Counsel for Defenders (Respondents)—Robertson—Jameson. Agents—H. B. & F. J. Dewar, W.S.

Friday, January 12.

FIRST DIVISION.

[Lord Fraser, Ordinary.

GAVINE *v*. LEE.

Sale—Sale of Heritage—Missive—Writ—Holograph.

Where a holograph signature and statement by a party sought to be bound is appended to words not holograph, and the signature and statement are written under the part which is not holograph, the party adopts that which goes before, and the document is equivalent to a holograph document.

Terms of an agreement constituted by missives, and stipulating that the granter of a feu should procure for the feuar a loan on certain conditions, under which *held* that the feuar was not entitled to have the feu-contract and the bond for the loan executed simultaneously; and in respect the granter had offered to implement the contract, action *dismissed* as unnecessary.

This was an action at the instance of John Gavine, designed as a builder and contractor in Edinburgh, against J. B. W. Lee, S.S.C., to enforce implement of a contract alleged to have been constituted by certain missives by which the defender agreed to feu out to the pursuer certain vacant building stances in Albert Street, Edinburgh, and also to procure for him certain loans on the security of the subjects built.

The missive offer was in the following terms, the signature and the words following being holograph of Gavine:—

"*Edinburgh, 27th July* 1881.

"J. B. W. Lee, Esq., S.S.C.,

"10 George Street.

"Sir,—I hereby offer to feu from you the two vacant stances belonging to you at the north-west end of Albert Street, adjoining Messrs Drysdale & Gilmour's feu, each having a frontage of 55 feet or thereby, at the rate of 16s. per foot of frontage, with duplicand every twenty-first year, as in your title, on the following conditions, viz.—

"(1) That you grant or procure for me a loan or loans equal to three-fourths of the value of the subjects built, at the rate of 4½ or 5 per cent., payable by instalments, according to schedule annexed, on the certificate of Messrs M'Gibbon & Ross, architects, the buildings being always in value one-fourth more than the payment so made:

"(2) That I be allowed one year from Martinmas next, free of feu-duty, to build, the feu-duty beginning to run at Martinmas 1882:

"(3) That I take the ground subject to all conditions, provisions, &c., in your title from Heriot's Hospital, except as regards feu-duty and duplicand above stipulated, so far as applicable to the ground:

"(4) That I have entry to the subjects at date of acceptance of this offer: And

"(5) That a valid feu-contract of the ground be entered into between us, subject to the conditions, &c., above referred to.

"This offer to be binding for two days only.—I am, Sir, your obedient servant.

"JOHN GAVINE,

"Builder, 42 Rosemount.

"*Adopted as holograph.*"

Annexed was a schedule stating the periods when instalments were to be payable, according to the advancement of the work. To this schedule there was this docquet:—

"I hereby adopt the above as holograph.

"JOHN GAVINE,

"*27th July* 1881."

The original offer was lost, but it was proved by the pursuer and his agent, Mr Barton, S.S.C., that it had been written by a clerk of the latter, and that thereafter the pursuer had appended to the letter his signature, "John Gavine, builder, 42 Rosemount," with the docquet in his own writing, "Adopted as holograph."

The letter with the schedule, in this shape, was sent to the defender, who by holograph letters dated 28th and 30th July 1881 accepted the offer. It was not proved when the docquet was appended to the schedule. The original offer having been lost in the hands of the defender, a copy was admitted.

The defender pleaded—"(1) The documents founded on by the pursuer not being holograph or tested, are insufficient in law to make a binding agreement. (2) The defender having been always willing and ready to enter into a feu-contract with the pursuer in terms of said documents, as if they were legally binding, the present action is unnecessary, and should be dismissed."

The nature of the dispute as to the terms of the contract is explained in the opinion of the Lord President.

Gavine having become bankrupt, Theodore Macdonald, commission agent, Leith Walk, Edinburgh, trustee on his sequestrated estate, was sisted as pursuer.

The Lord Ordinary (FRASER), after a proof, pronounced this interlocutor:—"The Lord Ordinary having considered the proof, productions, and whole process, Finds that John Gavine, by missive letter, not tested or holograph, offered to take a feu from the defender of two vacant stances belonging to the latter in Albert Street, Edinburgh, and that the defender, by missive letter holograph of him, accepted said offer: Finds in law that said missives do not constitute a binding agreement, in respect that the offer by Gavine was not holograph or tested: Finds it not proven that there was such *rei interventus* as to obviate said objection; therefore assoilzies the defender from the conclusions of the action, and decerns: Finds the defender entitled to expenses, subject to modification, from Theodore Macdonald, trustee on the sequestrated estates of John Gavine, who was sisted as pursuer in room of Gavine," &c.

