ment was extended to four months. The defender signed the bill, and received by post a remittance of £50. It is found by the Sheriff-Substitute, whose findings in fact were affirmed by the Sheriff, that no pressure was used by the pursuer to obtain the bill, and this finding is in accordance with the evidence. The Sheriff-Substitute found in law that the defender was entitled to relief under the statute; but this finding was disaffirmed by the Sheriff, who was of opinion that the transaction was not harsh and unconscionable, and gave decree in terms of the conclusions of the petition.

In considering the merits of the case I think it must be taken on the defender's statement that he was not in a position to get the sum of £50 which he required from his bankers, or by a loan on security, because he does not say that he had any security to offer.

Supposing that he had anything to offer in the form of security, it may be kept in view that a loan of so small a sum as £50 on security was not a transaction in the ordinary course of business, and also that a loan on security could not have been got for less than a year, and on payment of the legal expenses of a security transaction. But as the defender had no security to offer he would have had to insure his life and to assign the policy to his creditor, which would have involved payment of a premium and legal expenses.

But I do not think that such a sum as £50 could have been raised in this way, as it was not a transaction in the ordinary course of business. It follows in my opinion that the defender had no other way open to him of getting the money except from a money lender, who, having no security, would of course be entitled to charge a relatively high premium to cover the risk which he undertook.

It may be that £15 was in excess of the sum required to cover interest and risk, but of this it is very difficult to judge. I think that is a fallacy in considering the question as one of percentage. If the sum required had been £500 instead of £50, and the premium £150, the disproportion of the premium to the loan would be very evident, supposing the circumstances of the borrower to be such that he might reasonably be expected to be able to repay the loan. But then this was a small transaction, and I can understand that the money lender's position might be that he would not enter into any transaction, great or small, for a profit of less than £15.

Be this as it may, I think that the defender, voluntarily, and without pressure, concealment or fraud practised upon him, agreed to give a bill for £65 in exchange for an advance of £50, and if he could not get the money on better terms, he must have considered when he signed the bill that he was willing to submit to a loss of £15 in return for the accommodation which he instantly required. I am unable to say that this was a transaction which the law would regard as "harsh and unconscionable." I have some difficulty in putting a definite meaning upon the statutory expression, but I think it at least implies some fault on the part of the money lender—some want of fairness in the transaction for which he may justly be held responsible. In the present case I see no evidence of such fault or want of fairness. The premium was perhaps too high, but excess in the amount is not sufficient under the statute to let in the discretionary power of the Court to re-form the contract, and I think there is no objection to this contract except that the rate was excessive. In all the circumstances I am of opinion that the Sheriff's judgment is sound; that we should find as the Sheriff has done in terms of the Sheriff-Substitute's findings in fact, and find in law that it is not proved that the transaction was harsh and unconscionable, and affirm the decree.

The LORD PRESIDENT, LORD KINNEAR, and LORD PEARSON concurred.

The Court refused the appeal and affirmed the interlocutor of the Sheriff.

Counsel for Pursuers (Respondents)—Hunter, K.C.—D. P. Fleming. Agents—Paterson & Gardiner, S.S.C.

Counsel for Defender (Appellant)—Sandeman—J. G. Jameson. Agent—Arthur F. Frazer, S.S.C.

Thursday, February 4.

FIRST DIVISION.

[Sheriff Court at Perth.

SCOTLAND *v.* SCOTLAND.

Loan—Proof—Writ—Endorsed Cheque.

In an action for repayment of an alleged loan, the pursuer produced a cheque drawn by her in favour of the defender, endorsed by him, and marked "paid" by the bank.

Held that the document did not infer an obligation to repay.

Haldane v. *Speirs*, March 7, 1872, 10 Macph. 537, 9 S.L.R. 317, *followed.*

Gill v. *Gill*, February 8, 1907, 1907 S.C. 532, 44 S.L.R. 376, *distinguished.*

On 17th June 1908 Miss Elizabeth J. Scotland, 89 Magdalen Green, Dundee, brought an action against her brother John Scotland, spirit merchant, Abernethy, for repayment of an alleged loan of £100. She averred—"(Cond. 2) On the 14th January 1895 . . . the pursuer advanced on loan to the defender the sum of £100 by cheque drawn by her in favour of defender on the Commercial Bank of Scotland, Dundee. The cheque was dated 14th January 1895, and was handed to the defender on said date, and was thereafter cashed by or for him. . . . (Cond. 3) In exchange for said cheque the defender gave pursuer his I O U for said sum at the time when he got the cheque. The pursuer handed the I O U to her mother to keep for her, but after her

mother's death in 1900 the pursuer was unable to recover same. She asked the defender to give her a duplicate, but he refused to do so."

