judged, that the parts of the interlocutors complained of, by which the respondents are decreed to pay to the appellants the sums of £82, £63, and £140, together with the expense of extracting the decree, be affirmed; and that the said interlocutors be in all other respects reversed.

For the Appellants, *Sir J. Scott, William Adam.*
For the Respondents, *W. Scott, J. Anstruther.*

NOTE.—The result of this interlocutor was to sustain the claims made for demurrage at 10s. per ton, and also part of the claims made for damages, such as the premium of insurance on £1000 short insured, and also for that insured; the sums for unloading and reloading the vessel; the amount of repairs for the vessel, and the harbour and other dues.

[M. 16853.]

Mrs. AGLIONBY or LOWTHIAN, Widow of RICHARD LOWTHIAN, Esq., - - } *Appellant;*

JOHN MAXWELL and Another, trustees of GEORGE ROSS, - - - } *Respondents.*

House of Lords, 11th June 1794.

SETTLEMENTS—EXECUTION OF SETTLEMENTS BY NOTARIES—SOLEMNITIES REQUISITE—INCOMPETENT WITNESS.—A deed of settlement and other relative deeds, were executed by a person blind, and partly deaf, by the aid of notaries. The deeds, before being signed, were not read over to him, so as to make him understand, or to be heard; nor were they read over to him in the presence of the witnesses, nor was any mention made in the notaries' docquet, that they were so read. Held, the deeds of settlement void and ineffectual in law. Also, held that the agent for the appellant in this cause, and who had also been agent for her deceased husband, was an incompetent witness for her.

This was a reduction brought of certain deeds of settlement, executed by Richard Lowthian in favour of his wife, settling his whole heritable and moveable estate in Scotland, worth £70,000, on her and her heirs and assigns. He

1794.

LOWTHIAN v. MAXWELL,&C

had also heritable estate in England, which was conveyed to her in liferent, and to the respondents as trustees, for George Ross, his heir at law. He died without issue in May 1784, survived by his wife, who entered into possession.

By his marriage contract, the deceased had made ample provision in favour of his wife, which she thought proper to conceal, and pretend ignorance of. Besides, he had executed a settlement in 1774, in favour of George Ross, which the appellant swore had been destroyed. About this date Mr. Lowthian became so blind, as scarcely to discern light; so deaf as scarcely to hear, and his faculties of mind were also impaired. All his settlements, until about this time, and prior to 1776, were in favour of his nephew, George Ross. Subsequent, however, to this, the appellant was in use to direct her husband's men of business, who were only continued as they complied with her will. In George M'Kenzie, writer, Dumfries, she found an assiduous agent, and on his death, his brother Simon was employed. By them the several settlements brought under reduction were executed, at the request, and on the employment of the appellant, and which set aside the previous settlements in favour of George Ross. The grounds of the reduction were: 1st, That the deceased was in dotage, and not of a sound disposing mind, so that he was incapable of understanding the effect of the deeds. 2d, That being both blind and deaf, the deeds were not executed with all the solemnities which in such a situation were necessary and requisite in law. 3d, That he was fraudulently imposed on and deceived in their execution, he not knowing their true import, and not understanding that they disposed of so much of his fortune to his wife.

The case went to proof. Mental incapacity was not much rested on, but facts were proved, which showed that his wife, or some other, managed business for him. An objection was taken to a witness adduced for the appellant, namely, her own Edinburgh agent in this cause, who had also been agent for her husband, to prove his perfect capacity, on the ground that he was, as agent, inadmissible to prove any fact previous to the raising of this cause. The objection to his testimony was sustained by the Court, in respect he was agent for the appellant in this cause. The third ground was established by evidence of a misunderstanding which existed between Mr. Lowthian and his wife, as to the import of these deeds, which was attempted to be explained

by a letter from the agent who drew them out. Also by an unwillingness shown on the part of Mr. Lowthian to sign the last deed.

But the chief ground rested on was, that the deceased, being blind and deaf, the deeds were not read over to him in presence of the witnesses, in a way and manner so as to make them be sufficiently understood; and that the notaries' docquets did not bear that they were read over to the deceased in presence of the witnesses before being signed.

