in like manner postponed. The pursuers being the entered vassals of the defenders, and seeking to have the casualty redeemed under the terms of the 15th section of the statute, it appears to me quite unreasonable, and beyond all intelligible construction of this statute, to say that this party, who is entered with the superior and is now the superior's vassal in this particular part of the original feu as distinguished from the other, is to pay anything more by way of composition than one year's rent of that subject in which he is the vassal of the superior."

My Lords, I entirely agree with that view of the statute—that it would be unreasonable in the greatest degree, and that nothing but the clearest words could lead any Court to put such a construction upon the statute as would make the disponee of a portion of a feu, who by virtue of the statute is to be taken or entered as vassal of that portion of the feu, lie under an obligation of redeeming the casualties by a payment made with reference to the value of the whole feu, in a part of which only he is the vassal. My Lords, I think that that is not the true construction of the statute, and that the construction adopted by the Court below is perfectly right.

I therefore propose to your Lordships that the appeal be dismissed with costs.

Lord Penzance and Lord O'Hagan concurred.

Lord Selborne—My Lords, I am of the same opinion, and I will only add a few words to the opinions given by your Lordships.

In *Wemyss* v. *Thompson*, January 19, 1836, 14 S. 233, the case relied upon by the appellants, the superior was held to be entitled to retain, as against the purchaser of part of the feu, his remedy for the entirety of the feu-duty, and of the duplicand of the feu-duty, which was the casualty on the entry of an heir—both those being conventional liabilities of the feuar and having in themselves no distributable quality according to which they could be apportioned over different parts of the lands. But in the same case no similar claim was either made by the superior or recognised by the Court as to the casualty for the entry of singular successors, which was not taxed, and which (in the language of the Statute of 1669) was due, "by statute and the constant practice of the kingdom," according to the measure of one year's rent (that is, one year's annual value to be let) of the lands of which the superior was bound to grant entry. It is impossible, in my opinion, to extend this obligation in any case to one year's value of any other lands than those to which entry might be claimed; and therefore when entry could be claimed to part only of the lands included in the original feu, this casualty would only be one year's value to let of that part of the lands.

In the present case the Statute of 1874 has given the same right with the same liabilities to the respondents as if before that enactment they had been actually entered and confirmed as vassals by the superior as to the particular lands purchased by them, and not as to any other lands. This being so, the 15th section of the same Act entitled them to redeem this casualty upon the terms which the Court of Session has allowed; and the 16th section, and the form of discharge there referred to, make that right additionally clear.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Counsel for Appellants—Kay, Q.C.—M'Laren. Agents—J. & J. Graham, Solicitors.

Counsel for Respondents—Southgate, Q.C.—Thorburn. Agent—

COURT OF SESSION.

Saturday, November 23.

SECOND DIVISION.

[Sheriff of Forfarshire.

NICOLL *v.* REID.

(*Ante*, vol. xv. p. 89.)

Proof—Parole Evidence—Bank Cheque.

Where payment of an account has been made by cheque, parole evidence is competent to show under what circumstances the cheque was given.

Observations (per curiam) on the case of *Haldane* v. *Speirs*, March 7, 1872, 10 Macph. 537.

This was an appeal from the Sheriff Court of Forfarshire. James Nicoll sued William Reid for £66, 8s. 10d., the amount said to be due for joiner work done by the workmen of the firm of Nicoll & Reid to the defender's house. A preliminary objection to the title to sue was repelled by the Court (Nov. 15, 1877, 5 R. 137, 15 Scot. Law Rep. 89).

William Reid, the defender, had employed his son Alexander Reid, in July 1875, to execute the work of which the price was in dispute. The son was then a partner of the firm of Nicoll & Reid, joiners in Kirriemuir, the work being performed by their workmen.

On 31st December 1875 the partnership was dissolved, and the work in question was at that time valued as part of the firm assets in a settlement of the accounts between the partners. Alexander Reid, the son, died in July 1876. In October 1876 the pursuer had first demanded payment for the work. The defence to this action, on the merits, was that the work had been done by Alexander Reid as an individual, and that payment had been made to him before his death, and four cheques were produced in evidence of the payment of £42. The other circumstances of the case, so far as material, will sufficiently appear from the note to the Sheriff-Substitute's interlocutor and from the opinions of the Court.

The Sheriff-Substitute (Robertson) gave decree for £24, 8s. 10d., the balance, thereby allowing the defender credit for the payment which he instructed by the cheques. He added this note:—

"*Note.*—It is inconceivable that the defender was ignorant of a partnership which was well known in the district. When he employed his son as a joiner, he employed his son's partner as well. It is possible for one member of a firm to have private contracts in which his partner has no concern; but very special proof would be required that both employer and employed clearly understood this position, otherwise the usual rules follow

the employment of one member of a firm. It is quite clear that the deceased Alexander Reid regarded his father's order as an order to the firm of Nicoll & Reid. The plant of the firm was employed, and wages were paid by the firm to the men who did the work. Not only so, but prior to the dissolution a valuation was made by the two partners of this very contract, so as to enable each to draw his fair share of the contract price before separating. It is of no consequence that the defender had little or no personal dealings with the pursuer.

