tents of a promissory-note for £600, accepted by him jointly with his deceased brother, but alleged to have been so accepted solely for his deceased brother's behoof; (2) Whether he was also entitled to be relieved of certain expenses incurred by him in defending an action on the note brought against him by the holder.

In support of his allegation, that he was merely cautioner in the note, and that Alexander Thoms was the true debtor, the pursuer produced certain entries from the books kept by Alexander Thoms, and also a letter of acknowledgment by the latter of the same date as the bill. This acknowledgment was admitted to be signed by Alexander Thoms; but it was neither holograph nor tested; and the defender, in these circumstances, contended that it was not an effectual writ.

The Lord Ordinary (Jerviswoode) sustained the acknowledgment as an effectual writ, and decerned in terms of the summons.

The defender reclaimed.

Lord Advocate (Gordon) and Scott, for him, pleaded that the document was not *in re mercatoria;* that its date was not probative, and therefore it could not be assumed as *pars ejusdem negitii* with the note; and that, that being so, there were no grounds for excepting the document from the ordinary rule that writs to receive effect must be either holograph or tested. The defender also pleaded that, in any view, he was not liable for the expenses concluded for, these having been incurred by the pursuer in defending himself in an action in which he was ultimately found wrong.

Solicitor-General and Adam in answer.

The following cases were quoted in the course of the argument:—*Macandrew*, 13 D. 1111; *Hislop*, 5 D. 507; *Black*, 2 S. 118; *Crichton*, M. 17047; *Wallace*, M. 17056; *Edmonstone*, M. 17057; *Walker*, Hailes, 985; Wilson's Thomson on Bills, p. 2.

The Court to-day adhered to the Lord Ordinary's interlocutor, except as regards the expenses sued for, as to which their Lordships were equally divided, and which were thereupon given up by the counsel for the pursuer.

At advising—

Lord Cowan held that the acknowledgment and the entries in the books between them were good evidence of the pursuer's averment, and he agreed with the Lord Ordinary's conclusion on that ground, without finding it necessary to decide absolutely what would have been the effect of the acknowledgment if it had stood alone. His Lordship was, however, clear that the pursuer was not entitled to be relieved of the expenses sued for.

Lord Justice-Clerk, Lord Benholme, and Lord Neaves concurred in holding that the acknowledgment was *per se* sufficient. They held that it was properly *in re mercatoria* because the note was so; but, further, they thought that the statutes with reference to the authentication of writs had no application to a document which was merely used as evidence of a fact. These statutes were designed to secure that parties should not execute writings which created obligations otherwise than deliberately, and, to secure that, they provided in effect a power of resiling whenever the deed of obligation was not either holograph or tested. That was a principle which did not apply to a document which merely set forth a fact. A man did not need to deliberate about stating a matter of fact; and it was not material that a statement of fact might indirectly create an objection. The obligations contemplated by the statutes were obligations by which parties became directly bound, and which formed the substantive *vincula* upon which action could be raised. The fact was, that the question was just one of satisfactory evidence, and the effect to be given to a writ like the present depended just upon the value and effect which a judge or jury might be disposed to give to it in the circumstances of the case. Here there was no doubt about the genuineness of the signature, and there was certainly no presumption that the signature was not adhibited to the writing in the knowledge of its contents.

With regard to the question about the expenses, Lord Benholme could not presume, in the absence of information, that the litigation had been improper; and therefore was for adhering on this point also to the Lord Ordinary's interlocutor.

The Lord Justice-Clerk was inclined to take the same view, but desired some inquiry before deciding.

Lord Neaves agreed with Lord Cowan.

Their Lordships were unanimous in holding that the pursuer should get the whole expenses of the present process.

Agent for Pursuer—A. J. Napier, W.S.

Agents for Defender—Hill, Reid, & Drummond, W.S.

Saturday, December 21.

FIRST DIVISION.

MACPHERSON, PETITIONER.

Factor loco tutoris—*Removal — Resignation — Expenses.* A petition for removal of a factor *loco tutoris* was presented. An agreement was then entered into by the parties, the factor to resign, and agree to new factor being appointed, on withdrawal of the charges made against him in the petition; both parties to get expenses out of the estate. The Court *held* that the expense of the petition itself would form a good charge against the estate, but refused to give expenses to either party out of the estate.

This was a petition for removal of a factor *loco tutoris*, and appointment of a new factor. The petition was presented by the only surviving next-of-kin of the pupil, and the ground upon which the petitioner craved removal was, that the factor, with whom the boy had resided for some time, had totally neglected the boy's education and health, and was not a fit person to hold the office of factor *loco tutoris*.

Answers were lodged for the factor, denying the charges made against him, but stating his willingness that the boy should be sent to reside with some respectable third party.

The Court, after hearing counsel, remitted to the Sheriff to take a proof, but, before the proof was taken, the matter was settled on the footing of the petitioner withdrawing the charges made against the respondent in the petition, the respondent resigning his office, and agreeing to the appointment of a new factor *loco tutoris;* both parties to get their expenses out of the pupil's estate.

Both parties now claimed expenses out of the estate.

Mackintosh for petitioner.

M'Lennan for respondent.

Lord President—This petition is, so far, for the benefit of the pupil's estate, for it not only prays for removal of this factor, but for a new appointment. Supposing this factor had resigned voluntarily, a petition would have been necessary for appointing a new factor. The expense of the petition itself, therefore, will form a proper charge in the accounts of the new factor, and, so far, we do not require to find it. But I am against giving expenses to the parties, and I am not disposed to throw out of view that these two parties made it matter of bargain that they were both to get their expenses out of the estate.

