that time therefore he was not entitled to resile.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court refused the petition.

Counsel for the Petitioner — Young — Macaulay Smith. Agents — Emslie & Guthrie, S.S.C.

Counsel for the Respondents — Shaw — Craigie. Agents—Menzies, Bruce-Low, & Thomson, W.S.

Tuesday, June 7.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

NATIONAL BANK OF SCOTLAND, LIMITED *v.* CAMPBELL.

Cautionary Obligation—Letter of Guarantee—Improbative Writ—Rei Interventus—Writing in re mercatoria.

A bank handed a letter of guarantee to M, the person whose credit was to be guaranteed, for the purpose of obtaining the signature of the granter. After the granter had signed, and outwith his presence, M got two persons to adhibit their signatures as witnesses to the subscription, presented the writ to the bank with the testing clause filled in, and received the advance guaranteed.

In an action raised after M's bankruptcy, at the instance of the bank, it was *held* that they were entitled to recover the sum contained in the letter of guarantee from the granter thereof, and that as the advance had been made on the faith of his signature, he was barred by *rei interventus* from pleading the improbative condition of the writ when it left his possession.

Question whether a letter of guarantee is a writ *in re mercatoria.*

In October 1891 the National Bank of Scotland, Limited, brought an action against John Campbell, shipmaster, Park Cottage, Oban, for payment of £200, being the amount contained in a letter of guarantee, dated 28th February 1888, granted by the defender to the pursuers, in consideration of which they had advanced that sum to Messrs M'Dougall & M'Coll, builders, Oban, who had since become bankrupt.

The letter of guarantee, which was produced, was partly written and partly printed, and contained a testing clause, which bore to be signed by John Campbell, whose signature was apparently duly attested, but the pursuers admitted that the witnesses had neither seen him sign nor heard him attest his signature.

They pleaded—"(1) The defender being due and resting-owing to the pursuers, under the guarantee libelled on in the summons, the principal sum sued for, decree should be pronounced against him as concluded for, with expenses. (2) The said guarantee is valid and effectual in respect, 1st, it was granted in *re mercatoria;* 2nd, it was followed by *rei interventus.*"

The defender averred that he had not subscribed the said guarantee, and pleaded —"(1) The pursuers' material averments being unfounded in fact, the defender is entitled to absolvitor, with expenses. (2) *Esto* that the defender signed the said guarantee, it is not binding upon him, in respect it is neither holograph nor tested, and was not followed by *rei interventus.*"

A proof was allowed, from which it appeared that the pursuers prepared the letter of guarantee and sent it to their agent in Oban, who gave it to Mr Angus M'Dougall, of the firm of M'Dougall & M'Coll, to obtain the defender's signature. Mr Angus M'Dougall deponed that the defender had signed the letter of guarantee in his office; that after the defender left he had got his son and one of his joiners to affix their signatures as witnesses of the subscription; that he returned the letter of guarantee to his Edinburgh law agents, with information to enable them to fill up the testing clause before sending it to the bank; and that on the faith of the guarantee his firm had received an advance of £200.

A letter from the bank's agent in Oban to Mr Campbell, dated 24th December 1890, was produced. It was in the following terms:—"Messrs M'Dougall & M'Coll having been sequestrated, I beg to request payment from you of the sum of £200, being the amount guaranteed by you in your letter of guarantee, dated 28th February 1888." And was answered as follows—"*Stornoway, 2nd January* 1891.—Received your letter of 24th ult. to-day. I am on my way to Tobermory with the vessel for to lay up, waiting favourable winds, and hope to be in Oban soon, and will try and arrange matters."

The defender denied ever having signed any letter of guarantee in M'Dougall's favour except one in 1887, which he knew had been spoilt by his adding certain qualifying words. He deponed that he had that guarantee in his mind when he wrote to the bank agent on 2nd January 1891; also that he was at Tobermory continuously from 20th February to 19th March 1888. He admitted receiving a letter from M'Dougall upon 4th January 1891, informing him that the witnesses to his signature had neither seen him sign nor heard him acknowledge his signature, and suggesting that he might escape liability on that ground.

