I remember cases of that kind, and I see no harm in such an issue being directed by the Court of Session.

By the way in which my noble and learned friend has proposed to direct the issue, any difficulty in point of form is got over, because what he proposed is to direct the Court of Session to direct an issue, whether the working and removal of the barrier of coal since the time when the alleged parole agreement was given was with the consent of the respondent. The consent of the respondent, in my mind, will include everything, because, although we do not use the word "acquiescence," acquiescence necessarily involves consent, for in truth acquiescence is only important as being evidence of consent. Therefore I entirely agree with the motion of my noble and learned friend. The form of the order may perhaps be improved by putting it in the way I have proposed.

LORDS WENSLEYDALE and KINGSDOWN concurred.

Mr. Rolt.—As I understand your Lordships, the interdict will still be under the control of the Court of Session.

LORD CRANWORTH.—Yes; my noble and learned friend proposed that, after the trial of the issue, the Court should deal with the whole question as justice may require.

The following *order* of the House of Lords was made:—"Ordered that the said interlocutors of 7th February 1855, 27th February 1855, 12th June 1855, 9th February 1856, so far as complained of, be affirmed: and further ordered and adjudged, that the said interlocutor of 8th March 1856, be, and the same is hereby, reversed, save and except so far as it interdicts and prohibits the defenders from in any way removing any part of the barrier therein mentioned, which at present remains; and so far as it declares, decerns, prohibits, and interdicts, as craved, in the second conclusion of the summons, and so far as it finds no procedure to be necessary in regard to the separate defence for Mr. M'Creath: and declared that the said Second Division of the Court of Session ought to have directed an issue, whether the barrier coal was worked and removed with the consent of the pursuer: and also further ordered, that the cause be remitted back to the Court of Session to do therein, as well in regard to the said interdict, after the said issue shall have been tried, as in regard to all claims of either party to the expenses hitherto incurred in the Court below, and in all other respects as shall be just and consistent with this declaration and judgment."

Appellants' Agent, Alexander Hamilton.—*Respondent's Agents*, Horne and Rose.

MARCH 24, 1859.

DAVID STEWART GALBRAITH, JOHN CULLEN, W.S., and DAVID STEWART GALBRAITH, Junior (MacCrummon's Trustees), *Appellants*, *v.* The EDINBURGH and GLASGOW BANK, and JOHN WHITEHEAD, S.S.C., and CHARLES MORTON, W.S., Assignees of the Bank, *Respondents*.

Writ—Probative Deed—Act 1696, c. 15—Pagination—Testing Clause—Reduction.

HELD (affirming judgment), *That a bond, the pages of which were not marked with the numbers first, second, &c., as required by the Statute* 1696, *c.* 15, *was invalid, although the testing clause set forth correctly the number of pages of which it consisted.*[1]

In 1814 the late Malcolm MacCrummon, formerly Sheriff Clerk of Skye, and Margaret Frazer, his wife, on the narrative, that there were no children of their marriage, and with the view of settling the succession to their property, conveyed their whole heritable and moveable estates to Rear Admiral Bisset, the appellant David Stewart Galbraith, and Charles Stewart, W.S., as trustees for payment, 1st, of debts and funeral charges; 2nd, of the free produce of the whole property to the spouses in liferent; 3rd, of certain legacies; and 4th, of the remainder and residue to the survivor.

In 1818, Mrs. MacCrummon died; and on the 31st May 1822, Mr. MacCrummon executed a trust disposition and settlement, and other testamentary deeds, by which he made additional provisions for the wife and children of the appellant, David Stewart Galbraith. He also conveyed the whole residue of his property belonging to him at his death, after satisfying these

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[1] See previous report 18 D. 470; 28 Sc. Jur. 205. S. C. 31 Sc. Jur. 425. See Statute 19 and 20 Vict. cap. 89, abolishing the necessity of numbering the pages of deeds.

provisions, in favour of the trustees for the purpose of paying debts and carrying his settlement into effect.

After the death of Mr. MacCrummon in 1823, and thereafter of Admiral Bisset, Daniel Galbraith and the appellant, David Stewart Galbraith, became the sole surviving trustees.

In course of their management the trustees lent £5000 to D. S. Galbraith, who gave them a bond and disposition as security. Afterwards the validity of this bond was called in question owing to the manner of its execution. An action was raised to reduce the bond, and the trustees were defenders. One plea was as follows—"The said bond and disposition in security, and sasine thereon, are null and void, in respect they are vitiated and erased *in substantialibus*, are not duly signed, tested, or recorded, and are otherwise defective in the solemnities required by law. In particular, the pages of the bond are not numbered, either in figures or in words, in terms of the Statute 1696, cap. 15."

