facts, but in the statement, read as that statement has been by the Lord Ordinary, which is set forth in that disposition.

On the whole matter I come without hesitation to the conclusion that the defender was not at the date of the service of the pursuer's summons the owner of heritage in Scotland, and consequently that he was not within and is not now subject to our jurisdiction.

Lord Rutherfurd Clark—I am of the same opinion. I have not written an opinion. I concur in the views which your Lordships have expressed.

The only difficulty I had in the case was in regard to the form which the denuding deed took. It seemed to express that the defender had an individual interest in the property which he conveyed away to his brother. His interest is described in the narrative as his interest in the house. The words of conveyance seem to imply an individual interest. The difficulty which disturbed my mind was, whether that should not be held, as the pursuer suggests, as conclusive of the question, but I have come to think that that will not do. We are not here in a case between truster and trustee. We are not affected by the limitations of proof which the Act which was referred to in the course of the debate introduces. We may ascertain what is the real state—what is the truth—with respect to the interest which the defender did possess in this house, whatever may be the form and whatever may be the expression. I think, therefore, there cannot be but one conclusion to be drawn from the evidence, if we are to draw a conclusion from the evidence at all. I think it is perfectly plain upon that evidence that the defender never had, and never was intended to have, any individual interest, and that he was a mere name in the transaction throughout the whole of it—that name being taken out of the title by the ultimate conveyance granted in October 1885.

The Lord Justice-Clerk was absent.

The Court recalled the interlocutor of the Lord Ordinary, sustained the plea of no jurisdiction, and dismissed the action.

Counsel for Pursuer — Comrie Thomson — Strachan. Agents—Welsh & Forbes, S.S.C.

Counsel for Defenders—D.-F. Mackintosh, Q.C. —Pearson—Dickson. Agent—J. B. M'Intosh, S.S.C.

Friday, March 19.

SECOND DIVISION.

[Sheriff of Forfarshire.

HAY & KYD *v.* POWRIE.

Bill of Exchange—Novation—Delegation—Giving Time—Course of Dealing.

The pursuers were in the habit of selling cattle to A, and taking in payment the joint acceptances of the defender and him at two or three months. These acceptances were renewed again for similar periods, and generally for less amounts, the difference being paid by A in cash either at the time of the renewal or shortly after. If it was not paid at the time, the pursuers debited A's account in their books with it, and retained the old acceptance till it was paid. All communications betwixt the pursuers and the defender took place through A, for whom the defender was really a cautioner. On A's bankruptcy the defender retired three of the acceptances, each of which was the last of a series of renewals, but the pursuers also claimed from him the differences between the amounts in certain acceptances and the acceptances by which they were renewed. They had in each of these cases retained the old acceptance till A should fulfil his promise to pay the difference. *Held* that the obligations in the old acceptances were not extinguished by novation or delegation; that there was no such giving of time to A as to free the defender, even if he were entitled to the equities of a cautioner; and that the pursuers were not barred from suing on the bills by the fact that the defender in accepting the renewals believed that to the extent of the differences in the amounts of them, and of the acceptances sued on, the pursuers' claim had been reduced.

Hay & Kyd, agricultural auctioneers, Perth, sued James Powrie of Reswallie, near Forfar, for payment of (1) £10 as the balance due on a bill, dated 9th December 1882, drawn by them for £150 at two months upon and accepted by John Ogilvy, farmer, South Gask, Coupar-Angus, and the defender, for value received in cattle, after deducting £140 paid to account on 12th February 1883, the date when the bill fell due; (2) £10, as the balance due on a similar bill, dated 1st December 1882, for £80 at three months, after deducting £70 paid on 4th March 1883; and (3) £25, as the balance due on a similar bill, dated 12th January 1883, for £100 at three months, after deducting £75 paid on 15th April 1883.

For several years Ogilvy had been in the practice of purchasing cattle at the pursuers' auction mart, and they had in some cases taken the joint acceptances of himself and the defender in payment of the prices. He had a general account with them.

