journments, the most specific regulations have been inserted in the interlocutors. So much is that the case, that the very place to which the jury are to repair is named and made for the time a portion of the premises of the Court; and then there are special appointments as to surveillance, by which the parties naming the charge are for the time raised to the position of functionaries of the Court. Consent is sometimes given, but it is not necessary, therefore there is no impropriety, but the reverse, in leaving it out; but every adjournment ought to be rested on the necessity of the case as appearing on the face of the interlocutor.

I agree that the omissions in the interlocutor of adjournment here are fatal. The very beneficial effects of the safeguards of liberty make people forget how much they owe to them, but if we come to support such interlocutors as we have here, I would anticipate very great laxity. All that we see from them is, that the jury are left to go free wherever they pleased, and that they appeared next morning just as in a civil case. Then, although the panels were out in bail, and the bail bond evacuated by them, appearing at the first diet, no more bail bond was taken or no warrant granted to commit them to prison.

The sentence was accordingly quashed, and a warrant issued for the liberation of the complainers.

Agents for Complainers—Jardine, Stodart, & Frasers, W.S.

Agents for Respondent—Morton, Whitehead, & Greig, W.S.

FIRST DIVISION.

Wednesday, May 12.

CITY OF GLASGOW BANK *v.* JACKSON AND OTHERS.

Promissory Note—Proof—Writ or Oath. Held that an averment by the granters of a promissory note in favour of a bank, that it was granted in payment of certain over-drafts, and not as a continuing security for cash advances, could only be proved by writ or oath.

The pursuers sued the defenders, William Jackson, Alexander Blane, John Kelly, and Alexander Kelly, for payment of £700, contained in their promissory note dated 26th December 1864, and payable one day after date. The said Alexander Kelly was agent of the City of Glasgow Bank at Girvan, and at the end of 1864 he had overdrawn his account to the extent of £670, 10s. 9d. He then delivered the note sued on to the bank, who thereupon closed his old account, and opened a new account with him, in which he was debited with £700, the amount of the note, and credited with £29, 9s. 3d., the difference between it and his debt. He continued to operate on this account, and at various times paid in sums amounting to upwards of £900. The defenders maintained that the note was to be held as extinguishing the debt of £670, 10s. 9d., and that the sums subsequently paid by Kelly must be imputed to the payment of the note. The bank contended that, according to custom, and as was evident from the form of the new account, the note was meant only as a collateral continuing security for a future fluctuating account between Kelly and the bank, and that the original debt was kept up.

The Lord Ordinary (BARCAPLE) pronounced the following interlocutor:—"*Edinburgh*, 18*th July* 1868.—The Lord Ordinary having heard counsel for the parties, and considered the closed record, productions, and whole process—Finds that the defenders' averment, that the promissory note sued on was granted by them in payment of a balance due by Alexander Kelly on his account-current with the pursuers when said promissory note was handed to the pursuers, can only be proved by writ or oath: Finds that Nos. 14 and 15 of process are admitted to be correct excerpts from the books of the bank: Finds that the defenders do not ask further probation by writ: Repels the defences; decerns against the defenders, William Jackson, Alexander Blane, and John Kelly, in terms of the conclusion of the libel: Finds the said defenders liable in expenses; allows an account thereof to be given in, and when lodged remits the same to the Auditor to tax and report.

"*Note.*—The pursuers, the City of Glasgow Bank, admit that no present value was given for the note sued on, and that they held it merely as a security for the fluctuating balance on Alexander Kelly's cash account. On the other hand, the defenders allege that it was given and received as a security for a specific amount of over-drafts due by Alexander Kelly on his account at the date when the note was handed to the bank. If the former was the true nature of the transaction, the defenders, as granters of the note, are liable to the bank for its amount, which it is not disputed is less than the balance due by Alexander Kelly at the close of the account. *Pease* v. *Hirst*, decided in the Queen's Bench, 10 B. and C. 122, was such a case, in which it was held that the liability under the note for the ultimate balance of the account was not discharged by the existence at an intermediate time of a balance in the hands of the bank equal to the amount of the note. But the proposition, that an obligation which is intended by the parties to operate as a security for a fluctuating balance is not satisfied by intermediate payments into the account, if there is an ultimate balance due to the bank, is too plain to require authority. If, on the other hand, the note was merely a security for a specific amount of overdrafts due by Alexander Kelly to the Bank when it was handed to them, it is clear, on the authorities both English and Scotch, including the judgment of the House of Lords in the *Royal Bank* v. *Christie*, 2 Rob. Ap. 118, and the later case of *Lang* v. *Brown*, 22 D. 113, that the liability is extinguished to the extent of the subsequent payments made by Alexander Kelly into his account. The mere fact that the Bank went through the form of closing the account and opening it anew in their books cannot change its character, as being truly one account in regard to a continuous series of transactions.

