is still available to the landlord who has sold. But the point is in substance decided in the case of *Christie* v. *M'Pherson*, Dec. 14, 1814, F.C.; and following that decision, I am of opinion that the respondents were still entitled to enforce their hypothec over the stock at the date when they applied for sequestration.

"The second objection is of a different kind. On the 18th October the sheriff-officer served upon the complainer an inventory of the crop, and it is conceded that he did so without warrant, the respondents having neither asked nor obtained sequestration of the crop, but only of the stock of cattle. On the 19th, the error having been pointed out to him, he intimated to the complainer that the inventory was withdrawn, and substituted for it a correct inventory of the stock. It was maintained, in the first place, that this proceeding was illegal, and that the sequestration is invalid, because the warrant was exhausted and the sheriff-officer *functus officio* by his delivery of the first inventory. But so far from being exhausted, it appears to me the warrant had not been put in force to any effect whatever. The inventory of crop was a mere nullity, and the warrant to inventory and secure the stock still remained perfectly effectual, nothing having been done to put it into execution."

The complainer reclaimed, and argued in support of the second objection—The whole proceedings in the sequestration were grossly irregular and therefore invalid. The officer sequestrated crops, whereas he was only entitled to sequestrate stock. The substituted inventory was bad, because the officer omitted to revisit the lands, and made up his inventory from information supplied by the tenant. No argument was offered in support of the first ground urged in the Outer House.

Authorities—*Horsburgh* v. *Morton*, February 26, 1825, 3 S. 409; Bell's Com., vol. ii., p. 33.

Counsel for the respondents were not called on.

At advising—

Lord President—I think that the Lord Ordinary is right in the decision which he has arrived at in this case.

There can be no doubt that a mistake was committed by the officer, who, when he went to the farm in obedience to the Sheriff's warrant, executed an inventory of crops, whereas the warrant only authorised him to make an inventory of the stock. As soon as the officer discovered the mistake which he had made, he withdrew the inventory of the crop, and intimated the fact to the complainer. After a conference with the tenant, there was substituted for the inventory of the crop an inventory of the stock, which inventory was made up from information supplied by the tenant.

There is no dispute that the information thus obtained was correct, or that the officer was on the lands the previous day when making an inventory of the crops. He had an opportunity of observing the stock which was on the farm, but it is to be observed that the information upon which the substituted inventory was prepared was given by the tenant himself, and the accuracy of the information thus supplied is not called in question by either party. I am not prepared to say that an inventory thus made up is a bad inventory, and am accordingly for adhering to the Lord Ordinary's interlocutor.

Lord Deas—There is no general question to be settled in this case. The messenger went to the ground for the purpose of making an inventory of the crops, which he did without any warrant, as it is conceded that sequestration was obtained only of the stock of cattle. I think that the grounds of the Lord Ordinary's judgment are clear and plain. The tenant supplied the information, his representations were admittedly accurate, and the new inventory was made up according to the information so supplied. In these special circumstances I am satisfied that the proceedings in this case were sufficient, and agree with your Lordship in adhering to the Lord Ordinary's interlocutor.

Lord Mure concurred.

Lord Shand — This is a special case, and nothing which we may now decide will supersede the necessity of the officer in the ordinary case being required to visit the lands preparatory to making up his inventory. This is the invariable practice, and it must be followed. In this case the tenant dispensed with the officer revisiting the lands, by himself supplying him with what really was a true return of his stock. It is impossible for the tenant now to raise any objections to the proceedings, as he must be held to be barred by his own actings in the matter.

Their Lordships refused the reclaiming note, and adhered.

Counsel for Complainer and Reclaimer—Brand—Ure. Agent—Thos. Carmichael, S.S.C.

Counsel for Respondents — D.-F. Macdonald, Q.C.—Darling. Agent—James Gow, S.S.C.

Thursday, May 25.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

WILLIAMSON *v.* ALLAN.

Bankruptcy — Acknowledgment of Debt Granted after Insolvency—Proof—Proof of Loan—Writ—Delivery—Fraud.

A father advanced a sum, which amounted to nearly the whole of his means, to assist one of his sons in stocking a farm, and took no receipt or other acknowledgment at the time. The sum was contained in two deposit-receipts which were endorsed by the father at the date of the advance. After the lapse of three years his son, being in pecuniary difficulties, granted an I.O.U. for a sum in excess of that which had been advanced, antedating the I.O.U. to the date at which he had received the advance, and placing it in the hands of his own agent to hold for his father. A year thereafter he was sequestrated, and his father claimed for the amount. *Held* (1) that the I.O.U. was not null either under the Statute of 1621, c. 18, or under the Statute of 1696, c. 5, and was not in the circumstances reducible as fraudulent, it being shown that it was owing to an innocent mistake that it had been granted for a sum in excess of the advance. (2) That it had been delivered. (3) That

evidence *prout de jure* was competent to show that the advance acknowledged by the I.O.U. was made by way of loan.

