

of legal heirs, which it is left to the law to work out, it seems reasonable to say that this series of persons would take by devolution of law, and might be held to derive right from the party to whom they are thus substituted in the character of heirs, the deed leaving it to the law to ascertain and fix their rights in relation to that party as their ancestor. In that view each of the heirs of this class would be held as the predecessor of the immediately succeeding proprietor, and would pay succession duty accordingly; and the same principle might, though not with equal force, apply to every class of legal heirs, such as heirs-male of the body, heirs-male, &c. This view of the matter, besides being reasonable in itself, appears to the Lord Ordinary to be in accordance with the opinion of the noble and learned Lords who took part in determining *Lord Saltoun's* case, and more especially with the reasoning of the Lord Chancellor in that case.

“Without dwelling longer on the matter, the Lord Ordinary may state his ground of judgment in the present case, supported, as he thinks it is, by the case of *Lord Saltoun*, thus:—When the party who succeeds to an estate does so in respect of his having been called by the maker of the entail *nominatim*, or as one of a fresh *stirps*, he may be said to take by the express direction of the maker of the entail, who consequently is his predecessor, from whom his interest is derived; but, on the other hand, when the party who succeeds to an entailed estate does so not by the nomination of the entailer, or by his express direction as one of a fresh *stirps*, but as one of a class of a series of heirs in succession to a preceding heir of the same class, whether of the body male or female, or of other character, it must be held that his interest is derived from his immediate ancestor, who in that case must be held to be his predecessor. It is in accordance with the rule as thus stated that the Lord Ordinary has answered the questions submitted in the Special Case for the determination of the Court.”

RUTHERFORD and Solicitor-General (CLARK),  
Q.C., for first parties.

WATSON and MILLER, Q.C., for second parties.

The Court adhered.

Agents for Reclaimers—Campbell & Lamond,  
C.S.

Agent for Respondent—Angus Fletcher, Solicitor  
of Inland Revenue.

Friday, July 19.

DUNCAN'S TRUSTEES v. SHAND.

*Promissory-Note—Act 1696, c. 25.*

A document which does not contain the name of a creditor cannot be sustained as a promissory-note, and is null under the Act 1696, c. 25.

This was an action at the instance of Mr Macdonald, general treasurer of the Free Church, and Mr James Balfour, W.S., as trustees of the late Dr Duncan, Professor of Hebrew in the Free Church College, against Miss Shand, residing in 25 Charlotte Square. The summons concluded for payment to the trustees by Miss Shand of the sum of £100, with interest, for which sum the pursuers stated Miss Shand had granted a promissory-note to the late Dr Duncan, which document they stated was

in his possession at the date of his death. Miss Shand resisted the claim, on the ground that the note was not a valid document of debt, as it was silent as to the payee; also that a document blank in the creditor's name was struck at by the Act of 1696, c. 25. It was, moreover, alleged that Dr Duncan, as a recognition of kindness and pecuniary assistance afforded him in his student days in Aberdeen by Miss Shand's mother, had, when he became aware she was in difficulties, offered her the money, which she accepted, but that he had intended, and indeed stated at the time, that the money was not to be repaid to him. The defender further averred that, as she expected to receive a large sum of money from another source, which, however, has not yet been paid to her, she delivered to Dr Duncan the following document:—

“Edinburgh, 2d February 1869.—I promise to pay on demand the sum of one hundred pounds sterling, value received. ISABELLA SHAND.”

She stated, moreover, that during Dr Duncan's lifetime, Mr Balfour had called upon her, and pressed her to repay the money, but that when she went to Dr Duncan about it, he had disapproved of Mr Balfour's conduct, and renewed his assurances that she would never be asked to repay either principal or interest. She also alleged that Dr Duncan wrote a letter to that effect, which she left with one of Mr Balfour's clerks to be handed to him. In addition, it was contended that the document was not left by Dr Duncan in his repositories, but had been removed therefrom without his knowledge or consent long before his death. The pleas in law for the defender were—(1) The document founded on was not a valid document of debt; (2) that it had been taken possession of by the pursuers without lawful cause, and was improperly in their custody.

The Lord Ordinary (MURE), before answer, allowed both parties a proof of their averments applicable to the possession by the late Dr Duncan of the promissory-note in question.

The defender reclaimed.  
CAMPBELL SMITH for her.

TRAYNER for the defenders.

At advising—

LORD NEAVES—This is a case of some nicety and some importance. The action was brought at the instance of the trustees of the late Dr Duncan, and is directed against Isabella Shand. It is founded on what is said to be a promissory-note, said to have been granted by the defender, and intended to be delivered as a document of debt in favour of the late Dr Duncan, in these terms—(*reads document*). It is not said that this document is holograph, but it appears to be so, and that statement, if necessary, might be added to the record. The question is, whether that statement should avail the party founding on the document. Now, it appears to me that the document, as it stands, is not a promissory-note. It is a writing in which Isabella Shand promises to pay £100 on demand, but it is not said to whom the money is to be paid, and there is no creditor's name, therefore it is quite different from a common promissory-note. I take it to be the law that the name of the promisee must be set forth in the document. That is not done here. Whether it can be supplied is another question. The document is incomplete and inconclusive. Another separate objection is, that it is blank in the creditor's name.—It is silent as to the party to whom payment is to be made.