Upon 6th February 1892 the Lord Ordinary (KYLLACHY) assoilzied the defender.

"*Opinion.*—In this case the National Bank of Scotland seek to enforce against the defender, who is a shipmaster in Oban, an alleged letter of guarantee for the sum of £200, said to have been granted by the defender in security of an advance made at the bank's Oban branch to the late firm of M'Dougall & M'Coll, builders in Oban. The guarantee bears to be signed by the defender and two witnesses, and bears a

testing-clause in the usual form; and it is not disputed—at least I think it is sufficiently proved—that the bank on receipt and on the faith of the guarantee made to M'Dougall & M'Coll the advance for repayment of which they now sue.

"The defender, however, denies the genuineness of his signature, and it is admitted that the instrumentary witnesses neither saw him sign nor heard him acknowledge his subscription. The questions which I have in these circumstances to decide are (1) whether the signature is genuine? and (2) whether, assuming it to be so, the professedly tested but really untested guarantee can be set up as a binding document either (1st) as being a writ *in re mercatoria*, or (2nd) as followed and validated by *rei interventus?*

"I confess I should have had doubt as to the genuineness of the defender's signature if I had simply to weigh his (the defender's) evidence against that of the principal debtor M'Dougall, who swears that the guarantee was signed in his presence. The defender, although his evidence was somewhat loose, and became at times somewhat confused, did not give me the impression of a person who was wilfully speaking untruth. And, on the other hand, the witness M'Dougall is not, to say the least, a witness with a quite clean record. Because, apart from the irregularity to which he confesses (and which I am disposed to attribute to ignorance) of calling in the witnesses and obtaining their signatures outwith the presence of the defender, he quite frankly admitted that, at a period not very remote from that of the guarantee, he had been guilty of conduct towards the defender which showed that in money matters he was, to say the least, not over scrupulous. But, as it happens, I do not require to elect as between the respective testimonies of these two witnesses. What is conclusive to my mind is the real evidence afforded by the signature itself, compared as we have had the means of comparing it, with the admittedly genuine signatures of the defender. I have not found it possible to doubt, upon the *comparatio literarum*, that the signature is the defender's genuine signature. It is not merely that there is resemblance. There is identity; and while forgery is always of course possible, I have not been able to reconcile that view of the matter with the singular ease and freedom of the handwriting. I am also bound to say this, that while the witness M'Dougall may be so far a discredited witness, he yet gave his evidence in a manner which impressed me favourably. He was quite candid about his misappropriation of the defender's funds, and although apparently not alive to the gravity of his offence, he appeared to me, so far as I could judge, to be speaking the truth. Moreover, while acquitting the defender of wilful falsehood, I am not, I confess, altogether satisfied with the explanation which he gives of his attitude when first called upon by the bank for payment. It is true that he had a year before the date of the guarantee in question (viz. in 1887) signed a similar guarantee which he was told by the bank accountant had been spoiled. And it is just possible that he may have supposed that this was the guarantee on which the bank were claiming. But I hardly think that such is the natural inference from his conduct. He had been told that the guarantee in question was useless, and he does not explain how he came to believe otherwise.

"If, therefore, there had been no other question in the case, I should on the whole have found for the pursuers. But the questions which remain are questions of law, and they have led me after a good deal of difficulty to a different conclusion.

"In the first place, I cannot hold that the guarantee here in question was *per se* a valid document as being a writ *in re mercatoria*. I do not say that a guarantee granted to a bank for future advances requires to be authenticated by the statutory solemnities. It may be that such a writ is *in re mercatoria*, and is therefore privileged. That question seems still open. See the opinion (not the rubric) in *Johnston* v. *Grant*, 6 D. 875. But a writ, although *in re mercatoria*, and therefore privileged, may yet be invalid for want of the statutory solemnities. Such solemnities, though not required by law, may be prescribed by the parties, and if, being prescribed, they are imperfectly observed, there is *locus pœnitentiae*. A holograph deed need have no witnesses and no testing clause, but if it professes to be a tested deed, and the witnesses do not sign, or (as here) sign irregularly, I suppose there is no doubt that the deed would be invalid. Similarly, as decided long ago in the case of *Naysmith*, although in Scotland sealing is not required, yet if the granter on the face of the deed prescribes sealing as a solemnity which he contemplates, the want of the seal is fatal. Now here I think it sufficiently appears that when this deed left the bank and was sent for signature, it bore the words 'In witness whereof,' and had a space left for a testing clause in the usual way. It was intended, in short, to be a tested deed, and that being so, I think I am bound to hold that until executed in the manner contemplated there was *locus pœnitentiae*.

