also to have the expense of the discussion of the question of relevancy ; that would be the expense incurred subsequently to the closing of the record, because, if they had not driven us to a discussion upon that question, we should have tried the issue at once. And, therefore, that expense has been entirely thrown away.

LORD CHANCELLOR.—The expenses which the appellant has been ordered to pay will, undoubtedly, be returned to him under the authority of the Court of Session. I observe, that, by the interlocutor of that Court, expenses were given to the respondents ; but that was in consequence of the respondents being, by that interlocutor, assoilzied altogether from the action. I do not think, my Lords, that it will be necessary, upon this question of relevancy, to give any direction as to the expenses of the discussion of that question. I apprehend that they will form part of the expenses of the action, and I think they ought to be reserved.

Interlocutor reversed, and cause remitted with a declaration.

Agent for Appellant, J. F. Elmslie, Solicitor, London.—*Agents for Respondents, Thomson's Trustees*, Loch and Maclaurin, Solicitors, Westminster.—*Agents for Charles James Kerr*, Dodds and Greig, Solicitors, Westminster.

FEBRUARY 23, 1863.

ANDREW GEMMILL, *Appellant*, *v.* JAMES M'ALISTER, *Respondent.*

Bill of Exchange—Summary Diligence—Evidence—Agent and Client—Writ or Oath—Parole—Conjunction—Process.

HELD (affirming judgment), *In a suspension of a charge given for payment of a bill of exchange* —(1) *That the usual rule, limiting the proof of the suspender's plea of non-liability in payment to the writ or oath of the charger, was not applicable, and that he was entitled to an issue on the facts, as the debtor was a client of the charger, and the liability depended on complicated transactions between them ; and* (2) *That parole proof was admissible to explain the circumstances under which an agreement reduced to writing had been entered into, as the relation of agent and client existed, and the charger had agreed to secure his client the suspender against liability under that agreement.*

Appeal—Competency—Interlocutor of Lord Ordinary.—*If an interlocutor of the Lord Ordinary has not been reclaimed against to the Inner House, the House of Lords will not reverse it, unless the reversal of some subsequent interlocutor make it necessary to do so.*[1]

In February 1859 James M'Alister, glass merchant, Glasgow, presented a note of suspension against Andrew Gemmill, writer there, setting forth—"That the complainer has been charged at the instance of the said Andrew Gemmill to make payment of the sum of £272 sterling, and the legal interest thereof since due and till paid, contained in and due by a bill, dated the 8th day of May last, drawn by the complainer upon and accepted by Messrs. John Dickie and Company, mill sawyers, Rock Villa, Craighall Road, Glasgow, and payable four months after date ; which bill was indorsed thus—'Jas. M'Alister ;' and which bill was duly protested for non-payment of the contents, etc., and that to the said Andrew Gemmill within six days next after the date of the charge, under the pain of poinding and imprisonment, most wrongously and unjustly, as will appear," etc.

The Lord Ordinary (Kinloch) having heard parties, passed the note on 23d February on consignation by the suspender of the sum of £100, which was the amount of liability acknowledged by him in his statement of facts. The record in the process was not made up till 21st January 1860. On 14th November 1860, the suspender brought an ordinary action against the respondent Gemmill for payment of £128, being the amount of a bill, dated 22d April 1858, drawn by the pursuer on Messrs. John Dickie and Company, dishonoured by them, and ultimately taken up and retired by the pursuer, with interest from 27th August 1858, the date of payment. A record in this action was also made up, and, on 29th May 1861, the Lord Ordinary pronounced an interlocutor conjoining the two processes and appointing the suspender (the pursuer) to lodge issues, in which interlocutor he gave the following account of the origin of the cause :

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[1] See previous reports, 24 D. 956: 34 Sc. Jur. 475. S. C. 4 Macq. Ap. 449; 1 Macph. H. L. 1. ; 35 Sc. Jur. 263.

"The leading contention of the charger, Gemmill, was, that no evidence could legally warrant suspension of the charge on the bill for £272, except writ or oath of the charger, and, that therefore no issue should be granted in that case. According to his present impressions, the Lord Ordinary is unable to concur in this view.

