Tuesday, March 7.

SECOND DIVISION.

[Sheriff of Perthshire.

BUCHANAN *v.* BUCHANAN'S TRUSTEES.

Succession—Legitim—*Fund for Division*—*Donation* inter vivos—*Intention.*

A father went through the form of handing over his whole moveable property during his lifetime to a son, by discharging a debt of £700 due by the son to him, and paying over in addition the sum of £300, and taking three I O U's, one for £400 and two for £300 each, from the son in favour of three other children. These three documents of debt were all on one sheet of paper, and were handed to the father, who retained them in his custody. *Held* that there had not been a real intention to divest himself absolutely on the father's part, and that the fund had not passed out of his control, and was therefore subject to claims of *legitim.*

This was an appeal in an action in the Sheriff Court of Perthshire, at the instance of James Buchanan against his brothers Thomas Buchanan and Walter Buchanan junior, trustees and executors-nominate of their father, the deceased Walter Buchanan. The summons concluded that the defenders were bound to count and reckon to the pursuer for the amount of the personal estate which belonged to the deceased Walter Buchanan at his death, and to make payment to the pursuer of the share thereof due to him as *legitim.*

The defence was, that Walter Buchanan senior had during his life paid to the pursuer advances equal to the share to which he would otherwise have been entitled at his (Walter Buchanan's) death, and that he had divided the whole of the remainder of his estate among his children Walter Buchanan junior, and Elizabeth and Isabella Buchanan.

The defenders pleaded—"(1) The said Walter Buchanan having absolutely denuded himself of and paid away his whole personal estate during his life, his trustees and executors are not liable to account therefor; and *separatim*, not having intromitted therewith, no liability attaches to them *qua* trustees or otherwise. (2) The said Walter Buchanan having divided said personal estate among his said children, the said Walter Buchanan junior, Elizabeth, and Isabella Buchanan, before his decease, no claim thereon can in the circumstances be set up by the pursuer. (3) The pursuer having received from the said Walter Buchanan during his lifetime several sums on account of his patrimony, equal to, if not exceeding, his legal share of his father's estate, he is barred from claiming *legitim* or any other right which might have been competent to him. (4) The defender, the said Walter Buchanan junior, is bound only to pay to the pursuer the proportion of the share of said personal estate received by him required to give the pursuer an equal share with the other children in the event of his being found entitled thereto, and that only on his producing confirmation."

On a proof it appeared that the pursuer's father had for a number of years carried on business as a merchant in Callander, and that in the year 1861 he retired from business, having realised a considerable sum of money—the division and ultimate possession of which became the cause of much ill-feeling among the different members of the family, and especially between the pursuer on the one hand, and the defenders and their sister Isabella on the other. Both parties attempted to obtain influence over their father with reference to the possession of his money, and in 1867 Thomas and Isabella obtained the regulation of their father's affairs. The father had in 1859 executed a trust-disposition and settlement, and in 1869 Thomas and Isabella seemed to have resolved that their father should at once divest himself and dispose of his property so as to leave only a small amount which would fall to be distributed in terms of the settlement. In the month of August 1869, accordingly, the father paid over £1000 to the defender Thomas Buchanan, who at the same time granted three I O U's in favour of Elizabeth Buchanan for £400, and in favour of Isabella and Walter junior for £300 each. The £1000 was composed of a debt of £700 due by Thomas to his father, and £300 lying in bank in the father's name. Isabella gave the following account of the transaction:—"In the spring of 1869 my brother Andrew died. Previous to his death my father had (I knew) made a settlement. In consequence of his death, and in anticipation of some disturbance with my brother James, my father resolved either to make a codicil or divide his estate. He spoke to me about it. He resolved not to make a codicil, but to divide his personal estate among his children who had not already got their shares. He—said, 'I was at a loss how to deal with Thomas. He has paid back all he ever got from me, and he has now more than me, and I have no right to deprive him for his well doing.' My father added that Thomas had 'relieved him, for he would not seek anything.' He said at that time that James had already got his full share. This conversation took place in Thomas' shop. Thomas, Walter, and I were present. At this meeting the first thing done was to settle with Thomas, who paid up the £700—my father writing the receipt No. 16. There was nothing more done that day, but a day or two after that my father came again to the shop with £1000, which he said was all he had, and that he thought it would be better to give the £1000 to Thomas to keep and put out to interest on behalf of the rest of us. At the same time Thomas, at my father's request, granted an I O U in favour of Elizabeth Buchanan for £400, and an I O U in favour of Isabella Buchanan for £300, and also an I O U in favour of my brother Walter for £300. . . . I did not see any money paid. My father spoke about it not being necessary to pay legacy-duty in consequence of the division he was making. I saw my father give £300 to Thomas on the day that the I O U's were written out. I cannot say that I then saw the notes of the £700 that my brother Thomas had got from my father. I knew when the I O U's were written out that I was to get a share under my father's settlement of the rents of his heritable property. I did not keep my I O U, but at once gave it back to my father to keep, as he wished."

