estate under his management. The question is, Whether his firm is entitled to charge for their services in conducting these proceedings? I am sorry for the operation of the rule of law in this particular case, but the rule we must follow is that which was laid down in the class of cases which were all decided under the name of *Lord Gray*. We cannot go back upon that decision. The mere fact that Mr Burness had left that part of the country where the factory business was conducted and had devolved the management of it on another gentleman can make no difference.

I am therefore of opinion that we must remit to the Auditor to disallow all the charges except those by which Mr Burness has been out of pocket.

Lord Deas—I had some hope that the charges here would fall under an exception. We were referred to the case of *Scott* v *Handyside's Trustees*, in which I made a reference to the case of *Findlay's Trustees* and to Lord Colonsay's note in that case. The effect of that was said to be, that while a party in the position of judicial factor or trustee was excluded from making ordinary law charges against the estate under his charge, an exception was allowed in the case of process business. That question was not at issue in *Scott's* case. It was a very troublesome case to decide, as the whole papers required to be examined in order to see whether the party making objection to the charges was barred from doing so. What is said there about process business is merely incidental. It takes a very careful examination of *Lord Gray's* case in order to discover that process business was included in the accounts there. I have examined the accounts, and I see that process business was comprehended in several of them. It is impossible after the decision of the whole Court in that case to say there is any such exception, and accordingly I am of the same opinion as your Lordship.

Lord Mure—The principle of *Lord Gray's* case applies here. The rule laid down there and in the two English cases quoted in the Lord Justice-Clerk's opinion in that case must be applied to the case before us, although I must say I regret it in the circumstances of this case.

Lord Shand—I am, like all your Lordships, quite satisfied that in this case all the expenses charged by the firm to which Mr Burness belongs were necessarily and properly incurred; for Mr Burness, who was judicial factor on the estate, only did his duty in defending the fund against the claim that was made for its division. But at the same time the Court has no choice but to apply the broad rule that was laid down in the case referred to by your Lordships in the full consciousness that it might in some case press hardly. The principle of that rule is directly applicable, viz., that one holding the office of factor and occupying therefore a position of trust cannot receive any remuneration for his services as law agent.

The Court therefore remitted the account back to the Auditor to tax on the principle of allowing only costs out of pocket, and to report.

Counsel for Factor — Thorburn. Agents—W. & J. Burness, W.S.

HOUSE OF LORDS.

Thursday, March 21.

(Before the Lord Chancellor, Lord Hatherley, Lord O'Hagan, Lord Blackburn, and Lord Gordon.)

GARDNER *v.* BERESFORD'S TRUSTEES.

(*Ante* vol. xiv. 570, June 13, 1877, 4 R. 885; and vol. xv. 359, February 8, 1878.)

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

Held (*aff.* judgment of Court of Session) 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 improbative instrument under the Act 1696, c. 15.

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

Held (*aff.* judgment of Court of Session) that 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.

Opinion (*per* Lord Blackburn) that statutes introducing alterations in the law of evidence are, similarly with those which effect a change in forms of procedure, retrospective in their operations.

This was an action seeking to set up as a probative document an agreement for a lease, which consisted of two separate sheets of paper and seven pages, which was subscribed by the parties on the last page in proper form, but merely initialed on the prior pages. A formal lease, which had afterwards been executed, had been reduced on the ground of fraud, and decree of removing pronounced against Gardner, the present pursuer.

On February 8, 1878 (*ante* 359) the Court of Session had held that the document was invalid under the Act 1696, c. 15, and that it was not set up by the 38th and 39th sections of the Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94), which were not retrospective in their operation; and had therefore assoilzied Beresford's trustees, the defenders.

The pursuer appealed to the House of Lords.

The respondents were not called upon.

At delivering judgment—

Lord Chancellor—My Lords, the only questions upon these two appeals which have been opened for your Lordships' consideration, and the only questions, as it is admitted at the bar, which your Lordships have to decide, are questions which at first sight appear to be of very considerable technicality, but are such that the reasoning which your Lordships must apply to them must be in consonance with the practice which has hitherto prevailed in Scotland, and with the decisions both of the Scotch Courts and of this House. My Lords, the two questions

are—first, Whether in the instrument before the House, which we should call an agreement for a lease, there has been that compliance with formalities which would make it a probative instrument? and, in the second place, whether, if that is not the case, if it was not a probative instrument as the law stood before the year 1874, there is any enactment in the Act which was passed in that year which would remedy the defects in the instrument?

