else than the payment of a moveable sum, and I cannot see how the fact that further payments are to be made in the future can change the character of the right. I therefore agree with your Lordship in holding that the accruing interest is part of the moveable estate of Robert Hunter Hill.

The Court held that the accruing interest was part of the moveable estate of the deceased Robert Hunter Hill, and that his mother was entitled to one-third thereof under the Moveable Succession Act of 1855.

Counsel for James Hill—Watson and M'Lean. Agents—J. & J. Gardiner, S.S.C.

Counsel for Mrs Hill—Fraser and Duncan. Agents—Jardine, Stodart, & Frasers, W.S.

Tuesday January 7.

SECOND DIVISION.

[Lord Mure, Ordinary.

DUNCAN'S TRUSTEES *v.* SHAND.

Obligation—Promissory Note.

A holograph document couched in the terms "I promise to pay on demand the sum of £100, value received"—*Held* (1) That it was not a promissory note. (2) That it could not by subsequent letters written by the granter be raised into a valid obligation."

Observed—It should be understood in the profession that where documents are included in an inventory which is given in by a party at the close of his proof, the counsel on the opposite side must satisfy themselves that there is no objection to the competency of these documents as evidence, as they will not afterwards be allowed to state such objections.

This case came up by a reclaiming note against the Lord Ordinary's interlocutor of 22d June 1872, which was as follows:—

"22*d June* 1872.—The Lord Ordinary having heard parties' procurators, and considered the closed record and productions, before answer allows parties a proof of their averments applicable to the possession by the late Dr Duncan of the promissory-note in question, and to each a conjunct probation, and appoints the proof to be taken before the Lord Ordinary on a day to be afterwards fixed.

"*Note.*—Until the facts relative to the possession of the document in question by the late Dr Duncan are ascertained, the case will not, it is thought, be in a position for disposing of any of the pleas raised in defence, or to enable the Court to decide whether the rules on which the decision in the case of *Fair*, 24th June 1801, Hume, p. 47. D. p. 1677 *Ogilvie*. 24 June 1804, M. Appx. Bill, No. 17; and *Macdonald*, 13th June 1817,—proceeded, admit of being here applied."

Thereafter, on the 22d and 26th November last, the following interlocutors were pronounced in the cause by the Second Division:—

"The Lords, on the motion of the pursuers, allow them a proof of the debt sued for, and appoint the same to proceed before the Lord Justice-Clerk on Saturday the 30th of November current, in the Parliament House, at one o'clock, and grant diligence."

"The Lords, on the motion of the defender, grant diligence for recovery of the writings specified in No. 23 of process, and to Mr Donald Crawford, advocate, to receive exhibits and take the deposition of havers, to be reported *quam primum*."

Accordingly a proof was led (Nov. 30th) before the Lord Justice-Clerk, and the case came up for hearing before the Second Division on 21st December.

The document on which the action was founded was as follows:—

"*Edinburgh 2d February*, 1869.—I promise to pay on demand the sum of £100 Sterling, value received. ISABELLA SHAND."

There were also produced a number of letters relative to the matter.

For the pursuers it was argued, that although the document erroneously termed a promissory note in the course of the correspondence was not perhaps sufficient to constitute a legal obligation, nevertheless it was entirely holograph of the defender, and was referred to by her all through as intimately connected with the transaction in question. The principal letters referred to were those of Miss Shand, of date 5th February 1869 and of 15th January 1872; the first is in answer to one of Mr Balfour's of the same date, and the two letters were as follows:—

"4 *Thistle Court, Edinburgh, February* 5, 1869.

"Madam,—I beg to remind you of the arrangement made yesterday, in terms of which you promised either to pay me £50 of the £100 which you got from Dr Duncan, or to find security to my satisfaction for the payment of the first £50 within a month, and the second £50 within two months, and this was to be done not later than Monday morning at eleven. We shall delay taking any proceedings against you till that hour.—Your most obedient servant, J. M. BALFOUR."

