devolution? The Court were not prepared to adopt that construction of the statute, or of the maxim *resoluto jure dantis resolvitur jus accipientis.* That maxim only applied in the case of derivative rights flowing from parties whose own rights were in their nature temporary (*e.g.*, tack rights), or in the case where an objection subsisted at the date of the constitution of the derivative right.

Agents for Pursuer—Mackenzie & Kermack, W.S.
Agents for Defenders—Dundas & Wilson, C.S.

Saturday, February 27.

FIRST DIVISION.

WHITE *v.* CALEDONIAN RAILWAY CO.

(*Ante*, v. 250.)

Prescription—1579, c. 83—*Proof, by Writ, of Constitution—Reference to Oath—Railway Company.* Circumstances in which *held* that a pursuer had not proved, *scripto* of the defenders, the constitution of an alleged debt.

Circumstances in which, in an action by a broker against a railway company, a minute of reference to the oath of the defenders *refused.*

James White, stockbroker in Edinburgh, sued the Caledonian Railway Company and the Crieff Junction Railway Company for a sum of £347, conform to account commencing 24th September 1852 and ending 2d April 1855. The claim was made in respect of work done between the dates libelled, and mostly in the last four months of 1852, in the way of starting the Crieff Junction Railway. The action was raised in January 1866. The Court, in February 1868, found "that the account libelled, not having been pursued for within three years after the date of the last item charged therein, had fallen under the operation of the triennial prescription introduced by the Statute 1579, c. 83," and sustained a plea founded by the defenders on that statute.

The pursuer lodged a minute of reference to the oath of the defenders, which was refused by the Lord Ordinary, to whose judgment the Court adhered.

The pursuer lodged another minute of reference, which was refused by the Lord Ordinary. The pursuer acquiesced.

The pursuer lodged another minute of reference referring the constitution and resting-owing of the debt sued for, or any part thereof, to the oaths of the defenders, the chairman and directors of the said Crieff Junction Railway Company, and the secretaries, solicitors, and treasurers, comprehending the parties having power to bind the said company, viz., Carolus James Home Graham, Esq. of Strowan, &c., whereon the Lord Ordinary (ORMIDALE), on 6th February 1869, pronounced this interlocutor:—"The Lord Ordinary having heard parties' procurators on their respective counter-motions, viz., motion of the pursuer to be heard on his right to prove the constitution of his claim *scripto* of the defenders, and motion of the defenders that the minute of reference to oath, No. 145 of process, should in the first instance and now be refused, with expenses: Makes avizandum with the debate on these motions, and whole process." And, on 8th February, this other interlocutor:—"The Lord Ordinary having considered the debate on the respective motions of the parties referred to in the preceding interlocutor, Sustains the motion for the defenders, and, in terms thereof, refuses the minute of reference therein referred to (No. 145 of process): Finds the pursuer liable in expenses since the date when said minute of reference was lodged in process: Allows an account thereof to be put in, and remits it, when lodged, to the auditor to tax and report; and, with regard to the pursuer's motion referred to in the preceding interlocutor, Allows him to be heard in support thereof, if he is still to maintain the same, and the defenders to be heard in opposition thereto.

"*Note.*—By interlocutor of 13th February 1868, the Court decided that the account sued for by the pursuer had fallen under the operation of the triennial prescription, and since then the pursuer has lodged three several minutes of reference to the oaths of the defenders, or some of them, not only of the constitution, but also of the resting-owing of his alleged claim of debt. The first of these minutes was refused by the Lord Ordinary, whose interlocutor was, on reclaiming note, adhered to by the Court; the second minute was also refused by the Lord Ordinary, and his interlocutor of refusal was acquiesced in. The pursuer then put in his third minute, but, in place of supporting it, or withdrawing it, he proposed, after some expenses in connection with it had been incurred, that it should be allowed to stand over till his motion, referred to in the preceding interlocutor, viz., that he should be allowed to prove the constitution of his claim *scripto* of the defenders, should be gone into and finally disposed of. On the other hand, the defenders insisted, and the Lord Ordinary thinks rightly, in terms of their counter-motion, that the pursuer's third minute of reference should be first disposed of. The Lord Ordinary having now accordingly refused the pursuer's third minute of reference, he may, if so advised, enrol the case to be heard on his motion to be allowed to establish the constitution of his claim *scripto* of the defenders; and it is to be understood that the Lord Ordinary has not, in the meantime, determined anything as to the competency of such a proceeding in the circumstances in which the pursuer has, at this stage of the litigation, proposed that it should be adopted."

