deserted them and went away with the tramcar-driver. The question then comes to be, Has he sufficiently indicated his intention to abandon his domicile of origin in India, and to acquire a Scottish domicile? And the Lord Ordinary thinks he has. This appears more clearly from the letters which he wrote to the wife, than from the evidence given by himself as a witness. Throughout all these letters he speaks of Scotland as his home, after which his heart was yearning; and of his anxiety to get away from India, the residence in which he only prolonged in order to save up a little more money for his family. He is attached to no regiment, but is upon the staff. He is not liable to be recalled to India in the event of war breaking out, and although he has the idea in his mind of going out to serve the three years, that will not prevent the conclusion being reached, that at present he being *de facto* in Scotland and resident here with a determination to make Scotland his home, his domicile is at this time in Scotland. A man may have an intention at some future time of removing from the place where he is then living, and of going elsewhere in the pursuit of a more or less permanent object, and yet be still held domiciled in the place of his actual residence—at all events until he actually does remove. The intention to make Scotland the domicile of the pursuer is clearly proved by the letters which he wrote to his wife. It was a fixed idea in his mind; and once the intention is ascertained, then all that is requisite in order to acquire a new domicile with the consequent abandonment of the old one, is the fact of residence which here exists since March 1883. Residence, however short—even for an hour—will be sufficient if intention to change exist.

"Therefore the judgment in this case must be to repel the plea against the jurisdiction of the Court, and to put the case in due course for determination on the merits."

The defender reclaimed, but the parties resumed cohabitation, and the case was taken out of Court.

Counsel for Pursuer—Gillespie. Agents—John & Charles Stewart, W.S.

Counsel for Defender—J. Burnet. Agent—Knight Watson, Solicitor.

Tuesday, October 23.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

ANDERSON'S TRUSTEES *v.* WEBSTER.

Loan—Donation to Debtor of the Amount of his Debt—Proof—Admissibilty of Parole Evidence.

In an action raised by the executors of a deceased lady for payment of a sum of money alleged to have been lent by her and not repaid, the alleged debtor admitted having received a loan of the money, but led parole proof to the effect that he had given the deceased an I O U for the amount, which she had afterwards, with the view of making him a present of the amount of the debt, handed to him, and directed him to burn. *Held* (1) that parole evidence as to the granting and destruction of the alleged I O U was admissible; and (2) that the evidence established that it had been granted and destroyed as alleged.

The executors and trustees of the late Miss Anne Anderson, residing at Westhaven, Forfarshire, sued Lindsay Webster, draper in Newburgh, Fife, for a sum of £140, which they alleged had been lent to him by Miss Anderson, but had not been repaid. The action was based on the following averments:—The defender, who was married to a niece of Miss Anderson, being pressed for money, and having to meet a bill payable on the 30th of March 1880, applied to her for a loan of money. She replied requesting him to inform her when it would be necessary to transmit the money to him. In reply he wrote her the following letter, dated 25th March 1880:—"My dear Aunt—Your letter of the 22nd reached me last night after the shop was shut. You ask me to let you know if the 1st of April would suit for sending the money. I have a bill to pay on the 30th, and would require it that morning. You would have to send it on me by Monday afternoon. Jeanie [defender's wife] joins me in sending her kindest regards to you, and hopes that this will find yourself and Jeanie, as it leaves us all, in good health. —I am, yours affectionately, L. WEBSTER." On receipt of this letter Miss Anderson on 27th March 1880 procured at a bank in Carnoustie a bank draft in favour of the defender for the sum of £140. This draft she at once transmitted to the defender, and he wrote on the 29th March the following letter:—"My dear Aunt—I beg to acknowledge the receipt of your letter with draft on Saturday night all safe; the shop was shut before I received it, or I would have replied at once on receipt. I have to thank you very kindly for the favour and obligement you have done me in those trying times of depression." These letters were found after her death in Miss Anderson's repositories.

