graph note itself. But, independently of this consideration, the authorities referred to by the Lord Ordinary determine, as I conceive, that probative instruments are not necessary to instruct the compromise of a suit; but that this may be proved by the combination of informal writings with parole evidence. We are therefore, I conceive, fully put in possession of the terms of the compromise; and the compromise, as I think, is liable to no legal exception, and has been rightly enforced by the Lord Ordinary.

The other Judges concurred.

The Court adhered, with additional expenses.

Agents for Pursuers—J. & R. Macandrew, W.S.
Agents for Defenders—Waddell & Mackintosh, W.S.

Wednesday, June 12.

LEES *v.* WHIFFIN.

Executor—Foreign—Title.

Held (dissent Lord Deas) that a person who was appointed by the Court of Probate in England to be administrator, pending a suit, of the personal estate and effects of a deceased foreigner, had not, in virtue of that appointment, any title to be appointed executor-dative to the deceased in Scotland.

Francisco Solano Lopez, President of Paraguay, died at Cerra Cora, in Paraguay, on or about 1st March 1870, and had at the time of his death his domicile in that country. He left personal estate and effects, which were situated partly in England, and partly in Scotland. Three competitors for that estate appeared in the English Court of Probate—the President's mother, as entitled under the law of the deceased's domicile; Eliza Alicia Lynch, claiming under a deed of universal donation *mortis causa;* and the State of Paraguay itself, founding upon the decree of outlawry which was issued against the President some months before his death, and confirmed by the Legislative Congress on 13th July 1871. In these proceedings, Lord Penzance, Judge of the Court of Probate, on application of Council for the plaintiff (Lynch), with the consent of the defendant (Madam Lopez), made an order appointing Mr George Whiffin to be administrator, pending the said suit, of the personal estate and effects of the said Francisco Solano Lopez; and on 6th September 1871 letters of administration of the personal estate and effects of the said deceased, pending the said suit, were granted by the Court of Probate to the said Mr George Whiffin.

As narrated above, a portion of the estate and effects of the deceased President Lopez were situated in Scotland, and in order to its recovery it was necessary that there should be a party having an active title from the Court to sue therefor, and accordingly Mr Whiffin presented a petition to the Commissary Depute in Edinburgh, craving to be decerned "executor dative to the said deceased Francisco Solano Lopez, *qua* administrator of the personal estate and effects of the said deceased."

This petition was opposed by Mr Richard Lees, as attorney in Great Britain and Ireland of the Government of Paraguay, and as delegate administrator on their behalf of the estate of the deceased Lopez. The said Mr Lees was a writer in Galashiels, and a partner of Mr Robert Stewart, writer and banker there, in whose hands was a deposit of £4136, the only part of Lopez's estate alleged to be in Scotland.

The Commissary Depute (HALLARD) pronounced the following interlocutor:—

"*Edinburgh, 8th March* 1872.—The Commissary-Depute having considered the whole process, and heard counsel for the parties, for the reasons stated in the following note, repels the pleas of the respondent, and decerns the petitioner, George Whiffin, executor-dative to the defunct, *qua* administrator of the estate and effects of the said defunct, conform to letters of administration from the Principal Registry of Her Majesty's Court of Probate in England produced: Finds the respondent liable in expenses; allows an account thereof to be lodged for taxation; and remits the same, when lodged, to Mr Robert Barclay Selby, S.L., to tax and to report."

The learned Commissary-Depute, in a note, stated that in his opinion every consideration of convenience and propriety was in favour of the application, and that it seemed right that the funds of the deceased in Great Britain should be in the hands of one administrator; that the circumstance that the only opposition to the application proceeded from a partner of the holder of the fund sought to be recovered, gave additional strength to the considerations of convenience and propriety; and that although the records of the Court afforded no direct precedent for this application, yet the case of the *Marchioness of Hastings* (14 D. 489) showed clearly that, instead of an absolute and inflexible line between those persons who are and those who are not entitled to the office of executor, there is no limitation, if the applicant has any interest in law to obtain a decree; and in his opinion the requisite legal interest had in this case been created or declared by what *ex comitate* must be held a competent tribunal.

Mr Richard Lees appealed.