"13 *Maitland Street, 5th February* 1869.

"Sir,—I called for Mr Barbour to-day, to ask him to become my security to Dr Duncan, but unfortunately he was out. Mrs Barbour assured me I should see him to-morrow, when I hope to come to some arrangement with you. I have received your note.—I am, yours, &c., ISABELLA SHAND."

The other letter, with that which called it forth, was in these terms:—

"*Aberdeen*, 11*th January* 1872.

"Dear Madam,—We received your letter of 10th inst. Had you received the £100 from Dr Duncan on 2d February 1869 in payment of a debt, it is obvious you would not have granted your bill to him.

"Mr James Balfour, one of Dr Duncan's executors, handed over the bill as evidence of a debt legally due by you to the deceased, and as forming part of the residue falling to his minor grandchildren. In these circumstances, it is the duty of the trustees to recover payment, and we hope you will arrange for an immediate settlement, so as to avoid the disagreeable necessity of legal proceedings in terms of our instructions.

"We are sure Dr Duncan's trustees will not disregard any debt which may have been legally due by him.—Yours, &c., EDMONDS & MACQUEEN."

"*Edinburgh*, 25 *Charlotte Square*,

"15*th January* 1872.

"Dear Sir,—In reply to yours of 11th January, I beg to say that I will arrange as soon as possible

to pay the £100, as you consider it imperative in me to do so, notwithstanding the fact that Dr Duncan owed me more than double the sum, and acknowledged that he did so.—I remain, sincerely yours, ISABELLA SHAND."

These letters were an acknowledgment of an arrangement as to the mode of repayment. The defender never pleaded donation, and the pursuer was entitled to decree, the defence having been that the payment was one in extinction of a previously existing debt of honour.

Authorities—*Thomson* v. *Geikie*, 23 D. 693, and opinions of Lords Wood and Benholme therein.

For the defender, it was argued that the pursuer's case lay in a line and a-half of their own condescendence.—"On 2d February 1869 the said Dr John Duncan advanced and lent to the defender £100." Unless there was an unequivocally proved promissory-note, no ground of action existed. The document granted by the defender was equally referable to, and, indeed, best explained by regarding it as an advance by Dr Duncan, which she was to repay or not as she found convenient. The import of the letter of 15th January 1872 was not consistent with the view that the document was intended as an acknowledgment of a loan. That letter was written under the impression conveyed to her mind by the conscientious advice of a respectable firm of law agents, that *this* was a promissory-note. Subsequently the Court held it was not so, and yet this letter of hers and the document were being used conjointly to build up a case against her, to raise the document into a valid obligation.

Authorities—*Donaldson*, June 10, 1852, 14 D. 849; *Johnston*, 1860, 22 D. 404; *Downie*, Dec. 8, 1859, 22 D. 181; *Carnegie*, Feb. 22, 1825, 3 S. 566.

At advising—

LORD JUSTICE-CLERK — The summons in this action concludes thus—"Therefore the defender ought and should be decerned and ordained to make payment to the pursuers of the sum of £100 sterling, and for which sum the defender granted a promissory-note to the said Dr John Duncan, dated 2d February 1869, payable on demand, with interest at the rate of 5 per centum per annum from the date of said promissory-note until paid; together with the sum of £50 sterling, or such other sum as our said Lords shall modify as the expenses of the process to follow hereon." Your Lordships have, by your former judgment, (*ante*, 9 Scot. Law Rep., 651) negatived the statement that the document granted was a "promissory note," and, moreover, this Court found that the debt alleged to be due by the defender could only be proved by her writ or oath. The document before us was unanimously held not to be of an obligatory character. With some difficulty we sustained the summons, and allowed the pursuers a proof by writ or oath. To the former they have restricted themselves.