The defender admitted the receipt of the sum of £140 in March 1880, but averred that he had given Miss Anderson his I O U for the amount, and that she on the 4th July 1881, on the occasion of a visit to him and his family at Newburgh, had handed him back the I O U and told him to burn it, which he accordingly did. She had then and there, he averred, made him a donation of her claim against him in respect of the advance, and she had thereafter referred to this to him and his family, and expressed her satisfaction with what she had done.

The pursuers pleaded—"(1) The defender having borrowed and received the sum sued for from the said Anne Anderson, he is bound to make payment thereof to the pursuers. (2) The sum sued for being justly addebted and resting owing by the defender to the pursuers as trustees foresaid, they are entitled to decree as concluded for."

The defender pleaded—"(1) The pursuers' averments can be established only by the defender's writ or oath. (2) The defender not being indebted to the pursuers, should be assoilzied with expenses."

The Lord Ordinary, after a discussion in the Procedure Roll on the defender's plea that the proof must be limited to his writ or oath, allowed a proof at large.

The pursuers, besides founding on the letters

above quoted, led evidence to show that the deceased down to a few days before her death had spoken of the loan as subsisting, and had spoken to defender about the interest on it.

The defender's evidence was to the following effect:—1*st*, *As regards the constitution of the loan*—The defender deponed that on the 12th May, about six weeks after he had got the loan, Miss Anderson, who was on very affectionate terms with him and his family, came on a visit to him. He was anxious to give her an acknowledgment of the loan, and though she was unwilling to take one, he insisted on writing her the I O U on a half-sheet of paper with a receipt stamp affixed, across which he wrote his name. This document she at last consented to take and put into her purse. This evidence was corroborated by Mrs Webster, the defender's wife. Isabella Webster, the defender's daughter, deponed that she had heard her parents talking occasionally about the I O U. 2*d*, *As regards the destruction of the I O U*, the defender deponed—Miss Anderson, at her visit to him about the 5th July, asked him for the account which she was due him for various articles he had supplied her with, and sometime in the afternoon she came down with his wife to his shop. He went with her into the office and after the account was discharged, she took the I O U out of her purse and handed it to him saying she was going to make him a present of the £140, and she asked him to destroy it by burning it. Finding there were no matches in the shop, he sent a witness named Scott to get some, and on Scott's return lit a fire and burned it. Thereafter Miss Anderson told the defender's wife and daughter what she had done. Mrs Webster deponed that she had seen Miss Anderson take a paper out of her purse and give it to the defender as a present, telling him to destroy it. Miss Anderson afterwards told her and her daughter that the I O U was burnt, and she had made the present. Isabella Webster corroborated her mother's evidence as to the deceased having spoken of the burning of the I O U, as did also another witness, who deponed that the deceased in a visit she had paid in his house on the day when the burning of the I O U was alleged to have taken place, had spoken of having made a handsome present to the defender, which was at a later part of the same day explained to him (witness) to refer to a gift of £140, and the burning of a document of debt. John Scott, who was defender's assistant, deponed to having been sent out of the office to get some matches, and to having seen defender, in Miss Anderson's presence, burning a half-sheet of paper, across which there was a receipt stamp.

The Lord Ordinary (KINNEAR) assoilzied the defender from the conclusions of the action.

"*Note.*—The burden of proof in this case plainly lies, in the outset, on the pursuers; and I do not think that they could have very satisfactorily proved their case, or the first element in their case, that an advance was made to the defender, without the aid of the defender's own evidence. I do not say that it was not possible to prove it; but there can be no doubt that the defender's own admission is a very valuable piece of evidence for the pursuers' case; and I think he is entitled to have the benefit of the consideration, so far as it goes, that it appears from the first, when the question arose on Miss Anderson's death, that the defender at once admitted not only that he received the money, but that he received it by way of loan. He says, however, that although it was originally given to him by way of loan, the conditions were changed, as the deceased Miss Anderson made him a present of it, and did so by cancelling the document of debt which he had given formerly. Now, if his evidence is to be believed, I think that is quite sufficient, in point of law, to establish his case, or rather to meet the pursuers' case.

