

support it. But an irritancy is often found adjoined to those conditions, for various reasons. It gives a readier and more powerful remedy in case of contravention. Thus, in the present grant there is an obligation on the vassal to erect houses of a certain description on the subject. In case of failure a penalty of £100 is stipulated, and that condition might be enforced in an ordinary action. But as the pursuers of the action might be involved in a question as to the amount of damages which they sustained by the failure—penalties being restricted in a court of equity to the actual loss sustained—a clause of irritancy, as in this case, is added, providing that the vassal, besides the penalty, ‘shall also lose all right and title to said piece of ground, which in that event shall revert to and become the property of said trade.’ This is more stringent and effectual, for it could not be evaded except by purging before decree of declarator. The Statute 1597, cap. 250, enacted that all vassals by feu-farm failing to pay their feu-duty for two years together shall lose their right in the same manner as if an irritant clause had been specially engrossed in their charters. Notwithstanding this irritancy by statute, it was the practice to introduce an irritant clause in the charter, with the view of preventing the vassal from purging before declarator, for it was held that although legal irritancies might be purged, conventional irritancies could not. The same practice continues still, although the distinction between legal and conventional irritancies no longer obtains, and when there is therefore no use for the provision. In the present case the irritant clause, in the event of the duties not being paid, is extremely proper, for the Statute 1597 expressly applies to vassals by feu-farm, and it is very doubtful whether it could be extended to the duties here, which are not feu-duties, but ground-annuals only, not payable to the superior, but to the grantor of the burgage right.’ It appears to me that these observations apply to the present case, which is one not of a proper feu-right, but of a conveyance of property by way of a contract of ground-annual.

“I think it is thus quite clear that, according to the law as it now stands, conventional irritancies attached to obligations *ad facta præstanda*, or for payment of annual-duties contained in conveyances of property, whether by way of feu-right or by contract of ground-annual, are purgeable at the bar, *i.e.*, at any time before decree of declarator of irritancy is extracted. And although Mr Menzies appears to have overlooked both the statement of Mr Bell in his Principles and the opinion in the case of *Coutts* which has just been quoted, Professor Montgomerie Bell, in his Lectures, vol. i. p. 585 (1st ed.), states the law to be as I have now stated it.

“The pursuer, however, refers to the case of *Stewart v. Watson*, July 20, 1864, 2 Macph. 1414, as supporting his contention, that notwithstanding the authorities just cited, conventional irritancies cannot be purged at the bar. But that was a case not of a right of property, but of a lease for a limited period of years—a consensual contract in which there is *delectus personæ*—and the irritancy which was there sought to be declared was not incurred by the tenant’s failure to perform certain acts or to pay the rents, but by his having suffered sequestration for non-

payment of rent to take place. The Court there held, that as the tenant had suffered sequestration to take place after great indulgence on the part of the landlord, he had incurred an irritancy which it was impossible to purge. But there is nothing in the opinions of any of the Judges to countenance the view that such irritancies would be enforced in contracts other than leases, or where they were attached to obligations *ad facta præstanda*, or for mere payment of annual-duties. Indeed, Lord Neaves expressly says—‘In all consensual contracts the agreements of parties ought to be enforced. I speak specially of consensual contracts, because location, which is the contract here, is a consensual contract. I do not speak of feus, which confer a right of property. But in a lease, which gives no right of property, the parties may stipulate for any conventional irritancies they please, provided they are not contrary to law.’ The case of *Stewart v. Watson* therefore does not, in my opinion, in any way infringe the general rule that conventional irritancies occurring in rights of property in land may be purged at the bar, at all events where the irritancy is attached not to a condition *ne quid fiat*, but to a certain *ut aliquid fiat*—see the case of *Forsyth* already cited.

“I am therefore of opinion that the defender, who undertakes judicially now to comply with the stipulation as to building, is entitled to a reasonable time in which to make and finish the erection, and the period of six months specified in his minute appears to me to be in the circumstances a reasonable one. But it must be distinctly understood that no further delay will be granted, and that at the expiration of the time fixed the pursuer will be entitled to decree of declarator in terms of the conclusions of the summons, unless the buildings are then completed or a satisfactory reason is assigned for their non-completion. All questions of expenses are in the meantime reserved.”

The interlocutor was acquiesced in.

Counsel for Pursuer—J. P. B. Robertson.
Agent—Lockhart Thomson, S.S.C.

Counsel for Defender—M’Kechnie. Agent—A. Kelly Morrison, S.S.C.

Friday, February 8.

FIRST DIVISION

[Lord Rutherford Clark,
Ordinary.

GARDNER v. BERESFORD’S TRUSTEES.

(*Vide ante*, June 13, 1877, vol. xiv. 570, 4 R. 885.)

Writ—Statute 1696, c. 15—*Subscription by Initials*.

Held that a writing dated in 1873, which consisted of two separate sheets of paper and seven pages, and was subscribed on the last page by the granters and witnesses, but merely initialed on those before it, was an improbable instrument under the Act 1696, c. 15.

Writ—*Conveyancing (Scotland) Act 1874* (37 and 38 Vict. c. 94), *secs. 38 and 39*—*Retrospective Effect*.

The provisions of the 38th and 39th sections of the Conveyancing (Scotland) Act 1874, the effect of which is to dispense with certain important solemnities which were previously required in the execution of written deeds, are not retrospective.

Observations per curiam on the rules of construction applicable to the question whether a statute is to be held to be retrospective or not?

Lease—Rei interventus.

A entered into an agreement with B to give him a lease of certain subjects on certain terms. A formal lease was executed, and B entered into possession. Thereafter A reduced the lease, on the ground that it had been fraudulently represented to him to be in terms of the agreement, whereas it was not so. B then sought to get a lease in terms of the agreement, which, being informal in itself, he said was fortified by actings on his part which constituted *rei interventus*.—*Held* that in order to found such a plea the actings must be clearly referable to the writing proposed to be set up, and that the circumstances condescended on in this case could only be held referable to the lease subsequently obtained.

This was the sequel of the case reported *ante*, June 13, 1877, vol. xiv. 570, 4 R. 885. The present action was raised by the defender in the former action of reduction, in order to set up the agreement of 7th June 1873, which was that a lease for fifteen years should be adjusted between the pursuer and defenders "in the same terms and conditions as to rent, lordship, and otherwise, as are expressed in" Mr Pitcairn's lease. The conclusion of the summons was to have it found and declared "that, under and in virtue of a minute of agreement, dated 7th June 1873, entered into between the defenders Dame Elizabeth Lucas or Beresford, Edward Averil Lucas, and Charles Davis Lucas, and the pursuer, the said defenders are bound to grant to the pursuer a lease of the slate quarries, &c., at Ballachulish, Argyleshire, for the period of twenty-one years from Whitsunday 1874, on the same terms and conditions as to rent, lordship, and otherwise, as are expressed in a lease of the said quarries entered into between Robert Tennant, Esquire, of Scarcroft Lodge, Yorkshire, and Alexander Pitcairn, formerly manager of the slate quarries at Easdale, dated 16th and 30th May 1863." The agreement consisted of two separate sheets of paper and seven pages. The parties subscribed their names to the last page of it, and the subscription was attested by two witnesses. The prior pages were initiated by the parties. A formal lease was afterwards adjusted between them, of date 1st and 14th November and 2d December 1873, for a term of thirty-five years, but it was reduced on the ground of the fraud of Gardner, the pursuer of the present action, and decree of removing was pronounced by the Court on June 13, 1877, which is reported as above referred to.

The pursuer Gardner now pleaded, *inter alia*—“(1) The defenders being bound to grant a lease in terms of their agreement, the pursuer is entitled to decree. (2) In the event of the minute of agreement being

held to be not duly executed or tested, the pursuer is entitled to have these defects remedied in terms of the Conveyancing (Scotland) Act 1874. (3) In virtue of the minute of agreement libelled, and the actings of parties condescended on, the pursuer is entitled to decree.”