The Commissary (DAVIDSON) pronounced the following interlocutor:—

"*Edinburgh, 19th April* 1872.—The Commissary having considered the appeal for the respondent with the process, and heard counsel for the parties, dismisses the said appeal, adheres to the interlocutor appealed against: finds the respondent liable in additional expenses, and decerns."

The appellant appealed.

SOLICITOR-GENERAL and BALFOUR, for him, argued that the appointment of Whiffin in the English Courts was only pending the decision whether Madame Lynch, or the mother of Lopez was the executor of Lopez; that he was therefore a mere collector of assets in England, and his being so was no reason why he should be appointed, not an officer of Court, but an executor in Scotland. That the sentence of outlawry during the life of Lopez constituted an escheat of all his moveables to the Government of Paraguay, and in that case the appellant, as agent of that Government, and as delegate administrator of the estate of Lopez, on their behalf, was the only person entitled to administer the estate in Scotland.

MILLER and BURNET, for the petitioner and respondent, argued that the petitioner had a sufficient legal interest to entitle him to apply for the office of executor, and that it was expedient that the application should be granted. That the sentence of outlawry was of no effect, as it was pronounced by an unauthorised and unconstitutional Government; and that, even if it were a good sentence of

outlawry, it did not necessarily include a sentence of forfeiture.

At advising—

LORD PRESIDENT—In this case a petition was presented to the Commissary of Edinburgh by Mr George Whiffin, in which it was stated that the petitioner was, on 11th July 1871, "appointed by the Right Hon. James Plaisted Baron Penzance, the Judge of Her Majesty's Court of Probate, to be the administrator of the personal estate and effects of the said deceased Francisco Solano Lopez, conform to letters of administration granted by Her Majesty's Court of Probate at the principal registry on 6th September 1871, in favour of the petitioner;" and also that, "in order to enable the petitioner to recover and realise the personal estate and effects situated in Scotland of the said Francisco Solano Lopez, it is necessary that he should be appointed by this Court executor to the said deceased;" and the prayer of the petition was that the Commissary should "decern the petitioner executor-dative to the said deceased Francisco Solano Lopez, *qua* administrator of the personal estate and effects of the said deceased." Now, from this petition one would take it for granted that Mr Whiffin, by being appointed administrator by the Court of Probate in London, had been placed in England in a position precisely similar to that of executor-dative in Scotland. If this had been the case the executor or administrator in England would *ex comitate* have been recognised as the proper person to be executor-dative here. But when we look into the proceedings in the English Courts we find that the nature of the appointment is not of this sort. The application to the Court of Probate in London was made originally by Eliza A. Lynch, and in the proceedings Juano Paula Carillo de Lopez, the mother of Lopez, also appeared as a claimant on the estate. Then Lord Penzance, Judge of the Court of Probate, decreed letters of administration "to be granted to Eliza Alicia Lynch, the universal legatee named in the will of the deceeased Lopez, on all caveats entered herein being subducted, there being no executor named therein, the said will being good as a *testamentum militare* by the law of the country in which the deceased died domiciled." This decree was a provisional recognition of the title of Eliza A. Lynch as universal legatee, provisional upon caveats being subducted, and the will (of which only a copy was produced) being authenticated. This cause went on for some time between the two ladies, and, in these circumstances, the Judge issued the letters of administration founded on in the petition. Now, these letters of administration were issued on application of counsel for the plaintiff (Madame Lynch), with consent of the defendant, and were letters of administration of "the personal estate and effects of the said deceased Lopez, pending the said suit;" and the petitioner Mr George Whiffin swore "well and faithfully to administer the same, save distributing the residue thereof, under the directions and control of the said Court." Now this is obviously only an interim appointment, to guard that part of the estate of Lopez which lay within the jurisdiction of the Court of Probate, and I am unable to see how it gives any right to apply for the office of executor-dative in Scotland. The appointment is derived exclusively from the Court of Probate, and is of a very limited character, and the Judge gives no opinion or direction that Mr Whiffin should administer in any other country except England; but Mr Whiffin, without any such direction, comes here and asks that he should be decerned executor-dative of Lopez *qua* administrator of the personal effects and estate of the said deceased. Now, I am of opinion that Mr Whiffin has no title to ask this, and the Commissary has no power to appoint him unless he has a legal title. The office of executor is not one which any one can claim, nor can the Commissary appoint any one to it. The person claiming must have a legal title, and the law establishes a distinct order in which persons eligible are to be preferred. Mr Bell in his Commentaries (vol. ii, p. 78) sets forth this very clearly. He says that the first to be preferred is the executor-nominate, then the universal disponee; third, the next of kin; fourth, the widow, and last of all the creditors and legatees. Now, the result of this is, that no one can claim the office on his own account and for himself, unless he has been nominated by the deceased, or on the ground of propinquity, or on the ground of interest.