The defender Thomas Buchanan deponed as follows:—"My father at the time of division asked me to write out the I O U's, and he told me what names and sums to put in them. I

wrote them, and handed them to my father, and then he handed them to Isabella, who gave them back to my father, who handed them across the counter to Walter, who finally returned them to my father. They were then all on one sheet of paper. The I O U's were all on a single sheet till after my father's death, when they were separated."

The I O U's were in the possession of the father at his death, being found in a box in which he kept his titles and other documents, and which box was given by him to his daughter Isabella a short time before his death, but for safe custody only.

The Sheriff-Substitute (GRAHAME) pronounced he following interlocutor:—

"*Dunblane, 2d April* 1875.—Having heard parties' procurators on the closed record, proof, and whole cause—Finds, in point of fact, that the late Walter Buchanan, merchant, Callander, died on 12th May 1870, survived by three sons and two daughters, of whom the pursuer James Buchanan is the eldest son; That by trust-disposition and settlement, No. 9 of process, dated 16th June 1859, the said Walter Buchanan conveyed to the defenders and their brothers Andrew and John Buchanan (now deceased) his whole estate, heritable and moveable, for the purposes of division, as therein set forth, among his wife and children; That the defenders are the surviving trustees under said deed, and that, in particular, the defender Thomas Buchanan, with the consent and authority of his brother Walter, the other defender, acted as trustee under said deed, drawing rents and otherwise intromitting with the estate of his late father; That the pursuer is not proved to have received from his father any payment of money due to him as patrimony from his father's estate; That the pursuer repudiates said trust-disposition and settlement, and now insists in his claim to one-fifth part of the *legitim* of his father's estate; That in August 1869, about nine months previous to his death, the said Walter Buchanan is proved to have paid over to the defender Thomas Buchanan the sum of £1000, and that it is not proved that the said Walter Buchanan was then possessed of any other personal property; That at the date of the said Walter Buchanan's death his whole personal estate consisted of a half-year's (less three days') rent of his heritable property, amounting to £17, 16s. 3d., £10 in cash (in the possession of his widow), and £10, being the appraised value of the furniture belonging to him in the house in which he died—in all £37, 6s. 3d., and which, under deduction of £10 for his funeral expenses, leaves £27, 6s. 3d. as the total amount of his personal estate, subject to any claim for *legitim*: Finds, in point of law, that the pursuer, as one of his father's five surviving children, is entitled to a fifth part of the *legitim* of his father's estate, and which fifth part amounts to £1, 16s. 5d.; That the defenders, as acting trustees under said settlement, and as having intromitted with their father's estate, are properly called into Court in that character under the present action, and liable to account to the pursuer for *legitim*; Therefore decerns against them jointly and severally, as trustees foresaid, to make payment to the pursuer of the said sum of £1, 16s. 5d. as the *legitim* to which he is entitled, with interest thereon at the rate of five per centum per annum from six months after the date of the said deceased Walter Buchanan's death till payment: Finds the pursuer entitled to expenses of process, in so far as caused by the defenders' plea that the pursuer's claim for *legitim* was excluded by previous payments to him of his patrimony out of his father's estate; but otherwise, and in respect of the large amount claimed by the pursuer, and of the very small sum to which he has been found entitled as *legitim*, finds the defenders entitled only to modified expenses, of which expenses allows accounts to be given in, and when lodged remits the same to the Auditor of Court to tax and report, and decerns."