The defenders pleaded *inter alia*—“2. The averments of the pursuer are not relevant or sufficient to support the conclusions of the summons. 8. The document libelled is not obligatory, and the defenders ought to be assolated, in respect—(1) that although the said document consists of two separate sheets, it is signed on the last page of the second sheet only; (4) that the said document was intended to be provisional, and to be followed by the execution of a formal lease, and was in fact followed by the execution of such a lease; (5) that it was abandoned and departed from; and (6) that it was never followed by possession, or otherwise acted upon. 6. The formal lease being now reduced and set aside, the pursuer is not entitled to have recourse to the document libelled, or any other provisional or preliminary writings.”

The clauses of the statutes founded on or referred to are quoted in the opinions of the Court.

The pursuer's averments as to the plea of *rei interventus* and the actings of parties were these—“(Cond. 6) A draft lease was prepared by George Gardner, acting on behalf of the defenders; and, according to an agreement or understanding come to between the pursuer and them, the duration of the lease was extended to thirty-five years. The pursuer's and defenders' said agents afterwards met and adjusted the clauses of the lease. The terms thereof, as prepared by the defenders' agent, were somewhat relaxed from those of Mr Pitcairn's lease, which neither the pursuer nor his agent saw till after the meeting of 7th June 1873. The pursuer and his agent believed that the defenders' agent had their authority to make the said alterations; but the pursuer was quite ready to accept the clauses of Mr Pitcairn's lease, and has been all along willing to execute a lease in terms thereof. The lease so adjusted was submitted to the defenders, and executed by them on 1st and 14th November 1873, and by the pursuer on 2d December thereafter. The pursuer at Whitsunday 1874 obtained entry to the Ballachulish slate quarries, and has since worked the same, and paid the lordships to the defenders, and otherwise implemented the terms of the lease. Cond. 9 The pursuer having made up his mind to enter into a lease, and in reliance on the agreement to grant a lease for a term of years, made arrangements for giving up the business of a fletcher, which he had successfully carried on in Glasgow for many years. During the autumn of 1873 he curtailed the said business and gradually withdrew therefrom. He also induced his son John Gardner to wind-up the business of lard and tallow merchant, which was yielding a profit of £1000 per annum, in order to join him in carrying on the Ballachulish quarries, and the said John Gardner during the autumn of 1873 gradually gave up the business, and made arrangements for having it wound up. Further, the pursuer, in reliance on the said agreement, and before the said thirty-five years' lease was completed, engaged John Ferguson as manager

of the quarries for five years at a salary of £200 per annum, and an agreement to that effect, subject to the condition that the pursuer should become lessee, was entered into between them on 27th October 1873. Captain Lucas, one of the defenders, recommended John Ferguson, who was Mr Pitcairn's manager, to the pursuer, and assisted in arranging terms with Ferguson, and generally took part in the negotiations, and signed the agreement as instrumental witness. The pursuer was put into possession of the quarries by the defenders as tenant, and bought and paid for one-half of Mr Pitcairn's plant in terms of the agreement. The whole price was £3625, 15s. 2d., of which he paid £2000 at Whitsunday 1874, and the balance on the 14th of December of the same year. Mr Pitcairn's plant consisted chiefly of fixtures, such as tramways, pumps, and drums. The pursuer also during the same year, and before his title was challenged, made roads, tramways, a railway a mile long, cleared out old quarries, made new levels and inclines, erected a pier and buildings, and altogether spent upon fixtures and means of working the quarries upwards of £10,000. The pursuer likewise during the same period bought large quantities of moveable plant. In these and other ways the pursuer acted in reliance on the said agreement and on his being tenant."

The Lord Ordinary pronounced the following interlocutor—"Repels the first plea-in-law stated for the defenders: Finds that the writing, dated 7th June 1873, is not a probative deed: Finds that there is no relevant allegation that the said writing has been validated *rei interventu*: Therefore assolizes the defenders from the conclusions of the summons, and decerns," &c.

"*Note.*—The parties concurred in asking the Lord Ordinary to decide certain legal questions which arise on the record before any inquiry was ordered.

"The first question is, Whether the writing founded on by the pursuer is a probative writ? It contains a testing clause, to which the defenders stated that there was no *ex facie* objection; but though of more than one sheet of paper, it is signed on the last page only. The previous pages are however initialed.

"The defenders contended that the document is not executed in terms of the Act 1696, c. 15, because it is not signed on every page, and in the opinion of the Lord Ordinary the objection is well founded.

"By the case of *Thomson*, 18 D. 470, affirmed in the House of Lords, 21 D. 3, it is settled that when a deed is written bookwise the solemnities introduced by the Act must be observed in order to the validity of the deed. The provision of the Act is 'that if they be written bookways, every page be marked by the number first, second, &c., and signed as the margins were before,' &c. The question then is, whether every page of the document on which the pursuer founds is signed within the meaning of the Act?

"The pursuer contended that the signature on each page is not the subscription by which the grantor expresses that the deed is completed, but is only required for the authentication of the different pieces of paper of which it is composed; that the Act prescribes no more than that each page shall be signed as the margins were before; and that prior to the Act deeds

were held to be well executed though initialed only.

"So far the Lord Ordinary assents to the pursuer's view. The signature of the pages is not, he thinks, the act by which the deed is completed, but is rather to be considered as a means of authentication. But not less does it seem to him that the Act requires the pages to be signed, and the reference to former custom is a reference to a custom of signing the margins. Initialing cannot, it is thought, be held to be signing, especially when it is not pretended that the grantor of the deed is in use to subscribe by initials.

"But the pursuer maintained that, even if the objection were good under the Act of 1696, it is removed by the 39th section of the Conveyancing Act of 1874. The Lord Ordinary is of opinion that this plea is not well founded. If the document was not probative under the Act 1696, it created no contract and no right in either party. He cannot hold that the Act of 1874 raises up into legal efficacy any document which at the time when it was passed was of no force—See *Veasey*, 2 R. 748.

"2. But the pursuer contended that the informal contract contained in the writing on which he founds was validated by *rei interventus*. The allegation is contained in the 9th article of the condensation, and consists of three parts—1st, 'That he curtailed and gradually gave up his own business as a fletcher, and induced his son to give up his business as a lard and tallow merchant in order that he might join with him in working the slate quarries; 2d, that he engaged John Ferguson as manager of the quarries for five years, subject to the condition that the pursuer should become lessee; and 3d, that he entered into possession of the quarries at Whitsunday 1874, and made large expenditure thereon.

"The pursuer did not maintain that the first part of this allegation was relevant. But he urged that the fact that he had engaged a manager under a contract for years was of itself sufficient to validate the writing. It is to be observed, however, that the contract is made subject to the condition that the pursuer should become lessee, and there was to be no contract unless the pursuer obtained a binding lease. Things therefore remained entire notwithstanding of the contract.

"It was urged that the condition was inserted to meet the reserved right of the defenders to 'break this agreement on giving notice prior to Martinmas 1873.' But the condition is general, and cannot, it is thought, be limited to this case only.

"The pursuer relied on the possession which he obtained at Whitsunday 1874. But the writing provides that a formal lease 'embodying the foresaid terms' shall be completed prior to Whitsunday 1874, which was the term of entry. A formal lease was so prepared, and it was not until it had been executed that the pursuer obtained possession. This lease was afterwards reduced. But it was to it and not to the informal writing that, in the opinion of the Lord Ordinary, the possession is to be ascribed.

"The defenders urged as a separate point that the formal lease must be held to supersede the prior contract, and that the pursuer could not revert to the latter after the former had been reduced by reason of his fraud. This is an important question, but the Lord Ordinary does not think it necessary to enter on it."

The pursuer reclaimed, and argued—(1) On the question of the validity of the deed with reference to the provisions of the Act 1696 c. 15—The pages were to be signed “as the margins were before.” Now, this marginal signing was a custom, and no solemnity. It was therefore a question whether, in the circumstances of each case, the authentication on the different sheets was sufficient to identify them as parts of the deed. If it was, that was all that could be required. Where, as here, a number of persons joined in initialing the various sheets, that was a perfect identification—*Menzies' Conveyancing*, 97. The cases of *Sym v. Donaldson*, M. 16,713, and *Ogilvie v. Earl of Findlater*, M. 16,804, showed that there was no custom anterior to 1696 that all the parties should sign at the margins. What was sufficient to identify the whole deed as the act of the granters was in custom to be held sufficient subscription, and it was no more than that custom that was by the Act 1696 applied to the new form of deeds. In the case of *M'Donald v. M'Donald*, M. 16,808, the writ was held null because the last sheet contained nothing but words of style, and therefore it could not be identified as part of the same deed as the preceding sheet—cf. also *Ferguson v. Burnett*, 1 Elchies, Writ No. 22. Further, was subscription by initials not signing? [LORD PRESIDENT—No. A signature is what you usually subscribe. If you usually sign initials, that is your signature, and is sufficient.] But in *Grierson v. Grierson*, M. 16,802, all that was asked for by the Court was proof that the initials were signed by the parties; no proof of custom was required.