"In the second place, however, this does not dispose of the question of *rei interventus*. For however informal the document, it cannot be doubted that it was capable of becoming obligatory if it was followed by an advance made on the faith of it, and that advance was made in the knowledge of the defender, or might reasonably have been contemplated by him as the result of his signing the guarantee and leaving it in the hands of M'Dougall. It is on this part of the case that I have had most difficulty. The question raised is a delicate one, and one on which there is little or no authority; although certainly the whole subject is canvassed, and some valuable observations are to be found in the opinions in the case of *Johnston* v. *Grant*, to which I have before made reference.

"The conclusion, however, to which I have come is this—that one must deal with

the matter not by drawing inferences always more or less conjectural as to the probable views, intentions, and state of mind of the defender, but by applying to the case in the absence of direct evidence recognised legal presumptions. I confess I think it is quite probable that the defender when he signed the guarantee and left it in M'Dougall's hands had no thought of the necessity of acknowledging his subscription before the witnesses, and contemplated nothing else than what happened, viz., the handing of the document with or without the witnesses' signatures to the bank. But there is no evidence to that effect, and I think that that being so, the legal presumption is and must be that he knew what he was doing, and knew that until he acknowledged his subscription his execution of the deed was incomplete. And if that was so, the question is, Was he bound to contemplate, and can be held to have contemplated, what followed? In other words, can I assume against him that he foresaw and contemplated either (1) that M'Dougall would without further authority deliver to the bank a deed incompletely executed, and which could not be completely executed without his (the defender's) further intervention, and that the bank would proceed to make advances on the faith of a deed thus on the face of it incomplete? or (2) that M'Dougall would do what he did do, viz., call in witnesses and obtain their subscriptions and hand the deed to the bank as completely executed, with a schedule for the testing clause setting forth a complete execution. I do not think I can properly make either of those assumptions, and therefore I do not think I can properly hold that the defender authorised the delivery of the document to the bank, or authorised or contemplated the making of the advances which are said to constitute the *rei interventus* in the case.

"The case would have been different if the advances had been made with the defender's actual knowledge. It might have been different if he had personally handed the document to the bank in an incomplete condition. It would certainly have been different if he had himself handed the document to the bank in the condition in which it reached the bank through the hands of M'Dougall. But as the facts stand the question arises differently, and I must therefore on the whole case assoilzie the defender, with expenses, but I think those expenses must be modified, and I shall reserve as to that matter until I see the Auditor's report."

The pursuers reclaimed, and argued—(1) The Lord Ordinary was right in holding that Campbell had signed the letter of guarantee. (2) A bank was a merchant in money, and letters of guarantee were *in re mercatoria*. Consequently they did not require to be tested—*Paterson* v. *Wright*, January 31, 1810, F.C.—*aff.* (1814) 6 Pat. App. 38; *Thomson* v. *Gilkison*, March 1, 1831, 9 Sh. 520; opinions in *Johnston* v. *Grant*, *infra*. The Mercantile Law Amendment Act (19 and 29 Vict. c. 60), by section 6 provided for guarantees being written by the granter or some one authorised by him; evidently a tested deed was not contemplated. (3) Whether a letter of guarantee required to be tested or not did not signify here, as *rei interventus* made it impossible for the defender to resile on the ground of informality. He had given the letter to M'Dougall to use, and the advance had been made upon the faith of the guarantee not upon the probative character of the writ. It was not necessary the defender should know the advance had been actually made if he had done what would actually lead to that result—Erskine, iii. 2, 3; Bell's Comm. (7th ed.) i. 346; *Ballantyne* v. *Carter*, January 21, 1842, 4 D. 419; *Johnston* v. *Grant*, February 28, 1844, 6 D. 875; *Church of England Life and Fire Assurance Company* v. *Wink*, July 17, 1857, 19 D. 1079; *United Mutual Mining and General Life Assurance Company* v. *Murray*, June 13, 1860, 22 D. 1185.