In the record MacCrummon's trustees explained that "the bond and disposition in security under reduction is written on two sheets of paper duly stamped, each of which is subscribed by the granter; and although the pages of the deed are not numbered, 1, 2, 3, &c., at the top, the number of pages of which the deed consists is correctly stated in the testing clause. The deed ends on the seventh page, while it is stated to consist of that and the six preceding pages. Each page is connected by the continuity of the sense as well as by regular catch words, if that were necessary, which it is not; and there is not the slightest circumstance appearing on the deed to justify the most remote suspicion of fraud or unfairness, which is not even alleged. No objection to the bond has been brought forward by the proper debtor, who acknowledges the full force and obligation of it."

The Second Division reduced the bond as not being executed in conformity with the Statute 1696, c. 15.

MacCrummon's trustees appealed, maintaining in their *printed case*, that this judgment should be reversed for the following reasons—"I. The Act 1696, c. 15, does not support or warrant the judgment under review, either by its own terms and import, or as taken in connexion with the other Statutes *in pari materia*; and there is no enactment in any existing Statute according to which, and in a case where fraud is neither averred nor suspected, the mere omission to mark upon a deed the number of each page can, in sound construction, be held to infer the nullity of the instrument, or to justify the Court in reducing and setting it aside. II. The provisions of the Act 1696, c. 15, regarding the numbering of the pages of deeds written bookways, has been abolished by the Act 19 and 20 Vict. c. 89, entitled, 'An Act to abolish certain unnecessary forms in the framing of deeds in Scotland,' whereby the failure to number the pages of any deed executed in Scotland has ceased to be a legal ground of objection to the validity thereof, and in virtue of the terms of that act the judgment ought to be reversed."

The *respondents* in their *printed case* supported the judgment on the following ground:—The Statute 1696, relating to deeds written bookways, requires, as a solemnity essential to the validity of a deed, that each page shall be numbered; and the bond and disposition in question not being so numbered on each page, is void and null. Dwarris, p. 611, 2d edit.; *Holmes* v. *Reid*, 7 S. 538; *Lord Fife*, 4 S. 335; 2 W. S. 166; Bell on Testing of Deeds, pp. 48, 49; *Williamson* v. *Williamson*, M. 16,955; *Smith* v. *The Bank of Scotland*, 4th July 1816, F.C.; *Wood* v. *Ker*, 1 D. 14; *Porteous* v. *Bell*, Brown's Suppt. vol. v. p. 857.

Sir R. Bethell Q.C., and *R. Palmer* Q.C., for the appellant.—The deed in this case sufficiently complies with the requisites of the Statute 1696, c. 15. It is to be observed, the transaction was perfectly fair and honest, and the deed is without any mark of suspicion; and, therefore, every presumption will be made by a Court of law in its favour. Pagination is not made a peremptory or obligatory act by the Statute 1696; but it is merely directory or permissive. The Statute was passed to remedy the trouble and inconvenience of pasting sheets together, and provided that, in future, deeds might be written bookways; but no particular size or form was prescribed. The Statute was one of a series which pointed out certain very useful things which might be done, but did not state that the deed would be null which wanted those formalities. The formality of pagination was the most frivolous of all the formalities, and was obviously superfluous if the other formalities were observed; and that was the case here. Once, in Westminster Hall, an objection was raised to an indenture that the vellum on which it was written was not indented; whereupon Mr. Justice Burroughs called for a pair of scissors, and, holding the deed in his hands, indented it then and there, and said the objection was at an end.

[LORD WENSLEYDALE.—You may contend that this deed is good by the common law of Scotland without being paged, irrespectively of the Statute, which merely says, "Deeds may be written in another way than what was then usual."]

There is no trace of what was the common law on the subject, and all the writers on Scotch law are silent on that point. It appears side scribing of sheets pasted together was the formality before the Statute 1696; but even that was not essential according to *Ferguson* v. *Burnett*, Elch. Writ. No. 22; Ersk. 3, 2, 14; *Sims* M. 16,713. Pagination, therefore, which came in the place

of side scribing, was also not essential, and the want of it is nowhere declared a nullity, nor deemed so by the writers on the law of Scotland—1 Bankt. 330; 1 Bell's Com. 323; Bell on Testing Deeds, 123.

[LORD CRANWORTH.—The Statute 1696 says, "You may write the deed in folio or octavo;" now, is a deed bad which is written on one sheet folded in octavo, but not paged?]

No; there are many cases to shew, that the Statute did not apply at all, when the deed was written on one sheet only.

[LORD CHANCELLOR.—We must find out, whether a deed at common law was good without pagination.]

[LORD WENSLEDALE.—I apprehend a deed at common law would be quite good without that, especially if it was signed by the party.]