On this point the defender answered—It was settled law that “signing,” the word used in Act 1696, c. 15, meant the ordinary subscription of a party. Subscription by initials must, in order to be sustained, be shown to be the ordinary custom of the party, and to have been adhibited by him in the particular case—*Forrest v. Marshall*, M. 16,805.

On the question as to the retrospective effect of the Act of 1874, the pursuer argued—This question was left open in *Maclaren v. Menzies*, July 20, 1876, 3 R. 1151, where a document of this kind, executed after the passing of the Act, was set up, but the Judges there held (v. Lord Mure's opinion) that the Act as a remedial measure must receive a broad interpretation. In *Veasey v. Malcolm's Trustees*, June 2, 1875, 2 R. 748, Lord Young expressly reserved this question, but pointed out that the old law as to testing of deeds was mischievous. The Court could not therefore regard it with favour. There was not here the difficulty that arose in that case as to rights arising under the previous law. No rights would be trespassed on by sustaining this deed. The preamble of 19 and 20 Vict. c. 89, was illustrative of the effect which the Legislature always intended to be given to a remedial statute. It was said that the clauses of this statute of 1874, which were intended to be retrospective—viz., 11, and 51—had distinct words to that effect, and that where no such words were found the operation of the Act was only prospective. But certain clauses—*e.g.*, 52 and 56—were specially declared to be prospective, so that where there was no special provision made the interpretation must be aided by a consideration of the general clause, viz., sec. 68, which

provides that “nothing herein contained shall affect any action now in dependence or that shall be instituted before the commencement of this Act.” The inference from that was that in any action raised subsequently the Act was pleadable.

Then, as to the effect of the words “shall be deemed”—Their effect was explained in *Towler v. Chatterton*, November 20, 1829, 6 Bingham 258, and in *Marsh v. Higgins*, April 25, 1850, 9 Manning and Scott's C.B. Repts. 561, 569, and 19 L.J., C.P. 297 (Mr Justice Cresswell's opinion). In *Queen v. Mill*, 10 Scott's C.B. Repts. 379, and *Perry v. Skinner*, 2 M. and W. 476, it was laid down that the effect of such an expression as “shall be deemed” was that when the question was raised before a Court they must give effect to the provision of the statute. It laid down an absolute rule for the treatment of the particular case whenever it was brought into Court—*Queen v. Leeds and Bradford Railway Company*, 21 L.J. 193; (Magistrates' Cases); *Pryor v. Pryor*, 19 L.R., Eq. 595—on appeal, 10 Ch. App. 469. In the case of *Reid*, March 31, 1863, 1 Macph. 774, a statute was held retrospective.

On this point the defender argued—Where the clauses of this Act were intended to be retrospective, it was specially so declared, as in sections 11, and 51. The presumption therefore was that where no such provision was expressed the enactment was prospective only. Courts had no doubt recognised Acts as retrospective, but only where (1) privileges were taken from one party and given to another, or (2) where the Court was directed in the ascertainment of rights to take certain procedure. That was the explanation of the cases of *Towler v. Chatterton* and *Queen v. Leeds and Bradford Railway Company*. On the law of this matter see *Dwarris on Statutes*, 540, and *Maxwell on the Interpretation of Statutes*, 190, and cases there quoted. The rule was that if existing rights and obligations would be affected the Act was not to be retrospective. Now, if it was not to affect existing rights it was not to affect mine. If it was, the Court could not recognise such operation of a statute without express words to that effect.

On the question of *rei interventus* it was argued for the pursuer—That the expense which he had been at was in consequence of this agreement, and it was not necessary in law that the other party should be aware of it in order to set up an informal contract—*Johnstone v. Grant*, February 28, 1844, 6 D. 880 (Lord Medwyn's opinion).

The defender answered—All the pursuer's actings were referable to the lease which he afterwards obtained, and which had now been reduced. In order to found the plea of *rei interventus* the actings must be clearly referable to the contract which was to be set up, and must be such as were naturally to be expected—*Bell's Principles*.

At advising—

LORD PRESIDENT—The writing which is founded upon by the pursuer of this action, and which is sought to be set up by the conclusions of declarator as a probative instrument, was executed, however imperfectly, by the parties after some negotiations between them as to a lease of the slate quarries of Ballachulish. It bears date 7th June 1873, and it is not said that anything immediately followed upon its execution. The pursuer alleges, that being satisfied that he could

work the quarries to profit, he did not give notice to the defenders that he withdrew or desired to withdraw from the said agreement at or before Martinmas 1873—that being a right reserved to him by the agreement in question—and the agreement (he says) thereby became complete and binding on the pursuer, and in particular he thereby became bound to fulfil a certain other agreement after mentioned with John Ferguson, and to purchase and pay for the stock and plant of Pitcairn, the previous tenant of the slate quarries. He alleges further, in the condensation, that—‘Thereafter a draft lease was prepared by George Gardner, acting on behalf of the defenders; and according to an agreement or understanding come to between the pursuer and them, the duration of the lease was extended to thirty-five years. The pursuer’s and defenders’ said agents afterwards met and adjusted the clauses of the lease. The terms thereof, as prepared by the defenders’ agent, were somewhat relaxed from those of Mr Pitcairn’s lease, which neither the pursuer nor his agent saw till after the meeting of 7th June 1873. The pursuer and his agent believed that the defenders’ agent had their authority to make the said alterations; but the pursuer was quite ready to accept the clause of Mr Pitcairn’s lease, and has been all along willing to execute a lease in terms thereof. The lease so adjusted was submitted to the defenders, and executed by them on 1st and 14th November 1873, and by the pursuer on 2d December thereafter. The pursuer, at Whitsunday 1874, obtained entry to the Ballachulish slate quarries, and has since worked the same, and paid the lordships to the defenders, and otherwise implemented the terms of the lease.’ Now, the lease here mentioned, of course is the lease executed upon 1st and 14th November and 2d December 1873, and is not the lease, or supposed lease, executed upon the 7th of June 1873, which is in many essential particulars entirely different from that which was executed of the latter date. The lease upon which Gardner thus obtained possession was afterwards reduced in an action at the instance of the present defenders, upon the ground that it had been obtained by Gardner and another party acting for him through fraud, and that lease is now therefore entirely set aside, and of no value as a title of possession. In consequence of the verdict of the jury, we were asked in the previous action not only to declare in terms of the reductive conclusions, but also to ordain the defender to remove from the slate quarries, and that we did, notwithstanding a plea on the part of the present pursuer that he was entitled to fall back upon the agreement of 7th June 1873, and to maintain his possession under that as a good title. We disregarded that plea in the action in which it was maintained, because it was obvious that the writing of 7th June 1873 could not be at once accepted as a probative instrument, and it was quite necessary to show either that it was a probative instrument, or that something had followed upon it which made it, although improbativ, an effectual instrument. The present action, therefore, has been raised for that purpose, and the question comes to be, Whether this writing of 7th June 1873 is an available instrument and title of possession to the pursuer of this action? The objection taken to

it on the part of the defender is that it is an improbativ instrument under the Statute 1696, chapter 15, because, though subscribed on the last page by the granters and witnesses, it is not subscribed upon the previous pages—the writing consisting of two separate sheets of paper and seven pages.

