

recorded in consequence of the inadequacy of its terms, there may be questions as to the precise effect and extent of any order he may make under the provisions of Schedule II, sub-section 9 (b), more particularly with reference to the provisions of Schedule II, section 10, and the provisions of Schedule I, section 19. No such question arises at this stage of the case.

I agree that it was not within the competency of the arbitrator to make it a condition-precident to going on with this inquiry that the workman should consign the sum of £80.

LORD SKERRINGTON—I concur.

The Court pronounced this interlocutor—

“Find it unnecessary to answer the first question of law in the case: Answer the second question in the negative: Recal the determination of the Sheriff-Substitute arbitrator so far as it finds that as a condition-precident to inquiry the sum of £80 should be consigned by the appellant and ordains the appellant to consign the said sum in the hands of the Clerk of Court; and remit the cause to the Sheriff-Substitute to proceed as accords.”

Counsel for the Appellant—Patrick. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Respondents—Moncrieff, K.C.—Fenton. Agents—Simpson & Marwick, W.S.

Tuesday, March 10, and Friday, March 20.

## FIRST DIVISION.

(Before Seven Judges.)

WALKER AND OTHERS *v.* WHITWELLS.

WHITWELLS *v.* WALKER'S TRUSTEES AND OTHERS.

*Writ—Authentication—Signature as Witness after Death of Granter of Deed—Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94), sec. 39.*

A testatrix on June 25, 1913, dictated a testamentary writing to her son, a doctor. It was signed by the testatrix in presence of (1) a nurse, who then and there signed as a witness, but did not add her designation and address, and (2) the son, who, however, did not then subscribe, being ignorant that the subscription of one witness was insufficient. The testatrix died on 1st July 1913, and at the date of her death the testamentary writing bore to be subscribed by the testatrix and by one witness. On 24th July 1913 the son signed his name as witness; the word “witness” and his designation, and also the designation of the nurse, were subsequently added. In a petition presented under section 39 of the Conveyancing (Scotland) Act 1874, held (by Lord President, Lord Dun-

das, Lord Salvesen, and Lord Mackenzie—*diss.* Lord Johnston, Lord Guthrie, and Lord Skerrington) that the testamentary writing was duly subscribed by the testatrix as maker thereof, and by the nurse and son as witnesses attesting the subscription of the testatrix.

*Tener's Trustees v. Tener's Trustees* June 28, 1879, 6 R. 1111, 16 S.L.R. 672, approved and followed.

*Appeal to the House of Lords—Expenses—Pupil.*

In a petition under section 39 of the Conveyancing (Scotland) Act a Court of Seven Judges, by a majority of four to three, held that a deed had been subscribed by a person as a witness attesting it. The father of a pupil child, who in the event of the decision having been the other way would have been entitled to one-seventh share of the residue, presented a note in which he craved an order on the trustees ordaining them to make payment to him of a sum to enable him to appeal to the House of Lords.

The Court refused the prayer of the note.

*Crum Ewing's Trustees v. Bayly's Trustees*, 1910 S.C. 994, 47 S.L.R. 876, distinguished.

The Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94) enacts—Section 38—“It shall be no objection to the probative character of a deed, instrument, or writing, whether relating to land or not, that the writer or printer is not named or designed, or that the number of pages is not specified, or that the witnesses are not named or designed in the body of such 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; and such designations may be so appended or added at any time before the deed, instrument, or writing shall have been recorded in any register for preservation, or shall have been founded on in any court, and need not be written by the witnesses themselves.” Section 39—“No deed, instrument, or writing subscribed by the grantor 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 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, 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 grantor or maker and witnesses.”

Harry Walker, spinner and manufacturer, Dundee, John William Thomson Walker, surgeon, London, and others, the whole surviving children of Mrs Isabella Thomson or Walker, who resided at Westwood, Newport, Fife, presented a petition under section 39 of the Conveyancing (Scotland) Act 1874 to have it declared that a certain testamentary writing purporting to be signed by the late Mrs Walker was subscribed by the grantor or maker thereof and by the witnesses by whom it bore to be attested.

Answers were lodged for Henry Edward Leatham Whitwell (the pupil son of a predeceasing daughter of Mrs Walker), and for Edward Leatham Whitwell, his father, as his guardian.

The testamentary writing, when produced in Court, was as follows:—

“The Empress Club. “June 25. 1913.

“& worldly goods

“It is my desire that I leave all my means<sup>a</sup> of whatever kind to be equally divided between my six surviving children with the following special bequests:—[Here followed nine bequests of specified articles of jewellery, &c.]—ISABELLA WALKER.

“Witness—MABEL HAYWARD, Nurse,  
c/o Miss Hartnell, 37 Warwick Avenue,  
Maida Vale, London.

“Witness—J. W. THOMSON WALKER,  
Surgeon, 30 Queen Anne Street,  
London, W.”

The petitioners prayed the Court “to declare that the said testamentary writing was subscribed by the said Mrs Isabella Thomson or Walker as maker thereof, and by the said Mabel Hayward and John William Thomson Walker as witnesses attesting the subscription of the said Mrs Isabella Thomson or Walker [and is a valid testamentary writing of the said Mrs Isabella Thomson or Walker].” The portion in square brackets was, however, subsequently deleted by amendment.

The respondents in their answers stated, *inter alia*—“In terms of [Mrs Walker’s] trust-disposition and settlement [of 29th June 1886] and codicils [of 6th June 1898 and 10th July 1903] the said Henry Edward Leatham Whitwell is entitled to an equal share along with the petitioners of the heritable and moveable estate of the said Mrs Isabella Thomson or Walker [amounting approximately to £23,000]—viz., to one-seventh thereof. Not known and not admitted that the alleged informal writing of 25th June 1913 was written by the petitioner John William Thomson Walker to the dictation of the said Mrs Isabella Thomson or Walker. Not known and not admitted that same was subscribed by the said Mrs Isabella Thomson or Walker in the presence of Mabel Hayward and the said John William Thomson Walker. . . . The said informal writing was not, at the date of death of the said Mrs Isabella Thomson or Walker, a validly executed and completed testamentary writing by her, and is consequently invalid and of no effect. The prayer of the petition should be refused in respect that (1) at the date of the death of the said Mrs Isabella Thomson or Walker the said document was incomplete, (2) that the subsequent addition

by the said John William Thomson Walker of his signature as a witness attesting the execution thereof, and of the designation of the said Mabel Hayward, was incompetent and invalid; and (3) that in the whole circumstances of the case the said John William Thomson Walker, on account of his interest, was not a competent witness to the execution of the document. *Separatim*, the prayer of the petition is incompetent and should be refused in so far as it craves for declarator that the document in question is a valid testamentary writing of the said Mrs Isabella Thomson or Walker.”

It was in consequence of this last paragraph that the amendment above referred to was made.

On 22nd October 1913 a proof was allowed, and was taken on 29th November before Lord Mackenzie. The facts disclosed by the proof were as follows:—Mrs Isabella Thomson or Walker died in London on Tuesday, 1st July 1913, leaving (first) a trust-disposition and settlement, and appended codicils dated respectively 29th June 1886, 6th June 1898, and 10th July 1903, by which she conveyed her whole estate, heritable and moveable, to the trustees, and for the purposes therein mentioned, the only survivors of said trustees being the petitioner the said Harry Walker, and James Thomson, some time merchant, Dundee; and (second) the testamentary writing above quoted.

On 23rd June 1913 Mrs Walker, who was staying at the Empress Club, London, became ill. On 25th June she sent for her son John William Thomson Walker, surgeon, and when he came she told him that she wished to add a clause to her will. He then wrote to her dictation the writing already quoted, and after writing it read it over to her, when she suggested some slight additions to make it clearer, which were given effect to. He then asked Miss Hayward, the nurse in attendance, who had withdrawn, to come in, and both she and J. W. T. Walker saw Mrs Walker sign. J. W. T. Walker had already written the word “witness,” and Miss Hayward then signed her name immediately following the word “witness.” J. W. T. Walker did not then sign as a witness, being ignorant—as apparently also was Mrs Walker—that the subscription of one witness was insufficient, but after Miss Hayward had signed he folded the document and placed it in an envelope. He gummed the envelope and wrote on the outside “Codicil to will, 25/6/13.” He then put the envelope in a small handbag, closed the bag and put it in a drawer. The envelope was sent to Messrs Johnstone, Simpson, & Thomson, solicitors, Dundee, by Mr Harry Walker on 29th June. Mrs Walker died as above stated on 1st July. The envelope was opened by Mr Johnstone on 5th July at a family meeting. Acting on legal advice, J. W. T. Walker on 24th July subscribed his name as a witness to the execution, and shortly thereafter the designations and addresses of the witnesses were added to their signatures.

On 13th and 14th January 1914 the case was heard before the Lord President, Lord

Johnston, and Lord Skerrington. On 14th January the Court appointed the cause to be argued by one counsel on each side before the First Division and three Judges of the Second Division.

On 17th and 18th February the case was heard before the First Division with three Judges of the Second Division.

At the first hearing, on 13th January, counsel for the respondents admitted, in view of section 38 of the Conveyancing (Scotland) Act 1874, that designations of witnesses might be subsequently appended, and in view of *Simmons v. Simmons*, July 19, 1883, 10 R. 124, 20 S.L.R. 831, that a testamentary deed was not invalidated by the fact that an attesting witness took benefit under it.

Argued for the petitioners—The signature of the witness of a deed was a mere formality, and it did not matter when it was appended. Originally it was neither necessary nor the practice to have witnesses—*Edinburgh v. Leith*, 1630, M. 16,880,—and the very subscription of deeds was purely statutory. The Act 1540, cap. 117, on the narrative that seals might be stolen, provided that in future no faith should be given to deeds without the subscription of the granter “and witness.” But apparently the witnesses did not subscribe—Duff, Feudal Con., sec. 5; *Bell v. Campbell*, 1707, M. 16,888. The Act 1579, cap. 80, provided that deeds should be subscribed and sealed by the principal parties if they could subscribe, otherwise by two notaries before four witnesses denominate by their dwelling-place or some other evident tokens. The Act 1593, cap. 179, provided that deeds should mention “in the hinder end thereof, before the inserting of the witnesses therein,” the name and designation of the writer of the deed. The cases which followed the Statutes of 1579, cap. 80, and 1593, cap. 179, showed that while probably the practice was to insert the designation of witnesses in deeds subscribed by the party himself, as well as in deeds subscribed by notaries, the Court in the case of deeds signed by the party himself allowed the designation of the witnesses to be supplied by a note or condescendence afterwards, and to be proved by the testimony of the witnesses if alive, and if dead by comparing their subscriptions on the deed with other writings of theirs—*Hume v. Hume*, 1634, M. 16,881; *Bell v. Lord Mow*, 1635, M. 16,882; *Colvill v. Lord Colvill's Executors*, 1664, M. 16,882; *Falconer v. Earl of Kinghorn*, 1665, M. 16,883; *Ogilvie v. Baillie*, 1711, M. 16,896. However, in *Urquhart v. Officers of State*, 1753, M. 9915 at p. 9919, and 9923, 1 Pat. 586, the House of Lords held that in a deed prior to 1681 the want of designation of the witnesses was not a good objection to its validity. The Act of 1681, cap. 5, on the narrative that “by the custom introduced when writting was not so ordinary witnesses insert in writs, although not subscribing, are probative witnesses, and by their forgetfulness may easily disown their being witnesses,” enacted that only subscribing witnesses should be probative witnesses, and that deeds wherein the writer and witnesses were not designed should be null, and that a wit-

