count thereof to be lodged, and remits it when lodged to the auditor to tax and report.

"*Note.*—The summons as it came into Court, and as it was first brought under the consideration of the Lord Ordinary, contained two alternative conclusions—the first for implement of an alleged obligation, whereby it is said that the defenders undertook to employ the pursuer constantly in light work, and for payment of £250—and the second for payment of £1000 damages.

"It was explained on the part of the pursuer, and the record shows, that the first of these alternative conclusions was founded on the assumption that the defenders had undertaken and bound themselves, by way of compensation for injuries the pursuer had sustained through their fault in 1846, to employ him in light work so long as he lived and was able for it, and that the defenders had recently broken that contract, and refused to go on with it, and were, consequently, for that breach liable to him in the £250 concluded for; and that the second alternative conclusion was to meet the contingency of the pursuer failing to establish the first, and being obliged to resort to his remedy against the defenders in respect of the injury he sustained in 1846, just as if there had been no such agreement as that upon which the first alternative conclusion of the summons was founded.

"But, after discussion, and when it is presumed the pursuer became sensible that he could not succeed in supporting his first alternative conclusion, he amended his summons to the effect of deleting from it that conclusion altogether; so that there is now only one conclusion—viz., that which was formerly the second alternative one.

"It appears to the Lord Ordinary that the allegations of the pursuer are not relevant or sufficient to support the action as it is thus now laid.

"The agreement, whereby it is said that the defenders bound themselves to employ the pursuer in light work, is averred in Article 4 of the condescendence. It is not, however, there said that the defenders were parties to that agreement, but only that certain individuals, 'acting on behalf of the North British Railway Company, undertook, as a compensation to the pursuer for his said injuries, and assured him that if he was ever able to work, he should be constantly employed by the defenders as long as he lived.' It was accordingly maintained by the defenders at the debate that they, a statutory company, who could only enter into contracts in conformity with their statutes of incorporation, could not be bound by any such verbal undertaking and assurance of the individuals referred to: and further, that the allegations of the pursuer are insufficient to admit of such an undertaking and assurance being rendered operative and effectual against the defenders, on the principle of *rei interventus* or otherwise.

"These appeared to the Lord Ordinary to be very formidable objections to his sustaining the action *quoad* the first alternative conclusion of the summons, but it has become unnecessary to deal further specifically with that conclusion, as it has now been, on the motion of the pursuer himself, deleted, and the summons to that effect held as restricted or amended.

"Then, in regard to the other, and only conclusion of the summons as it now stands, viz., that which was formerly the second alternative one, it appears to the Lord Ordinary that it cannot be sustained. He can find no relevant or sufficient allegations in the record to entitle the pursuer to maintain such a claim against the defenders, after the lapse of more than twenty years, during which not only was it not brought forward, but, according to his own showing, he had been receiving other compensation in lieu of it. It must, the Lord Ordinary thinks, be held, on the showing of the pursuer himself, that such a mode of redress as that now attempted to be enforced under the summons as it now stands was long ago waived and abandoned by him, and not only so, but also that in lieu of it he had betaken himself to another and different mode of redress, the full benefit of which he has reaped for many years. In this view of the pursuer's action, as it is now laid, the Lord Ordinary has dismissed it, being of opinion that his allegations are irrelevant, and insufficient to support it."

The pursuer reclaimed.

MAIR and KIRKPATRICK for him.

SOLICITOR-GENERAL and MACLEAN in answer.

At advising—

LORD BENHOLME—Damages are claimed in this action upon two grounds, and the Lord Ordinary has dismissed the case as laid upon both grounds. As to the first of these, I agree in thinking that no relevant case has been stated upon record; but as to the second my opinion differs from that of the Lord Ordinary. I think that the claim for damages is cut off by *mora* on the part of the pursuer. The word *mora* suggests mere delay, but I am free to admit that in the ordinary case delay of itself is not sufficient to establish a plea of *mora*, and that abandonment must be implied in the delay. But when the claim is one which requires constitution, such as the claim in the present case, I think the plea of *mora* will be justified by delay for a certain length of time in constituting the claim. In such a case presumption of acquiescence or abandonment is not required. I do not think that this poor man ever acquiesced or abandoned his claim against the Railway Company; but his failure to constitute a claim for so many years was an injury to the defenders, which justifies the plea of *mora*. I am of opinion, therefore, that we should recall the Lord Ordinary's interlocutor, and assoilzie the defenders.

The other Judges concurred.

Agent for Pursuer—Thomas Lawson, S.S.C.

Agents for Defenders—Dalmahoy & Cowan, W.S.

Monday, March 4.

FIRST DIVISION.

(Before Seven Judges.)

HALDANE (SPEIRS' JUDICIAL FACTOR) *v.* SPEIRS.

Proof—Loan—Writ or Oath—Admissibility of Parole Evidence—Bank Cheque.

The judicial factor on the estate of a deceased brought an action against a brother of the deceased to recover payment of a sum of £750, which he alleged was advanced in loan to the defender by the deceased a short time before his death, and produced a bank cheque for the amount, payable to the defender or bearer, drawn by the deceased on his bank account, with the defender's signature on the back. The defender admitted that he had re-

ceived and cashed the cheque, but explained that the cheque was given and received in payment of a debt of larger amount due to him by the deceased.

The Lord Ordinary (ORMIDALE) allowed both parties a proof before answer.

Held, by a majority of the seven Judges (diss. Lords Deas, Ardmillan, and Kinloch), that the allowance of proof at large was incompetent; that the loan could only be proved by writ or oath of the defender; and that the loan was not proved *scripto* of the defender by the bank cheque with the defender's signature thereon; but the pursuer *allowed* to produce any writ of the defender which he possessed or might recover.

The Reverend Alexander Speirs, minister of the parish of Kilsyth, died on 24th January 1871, survived by four brothers, one of whom is the defender Dr Douglas Speirs, and one sister. On 11th March 1871 the pursuer was appointed judicial factor on the estate of the deceased.

The purpose of the present action was to recover payment of a sum of £750, alleged to have been advanced in loan by the deceased to the defender.

The pursuer's averments and the defender's answer were as follows:—

"*Cond.* 2. Previous to the death of the said Reverend Alexander Speirs, the defender had acquired certain valuable superiorities of lands, situated in Glasgow, at a price of about £6725, and on or about the time of the purchase of these superiorities it was arranged between them that the said Reverend Alexander Speirs should advance in loan to the defender the sum of £750, to assist him in paying the price of the said superiorities; and, accordingly, on or about this date (Oct. 14th 1870), the said Reverend Alexander Speirs, in terms of the said arrangement, signed a cheque on his bank account kept with the Royal Bank of Scotland at Glasgow, for the amount of the said loan of £750, and he delivered the said cheque to the defender, who endorsed the same to the said bank, and received from them the said sum, which was put to the debit of the said Reverend Alexander Speirs' account with them, and was appropriated by the defender for his own uses. The cheque, signed by the said Reverend Alexander Speirs, and delivered to the defender, is herewith produced. The explanation in answer is denied.

"*Ans.* 2. Admitted that the defender received from the late Reverend Alexander Speirs the cheque which has been produced, and cashed it with the Royal Bank of Scotland at Glasgow. *Quoad ultra* denied: and explained that the said cheque was handed to the defender and accepted by him in payment of a debt of a larger amount due to him by the said Reverend Alexander Speirs for monies advanced to and for him, and for professional services rendered, and medicines furnished to him during the time he was minister of Kilsyth."

The defender's only plea was:—"The defender not having received in loan from the said Alexander Speirs the said sum of £750, and not having been at the time of the death of the said Reverend Alexander Speirs, and not being now, justly addebted in and resting owing the said sum, he is not liable in payment thereof to the pursuer as judicial factor, and is entitled to be assoilzied, with expenses."

The Lord Ordinary (ORMIDALE) pronounced the following interlocutor:—

"*Edinburgh, 5th December* 1871.—The Lord Ordinary having heard counsel for the parties, and considered the argument and proceedings—Before answer allows to the parties a proof of their respective averments, the pursuer to lead in the proof. Appoints the proof to take place before the Lord Ordinary, within the Parliament House, Edinburgh, on Friday the 22d day of December current, at half-past ten o'clock forenoon; and grants diligence to each of the parties for citing witnesses and havers.

"*Note.*—Had there been clear and distinct evidence, independently of the defender's statement in the record, of the pursuer's alleged advance of money to the defender, the *onus probandi* might be wholly on the latter. But in the circumstances of this case, and as nothing can as yet be held as established on the part of the pursuer—not even the payment to and receipt by the defender of the money sued for through the medium of the bank cheque libelled—except by the defender's statement, and as that statement can only be taken subject to all its qualifications, a proof has been allowed, in terms of the prefixed interlocutor. The pursuer will thus have an opportunity of proving, independently altogether of the admission in the defender's statement, that the bank cheque referred to is endorsed by the defender, and that the contents were drawn and received by him. Whether the pursuer will require or think it necessary to do more, in the first instance at least, so as to shift the *onus* over on the defender of proving his defence, will be for himself to judge.

"The course adopted by the Lord Ordinary, of allowing a proof before answer, appears to have been that which was followed in analogous circumstances in the recent case of *Kyle's Executors* v. *Williamson*, Jan. 28, 1871, 15 vol. Journal of Jurisprudence, p. 155; and also in the older cases of *Ross* v. *Fidler*, Nov. 24, 1809, F.C.; and *Fraser* v. *Bruce*, Nov. 25, 1857, 20 D., p. 115."

The defender reclaimed, and maintained that it was incompetent to allow a proof at large, since loan of money could only be proved by the writ or oath of the alleged borrower.

After the case had been debated before the First Division, their Lordships appointed it to be heard before seven Judges.

LORD ADVOCATE and SCOTT, for defender, argued—(1) Loan of money (at least beyond £100 Scots) can only be proved by writ or oath of the debtor; there can be no mixed proof, partly writ and partly parole; Stair iv, 43, 4; Erskine iv, 2, 20; followed by a series of cases, quoted by Dickson on Evidence, vol. i, § 592. (2) The cheque produced is not writ of the defender. It is not disputed that there are certain kinds of documents which the Court have held sufficient to establish loan against the granter, unless the document can be shown to be granted for some other purpose. But a cheque signed on the back by the payee not only affords no presumption of loan against the payee, but, if there is any presumption at all, it is that the cheque was given in extinction of a debt, since that is the purpose for which most cheques are given; Opinions of Lord Neaves in *Macdonald* v. *Union Bank*, March 29, 1864, 2 Macph. 977, and in *Gow's Exrs.* v. *Sim*, March 15, 1866, 4 Macph. 582. English authorities—Byles on Bills, 435; Taylor on Evidence, p. 182; Mullick, 9 Moore's Privy Council Reports, p. 69, Baron Parke.

SHAND and MAITLAND in answer—The cheque produced is writ of the defender; it proves the re-

ceipt of money by him, and therefore the onus lies upon the defender of showing that it was received on some footing other than that of loan. At least, the pursuer is entitled to a proof at large, for the purpose of showing *quo animo* the cheque was granted; *Ross* v. *Fidler*, Nov. 24, 1809, F.C.; *Martin* v. *Crawford*, June 4, 1850, 12 D. 960; *Fraser* v. *Bruce*, Nov. 25, 1857, 20 D. 115; *Thomson* v. *Geidie*, March 6, 1861, 23 D. 693; *Kennedy* v. *Rose*, July 8, 1863, 1 Macph. 1042; *Brodie* v. *Muirhead*, Feb. 1, 1870, 8 Macph. 461; *Kyle's Exrs.* v. *Williamson*, Jan. 28, 1871, 15 Journal of Jurisprudence, 155. The English authorities cited by the defender have no application, as in England a proof at large is always allowed.

At advising—

Lord President—This action is at the instance of the judicial factor on the estate of the late Rev. Alexander Speirs. The defender is the brother of the deceased Dr Douglas Speirs, a doctor of medicine in Glasgow. The purpose of the action is to recover a sum of £750 alleged to have been advanced by the deceased to his brother in loan, for the purpose, as is alleged, of assisting him in paying the price of certain superiorities. The defender admits that he got the money, but explains that the cheque by which it was paid was handed to him in repayment of a debt of larger amount due to him by the deceased. The record having been closed on this allegation and answer, the Lord Ordinary pronounced the interlocutor now under review. It appears to me that this being an action to recover repayment of a loan, met by the defender with the answer that the money was not advanced in loan, but handed over in payment of a previous debt, the order pronounced by the Lord Ordinary is in direct violation of one of the best established rules in the law of Scotland, viz., that a loan of money can be proved only by the writ or oath of the alleged borrower. This appears to me so simple that I should not have thought it necessary to enlarge upon the point, had it not been for my knowledge of the difference of opinion that exists among your Lordships. This is my apology for propounding principles and citing authorities which may give my opinion somewhat of an elementary character.

The rule laid down by all the institutional writers, is a strict rule, and I think it has been strictly and literally enforced. I shall illustrate this by two or three of the best known and most instructive cases on the point. I cite first *Stewart* v. *Syme*, December 12, 1815, F.C. In that case an action was raised against the children of the deceased Alexander Syme, and their factor *loco tutoris*, for repayment of a sum contained in a bill, alleged to have been for the accommodation of Syme, and, in order to show that the proceeds had been applied for Syme's behoof, the pursuer founded on a missive letter. Lord Pitmilly, Ordinary, found that this document, bearing to be an acknowledgment of debt by the late Alexander Syme to the pursuer, was destitute of the legal solemnities, and not actionable, and that the attempt to connect this informal document with the bill produced by the parole testimony of the persons said to have been present when these transactions were completed, was irrelevant and inadmissible. The Court adhered. This appears to me a very plain and instructive application of the rule.

The next case is *Hamilton* v. *Richmond*, in 1825, of which the best report is in 1 Wilson and Shaw, 35. A proof had been allowed in the Sheriff-court, although the action was both in substance and in form an action for repayment of a loan. The Court of Session, before whom the case had come by advocation, assoilzied the defender, without prejudice to the pursuer insisting in any other action which he might be advised to raise. A new action was raised. The defence was that the money was not given in loan, but to retire a bill for a special purpose. The Lord Ordinary, "in respect of the former judgment, and that the pursuer makes no reference to the oath of the defender," assoilzied the defender. The Court adhered, and remitted to the Lord Ordinary to receive a reference to oath. There was a reference. The deposition was found not to instruct the loan, and the defender was assoilzied. After a variety of procedure, an appeal was taken to the House of Lords, where the whole interlocutors were affirmed. This also is an excellent illustration of the rule.

