of opinion that we should affirm the judgment of the Sheriff. I wish to say that my opinion is based upon the fact that I think that there was a true sale in each case. I do not think they were loan transactions. On the question as to whether a purchase by a director from the company without the clause in the articles of association, I desire to say nothing. I proceed entirely upon this being a real sale, and that the buyer has the authority of the Mercantile Law Amendment Act.

LORD TRAYNER—I am satisfied that in this case the defender has established that there was a *bona fide* sale of the goods. If, however, it had been a mere security transaction without delivery of the goods, I could not have taken that view, but I think there was a *bona fide* sale and delivery of the goods to the purchaser.

With regard to the other matter, while I think the transaction might have been set aside at common law, I do not think that can be done here, because the company cannot challenge the transaction, as by its own articles contracts such as this are not voidable, and the creditors cannot challenge it except upon the condition of *restitutio in integrum*, and no offer of that kind has been made.

The LORD JUSTICE-CLERK concurred.

The Court pronounced this judgment:—

"Recal the interlocutor appealed against: Find in fact (1) that the West Lothian Oil Company, Limited, on or about the month of October 1891, sold to the claimant Hugh Mair, and the said Hugh Mair purchased, the 14,500 empty oil barrels mentioned on record at the *cumulo* price of £2900 sterling; (2) that the said price was duly paid to the said company by the said Hugh Mair; and (3) that the said barrels were delivered to the said Hugh Mair by said Oil Company: Find in law (1) that the property in said barrels passed to the said Hugh Mair by said delivery; (2) that said barrels were the property of the said Hugh Mair at the time the same were sold of consent as set forth in the condescendence for the nominal raisers; and (3) that the price realised by the sale of said barrels, which now forms the fund *in medio*, belongs to the said Hugh Mair: Therefore repel the claim for the claimant John Gourlay, and sustain the claim for the said Hugh Mair: Rank and prefer the said Hugh Mair," &c.

Counsel for the Appellant—C. S. Dickson—Cooper. Agents — Drummond & Reid, W.S.

Counsel for the Respondents—Sol.-Gen. Asher, Q.C. — Salvesen. Agent — John Rhind, S.S.C.

Friday, November 18.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

THOMSON *v.* CUNNINGHAM AND OTHERS (CLARKSON'S TRUSTEES).

Writ — Will — Execution — Instrumentary Witness — Witness who Heard Testator Acknowledge Signature, Signing Outwith Testator's Presence—Act 1681, *cap.* 5 *—Conveyancing (Scotland) Act* 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 39.

Held that it was not a valid objection to the testing of a deed, *ex facie* probative, that the two instrumentary witnesses who had heard the granter acknowledge her signature did not affix their subscriptions until an hour afterwards, and outwith the presence of the granter.

The Act 1681, cap. 5, provides—"That no witness shall subscribe as witness to any partie's subscription unless he then know that partie, and saw him subscribe, . . . or that the partie did at the time of the witnesses subscribing acknowledge his subscription."

The Conveyancing (Scotland) Act 1874 37 and 38 Vict. cap. 94), sec. 39, provides—"No deed, instrument, or writing subscribed by the grantor or maker thereof, and bearing to be attested by two witnesses, and whether relating to land or not, shall be deemed invalid or denied effect according to its legal import because of any informality of execution, but the burden of proving that such deed, instrument, or writing so attested was subscribed by the grantor or maker thereof, and by the witnesses by whom such deed, instrument, or writing bears to be attested, shall lie upon the party using or upholding the same." . . .

Mrs Margaret Clarkson or Thomson raised this action against William Cunningham and David Gray, both residing in Inverkeithing, and James Robert Russell, solicitor, Dunfermline, for reduction of a trust-disposition and settlement dated 6th March and relative codicil dated 23rd April 1891, alleged to have been executed by the deceased Miss Henrietta Lochtie Clarkson, sometime residing at Inverkeithing, under which the defenders were the accepting and acting trustees and executors.

The cause was tried under, *inter alia*, this issue—"Whether the trust-disposition and settlement dated 6th March 1891 is not the deed of the said Henrietta Lochtie Clarkson?" and evidence was adduced on both sides in support of the parties' respective contentions under the issue.

It appeared that Mr Russell went to Miss Clarkson at Inverkeithing on 5th March, and explained the trust-settlement to her, and that she signed it, but owing to her objection to have any of her neighbours as witnesses, her signature was not attested. On the next day Mr Russell sent two clerks from his office in Dunfermline to Inver-

keithing with the deed. They showed it to Miss Clarkson, who examined it, and declared that the signatures thereon were her signatures. The table in the room had been used for a meal, and was not in a convenient condition for writing. The clerks did not sign then, but took the deed back to Dunfermline, and together affixed their signatures as instrumentary witnesses in the office there, about an hour after Miss Clarkson had acknowledged her signatures before them.