ness should not subscribe as such unless he knew the party and saw him sign, or the party acknowledged his signature at the time when the witness subscribed. As explaining the need for the Act of 1681, reference was made to Stair iv, 42 (4), and on the history of these early Acts to Ersk. iii, 2, (7), (9), (11), and (13). The Act of 1681, however, put the signature of the witness in no higher position than his designation. Accordingly (apart from the provisions of sections 38 and 39 of the 1874 Act) it was not a valid objection to the validity of a deed that witnesses who saw the granter subscribe had signed *ex intervallo* if the deed had not been recorded nor produced in judgment—*Frank v. Frank*, 1795, M. 16,824, *affd.* 1809, 5 Pat. 278, more fully reported in Bell on Testing of Deeds, p. 254; *Hogg and Others v. Campbell and Others*, March 12, 1864, 2 Macph. 848, Lord Colonsay at 855; *Thomson v. Clarkson's Trustees*, November 18, 1892, 20 R. 59, 30 S.L.R. 93; *Stewart v. Burns*, February 1, 1877, 4 R. 427, 14 S.L.R. 292; *Macleod v. Cuninghame*, July 20, 1841, 3 D. 1288, *affd.* August 13, 1846, 5 Bell's App. 210 (there the appellant at p. 240 put forward the same argument unsuccessfully as the respondents do here); *Dick's Trustees v. Dick*, 1798, Hume 908; *Hill v. Arthur*, December 6, 1870, 9 Macph. 223, Lord Cowan at 229; *Veasey v. Malcolm's Trustees*, June 2, 1875, 2 R. 748, 12 S.L.R. 479. Ministers might sign as notaries after the death of the granter—*Gray v. Lady Ballegerno*, 1678, M. 16,296; *Traill v. Traill*, February 27, 1805, M. 15,955. This case had, however, been doubted or disapproved in *Campbell v. Purdie*, March 12, 1895, 22 R. 443, 32 S.L.R. 316. Similarly, even apart from the 1874 Act, witnesses who had seen the granter sign might append their signatures to the deed after the death of the granter. The only case which at first sight might appear contrary to this was *Arnott v. Burt*, November 14, 1872, 11 Macph. 62, 10 S.L.R. 51, but the ratio of the decision in that case was that it was held proved that the deed was not intended by the granter to be completed, and that he died in the belief that the deed was invalid. In any case the fact that a witness did not append his signature until after a testator's death was a mere informality of execution—*Thomson v. Clarkson's Trustees (cit. sup.)*, Lord Rutherford Clark at p. 63; *Richardson's Trustees*, July 11, 1891, 18 R. 1131, 28 S.L.R. 889—and as the deed bore to be subscribed by the granter and to be attested by two witnesses, it was, in terms of section 39 of the Conveyancing Act 1874, valid and must receive effect—*Tener's Trustees v. Tener's Trustees*, June 28, 1879, 6 R. 1111, 16 S.L.R. 672; *Beattie v. Barn's Trustees*, 1899, 6 S.L.T. 277. It was true, however, that *Tener's Trustees* had been doubted by Lord Johnston and Lord M'Laren in *Brownlee v. Robb*, 1907 S.C. 1302, 44 S.L.R. 876.

Argued for the respondent—In order to be a competent witness a person must be called expressly or impliedly for that purpose—Ersk. iv, 2, 27; Dickson on Evidence, sec. 695; Ross's Lectures, p. 148; *Baillie v. Lockhart*, 1710, M. 16,891; *Robertson v. M'Caig*, December 1, 1823, 2 S. 544; *Home v.*

*Dickson*, 1730, M. 16,898—and this was also the case in Roman wills—*Stair*, iii, 8, 3. There was no valid distinction between a case where the witnesses saw the testator sign, and one in which they heard him acknowledge his signature—*Thomson v. Clarkson's Trustees* (cit. sup.), Lord Rutherford Clark at p. 62; Lord Trayner, at p. 63. Not only in the latter case—*Hogg v. Campbell* (cit. sup.)—but also in the former case, signature by the witnesses *ex intervallo* was invalid, and certainly the delay of a day was fatal—*Duff*, Feudal Con., p. 16; *Homer v. Dickson* (cit. sup.). In *Thomson v. Clarkson* (cit. sup.) the delay was only three-quarters of an hour, and accordingly the signing of the witness was regarded as really being *unico contextu*, and the same applied to *Frank v. Frank* (cit. sup.). *Traill v. Traill* (cit. sup.) could not be regarded as of authority in view of the disapproval expressed in *Campbell v. Purdie*, and *Gray v. Lady Ballegerno* was in the same position. *Stewart v. Burns* (cit. sup.) was really the only case in which witnesses had signed *ex intervallo*, and the deed there was *inter vivos*, and the deed really proceeded on there being *rei intervenus*. In any case, a will not properly executed at the date of the testator's death could not by anything done afterwards be made a valid will. The mandate of a testator to the witnesses to append their signatures fell with his death, and after his death their signatures should not be appended, and if appended were valueless—*Arnott and Others v. Burt* (cit. sup.), Lord Cowan at p. 72. The only case to the contrary—*Tener's Trustees v. Tener's Trustees* (cit. sup.)—had been doubted by Lord Johnston and Lord M'Laren in *Brownlee v. Robb* (cit. sup.). The Conveyancing Act 1874, section 39, did not help the petitioners, for there was here an irregularity, not an informality. Moreover, section 38, by expressly permitting designations of witnesses to be appended at any time before the deed was recorded or founded on, thereby implied that the signature of the witnesses could not be added subsequently. On these sections reference was made to *M'Laren v. Menzies*, July 20, 1876, 3 R. 1151, Lord Deas at 1157, 13 S.L.R. 703.

At advising on 10th March—

LORD DUNDAS—This is an interesting and important case. We are asked by the petitioners to declare that the testamentary writing was subscribed by the testatrix Mrs Walker as maker thereof, and by Mabel Hayward and John William Thomson Walker, as witnesses attesting her subscription. The document was written by Dr Walker on 25th June 1913 to his mother's dictation; it was then and there signed by her; Miss Hayward, the nurse, came into the room and signed her name as a witness—the word "witness" which follows her signature had already been written by Dr Walker; Dr Walker did not sign his name until 24th July; the word "witness" after his name, and the designations both of Miss Hayward and Dr Walker, were afterwards added to the document. The testatrix died

on 1st July 1913. There is no doubt that the subsequent additions of the word "witness" and of the designations were competently made in virtue of section 38 of the Conveyancing Act 1874, but the point of difficulty is whether the signature of Dr Walker as one of the witnesses is, in the circumstances above narrated, sufficient to satisfy the statutory requisites of a probative writ. The objection is stated by the respondents in a two-fold form—(1) that Dr Walker's signature was not made contemporaneously with that of the granter, but after an interval of twenty-nine days; and (2) that even if such an interval of time was not in itself fatal to the probative character of the instrument, the fact of Mrs Walker's death before her son adhibited his signature rendered it incompetent for him to do so with any effect thereafter.

The present case cannot, in my judgment, be distinguished in any material respect from that of *Tener's Trustees*, (1879) 6 R. 1111, where the Second Division of this Court held the deed to have been validly subscribed and attested; and it is to reconsider that judgment, particularly with regard to some observations made upon it by Lord M'Laren in *Brownlee v. Robb*, 1907 S.C., at p. 1312, that this Court of Seven Judges has been convened. I am of opinion that *Tener's Trustees* was a sound decision and should be followed.

As regards the first head of the respondents' objection, one must pay close attention to the language of the Act 1681, cap. 5, which made the signature of the witnesses essential to the probative character of writs. This well-known Act, the authorship of which is generally ascribed to Lord Stair, ordains, *inter alia*, 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." One notices that the words "at the time of the witnesses subscribing," which imply that the witnesses' signatures must be substantially contemporaneous with that of the granter, are only used with reference to the case of acknowledgment; and not to that where the witnesses actually saw the granter sign. I confess that I cannot see any good reason for this distinction, nor do I find one suggested in the books or the decisions; but the words of the Act are definite and precise, and the distinction seems to have been always recognised by the Court—(see *Frank*, (1795) M. 16,824, *affd.* 5 Paton, 278, and especially the much fuller transcript of the Judges' opinions given in Bell on the Testing of Deeds, pp. 256, *et seq.*, *Hogg v. Campbell*, (1862) 2 Macph., p. Lord President M'Neill at p. 855, *Thomson v. Clarkson's Trustees*, (1892) 20 R. 59, *percuriam*). Professor Montgomery Bell, Lectures, (3rd ed.) p. 53, states the law and practice thus—"It is usual and right for the witnesses in all cases to subscribe at once and without delay, after the party has subscribed in their presence or acknowledged his signature to them. But immediate subscription is not essential on the part of a witness who has seen the subscription of the

party adhibited. Such witnesses may sign after the lapse of an interval of time, and the one may sign on one day and the other on another day." The learned writer goes on to point out that *Home v. Dickson* (1730) M. 16,898, which was referred to by the respondents' counsel, is not an authority adverse to what he has laid down. What, if any, limit there may be to the interval allowed to elapse between a witness seeing the granter sign and adhibiting his own signature has never, so far as I know, been decided. In *Frank's* case one finds from the report in Morison, that the interval which had actually elapsed "at most . . . did not exceed a quarter of an hour"; but the decision bears that "although there never ought to be any considerable interval, yet when such a case occurs it must be judged of upon its whole circumstances." Mr Duff (Feudal Conveyancing p. 16), on the authority of the same case, states that "A considerable interval between the subscription of the party and their" (i.e., the witnesses') "subscribing may leave room for the averment that he had withdrawn his consent before the deed was perfected; but it is not essential that the subscriptions of the witnesses should be added in his presence, or that the deed should not have been lost sight of by them in the interval." The learned author adds that "any deviation from the ordinary practice is, however, to be carefully avoided as subjecting the deed to suspicion; and it is not to be doubted that a delay to complete the deed until another day had commenced would be fatal"; but for the last statement he cites no authority. The judgment in *Frank's* case seems to establish authoritatively that contemporaneous signature by the witnesses was not at any time a statutory solemnity in cases where they had seen the granter sign, and I think the inference is that the fact of time, longer or shorter, having been allowed to pass before the witnesses adhibit their signatures will never by itself render the writ null, but that each case "must be judged of upon its whole circumstances." It is obvious that a material lapse of time may give rise to difficult questions, and may imperil the validity of the writ, but it seems equally clear that far more important than the mere duration of the interval are the attending facts and circumstances, the opportunities for substitution of another writ, and the means which the witness has in each case of absolutely identifying the document he signs with that which he saw the granter sign. It is certainly the duty of the Court to be vigilant in such a case against anything like fraud; but in the case now before us it happens fortunately that Dr Walker when he signed his name as witness had the most perfect means of identifying the document as being that which he himself had written to his mother's dictation about a month previously. I am, therefore, of opinion that so far as the mere lapse of time between 25th June and 24th July is concerned, there would be no obstacle to our declaring this document to be validly attested, even with-

out the aid which it derives from the 30th section of the Act of 1874.

If, however, I should be wrong in this view, I think the provisions of that section would obviate any objection upon the head of mere lapse of time. We have here a "writing subscribed by the granter or maker thereof, and bearing to be attested by two witnesses subscribing," and section 30 declares that such a document shall not be "deemed invalid or denied effect according to its legal import because of any informality of execution, but the burden of proving that such writing was subscribed by the maker and by the witnesses shall lie upon the party using or upholding the same." The present petitioners have in my judgment discharged this burden. I think the delay which occurred was at most an "informality of execution." I respectfully repeat, and adopt as my own the words of Lord Rutherford Clark in *Thomson's* case, where he says that under the Act 1681, cap. 5, "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 witnesses are formalities for attaining this end. . . . 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 1681 have not been observed, it throws the burden of proof on the person who uses the deed. I do not think it dispensed 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."

The first head of the respondents' objection therefore in my opinion fails. I now turn to the second head, viz., that, apart from mere lapse of time, the death of Mrs Walker before Dr Walker's signature was adhibited made it incompetent for him thereafter to sign as a witness to the instrument.