The next case is that of *M'Master*, January 28, 1828, 7 S. 337. This was an action for money lent. Certain documents were produced in support of the allegation of loan. They were objected to as unstamped. The Lord Ordinary, thinking the case one of suspicion, unfavourable to the defender, ordered him to be judicially examined, but afterwards assoilzied the defender. The pursuer reclaimed. The Second Division quashed the whole proceedings, considering the judicial examination altogether irregular. Lord Gillies remarked—"It would be very dangerous to allow proof of a loan otherwise than by writ or oath, and I always understood that there could not be a judicial examination on points which could only be proved by writ or oath."

Lastly, there is the very remarkable case of *Birnie's Assignees* v. *Darroch*, January 12, 1842, 4 D. 366. General Darroch had for a course of years done his whole business with Greenwood, Cox, & Co., the well known army-agents. Mr Birnie was a confidential clerk of Greenwood, Cox, & Co. He was in the habit of making pecuniary advances on his own account to some of Greenwood, Cox, & Co's. employers, who required accommodation beyond what was the rule of the house in regard to overdrawing accounts, and amongst others, to General Darroch. These advances were sometimes made from Birnie's own pocket, and sometimes the money was raised on joint acceptances of General Darroch and Birnie. After a long course of such dealings, during which no settlement was made, Birnie died. His assignees raised an action against General Darroch to recover a large balance of advances said to be due by him. Lord Jeffrey, Ordinary, before answer, remitted to an accountant to examine the accounts, and to report what appeared to him to be the true state of accounts between the parties. General Darroch objected to this order, and maintained that each entry against him must be proved by his writ or oath. The Lord Ordinary's reasoning, in refusing to give effect to the defender's objections, is certainly very plausible, and is founded on the very peculiar circumstances of the case. The Court took a different view. As the report bears—"The Court not coinciding with the general view taken by the Lord Ordinary on the whole matter, but holding that the rule of law must be strictly applied, and that every advance and payment must be specially instructed by the writ of the debtor, or other written evidence connecting therewith," pronounced a detailed interlocutor, in which they dealt with the different items separately. This

was as strong and strict enforcement of the rule as could well occur. I refrain from any further citation of authorities for the purpose of showing that the rule has been strictly and literally applied.

It is contended in the present case that there is writ of the defender, or at least a writing, sufficient to overcome the rule of law, and to let in parole evidence for the purpose of eking out the written evidence. The document produced is a bank cheque, the bank cheque which, according to the admission of the defender, was given him by his brother for the purpose of drawing the money. The money was drawn from the bank, and the defender was asked to endorse the cheque, according to the usual practice, which he did, *i.e.*, he wrote his name on the back, which is endorsement in a popular, though not in any legal sense. I have considerable doubt whether a bank is entitled to require the holder of a cheque payable to bearer to put his name on the back as a condition of obtaining the money. The name is merely put there for the satisfaction of the bank, to show, if any question should arise, who it was that actually obtained payment of the cheque. The bank cheque proves nothing but the passing of the money from the deceased to the defender, about which there is no dispute. The mere delivery of money will not prove loan, or any other contract. The purpose of the delivery is a different question, to be proved by different evidence, according to the allegation of parties. The notion that the bank cheque is a writ of the defender in a question of loan, I am not able to understand. It makes not the least difference whether the money passed in the form of coin or in the shape of a cheque. In both cases it is just the passing of money from one hand to another. Does the passing of money from one hand to another create any presumption of a particular kind of contract? I apprehend not. If payment by cheque were to import something more than payment by gold or bank-notes, the practice of payment by cheques would be much curtailed. If in the innumerable cases in which cheques are used there should be presumption of some particular kind of contract between the granter and the grantee of the cheque, it would be highly inconvenient. The passing of a cheque is nothing more than a convenient way of passing money from one to another. Most cheques—I may say ninety out of every hundred—are drawn for the purpose of paying a debt of the drawer. If there is to be any presumption at all, the reasonable presumption would be that it was in payment of a debt. But I do not say that any presumption whatever should be held to arise from the drawing of a cheque, any more than from the delivery of money.

It is not unimportant to see what the law and practice in England is on a point of such great practical importance. The rule is clearly stated by Starkie on Evidence, vol. 2, p. 79 (3d ed.)—"The receipt of money by the defendant, on a cheque drawn by the plaintiff on his banker, *prima facie* imports a payment, and not a loan."

How is the production of this cheque to have any effect in affecting the rule which limits proof of loan to writ or oath of the defender? The case stands precisely as it would if the money had been paid in coin or notes, and admitted to have been paid by the defender.

It is necessary to distinguish between this document and documents held to constitute proof of loan. I mean acknowledgment of receipt of money. Many cases have occurred in which the alleged lender succeeded in establishing his case by holding such a document as the alleged borrower's writ. But I am not aware of any case where a document not in the hands of the lender was held to prove a loan. I am speaking of that class of documents known as I.O.Us., where the writer states in his own handwriting, and under his own signature, that he has received so much money, and gives that document to the lender to hold as his writ. That is held to constitute a loan. Such a document requires no evidence to support or explain it. The words are sufficient. The Court construes it as not only a receipt of money, but an implied obligation to repay. If the money had been received in discharge of a debt, it would have borne to have been in payment of such debt, and would have required a stamp. In advances of money it is not uncommon to grant a bill or promissory-note, and these require a stamp of a different kind. But simple acknowledgments or I.O.Us. are very frequent between parties who do not wish to use a negotiable document, and prefer a more simple way of evidencing the loan. And the Court has given effect to this class of documents. But they are not taken as part of the evidence, but as constituting the loan. No doubt you may require to set them up in this sense, that it may be necessary to prove the handwriting, or the delivery—a very essential point.

But I think that the view which has been taken of cheques is not to be left out of account. If we were to give effect to the Lord Ordinary's interlocutor in the present case, we should be going against the opinions of the whole Judges of the Second Division in *Gow's Executors* v. *Sim*, March 15, 1866, 4 Macph. 578. Lord Cowan and Lord Neaves expressed views precisely in accordance with those which I am now stating, and Lord Benholme said nothing inconsistent with them. In that case it was not absolutely necessary to pronounce on whether the cheque was of any value in proving the loan, but it was very natural for the Court to indicate their opinion, as the point had been adverted to in the able note of the Sheriff. Another case in the Second Division, *Rutherford's* v. *Marshall's Exrs.*, July 12, 1861, 23 D. 1276, is instructive on the general doctrine.

It remains to notice certain cases in which it was said that the rule of law was relaxed in circumstances like the present. The first is *Ross* v. *Fidler*, Nov. 24, 1809, F.C., which is worthy of all the more attention as the decision was pronounced in the time of Lord President Blair. Certain documents were produced for the purpose of instructing loan—(1) A letter by the defender asking for money; (2) a cheque, drawn by the pursuer, payable to the defender or bearer; (3) another letter, holograph of the defender, to the cashier of the bank, asking him to send the money with the messenger. The judgment proceeded entirely on a construction of these writings. A proof was allowed—improperly allowed as I think. The reporter says that the proof contained nothing material, and his remark is justified by the import of the proof, as it appears in the session papers. All the witnesses, with the exception of one, deponed to the receipt of the money, which was not disputed. One witness alone deponed to a statement by the defender of some debt due by him to the pursuer, not this particular debt. The Lord Ordinary (Armadale) pronounced an interlocutor—"Finds it constructed by the let-

ter of 23d of May 1807, and subsequent order by the pursuer on his cash account at Aberdeen, *and other evidence in process*, that the deceased Thomas Fidler received £30 from the pursuer, and that the defender has not instructed the same to have been in extinction of a debt due by the pursuer; therefore advocates the cause, and decerns against the defender for payment of the said sum." This interlocutor is cited to show that Lord Armadale pronounced on parole evidence, and the words, "other evidence in process," are founded on in support of this view. Surely this is a very rash conclusion. There was another letter produced by the pursuer, which is not specially mentioned in the interlocutor of the Lord Ordinary. The Court adhered. There are no detailed opinions given in the report. But it is obvious from the argument which is given, that the case turned on the construction of writing. Not a word is said about parole evidence. To infer that the Court intended by this circuitous and ambiguous route to discharge from the law of Scotland one of its best settled principles, is very rash. If it was the intention of the Court in 1809, presided over as they were by so distinguished a judge, to relax the rule, they would have embodied the result of their deliberations in a very distinct and well considered judgment. I find it impossible to give to the decision in *Ross* v. *Fidler* any such construction as that contended for by the pursuers.

The case of *Allan* v. *Murray*, June 13, 1837, 15 S. 1130, was a case of a holograph acknowledgment in these terms—"Received from A. B. £186, signed C. D." which was held, *in dubio*, to constitute a general obligation to repay. This was nothing more than one of the class of cases in which a writing in general terms, an I.O.U., is held to import a loan. There is a paragraph in Lord Jeffrey's note which deserves particular attention. He afterwards decided *Birnie's Trs.* v. *Darroch*, and was disposed in that case, on account of special circumstances, to relax the rule. But that he did not take the view which the pursuer contends for of *Ross* v. *Fidler* is demonstrated from his citing *Ross* v. *Fidler* as one of the cases which turned upon the construction of written documents.

In *Fraser* v. *Bruce*, Nov. 25, 1857, 20 D. 115, the signature of the defender in the pass-book of a Savings Bank was held to prove a loan. The circumstances were peculiar, and it was undoubtedly a narrow case. But it is easy to see that it was dealt with by the Court as turning upon the construction of writing. No proof was allowed, any more than in the case of *Allan* v. *Murray*. That which appeared on the face of the Savings Bank book, in the circumstance of the parties, was held sufficient to prove a loan. The interlocutor of Lord Benholme bears—"Finds that the pursuer has proved *scripto* the loan of £40 libelled." This is very different from what the Lord Ordinary has done in this case. He has not held the writing sufficient to prove a loan, but has allowed a proof.

I am therefore of opinion that we should recal the interlocutor of the Lord Ordinary; find that the pursuer has failed to prove *scripto* the alleged loan; but allow him to prove it by oath of the defender, if so advised.

LORD COWAN—As I concur generally in the exposition of the principles and authorities applicable to the question before us given by your Lordship, and in the result at which you have arrived, I shall confine myself to a statement of the general views which have led me to the same result.

This action is for repayment of money alleged to have been lent by the deceased, on whose estate the pursuer is judicial factor, to the defender. It is not doubtful that by the law of Scotland the only admissible proof in such a case is writ or oath. The sole question thus is, whether there exist specialties in the circumstances of this case, as set forth in the record, to exclude the operation of the general rule.

There is an admission in the record to the effect that the money was received by the defender, but qualified by the statement that it was received in payment of a debt of larger amount due to the defender, for monies advanced to and for the party represented by the pursuer, and for professional services rendered, and medicines furnished to the deceased. This admission, being thus inherently qualified, can be of no avail to the pursuer. He must, notwithstanding, establish by competent and admissible evidence his claim for repayment, on the grouud of the money having been lent by him to the defender.

The attempt is to assimilate the present case to a class of cases commencing with the decision in *Ross* v. *Fidler*, 24th November 1809, and the earlier decisions there referred to, and terminating with the decisions of more recent date, in which proof *prout de jure* or parole has been held competent and admissible. The principle which pervades all those cases is this—that where a document or writing admitting the receipt of money is given to the party advancing the amount by the party who receives it, it will be presumed that an obligation to repay is thereby constituted—unless the party who has received the money shall establish that it was paid to extinguish some counter obligation, or to satisfy some other demand which he had against the advancer. On a careful consideration of all the authorities that were referred to in the argument, I am satisfied that this is the principle which pervades one and all of them. I will not enter on the examination of those decisions in support of the conclusion at which I have thus arrived. This has been satisfactorily done by your Lordship, and it would be a waste of time for me to offer farther observation on the import and effect of those decisions. Some acknowledgment in writing there must be on the part of the alleged debtor, to which the creditor can appeal as the basis of his demand for the repayment of money, and presumably a written constitution of his claim, so as to throw the *onus* of destroying that presumption on the receiver of the money. One observation I may make on the case of *Fraser*, that the signature in the bank pass-book was an acknowledgment directly to the owner of the pass-book, and this was held to bring the case within the operation of the legal principle.

Taking this view to be correct, the inquiry on which the result of the present argument depends is, whether any such writing exists as entitles the pursuer to maintain that his claim for repayment of lent money can be established otherwise than by writ or oath. The only writing founded on is a bank cheque given by the pursuer to the defender, and which, on receiving the money from the bank, was indorsed by the defender. This is alleged to be a writing from which it may be presumed that the money was received, subject to an obligation to repay, and subjecting the defender to liability for the amount, unless redargued. But it is a mistake to view the indorsation on a bank cheque in any other light than that of a discharge to the bank of the amount having been paid by them to

the indorser. In this case the cheque bore to be payable to the bearer, and there was no necessity for an indorsation at all to enable the holder of the cheque to get the money. The indorsation was a voucher to the bank, but nothing more. It was not a writing given to the pursuer, or to any one on his behalf, in acknowledgment of the money, which could be the basis of a demand for repayment. The case stands no otherwise than if the bank had given the amount to the defender without requiring his indorsation. The defender has certainly got a payment of money from the pursuer; but there being no writing to support the pursuer's averment of its having been advanced in loan, he can have recourse only to the defender's oath. The case is not one which permits of parole proof. A loan of money cannot be established otherwise than by writ or oath of party; and it would, in my opinion, be of dangerous consequence were any other rule applied to such a case as the present. The transactions in which money is paid by means of bank cheques are innumerable. A demand for repayment may be made after both giver and receiver of the cheque are dead, and when it has become impossible for the representatives of the latter to show on what ground the money was paid. But it is unnecessary to enlarge on the legal character and effect of a bank cheque. I concur in what your Lordship has stated. The advancer of the money ought to have taken a written acknowledgment of its having been given in loan, or, at all events, to have taken some writing in his own favour, from which the obligation to repay might be presumed, if not redargued by evidence that it was received for an onerous consideration. I may add that, in stating these views I only give renewed expression to the principles given effect to in the opinions delivered by the Judges of the Second Division of the Court in deciding the case of *Gow's Exrs* v. *Sim*, March 15, 1866, and from which I have found no sufficient ground in the recent argument to depart.

