made on her behalf, the Lord Ordinary finds himself unable to see grounds on which to give effect to her alleged title. She had no such title, as he thinks, at the date of the assignation by Wm. Cuthbert, because the right to the I O U was then in his trustee and creditors; and if the pursuer cannot show how and when that right has now become effectual to her she must fail in her action."

(Before Lord Kinloch.)

BIRRELLS *v.* ANSTRUTHER AND OTHERS.

Reparation—Relevancy—Consequential Damage. An action of damages for breach of obligation dismissed (per Lord Kinloch) as irrelevant, because (1) the obligation never arose; and (2) the damage alleged was consequential.

Counsel for the Pursuer—Mr Campbell Smith. Agent—Mr James Somerville, S.S.C.

Counsel for the Defenders—Mr Fraser. Agents—H. G. & S. Dickson, W.S.

This was an action of damages brought by the widow and children of the late Rev. Alexander Gibb Birrell, schoolmaster of the parish of Pettinain, for reparation of the injury caused to them by his death, which the pursuers allege to have been occasioned by the defenders, who are the heritors of the parish, not providing him with a suitable house, which they were bound to do by the Acts 43 Geo. III., c. 54, and 24 and 25 Vict., c. 107. On account of the damp and cold of the house acting on his constitution, Mr Birrell's health gave way. In 1857 he was attacked by violent rheumatism, which afterwards set in in his right ankle with such severe effects that his foot had to be amputated. He died in 1864. The pursuers further aver that all the proper steps were taken by Mr Birrell to have his house put into proper condition, but that his request was set aside by the heritors on pretence of its being expressed in such terms as to preclude its being acted upon.

The Lord Ordinary sustained an objection stated by the defenders to the relevancy of the action. In his note his Lordship observed — "The Lord Ordinary dismisses the action on the ground that it is founded on an illegal breach of obligation, when the steps were not taken by the deceased schoolmaster necessary to raise the obligation; and the obligation therefore never arose. Another objection was pleaded against the relevancy of the action—viz., that the damage stated is not direct but consequential damage, which the law does not recognise. The Lord Ordinary is disposed to think that this objection is also well-founded. If a house which a particular individual is bound to keep in repair falls down and injures the inhabitant for want of the repairs stipulated, this may be considered direct damage raising a claim of reparation. But it is a different thing to say that the insufficiency of the house brought on a fit of rheumatism; still more that this rheumatism led to a supervening malady, and that this malady issued in death. And rheumatism, however painful, is in its nature by no means a mortal disease. It would be difficult to trace the death of the schoolmaster to this cause with the certainty which the law requires in every case of reparation."

Friday, Feb. 2.

FIRST DIVISION.

SPINKS *v.* INNES.

Bank Cheque—Mandate—Revocability—Proof—Onus Probandi. (1) A bank cheque is a mandate, and irrevocable if given for an onerous cause, but revocable if it is not; (2) A person alleging that a cheque was given to him in payment of a debt must prove his averment; (3) Circumstances in which held (aff. Lord Ormidale) that onerosity had not been proved.

Counsel for Pursuer—The Solicitor General and Mr Pattison. Agents—Messrs J. & W. C. Murray, W.S.

Counsel for Defender—Mr Patton and Mr Gifford. Agents—Messrs Patrick, M'Ewen, & Carment, W.S.

This action was raised by Charles Spinks, turner, Kirkgate, Leith, against John Innes, engineer, residing in Alloa, for payment of £100 contained in a bank cheque or draft, dated 21st April 1864, drawn by the defender on the manager of the City of Glasgow Bank, and payable to the pursuer. It was averred by the pursuer that the cheque was given in payment of money due to him "for advances of money made and services rendered by him to the defender at various times during a long course of years, when the defender was often in pecuniary difficulties, and pressed for money to meet the daily requirements of himself and family, and otherwise embarrassed and in trouble." The defender averred on record that on the Edinburgh Fast Day in April 1864, the pursuer, who knew that the defender had succeeded to a considerable sum of money, came to Alloa to visit him, and that after they had been drinking together for some time, the pursuer proposed that the defender should lend him £100 on the security of his property in Leith, which was already fully burdened. The cheque was therefore written out, but at the time it was done, "and when the arrangement was made for the security to be given for the loan, the defender was intoxicated, and incapable from intoxication of doing any business, or of understanding the nature of the transaction into which the pursuer endeavoured to induce him to enter." Next morning the defender went in search of the pursuer in order to accompany him to Leith to see after the heritable security, when he found he had gone to Glasgow. He therefore telegraphed to the bank there, and payment of the cheque was stopped. No value, he said, was given for the cheque by the pursuer, and it was fraudulently impetrated from the defender in the manner above described.