On appeal the Sheriff pronounced the following interlocutor:—

"*Edinburgh, 17th June* 1875.—The Sheriff having considered the reclaiming petition and answers, and whole process—Sustains the pursuer's appeal, and recals the interlocutor appealed from in so far as it finds, in August 1869, about nine months previous to his death, the said Walter Buchanan is proved to have paid over to the defender Thomas Buchanan the sum of £1000; and also the subsequent findings in the interlocutor; and in place thereof, finds that on the 7th August 1869 the said deceased Walter Buchanan paid to the defender Thomas Buchanan the sum of £1000, receiving from him in return three I O U's for the sums of £400, £300, and £300 respectively, in favour respectively of Elizabeth, Walter, and Isabella Buchanan: Finds that the said sum of £1000 was the property of the said deceased Walter Buchanan, and that no part of it was the property of the said Elizabeth, Walter, or Isabella Buchanan: Finds that the said I O U's were in possession of the said deceased Walter Buchanan at the time of his death, and that it is not proved that they were ever delivered to the said Elizabeth, Walter, or Isabella Buchanan respectively: Finds, therefore, that the said sum of £1000 formed part of the deceased's personal estate at the time of his death, and that the defenders, as his trustees, are bound to account for it, with interest at the rate of five per cent. from the said 7th August 1869 to the date of the deceased's death: Finds that at the date of the said Walter Buchanan's death the fund subject to *legitim* consisted of—(1) the said sum of £1000, with interest as aforesaid; (2) a half-year's rent of his heritable property, amounting to £17, 10s.; (3) £10 in cash; and (4) £10, being the appraised value of the furniture belonging to him in the house in which he died: Finds that it is not proved that the defenders have been unable to realise any part of the said sums, or that any delay or expense was incurred in the realisation thereof: Finds, in point of law, that the pursuer, as one of his father's five surviving children, is entitled to *legitim* of his father's estate, and that the same amounts to one-fifth of a third of the foresaid sums, with interest at the rate of five per cent. per annum from the date of the said Walter Buchanan's death, and appoints the pursuer to lodge in process a state showing the amount due to him on the footing of the foresaid findings being correct, and for which amount he will be entitled to decree: Finds the pursuer entitled to expenses; allows an account thereof to be lodged, and remits to the Auditor to tax the same and report: *Quoad ultra* adheres to the interlocutor appealed from, and decerns."

"*Note.*—The Sheriff cannot concur in the

judgment of the Sheriff-Substitute in so far as regards the sums of £400, £300, and £300, contained in the three I O U's, dated 9th August 1869. These I O U's bear to be granted by the defender Thomas Buchanan in favour respectively of Elizabeth Buchanan, the defender, Walter Buchanan, and Isabella Buchanan. It is clear, and in fact is not matter of dispute, that the money in respect of which these I O U's were granted by Thomas Buchanan, the debtor in these obligations, was the money of the deceased Walter Buchanan. It is also clear that these documents were in possession of the deceased at the time of his death. They were contained in a box in which he kept his titles and other documents, and which box was given by him to his daughter Isabella a short time before his death, but for 'safe custody' only. The Sheriff thinks that there is no evidence that the deceased ever delivered the I O U's to Elizabeth, Walter, and Isabella Buchanan respectively. He thinks that the deceased was in possession of them at the time of his death, as being his own property, and not in any sense as holding them on their behalf.

"In this state of the facts the Sheriff is of opinion that the deceased never divested himself during his life of his right to the sums in question. Upon proof of these facts the Sheriff does not doubt that the deceased would have been entitled during his life to recover these sums from Thomas Buchanan, the debtor in the obligations. On the other hand, he does not doubt that an action at the instance of Elizabeth, Walter, and Isabella Buchanan, to have their father, the deceased Walter Buchanan, ordained to deliver up to them respectively these I O U's, must have failed, in respect that until delivery they had no right either to the documents or to the sums contained in them. If this be so, the sums in question were *in bonis* of the deceased at the time of his death, and must be accounted for by his trustees.

"The fund for *legitim* consists of one-third of the moveable estate as realised, subject to deduction of a proportion of the expense of realisation, with interest from the date of realisation. In this particular case the whole of the estate seems to have been in possession of the defenders themselves, and there appears to have been no delay, loss, or expense in the realisation thereof; and the Sheriff has therefore given interest from the date of the death.

"If the Sheriff's judgment be well founded, it would rather appear that the pursuer would have been entitled to a larger sum under the trust-disposition than he will receive as *legitim*."

The defenders appealed to the Court of Session.