Lord Deas—The late Rev. Alexander Speirs, minister of the parish of Kilsyth, and the defender Douglas Speirs, doctor of medicine in Glasgow, were brothers. On 14th October 1870 the deceased gave the defender a cheque on his account with the Royal Bank of Scotland, in Glasgow, for £750, payable to the defender or bearer. The defender presented the cheque at the bank, and having signed his name on the back of it, according to usual practice, he received the money and appropriated it to his own purposes. Thus far all is clear, and there is no dispute about it.

The Rev. Alexander Speirs died on 24th January 1871, unmarried and intestate, survived by the defender and three other brothers and a sister, whose interests are represented by the pursuer, who has been appointed judicial factor for the realisation of the deceased's estate; and who, in that character, has brought the present action for repayment of the £750, on the allegation that it was given as a loan to the defender to assist him in making up the price of certain valuable superiorities he had purchased for the much larger sum of £6725 or thereby.

The defender's whole defence to the action is stated in these words—"Admitted that the defender received from the late Rev. Alexander Speirs the cheque which has been produced, and cashed it with the Royal Bank of Scotland at Glasgow. *Quoad ultra* denied; and explained, that the said cheque was handed to the defender, and accepted by him in payment of a debt of a larger amount due to him by the said Rev. Alexander Speirs for monies advanced to and for him, and for professional services rendered and medicines furnished to him during the time he was minister of Kilsyth."

The defender does not state what the amount of the alleged larger debt due to him by the deceased was. He does not say how much of it consisted of advances to the deceased himself,—how much of it was advanced for the deceased to others, or who those others were. He does not say when or under what circumstances he rendered professional services and furnished medicines to the deceased, nor what the charges for these services and medicines were. He produces no medical account—no vouchers for sums advanced either to or for behoof of the deceased; and he does not say whether such account and vouchers do or do not exist.

I am not, at this moment, considering whether the defender may or may not be entitled to exercise this reticence. I am merely observing that such is the way in which he states his defence; and I am not surprised that it does not encourage his brothers and sisters, or the factor who represents them, to trust their case implicitly to his candour and veracity. On the other hand, it must be observed for him that he does not, on the record, attempt to take shelter under the plea that the loan can only be proved by his writ or oath. His only plea in defence is this—"The defender not having received in loan from the said Alexander Speirs the said sum of £750, and not being at the time of the death of the said Rev. Alexander Speirs, and not being now, justly indebted in and resting-owing the said sum, he is not liable in payment thereof to the pursuer as judicial factor, and is entitled to be assoilzied, with expenses."

His defence therefore, when his plea in law is taken in connection with his statement already quoted, just comes to this—that, in respect the money was received by him in payment of a larger debt made up in the way already mentioned, he is entitled to absolvitor. That is the ordinary mode of pleading, in this Court, when the result is to depend upon a general investigation by proof on both sides; and why the defender should have the honour thrust upon him by his advisers and the Court which he does not claim for himself in the record, of having the whole matter perilled on his oath of reference, I do not well see. I shall not, however, on this account, evade considering the legal question which the plea maintained at the Bar would raise.

The Lord Ordinary's interlocutor under review is "before answer, allows to the parties a proof of their respective averments,—the pursuer to lead in the proof;" and his Lordship, in his Note, makes some observations pertinent to the question of *onus*, which it is sufficient to refer to without quoting them.

I need hardly say that the words "before answer," used in this interlocutor, imply by our practice important reservations, leaving it open afterwards to deal with all questions of law as freely as they might have been dealt with before the proof was allowed. This practice has been found a most convenient one, and I should be sorry to see it circumscribed. Such a reservation does not imply that the Judge or Commissioner who takes the proof may receive evidence which is not legal evidence at all,—such, for instance, as hearsay evidence; but it does, I think, imply, when

such appears from the nature of the case, or the observations made on the Bench to have been the intention of the Court, that the question how far parole proof is or is not admissible, on particular points, is to be left open for future consideration. I have no doubt that the Lord Ordinary so meant it in the present case; but, if this could be thought doubtful, it would be easy, while adhering *quoad ultra*, to introduce such an understanding into the interlocutor as was expressed in the recent case of *Stewart*, Jan. 16, 1869, 41 Scot. Jur. p. 213. One advantage of such a course is this—Facts and circumstances of real evidence may sometimes be admissible in a case in which direct oral testimony as to verbal acknowledgments, or as to what passed verbally between the parties, may not be admissible. Facts and circumstances of real evidence can always be competently proved by parole; and it is often not easy or safe to attempt to fix beforehand what portion of the parole testimony shall fall within the one category or the other.

In the present case, supposing the proof allowed by the Lord Ordinary had been led, it is quite possible that a distinction might have been taken by some Judges between the competency and effect of that part of it which went to establish facts and circumstances of real evidence and that part of it which related to verbal acknowledgments or conversations between the parties; and a question might thus have arisen, To what extent the evidence was to be considered of the one character or of the other?—a question which could be much more safely considered with the whole proof before us than it could possibly be by anticipation.

Your Lordships are, of course, familiar with the difference between the real evidence of facts and circumstances and direct oral testimony, and no illustrations are therefore necessary to point it out. That no such real evidence can be adduced in this case is more than we are entitled to assume. It is neither necessary nor regular for parties to condescend upon their evidence in the record; and the proposed exclusion of all evidence, except two specified kinds, must proceed on the footing that every other kind of evidence (although it may exist) is incompetent.

Suppose that in the present case the pursuer were to prove to demonstration that the defender never had the means of making advances to or for his late brother,—that, in point of fact, he never did so,—that the defender never attended him professionally,—never prescribed for or furnished him with any medicines,—that, in fact, the deceased was never ill, and so neither got nor required either attendance or medicines while the defender was living or practising within reach of him,—it would be a strong thing, I think, to say that, although the whole defence was thus negatived by the real evidence of facts and circumstances, the pursuer's case must fail, because the indorsed cheque was not to be regarded as the writ of the defender. Yet such must be the result of a judgment finding that the indorsed cheque cannot be supported as the defender's writ, in the sense of law, be the facts and circumstances what they may. To justify such a judgment, all the facts and circumstances I have just supposed, or others equally favourable, must be assumed to be true, and held altogether irrelevant.

Again, suppose that, in the course of the proof, writings are recovered and produced,—such as do not, *ex facie* and in their terms, prove the debt, but capable of being construed and explained by such proof as the Lord Ordinary has allowed,—these, of course, would be valueless under such an interlocutor as is now proposed to be pronounced; whereas, under the Lord Ordinary's interlocutor, the result might have been conclusive in favour of the pursuer.

In deciding beforehand, and in the dark, against the admissibility of certain kinds of evidence, we are bound to assume the most favourable view possible of the nature of that evidence for the party who is excluded from adducing it. There is great risk of injustice in that course, which by the course contemplated by the Lord Ordinary would have been avoided.

Your Lordship, however, as I understand, is of opinion that the evidence allowed is so clearly incompetent, that it ought not to be allowed, even before answer. I cannot concur in that opinion.

It is a rule of our law, or rather of our practice—for the rule rests on practice merely—that a loan of money must be proved either by the writ or by the oath of the debtor. But that does not mean that the writing must, in all cases, be in its terms an acknowledgment of the loan, or an obligation to repay. If the writing be in these terms, it is, of course, of itself conclusive. But, although not in these terms, it may be proved by other evidence, and, particularly, by the real evidence of facts and circumstances, that such is the true construction and effect to be attached to it.

If there be no writing at all under the hand of the alleged debtor, to the support or explanation of which the proof can be directed, then of course the rule applies, and parole evidence is excluded. The cases quoted by your Lordship were all dealt with as cases of that kind; and I agree with your Lordship in describing them as affirming a trite and familiar doctrine; which, however, I must add, is not here called in question, and has no application to this case.

I shall notice these cases in their order. In *Steuart* v. *Sime, &c.*, Dec. 12, 1815, F.C., the action was against pupil children and their factor *loco tutoris* for payment of a bill, said to have been for their deceased father's accommodation, but on which his name did not appear in any capacity. The only other document was an acknowledgment, which did not mention the bill, and which it was held could not be looked at, as it was neither holograph nor tested. It is not surprising that in these circumstances parole testimony was held inadmissible to connect the inept acknowledgment with the bill.

The case of *Hamilton* v. *Richmond, &c.* (*Lindsay's Trs.*), Jan. 21, 1823, 2 S. and D. 132, and H. of L. March 8, 1825, 1 W. and S. 35, was a case in which it was not pretended that there was any writ whatever, either acknowledging or implying a loan by the pursuer. The question simply was the import of an oath of reference.

In *M'Master* v. *Brown*, Jan. 28, 1829, 7 S. and D. 337, the Lord Ordinary, holding that the only documents produced could not be looked at, as being unstamped, appointed the defender, his wife and agent, to be judicially examined, but "the Court," as the report bears, "holding that the case was not yet fit for decision, and that the judicial examination had been irregular, without deciding anything on the merits, recalled the Lord Ordinary's interlocutor; found that the whole proceedings since the defences were given in were irregular and inept, and remitted the case again to his Lordship, reserving all questions of expenses."

The rubric of the case of *Birnie's Exrs.* v. *Darroch*, Jan. 12, 1842, 4 D. 366, is in these words—"In an action for repayment of money advances, the rule of law strictly applied that cash advances and payment must be specially instructed by the writ of the debtor, or other written evidence connecting therewith." There is nothing in this doctrine to affect the present case. And still less will anything bearing upon it be found in the elaborately detailed interlocutor of the Court, which, on the contrary, shows how very peculiar and circumstantial the whole case was.

The question here is, not whether there is a rule of practice requiring that there shall be writ of the debtor in an action for loan, but whether that rule, which I assume to exist, has been satisfied in the sense in which it has been understood in the course of the same practice which established the rule. Upon that question the above cases humbly appear to me to be valueless.

I pass on therefore to observe, that it is not essential that the writing which satisfies the rule of law should have been intended as a document of debt. It may be a letter soliciting time to pay the particular debt, or making excuses for not having yet paid it.

Neither is it essential that the writing should have been addressed or delivered to the creditor, or that it should even have come into his custody. It may be an entry in the debtor's handwriting in his own books of the specific loan, with day and date, of the very existence of which entry the creditor was ignorant till he recovered it under a diligence against havers.

In the present case the cheque libelled on, with the defender's signature on the back of it, constitutes, in my opinion, a writing under the defender's hand, whatever may be held to be the effect of that writing. The signature is undoubtedly referable to the contents of that cheque, and the document with that signature upon it was left with the defender's bankers, who were his hands and instruments, and fell to be given up, and was given up by them to him as his own document; and the question now is, whether it is incompetent to prove by the real evidence of facts and circumstances, or otherwise than by oath of reference, that the transaction to which the cheque relates was truly one of loan?

That it is proved by the defender's signature on the back of the cheque that he received the money cannot be disputed. Whether it was necessary or not for the bank to take that signature, as it certainly would have been if the cheque had been payable to order, is not material. The undoubted object of taking the signature was to show that the defender got the money. How the case would have stood if he had got the money without indorsing the cheque is a question which may be left for decision when it arises. It is not the present question.

Now, the general rule laid down in the books, and sanctioned by the decisions, is, that when it is competently proved that one man has received a certain amount of another man's money, the recipient must account for and repay that money, unless he can establish that he received it on some other footing than that of loan or an obligation to repay. That rule, however, I readily admit, requires modification in a case like the present, so far as the *onus* of proof is concerned; because a bank cheque is used for so many different purposes that, until some inquiry has been made, or the relative position of parties admitted, there is little presumption as to its purpose one way or the other. But that, I think, raises only a question of *onus*, and does not at all affect the well established and more important rule of practice—that when there is written evidence that one man has received the money of another, inquiry is competent *prout de jure* to ascertain *quo animo* or on what footing he so received the money.

That this rule is applicable to the case of money received under a bank cheque is directly established by the well known case of *Ross* v. *Fidler*, Nov. 24, 1809, F.C. That it a case of the highest authority, decided unanimously by the First Division of the Court, under the presidency of President Blair. The soundness of the judgment has never been questioned. On the contrary, it has been referred to and quoted as a leading authority, in this branch of the law, ever since its date, now considerably more that sixty years ago. It proceeded on the principle laid down in the much older case of *Ogilvie* v. *Alexander*, Jan. 7, 1703, M. 11,510, the report of which bears—"The Lords were clear that receipt of money did, in the general imply repayment;" that is to say, an obligation of repayment. Also in the case of *Donaldson* v. *Walker*, June 11, 1711, M. 11,511, in which Walker's holograph receipt, which simply bore that he had received 400 merks from Boag, acting for Donaldson, was held a good ground of debt against Walker, "unless," as the report bears, "they would produce some evidence that Walker was creditor in that sum to Donaldson."

The peculiar importance of the case of *Ross* v. *Fidler* is, that the principle of these more ancient cases was there held applicable to money received under a bank cheque, after proof had been allowed and led of the purpose for which the cheque had been granted, and the money drawn. There was no writing whatever which specified that purpose. The terms of the cheque were—"Pay to Thomas Fidler or bearer £30 sterling, which place to my debit in my cash account." The letter written by Fidler, and sent by his carter (George Kirkton) to Ross, simply bore—"Please give me an order on your cash account for £30;" and the letter sent by Fidler to the cashier of the bank two days afterwards simply asked the cashier to send the contents of the cheque by Kirkton—the object obviously being to accredit the country carter, Kirkton, to the bank agent in Aberdeen, as a duly authorised messenger.