Question (*per* Lord Shand) as to the authority of *Haldane* v. *Speirs*, March 7, 1872, 10 Macph. 537.

John Finnie Allan became tenant of the farm of Cardrona Mains, Peeblesshire, under a lease for nineteen years, with entry at Whitsunday 1876, at a rent of £1000 per annum. He continued to possess the farm as tenant from the date of his entry to Whitsunday 1881, when owing to the rent of the farm having fallen considerably into arrears the lease was renounced. His estates were sequestrated on the 10th May 1881 by the Sheriff of the county of Peebles, and Mr Alexander Black, W.S., was appointed trustee.

It appeared from the record that when the bankrupt took the farm of Cardrona Mains in 1876 his father had advanced a sum of about £1700 to assist him in stocking the farm. This sum was made up partly of the amount of two sums in deposit-receipts, and partly also of the balance of a sum which it was maintained by the bankrupt his father had previously lent to him. The deposit-receipts bore the endorsations both of the bankrupt and of his father. On the 26th of May 1876 the bankrupt, accompanied by his father, called at the Bank of Scotland for the purpose of arranging a cash-credit in his own favour. He took with him on that occasion the two deposit-receipts, which were then endorsed by his father and delivered to him. No document of debt at that time passed between the father and the son, nor was any acknowledgment taken that the sum so advanced was by way of loan.

About the end of 1879 the bankrupt's affairs were getting so involved that he thought it necessary to consult Mr M'Laren, W.S., Edinburgh. Mr M'Laren suggested that some acknowledgment should be granted of the sum which had been advanced, and proposed first of all a bill, which, however, was objected to, and finally the I.O.U. in question (bearing the date at which the money was advanced) was written out by the bankrupt in Mr M'Laren's office, and left in his hands. In the sequestration, which followed shortly after, a claim was put in by John Allan senr., the bankrupt's father, for a sum of £1872, 2s. 6d. The trustee, after inquiry into the circumstances, admitted the claim to the extent of £1700, the amount vouched for by the I.O.U.

Against this deliverance an appeal was taken by Miss Isabella Williamson, the heiress of entail in possession of the entailed estate of Cardrona, who was a creditor on the bankrupt estate.

On the 3d April 1882 the Lord Ordinary recalled the deliverance appealed against, and remitted to the trustee to rank the claim of the respondent to the extent of £1544, 17s. 2d.

He added this note:—"The only question of difficulty in this case appears to me to be one of fact, viz., whether the advances for which the I.O.U. is said to have been granted were truly made by the respondent to his son as advances or loan so as to create a proper debt of which the father might at any time demand repayment. It is clearly proved that when the bankrupt took the farm of Cardrona Mains in 1876, the respondent, to assist him in stocking his farm, made over to him the sums contained in two deposit-receipts of the Bank of Scotland for £1000 and £544, 17s. 2d. respectively; that this money belonged to the respondent, and that it has never been repaid; but the question is whether these advances were truly loans, or whether they were not intended either as pure donations or as anticipations of succession for which the son is not liable to account *inter vivos*.

"The appellant maintains it to be conclusive of this question that the respondent has no valid document of debt. It is said that the I.O.U. is invalidated by reason of its having been granted on the eve of bankruptcy and vitiated by a false date; that the respondent is in no better position than if it had since been executed; and that he cannot be permitted to prove a loan by parole. I think the argument altogether unsound. The I.O.U. is the bankrupt's writ, and is *prima facie* evidence of the debt. But it is open to suspicion from the circumstances under which it was granted, and it is challenged by the appellant as a fraud upon the creditors. But the issue of fact which has thus been raised by the appellant herself is whether there was or was not a transaction of loan between the parties in respect of which the father would have been entitled to demand, and the son justified in granting, a written acknowledgment of debt. And upon the issue so raised parole evidence is plainly admissible on either side.