The defender denied the loan, and pleaded, *inter alia*—"2. The pursuer not having produced the defender's writ in proof of the alleged loan, proof should be restricted to a reference to the defender's oath."

In support of her averment the pursuer produced the following document—

"£100. Dundee, January 14th 1895.

"The Commercial Bank of Scotland,
"Limited, Dundee.

"Pay to John Scotland, Esq. or Bearer
"One hundred pounds.
(Sgd) E. J. SCOTLAND.

[*The words "or Bearer" were deleted in the cheque.*]

"No. U 5716 (Stamped) C.B. of S. Ltd. Dundee Paid.

"*Endorsed*—JOHN SCOTLAND.

"*Endorsed*—A. M. M. SHEPHERD."

On 8th October 1908 the Sheriff-Substitute (SYM) pronounced the following interlocutor—"Refuses the pursuer's motion for decree *de plano*, and refuses her motion for a proof before answer: Finds that the action is for payment of an alleged loan: Finds that no writing inferring loan has so far been produced: Finds that the pursuer's averments can only be established by the writ or by the oath of the defender."

The pursuer appealed to the Sheriff (JOHNSTON), who on 22nd December 1908 affirmed his Substitute's interlocutor.

Note.—"It is well settled that—(1) Loan cannot be proved by parole. (2) Evidence by writ simply that money passed does not instruct loan—*Haldane* v. *Speirs*, 10 Macph. 537. The law rejects the view indicated by Lord Cowan in *Fraser* v. *Bruce*, 20 D. 115, and repudiated by the same Judge in *Haldane* v. *Speirs* that it is 'a settled principle that when the money of one party is proved to have been given to or received by another, the receiver must, *in dubio*, show that he received it on some footing other than under an obligation to repay.' (3) A simple receipt for money paid given to the person who pays *prima facie* instructs loan—*Gill* v. *Gill*, 1907 S.C. 532, and cases there collected. The rule is stated by Lord Cowan in *Haldane* v. *Speirs*—'When a document or writing admitting the receipt of money is given to the party advancing the amount by the party who receives it, it will be presumed that an obligation to repay is thereby constituted.' This is one of the doctrines of our law which causes real pain. That the mere proof that money passed should not *prima facie* import loan is intelligible, but it is hard to understand why it should make a difference in favour of loan that a document is produced which, according to ordinary experience, is not of the kind that is employed when loan is made and evidence of loan is desired to be retained. It is a matter of everyday occurrence that a person making payment of a sum he is due is content with a simple receipt for the money without troubling to require further particulars on the receipt. On the other hand, it must be matter of the rarest possible occurrence that a party requiring documentary evidence of a loan takes it in the form of a simple receipt. Such a document is much more appropriate and more common as an acknowledgment of a loan repaid than as an acknowledgment of a loan made. As Lord Young states in the case of *Paterson*, 25 R. 144, a simple receipt for money is a document of discharge, not of obligation. The cases are too hard, however, to allow of any effect being given to such reasoning.

"Such then being the rules to be applied, how do they meet the case of a cheque to order? It was decided in *Haldane* v. *Speirs* that loan was not instructed *scripto* by an indorsation upon a cheque. The writing founded upon in the present case is the indorsation upon a cheque. The difference between this case and *Haldane* v. *Speirs*, which is insisted in, is that in this case the cheque was not as in *Haldane* v. *Speirs* a cheque payable to bearer, the indorsation upon which was a superfluity, but was a cheque payable to order, and therefore the granter was careful to make indorsation a condition of payment. In this view the case was likened to *Fraser* v. *Bruce*, 20 D. 115. *Gill* v. *Gill*, 1907 S.C. 532, was not referred to, but it also is very much in point. In *Fraser* there was a signature by the alleged borrower in a payable-to-bearer bank pass-book of the alleged lender. The case is not a satisfactory one, for it was complicated by certain admissions, and it is doubted by the Lord President in *Haldane* v. *Speirs*, but it was followed in the case of *Gill*. In this latter case the alleged lender gave to the borrower an order on a savings bank to pay to bearer £47, 10s. on production of a deposit-book. Across the back of the order the bearer wrote and signed, 'Received the sum of £48, 11s.' It will be observed that in this case the cheque or order was a bearer one, and the distinction between this case and *Haldane* v. *Speirs* is certainly very narrow. There are no doubt the words 'received the sum of,' but these words might have been supposed to be implied in bare indorsation of a cheque presented at a bank. There is also the circumstance noted by one of the Judges that interest was added and paid to the holder of the cheque or order. As the orders or cheques were to bearer in both cases, the case of *Gill* does not seem to meet what has more than once been described as the determining factor in *Haldane* v. *Speirs* that the acknowledgment was given to the bank as *its* voucher, not to the alleged lender as *his* voucher (*per* Lord Kyllachy in *Paterson*, 25 R. 176, top).