Argued for respondent—(1) The pursuers had not discharged the *onus* of proving that he had signed the letter of guarantee—*Geddes* v. *Reid*, July 16, 1891, 18 R. 1186. (2) A letter of guarantee savoured more of the Juridical Styles than of the law merchant, and was not a writ *in re mercatoria*—*Johnston* v. *Grant*, *supra*. Nor was there any reason in the interests of commerce why it should be. Even if it were, formalities might be prescribed—(*cf. Naysmith* v. *Hare*, July 27, 1821, 1 Sh. App. 65). Here the respondent was entitled, relying upon the words "in witness whereof," to presume that the letter of guarantee would not be acted upon until his signature had been tested which could only be after he had acknowledged it. (3) The bank was not entitled here to plead *rei interventus*. They had departed from their usual practice in not getting the letter of guarantee signed at their own branch office. M'Dougall was the bank's agent *ad hoc*, and they were not entitled to take advantage of his fraud. The money had not been advanced as in *Johnston* v. *Grant's* case upon the faith of the informal document—it never would have been—but upon a fully completed document filled up unwarrantably by M'Dougall.

At advising—

LORD M'LAREN—This is an action for cash advances made to the principal debtor M'Dougall on an account said to be guaranteed by a cautionary obligation signed by the defender Campbell. The writing contains a testing clause, but the evidence establishes the defence that the witnesses signed outwith the presence of Campbell, and without his signature being acknowledged as required by law. The defender pleads that his signature is forged, and the first question for consideration is the truth of this defence. The Lord Ordinary has come to the conclusion that the signature is genuine, and on such a question the greatest weight is due to the opinion of the judge who tried the case. So far as the case depends on parole evidence it is a question of the degree of

credit to be attached to the testimony of M'Dougall, who says that the writing was signed by the defender in his presence, and that of the defender who denies having signed it. The Lord Ordinary accepts the statement of M'Dougall as reliable, and that, as I have said, is a very important element in the case. But further, the Lord Ordinary has held that the signature in dispute is identical with authentic signatures of Campbell which have been produced for comparison, and I believe that your Lordships have come to the same conclusion on an examination of the documents. Campbell's signature, although not a very artistic or free-handed performance, has a very distinct character, and it is one which I should imagine would not be easily imitated. The expert witnesses who were examined for the bank say that such a signature would be more difficult to copy than a signature in an ordinary correct hand, and this observation appears to me to be well founded. It must be considered that in civil cases *comparatio literarum* is always an important part of the evidence, and in the case of such documents as bills, which are signed when no one is present, this is often a decisive element. Were it not for this test, on which men of business are accustomed to rely, it would be in the power of any man to repudiate his subscription to a mercantile document on the ground that he had not been seen to write it, and that there was no direct evidence of the act of subscription.

There are other circumstances in the case which are not favourable to the defender's theory. One of these is the defender's statement at the end of his examination-in-chief, where he admits having received a letter from M'Dougall suggesting that he might get clear of his guarantee because the instrumentary witnesses had not seen him sign or heard him acknowledge his subscription. It was suggested that the document here referred to might be a previous guarantee which the defender had signed in the bank, but had rendered useless by adding words limiting his responsibility. But this explanation is inadmissible, because the spoiled guarantee was executed in the presence of witnesses, as M'Dougall and Campbell very well knew. M'Dougall's letter must then have reference to the guarantee sued on, and this suggests two observations. First, it is incredible that M'Dougall should have written to Campbell in such terms regarding an obligation which he knew that Campbell had never signed. Secondly, if Campbell had not in fact signed a guarantee, he would instantly have repudiated the suggestion and challenged the writing as a forgery. Then the defender's action towards the bank is not that of a person who has been defrauded. It is not until he has seen the document and examined the signature that he comes to the conclusion that the signature is not his. This would be intelligible if it were a question of identifying an autograph, but the defender could not be in doubt as to whether he had in fact guaranteed M'Dougall's cash-credit, and this excess of caution on the part of the defender is anything but favourable to the honesty of his defence. I agree with the Lord Ordinary that the defence of forgery has entirely failed.

