fishings as her exclusive property, and then, having finished that process, had brought a declarator against Sir John, because the question which she has got to try with Sir John is an entirely separate and distinct question from that which she had to try with her co-proprietor. The question which she has got to try with Sir John is whether he has any title to the fishing *ex adverso* of this portion of the Pow Meadow, and in regard to the merits of that question I think she is entitled to prevail for the reasons that I have already very shortly given. Upon the whole matter, therefore, I am very clearly of opinion, with all your Lordships, on the grounds that I have now stated, that Lady Gray is entitled to prevail to the extent which I have indicated. What precise form of words may be adopted for the purpose of expressing the limits of her right to the fishing I am not prepared at this moment to suggest, but probably that may not be very difficult to adjust with the help of the counsel for the parties.

The Court pronounced the following interlocutor—

"The Lords having heard counsel on the reclaiming note for the Right Honourable Margaret Baroness Gray, against the interlocutor of the late Lord Mackenzie, dated 5th January 1875, Recal the said interlocutor: Find and declare that the pursuer has the sole and exclusive right of salmon-fishing in the river Tay *ex adverso* of that piece of ground formerly called the Meadow Pows or Powlands of Inchyra, which lies to the westward of the stone indicated by the letter C on the plan No. 79 of process; to this extent and effect repel the defences, and decern: Find that neither of the defenders have any right of salmon-fishings *ex adverso* of the said piece of ground: Interdict, prohibit, and discharge the defenders, or either of them, from fishing in the river Tay *ex adverso* of the said piece of ground, and decern: *Quoad ultra* assoilzie Sir John Richardson from the conclusions of the summons, and decern: Find the pursuer entitled to expenses against the defenders Mrs Fleming and her husband to the extent of two-thirds of the taxed amount thereof: Find the pursuer entitled to expenses against the defender Sir John Richardson to the extent of one-half of the taxed amount thereof: Allow an account or accounts of the said expenses to be lodged, and remit the same to the Auditor to tax and report."

Counsel for the Pursuer — Dean of Faculty (Watson)—Johnstone. Agents—Hope, Mackay, & Mann, W.S.

Counsel for Sir John Richardson — Balfour — Robertson. Agents—Murray, Beith, & Murray, W.S.

Counsel for Mr and Mrs Fleming—Lee—Gloag Asher. Agents—Hamilton, Kinnear, & Beatson, W.S.

Friday, January 21.

FIRST DIVISION.

[Lord Young.

ATCHISON'S TRUSTEES *v.* ATCHISON.

Writ — Notarial Subscription — Conveyancing Act, 1874 (37 *and* 38 *Vict. cap.* 94).

Held that a deed executed by a notary, the docquet of which set forth substantially all the particulars required by sec. 41 of the Conveyancing Act, 1874, was a valid deed, even though the docquet was not expressed in terms of the schedule relative to that section.

This was an action of removing by the trustees of the late Mrs Christina Atchison, brought for the purpose of having her son and his wife removed from the premises formerly occupied by her at Bothwell. The trustees were appointed by a trust-disposition and settlement dated May 19, 1874, and the defence to the conclusions of the summons was founded on a disposition by the late Mrs Atchison, dated October 10, 1874, whereby she conveyed the whole of her heritable and moveable property to the female defender. In reference to this deed the pursuers maintained as their fourth plea in law that it was *ex facie* null and void, in respect that while bearing to be notarially executed, the name and designation of the notary were not set forth in the docquet.

The Lord Ordinary on 25th June repelled the fourth plea in law for the pursuers, and on 2d July dismissed the action.

The pursuers reclaimed, and argued — The deed founded on by the defenders was not properly attested in terms of the Conveyancing Act of 1874, sec. 41, and relative schedule, in respect that there was (1) no authorisation; (2) no name or designation of the notary; (3) no statement that the witnesses subscribed the docquet in terms of schedule I; (4) no statement that the docquet was read over to the granter; (5) no distinct statement that the whole was done by authority given in the presence of the witnesses.

An Act of Parliament such as this, which gave a party the option of adopting a less cumbersome and more convenient way of doing a thing, must be construed literally and strictly. The witnesses were required to speak not only to the execution of the deed, but to the truth of that which was stated in the docquet. The section of the Act and the schedule must be read together.