"On the cases the question does not appear to me to be foreclosed of the effect of a bare indorsation upon an ordinary cheque to order as *prima facie* evidence of loan. The circumstance that the cheque was to bearer is referred to in *Haldane* v. *Speirs*, but I do not think that it can be affirmed that the decision of the majority was dependent upon that factor. On the other hand, in subsequent cases *Haldane* v. *Speirs* has been referred to as an authority for the general proposition that an indorsation

upon a cheque is not *prima facie* proof *scripto* of loan, and that on the ground that a cheque is the ordinary mode of payment of debt.

"I do not feel that I should be warranted in extending one *iota* beyond what is matter of decision, a rule the reasonability of which I am unfortunately unable to appreciate. That evidence *scripto* that money has passed should be sufficient to let in parole in proof of loan would be a rule which might have much to commend it. The law, however, negatives this. There must be written evidence, not merely that the money passed but that the money was given on loan. So far there is no difficulty, but when the law goes on further to affirm that a mere receipt acknowledging that money passed is *prima facie* proof that the transaction was loan, it humbly appears to me that this is a presumption which contradicts experience. The great majority of cheques are, I believe, 'to order,' and in the case of a person using such a cheque-book he would, if the indorsation is equivalent to a receipt given to himself, on getting his bundle of cheques at the end of the banking year, be at once armed with it may be a hundred documents, every one of which would be *prima facie* proof of loan against the indorser. It would, I apprehend, be exceedingly inconvenient if every person who cashes an order cheque thereby placed himself or his executors under the *onus* of proving that he did not get the proceeds on loan. The person who has granted a simple receipt and who maintains that it was in payment of a debt may perhaps be held to have been himself to blame for not specifying this on the receipt, but such specification on the indorsement of a cheque is unusual, if not unknown."

The pursuer appealed.

The appellant's argument sufficiently appears from the opinion (*infra*) of the Lord President.

Counsel for the respondent were not called on.

LORD PRESIDENT—This is an action at the instance of a sister against her brother for repayment of an alleged loan. She sets forth that in 1895 she advanced him a sum of £100, which was paid by means of a cheque on her bank account. She further avers that the defender granted an I O U for the loan, but that the I O U had been lost through her having given it to her mother to keep for her, and that on her mother's death it could not be found. Accordingly she now sues without it. The defender denies the loan. The cheque has been produced, and that in itself is evidence that money passed from the pursuer to the defender. On these facts the pursuer asks for decree *de plano*. I do not think she can possibly get decree *de plano* without overturning the law laid down in the case of *Haldane* v. *Speirs*, 1872, 10 Macph. 537—a decision not only binding, but in my opinion salutary. There may be cases—and this may be one of them—where the rule there laid down may occasion hardship to the individual, but for behoof of the community at large the rule is a salutary one, and ought not, I think, to be relaxed.

The learned counsel for the pursuer tried to distinguish this case from that of *Haldane* in two respects. He said that in *Haldane's* case the defender stated that the money passed because of the existence of the relationship of debtor and creditor, whereas the defender here does not give any explanation, but simply denies the loan. I do not think, however, that that circumstance makes any difference, for that question was not gone into. If evidence on that point had been admissible, it would have been open to the pursuer to prove that the fact was otherwise. Therefore I do not think it can make any difference that the defender says I admit nothing, for that cannot affect the technical rule of law that there must be *scriptum*. No doubt if parole evidence were admissible the pursuer might safely say "My evidence is uncontradicted, for the explanation given by the defender is no explanation at all, and therefore I am entitled to decree." But standing the rule that *scriptum* is essential, that distinction is immaterial.

The second ground on which the learned counsel sought to differentiate the two cases was that in *Haldane* the cheque was payable to bearer, whereas the cheque here was one drawn to the payee or order, thereby making it certain that the payee's endorsation would be upon the cheque. No doubt the cheque was endorsed, but why? Not as a receipt to the drawer, but to protect the bank, and to certify that the bank paid the money to the person named in the cheque. The drawing of the cheque to order is for purposes of security, and is equivalent to saying that the bank are to pay only on endorsation, and to the person whose name corresponds to the name in the cheque.