It was urged in the first place that Dr Walker could not validly sign as a witness because on 24th June 1913 he was merely an amanuensis, and was not specially chosen or called in by his mother to be a witness to her signature. This point has to my mind no real weight or substance. The authorities referred to by the respondents' counsel do not carry him far; they were mostly concerned to show that the old objections to judicial witnesses, based on interest or character, do not apply to instrumentary witnesses who are chosen by the parties to attest their signatures; the parties are personally barred from stating such an objection (e.g., *Ersk. Inst. iv. ii. 27, Dickson on Evidence*, section 695). The point may, I think, be disposed of by quoting

what was said—very soundly I consider—by two of the learned Judges in *Tener's* case, where the circumstances under which Mr Tener was present when his wife signed the deed were in all material respects completely parallel with those in which Dr Walker attended on the occasion of his mother's signature. The Lord Justice-Clerk (Moncreiff) said (6 R. at p. 1115)—“It was argued with much earnestness that Mr Tener could not be a witness because he was not desired by the granter to attest her signature. But there is no place for that argument in the admitted facts. No doubt subscription before a casual, an accidental, or a concealed, witness may not amount to subscription as required by the statutes. But there is no such case here. We cannot doubt that if Mrs Tener had thought that two witnesses were necessary she would have desired Mr Tener to sign. He was entrusted to do all that was necessary to make the deed effectual, and as to his competency as a witness there can be no doubt at all.” Lord Gifford (at p. 1117) observed that it was argued that Mr Tener “was not specially called as a witness, and he did not himself intend to act as such because he thought one witness was sufficient. I do not think this is a good objection. Instrumentary witnesses do not require to be ‘called’ as such as a solemnity. No formal *invocatio testium* is required—it is enough if the witnesses are legitimately present and openly stand by and see what is done.”

But the real gist of the respondents' objection, as I understood it, was that the signature of a witness can only be adhibited by virtue of a mandate from the granter, that such a mandate necessarily falls on the granter's death, and that the subsequent adhibition of Dr Walker's signature was of the nature of a trespass upon the paper which was the granter's property. The argument appears to me to involve some confusion of thought. In my judgment we are not truly here in the region of mandate properly so called; but I may observe, by the way, that if such is really the case, Dr Walker's mandate would not, to my thinking, fall on the granter's death, for if mandate it was it surely extended to the doing of everything which the law might require in order to verify the fact that he had seen her sign, and to make her instrument valid and probative. But the true theory seems to me to be that a witness to a deed, like any witness in judicial proceedings, merely testifies to a fact within his personal knowledge, and that in doing so he cannot be properly regarded as a mandatory of anyone else, in the one case or in the other. I may refer in this context to Lord Ormidale's observations in *Stewart v. Burns*, 1877, 4 R., at p. 433, foot, which appear to me to be well founded. It may well be that Dr Walker would not during his mother's life have been justified in signing the document as a witness against her wish, or without her authority, express or implied. No one has the right to sign his name, or to make any other mark, upon a document belonging to another, to the effect of changing its character, without that other's permission

or assent; to do so might well be regarded as a species of trespass. But the only person who could object to his doing so is the lawful owner of it; and all idea of trespass is at once excluded by such owner's request to the witness that he should sign. In the present case such request was in fact made to Dr Walker by those who after Mrs Walker's death were the owners of the paper and entitled to found upon it. I am not to be understood as suggesting that a writ which the maker has purposely left improbable, as not expressing his completed intention, can be made to be his writ without his leave by the subsequent attestation of persons who happened to see him sign it. But where we have evidence, as I consider we have here, to show that the maker did regard this as a completed testamentary writing, and also the attestation in statutory form of the witnesses who saw her sign, I know of no authority, and I see nothing in principle, which compels us to disregard the attestation, and so to deny effect to the instrument which she signed and intended to have effect. The second branch of the respondents' objection seems to me to fail as well as the first.

I do not think it necessary to refer to the cases which were cited to us in regard to the filling in of testing clauses after the death of the granter of an instrument; or to say anything about the old case of *Gray*, 1678, M. 16,926, which, if well decided—perhaps a doubtful point, though the decision does not seem to have been ever expressly overruled—appears to go further than anything required by the present petitioners. But I should like to notice an argument strenuously maintained by the respondents to the effect, that if we decide this case in the sense in which I am for deciding it, this grave anomaly would seem to be involved, that it puts it in the power and even the caprice of a third party to decide in any such case as this whether a deceased person has in fact died testate or intestate. But the contingency, though it may be anomalous, is not unique. If one who intends to make a testament or other instrument neglects the obvious and proper precaution of seeing that both his witnesses sign at the time, he undoubtedly runs the risk that one or both of them may afterwards fail him; they may die or be lost sight of, or refuse (or become unable) to sign. Life is full of such contingencies; they are not created by or dependent on any provision introduced by the Conveyancing Act of 1874. But because he runs this risk I do not think it follows of necessity that where (as here) the necessary witness is available and willing to give his testimony, that testimony is to be excluded merely because the witness could not have been compelled—and I do not at present see that he could be compelled—to give it in the form which the statutes require.

For these reasons I am of opinion that we ought to declare that the document was duly subscribed by the granter and the attesting witnesses.

I find myself unable to agree with those of my brethren who hold that, as matter of statutory solemnity, it is essential that a

witness who has seen a granter sign must adhibit his own signature substantially at the same time, or that such adhibition of signature is an affair of pure mandate, or that the intervening death of the granter is necessarily a bar to the effectual adhibition of a witness's signature. As already explained, I am of opinion that the contemporaneous signature of any instrument by a witness who has seen the granter sign it, has never been an essential solemnity of our law; that signature by a witness is not truly an affair of mandate at all, but one of evidence; and that the fact of the granter's death will not by itself preclude the witness from testifying thereafter in competent form that he did see him sign. At the same time I hope that my opinion in this case will never be understood as affording the slightest approval of any unnecessary deviation from the ordinary and proper practice as to the signing of deeds. Any such deviation, in my judgment, is not only irregular, but may be fraught with grave peril to the probative character of the instrument. In every case the circumstances will be for the careful and jealous scrutiny of the Court. But in the case now before us, where the facts are exceptionally favourable, it seems to me that we cannot justly refuse to declare that the writing in question was subscribed by Mrs Walker as maker thereof, and by Miss Hayward and Dr Walker as witnesses attesting her subscription; and that, after all—though one has been led to discuss a variety of questions—is the sole demand of the prayer of this petition as amended at the Bar of the First Division.

LORD JOHNSTON—The question raised in this case is one of great importance to the Scottish law in the matter of authentication of deeds. And its decision in the manner proposed by your Lordships who have already spoken would, I think, give a further shake to the confidence which has justly been reposed for more than two centuries in a practice created and fostered by statute. I cannot help feeling that your Lordships are influenced in your conclusions by a feeling of sympathy for the individual deed instead of by consideration of what is best for deeds in general, and that you are opening wide the door to the exception instead of regarding the general advantage of the rule, and relegating the effectiveness of the attestation and therefore the validity of a will, and equally of any other important document, to a proof of facts and circumstances. I think it not without some use that we consider precisely what you are proposing to do here. The deceased lady left a regular settlement and a regular codicil, both prepared by skilled conveyancers, and duly executed. Within a week of her death she is alleged to have dictated to her son, a London surgeon, what she is said to have described as an addition to her will, and what he at the time designated as a codicil. This document, written on a half-sheet of paper, consists of three lines, which are not an addition to but an entire supersession of her former will, and of twenty-two lines of personal bequests

dealing with plate, jewels and other mementoes. Taken as they stand, the first three lines have the effect of disinheriting one stirps among her descendants. It is open at least to some doubt whether the real object of this document, if perfected, was merely to make the distribution to nine selected individuals of jewellery and family possessions, the first three lines being merely a preamble shortly narrating what she understood her will already to have done, or whether it was truly to make a re-disposal of her whole estate in order to cut out the issue of her deceased daughter, with some personal gifts superadded. I only say that there is room for hesitation on the subject, and that the writer, and the witness who is said to have perfected the deed a month after the lady's death, was a son who benefited in some degree by the disherison of his sister's issue.

I am glad to concur in what I understand is the view of all your Lordships, that in the present case there is no ground for the slightest imputation on the good faith of those concerned, and I am confident that Dr Walker in particular never for one moment considered, probably never realised, his personal interest in what was being attempted. But I ask myself where the decision which your Lordships propose is to lead us, and how we are to deal with a case where the circumstances bear a different complexion. I do not pursue the point, which must be clear to anyone engaged in conveyancing practice, nay, I should think even to the lay mind, if it be told that a will ineffectual at the death of the alleged testator can, after—and it must be conceded, at any time after—the death, be validated by the act of a third party *ex proprio motu*, for though compulsorily has been ventilated none has been suggested.

The subject requires consideration of four points:—1st, The growth of the statutory practice which existed prior to 1874; 2nd, How far the statutory provisions are affected by subsequent decisions; 3rd, The intent and effect of the legislation of 1874; and 4th, The effect of the alleged testator's death while the deed in question was improbativ because incomplete.

First, then, as regards the statutory system. I do not propose to enter at length upon the subject. But I think that it is important to point out (1) that the moving cause of the interference of the Legislature was the prevention of fraud, more common in times when the art of writing was confined to the few, and when the granters of deeds were frequently illiterate, than at the present day; and (2) that the result of this legislative interference was to bring about that valuable legal conception the probative deed, that is to say, the deed which proves itself, not indeed as being *probatio probata* of its own authenticity, but as producing such a legal presumption of its own authenticity that it stands effective in law until set aside by direct challenge.

The advantage of the probative deed has hitherto placed our system of execution of deeds in advance of that which prevailed in England. Now I confess that I think we must take a lower place if the petitioners'



contention is to prevail, at least until—what I trust we shall some day have—a statute is passed clearly declaring that to make a will, and, for that matter, any other obligatory document not *in re mercatoria*, effectual, it must be signed as in England in presence of two witnesses, who shall sign as attesting in presence of the testator or grantor and of one another. I do not think that we need be ashamed to follow the very excellent example of the English Wills Act of 1837.

The Scottish system was the result of a number of statutes framed between 1540 and 1681, which provided certain forms to be observed in the execution of a deed if it was to have effect and so that it might carry "its credentials within itself." Shortly, these statutes (1) substituted signature for sealing, and made the former imperative; (2) required the writer of the document to be designed at the end thereof; (3) required deeds when written bookwise to be signed on every page where they consisted of more than one sheet, and the numbers of the pages to be mentioned in the end of the deed; and (4) substituted subscribing witnesses for witnesses not subscribing, and required their designation in the body of the deed at the end thereof. I refer in detail only to the Act of 1681, cap. 5, the last and most important, because it substantially codified in clearer expression much that had preceded it. Its terms have been much canvassed in the present case. It for the first time, so far as I am aware, used the expression "probative" witness. It commences with the preamble—"Considering that by the custom introduced when writing was not so ordinary witnesses insert in writs though not subscribing are probative witnesses and by their forgetfulness may easily disown their being witnesses," and "for remeal whereof" it enacted "that only subscribing witnesses in writs to be subscribed by any partie hereafter shall be probative and not witnesses insert not subscribing." So far is clear. And then it goes on—"and that all such writs to be subscribed hereafter, wherein the writter and witnesses are not designed, shall be null and are not suppliable by condescending upon the writter or the designation of the writter or witnesses." In the construction of this Act something has been made by those desirous of refusing it full effect of the nullity attached to this last provision as contrasted with the mere positive enactment of the former. But I again draw attention to the term "probative." The clause excludes recourse to the non-subscribing witness—his testimony can have no bearing on the authenticity and effectiveness of the deed. It is only the subscribing witness who can be "probative" or give the deed its "probative" character. The sanction of nullity would thus be not merely unnecessary but out of place. The statute then proceeds to deal with the detail of attestation, and enacted "That no witness shall subscribe as witness to any parties' subscription unless he then knew the party and saw him subscribe . . . or that the party did at the time of the witnesses subscribing acknowledge his subscription; Otherwise the said

witnesses shall be repute and punished as accessorie to forgerie." Controversy has arisen on this passage also as to whether it required the witness where he sees the party sign, equally as where he only hears the party acknowledge his subscription, then and there to append his attesting signature. On the terms of the statutes, taken by themselves I should have no doubt that the word "then" covers the witness's seeing the grantor subscribe, as well as his knowledge of the individual subscribing, and that it is the same in effect as the slightly different expression "at the time of" in the latter part of the clause, which is rendered necessary by the different collocation. I cannot doubt that the statute intended, though expressing it in the simple and less skilled legal diction of Scotland in the seventeenth century, what is the English practice, of the grantor signing in the presence of the witnesses, and the witnesses in presence of the grantor and of one another, and therefore "at the time." And, again, I do not think that anything is made in favour of laxity by the contention that there is no sanction of nullity, but only a penalty imposed on the individual witnesses. All is part and parcel of what is necessary to make even the subscribing witness a probative witness.