Authorities—37 and 38 Vict. cap. 94, secs. 39, 41; *Johnston* v. *Pettigrew*, 16 June 1865, 3 Macph. 954; *Birrel* v. *Moffat*, M. 16,846; Bell on Deeds, iii, 17 (edit. 3d); *Sim* v. *Yuile*, 15 November 1845, 8 D. 8; *Cleland* v. *Clark*, 15 Feb. 1849, 11 D. 602, H. of L. 7 Bell, 153; *Henry* v. *Reid*, 10 Feb. 1871, 9 Macph. 503.

Argued for defender — An action of removing was not the proper form of process. The Act 37 and 38 Vict. cap. 94, did not make the form of docquet in the schedule imperative. The deed and docquet together were more than sufficient to meet all the requirements of the statute. Section 39 did not apply.

At advising—

Lord President—This is an action of removing at the instance of the late Mrs Atchison's trustees, and it is directed against her son and his wife, who occupy her premises. The defence is rested on a deed which is produced, bearing a date subsequent to that of the trust-disposition, which is dated 19th May 1874. The pursuers object to this deed that it is *ex facie* null, not being properly subscribed. It is not subscribed by Mrs Atchison at all, but by a notary, and the question is whether the notary's subscription is valid under the Conveyancing Act of 1874. This raises an important question on the construction of that Act. Its object was to enable deeds to be executed by one notary and two witnesses, instead of by two notaries and four witnesses, as was previously the case. It is said that that relaxation of the strictness of the law was accompanied by conditions which have not been fulfilled here, and our decision must turn on a consideration of the Act, but before coming to that I desire to notice what was the previous law on this matter. We all know that in the execution of such deeds as this two notaries and four witnesses were required; but the more important question is, what it was necessary that the notarial docquet should bear, because the objection to this deed is based on the docquet. One thing needful was that the special fact should be set forth, that the granter of the deed authorised its execution. It must not be left out of view that the law on this matter was statutory, depending on the Act 1579, cap. 80, which required all parties who could do so to subscribe their own deeds; otherwise they were to be subscribed by "twa famous notars befoir four famous witnesses, denominat be their special dwelling places, or some other evident tokens, that the witnesses may be knawen, being present at that time, otherwise the saidis writs to mak na faith." Now, all that that Act prescribed was that the notaries should subscribe in the presence of four witnesses, and that they should be so described as to be easily found. But the common law required that the notarial docquet should set forth that authority was given by the party, and that he touched the notary's pen in token thereof, but I am not aware that the docquet required to set forth any special fact except that authority was given. This is the view taken by Erskine (Instit. iii. 2, 9,) and he refers to the case of *Birrel*, 18 June 1745, M. 16,846. In that case it was objected that the notarial docquet did not bear that the maker of the deed had granted authority to the notary, and it was answered (1) that no special form was required of notarial attestation, and (2) that the first notary was the writer of the deed, which bore in the body of it to be signed by notaries at the granter's command. Both these reasons, however, were disregarded and the deed reduced. Lord Kilkerran in his report of the case makes some important observations — "Witnesses to a deed signed by notaries are not only witnesses to the subscription of the notary, but also to the command given him, both which the witnesses attest; and for that very reason it is that four are required. And as witnesses are neither bound nor supposed in any case to know what is contained in the body of the deed, they attest no more than what is in the docquet: the authority also to notaries must be given at the very time of executing the deed, for till then there is *locus pœnitentiæ*; and from anything which could appear from the face of the deed in question it might have been written many days before signing. The docquets bearing *pro illo subscribo* was nothing, for though it may be true that the notary could not with truth say so without her authority, yet that was but his assertion, which, whether true or false, is the very question, as no fact was asserted in evidence of such authority, the truth of which the witnesses were to attest." The answer to the second objection is given in an observation from the Bench in Falconer's report of this case—"That in the body of the writ the notary speaks not, but the party; and the thing to be attested is that the party spoke at all." That case was in 1745, and we see from the report that the docquet in use then was required to set forth that authority. But in 1762 you have the very form of docquet given in a well-known book called "The Office of a Notary," published in that year. Before the date of the last statute, therefore, I should hold on these authorities that the one thing necessary in the docquet is that it should bear that the notary received authority from the granter. In the case of a blind person it was necessary that the deed should be read over to him, but it was not *de solemnitate* that that should enter the docquet. That being the state of the law before 1874, let us see what are the changes which have been introduced by the Conveyancing Act of that year. I have said that the main object of section 41 is to dispense with two notaries and four witnesses, and be content with one notary and two witnesses. It is in the following terms:—"Without prejudice to the present law and practice, any deed, instrument, or writing, whether relating to lands or not, may, after having been read over to the granter, be validly executed on behalf of such granter, who, from any cause, whether permanent or temporary, is unable to write, by one notary-public or justice of the peace subscribing the same for him in his presence and by his authority, without the ceremony of touching the pen, all before two witnesses." I stop there, because what remains of the clause prescribes what must enter the docquet. This prescribes what shall be done; and the requisite conditions—(1) The deed must be read over to the granter. (2) He must be unable to write. (3) The deed must be subscribed by the notary in the presence of, and by the authority of, the granter. (4) He may dispense with touching the pen.