The instrument in question is written, as the term is, bookwise, and extends over a number of pages; it is signed by the persons who were charged with the responsibility of the instrument at the end with the names written at full length, the initials only of the persons so signing being appended on the margin to each of the preceding pages; and the question is, Whether the execution of an instrument in that way is a sufficient compliance with the Statute of 1696?

Now, my Lords, the statute of 1696 introduced by way of privilege a mode of execution of deeds and similar documents which had not prevailed and was not sufficient in Scotland up to that time. The statute proceeds upon the recital that the King, "understanding the great trouble and inconvenience the lieges are put to in finding out of clauses and passages in long contracts, decreets, dispositions, extracts, transumpts, and other securities, consisting of many sheets battered together, which must be either folded or rolled up, doth, for remeid thereof, with advice and consent of the estates of Parliament, statute and ordain that it shall be free hereafter for any person who hath any contract, decreet, 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 leaves of paper, either in folio or quarto"—in other words, he may continue if he pleases to resort to the oldmethod of writing the instrument upon a roll formed by sheets battered together, the name to be written at the point of juncture, or he may adopt this new mode, writing the instrument "by way of book, in leaves 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 margines 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 when 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, from the cases which were cited at your Lordships' bar it undoubtedly appears that up to the year 1696 the general custom was to sign both at the points of junction and at the end with the full name of the person signing, for the fact that that was the custom is proved by the cases which were cited by way of exception to the general rule. Those were cases which showed that in particular instances, where, for example, a person was in the habit of signing with initials, or where not being able to write he was obliged to sign with a mark, an exception might be made in favour of such persons, and the full signature would be dispensed with. But, my Lords, I asked, and asked in vain, the learned counsel, who have examined every authority upon the point, whether there was any authority which showed that, either before the statute with reference to the form of deeds then in use or since the statute with reference to the new mode that is provided by the statute, this ever had been supported, viz., a deed or a writing executed at the end by a person with his full christian name and surname, thereby showing that he could write, and was in the habit of writing his name at length, and at the same time in the margin affixing not his full name but either his mark or his initials. My Lords, no such case has certainly been cited.

Your Lordships have here the unanimous opinion of the learned Judges in the Courts of Scotland that the execution of a deed in that form would not be within the words of the statute which I have read, and your Lordships would, in regard to a matter of practice with reference to the form of execution of a written instrument in Scotland, be slow to differ from the unanimous opinion of the learned Judges. But I own that, independent of such reluctance to come to a different decision, it appears to me the grounds of that decision are entirely right. I think the words of the statute are not complied with unless that which is the proper signature at the end is also appended by way of signature to the separate leaves. If, in the case of any particular person, the proper signature at the end be a signature by way of mark or by way of initial, then that may also serve as the proper signature upon each separate page; but if the proper signature at the end be a signature at full length (and the persons signing the writing in question here show that that was their opinion of their signature and their habit of signature), then the same signature must, as it seems to me, be found on each individual page. So much, my Lords, for the first question which comes before you.

My Lords, the second and only other question is as to the effect of the Conveyancing Act of 1874. My Lords, upon that I must say that I think there is considerable foundation for the elaborate examination which the learned counsel at the bar made of the different sections of the Act. No doubt there is, with regard to some of its sections, a very clear statement that they shall apply only to instruments written after the passing of the Act; and with regard to other sections there is an equally clear statement that those sections shall apply to things done both before and after the passing of the Act; and there is a third class of cases, of which the 38th and 39th sections are examples, in which the Act contains no clear and explicit statement of whether it is to be retrospective or merely to be prospective. But, my Lords, in a case of that kind your Lordships have to examine the subject-matter of the enactment and of the particular section which you have to construe, and you have to bear in mind the effect of a construction which would make it retrospective, and to ask yourselves whether it is to be supposed that that construction was intended by the Legislature to be given to it. Your Lordships have further to guide and direct you the observations which were made in this House in the case last referred to at the bar—the case of *Urquhart* v. *Urquhart*—that in a matter of this nature any Court will be slow to construe an enactment as retrospective, and thereby as disturb-

ing existing rights, unless Parliament has clearly said that the enactment is to be construed retrospectively.

