sioners without doubt the duty of causing "all the streets, public or private, together with the foot pavements, from time to time to be properly swept and cleansed, and all the dust, dung, ashes, rubbish, and filth to be collected from such streets, privies, sewers, cesspools, houses or premises, and to be removed at such convenient hours and times as they shall consider proper." The defence, as may be supposed, is this—that the clause relates to ashes, refuse, and dung from domestic habitations, and it is not intended to apply to manufactory produce. The pursuers' ashes are produced not in domestic but in manufacturing processes. It is not said that they are injurious to any one. The object is to have the works relieved at the public expense, that is, to convert a statute intended for the public benefit into a subsidy to the owners of these works. I can see no ground for doing this. The word "ashes" includes chemically no doubt the product of furnaces, and of many other processes. But to say that this clause extends to every residue of combustion, is carrying the construction of the clause to an extent which it will not support. It is admitted that the refuse here is not noxious, and the real meaning of "ashes" in the clause is such refuse as becomes injurious to the inhabitants, who are therefore bound to submit to the Police Commissioners taking them away. Besides, it clearly appears from the Act that there is a discretion in the hands of the Commissioners as to what places they shall clean, and other places people are bound to keep clean for themselves. I am clearly of opinion that there is no duty imposed on the Commissioners by the Act to remove the ashes from a huge manufactory, and I am therefore for adhering to the judgment of the Lord Ordinary.

Lord Neaves—I am of the same opinion. This case must not be decided on microscopic views of the words used in the statute, but on general considerations. In the ordinary case of dwelling-houses refuse is the result of inhabitancy, and that is quite the thing contemplated to be removed by the town for its own credit. All the inhabitants get the benefit of that. But it is a different thing when we come to consider a manufactory where the ashes are not from domestic but from artificial processes of profit to the parties, which profit they wish to increase by getting the town to take away their residuum. I cannot conceive that this should be a burden on the general ratepayers, to save the manufacturer the expense of doing so himself. These are ashes no doubt, in one sense, but they are not injurious to the public welfare, and therefore I think there is no duty incumbent on the Commissioners to remove them.

Lord Ormidale concurred.

Lord Gifford—I concur. The clause founded on is very broadly expressed. The dust, dung, ashes, rubbish, and filth (except stable and byre dung) within the burgh are first vested in the Commissioners, and then they are held bound to take them away. If taken in its widest sense this clause would go very far, and therefore we must look to the purpose of the statute. It is not a statute in favour of manufacturers, but a police statute, and there is a distinction between domestic filth and refuse from manufacturing processes. I quite admit the difficulty of distinguishing police rubbish from manufacturing rubbish, but surely there is a broad distinction between ashes from great furnaces, and from houses. There may be a narrower question in the case of manufactories for domestic purposes, but here we are beyond debateable ground.

The Court adhered.

Counsel for Pursuers—Balfour—J. P. B. Robertson. Agent—Robert A. Brown, L.A.

Counsel for Defender—Scott. Agents—Hill & Fergusson, W.S.

Thursday, July 20.

SECOND DIVISION.

M'LAREN AND OTHERS *v.* MENZIES AND OTHERS.

(Before the Judges of the Second Division, with Lords Deas, Mure, and Curriehill.)

Deed—Authentication—Subscription—Witness—Conveyancing and Land Transfer (Scotland) Act 1874, (37 *and* 38 *Vict. c.* 94, § 39.)

A will consisted of two sheets of paper, the one stitched within the other, the thread being sealed by the granter. The name of the granter was written by way of subscription on the fifth page, followed by a docquet which finished on the sixth page with the names, also by way of subscription, of three attesting witnesses, but without their designation.—*Held* that this was a "deed, instrument, or writing subscribed by the granter thereof, and bearing to be attested by two witnesses subscribing" within the meaning of the 39th section of the Act 37 and 38 Vict. c. 94, and that parole proof that it was so attested and subscribed was competent.

This was a petition presented to the Court by John M'Laren, advocate, and Thomas Peacock, merchant, Madeira, executors nominate of the late Hon. Caroline E. C. Norton, and by Mrs Scott Gordon and Miss Johnston, the beneficiaries under her will, under the following circumstances:—The Honourable Caroline Elizabeth Conyers Norton died at Quinta das Maravilhas, in the island of Madeira, on the 20th July 1875. She was a British subject, and her domicile of origin was Scotch. She left a last will, dated 13th July 1875, by which she bequeated certain legacies and annuities, and disponed and bequeathed nearly all her means and estate, consisting of heritable and moveable property in Scotland and elsewhere, to the petitioner Mrs Scott Gordon in liferent, and to the petitioner Miss Caroline Elizabeth Mary Johnstone in fee; and she appointed Mrs Scott Gordon her residuary legatee, and the petitioners John M'Laren and Thomas Peacock to be her executors. The will was in ordinary form according to the practice of conveyancers in Scotland, with the exception of the testing clause. It was written on two sheets of paper, and consisted of five pages, exclusive of

the attestation, which was written partly on the sixth page. It bore the subscription of the testatrix (together with her seal) on the fifth page only. The subscription bore to be attested by three witnesses subscribing, but they were not designed. The last part of the will was as follows:—"Lastly, I consent to registration of these presents for preservation.—In witness whereof I have signed and sealed these presents at my residence, the Quinta das Maravilhas, in the Island of Madeira, this thirtieth day of July one thousand eight hundred and seventy-five.

"C. E. NORTON.

(Seal) "CAROLINE ELIZABETH CONYERS NORTON.

"Signed and sealed by the testatrix, the above named Caroline Elizabeth Conyers Norton, and acknowledged by her to be her last will and testament, in presence of us, present at the same time, who at her request, in her presence, and in the presence of each other, have hereunto subscribed our names as witnesses, Quinta das Maravilhas, in the island of Madeira, this thirteenth day of July one thousand eight hundred and seventy-five.

'JNO. HOLLAND PAYNE.
'FRANCIS GORBELL TABB.
'FRANK BURRIDGE FOY.'

"The seal was placed upon the thread by which the two sheets were stitched together."

By the 39th section of the Conveyancing Act 1874 it is provided—"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, but the burden of proving that such deed, instrument, or writing so attested was subscribed by the granter or maker thereof, and by the witnesses by whom such deed, instrument, or writing bears to be attested, shall lie upon the party using or upholding the same, and such proof may be led in any action or proceeding in which such deed, instrument, or writing is founded on, or objected to, or in a special application to the Court of Session, or to the Sheriff within whose jurisdiction the defender in any such application resides, to have it declared that such deed, instrument, or writing was subscribed by such granter or maker, and witnesses." This application was accordingly presented, praying the Court "to allow the petitioners a proof of the averments contained in this petition, and thereafter to find and delare that the last will above mentioned was subscribed by the said Caroline Elizabeth Conyers Norton as maker thereof, and by the said John Holland Payne, Francis Gorbell Tabb, and Frank Burridge Foy, as witnesses attesting the subscription of the said Caroline Elizabeth Conyers Norton."

Answers were lodged for Honourable Lady Menzies, a sister of the testatrix, and others; and by interlocutor of 14th December 1875 their Lordships of the Second Division allowed the petitioners a proof before answer of their averments. The evidence was accordingly taken on commission, and conclusively established that the deed was signed by Miss Norton and the witnesses of the date it bore; that Miss Norton was fully aware of the contents of the deed that she signed in the presence of the witnesses; and that she herself sealed it with her signet ring.

The Court ordered the case to be heard before seven Judges.

Argued for the petitioners—The word "subscribe" has reference to the signature at the end of the deed, and to that only. Signing each page is a statutory formality entirely different from what may or may not be an operative signature. The object of signing at the foot of each page is the authentication of the sheets of which the deed may be composed. The Act 1681, cap. 5, introduced the subscription of two witnesses, and the Act 1696, cap. 15, the practice of subscribing each page. The practice of "side-scribing" is proper, but not essential: it is founded not on any statute, but on custom. "Subscribing" is only signing at the end of the deed; the placing a signature at the foot of each page is merely "signing," and took the place of the old "side-scribing." Read from this point of view, the importance of sec. 39 in the Act of 1874 is evident, and proof is allowed to meet such a case as the withdrawal of one sheet and the substitution of another.

Authorities—Act 1681, cap. 5; Act 1696, cap. 15; Erskine iii., 2, 14; Ross' Lectures, pp. 133, 136; *Smith*, 1816, F.C.; Act 7 Will. IV. and 1 Vict. cap. 26, sec. 9; 15 and 16 Vict. cap. 24; Jarman on Wills, (2d ed.) p. 66; Bell on Deeds, pp. 49, 167; *Smyth* v. *Smyth*, 7th March 1876, 13 Scot. Law Rep. 356; *Paton*, June 8, 1711, M. 16,807.