The pursuer reclaimed.

FRASER for reclaimer.

Solicitor-General (YOUNG) and JOHNSTONE for respondents.

At advising—

LORD PRESIDENT—When this case was before us originally in February 1868, we pronounced an interlocutor in which we found that the account libelled, not having been pursued for within three years after the date of the last item charged therein, had fallen under the operation of the triennial prescription introduced by the statute 1579, c. 83, and therefore sustained the first plea in law stated for the defenders. That was the plea founded on the statute. We pronounced that judgment against the contention by the pursuer that the debt was constituted by writing. If he had been well founded in that contention, the debt would have fallen under the exception in the Act 1579, but we were satisfied that the debt was not of that nature; but, on the contrary, that the employment was on a verbal and not a written contract. The practical effect of that judgment was to limit the mode of proof to which the pursuer could resort, so that he could only prove the subsistence or constitution of the debt by the writ or oath of the party, and now the pursuer contends that he has sufficiently proved the constitu-

tion of the debt by the writ of the party. He, however, disclaims any contention that he has proved the subsistence of the debt by the writ of the party.

In order to judge of the question, it is necessary to consider the nature of the debt claimed by this action, for it is a debt stated as commencing in 1852, and substantially ending in December of that year, although there is a small separate charge which, if incurred at all, must have been on a separate employment. The constitution said to be proved can only refer to that part of the debt which is contracted between 24th September and 25th December 1852. Most of the charges are for the services of the pursuer as a broker in bringing into the market, and apparently forcing through the market, the scrip of a proposed railway company, and the only employment he could have had then was one emanating from the provisional committee formed for promoting this scheme. But the defenders here are the Caledonian Railway Company, which has acquired, under statutory powers, the Crieff Junction Railway constructed by the Company's Incorporation Act in 1853. Assuming that the Caledonian Railway Company have taken over the obligations of that Crieff Junction Railway Company, it is obvious that the Crieff Junction Railway Company was not in existence when this account was incurred. The writings founded on show that there was a good deal of communication between the provisional committee and their secretary and this pursuer, which was of a very peculiar kind. I have great doubt whether any such charges, even though incurred by the provisional committee, could even be a legitimate claim against the Incorporated Company when it came into existence. But it is not necessary to go on that here, because I cannot take the writings,—that is, the communications and correspondence previous to the constitution of the Crieff Junction Railway—as the writ of that party. That appears to me to dispose of the question. There can be no writ of that party until it comes into existence. And when we ask what is the writ of that Incorporated Company, by means of which the constitution of this debt is said to be proved, we are referred to two documents, one a minute of the directors of 10th September 1853, and the other a letter by Ironside, their secretary, in consequence of instruction contained in that minute. The passage in the minute which is founded on is this,—"The secretaries were instructed to call in all outstanding accounts, and to prepare a state of them and of the accounts already paid, to be submitted to the directors." That alone can hardly be founded on as proving the constitution of any debt. How can it be said that any debt is admitted to be incurred when it is merely said that all outstanding accounts were to be called in; and if the secretary went beyond his instructions, he could not bind the company? But I don't think he did go beyond his instructions. He merely called on the pursuer, like every one connected with the provisional committee, to render any account he might have against it, without admitting that such was truly owing. All he says is, "The directors having ordered in all accounts, be so good as send yours as soon as possible, and desire the London brokers to send theirs." That is the whole writ before us, said to be the writ of the defenders, as coming in place of the Crieff Junction Railway, who are said to have admitted the existence or constitution of such debts as this in 1853 by this minute. I confess I never saw so meagre an attempt to prove a debt, and therefore the conclusion to which I come is, that the pursuer has failed to prove the constitution of his debt *scripto* of the defenders. We must make a finding to that effect, but what we are to do beyond that is open for consideration. As this case comes before us on a reclaiming note against an interlocutor of the Lord Ordinary refusing a minute of reference for the pursuer, we had better hear parties on the proposal to refer, for of course the finding that the debt has not been proved *scripto* does not interfere with the reference to oath.