After Thomas Fidler's death, Ross brought an action against his representative, George Fidler, before the Magistrates of Aberdeen for the £30 as money lent. The report bears that "the defender pleaded that the money was not a loan, but a payment in extinction of debt." The reporter adds—"After various proceedings, wherein a proof was taken, in which there was nothing material, the cause came before the Court of Session by advocation." But this last is a mere loose statement by the reporter—inaccurate in both its branches, as we find from the Session Papers preserved in the Advocates' Library, which enable us to see what the proof was, as well as the opinion which was entertained of the competency of that proof, and the importance which was attached to it.

From the terms of the report it would naturally be infered that the allowing of a proof had been the act of the magistrates, in accordance with their own views, and that the case did not come to the Court of Session till after that proof had been led

But the reverse is the fact, as the Session Papers show. The magistrates on 12th March 1808 had pronounced this judgment:—"Having advised the process, finds that the vouchers founded on do not instruct the libel, and that the proof offered by the pursuer is incompetent; assoilzies the defender, and decerns."

Against this judgment the pursuer presented a bill of advocation, followed by answers and replies, on advising which Lord Polkemmet, Ordinary, on 3d May 1808 remitted "to the magistrates, with this instruction, in the present very doubtful case, to allow excerpts from account books, and any other written evidence, on either side, to be produced, and any witnesses to be examined who shall be suggested by either party, whose evidence may tend to instruct, one way or other, whether the draught for £30, asked by the deceased Thomas Fidler, and given to him by the complainer, was a loan, or was in payment of a debt by the complainer to the said Thomas Fidler; and after such production shall have been made, and witnesses examined, that the magistrates shall do farther as they shall see just."

When the case went back to the magistrates the only additional productions made by or recovered from either party, applicable to their transactions with each other, were some entries in the pursuer Mr Ross's rental book, of transactions between him and the deceased Thomas Fidler in the previous year, 1806, on which a balance of £5, 4s. 7d. was brought out as having been due and paid to Fidler. There were no entries whatever applicable to the year 1807, in May of which year the loan was said to have been made, and consequently it is clear that no additional writings were got or produced in aid of the pursuer's case.

The parole proof was short, but far from immaterial. George Kirkton (the deceased's messenger) proved that he drew the £30 from the bank for the deceased, and handed it over to him. James Calder proved "that he was present when the preceding witness (Kirkton) delivered to the deceased Thomas Fidler the sum of £30 sterling, which the defunct mentioned to the company present was given to him by the laird from his cash account." Robert Moir, the teller of the bank, proved that he paid the contents of the cheque to Kirkton; and William Mitchell, who was well acquainted with the deceased, proved "that he heard the defunct mention several times, some little time before his death, that the pursuer had been a very good friend to him, and had given him money, but did not mention the precise sum. Depones that the defunct also mentioned that the pursuer had been so very good as not to ask any voucher for the money, nor to limit him to any precise term of payment." The same witness farther deponed to his belief of having been present when Kirkton delivered the money to the deceased in Spring 1807, and although, as to this, he said he was not exactly certain, the circumstances he was able to mention showed that he had been present; for he added that "this was in the afternoon, and James Calder, a preceding witness, was also present. That a girl mentioned that George Kirkton wished to see him, upon which the defunct asked Kirkton to come ben, as there was no secret in the business, as it was money he had brought from Aberdeen that day, and was getting from the pursuer's cash account."

The magistrates on 3d December 1808 pronounced this interlocutor:—"Having advised the proof adduced, and productions made by the parties, and whole process, finds no sufficient evidence brought forward to instruct the claim libelled; adheres to the decree of absolvitor of 12th March last, and decerns."

A second advocation was then brought, upon which Lord Armadale, Ordinary, on 23d May 1809 pronounced the interlocutor quoted in the report, by which he found "it instructed by the letter of 23d May 1807, and subsequent order by the pursuer on his cash account, and other evidence in process, that the deceased Thomas Fidler received the sum of £30 from the pursuer, and that the defender has not instructed the same to have been in extinction of a debt due by the pursuer; therefore advocates the cause, and decerns against the defender for payment of the said sum and interest, conform to the original libel."

To this interlocutor his Lordship, on advising a representation and answers, adhered by interlocutor, not mentioned in the report, of date 4th July 1809.

The defender then presented a reclaiming petition to the Inner House, in which the case was fully argued, both as to the competency and sufficiency of the proof. It was contended that, "wherever the debt exceeds £100 Scots, nothing short of written evidence will suffice;" and it was strongly insisted on that the pursuer, who was a landed proprietor, and had been bred to the law as a writer to the signet, would have taken a formal voucher or obligation for repayment of the money had it been really a loan. I do not, however, enter into the merits of the proof, because what we have to do with here is not the sufficiency, but the competency of that proof, which the interlocutors show to have been unequivocally sanctioned by two successive Lords Ordinary, and also by the Inner House, who not only concurred with Lord Armadale in the result, but also in the grounds of his judgment. The report accordingly bears—"The Court concurred in opinion with the Lord Ordinary on the grounds expressed in the interlocutor, and therefore refused the petition without answers."

Now, Lord Armadale's interlocutor, it has been seen, proceeded on the letter asking the cheque, the cheque itself, and the "other evidence in process." If the letter accrediting Kirkton to the bank cashier had been thought of much weight in the case, his Lordship would naturally have mentioned it specifically, as he did the other letter and the cheque. But, however that may be, it is obvious that the letter to the bank was not the only other evidence, besides the first letter and the cheque, on which his Lordship and the Court proceeded. On the contrary, both letters, as well as the cheque, had been in the process all along, and had been before Lord Polkemmet when he remitted to the magistrates with express instructions to allow witnesses to be examined whose evidence might tend to instruct whether the cheque for £30 was given as a loan or in payment of debt; and it was only on considering the depositions of these witnesses, along with the letters and cheque, that Lord Armadale and the Court held the loan established, and decerned accordingly.

I have gone thus carefully and minutely into the case of *Ross* v. *Fidler*, because it is a case substantially on all fours with the present as regards the competency of the proposed proof, and the more it is examined the more authoritative it will be seen to be. It has been cited and relied on,

both at the bar and on the bench, in all analogous cases since its date. For instance in the cases of *Allan and Others, Heriot's Trustees* v. *Murray*, June 13, 1837, 15 S. and D. 1130; *Martin* v. *Crawford*, June 4, 1850, 12 D. 960; *Robertson* v. *Robertson*, Jan. 9, 1858, 20 D. 371, and *Thomson* v. *Geekie*, March 6, 1861, 23 Macph. 693.

In the first mentioned of these cases—*Allan, &c.* v. *Murray*, the document mainly relied on was a holograph writing in these terms:—"*May* 29, 1815.—Received from Mr David Heriot £186 stg. —(signed) David Murray, Brockholes." It is obvious enough that this document did not, in its terms, import a loan. On the contrary, it was in words appropriate to the discharge of a sum due. But it was a case between an uncle and his nephews (as here it is a case between brothers). It was established that the uncle had been in use to make loans to his two nephews, who were tenant farmers, to assist them in their embarrassments. A state (not, however, in the handwriting of either of them) had been made up by their creditors at a meeting called by the nephews, in which state the uncle was entered as a creditor for the £591, and, in a trust-deed, subsequently executed, this larger sum was stated to be due, coupled with a qualification in the body of the deed that the mention of sums as due should not import that they were actually due, unless otherwise sufficiently instructed. The Sheriff, after investigation,—the extent of which does not appear,—found that £400 of the £591 had been repaid, and that the balance had not been established by legal evidence to be due. Lord Ordinary (Jeffrey) recalled the judgment, found the debt sufficiently instructed, and decerned accordingly; observing in his Note that "he holds it to be settled by the cases of *Ogilvie*, Jan. 7, 1703, M. 11,510; *Donaldson*, June 12, 1711, M. 11,511; and *Ross* v. *Fidler*, Nov. 24, 1809, F.C., that such a naked acknowledgment of the receipt of money does, *in dubio*, import the constitution of a debt and a general obligation to repay, while it is undeniable that all the circumstances of this case tend most strongly to corroborate this conclusion."

A reclaiming-note was presented, but the report bears—"The Court, holding the balance of £191, instructed not merely by the holograph acknowledgment above mentioned, but by the whole circumstances of the case, pronounced as follows—Adhere to the interlocutor as far as complained of by the note for Thomas Murray," &c.

The points to be noted in this case are the judicial reliance on *Ross* v. *Fidler* as a precedent, and the fact that both Lord Jeffrey and the Court took into view all the circumstances, ascertained in the Sheriff-court, as explanatory of the writings which were not of themselves explicit,

In the case of *Martin* v. *Crawford*, June 4, 1850, 12 D. 960, and 22 Scot. Jur. 426, three holograph writings were founded on, all in the form of receipts, and all in *verbatim* the same terms, except that each of the two first was for £20, and the third was for £10. It is sufficient, therefore, to quote one of them, which ran thus:—"*Paisley, 9th April* 1845—Received from Mr William Martin the sum of £20 sterling"—(signed) "John Crawford."

The action was laid as for money lent. The defender denied the loan, and alleged that the sums were paid to him to account of his share in a partnership concern. The Sheriff-substitute and Sheriff found "it incumbent on the pursuer to prove by the defender's writ or oath that the said advances were in loan." But the Lord Ordinary (Wood) pronounced this interlocutor:—"Recals the interlocutors complained of; remits the case to the Sheriff with instructions to allow the respondent to prove his defence—that the sums in question were not received in loan, or under any obligation to repay, but in extinction of a claim which he had against the complainer, arising in the way and manner alleged by the respondent." In a note to this interlocutor Lord Wood referred to the cases cited by Lord Jeffrey in *Allan, &c.* v. *Murray*, viz., the case of *Ross* v. *Fidler*, and the two older cases already mentioned, as deciding that acknowledgments in writing of the receipt of money, "*in dubio*, import the constitution of a debt and a general obligation to repay," and observed that he did not think the course taken in the Sheriff-court consistent with the law as laid down in *Allan's* case. On advising a reclaiming-note, the Lord Justice-General and Lords Mackenzie, Fullerton, and Cuninghame successively expressed their concurrence in the law as laid down by the Lord Ordinary. Lord Mackenzie further observed that there was a presumption in favour of the obligation to repay; and Lord Fullerton said "a person who has granted such acknowledgments is bound to give some statement in explanation of them. Here the defender has explained that they were paid to him in extinction of debt under this alleged copartnery, and he is bound to prove that statement."

The interlocutor of the Court was in these terms —"Adhere to the interlocutor of the Lord Ordinary reclaimed against—it being understood that, in taking the proof allowed by the said interlocutor, the Sheriff is to allow the advocator William Martin conjunct probation."

I think this case of *Martin* of great importance in the question of procedure and proof we are now discussing. No Judge had more practical experience of such matters than Lord Wood, both as Sheriff and Lord Ordinary. The question came before him in a shape calling for the most direct and deliberate consideration. For the Sheriff-Substitute and Sheriff had both found "it incumbent on the pursuer to prove by the defender's writ or oath that the said advances were in loan." The documents libelled on instructed, on the face of them, nothing more than is instructed in the present case by the defender, and admitted by him, viz., that he received the money of the deceased to the amount sued for. By reference to the decisions cited by Lord Jeffrey, the case of money received under a bank cheque, which was the case of *Ross* v. *Fidler*, was obviously regarded by Lord Wood, as it had been by Lord Jeffrey, as a leading case of the class in which proof at large was competent, and the result was a judgment, both by Lord Wood and the Inner House, in the strongest of all forms, viz., that of an absolute allowance of proof, and not merely, as the Lord Ordinary has allowed here, a proof before answer. The Court construed Lord Wood's interlocutor as sanctioning probation on both sides, and accordingly adhered to that interlocutor, "it being understood that, in taking the proof allowed by the said interlocutor, the Sheriff is to allow to the advocator William Martin conjunct probation."

The somewhat complicated case of *Fraser* v. *Bruce*, Nov. 25, 1857, 20 D. 115, and 30 Scot. Jur. 70, is only of importance here as showing the effect which the Court attached to the mere signature of the borrower in the Savings-Bank pass-book, as

showing that he got £40 of the lender's money, and consequently bringing in what, as Lord Cowan observed, is "a settled principle, that when money belonging to one party is proved to have been given to or received by another, the receiver must *in dubio* show that he received it on some footing other than under an obligation to repay." The mere presentment of the pass-book was, by the Savings-Bank Act, sufficient authority to the bank to pay to the person who presented it. Accordingly, as the Lord Justice-Clerk Hope said—"The book which is produced is used between the savings-bank and the pursuer for the safety both of the bank and the depositor. The bank so far recognises it that entries made in it of payments into the bank are good against the bank, with the signature of their clerk; and, on the other side, entries of repayments made to a depositor are, with his signature, or the signature of the party who presents the book at the bank, good vouchers that the money has been repaid to the depositor. The depositor gets this book, and the bank pays to him a sum of money, for which he is required to sign the book. That is a good voucher for the bank, and I think it good proof of receipt by the defender of the pursuer's money." The applicability of these remarks to the defender's signature on the back of the cheque now in question is clear enough, without any remark from me, and it is for that only that I refer to this case of *Fraser* v. *Bruce*.

The case of *Thomson* v. *Geekie*, March 6, 1861, 23 D. 693, 33 Scot. Jur. 340, deserves attention, because there a proof, before answer, was allowed and led in the Sheriff-court, and although the majority of the Court seem ultimately to have thought that the acknowledgment of the receipt of the money would, of itself, have been sufficient to infer loan, the proof was not dealt with as incompetent, but, on the contrary, was made the subject of findings, both by the Lord Ordinary (Kinloch) and the Court.

The Lord Ordinary, indeed, while he embodied these findings in his interlocutor, expressed doubts in his Note of the admissibility of parole evidence in the case, and so brought that point specially under the notice of the Court. But their Lordships not merely commented on that evidence as confirmatory of the pursuer's claim, but they adhered *simpliciter* to the interlocutor of the Lord Ordinary, without giving any effect to the doubt expressed in his Note, as to whether he was right in throwing "the interlocutor into the shape proper to the case in which proof has been allowed."