In itself, the writing, dated February 2, 1869, was found not to be a promissory-note, and I do not think that, as it has not been in itself available as an obligatory writing, it can be raised up into one by the other subsequent letters of the defender produced in the course of this action. For the purpose of explaining unintelligible expressions, or of illustrating the other writings, I think it might have been employed, but that is all. Now, my Lords, I have come to a very clear conclusion that the letters themselves do not imply that this money was in any way in the position of a sum advanced as a loan by Dr Duncan to Miss Shand. The letter of Mr Balfour, as a third party, is not evidence in the case, it is only explanatory; but the only way I can regard it as being perfectly consistent, is in the view of the money not having been given as a loan at all. Mr Balfour did not think that in the circumstances Miss Shand should have got the money at all, and, accordingly, he wished to change the footing upon which the money was given, and render it a loan duly secured by a promissory-note. Nothing further after February 1869 is heard in the matter until December 1871, and, with regard to the reply thereto and the subsequent letters written by Miss Shand, they must clearly be taken as a whole, with all the qualifications they contain. To the argument that the letters are equivalent to an agreement to repay, it would be a sufficient answer that this is not the ground on which this action was raised. The fact that there are qualifications takes the case out of the category of authorities quoted in the case of *Speirs*, 9 Scot. Law. Rep., 232, 10 Macph. 397. In this view, I do not think we approach the principle of the cases quoted. Apart from the writ there is here no acknowledgment, the only alleged proof being to be found in the letters in question, which, however, also show that it was not received as a loan. In these circumstances, my Lords, we should, in my opinion, sustain the defences, and assoilzie the defender.

LORD COWAN—We are tied up here to the question whether the obligation has been proved by the writ of the defender. Reference to oath has not been made, and consequently with that the Court have not at present to deal. All that the cases quoted for the pursuer tend to prove is, that where a writing is produced to show that money has passed from one hand to another, the presumption is one of loan. Miss Shand received the money, and to that there is no denial whatever offered, but the question is whether she received it as a loan or not? Had a reference to oath been resorted to, the writing might have been shown to her and made part of the oath, but this course has not been adopted. In none of her subsequent letters does Miss Shand specifically refer to it as hers, and as signed by her. As to the argument for the pursuers, I may notice two points, my Lords; in the first place, when judging of these letters, and elucidating their meaning, both sides of the correspondence must be regarded; and, secondly, that in reference to the writings it is impossible to resist the effect of the qualifications found in them. There is no admission that an agreement, as was argued, had been entered into for payment of the debt by instalments; on the contrary, I think the words of the letter indicate merely a hope that some arrangement might be arrived at. After Dr Duncan's death Miss Shand is addressed by Messrs Edmond & Macqueen on the subject of the money she had received. They demanded payment, and asserted that it was a debt legally due by her. It was in consequence of this that the lady wrote, "I will arrange as soon as possible to pay the £100, as you consider it imperative on me to do so, notwithstanding the fact that Dr Duncan owed me more than double the sum, and acknowledged that he did so," but I cannot regard that as any agreement to pay.

I concur with your Lordship in holding that

there is no debt proved by writ, which is the only issue in the case.

LORD BENHOLME—I concur with your Lordships, and would add that I find no document of debt other than that of February 2, 1869, which the Court have already held not obligatory. During Dr Duncan's lifetime an attack for the money was commenced, was then unaccountably stopped, and has now, after a long interval, revived on his death. It appears to me very unlike what would have occurred had the money been advanced as a loan. A null obligation cannot be set up and raised into a good one by these letters; they must in that respect be regarded alone. Has Miss Shand by these letters bound herself to pay the money? I clearly think it is not so, the qualifications adjected entirely destroyed them as substantive obligations.

LORD NEAVES—I concur. The argument for the pursuers had, I think, but small foundation; I should be sorry to suppose that any such doctrine of law had received support, but hitherto in Scotland it is not so.

I do not think Dr Duncan meant to do posthumously that which certainly in his lifetime he did not do.

Counsel for Duncan's Trustees—Watson and Trayner. Agent—D. Todd Lees, S.S.C.