Lord Deas—This case comes before us in a most unsatisfactory form, so that I am not very well able to know what is to be decided at this stage. The Lord Ordinary held that, as the minute of reference had been put in, his duty was to dispose of that minute, and not to go into some other question which it was proposed to raise as to the constitution of the debt *scripto*. I think he was right. If that minute of reference was to be sustained, there was no room for any question but what was sworn by the party. I understood that we were now to try to bring this case to some practical conclusion, whereas I think we are now splitting it up into bits more than ever. We have already decided that this debt is not constituted by writing in the sense of its being a written contract, which would have rendered it not liable to the triennial prescription. If after that the pursuer pleads that the constitution of the debt is proved *scripto*, and if by that he means that that is full proof of his whole debt, I agree that there is no such thing proved. That would be an end of the matter, for in that sense he has not proved the constitution of his debt. But if he means that these writings prove the subsistence of a debt of some amount, and that then the question is, whether he is to be allowed to prove the amount by parol-evidence, I think that is a very important plea, and I am not prepared to repel it. There are two pleas that might have been stated by the defenders,—(1) That on the pursuer's own showing, there was a *pactum illicitum* on which no action could be maintained; and (2) that if there was a debt at all it was a debt incurred by the Provisional Committee. Neither of these pleas is stated, and I don't think it is necessary to take them up now. I take the case on the footing that there are no such pleas in it. If so, that implies that if there is a debt the defenders don't dispute that they are the parties who are liable for it. The question is, whether these writings are such as to elide the triennial prescription, by showing that there is a debt of some amount? I am not prepared to say they do not, and that the pursuer is not entitled to a proof *prout de jure*. In this view of the case we must hold these to be the writ of the party sued. The pursuer may meet with difficulties when the proof is led, and he goes on to prove the different items. Some may be good and some bad, all that can be said at present is, that some debt is due, unless it has been paid. There is great difficulty in the matter from the way in which the case has been pleaded on both sides. If, therefore, the meaning of the interlocutor is that these writings do not prove the debt in the sense of proving its amount, I concur. But if it means that they prove no debt at all, I am not prepared to concur. I think the right thing to do would be what the Lord Ordinary has done.

Lord Ardmillan—This case comes before us

in form on a reclaiming-note against an interlocutor disposing of a reference to oath, but on the attention of the pursuer's counsel being called to the interlocutor of 6th February, Mr Fraser was heard on the argument that he had proved the constitution of the alleged debt *scripto*. The question for the Court therefore is, Whether the pursuer has proved his debt *scripto* of the defenders? The first thing to do, when the triennial prescription is pleaded, is to see whether the case is within the statute which creates that prescription. That was done here, for the Court held that this claim of debt was within the act. The effect of prescription being applicable is to limit the pursuer to prove both the constitution and subsistence of the debt by the writ or oath of the party. The pursuer now says he has proved the constitution of the debt by writing. In looking at the documents upon which he founds, it seems quite clear that they do not prove the debt—(reads minute of directors *ut supra.*) That simply means that all who think they have claims are to lodge them, but it does not amount to the constitution of any debt. Then Ironside writes—(reads letter *ut supra*). Does that also constitute the debt of the London brokers? Neither singly nor together do these documents prove the constitution of the debts. I concur in thinking that in dealing with such a claim it is impossible to keep out of view the peculiar character of the claim. No one can read the documents here without seeing the nature of the claim. It is absurd to say that we must first find that a debt is constituted and then consider whether it is a lawful debt. We cannot separate the constitution of the debt from its intrinsic quality. I have no doubt that this debt cannot be held to be constituted *scripto*.