Argued for respondents — This is not a "deed, instrument, or writing subscribed by the granter." How is it possible to say whether or not there were any number of pages signed before the last that is signed?—Whether there may not have been pages removed or pages interpolated? The meaning of "subscribing" is the adoption by one person as his own of what is written by another. But it is not only the last page or sheet that is so adopted, it is the whole deed. How, then, can there be adoption of the whole by the signing of one page? It would not be safe merely to proceed upon the etymology of the word "subscribe," we must look at the reason of the thing. But the reason does not apply only to the last page, which might contain nothing of importance; indeed, perhaps only two words of the testing clause which is not filled up at the time at all; the reason applies to all the pages. The general and ordinary understanding of conveyancers is opposed to the meaning sought to be given to the word "subscription" by the petitioners here, and the Act 1874, in using the word, must be supposed to have intended signature on every page—to hold otherwise would totally revolutionise the practice as to the execution of deeds. This is an attempt to prove this to be the writ of the granter by parole evidence only, and the Act cannot have contemplated any such procedure.

Authorities—Paterson Compend. of English and Scotch Law, sec. 663; *Macdonald* v. *Macdonald*, 1714, M. 16,808; *Peter* v. *Ross*, M. 16,957; *Syme*, 1708, M. 16,713; *Thomson* v. *M'Cubbin's Trs.*, Feb. 1, 1856, 18 D. 470; *Galbraith* v. *Edinburgh and Glasgow Bank*, 24th March 1859, 31 Jur. 425; *Addisson*, 23d Feb. 1875, 2 R. 457; *Thom*, 15th June 1870, 8 Macph. 857; *Hill* v.

Arthur, 6th Dec. 1870, 9 Macph. 223; *Veasey* v. *Malcolm's Trs.*, 2d June 1875, 2 R. 748; *Smyth* v. *Smyth*, 7th March 1876, 13 Scot. Law Rep. 356; Duff's Feudal Conveyancing, p. 63; Bell's Lectures, i. 71.

At advising—

Lord Deas—This is an application, presented under section 39 of the Statute 37 and 38 Vict., c. 94, to have it declared that a deed bearing to be the last will and testament of the late Honourable Caroline Elizabeth Conyers Norton, then residing in the island of Madeira, and to have been signed and sealed by her there on 13th July 1875, and to dispose of certain personal estate belonging to her, as well as of her heritable estate in Scotland, was subscribed by her and the witnesses whose names are attached thereto.

The enactment relied on bears that "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, but the burden of proving that such deed, instrument, or writing, so attested and subscribed by the granter or maker thereof, and by the witnesses by whom such deed, instrument, or writing bears to be attested, shall be upon the party using or upholding the same."

The deed now in question consists of two sheets of paper, the one stitched within the other. The name of the granter is written by way of subscription on the 5th page, followed by a docquet, which finishes on the sixth page with the names, also by way of subscription, of the three attesting witnesses, but without their designations.

The informality of execution which is said to render the present application competent and necessary is that the granter has not subscribed all or any of the first four pages.

The principal Scotch statutes bearing upon the subscription and authentication of deeds (other than sasines, which are not necessary here to be considered) are 1579, c. 80; 1593, c. 179; 1681, c. 5; and 1696, c. 15.

The solemnities required by these statutes have been greatly reduced by recent legislation. Sealing has been long dispensed with. In the case of *Thomson* v. *M'Crummin's Trustees*, 1st February 1856 (18 D. 470), I came to the conclusion that pagination was essential in deeds written upon more than one sheet, and indeed that all the requirements of the Act 1696, c. 15, were necessary solemnities in deeds written bookways; and in that opinion I was confirmed by the unanimous judgment of the Inner House, affirmed by the House of Lords. It was, however, soon afterwards enacted by statute that the want of pagination should no longer be a nullity. The statute under which we are now asked to proceed provides, in § 38, that it shall be no objection to the probative character of a deed, instrument, or writing, whether relating to land or not,—1st, That the writer or printer is not named or designed; 2d, That the number of pages is not specified—that is to say, not specified in the deed, instrument, or writing itself; 3d, That the witnesses are not named or designed in the body of the deed, instrument, or writing, or in the testing clause thereof, provided that where the witnesses are not so named and designed their designations shall be appended to or follow their subscriptions, to which they may be added at any time before the document is registered for preservation or founded on in Court,—it being farther provided that the designations so added need not be written by the witnesses themselves. Prior to the statute of 1874 each or any of those three objections would have been fatal to the deed, and not suppliable in any way. But if I read the modern statute law rightly, including § 38 of this statute of 1874, a deed is now probative, on the face of it, if three requisites are complied with—1st, If there are subscribing witnesses; 2d, If these witnesses are either designed in the deed or testing clause, or their designations are added to their subscriptions before the deed is recorded for preservation, or is founded on in Court, it being provided, as I have already said, that the designations "need not be written by the witnesses themselves;" 3d, If the deed be subscribed by the granter on the last page in the case of a deed on one sheet only, or subscribed by him on each of the sheets or pages in the case of a deed written on more than one sheet.

If the first of these requisites be omitted—that is to say, if the deed does not bear to be attested by at least two witnesses—no remedy is provided. The objection is necessarily fatal to the deed.

If the second of these requisites be omitted at the time of completing the deed, the remedy is in the hands of the parties themselves—the designations of the witnesses may be appended to their subscriptions as long as the deed is not recorded or founded on in Court, and these designations "need not be written by the witnesses themselves." If this easy remedy be not timeously adopted, the parties interested have themselves to blame. The deed will not be an effectual deed.

If the third of these requisites be omitted to the extent of having no subscription of the granter on the last page, the deed will of course be ineffectual, as never having been completed by the granter. But if the deed bears to be subscribed by the granter and two witnesses on the last page, then I think, although if it consists of more than one sheet and is not subscribed on the previous sheets or pages as well as on the last page it would be *prima facie* improbative, there is a remedy provided for this omission by the statute of 1874, and that remedy is, that the party using or upholding the deed shall take the burden of proving that the subscriptions of the granter and witnesses at the end of the deed were truly and intelligently adhibited to the deed. If the deed had been *ex facie* probative as it stood, the verity of the subscriptions and the binding nature of the deed would of course have been taken for granted, and could only have been disproved by an objecting party in a reduction.

I do not at all depreciate the serious nature of the omission to subscribe the previous sheets or pages of a deed written bookways upon more than one sheet. I think it is the omission of a solemnity required by the Act 1696, c. 15. Prior to that Act, if more than one sheet was used the sheets required to be battered together so as to admit of being rolled up; and side-scribing, as it

was called, was required only so far as necessary to shew the connection of the sheets, and not as matter of solemnity. But the effect of the Act 1696, c. 5, was to recognise and set up side-scribing as a necessary solemnity in deeds written in the old fashion. It was so decided in the case of *M'Donald*, 18th December 1714 (M. 16,808). In that case a disposition dated subsequent to the Act of 1696 was objected to as null because written on two sheets battered together and not side-scribed at the joining. The report bears "the Lords sustained the nullity that the disposition produced by the pursuer as his title in this process was not side-scribed, the writ being granted after the Act of Parliament establishing the custom of side-scribing the joining,"—that is to say after the Act 1696, c. 15. The soundness of that decision, so far as I know, has never been questioned. The legitimate inference drawn from it is, that if a deed written on more than one sheet be subscribed on the last sheet only, it is a nullity. There can be no doubt, therefore, that if sec. 39 of the Act of 1874 provides, as I think it does, a remedy for the omission of subscribing each of the sheets or pages of a deed consisting of more than one sheet, the remedy is one for the omission of a solemnity.

But then I am of opinion that it was the omission of a solemnity, and indeed of this very solemnity, for which sec. 39 of the statute of 1874 was intended to provide and has provided a remedy.

It would have been superfluous to have provided a remedy against trifling informalities which could not affect the validity of the deed. The statute distinctly specifies the nature of the informality to be remedied, viz., "any informality of execution," and, not contented with this, it describes the informality of execution as one in consequence of which the deed would be "deemed invalid or denied effect according to its legal import."

There is nothing startling therefore in the fact that the effect of the proof allowed by the statute may be to remedy the omission of a statutory solemnity. That was what the statute intended.

Not only so, but I think it must be clear, from what I have already said, that it was the omission of this very solemnity, and no other omission, which the statute contemplated might be remedied by a proof. There are now only the three solemnities I have enumerated necessary to make a deed probative. The statute does not make the omission of the *first*—viz., the want of subscribing witnesses—suppliable by proof. It does not make the omission of the *second*,—viz., the designations of the witnesses in the deed or testing-clause—suppliable by proof, or at least not by the proof merely, but by adding the designations to the signatures or subscriptions before registration or founding on the deed in Court. The omission of the *third* requisite—viz., the subscription by the granter on all the sheets or pages of a deed written on more than one sheet—remains as the omission, and in fact the only omission or informality, in the execution of the deed which the statute has said may be remedied or supplied by proof. Had it not been for that omission an application such as the present would have been equally unnecessary and incompetent. If sec. 39 of the statute of 1874 does not authorise the remedying of that omission by a proof, it has, so far as I can discover, done nothing at all.

As regards the deed now under consideration in particular; if the first four pages had been subscribed by the granter as well as the last, it would have required no judicial application or aid from the Court to make it in all respects a probative deed. The petitioners might themselves have added or caused to be added the designations of the witnesses, and this application would have been both unnecessary and incompetent.