The deeds themselves afforded evidence that the notaries' docquet did not mention that they were read over. And inregard to the actual reading of the deeds, the evidence was conflicting. But the points were, supposing them to have been read: Were they read in such a manner as to be understood by Mr. Lowthian? and, 2d, Whether they were read in presence of the testamentary witnesses?

The evidence as to the first general settlement in favour of the appellant, was that the deed was read over very rapidly,—one of the witnesses stated, so rapidly, and in so low a tone of voice, as that Mr Lowthian could not comprehend it, although the other witnessess thought that the deceased understood it. Again, as to the subsequent general settlement, one of the notaries swore he *did not recollect* in what manner it was read over, although it was read completely and distinctly, and Mr. Lowthian comprehended it. Two of the witnesses recollected nothing about it; but the other two say that it was read over in their presence distinctly. As to a later deed,—one of the notaries to the deed swore, that it was purposely read over in a way that Mr. Lowthian might not understand it. In particular, when he came to Mrs. Lowthian's name, and also as to some other legacies, it was read in a low tone of voice. One witness to the signing of the deed was dead. Another says the deed was read hastily, and in a way the deceased, he thinks, could not understand it, and the fourth corroborated him.

But the argument which the appellant urged was, that the reading of the deed in the presence of the notaries and witnesses, was not a statutory solemnity,—that all the statutory solemnities were complied with,—that the statute 1681, c. 5, only declared that the witnesses be witnesses to the subscription of the notary, and also to the command given him. That they are not bound to know the contents of the deed, but called to attest the notary's docquet: That the two essentials are two notaries, and four witnesses,

1794.

LOWTHIAN
v.
MAXWELL, &c.

who see and know the party whose deed is to be authenticated; and, 2d, That they should hear and see him grant and give warrant to the notaries to subscribe for him, and in token thereof, see the granter touch the notary's pen. That all these having been complied with, and the notaries' docquet having mentioned all these, the deeds thus executed, with the full solemnities, ought not to be allowed to be set aside by parole evidence of facts, which the statutes do not declare necessary, *de solemnitate.* If the reading of the deed in presence of the notaries and witnesses, be not a requisite of the statutes, so neither could the mentioning of it in the notaries' docquet be a requisite. And it was a question of grave moment to the law, whether any of the notaries and witnesses, after having authenticated these deeds in the usual manner, and had legally attested that every thing was done "*rite et solemnitur actum,*" could be admitted as evidence to contradict and destroy what they had so solemnly authenticated. They humbly maintained that they could not be so admitted, and therefore, ought to have been *in toto* rejected.

On the other hand, it was maintained, that distinction was to be taken between statutory solemnities, and the solemnities which the law, over and above these, have declared to be essential in certain situations. That law has declared the reading of the deed executed by notaries in their presence, and the presence of the witnesses, to be an essential; and declaring it so, it also declared, that whatever was done *de solemnitate*, should be mentioned in the notary's docquet. That assuming the proof to be conflicting and doubtful on the point of the deeds being read over in such a way as not to make them understood to the deceased, yet the fact of reading of them not being mentioned in the docquet, was decisive against the validity of the deeds. But the proof, in reality is strong and positive, that they were not read over in such a way as to be understood. Some of the witnesses and notaries do not recollect, but want of recollection will not do. They must speak positively to their own act, otherwise the deed will not stand; but such of them who do recollect, are clear that the deeds were read rapidly, and in a low tone, to a deaf man.

The Lords sustained (of the date 3d July, 1792), "The "reasons of reduction of the settlements, dispositions, as- "signations, and other deeds, bearing to be executed by the "deceased Richard Lowthian of Staffold, as generally and

" particularly libelled: As also find the destination or sub-
" stitution conceived in favour of the defender Mrs. Sarah
" Aglianby, and her heirs, contained in the assignations, bonds,
" and other writs or securities libelled, are void and null, and
" to be held *pro non scriptis*, in as far as they might have
" the effect of vesting the same in, or carrying the succession
" thereof in favour of the said defender, to the prejudice of
" the heirs at law."

They also, of same date, refused a reclaiming petition as to the admissibility of Mr. Currie. On reclaiming petition against both, the Court adhered. * Nov. 20, 1792.

---

* Opinions of Judges:

LORD PRESIDENT CAMPBELL.—" In considering this important case, we must attend:

" 1. To the nature of the challenge, and the requisites of the law in executing the deeds of a blind man, who is also partly deaf.