"It is, however, a material consideration in support of the appellant's case that the respondent took no document of debt from his son at the time when the advance was made, nor indeed at any time thereafter, for the I.O.U. was not asked for by the respondent, but was written on the suggestion of the bankrupt's law agent. The appellant founds upon a rule which is said to be established by the important cases of *M'Dougall's Creditors* v. *M'Dougall*, 31st January 1804, Th. Bankrupt App. 21, and *Nisbet* v. *Nisbet*, 6 Macph. 567, and maintains that when a father makes advances to establish his son in a profession or trade, such advances are not presumed to be proper loans, but donations or advances to account of the son's share of his father's succession. But the cases referred to do not appear to me to establish a rule of law. They proceed upon presumptions of fact, and in all their material circumstances they are distinguishable from the present. In each of these cases a father who was possessed of considerable means made advances for his son's promotion in the army by purchasing commissions; the sums were just such as, having regard to his position and circumstances, the father might reasonably be expected to give to his son for such a purpose without a thought of repayment. In such circumstances as these the Court held, as Lord Neaves explains, that it would be 'unreasonable that a father when he has advanced a sum to launch his son in a profession which may not for years yield any return, should be entitled the very next day or year to demand repayment with legal interest, or to transmit such a right to his executors or creditors; such a result might operate most cruelly.' But in the present case the sum advanced appears to have been the whole, or nearly the whole, of the respondent's means. He was an old man who had retired, or was about to retire, from the active exercise of his business as a farmer, and it is not unintelligible that he should put his money into his son's hands in the belief that he could employ it better than himself, but without the intention of ab-

solutely giving it away. Nor is it surprising that a man in his position, having confidence in his son, should not have thought of taking a written obligation for repayment. It does not appear to me, therefore, that if the money is proved to have been advanced, there is any presumption from the relationship of the parties, or the probabilities of the case, against it being repayable. But if not, the result of the evidence is in favour of the claim. The transference of the money from the father's account to the son's is proved beyond question, and there is nothing to show that it was transferred by way of donation, or on any other footing than that of loan.

"It is said that, according to the respondent's own statement, he did not intend to ask back the money. But what he says is, that he would not have done so if his youngest son had been provided for, and the inference is rather against than in favour of the theory of donation. It is very probable that, if things had gone well he would not have been an exacting creditor. But it does not follow that he had abandoned all right and interest in his own money.

"The result is, that the claim must be admitted to the extent of £1544, 17s. 2d., being the amount of the sums in the deposit-receipts. But it has not been made out to any farther extent, since the bankrupt's statements as to the other sums which he includes in his I.O.U. are disproved by the respondent himself."

Against this interlocutor the appellant reclaimed, and argued—The sum advanced was really a gift, or alternatively a family investment, and the present demand an afterthought arising from the son's bankruptcy. The I.O.U. was invalid on various grounds. It bore a false date; it was granted on the eve of bankruptcy to a conjunct and confident person; it was never delivered, being kept by the bankrupt's agent. If the I.O.U. be excluded, the claimant has produced no writ to instruct a loan of money. It is a fraud on the creditors at common law. Parole proof is not admissible.

Authorities—*Haldane* v. *Speirs*, March 7, 1872, 10 Macph. 537; *Nisbet's Trustees* v. *Nisbet*, March 10, 1869, 6 Macph. 567; *Anderson* v. *Guild*, June 13, 1852, 14 D. 866; *Gordon* v. *Tolmie*, June 6, 1854, 16 D. 905; the Bankruptcy Acts 1621, c. 18, and 1696, c. 5.

Argued for respondent—The I.O.U. is founded on. Though granted voluntarily, that was no reason for setting it aside. Though antedated it really bore the date of the transaction. Though retained by the bankrupt's agent, it was delivered to him for behoof of the bankrupt's father. The I.O.U. cannot be set aside unless it can be shown that no money passed between the parties. The whole transaction points to a loan, and not to a donation.

Authorities—*M'Laren* v. *Fisher*, July 7, 1838, 16 S. 1279; *Thomas* v. *Thomson*, December 19, 1866, 5 Macph. 198; *Matthews' Trustees*, June 28, 1867, 5 Macph. 957.

At advising—

Lord President—The claimant in this case, John Allan, has put in an affidavit in which he claims to be ranked for £1740, which sum is made up of, first, £1544, 17s. 2d., the amount of the sums in two deposit-receipts; and, second, of £184, 11s. 2d., the balance at the credit of the bankrupt in one of the Edinburgh branches of the Bank of Scotland. These sums were uplifted by the bankrupt, and the I.O.U. granted therefor. The Lord Ordinary has ranked the claimant for £1544, 17s. 2d., being the amount of the sums in the deposit-receipts, but he has refused to admit his claim for the further sum of £184, 11s. 2d., on the ground that the bankrupt's statements regarding it are completely disproved. I think that the Lord Ordinary has acted rightly in what he has done in this case. It is true that at the time this money was advanced no document of debt was taken to show that the money thus advanced was by way of loan, and it is also true that the claimant here is met by the ordinary rule of Scotch law that a loan of money can only be proved by writ. But the claimant produces his I.O.U., and maintains that it is sufficient to instruct a loan. The I.O.U., however, was objected to on several grounds:—1st, That while it bears to be dated May 1876, it was in reality granted about March or April 1880. 2d, That it was for a larger sum than was contained in the deposit-receipts, and this is proved. 3d, That though granted prior to sequestration, it was granted after insolvency. And 4th, That it was not delivered, as it never passed out of the power or control of the bankrupt, and was retained in the custody of Mr M'Laren, his agent.