"*Opinion.*—The plea which has now been sustained gives effect to one of the most firmly settled rules in regard to heritable rights in our law. An agreement for the sale or feuing out of heritage must be on both sides holograph or tested. This rule has been uniformly enforced, and therefore it is not necessary to do more than to refer to the recent decisions upon the subject—*Goldston* v. *Young*, 8th Dec. 1868, 7 Macph. 188; *Scottish Lands and Building Co. (Limited)* v. *Shaw*, 13th

May 1880, 7 R. 756; *Caithness Flagstone Quarrying Co.* v. *Sinclair*, 9th July 1880, 7 R. 1117, and in H. of L. 7th April 1881, 8 R. 78. But it is contended that a writing not holograph or tested must be given effect to provided it be recognised in a subsequent writing which is holograph or tested. Assuming this to be the law, the facts of this case do not permit of its application here. The original offer made by the pursuer Gavine has been lost. It is proved, however, by the pursuer and by his agent, that it was written by a clerk of the latter. A copy of it made by the clerk of the defender is preserved, it being prefixed to his letter of acceptance, dated the 28th of July 1881. At the end of this copy made by the defender's clerk there appears the following words:—'I hereby adopt the above as holograph. JOHN GAVINE. 27th July 1882.' At what time these words were added to the document does not very clearly appear. But this is quite certain, that the date, 27th July 1881, is false, for that copy offer was only sent to the pursuer's agent by the defender on the 28th of July, and therefore the pursuer could not have added his docquet to it on 27th of that month. The Lord Ordinary is of opinion that this *notandum* dated 27th July was added after the defences were lodged. It is not referred to in the original summons, but it now appears in the record, in virtue of a marginal note put upon the summons after the defences were seen. The defences were lodged on the 4th of May, and the missive letters with the holograph *notandum* were lodged on the 4th of July, and thereafter the marginal note was put upon the summons. The pursuer seems to have rather a vague notion as to the meaning of his holograph *notandum*, for he stated 'holograph' was a French word which meant that the parties were to stick to their bargain.

"The next point in the case is whether there was such *rei interventus* as to cure the defect in the missives, and allow the Court to set them up" —[*His Lordship then examined the proof on this question, and expressed the opinion that there had been no* rei interventus].

The pursuer reclaimed, and argued — The Lord Ordinary had fallen into an error with regard to the docquets. The holograph docquet at the end of letter, into which was imported by reference the schedule, had the effect of making the offer holograph. The outlays of the pursuer on plans for the proposed buildings were sufficient *rei interventus* even though the money was paid to third parties. By the terms of the contract the pursuer was entitled to have a bond executed and the money advanced at the same time the feu-contract was executed.—*M'Intyre* v. *M'Farlane*, March 1, 1821, F.C.; *Christie's Trustees* v. *Muirhead*, Feb. 1, 1870, 8 Macph. 461; *Maitland's Trustees* v. *Maitland*, Nov. 10, 1871, 9 Macph. 79; *Church of England Life and Fire Assurance Co.* v. *Wink*, July 17, 1857, 19 D. 1079; *Stewart* v. *Burns*, Feb. 1, 1877, 4 R. 427; *Johnstone* v. *Grant*, Feb. 28, 1844, 6 D. 875; *Weir* v. *Robertson*, Feb. 1, 1872, 10 Macph. 438.

The defender replied—There was here no binding contract, the missive offer being improbative. The defender having been all along willing to implement the terms of the contract, the action was unnecessary.—*Scottish Lands Co.* v. *Shaw*, May 13, 1880, 7 R. 756; *Shaw* v. *Shaw*, March 6, 1851, 13 D. 877; *Logan* v. *Logan and Others* Oct. 29, 1869, 7 Scot. Law Rep. 40; *Dickson* v. *Blair*, Nov. 3, 1871, 10 Macph. 41.

