have gone wrong. The provision of the statute is that the debt shall prescribe unless the creditor take document thereupon. That provision is not to be satisfied by mere proof by witnesses, 1st, that money was paid, and 2d, that it was applied for the purposes of a particular debt. In many cases the fact that money was paid may be proved by witnesses, but not to relieve the debtor, but for collateral purposes. In all the cases in which the payment of interest or partial payment of principal has been held to interrupt prescription, the proof has been by receipts or by judicial admission, and I think it would be highly inexpedient to allow any other proof now.

I am therefore of opinion that the Sheriff's interlocutor should be recalled.

LORD DEAS—The real question in this case is whether this sum of principal and interest sued for has undergone prescription, or whether there has been interruption of prescription, or a relevant averment of payments such as will interrupt prescription.

It is said for the defender that by force of the Statute of 1469, c. 28, the claim is cut off, and that there has been no interruption of prescription. The statute is short, and I shall accordingly read it—[*Lord Deas here read the statute.*] Now it is clear that the interruption must be by taking document thereupon. But it was powerfully argued that the provisions of this statute were altered by the Statute of 1474, c. 54. That statute is as follows:—[*Lord Deas read the Act of* 1474, c. 54.] Now the Solicitor-General's argument was that the taking of document is here purposely omitted. But on looking at these two statutes it is clear that the object of the second statute was to explain that all obligations which had not been followed out for forty years, whether they were entered into before or after the passing of the statutes, should prescribe. There is no alteration intended with reference to the taking document; on the contrary, what is said in the second statute is that all obligations "not followed" within forty years, prescribe—followed *i.e.* by taking document. Accordingly I don't find that it has ever been judicially suggested that taking of documents was not the test of interruption of prescription. What has happened since the statutes is that the Court has put a liberal interpretation on the statute (apparently on the ground that the prescription was an odious one, an opinion with which I cannot agree) and held that taking of document was constituted by payment of interest for which receipts were granted and found in the custody of the debtor. That document in the hands of the debtor becomes a document taken by the creditor. This is, I think, a stretch of the provisions of the statute, and clearly proceeded on the notion that it was an odious prescription, to be got over in every possible way.

In all the cases which have been so strongly founded on—in *Nicholson*, *Guthrie*, and *Garden*—it is clear that there were documents. Now in this case it is not said that there are any receipts, or that there ever were any, and I am clearly of opinion that there is no authority for the statement that the taking of document can in any circumstances be otherwise than essential. Mr Erskine, 3, 7, 15, says—"All our lawyers are agreed that in the long negative prescription the creditor, barely by his silence for the whole course of prescription, is understood to have abandoned his claim, and so looseth his right of action without the necessity of *bona fides* of the debtor." In my manuscript notes of Hume's Lectures I also find it laid down that the effect of forty years' prescription is absolute extinction of the obligation, without room for reference to the oath of the debtor. Now it would be very strange if this prescription, by which the obligation is absolutely extinguished, could be elided by partial payment of interest not instructed by writing. Unless document has been taken, the question of payment is not a competent one. Thus if this case stood on the older statutes alone, I think the answer would be conclusive, but even if it were not so, there is still another statute which it would be necessary to answer, namely, the Act of 1617, c. 12. It is there enacted "that all actions competent of the law, upon heritable bonds, reversions, contracts, or others whatsoever, either already made or to be made after the date hereof, shall be pursued within the space of forty years after the date of the same." Now we can't look at that enactment without seeing that the obligation in this case comes under it.

I therefore concur with your Lordship.

LORD ARDMILLAN not having been present at the argument declined to give an opinion.

LORD MURE concurred.

The Court recalled the judgment appealed against.

Counsel for Pursuer—Rhind and Dean of Faculty (Clark), Q.C. Agents—D. Crawford & J. Y. Guthrie, S.S.C.

Counsel for Defender—Balfour and Solicitor-General (Watson). Agent—Charles S. Taylor, S.S.C.

Friday, December 4.

SECOND DIVISION.

[Lord Mure, Ordinary.

WILLIAM MITCHELL *v.* CURRER AND OTHERS (SCOTT'S TRUSTEES).

Sale—Contract—Writ—Essentials—Designation of Writer.

The testing clause of a missive offer to sell certain heritable subjects bore to be written by "the said John Smith," who was also one of the witnesses; but in the body of the writ the writer was simply mentioned as "Mr John Smith." *Held* (1) that this designation was insufficient, and (2) that the objection was not obviated by the description given of the writer in the acceptance of the offer, and in the document signed by Mr Smith and annexed to the acceptance, such acceptance not being holograph.

Observed (*per* Lord Gifford) that although the law permits an objection to a defective offer to be cured by homologation on the part of the person whose writ is defective, yet that the docquets at the end of the missives in this case could not make them into a complete and valid document.

Observed (*per* Lord Neaves) that to permit one agent to act for both parties in contracting would be to authorise one person to enter into a bilateral contract.