"Coming now to the payments alleged to be paid to the late Alexander Reid by his father, these can only be instructed by writ or oath of the payee in the usual way. As the Sheriff remarks in an action at present depending between the partners of this same firm—'Parties who pay money, or who allege they have paid money, must take good care to preserve proper evidence of such payments.'

"The defender may have paid all the sums he alleges in his defences, but he can only instruct four payments by writ, which amount to £42; and these are all that the Sheriff-Substitute can credit him with. It was carefully argued by the pursuer's agent that even these should not be credited. But parole evidence is here admissible to show under what circumstances the cheques were given. (See *Bryce* v. *Young's Executors*, 4 Macph. 312.) They were all granted during the progress of the work, and at distinct intervals of time. The drawing of a cheque seems to raise a presumption that a debt exists between the drawer and payee — ninety-nine cheques out of a hundred are drawn for the purpose of paying such debts. (See Lord President in *Haldane*, 10 Macph. 537.) If this be so, and if four cheques are granted to the partner of a firm during the progress of the work—that partner being the member of the firm through whom the whole contract was managed — the Sheriff-Substitute holds the oath of the grantee and his daughter-in-law to be conclusive that they were granted to account of this joiner work. It appears the pursuer was kept in ignorance by his partner that these payments had been made; but this is a matter between him and his late partner's executors.

"Giving credit then to the defender for these payments by cheque, there still remains the question, what amount of work had the firm performed prior to its dissolution? and this part of the case has always appeared to the Sheriff-Substitute a delicate matter; for the valuation made for the information of the partners is not a document to which the defender is in any way a party. Nevertheless the Sheriff-Substitute has taken it as the only available guide to extricate the case. It seems to have been made in perfect *bona fides;* and the defender himself says he had paid more than the valuation to his son prior to the dissolution, which shows that the defender considered that amount of work at least had been performed by the firm up to that date.

"For these reasons, the Sheriff-Substitute has decerned against the defender for the sum of £24, 8s. 10d."

The Sheriff (Maitland Heriot) recalled the Sheriff-Substitute's interlocutor, and decerned against Reid for the whole sum sued for—holding that the cheques could not be held to instruct the payments alleged, upon the authority of *Haldane* v. *Speirs*, 10 Macph. 537.

The defender appealed to the Court of Session, and argued that payments to the amount of £42 were sufficiently instructed by the cheques produced endorsed by Reid the son; and further, that payments to one partner were equivalent to payments to the firm.

The pursuer argued—The case of *Haldane* v. *Speirs* was in point. The cheques no doubt showed payments by the father to the son, but they did not indicate any specific work or contract under which the payment was made, and father and son might have many transactions other than this particular one. There was no presumption even from the sum paid that would refer it to any special piece of work.

Authorities—*Egg* v. *Burnett*, 3 Espinasse 195; Thomson on Bills, 257; *Roxburghe & Co.* v. *Barlas*, Jan. 15, 1876, 13 Scot. Law Rep. 215; *Gibb* v. *Craik*, 8 Jur. 421; *Haldane* v. *Speirs*, March 7, 1872, 10 Macph. 537; *Ramchurn Mullick* v. *Luchmeechund Radakissen*, February 1854, 9 Moore P.C. Reps. 69.

At advising—

Lord Justice-Clerk—I am of opinion that the cheques alone, with the testimony adduced, are sufficient evidence of payment so far of the account incurred. The presumption of law further favours the defender's contention. The surviving partner Nicol was of course entitled to look upon this as a company transaction. On the other hand, there is no doubt that the contract was made directly with the son Alexander Reid, and that therefore William Reid the father was entitled to discharge it in the way in which he made it by paying the cheque to his son alone. There were several payments made in this way during the progress of the work, and Alexander Reid endorsed the cheques received by him, which proves that he got the money—a most important factor in the present case. This may be often immaterial, but here it is not so, for the payment was received from an admitted debtor. I think that in the absence of anything to show the contrary, the presumption is too strong for argument that Alexander Reid received this money in payment for this work. I think if the money is once traced to him, and no other reason for his receiving it can be given, that is sufficient to discharge the debt.

Lord Ormidale—The first question is whether Alex. Reid was entitled to make this contract. I think there can be no doubt that he was. He was entitled to get work for the firm where he could, and the firm having done the work, was not Reid's partner, the pursuer, entitled to go to the defender for payment, or did he need a mandate from the other partner who had made the contract? It is clear that he did not.

The next and really important question is whether the work undoubtedly done has been paid for by the four cheques. It is said for the pursuer that these cheques only infer payment to the son. Now, they were received by the son, and he endorsed them, but for what purpose, it is asked, and for what debt? The case of *Haldane* v. *Speirs* has been founded on by the pursuer, but it was very different from the present. It did not raise a question as to whether

payment was proved by a cheque. It dealt with the question whether a person paying money by cheque is entitled to rear up an obligation of loan. But indeed it is rather against the pursuer here than for him, for from the opinion delivered by the Lord President, his Lordship's view appears to have been that a cheque is *prima facie* evidence of payment of an antecedent debt—Starkie on Evidence (3d. ed.) vol. 2, p. 79.