These are the conditions on which the lieges may avail themselves of the relaxation of the law.

But the Act further requires that certain things should enter the docquet. "And the docquet thereto shall set forth that the granter of the deed authorised the execution thereof, and that the same had been read over to him in the presence of the witnesses. Such docquet may be in the form set forth in schedule I. hereto annexed, or in any words to the like effect." Now, the question is, whether the docquet here complies with the requirements of the statute? It appears to me that it does. It bears—

"The foregoing disposition and deed of settlement having been read over and explained by me the undersigned notary-public to the above-designed Christina Smith or Atchison in presence of the witnesses also above designed and she hav-

ing approved thereof in every respect and stated that she was unable to subscribe the same from weakness and having desired me to sign for her and in token of her request touched my pen I do hereby subscribe the same for her in presence of the said witnesses. *Per opera*

J. D. FERRIE, Notary Public.

Robert H. Arthur *witness.*
Charles Peattie *witness.*"

Now, does not that bear that the granter gave authority, and that the same had been read over to her in the presence of the witnesses? I think it does. It is contended that the word "authorised" or "authority" is not used, but I do not think those words are solemnities, and similar words are used. The docquet sets forth in so many words that the deed was read over in the presence of the witnesses, but it is contended that it does not bear that the authority was given in the presence of the witnesses, and there is some little ground for that contention, as the word is not repeated. But I think that would be far too strict an interpretation. I think the touching the pen with which the notary subscribed, though not now necessary, shows that the whole thing was a continuous act, so that, as far as the requirements of section 41 are concerned, I think they have been carried out. But I am disposed to maintain strictly the doctrine laid down in the case of *Johnston* v. *Pettigrew*, that where a relaxation of the law is introduced, the party availing himself of it must comply exactly with the conditions on which it is granted, and we are told that there are here other conditions imposed by schedule I. which we must therefore attend to. Now, the authority of the schedule depends on the interpretation of the clause. Now that clause is as follows:—"Such docquet may be in the form set forth in schedule I. hereto annexed, or in any words to the like effect." The pursuer contends that this docquet does not comply with the schedule, in respect—*first*, that the notary is not designed; and *secondly*, that the two witnesses are not said to have signed "in testimony of their having heard [or seen] authority given to me as aforesaid, and heard these presents read over to the said A B." It seems to me that the parties are not required to adopt the form in the schedule if they comply with section 41. I cannot read it as an indispensable condition that they should adopt it even as nearly as circumstances will admit of. The form in the schedule is merely a good practical form suggested for adoption by those who choose it. Great stress was laid in the discussion on the case of *Johnston* v. *Pettigrew*, and it is a very important decision, for it turned on the construction of the then recent Conveyancing Act of 1858. The first section of that statute dispensed with a separate instrument of sasine, and substitued registration of the conveyance itself in the Register of Sasines. It is as follows:—"From and after the first day of October in the present year, it shall not be necessary to expede and record an instrument of sasine on any conveyance of lands, but it shall be competent and sufficient for the person or persons in whose favour the conveyance is granted, instead of expeding and recording such instrument of sasine, to record the conveyance itself in the Register of Sasines applicable to the lands therein contained; and the conveyance being presented for registration, with a warrant of registration thereon, in or as nearly as may be in the form of schedule A., No. 1, hereto annexed, specifying the person or persons on whose behalf it is so presented, and signed by such person or persons, or his or their agent; and being so recorded along with such warrant, shall have the same legal force and effect in all respects as if the conveyance so recorded had been followed by an instrument of sasine duly expede and recorded at the date of recording the said conveyance, according to the present law and practice, in favour of the said person or persons on whose behalf the conveyance is presented for registration." Now, the warrant of registration in the case of *Johnston* was in these terms:—"Register in behalf of Matthew Pettigrew. William Maclean, agent." Certainly, on the face of it, a most imperfect writing. Now, schedule A. No. 1, is in these terms:—"Register on behalf of A B (*insert designation*), [*or* register, &c., along with assignation (*or* assignations) (*or* writ of resignation) hereon] (*or otherwise, as the case may be*).