In *Hogg* v. *Nobell*, 23 Sc. Jur. 488, Lord Robertson discussed the whole subject of paging deeds, but did not allude to what the common law was, so that we are quite in the dark as to that. But there is no agreement among the authorities that pagination is absolutely essential—*Peter* v. *Ross*, M. 16,957; *Gaywood* v. *M'Eand*, 6 S. 991; *Morison* v. *Nisbet*, 7 S. 810; *E. Cassilis* v. *Kennedy*, 9 S. 666; *Smith* v. *North British Railway Co.*, 12 D. 1132. There has been a general neglect of the practice, and it is so expressly stated in the recital of the late Statute, 19 and 20 Vict. c. 89, which was passed to abolish the necessity of it in future.

[LORD CRANWORTH.—But the mere recital of matter of law in an act of parliament does not conclude anybody as to the true state of the law—*Dove* v. *Gray*, 2 T. R. 2053.]

Attorney-General (Kelly), Q.C., and *Anderson* Q.C., for the respondents.—As to the common law of Scotland there seems little authority; and, if this deed had been good at common law, the point would no doubt have been raised or alluded to in the Court below. But it is plain that, at common law, a deed could not be executed bookways. The mode of executing it bookways was quite a new thing, introduced by the Statutes 1672, c. 7, and 1686, c. 18. Therefore the Statute 1696, c. 15, did not require to declare, that deeds not so executed were to be null, for that was already so. Now the Statute 1696, c. 15, prescribed three things as conditions for the exercise of this new power thereby conferred, and it is well settled that, when a power is given to be exercised on certain conditions, all the conditions prescribed by the Statute must be strictly complied with—*Hawkins* v. *Kemp*, 3 East, 440. If any one is necessary, all are so, for they are all put on the same footing. The stream of authority since the Statute has been in favour of the essential nature of pagination—Forbes 2, 3, 6; Bankt. 1, 11, 44; Bell on Testing Deeds; 1 Bell's Com. 323; R. Bell on Completing Titles; Bell's Dict. *voce* "Testing Clause;" Hunter's L. & T. 311 (1st ed.); Galloway's Lectures, 1817, published 1838; Menzies' Lectures (1855). Lord Robertson, who decided *Hogg* v. *Nobell*, afterwards changed his opinion, and admitted pagination was essential.

Sir R. Bethell replied.—The Statute 1696, c. 19, says, "Deeds may be executed in either of two ways;" which implies that both ways were valid. The word "provided," in the Statute, does not import, that the things there pointed out were conditions precedent to the validity of the execution; they are only directory.

LORD CHANCELLOR CHELMSFORD.—My Lords, this is an appeal from an interlocutor of the Second Division of the Court of Session upon an action of reduction of a bond for £5500, upon the ground that the pages of the bond were not numbered either in figures or in words, in the terms of the Statute of 1696, chapter 15.

The question is a short and simple one, and, as it appears to me, the common law of Scotland has nothing whatever to do with it. It depends entirely upon the construction of the Statute; and although that Statute has been frequently read to your Lordships, I must, as introducing the opinion which I have to express, again trouble your Lordships with it.

The Statute is in these terms:—"Our Sovereign Lord understanding the great trouble and inconveniency the lieges are put to in finding out of clauses and passages in long contracts, decrees, dispositions, extracts, transcripts, and other securities, consisting of many sheets battered together, which must be either folded or rolled up, doth, for remied thereof, with the advice and consent of the Estates of Parliament, statute and ordain that it shall be free hereafter for any person who hath any contract, decree, disposition, or other security above mentioned to write, to choose whether he will have the same written in sheets battered together as formerly, or to have them written by way of book, in leafs of paper, either in folio or quarto; 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."

My Lords, this bond, which is dated on the 26th May 1826, is written on two sheets of stamped paper. It ends on the seventh page. The witnessing clause purports it to have been

written on that and the six preceding pages, and there is a regular catchword connecting each page with that which follows.

The bond was a perfectly fair transaction; it is in all respects regular and in compliance with the requisitions of the Statute, with the single exception, that the pages are not marked by numbers, "first, second," &c. The question is, whether this is essential to the validity of the bond; whether the requisites prescribed by the Statute are solemnities; or whether they are merely evidence which may be supplied by an equivalent?

Every Court must desire that a bond given under these circumstances should, if possible, be upheld; and it will not be inclined to pronounce against such a bond, unless it is imperatively required to do so by the words of the Statute.

It appears from the institutional writers upon the law of Scotland, that deeds were originally written on a sheet, and folded or made up in the form of a roll, and that where the deed was of any length, and there were many sheets, those sheets were pasted or battered together, as it is called, and then the whole was folded up in the form of a roll. There is no trace to be found in any of the text writers, or in any of the authorities which have been cited, of any deeds at the common law made in any other form. When the deeds consisted of more than one sheet, in order to prevent any sheet being abstracted and another being substituted, the practice was to side scribe, as it was called, that is, to write the name of the granter, or the person who came under the obligation by the deed, in the margin, one half of the name being written on one side of the junction, and the other on the other side; but this, which was mere practice, and which does not appear to have been required by any statutory enactment, was held by the Courts not to be essential to the validity of the deed.