Secondly, what has been the effect of decision on the legislation of 1681 and prior years? As particularly touching the present question, while it is contended for the petitioners that the courts have given a wide interpretation to the terms "then," and "at the time of," the only cases cited to us which truly bear upon that question were these—*Frank's* case, M. 16,824 and 5 Pat. 278, where the witnesses had seen the grantor sign, and by reason of his extreme illness were then sent into the next room so that he should be no more disturbed, to which place the deed was brought to them by the lawyer and there signed by them within a quarter of an hour. The important point of course was the witnesses having lost sight of the deed even for such brief period. The Court, however, sustained the deed, remarking at the same time—"There never ought to be any considerable interval, yet when such case occurs it must be judged of upon its whole circumstances"; and the House of Lords affirmed. Next comes *Condie*, 2 S. 341, where the witness went into another room and signed. But in view of the case of *Frank* the point was not taken.

Then *Hogg's* case, 2 Macph. 848, where it was held no objection that a signature was acknowledged to the two witnesses separately, and that they attested it separately, and not in presence of one another. But Lord Colonsay, going beyond the question before him, and drawing a distinction between the case of a signature seen and one acknowledged merely by reason of the words used in the statute, expressed the opinion that there could be no interval in the latter case, though he indicated that practice had recognised that an interval in the former case was admissible. His Lordship, who does not state what he understands under the term "interval,"



or what he means to be understood by the term "practice," and whether anything more than is derived from the case of *Frank*, at the same time gives the very unsatisfactory reason for the distinction, viz., that the witnesses may not after an interval recognise the deed that they saw acknowledged, whereas the witnesses have no more means of identifying the deed in the one case than in the other.

*Thomson v. Clarkson*, 20 R. 59, follows. The witnesses came a distance to the granter's house that a deed already signed might be acknowledged before them. Instead of signing then and there they brought the deed away with them, and took it straight to their employers' office, where they witnessed it at once. They were three-quarters of an hour on the road. The Lord Justice-Clerk Macdonald said—"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"; and Lord Rutherford Clark held the attestation to have been completed at the time in the fair and reasonable sense of the phrase "The whole is one continuous process." I do not regard the *ex parte* proceeding in *Murray's* case, 6 F. 840, however extraordinary, of any value as an authority. And *Brownlee's* case, 1907 S.C. 1302, though the point was raised, proceeds on a different ground. There remains the case of *Tener*, 6 R. 1111, which is under reconsideration. Lord Justice-Clerk Moncreiff expresses the opinion that it is not "necessarily fatal to a deed that the attesting witnesses have signed after an interval." For this opinion—and the interval in the case to which he was addressing himself was more than two years—his Lordship gives no authority, and in view of the other cases both before and since, in the light of which I must read any dicta of text writers, I cannot hold that any extension has been judicially given to the statutory provision in question beyond this, that provided the whole is a continuous process, the terms "then" and "at the time" will not be construed so strictly as to effect the statutory regularity of the procedure. If *Tener's* case is to be followed and the deed under consideration upheld, the result will, I think, be to throw over all previous authority, and, as I have already said, to relegate the authenticity of a will or other obligatory document to a proof of facts and circumstances.

Third, what was the intent and effect of the Conveyancing Act of 1874. This mainly depends upon the provisions of section 39. But I think that some attention must first be given to section 38. This is intended apparently to maintain the probative character of a deed duly executed, but at the same time to reduce the essentials. "It shall be no objection" it says "to the probative character of a deed . . . that the writer or printer is not named or designed or that the number of pages is not specified, or that the witnesses are not named or

designed in the body of such deed . . . 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; and such designations may be so appended" at any time and by any person before the deed is recorded or produced in judgment. What then of the statutory solemnities, which I enumerated at the outset, are left? None but these—1st, that under the Act 1579, cap. 18, the granter must subscribe; 2nd, that under what is left of the Act 1696, cap. 18, where a deed is written bookwise each page must be signed by the granter; and 3rd, that under the Act 1681, cap. 5, instrumental witnesses must subscribe, and that when they subscribe they must know the party whose signature they attest, and must either see him subscribe or he must acknowledge his signature to them. Having then reduced the statutory solemnities to these, the statute provides, section 39, that "No deed, instrument, or writing subscribed by the granter or maker thereof, and bearing to be attested by two witnesses subscribing . . . shall be deemed invalid or denied effect according to its legal import because of any informality of execution." That is the positive enactment. But then it is laid under this condition that "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 parties using or upholding the same." The rest of the section deals with how such proof may be led, and is not material to the present question.

In studying this section, one must, I think, be struck with the justice of what is said by Lord Neaves in *M'Laren's* case, 3 R., at p. 1159, viz.—"The 39th section is a peculiar clause, and is not very happily framed, I think, nor very harmonious in all respects"; and his Lordship then comments on the strange distinction between the introductory words as they refer to the granter and to the witnesses. Taking them as they stand, the deed must be signed by the granter. It need only bear to be signed by the witnesses. His Lordship says—"I do not understand the meaning of that difference of expression, or whether it has any meaning." I confess that I am equally unable to understand it. But one thing is certain, that it is a condition-precident of the provision applying that the deed shall be signed by the granter and shall bear to be attested by two witnesses subscribing. *Ex hypothesi* there is something about the deed in aid of which the provision of section 39 is made which renders it improbable. But it is nevertheless not to be denied effect because of any informality of execution provided the subscription and the attestation is proved. I would ask the petitioners what is meant by informality of execution? I cannot regard it as comprising anything but defect in some prescribed formality, which renders the document *ex facie* improbable. Such defect can only appear *ex facie* of the docu

ment. It must be patent. The deed which we are considering, though it does bear a suspicious appearance in the original, if a fair copy is made of it is found to be in all respects *ex facie* formal and probative according to the present law. What is the objection to it? Not that it is patently informal, but that it has a latent defect, depending on the fact that though it bears to have two instrumentary witnesses it really only had one. I cannot accept the somewhat cynical contention of the author of the Act in *Geddes' case*, 18 R. 1186, that the provision of the section covered, and I suppose was meant to cover, the case where, though it could be proved that the granter's and witnesses' signatures were genuine, the witnesses attested nothing, having never seen the granter sign nor heard him acknowledge his signature. And to this, I think, Lord Kinnear refers in *Forrest's case*, 1907 S.C. 1240. If the petitioners admit that the informality consists in this, that when the testator died her will was attested by only one witness, I agree that that was an informality patent on the face of the deed, but then it was one which could not be cured by the proof allowed by the 39th section. But if they maintain that the informality consisted in this, that one witness adhibited his attestation *ex intervallo*, not to say after the granter's death, then I conceive this is not merely an informality. The deed is formal, and therefore probative. It needs no form to be supplied. If the *ex post facto* and even *post mortem* adhibition of an attesting signature had the legal effect which is attributed to it, it stands, not because of the proof permitted under the 39th section, but because it is formal and probative, and no effectual challenge of it has been established. If the postponed attesting signature had no legal effect it falls, notwithstanding that signature, and notwithstanding proof of the authenticity of the whole signatures.

Like Lord M'Laren in *Brownlee* — "I am not quite clear as to the ground of decision in the case of *Tener's Trustees*," and with him "I cannot admit that a witness who does not sign the deed is an instrumentary witness, or that the omission to sign is an informality of execution which can be corrected or supplied after the death of the maker of the deed," and I should have added *ex intervallo* had I been dealing with the more general question. I can find no more clear expression of the ground of decision in the last mentioned case than that given by Lord Gifford. The *ex post facto* attestation of the witnesses "was irregular, and is, I think, indubitably an irregularity of execution, or as the statute calls it an informality." This begs the question. For that is exactly what the statute does not do. I am aware that the matter was considered by the three Judges who decided the case of *Thomson v. Clarkson's Trustees*. They were all agreed that the objection that the witnesses had signed *ex intervallo*, was not good under the Act 1681, cap. 5, because there had been no real interval. But at the same time they were all of opinion that, had it been necessary, recourse

might have been successfully had to the Act of 1874, section 39, because, I must assume, they agreed with Lord Justice-Clerk Macdonald that the objection related to formality of execution. I think it right to refer more particularly to Lord Rutherford Clark's opinion, for he proceeds upon the view that the object of the Act of 1681 was to give assurance that the deed in question was the deed of the granter, and that its regulations were formalities for that end. Most of them are. But if the subscription of the witnesses is only a formality, the want of it under the Act of 1874 should not have rendered the deed ineffectual. That it does so shows that it is not an informality merely but an essential. It was, I think, unfortunately that the important case of *M'Laren v. Menzies*, 3 R. 1151, was not canvassed at the hearing. It was quoted, but only in answer to a question put by myself on an incidental point, and was not discussed. It was heard before a Court of Seven Judges, and decided by a narrow majority, that while the signature by the granter of all the pages of a deed, consisting of more than one sheet, was still an essential solemnity, the failure to attend to which rendered the deed improbate, the defect was an informality—and be it remembered it was patent—which could be obviated by recourse to the 39th section of the 1874 Act. The case is in consequence the most instructive which I have found on the bearing and limitations in application of that section. I do not detain your Lordships by referring in detail to the opinions. I would only particularly refer to what Lord Deas says at page 1158 for a limited purpose—"This leads me," his Lordship says, "to observe that I think the petitioners acted quite rightly in not appending the designations of the witnesses to their subscriptions" (the want of these was another defect in the deed, as it stood, at the granter's death) "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." I too think that we are entitled and bound to look at the deed as it stood at and for a month after Mrs Walker's death. There is no imputation intended on the subsequent actings of her trustees or her law agents, whichever of them were responsible for what was done, nor of the witness Dr Walker, who acted on their instructions. They were acting *ob majorem cautelam*. But their action does not alter the question which we have before us. And looking at it, as Lord Deas and I think his brethren would have looked at it, I am bound to conclude that the deed in question was informal when it came into the hands of the granter's trustees and law agents, that it was consequently improbate, but that its particular informality, the want of an instrumentary witness, was not one which could be obviated by recourse to the 1874 Act. If, however, it be represented that its informality was not the quondam want of an instrumentary witness, but the *ex intervallo* adhibition of that witness' signature, then I hold that this was not

an informality in the sense of the statute, but an illegal irregularity.

I may, in conclusion on this branch of the case, refer for a moment to *Baird's* case (11 R. 153). The objection taken by some of the granters of the deed in that case was that the witnesses had not seen them sign or heard them acknowledge their subscriptions. The deed was probative, but was challenged in a multiplepinding. The Lord President (Ingis), not referring in particular to the 1874 Act, which was inapplicable, uses language which has been founded on by the petitioners. While he says in the first half of his opinion "The objection we are dealing with therefore is a technical latent objection. There is nothing on the face of the deed that can suggest in any way the possibility of its being anything else than a well-tested deed," he uses a different expression in the latter part of his judgment, thus "there is an informality—a technical and undiscoverable informality, known only to" the granters. I cannot think that his Lordship in this latter expression meant anything different from what he had said in the former, or gives any real support to the petitioners' contention. Lord Mure speaks of "a technical objection" and Lord Shand of "a latent objection."

It was further maintained by the petitioners that unless the present case fell under the expression "informality of execution" there was nothing to which that expression can be referred. This contention is negatived by the case of *M'Laren*, and by the instances there suggested from the Bench, as well as by several cases which have since occurred.