" 2. To the circumstances attending the execution of these deeds, the actual situation of the testator, and the import and effect of the deeds themselves.

" 3. To the conclusions in law that ought thence naturally to arise.

" The deeds of settlement are challenged as unduly obtained from an old man, blind and dull of hearing, and on the ground of not being properly executed.

" The granter was not destitute of capacity to make a will; and it is admitted that he was not entirely bereaved of understanding, but only reduced to a weak state by infirmity and old age, so as to become an easy prey to those who were about him.

" How far importunity, and other circumstances denoting influence, are relevant, see Swinburn's Treatise on Testaments, p. 77, &c. Voet. lib. 28, tit. 1, § 10. Julius Clarus, lib. 3, quest. 37, &c.

" The material points to be attended here, are the blindness and deafness, and what precautions are necessary in the execution of deeds by a person in those circumstances, and how far these have been observed in the present case.

" When a deed is to be executed by a person in health, possessed of the faculties of mind, and having the organs of sense entire, if the testing clause be regular, everything fair will be presumed, unless the contrary be proved. When witnesses are called in, and desired by the party himself to attest his subscription, they cannot reasonably doubt that a person who can read or hear, and who has all his senses about him, has actually read or heard, has given the necessary instruction to his man of business, and is satisfied that the writing is right.

1794.

LOWTHIAN
v.
MAXWELL, &c.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—The deeds in question are *ex facie*, regular, and being executed with all the solemni-

---

"But if the party whose deed is to be attested is, by disease or other circumstances, rendered unable to see and hear in the usual manner, or can only do so in part, or with difficulty, and, in short, must trust to the fidelity of others, it is plain, both in reason and in law, that some further precautions are necessary. It ought to appear from evidence, that the deed was his own voluntary deed, and sufficiently understood, that instructions were given to make it out in these terms, and that there was no deception, but everything explained and known to the party and all present.

"Presumptions must always give way to truth; and as it is certain that a blind man cannot read, there must be positive evidence that the paper which he is to sign, or rather, which is to be signed for him, has been read and explained to him.

"In the execution of a deed of settlement, or any writing of importance, although he might be able to adhibit his scrawl (signature?) it is much more fit, and the law expects, that two notaries and four witnesses should be called in. And these must be *in præmissis specialiter requisiti*, *i. e.* they must attest the fact of being authorised and required to subscribe a certain deed for the party, which deed, therefore, of course must be made known to them.—*Vide* Stair, Galloway *v.* Duff, 5th December 1672; Kilkerran *voce* Writ, 18th June 1745; Birrel, 9th January 1752, Falconer; Erskine, p. 429; Dict. Vol. 2, p. 536, 25th June 1760; Fairholmes *v.* Myles, 1st July 1767, Rolland; Trotter *v.* Trotter, Sess. Papers, Vol. 2, No. 24; Crawford of Doonside *v.* Trustees of Crawford, Sess Papers, Vol. 38, No 27 (App. to Mor. Dic.); case of M'Arthur *v.* Williamson, &c. Vol. 45, No. 37; Weir of Kirkwood *v.* Gibson, Vol. 40, No. 7; Brown *v.* Chalmers, Vol. 40, No. 78 (App. to Mor. Dic.); Jerdon *v.* Scott, 17th Nov. 1789. (Mor. p. 4964).

"In Bacon's Abridgment *voce* Wills, one of the cases put of a will being challengeable is, where the husband is in weakness and distress, and the wife, attending upon him, induces him by flattery to give her all. Another is, If the friends of a sick man, of their own hands shall make a will, and bring it to a man in the extremity of sickness, and read it to him, and ask him whether this shall be his will, and he says, yes, yes. Swinburn, p. 78, says, "when the "sick man's kinsfolk, or some other person, do cause a testament to "be written after their inditings, and then afterwards the same be "read unto him, and he being demanded whether the same shall "stand for his testament? Answereth yea, and shortly after dieth, "in this case the testament is not good." And a pleasant story is

ties which the law requires, and which are usual in practice, when the granter is in the situation Mr. Lowthian was, they must stand unquestioned and unquestionable, in so far as

---

told by him of a monk, &c. See also, Voet, Lib. 28, tit. i. § 10.—Julius Clarus.