Deeds which were of any considerable length, and which were rolled up in the way which I have described, were, of course, extremely inconvenient. It was very difficult to refer to them, or to find out the different parts of the deed. And, at a very early period, the parliament of Scotland interfered, not originally with regard to the deed itself, but with regard to the record of that deed; because it appears that the ancient custom was to record those deeds and instruments in the same form of a roll, which was found to be extremely inconvenient. And, therefore, by a Statute which was passed in the year 1469, it was provided, "Item—It is thought expedient that the king's rolls and register be put in books, and have sic strength as the rolls had of before."

Nothing further appears to have been done for nearly 200 years, when the same benefit was given, of writing bookways, with regard to writs which passed under the Great or the Privy Seal by an act in the reign of Charles the Second, the Statute of the 12th of July, 1672, which is in these terms:—"Likewise His Majesty understanding the great trouble and inconveniences occasioned by the writing of long charters and other writs which pass the seals aforesaids, in one broad parchment of so great length and largeness, that they can hardly be read, doth, for remied thereof, with advice foresaid, statute and ordain that it shall be free to any person who hath any charter or writ to be written for the Great or Privy Seals, to choose whether to have the same written on a broad skin of parchment as formerly, or to have them written by way of a book in leaves of parchment about the breadth of an ordinary sheet of paper; and, accordingly, the writers to the Great and Privy Seals are hereby ordained to write and expede the same. And if they shall be written in the way of a book, that each page be signed and marked by them as said is."

This privilege (if I may so call it) of writing bookways was afterwards extended to instruments of seisins by a Statute of the year 1686, which is called "An Act for writing seisins by way of book;" and which states, "Our Sovereign Lord taking into his consideration that seisins do extend to great length by reason of inserting and repeating of the whole provisions of the charter therein; therefore His Majesty, with advice and consent of his estates of parliament, for the more easy and commodious perusal thereof, statutes and ordains, that it shall be lawful for parties, if they think fit, to cause write and extend their seisins by way of book, the attestation of the notary condescending upon the number of the leaves of the book, and each leaf being signed by the notary and witnesses to the giving of the seisin. And ratifies all seisins already written by way of book by warrant of His Majesty's Privy Council." And then, ten years afterwards, in the year 1696, followed the Statute in question.

Assuming that deeds written bookways were not in use prior to this Statute of 1696, which, I think, I am entitled to do, from the reference which I have made to the text writers and to the authorities, and to the provisions of those different Statutes, it appears to me, that the effect of this Statute clearly is to allow, for the first time, these different instruments which are mentioned in the Statute to be written by way of book on leaves of paper, either in folio or quarto.

It has been said, that the Statute refers to two things which were previously well known, and merely allows a choice between the two. But I think it is quite plain from its words, that it refers to the roll form, as being that which alone was in use, referring to all deeds being written in sheets battered together as formerly, and it introduces an alternative as something new, which is to be allowed for the first time under this Statute.

If that is so, then that appears to me to dispose entirely of the argument which has been used, that there is nothing declaring nullity, supposing that these different formalities or solemnities are not observed; because a declaration of nullity would only be necessary where, as in the different Statutes to which reference has been made, those of 1540, 1579, 1593, and 1681, additional solemnities were required with regard to instruments which had been used before; and in which, of course, it would be necessary to provide that, for the non-observance of those formalities which were added to the former ones, the instruments should make no faith, or should be null, according to the words of those different Statutes. But, with respect to deeds written bookways, which are permitted for the first time in the Statute of 1696, there was no necessity whatever to declare, that unless those formalities were observed, the instrument should be null, because it creates or gives them existence for the first time; and it declares, that they shall be good providing those formalities are observed. And if the formalities are not observed, then the instrument never comes into existence at all. It is absolutely necessary, for the purpose of the creation of the instrument, that you should follow the different requisites which are provided by this Statute.

Now, none of the cases cited appear to reach the point in controversy, except perhaps the case of the *Earl of Hopetoun* against the *Scots Mines Company*, 18 D. 739, 771. Because, whatever may be said with regard to the ultimate ground upon which that case proceeded, it is perfectly clear that it was necessary, in the first place, for the Scotch Court to clear the way by a decision as to the effect of the award, according to what was required by the law of Scotland; and there is no doubt at all that the Judges did decide the question, and decided, amongst other points, the necessity of pagination, as it is called, for the purpose of giving validity to a deed under the Statute of 1696.