LORD KINLOCH—The question here raised is, whether it has been proved *scripto* that the debt claimed was contracted? The defenders do not maintain that the pursuer is precluded from adducing written evidence on this point, either by the proposed minute of reference, or by anything which has already been done in the case. The previous judgment of the Court merely decided that the debt claimed was not constituted by a written contract. It remains open to inquire whether there is a debt which was contracted verbally, proved, *scripto*, to have existed?

I agree with the Solicitor-General that in every question of this sort a great deal depends upon the character of the debt claimed. There are some debts as to which the general fact that an account has been incurred goes far to prove the whole case, *e.g.*, where a law agent has been employed to prepare a deed, in which case, if the preparation of the deed is admitted or established, the amount of the fees may be very easily settled. But the present is not a case of this description. It is a case of a very peculiar nature; and one in which I think that a great deal is incumbent on the pursuer to establish before he can make out his claim. It is not enough for him to prove that services of some description were performed by him. He must show what these services were, and that they were such as would afford a legal claim to remuneration; and I think that there has been a failure on the part of the pursuer to prove what it was necessary for him to show. It is true that there is some evidence of written instructions communicated to the pursuer to do something for the Provisional Committee of the Crieff Junction Railway. But this goes a very short way to support the claim. And here I would advert to a very common mistake in reference to the triennial prescription, viz., to suppose that a written order for goods constitutes a written contract. The mere fact that an order has been given proves nothing. There must be evidence that the goods were delivered, and at what price. Now, all we have here is a correspondence which affords a surmise, and nothing more, that something was going on of the most doubtful legality, on the part of the pursuer; the precise details of which are not established. It is closed by Mr Ironside's letter, which merely amounts to a request to the pursuer to send in any account which he might have. It seems ludicrous to say that this proves the debt. It is not proved even that the pursuer had an account against the committee, much less what it was, and that it was legally due. I think it quite impossible to hold that the alleged debt is established. The case is a very different one from that in which employment has been proved and the only question is the amount of the charge. Even in some cases of that kind I am disposed to think that the Court has gone rather too far in holding the claim to have been made out; but the present is a very different case. Any proof to be allowed here would not be of the mere amount, but of all the elements of the constitution of the debt.

I do not think it necessary to go into the question as to the responsibility of the defenders for the contracts of the Provisional Committee. The consideration is by no means irrelevant, but there is enough in the case otherwise to dispose of it against the pursuer.

In answer to a question from the Bench,

FRASER, for the reclaimer, stated that he could not say whether the defenders were now personally interested in the defenders' railway or not.

The Court refused the reference.

Agents for Pursuer—J. W. & J. Mackenzie, W.S.

Friday, February 27.

STEEL *v.* SWAN.

Arbitration — Sale — Valuation of Stock in Trade — Signing of Inventory. Held, on a proof, that a party who had agreed to take over a stock-in-trade at a valuation, was bound to pay the price set out in the inventory prepared by the valuators, although there was no formal award or signing of the inventory.

Mrs Steel, who for some time carried on business as a draper and grocer in Mid-Calder, proposed in March 1868 to give up business. The defender, Swan, proposed to take up the business, and arranged with the landlord for a lease of the premises. He also, on 25th March, addressed this letter to the pursuer:—"I do hereby agree to take the remaining goods that may be in the shop at Whitsunday, at a valuation of two men, you choose one and me another, with the full understanding that you do not add anything to it but what is necessary for carrying on the grocery department. JOHN SWAN."

The pursuer answered—"Dear Sir,—I agree to accept you as the purchaser of my stock-in-trade, and promise to add nothing to its extension, except what is required for the grocery department;