On the conclusion of the evidence adduced for the defender in the cause, and after counsel for the parties had addressed the jury, Lord Kyllachy charged the jury, and in the course of his charge directed the jury that the evidence adduced with respect to the execution of the trust-disposition and settlement was insufficient in law to establish that the deed was not duly executed. Whereupon counsel for the pursuer excepted to the said direction, and asked the Lord Ordinary to direct the jury in point of law—"That if they are satisfied that the witnesses did not subscribe the said trust-disposition and settlement as witnesses in the presence of the granter at the time of her acknowledgment, the said deed was not validly executed; that if they are satisfied that the witnesses did not subscribe the said trust-disposition and settlement as witnesses until they returned to Dunfermline, three-quarters of an hour after its acknowledgment, the said deed was not validly executed." The Lord Ordinary refused to give either of the foresaid directions. Whereupon counsel for the pursuer excepted to the ruling and refusal of the Lord Ordinary. The jury unanimously found for the defenders on all the issues.

The case was now heard upon the exceptions above proposed.

The pursuer argued—The subscriptions of instrumentary witnesses who signed on hearing the granter acknowledge his signature must be in the presence of the granter. The Act 1681, cap. 5, provided for two different sets of circumstances. In the case of witnesses who saw the granter sign, their subscription might be made some time after, but in the case of witnesses who only heard the granter acknowledge his signature, the subscription must be "at the time." There was no decision on the subject, but the difference had been pointed out in *Hogg and Others* v *Campbell and Others*, March 12, 1864, 2 Macph. 848 (*per* Lord President, 855). The Act ought to be strictly construed, as the strict observance of statutory solemnities is necessary with regard to a deed executed *mortis causa*, and "at the time" meant "immediately"—*Frank* v. *Frank*, March 3, 1795, M. 16,824; Bell's Lectures, i. pp. 52, 53; Bell on Deeds, p. 273. The Conveyancing Act 1874, sec. 39, did not apply to such a case as this. The effect of that section was merely to prevent the reduction of a deed for want of formality. It did not do away with the necessity of any solemnities which were previously necessary. Here the subscription of the witnesses at the time was a solemnity under the Act of 1861, and no provision regarding informality could affect it. That was the sense in which the Act had been previously construed—*Smyth* v. *Smyth*, March 9, 1876, 3 R. 573 (Lord Ordinary, 575).

The respondents argued—This case was ruled by two decided cases—*Frank* v. *Frank, supra; Condie* v. *Buchan*, June 26, 1823, 2 S. 385 (1st ed. 432). In both it was proved that the witnesses had signed as witnesses to a signature which they knew to be the granter's. That was enough, and that was the case here, and it did not invalidate the deed because a little time intervened between the acknowledgment and the attestation if the witnesses knew they were really attesting the granter's signature—*Geddes* v. *Reid*, July 16, 1891, 18 R. 1186. Since the case of *Hogg*, referred to, no difference had been made in practice between witnesses adhibiting their signatures, whether they had seen the granter sign or only acknowledge his signature. Even if the deed was reducible under the Act 1681, cap. 5, the defect was cured by the Act of 1874, because the fact that an interval of time elapsed between the acknowledgment and the attestation was an informality which that Act declared should not invalidate the deed.

At advising—

LORD JUSTICE-CLERK—The facts out of which this bill of exceptions has arisen are these—The trust-disposition and settlement of Miss Henrietta Lochtie Clarkson was challenged on various grounds, and among others on the ground that not being holograph the granter's signature was not duly authenticated by the witnesses. The facts on this point were that the witnesses, who were the law-agent's clerks, not having seen the testator sign, went from the office in Dunfermline with the document to her house at Inverkeithing, and heard her acknowledge her subscription; that they at once returned to Dunfermline with the deed in their possession, and on arriving at their master's office, about half-an-hour after the acknowledgment, at once signed as witnesses.

On these facts the counsel for the pursuer asked from the presiding Judge the following direction—"That if they are satisfied that the witnesses did not subscribe the said trust-disposition and settlement as witnesses in the presence of the granter at the time of her acknowledgment, the said deed was not validly executed; that if they are satisfied that the witnesses did not subscribe the said trust-disposition and settlement as witnesses until they returned to Dunfermline, three-quarters of an hour after its acknowledgment, the said deed was not validly executed." That direction his Lordship declined to give.