Now, the Act 1696 allowed instruments to be written bookwise, as it is called, but under certain provisos, which are thus expressed in the statute—“Providing that, if they be written bookways, every page be marked by the number first, second, &c., and signed as the margins were before, and that the end of the last page make mention how many pages are therein contained, in which page only witnesses are to sign in writs and securities where witnesses are required by law; and which writs and securities being written bookways, marked and signed as said is, His Majesty, with consent foresaid, declares to be as valid and formal as if they were written on several sheets battered together, and signed on the margin according to the present custom.” Now, it might no doubt have been contended, upon the construction of this statute, that the provisions that the pages should be marked by number, and that each page should be signed as the margins were before, and that the number of pages should be specified in the testing-clause, are not absolute conditions of the validity of deeds written bookwise. But that is a matter which cannot admit of any doubt after the decision of this Court and of the House of Lords in the case of *Thompson v. M’Crummen’s Trustees*, 18 D. 470 Aff. H. of L. 21 D. 3, where the deed was exposed to this objection, that the pages were not marked and numbered, and it was held that that was an absolute condition of the deed being received as a probative instrument, and consequently the writing labouring under that imperfection in the case of *Thompson v. M’Crummen’s Trustees* was reduced and set aside. Now, I am quite unable, under this statute, to distinguish between the one condition and the other—the condition that the pages shall be marked with numbers, and the condition that each page shall be signed. Indeed it appears to me that the latter is rather a more important solemnity than the former, and therefore, following that authority, I am bound to say that I think the objection under the Statute 1696 is a good objection, and that the deed therefore is invalid.

It was contended, no doubt very strongly, upon the part of the pursuer, that when the statute speaks of the margins of writings previous to the statute being signed, it speaks of a very imperfectly observed custom, and that any kind of identification of the different sheets of which a deed was composed would have been sufficient before the statute, and therefore that a mere marking by initials is sufficient,—the marking by initials having been made upon each page of the writing in the present case. But I cannot so read the statute. I think the statute requires, as a condition of the writ being valid, that each page shall be signed. There is no other word used, and I do not think a marking by initials is signing in any ordinary sense of the term. It may be that a person who does not sign his name in full, and perhaps cannot sign his name in full, but is in use to subscribe deeds by initials, may

be held sufficiently to sign a deed if he appends his initials as his usual and only form of subscription, but with reference to persons who do subscribe their names in full, or at least in full as regards the surname, I do not think it is possible to say that they sign a deed when they merely put their initials upon the paper. Upon the first point, therefore, involved in the Lord Ordinary's interlocutor, I confess I entertain no doubt at all,—that this is an invalid deed under the Statute 1696.

But the pursuer further maintains that this objection is cured by the operation of the Conveyancing Act of 1874, and particularly of the 39th section of that statute. Now, that depends upon whether the 39th section of the statute is to receive a retrospective effect, a question of very great and general importance. The rule in the construction of statutes as to the question whether they are retrospective or not, I think is very well fixed as a general rule, and I know no place in which it is more distinctly stated than in the opinion of Lord Chancellor Cranworth in the case of *Kerr v. The Marquis of Ailsa*, 14 D. 864; aff. (H. of L.) 17 D. 11, 1 Macq. 736. He says,—“Unless there be something in the language, context, or objects of an Act of Parliament showing a contrary intention, the duty and the practice of Courts of Justice is to presume that the Legislature enacts prospectively and not retrospectively. There may, however, be Acts that are evidently on the face of them, by their language and subject-matter, intended to be retrospective.” The question will always be, therefore, whether there be anything in the language, context, or objects of a statute showing that it is intended to be retrospective; and that must be the inquiry in dealing with the 39th section of this statute. There are a great many cases both in England and in Scotland on this subject, and I should not like to undertake the duty of reconciling all the judgments that have been pronounced, nor do I think it at all safe to assume that there is any rule beyond the general rule stated above. I therefore proceed to consider the 39th section, with a view entirely to the inquiry whether there is anything in the language, context, or objects of that enactment showing that it is intended to be retrospective.

It is probably not very easy to understand the whole meaning and effect of the 39th section without considering at the same time the enactment contained in the 38th section, and I shall therefore consider them together. The 38th enacts—“It shall be no objection to the probative character of a deed, instrument, or writing, whether relating to land or not, that the writer or printer is not named or designed, or that the number of pages is not specified, or that the witnesses are not named or designed in the body of such deed, instrument, or writing, or in the testing clause thereof, provided that where the witnesses are not so named and designed, their designations shall be appended to or follow their subscriptions; and such designations may be so appended or added at any time before the deed, instrument, or writing shall have been recorded in any register for preservation, or shall have been founded on in any Court, and need not be written by the witnesses themselves.” Now, the effect of this section is undoubtedly to dispense

with some very important solemnities that were required previously in the execution of deeds. A previous statute had dispensed with the necessity of numbering the pages. This section dispenses with the necessity of specifying the number of pages in the testing-clause. It dispenses also with the necessity of designing the writer of the deed, and also with the necessity of naming or designing the witnesses in the testing-clause, provided their designations be added to their subscriptions; and thus it takes away, to a very great extent, all the more important formalities that were previously required in the execution of probative instruments. Now, this is followed by the 39th section, which carries the change of the law a step further—“No deed, instrument, or writing subscribed by the grantor or maker thereof, and bearing to be attested by two witnesses subscribing, and whether relating to land or not, shall be deemed invalid or denied effect, according to its legal import, because of any informality of execution, but the burden of proving that such deed, instrument, or writing so attested was subscribed by the grantor or maker thereof, and by the witnesses by whom such deed, instrument, or writing bears to be attested, shall lie upon the party using or upholding the same, and such proof may be led in any action or proceeding in which such deed, instrument, or writing is founded on or objected to, or in a special application to the Court of Session, or to the Sheriff within whose jurisdiction the defender in any such application resides, to have it declared that such deed, instrument, or writing was subscribed by such grantor or maker and witnesses.” This is in some respects what may be called the complement of the preceding section. Certain particular objections are to be denied effect under the 38th section, but here all other objections arising out of the mode of the execution of the deed,—any informality of execution, that is to say, not already provided against by the 38th section,—all such objections from informality of execution—are taken away upon condition that the grantor has subscribed the deed, that two attesting witnesses have subscribed the deed, and that the party founding upon the instrument shall prove that *de facto* the grantor did subscribe the deed in presence of those attesting witnesses. Now, it rather appears to me that not only are these two sections to be read together as relating entirely to the same subject-matter, but that it is impossible to say that one of them can be retrospective while the other is not, and therefore the question we have to determine really is, whether these two sections are to have a retrospective effect? If they are to have a retrospective effect, it will be a very serious effect in many cases, for I cannot see that if these enactments are retrospective, that effect is to follow in one set of circumstances and not in another. I know of no rule of construction of a statute that will enable us to arrive at such a conclusion as that. It may be, no doubt, that a deed imperfectly executed before the passing of this statute may not have received any effect, and that nothing may have been done inconsistent with the operation of that deed, and consequently that no existing and vested interest one way or another will arise to be affected by the retrospective action of these clauses. But it is just as likely, on the other hand, that a deed imperfect under the statute of 1696, or under any

of the other statutes, has been abandoned as useless—that is to say, has never been acted upon—and that parties have proceeded upon the footing that it could receive no effect, and in consequence of that conviction a landed estate or a moveable estate, as the case may be, has been taken up by the heir-at-law or the next-of-kin because the deed which purported to be the testamentary disposition of the deceased could receive no effect; and if these enactments are to receive retrospective effect, of course the result would be that the heir who has taken up the landed estate, or the next-of-kin in whom the moveable estate has vested by force of law, will be divested in favour of the party in whose interest the improbativ instrument has been made. Now, these are very serious consequences to contemplate, and yet I confess I do not very well see how, if the statute is to receive a retrospective effect, it is possible to limit it in such a way as not to apply to the cases I have supposed.