Authorities—*British Linen Co.* v. *Martin*, *&c.*, 8th March 1849, 11 D. 1004; *Keddie* v. *Christie*, 24th Nov. 1848, 11 D. 145; *Little* v. *Little*, 28th Feb. 1856, 18 D. 702; *Collie* v. *Paris' Trustees*, 22d Jan. 1851, 13 D. 507, Bell's Prin. 1584; *Hill* v. *Hill*, 1755, M. 11,580; *Hog* v. *Lashley*, July 1804, 4 Paton App. 581; *Cruikshanks* v. *Cruikshanks*, 10th Dec. 1853, 16 D. 168; *Watt's Trustees*, *&c.*, 1 July 1869, 7 Macph. 930; *Cuthill* v. *Burns*, 20th March 1862, 24 D. 849; *Morris* v. *Riddeck*, 16 July 1867, 5 Macph. 1036; *Wright's Trustees*, *&c.*, 15th March, 1870, 8 Macph. 709.

At advising—

Lord Justice-Clerk—[*After stating the facts*]—There are two questions here which are distinct—(1) Whether the right conveyed *ex facie* of these obligatory writings was incomplete by reason of their not being delivered; and (2) whether, assuming that the forms of law have been sufficiently complied with, that which was done was intended to take effect during the lifetime of the father?

On the first of these questions, although it is narrow enough, I should hesitate to say that the obligation was ineffectual for want of formal completion. The ordinary rule of law is that an obligatory writing found in the hands of a third party is presumed to be held for the creditor, as it is beyond the control of the granter. A strong example of the rule, where it is very explicitly enunciated, will be found in the case of *Turner*, M. 11,582, in which a bond granted by a purchaser for the price of lands sold, taken in the name of the son of the seller, was found effectual against the father, having been delivered to a third party. No doubt an exception has been admitted in some cases in which a father has taken rights purchased with his own money in the name of his children and has retained the written obligations in his own custody. The cases in the Dictionary are numerous, and far from being consistent—the case of *Hill* in 1756, M. 11,580, and of *Holwell* in 1796, M. 11,583, being apparently in contradiction to the prior case of *Hamilton* in 1741, M. 11,576, and the case of *Turner* in 1782. Even in these cases, however, it must be shown that the father was the real creditor, and that fact, along with the retention of the bond, raises a presumption against the form of the obligation and the ordinary rule, and a presumption that no immediate gift was intended. But wherever the father has communicated the right to his children, and has intentionally so written, spoken, or acted as to lead to the inference that he regarded the right as transferred, that will be sufficient to remove the presumption, and his retention will be in the character of trustee only.

The real question, therefore, is the second—not what was done in form, but what was intended in substance. Was the form of delivery which was gone through with the children intended to operate on instant completion of the gift, or was it only intended to make an apparent and simulate completion of it? If the first was intended I think the form was sufficient—the mere form must yield to the actual purpose.

I have found difficulty on this question also; but, on the whole, I have come to the conclusion that this case belongs to the same category as those of *Hog* v. *Lashley* and *Millie* v. *Millie*; and that the intention of all the persons engaged was to give an appearance of immediate right, so as to exclude the *legitim* and the legacy duty, while the actual command of the whole fund remained, and was meant to remain, with the father. I have come to this conclusion mainly and almost solely from the fact that these obligations were retained by the father, a proceeding for which no reason has been suggested, if an immediate and instant right was really contemplated. The avowed object was to disappoint the *legitim* and the legacy-duty—not to make over the money—and it was an attempt to reconcile objects which were incompatible, which must necessarily fail.

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

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

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

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

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

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

Wednesday, March 8.

SECOND DIVISION.

[Lord Curriehill.

SMYTH *v.* SMYTH.

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

The 39th section of the Conveyancing and Land Transfer (Scotland) Act 1874, provides "that no deed, instrument, or writing subscribed by the granter or maker thereof, and bearing to be attested by two witnesses subscribing, and whether relating to land or not, shall be deemed invalid, or denied effect according to its legal import, because of any informality of execution; but the burden of proving that such deed, instrument, or writing so attested was subscribed by the granter or maker thereof, and by the witnesses by whom such deed, instrument, or writing bears to be attested, shall lie upon the party using or upholding the same, and such proof may be led in any action or proceeding in which such deed, instrument or writing is founded on or objected to, or in a special application to the Court of Session, or to the Sheriff within whose jurisdiction the defender in any such application resides, to have it declared that such deed, instrument, or writing was subscribed by such granter or maker, and witnesses."

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

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

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

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