This case came up by reclaiming-note against a decision of Lord Ordinary MURE in an action of declarator, implement, and damages, at the instance of William Mitchell, ironfounder in Grahamston, near Falkirk, against Robert Currer, watchmaker in Falkirk, and another, trustees acting under the trust-disposition and settlement of the late Oliver Scott, sometime stocking manufacturer, Alma Street, Grahamston. The summons concluded for declarator that the pursuer had purchased from the deceased certain heritable subjects in Grahamston at the price of £540, and for an order on the defenders, as trustees of the deceased, to grant the pursuer a disposition of the subjects on payment of the price; and, further, for payment of £100 as damages in respect of the defenders' delay to implement the bargain now sought to be enforced. The action was defended, on the ground, *inter alia*, that the acceptance of the missives of offer constituting the alleged contract was not holograph of the pursuer, nor properly tested. The admission was made that the deceased signed the missives, but it was explained and averred that when he did so he was incapable of understanding the offer made him, and that they were not signed before witnesses.

The pursuer pleaded:—"(1) The offer by the late Oliver Scott, addressed to the pursuer on 21st August 1871, and the acceptance by the pursuer thereof of the same date, together with the writing by Mr John Smith, annexed thereto of same date, form a valid and formal contract for the purchase and sale of the subjects and others therein referred to, which the defenders are bound to implement. (2) The pursuer having paid one shilling to account of the price of the said subjects, is entitled to decree in terms of the conclusions of the summons. (3) The pursuer being ready and willing to implement the said contract, but the defenders having refused to implement the same, the pursuer is entitled to decree in terms of the conclusions of the summons. (4) The defenders having failed or delayed to implement their bargain with the pursuer, are liable in the loss and damage he has thereby sustained."

The defenders pleaded:—"(1) The pursuer's statements are not relevant or sufficient in law to support any of the conclusions of the summons. (2) The action cannot be maintained, in respect that the missives alleged to constitute the contract of purchase and sale between the pursuer and Mr Scott are not holograph, nor tested in terms of the statutes. (3) *Separatim*, no concluded contract was ever entered into, in respect that the material alterations upon the terms of Mr Scott's alleged offer expressed in the pursuer's alleged acceptance were never accepted or adopted by Mr Scott, or by any one having his authority. (4) The defenders ought to be assoilzied, in respect that, at the date when Mr Scott signed his alleged offer, he was not *compos mentis*, and that neither the said offer nor any of the relative documents are his acts or deeds. (5) The pursuer is not entitled to decree as concluded for, in respect that the alleged contract libelled was departed from and abandoned by him as aforesaid. (6) Assuming a valid and effectual contract of purchase and sale to have been entered into with Mr Scott, the pursuer cannot obtain any decree applicable to any larger area of ground than that comprehended in lots 2 and 3 upon Mr Black's sketch, in respect that the alleged contract did not relate to or comprehend any ground other than these lots. (7) The pursuer's whole material statements being unfounded in fact, the defenders ought to be assoilzied, with expenses."

The Lord Ordinary (MURE), after a proof, pronounced the following interlocutor:—

"*Edinburgh*, 14*th July* 1874.—The Lord Ordinary having heard parties' procurators, and considered the closed record, proof adduced, and whole process, Finds that the missive offer of the late Oliver Scott, founded on by the pursuer, is defective in the statutory solemnities, and that the acceptance of the said offer is neither tested nor holograph of the pursuer; sustains the second plea in law for the defenders, and assoilzies them from the conclusions of the action, and decerns: Finds the pursuer liable in expenses, subject to modification; of which appoints an account to be given in; and remits the same, when lodged, to the Auditor to tax and report.

"*Note*.—The testing clause of the missive offer, which is quoted in the third article of the condescendence, bears to be written by 'the said John Smith,' who is also one of the witnesses; but on referring to the body of the writ the writer is simply mentioned as 'Mr John Smith.' He is not, therefore, designed; and although it may be conjectured, from its being stated that he is to prepare the disposition to follow upon the missive that he was a professional agent, that, according to the rules laid down in the cases of *Percy* v. *Caldwell*, 25th November 1808, F.C.; *Lockhart*, 16th February 1815, F.C.; and *Callender*, December 17, 1863, is not a mode of construction which can be adopted as sufficient to supply the requirements of the statutes. The offer is therefore null under the Act 1681, c. 5, and cannot of itself be made the foundation of the claim raised under the present action.

"But it was contended on the part of the pursuer that the objection was obviated by the description given of Mr Smith in the acceptance of the offer, and also in the document signed by Mr Smith which is annexed to the acceptance, in both of which he is described as 'agent for both parties;' and it was also argued, upon the authority of the case of *Callender*, that this *notandum* was an adoption or homologation of the defective offer. The Lord Ordinary, however, has not been able to see his way to give effect to either of these pleas.

"For, in the first place, as to the acceptance, it is not holograph; so that even assuming the designation contained in it to be sufficient, which is a point not free from doubt, it cannot, it is thought, be read as supplying the statutory defect in the offer. It is not, moreover, a part of the offer, but the writing of another party. And the Lord Ordinary is not aware of any authority for holding that a separate writing of this description, not engrossed by reference into the writ, the validity of which is in question, as was the case with the rental in the case of *Callender*, can be founded upon as explanatory of the defect in the writ under challenge. To hold that it could, would, in the opinion of the Lord Ordinary, amount substantially to admitting a condescendence in support of the offer, which is expressly excluded by the statute. And the same observation applies to the writing of Mr Smith annexed to the acceptance, which, though holograph, is no part of the offer.