Having once arrived at the conclusion that the obligation sued on bears the subscription of the defender, the solution of the case does not seem to me to be difficult, because the obligation was given to M'Dougall to be used for the purposes of credit, and the money of the National Bank was advanced in consideration of the defender having pledged his credit to the extent of £200.

We are familiar with cases in which a party to a contract claims the right to resile on the ground that his deed is not executed in accordance with the statutory formalities, and in general this course is open to an obligant while matters are entire, that is, if there has not been payment or performance by the other party. But it is perfectly useless to plead the statute of 1681 against the demand of a creditor who has performed his part of the bargain and is seeking fulfilment of the counterpart, for there is nothing more certain in our law than that *rei interventus* or part performance will set up an informal obligation, or, what is the same thing, will bar the right to resile. Even in the case of a sale of heritable property the objection of want of attestation can only be taken when the case is *in nudis finibus contractus*, as was pointed out by the late Lord President in *Goldston* v. *Young*, December 8, 1868, 7 Macph. 188, 41 Scot. Jur. 122. It is hardly necessary to elaborate a principle which is so strongly founded in natural justice, but there is one aspect of it which is very pertinent to cases of money obligations—I mean that a party who is seeking to be relieved of a contract on the ground of informality of execution, whether he proceeds by way of reduction or by exception, can only obtain relief on condition of making restitution. In the present case the defender would have to repay whatever sum the bank had advanced to M'Dougall on the defender's credit as a condition of being relieved of his obligation. But as the bank actually advanced the whole sum which was guaranteed, restitution and payment are one and the same, the result being that the defender can only get a discharge of his obligation by payment in full. It may have been doubted at one time whether the advance of money to the principal obligant was *rei interventus* in a question with a co-obligant or cautioner. But this is no longer an open question since the decision in the case of *The Church of England Insurance Company* v. *Wink*, 19 D. 1079, and when it is observed that the consideration to the banker for making the advance is the undertaking of all the obligants to repay, it seems almost too clear for argument that the advance of money to the obligant who is to operate on the account is performance by the banker sufficient to bar any one of the obligants from rescinding or resiling to

his prejudice. I do not understand the Lord Ordinary's view to be essentially different from what I have stated, but his Lordship has apparently been unable to give effect to the principle, because he holds that the deed was intended to have a testing clause, and that the defender did not mean to be bound until his signature was attested. I think this difficulty is more apparent than real. In the first place, we have no evidence that the defender signed under such a condition. His state of mind on the subject is that he never signed it at all, and we do not know what his answer would be as to the supposed condition if it were brought home to his memory or his conscience that he had signed. But further, I must point out that a mental reservation will not enable a debtor to get quit of his obligation. If this were so, the doctrine of *rei interventus* would be of very limited application, because the debtor would always say—"I signed the paper, but then I did not mean to be bound by it until a testing clause had been inserted." I do not know that the answer would be any the better if he could point to the words "In witness whereof" in proof that attestation was contemplated. In the present case the writing was delivered to M'Dougall, who was the agent of the bank *ad hoc*—to procure the cautioner's subscription. We must take it that the writing was signed and delivered unconditionally, because there is no evidence of any condition; and in these circumstances I apprehend that the writing was rightly given by M'Dougall to the bank for the purpose of obtaining credit, and that the bank had sufficient authority to make the advance on the defender's credit.

The circumstance that M'Dougall got two witnesses to sign the guarantee outwith the presence of the defender does not appear to me to affect the question of liability. M'Dougall had no mandate from the defender to append a false or invalid attestation to the signature. An invalid attestation is no attestation, and the case is just the same as if nothing had been added after subscription.