Now, my Lords, in order to determine whether the 38th and 39th sections are or are not retrospective your Lordships must bear in mind that the effect of these sections is directly to bear upon the Act of 1696, and upon everything which has been done directly under that Act. Your Lordships are spared the trouble of any elaborate examination of that Act, and its meaning and operation, by the examination which took place of the Act in a case in this House which was decided in the year 1859—the case of *Galbraith* v. *The Edinburgh and Glasgow Bank*, 21 D. (H.L.) 3. It was the same as that called *M'Crummen's Trustees*. The Statute of 1696 there received a very full exposition from the noble and learned Lords who advised the House upon that occasion. Four noble and learned Lords took part in the consideration and examination of the question, and they all arrived with reluctance at the conclusion that the matters which were mentioned as formalities in the Act of 1696 were matters which went to the very existence of the deeds which were authorised by that Act to be framed in a particular way. I observe that the then Lord Chancellor, my noble and learned friend Lord Chelmsford, said,—"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." And further on he said,—"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." In that particular case the formality was what was called pagination, the numbering of each successive page with subsequent numbers. "If the Parliament has distinctly required that before a deed written bookwise 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."

Then Lord Cranworth said,—"Before this statute deeds written bookways were not valid according to the law of Scotland, and 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 put forward 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 if written bookways on only one sheet." "Therefore," he says, "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 upon 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 conclusions 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 said—"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."

And Lord Kingsdown in concurring said,—"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 was called the former manner—'battered together.'"

My Lords, looking at the decision in that case, and the reasoning upon which it was founded, the result appears to me to be this, that in the year 1874 wherever you had instruments of the kind in question, which being written bookwise had duly complied with the provisions of the Act of 1696, they were of course good—they were probative instruments; but if they had not complied with that statute they were absolutely as if they had never been written. They were not things which were voidable, or things as to which there could be any question; they were absolutely removed out of nature as it were, just as much as if the paper on which they were written had never been in existence. They did not require, therefore, to be struck out, or to be sentenced to condemnation; they were things which, for the purpose of title, or any property or persons they might affect, were as though they never had been written.

Now, my Lords, that being the state of the case in 1874, I ask, Where are the words in the statute of 1874 which are sufficient to give vitality to these things—to bring into existence these things which had already passed out of existence? My Lords, I may pass over the 38th section, because it is really not the one which is material. The 39th section is this,—"No deed, instrument, or writing subscribed by the granter 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." My Lords, these words seem to contemplate the possibility of some deed which after the passing of this Act shall be brought for judgment, as a thing upon which judgment would be passed at the date of the Act; but with regard

to every instrument that had failed in the formalities of the Act of 1696, and which had been written before the passing of this Act, the opportunity for judgment had gone. It was absolutely gone. The instrument had never come into existence, and, except by a strained interpretation, it would not come under the words "shall be deemed." The section seems to speak of a future judgment upon a future instrument brought for judgment after the passing of the Act.

But, my Lords, I do not stop there. I do not rest on what would appear to be a somewhat slender verbal criticism; but I take the larger view. If the construction contended for by the appellant is correct, the consequence is that this section, by words which at the outset are ambiguous, must have the effect of bringing again into existence, without limit as to time, every instrument which had failed of validity—which had failed to come into existence by want of compliance with the formalities of the Act of 1696—and must have the effect of setting up every such instrument notwithstanding the titles and the arrangement of property which might have been made upon an assumption that those instruments were absolutely invalid. For, my Lords, observe there is no qualification. There is nothing here which says that the section is not to take effect where arrangements have been made. On the contrary, the only qualification is that contained in the last section, which says,—"Nothing herein shall affect any action now in dependence, or that shall be instituted before the commencement of this Act." And the commencement of the Act was two or three months after the date of the royal assent. Therefore the theory must be that the whole of the subjects of Scotland upon whose property the shadow of any instrument which had failed in its formalities had fallen before the Act passed would be subject to have that instrument springing into validity, and operating upon their property or upon their persons, unless within the two or three months to which I have referred they instituted an action of declarator to have the instrument declared invalid. The thing might have passed out of their recollection; it might have been treated years before the Act of 1874 had passed as a document which went *pro non scripto*, and yet they might find that under the ambiguous words of this 39th section the instrument came again into validity. The proposition only requires to be stated in that way to show that this is a construction which your Lordships would not arrive at unless compelled by the strongest and clearest words of the statute. It is admitted that the words are not clear—that they are ambiguous; and if so, it appears to me that these considerations to which I have adverted would at once lead your Lordships to refuse to adopt that construction which would produce the gross injustice and the gross anomalies to which I have referred.