Some confusion has arisen in this case in consequence of the reference which was made to the practice of appointing a factor as executor. But this practice originated in the Act of Sederunt of 13th Feb. 1730, which deals only with the cases of factors for persons under age or absent. In such cases, when the person whom the factor represents could be appointed executor, the factor may be appointed instead of him, not in his own right, but as representing the pupil or absentee. Again, the Commissary is in the habit of appointing factors appointed by himself to be executors when the title of the person applying has been established, but when on account of non-age or absence he cannot take the office. In this case also the factor administers as representing the pupil or absentee and not in his own right.

Now, with these exceptions, I am not aware of any appointment which may be made to the office of executor, unless there is a legal title in the applicant, and a legal title arises only from nomination, from propinquity, from interest, or from being the representative of a person who cannot act for himself. In this case there is no such title, the only title is an appointment which limits the applicant to a limited portion of the estate for a limited purpose.

I should desire not to be misunderstood as to the courtesy which this Court should exhibit in reference to any title bestowed by the Court of Probate in England, or any other foreign Court. It was established by the case of the *Marchioness of Hastings* (14 D. 489) that a title bestowed by the English Court will be recognised by this Court, and the recent statute of 1858 is only a carrying out of this principle. If, therefore, a person obtained probate in England to the estate of a foreigner, I do not say that the Court here would not think it a sufficient title to support the appointment of executor, but there is no case of that sort here. This is the case of a person appointed to a certain office in reference to a certain cause—and that a very temporary one,—and I am accordingly of opinion that the interlocutor of the Commissary should be altered, and the petition refused.

LORD DEAS—I think there can be no doubt that if it was in the power of the Commissary to grant this petition, it was expedient that he should do so. Now, the only fund in Scotland is a sum admitted to be in the hands of a debtor, and the only

party who opposes this appointment is a partner in business of that debtor. It is quite clear that that fund should be made safe, and it is also clear that, if possible, it should be in the hands of the same person who is in possession of the funds in England, for it is not expedient to have a double management of the estate if it can be helped. Now, Whiffin has been appointed administrator in England by the mutual consent of two out of the three parties claiming right to the estate. If he is appointed here he must find caution to the full amount of the fund, and he is also bound by law to make the fund forthcoming to the party who may be found entitled to it, and to nobody else, so this fund would be perfectly safe in his hands. It is true that the office will be temporary, but only in this sense, that when it is finally decided by the Court who is entitled to the fund, he must hand it over. Thus the position which he would hold as executor-dative here is substantially the same as the position he now occupies as administrator in England, and the two offices would expire at the same time.

Now, your Lordship holds that, if Mr Whiffin had really been administrator in England, he might have been appointed executor here. Now, if Mr Whiffin is not administrator in England as the decree says he is, I am unable to see what position he holds. I think that his appointment is one in the very terms of the statute 20 and 21 Vict. c. 77. In section 2 of that statute it is enacted, that "'Administration' shall comprehend all letters of administration of the effects of deceased persons, whether with or without the will annexed, and whether granted for general, special, or limited purposes;" and in section 70 it is enacted, that pending any suit touching the validity of the will of any deceased person, &c., "the Court of Probate may appoint an administrator of the personal estate of such deceased person; and the administrator so appointed shall have all the rights and powers of a general administrator, other than the right of distributing the residue of such personal estate." It appears to me that the appointment of Mr Whiffin by the Court of Probate is an appointment under this statute. And, apart from statute, it is quite common in England to grant administrations for various purposes, as, for example, in the case of absentees, or pupils. So, I think, that we cannot assume that Mr Whiffin is anything else but an administrator. It is true he is an administrator for a limited purpose, but still an administrator with a valid and legal title.