"The case stated by the suspender is substantially to the following effect. Andrew Macfarlane, wright and builder in Glasgow, having required pecuniary accommodation, it was agreed to be afforded to him by the defender, M'Alister, and a house of the name of Dickie and Company, acting in conjunction. Amongst others, a bill for £128 was made up between these last mentioned parties, which was discounted, and the proceeds handed to Macfarlane—Dickie and Company becoming bound to retire the bill when it fell due.

"An additional advance being required, the bill for £272 now charged on was drawn by the suspender on Dickie and Company, and accepted by that house. The arrangement was, that Dickie and Company should retire the bill to the extent of £172, and the suspender to that of the remaining £100. The money was advanced on the bill by the charger, Gemmill, who had been for years the law agent of Dickie and Company, and was acquainted with the whole transaction.

"It is alleged, that it was part of the arrangement, that Macfarlane should give heritable security, keeping both Dickie and Company and the suspender safe in making this interposition on his behalf, and, that the charger, Gemmill, was employed as agent to complete this security.

"It is said, that, in place of preparing the security in such a way as to cover the whole sums in the bills, whichever of the parties should ultimately be obliged to pay them, the charger made out the deeds so as to give Dickie and Company, in their separate name, security for the sums of £128 and £172 intended to come out of their pocket, and the charger separate security for the £100 intended to be his share of actual advance. The result was, that if Dickie and Company failed to pay their share of the bill charged on (which is what actually happened), and the suspender was obliged to pay the whole, he had only security for £100, not for the whole £272.

"The suspender avers, that, in so framing the security, the charger not only acted in violation of his duty as law agent, but fraudulently, and with the intention of forwarding his own personal interests at the expense of those of the suspender.

"This, it is said, was made manifest, and the intended fraud carried into full effect by a proceeding which thereafter took place between the charger and Dickie and Company. In place of Dickie and Company holding the security for their own relief, and collaterally for that of the suspender, in the event of their share of the bill falling on the suspender, the charger took from Dickie and Company an assignation of the security in his own favour, and under this assignation realized from Macfarlane's estate, and put into his own pocket, the sums of £128 and £172, intended to fall on Dickie and Company, but which their bankruptcy prevented them from paying. In this, it is said, the charger again acted fraudulently, and with the intention of defeating the rights of the suspender, which were well known to him. At least he did so act, if he did not arrange, when taking the security to fulfil the obligation of Dickie and Company to relieve the suspender to the stipulated extent, and did not apply, accordingly, for the suspender's benefit, the sum so received by him.

"In this condition of things, the suspender, besides being obliged to retire the bill of £128, which was in the hands of a bank, has been charged by Mr. Gemmill to pay to him, as holder, the whole amount of the bill of £272.

"The suspender defends himself against this charge, to the extent of £172, on the following among other pleas—*1st*, That the charger culpably and fraudulently violated his duty as law agent in not taking the security in such a form as would have relieved the suspender of all liability for this £172, and is thereby excluded from demanding the same from the suspender. *2dly*, That, at all events, the charger fraudulently took to himself the security which was destined, and which he knew was destined, for the suspender's relief, and must replace the damage to the suspender; in other words, must satisfy his present demand out of the monies recovered by him on the security.

"It appears to the Lord Ordinary, that, with reference to these pleas, the case is removed from the application of the rule which limits a suspender's proof to the writ or oath of the charger. The rule properly applies where the charger is alleged to hold the bill without value, or to be the mere hand for operating payment for some other party's behoof. There is no dispute on these points in the present suspension, for it is not denied, that the charger advanced the full amount of the bill, and holds it for his own behoof. The defence arises on an extrinsic ground, namely, that, by the charger's negligence or fraud, the suspender was deprived of the benefit of a security which would have given him full relief of the sum now demanded. The question arising under such a defence is one eminently fitted to be the subject of an issue, and not one, the determination of which is to be ruled exclusively by the charger's writ or oath.

"By the prefixed interlocutor the Lord Ordinary intends no absolute determination on relevancy, but merely, that he perceives no sufficient ground for finding the suspender's defence

in the suspension only capable of being proved by writ or oath, and desires, before further procedure, to see an additional draft of an issue or issues. To what extent issues may be allowed will depend on their proposed terms. The suspender has already lodged issues in the separate actions, but the Lord Ordinary desires to see them in the shape ultimately resolved on as issues in the conjoined processes.