The case of *Macdonald* v. *Macdonald*, 2 Hailes, 789, which was cited on the part of the respondents, hardly appears to me to have an application to the present question. That was the case of a deed which was written in the old form of a roll,—and the question was, whether the absence of side scribing rendered it a nullity. The Court appears to have been of opinion that, although prior to the Act of 1696, the absence of sidescribing did not invalidate a deed, because there was no statutory enactment upon the subject, but it was mere matter of practice; yet, under the Statute of 1696, side scribing was made a requisite solemnity. Now, I should venture to think, that that Statute made no alteration whatever with regard to the necessity for side scribing as to deeds which were made in the form of a roll. It does no more than refer to the practice. It says, "Every page shall be signed as the margins were before." It is merely referring to the practice which existed with regard to the side scribing, as applied to the signature of different pages of the deeds written bookways, and it seems to me to have left things precisely upon the same footing as before.

Then, on the other side, the case of *Duke of Roxburghe* v. *Hall*, M. 14,332, was used as an authority for the purpose of shewing, that all those forms which were provided for by the Statute of 1696 might be dispensed with. But, I confess, it appears to me that that was not a case in which the Judges proceeded upon what may be termed judicial exposition, but upon a view of expediency; and they exhibited a vigour beyond and above the law. For they say, "The Lords repelled the objection to a sasine wrote bookways, that the notary's docquet did not specify the number of leaves, as in express words is required by the Statute of 1686, authorizing sasines to be made out in that form, in respect of an attestation from the Keeper of the Register and of several Writers to the Signet, that there were more sasines that laboured under the same defect than these sasines in terms of the Statute; and of the danger that might ensue by annulling the sasines for a defect which in practice has been so general, but declared they would make an Act of Sederunt reviving and enforcing the Statute."

My Lords, it is unnecessary to consider such cases as the *Earl of Cassillis' case*, *Gaywood's case*, *Morison* v. *Nisbet*, *Smith* v. *The North British Insurance Company*, *Wood* v. *Ker*, and other cases of the same description, in which there was manifestly an intention of the parties to obey the requisitions of the act, but where, from some clerical error, or from an erasure, there was a slight departure from accuracy; but the act was substantially complied with, because those authorities hardly appear to me to be applicable to a case, in which there is an omission of all effort to comply with this particular requisition of the Statute.

My Lords, perhaps also I need not advert to *Henderson's case* and the judgment of Lord Robertson in *Hogg* v. *Nobell*, except for the purpose of observing that, with regard to *Henderson's case*, all that appears to have been decided was this, that it was not necessary in the testing clause to use the word "pages;" that you might use an equivalent word, the testing clause bearing that the deed was written on twelve sides of paper, there being clearly, I think, three sheets of twelve pages, and it being quite clear that the word "sides" there was used for pages, and was considered to be equivalent to it, the Statute not requiring the word "pages" to be used.

With regard to Lord Robertson's judgment in *Nobell's case*, perhaps the best answer to that is to say, that Lord Robertson was one of the Court of Session, in the case of the *Earl of Hopetoun* v. *The Scots Mines Company*, in which undoubtedly the decision of the Court is perfectly

irreconcilable with the view which was taken by Lord Robertson, as Lord Ordinary, in that case of *Hogg* v. *Nobell.*

My Lords, I have already, I believe, observed that it is impossible for your Lordships to consider the importance of this particular ceremony, or formality, or solemnity, whichever it is to be called, which is now in question. If parliament has distinctly required, that before a deed written bookways can have any existence, this amongst other formalities should be observed, it is not for us to consider the relative importance of these various requisitions. They are all put precisely upon the same footing ; and if you may get rid of the paging of the deed or instrument, you may get rid of the signature of the pages, and you may get rid of that portion of the witnessing clause which requires the number of pages to be stated. They are all of them put on precisely the same footing, and there is no reason, if you are at liberty to get rid of one, why you are not equally at liberty to get rid of all.

My Lords, I cannot bring myself to any other conclusion than that if a party prefers writing his deed bookways, he must observe all the formalities which the Statute of 1696 requires.

My Lords, this appears, I think, as I have already said, to be clearly established as the opinion of the Judges in the case of *The Earl of Hopetoun* v. *The Scots Mines Company;* but, my Lords, there is another matter which has been introduced on both sides, and which appears to me to have a most important bearing, and to give your Lordships great assistance in putting a proper construction upon this Statute of 1696. I allude to the Act of the 19th and 20th of the Queen, which has been challenged by both sides as being of great assistance to their arguments. My Lords, it appears to me, that that Statute confirms the view which I am submitting to your Lordships in the strongest possible manner. It recites that the safeguards prescribed by the act, other than the said provision, (that is, the numbering of the pages,) "have been found in practice to be of themselves amply sufficient for the purposes thereof." It therefore treats the paging, the numbering each page, as one of the safeguards prescribed by the act. It then goes on to recite, that that provision 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." Now, it could not be for the security of the public that any safeguard which had been provided by the Statute should be abolished ; but inasmuch as there had been a very general neglect in practice in observing that provision of the Statute, it was for the security of the public, whose deeds were endangered by the non-observance of this formality, that some provision should be made for their protection ; and, accordingly, the enacting part provides, that "it shall not be competent to institute, or to insist in, or maintain any challenge of, or exception to, any deed or writing aforesaid, or any deed or writing of any description whatever, on the ground that the pages thereof are not marked by numbers." And it then provides that, for the future, this formality shall not be requisite, "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."