My Lords, I therefore must say that I entirely concur with the unanimous opinion of the learned Judges below, that the sections to which I have referred, the 38th and 39th, are not retrospective. I therefore move your Lordships that the interlocutors appealed against in these two appeals be affirmed, and the appeal dismissed, with costs.

Lord Hatherley—My Lords, although, as has been observed by my noble and learned friend on the woolsack, the question before your Lordships might at first sight appear to be very decidedly technical as regards the special point that has been raised in this discussion, yet the principles involved in the decision of this question are of very great importance for the safety of property and estates.

No doubt in every case in which by the law of the land care has been taken to prevent the numerous frauds and forgeries which unhappily occur in the transaction of human affairs it has been found from time to time that the restriction imposed by the Legislature upon the framing of deeds and the like, in order to secure the integrity of the instrument may very often be found in practice, as in this particular Statute of 1696, to press hardly upon certain individuals who come to be affected by the invalidity of the instrument occasioned by the want of the observance of the due formalities. I am not applying that observation to the present case; but I say such is the case in many instances. Yet some such laws have at all times been found necessary; and in this particular case the Legislature has interposed, as it now appears, more than once to correct the special statute which we have before us.

Now, this Statute of 1696 seems to have been intended for the case of those subjects (as is recited by the Act) who had to send in their documents of title, which were sometimes, as was stated in the statute, of considerable length, and who were, from the then mode of conveying property, subjected to considerable inconvenience in finding the portions of the instrument which they wished to examine, or which more particularly affected them. That seems to have been the moving cause of this statute being passed, in order that they might have a more convenient instrument by which property could be affected than was then common in conveyancing. And accordingly, the statute having referred to a particular mode described as that of a roll of portions of paper battered or glued one to another, and attested as to the number of sheets, in order to give assurance of the honesty of the parties, declared that, as it might be more convenient for those who wished to avail themselves of the privilege, equal validity should be given to an instrument framed bookwise, provided certain solemnities were observed.

I shall occupy but a very short portion of your Lordships' time in the observations I have to make, because I think that everything which can be said upon the subject has been well and precisely expressed by the Lord President in the Court below. After reading the provisions of the Act of 1696 he says (*ante*, p. 363) that "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 bookways. 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*." So, my Lords, it appears to me plainly to be the case, as has been shown by several passages cited by my noble and learned friend on the woolsack. The case of *M'Crummen's Trustees*, as it seems to me, proceeded distinctly upon this ground,—that whereas there was a certain mode

of conveyance anterior to the statute which was found inconvenient, it shall be open to all people to have a different mode, which would not in itself be valid unless it was enacted by statute; and the statute says that this different mode of framing a document shall be valid, and that all who wish to adopt it may do so provided they follow certain conditions which are here specified; if not, then they have not chosen to avail themselves of the Act; they have executed an instrument which the very existence of the Act shows required an Act of Parliament for its validity; and the Act of Parliament comes in to validate it on certain conditions, which must be strictly observed. The only argument to be heard on that part of the case was this—There was a citation of numerous authorities by Mr Benjamin to show that that might be taken to be a compliance with the statute which might not at first sight appear to be so; but it was admitted by the very cases themselves that doubt and difficulty arose because they did not appear to be signed in the very express words of signing as had hitherto been the custom to be the case. But, my Lords, these were mostly cases of marksmen whose signature could not be what we ordinarily understand by the word signature, inasmuch as they knew not how to form the letters which were to compose it, but they were in the habit, not being able to write, of making their mark by which an instrument could be identified, and that mark was, as I believe it has been in most countries, held to be a signature. A marksman who could not frame the letters which make up a signature, instead of doing so, makes a mark by which his instrument may be recognised, and that is held to be his signature. That accounts, I think, for the greater number of cases which were cited by Mr Benjamin. All of them turned upon special points of that character—not saying you can dispense with one single iota of the provisions which the statute requires to give validity to your deed, but only saying you have complied with it in the best way you can, regard being had to your infirmity and to your not being capable of executing it in this particular manner. There was one case, however, where, although there were one or two sheets bookwise, the only sheet that affected the contract was the last sheet, and it alone was duly executed and signed according to the statute, the other portions conveying nothing. I suppose they were merely narrative, or of that nature, but had nothing to do with the instrument as it was executed. Therefore it was just as if it had been said, You may take away those sheets, and the instrument remains a good instrument, because, although that part which remains is not glued together as a separate sheet, the whole contract is framed in one sheet; and that being so, what was done with reference to that one sheet has been sufficient, and the instrument is a good and valid instrument.