"In the ordinary action the suspender claims from the charger relief from the bill of £128, which he was obliged to pay, on similar grounds with those on which he resists payment of the bill charged on. The charger, as the Lord Ordinary understood, did not maintain, that in the ordinary action the suspender was limited, as pursuer, to evidence by the charger's writ or oath. But the case made for relief in the ordinary action is in substance and principle identically the same with that which forms the ground of suspension in the other process."

Ultimately issues were sent to trial, and after trial and certain exceptions argued, the Court held, that the judge rightly directed the jury, that if before the framing of the written agreement the pursuer had employed the defender as his law agent to secure him against risk, the defender would be responsible; and that parole evidence was admissible to shew what was the real agreement though inconsistent with the written deed of agreement.

The defender appealed, praying the House of Lords to reverse the interlocutors of the Court of Session, for the following reasons, as stated in his case:—1. Summary diligence on a bill of exchange at the instance of an indorsee cannot be suspended upon any general ground of non-liability, and any relevant allegation of non-liability can only be proved by the writ or oath of the charger. 2. No relevant case is alleged by the respondent on record, entitling him to be relieved from the diligence on the bill for £272. 3. The alleged understanding relied on by the respondent was negatived by the formal deed of agreement of 8th May 1858, executed by him, and produced in process, and which it was the duty of the Court to construe and give effect to, without sending issues to a jury. 4. The issues adjusted by the Court, and sent for trial by the jury, were incorrect and erroneous, and not adapted to try any question of fact properly at issue between the parties. 5. The parole evidence at the trial contradicting or qualifying the written instructions given to the appellant by the respondent, and, that by reference to conversation said to have taken place, not after, but before said instructions were reduced to writing, and finally approved by the respondent, was incompetent, and ought not to have been admitted. 6. As regards the bill for £272, had the respondent repaid that sum to the appellant by the 20th of May 1858, as he promised, he would have had the bill returned to him, and might, at its maturity, have operated payment from Dickie and Company of so much of it as they were liable for under the agreement. 7. The ordinary action ought not have been conjoined with the suspension; and no relevant ground was stated in the record in the ordinary action to entitle the respondent to a decree against the appellant for the £128 concluded for.

The respondent supported the interlocutors for the following reasons:—1. The interlocutor of the Lord Ordinary passing the note in the suspension is final, because it was not brought under review of the Inner House. It was, moreover, well founded, because investigation of the circumstances, and of the transactions between the respondent and appellant, was necessary for the ends of justice. 2. The interlocutors conjoining the suspension and the ordinary action were final; besides, being right, as the parties to both actions, and the grounds of both actions, were the same, it would have been the cause of needless and double proceedings to keep up two separate actions. 3. The conjoined actions were rightly sent to a jury, because the respondent stated a relevant case, and because that case was not met or answered by the memorandum of 8th May 1858, founded on by the appellant. 4. The issues could not be objected to, because they were well fitted to try the cause; and they were adjusted and approved of with the appellant's consent. 5. The bill of exceptions was rightly disallowed, because the evidence excepted to was rightly admitted; the Judge's charge was sound in law, and the directions asked by the appellant were ambiguous, unsound, inappropriate, and unnecessary, and would, if given, have had a tendency to mislead the jury. 6. The existence of the written agreement of 8th May 1858, between Macfarlane, Dickie, and Company, and the respondent, could not exclude parole proof of an agreement between the appellant and respondent. 7. It was competent, notwithstanding the memorandum, to prove any agreement between Dickie and Company and the respondent, in reference to the securities granted by Macfarlane. 8. The respondent and the appellant having stood in the relation of client and agent, the charges by the respondent were of such a nature that inquiry into them could not be excluded. 9. The interlocutor refusing to set aside the verdict and grant a new trial is final. 10. The verdict was justified by the evidence. 11. There is no objection to be taken to the interlocutor applying the verdict. 12. It had been established, that the appellant failed in the professional duty he undertook, and that he grossly violated that professional duty, and therefore the diligence complained of by the respondent has been rightly suspended, and the appellant has been rightly found liable to the respondent for the sum concluded for in the ordinary action.

Rolt Q.C., and *Anderson* Q.C., for the appellant.—The interlocutor of the Court below is wrong. It is well settled, that summary diligence cannot be suspended on any ground of non-

liability except it is established by the writ or oath of the charger—Thomson on Bills, 283 (2d ed.); *Little* v. *Smith*, 9 D. 762. As fraud or forgery or loss of the document was not alleged, there was in this case no relevant ground of suspension. Therefore the first interlocutor passing the note of suspension was wrong, for the rule of law as to summary diligence was misapprehended by the Lord Ordinary.