The law as to the witnessing of deeds is contained in the Act 1681, c. 5, by which it is enacted as regards witnessing a signature after acknowledgment—"That no witness shall subscribe as witness to any partie's subscription unless he then know that partie, and saw him subscribe, . . . or that the partie did at the time of the wit-

nesses subscribing acknowledge his subscription." In this particular the Act makes a difference between the case of witnesses seeing the granter subscribe and the case of their only hearing the signature acknowledged. In the former case it does not require that the witnesses should "sign at the time." In the latter case it does so require. Effect therefore must be given to this specialty, unless there be any relaxation introduced by a later Act of Parliament. The first question therefore is, was the deed in this case signed by the witnesses "at the time" of the granter's acknowledgment of her subscription? Now, it is plain that the words "at the time" cannot mean at the same moment. The signatures of the witnesses must follow the acknowledgment. Nor need it be instantly after, or even in the presence of the granter, for in the case of *Condie*, 2 S. 385, the deed was upheld, the evidence in support of it proving that after the acknowledgment by the granter the witnesses left the room and adhibited their subscriptions in another place outwith the granter's presence. The question what is meant by "at the time" is therefore one of circumstances. The case of *Condie* decides the point raised by the first alternative of the direction asked. A deed is not bad because the witnesses who have heard the granter acknowledge his subscription leave his presence and go into another room before signing. Such signature is signature "at the time." The question remains, whether the signing by the witnesses in this case was signature "at the time," or whether the fact that the clerks went back to their master's office with the deed in their possession before they signed makes it necessary to hold that they did not sign "at the time." I am of opinion that this signature by the witnesses was a signature "at the time." I hold that these words must be read in a reasonable sense, and that "time" is not the same thing as "moment." I hold that where a signature is acknowledged, and the deed is at once conveyed by the witnesses to the lawyer's office, and there signed by them within half-an-hour or so, and without the deed ever being out of their hands, or any other business being done by them in the interval, that such signature fulfils the statutory requirement of being "at the time." Such a case seems to me to be quite different from one in which there has been an interval in a true sense, where the piece of business has been set aside, other things done, and then the attestation of the witnesses taken up of new, and at a different time. I should in such a case concur entirely with the view expressed by Lord Colonsay, in the case of *Hogg*, against the validity of a deed, where the witnesses signed truly *ex intervallo*. In such a case there might be great ground for doubting whether their signatures were truly added to the signature which had been acknowledged.

I am therefore of opinion that upon the Act of 1681 itself the Judge was right in declining to give either of the directions asked. But even if my view of the proper application of that Act were erroneous, it appears to me that the Conveyancing and Land Transfer Act 1874 is applicable to this case. By sec. 39 it is enacted—[*quoted supra*]. Now, I hold that the question raised in the present exception relates to a formality of execution as required by the Act of 1681. If there had been anything that could be validly stated as an objection to the deed here, it is based on informality of execution, and nothing else. That would throw the burden of proof that the attestation was a true attestation upon the party upholding the deed. But here that *onus* has been taken and discharged. For it was proved to be the fact that the granter acknowledged the signature by her, and that the witnesses did attest that signature so acknowledged. Therefore, if there was informality, the party founding upon the deed has overcome the objection to the informality by undertaking and discharging the burden laid upon him by the Act of 1874.

There is thus no ground for holding that the Judge should have given any such directions as those which form the subject of the present bill of exceptions, and which I therefore move your Lordships to refuse.

LORD YOUNG—I am of the same opinion, and think that the pursuer's objection to the learned Judge's ruling is not good irrespective of the Act of 1874.

LORD RUTHERFURD CLARK—I am of opinion that the exception should be disallowed.

The direction which the pursuer asked is, I understand, founded on the Act 1681, c. 5. It is intended to raise the point that the deed was not executed in terms of that Act.

The deed was not signed by the testator in the presence of the witnesses. She acknowledged the signature only. The objection is that the witnesses did not subscribe at the time of acknowledgment, inasmuch as they did not sign in her presence, but at another place and after the lapse of about three-quarters of an hour.

The witnesses are required to subscribe at the time of the acknowledgment. But we cannot put a literal construction on these words, for I do not suppose that it could be disputed that the witnesses could sign after the acknowledgment. If so, it is not necessary that they should subscribe in presence of the granter. For except on the theory that the subscription must be made during the acknowledgment, the presence of the granter is not required. They might retire to another room and sign there. We are therefore bound to give the language of the statute a fair and reasonable construction, looking to the purpose which it was intended to serve. That purpose was to secure that the witnesses should attest the signature which was acknowledged, and no other. If, then, after the acknowledgment the deed is removed by the witnesses to a convenient place for their attestation, and there subscribed, I think that I am bound to hold that the statute has been complied with.