But then, is there anything in the words of these clauses themselves that leads one to believe they are intended to have a retrospective effect? I cannot say I think so. I know some very critical and subtle observations have been made upon the meaning of the words—"It shall be no objection to a deed," or "Such and such things shall be deemed and taken to be so and so;" but I cannot say I think that these arguments are by any means satisfactory in a question of this kind. It is not upon single words or phrases like these that a question of this kind depends; it is upon a consideration of the object of the enactment, of the words in which it is generally expressed, and of the effects to which it will lead. Now, taking the clauses by themselves, and finding no words either expressing, or to my mind satisfactorily implying, an intention to give the enactment retroactive force, and seeing that to give it retroactive force would be followed by very startling consequences, I think the next point for consideration is, whether in this statute we can find any example of clauses with retrospective effect, expressed or implied, in order that we may compare those clauses with these immediately under consideration. And, fortunately I think, there are two clauses that have a very important bearing upon this argument—I mean the 11th and the 29th. The 11th section deals with a matter which had been found to be very embarrassing in practice in the service of heirs—"Notwithstanding any existing law or practice, it shall be no objection to any precept or writ from Chancery, or of *clare constat*, or to any decree of service, whether general or special, or to any writ of acknowledgment, whether obtained before or after the commencement of this Act, or to any other decree, or to any petition, that the character in which an heir is or may have been entitled to succeed is erroneously stated therein, provided such heir was in truth entitled to succeed as heir to the lands specified in the precept, writ, decree, or petition." This is an example of a case in which the Legislature intended the legislation to be retrospective, and where it is accordingly clearly expressed, for the words used are, in regard to any of the writs enumerated, "whether obtained before or after the commencement of this Act." We are therefore, I think, from that example, bound to assume that in framing this statute, when the Legislature intended that an enactment

should receive a retrospective effect, express words were used to indicate that intention. Again, in section 29, the enactment is—"No decree, instrument, or conveyance under this Act, and no other decree, instrument, or conveyance, whether dated before or after the commencement of this Act, shall be deemed to be invalid because the series of titles connecting the person obtaining such decree, or expeding such instrument, or holding such conveyance, with the person last infest, shall contain as links of the series two or more general dispositions, or because any general disposition forming a part of the series does not contain a clause of assignation of writs." There, again, express words are used for the purpose of showing the intention of the Legislature to give the enactment retrospective effect, the words being, "whether dated before or after the commencement of this Act." Now, if in the present case, in sections 38 and 39, there had been any intention to give retrospective effect to the enactments, nothing could have been easier than to follow the same style that had been adopted in sections 11 and 29. The 38th section would have read—"It shall be no objection to the probative character of a deed, instrument, or writing, whether executed before or after the commencement of this Act;" and I cannot but think that the omission of those words which we have in the two preceding sections is a distinct intimation of the intention of the Legislature that the enactment shall not be retrospective. Two other sections have been referred to in the course of the argument by the party founding upon the instrument here, which I think have not any very strong bearing upon the case one way or another. One of these is the 52d—"It shall not be competent to challenge any judgment or decree of service pronounced in terms of the Act 10th and 11th Victoria, chapter forty-seven, intituled 'An Act to amend the law and practice in Scotland as to the Service of Heirs,' or of 'The Titles to Land Consolidation (Scotland) Act 1868,' and dated before the commencement of this Act, or any extract of any such judgment or decree, or any titles following upon such judgment, decree, or extract, on account of any objection to the manner or form in which such judgment or decree was recorded or extracted by the Director of Chancery or his depute, or on the ground that the manner and form of recording or extracting such judgments or decrees in use by the Director of Chancery or his depute for the time had not been directed or approved of by the Lord Clerk Register in terms of the said Acts, or on the ground that evidence was led in the petition on which such decree followed, and that the decree itself was pronounced before the expiry of the *induciae*, or days of publication prescribed under the tenth section of the former Act, or under the thirty-third section of the latter Act." It is plain that the decrees there intended were decrees pronounced before the passing of this statute—the limitation being for a very obvious reason—for a new mode of proceeding in regard to such decrees is introduced by the statute itself, and therefore this clause could not by possibility apply to any decrees except those which were pronounced before the Act. Then, again, in section 56, there is introduced a form of executing deeds by certain companies—"Any deed executed after the commencement of this

Act, to which any company registered under 'The Companies Acts 1862 and 1867' is a party, shall be held to be validly executed in Scotland on behalf of such company, if the same is either executed in terms of the provisions of these Acts or is sealed with the common seal of the company, and subscribed on behalf of the company by two of the ordinary directors and the secretary of the company, and such subscription on behalf of the company shall be equally binding and effectual whether attested by witnesses or not." Of course that new mode of execution could not be in operation before the statute was passed, and therefore it was most natural that the section should be expressed as applicable to any deed executed after the commencement of this Act. These two last sections, I confess, do not affect my mind much in considering this question, while the 11th and 29th sections afford distinct examples of the way in which the framer of the statute expressed himself when he designed to give retrospective effect to an enactment, and the absence of all such expression in the two sections which we are considering is therefore very pregnant with meaning, and signifies to my mind that retrospective effect is not intended.

It may not be amiss, however, in illustration of this construction, to refer back to another statute *in pari materia*—the 19th and 20th Vict. cap. 89—which dispenses with the formality of numbering each page of the deed. That was a very small step in the progress of the reform which is now completely carried out by the statute before us; but the former is not the less a statute having exactly the same kind of object in view, and accomplishing the object in the same way. Now, observe how that Act is expressed—"Whereas an Act of the Scottish Parliament was passed in the Sixth Session of the First Parliament of His Majesty King William, intituled 'Act allowing Securities, &c., to be written Bookways,' which Act statutes and ordains that it shall be lawful to write any contract, decret, disposition, extract, transumpt, or other security by way of book, in leaves of paper, provided that every page be marked by the number, first, second, &c., and signed, and that the end of the last page make mention how many pages are therein contained, in which page only witnesses are to sign in writs and securities where witnesses are required by law: And whereas the safeguards prescribed by the said Act, other than the said provision as to marking every page by number, have been found in practice to be of themselves amply sufficient for the purposes thereof, and the said provision as to marking every page by number has been very generally neglected in practice, and it would therefore be beneficial to and for the security of the public that the same should be abolished: Be it therefore enacted," &c., "that from and after the 1st day of September 1856 it shall not be competent to institute, or to insist in, or to maintain any challenge of or exception to any deed or writing foresaid, or any deed or writing of any description whatever, on the ground that the pages thereof are not marked by numbers." Observe how full of meaning are the words there. After a certain date—the 1st of September of the year in which the statute is passed—it

shall not be competent to institute or insist in or maintain any challenge of a deed on the ground of the pages not being marked. That itself shows, by the use of the words, that a retrospective effect was intended, and that again becomes still more clear by what follows, because the next words are not retrospective, but prospective—"And it shall no longer be necessary to mark the pages of any deed or writing by numbers, any law or practice to the contrary notwithstanding"—that is to say, it shall not hereafter be necessary—the one part of the section applying to deeds with unnumbered pages existing at the time the Act was passed, the other part of the section referring to deeds to be executed in the future. And then there follows this proviso, that "nothing herein contained shall be construed to affect any question which may be in dependence before any Court prior to the passing of this Act, or any judgment already pronounced," and so on. Now, taking these two statutes together, is it not a fair inference from what I have said, that when the Legislature is dealing with a matter of conveyancing in this country it always uses unmistakable language when there is an intention that any enactment shall receive a retrospective effect? Such is my conclusion from a perusal of both these Acts of Parliament; and the clauses in question, containing no language which I think, upon any fair construction, can be intended to imply such an intention, I arrive at the conclusion that this enactment is not retrospective, and consequently that the deed now before us, being a deed executed before the passing of the Act of 1874, and being objectionable under the Statute of 1696, cannot receive effect.