That being so, I am clearly of opinion, with my noble and learned friend who preceded me, that with regard to the instrument in question, according to the authority of this House, and the grounds upon which the noble and learned Lords proceeded who advised the House in the case of *Thomson* v. *M'Crummen's Trustees*, all the formalities of the statute have not been complied with, and the instrument is without existence—at all events up to 1874 incontestably it did not exist.

But then it is said that the Statute of 1874, which would have the effect of giving validity to instruments afterwards executed in the manner in which this has been, must be construed as also having a retrospective effect, and must affect this instrument such as it is, although it purported to be made in the year 1873, and was not properly framed, and not being properly framed, was, to my mind, for the reasons I have already assigned, not an instrument at all, and had therefore no legal effect or validity whatsoever in 1873; nevertheless, it is said that in 1874 it might be made to have effect.

I would here again refer to the Lord President's judgment, and we may consider also what is the rule that we ought to observe in a matter of such importance in dealing with the construction to be given to an Act of Parliament. He cites first the opinion of Lord Cranworth in the case of *Kerr* v. *The Marquis of Ailsa*, 1 Macq. 736, in which he says—"Unless there be something in the language, context, or objects of an Act of Parliament showing a contrary intention, the duty and practice of courts of justice is to presume that the Legislature enacts prospectively, and not retrospectively;" and in this observation I entirely concur. Then Lord Cranworth says—"There may, however, be acts that are evidently on the face of them by their language and subject-matter intended to be retrospective," of which you have instances in the very Act before us, in which certain clauses are declared to be expressly applicable to matters which are past as well as to those which are future.

The dangerous consequences of such a procedure are also well pointed out by the Lord President, who says—"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 improbative instrument has been made." Now, my Lords, you can hardly conceive more serious evils than are there pointed out and designated by the Lord President, and yet without doubt the observations are perfectly just, and the consequences of holding this Act retrospective would inevitably be of the character here described.

From that consideration we will turn to the sections in question. The sections in question have on their face no peculiar phraseology which would induce one to hold them *per se* to be re-

trospective, or take them out of the general rule which Lord Cranworth lays down, that the portions of a statute which are silent in that regard are to be taken *prima facie* as clearly indicating prospective intention, and prospective intention only, acting from the time the Act comes into operation, which in this statute is precisely fixed by a clause, for it is said to be the 3d of October, the Act being an Act of 1874. This instrument, such as it is now—this piece of paper purporting to be an instrument, and having never received any valid inception whatever anterior to 1874, being therefore a mere piece of waste paper up to that time—is then, on the 3d of October 1874, to come into effect with all the consequences which are pointed out by the Lord President. My Lords, I think it would be quite sufficient, if there were nothing else in the case, merely to state that proposition. But beyond that, there are certain clauses which are intended to have effect before that time,—the consequences of which are not of that character which has been designated in the passage I have read from the Lord President's judgment,—matters relating to procedure, and not having the same consequential effect upon rights already accrued as any such retrospective effect would give to the clause now in question. In those clauses it is carefully stated that they are to come into effect before the passing of the Act, just as here there is the absence of any such statement whatever.