My Lords, it appears to me, if we are to adopt any legislative exposition of the Statute, that this, in the strongest way, shews that this requisition of paging the leaves was, in the eye of the legislature, a most important provision for the safeguard of the public ; and it therefore strongly confirms the view which I am submitting to your Lordships.

My Lords, upon the whole, I have come to the conclusion, but with very great reluctance and regret, that this deed is invalid in consequence of the non-observance of this particular requisition of the Statute. It is unfortunate that a fair and honest deed should be invalidated upon a mere formal objection, and that it should have been brought into question before the act passed, which would have saved it from invalidity. The words of the Statute, however, are too strong for me, and I am bound to submit my inclination to its authority, and to advise your Lordships that this interlocutor must be affirmed.

LORD CRANWORTH.—My Lords, if this question had to be determined entirely upon the construction of the Act of 1696, I confess that I should never have entertained any serious doubt upon the matter. Arguments have been addressed to your Lordships upon the question of whether the enactments of the Statute are directory or imperative. I do not think that is quite the proper alternative to put. It is in strictness neither the one nor the other. The Statute professes to authorize something to be done, provided certain requisites are complied with. And if those requisites are not complied with, the question is not properly whether they are directory or imperative ; unless they are complied with, the permission is not given, and the consequence of non-compliance must follow.

But I confess that I have entertained, and but for finding that the other noble Lords who have heard the case are all quite clear on the subject, I should perhaps still continue to entertain some doubt, whether, in truth, the construction of this Statute is the real question to which attention ought to be mainly directed. The Statute says, that deeds, if written bookways, provided (for "providing," I think, means the same thing) "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." And then it goes on to say, "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 I think, that, in order to entitle you to insist that a deed written bookways was as valid as a deed written according to the former custom, and signed in the margin, you must shew that you have complied with all the requisites of the Statute; but, in looking at the authorities, I confess that it appeared to me (and that, indeed, I understand to be also the view of my noble and learned friend) that the signing in the margin was not so absolutely requisite as that the consequence of non-signing in the margin would be to make invalid a deed written in sheets battered together, (according to the expression used,) which means sheets fastened together by paste.

But there are abundant authorities which have been referred to. There was *Ogilvie's case*, reported in Morrison, in 1674; that was before the Statute, and, therefore, is not important. There was *Sims' case*, on the 23d of November 1708, in which the argument on both sides, which was acted upon by the Court, presumed that before the Statute "side scription," as they call it, was not so essential as that the want of it would invalidate the deed, nevertheless, they say "Ita invaluit usus et consuetudo." It was the common practice to subscribe at the side, that is, to write a subscription over the joinings, in order to shew that there had been no tampering with the deed, but that it was the real deed of the party producing it. And then, further, in Lord Elchies' note there is the case of *Ferguson* v. *Burnet*, in which the Court lay down this: "Before the Act of 1696, deeds written scrollways, on different sheets, required signings at the joinings as a piece of evidence, but not as a solemnity;" that is to say, you required to have it explained why it was not so signed, but it was not what the Scotch call a solemnity; that is, it is not something which, like the signing of a deed in this country, is essential to its validity.

Well, then, if a deed made on sheets of paper battered together but not side scribed was still capable of being sustained as a valid deed, though not of itself so far probative as to be *primâ facie* evidence that everything was correct when it was produced, it would seem to follow that a deed wanting the solemnities which are required by the Act of 1696 might, at least, come in the place of the old Scotch deed, written on sheets battered together, but not sidescribed.

But then the answer given to that is, that, before this Statute, deeds written bookways were not valid according to the law of Scotland, and that it is only by virtue of the Act of 1696 that they are made valid. And I must own, that to that argument great force is to be attributed, from the circumstance that in all these cases the Court has beaten about, as it were, to find arguments to sustain the different deeds that have been brought before them, and none of them have seemed to put forward the observation that, though the deed was not valid under the Statute, it was still valid at common law. That is an argument strongly shewing that these deeds written bookways were not valid at common law. On the other hand, I cannot but observe that deeds were certainly valid at common law, if written bookways on only one sheet. That must have been so, because there are several cases in which deeds written bookways, when they were on one sheet, have been held good, though they did not comply with the Statute.

Therefore, it has certainly appeared to me, that it would be a correct general statement of the common law of Scotland to say, that a deed written bookways might be valid if written upon one sheet; but if it were written on two sheets it was invalid. That is a necessary consequence from the authorities. I think that must be taken to have been the opinion of the Judges below. And that being so, I quite agree in the conclusion come to by the Court of Session, that this deed is not valid, as not having been brought within the provisions of the Statute of 1696.

