranstoun—Adam.* No. 39.

DONALD CUTHBERTSON, (Mennon's Trustee), and Others, Respondents.—*Solicitor-General Wetherell—Greenshields.*

Bankrupt—Sequestration—Heritable Creditor.—Circumstances under which, (reversing the judgment of the Court of Session), a creditor holding a bond and assignation in security of a lease, for payment of a debt due to him by a party whose estates were afterwards sequestrated; and who was ranked, and appointed a commissioner, and received payment of his debt, by a transaction with the other creditors, on the footing of being an heritable creditor, was found not liable for the expenses of the sequestration.

IN 1801, John M'Luckie, Walter M'Alpine, Moses Gardner, and John Mennons, acquired right, in equal shares, to a lease of the coal in the lands of Eastmuir, near Glasgow, together with the whole machinery, and entered into partnership for the purpose of June 9. 1824.

1ST DIVISION. Lord Gillies.