The bill for £150 first sued on was one out of a series of renewals of a bill drawn in such circumstances by the pursuers upon and accepted by Ogilvy and the defender on 3d December 1880 for £268, 6s. 9d. When this bill fell due it was renewed for the same amount; when the renewal matured, it was in its turn renewed for £265, the difference having been paid to the pursuers in cash by Ogilvy; and in this manner there were renewals for £235, £230, £200, £160, and £150, the amount of the bill the balance of which was sued for. The bill for £150 had been renewed by a bill drawn on 10th February 1883 for £140, but the difference of £10 had not been paid in cash at the time. This bill for £140 had been four times renewed for the same amount, the last renewal having been drawn on 18th February 1884 at three months. Ogilvy became bankrupt during the currency of this renewal bill, and his estates were sequestrated on 12th April 1884. The defender retired his acceptance of 18th February 1884 when it fell due; but the pursuers now claimed from him the sum of £10 as the difference

between the bill for £150 and the first renewal of that bill. The bill for £150 had all along remained in their possession, and they alleged that to the extent of £10 it had not been paid.

The second bill sued on was one of a series of renewals for a similar bill, dated 21st October 1881, for £186, 1s. 6d., and had been renewed by a bill for £70, dated 2d March 1883; but the difference had not been paid in cash at the time. This bill had in turn been renewed by a bill for £60, the difference having been paid in cash at the time; and the bill for £60 having been three times renewed for the same amount, was retired by the defender on Ogilvy's becoming bankrupt. The pursuers now claimed £10 as the difference between the bills for £80 and £70. They also claimed in similar circumstances £25, as the difference between £100, the amount of the third bill sued on, and £75, the amount of a renewal bill. The bills for £80 and £100 had all along remained in their possession, and they alleged that to the extent of these sums of £10 and £25 they had not been paid.

The defender averred that the pursuers were well aware that he signed the bills as cautioner for Ogilvy and received no value for them; that in the case of each series of renewals, when the renewal was for a smaller sum than the bill retired, Ogilvy arranged with the pursuers to pay, and actually paid, the difference, and on that express understanding he (the defender) signed the renewals; that when Ogilvy got the three bills sued on renewed, he omitted to get delivery of them; that on 9th May 1883 Ogilvy remitted to the pursuers the sum of £150, and arranged with them that they should apply it first in payment of the differences now sued for, and the balance to his balance due them on his general account; and that notwithstanding the frequent renewals subsequent to the retirement of the bills sued on, the pursuers made no claim against him for the differences until after Ogilvy's sequestration; and he pleaded (1) that the sums sued for had been paid to the pursuers by Ogilvy; (2) that the pursuers by accepting renewal bills for smaller amounts in accordance with a course of dealing between them and Ogilvy, had discharged him of liability for the old bills; and (3) that the pursuers being aware that the defender signed the bills as cautioner for Ogilvy, had lost all claim by giving Ogilvy time to pay the differences without his consent.

On a proof Alexander Hay, one of the partners of the pursuers' firm, deponed—"I distinctly agreed with Ogilvy that he must get a co-obligant on his bills before we gave him cattle. I never subsequently became aware or found out that Mr Powrie was only a cautioner in these bills for Ogilvy. Ogilvy got cattle away from us as soon as Powrie's name appeared as joint-acceptor. Mr Ogilvy himself always paid the money when the differences were paid prior to the bills being renewed. Mr Powrie himself never paid any money or appeared in the transactions. I never had any communication with Mr Powrie in the matter. When the renewal bills were handed to me of smaller amounts, the differences were sometimes paid to me at the time and sometimes they were not. When renewals were given without any difference being paid at the time, I did not intimate this fact to Mr Powrie. I did not consider that I was bound to do this. I made no special arrangement with Mr Ogilvy about this matter. I always pressed for payment at the time, but could not get it, and I held the bill until I did get it. Ogilvy was very particular in getting up the bills whenever he paid any bill, as I supposed to show his co-obligant Mr Powrie. As each bill was paid it was delivered up to Ogilvy. When he paid the difference and got the renewals, he would get the bill the next time we saw him, perhaps the week after. I insisted upon the difference being paid when I renewed the £150 bill or the one for £140. I cannot specially remember what conversation took place between us when the £150 bill was renewed; but I am sure I would insist upon the difference being paid. Beyond these general conversations I cannot remember any specific conversation I had on the matter. In May 1883 Mr Ogilvy paid a sum of £150, but I forget if he did this personally. If Mr Ogilvy told me to apply this money to the reduction of his bills I certainly would have done so. The £150 he paid is put to his credit in his general account, which would be the purpose he told me to put it to. I have refused to receive from Mr Ogilvy a bill for a smaller amount than the one sued for unless the difference was paid. If I ever gave Mr Ogilvy time to pay the balances on these bills, it was not more than a week or so. I never agreed to give him any definite time. I was always pushing him to pay up. I am not aware that I ever received any money from Mr Ogilvy to be applied to balances on the bills except when the bills were renewed at the time. I frequently refused to renew Ogilvy's bills. I have refused to take a bill of a lower amount when he brought the difference with him. I have refused to renew the bill because I wanted to apply the money to reducing his open account, having Mr Powrie's name, which was a good name, upon the bill. When this happened he would return with the bill signed by Mr Powrie for the full amount, and the money he had brought would then be applied to reduce his open account."