I think Mr Benjamin pointed out one clause which said that it should not have any effect upon any matter anterior to the passing of the Act. I can only say, in the language of conveyancing, it was *ex majore cautela* that that should be put in. I do not think we could found any inference upon that. It is enough that you do not find any such retrospective effect given to the clause in question, and that the consequence of your attributing any such effect to it instead of making the Act effective for the purpose for which it was designed would be in fact to create new rights in parties who had no rights at all, because they could only claim them under a probative instrument; and such a conclusion is not one which your Lordships could come to, especially after the authorities we have had in this House. I may also point out that this is a matter of Scotch conveyancing, and that the case comes before your Lordships' House with strong authority, all the Judges of the Court below concurring.

Lord O'Hagan—My Lords, I quite concur with what the noble and learned Lords who have preceded me have stated, and I shall add very little indeed to what has been said. The case, however, is of some importance, although, indeed, upon the first point I have entertained no doubt, I may say, from the beginning of the argument.

The Court of Session and the Lord Ordinary have been unanimous with reference to the matter of practice in Scotland, and certainly it would be a very strong thing for this House to differ from the learned Judges, whether we have regard to the reason of the thing or the course of practice which has been pursued with reference to the Scotch Courts for a very great length of time by your Lordships.

But it appears to me that the decision was not only unanimous but was perfectly correct. The question is, What is the meaning of this one section of an Act of Parliament? Now, it appears to lie upon those who contend that the word "sign" is not to be taken in its ordinary conventional sense to show by some authority that it ought not to be so taken, especially when you consider that you have not only the word "sign" in this clause, but you have a sort of definition of signature by the Scotch Legislature when you come to the Act of 1672, entitled an Act concerning the privileges of the office of Lyon King-at-Arms, as to the subscription at the end of the instrument—"they shall subscribe their christened names, or the initial letter thereof, with their surnames"—manifestly showing that although the initial letter under certain circumstances might be employed with the surname, the initial letter was not itself considered by the Legislature, as it is not considered by people of ordinary sense and understanding of words, to be a signature in the proper sense of that term.

Then the question arises—this being the case,—have the authorities cited by Mr Benjamin led your Lordships to the conclusion that you should not read the word "sign" in its ordinary sense—in its ordinary signification? These authorities do not seem to me really to have touched the case. Some of them were exceptional cases, really establishing the rule against which Mr Benjamin was contending. We had the case of persons who could not write, who were marksmen, or who were under such circumstances as rendered writing impossible, and in those cases the thing was permitted. In the same way, there were some cases in which it was the custom of the party to employ initials; and I must remind your Lordships that the learned Judges in the Court of Session make that exception themselves, and say it would be perfectly competent if it were established that it was the custom of the person to use initials only, his various friends everywhere accepting those initials as his signature, although it was not a full signature at all. Those cases manifestly do not touch the case before your Lordships.

One case certainly of importance was cited, and very much relied upon by Mr Benjamin, but that was a case in which there was a full signature at the end, and that full signature followed upon a paragraph which contained the entire substance of the deed. That therefore did not touch the case at all.

Upon the first point therefore it appears to me that really there ought to have been no controversy between the parties.

During the argument I had some doubt, I confess, as to the construction of the Act of 1874. That is a very important question—more important for general purposes than the other, and I am glad to say that I have been able to come to the conclusion to which your Lordships generally have arrived. I do not think that the 38th and 39th sections of that Act ought to be construed retrospectively. In the first place, I think the words which were pronounced by Lord Cranworth in the case of *Kerr* v. *The Marquis of Ailsa*, followed up as they have been by a great number of opinions given by other Judges, are decisive to this effect, that unless there are some circumstances rendering it inevitable that you should take the other view, you ought to presume that the Act is prospective and is not retrospective. It appears to me that the reason of that is very plain indeed.