Agent for Petitioner—Robert Hill, W.S.

Agent for Respondent—Colin Mackenzie, W.S.

Saturday, December 21.

SINCLAIR *v.* SINCLAIR'S TRUSTEES AND OTHERS.

Trust—Vesting. Circumstances in which *held* that vesting had taken place.

This was an action of multiplepoinding raised by Godfrey Sinclair, judicial factor appointed for the purpose of fulfilling the purposes specified in certain articles of agreement entered into between Henry Bertie Tollemache and other parties. The following statement of the facts of the case is taken from the opinion of Lord Curriehill:—"The fund *in medio* in this process of multiplepoinding consists of £1000, being part of a sum of £3000 which, in 1841, was entrusted by Lady Catherine Camilla Sinclair, spouse of Sir George Sinclair, to certain trustees for purposes which are set forth in a minute by these parties, executed in June of that year. The parties to that minute were Lady Catherine Camilla Sinclair; her husband, Sir George Sinclair; her daughter, Mrs Amelia M. L. Sinclair or Tollemache; and Henry Bertie Tollemache. The purposes of that trust are set forth in these articles of agreement. It was constituted in contemplation of a divorce being immediately obtained between Lady Sinclair's daughter and her husband. The issue of the marriage consisted of only one son, Wilbraham Archibald Tollemache, who, at the date of this agreement in 1841, must, I think, have been about three years of age. The trust which was the subject of that arrangement included not only that sum of £3000, but also two other sums amounting to £2000, contributed by Sir George Sinclair; but the present action is not concerned with that fund. Two trustees were appointed to administer the trust, but, they having declined, the trust was put under judicial management, and the judicial factor is now the raiser of this multiplepoinding. The purposes of the trust are numerous and somewhat complicated, but it is not necessary to trouble your Lordships with any statement as to more than one of them regarding the £1000 which alone constitutes the fund *in medio*. The first set of provisions applies to this sum of £3000, and provides that the revenue therefrom, to the extent at all events of £75 per annum, was to belong to the daughter, Mrs Amelia Sinclair; and ultimately, in certain events, she was to get the whole of the revenue, but not any part of the capital. That income was to be enjoyed by her during her life. As to the capital, one-third was disposed of by the fifth article of this agreement, and that is the article with which we are concerned in the present case. That article provides 'that after the death of the said Mrs Amelia Madeline Louisa Sinclair the said monies above-mentioned (consisting of the said sum of £3000 from Lady Catherine Camilla Sinclair's funds, and of two sums of £1500 and £500 from the funds of the deceased Sir John Sinclair of Ulbster and Sir George Sinclair, payable after the death of the latter), shall be held by the said trustees for the purposes after-mentioned, all as stated in the several following articles, that is to say, the sum of £1000, part of the said sum of £3000 (part of Lady Catherine Camilla Sinclair's funds), shall be held for behoof of Wilbraham Archibald Tollemache, the only child of the said Henry Bertie Tollemache and of Mrs Amelie Madeline Louisa Sinclair or Tollemache, and be payable to him on his attaining the age of twenty-four years; the interest, under the restriction in article tenth, to be applied for his use until he shall attain that age." Now, Wilbraham Tollemache attained the age of twenty-four years in July 1862, and died on 27th June 1863. His mother, Mrs Amelia Sinclair, survived till January 1864. Lady Catherine Sinclair predeceased both her daughter and her grandson, having died on 17th March 1863."

Lady Sinclair's trustees claimed the whole fund *in medio*, pleading (1) that Wilbraham having predeceased his mother, after whose death only the said sum of £1000 was to be held by the trustees of the settlement for his behoof, he had at his death no vested interest in that sum; and (2) that the said sum had reverted to Lady Sinclair's estate on the death of Wilbraham and his mother.

Henry Bertie Tollemache, father of Wilbraham, claimed one-half of the fund *in medio*, pleading that, according to the sound construction of the articles of agreement above set forth, the sum of £1000, forming the fund *in medio*, was vested in the deceased Wilbraham Archibald Tollemache from and after his attaining the age of twenty-four, or at least from and after the death of the said Lady Catherine Camilla Sinclair.

The Lord Ordinary (Jerviswoode) held that the £1000 was vested in Wilbraham Archibald Tollemache at the time of his death, and sustained the claim of Henry B. Tollemache.

Lady Sinclair's trustees reclaimed.

Adam for reclaimers.

John Marshall for respondent.

At advising.

Lord Curriehill (after narrating the facts of the case *ut supra*)—This being the state of facts, the difficulty is, how to apply to them the direction in the fifth article; for, on the one hand, the capital is to be paid to Wilbraham Archibald Tollemache, but then, as the commencement of that statement bears, it is after the death of his mother, Mrs Amelia Sinclair, that the money is to be held for his behoof, payable to him on his attaining the age of twenty-four. How is the direction to pay to him to be reconciled with the direction to hold for him from a date posterior to his death? And accordingly the competition here is between the representatives of Lady Catherine Camilla Sinclair and the representatives of Wilbraham Archibald Tollemache, the representatives of the former claiming, apparently, on the ground that there is a part of these funds the purpose as to which has become inoperative. The claim of Wilbraham's representatives, on the other hand, is