In such a case the attestation is completed at the time the acknowledgment was made, in the fair and reasonable sense of that phrase. The whole is one continuous process.

I do not wish to be understood as expressing an opinion different from that of the Lord President in *Hogg* v. *Campbell*. I only mean to say that in the case before us the subscriptions of the witnesses were not adhibited *ex intervallo*, in the sense in which I think the Lord President used that expression.

I do not think that the point has been decided. For it seems to me that the cases to which we have been referred do nothing more than recognise the well-settled rule, that the testimony of the instrumentary witnesses, however adverse, will not necessarily invalidate the deed. But it is certain that it might have been raised in the case of *Condie*. When I consider that the pursuer was advised by very eminent counsel, it is a very suggestive fact that it was not raised.

But the direction which the pursuer asked was that the deed was null if not executed in terms of the Act of 1681. This is not a sound proposition. For a very signal change in the law was made by the Act of 1874. That Act 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 in the execution, but the burden of proving that such deed was subscribed by the granter and by the witnesses by whom such deed bears to be attested shall lie on the party using the same.

Assuming that under the Act of 1681 the objections of the pursuer would be fatal to the deed, the question is, whether there is here anything more than an informality of execution within the meaning of the Act 1874?

Under the former Act the attestation of witnesses has no other object than to give assurance that the deed is the deed of the granter. Such regulations as are made with regard to the subscription of the witnesses are formalities for obtaining this end. It seems to me to be immaterial whether they are made by injunction or by prohibition. In whatever manner they are expressed, I think that they do nothing else than prescribe the formalities by which the object of the Legislature is to be attained.

The Act of 1874 requires, I think, the Court to sustain all deeds which were signed by the granter, and honestly attested by the instrumentary witnesses. When the formalities of the Act of 1681 have not been observed, it throws the burden of proof on the person who uses the deed. I do not think that it dispenses with the necessity of witnesses. But it requires no more than that the witnesses shall have a warrant in fact and truth for what they attest. They have such a warrant if they saw the granter subscribe or heard him acknowledge his subscription. If the subscription to the deed be the subscription of the granter, and if the witnesses were warranted in attesting that fact, there is nothing lacking in essentials. The rest is mere formality of execution.

LORD TRAYNER—In this case the pursuer asked the learned Judge presiding at the trial to give two directions to the jury. In my opinion these directions were such as his Lordship was not bound or entitled to give.

The first direction asked was, that if the jury were satisfied that the settlement sought to be reduced was subscribed by the witnesses outwith the presence of the granter, the deed was not validly executed. I find no authority either in the text-writers or in the reported cases for the proposition that instrumentary witnesses must subscribe their names in the presence of the granter, either in the case of witnesses seeing the granter sign or hearing him acknowledge his signature. In fact, all the text-writers concur in saying that it is not necessary.

The second direction was that the deed was not validly executed if the jury were satisfied that the settlement was not signed by the witnesses until they returned to Dunfermline three-quarters of an hour after the acknowledgment of her signature by the granter of the deed. If it had not been for the expression of opinion by the Lord President in the case of *Hogg* I would have been disposed to think that the Act of 1681 makes no real distinction, in so far as regards the subscription of the attesting witnesses, between the case of witnesses who see the granter sign and of those who only hear him acknowledge his signature. The language in each case no doubt differs in expression, but on the fair reading of the whole statute I think that in each case there is practically the same provision. As has been pointed out, the language of the statute, in reference to the subscription of witnesses who only hear the granter acknowledge his subscription cannot be taken literally. The witnesses have no warrant for subscribing as such until the granter has acknowledged his subscription, and therefore such acknowledgment must precede the attestation. If that is so, the acknowledgment must be made before and not "at the time of the witnesses subscribing." But, at the most, that which the statute requires is that the witnesses who have heard the granter acknowledge his subscription shall subscribe at or soon after the time of acknowledgment. In short, to use the Lord President's expression, the attesting witnesses must not sign *ex intervallo*.

In this case I agree with your Lordships that the witnesses signing their names at the time they did was signing "at the time" when the granter acknowledged her signature within the meaning of the Act. I am therefore of opinion that the exceptions should be disallowed.