Fourth. I have dealt with the case hitherto irrespective of the special point that the second instrumentary witness adhibited his signature at the request of the executors, or rather of their law agents, a month after the testatrix's death. I desired to explain my view of the subject independently of that speciality. Were it not so I should, with his Lordship's leave, have simply adopted the opinion of Lord Sker-rington, which I have had the privilege of perusing and considering. In all that he says I entirely concur, and do not think I need detain your Lordships by dealing separately with this branch of the question. I would only add one remark. I do not regard the *post-mortem* adhibition of the witness's signature as in any way justified by the lady's executors' title of property in the *corpus* of the document. But I do consider the *post-mortem* adhibition of the witness's signature as an unauthorised interference with that incorporeal abstraction the testamentary intention, which that document, had it been complete at Mrs Walker's death, would have recorded and conveyed, but which it failed to record and convey because it was not complete when she died. It was an accident that she left executors appointed under a regular settlement previously executed. She might just as well have died intestate. But in point of fact the signature of the second witness was adhibited, whether with the knowledge of these executors or not, at the instance of

the lady's law agents, acting on their own initiative and on the advice of counsel. How does the witness justify his *post-mortem* interference? On the ground of duty to the deceased? or of his civil duty to bear testimony to what has come under his observation when called upon? or of his good will to some one or more who will benefit by the document when set up? None of these except the first can be seriously maintained. As regards it, in point of fact the witness was never asked by the lady to attest her signature. As writer of the deed he had delivered it over to her, and had no right to resume the custody. Duty appears to me to imply mandate. Here there was no mandate. Had there been such it would, in my opinion, have fallen by the resumption of possession by the granter and, independently, by her death.

LORD SALVESEN—I have had an opportunity of reading the opinion which has been delivered by Lord Dundas, and I concur in the result of that opinion, and generally in the reasons which he has adduced. There is only one point on which I do not go entirely along with him, and that is raised by the last observations which have been made by Lord Johnston. I agree with Lord Dundas that the right or, as I should prefer to call it, the duty, of a testamentary witness to adhibit his signature after an interval, if he has not done so at the time of execution by the testator, does not depend in any way on the doctrine of mandate. The instrumentary witness is merely a witness to a fact—the fact of the granter's signature—a fact which, according to our law, cannot be established in any other way than by the signature of the witnesses who were present when the granter signed. I do not attach the same importance as Lord Dundas does to the fact that this particular witness was asked to affix his signature by the persons who happen to be the executors of the deceased. It might have been that the deceased would have died intestate if the incomplete deed was not to take effect, and I cannot imagine that the duty of the witness to complete the document would depend upon whether it was in the interests of the heirs, who would then be the owners of the *corpus* of the uncompleted will, that he should do so. It rather appears to me that any person interested in the incomplete will would be entitled to demand that the testamentary witness should at least have an opportunity of signing his name as a witness, and so completing the document the execution of which he in fact witnessed. I do not know whether he might not, under certain circumstances, be ordered by the Court to affix his signature after an interval and so to complete the document, but at all events I do not think that the mere accident in this case that the executors were willing that he should complete the document by his signature is of any material importance, or that there would have been anything in the nature of a trespass by him but for the circumstance that he was invited by the owners of the incomplete document to affix his signature.

These are the only observations which I think it necessary to make so as to guard against my being assumed to assent to that part of Lord Dundas's opinion. For the rest he has expressed the opinion that I hold so much better than I could do that I have nothing to add.

LORD MACKENZIE—I concur with Lord Dundas, whose opinion I have had an opportunity of reading.

LORD GUTHRIE—In defining the precise question before the Court it is necessary to keep in view three dates, all in 1913, namely, (1) 25th June, when Mrs Walker's testamentary writing, written by Dr Walker, her son, to her dictation, was signed by her in his presence and in presence of Nurse Hayward, who were impliedly authorised by the deceased to act as witnesses to her signature of the document, and of whom Miss Hayward subscribed immediately after the testatrix and in her presence; (2) 1st July, the date of Mrs Walker's death; and (3) 24th July, when Dr Walker, acting under legal advice, signed the writing, thereby intending by the only method allowed by law to fulfil the undertaking impliedly placed on him by his mother, and to render the document a valid testamentary writing.

Thus the document in question in this case was signed by Dr Walker twenty-nine days after his mother had subscribed it in his presence, and twenty-three days after her death.

In these circumstances, putting out of view meantime the serious and difficult question which arises under section 39 of the Conveyancing Act of 1874, I cannot bring Mrs Walker's act in signing on 25th June as the grantor and Dr Walker's act in signing on 24th July as an attesting witness to his mother's signature within the category of one continuous transaction.

Nor again, apart from the Act of 1874, can I see how the writing can be supported as a duly tested testamentary writing, even supposing that Dr Walker was entitled to sign not only at any time up to his mother's death but also within such a period thereafter as made it reasonably possible for him to do so; no relevant reason, such as sudden illness, is suggested to explain why, instead of signing at once after the death, he delayed for twenty-three days. It is not alleged that Mrs Walker gave Dr Walker express instructions to sign if necessary at any time after her death, and there was no special circumstance to imply any such instruction on her part.

Therefore no question of the relaxations which may be justified from cases like *Frank*, (1796) M. 16,824, *aff.* 5 Paton, 278, and *Thomson*, (1892) 20 R. 59 arise. In these cases although there was an interval of less than an hour between the testator's subscription and the witnesses' signatures, the two acts might fairly be held parts of one continuous transaction, with no greater interval than the circumstances made reasonable. Had the decision which, I understand, your Lordships approve, been put on the ground that, although there was an interval of twenty-nine days between the

date of Mrs Walker's signature and Dr Walker's signature, the two acts were truly in the circumstances part of one transaction, or on the ground that, although twenty-three days elapsed between Mrs Walker's death and Dr Walker's signature, the deed could not in the circumstances have been reasonably expected to have been signed sooner, the decision, although I could not have acquiesced in it on the facts, would have had little legal importance.

Nor can the question be affected by the fact that the deed was duly signed by Miss Hayward, the other witness. The same issue would have arisen had the deed as at Mrs Walker's death borne no signature but Mrs Walker's.

Accordingly, the question seems to me to be whether it is the law of Scotland, as alleged by the petitioners, that a document requiring for its validity to be attested by two witnesses is valid or may be validated under the 1874 Act if the persons who have received from the maker of the document authority, express or implied, to act as instrumentary witnesses, sign at any distance of time after the maker's death.

I assume that Dr Walker had express authority, as an amanuensis, to write out the deed to his mother's dictation, and had implied authority as a witness to sign it, or as an agent to get it signed.

The affirmative of the proposition just stated was laid down by a bench of three Judges in *Tener's Trustees*, 6 R. 1111, which was followed by Lord Kincairney in *Beattie*, 6 S.L.T. 277. In *Tener's Trustees* Lord Ormidale said—"I find myself obliged to concur, although not without reluctance, for the result will be that almost everything connected with the solemnities attending the execution of deeds, beyond the actual signature of the party, may be supplied, as in the present case, after the grantor's death, and that too after the lapse of any number of years, provided the deed has not been 'produced in judgment.' But this result is the effect of legislative enactment which leaves us no alternative. That result is, nevertheless, somewhat startling, and may open the door to those frauds which it was the aim, and as I think the effect, of the older statutes to prevent." In that case no attempt was made by any of the Judges to bring the signature of Mrs Tener, the maker of the deed, and the signature of the instrumentary witness, who subscribed more than two months after Mrs Tener's death, into the category of one transaction, or to say that the interval was reasonably necessary.

I am not disposed to accept the opinions in *Tener's Trustees* as expressing the law of Scotland on this matter, unless I am forced by decision or practice. The result seems to me opposed to principle, and likely to bring about results not only grotesque, but productive of serious embarrassment and injustice—results, so far as I know, impossible under the law of any other country. Whether an individual has died testate or intestate is a question which the Courts have frequently to consider; the grotesqueness of the situation will arise

from the fact that in circumstances like the present the question will depend not on the act of the deceased but on the whim or goodwill or avarice of a person called, it may be accidentally, to attest the deceased's signature. In certain circumstances this result will involve grave injury to the public interest, without, so far as I can see, any counterbalancing advantages. In addition to the risks of fraud referred to by Lord Ormidale in *Tener's Trustees* (which might be equally alleged about other cases, such as signature only on the last page, which are undoubtedly covered by section 39 of the 1874 Act—*M'Laren v. Menzies*, 3 R. 1151—it may, in trusts, lead to a deadlock; it will encourage laxity of practice on the part of the legal profession in relation to their most important duties; and it will lead to what may be called legalised blackmail.

If a document can be signed by a witness at any time after the death of the granter, and so rendered as effective as if signed *unico contextu* with the granter's signature, or at least *unico contextu* with the granter's death, the temptation to depart from the admittedly proper rules to have a document completed at once will be obviously increased. As to direct public interest, persons called to be instrumentary witnesses will be in a position after a testator is dead to hold up the administration of a trust indefinitely by refusing to say whether they will or will not sign. This might happen without suspicion of blackmail if the witness, as not infrequently happens, has either entirely forgotten, or has only a hazy recollection, that he was present when the deceased subscribed, or that he heard the deceased acknowledge his signature. In such a case, is the witness, on the assurance of credible persons that he was present and saw the testator subscribe, or heard him acknowledge his signature, bound, or at least entitled, to add his signature? Or there might be delay or refusal if the witness (contrary to what happened in the present case, where it was to Dr Thomson's advantage that the codicil of 25th June should be validated) finds out, on looking at the terms of the document which he saw the deceased sign, that if he signs he will seriously injure his own interests or those of his children. A witness's interest to sign or not to sign might even vary according to the period when the request was made. In such a case, is the witness deliberately to injure or ruin his personal or family interests because without a word of assent on his side he has happened to see a deceased testator subscribe, or happened to hear him acknowledge his subscription?

These difficulties, or some of them, might, no doubt, be obviated if it were competent for the Court, at the instance of those interested in an incomplete will, to dispense, after the death of the testator, with the signatures of witnesses who refuse or unduly delay to sign, and to hold a document as duly tested which is not tested at all. Contrariwise, the difficulties might be overcome if it were competent, at the instance of those interested under a previous will or as heirs *ab intestato*, to declare that if the

witness or witnesses do not adhibit their signatures within a certain period the alleged testamentary writing will be held invalid. Or the witnesses might be forced to sign if it were competent for the beneficiaries under the incomplete will to sue the recalcitrant witnesses for declarator that they were bound to sign, and a relative crave for an order *ad factum præstandum*, with an alternative conclusion for damages in the event of their failing to implement the order, the measure of the damages to be the amount of the lost benefits.

But it is not said that any of these suggested remedies are competent, and I do not know of any others that are competent, the result being that recalcitrant witnesses could produce an impasse, which in some cases would remain till the witness's death, and in others would be removed by what I have already hinted at, namely, a transaction savouring of blackmail, yet not blackmail. If witnesses could not be forced to sign, either by a decree *ad factum præstandum*, to be followed on disobedience by imprisonment or by an action of damages for refusal to sign, they would be in a position to make their own terms either to sign or not to sign, terms which would probably be arrived at after something in the nature of an auction. In view of the fact that anybody can fill up a testing clause, the analogy on which the petitioners strongly founded fails in at least one essential particular.

The question thus stated is one of great difficulty on the common law under the Statute of 1681, chapter 5, and under the 39th section of the Conveyancing Act of 1874. On the whole, I am of opinion that the law is not in the unfortunate position alleged by the petitioners, and that the writing founded upon is not part of the will of the deceased.

As I have indicated in my statement of the question, I do not proceed on the matter of undue interval between the date of Mrs Walker's signature on 25th June and Dr Walker's signature on 24th July. Prior to the passing of the 1874 Act, I think, on the authorities cited to us, that the length and the circumstances of the interval would have been fatal to the petitioners' case. But I assume, had Mrs Walker survived 24th July without withdrawing Dr Walker's authority, that the delay, although exclusive of the idea of one transaction and beyond the limits of reasonable delay, would have fallen under the head of informality of execution, which the 39th section of the 1874 Act was designed to cover. But for the reasons stated by Lord Johnston in the opinion which he has read, and by Lord Skerrington in the opinion which he is about to deliver, and which I have had an opportunity of reading, it seems to me clear that before the passing of the 1874 Act the death of Mrs Walker would have made it impossible for Dr Walker thereafter to complete the deed by appending his signature as a witness, and that this obstacle was not removed by the 1874 Act.