"These authorities are mentioned, in order to show that sometimes even reading to the testatator, and receiving an affirmative answer, is not sufficient. Cases of this kind must depend upon circumstances. The great and leading principle is, that the will must appear to be spontaneous and deliberate, not the effect of fear, compulsion, fraud, or strong importunity; and, above all, in the case of a blind man, it must be proved that what is called his will is truly so, and that it proceeded from himself; and that the contents were fully known to and authorised by him; and some proper means must be taken to substantiate and to identify the instrument containing that will.

"These are not *statutory* solemnities attending the execution of the deed, but requisites *in modum probationis*, to obviate fraud and deception. They arise from the nature and necessity of the case, and there may be different modes of authentication, and of proving the identity.

"The most simple and natural seems to be this, that when a man of business is employed to execute the will of a blind man, he should take care to receive his instructions in presence of two creditable witnesses; he should set down the heads of them in writing in presence of these witnesses, and one duplicate may be left in their hands, another used by himself in extending the deed, and these same witnesses being again called upon to attend at the execution of the deed, the extended instrument ought to be read over, and fully explained in presence of the testator, and compared by them with the previous instructions; and another precaution seems also to be proper, viz. that two duplicates should be made of the will itself, one to be deposited in the hands of one or other of the witnesses, or of some trust-worthy person, and another put into the custody of the testator himself, or those about him.

"The will of a blind man cannot be concealed like that of a person who has all his senses about him. It ought to be made known at least to two persons of honour and veracity, who may be afterwards called upon to support it by their evidence.

"The law of England may perhaps be satisfied with one witness. The law of Scotland requires two, and this cannot be dispensed with.

"In the present case, the deeds are not destitute of legal solemnities, for the notary's docquet is formal, and all the statutory requisites have been observed. The objection does not lye upon statute,

1794.

LOWTHIAN
v.
MAXWELL, &c.

these solemnities are concerned. By statutes 1579 and 1681, when a person cannot write, he may authorize two notaries to subscribe for him, in presence of four witnesses, but upon common law, and consists in the want of legal proof, not the want of legal form.

"Had the instrumentary witnesses been called upon to prove, contrary to their attestation in the docquet, as to the subscription of the notaries, or the testator's giving a symbolical mandate by touching the pen, and had any of them sworn to the contrary of what they attested, it would have been doubtful whether such evidence could have been received, or at least could have been credited.—See Burrow's Reports, Vol. 4, p. 2225. Our law does not differ from the law of England in that particular.

"But the evidence here is of quite a different nature. It goes to extrinsic facts, which in all the cases of a blind person are essential, viz. the authority given to execute a will of a certain tenor, the knowledge of the testator, and his assent to the tenor so read and written; and, in short, that this deed, which was neither written nor read by him, and which was composed, written, and subscribed by others, at his desire, is truly the deed which he had a deliberate purpose of executing.

"That it was fairly obtained, and not the effect of fraud, force, or any illegal practice, may be presumed, if once his knowledge and approbation of the deed are sufficiently instructed; but it requires something more than the notary's docquet to show that the deed was truly his. At least this will be required if the proof is extant, though possibly, at a great distance of time, and after all persons concerned are dead and gone, the docquet itself may establish a presumption, unless something very irrational, absurd, or inconsistent, shall appear upon the face of the instrument itself, or unless collateral written evidence shall appear to defeat any presumption that can arise from the docquet; and it is always a material circumstance, one way or other, that the deed appears to be consistent *with*, not contrary *to*, former deeds or settlements.

"It is said that there is sufficient proof of *enixa voluntas* here to give the whole to Mrs. Lowthian. Were this clearly established by legal evidence, it would go far to support the deeds. But prior to 1774, we have not the vestige of any such intention, further than to the extent of reasonable provisions, and it is an unfavourable circumstance in her cause that neither the deed 1774, nor any scroll or copy of it, now appears. The opinion of counsel, p. 12, of 2nd Appendix, speaks of it as a deed in favour of Mrs. Lowthian and *other legatees;* and from the close of the opinion, at letter G, it would seem that some part of the Scotch succession was settled on Mr. Ross. The opinion further shows, that not only the deed itself was