It has been maintained, however, on the part of the pursuer, that this deed has been acted on, and therefore, although improbable, it must receive effect as a contract between the parties. This comes to be a matter of relevancy, but it is quite necessary to keep in view what is the history of the case as disclosed in the pursuer's condescendence. I have already partly adverted to that, but it is necessary to recal the fact that the possession taken by the pursuer is, according to his own distinct statement in the 6th article of his condescendence, possession taken under and in implement of the regularly executed contract of lease, dated 1st and 14th November and 2d December 1873, which has now been reduced and set aside. The 9th article of the condescendence contains the statements upon which he relies as constituting the *rei interventus* following upon this imperfectly executed deed. He there says—"The pursuer having made up his mind to enter into a lease, and in reliance on the agreement to grant a lease for a term of years, made arrangements for giving up the business of a flesher, which he had successfully carried on in Glasgow for many years. During the autumn of 1873 he curtailed the said business and gradually withdrew therefrom. He also induced his son John Gardner to wind up the business of lard and tallow merchant, which was yielding a profit of £1000 per annum, in order to join him in carrying on the Ballachulish quarries, and the said John Gardner, during the autumn of 1873, gradually gave up the business, and made arrangements for having it wound up." Now, in so far as these averments are concerned, I do not

think the pursuer in the argument seriously contended that these could be said to constitute *rei interventus* to validate this instrument. They were private arrangements made by the pursuer and his son without any knowledge on the part of the defenders, and they have no direct reference to the imperfect contract of lease. I pass over them, therefore, without further observation. He goes on—"Further, the pursuer, in reliance on the said agreement, and before the said 35 years' lease was completed"—and apparently while it was in course of adjustment—"engaged John Ferguson as manager of the quarries for five years, at a salary of £200 per annum, and an agreement to that effect, subject to the condition that the pursuer should become lessee, was entered into between them on 27th October 1873. Captain Lucas, one of the defenders, recommended John Ferguson, who was Mr Pitcairn's manager, to the pursuer, and assisted in arranging terms with Ferguson, and generally took part in the negotiations, and signed the agreement as instrumentary witness." Now, observe that this dealing with John Ferguson to become manager of the quarries is a dealing which is going on at the time when the formal contract afterwards executed was in course of adjustment, and that the agreement with Ferguson was conditional upon the pursuer becoming lessee of the quarries—that is to say, he assumes he is not so yet. He himself says, no doubt *arguendo*, that that had reference to his option to be off before the term of Martinmas, embodied in the writing of 7th June 1873; but whether that was so or not, at all events the agreement with Ferguson was contingent upon his becoming lessee of the quarries. Now, he could only become lessee of the quarries either by having a formal contract of lease completed, or by being allowed to enter into possession under the informal contract, and therefore how this can be acting under the informal contract I am quite at a loss to understand. It is plain to me that this acting—that this agreement with Ferguson—was not in respect of the writing of 7th June 1873, or following upon it at all, but was in anticipation of the completion of the formal contract. Then again he proceeds to say:—"The pursuer was put in possession of the quarries by the defenders as tenant, and bought and paid for one-half of Mr Pitcairn's plant, in terms of the agreement. The whole price was £3625, 15s. 2d., of which he paid £2000 at Whitsunday 1874, and the balance on the 14th of December of the same year. Mr Pitcairn's plant consisted chiefly of fixtures, such as tramways, pumps, and drums. The pursuer also during the same year, and before his title was challenged, made roads, tramways, a railway a mile long, cleared out old quarries, made new levels and inclines, erected a pier and buildings, and altogether spent upon fixtures and means of working the quarries upwards of £10,000." Now, taking that in connection with the averment to which I have already referred, in the 6th article of the condensation, it is impossible to read it otherwise than as an averment that he was put into possession of the quarries under the former contract of lease executed in November and December 1873. All those things, according to his own averment, were done after the execution of that lease,

and in implement of that lease; and therefore I hold it to be impossible, upon his own averments, to ascribe those acts of possession to the informal writing of 7th June 1873.

These considerations are quite sufficient for the disposal of this case. They are the only points which have been determined by the Lord Ordinary, and I entirely agree with the Lord Ordinary's judgment. But if it were otherwise, there are some very serious questions remaining in this case—some very serious pleas of the defenders to be disposed of—supposing we had arrived at an opposite conclusion. But I do not think it at all necessary to enter upon a consideration of these, particularly as one of them—the allegation that this writing of 7th June 1873 was obtained by fraud—would require an issue to be sent to a jury for the purpose of trying the question and of having the fact ascertained. That is rendered perfectly unnecessary if the Court is satisfied that the interlocutor of the Lord Ordinary is right.

LORD DEAS—The Lord Ordinary's judgment is rested upon three grounds. Two of them only are specifically stated in his interlocutor, but we have a third one added and explained in his note. The first is, that the writing dated 7th June 1873 is not a probative deed; the second is, that there is no relevant allegation that the said writing has been validated *rei interventu*; and the third, which we have in the note, is, that although the pursuer maintained that even if the objection to the writing were good under the Act of 1696 it is removed by the 39th section of the Conveyancing Act of 1874, the Lord Ordinary cannot hold that the Act of 1874 raises up into legal efficacy such a document which at the time when the Act was passed was of no force.

I am of opinion that these three grounds are, each and all of them, well founded.

As to the first, which is a very important one—that this writing of 7th June 1873 is not a probative deed—that is a question upon which I should have considered it my duty to express a very careful and full opinion if I had not done so already in the case of *M'Laren v. Menzies*, which came before seven Judges, on 20th July 1876. In that case I very fully considered the construction of secs. 38 and 39 of the Conveyancing Act of 1874 in reference to the question whether a deed like this is a probative deed; and, looking back upon the case as reported (3 *Rettie* 1151), I see no ground for departing from the opinion I there expressed. It is therefore unnecessary for me to repeat what I then said upon that subject.

The second question is, Whether there is any relevant allegation that the writing has been followed by *rei interventus*? Now, if the whole question were whether the allegations in article 9 of the condensation would in an ordinary case be relevant to go to proof as setting up an improbativ deed—if that were the only question involved—there might be some nicety about it, and I should rather have been disposed in such a case to have allowed a proof before answer (that is, before deciding the relevancy) with reference to those allegations, because some of them—the more important of them—are of that kind, the full meaning and weight of which it is not very easy to determine till the precise cir-

cumstances are disclosed. That is an exceptional course we sometimes find it satisfactory to take. But that is not the state of this case, because I agree with what I understand to be the view of your Lordship, that the great objection to the relevancy of the pursuer's averments here is that the actings he avers are attributed by himself, in this very condescendence, to another deed altogether. Further, I am of opinion that the pursuer's whole conduct, and the way he proceeded upon that other deed which has been reduced by the verdict of a jury, necessarily implied the abandonment of this deed of 7th June 1873 as a ground of possession, and removed any force that might have attached to those acts upon which he founds as being *rei interventus* upon it. Having obtained the second deed by fraud, he perilled his case upon it before a jury, and affirmed it was in consequence of that deed that he laid out the money and did the acts which are now founded upon as validating the prior deed of June 1873. I am of opinion that all the actings of any moment set out in article 9 have been attributed by himself, both by what he has done and by what he has otherwise averred, to that second deed, and therefore, that the finding that there is no admissible and relevant allegation of *rei interventus* is in its substance a correct finding.

Then, as to the third and most important question, whether sections 38 and 39 of the statute of 1874 are or are not retrospective?—that is a question which undoubtedly was left untouched by the case of *M'Laren v. Menzies*, decided in 1876. Upon that question, however, I cannot entertain any doubt. I agree with many of the general observations which your Lordship has made as to whether statutes are to be held retrospective or not, but I agree particularly in holding that in a question of this kind we are to look to the particular statute with which we are dealing. I think, indeed, we are safer in going upon the terms and object of the particular statute than on more general grounds. It is most important to consider what kind of change the statute was intended to introduce. I can hardly imagine any kind of change more unlikely to be intended to be retrospective than a change with reference to the whole probative deeds of the country, both relating to personal estate and to heritable estate—these last, in particular, having always been held hitherto to require solemnities of a very strict kind in order to give them effect. To hold that these solemnities were intended to be dispensed with in all deeds executed in time past to the same extent as in deeds executed in time future would be a most startling proposition. I by no means say the Legislature could not have done it—the Legislature can do anything—but it would require a very clear Act of Parliament, I think, to lead us to the conclusion that that was intended. A kind of hazy notion has been indicated that the Act may not be retrospective where certain rights have been acquired, and may be retrospective where such rights have not been acquired. I am not able to follow that distinction. I think it would be a very dangerous thing to say that we are to be put upon an inquiry of that kind in every case with reference to the heritable and moveable rights and titles of this country before we can say whether deeds dated

prior to the statute, hitherto deemed nullities, are, in respect of their priority in date to other deeds, to displace these other deeds, although in themselves unobjectionable. Besides, I cannot see any consistency in such a view. It appears to me that the Act must either be retrospective out-and-out with reference to the solemnities of all deeds, or it is not retrospective at all. I have no hesitation in coming to the conclusion, both from the subject-matter of the enactments we are dealing with, and likewise from the way in which the different clauses which have been referred to are expressed, that the enactments now in question were not intended to be retrospective. I do not mean to go over the various clauses of the statute, but it sets out by enacting in section 2 that "this Act shall, except where otherwise provided, come into operation on the first day of October 1874, which date is hereinafter referred to as the commencement of the Act." Not only is it not said that the Act is to be retrospective, but it is in substance here said that it is not to be retrospective. It is to come into operation on a given date; does that not mean that it is not to come into operation before that date, and is not to affect anything before that date? And then we have the sections which have been more particularly referred to—secs. 11 and 29—where it is provided that certain enumerated classes of deeds, whether obtained before or after the commencement of the Act, shall not be objected to or invalidated by the particular defects therein specified. Taking these clauses along with the subject-matter dealt with in sections 38 and 39, I really am not able to entertain any doubt that these latter sections are applicable only to deeds dated after the date specified in the second section of the Act. It is difficult to figure the extent of confusion and injustice that would result from any other construction of this Act.