Now, is parole evidence admissible to prove the object for which this cheque was given. I think in point of law and equity that it is. I base my judgment without hesitation on this, that payment being proved *scripto*, parole is competent to prove why it was made. It seems to have been an afterthought given effect to by the Sheriff that it is incompetent to prove the object of payment by parole. It would be most unjust not to allow parole to that effect if the payment itself is proved *scripto*.

Lord Gifford—This is a very important case. Cheques are evidence of the passing of money. If I thought that in this judgment we were disturbing the judgment in the case of *Haldane* v. *Speirs* I would be for consulting the other Division of the Court, but in the view I take of that case we are not doing so at all. There an attempt was made to rear up a new contract—one of loan—by parole, and no doubt it was held that parole is not competent to prove a loan, but it was expressly said that the presumption raised by a cheque is payment of the debt—the Lord President observing that in ninety-nine cases out of one hundred a cheque is given as payment. I concur in that statement. It would be a very unjust result were we to hold anything else, and accordingly Starkie on Evidence (vol. 2, p. 79), sets forth that "a receipt of money by a defendant on a cheque drawn by the plaintiff on his banker *prima facie* imports a payment and not a loan." If a gentleman sends a cheque to his grocer, that is evidence that he means to pay him, and to refuse to allow parole proof in support of that, in case it is denied, would be very unjust. Here we have competent evidence that money passed from a creditor to a debtor, and that payment being proved *scripto* it may be proved by parole why it was made.

Lord Justice-Clerk—I wish to add that on this question of the admissibility of parole I take the same view as your Lordships, and though I did not rest my judgment on that ground, I do so now.

The Court pronounced the following interlocutor:—

"Recal the judgment appealed from: Find that the cheques in question were granted by William Reid and received by Alexander Reid in payment of the account libelled: Find that the endorsation of these cheques to Alexander Reid proves that he received the proceeds thereof; and that the presumption is, in the absence of any other cause of granting being alleged, that the said cheques were granted and received in payment of the admitted debt: Find, *separatim*, that it has been proved by the parole testimony that the said cheques were so granted and received: Therefore decern against the appellant (defender) for payment to the respondent (pursuer) of the sum of £24, 8s. 10d., being the balance of £66. 8s. 10d. sued for, after deduction of £42, being the amount of the said cheques, with interest on the said sum of £24, 8s. 10d. at 5 per cent. per annum from the date of citation until payment thereof, &c.

Counsel for Pursuer (Respondent)—M'Laren—J. A. Reid. Agents—Ronald & Ritchie, S.S.C.

Counsel for Defender (Appellant)—Balfour—Strachan. Agents—Macbean & Malloch, W.S.

Wednesday, November 27.

FIRST DIVISION.

* CITY OF GLASGOW BANK LIQUIDATION—BRIGHTWEN & CO. AND OTHERS, PETITIONERS, *v.* THE LIQUIDATORS.

Public Company — Voluntary Winding-up under Supervision of the Court—Appointment of Additional Liquidator—Companies Act 1862 (25 *and* 26 *Vict. cap.* 89), *secs.* 147, 149, *and* 150.

A company was in process of voluntary winding-up, and it had been agreed that an order should be pronounced making the winding-up subject to the supervision of the Court. Four liquidators had been appointed in the winding-up. The debts amounted in all to not less than twelve millions, ten and a-half millions of which were due in Scotland, the rest in England and elsewhere, but the assets were stated by the liquidators in open Court to be sufficient to pay all creditors. Creditors to the amount of £455,000 presented a petition to the Court praying, *inter alia*, under the 150th section of the Companies Act 1862, for the appointment of an additional liquidator or of a creditors' representative to attend specially to the interests of the creditors out of Scotland. This liquidator was to be appointed either to act with the existing liquidators or to come in the place of one or more of them. Looking to the circumstances of the case, the Court, in the exercise of its discretion, *refused* to grant the prayer of the petition.

Observed per Lord President (Inglis) that it would not in all cases be incompetent for the Court to appoint a person resident beyond the jurisdiction of the Court as liquidator of an incorporated company under the 150th section of the Companies Act 1862.

Observations upon the office and appointment of a "creditors' representative."

The City of Glasgow Bank suspended payment on 2d October 1878. On 22d October a special general meeting of the shareholders of the company was held in Glasgow, when it was resolved, *inter alia*—(1) That the bank be wound up voluntarily; (2) that liquidators should be appointed for the purpose of winding-up the affairs of the bank. Liquidators, four in number, were also nominated and appointed. On October 29th a petition was presented to the Court by Messrs Brightwen & Company, bill brokers, London, which prayed for a winding-up by the Court, or

* The City of Glasgow Bank liquidation cases, decided prior to the rising of the Court for the Christmas recess 1878-79, here follow, taking precedence of all others up to that date.