"If I am to believe what is said by the defender and his wife, I cannot sustain the action as an action for recovery of money lent. The pursuers say that that is an incredible statement. But then that requires that they should go this length—which I think they do go—that not only the defender himself, but also his wife and daughter, have perjured themselves in the box, but that they had entered into a deliberate conspiracy to defraud the pursuers in this action; and not only so, but in the way in which the case was presented on the evidence, that they had entered into a conspiracy to defraud the deceased lady herself, so far back as July 1881, because the mode in which the pursuers' counsel undertakes to account for the evidence of what took place at Mrs Anderson's house at Newburgh is, that the defender's wife at that time saw the importance of inducing people to believe that the I O U which he had granted had been destroyed on that day. Now I should be very reluctant indeed to come to that conclusion unless I were forced to do so. There is certainly a good deal that requires some explanation, and a good deal still left in doubt in this case, but I think the defender's story is corroborated by two witnesses in such a way as to make it impossible for me to say that I believe it to be a false story concocted by him. In the first place, it is quite clear that on the occasion on which he says that he destroyed an I O U which had been given by him to his aunt, he did destroy, in her presence, some document, because the evidence of the boy Scott is quite clear and conclusive, and I do not entertain the slightest doubt as to its truth. But then, further, it is proved that that was the document of debt, and that the destruction of the document of debt was the mode which the deceased lady adopted of giving him a present, because that is proved by the evidence of the witness Anderson, whose testimony I cannot doubt, because he says that Mrs Webster, in Miss Anderson's presence, said that Miss Anderson had given the defender a present; and he says, as Mr Rhind has justly stated, that after the ladies had gone home he was afterwards told by his mother that she said to her it was £140, and that the document of debt was destroyed. Now, I do not see how to account for that evidence other than by giving effect to defender's story; and therefore I think the pursuers have failed to prove their case, and that the defender must be assoilzied with expenses, but subject to modification slightly in this respect, that I think the defender is not entitled to the expenses which were unnecessarily caused by his opposing a proof at large. The expense of the discussion in the Procedure Roll must not fall on the pursuers."

The pursuers reclaimed, and argued—They had shown by means of the letters founded on a debt well constituted against the defender. He had failed to discharge the *onus* of proving that that

debt was remitted. That a loan was constituted and wiped off, as the defender alleged, could not be competently proved by parole. (2) In any view, the evidence for the defender was not convincing.

The defender replied—In the case of *Rutherford's Executors* v. *Marshall*, July 12, 1861, 23 D. 1276, where the letters were more distinct as to the admission of a loan than those in this case, it was held that the loan was only provable by writ or oath. The letters here founded on did not instruct a loan apart from the defender's admissions, which must be taken as a whole. On the other hand, it was perfectly competent for the defender to prove the constitution and destruction of the document of debt by parole. This he had done to the satisfaction of the Lord Ordinary.

At advising—

Lord Justice-Clerk—On this question of evidence and credibility in the first instance, and of competency in the second, I should be slow to differ from the Lord Ordinary, all the more that it is impossible to read the proof without seeing that there is a serious conflict of evidence. In such a case the Lord Ordinary who hears the witnesses give their evidence has an advantage which we cannot lightly disregard, and on the whole matter I do not wonder that he has come to the result he has reached, though the case seems narrow on the proof. The important question is, Whether the granting and destruction of this document of debt may be competently proved by parole? I am of opinion that it may, and that great injury might be done, and the door be opened to fraud if it were to be held that it was not competent to prove by parole the facts surrounding such an alleged transaction. Here, then, I am of opinion that it was competent to prove by parole that the document was granted. It was natural that it should be granted, because the alleged constitution of the debt did not express what was done, and Mr Webster said he thought it was right to grant the document. It was not only right, but only what every honest man would have done in the circumstances. Therefore on the whole matter I am of opinion that there is no incompetency in proving by parole the facts out of which the loss of the document of debt arose, and also that it is competent to prove that there was a document of debt granted which perished. I therefore agree with the judgment of the Lord Ordinary.