Then the office of executor is not irrevocable any more than that of administrator in England is, and a different executor could be appointed at any time if it were found necessary. Again, it is not incompetent to give an executor for limited purposes, as, for example, in the case of an executor *qua* judicial factor. I am unable to understand where the objection lies, seeing that, from the nature of the case, the appointment would last only as long as the office of administrator lasts. I agree entirely with the Commissary.

Lord Ardmillan—Lopez died with a foreign domicile, and if there had been no debts due in England there would have been no call for the intervention of the English law. Thus the jurisdiction of the English Courts arises from the fact that there are funds in England, and in virtue of this jurisdiction the Court of Probate appointed an administrator to these funds pending the suit.

It seems common in England to appoint administrators for limited purposes, and in such cases the duties of the administrator must be measured by the limitation. In this case the limitation is to the English debts, and such seems obviously to be the meaning of the decree appointing the administrator.

The funds in Scotland may be reached in other ways than by appointing an executor. A factor might be appointed, and the very fact that it is said that the appellant has an interest to keep back the fund in Scotland, would facilitate such an appointment.

As to an executor with limited powers, I never heard of such an office; an executor is always appointed to the whole executry estate. And I am of opinion that this administrator holds only a temporary appointment, and is not administrator in the sense in which an executor is. I therefore agree with your Lordship that the interlocutor of the Commissary should be recalled.

Lord Kinloch—By the judgment under appeal the Commissary "decerns the petitioner, George Whiffin, executor-dative to the defender, *qua* administrator of the estate and effects of the said defunct, conform to letters of administration from the Principal Registry of Her Majesty's Court of Probate in England, produced." I am of opinion that, in the circumstances, this was an erroneous appointment.

The petitioner, George Whiffin, had no other title to be decerned executor-dative to the deceased President Lopez than what was given him by certain procedings in the English Court of Probate. More than one party were there applying for letters of administration to the estate of the deceased; and by arrangement Mr Whiffin was appointed administrator, but without power of distribution, until the suit which thus arose was terminated. He was so appointed by decree of the Court of Probate on 11th July 1871, being thereby in express terms appointed administrator, "pending the said suit of the personal estate and effects of Francisco Solano Lopez, the deceased." On 6th September thereafter, it appears that letters of administration were granted in his favour, "pending the said suit." Thus, although formally in the usual right of an administrator, his right to act lasted only during the dependence of the suit in the Court of Probate, and was only to the extent of ingathering, not of distributing, the effects.

I am of opinion that this gave Mr Whiffin no right to be appointed, generally and unlimitedly, executor-dative of President Lopez in Scotland. Such an appointment went far beyond any title vested in Mr Whiffin. Executor, generally, of President Lopez he had no title whatever to be. And if it be answered, as I think it fairly is, that the appointment must be held limited and restrained in terms of the appointment in the English Court of Probate, the immediate reply is, that such a limited appointment to the office of executor-dative is unknown to the law and practice of the Scottish Courts. An appointment to the office of executor-dative during the pendence of a suit, and to no further extent, is, I believe, unprecedented and unheard of. There appears to be such flexibility in the administration issued by the English Court of Probate as to admit of such an appointment; but I consider it altogether inadmissible in our Courts. It is true that the office of executor is sometimes conferred on a party

having a limited title, as a curator, a judicial factor, a trustee. But the appointment is in all these cases general and unlimited; it is given to a party having a general right to administer; and no reason exists in the nature of the case why the entire administration may not be completed and the executry estate wound up by the party appointed. There is no sanction given by this to the appointment of an executor to administer, without power of distribution, only during the pendence of a particular law-suit. I consider the appointment incompetent. My grounds are these two, already suggested:—1st, Because Mr Whiffin possesses no title on which to be appointed, generally and indefinitely, executor of the deceased; 2d, Because, supposing the appointment to be held restrained to administration during the pendence of the suit in England, I consider such an appointment to be inadmissible, according to the law and practice of our Courts.