I have only a word to add on the question which was argued to us, whether a letter of guarantee is a writing *in re mercatoria*.

I do not propose to offer any opinion on this question, which, as I think, has only a theoretical interest. If in such a case the writing had not been acted on, I suppose it would be open to the guarantor to give notice to the bank that he meant to recal it; if advances had been made on the faith of the obligation, the obligation would be binding on the principle on which we propose to decide the case. The result of my opinion is that the bank is entitled to decree in terms of the summons.

Lord Adam—I have read over the proof in this case more than once, and I have come to the conclusion that the Lord Ordinary and Lord M'Laren are right in holding that it has not been proved that Campbell's signature was a forgery, and that after a consideration of the parole evidence, the *comparatio literarum*, and the conduct of the defender at the time when the claim was made. I need not go over these matters again in detail.

But that being so, there is still left the ground upon which the Lord Ordinary has assoilzied the defender. The facts which raise the question are these—This letter of guarantee was sent by the head office to their agent in Oban in this condition, partly in writing and partly in print, and it concluded with the words "in witness whereof." When the agent got it he handed it to M'Dougall, the principal debtor, that he might get it signed. This was not in conformity with the usual and safe principle followed by bankers, which is to get such letters of guarantee signed in the bank's premises, in order to avoid the possibility of such an occurrence as has taken place here. But that is really a matter of no moment. What the bank did was to employ M'Dougall as their agent in this transaction to procure the defender's signature, and he did in fact procure it. He afterwards got two persons to sign as witnesses of that signature, although they had neither seen the defender sign nor heard him acknowledge his signature. There is no doubt whatever that the document was informally executed, but having so treated it, M'Dougall sent it to his own agents in Edinburgh. No doubt he sent it with sufficient information to enable the bank to fill up the testing clause, and that accordingly was done, and *ex facie* it was a probative document. Upon the faith of that document the bank advanced the money, so that *rei interventus* took place on the faith of it, and there is no doubt that where the granter of an informal deed has signed it and delivered it, and *rei interventus* has followed upon it, he cannot plead the informality. That is conclusively settled by the cases of *Johnston* v. *Grant*, *The Church of England Assurance Company* v. *Wink*, and other cases. The question now is, whether there is any reason why that well-established doctrine should not be applied to this case? The Lord Ordinary has held that it should not, and that upon somewhat subtle grounds. He starts with this proposition, that where parties to a contract prescribe that certain solemnities or formalities shall be observed in a deed of obligation, and these are not fulfilled, they will not be bound. That means that if parties make it a condition of incurring the obligation that certain formalities be observed, they will not be bound in the absence of such formalities even although *rei interventus* has followed. Probably that is so. But has that rule got any application to the present case? There is no evidence in this case that the parties did prescribe any formalities or insist upon having a probative writ. The Lord Ordinary deduces such a stipulation merely from the words "in witness whereof" being in the document when sent for the purpose of being signed. I have no doubt the bank intended to obtain a probative deed, but it is a very long step to say that because the bank wished such a deed the

parties made its being a probative deed a condition of the obligation.

So far, then, I think the first ground upon which the Lord Ordinary makes this an exception to the general rule fails. But further, he holds that the principle of *rei interventus* does not apply in this case, because, as far as I can gather from his note, he is of opinion that Campbell did not mean to grant his guarantee upon the document as it left his hands, but presumed, and was entitled to presume, that nothing further would be done until he had been summoned to acknowledge his subscription before witnesses, and therefore that it cannot be presumed to have been within the reasonable contemplation of Campbell that money would be advanced on the document on the conditions in which it was when he handed it to M'Dougall, in which case he thinks *rei interventus* would not apply. I cannot agree with that view. It appears to me, as Lord M'Laren has said, that where a person signs and delivers an informal document, he authorises that document to be put to the use for which it was intended, and that there was nothing to prevent the bank acting upon it—even if they knew it was informal—and trusting to the doctrine of *rei interventus*. Here they advanced money on the faith of the document believing it to be a probative writ. But it was on the faith of Campbell's signature that they really advanced the money, and not upon the probative character of the writ. I cannot therefore agree to making an exception to the principle of *rei interventus* in this case.