I do not differ from the observation which has been made, that although subscription by the granter of all the sheets or pages of a deed consisting of more than one sheet be a solemnity, the term subscription, in the language of our old statutes, has generally a peculiar application to the subscription at the end of the deed. I do not think it necessary however to go into that inquiry or to rely upon the result of it. The thing to be proved is, that the deed was "subscribed by the granter or maker thereof and by the witnesses." These words are, I think, used in the section in their plain and natural sense. No distinction is made in using them between the granter and the witnesses who subscribe only at the end. The section does not say or imply that the granter must sign in the full manner required by the Act 1696. It implies the reverse. If the subscriptions to this deed be genuine the deed is unquestionably subscribed by the granter and witnesses, and that is enough to satisfy the words of the enactment as to subscription.

I may explain that I do not think the proof competent and requisite under the statute was intended to be limited to the bare fact that the subscriptions are genuine. On the contrary, I think that the surrounding facts and circumstances attending the subscription, both of the granter and witnesses,—everything in short tending to satisfy the mind of the Court that the deed was intelligently and deliberately subscribed when in the state in which it appears when submitted to the Court,—may be and ought to be elicited in the proof.

And this leads me to observe that I think the petitioners acted quite rightly in not appending the designations of the witnesses to their subscriptions before presenting this application, because it was very desirable that the Court should see the deed untouched, in the state in which it was left by the testatrix. Whether it would have been equally safe to have produced and founded on it in an action properly so called before adding the designations is a different matter, on which I do not enter. But I do not look upon the production of the deed along with and for the purposes of this petition as a founding upon it in Court in the sense of sec. 38 of the statute; and if your Lordships grant the prayer of the petition, I presume it will be open to the petitioners to add or cause to be added the designations of the witnesses, in the same way as they could have done before this petition was presented.

As regards the proof now before us relative to the deed in question, I have only to say, that to my mind nothing could be more satisfactory; and I am therefore, upon the whole, of opinion that the prayer of the petition ought to be granted.

Lord Neaves—I regret that I am unable to concur in the opinion that has been delivered. I regret it because I think it very desirable that a case of this kind, involving very important interests, and making an undoubted change in the law, should be decided unanimously. I have however formed a different opinion on the case, and although I necessarily feel a certain distrust of my own judgment, from the fact that the judgment is not to be unanimous I consider it to be due to the parties and to the law, as well as to myself, to state the opinion which I have arrived at.

I am of opinion that under the terms of this Act, and clause 39 in particular, it is not competent for the Court to interfere in the manner they are asked to do. I do not think it will be necessary to take up much time in stating the grounds of my opinion, which are very simple, and will be I hope easily understood, whatever view may be taken of their validity when I have stated them. The question is one of great importance. No doubt a great deal has been done to smooth away the difficulties and the snares, as they have been sometimes thought, that surrounded the conveyancer's path in getting deeds executed, but at the same time I think this is one of the strongest that has yet been done; for, as I understand it, it comes to this, as explained by my brother who has preceded me, that if there be a sheet of paper or a scrap of paper containing a man's signature, with nothing above it but a word or a line, and unprincipled persons be got to prefix to it, and allege that he prefixed to it, any number of sheets or pages containing a disposition or conveyance or disposal of his whole estate, of whatever extent or amount, both heritable and moveable, to the prejudice of all other claims upon it, while the line or portion of writing subscribed has no bearing or character of any kind at all to indicate what the intention of the party was, that shall be supplied by parole testimony; that the evidence of two witnesses that this last page, consisting of a single line however informal or unimportant, is the concluding page of 1 or 2 or 20 preceding pages, which they will prove by parole to have been the deed which the party meant to frame or meant to authenticate by his signature upon the last piece of paper. That is a very strong result, and a great change from the original law. I don't dispute that the Legislature is entitled to make changes. The Legislature is entitled to do much—it has almost unlimited powers. It has even the power to do what is wrong, and we are bound to obey it; but it is a very great change to say that the will of a testator as to heritage or as to moveables may be set up entirely by parole testimony, for it comes to that. It is the next thing to making a nuncupative will. There may be no writing that the party ever saw, that contains his will, provided two unprincipled or stupid men can be got to say that it preceded a piece of paper on which his name stands.

Now, what are the grounds on which this is said to be effected? It is based on the 39th section of the Act of Parliament, for I don't find anything in the 38th section that touches this matter much. The 39th section is a peculiar clause, and is not very happily framed, I think, nor very harmonious in all respects. It is a negative clause. It provides that—"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, but the burden of proving that such deed, instrument, or writing so attested was subscribed by the granter or maker thereof, and by the witnesses by whom such deed, instrument, or writing bears to be attested, shall lie upon the party using or upholding the same; and such proof may be led in any action or proceeding in which such deed, instrument, or writing is founded on or objected to, or in a special application to the Court of Session, or to the Sheriff within whose jurisdiction the defender in any such application resides, to have it declared that such deed, instrument, or writing was subscribed by such granter or maker and witnesses." The clause has rather a peculiar commencement—"No deed, instrument, or writing subscribed by the granter or maker," that seems to be the condition of coming under the Act at all. That is to say, it shall be subscribed by the granter or maker before we know anything about it. Why that expression is used as contrasted with the next thing about the witnesses, I don't quite understand; but it requires as a condition precedent of dealing with the thing at all that it shall be subscribed by the granter or maker thereof, and when we come to the witnesses which are all essential, it says, "and bearing to be attested by two witnesses." It is not to bear merely that it is subscribed by the granter, it must bear to be attested by two witnesses, but it must be subscribed by the granter. I don't understand the meaning of that, or whether it has any meaning. But the main point that appears to me to be involved in this question is this—there having been no previous enactment in this section that I have heard founded upon with regard to subscription, is it or is it not to be held in this important and serious question that the words—"No deed, instrument, or writing subscribed by the granter or maker thereof"—do or do not mean subscribed in the manner in which they are subscribed at present? No new subscription is prescribed, no new manner of subscription is prescribed. No change like that is indicated that I can see, but this clause is to deal with deeds that are subscribed by the maker or granter thereof, and without that you cannot proceed to apply the clause at all. Does that mean subscribing in some new way, or does it mean subscribing as at present? That raises the question, on which I don't mean to say there is not room for difference of opinion, whether the word subscribed means simply subscribed—written on the last page of the deed. Now, I can scarcely think that without further explanation the subscribing of a deed by a granter is not the subscribing of it in the way which the law at the time when you speak of it requires it to be done. There is no change of subscription made here. The subscription is the known form of subscription that exists at this time as recognised by law. It is said that subscription only applies to the last page. In its strict etymological meaning subscribing means writing under something else, no doubt, but it does not mean only that. When you speak of the

subscription of the granter of a deed, you legitimately mean the whole of his subscriptions that are required by law, and that constitute the total expression of his consent. It is said it can only mean the subscription on the last page, because the witnesses subscribe, and they only subscribe the last page. But if my view is right, that this clause assumes subscription to be in the deed under consideration as at present, that explains the whole thing. The party is to subscribe as at present, and the witnesses are to subscribe as at present. It happens that the established custom is that witnesses subscribe on the last page, because very few witnesses know or ought to know the contents of the deed. Their business is merely to see and attest the subscription. But if you speak of subscription by parties according to the law or practice at present used, that implies a subscription not of every page, but of every independent portion of the deed which being separable from the rest requires separate authentication. The purpose of this Act is said to be to do away with all that, and that one signature at the end of the deed upon a sheet of letter paper may be held to authenticate ever so many pages before without a scrap to show the writer's cognisance or knowledge of them, or that they have even passed through his hands, or have existed before the time they are brought into Court. That is the result of trusting everything to parole testimony. No doubt if we were living in the golden age, when people may not require to make their wills, or if our courts of justice were held in that fabled mansion which was called the palace of truth, where every one who entered was compelled *nolens volens* to speak the truth even against his will, we might be sure that we would get at the truth. No doubt the powers of cross-examination are very great, and on the other side of the island they have been accustomed to that. I am far from saying one word against this will on the proof which has been led about it; but the case must be decided on general grounds, and there are parts of Europe and of the world where truth may not be much valued. We know that in some places the truth is not the thing that is pleaded by the plaintiff or by the defendant. There is a well-known case of a man who was sued by a Neapolitan for a money debt, and his defence was that he had never got the loan and that he had never seen the money; but he was obliged to leave the place and to trust his defence to a friend. He came back and found that he had gained his case, and he asked his friend how it had been gained, saying, "Of course you showed that I never borrowed the money?" "Oh no," said the friend, "I got two men who swore that you received the money, and I brought other two to say that they saw you pay it back." Now where truth of that kind is for sale, it becomes a very serious thing to place much reliance upon parole testimony. Considerations of that kind make one alive to the importance and the risk of such things. Of course if it is the wish of the Legislature, it must be obeyed. It certainly is a change in the law and practice; but if that had been meant, how very easy it would have been to say "no deed, instrument, or writing, subscribed by the granter or maker thereof on the last page thereof." The change would then have been made on the face of the Act, and one would have seen precisely what was meant. But the word subscribed is used, and that gives rise to the doubt whether it meant to subscribe as at present, just as the witnesses are to subscribe as at present, the difference between the two substantially being, that is, the policy of the law that the granter shall subscribe on every page or separable sheet in order to prove his consent to the parts of the sheet or the whole sheet, the other being merely to show that they attested the deed, that they were not the granters of the deed, but merely the attestors of it. These are the grounds upon which I proceed. I do not say that there may not be ambiguities in regard to the use of the word signing or subscribing; I merely say that it would be no stretch of law to hold that subscribing the deed without further qualification means subscribing as at present. The change was introduced of providing that the attestation might be dispensed with so far, provided that the fact could be proved, but the fact to be proved was the fact of subscription by the several parties who were to subscribe according to their different functions, and if it meant subscribing as at the time, it seems to me to be fatal to the great extension of this application that is now made, and which operates an entire change in the law by making it possible to get a couple of witnesses to prove anything whatever that can be prefixed to a man's signature on a single piece of paper.

