Lord Ormidale—I am of the same opinion. I feel satisfied that the case before us is really one which depends upon an issue of fact, and nothing else. The action takes the form of one of count and reckoning at the instance of a son of old Buchanan against one of his brothers, who is trustee under the father's will, and the object of the pursuer is to obtain the share of *legitim* to which he is legally entitled. No defence has been taken to the effect that the pursuer is not entitled to *legitim* from forisfamiliation, or any other cause; but it is said, as an answer to the claim, that there is no fund for distribution on which *legitim* can be claimed. Thus, the whole question came to turn on the point whether or not these three I O U's formed part of the deceased's personal estate, or whether he had divested himself of this money completely during his lifetime. We have evidence as to what took place when the I O U's were first obtained; and further, of the transaction at the time of their delivery by the old man to his son and daughters, and upon that evidence it seems to me that the whole matter is attended with a great deal of suspicion. At the date of the delivery, as described, the old man was not in immediate prospect of approaching dissolution; indeed it does not appear that he was ill, and under these circumstances it would be very odd if he had divested himself of his whole personal estate, having only some £35 a-year from a small heritable property. That alone excites suspicion. Then further, we find it in evidence that the old man had received £700 from his son Thomas two days prior to the transaction; and what does he do? He gives back the £700 so recently paid him, and with it £300 more—in all £1000, and he is said to have done so in order to divest himself of this fund entirely and at once. If that be so, why did not old Buchanan pay the money at once to his daughters and son instead of taking an obligation from and leaving it all in the hands of his son Thomas? or why at least did he not give his three children *pro tanto* shares? The whole matter is very like a device or scheme concerted for the purpose of defeating *legitim*; and looking at it as a jury question, I can regard it only as a bit of acting, not a reality, and not intended to be so, for the father did not mean to lose control of that fund. On the whole question I think the Sheriff is right, and that we should affirm his judgment.

Lord Gifford—There is in this case a good deal of difficulty and nicety, but I have arrived at the same conclusions as your Lordships. To enable the father to defeat the claim of *legitim* he must so gift away as completely to divest himself during his lifetime. If he leave to himself any control over the fund, that fund may be successfully claimed as available for *legitim*. There was in the actings here enough, I think, for establishing a *mortis causa* gift, but not enough of a transaction *inter vivos* to resist a claim for *legitim* on the fund. The form of handing over this £1000 was so equivocal that I cannot regard it as a proper divestiture of his own rights by the late Walter Buchanan *inter vivos*. Therefore I am for affirming the Sheriff's judgment.

The Lord Justice-Clerk stated that Lord Neaves, who was unable to be present, entirely concurred in the opinions delivered by the Court.

The Court dismissed the appeal, and affirmed the interlocutor of the Sheriff appealed against.

Counsel for Appellants (Defenders)—Dean of Faculty (Watson)—Lorimer. Agents—Auld & Macdonald, W.S.

Counsel for Respondent (Pursuer)—Balfour—Mackintosh. Agent—T. J. Gordon, W.S.

Wednesday, March 8.

SECOND DIVISION.

[Lord Curriehill.

SMYTH *v.* SMYTH.

Deed, execution of—Witness—Conveyancing and Land Transfer (Scotland) Act 1874, *sec.* 39.

The 39th section of the Conveyancing and Land Transfer (Scotland) Act 1874, 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."

Held that this section did not apply to the case of a deed *ex facie* probative, the parties signing as witnesses having done so outwith the presence of the granter before he himself had signed, and never having heard him acknowledge his signature.

John Smyth, dealer in Glasgow, brought an action against Patrick Smyth, his brother, plasterer there, for the purpose of reducing a certain assignation, which bore to be granted by a deceased brother, Francis Smyth, in favour of the defender. By this assignation there was conveyed to the defender a certain debt, set forth as due by the pursuer to the deceased.

The pursuer alleged that this assignation bore to be granted by the said deceased Francis Smyth, and to be subscribed by him at Glasgow, the 1st day of June 1874, before Bernard Gallagher, laster, residing at No. 18 South Wellington Street, Glasgow, and Robert Gallagher, tailor, residing at No. 108 of the same street; but that it was deficient in the statutory solemnities of execution, in respect that the alleged witnesses neither saw the alleged granter sign nor heard him acknowledge his signature.