(Signed) A B.

[*or*] C D., W.S., Edinburgh.

(*or as the case may be*) Agent of the said A B."

There there was a failure to comply with the terms of the schedule, for neither one party or the other was designed, but in addition to that the terms of the enactment of 1858 stand in direct contrast to the one which we are now considering. There it was that the warrant was to be "in or as nearly as may be in the form of schedule A., No. 1, hereto annexed, specifying the person or persons on whose behalf it is so presented, and signed by such person or persons, or his or their agent;" indicating in the enactment itself the importance of those things which are set out in the schedule. I think that the meaning of an Act saying that a writing is to be as near as may be in the form of a schedule, is, that no departure therefrom is permissible except in special circumstances. Here the expression used is only "may be," and therein lies the great difference. For these reasons I am for adhering to the judgment of the Lord Ordinary.

LORD DEAS—Laying aside the recent statute in the first instance, the law applicable to notarial signature is regulated by the Act 1579, c. 80, by certain Acts of Sederunt, and by practice. We are not called on to decide what is essential to a notarial docquet, and I am not prepared to give an opinion on that point. I see in the case of *Henry* v. *Reid*, in 1871, the Lord President gives several things which he considers essential. The first of these is that the granter of the deed should specially authorise the notary to subscribe for him; the second is that such authority must be intelligently given; and the third is that this must be done in the presence and hearing of the witnesses. All these things should be expressly stated in the document, and also the authority ought to be given at the time, because if not there is *locus pœnitentiæ*, and the granter might change his mind. All these things must be in the docqet, and I see no reason for holding that there is any inaccuracy in that opinion. And my opinion is that whatever was necessary before the statute of 1874 is necessary still, except so far as expressly dispensed with by the Act, and further, that all the things set forth in section 41, in so

far as they are additional, must also enter the docquet. Now, in reading this docquet it is a nice question whether, in order to take advantage of the dispensation it is necessary that the docquet should contain the words of the schedule. It would very difficult to say that this document does, but I do not think it is necessary. We had occasion to look into the law in *Henry's* case, and I think that all that is essential by the old law and by section 41 is complied with in this docquet.

LORD PRESIDENT—In reference to your Lordship's remarks upon my opinion in *Henry's* case, I must explain that I do not say that all these matters *must* be in the docquet, but that they *ought* to be. The first and third must be set forth; the second, though very expedient to be stated, is not at all necessary.

LORD ARDMILLAN—This is an action of removing at the instance of trustees of the late Mrs Atchison against William Atchison, her son, and his wife Mrs Isabella Leiper or Atchison. The pursuers, founding on a trust-disposition dated 19th May 1874, conclude for decree of removing against the defenders from a certain house at Springbank, where the defenders are designed as residing. A deed is produced to sustain the possession. On the 10th October 1874 Mrs Atchison is said to have executed a disposition and settlement in favour of the female defender; and a deed of that date is produced bearing to be signed for her by a notary public, and before witnesses. The docquet is in the following terms—(*reads.*) Mrs Atchison died on 17th October 1874. She is said to have been 78 years of age, and the docquet bears that she stated that she could not then write from weakness. Both these deeds are *mortis causa*, and the later deed, the deed of 10th Oct. 1874, if probative and unreduced, is sufficient to carry the estate to the defender, and of course to protect against the removing. Many objections to the deed are stated. Some of these, if supported by proof, may be serious. But we are in an action of removing, not of reduction; and no objection requiring to be supported by reduction can now be considered. This deed is produced and founded on to sustain possession and resist removal.