The answer to this is, that there are cases in

which bills of exchange, though not complete, have been allowed to be completed, but bills of exchange and promissory-notes are different things. A promissory-note is a promise by the maker of the note to pay, and it ought to be to pay to somebody, and bills have been sustained in which the drawer's name was blank, but the bill, when this was filled up, was quite regular, being merely an inchoate obligation before this was done.

The law says that what was intended to be done in order to put the bill in proper form may be carried out in accordance with the intention of the parties. Hence the drawer or intended drawer may fill in his name, and here there is the mandate of the drawer, and the acceptance of the drawee.

It appears to me that the power to complete is not an authority in the present case. In case of a promissory-note the payee does not write upon the note at all. Here it is proposed to supply the want of Dr Duncan's name in the body of the note by appending his address after his death, but it is not by means of an address that a promissory-note is completed, but by the promise to pay to a particular party. It seems to me that the filling up of an address would be entirely to change the character of the document as it came from the hands of the promisor. To put in Dr Duncan's name would be to alter the document as it stands, and we must take it as it stands, as all that the defender meant to promise. The document has been produced in process, and the defect cannot now be filled up.

It is a question of delicacy whether the action should be allowed to proceed at all, but the tendency of our law is, if possible to allow an action to proceed, if we can by so doing get at the real matter in dispute between the parties. I recommend that we should find that this is not a valid promissory-note, and that the debt can only be established by the writ or oath of parties.

**LORD BENHOLME**—I concur. I cannot for a moment doubt—(1) that this is not a valid promissory-note, and (2) if it is to be regarded as an ordinary obligation, that it is struck at by the Act of 1696, cap. 25. The difficulty is whether this summons is so libelled that if this document be withdrawn it can still be sustained. Does the action not fall in consequence? The conclusion of the summons is as follows (*reads conclusion*). I am rather inclined to take the view that the summons may stand as regards the sum concluded for, and may be supplemented by proof—a reference to the writ or oath of the defender being the only competent mode of proof. While we hold the document which is mentioned in the conclusion not to be a promissory-note or a valid obligation, we might still sustain the debt, which does not depend upon the validity of the document. I therefore agree with Lord Neaves, and think that the Lord Ordinary's interlocutor should be recalled, and that we should allow a proof by writ or oath of the debtor.

**LORD JUSTICE-CLERK**—Upon the first point, namely, as to the legal effect of the writing, I concur in the opinions delivered. I was a good deal struck with the cases in Hume quoted to us. But I am satisfied that this document does not fall within that class of cases. This document is not blank in the creditor's name—it has no creditor and no blank, and does not contain a promise to anyone. Even if it had, having been produced in

judgment and founded on in this action, it is doubtful whether it could be amended by filling in the address. The address will not make what was not an obligatory right into a good document of debt. I concur therefore in the view that the action, so far as laid upon this writing, cannot be sustained.

It may be a question, whether the summons is relevant, should the reference in the conclusions of the summons to the document be withdrawn? I quite concur in the view that the summons may be sustained. We must accordingly find that this is not an obligatory document, and that the pursuer can only prove the alleged debt by the writ or oath of the defender. But it is a question, what effect may be given to the defender's statements on record, because she there admits that a sum of money was received, and hardly denies that it was £100. In her second statement she says that she received a sum of money, and does not deny that it was £100. As she received this from Dr Duncan on an indefinite footing, there may be a question how far she is entitled to have her statements on record taken together.

**LORD COWAN** was absent when the case was argued, and gave no opinion.

The Court pronounced this interlocutor:—"Recall the Lord Ordinary's interlocutor reclaimed against, and find that the debt sued for can be proved only by the writ or oath of the defender, reserving questions of expenses."

Agent for Pursuer—D. T. Lees, S.S.C.

Agent for Defenders—Thomas Spalding, W.S.

Wednesday 24th, and Thursday 25th July.

## FIRST DIVISION.

### JURY TRIAL.

(Presiding Judge—Lord President.)

**FERUS v. THE NORTH BRITISH RAILWAY COMPANY.**

**M'CORMICK v. THE NORTH BRITISH RAILWAY COMPANY.**

*Reparation—Negligence—Culpa—Onus probandi.*

Action of damages for injury caused by a collision between two of the defenders' trains. Direction that the pursuers were bound to prove to the satisfaction of the Jury that the collision was occasioned through the fault of the defenders. Circumstances in which, the Jury being of opinion that the pursuers had failed to discharge this *onus probandi*, verdict was given for the defenders.

These were two actions of damages at the instance of the pursuers against the defenders for injuries said to have been received by them in a collision on the North British Railway, near Sunnyside (Coatbridge) Station, on 28th December 1871. The statement of facts as to the cause of the collision was the same in both cases, and they were, at suggestion of the Lord President, tried together.

The admitted facts were, that a collision took place between the train in which the pursuers were passengers, and some waggons of a goods train proceeding in opposite direction on another line of rails. The passenger train was going from Glasgow to Airdrie, and the goods train from Airdrie