Lord Young—I am of the same opinion. I think the case is one of considerable legal interest and importance. There is no doubt whatever that the defender got a loan of £140 from Miss Anderson, for he says so himself. In the letter of 25th March 1880 he speaks of the date at which it could suit his convenience to receive the money, and again on the 29th March he acknowledges the receipt of the money. Now, these letters are consistent either with a loan or a gift, and I think that it is clearly according to the decisions, of which there have been many, that in the absence of anything further to the contrary, the Court would have dealt with them as sufficient evidence of a loan, and it would be consistent with decision that a loan of money is not established by receipt of a bank cheque. Now, the defender, in answer in the action brought for a loan which stands *prima facie* on letters, says—"I did get the money in loan, but at a subsequent date I sent Miss Anderson an I O U for it, and again, subsequently, she, on the occasion of settling an account with me, returned the I O U, meaning to make me a present of that sum of money which before stood as a loan." Now, the first observation which occurs to one is that this is a most unlikely story to allege falsely—the foundation of the falsehood being that the defender had granted a document quite conclusive against himself and of which there is no other evidence. The supposition of the cause of the fabrication of such an ingenious falsehood is, I fancy, that the defender granted it against himself in order that he might add at a later date that it had been returned to him. This is not at all likely; but the question is, May it be proved by parole evidence? I am of opinion with your Lordship that it may. If it be the fact that the document of debt was given and then returned to be cancelled, then no doubt it was discharged; but may this be proved by parole? It cannot very well be proved otherwise; even if its destruction had been seen by any number of credible witnesses, it could only be proved by parole, unless a written record had been taken before them at the time of its destruction. If the document had been one of a very formal nature, a proving of the tenor might possibly have been resorted to, but then in that case it would have been necessary to proceed on parole evidence as to its history. If, then, the document be once established by parole, then there is no doubt whatever that its discharge may also be proved by parole.

Now, in this case, which is sufficient in law, and legally proveable by parole evidence being stated by the defender, we have a large amount of such evidence. Criticisms may no doubt be made upon it, but then it all comes to credibility of the witnesses on whose evidence the facts stand. The suggestion on the pursuers' part, as the Lord Ordinary tells us in his note, is perjury, and amounts to this, that the defender and his wife and daughter had entered into a deliberate conspiracy to defraud the pursuers, but there, I think, while admitting that allowable criticisms may be made, I must take refuge in the fact that the Lord Ordinary believed the witnesses, and declined to accede to the pursuers' view.

Parole evidence, then, in my opinion, was competent. It is certainly sufficient if true, and the Lord Ordinary being of opinion that it is, I agree with your Lordship that we should affirm his judgment.

Lord Craighill—I concur. On the first and more important question I cannot say that I have any difficulty. The defence which is stated to the action is, that the document of debt was returned to the debtor in order that it should be destroyed, that it was so destroyed by the authority of the creditor, who intended to make a gift, and that therefore the debt was cancelled. Now, if this is a competent or relevant defence it can only be established by parole, and on the whole matter I think that a proof was very properly allowed.

On the second point, viz., the import of that proof, I agree with your Lordship that it would be dangerous to overthrow the Lord Ordinary's judgment, he having heard the evidence and made up his mind as to the relative credibility of the several witnesses.

Lord Rutherfurd Clark—I am of the same opinion.

The Court adhered.

Counsel for Reclaimer—J. P. B. Robertson—Pearson. Agents—J. A. Campbell & Lamond, C.S.

Counsel for Respondent — Mackay — Rhind. Agent—William Officer, S.S.C.

Tuesday, October 23.

FIRST DIVISION.

HOEY *v.* HOEY.

Husband and Wife — Divorce — Aliment — Expenses.

A husband having obtained decree of divorce in the Outer House, the wife presented a reclaiming-note. On the wife's motion the Court gave her decree for aliment, to continue until further orders of Court, and for a sum of £75 to account of her expenses incurred in the Outer House. Authorities cited—*Ritchie* v. *Ritchie*, March 11, 1874, 1 R. 826; *Montgomery*, October 22, 1880, 8 R. 403.

Counsel for Pursuer—Lang. Agents—Paterson, Cameron, & Co., S.S.C.

Counsel for Defender—Ure. Agents—Ronald & Ritchie, S.S.C.

Tuesday, October 23.

FIRST DIVISION.