[*Sir H. Cairns*, for the respondent, objected, that as that interlocutor was never appealed to the Inner House, it could not be brought now by appeal to this House—48 Geo. III. c. 151, § 15.]

[LORD CHANCELLOR.—If necessary, we will hear the appellant's counsel in reply on that point; but at present it may be passed over.]

As regards the exceptions at the trial to the admission of parole evidence to control the written agreement, those exceptions were well founded. It is a rule well settled, that no parole evidence is admissible to contradict a written instrument. All that the parties agreed to was incorporated in writing, and nothing else can be looked at as evidence of what the agreement was—1 Bell's Com. 433; Dickson on Evidence, § 110; Taylor on Evidence, 355.

[LORD WENSLEYDALE.—It was not evidence to control the written agreement. It was merely parole evidence of what instructions were given to the attorney by one of the parties before the parties made their agreement. It was an independent matter altogether.]

All the instructions that were given were put in writing in the deed, and therefore no parole evidence was admissible.

Sir H. Cairns Q.C., for the respondent, was not called upon.

LORD CHANCELLOR WESTBURY.—My Lords, it must be a matter of vexation to your Lordships to find, that in a case so clear as the present, where in truth there is hardly a controversy upon the facts, and where the conclusions of law and justice are so plainly evident, there should have been a litigation of so long a period of time so involved, and, I will say, so mistaken in many particulars, as to occasion an appeal of the ten interlocutors which are now brought before us.

This litigation arose in this very simple form: The respondent Mr. M'Alister and the firm of Dickie and Co. were mutually desirous of giving some accommodation to a gentleman of the name of Macfarlane, who was a builder in Glasgow. They had previously given to him accommodation of a similar kind. They accordingly determined to draw and accept two bills of exchange—one for £128, and another for £272, the proceeds of the discount of which should represent the money that Macfarlane would receive. It was then mutually agreed, between the lenders of the money and Macfarlane the receiver of the money, that their relative advances to Macfarlane by the two bills, amounting together to £400, should be thus constituted. It was agreed, that £300 should be regarded as an advance made by Dickie and Co., that £100 should be treated as a loan made by the respondent M'Alister, and, that Macfarlane should give specific scurities for those two sums of money, namely, a specific security for the £300 in favour of Dickie and Company, and a specific security for the £100 in favour of the respondent M'Alister.

It was at the same time agreed, that the antecedent debts due by Macfarlane to those two lenders should be added to that security. Now the antecedent debt by Macfarlane to Dickie and Co. was £293 16*s.* 6*d.* The antecedent debt that was due to M'Alister was £109 3*s.* 7*d.* Accordingly a bond and disposition—that is to say, a mortgage of heritable property belonging to Macfarlane, was given to Dickie and Co. by Macfarlane for the sum of £593 16*s.* 6*d.*, and another bond and disposition for the sum of £209 3*s.* 7*d.* was given by Macfarlane to the respondent M'Alister.

Now the dedication and appropriation of those two securities, and the money they represented, were made by an agreement between the parties, dated the 8th of May 1858, which was also the date of the two bonds and dispositions I have mentioned.

By that agreement it was expressly provided, that the £300 which was to be advanced by Dickie on account of the bill should be the subject of a particular security to them, and in like manner as to the £100 that was to be advanced by M'Alister; and on the perusal of that agreement it is quite clear and certain, although it is not so expressed in the recitals in the bonds, that the mortgages were given specifically on account of the £300 that was to be paid by Dickie and Company in part of the two bills, and on account of the £100 to be paid by M'Alister as his contribution to those two bills; and whosoever had knowledge of the agreement which was the parent of the mortgages, knew well the purpose of those mortgages, and the agreement under which they were produced, and the contract which governed altogether the ownership of the mortgages, and the application of the moneys to be received thereon.

Now the present appellant was most particularly aware of the nature of this contract, for he was the law agent who prepared that agreement. He was the law agent who prepared the mortgages. He knew well the agreement between the parties, and he knew well, that the money resulting from those mortgages ought in all justice to be applied in conformity with the contract, viz. in liquidation of those two bills.