With the concurrence of parties, the Lord Ordinary (Ormidale) allowed a proof before answer. Thereafter his Lordship found as matter of fact (1) that no value was given by the pursuer to the defender for the cheque; (2) that when the cheque was obtained by the pursuer, the defender was in such a state of intoxication from excessive drinking as to be easily imposed upon and taken advantage of; and (3) that the pursuer, taking advantage of the defender when in that state, fraudulently impetrated the cheque from him. He therefore assoilzied the defender. The pursuer reclaimed, and the Court adhered.

The LORD PRESIDENT said—The question is whether the pursuer is entitled to recover. He does not allege any donation, but says the cheque was given in payment of a debt due to him by the defender. The defender, on the other hand, says in his evidence that he has no recollection of giving the cheque, and is quite oblivious as to what passed at the time; but that next morning when he found out that he had given it he went to the telegraph office and stopped payment. Which of these statements has been made out more satisfactorily? Was there a debt due by the defender to the pursuer, and may it reasonably be inferred that the cheque was given in payment of it? I think the Lord Ordinary has taken the right view. Taking the pursuer's own statement, he has only proved loans of very small sums—a few shillings or so at a time. As to the amount of the pursuer's incapacity at the time, that is somewhat obscure; but certainly there was a great deal of drinking, and no doubt the pursuer was not capable of attending his business as he should have been, and was thus more easily imposed on. Whether or not he was wholly incapable is a point on which the witnesses differ, and which depends on the different criteria on which they form their opinion, but on which I think it unnecessary to enter.

Lord CURRIEHILL—This cheque contains no personal obligation. It is a mandate to the bank to

pay a sum to the pursuer. Why, then, does the pursuer not sue the bank to pay? The answer is, payment has been stopped. But could it be stopped? Was the mandate revocable? If it is revocable, then it has been revoked. If not, then the pursuer should sue the bank and not the defender, or raise a multiplepoinding as was done in the recent case of Bryce (*ante* p. 114). If the mandate was granted for an onerous cause, it was not revocable. It is not alleged to have been gratuitous. It was therefore incumbent on the pursuer to prove that there was an onerous cause of granting. I think he has failed to do so.

Lord DEAS—The question is whether this cheque was given in payment of a debt, or whether it was intended for a different purpose which was not followed out. Its revocability depends on this. If it was given in payment of a debt, that was a good enough way of discharging the debt. If not, then it was revocable. We held lately, in the case of Bryce, that we should inquire *quo animo* the cheque was granted. Accordingly, what was attempted to be proved here was that the cheque was payment of a debt. The pursuer has failed in this proof, and it does not much matter whether the defender was drunk or sober at the time. I think if we were to hold on the proof that he was sober, the result would just be the same.

Lord ARDMILLAN—I don't think, as Lord Curriehill suggests, that the form of this action is material. We must get at the fact whether or not this cheque was onerously held. I have no doubt that these bank cheques are documents which are examinable to the effect of ascertaining this. It was not a gift; that is not alleged. It was not a loan; that is positively denied. It is said to have been payment of a pre-existing debt. The burden of proving that was on the pursuer, and he has failed in doing so.

PETITION—JAMES HOWIE YOUNG.

Records—Transmission of Deeds to England. The Court will not grant warrant for the transmission of deeds in the hands of the Lord Clerk Register to England, to be used as evidence at a trial there, on the application of a party not having a direct interest in the deeds, and where inspection of the principal deeds is not absolutely necessary.

Counsel for Petitioner—Mr Fraser. Agent—Mr James A. Robertson, S.S.C.