The question, whether the *onus* lay on the pursuer or defender to prove the footing on which the money was received, was fully discussed, involving, of course, the question whether any proof was, in the first instance, necessary on the part of the pursuer, in addition to the document. On that point there was a difference of opinion, as well as on the sufficiency of the evidence to clear up the ambiguity, if there was one, in the words of the document. But the competency of the evidence is, of course, quite different from its necessity or sufficiency, and, in place of repudiating the competency of the parole evidence, it seems only to have been because the limited extent of that evidence was attributed to the fault of the parties themselves that the Court did not order more of it to be led, and the fact of its being so limited was regretted the end, particularly by Lord Wood, whose opinion is throughout of great importance as bearing upon the present case.

The document there was written upon a receipt stamp—a specialty which did not occur in any of the prior cases, and which I should have regarded as adding weight to the ground in respect of which your Lordship in the chair, then Lord Justice-Clerk, desiderated further evidence,—namely, the terms of the document, which were these—"Received from Mr Geekie the sum of £30 sterling, as per agreement." But the fact that these specialties did not prevent the majority of the Court from deciding as they did only shows the great importance they attached to the presumption of loan arising from the mere receipt of money.

That is the presumption which is the basis of the case we are now dealing with, although it is a presumption which, looking to the variety of purposes for which bank cheques are used in the present day, ought not, I think, to go the same length in relieving the pursuer from all *onus* whatever, as it has been sometimes held to do where the document founded on was a receipt for money. It is more reasonable to deal with a bank cheque, as presenting a case for inquiry, such as the case of *Thomson* v. *Geekie* would apparently have been held to be, had the majority of the Court concurred with your Lordship in thinking that the words "as per agreement" so far lessened the presumption arising from receipt of the money as to lay some *onus* on the pursuer which might not have been upon him otherwise. It is essential, however, to keep in view that, in these cases of receipts for money, the presumption of loan was held to arise from the fact—which equally occurs in the case now before us—that the money of the one party had passed to the other, there being nothing in the terms of the receipts by way of acknowledging a debt to be thereby created. In this respect such receipts stand in direct contrast to an I.O.U., which expressly acknowledges a debt to be owing of the amount which it specifies, whereas mere receipts rather import in their terms that a debt has been paid, and it must therefore be entirely upon the fact of the money having passed that the presumption of a debt being created arises.

The case of *Hilson and Others* (*Rutherfurd's Exrs.*) v. *Marshall*, July 12, 1861, 23 D. 1276, was a case in which the claim was for £31 of borrowed money; but the only writings were two letters, the latest of them dated some ten years before the action, in which the defender apologised for being so long in paying his debt, but no sum nor specific debt was mentioned; and, in these circumstances, I am not surprised that the Court should have held that the pursuer's only course was a reference to oath. The letters did not prove that the money sued for was received, and consequently there was no room for the presumption which that fact implies.

As to the recent case of *Kyle's Exr.* v. *Williamson*, Jan. 28, 1871, which appears to be reported only in the Journal of Jurisprudence (vol. xv, p. 155), I have looked carefully into the Session Papers—which are now before me—and I find it was of this nature: the summons was for "payment to the pursuer of the sum of £150 sterling, advanced in loan to the defender by the said deceased James Alexander Kyle, by cheque granted by the said James Alexander Kyle to the defender, on the agent for the Bank of Scotland, Aberdeen, and dated 26th February 1867, and the amount of which cheque was paid to the defender by the said bank, together with interest on the said sum of

£150 sterling, at the rate of 5 per cent. per annum, from the said 26th day of February 1867 until payment." There was nothing libelled on but the cheque, and no conclusion in the summons except the conclusion just quoted, for repayment of the loan given by the cheque, with interest.

The defence was that the defender had drawn a bill upon the deceased, dated 7th December 1866, payable two months after date, for value received; which bill was accepted by the deceased, and discounted at the North of Scotland Bank, where it was noted when it fell due, and notice of the dishonour sent to both parties; whereupon the deceased gave the defender the cheque in dispute, to enable him to apply the contents to pay the bill, which he did. The pursuer's reply to this was that, although the deceased was acceptor of the bill, it was truly for the defender's accommodation, to enable him to buy a stallion, which he accordingly did, with the contents, and that the cheque was not connected with that transaction, but was given as a loan.

The pursuer's plea in law was that the deceased having advanced the £150 in loan to the defender by the cheque libelled, the pursuer, as the deceased's executor, was entitled to repayment. The defender's pleas were in these terms—"(1) The pursuer's averments can only be proved by the writ or oath of the defender. (2) The statements of the pursuer being unfounded in fact, the defender is entitled to absolvitor, with expenses."

There was nothing, either in fact or in law, beyond what I have now stated, in the closed record. Upon that record, Lord Jerviswoode, Ordinary, on 3d March 1870, pronounced this interlocutor:—"Having heard counsel, allows to the parties a proof of their respective averments on record, and that before answer; and appoints said proof to proceed before himself, within the Parliament House, on a day to be afterwards named." His Lordship afterwards granted diligence for recovery of writings; and on 8th July 1870 a long proof, by witnesses, was taken and concluded before him. Thereafter, on 27th July 1870, his Lordship pronounced the following interlocutor:—"Having heard counsel for the parties on the proof by them respectively, and made avizandum," &c., "Finds as matter of fact that, on or about 26th February 1867, the now deceased James Alexander Kyle of Binghill, in Aberdeenshire, to whom the pursuer has been decerned executor, advanced to the defender the sum of £150 in loan, by means of a cheque for said sum, granted by the said James Alexander Kyle on the agent of the Bank of Scotland, Aberdeen, and cashed by the defender, and the amount of which was received by him or applied for his behoof: And finds that the said sum is resting-owing by the defender to the pursuer, as executor of the said deceased James Alexander Kyle: Therefore finds the defender liable in payment to the pursuer, as executor foresaid, of the said sum of £150 sterling, with interest thereon, in terms of the conclusions of the summons, and decerns," &c.

On advising a reclaiming-note, the Court pronounced this interlocutor:—"Recal the interlocutor complained of: Find that, upon an accounting between the parties, there is a balance due by the defender to the pursuer, as executor of the late James Alexander Kyle, of £52, 18s.; therefore decern for payment of said balance by the defender, with interest at the rate of 5 per cent. from 26th February 1867 until payment: *Quoad ultra*, Assoilzie the defender from the conclusions of the summons, and decern."

The summons on which these interlocutors were pronounced was laid, as we have seen, exclusively upon an allegation of a loan of £150, by a cheque on the lender's bank account for that sum. The only difference between the interlocutor of Lord Jerviswoode and that of the Court was that his Lordship held the whole sum lent to be still due, while the Court held a balance of £52, 18s. only to remain due. Both went equally upon the proof establishing the loan, and differed only as to how much of it remained due. The £52, 18s. could have been nothing else than the balance of the £150 loan given by the cheque, for there was nothing else libelled or concluded for. Explanation of that case, therefore, consistently with holding proof in this case incompetent, seems to me impossible.

There are cases of a different class from any I have yet alluded to, which, although not direct precedents here, are not to be overlooked, for the law laid down in them as to the admissibility of parole evidence where there is a writing which may be granted or used for a variety of purposes, and the question arises *quo animo*, or for what purpose, was that writing granted or used in the particular case. I allude to cases of donation *inter vivos* by the intervention of deposit-receipts or bank cheques. Two of these cases, in particular, deserve attention —*The National Bank of Scotland* v. *Bryce*, Jan. 20, 1866, 4 Macph. 312, and 38 Scot. Jur. 161; and *British Linen Co.* v. *Mackenzie, &c.*, June 15, 1866, 4 Macph. 820, and 38 Scot. Jur. 435.

In the first of these cases, Matthew Young, when living in lodgings kept by Miss Bryce and her sister, to the latter of whom he had been engaged to be married, gave to Miss Bryce a cheque on his bank account, dated 4th February 1863, for £321, 8s., payable to "Miss Bryce or bearer." She presented the cheque at the bank on the afternoon of 5th February; but as the balance due to him was only £281, 8s., the cheque was returned to her to get that sum filled in in place of the larger sum. She then explained that Young had died that morning, whereupon the bank declined to honour the cheque. In a multiplepoinding raised by the bank, she claimed the £281, 8s., upon the ground that Young had given her the cheque in payment of board and lodging due to herself and her sister, with a request to keep and divide the balance between them. The Lord Ordinary reported the case, and the Court ordered a proof before answer. The proof consisted entirely of parole evidence, which it is unnecessary to notice farther than to say that the Judges were all satisfied of the truth of Miss Bryce's case, provided the parole proof was competent; and, upon that point likewise, they were all agreed, upon the ground that the basis of the case was the cheque, which, as it might have been given on various footings, or for various purposes, must always leave the question open to proof *prout de jure* on what footing and for what purpose it was given in the particular case under consideration.

These opinions were given without deciding whether donation could in any case be competently proved otherwise than by oath of reference, if there was no writing.

Accordingly, it will be seen that, in the case of *Bryce*, Lord Curriehill said—"This action involves questions of nicety. But I do not think that among these is the question, whether a donation can be

proved by parole evidence. The very basis of the rule is taken away in this case, because we have here a written document granted by the owner of the fund directing the holder of it to pay to Miss Bryce. The basis of the case, in short, is writing, and the question is, *quo animo* was that writing delivered? There may be a presumption, in the circumstances, that this money was meant for Miss Bryce's own use; but that presumption is open to inquiry by evidence of every kind, and therefore I think parole evidence was competent. The question is, what is the effect of that evidence?" and this his Lordship held to be to establish the claim of Miss Bryce.

In the same case Lord Ardmillan said—"It is quite true, as a general rule, that a donation cannot be proved by parole testimony. But we are not dealing here with a case in which that is the exclusive, or even the most prominent, feature, but with a case in which all the questions cluster round the written document." And then his Lordship goes on to say, with reference to the position of a party who receives a cheque—"I do not think an inquiry is excluded, for I think his position is examinable."

The Lord President (M'Neill) observed—"The document given to Miss Bryce was a cheque apparently in her own favour, and I think presumably in her favour in ordinary circumstances. The presumptions, however, are different, according to the position of circumstances. Where a merchant is in the position of sending a clerk with cheques to the bank to draw money, there is no presumption that he intends the clerk to keep the amount of the cheques to himself, but the contrary. It may, however, be generally otherwise, especially if the person to whom the cheque is given is a stranger, and particularly if there is any reason for holding that he is entitled to get the money, or for its being given to him." But all this his Lordship held to be open to inquiry, and accordingly he proceeded to detail the circumstances proved in the case, which led him to the conclusion that Miss Bryce was entitled to keep the money. I do not go into my own opinion, which, as regards the varying presumptions arising from getting a cheque and drawing the money, is very much an amplification of such illustrations as were given by the Lord President, and which he gave still more fully in the subsequent case of *The British Linen Co.* v. *Mackenzie and Others*, June 15, 1866, 4 Macph. 820, 38 Scot. Jur. 435. That case related to an alleged donation by delivery, not of a cheque, but of a bank deposit-receipt; but it is nevertheless important with reference to the competency of parole testimony when the basis of the claim is a written document.

The Lord Ordinary (Kinloch) had in that case repelled the claim of the alleged donee, on the footing that parole evidence was incompetent. But the Court recalled that interlocutor, and allowed a proof before answer.

On advising the case with the proof, Lord President M'Neill said—"The basis of the case here is the possession of the deposit-receipt, which is a basis in writing." Then he said the question is important, whether the indorsation of a deposit-receipt transfers the contents. "I have already suggested cases in which it may not be so. Still I think, with reference to a deposit-receipt indorsed by a party and put by him into the possession of another, that the farther question, *quo animo*, is a matter which may be inquired into, and as to which our conclusions may be ascertained from facts and circumstances to be ascertained by parole evidence. The doctrine that donation cannot be proved by parole is often quoted rather more widely than the law authorises. The putting into a party's power the uplifting of funds, whether by means of a draft on a bank or a deposit-receipt, will generally raise the question, with what purpose that was done, and what were the facts and circumstances to indicate the intention of the party."

Lord Curriehill expressed his entire concurrence in all that had been said by the Lord President, and observed—"The point is of great importance, and, after giving it great consideration, I concur with your Lordship in holding that the *animus* with which the actual delivery of the document, with the indorsation on it, was made, is proveable by parole evidence, or by facts and circumstances. And I think that in some of the cases, and particularly in *Heron* v. *M'Geach*, in which the question was very deliberately considered by the Court, the principle was deliberately so laid down, and it was stated that the older doctrine, that donation cannot be proved by parole testimony, had been carried too far. I think that, both on principle and authority, parole evidence is competent to show the *animus* with which delivery was made."

My own opinion, and that of Lord Ardmillan, were much to the same effect. His Lordship observed that the indorsation, whether blank or special, "does not of itself convey the right to the money, and it creates no presumption of gift. But the question remains *Quo animo* was the receipt indorsed? or perhaps it may be as accurately put—On what footing did Mr Muir obtain possession of the receipt? And he further observed—"All the cases in which proof was allowed or inquiry ordered are practical confirmations of the rule that in the case of the holder of an indorsed deposit-receipt or a bank cheque the investigation of the facts and circumstances is not excluded."

I think the opinions in these cases embody a general doctrine of great importance, applicable to bank cheques, which it would be most inexpedient to go back upon. Our law is jealous of the risk of allowing a loan to be proved by witnesses; but that risk, it is obvious, is greatly diminished whenever the vital fact is established by writing that the one man's money passed into the pocket of the other. The risk of injustice of inquiry being excluded is then all the other way. Accordingly, the practice of holding such a writing to satisfy the rule requiring writ or oath, and so to open up the case to general inquiry, has grown up with the rule itself, and has obviated the reproach to which the rule, if otherwise construed, would have been subject. The rule is severe enough as it stands, often leading, on the death of the debtor, to the inevitable loss of a just debt which he would have admitted on oath. But to exclude the light by putting on the rule, in the present day, a construction which has never yet been put upon it, would, it appears to me, be extremely unfortunate, even if the opposite construction had not been stamped upon the rule by a series of cases, and more particularly by the direct precedent of *Ross* v. *Fidler*, concurred in by seven Judges (including the two Lords Ordinary), sixty-two years ago,—sanctioned by every Judge who has considered it since,—and which, if it is now disregarded, will certainly be so in circumstances which contrast strongly with the unanimity with which that judgment was pronounced.