Counsel for Miss Shand—Lord Advocate and Smith. Agent—T. Spalding, W.S.

Thursday January 9.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

REID *v.* REID'S TRUSTEES.

Process—Act, 48 *Geo. III. c.* 151, § 9—*Remit* ob contingentiam.

B brought an action, marked to the Second Division, against A's trustees, to ascertain the amount of the trust-estate, and the portion thereof due to her. Ten years after, C brought an action against A's trustees, marked to the First Division, to ascertain the amount of the trust-estate and the portion due to him. About the same time the trustees brought an action against B and C, also with reference to the trust-estate. The First Division remitted the two last actions to the Second Division *ob contingentiam* of the first action.

An action of count and reckoning was brought by Elizabeth Reid and others, her sisters, against the trustees of the deceased James Reid, their father, and the object of the action was (1) to ascertain the amount of the trust-estate, and (2) to ascertain the portion of that estate due to the pursuers.

This action was a Second Division case.

Ten years after, an action of count, reckoning and payment was raised by Walter Reid, the brother of the pursuers in the first action, against the same defenders, viz. the trustees of James Reid, and the object of this action was to fix the amount of the trust-estate due to the pursuer Walter Reid.

About the same date as the second action, a third action was raised by the said trustees against the pursuers in both the other cases, viz. Walter Reid and his sisters. The object of this third action was to recover certain sums said to be due by Walter Reid to the trust-estate, but with the alternative that he should relieve the pursuers of the first action—that is the action of count and reckoning brought by the other defenders Elizabeth Reid and others, against the pursuers Reid's trustees.

The second and third actions were brought to the First Division of the Court.

The Lord Ordinary pronounced an interlocutor conjoining the actions, and Walter Reid and his sisters reclaimed. When the reclaiming notes were in the Single Bills the counsel for the trustees moved that the actions be remitted to the Second Division. This motion was opposed by the reclaimers.

It was argued for them that (1) There was no such identity in the subject matter of the actions, or contingency between the actions, that they must be conjoined under the Act of 1868; (2) That there being thus no necessity to do so, it was not in the circumstances expedient, for the later actions had not been raised until many years after the first action, and although the trust-estate which formed an element in each action was the same, yet the real subject matter in each action was different, viz. the amount due to the respective parties.

Mansfield v. Atchison, 11 Dec. 1829, 8 S. 243; *Landale* v. *Todd*, 9 S. 268; *Western Bank*, 22 D. 447; *M'Neill* v. *Scott*, 4 M'Ph. 468.

It was argued for the respondents that there was plainly contingency between the actions, as the parties were the same, as also the subject-matter, viz. the division of the trust-estate, and that a decision in any one of the cases would very materially affect the other. It was therefore argued that this was a clear case for conjoining the actions, and remitting the First Division action under the 9th section of the Procedure Act of 1808, to the Second Division, in which Division the original action was brought.

At advising—

LORD PRESIDENT—It is not wonderful that questions should have arisen in construing the 9th section of the Act of 1808. If the section is widely construed it may include all cases in which there is any connection. I have never been able to hold that every case which has a connection with another in dependence in the other Division must be remitted. Connection means more than contingency. The other part of the section, which consists of the words "relating to the same subject matter, or thing," is also susceptible of different interpretations, as you construe it strictly or extensively. In the *Western Bank* case all the actions related to the same subject-matter, but the Court were of opinion that there was not sufficient ground for remitting.

I am clearly of opinion that the present case must be remitted to the Second Division. The object of all the actions is the same, viz., to have an accounting and enquiry into the estate of the late Mr James Reid, with a view to its distribution. The parties are also the same. I am therefore of opinion that it is imperative on us to remit the case.

The other Judges concurred.

The Court remitted the actions at the instance of Walter Reid and Reid's Trustees and the action at the instance of Reid's Trustees v. Walter Reid, Elizabeth Reid, and Others, to the Second Division *ob contingentiam* of the process depending before the