Lord Ormidale—I concur with both your Lordships who have given prior opinions, that the question in this case is a very important one, relating as it does to the execution of deeds and the true interpretation of the 39th section of the recent Act, the 37th and 38th Victoria, cap. 93, entituled an Act "to amend the law relating to Land Rights and Conveyancing, and to facilitate the transfer of land in Scotland."

The petitioners have presented the present application to the Court in order to allow them a proof of their averments, and thereafter to find and declare that the paper or writing referred to by them as the last will of Miss Norton was subscribed by that lady as maker thereof, and by three other persons as attesting her subscription.

But while such is the prayer of the petition, it is at the same time stated and admitted by the petitioners that the alleged will, although written on two sheets of paper, and consisting of five pages, exclusive of the attestation, which is written partly on the fifth and following page, bears the subscription of the testator on the fifth page only. And it is also stated, and is the fact, that although the subscription bears to be attested by three witnesses subscribing, they are not designed.

A proof having been allowed to the petitioners before answer, it has been adduced and is now before the court. I do not understand it to be denied that the proof is sufficient, provided that the Act referred to is applicable to such a case as the present; or, in other words, provided the objections and defects to which the alleged will is, as it stands, undoubtedly subject, are capable of being remedied under the Act referred to.

On the one hand, it was contended for the petitioners that it was enough to entitle them to the benefit of the Act that the alleged will was

subscribed by the testatrix at the end of it on the fifth page, although not subscribed at all by her on the preceding pages; while, on the other hand, it was contended by the respondents that in consequence of the non-subscription of the testatrix on the first four pages of the will it could not be said to be "a deed, instrument, or writing subscribed by the granter or maker thereof," and was therefore incapable of being validated under the Act.

By the 39th section of the Act it is provided that "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 effect because of any informality of execution." The Act also provides that the burden of proving certain particulars shall lie upon the party using or upholding the deed.

Having regard to the Act as so expressed, the primary question is, Whether we have in the alleged will under consideration a deed, instrument, or writing bearing to be subscribed by the granter or maker thereof. It is very clear, and neither was nor could be disputed, that two sheets of paper with writing on the first five pages, but not bearing the subscription or signature of the maker at all, could not be held to be a deed, instrument, or writing subscribed by the granter or maker thereof. But it was argued that the will here in dispute must be held to come under the operation of the Act, because although partly written on two sheets of paper, and not containing the signature or subscription of the maker on the first sheet, it was subscribed by the granter or maker at the end on the second sheet or fifth page. The Act, however, does not so limit, at least expressly, the requisite subscription. It is quite general to the effect that the writ must be subscribed by the maker or granter thereof. But can a deed, instrument, or writing be said to be subscribed unless it is so in the way required by law, independently of the Act and before it was passed? The attestation of the subscription is another and different thing altogether, which will be afterwards spoken to. I am only at present dealing with the subscription of the maker, and I think it plain that it is indispensable that there should be a deed, instrument, or writing which could be said before the Act was passed to be subscribed by the granter or maker thereof. The petitioners, however, maintained that, let the deed, instrument, or writing consist of one or two or any greater number of sheets of paper, it was enough to admit of the application of the statute that it had the subscription of the granter or maker at the end, whether that was on the second or any subsequent sheet; while, on the other hand, it was contended by the respondents that no deed, instrument, or writing consisting of more than one sheet, as the alleged will does, could be held to be subscribed by the granter or maker thereof unless the subscription appeared on every page of it. That the respondents are right in this contention, according to the law as it existed before the passing of the Act in question applicable to the subscription of deeds, cannot, as it appears to me, be successfully disputed. The statute 1696, cap. 15, removes, I think, all serious doubt on the point, for while it validates deeds written bookways, as the will here in question is, it does so only provided that "every page be marked by the number first, second, &c., and signed as the margins were before." And that the Act 1696 is in this respect imperative was decided by this Court in the case of *Thomson* v. *M'Crummin's Trs.*, 18 D. 470, and 31 Scot. Jur., p. 425, where it was held, without any dissent, that the omission to mark every page of a deed written by way of book upon more than one sheet was fatal to it; and in coming to that decision all the learned Judges proceeded on the assumption that an omission to sign any of the pages of a deed written upon more than one sheet of paper would be equally fatal to it as an omission to mark every page by its number. Nor does it affect the matter that it has been decided to be unnecessary to subscribe a deed written on a single sheet of paper except on the last page, because, as shewn in the report of the case of *Thomson* v. *M'Crummin's Trs.*, as disposed of in this Court, 18 D. 473, it was so decided on the ground that on a correct construction of the Act 1696, cap. 15, it did not apply to deeds written on a single sheet, but only to deeds written on more than one sheet, as the present deed is. And just as little do I think it of any importance that the word "signed," in place of the word "subscribed," is employed in the Act 1696, seeing that the same word is used alike in reference to the signature of the maker of the deed on the last as well as the other pages. Accordingly, all the writers on the subject since the Act 1696 was passed down to the present time have referred to what that Act requires as the subscription, not the signature, of the maker on every page where there is more than one sheet, and the practice of conveyancers has also, I believe, been to give effect to the Act in that sense.

Without, therefore, going into the various collateral points and speculations which were adverted to at the debate, it appears to me that a "deed, instrument, or writing," as referred to in the recent statute, must be held to be such and such only as can be said to have been subscribed by the granter or maker thereof according to the law as it stood prior to its passing. And that this must be so is further very strongly enforced by the circumstance that while by the 39th section of the statute it is made incumbent on the party using or upholding a deed subject to informality in its execution to prove that it was subscribed by the granter or maker thereof, nothing is said about the necessity of proving that these pages of a deed written on more than one sheet of paper did truly contain the will of the granter or maker, although not subscribed by him at all. In short, the terms of the 39th section of the Act, whether in the earlier or later part of it, appear to me to require—let the informalities otherwise of the execution of a deed be what they may—that the subscription of it by the granter or maker must be legally complete and unobjectionable.

It seemed to be argued, however, that the expression—the formalities of execution of a deed—must necessarily cover and include the subscription of it by the maker on every page except the last. I cannot entertain this view. The language of the Act may not in all respects be very distinct or precise, but I have been

unable, after full consideration, to see how the subscription of a deed by the granter or maker thereof can be treated as anything but the all-important substantial and indispensable part of the execution of a deed, while the testing clause and the particulars usually stated therein may be called the formalities of execution. To the latter, therefore, and not to the subscription of the deed, do I think that the statute refers in speaking of "the informality of execution." Nor is it a sufficient answer to this to say that if a deed written on more than one sheet requires to be subscribed not only on the last but every page, there would be no defect or informality left for the remedial application of section 39 of the statute, as every other formality is dispensed with by section 38. It appears to me that this is an entire fallacy; for as I read section 38, and after making allowance for its dispensing power, a deed would still be invalid if the designation of the witnesses were not added before the deed was recorded or founded on in Court. Besides, proof in support of the subscriptions of the maker and witnesses is requisite by section 39 of the Act where the deed has not been formally completed so as to be otherwise probative.

The attachment of the two sheets of paper on which the alleged will is written by seal and string is, I think, of no consequence, for it could not be, and was not said to form by the law of Scotland as it existed at the passing of the Act in question, any part of the execution, either in substance or form, of a deed, instrument, or writing. And neither do I think it of any consequence that the Act uses the same expression—subscribed or subscribing—in reference to witnesses as to the granter or maker, seeing that it does not alter, but leaves exactly as it had been before, the place or places where the granter and the witnesses require to adhibit their subscriptions, viz., on each page by the former, and at the end of the attestation by the latter.

On the grounds, and for the reasons now stated, I am of opinion that the petitioners have failed to establish their case, and therefore that the prayer of the petition ought to be refused.