[Lord Lee, Ordinary.

LEE *v.* FERRIER.

Bankruptcy—Composition Contract.—Cautioner —Bankruptcy Act 1856 (19 *&* 20 *Vict. cap.* 79), *secs.* 138 *and* 141.

A composition contract entered into by a bankrupt and his cautioner with his creditors, but not yet approved by the Lord Ordinary or the Sheriff, cannot be resiled from by any of the parties to it without good cause; but a material alteration of circumstances, leading to the prejudice of a party, which could not have been foreseen when the contract was entered into, will warrant the Lord Ordinary or the Sheriff in withholding approval of the contract.

Observations on the case of *Ironside*, March 26, 1841, 4 D. 629.

Where the cautioner claimed right to withdraw on the ground of delay on the part of the trustee in reporting the composition contract to the Sheriff for his approval, and it appeared that the delay was largely attributable to his own fault, and no injury to him was relevantly averred, the Court *refused* to allow him to withdraw.

Thomas Stevenson, joiner, Annandale Street, Edinburgh, having got into difficulties, and been sequestrated, Mr Ferrier, C.A., was appointed trustee. On the 15th of January 1883 a state of the bankrupt's affairs, made up by the trustee, was submitted by him to a meeting of creditors held in Edinburgh. This state showed a probable dividend of 7s. per pound, subject to the expenses of realisation and sequestration. The bankrupt offered a composition of 6s. 6d. per pound, by two equal instalments at two and four months respectively, and offered Mr J. B. W. Lee as cautioner. This offer of composition was unanimously accepted by the creditors. The bond of caution was executed by the bankrupt and Lee as principal and cautioner on 13th February. On 6th March 1883, in the course of a correspondence which passed between the trustees and Mr Lee relative to a dispute which had arisen as to whether Mr Lee was to prepare the composition bill, and whether he was bound at once to sign them, Mr Lee called upon the trustee to make his report to the Sheriff in accordance with the Bankruptcy Act. On the 14th March a caveat (subsequently withdrawn) was lodged by Lee, who acted not only as cautioner for the bankrupt but also as his agent, narrating that the trustee had not made the statutory report to the Sheriff, and craving to be heard before the said report was approved of by the Sheriff. On the 17th March the trustee presented the following report to the Sheriff in terms of the Statute:—"*To the Sheriff of the Lothians*—In terms of the 138th section of the Bankruptcy (Scotland) Act 1856, the trustee reports to your Lordship that at the special general meeting of creditors held within the trustee's chambers No. 5 York Place, Edinburgh, upon Monday the 15th day of January 1883 years, at three o'clock afternoon, for the purpose of deciding upon an offer of composition made by the bankrupt, the creditors and mandatories for creditors then present unanimously agreed to accept of a composition of 6s. 6d. per pound on their respective debts as at the date of sequestration, payable by bills, in instalments at two and four months from the date of said offer, 15th January 1883, being at 3s. 3d. per pound each instalment, and approved of Mr J. B. W. Lee, S.S.C., Edinburgh, as security for payment of composition. The trustee herewith produces the minutes of said meeting, together with the minute of the previous meeting of creditors, when the offer was entertained, as also a copy of the *Edinburgh Gazette* containing the requisite statutory notice and certificate of posting of the circulars to the creditors, and lastly, the bond of caution by the said Thomas Stevenson and the said J. B. W. Lee as cautioner, dated 9th and 13th February 1883 years. The trustee also reports that his accounts have been audited by the commissioners, and the balance ascertained, and his remuneration fixed on the footing of his having no further trouble; but the expenses attending the sequestration have not yet been fully ascertained, for the reason that the bankrupt and his cautioner, when called upon by the trustee, on the instructions of the commissioners, to grant and indorse the bills for the composition, in terms of said offer, refused to do so, or perform the other obligations under the offer. The first instalment of said composition is past due, but has not been paid, and they still decline to pay it, and to grant and indorse bills for the second instalment of said composition, or perform said other obligations. In these circumstances, the trustee, on the further instructions of the commissioners, has convened a general meeting of the creditors, to be held on Monday,