The contest before your Lordships arises from an endeavour of the present appellant to depart from that agreement. He procured to himself an assignation from Dickie and Company of the bond and disposition of £593. He received that entire sum of £593 on the 18th April 1859. The moment he received that money, he took the £593, £300 of which had, by a contract to which he was privy, and which he had prepared as law agent, been dedicated to the payment (or rather the partial payment, namely, as to the £100) of the bills of £128 and £272. Notwithstanding that he had that money in his pocket appropriated by agreement, and was bound by every moral consideration to apply it to the payment of those bills, he proceeded to sue the respondent upon the bills for £272. On that the respondent applied for an interdict to suspend the charge, on the ground of the existence of the agreement. When that note of suspension was originally presented, the money had not been actually received by the present appellant, but the agreement existed, and upon proof of the agreement the Lord Ordinary thought it right not to treat any part of the bill as paid or discharged, but to suspend for the present the proceedings upon that charge. And accordingly, the first interlocutor which is now brought up to this House, but which was not carried by reclaiming note to the Inner House, is the interlocutor by which the Lord Ordinary having considered the note of suspension, answers, and productions, on consignation of the sum of £100, passes the note. The note appended to that interlocutor by the Lord Ordinary gives the reason for his so doing, namely, that he deemed it right to suspend the charge for the present upon proof of the agreement to which I have already referred.

Now that interlocutor is brought up by the present appeal, and it is argued, and I think it must be admitted to be correctly argued, that it is competent to the appellant to bring up that interlocutor. But it is, I apprehend, not competent to your Lordships, in the face of the Statute, to consider that interlocutor by itself, or to deal with that interlocutor in the shape of a reversal of it, unless you find it necessary to reverse any of the subsequent interlocutors. It is undoubtedly true, that when you bring up an interlocutor upon the merits, you may bring up an antecedent interlocutor of the Lord Ordinary, although it had not been carried by reclaiming note to the Inner House. But it does by no means follow, that you can get a reversal of the interlocutor so brought up, if the House is of opinion, that the appeal fails with regard to the subsequent interlocutors.

Both parties proceeded to make up the record upon the merits of the question at issue after that interlocutor was pronounced, and your Lordships will find, upon referring to the revised reasons for suspension, in the 9th and 12th articles of the condescendence, that the ground for giving relief to the present respondent, which I have already stated to your Lordships, is there most distinctly set forth.

I must admit, that it is a matter of great regret, that in a case so plain it was deemed necessary by the Court of Session, that issues should be directed, and I must add to that an expression of regret, that the nature of jury questions appears to be so little understood by parties in Scotland, as that issues of the extraordinary character of these now appearing should have been directed. But we are bound, I apprehend, to give credit to the statement of the learned Judge by whom those issues were passed, that the issues were agreed upon between the parties. That is distinctly stated by Lord Deas. And the issues were tried, and a verdict was found for the respondent upon those issues.

The next point we come to in the appeal is the exceptions to the admissibility of certain evidence, and also the charge of the learned Judge. I have seldom seen anything more entirely misapprehended than the ground upon which this part of the appeal is founded. The production of the evidence excepted to was no attempt to alter or add to the agreement by parole testimony, but the parole testimony was admitted upon this inquiry as to what were the instructions and directions given to the present appellant, as the law agent, by the parties, as to the nature of the agreement, that he was to prepare. The contention at the bar mainly has been, that because a certain agreement was actually prepared and executed by the parties, the production of that shall stop and prevent any inquiry as to what the parties have desired and directed the law agent to prepare. An argument of that kind cannot for a moment be listened to. Neither can the objection which is raised to the charge of the learned Judge, which partakes of the same nature. I think, that upon these points, as well as upon the first, your Lordships will entirely concur with the unanimous opinion of the Court below. And as to the point of real justice, there can be no possible doubt whatever.

We have heard a good deal of the doctrine of retention, and of the claim of Mr. Gemmill to apply the security to other deeds. But the doctrine of retention, which is very similar in the law of Scotland to the doctrine of lien in the law of England, can have no application to a case in which the nature of the security, and the destination of the money to be raised and secured by that security, had been already agreed upon, and is regulated and controlled by an express contract between the parties, of which contract the individual claiming the right of retention was perfectly cognizant at the time when he took an assignation of the security, in respect of which he now claims a general right of retention.