he at sametime touching the notaries' pen, as evidence of his authority; and as the statutes take no account of the then extant, viz. Aug. 1775, but a copy or scroll which was shown to the counsel, and probably the memorial upon which the opinion was given, contained a fuller description of it, but the opinion is produced without the memorial, though it is seldom that an opinion is preserved without the relative case. Again, we see from Mackenzie's letter, 1st Appendix, p. 49, that Mrs. Lowthian was the executor named in the deed 1774, but it is not there said either that she was residuary legatee, or that there were not special legacies in favour of Ross, (N.B.—Ross was then in favour), and other relations, or that any part of the heritable succession was included. The same letter bears expressly that the deed 1774 was extant, and in force as far down as January 1776, when the first deed now under challenge was executed. Mrs. Lowthian says, in her deposition, State, p. 140, C., that the deed 1774 was destroyed by Mr. Lowthian in his lifetime, but she ought to have added, that it was destroyed after January 1776, long after he was blind, and consequently with the assistance either of her or some other person about him; and it is singular that not only the deed itself, but the scroll or copy, and the memorial to counsel, should all have been destroyed, when all the succeeding deeds should have been carefully kept.

"The deed of 1776 is said to be the best authenticated of any of those under challenge. In one respect it is so.; viz, in so far as Mr. Maxwell of Carrochan swears to a previous reading either of the deed or scroll. In other respects it is more exceptionable than any of them. It is clear from the evidence of both Maxwell and Staig, that the reading at the period of execution was not such as could convey any knowledge to the testator. It was meant that even the witnesses, who had their sense of hearing entire, should know as little as possible of the matter. Of course the testator, whose sense of hearing was very imperfect, as well as his eye-sight gone, must have known much less of what was then doing in his presence. To a fact of this kind the evidence of Kay and Clark, two inferior persons, evidently prejudiced in favour of the defender, must go for little in competition with two such witnesses as Staig and Maxwell. The above low witnesses have greatly exaggerated, and been directly refuted in some particulars sworn to by them; and the evidence of Graham, the assistant of M'Kenzie, is infinitely more exceptionable.

"As to Maxwell's account of the previous reading, it is enough that the law of Scotland does not admit such a fact to be proved by one witness; and besides, he seems to have proceeded very much upon confidence in M'Kenzie, gave himself little trouble in explain-

1794.

LOWTHIAN
v.
MAXWELL, &c

cause which may disable a party from writing, whether from blindness, or from never having been taught, it is reasonable ing, and no attention at all to the after execution, so as to establish with sufficient clearness the identity.

" Besides, it is a remarkable feature of this deed, that it conveys in express terms the testator's whole estates, real and personal, in Scotland, and even all that he should die possessed of, whether acquired, or devolving upon him by succession, and whether consisting of lands, tenements, tythes, debts due by mortgage, heritable bonds, &c. (1st Appendix, p. 14, letter K). And yet M'Kenzie's letter, (p. 50, letter D), says that the heritable subjects were not meant to be at all conveyed by that settlement.

" It is no less a fatal circumstance to this deed, that M'Kenzie did, by the form of it, take the whole residue to himself, though it was afterwards confessed that no such thing was meant, and this was but partially set to rights by the codicil, (p. 20), which was articled by its nature to the personal estate, leaving entirely out the heritage, which had become very considerable, as heritable bonds are heritage by the law of Scotland.

" In short, both the principal will in 1776, and codicil in 1778, are, upon the face of them, and by written evidence, proved to be fraudulent deeds, independent of the parole evidence, so that there is an impossibility of supporting them.

" All the other deeds were clearly executed in a most improper manner, without the least appearance either of previous instructions, previous reading, or due reading and explanation at the time. Such of the witnesses as deserve any credit at all, agree in this. To say nothing of M'Kenzie, the evidence of Wilkin and Johnstone, Widers and Lockerby, is remarkable, nor is there any reason to suppose that the ceremony of reading at the period of execution, would be differently performed from what it was at the first and leading deed.

" Besides, the private letter from M'Kenzie, and the memorandum by Graham, and the fact of reading the bonds in an improper manner, leaving out the destination, are such invincible proofs of fraud, that they are sufficient to outweigh whole volumes on the other side. Every attempt to explain these written documents, has proved ineffectual and desperate, so that, upon the whole, no doubt can remain, that the deeds ought, all and each of them, to be laid aside.