"But the question remains, whether that writing can be held to amount to such an adoption and

corroboration on the part of the late Mr Scott of the defective offer as must have the effect of precluding Mr Scott, or the defenders as his trustees, from challenging the transaction? The Lord Ordinary does not think that it can. It is not the writ of Mr Scott; and the Lord Ordinary doubts whether the passage in Mr Erskine (3. 3. 47), which is generally relied on in such questions, can be held to afford any sanction to acts of homologation by any one other than the party himself whose writ is defective. It is not, as the Lord Ordinary conceives, within the ordinary powers and duties of a law agent himself to execute the writings by which a sale of his client's property is carried through. Nothing, in the opinion of the Lord Ordinary, short of express—and as he is disposed to think written—authority to that effect, of which there are examples in the Styles Books, ought to be held as sufficient to bind a client in such transactions; and the Lord Ordinary does not think that there is evidence of any such authority having been given in the present case.

"On the question of expenses, the Lord Ordinary has found the pursuer liable, only subject to modification, because the statutory objection to the designation of the writer of the missive offer, in respect of which the case has now been disposed of, was not raised till after the whole proof had been led. It is covered, no doubt, by the plea in law which the Lord Ordinary has sustained, but it is nowhere specifically stated in the record, and was not mooted at the discussion which led to the record being amended before the proof was allowed. Had it been so raised, the Lord Ordinary would have considered it right to deal with it before a general proof was allowed, and the expense of that proof would, in all probability, have been saved."

At advising—

LORD JUSTICE-CLERK—My Lords, this is a case of some delicacy. As regards the first point—that of insufficient designation—I think that the conclusion arrived at by the Lord Ordinary is the correct one, although undoubtedly the question is one not entirely free from difficulty. But, altogether apart from this, there never was here any completed contract at all. There is considerable difficulty in one agent acting for both parties, and although in certain circumstances, more especially in the preliminary steps of a transaction, it may be quite safe for him to do so, yet, when the interests involved cease to be identical, or even become opposed, it will almost inevitably lead to confusion and perhaps litigation. In conclusion, I may add that here the agent had clearly no express authority to contract, since he went to his client to obtain that authority, which otherwise it would not have been necessary for him to do so.

LORD NEAVES—One remark naturally occurs to me from the discussion, namely, that this transaction turns upon an alleged contract entered into by Mr Smith for both parties, the only agreement being that by which Mr Smith binds both his clients. There can be no doubt that in the preliminary stages of a negotiation it will do well enough for one agent to act for both parties; indeed this may be the wisest course to pursue; but it is a question whether the ultimate and binding process can be concluded as a bi-lateral contract through the intervention of one agent; that I much doubt. The parole evidence in this action shows that Mr Smith was agent for both parties—to say the least, a dangerous course, and indeed in such a case the safe plan would be, I rather think, to have double interchanges of consent. If, however, in such a state of matters the transaction is to constitute an obligation, the whole surrounding circumstances must be such as to leave no doubt at all; now we have not that here. I think we should adhere, as I have no doubt that the Lord Ordinary is right.

LORD ORMIDALE concurred.

LORD GIFFORD—I have come to the same conclusion. The case arises under the old law, and must be looked at as such. Two points present themselves; first, as to the designation of the writer in the original document. Now, as to this there cannot be any doubt that there is not sufficient designation very little certainly will do, but there is not enough here to enable the Court to identify who John Smith is. The second point is that the acceptance is admittedly not holograph. It was ingeniously argued that both these missives are made into one complete document by the docquets at the end. There is no doubt that the law permits an objection to such a defective offer as the present to be cured by a document in which the disponing party whose writ is defective homologates, but we have not that in the case before us.

On the matter of the agency I admit that one agent may act for both parties in the preliminaries or in the carrying out of a contract, but I doubt if this will do as regards the making of it. He will be in such an event contracting with himself—in fact, as Lord Neaves has said, one person would be authorised to make a bilateral contract. Such a contract to avoid subsequent difficulty would require to be wonderfully exact. I think that the agent's powers in such a position must come up to those of an arbiter. Now, had Mr Smith those powers here? I do not think that he ever had in such a way as to be able to contract for both parties.

My Lords, I am therefore for adhering on these two grounds; firstly, that the missives as they stand do not form one document; and secondly, that Mr Smith had no such special authority as to enable him to contract for both parties.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel in support of the reclaiming-note for William Mitchell against Lord Mure's interlocutor of 14th July 1874, Refuse said note, and adhere to the interlocutor complained of, with additional expenses, and remit to the Auditor to tax the same and to report, reserving consideration of the question of modification of the expenses incurred in the Outer House."

Counsel for Pursuer — Scott and Strachan. Agents—Morton, Neilson, & Smart, W.S.

Counsel for Defenders — Balfour and Keir. Agents—J. & A. Peddie, W.S.

I., Clerk.