Lord Mure—I agree with all your Lordships who have delivered your opinions that this is a very important case, and I have approached it strongly impressed with that view. The deed which we are asked to deal with bears to be the last will and testament of Miss Norton. It appears *ex facie* of it to be written upon two sheets of paper, the catch-words all correspond at the bottom of the first, second, third, and fourth pages, and the fifth page bears the signature of Miss Norton, and it bears to be attested by three witnesses who were present. Upon the application of the parties wishing to have the will enforced, your Lordships allowed a proof of the circumstances under which it was subscribed by Miss Norton, and upon the evidence which we have had laid before us it appears to me to be proved as clearly as anything can be proved that this lady had deliberately read over every word of this document; that it was prepared according to her direct instruction; that it was stitched together in the way in which we find it, and the thread brought together and the seal put upon it and sealed by her in order that these two sheets should be attached together as her last will. That is as clearly and distinctly proved as possible; and the question which we are now to consider is, whether the deliberate act of this lady can be set up as a good document under the 39th clause of this Act of Parliament? Under the law as it existed in 1874, when that Act was passed, this is not a probative document, because it is only signed on the last page. If it had consisted of one sheet of paper of four pages, and had been signed on the fourth page, but there had been no signatures on the other pages, it would have been a good will. But because it required two sheets of paper, it was prepared in this way, and it consisting of two sheets of paper, and being in that sense of the word a will made bookways, and not being signed or subscribed—I take the word in either sense—on the first, second, third, or fourth pages, it was a bad will at that date, because it was a will in which there was an informality of execution of a very solemn description. Now the parties maintain that under this Act of Parliament this will is a good and valid will upon that evidence, because it is a document of the description which the Act of Parliament was intended to apply to. Whether it was a politic or impolitic act in the Legislature to pass such a provision as this, I do not inquire. I do not think it unreasonable, knowing that parties may at a distance make a will and require more than one sheet of paper to make it upon; but as a will so framed may have informalities of execution which would render it invalid and force the Courts to refuse effect to it, I do not think it unreasonable that Parliament should pass a measure to enable parties to set up such a will. The question is whether this clause does so. The clause provides that "no deed, instrument, or writing," &c.—[*reads it*]. The clause is framed evidently with reference to informalities of a serious description, because they are described as informalities that might lead to effect being denied to the deed. There is such an informality in this deed, viz., the omission of the signature on the different pages. Now in construing this Act of Parliament we must keep in view that it is a remedial Act, and that it must have a fair and large and generous construction in order to carry out the object which the Legislature appears to have had in view. It was to set up deeds that are the real will of the party who bears to have subscribed them, although they may have been defective in certain formalities. The question then comes to be, as I understand it, whether it applies to any deed which does not happen to be subscribed in terms of the Act 1696? The first question is, What is the meaning of the word subscribe? Now the word subscribe, or subscription, dealing with it in the general sense, whether it be a will or a couple of sheets of note paper sent to a friend as a letter, or said to be subscribed or signed on the last page—if one writes a letter with three sheets of note paper you may put "two" or "three" to connect the two together, or you may use a catch word, but that is a subscribed document. The language of an Act of Parliament of this kind is not meant to be addressed to conveyances alone. It is meant to be addressed to parties who may be at a place where they are not expected to know what the particular formalities may be, when they come to subscribe before witnesses. I read the word subscribed in that common

ordinary sense in which it is read and used every day. I do not go into the distinctions of the older Acts; but as I understood the argument addressed to us, the Court are not entitled to deal under this clause with any deed that is not subscribed in terms of the Act 1696, and that instead of saying no deed, instrument, or writing subscribed by the granter, what Parliament meant was, to say no deed subscribed in terms of the Act 1696 by the granter. I cannot put that limited construction upon the words. It appears to me that the words are of the broadest description, and that the natural use and meaning of the word subscribed is, that being subscribed on the last page and attested by witnesses on the last page, that covers every deed subscribed in that way, and that it is competent in this Court, if there are informalities appearing on the face of it in the execution, to allow that deed to be substantiated and set up by its being proved, as has been done in this case, that every word of it was known to the lady who signed it, and that it was signed by her and attested by these witnesses as her solemn and deliberate act. If it were meant to be read in that limited sense, as meaning subscribed on every page in terms of the Act 1696, I do not know what was the use of a proof about the matter at all; because what the statute says you are to do is this,—the party shall be entitled to apply to have it declared that this deed, instrument, or writing, was subscribed by such granter or maker thereof. But a deed that is signed on every page and subscribed at the end by four witnesses is a subscribed deed in the sense of the Act 1696. The statute could not be meant to apply to things that prove themselves under the statute. This would have proved itself, and there was no necessity for the proof. The proof is allowed to supply something that is wanting; and what is wanting here is a formality of execution by the omission of the party to sign every page; and I think it is a formality of execution that may be supplied, as has been done here, by the clear and distinct proof that every word of the deed laid before us was known to the granter, and that it was the deed which she signed. In that view of it, the statute allows the parties wishing to set up a deed which has a informality of this sort, to prove that a deed written book-ways but not signed on every sheet shall not be invalid because of the want of that formality of execution, if the whole of that particular deed is proved to have been signed or subscribed by the granter. In my view of the case no difficulty can arise from this, because it is in substance simply saying that a deed written book-ways, if actually proved to have been subscribed by the granter of it, shall not be invalid, but shall be held to be as valid as a deed written on one sheet and written on the last page has always been held to be, though not signed on every page of that one sheet. These are the general views which I have thought it right to add, but I concur in every word of the more detailed and full opinion that has been given by Lord Deas.

Lord Gifford—In this case, which is one of great importance and of general interest, I concur in the opinions expressed by Lord Deas and Lord Mure, and while fully sensible of the difficulties which attend any view which may be taken of the case, I cannot say that ultimately I have felt much hesitation in coming to the conclusion that the deed in question must be held a valid and effectual deed, the whole provisions of the statute 1874 having been fully complied with.

The statute of 1874, 37 and 38 Vict. cap. 94, is a statute of a remedial nature. Its object is to "amend the Law relating to Land Rights and Conveyancing, and to facilitate the transfer of Land in Scotland," and its whole purview is to simplify the rules of conveyancing, and to dispense with the necessity of certain deeds, and with certain formalities which were previously essential in all deeds and in titles to land. In particular, the two sections of the Act which directly bear upon the present case (sections 38 and 39) are intended to give validity and effect to deeds which under the pre-existing state of the law would have been absolutely null and void, and the special enactment of section 39 is that no deed or writing subscribed by the granter and bearing to be attested by two witnesses subscribing shall be deemed invalid or denied effect "because of any informality of execution." I shall immediately advert to the conditions which this clause imposes, but the general object of the clause is apparent—to remove all objections founded on mere matters of formality, and to give effect to what is really the deed of the granter according to its true legal import. I think this provision is one which ought to be liberally interpreted according to the obvious spirit of the enactment, and I cannot help thinking that it would be a great misfortune if we were compelled to hold that while many of the old formalities formerly essential to deeds are dispensed with, other formalities not more important in character or in themselves are still essential, although in the fair sense of the words they are "mere formalities of execution."

It appears to me that the fair meaning of the enactment is that a deed which is in the sense of this statute subscribed by the granter and attested by two subscribing witnesses shall be effectual notwithstanding that in all other respects it shall have been irregularly and informally executed. In short, the subscription of the party, whatever that may truly mean, and the subscription of two attesting witnesses, are now the only formalities essential to the validity of a deed.

It appears to me, then, that the real and only question in the present case is, Whether the alleged last will and settlement of the Honourable Miss Norton now before us is, in the sense of the statute of 1874, "subscribed by the granter or maker thereof." If this question is answered in the affirmative, it is admitted that all other requisites of the statute have been complied with. It is duly and sufficiently subscribed by two attesting witnesses, and the proof which has been adduced makes it absolutely indisputable that whether Miss Norton's signature on the fifth page of the deed is or is not to be held her subscription in law to the whole writing, consisting of two sheets, she certainly intended it as her subscription to the will as a whole, written on both sheets, and she intended thereby to execute as her last will and settlement the whole writing now before us.

The deed consists of two sheets or pieces of paper, and the sheets are folded so that the one

is placed within the other, the first two pages of the deed being thus written upon the first sheet, and the last three pages upon the second or enfolded sheet. Miss Norton, the granter, signs her name or affixes her signature only upon the fifth page, that is upon the third page of the enfolded sheet, and thus the outer sheet and the two pages which are written thereon does not contain any signature of the granter. The two sheets, however, at the time Miss Norton signed on the fifth page, were stitched together, and the ends of the thread by which the two sheets were fastened together were brought to the fifth page and sealed on that page under the wax bearing Miss Norton's seal, and affixed by herself at the time, and thus it is said that the two sheets were made physically one deed.

Now, I am not disposed to attach very much importance to the circumstance that the deed was so stitched and the ends of the thread sealed by Miss Norton. I should be sorry to raise this circumstance or some equivalent therefor into an essential requisite for the validity of such a deed. The circumstance is important, but it is only important as part of the parole proof, that the deed when Miss Norton put her signature on the fifth page consisted not of one sheet but of these two sheets which we now have, and of nothing else, but then I think this fact might have been proved without the sealed thread in any other way, provided only that it was made perfectly clear what really was the deed or writing which the granter executed, and this leaves in my view, as the only question in the case, this question, Is Miss Norton's signature on the fifth page of the deed her subscription of the deed, that is, of the whole deed as it is now before us, in the sense of the Act of 1874?

I am of opinion that it is, and that it is not necessary under the statute of 1874 that each page of a deed shall be signed by the granter, or even that each sheet of the deed shall be so signed; that it is enough if the granter signs at the end of the deed, provided it be made perfectly and indisputably plain by any kind of evidence, parole or written, that he intended his subscription to be the subscription of the whole deed tendered in judgment.

There is no statutory definition of the word subscription, either in the Act of 1874 or in any other statute. The word means, etymologically and originally, a signature or other writing equivalent to a signature at the foot or end of a writing, as opposed to superscription, where the signature or sign manual was put at the beginning or top of a writing, and I do not think the word subscription has in strictness and in Scotland any other meaning than this original one.