There are cases, as was observed during the argument by my noble and learned friend on my right (Lord Blackburn)—English cases, and I suppose Scotch cases also—which make a clear distinction between matters of procedure and matters of right as to the operation of a statute prospectively and retrospectively. In the case before your Lordships it is a matter of right; this is a creation of a right; unless the execution of a deed fulfil the conditions prescribed by the Legislature no right exists under it. Now, upon this second part of the case we must for the purpose of the argument assume that Mr Benjamin failed upon the first branch of the case; we must assume that up to the year 1874, when this Act was passed, there was absolutely no validity in the deed; we must suppose that in that year—there being no right existing at all, the conditions of execution not having been fulfilled—the Legislature came forward and by equivocal words, without any expression of clear intention, and not only without the necessity of the case justifying it, but in direct opposition apparently to all public policy and all private interests, established a right that never before had any existence. That, I think, is very contrary to what we ought to expect. I shall not occupy your Lordships' time by saying again what has been already said of the injury of this interpretation, and the consequences to be attached to it. You have, or may have, my Lords, a man who on the faith of the construction (which, as I think, must now be taken to be established against the appellants here) had advanced a large sum of money on a purchase, and who would, if the construction that the appellants seek were given, be deprived of all that outlay; or you may find an heir or next-of-kin who for a number of years has possessed property on the faith that the law of the land had given it to him, and would protect him in it, but who finds himself all at once deprived of his property by an *ex post facto* decision that he has no interest in it, and his family are beggared by a construction which nobody perhaps ever thought of putting upon an Act of Parliament before. Those are consequences of a very serious kind; and although Mr Benjamin said that in a matter of this sort there are no vested interests, I confess I do not concur with him. The vested interest is that of a man who, acting upon the law of the land as he understands it, and as it really turns out to be, has advanced his money or changed his position, and to say that in those circumstances there are no vested interests which ought to be regarded is very strange indeed.

With these consequences staring us in the face we are required to give a retrospective meaning to these sections of an Act of Parliament. We have not only no express words giving them such a meaning, but we have in the Act of Parliament itself in one of its sections an express declaration that, save in the case where it is otherwise expressed, it shall be of future operation; and then we have that same Act of Parliament within its four corners pointing out in the express words which the Legislature thought necessary that it was intended to be of retrospective operation.

On the whole of these grounds, I think it is very clear that upon both the points the appeals should be dismissed with costs.

Lord Blackburn—My Lords, I am entirely of the same opinion. I will not trouble your Lordships with repeating anything as to the effect of the Scotch Act of 1696. I wish to point out this, which I think is material, in considering the Act of 1874. The effect of the Act of 1696 was that a book-deed if not properly executed was not binding at all, but was altogether invalid. It was exactly as if it had not been made. If the party had not signed it at the bottom, or not signed each page, or gone through other preliminaries, he was as free from his bargain as if he had never signed anything. It was absolutely invalid. In case of *rei interventus* there might be a sort of conclusion or estoppel from anything that might be set up that way. That, however, would be hereafter; but in the meantime it is not binding upon him; it is not a contract; but it is invalid, and without any effect at all.

Now, taking that view, which I consider to be of great importance in considering the second question, I come to see whether the Act of 1874 has the retrospective effect of turning that instrument which was invalid before into a valid instrument now. That I take to be the question which really arises here. Now, this Act of 1874 has a great many clauses in it. Some are expressed in terms that leave no doubt that the Legislature intended them to be retrospective. Some of them are expressed in terms that leave no doubt that the Legislature did not intend them to be retrospective; but this particular one—the 39th section—for I think the 38th may be passed over—is expressed in words which by no means, taking the words only, would show whether the Legislature did mean it to be retrospective or not. It is that "no deed or instrument or writing subscribed by the granter 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 the legal import because of any informality of execution." Now, these words by themselves do not certainly indicate to me very clearly upon their face whether those who passed them intended they should be retrospective or that they should not. So far as the words go, I think it extremely probable that of the lay members of the Legislature who passed the Act many might think they were retrospective, and many might not think about it at all; but we must construe the Act according to the legal rules of construction, to see whether or no it does express an intention of the Legislature that it should be retrospective.

Now, the general rule, not merely of England and Scotland, but I believe of every civilised nation, is expressed in the maxim, "*Nova constitutio futuris formam imponere debet non præteritis.*" *Prima facie* any new law that is made affects future transactions, not past ones. Nevertheless, it is quite clear that the subject-matter of an Act might be such that in the absence of any express words to show it it might be retrospective. For instance, I think it is perfectly settled that if the Legislature intended to frame a procedure—that instead of proceeding in this form or that you should proceed in another and a different way—clearly these bygone transactions are to be sued for and enforced according to the new form of procedure. Alterations in the form of procedure are always retrospective unless there is some good reason or other why they should not be. Then, again, as to matters of evidence—though I can-