Upon all these grounds, I entirely agree with the result arrived at by your Lordship and the Lord Ordinary.

LORD MURE—I concur with your Lordship upon all the points in this case. With reference to the question raised under the Act of 1696, I am very much in the same position with Lord Deas, for I concurred in the case of *M'Laren v. Menzies* in that part of his opinion which related to the construction and operation of that Act, although my opinion in that case upon the effect of the 39th section of the Act of 1874 proceeded upon somewhat different and more general grounds. In so far therefore as I am concerned, the main question which I have now had to consider, as regards the validity of the writing of the 7th of June 1873, is whether it can be set up, as the will of Miss Norton was, under the 39th section of the Act 1874; and the solution of that question, in the view I take of it, depends solely upon whether the provisions of the 39th section can receive a retrospective effect. Now, I am unable to read that section without seeing that, were it to be held to have a retrospective effect, vested interests would in most cases be either directly or indirectly materially affected; and that being so, the presumptions are against its having been the intention of the Legislature to make such a clause retrospective. The passage which your Lordship has read from the opinion

of Lord Cranworth in the case of *Kerr v. Lord Ailsa* is quite distinct as to the general rule of law upon that point, viz., that the presumptions are against retrospective effect. Unless therefore we can find within the provisions of the Act of 1874, and more especially within the terms of section 39, something to show that it was intended to give the statute retrospective effect, it cannot receive that effect; and in all the cases I know of the rule has, I think, been also laid down that it must be made clear, either by the express words of the clause or by absolutely necessary implication, that the Act was intended to have this effect. Now, in this clause there are certainly no such words. And in the other parts of the statute, as your Lordship has pointed out—more particularly in sections 11 and 29—there is a distinct indication of the sort of provision, or rather mode of enactment, which the Legislature adopted when they intended to give its provisions retrospective effect. In both these clauses the words are inserted—“whether before or after the commencement of this Act.” In these circumstances, I can come to no other conclusion, when no equivalent expressions have been inserted in either section 38 or 39, than that it was not the intention of the Legislature that those sections should have a retrospective effect; and upon that broad ground I concur entirely with your Lordships. As regards the question of *rei interventus*, I have nothing to add to what has been already said.

LOED SHAND—I am entirely of the same opinion.

I think it is practically decided—and if it were not decided I think it is clear—that the Act of 1696, chapter 15, required that each page of a deed should be signed—that that requirement was essential to the validity of the deed—and as that was not complied with as regards the deed now in question, it is bad under that statute, and so is invalid, unless it can be set up under the Act of 1874.

The Act of 1874 has operated one of the most important changes—perhaps the most important change—that any statute has ever done in reference to the authentication of writs in this country, by dispensing with several requirements which were essential to the validity of writs under previous statutes. The altered law is introduced by sections 38 and 39 of the statute, the former of which deals with deeds of themselves probative, as distinguished from the latter, which deals with deeds which may be made effectual though not probative in themselves. Section 38 now makes a deed probative provided it is duly signed, and the two witnesses subscribing are either designed in the deed itself or have their designations added to their subscriptions. That of course is a vital change in the solemnities of deeds. But section 39 goes even further, for in the case of deeds that have been signed in the presence of witnesses, it allows the fact of signature by the grantor and witnesses to be proved to the effect of making the deed effectual even though there may be no mention of the designations of the witnesses on the face of the instrument.

It follows from the decision in the case of *M'Laren v. Menzies* that if the statute be retrospective in effect, the writing now in question

would be a valid deed, because it is subscribed on the last page, and there would be no difficulty in proving the subscription by the parties and witnesses. On the other hand, if the statute be not retrospective, the deed is plainly bad.

On the question whether the statute be retrospective or not, I do not repeat what your Lordship has said as to the general rule of interpretation. I may add, however, that I think that in the passage quoted in the argument from the work of Sir Peter Maxwell on the Interpretation of Statutes, an element of considerable importance in such questions is properly noticed as strengthening the presumption that applies in every case against the retrospective effect of statutes. He says—and I think rightly (page 192)—“Where the enactment would prejudicially affect vested rights or the legal character of past acts, the presumption against a retrospective operation is strongest. Every statute which takes away or imperils vested rights acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of actings and considerations already past, must be considered, out of respect to the Legislature, to be intended not to have a retrospective operation.”

I think it would be alarming to contemplate the consequences which would result if the argument of the pursuer were to receive effect—I mean the consequences, as affecting existing rights, of holding this statute to be retrospective in its effects. When the Act came into operation in 1874 there were rights—I may almost say without number—which had been settled in this country on the footing of the invalidity of writings which from a want of compliance with the testing statutes then in force were ineffectual. If the argument of the pursuer were well founded, such writings would suddenly become valid and retrospective in their effect, and the utmost hardship and injustice would result from the interference with vested rights which would thus be caused. I do not confine this observation to rights of succession to heritable and moveable estate. Within the period of prescription, testamentary writings, the number of which it would be impossible to estimate, have been treated by all parties interested as of no effect because they wanted the statutory solemnities. But I extend the observation to writings of every kind which were calculated to affect existing rights—contracts, obligations, and writings of that general class to which the document with which we are dealing belongs. And I may notice here in passing, with reference to some of the cases that were cited as to the retrospective effect of particular statutes, that the subject with which this statute deals is very different from such questions as what shall be received as evidence in Court at and from a particular future date, or how the forms of process in Court shall be modified or changed after a particular date. What the Statute of 1874 really deals with are writings not of the nature of mere evidence, but which directly create or affect existing rights of property as at the time when they come into operation in one way or another.

The counsel for the pursuer felt that the consequences to which I have alluded were so alarming that they were scarcely able to maintain in argument a construction of the statute which

would infer direct interference with existing rights. They endeavoured to draw a distinction between different classes of documents, and to make the statute apply in some way to a limited class of writings only, which did not create or affect existing rights, and to bring this document within that class. I confess I have been unable to follow the distinction suggested, or to see how it would apply favourably to the pursuer in this case. To take the document with which we are here dealing, at the date of its execution, and when it came into operation—such operation as it had—it either created an obligation against the defenders or it did not. If it created an obligation against the defenders, that could only be because it was a well-attested document, but we have now held that under the Act 1696 it was bad, and therefore created no obligation. The existing rights of parties after the date of that document were therefore these—that, on the one hand, the pursuer had no right to a lease, because the document was improbate—he had no obligation upon which he could sue the defenders—and, on the other hand, the defenders were in possession of their property unaffected by any obligation to grant a lease, and so not bound to give any weight whatever to this document as conferring a right upon the pursuer. It is clear that if we were now to give to the document the effect of rendering the defenders liable to grant a lease, this is interpreting the statute so as to interfere in the most direct way with the existing rights of the parties as they stood the day before it was passed. While the pursuer seemed to shrink from a construction of the statute which would interfere with existing rights, it seems to me to be plain that in effect he is maintaining a construction which would necessarily have that result. I agree with Lord Deas in thinking that there is no room whatever for such a construction of sections 38 and 39 of the statute as would make them apply with a retrospective effect to any limited class of writings, dated and delivered before the statute came into operation, or for distinguishing one class of such writings from another. I observe that in the only case in which the question of the retrospective effect of the statute came up directly for decision,—the case of *Veasey v. Malcolm's Trustees* (2 Rettie 748), which related to a testamentary writing dated before the statute, the Lord Ordinary held that the statute had not such effect. In the Inner House the case was disposed of on another ground. But the Lord Ordinary in dealing with it said—“The second question is whether the pursuer can take benefit, to the corresponding prejudice of the other interests represented by the defenders, from the provisions of sections 38 and 39 of the Act of 1874, and I am of opinion that she cannot. I do not mean to decide that these provisions apply only to deeds executed or coming into operation subsequent to the Act, but only that they do not destroy rights which arose and were recognised by the law as existing prior to the Act. If and in so far as retrospective effect can be given to these provisions without conflicting with rights established before the Act—not necessarily by judgment, but in the estimation of the law—I express no opinion against such retrospective effect being allowed.” His Lordship there had a case which plainly dealt with existing rights, and he had no hesitation that the statute had not

