

made on her behalf, the Lord Ordinary finds himself unable to see grounds on which to give effect to her alleged title. She had no such title, as he thinks, at the date of the assignation by Wm. Cuthbert, because the right to the I O U was then in his trustee and creditors; and if the pursuer cannot show how and when that right has now become effectual to her she must fail in her action."

(Before Lord Kinloch.)

BIRRELLS v. ANSTRUTHER AND OTHERS.

Reparation—Relevancy—Consequential Damage. An action of damages for breach of obligation dismissed (per Lord Kinloch) as irrelevant, because (1) the obligation never arose; and (2) the damage alleged was consequential.

Counsel for the Pursuer—Mr Campbell Smith. Agent—Mr James Somerville, S.S.C.

Counsel for the Defendants—Mr Fraser. Agents—H. G. & S. Dickson, W.S.

This was an action of damages brought by the widow and children of the late Rev. Alexander Gibb Birrell, schoolmaster of the parish of Pettinain, for reparation of the injury caused to them by his death, which the pursuers allege to have been occasioned by the defenders, who are the heritors of the parish, not providing him with a suitable house, which they were bound to do by the Acts 43 Geo. III., c. 54, and 24 and 25 Vict., c. 107. On account of the damp and cold of the house acting on his constitution, Mr Birrell's health gave way. In 1857 he was attacked by violent rheumatism, which afterwards set in in his right ankle with such severe effects that his foot had to be amputated. He died in 1864. The pursuers further aver that all the proper steps were taken by Mr Birrell to have his house put into proper condition, but that his request was set aside by the heritors on pretence of its being expressed in such terms as to preclude its being acted upon.

The Lord Ordinary sustained an objection stated by the defenders to the relevancy of the action. In his note his Lordship observed—"The Lord Ordinary dismisses the action on the ground that it is founded on an illegal breach of obligation, when the steps were not taken by the deceased schoolmaster necessary to raise the obligation; and the obligation therefore never arose. Another objection was pleaded against the relevancy of the action—viz., that the damage stated is not direct but consequential damage, which the law does not recognise. The Lord Ordinary is disposed to think that this objection is also well-founded. If a house which a particular individual is bound to keep in repair falls down and injures the inhabitant for want of the repairs stipulated, this may be considered direct damage raising a claim of reparation. But it is a different thing to say that the insufficiency of the house brought on a fit of rheumatism; still more that this rheumatism led to a supervening malady, and that this malady issued in death. And rheumatism, however painful, is in its nature by no means a mortal disease. It would be difficult to trace the death of the schoolmaster to this cause with the certainty which the law requires in every case of reparation."

Friday, Feb. 2.

FIRST DIVISION.

SPINKS v. INNES.

Bank Cheque—Mandate—Revocability—Proof—Onus Probandi. (1) A bank cheque is a mandate, and irrevocable if given for an onerous cause, but revocable if it is not; (2) A person alleging that a cheque was given to him in payment of a debt must prove his averment; (3) Circumstances in which held (aff. Lord Ormisdale) that onerosity had not been proved.

Counsel for Pursuer—The Solicitor General and Mr Pattison. Agents—Messrs J. & W. C. Murray, W.S.

Counsel for Defender—Mr Patton and Mr Gifford. Agents—Messrs Patrick, M'Ewen, & Carment, W.S.

This action was raised by Charles Spinks, turner, Kirkgate, Leith, against John Innes, engineer, residing in Alloa, for payment of £100 contained in a bank cheque or draft, dated 21st April 1864, drawn by the defender on the manager of the City of Glasgow Bank, and payable to the pursuer. It was averred by the pursuer that the cheque was given in payment of money due to him "for advances of money made and services rendered by him to the defender at various times during a long course of years, when the defender was often in pecuniary difficulties, and pressed for money to meet the daily requirements of himself and family, and otherwise embarrassed and in trouble." The defender averred on record that on the Edinburgh Fast Day in April 1864, the pursuer, who knew that the defender had succeeded to a considerable sum of money, came to Alloa to visit him, and that after they had been drinking together for some time, the pursuer proposed that the defender should lend him £100 on the security of his property in Leith, which was already fully burdened. The cheque was therefore written out, but at the time it was done, "and when the arrangement was made for the security to be given for the loan, the defender was intoxicated, and incapable from intoxication of doing any business, or of understanding the nature of the transaction into which the pursuer endeavoured to induce him to enter." Next morning the defender went in search of the pursuer in order to accompany him to Leith to see after the heritable security, when he found he had gone to Glasgow. He therefore telegraphed to the bank there, and payment of the cheque was stopped. No value, he said, was given for the cheque by the pursuer, and it was fraudulently impetrated from the defender in the manner above described.

With the concurrence of parties, the Lord Ordinary (Ormisdale) allowed a proof before answer. Thereafter his Lordship found as matter of fact (1) that no value was given by the pursuer to the defender for the cheque; (2) that when the cheque was obtained by the pursuer, the defender was in such a state of intoxication from excessive drinking as to be easily imposed upon and taken advantage of; and (3) that the pursuer, taking advantage of the defender when in that state, fraudulently impetrated the cheque from him. He therefore assoiized the defender. The pursuer reclaimed, and the Court adhered.

The LORD PRESIDENT said—The question is whether the pursuer is entitled to recover. He does not allege any donation, but says the cheque was given in payment of a debt due to him by the defender. The defender, on the other hand, says in his evidence that he has no recollection of giving the cheque, and is quite oblivious as to what passed at the time; but that next morning when he found out that he had given it he went to the telegraph office and stopped payment. Which of these statements has been made out more satisfactorily? Was there a debt due by the defender to the pursuer, and may it reasonably be inferred that the cheque was given in payment of it? I think the Lord Ordinary has taken the right view. Taking the pursuer's own statement, he has only proved loans of very small sums—a few shillings or so at a time. As to the amount of the pursuer's incapacity at the time, that is somewhat obscure; but certainly there was a great deal of drinking, and no doubt the pursuer was not capable of attending his business as he should have been, and was thus more easily imposed on. Whether or not he was wholly incapable is a point on which the witnesses differ, and which depends on the different criteria on which they form their opinion, but on which I think it unnecessary to enter.

Lord CURRIEHILL—This cheque contains no personal obligation. It is a mandate to the bank to