" The proof of *general intention* in favour of the defender, *i. e.* to leave her a considerable portion of his effects, and trusting the execution to others, however strong, would not be relevant. We do not admit *nuncupative* wills; and in such a case confidence must be excluded, because the law requires that the deed should be wholly the party's own. See the case of Crawford of Doonside.

to presume that if, in either case, these solemnities were required, the deeds so executed would be unexceptionable. All these solemnities have been complied with in the present case, yet the deeds have been challenged on those very grounds,

---

The general intention was clear, and he trusted in very honourable men, viz., Sir Adam Ferguson, &c.

"The strongest circumstance in support of the deeds, is the delay of the challenge till the death of Carruthers of Dormont, who was witness to the last deed in 1782. But his evidence, if alive and favourable to the defender, would scarcely be sufficient against the other circumstances, particularly the evidence of Wilkin, who also witnessed the codicil to the last deed, joined to that of Staigs, and the written proofs already mentioned. He would be a single evidence to the fact of previous reading, if we suppose that he would say so, for the support he has from M. Black, (p. 203, B), is very slender. She is a low, suspicious witness, in the service of the defender, and evidently exaggerates in some circumstances in the leading questions put to her. She is likewise a legatee, and has an interest in supporting the deeds. Most of the other legatees are persons who will succeed by law. In both the cases of Crawford of Doonside and M'Arthur, the Court went chiefly upon the circumstance of the deed not being read. In the former case it was said, "When "the author of a deed who has his senses entire, and can read, ad- "hibits his subscription to that deed, your Lordships will presume "that the deed has been considered by him previous to the sub- "scription being adhibited, knowing that the understanding of men "will induce them to examine the contents of their deed before "they adhibit their subscription to it." But it was observed that there was no room for presumption in that case, as it was an ascertained fact, that Mr. Crawford had no opportunity either of reading or hearing read, and that no previous scroll was made.

"In the other case, it was said by the judges, in delivering their opinions, that Miss M'Arthur, though in distress of body, was not incapable to make a will, but that no evidence appeared that she had either given previous instructions, or read the will made for her: That although it was a general presumption that a will, duly authenticated by the subscription of the party, and of the instrumentary witnesses, had been previously read and considered, yet this presumption might be taken off by contrary circumstances, that the will was irrational, being against her father, who was her nearest heir, and seemed to be the effect of a combination of those about her."

LORD ANKERVILLE.—"There is no evidence of any intention in favour of the wife prior to these deeds. After he was blind, the testator fell into the hands of his wife and M'Kenzie, and the deeds were then procured by fraudulent means."

1794.

LOWTHIAN
v.
MAXWELL, &c.

namely, that they were not read over to the deceased at execution. But this is not made a statutory solemnity. When a person who sees, and can read writing, although he cannot write, makes a will, the legal presumption is, that he has read and

---

LORD ABERCROMBIE.—"The deceased was capable of testing. But he was blind, and his hearing impaired. The question is, Whether these deeds were executed according to law? The act 1681 prescribes the regulations without distinction. If able to read, the presumption is, that he has read it. But in the case of a blind man, the witnesses and notaries must be satisfied that authority is given; and no other method but reading can be admitted, and the identity must be clear. The inconvenience of publishing settlements of this nature, is much overbalanced by the advantages to the law, and to the rights of individuals. The deeds here were worse than if they had not been read at all. They were purposely misread. I am, therefore, for reducing the deeds, as not sufficiently read and explained even independently of fraud. But there is evidence of fraud besides."

LORD JUSTICE CLERK.—"I am of the same opinion as to capacity. Regarding the objection as to the execution of the deeds. Upon looking into them, a point of law occurs, namely, that where writing is essential any defect in them cannot be supplied by parole evidence. If the deed is not formal, it is null and void. In the case of a person possessed of all his faculties and senses, there is no occasion for reading the deed. But where he cannot sign, he must have notaries; and the whole must be read over and done *unico contextu*. Nothing can be taken upon the authority of another, even if it were proved by two witnesses, that one or other of them had authority. Suppose both the notaries had read the deed in another room, this is not enough; for when they came before the witnesses, another deed may be substituted. The docquet, therefore, ought to bear that it was read, otherwise there is no legal evidence of its being the deed of the party."