LORD WENSLEYDALE.—My Lords, this case has been argued at great length, and with great ability and great industry on both sides, and I believe all the authorities that could be brought to bear upon this subject have been cited, both in decided cases and text books. But, after all, I own it appears to me that the question lies in a very narrow compass, and I cannot accede to the objection that was made by Sir Richard Bethell to the judgment of the Lord Justice Clerk, for I think he puts it upon a very clear, and intelligible, and satisfactory basis. He says that there is no room for inquiry, in this case, into what has been not very correctly called the question as to the directory or mandatory provisions of the Statute. That expression is not altogether accurate, as I have taken occasion to observe in the course of the discussion. But it is intelligible enough, he says very properly. In this case the Statute commands nothing, directs nothing; it merely gives a privilege to all the liege subjects to make use of the Statute upon conditions, and to have the benefit of the Statute upon conditions.

I think the words of the Statute are perfectly clear. In the recital it appears that there being some difficulty in lieges finding out "passages in long contracts, decreets, dispositions, extracts, transumpts, and other securities, consisting of many sheets battered together, which must be either folded or rolled together, doth for remied thereof, with advice and consent of the Estates of Parliament, statute and ordain that it shall be free hereafter for any person who had any contract, decreet, disposition, or other security above mentioned, to write, to chuse whether he will have the same written in sheets battered together as formerly, or to have them written by way of book, in leafs of paper either folio or quarto."

Therefore, it clearly appears to me a privilege given, and it annexes a condition to that

privilege, for it uses the word "providing," and it insists on providing certain conditions without which parties cannot have the benefit of the Statute. The words are so very clear, that I think they cannot admit of the least doubt.

The provision is, in the first place, "if they be written bookways, every page be marked with the nu nber 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 such 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." Therefore, it is clearly an option given on certain express conditions, and those conditions must be complied with.

If there had been a uniform course of decision that these conditions need not be complied with, even if that could be shewn, I should still have hesitated very considerably whether it was competent to the Court to repeal the express provisions of an act of parliament. But, on investigating the cases which have been brought before us, it does not appear that there is any authority to that extent,—there is nothing bearing upon it except the interlocutor of Lord Robertson, which does not proceed upon the ground that the condition of signing each page might be dispensed with; but inasmuch as that learned Lord afterwards coincided with the rest of the Judges in *Lord Hopetoun's case*, it cannot be supposed that he persevered in that opinion to the last; and with that exception, there is really not a single authority which goes to the extent of shewing that these conditions may be abrogated. All that has been done in that direction has been, that the Court have said that they will not be strict to look at the manner in which these conditions have been performed. There are decisions, which I need not refer to, that the numbers of the pages may be put, not in words as it is in the Statute, but in numerals. Probably, if they were put in Roman numerals, as well as Arabic numerals, that would be sufficient. There are also decisions, that where the numbers are written in words, and a part of the words has been written upon an erasure, if the words can be sufficiently made out, as in the case of "first" in the one case, and "twelfth" in another, that was a sufficient compliance with the act.

So also another case has gone upon the supposition that the word "sides" might be substituted for "pages." I think that clearly was so in *Williamson's case;* it is perfectly clear, if you look at it, that the ground upon which that decision proceeded was, that the substitution of the word "sides" instead of "pages" was a sufficient compliance with the act.

In other cases the Court has gone upon the supposition, that the act only applies where there are two leaves used. I think it is perfectly clear upon the construction of the act, that it only applies to such cases. It is clearly meant to apply only to deeds if they are written upon two sheets, which must be joined together, in a certain manner, with side scriptions at the junctures. But in case there is only one sheet or leaf, the Statute is not applicable at all. Therefore, all those cases, many of which were cited before us, really have no application to the present case.

Therefore, I think, that, reading the words of the Statute, according to their ordinary import and meaning, and without a single decision to induce us to put a different construction upon these words, we are obliged to give them effect. And, however reluctant we may be to let a technical objection of this kind prevail, yet we must come to the conclusion that the conditions imposed by the Statute have not been performed; and that, therefore, this deed made bookways, consisting of more sheets than one, stands upon the common law.

If it could be shewn that this deed was according to common law binding, although it was written bookways, and although it consisted of several sheets, then I think the judgment could not be supported. One thing is perfectly clear, that, in a case of this kind, it is incumbent upon the appellants to shew, that this deed would be valid at common law. But I think there can be very little doubt about it, for otherwise, why should this Statute itself, and other Statutes of a like kind, have been passed authorizing engrossments upon more sheets than one written bookways; and why should there have been, during such a length of time, so many cases upon this subject, in which the Courts have been striving to get out of the difficulties created by this Statute? It appears to me, therefore, perfectly clear, that we must take a Scotch deed of more sheets than one written bookways without pagination as bad at common law. And then the appellants cannot have the advantage of this Statute unless they have complied with its conditions; and they not having complied with the condition in question in any sense of the term, however loose, I think the judgment of the Court below is perfectly right, and ought to be affirmed.