I have only to add, that even if the defender's signature on the back of the cheque were not to be regarded as proof by the defender's writ that he had received the money, I should be disposed to hold that the defender's statement on the record was of itself sufficient to render evidence *prout de jure* competent, to the effect of, at all events, entitling the pursuer to disprove the truth of that statement.

The statement, it will be recollected, is in these words—"Explained that the said cheque was handed to the defender, and accepted by him in payment of a debt of a larger amount due to him by the said Rev. Alexander Speirs, for monies advanced to and for him, and for professional services rendered, and medicines furnished to him during the time he was minister of Kilsyth."

The rule against taking an admission in the record without its qualification may prevent the pursuer from at once claiming decree in respect of the presumption attaching to an admission that he had received the money. But, surely, when the qualification consists, as here, of allegations on point of fact, on the truth of which the whole defence is perilled, the pursuer must, in the least favourable view for him, be entitled to prove *prout de jure* that these allegations are untrue. The issue raised on the record is simply whether the advance, admittedly made, was a loan or payment of a debt incurred in the three different ways specified by the defender, viz., advances to the deceased; advances for him to others; and charges for medicines and medical attendance. If the negative of any one or more of these three things can competently be proved by parole, that seems to be of itself enough to necessitate a proof at large; and then the observation would apply which I had occasion to make in the case of the *Lord Advocate* v. *M'Neill*, Feb. 6, 1864, 2 Macph. 626 (and House of Lords, March 23, 1866, 38 Scot. Jur. 350), that although you cannot take an admission in the record without its qualification, to the effect of dispensing with proof, yet, "when you have a concluded proof, you take the admission as part of the proof, and give to the qualification no more weight than it deserves.

In every view, I am of opinion that the Lord Ordinary's interlocutor should, in its substance, be adhered to.

Lord Benholme—It is contended on one side that, by the law of Scotland, loan cannot be proved by parole evidence, but must be instructed by writ or oath of the alleged borrower. The contention on the other side amounts to this—Wherever there is anything in the shape of writing, however unsatisfactory, you are to be allowed to supplement it by parole. This appears the foundation of the interlocutor under review. It appears to me that the qualification of allowing a proof "before answer" is inapplicable where an objection to the competency of the proof is taken. If we are to hold by the rule that loan cannot be proved by parole, we cannot allow a proof at large.

With regard to the observations of Lord Deas, I will only say that whilst *Ross* v. *Fidler* has been often cited, it has never been given effect to, so far as I know, in cases of this kind. It is said that wherever money has passed from one to another there is a presumption of loan; and the observations of Lord Wood in *Thomson* v. *Geekie*, March 6, 1861, 23 D. 693, are referred to. But that case was totally different from the present. The writing there was an acknowledgment of receipt of money. To assimulate the case to which Lord Wood's observation applies, in which the party gave a receipt for the money, to the case of a bank cheque, the ordinary way of paying debts, and to suppose that it has the same effect in raising a presumption of loan against the party, only shows how dangerous it would be to interfere with the well established rule, by which parole proof is excluded.

I entirely agree with the explanations which your Lordship in the chair has given.

Lord Neaves—I concur with the Lord President. The question is, Whether the pursuer be allowed a proof *prout de jure*? Something has been said about the defender having no plea on record on this head. But where the pursuer's averments are denied, he must prove them in a competent manner. "Before answer" is explained by Lord Stair as "before deciding on the relevancy." It used to be the custom to pronounce an interlocutor of relevancy, and it is still done in certain cases. A proof "before answer" in a case like the present is out of the question. There is no doubt as to the relevancy of the pursuer's averments. They are clear, distinct, and relevant. What the Lord Ordinary really means by "before answer," is "before answer as to the competency." That perhaps may be done, but it is certainly not a regular or usual order. To allow a thing, said to be incompetent, without deciding on its competency, is not very logical, and certainly requires very special reason. The Lord Ordinary has been led into this course, partly by looking into the averments of the defender. First he ought to look into the nature of the action. The pursuer must prove his case, whether the defender proves anything or nothing. He must prove *habili modo*, whatever that be, loan of money. The issue which is taken by him is, Loan or not loan? No counter issue is needed. We are not going before a jury, but it is not the less necessary precisely to understand the matter at issue. This being an allegation of loan, what is the rule of law? Is it competent to allow a party to prove his allegation of loan *prout de jure*? Stair states distinctly that while many contracts of loan may be proved by witnesses, there is one known exception—the borrowing of money—iv, 43, 4; so Erskine iv, 2, 20, and indeed the rule is scarcely disputed.

Such being the rule, Is it to be dispensed with in this case; or is it satisfied? The specialty in this case is said to arise from the medium of a cheque, and the signature of the defender on the back. I do not suppose that this matter of a cheque is founded on as taking the contract out of the category of a loan of money, and as making it a loan of a cheque. But the cheque and writing on the back are supposed to get rid of or satisfy the rule of law. Suppose nothing appeared but the giving of the cheque. The giving of a cheque does not, any more than the giving of money, prove anything. If it indicates anything, the giving of a cheque rather indicates payment of an existing debt than the constitution of a new debt. Suppose the rule of law out of the way, and the pursuer rested his case on the cheque, would that be conclusive? I get the money, keep the money, and no fault is found with me. An action is then raised—apart from the rule of law, would those facts prove loan? (It is not a question of liability to account; loan is not a liability to account, it is a contract of *mutuum*.) If these facts are quite in-

conclusive, then how does the party putting his name on the back make a difference? It only proves that the cheque was put to its natural use. It is doubtful whether the holder of a cheque payable to bearer can be required to put his name on the back, any more than a person can be required to put his name on a bank-note, which is often done. The name on the back only shows that the money was paid to the defender, which is admitted. This is the whole amount of writing produced, and I take it for granted that there is no other writing recoverable. The Lord Ordinary allows a proof *prout de jure*. The law says—You shall not prove loan of money except by writ or oath. If the Lord Ordinary's view was that the name of the party on the cheque raised a presumption of loan, I could understand it. In that case the proof allowed would be for the purpose of enabling the defender to overcome the presumption. But he does not take the case as proved. The pursuer is to lead in the proof. If the case is not proved already, this is allowance to prove, what is not already proved, by parole. There are said to be facts and circumstances which can be proved by parole. But if you have not a document to instruct the loan, you cannot prove it by witnesses without violating the rule in the most direct manner. This case is not to be confounded with *Ross* v. *Fidler*, where, in any view, the evidence of loan consisted not only in the existence of a writing which showed that money had passed, but in the granting of a writ or cheirography by the borrower to the advancer. Where a party gives another a document under his hand, to be kept by him as a memorial and voucher of money having passed, and if he does not in that document, which is his own composition, ascribe the receipt of the money to some other cause, that imports a loan. But unless you are to lay it down that the use of a cheque, or the putting one's name on the back, is an acknowledgment of this kind, this case entirely differs from that of *Ross* v. *Fidler*. The notion that the existence of a document, which infers payment of a debt rather than the creation of a loan, enables the pursuer to supply by parole evidence what he has not proved, is totally illogical. That a party may escape from liability in consequence of a strict adherence to the rule of law is an entire mistake. If my clerk, whom I send to the bank with a cheque, gets the money and runs away, I do not sue him for a loan. It is only when the party sues for a loan that he must prove that transaction by oath, or by a document which expresses or necessarily infers a loan.

Lord Ardmillan—This case, which in point of fact, so far as yet ascertained, is one of the simplest and shortest which has been brought into Court, is in point of law one of the most important and most delicate with which we have had to deal.

The question raised in regard to the competency of parole proof lies on the boundary-line between the scope or province of a rule of law on the one hand, and the scope or province of a principle of equity on the other hand. The rule and the principle are both, in my opinion, well settled. But the border marches require to be cleared and defined. The rule is, that a loan of money beyond £100 Scots can only be proved by the writ or oath of the alleged debtor. The principle of equity is, that where the receipt of a sum of money is instructed by writing, there arises a presumption that the receiver is bound to account—in some circumstances to repay,—in all to explain.

In the present case, where we have a writing proving receipt of the money, and also an admission of the receipt, and where the facts, so far as yet ascertained, are few and simple, the difficulty arises in the ascertainment of the true relation and bearing on the case which, under the circumstances, exists between this principle of equity and this rule of law. To what extent does the rule of law here exclude the principle of equity? or, on the other hand, to what extent does the principle of equity here qualify the rule of law? We do not yet know the true state of the facts. Is there not a case for inquiry?

The action is brought by Mr Haldane, judicial factor on the estate of the late Rev. Alexander Speirs, against Douglas Speirs, the brother of the deceased. It is alleged that Alexander Speirs lent £750 to Douglas Speirs, and handed to him a cheque, payable to Douglas Speirs or bearer, on the Royal Bank of Scotland. That this cheque was received by the defender, and presented by him at the bank, and that he received the money and indorsed the cheque—is not matter of dispute. It is admitted on record by the defender. But, apart from that, it is instructed by production of the cheque bearing the indorsation of the defender. It is clear in point of fact, and not disputed.

Donation is not alleged by the defender, and is never presumed. The statement of the defender on record is that the cheque was given in payment of "a debt of a larger amount," due for monies advanced, and "for professional services rendered, and medicines furnished to the late Alexander Speirs during the time when he was minister of Kilsyth. This is all the explanation which the defender gives. He has received, and he retains, the money; and he stands upon the legal plea that the cheque, taken by itself, is not sufficient proof by writ of the loan, and that all investigation into the actual state of the facts, and into the verity of the averments of the parties, except by reference to the defender's own oath, is excluded.

The Lord Ordinary has allowed the parties a proof, before answer, of their respective averments—the pursuer to lead in the proof. I am of opinion that this interlocutor is sound, and ought to be adhered to. I think that it rightly maintains the rule of law, and yet justly recognises the principle of equity, to which I have adverted.

In support or explanation of the general rule of law, I need not again refer to authorities. They have been already mentioned. That a loan of money cannot be proved otherwise than by writ or oath is clearly laid down by our great institutional writers, and has been recognised as law since the days of Lord Stair (Stair, iv, 43, 4; Ersk. iv, 2, 20). I have no intention of challenging or of doubting this rule.

The principle of equity is in my opinion no less clear, and is no less firmly settled, though it has been more gradually evolved in the course of judicial decisions. That it is a just and equitable principle is beyond doubt,—I am now speaking of its recognition. The trace of it is to be found in very early judgments, and as our jurisprudence became more and more affected by the great moral and equitable considerations suggested and necessitated by commercial relations, the principle has been more fully developed, and more clearly recognised.

Without going back to any earlier date, I find that in the case of *Ogilvie* v. *Abercromby*, Jan. 7, 1703, M. 11,510, it was decided that a receipt for money implies an obligation to repay. The same principle was recognised in the case of *Donaldson* v. *Walker*, June 11, 1711, M. 11,511. After the lapse of a century, we find the same principle yet more clearly and emphatically recognised in the case of *Ross* v. *Fidler*, Nov. 24, 1809, F.C., which, like the present, was a case of loan. That was an action brought for payment of a loan of £30. The evidence of the loan was (1) a letter from Fidler requesting from Ross an order on his cash-account for £30. The letter did not bear, in terms, to be a request for a loan. It might, or it might not, have been so. It might have been a request for a gift, or for payment of a debt. (2) A bank order or cheque in exactly the same terms as the present. (3) A letter from Fidler, the payee, to the cashier of the bank, requesting payment of the money, which may be held equivalent to the indorsation of the cheque, which we have in this case. I have looked into the Session Papers, and can confirm the statement of Lord Deas. A proof was taken, and facts not without some importance were ascertained. The Lord Ordinary, on considering the proof and these documents, found it instructed by the letter and the cheque, and the other evidence, that Fidler received £30 from the pursuer, and that the defender (the representative of Fidler) had not instructed the same to have been in extinction of a debt due by the pursuer. Therefore he decerned against the defender. To this judgment the Court adhered, on the grounds therein expressed. In almost every particular the circumstances of this case of *Ross* v. *Fidler* are the same as in the present case. In one respect, however, it was less favourable to the pursuer than the present case. Fidler, the receiver of the money, and the man to whom the loan was said to have been made, died before the action was brought. The defender in the action was not the receiver, but only the representative of the receiver, of the money. He might not, and probably he did not, personally know the facts. In the present action the receiver of the money, the man to whom the loan is said to have been made, is himself the defender; and he must personally know the whole truth in regard to the facts and circumstances of the transaction. Having that personal knowledge, he has offered no intelligible explanation of the footing on which he received this very considerable sum. But, apart from this distinction, the case of *Ross* v. *Fidler* is directly applicable here. Accordingly, the Lord Advocate evidently felt it to be so; and he scarcely attempted to distinguish between the two cases; and, for my part, I am quite unable to perceive any sound distinction, except indeed the one to which I have alluded,—a distinction which is favourable to this pursuer.

Of course it was open to the Lord Advocate to contend that the judgment in *Ross* v. *Fidler* is wrong, and he has done so, not I think with success. I shall endeavour to show that it has to a large extent received important confirmation, but that it has been accepted and recognised as authority I have no doubt. It was a judgment pronounced by the Court, with President Blair at its head. It was given unanimously, and without hesitation, and it was in accordance with the judgment of the Lord Ordinary. Sixty years and more have passed since it was pronounced; it has been repeatedly quoted and founded on by counsel, and referred to by the Court, and until the remark of Lord Benholme to-day I have been unable to discover any expression of judicial disapproval of that decision. It remains, I think, to this day a recognised authority on the very point before us—an authority not so old as to be out of date, yet old enough to have been fortified by long continued recognition.

Coming down to a more recent period, we have the case of *Allan* v. *Murray*, June 13, 1837, 15 D. 1130. This also was an action for payment of a loan, or advance of money. An acknowledgment in the briefest and simplest form of receipt of the sum claimed, and containing no obligatory words, was held as instructing, in the absence of evidence to the contrary, the constitution of a debt, and a general obligation to repay. Lord Jeffrey, whose interlocutor was adhered to by the Court, held that "a naked obligation of receipt of money does *in dubio* import the constitution of a debt, and a general obligation to repay;" and his Lordship refers to the decisions in the three cases which I have mentioned, viz., the case of *Ogilvie*, of *Donaldson*, and of *Ross* v. *Fidler*. The same principle was applied in the case of *Martin* v. *Crawford*, June 4, 1850, 12 D. 960, so well explained by Lord Deas. Lord Wood, as Ordinary, pronounced judgment in that action for repayment of loan, in respect of a bare receipt for money, and he allowed to both parties a proof of facts and circumstances. His Lordship refers expressly to the decision of Lord Jeffrey in the case of *Allan*, and to the authorities there quoted by him, including, as I have already said, the case of *Ross* v. *Fidler*.