The only point for consideration at present is, whether the signature of Mrs Atchison, given for her by a notary public, is valid? is this docquet probative? and if so, is the deed validly subscribed?

The date of the deed is subsequent to the recent Conveyancing Act (37 and 38 Vic. c. 94), and therefore the signature by one notary, and in presence of two attesting witnesses, is sufficient,—as sufficient as two notaries and four witnesses had formerly been. The old law regarding subscription by notaries for those unable to write is well known. The statutes 1540, c. 117, 1579, c. 80, and 1681, c. 5, contain the enactments of the law on the subject down to recent times. But by the Conveyancing Act of 1874 a change was made, and while the old procedure was not abrogated or put an end to, a new and more convenient mode of subscription by notaries was permitted. Now, I fully admit that when a party adopts this newly permitted form of subscription, he must, in exercising the new power, conform himself to its requirements. This is fully and instructively explained by your Lordship from the chair of the Second Division in the case of *Johnston* v. *Pettigrew*, on 16th June 1865. Some distinction however there is between the requirements of the enacting clauses and the inferences from the language of the schedule. There is more precision of authority, more stringency of obligation, in the enactments of the clauses than in the terms of the schedule.

I have carefully considered the objections taken by the pursuers to this subscription and this docquet in so far as we can now deal with them.

I am satisfied that the docquet—if itself valid—does sufficiently and legally instruct the subscription of the deed by Mrs Atchison. I am also satisfied that in this docquet there is not any violation of the enactments of the statute of 1874. All that the statute requires as necessary to a notarial docquet attesting and instructing subscription by a person who is unable to write, is in my opinion within this docquet.

In regard to the schedule, the adoption of it is not imperative. It may be adopted. I am of opinion that exact observance of the form of the schedule in minute particulars is not imperative. The statute does not so direct the use, or the mode of the use, of the schedule, as to make every part imperative. The word "may" is not imperative. Not every variance from form is fatal, but only a "material variance."—*Nixon* v. *Nonney*, 6 Eng. Jurist, 389. To hold that every trifling deviation from the words of the schedule is fatal to the docquet and to the subscription would be contrary to the spirit of our law, as evinced by all recent legislation and judicial decison on the subject of subscription of deeds.

In the case of *Henry* v. *Reid* (10th February 1871) the docquet was not holograph, and this was admitted. If it was necessary that the docquet should be holograph, then there was no doubt that it was void and null, for holograph it was not. That was the only question. No other objection was taken. If the docquet in the case of *Henry* had been holograph it would have been sustained.

If this case had been under the law previous to the Conveyancing Act of 1874, and if this docquet had been signed by two notaries and four witnesses as then required, and if the docquet had been in the terms of that now before us, I am of opinion that it would have been valid. There is no case of a docquet in such terms as these ever having been set aside on the head of *ex facie* nullity. Lord Kilkerran's remarks, quoted by your Lordship, are, in my view, most important. A witness subscribing as attesting the docquet, does attest what is expressed in the docquet, and this, in the case of a blind person, means that the witness attests the authority given to the notary. That which the notary states in the docquet to have been done is by the witnesses attested. In the case of *Hardie* (6th December 1810, Fac. Coll.) a docquet less correct than the present was sustained; and that case of *Hardie* was a unanimous judgment in the time of President Blair, and is referred to as an authority by recent jurists.

Now, it was not the purpose of the recent statute to multiply the requirements of formal procedure, or to increase the difficulties of sub-

scription by the blind. On the contrary, to facilitate such subscription was the Legislature's intent.

Accordingly, my opinion is that the Lord Ordinary's judgment is right.

In repelling the 4th plea in law for the pursuers, —a plea founded on the alleged express nullity of this deed—I think the Lord Ordinary has pronounced a decision in accordance with legal principle and precedent; and there is no other question before us, for if that 4th plea is repelled the action of removing falls to be dismissed.