Previous to the Act 1696, cap. 15, deeds in Scotland were never written bookways, that is on successive pages like the pages of a book. They were always written on the face of a sheet or sheets of parchment or paper, the sheets being pasted together if there were more than one, and the whole deed was only subscribed at the foot or end thereof. Originally the signature or mark made by the granter was the sign of the cross, then the granter affixed his seal, and ultimately, under the statute 1540, the subscription or writing of his name by the granter was required, but even then only at the foot or end of the deed where the cross or seal had formerly been in use to be affixed. The seal which subscription superseded was never affixed anywhere else than at the end of the deed.

If the deed consisted of more than one sheet, the several sheets were pasted together, and custom introduced the practice of signing across the joinings of the sheets, part of the name being written on the one sheet and part on the other. But this was not subscription, and was never called so. It was called "side-scriving," and was merely intended to authenticate the various sheets, all of which the granter subscribed by his one subscription at the end, and so subscription was always used in the singular, and indeed is so still, at least in strictness and when accuracy of language is observed. It is the one act by which the granter makes the whole deed his.

The Act 1696 allowed (that is made lawful without prescribing) deeds to be written bookways, but it imposed as a condition of this permission that "every page" be marked by the number and "signed as the margins were before," but it is remarkable that this signing of each page is not called subscription any more than the old side-scriving was called subscription. The signing of each page is put upon the same footing as the old side-scriving at the joining of each sheet, that is a mere method of attesting and of vouching that the side-scrived sheets or the signed pages are parts of the deed which the granter executes as his deed by his one and single subscription at the foot or end thereof.

It is quite true that the conditions which the Act 1696 imposed as requisites of the permission to execute deeds written bookways have been strictly exacted as absolutely essential to the validity of a deed written bookways. Thus, in the very remarkable case of *Galbraith* v. *The Edinburgh and Glasgow Bank*, Feb. 1, 1856, 18 D. 470 (H. L. 24 March 1859, 31 Jurist 425), it was held, both by this Court and by the House of Lords, that a bond written bookways was absolutely null merely because the pages were not marked by their numbers. It is undoubted that under the law prior to 1874 a deed written bookways must under the Act 1696 have each page or at least each sheet (for this is an open point) signed by the granter, for this is the condition imposed by that statute, but then I am of opinion that such signature was not in strict technical language the "subscription" of the granter, but the mere attestation of the separate sheets, avouching that these separate sheets were parts of the entire deed which the maker subscribed at the end thereof, and therefore the new statute of 1874, which dispenses with all formalities of execution, dispenses with this also as an essential, provided it be clearly proved that the whole deed was really subscribed by the granter affixing his signature as his subscription at the foot or end of the deed.

Indeed, I am of opinion that even according to the old law of Scotland, and in the strictest sense of the word, it was only the signature of the granter at the foot or end of the deed which was properly and really his subscription. All other signatures, however essential, were not subscriptions but something else. Sometimes they were side-scrivings, attesting the separate sheets—sometimes they were marginal signings, attesting a marginal note or an interlineation, or it may be an erasure, but none of these were

"subscription," and even where the signing of each page was made statutory, the statute might have been complied with otherwise than by subscribing, that is by signing at the foot or end of each page, provided there was signing somewhere on each page, as by signing the pagination at the top of the page or by signing a marginal note on each page bearing "this is the first page of my will"—"this is the second"—and so on. Surely that would have each page signed in the very strictest reading of the Act 1696. The true subscription of the granter is his signature at the end of the deed, where in old times the granter put his cross or his seal, and without which it is not his completed deed. Other signatures were no doubt under our law as it stood prior to 1874 required as "essential formalities of execution," but all these are now dispensed with by the statute of 1874, provided only it be proved that the deed as a whole was subscribed by the granter and by two attesting witnesses.

Confining attention, therefore, in the first instance, to the older statutes—that is, to the statutes prior to the Act of 1874, I think they fairly raise the distinction between signature or signing and "subscription" strictly so called. "Subscription" is properly and in strictness the writing of his name by the granter at the foot or end of the deed as an obligatory act, making it his deed and obligation. Signature or signing, on the contrary, is the mere writing of the granter's name anywhere, not as the act binding the granter or making the deed his, but merely for authenticating as part of the deed some separate sheet or some marginal note, or even it may be some separate word, which may be erased or superinduced or otherwise made doubtful or open to question.

But then comes the Act of 1875, and while it is most important to see what is the strict and proper meaning of subscription in the sense of the older statutes, the true question is, What does "subscribed" mean in the Act of 1874,—in what sense does that statute (for really that is the only statute we have directly to do with) use the word "subscribed"—what is a "subscribed" deed in the sense of the statute of 1874?

It may be noticed that the statute of 1874 speaks of the subscription of the maker and the subscription of the instrumentary witnesses in the very same words and in the same sentence. The instrumentary witnesses only sign on the last page—that is their subscription to the deed—and it does not seem very difficult to hold that when the statute speaks of a deed subscribed by maker and by witnesses it means their subscriptions at the only place where they all subscribe—that is, at the foot or end of the deed. But still farther, the word "subscribed" has a popular and common meaning as well as a strict and technical one, and in a remedial statute like this of 1874, which is meant to give validity to deeds otherwise null, I think it not unreasonable to ask what is the popular and common meaning of "subscribed?" Now in popular language a deed, or paper, or petition, or memorial, is subscribed by a person when it is under his hand, when he has put his name at the end of it, though it may consist of many pages or many pieces of paper. The question really is, Has the subscriber made the deed his by subscribing it though he has only signed the last page? Did he so sign with the animus to make the whole deed his deed and evident? If so, he might quite rightly be said to have subscribed the deed although he did not sign and authenticate every page. I think this is the sense in which the statute of 1874 uses the word "subscribed." I am not compelled to hold that the Act of 1874 uses the word "subscribed" in any technical and narrow sense, even if it could be shown (which I think it cannot) that "subscribed" means technically signed on every page. I prefer holding that the Act of 1874 uses the word "subscribed" in a broader and popular sense, as meaning "under the hand of the granter"—signed at the end only it may be, but provided always that such signature was intended as the signature of the whole deed. I am humbly of opinion that wherever a deed has been signed, although at the end only, before attesting witnesses, and it is offered to be proved that that signature was affixed as and was intended to be the subscription of the whole deed—that is a case to which the provision of the Act of 1874 directly applies.

I feel the weight of the argument, that when a deed consists of many sheets all unmarked and unsigned, and where there is only one signature at the end, there may be room for fraud in inserting one or more sheets which were not part of the deed intended to be executed by the granter, but then this is a matter on which the Court must be satisfied by the most explicit proof. Wherever there is room for suspicion or doubt as to what really was the deed or the sheets which the testator really intended to subscribe, the Court will refuse to sustain the deed. The Court will always, and rightly, exact the clearest proof upon this point, and this seems to be an ample and sufficient guarantee. It is really the only guarantee against fraud in this and in all cases. For those who would fraudulently substitute or prefix to the signed sheet any number of spurious previous sheets which the testator never saw and never intended to form part of his will,—parties who could commit that fraud might just as well forge the testator's signature or any number of signatures, and of course against such frauds as these the only safeguard can be the full and sifting inquiry of a court of law. I need hardly say that in the present case there is not the shadow of a doubt that the deed, exactly as it now lies before us—I mean both the sheets of paper on which it is written—was as a whole executed as and intended by Miss Norton to be her latter will.

On the whole, therefore, I am of opinion that this deed is in the sense of the Act 1874 subscribed by the granter; that sufficient proof in terms of that statute has been adduced, and that the prayer of the petition should be granted.

Lord Curriehill—Lord Neaves has so well stated the grave importance of the present question, and the serious consequences which may flow from the decision now to be pronounced, that I shall add nothing on that point beyond expressing my entire concurrence in his remarks.

On the merits of the question I have, after most anxious consideration, arrived at the same result as Lord Neaves and Lord Ormidale. I shall shortly state the grounds of my opinion. But for the provisions of the Conveyancing (Scotland) Act 1874, the will of Miss Norton, which consists

of separate sheets of paper written bookways, would beyond all doubt according to the law of Scotland have been null and void, in consequence of non-compliance with the requirements of the last three statutes which regulate the authentication of deeds. The defects—any one of which would under the law as it stood before 1874 have been fatal to the validity of the will—are the following, viz., (1) The designation of the writer is not set forth as is required by the Act 1593, c. 179. (2) The subscribing witnesses are not named and designed in the body of the deed as is required by the Act 1681, c. 5; and (3) The granter has not signed the will on each page, and the number of pages is not specified, as is required by the Act 1696, c. 15.

Even if the document had been signed by Miss Norton on every page, the other defects enumerated are such as could not have been supplied by proof. The will, therefore, would not have been probative; it could not have been allowed to make faith in judgment in its existing condition; and its authenticity could not have been established by any extrinsic proof.