I think, that it is impossible to justify the irregularities which have taken place in some of those

proceedings. The utmost that we may do is to concur with the Court below, and to dismiss this appeal; and having regard to the nature of the case which is raised by it, I cannot but think, that your Lordships will agree, that the appeal should be dismissed with costs.

LORD WENSLEYDALE.—My Lords, I so entirely concur with the opinion which has been expressed by my noble and learned friend on the woolsack, that I have very little indeed to add to what he has said, after the full and copious statement which he has given of his reasons.

In this case two questions are involved—the first a question upon the suspension of the action for £272; and the second upon the subsequent action which was brought by M'Alister, by direction of the Court, to try the question of the misconduct of the defendant, the present appellant, in not procuring a satisfactory security for the bill, and in not paying himself, as he ought to have done, out of the money he received. I will take the second of those questions first. It appears to me that the case was clearly disposed of. The issues were tried. And the issues were perhaps not the best that could be framed for that purpose. I take it to be clear, not only from the report of Lord Deas, but also from the report of the Lord President, that those issues were settled with the concurrence of both parties, and ultimately there was only a single point to be disposed of by the Court; and therefore, although those issues do not appear to me to be the most proper for the purpose of disposing of the whole question, the parties must now be bound by them. Those issues, I think, raised sufficiently the question.

Then comes the question as to the propriety of the exceptions that were taken to the summing up or direction of Lord Kinloch. I cannot see any objection to those directions. The principal exception is, I think, the third. It was objected by the counsel for the defender, that this question is incompetent, because it is calculated and intended to adduce parole evidence to prove the terms of the agreement which was entered into at the meeting in question by Macfarlane, Dickie, and Co. and the witness, in reference to the advances to be made to Macfarlane, which agreement was reduced to writing in a deed executed by those parties. An objection was taken to the general question. What passed at that meeting, I am clearly of opinion, was a perfectly lawful question. It was not confined to the terms of the agreement, but the question as to anything that passed upon that occasion. There might have been in the course of that conversation something to shew, that there was a particular direction from the respondent to the appellant to take care of his interests, and to take care that he should be paid out of the other securities. It did not involve any question as to altering the terms of the agreement entered into by the three parties. Then, in the next place, an objection was taken to the summing up of Lord Kinloch. The objection seems to me to be without foundation. That direction of the learned Judge was, "That if the jury were satisfied on the evidence, that anterior to the framing of the memorandum, the pursuer had employed the defender as his agent to obtain for him security against all possible liability on the bills, on which he was an obligant with Dickie and Company, and the defender had undertaken so to do, it was competent to the jury, if they saw sufficient cause for it in the evidence, to regard the framing of this memorandum as a step taken in the course of this employment, and any error in framing the memorandum, as not inferring liberation to the defender from the professional responsibility charged on him."

I think there was no impropriety whatever in that direction by Lord Kinloch. If the jury, looking at the evidence of the conversation that took place at the time of the agreement that was entered into, and the other evidence in the case, saw sufficient cause for taking that view of the transaction between the parties, there was no reason why they should not come to that conclusion.

Then it was contended, on the part of the appellant, that Lord Kinloch ought to have directed the jury upon two points. The first point is, that the agreement of the parties in regard to the bills mentioned in the issues, and the heritable securities which it was agreed should be granted, having been reduced into writing, the jury could not legally give effect to parole evidence as establishing an agreement, in regard thereto, inconsistent with the terms of that deed. But one does not at all see why these should not do so, if the parole evidence was quite independent of the deed.

It seems to me, therefore, that there is no objection to the summing up of Lord Kinloch. I concur, therefore, entirely in the opinions of the learned Judges in the Court below, which were delivered at considerable length, and with very great clearness, so that there is no ground for the exceptions to the directions and summing up of the Lord Ordinary. I equally agree with them, that there was nothing in the course of the trial which made it necessary to summon another jury for the purpose of trying the case. The case, therefore, as it appears to me, is most satisfactorily disposed of as regarded the action of the respondent for misconduct.