I see the Lord Ordinary says—"The case would have been different if the advances had been made with the defender's actual knowledge. It might have been different if he had personally handed the document to the bank in an incomplete condition." In my view that is exactly what he did. He handed the document in an incomplete condition to the agent of the bank, M'Dougall, and it humbly appears to me that when he did that he authorised the bank to make the use of it which it was intended to have.

LORD KINNEAR—I am of the same opinion. The real questions in the case appear to me to be questions of fact, and when the first of these questions, whether the letter of guarantee was subscribed by the defender or not, has been decided, I think that that decision carries along with it the solution of the others. For when we once reach the conclusion that the defender is not to be believed when he denies his signature, it appears to me that we must also reject his testimony as unworthy of credit in every instance where it is in conflict with evidence which we think credible.

That being so, I think it is proved not only that the defender subscribed the guarantee, but that the document was put by him into M'Dougall's hands for the purpose of enabling him to obtain an advance from the bank. If that be so, and if the money was thereafter advanced by the bank upon the faith of the guarantee, it does not appear to me to be material whether the document was formally completed as a probative instrument or not, because there can be no question that it was at least capable of being made obligatory by *rei interventus* when it was delivered to M'Dougall. I agree with the Lord Ordinary that it was apparently incomplete, because it was obviously intended that it should be duly attested. It never was duly attested, because although two persons afterwards appended their signatures as witnesses, it appears that they were not themselves present when the defender signed, nor did he afterwards acknowledge his signature to them, and accordingly the document remained untested. But if money was advanced upon the faith of the signature which was attached for the purpose of guaranteeing an advance by the bank; and if the letter of guarantee was delivered to the borrower for the purpose of enabling him to attain that advance, it appears to me to be immaterial whether the letter was obviously incomplete from the first, or whether the irregularity which makes it incomplete was only discovered after the advances had been made.

I cannot see that there is any room for presumption as to the defender's intention arising from the appearance of the deed. If he had sworn that he delivered it to M'Dougall for the purpose of his having it completed by the attestation of witnesses, knowing that that could not be done without his presence, and that he never authorised M'Dougall to deliver it to the bank, or to make any use of it, but only to procure witnesses to whom he might acknowledge his signature, there might have been strong grounds for sustaining the Lord Ordinary's view that he was entitled to resile until the document had been finally completed. But it is impossible for the defender to put forward a case of that kind because he denies his signature, and if I cannot accept his denial, the question whether he delivered the guarantee to M'Dougall, and for what purpose, is not to be decided by any legal presumption, but is a pure question of fact to be determined according to the evidence. I agree with your Lordships in thinking it proved that it was in fact delivered, and for the purpose of being used as a guarantee.

LORD PRESIDENT—I agree with your Lordships. To the grounds stated by Lord M'Laren, upon which the fact of signature is sufficiently proved, I shall only add another which strikes me as supporting the same conclusion. According to the defender, he was not in Oban on the day alleged, nor for a week before and a week after. If this had been true, it is difficult to suppose that he could not have found evidence of the fact either in Oban (in his own household for instance) or in Tobermory, the alleged *alibi;* at all events, it was his plain duty to allege the fact on record, and thereby dare the pursuers to produce evidence to the contrary of his own oath. His failing so to proceed shakes the credibility of his story.

For the decision of the legal question on which we differ from the Lord Ordinary, the essential fact is that the writ when signed was delivered by the defender to M'Dougall without any special instructions, and, in particular, with no instructions to complete the testing clause. M'Dougall was *in hac re* the agent of the bank, and therefore delivery to him was delivery to the bank.

I cannot find in the survival of the words "in witness whereof" the constitution of a condition restricting the legal effect of signature and delivery, nor do I see in those words a silent mandate to M'Dougall to do something for behoof of a man who could speak if he wanted anything further done. I therefore answer in the affirmative the first alternative query put by the Lord Ordinary towards the end of his note.