The Act of 1874, however, has by section 38 declared that the omission to design the writer or to specify the number of pages of any writing shall no longer be valid objections to its probative character, and a similar declaration is made as to the omission to name and design the witnesses in the body of the writing, or in the testing clause, provided their designations are appended to or follow their subscriptions; and such designations may be so appended or added at any time before the writ is recorded in any register for presentation or is founded on in any Court, and need not be written by the witnesses themselves. In the present case the will has been produced and founded on in this Court, but the designations of the witnesses have not been appended to their subscriptions and are not set forth in the deed itself or in the testing clause, so that, although the probative character of the will cannot now be objected to in respect of the omission to name and design the writer or to specify the number of pages, it is still open to objection in respect of the omission to design the witnesses, and but for the 39th section of the Act of 1874, the prohibition in the Act 1681, c. 5, must have prevented that omission from being supplied by proof or otherwise.

But by section 39 of the recent Act it is provided—[*reads*]. This section of the Act is not very happily expressed, but it must be read in connection with the previous section (section 38) and when so read its true construction appears to me to be, that where from the omission to design the witnesses, or from failure to comply with any of the statutory solemnities of deeds not specially repealed by section 38 or by any previous statute, a writing subscribed by the granter and bearing to be attested by two witnesses subscribing, is not formally executed, the informality of the execution may be obviated by the party upholding the deed proving that the writing so bearing to be attested was in point of fact subscribed by the granter and by the witnesses. The only informality of execution which the framer of the Act appears to have had specially in view was the failure to design the witnesses, and the clause has been expressed in general terms, apparently in order to meet the case of any similar informality which, though not then present to the mind of the framer, might arise in practice. But unless the writing is subscribed by the maker, *i.e.*, duly subscribed by him in the manner required by law at the date of the statute, I do not think that section 39 can at all avail the party upholding the writing. In short, the failure of the granter duly to subscribe the writing is not in my opinion an "informality of execution" within the sense and meaning of the section.

It is unnecessary to refer at length to the various statutes which make the subscription of the granter essential to the authenticity of an important writ. It is enough to say that by the Act 1540, c. 117, subscription by the maker of a deed, or by notaries for a maker who cannot write, became (except in the case of Crown charters, which are authenticated by seal without subscription), and have ever since continued to be, essential for the purpose of establishing the authenticity of the deed, *i.e.*, that it is truly the deed of the maker. Before 1696 deeds were generally written on the face of one sheet of paper or parchment, or of two or more sheets battered together at the edge. In the case of a single sheet there could be no difficulty, as the subscription of the maker was necessarily made below at the end of the writing, and where two or more sheets battered together were employed, the last sheet was subscribed and the margins were sidescribed at the joinings. This was the custom before the Act 1696, c. 15. The decisions which have been referred to as showing that sidescribing was not before that date universal or necessary, are all cases in which either the material parts of the deed were contained in the sheet which was actually subscribed, or the margins were sidescribed at the joinings by one or more of the granters, side-scription by the other granters being dispensed with either because they were cautioners and the part of the deed affecting them was on the sheet subscribed, or because they were too numerous to sidescribe. In the latter case the whole of the parties in the last sheet of the deed which contained these subscriptions authorised one or more of their number to sidescribe the margins. The identity and authenticity of the whole deed was thus in all such cases ascertained and secured by each sheet of which it consisted proving the signature of one or more of the granters.

In order to obviate the inconvenience of deeds being written in the form of a roll with such battered junctions, writs were allowed to be written bookways on separate sheets stitched together. The first statute on the subject was the Act of 1672, c. 7, which dealt only with Crown charters, which were authenticated not by subscription but by seal. The recipient of the charter was allowed to take it either on one broad sheet of parchment or on several sheets written bookways, but in the latter case it was enacted that the seals should "be appended on a tie or band which is to go thorow all the leaves in the margin." As such writs were prepared and sealed by responsible public officials, the prescribed mode of appending the seal effectually authenticated each sheet secured by the tie as being part of the charter, and prevented the interpolation of any spurious sheet. The next statute on the subject, 1686, c. 17, allowed sasines to be written bookways, provided the

notary attested in his docquet the number of leaves, and signed each leaf along with the witnesses. And by the Act 1696, c. 15, all other writs were authorised to be written bookways, provided that every page was marked by the number First, Second, &c., "and signed as the margins were before," and that the end of the last page made mention of the number of pages, and was signed by the witnesses where witnesses were required by law. I am of opinion that this statute—although abrogated as to the pagination and mention of the number of pages by the Act 19 and 20 Vict. c. 89, and by the 38th section of the Act of 1874—remains in full force as regards the signature of the granter on each page and of the witnesses on the last page. I think it is not a sound construction of the statute to hold that the word "sign" is here used as meaning something different from "subscribe." It certainly means "subscribing" so far as the signatures of the maker of the deed and of the witnesses on the last page are concerned, and I think that it means "subscribing" the other pages by the granter as the margins were signed before. It does not mean that the other pages are to be signed on the margins, but that each page is to be subscribed in every case in which, and to the same extent as, the deed, if it had been written rollways, would have been signed on the margins.

It appears to me that such full subscription is necessary to entitle a party upholding a writing to claim the benefit of the 39th section of the Act of 1874. Without the subscription or signature of the granter on every page of the deed, when it consists of more than one sheet, it cannot be said to be a deed subscribed by the granter —he has not authenticated it or adopted it as his deed. A deed in that condition is not in my opinion "informally executed"—it is not executed at all. And in a case like the present, where the material part of the deed, viz., the conveyance or bequest of the heritable estate, is all contained in the first or unsigned sheet, it is a deed which, if written rollways, must have had the margin sidescribed, and which, as it has been written bookways, I must hold has not been in point of fact subscribed by the granter in its most material parts.

Were the argument for the petitioners to be sustained, a wide door would be opened for fraud. Take the case of a deed consisting of a dozen separate sheets—an occurrence by no means rare. Such a deed, not being a Crown charter, could not be authenticated by sealing, a hand passing through all the sheets. And unless each page or each sheet is authenticated by the subscription of the granter, there is no safeguard against the interpolation or substitution of spurious sheets. To allow a parole proof that the unsigned sheets were in their present condition all stitched together and laid before and read over to or by the granter before he subscribed the last page, would, in my opinion, instead of being a safeguard, be a source of danger. Subscription of the deed, and subscription alone, can secure its authentication as being the deed of the maker, and subscription to be effectual must be on every page, that being, as I read the statute 1696, c. 15, a condition precedent to the validity of every deed written bookways.

How, again, are marginal additions, interlineation, and superinductions or erasures to be authenticated? Deeds containing these irregularities are, if the petitioners are right, informally executed, and it would be competent to prove by parole testimony that the writing when the testator signed the last page contained all these irregularities though none of them were mentioned in the testing clause. Nay, more, such proof would be competent even if every page were signed by the granter, leaving the marginal notes unsigned and the interlineations and superinduction unacknowledged.

To allow such proof in any of the cases referred to would, in my opinion, be fatal to the security not only of our land rights but of all transactions requiring the interposition of formal writing for their completion. I cannot bring myself to believe that such was the intention of the Legislature in enacting [section 39 of the Act of 1874, and unless the language of the statute is so clear as to compel me to do so, I cannot give it a construction which must lead to such serious consequences. But as I think the construction contended for by the petitioners is not the sound or natural construction of the 39th section, I am of opinion, on the whole matter, that the will of Miss Norton has not been subscribed by her within the sense and meaning of the 39th section of the statute; that the provisions of that section therefore do not apply to the present case; and that the prayer of the petition should be refused.

Lord Justice-Clerk—I concur with Lord Deas and those of your Lordships who have arrived at the same result. I so completely agree with what has been already said in that sense, and have so little to suggest in addition, that I should gladly have been relieved from doing more than intimating my concurrence. But in the balance of opinion on the Bench it is perhaps right that I should shortly state the grounds of my opinion.

On the policy of the statute I have nothing to say, for if we construe its provisions rightly we are bound to assume that the construction we adopt must be beneficial to the public. I foresee none of the dangers in the future which some of your Lordships seem to anticipate. It is at least consolatory to reflect that in the case in hand the operation of the statute will give effect to the unquestionable intention of Miss Norton as to the way in which her property should be disposed of after her death, which, but for the statute, would have been unquestionably and inequitably frustrated.

There can be no question, on the proof, that Miss Norton subscribed this deed, consisting of five pages, and that the subscribing witnesses did truly attest the act of subscription. These things, as matters of fact, are established with absolute certainty. But when we are asked to find that such was the fact, the respondent, Lady Menzies, objects that this petition should be refused, because the demand is not sanctioned by the clause of the statute under which this petition is presented.

There are two objections taken to the petitioner's claim, both founded on the terms of the 39th section of the statute—First that it does not appear on the face of this writing that the subscription of the granter covers the first and second pages of the document, seeing that this can only appear by the signature of the granter on each page, in terms of the Act 1696; and Secondly, that the deed does not appear to be

subscribed at all, because under the Act 1696 no deed can be said in legal language to be subscribed which, if it be written in a roll, does not bear the signature of the granter across the joining of the sheets, or, if it be written bookways, does not bear the signature of the granter at the foot of each page.