At advising—

LORD PRESIDENT—This is an action to enforce a contract alleged to have been constituted by certain missives by which the defender undertook to feu to the pursuer certain vacant stances in Albert Street, Edinburgh, and also to grant or obtain for him a loan or loans equal to three-fourths of the value of the subjects built. The Lord Ordinary has found in law that these missives are not binding, in respect that Gavine's offer is neither holograph nor tested, and that it has not been proved that there was *rei interventus* following on the missives, and he therefore assoilzies the defender. I cannot help thinking that the Lord Ordinary's interlocutor is founded upon a misapprehension as to the facts of the case. The offer by Gavine was not holograph in the body of the document—indeed, we are here in the awkward position that the original offer by Gavine has been lost, but as it was last in the defender's hands he is willing to take the copy as an original, the body of which was written by a clerk and was subscribed thus—"John Gavine, Builder, 42 Rosemount; Adopted as holograph," —the signature and the words following being holograph of Gavine. Now, the acceptance of that offer is contained in two letters of the defender, both holograph of him, and the question in these circumstances is, whether the letter dated 27th July 1881 is equivalent to a holograph document? I am of opinion that it is, on the principle contained in three cases, the first of which is as far back as the year 1821, the case of *M'Intyre*, and the two more recent cases of *Christie's Trustees* and *Maitland's Trustees*. The principle of these cases is that where a holograph signature and statement by the party sought to be bound is appended to words not holograph, and the signature and statement are written under and after the part which is not holograph, the party adopts that which goes before. That principle is very clearly applicable to the present case, and I have no doubt that the Lord Ordinary would have thought so if he had not thought that the words founded on as holograph were not these which I have read, but certain others appended to the schedule. He states that the words founded on as holograph and appended to the schedule were added only after defences were lodged, and that he can give no weight to them because the date 27th July 1881 is false. But the writing founded by the amendment to the record is the writing to which I have just adverted, consisting of the signature and statement by Gavine, and I cannot doubt that if the Lord Ordinary had not been mistaken as to this fact he would have followed the cases to which he refers in his note.

In his opinion his Lordship says that nothing is better settled than the rule that an agreement for the sale or feuing out of heritage must be on both sides either holograph or tested, but that is only saying that an agreement relating to heritage must be in writing, and that is a statement which is applicable to many other cases than bargains relating to heritage. For example, in the case of *Christie's Trustees* the contract was a contract of loan. I therefore differ from the Lord Ordinary so far as regards the constitution of the obli-

gation, and in these circumstances I do not consider the question of *rei interventus*, for these missives required none.

Another question remains of quite a different character, namely, whether the defender Lee has been guilty of a breach of contract—that is to say, whether he has refused to implement the contract into which he entered? The contract is that Gavine is to get a feu of these subjects at the rate of 16s. per foot of frontage, with a duplicand every twenty-two years, and that Lee is to grant or procure a loan or loans equal to three-fourths of the value of the subjects built, at the rate of 4½ or 5 per cent., payable by instalments (that is to say, to be advanced by instalments), according to schedule annexed to one of the missives on the certificate of Messrs M'Gibbon & Ross, architects, the building being always in value one-fourth more than the payment so made. The feuar is to be allowed one year free of feu-duty, to build, and is to take the ground subject to the conditions in Lee's title from Heriot's Hospital.

The difference as regards the construction of the contract depends upon that part which provides for the granting of a loan. The pursuer contends that he is entitled to have the loan adjusted before the building is commenced, and insists that the feu-contract and the bond should be executed simultaneously, and in maintaining this I think that he entirely misconstrues the contract. It seems that the loan was to be for three-fourths of the value of the subjects built, not of the subjects intended or contracted to be built, and it is provided that the loan shall be advanced by instalments according to certificates by the architect. The schedule provides that the first instalment is to be paid when the first joists above the street joists are laid, the second instalment when the building is ready for the roof, and so on with regard to the six instalments into which the loan is to be divided.

The dispute on this part of the contract forms the subject of a long correspondence, which it would be quite idle to go into in detail, as it contains a great deal that is mere repetition. It is well summed up in a letter written by Lee before the action was raised, and which ought to have settled the matter. In this letter, dated 9th March 1882, he says—"I have offered, I cannot remember how often, to enter into a feu-contract with your client, and as you decline to adjust it with me, I offered and offer to adjust it at the sight of an agent to be mutually chosen. I have offered to find three-fourths of the value of the two tenements to be erected on the ground, on plans to be prepared by Messrs M'Gibbon & Ross, or sanctioned by them. I have offered to find the money, by instalments, on the certificate of Messrs M'Gibbon & Ross, but I have declined to prepare a security, or to fix the amount of the sum to be lent, until the first joists above the street joists are laid. You insist that I shall lend £5000 over the subject of security before a stone of it is laid, and that because your client requires that sum to enable him to build; though I have offered to build both tenements at a sum under that figure."