Reference was made to the case of *Gill* v. *Gill*, 1907 S.C. 532, but I do not think that case touches the present question. That was a case in which the cheque was drawn on a savings bank, but across the face of the cheque there was written — "Received the sum of forty-eight pounds and eleven shillings. (Signed) Grace Gill." So far as the bank was concerned the presence of these words did not matter, for the bank's warrant to pay was the cheque; therefore the Second Division in that case held, and held rightly, that there must have been some additional purpose for these words being written on the cheque, viz., by way of acknowledgment of receipt of the money, and that accordingly the case fell within the rule that the written acknowledgment of the receipt of money implies an obligation to repay unless the person granting the receipt can show that he received the money on a footing which did not involve any obligation to account or repay, and that of course means the admission of parole evidence. I do not think that case has any bearing on the present. If the production of an endorsed cheque were to infer an obligation to repay, the result would be appalling in its conse-

quences, for the mere production of bygone cheques would then enforce on all to whom they were given, the obligation to prove that they did not get the money on loan. I am accordingly of opinion that the judgment appealed from is right, and should be affirmed.

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

The Court affirmed the interlocutor of the Sheriff.

Counsel for Pursuer (Appellant)—Constable, K.C.—James Macdonald. Agents—Clark & Macdonald, S.S.C.

Counsel for Defender (Respondent)—Graham Stewart, K.C.—R. S. Horne. Agents—Davidson & Syme, W.S.

Saturday, January 23.

FIRST DIVISION.

[Lord Salvesen, Ordinary.

KERR *v.* THE SCREW COLLIER COMPANY, LIMITED (OWNERS OF THE "PRUDHOE CASTLE").

Ship—Collision at Sea—Merchant Shipping Act 1894 (57 *and* 58 *Vict. cap.* 60), *sec.* 48—*Regulations for Preventing Collisions at Sea, Article* 25—"*Narrow Channel*"—*Firth of Forth.*

The Regulations of 1897 for Preventing Collisions at Sea provide—article 25—"In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel."

Held that the Forth from the Forth Bridge upwards is a narrow channel in the sense of article 25.

The Regulations of 1897 for Preventing Collisions at Sea, article 25, is quoted in the rubric.

Isabella Webster or Kerr, widow of the deceased George Kerr, who was the master of the steamship "Ruby" of Glasgow, for herself and as tutrix and administratrix-in-law for three pupil children of herself and of the said George Kerr, raised an action against the Screw Collier Company, Limited, and others, registered owners of the steamship "Prudhoe Castle" of North Shields, concluding for damages for the loss they had sustained through the death of the said George Kerr. The case is reported only on the question as to the proper navigation for steamships—in view of article 25 of the Regulations for Preventing Collisions at Sea—in the Firth of Forth west of the Forth Bridge.

On or about the 9th day of October 1905 the "Ruby" left Middlesborough with a cargo of pig iron on board, bound for Grangemouth, and on the following morning, while in the vicinity of the Forth Bridge, between the Beamer Light and the Dodds Buoy, she collided with the steamship "Prudhoe Castle" belonging to the defenders. As the result of this collision the "Ruby" sank almost immediately, the master and six of the crew being drowned.

The pursuer, *inter alia*, averred—"(Cond. 5) The death of the said George Kerr was caused through the fault of the defenders, or those for whom they are responsible, owing to their faulty navigation. In particular, the 'Prudhoe Castle,' in breach of the Regulations for the Prevention of Collisions at Sea, and especially article 25 . . and of the rules of good seamanship . . . . the Firth of Forth west of the Forth Bridge, and, in particular, at and near the place of said collision being a narrow channel, failed to keep to that side of the fairway or mid-channel which lay on her starboard side. . . ."

On 28th February 1908 the Lord Ordinary (SALVESEN) pronounced an interlocutor by which he assoilzied the defenders from the conclusions of the summons.

The pursuer reclaimed.

At advising—

LORD PRESIDENT—I am quite satisfied, and I propose that your Lordships should lay it down, so as to leave no doubt upon the subject in future, that the Forth, from the Forth Bridge upwards, is a narrow channel in the sense of article 25 of the Regulations for Preventing Collisions at Sea.

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

Counsel for Pursuer (Appellant)—W. T. Watson. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for Defenders (Respondents)—Spens. Agents—Boyd, Jamieson, & Young, W.S.

Thursday, January 28.

FIRST DIVISION.

(SINGLE BILLS.)

COUL *v.* AYRSHIRE NORTHERN DISTRICT COMMITTEE.

Process—Proof—Evidence—Res Noviter—Admissibility of Fresh Evidence after Debate and Judgment.

Circumstances in which, in an appeal from the Sheriff Court, after proof had been concluded and judgment given by both Sheriffs, the Court *allowed* new evidence to be led by the defenders, who were appealing.

The Turnpike Roads (Scotland) Act 1831 (1 and 2 Will. IV, cap. 43), sec. 84, which is incorporated with the Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. cap. 51), by sec. 123 thereof, enacts—"It shall be lawful for the trustees of every turnpike road to make sufficient side drains on any such road, with power to conduct the water therefrom into