The opinion of Lord Rutherford Clark in *Thomson's Trustees* was strongly pressed on us by the petitioners' counsel, but I see

nothing in that opinion inconsistent with the view I have just expressed. His Lordship had no occasion to consider what seems to me the real question in this case.

Section 39 of the Act of 1874 has a negative and a positive clause which must be read together. The words "bearing to be attested" in the negative clause are contrasted with the word "subscribed" in the positive clause. That clause places on the petitioners the burden of proving that the writing in question was subscribed by the witnesses by whom it bears to be attested. In my opinion, in view of the contrast to which I have referred, "was subscribed" must mean was validly subscribed. I adopt as equally applicable to the question of warrant to sign, Lord Deas's words in *M'Laren v. Menzies*, used in reference to a different alleged defect—"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 subscriptions both of the granter and the witnesses—everything in fact 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." The petitioners have discharged the statutory burden in the case of Miss Hayward. In my opinion they have failed to do so in the case of Dr Walker, because it appears from the proof that he signed the writing in question when his warrant to do so had fallen by his mother's death, and because, even if it be reasonable to hold that a signature of a witness appended at the earliest possible moment after the death of a granter ought to be sustained as a valid subscription, Dr Walker's signature was not adhibited so as to fall within this possible exception to the rule that a mandate falls by death. It has been assumed, I think rightly, that surreptitious onlookers would not be entitled to act as instrumental witnesses, because they have not been, as Erskine (iv. 2, 27) puts it, "called for that purpose." If so, I do not understand under what legal category the relation between the granter of a deed and instrumental witnesses can be placed if it be not that of mandate, and no other category which seems to be applicable has been suggested. The mandate covers two acts—first to see the granter sign, and second to subscribe. But partial execution does not prevent withdrawal of a mandate as to the portion unexecuted; and Mrs Walker could have withdrawn the mandate which her son possessed to sign as a witness to her signature. If so, I am unable to see why this question should not be solved by an application of the simple and universal rules of law and of common sense, that the effect of the death of a granter is the same as if in life he had expressly withdrawn the mandate—a solution in accordance with legal principles, which avoids what seems to me the absurd as well as injurious results of the law for which the petitioners con-

tend. I am therefore of opinion that the petition should be refused.

LORD SKERRINGTON—This petition raises the general question whether a codicil or other testamentary writing which at the testator's death purported to be signed by the testator and to be attested by a single instrumental witness can be afterwards completed and validated by the signature of a second testamentary witness who saw the testator subscribe. The question would have been the same if neither of the instrumental witnesses had signed his name until after the death of the testator. There is no doubt upon the evidence that the codicil, the formal validity of which is in question, truly represents the final testamentary intentions of the testatrix, and that the irregularity in its execution arose from no hesitation on her part, and from no want of good faith on the part of the persons who attended upon her. One of her sons wrote out the codicil to her dictation when she was ill in bed about a week before her death. At his request a nurse who had seen his mother sign the codicil subscribed it there and then as a witness. Unfortunately he did not appreciate the fact that by the law of Scotland two witnesses are necessary. Three weeks after his mother's death the deceased lady's solicitors, acting on legal advice, requested him to sign the codicil as a witness, which he did. I hold it proved on the evidence that when his mother dictated her codicil to him she impliedly authorised him to do what was necessary for its formal completion. I doubt, however, whether after he had handed over the codicil to the testatrix, as he did immediately after the witness had signed, he could lawfully, without fresh instructions, have taken the paper out of her possession in order to sign it as a witness. That question does not here arise. What we have to decide is whether, after the testatrix had died leaving the codicil formally incomplete, her son had power to complete it by signing his name as a witness. I attach no importance to the fact that he so acted without the authority of one of the deceased's executors. If he was entitled to sign the codicil as a witness after the death of the testatrix, any person interested in upholding its validity must have had a legal right to insist upon the writing being produced in order that it might be formally completed. The right of a beneficiary under a testamentary writing cannot depend upon the whim of the custodian of the paper. There is a decision pronounced by three Judges of the Second Division in 1879—*Tener's Trustees v. Tener's Trustees*, 6 R. 1111—to the effect that it is irregular for an instrumental witness to sign his name after the death of the granter of the deed, but that the informality is one that can be cured in terms of section 39 of the Conveyancing (Scotland) Act 1874. That decision was followed by Lord Kincairney in the Outer House—*Beattie v. Bain's Trustees*, (1899) 6 S.L.T. 277—but its soundness was doubted by Lord M'Laren in *Brownlee v. Robb*, 1907 S.C. 1302. He expressed the

hope that the question might in the future be reconsidered by a larger Court, and that has now been done.

Section 39 of the Act of 1874, upon which the present petition is founded, enacts—  
“ . . . [*His Lordship here read the section.*] . . . ” The question which we have to decide is whether the failure of one of the attesting witnesses to sign the codicil until after the death of the testatrix, made it invalid under the law as it stood prior to 1874, and, if so, whether such failure is an “informality” which can be cured by evidence in terms of the clause above quoted.

The absence of any form which the law requires in order to secure the genuineness of a deed may be described as an “informality,” and a challenge of a deed on that ground may be described as merely “technical” if the genuineness of the granter’s subscription is admitted. Thus where an onerous deed admittedly genuine was challenged on the ground that an instrumentary witness had neither seen the parties subscribe nor heard them acknowledge their signatures, the objection was described by Lord President Inglis as a “technical informality”—*Baird’s Trustees v. Murray*, (1883) 11 R. 153, p. 161. On the other hand, it was conceded by the petitioners’ counsel that an informality of this kind (unless cured in the case of an *inter vivos* deed by *rei interventus*) was absolutely fatal, and that the section did not apply to such a case. It was so decided in *Smyth v. Smyth*, (1876) 3 R. 573, and although Lord Young expressed a contrary opinion in *Geddes v. Reid*, 18 R. 1186, this dictum was disapproved of, and the decision in *Smyth’s* case was approved of in the case of *Forrests v. Low’s Trustees*, 1907 S.C. 1240. It accordingly becomes necessary to inquire in what light the law as it stood prior to 1874 would have regarded the failure of an instrumentary witness to subscribe during the life of the granter of the deed which he attested.

The Act 1681, cap. 5, which on this point stands unrepealed, enacts that only subscribing witnesses shall be “probative.” There is not much authority as to the time at which witnesses may competently sign a deed in order to attest that they either saw the granter subscribe or heard him acknowledge his signature. But the statute prohibits any witness from subscribing as a witness to any party’s subscription “unless he then knew that party and saw him subscribe . . . or that the party did at the time of the witnesses subscribing acknowledge his subscription.” In the latter alternative it has been held that the Act requires that the witness should subscribe *unico contextu* with the granter, though not necessarily in the same room, or without any avoidable delay. In the case of *Thomson v. Clarkson’s Trustees*, (1892) 20 R. 59, it was held not to be a good objection under the Act 1681, cap. 5, that the attesting witnesses had not subscribed in the presence of the granter after hearing her acknowledge her signature, but had taken the deed away and appended their signatures in another house within three-quarters of an hour thereafter. It is important, further, to notice that the

Judges expressed the view that, even if the objection had been good under the Act of 1681, it would have been obviated by section 39 of the Act of 1874. I respectfully agree with this view. At the time when the will was subscribed by the attesting witnesses in the case of *Thomson* the testatrix was still in life, and as she had not indicated any wish that her will should not be formally completed, the failure of the witnesses to sign *debito tempore*, if there was such a failure, might fairly be held to be an informality within the meaning and purview of section 39.

If it had not been for the dicta of certain eminent Judges, I should have thought, with Lord Trayner (20 R. 63), that although the Act of 1681 used different language in the case where the witnesses saw the granter subscribe, it did not intend to draw any distinction as regards the time at which the witnesses must subscribe between that case and the case where they merely heard the granter acknowledge his subscription. On the contrary, I should have thought that the words “then” and “saw” as used in the Act required that the signature of the attesting witnesses should be appended *unico contextu* with that of the granter, and that the statute was not complied with if at the time when he subscribed an attesting witness was merely in the position of a person who had seen the granter subscribe, it may be many years previously. The dicta to which I refer were purely *obiter*. The case of *Hogg v. Campbell*, (1864) 2 Macph. 848, was one where the witnesses did not see the granter subscribe but heard him acknowledge his signature, and the dicta of Lord President Colonsay were not necessary for his judgment. In the case of *Frank v. Frank*, (1795) M. 16,824, *aff.* 5 Pat. App. 278, an objection was repelled that the attesting witnesses who saw the granter subscribe signed their names within a quarter of an hour but not in the presence of the granter. Here again the dicta were *obiter*, as the witnesses signed *unico contextu* with the testator. Accordingly I do not think that there is any authority which requires us to draw a distinction between two cases which from the point of view of good sense and expediency are indistinguishable. If a witness who hears a person acknowledge his signature is required by the Act of 1681 to subscribe his name *unico contextu*, no reason can be suggested why a witness who sees the granter subscribe should be entitled to sign his name *ex intervallo*.

If it should be thought that the construction of the Act of 1681 which I have suggested is too strict or is contrary to established authority there are two other possible constructions which might be suggested short of the view contended for by the petitioners to the effect that a witness may append his signature at any time before the deed is founded on in Court. In the first place, one might construe the Act as permitting a witness to sign his name within a reasonable time after the granter had subscribed. Lord Swinton in *Frank’s* case, Bell on Deeds, p. 264, suggested this view



as one which would "save the general principle." Practically this formula would require a witness to sign *unico contextu* unless he was taken suddenly ill, in which case he could subscribe as a witness on his recovery. An alternative view would be to sustain the subscription of a witness if adhibited at any time before the deed took effect by delivery or the death of the granter. Even in the case of a delivered deed *inter vivos* the signature of a witness might, on the principle of mandate, be sustained if adhibited *ex post facto* during the lifetime of the granter, and with his authority express or implied. In all such cases the sounder view would be to hold that the witness had not complied with the Act of 1681, but that the informality could be cured by section 39 of the Act of 1874.

The fatal objection, as it seems to me, to the contention of the petitioners' counsel, is that it requires us to hold that a deed which is improbable in respect that it is not subscribed by two attesting witnesses may yet operate to confer an irrevocable and indefeasible right upon some person to make it probative, and therefore valid and effectual, notwithstanding that (in the case of a delivered *inter vivos* deed) the granter had changed his mind and interpellated the witnesses from subscribing, or, in the case of a *mortis causa* deed, that he had died leaving the deed incomplete and improbable. Such a result seems to me to be contrary to the plain language of the Act 1681, cap. 5, and also to legal principle and good sense. The only argument in its favour is that derived from the analogy of the decisions in regard to the filling in or the correction of a testing clause setting forth the designations of the writer of the deed and of the witnesses. It was argued quite fairly that the subscription of instrumentary witnesses was a purely statutory requirement, and that the language of the Act of 1681 requiring their subscription was less stringent than that which expressly struck with nullity any writ wherein the writer and witnesses were not designed. If, as the decisions show, the designations may be inserted or corrected at any time before a deed is founded on in Court or placed beyond recovery in a public register, why should the same not hold good as regards the subscription of a witness? The answer is that the decisions in question cannot be reconciled with the language of the Act—*per* Lord Campbell in *Cunningham v. M'Leod*, 5 Bell's App. 257—and are "perilous and questionable upon principle"—*per* Lord Jeffrey, *ibid.*, 3 D. 1295. In his opinion in the case of *Blair v. Assets Company* (1896), 23 R. (H.L.) 47. Lord Watson emphasised the anomalous character of these decisions and pointed out the "unpleasant consequences" in which they had involved the Judges of this Court by committing them to two propositions which were self contradictory. Decisions of a quasi-legislative character were at one time not unusual in construing the statutes of the Scottish Parliament, but in the case in point their expediency has been justified by the fact that Parliament enacted in the

Act of 1874 that the designations of the instrumentary witnesses may be appended or added to their subscriptions "at any time before the deed, instrument, or writing, shall have been recorded in any register for preservation or shall have been founded on in any Court, and need not be written by the witnesses themselves"—section 38. There is, however, neither precedent nor expediency in favour of holding that an instrumentary witness may validly subscribe his name at any time before a deed is founded on in Court or placed beyond recall in a public register. Accordingly I decline to affirm the proposition that although a will is null and void if not attested by two subscribing witnesses, it is at the same time valid and operative in certain respects.