Now, there is no answer to this from the pursuer to the effect of withdrawing his demand, or any intimation that he does not mean to insist in it, and it is on the footing that this is the dispute that the action has been brought. I think that the offer in that letter is in terms of the contract, and that the action is therefore unnecessary, as the pursuer could have got out of Court all that he now asks. I am of opinion, therefore, that the action should be dismissed, and that as success has been so divided no expenses should be found due to either party. The action being dismissed, a question may remain whether the contract can be enforced. On that question I give no opinion, but I see that much has occurred since the date of these missives, and that both from the lapse of time and the bankruptcy of the pursuer it is doubtful whether the contract can now be enforced.

Lord Deas—When this question whether the offer of Gavine is binding was raised, no one ever doubted that the missives relating to heritage must both be probative documents, that is to say, either holograph or tested, but it was contended that the offer by Gavine was not probative, and the answer to that depends upon whether it is to be held as holograph. The acceptance was not objected to. On that question I stated to the parties that I recollected a case precisely similar to this, in which the question was decided as to whether words like what are used here—the words "Adopted as holograph" added by Gavine—I say I mentioned a case in which I was counsel in which words substantially the same were used —and the Court decided unanimously that they were enough to make the writing holograph. That was the case of *Bryson* v. *Crawford*, decided on this part of the case by an interlocutor dated 15th November 1833, 6 Scot. Jur., 55 and 502, in which the Court held that, provided the words appended and the signature were genuine, then the document was sufficient proof, either in a question relating to heritage, which that was, or any other question requiring writing. The words there were "I agree to the above," and then followed the signature—I am not sorry to find that I have remembered the words used and also the interlocutor. I am under the impression—indeed I am sure—that there has been no decision to the contrary since that, which was a decision pronounced by as able a bench of Judges as we have ever had, and that it is quite applicable here. I think therefore that it is quite established that both the missives are holograph. It is not to be wondered at that that case should be sufficient to decide the present question, because the proof of trust depends upon the Act 1696, c. 25, which declares "that no action or declarator of trust shall be sustained as to any deed of trust made for hereafter except upon a declaration or back-bond of trust lawfully subscribed by the person alleged to be the trustee, and against whom, or his heirs or assignees, the declarator shall be intented, or unless the same be referred to the oath of party *simpliciter*." In the case of *Bryson* v. *Crawford* there was a subsequent jury trial, and the party admitted that he could not prove that the words "I agree to the above" were holograph of Crawford at all, and therefore he failed on the merits on that issue. I have no doubt that this document, which is not disputed to have been lawfully subscribed, has the effect of a holograph document. I am of opinion, therefore, that in law these were good missives.

It is said that these missives were acted upon, and there is no doubt that missives may be set up in that way, but there is no necessity for considering that question here. I must say it did not appear to me so plain a ground of action as the other. On the rest of the case I concur with your Lordship, and have nothing to add.

LORD MURE—On the first question, whether the offer by the pursuer is to be held as holograph, it is plain that the Lord Ordinary was under error as to the date when the holograph words were written. Putting that aside, it is quite plain that provided the words were added after the body of the document had been written, this objection is unfounded, and I think that the missive with the holograph note at the end to the effect that all that is above written is adopted as holograph, when accepted by the defender, constituted a binding obligation, on the authority of the series of cases beginning with the case of *M'Intyre.* It then remains to construe the terms of the documents, and see whether the pursuer was entitled to insist on a bond for £5000 being executed when the feu-contract was signed. I think there was no such obligation undertaken by the defender. The words are that the loan is to be "payable by instalments, according to schedule annexed, on the certificate of Messrs M'Gibbon & Ross, architects, the buildings being always in value one-fourth more than the payment so made;" and that contains no authority for the immediate preparation of a bond for £5000. Lee was quite ready, when the pursuer raised his objections, to comply with the terms of the obligation, and states that he is willing in a letter dated 15th October 1881, in which he says—"Whenever Mr Gavine is at a stage when an instalment can be paid to him in terms of the missives, I will get an instalment for him in terms of the agreement if it shall be found to be still binding on me." He repeats that on 17th October, and on 28th February 1882 says—"If Mr Gavine builds up to the stage when an instalment is generally given, I will give or find an instalment, on the certificate of Messrs M'Gibbon & Ross that the work is satisfactory. But the amount of the first and other instalments will depend upon the certificate of Messrs M'Gibbon & Ross"—that is to say, I will do what was contracted. That is reiterated in the letter your Lordship has read, and on the whole matter I am of opinion that the pursuer was not warranted in coming into Court when the main difference between the parties was when the instalments were to be paid.