Lord Mure—I am of the same opinion as your Lordships. Had this docquet been under the old law, in a case where only one notary was required, I should have thought it a good one, because it expressly bears that it was read over to the granter and that she gave authority. In addition, I find that Mr Bell says that where parties cannot write, their deeds may be subscribed for them by notaries "duly authorised so to do." Therefore it is the authority which all the authorities consider essentially necessary. The question here is, whether the late statute has made any essential change. Sec. 41 seems to me to make it necessary that the fact of the deed having been read over by the granter should be stated in the docquet, and that is the only additional requisite prescribed, and so I think that this docquet contains all that sec. 41 enacts, and all that the old law required.

The Court adhered.

Counsel for Pursuers — Fraser — J. A. Reid. Agents—Philip, Laing, & Monro, W.S.

Counsel for Defender — Morrison. Agent — R. H. Arthur, S.S.C.

Friday, January 21.

FIRST DIVISION.

SPECIAL CASE—GEORGE FERRIER (LEIGHTON'S TRUSTEE) AND OTHERS.

Succession—Trust—Fee and Liferent—Vesting.

By post-nuptial settlement a husband and wife disponed each of them to the other, in case of his or her surviving, the whole estate, heritable and moveable, belonging or due, or which should belong or be due to them or either of them at the dissolution of their marriage by the death of either of them, and they appointed the longest liver of them to be sole executor of the first deceaser. After the death of the longest liver the property was to go to trustees, who were to divide it into two equal shares, one of which was to go to the legatees or next-of-kin of the husband, and the other to the legatees or next-of-kin of the wife. The deed also contained the following clause — "And such longest liver of them shall liferent the whole estate, heritable and moveable, that shall belong or be due to either of the parties, or in communion betwixt them at the death of either of them (excepting always their wearing apparel as aforesaid), and shall have the full and entire administration and management thereof during his or her life, with power to sell, use, and dispose thereof for onerous causes, at pleasure, without the interference or control of the legatees or relations of either party during his or her life, but such longest liver shall not have power gratuitously to gift or dispose of the said estate to the prejudice of the legatees or nearest of kin of the first deceaser."—*Held* (1) that the wife, who survived, had not the fee, but only the liferent of her husband's share of the estate; (2) that she was not entitled to dispose of her husband's share by ante-nuptial contract with a second husband, that being a gratuitous disposal; and (3) that the right of the first husband's next-of-kin, failing legatees, vested at his death.

The questions in this case arose on the construction of a post-nuptial contract of marriage entered into between the late Mr and Mrs Leighton, by which they "mutually and reciprocally give, grant, assign, and dispone each of them to the other, in case of his or her survivancy, all and sundry lands, heritages, tenements, tacks, adjudications, heritable bonds, and other heritable estate whatsoever, and all and sundry goods, gear, debts, sums of money, and other moveable estate whatsoever, belonging or due, or which shall belong or be due, to them or either of them at the dissolution of their marriage by the death of either of them, with the whole writs, evidents, vouchers, and instructions of the same, (excepting however from this conveyance the wearing apparel of both parties); and they name and appoint the longest liver of them to be sole executor of the first deceaser, with full power to give up inventories, confirm the same, and to do everything that any executor can do by law, but always with and under the conditions and provisions after specified, with and under which they surrogate and substitute the survivor of them, after the death of the first deceaser, in their full right and place of the premises; but declaring always, as it is hereby specially provided and declared, that the conveyance above written is granted for the uses and purposes, and with and under the conditions and provisions underwritten, viz. for payment, in the first place, of the death bed and funeral expenses, and the just and lawful debts of the first deceaser. *Secondly*, the longest liver of the said John Leighton and Elizabeth Leighton shall, as soon as may be conveniently after the death of the first deceaser, make up an inventory and valuation of the whole estate and effects, heritable and moveable, falling under the conveyance above written, deducting therefrom the whole debts, expenses, and charges of every description falling thereupon, and shall deliver a duplicate of such inventory subscribed by him or her to one or other of the trustees after named, to be kept by him for the use of the nearest in kin or legatees of the first deceaser, and such longest liver of them shall life-rent the whole estate, heritable and moveable, that shall belong or be due to either of the parties, or in communion betwixt them at the death of either of them (excepting always their wearing apparel as aforesaid), and shall have the full and entire ad-