This was a petition for warrant for the transmission of certain deeds, now in the custody of the Lord Clerk Register, to England in order to their being used in a suit which is shortly to be heard before Vice-Chancellor Kindersley. The petition prayed the Court to "grant warrant to and authorise the Lord Clerk Register and Deputy-Keeper of the Records to proceed to London with the deeds or instruments for the purpose of exibiting the same to the Court of Chancery in England on all necessary occasions within six months from the date of your Lordship's warrant, and thereafter to return said deeds to the record." There was produced an affidavit by the petitioner's counsel in England to the effect that the deeds were in his judgment material evidence for the petitioner in the English suit; and that according to the law of evidence in England, and the practice of the High Court of Chancery, official or other copies of the said deeds or instruments will not be received as evidence, but the originals thereof must be produced.

Some years ago a warrant similar to that now asked was granted by the Court in order that a deed might be produced at the trial in the Court of Probate of the case of Shedden *v.* Patrick; and in that case documents produced before that Court by the Deputy-Keeper of the Records in Scotland were taken from that officer and retained in England for a considerable period, an undertaking by the Court for their return to the Record, even at the close of the trial, being at the same time expressly declined. Accordingly, before disposing of the present petition, the Court requested the Lord Clerk Register to make a communication to the Vice-Chancellor with the view of obtaining a distinct assurance that in the event of the petition being granted, the Court's custody of the documents will in no degree be infringed on. The Vice-Chancellor made a reply, in which he said—"I have no hesitation in declaring my individual opinion to be, that when the Court of Session allows its own records to be brought to England in the custody of its own officer, for the purpose of their being produced as evidence before an English court of justice, no circumstances could justify the English court in taking them away from such officer and retaining them without the consent of the Court of Session; and as at present advised, I should act upon that opinion, if such a question came before me. Beyond thus stating my own opinion, I apprehend it is impossible for me to give to the Court of Session the desired assurance, for not only is it within the limits of possibility that I might be convinced by other precedents that my present opinion is erroneous (though I do not think any such precedent could be found), but it is to be borne in mind that any decision of mine is subject to appeal, and I cannot of course answer for the views of the Appellate Court."

The Court to-day, on considering the affidavit and the Vice-Chancellor's letter, refused the petition.

The LORD PRESIDENT — The Vice-Chancellor's communication is of that courteous and candid nature which we might expect from that eminent judge, but I confess I have the very greatest repugnance to allowing the title-deeds of property belonging to other parties to be taken beyond our jurisdiction, especially on the application of a person who has no rights connected with the subject-matter of these deeds—but who finds in the narrative of them something which may throw historical light on a collateral matter in which he is interested.

Lord CURRIEHILL — This is a most important matter, deeply concerning the interests of the public who place their writings on our records for preservation. If the Court sends these documents to a foreign country, where they may be lost or detained, the security of the lieges will be greatly diminished.

Lord DEAS—What is wanted at the trial in England is a knowledge of the contents of the documents. There is no question of forgery, to try which it might be necessary to have the deeds themselves. In this case all that is required may be ascertained by means of official extracts, which is reasonably sufficient evidence. If another country chooses to make a law that official extracts are to be in no case admissible evidence, I don't think we should make the security of our records bend to such a law.

Lord CURRIEHILL—It might be desirable to ascertain whether if we refuse this petition the Court will accept of secondary evidence.

Lord PRESIDENT—That may be ascertained; but I very much agree with Lord Deas that whether they do so or not we should not give up the deeds.

Lord ARDMILLAN—I concur. This petitioner is not the owner of the deeds, nor is he directly interested in them.

Lord CURRIEHILL—There is in history a very good illustration of the danger of parting with these deeds. Cromwell sent a large portion of our records to the archives in England, and although after the Restoration they were sent back, they perished on the way.

The petition was therefore refused, but it was suggested by the Court that the petitioner might possibly adduce sufficient evidence of the contents of the deeds by means of official extracts or examined copies which had been subjected to a double comparison proved by two persons. Such evidence, the Lord President said, had been received in Committees of the House of Commons, and in peerage cases in the House of Lords.