LORD MONBODDO.—"The necessity of reading implied. The deeds were not read sufficiently here; and the case is the same as if the testator was deaf as well as blind."

LORD SWINTON.—"I am of the same opinion."

LORD PRESIDENT.—"Of same opinion; but not essential that the notary's docquet should bear that they were read."

LORD DREGHORN.—"Of same opinion with Lord Monboddo."

LORD ESKGROVE.—"Whatever was his intention, it was not executed in a proper manner; but the assignation of the debt due by Ross seems to be in different circumstances."

"The Court reduce the whole deeds under challenge."—President Campbell's Session Papers, vol. 67.

understands the writings. When a party defective in sight is obliged to sign by notaries, the presumption is, that the instrument has been dictated by him, and read or explained to him by the notaries. In either case the witnesses are only called to the signing. When he signs himself, they are witnesses to his subscription. When he signs by notaries, they are witnesses to the notaries' attestation. In no case is it necessary to read the deed to him in presence and hearing of the attesting witnesses. It may be expedient to do so, in order that they may bear witness of the fact in case of a challenge, and if they swear that the deed was, in point of fact, read, then there is an end to every objection. This is just precisely the situation of the deeds now challenged. It would be truly impolitic and unjust to allow, after an interval of time, any inquiry into uncertain and fanciful speculations, as to whether the deed, when read, was so read as not be understood by the deceased. No doubt, when the deed is impeached on fraud, every inquiry is legitimate, but still the question always is, and will be: Whether, by the way in which the business was conducted, a fraud was actually perpetrated, not whether one was possible? In the present case, after the most searching scrutiny, not a vestige of fraud is traceable to the appellant. The proof of such allegation, which lies on the party asserting or affirming it, has therefore entirely failed. 2nd, Then again, as to the deceased's capacity, it is proved incontrovertibly, that, down to the period of his death, he was in possession of such strength of mind as well enabled him to direct how his fortune should be disposed of; this, coupled with his proof of good sense, his memory and attention, and anxiety in regard to his money affairs, and their settlement after his death, entirely disproved this part of the case. 3d, The only question which then remains is, whether the deeds set forth the genuine will and intention of the deceased? Now, as there is no pretence for saying that he actually died, or intended to die intestate, and when there is so much collateral evidence in letters, apart altogether from these deeds, to show that his intention always was to give the appellant the fee of his estates, the deeds ought to stand. By the Court refusing to admit Mr Currie as a witness, the appellant has been deprived of evidence duly tendered by her, which would not only have established her husband's capacity, but would have explained some of the letters and other writings produced in the cause.

1795.

THE YORK BUILDINGS CO. v. MACKENZIE.

Pleaded for the Respondent.—Mr Lowthian, though not entirely deprived of understanding, yet, besides being blind and almost deaf, was so far impaired in his mental faculties, as to be an easy prey to such as meant to impose upon him; and certain persons, who had insinuated themselves into his confidence, concerted a plan for deceiving him in regard to his settlements. But these settlements being executed in such a manner, in point of form, as not to be read so as to be understood, and no mention being made in the notary's docquet of the reading of the deeds, the same were null and void in law. And the Court below adjudged rightly, in refusing the examination of the appellant's agent as a witness on her behalf, because he was an incompetent witness according to the law of Scotland.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be affirmed.

For Appellant, *Sir J. Scott, J. Anstruther, Wm. Honyman.*

For Respondent, *W. Grant, Geo. Ferguson.*

THE YORK BUILDINGS COMPANY, . . *Appellants;*

ALEXANDER MACKENZIE, . . *Respondent.*

House of Lords, 13th May 1795.

JUDICIAL SALE — COMMON AGENT — DISABILITY TO PURCHASE — FRAUD — HOMOLOGATION.—Held, that a common agent, in a ranking and sale, cannot purchase the estates sold under the ranking for his own account, though at a public judicial auction, and sale reduced, though he had been in possession unchallenged for thirteen years.

The estates in Scotland, belonging to the York Buildings Company, being brought to a ranking and sale, under the authority of the acts of Parliament, a part of them, consisting of the estates of Seaton, &c., was purchased by the respondent at a judicial auction, he being the common agent in the ranking and sale: The sale was reported to and con-