So also in the case of *Fraser* v. *Bruce*, November 25, 1857, 20 D. 115. This was an action for repayment of a loan. The receipt of the money was proved by the defender's signature in the pass-book of the Savings-bank, and the Court held that, where receipt of the money is instructed by such a writing, the receiver must prove that he received it on some footing other than under an obligation to repay. There was in that case some irregularity in the procedure in regard to the position and effect of the defender's deposition. But, apart from that irregularity altogether, it cannot be doubted that the principle recognised in the previous cases was again accepted and enforced.

Then we have the case of *Thomson* v. *Geekie*, March 6, 1861, 23 D. 693. In that case there is a specialty, viz., that the written receipt for the money was qualified by the words "as per agreement." Your Lordship, now in the chair, then Lord Justice-Clerk, was of opinion that these words were important and qualified the receipt, and on that ground your Lordship differed from the rest of the Court; but I do not understand that your Lordship expressed any dissent from the judgment on the assumption that these words had not been in the receipt. Now, the Court found, adhering to Lord Kinloch's interlocutor, 1st, that receipt of the money was proved by the document; and 2dly, that it was not proved that the sum was received otherwise than in loan, and under obligation to repay. The previous cases which I have mentioned were again referred to in this cause. I observe that your Lordship in the chair did, in the recent case of *Christie's Trs.* v. *Muirhead*, in referring to the decision in *Thomson* v. *Geekie*, say—"There is nothing better settled in our law—the case of *Thomson* v. *Geekie* is conclusive on the point—than that a receipt for money in absolute terms is sufficient evidence of a loan." Yet it is not conclusive,

but only sufficient till the facts are ascertained; for a receipt for money in such terms may be given where there has been no loan. But there must be inquiry.

From this series of decisions, which might be further extended, if necessary, I feel that I can safely hold it to be settled that a written receipt or acknowledgment of payment of money implies an obligation to repay, or at least to account;—that this is the presumption arising from the receipt, and that the receiver, if he resists an action for payment, must instruct that, in point of fact, he received the money on some footing other than an obligation to repay. Had there been in this case a receipt or acknowledgment in general terms for this sum of £750—a receipt paid by the defender to his deceased brother—I should have held that, unless the defender instructed a gift to him, or instructed the existence of some debt to him by his brother, in payment of which the money was received, an obligation to repay must be presumed, and repayment enforced. Donation is not here alleged or suggested by the defender, and is never presumed. The receipt of money admitted, and proved by written acknowledgment, and without even any counter averment of donation, cannot, without inquiry into the facts and circumstances under which it was received, be set aside or ignored, in the manner maintained by the defender. Cases where the receipt of money is not instructed by writing are not in point. There is no case in which inquiry has been refused where a direct receipt was given in such circumstances. In most cases where there is a written receipt the burden of instructing facts sufficient to relieve from the obligation to repay has been laid upon the defender. The *onus* may be easily shifted. In all such cases there must be inquiry.

I am not doubting the general rule. But we must take care that we do not extend its scope and effect beyond what has been recognised by decision.

The proof of a loan of money is proof of a composite transaction, of which the component parts are—the payment or delivery of the money, and the quality of the payment, involving the footing on which it was paid, and the constitution or the exclusion of an obligation to repay.

If there is no writing there can be no proof of the loan of money except the oath of the defender. The decisions mentioned by your Lordship in the chair, including the case of *Birnie* v. *Darroch*, do not, in my opinion, go further than this. But if there is written proof of payment, especially when confirmed by admission of payment on record, then the composite character of the transaction is broken up. It is not then, after the writing has been produced, correct to say that a loan of money remains to be proved. What really remains to be proved is the quality and the condition of a payment which has been instructed by writing. Of that quality, of these conditions, real evidence may be furnished by the surrounding facts and circumstances; and I venture to repeat that there is no sufficient authority for excluding the investigation of these facts and circumstances.

The clearing up of the question, *Quo animo* was the payment made? is manifestly necessary to the ascertainment of the true meaning and effect of the written document by which the fact of payment is instructed. Such inquiry into surrounding facts and circumstances has been repeatedly sanctioned and directed by the Court in cases of alleged donation, as explained by Lord Deas.

The same inquiry has been directed in cases falling under the law of triennial prescription (Act 1579, c. 83), where writing being produced to instruct the debt, evidence to clear up what was left unexplained was directed. I may refer to the cases of *Stevenson* v. *Kyle*, Feb. 5, 1850, 12 D. 673, and *Fife* v. *Innes*, Nov. 17, 1860, 23 D. 30. So, also, in cases to which I need not particularly advert, falling under the sexennial prescription.

In the present case we have not a direct receipt for the money given by the defender to his brother, and intended to be retained by the brother as a voucher of debt. That, however, is not always necessary. An admission in a letter addressed to another, or an entry in the books of the defender, if clear in import, would be sufficient. We have here a cheque by the late Mr Speirs in favour of the defender, by name or bearer; we have the defender's indorsation of that cheque; and we have what was perhaps scarcely necessary, but which, being here cannot be easily got rid of, the admission on record of the receipt of the money by the defender. The defence is, that the money was received, and received through the medium of that cheque, though not in loan.

I appreciate fully the very able argument of the Lord Advocate, especially on the distinction between the production of a receipt granted by the receiver to the payer, to be held as a voucher, and the production of an indorsed cheque on a bank, payable to the defender. That distinction is of great weight and importance, and it was earnestly and powerfully pressed on us. There is no doubt that the mere production of a bank cheque, even when indorsed by the payee, does not raise the same presumption of obligation to repay as is raised in the case of a direct or even of an indirect receipt. A very large amount of the payments made in ordinary life, particularly above £5 or £10, is made through the medium of bank cheques. These cheques may be in general terms, or may be specially to a payee named, or to a payee or bearer. Even in the latter case, where the payee is named, and where he indorses the cheque, I do not think it conclusive of the obligation to repay. It cannot be at once taken for granted or be reasonably presumed that he has received the money in loan. He may have got the money on a different footing. He may have immediately expended it for behoof of the granter of the cheque, or have immediately returned the money to the granter of the cheque, and taken no document to instruct such return. The observations made by Lord Neaves in the case of *Gow* v. *Sim*, Mar. 15, 1866, 4 Macph. 578, on this point are important.—"When a party holds a document acknowledging receipt of money, and not bearing to be in discharge of a debt, he is not driven to refer the question of loan to the oath of his adversary. The law presumes the obligation to repay from the possession of such a document. Here we start with a document, but a document of a kind which does not acknowledge anything, and does not therefore import or infer an obligation to repay." It is, however, to be observed that that case arose out of a reference to oath, and the point now before us did not there arise. The chief question argued in that case was, Whether the statements in the deposition were intrinsic or extrinsic? The observations of Lord Neaves are certainly favourable to the distinction—sound, I think, in itself, and so well urged by the Lord Advocate. To that extent, and as affecting the question of *onus*, I do not differ from Lord Neaves' opinion in the

case of *Gow* v. *Sim.* I recognise the distinction, and I am not prepared to say that in this case of a bank cheque the same presumption, or an equivalent presumption, either in its nature or in its force, arises, as in the case of a direct receipt for money. I do not think that such a weighty presumption arises. The obligation to repay does not, I think, so arise from an indorsed cheque as to throw at once upon the defender the burden of clearing himself of obligation by proving the footing on which he got the money. So far the argument of the Lord Advocate has great weight.

But the question still remains, Shall inquiry into the circumstances,—into the real evidence supplied by the facts,—be excluded? Can the defender, without giving explanations, and without inquiry into the facts, retain the money, of which he admits the receipt, and of which, unquestionably, the receipt is proved? Is this matter not examinable? Are the facts and circumstances under which the cheque was given and the money received to be ascertained by proof? or, Is the pursuer now limited to proof by reference to the defender's oath?

I am humbly of opinion that inquiry cannot justly be denied. The basis of the pursuer's case is writing. The question is, On what footing did that writing pass? *Quo animo* was that writing delivered? I think that the Lord Ordinary has come to a sound result, and has rightly allowed to both parties a proof of their respective averments, —the pursuer to lead in the proof. I think that, receipt of the money being proved by writing, and admitted, the matter is examinable, and that inquiry cannot be excluded; but I also think that the *onus* does not primarily rest on the defender, as it does in the case of a distinct and direct receipt.

I agree in the views, on this point, now fully explained by Lord Deas; and, indeed, I concur generally in his opinion, which is, I think, in accordance with the opinions of the Court in the case of the *National Bank* v. *Bryce*, Jan. 20, 1866, and other similar cases.

I have no doubt that we should best reach the truth and justice of this case by allowing a proof, and thus ascertaining the real evidence—the facts and circumstances—under which this cheque was granted and used, and this money was received.

The competency of particular questions would be reserved if we adhere to the Lord Ordinary's interlocutor, as the proof would be before answer. We have here a writing and a signature, and we have an admission—the import of both is the same. I am of opinion that inquiry into the surrounding facts and circumstances is not excluded by law, and is essential to the ascertainment of truth and the doing of justice. We must hold that this money was received by the defender from his brother. It is admitted, and it is proved. It is impossible to doubt it, and nobody does doubt it. Around the writing which instructs the receipt of the money, and which is confirmed by the admission on the record, there cluster the facts and circumstances of real evidence, which, when ascertained, will lead us to the truth, by explaining the transmission of the writing which is produced, and the nature and purpose of the payment which is admitted.

It is said that to permit this inquiry would be dangerous to the law. I do not think so. The equitable principles evolved in the progressive jurisprudence of this country have, in several instances, been, with great advantage and great propriety, applied in construction and application of the stricter and narrower rules of our older law. The restrictions of evidence, when not statutory, have yielded to the demand for light, as the *metus perjuriæ* has yielded to the desire for truth. The exclusion of inquiry is now less favoured than in former days. The weight and value of the real evidence afforded by facts and circumstances is more highly and more truly appreciated now than in former days.

There is no danger to the law so great as the danger of doing injustice.

I agree so entirely with Lord Deas that I have nothing further to add.

Lord Kinloch—It is admitted on both sides in this case that, on or about the 14th October 1870, the defender Mr Douglas Speirs received from his brother, the late Rev. Alexander Speirs, a cheque or draft on his, the Rev. Alexander Speirs' cash account with the Royal Bank at Glasgow, for £750. The cheque was made payable "to Dr Douglas Speirs or bearer." Mr Douglas Speirs received the money from the bank, and handed over to them the cheque, with his signature written by him across the back.

The pursuer, as representing the estate of the Rev. Alexander Speirs, now sues the defender for this sum as belonging to his constituent's estate. His averment is, that the sum was given to the defender by his brother in loan, in order to enable him to pay the price of certain superiorities. The defender alleges, on the other hand, that the cheque was handed to him "in payment of a debt of a larger amount due to him by the said Rev. Alexander Speirs, for monies advanced to and for him, and for professional services rendered, and medicines furnished to him during the time he was minister of Kilsyth."

The Lord Ordinary has, "before answer," allowed to the parties "a proof of their respective averments." The question is, whether the Lord Ordinary has done right in allowing this proof.

It is impossible to dispute that it is the general rule of the law of Scotland that a loan of money can only be proved by the writ or oath of the alleged borrower. But the writ of the borrower is not necessarily a formal receipt, or a document of any one kind more than any other. The debt may be proved by written evidence of any sort, provided only it be what the law will regard as the writ of the party. Thus, it may be proved by entries in books kept by the party, or under his direction, and considered by the law as his writ. It may be proved by jottings, memoranda, or accounts, provided they come under the same category. There is no limitation or qualification as to the writings by which the debt may be established, except simply that they must be what the law will consider the writ of the party.

In the present case there is proof, by the writ of the defender, of at least one fact of great importance, viz., that he, the defender, received from the Royal Bank of Scotland a sum of £750 out of the funds in that bank belonging to the Rev. Alexander Speirs. I put aside the defender's admission of the fact, because this may be held given under the qualification that the money was received in payment of a debt, and so be not admissible, except subject to this qualification. I consider the indorsement by the defender of the cheque on which he received the money as a receipt for the amount under the hand of the defender. Such is the

meaning which, according to the invariable practice of banks, is attached to the indorsement. The cheque being payable to bearer, such indorsement might not have been necessary to obtain the money. If the money had been obtained without it, all that can be said is, that the written evidence now existing would have been wanting. But, as matters stand, I consider the indorsement to be as much evidence of the receipt of the money, under the defender's hand, as if he had written and signed a formal receipt, bearing—"Received by me, of this date, from the Royal Bank of Scotland the sum of £750, out of funds in their hands belonging to the Rev. Alexander Speirs."

It is said that the document thus indorsed was only a voucher to the bank, not to the Rev. Mr Speirs. I cannot admit this. I think it was a voucher to both. It fell to be given up to Mr Speirs by the bank on a settlement of his account, and to be thereafter retained by Mr Speirs. Such a voucher is often in practice retained as corroborative evidence of payment of money. But I think the point immaterial. It is not necessary to constitute a document the writ of a debtor that it should be formally given to the creditor. Entries in books and the like are illustrations directly to the contrary. It is not the less the writing of the defender, proving against him the receipt of £750 out of the funds of the Rev. Mr Speirs.