LORD SHAND—The defender's acceptance of the pursuer's offer was undoubtedly holograph, but the Lord Ordinary has found that the offer of which that was the acceptance was not holograph. That has been found as matter of fact, but it is clear that in coming to that conclusion the only matter to which he directed his attention was whether the words "I hereby adopt the above as holograph, John Gavine, 27th July 1881," had been appended to the original schedule. As regards the question whether these words were not appended, there is some doubt, and I can only say that I should not be prepared to have affirmed the conclusion of the Lord Ordinary on that point. But at the end of the letter itself we have this underneath the body of the writing, "John Gavine, Builder, 42 Rosemount; Adopted as holograph"—all in the handwriting of the pursuer—and I cannot doubt that if the Lord Ordinary had noticed this he would have come to a different conclusion.

On the authorities cited to us in argument, and also on the additional authority of *Weir* v. *Robertson,* I hold that a document written by another and adopted as holograph by the party signing it is binding on the party signing. Supposing that Lee had sought to enforce this contract, and that Gavine had said he had still *locus pœnitentiæ,* he would have been met by the answer that the missive offer was binding. If a person says in writing that he adopts a document as holograph, the rule is that he shall not thereafter be entitled to say that it is not holograph, and if this document is to be held as binding in a question with Gavine, it must be held as binding in a question with Lee. With reference, therefore, to the decisions, and especially that in *Weir's* case, I am of opinion that this technical defence must be repelled.

On the assumption that there was a binding bargain concluded between the parties, I quite agree with your Lordships that the demand of the pursuer cannot be held to be in accordance with the contract. It is clearly stated in a letter dated 7th March 1882, written by Barton (Gavine's agent) to Lee, in which he says—"I omitted to notice in writing you to-day that Mr Gavine cannot proceed with the buildings, nor take advantage of the ground feued, until the bond is adjusted and signed. He will on no account erect the buildings to the extent required by you in your letter to-day on your statement that you will provide the amount of instalments under the bond. He is entitled to have the bond executed before he expends a penny, so that he may be certain of the money, and obviate all quibbles or objections to the loan. You seem to obscure the fact that it is a building loan which is in question, and the invariable rule is to have such adjusted and settled before the building begins." This is clearly a question to be determined on the contract between the parties. The pursuer was entitled to have a loan arranged over the ground, which could afford no security until the buildings were commenced, and therefore the terms of the bargain were that the loan should be payable by instalments according to schedule annexed, on the certificate of Messrs M'Gibbon & Ross, architects, the buildings being always in value one-fourth more than the payment so made. It appears that Lee is right in his construction of the documents, which provide that the money might be raised by a loan or loans provided the amount was equal to three-fourths of the value of the subjects built, but we would require more than is contained in the contract before we would fix *ab ante* the amount to be expended. All that is provided is that at certain stages Lee is to make payment of certain instalments, and the pursuer is plainly wrong in demanding that before a stone was brought on the ground the bond should be executed; and therefore I am of opinion that this action should be dismissed.

That leaves it open to the pursuer to bring another action to enforce the contract, but his success would be doubtful, looking to the lapse of time, and also to the fact that the buildings should have been on the ground a year ago. That matter, however, is not before us, and I only indicate

that I should have great difficulty in giving effect to the demand of the pursuer. On the question of expenses, I think that as Mr Lee has stated a technical plea in which he has been entirely unsuccessful, neither party should have any expenses.

The Court recalled the interlocutor of the Lord Ordinary, and dismissed the action as unnecessary.

Counsel for Pursuer—Nevay—Keir. Agent—James Barton, S.S.C.

Counsel for Defender—J. C. Smith. Agent—Party.

Tuesday, January 16.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

THE PANT MAWR SLATE AND SLAB QUARRY COMPANY (LIMITED) AND LIQUIDATORS v. FLEMING.