John Ogilvy deponed—"The cattle were paid for by the original bills at the beginning of the series. Mr Powrie agreed to sign the bills jointly with me. Mr Powrie was not to get any part of the cattle however. He gave me accommodation in the way I asked him. He had no interest in the cattle. Mr Hay thus knew that Mr Powrie was security for me for these cattle. I several times renewed these bills for bills of smaller amounts. I sometimes paid the difference at the time, but if I had not the money by me I agreed to send it as soon as I could. I did not get up the bills at the time I paid the differences—not regularly. I got a number at a time. Mr Powrie understood that I was always paying the differences when he signed fresh bills. I once tendered Messrs Hay & Kyd a renewal of a smaller amount, which was refused, subsequent to the bill sued on. I sent money to pay for the difference, but they kept the money and placed it against their open account, seeing that they had Mr Powrie's name as security on the bill. This happened in two or three cases. When I renewed these bills from time, I understood that these renewed bills were for the total amount that Mr Powrie and I were liable to Hay & Kyd for."

Powrie, the defender, deponed—"Mr Ogilvy told me that Hay & Kyd had refused to sell him cattle unless he got security for the purchase money, and as I was anxious to assist Mr Ogilvy, I finally agreed that I would sign a bill along with him for the price of the cattle. . . . I got no benefit from the purchases. As I signed the renewals, I always insisted that the bills should be reduced, and they frequently were reduced accordingly by Mr Ogilvy. Personally I never saw Messrs Hay & Kyd in the matter. When the bills sued on were renewed, they were treated in the same way. I can hardly remember what Mr Ogilvy said about how the balances were paid. I presumed that all the old bills were given up; but I only saw some of them. On one occasion when I signed a renewed bill, Mr Ogilvy said that Hay & Kyd would not take it, as he had not the money at the time to pay the difference. I cannot say whether this was subsequently to the bill sued on. I cannot say if there was more than one bill in this position. As none of the other bills were returned in this way, I assumed that the differences had all been paid upon them."

With regard to the payment of £150 by Ogilvy to the pursuers, it appeared from a letter produced that he had written to them on 9th May 1883—"As my acceptance to you falls due on the 10th inst. I will be much obliged by your renewing it for me for three months longer, and for that purpose I enclose new bill signed by Mr Powrie and myself. I also enclose bank letter of credit for £150 to reduce my account with you."

The Sheriff-Substitute (Robertson) on 19th October 1885 pronounced an interlocutor finding in fact that the sums sued for had been paid, and in law that the defender was not liable to pay these sums, and assoilzieing him.

On appeal the Sheriff (Comrie Thomson) on 11th December 1885 pronounced this interlocutor:—"Having considered the cause, recals the interlocutor appealed from: Finds that the pursuers are the holders of the bills libelled, that the defender is an acceptor of the same, and that he has failed to prove that the balances sued for have been paid: Therefore decerns in terms of the conclusions of the libel, &c.

"*Note.*—The bills in question were not given up to the debtor, and the presumption is that they were not paid. There seems to be no satisfactory evidence to rebut that presumption, unless the payment of £150 by Ogilvy is to be imputed to the extinction of the balance of debt remaining due upon them. But that payment must be held to have been properly applied towards the reduction of the account standing in the pursuers' books against Ogilvy. That is the natural meaning of the expression 'to reduce my account with you.' At any rate the direction was not so specific as to prevent the creditors from applying the amount towards the wiping off of the unsecured debt; and this was what they did."