With respect to the bill, I certainly have had some doubt in my mind, whether or not the law of Scotland goes to the extent of permitting such a defence as this in a proceeding on the bill itself. The learned counsel at the bar have quoted no case to satisfy me, that it is competent to make such a defence. I can easily conceive the rule for which they have contended to apply very reasonably to a case where an action is brought upon bills in the ordinary course signed by parties, and as to which, when paid, the payment is denoted by a receipt therefor. When a person sets up a case, that the bill was not duly signed, or was not duly received, there being no

receipt produced, it is extremely reasonable to say, that he shall be bound by the bill, unless he can shew by the writ or oath of the party, that he is not liable. But this is a defence of a different nature. It is a defence arising from the position in which this defender stood towards the parties. And that depends upon a variety of facts. It is a complicated defence, and to say, that in such a case the non-liability can be proved only by the writ or oath of the party, seems to me unreasonable. All I can say at present is, that no case has been cited precisely of the same nature.

Upon the whole, I think the judgment of the Court is right, and therefore I concur with my noble and learned friend, that the judgment should be supported, and that the appeal should be dismissed with costs.

LORD CHELMSFORD.—My Lords, I must confess, that during the course of the very able argument on the part of the appellant, I have entertained very considerable doubt as to the regularity of some of these proceedings, but having listened to the reasons which have been given by my noble and learned friends in support of the interlocutors, I am glad to be able to concur in the opinion that the interlocutors ought to be affirmed.

Interlocutors affirmed, and appeal dismissed with costs.

For Appellant, J. F. Wilkie, S.S.C., Edinburgh; Deans and Stein, Solicitors, Westminster. —*For Respondent*, Macbrair and Parker, W.S., Edinburgh; Simson, Traill, and Wakeford, Solicitors, Westminster.

MARCH 3, 1863.

JOHN BAIRD and Others, *Appellants*, *v.* MAGISTRATES OF DUNDEE, *Respondents*.

Testament—Legacy—Trust—Mortification—Long irregular dealing—Negative Prescription—Poor—*J. in* 1639, *bequeathed to the Magistrates of D.* £1000 *to be invested for the yearly maintenance of aged people of D. The Magistrates bought land, and vested it in an existing hospital managed by themselves and the Council of D. for the poor of D. and orphans, and the land was managed for* 200 *years by them and the Council.*

HELD, *That after the lapse of time, the J. bequest must continue to be managed by the Magistrates and Council of D., but that the funds must be applied for the aged poor according to J.'s will.*[1]

The pursuers appealed, maintaining in their case, that the judgment of the Court of Session should be reversed, because—1. It was competent for the Court of Session to have pronounced a decree in terms of the first and second conclusions of the summons, and to have refused to entertain the other conclusions against any of the defenders, and in particular, against the respondents. 2. The purposes of the will were those alone for which Johnstone's bequest was received, and in fulfilment of which the purchase of Monorgan's Croft was made; and because the judgment appealed against was in opposition to the judgment of the House of Lords in the case of the Presbytery against the Magistrates of Dundee.[2] 3. On the assumption that the Provost, Magistrates, and Council were now legally in the administration of Johnstone's bequest, there had been no administrative acts adverse to or inconsistent with the purposes thereof. 4. If there had been any acts of the Provost, Magistrates, and Council in the administration of Johnstone's bequest, adverse to, or inconsistent with, the purposes thereof, their administration was usurped and illegal, as the proper trustees in the bequest were the Provost and Bailies of Dundee. 5. The respondents' plea founded on the mere lapse of time—the negative prescription—had no foundation in the circumstances, and no application to such a trust as Mr. Johnstone's. 6. Even if prescription were applicable at all, it strengthened the title of the respondents, or of the Hospital Master, their officer, as holding the property for behoof of the proper administrators of the bequest, or (if the Provost, Magistrates, and Town Council were legally in the administration of the bequest) for the proper and only beneficiaries therein. *Gordon's Trustees* v. *Eglinton*, 13 D. 1381, *per* Lord Justice Clerk Hope.

The respondents in their *printed case*, supported the judgment on the following grounds :—

1. On the shewing of the appellants in the record, the possession which the Provost, Magistrates, and Town Council of Dundee acquired, and had ever since had, was adverse to the title

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[1] See previous report 24 D. 447 : 34 Sc. Jur. 215. S. C. 1 Macph. H .L. 6 : 35 Sc. Jur. 305.

[2] See report of case alluded to by the LORD CHANCELLOR, viz. *The Magistrates of Dundee* v. *Presbytery of Dundee*, 4 Macq. Ap. 228 : *ante*, vol. i. p. 1078 : 35 Sc. Jur. 274.