A proof was led, in the course of which the Gallaghers stated that they had signed the deed

without either seeing Francis Smyth sign or hearing him acknowledge his signature. The defender led evidence for the purpose of proving that Francis Smyth had actually signed, but it was admitted that his signature was not on the deed when the Gallaghers adhibited theirs.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 22d October* 1875.—The Lord Ordinary, having taken the proof and heard the counsel for the parties, and considered the closed record and whole process, Finds, in point of fact, (1) That the assignation No. 7 of process, sought to be reduced bears to be subscribed by the deceased Francis Smyth, as granter, and to be attested by Bernard Gallagher and Robert Gallagher as instrumentary witnesses; (2) That the said assignation was subscribed by the said Bernard Gallagher and Robert Gallagher; (3) That it was so subscribed by them outwith the presence of the said Francis Smyth; (4) That at the time of their said subscription, the assignation had not been subscribed by the said Francis Smyth, the alleged granter; (5) That the said Bernard and Robert Gallagher did not see the said Francis Smyth subscribe the said assignation; and (6) That the said Francis Smyth did not at the time of the said Bernard and Robert Gallagher subscribing the said assignation, or at any other time, acknowledge his subscription: Finds, in point of law, that the said assignation is null and void: Therefore repels the defences, and reduces, decerns, and declares in terms of the conclusions of the summons: Finds the defender liable to the pursuer in expenses: Appoints an account thereof to be lodged, and when lodged, remits the same to the Auditor of Court to tax and to report.

"*Note.*—In this action an important question is raised as to the import and effect of the 39th section of the Conveyancing and Land Transfer (Scotland) Act 1874, declaring deeds not to be invalid because improbative.

[*His Lordship then proceeded to narrate the facts.*]

"In this state of facts the assignation, unless it can be aided by the provisions of the recent Conveyancing Act, is plainly null and void, under the various earlier statutes relating to the execution and testing of deeds, as these have been interpreted by numerous decisions. See particularly *Young* v. *Ritchie*, 2d February 1761, M. 17,047; *Allan* v. *M'Kean*, 21st December 1803, Hume 914; and *Earl of Fife's Trustees* v. *Duff*, 22d December 1825, 4 Sh. 340.

"The defender, however, maintains that the law which had thus been settled has been entirely altered by the 39th section of the recent Conveyancing Act 1874, which is in the following terms:—'39. 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 defender admits that, by the proof which the pursuer has led, the *onus* of establishing the validity of the deed is shifted from the pursuer to himself; but he maintains, that if he can prove that the deed was, in point of fact, subscribed by the person bearing to be the granter, and by the persons bearing to be the attesting witnesses—whether the subscription of the granter was made or acknowledged in their presence or not—he must prevail under the provisions of the recent Act above quoted. And in the course of the proof he examined himself, his wife, and his wife's aunt, in order to prove that the deceased Francis Smyth did in point of fact sign the deed after the so-called witnesses had signed it; but they failed, and indeed did not attempt, to prove the subscription was either made or acknowledged in the presence of the Gallaghers.

"I am of opinion that the construction which the defender seeks to put upon the Act of 1874 is wholly untenable. I do not think that the Legislature intended to dispense, or have by the statute in question dispensed, with the presence of witnesses as a solemnity at the execution of deeds, or that they have repealed the clause of the Act 1681, c. 5, which declared that none but the subscribing witnesses should be probative of the execution of writs, and, *inter alia*, of 'assignations.' It is indeed most obvious that unless the persons who bear to attest a deed see the granter subscribe, or hear him acknowledge his subscription, they are not 'witnesses.' Their presence is required to enable them to attest the fact that the granter subscribed the deed, and they cannot legally attest as a fact an act which they did not see the alleged actor perform or hear him acknowledge. Whatever may have been the intention of the Legislature in enacting the 29th clause of the recent statute, it appears to me to be clear that that enactment has not subverted the former law and practice, which required the subscription of the granter of a deed to be attested by subscribing witnesses, who either saw the granter sign the deed or heard him acknowledge his subscription. And as it is clearly proved that the persons Bernard and Robert Gallagher, who bear to be attesting witnesses of the execution of the assignation sought to be reduced, were not in point of fact 'witnesses,' in any sense of the word, to the alleged subscription of the granter, it follows that the assignation must be reduced as null and void."

The defender reclaimed.

Argued for him—Under the recent Conveyancing Act it is sufficient to prove that the signatures are genuine. Here there is no fraud. The assignation was, in point of fact, granted by Smyth, and this is all that the defender requires to prove

The Counsel for the respondent was not called upon.

At advising—

Lord Justice-Clerk — I have no hesitation whatever in concurring with the Lord Ordinary. It would have been a different matter if it could

be shown that this statute was intended to allow proof by the parties of the facts that a granter had signed a deed. That was not what was intended. It merely offers facilities for overcoming difficulties arising in the case of deeds which profess to be, and which actually are, probative. It provides that no deed subscribed by the granter, and bearing to be attested by two witnesses subscribing, shall be deemed invalid because of any informality of execution. In that case it throws the burden of proving the validity of the deed upon the party seeking to make use of it. It implies that what has to be proved is this, that the persons who are set forth as having signed as witnesses did actually do so.