The importance of this piece of written evidence is made manifest by the consideration that by several decisions of our Courts it is settled, as appears to me, that where money is proved by written evidence under the hand of the receiver to have been received by one man from another, and nothing else appears than the receipt of the money, the legal presumption is, that it was received in loan. It is unnecessary on this point to do more than to refer to the case of *Thomson* v. *Geekie*, March 6, 1861, 23 D. 693, in which a document running thus—"Received from Mr Geekie the sum of £30 sterling, as per agreement," was held presumptively to import a loan. Some difficulty was created by the insertion of the words "as per agreement," which created a division of three to one in the Court. But, except for these words, all were agreed as to the legal import of the document. The general principle thus laid down by Lord Wood was on all hands acquiesced in—"A writing, simply acknowledging receipt of money by the granter, taken by itself, is in law enough *prima facie* to entitle the grantee to repayment; it being, however, competent to the granter to rebut the legal presumption by competent evidence, instructing that the money was paid on a different footing—what is competent evidence depending on the nature of that which is proposed to be established."

If the case at present had been that £750 had been paid over in bank notes by the Rev. Alexander Speirs into the hands of the defender, and the fact of this payment was set forth in a written minute signed at the time by the defender, though not addressed to any one in particular, the principle of *Thomson* v. *Geekie* would, I think, directly apply, and the payment be held a loan, unless the defender proved the contrary. It is not easy to draw a distinction between money paid over in bank notes and money paid by a cheque on the bank. If the receipt of the money is established, the legal presumption may be fairly said equally to follow in both cases. It is not the form of the document proving the receipt of the money which is material. It is the fact of the receipt of the money, nothing else appearing by which the presumption is raised.

The difficulty in the present case is supposed to arise out of the peculiar nature of a bank cheque. It is said that, in practice, to grant a bank cheque is the common way of performing, not one, but many different cash transactions. It is not merely the way of granting a loan; it is as much, if not more, the way of paying an account, sometimes the way of granting a donation, often the mere method of expressing a mandate to a clerk or other official to receive and bring back the money. With all this in view, it is said that it would be against principle, and against justice, to hold a debt presumptively fixed against the person getting the cheque and receiving the money. The case of a clerk or cashier has been particularly referred to; and it has been asked how it was possible to hold such an one fixed with the money, unless he could prove that he got it as a mere hand, and faithfully accounted for it.

I fully admit the force of these considerations, though I consider them to go but a short way towards the solution of the present case. It does not, with all deference, seem very logical to argue that, because the money might be received on many different accounts, therefore it is to be held in the same position as if not received at all. It seems more consistent with reason to hold that there should be an inquiry into the precise account or consideration on which it was received; which is, in substance, what the Lord Ordinary's interlocutor proposes. The argument, I think, throws out of view that the receipt of the money only raises, *ex hypothesi*, a presumption that it was received in loan. This presumption may be redargued by proof; may, indeed, be redargued by other presumptions equally strong, or stronger. Thus, in the case of the clerk, the proved fact of his going, day by day, to draw money for his employer on his employer's cheque, and bringing that money back and paying it, may, in the ordinary case, set aside any presumed liability to account; although even here extraordinary circumstances may occur to maintain this liability. So in a great many cases. The circumstances may be such as to take from the receipt of the money all force of presumption against the receiver. In the present case the receipt of the money may lose all weight when the circumstances of the case are established. The question is, Whether these circumstances can be competently inquired into, or whether the defender is at once to be assoilzied, or the whole matter to be put within the arbitrament of his own oath? My opinion is in favour of the former alternative.

The proposed proof is not to establish a loan by parole evidence. There is already the defender's writ establishing the fact of that receipt of money which ordinarily presumes loan. The object of the proof is to clear presumptions; and this very especially in the interest of the defender, the presumed debtor. I consider it to be quite competent, where the general rule of law confines the evidence to writing, to allow parole evidence to clear ambiguities in the writing; and the best that the defender can say is, that the writing is ambiguous in its import. I perceive nothing in the general rule to exclude evidence of facts and circumstances explanatory of the writing, and showing *quo animo* the cheque was given and taken. I say "the evidence of facts and circumstances," because it is these which I have mainly in view in

the contemplated proof. It may be fairly made matter of controversy whether it would be competent to call the defender as a witness, and put to him the direct question, whether he received this money in loan. I reserve my opinion on that point, whether abstractly or in connection with the special circumstances which may give competency even to that question. But I am clearly of opinion that it is competent to lead evidence as to the surrounding circumstances of the parties at the time of delivering the cheque; and I think that such evidence would not improbably afford a very easy solution of the case. If, for instance, it was established that the very day that the defender received the money he went straight from the bank and paid it as the price of the superiorities bought by him, and there was no pretence of evidence that any debt was due him by his brother, there could be very little doubt as to how the case should be decided. For my own part, I should have been content that the interlocutor had in its terms simply allowed "a proof of all facts and circumstances tending to show whether the said sum of £750 was received by the defender as a loan or in payment of a debt." But the same end would be attained by the interlocutor, which is "before answer,"—being understood, or declared, to reserve all objections to particular questions, or lines of inquiry.

I conceive that the proof, at which I am now pointing, has been allowed by the Court in cases having, as here, the *basis* of a writing by the defender; and this so frequently as to constitute over-ruling authority in the present case. I cannot, in point of principle, distinguish the present case from that of *Ross* v. *Fidler*, decided so far back as 24th Nov. 1809, now more than sixty years ago. In that case there was no writing of the alleged debtor which proved more than is proved in the present case—viz., that on a certain date a certain sum of money was received by him out of the funds of the alleged creditor by means of a bank cheque. A proof was allowed; and the Court, proceeding on that proof, along with the written documents, found that a loan was constituted, inferring repayment by the party receiving the money.

Since the date of *Ross* v. *Fidler* several cases have occurred in which a written document was produced, proving receipt of money, but not formally expressing it to have been received in loan, and in which, before deciding, the Court allowed a proof. In some the Court found themselves compelled, from defect of proof, to proceed ultimately on the legal presumption attached to the document. But they did not do so until they had exhausted all the means of information which a proof would supply. I find that such a proof was allowed in *Martin* v. *Crawford*, 4 June 1850, 12 D. 960; *Allan* v. *Munnoch*, 30 Jan. 1861, 23 D. 417; *Thomson* v. *Geekie*, 6 March 1861, 23 D. 693; *Kennedy* v. *Rose*, 8 July 1863, 1 M. 1042; *Bryce* v. *Young's Executors*, 20 Jan. 1866, 4 M. 312; *Muir* v. *Ross' Executors*, 13 June 1866, 4 M. 820. In some of these cases the question which arose was whether money received on an indorsed deposit-receipt, or on a bank cheque was to be held a donation, or money to be accounted for. But they are not the less authorities in the present case, because the general rule of law that proof is limited to writ or oath applies as much in the case of a donation as of a loan. If the allegation of the defender in the present case had been that the money received on the bank cheque was given him as a donation by his now deceased brother, the question, whether it was so given, or whether he was bound to account for it to his brother's representatives, would on these authorities have been resolvable by a proof *prout de jure*. But I cannot conceive the principle varied merely because the question is not about donation, but loan. The principle is that laid down by Lord Curriehill in the case of *Bryce* v. *Young's Executors*, already referred to by Lord Deas, and which I would apply *in terminis* in the present case. "This action (said his Lordship) involves questions of nicety. But I do not think amongst them is the question whether a donation can be proved by parole evidence. The very basis of the rule is taken away in this case, because we have here a written document, granted by the owner of the fund, directing the holder of it to pay to Miss Bryce. The *basis* of the case, in short, is writing; and the question is, *quo animo* was that writing delivered? There may be a presumption in the circumstances that this money was meant for Miss Bryce's own use; but that presumption is open to inquiry by evidence of any kind, and therefore I think parole evidence is competent."

My conclusion is that this case ought not to be decided without a proof. If such a proof were allowed, I should reserve my opinion as to its effect, and also as to the competency of any particular evidence tendered. I should reserve my opinion as to what I should find to be the effect of this document, if the proof afforded me no further light. All that I at present say is, that I cannot assoilzie the man who is proved, under his own hand, to have received £750 of his deceased brother's money without some further inquiry, by means of evidence taken in Court, and other than the defender's own oath, into the ground or consideration on which he received it. To refuse such inquiry, on the plea of the rule excluding all proof of loan except writ or oath, appears to me, with all deference, to strain a principle to an inequitable application, and beyond its just legal scope.

Lord Cowan—An unreported decision of the Second Division—*Kyle's Executors* v. *Williamson*, in 1871—to which reference has been made by Lord Deas, may require explanation. The action was for payment of money advanced in loan by a cheque given to the defender by the deceased, in whose right as executor the pursuer stood. In defence, the receipt of the money was admitted, but it was alleged to have been received on account of debt, and to retire a bill of which the deceased was acceptor. The Lord Ordinary, before answer, allowed proof to both parties of their respective averments, and under that interlocutor, which was not reclaimed against, parole proof was led. The first witness called for the pursuer was the defender himself, and his deposition, which extends to upwards of nine printed pages, embraced the whole circumstances of the case, and especially had reference to certain letters which passed between the parties, and the bill transaction, on which the defender had founded in his defence. The Lord Ordinary, on the proof, decerned against the defender for the full sum libelled. A reclaiming-note was presented to the Second Division, and the defender then attempted to get quit of the parole proof on the rule of law that loan could only be established by writ or oath. But, after what had occurred, it was considered that the defender could not in this way get quit of his deposition, and that, having submitted to be examined

as a witness, the case must be determined on the proof which had been taken, and under it effect was given so far to the defender's oath in regard to his having sold to the deceased Mr Kyle for the price of £84, and decerniture was pronounced only for the balance of the £150. The case was thus quite special, and the decision cannot be regarded as having in any respect touched the important question at issue under this record, and for that reason I presume it has not been reported.

The following interlocutor was pronounced:—

"*Edinburgh, 7th March* 1872.—Recal the interlocutor of Lord Ormidale of 5th December 1871 reclaimed against: Find that the loan libelled can be proved only by the writ or oath of the defender: Find that the said loan is not proved *scripto* of the defender by the bank cheque with the defender's signature thereon, No. 7 of process: But allow the pursuer to produce any writ of the defender which he possesses or may recover: Find the defender entitled to expenses since the date of the Lord Ordinary's interlocutor reclaimed against, and remit to the auditor to tax the amount thereof and report."

Agents for Reclaimer—Webster & Will, S.S.C.
Agent for Respondent—Alex. Howe, W.S.

Tuesday, March 5.

SIR ANDREW ORR *v.* H. A. RANNIE.

Landlord and Tenant—Lease—Consensus in idem placitum—*Summary Ejection.*

Where parties had entered into a lease of agricultural subjects, complete in other respects, but omitting to specify the duration of the lease, and the tenant entered into possession and began to cultivate the subjects,—*held* that the landlord was not entitled to remove the tenant summarily in the middle of the crop and year, either in respect that no duration had been agreed on, or that the tenant had renounced the lease on the ground that the landlord had failed to implement certain conditions as to buildings, &c.

Question whether the omission of a clause specifying the period of endurance would render a lease utterly null and void.

This was an appeal from the Sheriff-court of Clackmannanshire against an interlocutor of the Sheriff, in a petition craving warrant for summarily removing and ejecting the respondent from the farms of Aberdona, &c., and for interdict against his entering into the possession of the mansion-house.

On 10th May 1871 the Sheriff-Substitute (BENNET CLARK) granted interim interdict, and thereafter a record was made up on the question of the landlord's right summarily to eject the tenant. In the meantime the tenant was warned to remove, and he left at Martinmas 1871.

On 18th November 1871 the Sheriff-Substitute pronounced the following interlocutor, in which the facts of the case are fully set forth:—"Finds that the petitioner, who is heritable proprietor of the farms of Aberdona, Weston, and Upper Sheardale, part of the estate of Harviestoun and Aberdona, advertised the said farms on 18th July 1870 to be let for the period of nineteen years, or such number of years as might be agreed upon, with entry at Martinmas 1870. That the respondent made offer on 15th September 1870 for said farms, in reference to said advertisement and relative conditions of let, of a certain rent, which was not accepted by the petitioner; and an amended offer was made by the respondent on 20th September, of an increased rent of £475, with certain conditions as to new buildings, the game, and the fences; which conditions were objected to, but ultimately the amended offer was accepted on 1st October 1870, with the exception of the proposed conditions as to the game, and keeping up the fences round the plantations; finds that nothing was said in the respondent's offer, nor was anything fixed in the correspondence and communings which followed between him and the petitioner's factor as to the endurance of the lease; finds that the respondent thereafter entered into possession of the said farms at the term of Martinmas 1870 but he did not obtain possession of the mansion-house of Aberdona, which was included in the lease of the said farms, it being then occupied by a tenant whose lease did not expire till Whitsunday 1871; finds that the respondent, after entering into possession of the farms, purchased from the petitioner, by valuation, the turnips on said farms, the straw of the previous corn crop, and a portion of the implements of husbandry on the farms, and paid for the grass seeds sown with the previous crop. That he proceeded to labour the lands, to prepare them for crops, and cultivated and sowed a portion of them for the ensuing season and crop, and for that purpose bought and used manure, and seeds; finds that, it being stipulated that the steading and fences were to be put in proper repair, and certain fences to be put up, and new buildings erected, the respondent urged on the petitioner the fulfilment of these stipulations, and in November and December 1870, complained to the petitioner's factor of the undue delay in reference thereto; and in January, February, and March 1871, the respondent remonstrated verbally and by letters, pointing out the inconvenience and loss he was suffering by the failure of the petitioner to attend to these stipulations; and on 7th March he wrote to the petitioner representing strongly the damage he was suffering, but the petitioner declined to make any compensation; finds that the respondent, on 22d March, submitted to the petitioner's factor a memorandum of conditions for a ten years' lease of the farms, and certain stipulations as to the buildings and fences, to which it was replied that the lease was understood to be for nineteen years, and declining the respondent's proposals. Whereupon the respondent intimated that he had no alternative but to give up the farms; and on 4th April he wrote to the petitioner's factor, holding the petitioner liable for having broken his engagements, and adding—'You understand that I do not occupy the farms in terms of the conditions of let to which you refer, for any lease, or for any fixed period, and that I am entitled to renounce possession at pleasure;' to which the petitioner's factor replied that the terms of agreement were the conditions of let, and that the petitioner had no wish that he (the respondent) should give up his bargain; finds that the agents of the parties then entered into a correspondence in regard to the position of the parties in the matter, the petitioner's agents holding that there was no concluded bargain between them for any period, to which the respondent's agents assented; and on the same day the petitioner's