The defender appealed, and argued—He should have all the equities of a cautioner, for the pursuers knew him to be so—*Liquidators of Overend, Gurney, & Company* v. *Liquidators of Oriental Financial Corporation*, L.R. 7 Eng. and Ir. App. 348; Byles on Bills, 323. The pursuers gave Ogilvy time to the extent of the currency of the new bill. The bills were truly extinguished by novation or delegation. The pursuers had accepted Ogilvy as sole debtor for the differences. At all events they were barred by their conduct from pleading the contrary. The question on the course of dealing resolved itself into a balancing of presumptions—*Reed* v. *White*, 5 Esp. 122; *Gould* v. *Robson*, 8 East. 575; *Pooley* v. *Harradin*, 7 E. and B. 431. The presumption raised by the retention of the original bill was taken off by the fact that none of the bills were at once given up. If the pursuers did not look to Ogilvy alone for the differences, there was no reason why the renewals should have been carried out or the differences debited to Ogilvy's account; and the defender was really accepting for the old amount when he put his name to the renewal. If he had known this he would have refused to sign. He signed because the pursuers permitted him to think the debt was being reduced. The pursuers really lent Ogilvy to pay themselves, and enabled him to go to the defender and ask him to renew. Taking Ogilvy's promise to pay in a day or two was in a question with the defender as good as payment.

The respondents argued—The bills were not paid except to the extent for which credit is given. The acceptance was joint, and the defender was not entitled to the equities of a cautioner. Even if he were, there was no equity here, for the defender was a party to the giving of time. To make out novation or delegation a special agreement must be proved—Thomson on Bills, 264; Chitty on Bills, 134; *Mowbray* v. *Whites*, 17th June 1824, 3 S. 146 (N.E. 100); *Lumley* v. *Musgrave*, 4 Bingham's N.C. 9; *Campbell* v. *Cruikshank*, 27th February 1845, 7 D. 548; *Sandeman* v. *Thomson*, 12th November 1831, 10 S. 4; *Lyon* v. *Butler*, 7th December 1841, 4 D. 178; *Wilson & Corse* v. *Gardner*, Hume, 247; *Duncan, Fox, & Co.* v. *North and South Wales Bank*, L.R., 6 App. Ca. 1. If the course of dealing was to control the defender's written obligation, the *onus* was on him to show that. If the pursuers agreed to a renewal for a smaller amount it was on condition the difference was paid. When it was not paid they retained it as a security. When it was paid the bill was always given up, though there might be a delay of a week or so. So far as pursuers were concerned, the defender and Ogilvy must be in precisely the same position. The pursuers were not responsible for the misunderstanding; on the other hand the defender was; he had been incautious; he should not have igned the new bill till the old one was handed to him—*Boyd* v. *Fraser*, January 28, 1853, 15 D. 342.

At advising—

Lord Rutherfurd Clark—I am of opinion that the pursuers are entitled to decree.

There can be no doubt that the defender was liable on the bills sued on, inasmuch as he accepted them jointly with Ogilvy. The question is, whether he has been discharged from that liability? He maintains that he has been discharged (1) by novation, (2) by delegation, and (3) by the pursuers having given time to Ogilvy, the principal debtor.

Novation means the extinction of one debt or document of debt by the substitution of a new one. Renewal bills were taken by the pursuers for part of the original bills, but the latter being retained by the pursuers, remained good obligations for the balance. Consequently there could be no novation. It is sufficient to dispose of this

plea that Ogilvy could have been sued on the original bills. For this fact shows that they were not extinguished, and if not extinguished, the defender must be liable upon them.

Nor, in my opinion, has the plea of delegation any better foundation. In this case it means that the pursuers agreed to take for the unpaid balance the sole obligation of Ogilvy in lieu of the joint obligation of Ogilvy and the defender. But the defender must prove this agreement, and I do not think that he has offered any proof of it. It is admitted that there were no communications between the defender and the pursuers, and I cannot infer the existence of such an agreement from any facts and circumstances which were proved in this case.