"It is maintained by the Bank that they are entitled to the privileges of the holders of a promissory note, and that the defenders' averment as to the footing on which the note was granted can only be proved by writ or oath. The Lord Ordinary thinks that this is the only point of difficulty in the case. But he is of opinion that the contention of the Bank is well founded. They are the holders of a note, with the legal presumption of value in their favour, which in the ordinary case can only be rebutted by writ or oath. It is true that this rule has been equitably and beneficially relaxed in some cases, where there was something suspicious or irregular appearing on the face of the transaction, or where the presumption of onerosity was neutralised by the admissions of the holder, or the unquestionable facts of the case. In such instances parole proof has been admitted, though not without difficulty. But the present case is not of that kind. It is not alleged that there was anything in the slightest degree suspicious or irregular in the way in which the note was taken by the Bank. Nor does their statement as to the purpose for which it was taken and held by them in any degree conflict with the presumption of onerosity. It merely amounts to an admission that the liability under it is limited to the balance due on the account, which would entitle the defenders to resist the claim, wholly or in part, on the ground that there is no balance due, or that it is of smaller amount than the sum in the bill. It does not appear to the Lord Ordinary that it can entitle them to a proof by parole that it was granted for a totally different consideration, which has been discharged. Their averment is, that it was granted as a security for a specific debt due by Alexander Kelly to the Bank, which has been paid. It does not appear that it would have made any difference with reference to this question if the averment had been that it was granted as security for an advance by the Bank to any other party, which had been paid by the debtor. If, as the Lord Ordinary must hold, such an averment could not be proved by parole in the ordinary case, it does not seem to let in such a proof that the holder states that the note was granted as a security, but for a different debt. In the case of *M'Gregor* v. *Gibson*, 9 S. 483, it was held that the statement by the drawer suing upon a bill, that all the parties, including himself, had joined in it for the accommodation of a third person, did not entitle the acceptors to a proof by parole that the bill was for the accommodation of the drawer and his brother. The interlocutor of Lord Fullerton, which was adhered to, remitted to the Sheriff to find, 'in respect that the pursuer's averment of the equal responsibility of himself and each of the defenders for the amount of the bill, truly forms, in a question between these parties, a restriction of the liability appearing *ex facie* of the bill to be contracted by the defenders, that that averment must be sustained, unless disproved by the pursuer's writ or oath.' The importance of that decision in the present case is, that effect was given to the legal presumption which excludes parole proof, though by the admission of the holder it appeared that, in the words of Lord Fullerton, 'the liability really contracted was different from that appearing to have been contracted on the face of the document of debt.' On the whole, the Lord Ordinary thinks that it would be going beyond any of the previous decisions if the defenders were allowed to prove the averment by parole.

"He has only to add that, in his opinion, the account of the transaction given by the Bank is strongly confirmed by the terms of the note, which is payable at one day's date, and is for £700, while there was not a balance of that precise amount due by Alexander Kelly, either at the date of the note or on 17th January 1865, when the defenders seem to say it was handed to the Bank. There is thus nothing in the aspect of the case to aid the demand for a relaxation of the ordinary rule of law as to the mode of proof."

The defenders reclaimed.

Burnet (with him Solicitor-General) argued—There is no question here as to value. The defenders do not dispute that the note was granted for value. The matter of fact to be ascertained is the footing on which the note was given to the Bank. In regard to that, the defenders should not be limited to proof by writ or oath. There is no presumption that a promissory note given to a bank is in all cases given as a continuing security.

Clark and Lancaster, for the pursuers, were not called on.

The Court adhered.

Agents for Pursuers—H. & A. Inglis, W.S.

Agent for Defenders—John Thomson, S.S.C.

Tuesday, May 18.

MACFARQUHAR *v.* M'KAY.

Donation mortis causa—*Irrevocable Gift—Proof—Account of Daily Expenses—Tender. Held*, on a proof, that money had been given as a donation *mortis causa*, which was afterwards revoked, and that the donee was bound to refund under deduction of all expenses incurred by him for behoof of the donor on the footing that the gift would not be revoked.

Opinion, that these expenses were sufficiently proved, being entered in a regularly kept daily account, being of a character for which it was not natural to take vouchers, and there being no counter evidence.

Expenses to donee, he having tendered a larger sum than was found due by him.

In this action the pursuer sought to recover payment of the contents of a deposit-receipt which she had handed to the defender. The defender alleged that the pursuer had, when ill, stated to him that she wished him to take her money, she getting the interest while she lived, or he otherwise providing for her. He took the money, and after some time, the pursuer having recovered, took her to reside in his own house, and made sundry advances for her behoof. He tendered £40 for a discharge of the pursuer's claim in this action. After a proof, the Sheriff (Ivory), recalling the interlocutor of his substitute, found that the pursuer had made an irrevocable donation of the money to the defender, on the condition that he was to provide for her if she lived, and see her respectably buried if she died.

The pursuer advocated.

Mackay for advocator.

Kerr for respondent.

At advising—

Lord President—The ground of the Sheriff's judgment is to be found in his first finding, which is, "that on or about 4th February 1865 the deposit-receipt for £120, of which No. 14 of process is a certified copy, granted by the British Linen Company, Inverness, in favour of the pursuer, was indorsed by the latter, and delivered by her to the defender, as an irrevocable donation thereof, and of the sum contained therein, but upon the condition that he was to provide for her if she lived, and see her respectably buried if she died." Now, apart from the question, whether there is evidence to support this finding, I am of opinion that it is in law self-contradictory. If the Sheriff means that this was a *donatio inter vivos*, he would be right in distinguishing it as an irrevocable donation, but I cannot understand how a donation that is irrevocable can be coupled with a condition of an onerous kind. That is no donation at all. It may be a gift in a certain sense, but it cannot be what is known to the law as donation.