But for the passing of the Act of 1874 a new and difficult question would have had to be decided at some time, viz., whether any person interested in upholding a deed could compel its production in order that he might make it probative by filling in the testing clause. On this subject Lord Neaves said in *Hill v. Arthur*, (1870) 9 Macph. 223, at p. 231—"Powers have been claimed over a testing clause which are very extensive, and in my opinion not a little anomalous. In the case of a deed *inter vivos* executed before witnesses it is competent to fill up the testing clause *ex intervallo*. The cases of *Blair* and *Shaw* show this. As to *mortis causa* deeds, I cannot doubt that the same power exists to a certain extent. The case of *M'Leod v. Cunninghame* settles that a testing clause in such a deed may be corrected after the death of the granter. A deed without a testing clause therefore is not a nullity. If otherwise well executed it is capable of being made a good deed, and the question thus arises, who has the power to do so? Can the next-of-kin do so or not as he pleases or as it suits his interest? Is it competent for the person in possession of the deed to fill up the testing clause if he be honest and to refrain from doing so if he pleases? I greatly doubt if that can be the law. I should be inclined to think that there is a duty to perfect the deed where there is the power to do so. It is not easy to find out the principle applicable to such cases. Very many deeds are signed before the testing clause is filled in; indeed that is the general practice. It is held that it may afterwards be filled in in virtue of a mandate to do so? And in whose favour is that mandate granted? In deeds *mortis causa* it would appear that such a mandate, if it exists, does not fall by death, but then there is the question, can anyone interested take up the mandate and execute it? The justice of the case would seem to require that in a deed well executed and wanting only the testing clause anyone interested in it should have right at least *de recenti* to obtain exhibition of it for the purpose of doing what is right. But no such point has yet been determined. I wish here to leave that question open."

This question can hardly arise now, seeing that any person interested may compel the production of a deed under section 39 of the

Act of 1874 in order that he may lead evidence of its having been executed by the grantor and subscribing witnesses. But the section assumes as a condition of its application that the attesting witnesses have already subscribed. It provides no machinery for compelling the production of a deed in order that the witnesses may subscribe it. In the case of *Murray*, (1914) 6 F. 840, the Court *ex parte*, and without expressing any opinion, allowed access to a testamentary deed in the Register of Deeds, Probative Writs, and Protests in order that the witnesses might sign their names as witnesses. In view of the decision in *Tener's Trustees* it was quite right that the petitioner should be allowed to complete the deed *quantum valeat*, but the Court directed a copy of its interlocutor to be added to every extract, so that the effect of the addition remained an open question. In this case the Court followed earlier precedents in regard to testing-clauses—*Miller v. Birrell*, (1876) 4 R. 87; *Caldwell*, (1871) 10 Macph. 99.

The best authority in favour of the view contended for by the petitioners is the following dictum in a case relating to a bill of exchange blank in the name of drawer—*A v. B*, (1738) Kilkerran, p. 70, M. 1436, No. 19:—"It was in the reasoning agreed that, as the creditor's name was in the bill, had it either been of his handwriting or if the drawer's name had been adjoined before it had been produced in judgment, it would have been good; in like manner as a bond duly signed before witnesses, but not subscribed by the witnesses before delivery, may thereafter be subscribed by them at any time before production in judgment. Whereas where the objection lies to a bill upon the Act 1696, the defect cannot be supplied after delivery." This dictum carries the petitioners the whole length which they require to go, and it is entitled to respect if only from its early date, within sixty years of the passing of the Act of 1681. In the case of *Frank v. Frank* (1796), as reported in Bell on Deeds, p. 255, Lord Methven referred to this dictum as "sufficient proof of the practice and of the opinion of lawyers upon that practice." The silence of the other Judges seems to me to be very significant. Not one of them refers to the dictum in question or to the analogy of the testing clause, though they could not have forgotten the leading case of *The Bank of Scotland v. Telfer*, M. 16,909, in which only six years previously it had been decided that a testing-clause could be corrected long after the execution of the deed, and after the bankruptcy of the grantor. If the law and practice had been understood to be as stated by Kilkerran, the objection to the formal validity of Mr Frank's deed that it had not been subscribed by the witnesses in presence of the grantor could not have been seriously debated and decided. There are copious references to the practice in the opinions of the Judges, but the practice to which they refer had to do with cases where the same two clerks subscribed a single time as witnesses to the signatures of a

number of different persons each of whom subscribed at a different place. This practice may or may not be permissible, but there is not a suggestion in the opinions of any Judge except Lord Methven that a witness might sign at any time before the deed was produced in judgment. As regards the practice of the nineteenth century, it is enough to refer to the statement in Mr Duff's Treatise on Deeds, published in 1838, pp. 16-17, to the effect that "it is not to be doubted that a delay to complete the deed until another day had commenced would be fatal." In *Baird's Trustees v. Murray*, already cited, the Lord President quoted from the printed form of particulars "which we all know is constantly in use among conveyancers directing parties who are to subscribe deeds how the thing must be done, and how the witnesses as well as the parties are to subscribe." It states that "where the same witnesses attest the subscriptions of parties signing the deed at different times or places, they must repeat their signatures." I refer to this form merely as showing that in the minds of practising lawyers the subscription of a witness was a thing which had to be done immediately, and which could not be left over like the filling in of a testing clause. The question whether an instrumentary witness can subscribe after the death of the grantor was, so far as I know, raised for the first time in the case of *Arnott v. Burt*, (1872) 11 Macph. 62, but the Court did not find it necessary to decide it. Lord Cowan said (p. 72)—"My impression was very strong that except in very special cases, such as were referred to in the discussion, an attempt to raise up a deed and make it a probative deed weeks after the death of the testator, even in good faith, is incompetent and illegal under the Statute of 1681. That was my original impression on looking at the case on its merits, but the argument addressed to us by Mr Crichton has a good deal shaken me in that conviction, and I reserve my opinion upon a consideration of the whole circumstances if a similar question were to arise for the judgment of the Court. I do not wish to commit myself finally to that view, but looking at the doctrine stated by the authorities on the subject I think it would be a very perilous thing indeed were any writer or agent to leave the completion of a deed by the subscription of the attesting witnesses till after the death of the testator." Counsel's argument as reported contains the following passage:—"The objection that a witness might thus have the option of making a man testate or intestate might be got over by the Court compelling an unwilling witness to subscribe, or holding his attestation unnecessary." This argument seems to carry its own refutation along with it. In the case of *Stewart v. Burns* (1877), 4 R. 427, the Lord Ordinary (Craighill), in an action for implement of a written contract of sale of heritage, decided that a writing which was probative when produced by the pursuer in Court could not be successfully impugned on the ground that the attesting witnesses had not been intended by either party to

act in that capacity but had subscribed the writing four months after its date at the request of one party—the other having repudiated the bargain. *Separatim*, he held that *locus penitentiae* was excluded by *rei interventus*. This interlocutor was affirmed by the Judges of the Second Division. Although they expressed opinions in favour of the view taken by the Lord Ordinary on the first point, they declined to put their judgment on that ground. Lord Ormidale, however, after referring to the law as to testing clauses, said—“In like manner I am disposed to think he” (any party having a legitimate interest to do so) “may *ex intervallo* get the witnesses to adhibit their signatures.” The next case—*Tener's Trustees v. Tener's Trustees*—is the case which we are asked to reconsider. It is very much in point as one of the witnesses to a gratuitous *inter vivos* deed signed after the death of the granter. The opinions of the Judges proceeded upon the ground that there was an informality of execution and that every informality may now be cured. Lastly, the petitioners' counsel laid great stress on a dictum of Lord Rutherford Clark in the case of *Thomson v. Clarkson's Trustees*, already referred to, to the effect that the Act of 1874 “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.” This dictum covers the case of a witness who was truly “warranted” in subscribing his name as an attesting witness though he had failed to do so *unico contextu* with the granting of the deed or even within a reasonable time thereafter. But without begging the whole question which we are now called upon to decide, one cannot say that a witness is “warranted” in signing and thus perfecting a deed after his warrant has terminated, as in *Stewart's* case, by a change of mind on the part of the granter of an *inter vivos* deed, or, in the case of a *mortis causa* deed, after the death of the testator.

After carefully considering the cases cited by the petitioners' counsel I have come to the conclusion that no authority deserving serious consideration can be cited in favour of the proposition that the Act of 1681 is complied with if an instrumentary witness adhibits his signature at any time before the deed which he attests is produced in judgment. The case of *Tener's Trustees* is no authority to that effect. It is a different question whether an informality of execution arising from the failure of a witness to subscribe his name *debito tempore* can be cured by the procedure pointed out in section 39 of the Act of 1874. In many cases I have no doubt that it could be so cured, but I draw the line so as to exclude two cases, viz. (1) the case where a party to a formally incomplete but delivered *inter vivos* deed upon which *rei interventus* has not followed either dies or having changed his mind prohibits the witnesses from attesting his signature by their subscriptions; and (2) the case where a testator dies leaving a testamentary writing which is improbable in

respect that it is not subscribed by two witnesses. My reason for excluding these two cases is that the qualification of an instrumentary witness does not consist merely in his having seen the granter subscribe or heard him acknowledge his signature. If he is no more than a witness to the fact of the party's subscription, why should the attestation of a concealed or surreptitious witness be open to objection? And yet the Lord Justice-Clerk and Lord Gifford in *Tener's* case shrank from saying that such an attestation would be valid. The only rational objection to a concealed witness is that he had no authority from the granter which entitled him to attest the deed and so to confer on it a special legal validity. But the very same objection applies to every instrumentary witness, however straightforward and honest, who happens to see or hear something which was not specially intended for his eyes or ears. If the granter did specially intend the witness to see or hear he impliedly authorised the latter to attest the deed by subscribing it. Accordingly, although no formal *invocatio testium* is required by our law, an instrumentary witness has no right to subscribe as such unless the granter of the deed authorised him expressly or impliedly to do so. It follows that such authority may be revoked by the granter at any time. No doubt a mandate *in rem suam* is irrevocable, but if one applies this principle to the attestation of deeds one makes an unattested deed as effectual as if it were duly attested. It follows that the right of an instrumentary witness to subscribe a deed depends primarily upon the mandate of the granter, and that such right comes to an end when the mandate is recalled or the granter dies. In my opinion the Court has no power under the Act of 1874 to sustain an attestation made by a witness who never had any authority to attest the deed or whose authority was terminated before he subscribed. If it is thought necessary to sustain the validity of a will in a case where the testator died immediately after subscribing it and before the instrumentary witnesses had time to do so, there is no necessity for being severely logical. One can construe the Act of 1681, which requires the subscription of the witnesses, as impliedly allowing them a reasonable time in which to sign, and as to that extent derogating from the strict principle of the law of mandate.

For these reasons I am of opinion that the prayer of the petition should be refused.

LORD PRESIDENT—As your Lordships are aware, I have not found the question we are to decide to-day attended with difficulty. In this, as in many other departments of law, a simple recital of the undisputed facts often serves to clear the issue and points decisively to the correct verdict. It is so, I think, in this case. The maker of this writing eagerly desired to execute it. She sent for her son to aid her. He came, and at her request he wrote every word to her dictation. She straightway signed it in his presence and in presence of her nurse. They were both competent and soothfast wit-

nesses. They both testify to the fact that they had seen the granter sign the writing by subscribing their own names. It is therefore beyond the shadow of doubt that the granter subscribed the writing, that she subscribed it in presence of two competent witnesses, and that these two competent witnesses attested the fact that they had seen her subscribe in the only way in which the law recognises as sufficient, to wit, by adhibiting their own signatures.