The Court sustained the appeal and pronounced decree in terms of the summons.

Counsel for Pursuers and Reclaimers—Jameson — Maconochie. Agents — Mackenzie, Innes, & Logan, W.S.

Counsel for Defender and Respondent—Dickson—W. Campbell. Agents—Gill & Pringle, W.S.

Saturday, June 11.

FIRST DIVISION.

[Sheriff of Mid-Lothian.

BROATCH *v.* DODDS.

Reference to Oath—Admission of Debt with Explanation—Production of Writings—Evidence.

A law-agent brought an action for payment of his professional account. The account having prescribed, the constitution of the debt was referred to the oath of the defender, who deponed that he had employed the pursuer as averred, but explained that he had only promised to pay what he was able, and that he understood the pursuer was conducting his litigation as a speculation.

Held that the obligation to pay was not limited or conditional, and that the oath was affirmative of the reference.

Observations by Lord Adam, Lord M'Laren, and Lord Kinnear to the effect that in a reference to oath the deponer may refer to documents, and be interrogated with regard to them, but that they cannot be looked at as productions except so far as they have been made part of his evidence.

In January 1892 Robert Broatch, solicitor, 23 Dundas Street, Edinburgh, brought an action in the Debts Recovery Court there against Jonathan M. Dodds, 245 Morningside Road, Edinburgh, for £27, 2s., being the balance of a business account for professional services rendered in connection with two actions in 1884-86.

The account having prescribed, the cause was referred to the oath of the defender, who, in answer to the pursuer, deponed, *inter alia*—"I called upon you about these actions and got your advice. . . . You attended and conducted the proof on my behalf. . . . (Shown twenty-five letters)—I do not deny having received all these letters. (Q) On 30th January you received this postcard?—(postcard read)—(A) I had abandoned the action by that time. . . . You knew well enough when I started the case the means I had, and what I told you I would do. I understood you were carrying it on as a speculation. . . . (Q) Were you to pay no money at all?—(A) I said I would give you what I actually could, and I told you when I gave you the last 10s. I was afraid I was drifting into litigation, and I would have to abandon it. I gave you altogether £1, 12s. 6d. . . . After paying the last sum of 10s. I said I could go no further. My letters show how unwilling I was."

The letters were produced, docketed and subscribed as relative to the deposition by the defender and by the Sheriff-Substitute (HAMILTON), who on 19th February 1892 pronounced the following interlocutor:—" . . . Finds the oath negative of the reference: Assoilzies the defender from the conclusions of the libel, &c.

"*Note.* — The defender's deposition amounts to this, that when he first employed the pursuer an arrangement was entered into by which he was to give the pursuer 'what he actually could,' but beyond that was not to be liable—in other words, that the pursuer undertook to conduct the business in question 'as a speculation.' That is a qualified oath, the qualification is intrinsic, and the oath must be regarded as negative—*Cowbrough* v. *Robertson*, 1879, 6 R. 1301."

The pursuer appealed to the Sheriff (BLAIR), who adhered.

The pursuer appealed to the First Division of the Court of Session, and argued—The oath was affirmative of the reference. The defender had admitted that the pursuer conducted the legal business referred to in the account for him. He did not say he had formally abandoned the actions, although he might have thought of doing so. The admitted debt was not a conditional one. The defender plainly did not regard this as a speculation on the part of the agent, for he promised to pay—contrast *M'Larens* v. *M'Dougall*, March 16, 1881, 8 R. 626. His understanding as to what the pursuer would require him to pay was only a conjecture, and did not amount to a bargain limiting the extent of his obligation—*Hamilton's Executors* v. *Struthers*, December 2, 1858, 21 D. 51. Nor was his obligation limited by his promise to pay what he could—*Fair* v. *Hunter*, November 5, 1861, 24 D. 1 (Lord Justice-Clerk Inglis, 8-9); *Forbes* v. *Forbes*, November 4, 1869, 8 Macph. 85; *Christie's Trustees* v. *Muirhead*, February 1, 1870, 8 Macph. 461.

Argued for the respondent—If there was admission of the constitution of the debt, it