The first of these objections is certainly formidable, namely, that which relates to the identity of the writing which appears to be subscribed. It is said that the only part of this document which appears to be subscribed is that sheet on which the granter's signature appears, and that it does not appear that the first two sheets formed any part of the deed, seeing that the requisites of the statute 1696 have not been complied with. This objection is of course technical, but I have found it attended with difficulty. It is not solved by holding, as I am inclined to hold, that the signature of each page, although a solemnity, is a formality of execution in the sense of the clause, for if the view be sound, the clause is limited to informalities in the execution of deeds which appear to be subscribed, which this, it is said, does not. But, looking to the general character and object of the enactments contained in this clause and in the preceding, I think this construction much too narrow, and that mainly on the ground so clearly elucidated by Lord Deas. It seems to me that these two clauses together were intended to cover the whole of the formalities previously required in the execution of writs. Some of them are enumerated and dispensed with by the 38th section, leaving the deeds probative under conditions therein expressed. I think the 39th section is intended to exhaust the rest. Two of these, namely, the subscription of the deed by the granter, and the attestation by the witnesses, still remain as essential solemnities; but all the rest (and I think the provisions of the Act 1696 seem nearly, if not entirely, to comprise all the rest), while not repealed or abolished, admit of being supplied by satisfactory testimony. There is nothing unreasonable in this, or inconsistent with the general spirit of these sections, which seems to be to reduce to the narrowest limits the formalities which are to remain *de solennitate*, and I agree with Lord Deas in thinking that the provisions of the Act 1696, whether as regards deeds written rollways or those written bookways, are, while they are solemnities, yet in the sense of this clause formalities of execution capable of being supplied by proof, and almost the only defects to which the clause can apply.

On the second objection, I have much less difficulty, indeed I am prepared without hesitation to reject it. The contention is that the word "subscription" as used in this section comprehends the signing of the pages and the side-scribing of the sheets provided for by the statute 1696. I think that proposition is quite untenable. If the statement were merely that any deed destitute of these formalities was before this Act not duly executed, and therefore null, it would be entirely accurate. These were solemnities without doubt. But the word "subscribe" as used here—and as used in every statute and decision as applicable to the execution of writs in our law, as far as I know—means subscription as required by the Act 1540—one signature adhibited at the end, close on the termination of the deed, in token of the foregoing writ being the expression of the intention of the granter. A man subscribes a deed when he writes his name at the end of it, just as when he subscribes a page when he writes his name at the end of it. But nothing is the subscription of the granter to the deed under the Act 1540 excepting one signature at the foot or end of the writ. "Subscribed" does not and cannot mean "duly executed," as it is placed in this very clause in contrast with "due execution." The Act 1696 deals with matter entirely different, and neither in words nor in the subject of it regulates the subscription of the granter to the completed deed. It regulates only his signature of the different pages, which, when signed, constitute the writ which is to be validated by the granter's subscription. I set little store on the mere expression "signature" as contrasted with that of "subscription," although the framers of these statutes knew what they were dealing with, and used accurate and precise instead of inaccurate and popular language, as some text writers seem to have done. Accordingly there is not a word about subscription to be found in any of its provisions, whether as regards deeds written rollways or those written bookways, and nothing which can be construed to indicate on what part of the page the signature to the pages of the bookways deed is to be placed. I should be unwilling to invent a statutory solemnity of which neither statute nor decision has said a word.

But really this is wholly immaterial to the question in hand. For even supposing that the Act 1696 had required each page to be subscribed, that is, signed at the foot or end of it, which it certainly does not provide, these signatures, although subscriptions of the different pages, would be in no sense subscriptions of the deed, and neither singly nor collectively would amount to subscription of any of the things contained in it. Until the deed is subscribed at the end it is wholly without subscription. The signatures on each page only serve another but very important object which the statute so clearly sets out in its terms as to admit of no doubt whatever.—[*reads* Act 1696]. Its object was to enable the lieges with safety to adopt the mode of writing deeds bookways, and at the same time to provide for the safeguards in regard to deeds written rollways. These provisions were entirely directed to ensuring that the different sheets on which the deeds were written were those to which the granter's subscription applied. The statute had no other object. Accordingly, side-scribing is made matter of solemnity in deeds written in rolls, and signature of each page "as the margins were before" when the deed is written bookways. Both are just on precisely the same footing; they had the same object, and are subject to the same rules. Now, no one pretends that side-scribing had any effect as subscription under the Act 1540, or could with any propriety be so called. It was a signature in a particular place specified, which not only was not, but from its nature never could be, a subscription; for one-half of the name had to be written at the bottom of one leaf, and the other half at the top of the other.

The only other remark I shall make is, that every case in which the Act 1696 has come in question, as far as I know, its specific object as I have described it has been recognised. Accordingly, it was early held, and ultimately finally settled in the case of *Smith* v. *The Bank of Scot-*

land, in 1814, that a deed written on one sheet was good although only subscribed at the end; a result which never could have been arrived at under the words of the statute, excepting on the footing that the signature of each page was only necessary to indicate the separate parts of the writing to which the subscription applied.

Something has been said as to how far this deed or settlement has been already founded on in the sense of the 38th section of the statute, so as to make it incompetent now to add the designations of the witnesses to their subscriptions. No such matter if raised under this petition, nor has been argued before us. I wish to express no opinion on the question. I am certainly not to be understood as assenting to the proposition that this settlement has been already founded on in judgment.

The Court pronounced this interlocutor:—

"The Lords of the Second Division having, along with three of the other Judges, heard counsel on the petition and answers and the proof in this case—in conformity with the opinion of the majority of the seven Judges,—Find and declare that the said last will and testament was duly subscribed by the granter thereof, the Honourable Caroline Elizabeth Conyers Norton, and by the witnesses by whom the same bears to be attested, viz., John Holland Payne, wine merchant in Madeira, and Francis Gorbell Tabb, clerk to the Brazilian Telegraph Company at Funchal, Madeira, and Frank Burridge Foy, also clerk there to the said company: Find the petitioners entitled to expenses since the reporting of the proof, and remit to the Auditor to tax the same and to report, and decern."

Counsel for Petitioners — Dean of Faculty (Watson)—Crawford. Agents—Morton, Neilson, & Smart, W.S.

Counsel for Respondents — Balfour—Hunter. Agents—T. & R. B. Ranken, W.S.

Thursday, July 20.

SECOND DIVISION.

[Lord Shand, Ordinary.

M'CULLOCH AND OTHERS *v.* THE KIRK SESSION AND HERITORS OF THE PARISH OF DALRY, AND OTHERS.

Endowment—Free Grammar School—Agreement with School Board—Education (Scotland) Act 1872, §§ 37 *and* 38.

Funds were left in trust "for the erection of a free grammar school, and maintenance of poor scholars, with a sufficient learned able schoolmaster that can fit them for the several universities or colleges," said school to be at a place within the parish of D. The school was erected, and the fund administered by the kirk session and heritors of the parish, failing trustees that had been nominated. From time immemorial the children of the inhabitants of the parish received education at the school free of charge. The income of the trust having become insufficient to maintain a school such as the donor contemplated, the trustees, after the passing of the Education Act 1872, made over the school on lease to the School Board of the parish. It was specially stipulated in the lease, and the School Board were taken bound to provide, "that besides elementary, higher branches shall be taught in said school to fit scholars for a university in Scotland, if there shall be scholars whose parents or guardians wish them to receive instruction therein;" and "that poor children or those whom the Parochial Board of D. recommend shall be taught without school fees being charged for them." Further, by the lease, the trustees, if satisfied that the teacher appointed by the Board was capable of preparing scholars for a university in Scotland, bound themselves to pay him £50 yearly during the lease.—*Held* that the arrangement made with the School Board was a legal one under sections 37 and 38 of the Education Act 1872, but that the trustees were not entitled to delegate to the Parochial Board the nomination of those children who should have the benefit of gratuitous education, but must retain the nomination in their own hands.

This was an action at the instance of John M'Culloch and others, residenters in the village of Dalry, against the kirk session and heritors of the parish, in the following circumstances:—

By last will and testament, dated 30th September, and codicil thereto dated 12th October, 1639, Robert Johnston of London gave and bequeathed the sum of £3000 sterling of lawful money of England, to be bestowed and employed upon some good, godly, and pious works within the realm of Scotland, in such way and manner as the Right Honourable the Lord Johnston, and Sir David Cunningham, of London, Knight and Baronet, supervisers of the said last will and testament, should in their wisdom think good. John Joyssie of Edinburgh, merchant, and Robert Inglis of London, merchant, were in said last will and testament nominated the executors of the said Robert Johnston. Lord Johnston having died, the sole management and disposal of the funds devolved upon Sir David Cunningham, who on 28th October 1658 executed a declaration or appointments whereby "according to the intention of the pious will of the testator, and for discharge of the trust reposed in him," he declared, ordained, appointed, and designed the said sum of £3000 to be distributed and employed in the following manner:—*First*, £500 to be invested in lands or annual-rents in Scotland, and the income to be applied in perpetuity for the maintenance of a schoolmaster to teach a free grammar school, and maintain so many poor scholars as the rent and profits of the said £500 should conveniently do, in the town of Kilmaurs, in the bailliary of Cunningham and sheriffdom of Ayr. The deed then proceeds—"*Item*, Whereas the remainder of the said £3000 sterling, being £2500 sterling, some part of it may prove desperate debt, and can never be obtained, in discharge of the trust reposed in me, to the glory of Almighty God, the memory of the worthy testator, and the good of posterity, I appoint, dedicate, ordain, and think good that the said remaining sum, or so much of the said sum of £2500 sterling as can be recovered, shall be em-