Here, therefore, we have before us a writing subscribed by the granter and appearing to be attested by two witnesses; and all that we are asked to do is, if we are satisfied with the evidence, to declare that this writing was subscribed by Mrs Walker as the maker, and by Mabel Hayward and John Walker as witnesses attesting her subscription. Why should we refuse, if we are satisfied of these facts? Because, say the respondents, at the date of the death of Mrs Isabella Thomson or Walker the document was incomplete, and the subsequent addition by John William Thomson Walker of his signature as a witness attesting the execution thereof, and of the designation of Mabel Hayward, was incompetent and invalid.

Now by the law of Scotland, as it stood anterior to the statute of 1874, I am of opinion that this objection would not have prevailed, and that the validity of the execution of this writing could not have been successfully challenged. The law as it stood at that date upon this point cannot, in the words of Professor Menzies, be better stated than in the words of the report of the first case, in which it was solemnly determined that the witnesses need not subscribe in the presence of the granter—*Frank*, M. 16,824—"The Act 1681 does not require, in point of solemnity, that the instrumentary witnesses should subscribe in presence of the granter, or that they should not lose sight of the deed in the interval betwixt his and their own subscriptions, nor has it been so understood in practice. The presumption of law is that witnesses will not subscribe a deed unless they are satisfied of its identity; and although there never ought to be any considerable interval, yet when such a case occurs it must be judged of upon its whole circumstances." That is taken from the report of *Frank's* case—a decision affirmed in the House of Lords.

The law of Scotland, therefore, anterior to the Statute of 1874, may, I think, be summarised thus, that witnesses who have actually seen the maker subscribe may attest that fact afterwards; that this is an irregularity, the immediate subscription of witnesses being the correct practice which ought always when possible to be observed; but that if the interval is considerable, then the validity or the invalidity of the execution of the deed will be determined upon a consideration of the whole circumstances. And if upon a challenge of the validity of the execution it was proved to the satisfaction of the Court that the maker of the deed really did subscribe it, that the witnesses really did see him subscribe, and that they thereafter attested that fact in the only way which the law recognises, the validity of

the execution of the deed would be sustained. No doubt, having regard to the aim and object of the Statute of 1681, to protect writings against the treachery of human memory and against difficulties of identification, the subscription of the witnesses at the time was the normal and the correct course. Nevertheless subscription *ex intervallo* was never fatal to the validity of the execution, but it required to be justified by satisfactory evidence, and if the evidence disclosed elements of doubt or suspicion, fraud or collusion, then the validity of the execution was seriously imperilled, and indeed the execution might be held to be null and invalid.

That I take to have been the law of Scotland anterior to the Statute of 1874, and accordingly under that law, if it had been proved to the satisfaction of the Court that the maker of the deed subscribed it, that the witnesses actually saw him subscribe it, and that they testified to that fact in the method prescribed by the Statute of 1681, then the validity of the execution could not have been successfully challenged. But when we have in view the provisions of the Statute of 1874, it appears to me that the case for the respondents is, not unarguable certainly, to use the words of Lord Young and Lord Trayner in the case of *Thomson v. Clarkson's Trustees* (20 R. 59), but I think very difficult. The scope and effect of sections 38 and 39, the sections devoted to questions of informality of execution, were, I think, never better stated than by Lord Justice-Clerk Moncreiff in the case of *M'Laren, &c. v. Menzies* (3 R. 1151), to which some of your Lordships have referred, where he says at p. 1174—"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 of 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*." Expressed in fewer words, the opinion of Lord Rutherford Clark in *Thomson v. Clarkson's Trustees* appears to me to be in complete harmony with the opinion that I have just read. He says (at 3 R. p. 63)—"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 dispensed 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"—that is to say, shall have actually seen with their own eyes the granter subscribe. "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 in execution." Now if that law be accepted as sound, as I think it is, it seems to me to apply in terms to this case.

Some of your Lordships seemed to think we are not dealing here with formalities, to which I answer in the words of Lord Rutherford Clark that under the Statute of 1681 "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 attaining this end. It seems to me 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," to make certain that the granter actually did subscribe the deed.

Others of your Lordships have held that inasmuch as this deed was left incomplete by the granter, it cannot now be completed, and that as it was left at her death so it must remain. I think a fallacy lurks here. The deed was not left incomplete by the granter. It was completed so far as the granter was concerned. She had done all that the law required. She had subscribed the deed in the presence of two competent witnesses. She could do no more. So far as she was concerned everything was complete. One witness subscribed at the time, the other subscribed a month later. Why should he refuse to subscribe a month later? Why should his subscription be invalid a month later? Why should it be invalid because of her death? Her death could not alter the fact. The fact was beyond recall. Her death could not in the slightest degree affect the fact that she had subscribed and that he had seen her do it, and when the witness subsequently adhibited his signature he merely said, in the only way which the law of Scotland recognises, that he had seen the granter subscribe. And it is inconceivable to my mind that the attestation of a fact which could not by any possibility be affected by the death of the maker of the deed, and could be asserted effectively prior to the death of the maker of the deed, could not be asserted subsequently to the death of the maker of the deed. The fallacy seems to me to be this, that attestation is regarded as something different from merely asserting in the only way which the law will deem effective a fact which the writer had actually witnessed. It appears to me therefore that signature subsequent to the death of the granter was valid, that the granter's death could affect it in no way whatever. The law of mandate I regard as wholly alien to this department

of our law. If mandate there was, surely it was a mandate to see her subscribe, and not a mandate to attest that fact subsequently at any time, properly at the time when the deed was subscribed indeed, but at any time to attest the fact which could not be affected one way or the other by the granter's death. It seems to me that to frustrate the known intention of the maker of this deed we should require to find ourselves constrained to hold that the witness was precluded on the death of the maker of the deed from asserting, in the only way which the law recognises, the fact which death did not alter and could not by any possibility alter.

Your Lordships have foreseen certain dangers. I foresee no dangers against which the law of Scotland has not provided ample safeguards, and adopting the words of Lord Justice-Clerk Moncreiff in the case of *M'Laren v. Menzies*, 3 R. 1151, at p. 1174, I find that in the case in hand the operation of the statute will give effect to the unquestionable intention of Mrs Walker as to the way in which her property should be disposed of after her death. With this knowledge, linked with the reflection that the judgment which we are to-day to pronounce is in harmony with the decided cases, with the understanding and practice of the profession, and with the opinions of eight Judges of this Court, more than one of whom was an acknowledged master in this domain of jurisprudence, I feel confidence in the opinion I have just expressed.

I move your Lordships to grant the prayer of the petition as amended at the Bar.

On 10th March the Court pronounced this interlocutor—"The Lords having, along with three Judges of the Second Division, considered the petition as amended, along with the answers for Henry Edward Leatham Whitwell and another—his grandson—and heard counsel for the parties, in conformity with the opinions of the majority of the Judges present, declare that the testamentary writing No. 11 of process was subscribed by Mrs Isabella Thomson or Walker, mentioned in the petition as maker thereof, and by Mabel Hayward and John William Thomson Walker, also mentioned in the petition as witnesses attesting the subscription of the said Mrs Isabella Thomson or Walker, and decern: Find both parties entitled to expenses, taxed as between agent and client, out of the estate of the said Mrs Isabella Thomson or Walker, as the account thereof shall be taxed by the Auditor, to whom remit the same for that purpose."

On 17th March a note was presented for the respondents, which stated, *inter alia*—"The respondents have been advised that the decision of the majority of the said Judges is not well founded in law, and the respondent Edward Leatham Whitwell is of opinion that it is his duty to do all he can to prosecute an appeal to the House of Lords on behalf of his son, who is a pupil, but he has no funds wherewith to defray the expenses of such an appeal unless the same can be provided from the trust estate of the

said Mrs Isabella Thomson or Walker. In these circumstances he has thought it proper to bring the position of matters before your Lordship with a view to obtaining an order on the trustees of the late Mrs Isabella Thomson or Walker to supply him with the necessary funds to appeal to the House of Lords, and he submits that in view of the circumstances of the case such an order should be pronounced."

The prayer of the note was—"May it therefore please your Lordship to move your Lordship's Court to pronounce an order ordaining the trustees of the late Mrs Isabella Thomson or Walker to make payment to the said Edward Leatham Whitwell on behalf of his pupil son the said Henry Edward Leatham Whitwell of £300, or such other sum as your Lordship shall think proper, to enable him to present and prosecute an appeal to the House of Lords on behalf of his pupil son, the respondent, Henry Edward Leatham Whitwell, against the judgment of your Lordship's Court and the three Judges of the Second Division, or to do otherwise in the matter as your Lordship may deem fit."

On 18th March the Court pronounced this interlocutor:—"Appoint the note for Henry Edward Leatham Whitwell and another to be intimated to the trustees of the deceased Mrs Isabella Thomson or Walker, mentioned in the note, and appoint hearing on said note to take place on Friday 20th March current."

On 20th March, in support of the prayer of the note, reference was made to *Crum Ewing's Trustees v. Bayly's Trustees*, 1910 S.C. 994, 47 S.L.R. 876; *Studd v. Cook*, May 8, 1883, 10 R. (H.L.) 53, 20 S.L.R. 566; and it was argued that the father was in the same position here as the *curator ad litem* in these cases.

Argued for the petitioners and for the trustees of Mrs Isabella Thomson or Walker—*Crum Ewing's Trustees (cit. sup.)* differed in that (1) it was a special case and the decree would have been a decree *in foro*, (2) the application was at the instance of a *curator ad litem*, (3) there was a divergence of interest between parents and children, and (4) the children there were in any event entitled to a portion of the estate. In *Studd v. Cook (cit. sup.)* the case was also between parent and child, and the allowance was made by the House of Lords to enable the *curator ad litem* to resist the appeal at the instance of the father.

LORD PRESIDENT—This is confessedly a novel and unprecedented application. The only specialty in the case, if it be a specialty, is that the judgment against the respondent was pronounced by the narrowest possible majority. If that were to be regarded as sufficient, then every litigant in this Court who had to submit to a judgment against him by a narrow majority would be entitled, it appears to me, to claim a contribution from his successful opponent to enable him to prosecute an appeal to the House of Lords. That of course would be entirely out of the question.

The only two authorities cited to us were

the cases of *Crum Ewing's Trustees*, 1910 S.C. 484, 994, and *Studd v. Cook* (1883) 10 R. (H.L.) 53. These were cases by parents against children, and involved specialties which are not present in the case before us. They cannot be regarded as in any sense precedents for this application, which in my opinion ought to be refused.

LORD DUNDAS and LORD MACKENZIE concurred.

LORD JOHNSTON and LORD SKERRINGTON were absent.

The Court refused the prayer of the note and decreed, and found no expenses due to or by either party in connection with the note.

Counsel for the Petitioners (and for Mrs Walker's Trustees in the Note)—Chree, K.C.—J. G. Robertson. Agents—Elder & Aikman, W.S.

Counsel for the Respondents—Macquisten—D. Jamieson. Agents—Sharpe & Young, W.S.

Tuesday, March 17.

## FIRST DIVISION.

[Lord Hunter, Ordinary.]

### MATHIESON v. ALLAN'S TRUSTEES AND ANOTHER.

*Property—Building Restriction—“Continued Permanently as Dwelling-houses.”*

The proprietor of a self-contained dwelling-house having let it to the Postmaster-General for the purposes of post office business, the owner of the adjacent house brought an action against him to prevent its being so used. The title under which the house was held contained the following restrictions—"Declaring that . . . shall only be entitled to erect self-contained lodgings or dwelling-houses and offices connected therewith on the said several steadings of ground, having polished ashlar fronts of the dimensions and in the architectural style or form delineated on such elevation plan . . . , and that the said lodgings shall always be maintained and kept in good and sufficient repair, and that the same, along with the sunk areas to be formed in connection therewith, shall be kept of the same dimensions and architectural style or form in time coming, and be continued permanently as dwelling-houses, and no part of any of the dwelling-houses . . . shall at any time be converted into shops, warehouses, or trading places of any description, and no common stairs shall be erected nor any house divided into flats upon any pretence whatever. . . ."

*Held*, on a sound construction of the titles, that the restriction was in regard to structure and not in regard to use, and that so long as the house remained structurally a dwelling-house, no valid