not at this moment cite the authorities—I think upon matters of evidence—certainly upon the reason of the thing, and I think upon the authorities also—those are retrospective, whether civil or criminal. If a man were to commit high treason, at present it would require two witnesses to prove that he did it. If the Legislature were to say in future one witness shall be sufficient to prove treason, I apprehend that would be retrospective, and that the bygone treason could be proved by one witness instead of by two, and for this obvious reason that it is impossible to suppose that the Legislature meant men to have the advantage of committing a crime relying on the absence of proof, and that then when Parliament amends the law he should have the advantage of his foresight. It is impossible to say they intended to give him immunity from bygone crimes. Consequently, I apprehend—and this I might mention, not so much deciding it now as guarding against being supposed to decide upon other sections of the Act—I apprehend where the question is one of evidence—of amount of proof—and the Legislature says what was formerly not sufficient evidence shall be evidence in future, and says nothing about whether it shall be retrospective or prospective, that that would apply to bygone transactions. The same thing would of course hold where the Legislature says that what was formerly sufficient evidence to convince the Court shall in future not be sufficient evidence to convince the Court. There it would be retrospective, not merely prospective, and in either case it would apply.

But where the effect would be to alter a transaction already entered into—where it would be to make that valid which was previously invalid, an instrument which had no effect at all, and from which the party was at liberty to be free as long as he pleased—I think the *prima facie* construction of the Act is that it is not to be retrospective, and it would require strong reasons to show that is not the case. The reason and object for that I need not again mention. The Lord President has put instances which show it very clearly. Take, for instance, the very probable case which he speaks of—a testamentary deed which was not executed according to the proper statutable forms, and therefore as it was an invalid deed the heir-at-law entered upon and enjoyed the property for nineteen or twenty years, or very probably sold it to other persons, and then of a sudden this testamentary disposition, which was supposed all the while to be invalid, shall now be considered valid. This would certainly create very great hardship and harm. The Legislature might very well, if they thought fit to make this prospective, have provided for such cases as have been mentioned, and that would have been strong ground for saying they meant it to be retrospective; but they have done nothing of the sort, and I think we must apply the ordinary rule in considering statutes, and say it is not retrospective for such a purpose as this, there being no evidence of intention upon the face of the language to make it retrospective.

I would rather be understood as giving my impression than as pledging myself, because I have not had the opportunity of consulting the authorities—that in regard to evidence legislation would be retrospective. I mention that simply to show that there are other sections in this Act of which I by no means say they are not retrospective. For instance, the 40th section is—"Every holograph writing of a testamentary character shall, in the absence of evidence to the contrary, be deemed to have been executed or made of the date it bears." No question arises upon that section here, and I merely put it in by way of protest, and so as not to be supposed to express an opinion that it would not apply to holograph wills that were executed before the 1st October 1874. So in the 54th section—"No challenge of any deed, instrument, or writing recorded in any register of sasines shall receive effect on the ground that any part of the record of such deed, instrument, or writing is written on erasure unless such erasure be proved to have been made for the purpose of fraud." I do not say that it is a matter of evidence only, and that therefore it is retrospective. I only say I am not in deciding this case indicating an opinion as to whether that would be retrospective, and I have no doubt that in the numerous sections that occur in this Act there are several of them to which a similar observation would apply.

My ground for saying that the 39th section is not retrospective is that if it were retrospective it would have the effect of making that a valid contract which as the law stood at the time it was executed was not valid at all.

Lord Gordon—My Lords, I quite concur in the views which have been stated by the noble and learned Lords who have preceded me. The question has received very careful consideration in the Court below, and the Judges were unanimously of opinion in favour of the judgment which your Lordships propose to affirm.

I feel that it is a question upon which I am perhaps not the best authority, as I happen to have had something to do with the introduction of this measure in another House, and therefore perhaps I am the very worst interpreter of what I am thankful to say not only passed the other House, but received the sanction of your Lordships, who are certainly free from any bias with reference to the matter. But I feel that the opinions have been so strongly expressed in the Court below and in this House that there really is no room for doubt whatever.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

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Counsel for the Respondents—Lord Advocate (Watson)—J. P. B. Robertson. Agents—Connell, Hope, & Spens, Solicitors.