I consider the case to be unaffected by the provisions of the 21st and 22d Vict., c. 56. By the 14th section of that Act it is declared, that in the case of any one dying domiciled in England or Ireland, where letters of administration have been granted in either of these countries, the production of these letters shall entitle to a concurring power of administration issued from the Commissary Court of Scotland. This provision is inapplicable in the present case, because President Lopez did not die domiciled in England, and the case does not therefore come under the statutory enactment, which is confined to administrations issuing within the domicile. Besides, I think the provision only applies to the case where a general right of administration is granted in England, not to that of a limited power of management during the dependence of a suit, which is all that here was conferred. This, although presenting the formal aspect of letters of administration, is in reality nothing more than a factorial power, or the creation of the office of receiver for a temporary period. Even had the deceased been domiciled in England, I should demur to the granting of a Scottish confirmation on the production of such a limited English title. But the case not being one of a party domiciled in England, the provision of the statute has manifestly no sort of application.

I am therefore of opinion that the interlocutor of the Commissary should be recalled, and the petition of Mr Whiffin refused. This will not deprive the parties interested of the power of having any effects in Scotland belonging to the deceased placed in secure custody. There are well-known means of effecting this object. But the only question before us now is, whether the appointment of Mr Whiffin to be executor-dative of President Lopez is sustainable. And I am clearly of opinion in the negative.

Agents for Appellant—Fyfe, Miller, & Fyfe, S.S.C.

Agent for Petitioner—William Mason, S.S.C.

Friday, June 14.

URQUHART *v.* BANK OF SCOTLAND.

Bill—Forgery—Adoption.

Held that a person who knew that his brother-in-law was in the habit of forging his name on bills, and who received a notice from a Bank informing him that a bill was past due on which his name appeared as an obligant, which proved to be also forged by his brother-in-law, and who nevertheless failed to inform the Bank that his signature was a forgery for three weeks after receipt of the notice, during which time the forger absconded, was barred from disputing his liability for the bill.

This was a suspension at the instance of Alexander Urquhart, farmer, Invermoriston, Inverness-shire, of a charge which he had received at the instance of the Bank of Scotland for payment of a bill for £34, bearing to have been endorsed by him to the Bank.

The suspender averred that the signature of his name upon the bill was a forgery.

The bill in question is dated 29th May 1871, and bears to be drawn by Hugh Gair on, and accepted by, William Macmillan, flesher, Inverness, and Duncan Fraser, farmer, Westerleys, and to be endorsed by Gair and the suspender. Gair is a brother of the suspender's wife, and was then a farmer at Hilton, near Inverness. The bill fell due on 1st August 1871, and as it was not paid on that day, the agent of the Bank of Scotland at Inverness, on 2d August, sent by post to the suspender, as well to the other obligants in the bill, a notice in the following terms:—

"*Inverness, 2d August* 1871.

"Sir, I beg to intimate that the bill after specified, on which you are an obligant, has been protested for non-payment. You are therefore requested to retire it at this office.

"William M'Millan and Duncan Fraser's acceptance to Hugh A. Gair, endorsed by you p. £34, dated 29th May 1871, @ 2 m/d, due here 1st inst.—I am, &c., "DON. DUFF, *Agent.*"

The notice was received in course of post by the suspender, who returned no answer till 23d August, when the Bank agent received a letter from him, dated 21st August, stating that he had never signed the bill. Meanwhile, on 17th August, Gair had absconded. He was afterwards apprehended and committed to prison on the charge of forging bills.

The Bank, besides maintaining the genuineness of the suspender's signature, pleaded—"(2) The complainer having homologated and adopted the signature in question as his genuine signature, is now barred from objecting that it is forged. (3) The complainer having, as condescended on, by his failure timeously to intimate to the respondents the alleged forgery, deprived them of their recourse against the said Hugh A. Gair, is barred from disputing his liability for said bill."

The note was passed on caution, and a proof taken.

From the evidence it appeared that Urquhart, who had been originally a ploughman, and was now a small farmer, though a shrewd and intelligent man, had received little or no education. He could write with difficulty, and his wife seems to have conducted his correspondence. For some time past Gair had been in the habit of forging Urquhart's name on bills, for the purpose of raising money. In general, these bills were retired by Gair before they came due, and Urquhart heard nothing about them. But on several occasions, shortly before the bill became due, Gair wrote to Mrs Urquhart, telling her that her husband would receive a notice from the Bank in reference to the bill, but that he need not mind, or something to