Trust—Declarator of Trust—Proof—Act 1696, *c.* 25—*Mandate.*

In an action of declarator of trust at the instance of a joint stock company against one of their directors, to have it declared that a lease of a quarry granted by the Crown to him and two other directors was in trust for the Company—*held* that the trust was proved by the writ of the defender.

Opinions that the Statute 1696, c. 25, did not apply, and that proof *prout de jure* would, had proof been necessary, have been competent, since there was no evidence to show that the company consented to the title to the lease being taken absolutely in the name of the directors, and the case alleged was one in which an agent had not fulfilled his mandate in the terms in which it was granted.

This was an action of declarator of trust and for denuding at the instance of The Pant Mawr Slate and Slab Quarry Company (Limited) and the Liquidators thereof against Alexander Gilruth Fleming, agent of the Scottish Banking Company (Limited), Dundee, and a director of the company, to have it found and declared that a lease of The Pant Mawr Quarry in Wales, granted by the Crown in favour of the defender and two of his co-directors, dated 3d May 1877, and commencing as at 10th October 1876, was a lease in trust for the company, and that the defender was bound to denude, or alternatively ought to be found liable in damages.

The following statement was made in the report by the directors to the first general meeting of the shareholders, dated 21st March 1877, and was founded on by the pursuers:—"The negotiations opened with the officers of the Crown for a lease direct from the Crown have resulted in such a lease being arranged for twenty-one years from 10th October 1876 on terms highly favourable for the company. As the Crown declines to deal direct with companies such as this, the lease was under arrangement agreed to be taken in name of three of your directors, *videlicet*, Messrs Nicoll, Blackadder, and Fleming. By a mutual deed to be executed by these trustees and the company, the trustees will declare that they hold the said lease in trust for the company, and the company will bind themselves to relieve the trustees of all personal obligations undertaken by them by the said lease."

The pursuers further founded upon the narration contained in a minute of agreement, dated 27th March 1877, between H. B. Roberts of Braich, of the first part, and The Pant Mawr Company, of the second part, relative to the formation of a certain tramway, and which was in these terms:—"Whereas the second party has (in name of trustees for its behoof) acquired from the Crown the lease of all that tract or parcel of land containing in the whole 207 acres or thereabouts, known as the Pant Mawr Quarry, situated on Moelwyn Mountain, in the parish of Llanfrothen, in the county of Merioneth." This minute of agreement was signed by the defender as a director of the company.

The pursuers also founded upon a letter dated 21st July 1880, addressed to the liquidators of the company by the defender and his co-lessees, which is quoted in the opinion of the Lord President, *infra*.

On 22d December 1882 the Lord Ordinary (M'Laren) allowed the pursuers a proof before answer and the defender a conjunct probation.

"*Opinion*.—I am satisfied that in this case a proof must be allowed. The rule of law is that where a trust is to be proved against a person who was originally *ex facie* absolute owner, that proof is limited to his writ or oath, because the owners of property are not to be deprived of their estates upon the statements of other parties which may be untrue, and against which they have no means of protecting themselves. But if an agent or director or other representative party takes property which he was authorised to buy or to hire for his constituent in his own name, then that is a subject of proof *prout de jure*; and I think that is the case alleged here. The company was formed first, and the report, signed by the directors, of whom the defender was one, says that a lease was taken or to be taken and a declaration was to be executed, and that has not been done. So there is a *prima facie* case of an unfulfilled obligation on the part of the directors to constitute a trust for behoof of the company. Whether that is so or not I cannot say, but I think that it is a case for investigation; so I shall allow a proof, on a day to be fixed now or afterwards, as the parties prefer. It will be a proof of all facts and circumstances tending to establish the pursuer's right or interest in the lease mentioned in the conclusions of the summons."

The defender reclaimed, and argued that this was a simple action of declarator of trust, and that by the Statute 1696, c. 25, the proof was limited to the writ or oath of the defender.

Authorities—*Home* v. *Morrison*, July 3, 1877, 4 R. 977; Dickson on Evidence, sec. 576; *Mackay* v. *Ambrose*, June 4, 1829, 7 S. 699; *Marshall* v. *Lyell*, Feb. 18, 1859, 21 D. 514.

The pursuers moved for instant decree, on the ground that the documents produced formed the writ of the defender establishing the trust. Alternatively they supported the interlocutor of the Lord Ordinary.