LORD KINGSDOWN.—My Lords, I feel myself compelled to concur in the judgment which has been proposed by the Lord Chancellor. It seems to me, that the most reasonable interpretation to be given to the Statute is, that it either introduced a new practice, or established a practice already existing, but which was considered of doubtful authority; and that it established or introduced that practice, subject to this condition, that certain formalities or solemnities should be complied with which would have the effect of producing an identification of the several pages

of which the document consisted, equivalent to, though not precisely of the same form with, that which had been, though not by statutory enactment, yet by usage, introduced and in regular use, when instruments were written in what is called the former manner "battered together." I feel obliged, therefore, to concur, although reluctantly, in the judgment, that upon the whole this instrument does not comply with the Statute, and is therefore void.

Interlocutor[1] *affirmed, and appeal dismissed with costs.*

John Cullen, W.S. *Appellants' Agents;* J. F. Elmslie, *London Solicitor.*—Morton, Whitehead, and Greig, W.S. *Respondents' Agents;* Dodds and Greig, *London Solicitors.*

MARCH 28, 1859.

ERNEST GAMMELL and Others, *Appellants*, *v.* THE COMMISSIONERS OF HER MAJESTY'S WOODS AND FORESTS, *Respondents.*

Salmon Fishings—Crown—Property—Fishing on Sea Coast—Limit.

HELD (affirming judgment), *That the salmon fishings around the coast of Scotland form part of the hereditary revenues, and belong exclusively to the Crown, so far as not expressly granted, by charters or otherwise, to subjects or vassals.*[2]

The respondents, as the statutory administrators of the Crown revenue in Scotland, brought this action, (in 1849,) setting forth—"That all the salmon fishings around the coast of Scotland, and in the navigable estuaries, bays, and rivers thereof, so far as the same have not been granted to any of our subjects by charters or otherwise, belong to us *jure coronæ*, and form part of the hereditary revenues of our Crown in Scotland: That, in particular, the salmon fishings *ex adverso* of the estate of Portlethen, in the county of Kincardine foresaid, belong to us *jure coronæ*, and are now under the management of the said Commissioners of Woods, Forests, Land Revenues, Works, and Buildings: That the defender, Ernest Gammell, is proprietor of the estate of Portlethen: That the charters and other titles flowing from us and our royal predecessors, in favour of the said Ernest Gammell or his authors, contain no grant of salmon fishings, and he has no right or title to salmon fishings *ex adverso* of the said estate of Portlethen, or in any part of the sea coast adjoining thereto: That the defender, Ernest Gammell, and his predecessors, never fished, or attempted to fish, for salmon, grilse, or salmon trout, *ex adverso* of the said estate, or in any part of the sea coast adjoining thereto, by net and coble or otherwise, until within the last few years: That the said defender has recently, without any right or title, granted a pretended lease of the salmon fishings, *ex adverso* of the said estate, in favour of the other defenders, Messrs. Gray and Hutcheon, and these parties have illegally and unwarrantably erected or used stake nets, bag nets, or other destructive engines for catching salmon in the sea, opposite, or nearly opposite, to the said estate of Portlethen: That these nets or engines are placed in the sea along the sea coast, and remain stationary in the water, where they are fixed by stakes, anchors, or other moorings, so as to intercept the passage of the salmon, and force or decoy them into courts or enclosures of netting where they are caught: That the said defenders have no right or title to fish for salmon, grilse, or salmon trout, at the place or places above described: That the pursuers intimated their willingness to grant a lease of the foresaid salmon fishings in favour of the defenders, at a moderate rent, but this proposal was declined; and the defenders most illegally and unwarrantably persist in fishing for salmon, grilse, and salmon trout, at the place or places above described, by means of bag or stake nets, and other apparatus, without having any legal right or title so to do: That, in the circumstances above set forth, the pursuers are entitled to insist in and follow forth the conclusions of declarator and others underwritten."

The first declaratory conclusion, upon which the discussion mainly turned, was as follows:—"That the salmon fishings around the sea coast of Scotland belong exclusively to us and our royal successors and form part of the hereditary revenues of the Crown of Scotland, so far as the said salmon fishings have not been expressly granted to any of our subjects or vassals by charters or otherwise." The second declaratory conclusion was as follows:—"That the salmon fishings opposite to the said lands and estate of Portlethen, in the county of Kincardine, belong exclusively to us and our royal successors, and that the defender, Ernest Gammell, the proprietor of

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[1] The exact terms of the order of the House of Lords in this case are set forth in a subsequent appeal of *Whitehead* v. *Galbreath*, *post* (22 July 1861).

[2] See previous reports 13 D. 854; 23 Sc. Jur. 388. S. C. 3 Macq. Ap. 419: 31 Sc. Jur. 431.