The argument of the defender is based on the fact that the pursuers accepted the renewal bills, and entered the balance to the debit of an account-current between them and Ogilvy. They could not do otherwise if they chose to accept the renewal bills instead of insisting, as was their right, for payment of the whole debt at once. But, if it be the case that Ogilvy remained liable on the original bills, I see no reason for inferring that the pursuers accepted him as their sole debtor. The entry in their books was a mere memorandum made by them for their own purposes. It was not made under any concert or arrangement with the defender. It was not even evidence in any proper sense against Ogilvy, and the original bills remained the only obligations on which he could be sued. If so, he could be sued as a joint debtor, and therefore there is no reason for holding that the pursuers have taken him as their sole debtor.

There can be no doubt that the defender was, in substance, a cautioner for Ogilvy. But the pursuers did not give time to the latter, so as to relieve the defender from his obligation as a cautioner. It is true that they did not enforce immediate payment. But in the language of the law, to give time does not consist in refraining from suing, but in the creditor putting himself under a disability to sue by agreeing to postpone payment of his debt. There is nothing of this kind here.

A somewhat general argument was urged to the effect that the pursuers were barred from maintaining that the defender was liable on the bills. It was said that the renewal bills were signed by the defender in the belief that he was to be relieved of the original bills. I do not doubt that this was his belief, but he was bound to see that his wishes were carried out, either by insisting on the delivery of the original bills, or by giving notice to the pursuers that if they accepted the renewal bills he was to be relieved of his obligations in the former. He did nothing of this kind. He trusted in Ogilvy alone, and had no communication with the pursuers. I do not think that the pursuers were under any duty to the defender, or that they are bound to take into consideration what might be the inducements which led him to accept the renewal bills. They did nothing to increase the amount of his debt to them. It remained as it was, though standing in two sets of documents instead of one.

The Lord Justice-Clerk and Lord Young concurred.

Lord Craighill was absent on circuit during the argument.

The Court affirmed the Sheriff's judgment.

Counsel for Pursuers (Respondents)—Darling—Watt. Agent—David Milne, S.S.C.

Counsel for Defender (Appellant).—D.-F. Mackintosh, Q.C.—Graham Murray. Agents—Tods, Murray, & Jamieson, W.S.

Friday, March 19.

SECOND DIVISION.

THE ATHOLE HYDROPATHIC COMPANY AND LIQUIDATOR *v.* THE SCOTTISH PROVINCIAL ASSURANCE COMPANY.

Public Company—Winding-up—Commencement of Liquidation—Heritable Creditor—Poinding of the Ground—Companies Act 1862 (25 *and* 26 *Vict. cap.* 89), *sec.* 163.

Held that section 163 of the Companies Act 1862, which provides that "where any company is being wound up by the Court, or subject to the supervision of the Court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding-up shall be void to all intents," does not apply to prevent a heritable creditor from proceeding to carry off the moveables by a poinding of the ground, because the object of the section is to prevent the obtaining of preferences after liquidation is begun, and the action of the heritable creditor is only the making available of an existing preferable security.

The Athole Hydropathic Company was incorporated under the Companies Acts 1862 and 1867 on 18th June 1873.

On 8th August 1876, 11th October 1876, and 3d October 1877, the company granted in favour of the Scottish Provincial Assurance Company three heritable bonds for £7000, £7000, and £6000 respectively over the heritable property belonging to the company. These bonds were respectively recorded on 12th August 1876, 16th October 1876, and 4th October 1877.

On 7th August 1885 the Assurance Company called up the bonds at Martinmas 1885. At Martinmas 1885 neither principal nor interest was paid.

At an extraordinary general meeting of the company, held on 23d January 1886, a resolution was passed that the company should be wound up voluntarily, and that Mr Morison, Perth, be the liquidator. This resolution was intimated in the *Gazette* in terms of the Companies Acts.

On Monday, 1st February 1886, a petition was boxed by the company and the liquidator, and by creditors and a shareholder, to the First Division, praying that the voluntary winding-up should be continued under the supervision of the Court. The object of the petition, as set forth therein, was to avoid difficulties through the separate action of creditors.

On Saturday 30th January the Assurance Company, as heritable creditors, had signeted a sum-