the retrospective effect contended for. He stated in a guarded and cautious way that he does not mean to decide that the provisions of sections 38 and 39 apply only to deeds executed or coming into operation subsequent to the Act. I can only say with reference to his Lordship's opinion, reserved by the concluding sentence of his note now quoted, that after having heard the argument, and given it my best consideration, I am unable to figure any case in which retrospective effect can be given to those provisions without conflicting with rights established before the Act, either by judgment or in the estimation of the law, and the ingenuity of counsel was unable to suggest any such case.

I do not mean to follow your Lordship into the examination you have made of the statutes. I think, as was pointed out in the argument, there is a remarkable contrast between sections 11 and 38 on the one hand, and sections 29 and 39 on the other. If I may say so, sections 11 and 38 are parallel. They are to a great extent identical in expression, but with this difference, that in section 11 you have the important words “Whether before or after the commencement of this Act.” And so in regard to sections 29 and 39, it is remarkable how close and parallel the expressions of those two sections are, with this difference only, that in section 29 again you have the words, “Whether before or after the commencement of this Act.” Nothing could be more convincing to my mind that those words were deliberately left out in sections 38 and 39,—and the general considerations to which I have adverted are sufficient to lead to the conclusion that the words were left out in reliance on the general principle of interpretation of statutes, and in order to prevent these sections from having a retrospective effect, and thus interfering with existing rights.

As to the question of *rei interventus*, I shall merely say that I lay entirely out of view all the actings founded on and mentioned in this record after the lease was entered into in November and December. That lays out of view the taking of possession, the payment to Pitcairn, and the taking over of his lease, and indeed everything else important; and the ground of this is, that every one of those actings is not only stated by the pursuer himself to have followed upon the lease, but obviously followed upon the lease alone. The lease is different in very material respects from the missive with which we are dealing. There were larger subjects embraced in it, the duration was much longer, and the terms and conditions were essentially different. It was upon that lease that payments and possession of the kind I have referred to followed, and those actings cannot be referred to as *rei interventus* in support of this document.

Then, as regards the other actings, the rule is, that such acts only can receive effect as *rei interventus* as are important in their character, and are either known to the other party or must necessarily be held to have been in the contemplation of that party when he entered into the agreement,—actings which are in the proper pursuance of the agreement, and which the other party to the agreement would naturally expect should take place in pursuance of it. One of these now founded on is an arrangement made for giving up a business in Glasgow. That plainly was not of a kind which the other party to the contract

could be assumed to have anticipated or to have knowledge of, and it is not said they had any knowledge of it. With regard to the engagement of a manager, I should doubt whether that would be an act of sufficient importance to set up a lease of this kind, even if it had not been qualified. But it was a qualified engagement; it was an arrangement with a person to become manager, provided a lease was entered into, and the only lease entered into was set aside by this Court. I am accordingly of opinion that the *rei interventus* alleged was not of a character that will set up this invalid document to the effect of making it valid and effectual.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Kinnear—Asher—Lorimer. Agents—H. & A. Inglis, W.S.

Counsel for Defenders (Respondents)—Balfour—J. P. B. Robertson. Agents—Tods, Murray, & Jamieson, W.S.

Friday, February 8.

FIRST DIVISION.

[Sheriff of Banff.

DUNCAN (INSPECTOR OF BANFF PAROCHIAL BOARD) *v.* FORBES.

Poor—Relief—Circumstances where a Father held bond to give Relief for Maintenance of Pauper Son.

A crofter had a large family dependent upon him, one of whom, owing to illness, was obliged to have partial relief from the Parochial Board. His father-in-law was also dependent upon him. In an action by the Parochial Board against him for relief of advances made on account of the pauper son—*held*, in respect it appeared that the father was contributing to the maintenance of a son who was earning a wage sufficient in itself for that purpose, and was therefore possessed of more means than was absolutely necessary for himself and his family, that the Board were entitled to relief.

Observed by the Lord President that a decree for aliment can never be made for all time coming.

This action was raised in 1874 by the Inspector of Poor of the parish of Banff, on behalf of the Parochial Board there, against James Forbes, and concluded, firstly for payment of a sum of £12, 2s. being the amount of alimentary advances furnished by the Parochial Board to James Forbes, son of the defender; and secondly, for decree against the defender obliging him to free and relieve the Parochial Board "in all time coming of all aliment and other advances" which the Parochial Board might thereafter make on account of his son.

The defender was a married man, and had six children. The pauper James Forbes, ever since his marriage in 1869, had been to a certain extent supported by his father, especially during illness, to which it appeared he was frequently subject. For the four years previous to the raising of this action his father had given him a house

of the value of about £3 a-year, and he further did what he could to supplement the relief of 4s. 6d. allowed by the Board. The father was a crofter, having a croft of 26 acres, for which he paid a rent of £18 a-year. He had a son John Forbes, in Glasgow, serving an apprenticeship as an engineer, but his wages, it was said, were not sufficient to support him, and he was therefore to a certain extent dependent on the defender, who contributed to maintain him. His wages were from ten to twelve shillings a-week. It further appeared from the defender's evidence that he gave this son a pound every two months. The defender, it was proved, had for some time been very unfortunate in his agricultural operations, and had other drains upon his resources in addition to those already mentioned, among which was the maintenance of his father-in-law, of which he relieved the Parochial Board, and the education of his youngest son. He deponed, further, that he could not pay 20s. per pound of his debts.

The Sheriff-Substitute (GORDON) assolizied the defender, but on appeal the Sheriff (BELL) reversed this decision in the following interlocutor:—

"*Edinburgh, 5th June 1877.*—The Sheriff recalls the interlocutor appealed against: Finds that the original pursuer advanced the sum of £12, 2s. sterling in the manner libelled: Finds the defender liable in repayment of the same, with interest from the date of citation: Finds him further bound to relieve the pursuer of all subsequent advances: Finds it unnecessary to subject him in expenses, and decerns.

"*Note.*—This is a very painful case; but it is impossible to doubt that it is quite possible, although perhaps not a little hard, for the defender to meet the strict, and it may be harsh, demand of the pursuer. The very efforts, however honourable, to support John Forbes in his apprenticeship is damaging to the defence. The discharge of the defender's obligation to the pursuer must take precedence of the defender's creditable desire to advance John Forbes in the world.

"At the same time, the defender had so much room for self-deception, the Sheriff ventures to hope that, between parties so differently situated, it may not in this case be incumbent upon him to award expenses."

The defender appealed to the Court of Session.

Defender's authorities—*Hamilton v. Hamilton*, March 20, 1877, 4 R. 688; *Moir v. Reid*, July 13, 1866, 4 Macph. 1060.

At advising—

LORD PRESIDENT—There are two distinct parts in the interlocutor of the Sheriff dated 5th June 1877, one in which he finds the defender liable to repay an advance of £12, 2s. made by the inspector of poor, the other in which he further finds the defender bound to relieve the pursuer of all subsequent advances—that is to say, in all time coming. In point of fact, this is a finding in terms of the second conclusion of the summons. As regards the second part of this interlocutor, I consider it to be entirely unfounded in point of law, for it will depend on the circumstances of the parties at the time whether the defender will be liable for aliment, and it is quite impossible for an interlocutor to decide that a