LORD KYLLACHY—I have no doubt that the direction I gave to the jury at the trial was right. I do not doubt that a witness who has heard the granter of a deed

authenticate his signature may sign as a witness after a lapse of time. But this is not a case of signing *ex intervallo;* it was one continuous proceeding.

I also agree—although the question was not argued before me at the trial—that the objection, even if good under the Act 1681, is excluded by the Act of 1874.

The Court refused the bill of exceptions.

Counsel for the Pursuer — Shaw — G. Stewart. Agents — Donaldson & Nisbet, Solicitors.

Counsel for the Defenders — Guthrie—Craigie. Agents—James Russell, S.S.C.

Wednesday, November 16.

SECOND DIVISION.

[Sheriff of Perthshire.

JOHNSTON *v.* HENRY-ANDERSON AND OTHERS (JOHNSTON'S TRUSTEES).

(*Ante*, vol. xxviii. p. 634; 18 R. 823.)

Trust — Tutors and Curators — Appointment—Intestate Succession — Guardianship of Infants Act 1886.

A testatrix directed her trustees to hold one-half of her estate for her nephew in trust until he reached the age of twenty-five, with certain discretionary powers as to payment of interest and earlier payment of part of the capital, "but which discretion will lie wholly with my said trustees, whom I hereby appoint to be tutors and curators to him until he attain the age of twenty-five years complete." The trustees were directed to hold the remaining half of the estate for behoof of the testatrix's brother and his children *nominatim*. By a codicil the testatrix cancelled the provision in favour of her brother and his children. She left her brother a legacy of £100, and directed that the residue should be disposed of among her relatives "according to their legal rights."

In a special case for the opinion of the Court it was decided that the half of the residue mentioned in the codicil fell to be divided equally between the brother and the nephew, and was immediately payable to them. Two of the trustees declined to accept the office of tutor, but one of them accepted, and the nephew's share of the intestate succession was paid over to him as his tutor and guardian.

In an action of accounting and for payment against the trustees by the mother of the nephew, as his natural guardian under the Guardianship of Infants Act 1886 — *held* that as the share now payable to the nephew passed to him as intestate succession, the trustees had no power to receive or administer it, and that the pursuer was entitled thereto.

Opinion per curiam, that the appointment of the trustees as tutors and curators was a joint appointment, and that one of them could not validly accept the office, the others declining to do so.

Mrs Agnes Johnston, Blairgowrie, as mother and guardian under the Guardianship of Infants Act 1886 of her pupil son William Low Johnston (his father having died), sued Isaac Henry-Anderson, S.S.C., Blairgowrie, John Soutar Baxter, and Dr Charles Smith Lunan, trustees and executors of the late Margaret Johnston of Welton, for an account of their intromissions as trustees and executors, and for payment to the pursuer of a sum of £1250 as one-fourth of the residue of Miss Margaret Johnston's estate.

Margaret Johnston died at Edinburgh on 14th July 1890. She left a trust-disposition and settlement dated 27th January 1887, whereby she disponed her whole estate, heritable and moveable, to Isaac Henry-Anderson, S.S.C., Blairgowrie, John Soutar Baxter, and Dr Charles Smith Lunan, as trustees, and directed them to convert her whole estate into money, and dispose of the same as follows—"One-half of the free rest and residue of my estate to my said nephew William Low Johnston, payable on his attaining the full and complete age of twenty-five years, but until he attains that age my trustees shall hold the capital in trust, and apply in such sums and in such way as they deem most expedient, the annual interest, or a part therof, for his maintenance and upbringing, but with power to said trustees, if they think proper, to advance to the said William Low Johnston, prior to his attaining said age, a part of the capital not exceeding one-half in starting him in business or otherwise starting him in life, but which discretion will lie wholly with my said trustees, whom I hereby appoint to be tutors and curators to him until he attains said age of twenty-five years complete; but declaring, in the event of the said William Low Johnston dying without leaving lawful issue of his body before attaining the said age, his said share of my estate shall fall to the parties afternamed, being the children of my brother James Johnston, and the said James Johnston, and shall be divided among them in the same proportions as their own share is to be divided as hereinafter set forth; and the remaining half of said residue shall be held, applied, and disposed of by my said trustees to and for behoof of the children of my said brother James Johnston, and to himself, in the proportions following."

By a codicil of 2nd July 1889 the testatrix cancelled and annulled "the whole provisions therein contained in favour of my brother James Johnston, and also of his children *nominatim*, in the said deed above written, and in lieu thereof I leave to the said James Johnston a sum of £100 sterling in full of all he can claim, and in the event of his challenging this codicil, this bequest of £100 will be held as null and void; and