LORD ORMIDALE—I concur entirely with what your Lordship has said. It has been proved in this case that the deed was executed by the granter after the witnesses had signed. It is clear that they did not see him sign, nor did he see them. The question is, did the statute intend to overcome such a defect as that? It is clear that it did not. We can imagine cases in which the statute could be brought in to supply defects, as when the witnesses' names had not been mentioned in the testing clause, or they had omitted the word "witness" after their names. The 39th section of the statute implies that there are two witnesses. Here, in the circumstances proved, there were really no witnesses at all.

LORD GIFFORD—I am of the same opinion. If Mr Lang's argument was well founded it would come to this, that the recent statute had abolished witnesses altogether. It has certainly not done that.

LORD NEAVES was absent.

The Court adhered.

Counsel for Pursuer — Darling. Agents — M'Caul & Armstrong, S.S.C.

Counsel for Defender—Lang. Agent—George Begg, S.S.C.

Wednesday, March 8.

SECOND DIVISION.

[Lord Curriehill.

DOUGLAS *v.* M'WILLIAM & M'CUTCHEON.

Bond and Disposition in Security—Assignation.

A, the holder of a bond and disposition in security, assigned to B for an onerous cause the heritable subjects held by him under his bond. There was no direct conveyance of the bond itself, or of the sum due, but the assignation was declared to be in real security of that sum. The deed contained an assignation of all right, title, and interest which A had to the subjects, and among the writs delivered to B, "according to inventory," was a copy of the bond and disposition in security.—*Held* (*reversing* the judgment of the Lord Ordinary, in a competition between B and the trustee upon A's sequestrated estate) that although not in the statutory form, there was a valid assignation to B both of the debt and of the security.

Conveyancing (*Scotland*) *Act* 1874, *sec.* 25—*Infeftment—Register of Sasines.*

The 25th section of the Conveyancing Act (1874) abolishes the distinction between feu and burgage tenures, and enables proprietors of estates held burgage to grant feus of their lands, providing that "the titles of all such feus granted before the commencing of this Act shall be unchallengeable, on the grounds that such feus were of lands held by burgage tenure, or that such titles have been recorded in the Burgh Register of Sasines.—*Held* by the Lord Ordinary, and acquiesced in, that this section obviated an objection which had been taken to a title, recorded in the Burgh Register of Sasines, to a feu granted before 1st October 1874 of land originally held burgage, but which had been feued out.

This was an action of multiplepoinding brought by John Douglas, farmer in Falhar, in the county of Wigtown, and proprietor of certain heritable subjects in the burgh of Wigtown. The object of the action was to settle a question which had arisen regarding a certain debt secured over his property. This question arose under the following circumstances:—

In 1853 the deceased James Brown, mason in Wigtown, then proprietor of these subjects, granted a bond and disposition in security for £100 over them in favour of the late William Carson, writer in Wigtown. In 1866 the subjects were acquired by John Douglas, the present nominal raiser, but under burden of this heritable security. By disposition and assignation, dated 22d June 1870, Mr Carson, in consideration of the sum of £700 paid and advanced for him by Robert M'William, S.S.C., one of the claimants in this action, residing in Edinburgh, "sold, alienated, assigned, disponed, conveyed, and made over" to the said Robert M'William, and his heirs and assignees whomsoever, heritably and irredeemably, various subjects, heritable and moveable, and, *inter alia*, the subjects contained in the said bond and disposition in security by Brown in his (Carson's) favour, "and that in real security to the said Robert M'William of the sum of £100 sterling, interest and penalty, borrowed by James Brown, mason and housebuilder in Wigtown, proprietor of said subjects, from me, the said William Carson, conform to bond and disposition in security, dated 11th July 1853, and recorded in the Register of Sasines for the burgh of Wigtown 19th November 1855." The subjects so disponed in security were held feu. This disposition and assignation contained an assignation of all right, title, and interest which the said William Carson had to the whole subjects "severally above described and hereby disponed,"—a clause of warrandice and an assignation of writs which, as the deed bore, were delivered "according to inventory, so far as in my possession." The inventory was signed of even date with the said disposition and assignation, and relative thereto. No. 10 of that inventory was "copy bond and disposition in security by James Brown to William Carson, dated 11th July 1853, recorded in Register of Sasines for burgh of Wigtown 19th November 1855." M'William expede an instrument of sasine on this conveyance in his favour,