Now, it appears to me that this last objection is not well founded. We gather from Mr M'Laren's evidence that the farm was in reality stocked by means of a loan from the bankrupt's father. It was subsequently suggested by Mr M'Laren that some document of debt should in turn be granted by the bankrupt to his father, and a bill was first suggested, but finally the I.O.U. in question was written out and left with Mr M'Laren. No doubt he was the bankrupt's agent, but in this case the document was left in his hands for the benefit of the bankrupt's father. This appears to me in the circumstances to be sufficient delivery. The fact that the I.O.U. was made out for more than the amount of the deposit-receipts appears to have been a mistake; the bankrupt seems to have got confused, and to have stated the amount at £1700 instead of £1544, 17s. 2d. It was a great pity that the I.O.U. instead of being antedated had not borne the date at which it really was granted; it would have been much better if it had been so, but the mere fact of antedating does not appear to me to be sufficient upon which to base a charge of fraud. Nor does it preclude us from looking at the document.

But it has further been urged against the I.O.U. that it was granted after insolvency. That of itself, however, is not sufficient to prevent us from giving effect to it. No doubt it is not so good as if it had been properly dated, but it cannot be reduced under either of the bankrupt statutes of 1621 or 1696.

It cannot be set aside under the Act of 1621, because there has truly been an advance of money; nor can it be reduced under the Act 1696, because the document of debt was granted more than sixty days before bankruptcy. The question then arises, may this writ be challenged and set aside as a fraud at common law? It appears to me that it cannot, unless we are satisfied that it was granted in order to deceive, or for the purpose of creating an undue preference. If the money was really due, surely it was not an illegal

thing to grant an acknowledgment of it, even though the party so granting knew himself to be insolvent. The only question that remains is, Was this sum of money which undoubtedly passed between the father and the son intended to be a loan? The result at which I have arrived after reading the evidence is, that the two sums on deposit receipt which were uplifted by the bankrupt with his father's consent were so uplifted for the purpose of stocking the farm, and that though there is doubtless a good deal of confusion in the evidence owing to the age of one of the witnesses, yet no doubt is left on my mind that in the contemplation of the parties a loan and not a gift was intended. I am therefore for adhering to the Lord Ordinary's interlocutor.

Lord Deas—By the law of Scotland a loan of money cannot be proved by parole evidence. It is essential in order to admit parole evidence that there should be some adminicle, and the question is, whether there is anything of that kind in this case? I think that there is. In the first place, the I.O.U. if not proved fraudulent, is a written adminicle under the hand of the alleged debtor, besides which, the indorsations on the backs of the deposit-receipts are also adminicles. It is not a matter of dispute that the alleged debtor got the money, indeed his indorsation of the deposit-receipts goes a long way to prove that fact; besides, their amount was entered to his credit in his pass-book at the bank.

The question to be determined is, how was the money paid—was it as a loan, or as a gift?

It must be kept in mind, as against the theory of a gift, that the sum thus advanced seems to have been the father's whole means of subsistence—it was his all—and that there were other members of the family besides the bankrupt. It is impossible, I think, to view this advance in the light partly of a gift and partly of a loan; we must consider it to be one or the other. That being so, I cannot think that the lender in this case intended so to put away his whole means of livelihood that he could never get them back again.

As between the two theories, I am inclined to view this transaction as one of loan, and I agree with what your Lordship said about the impossibility of impugning this transaction under either of the Bankruptcy Statutes of 1621 or 1696. I can see no trace of fraud throughout the whole matter. I need only further observe that it was represented to the bank that the transaction was of the nature of a loan, to which the son became a party, and I therefore agree with your Lordship in thinking that the Lord Ordinary was right in the result at which he arrived.

Lord Mure—The question in this case refers to an I.O.U. which was granted after insolvency, and which is admitted to have been executed subsequent to the date which it bears. In considering whether this is to be held as a fraud at common law, I agree with your Lordships in thinking that a transaction such as this is not struck at by the Bankruptcy Statutes, and that what we have to determine is, whether, viewed as a whole, this transaction looks so suspicious as to warrant us in cutting it down.

It would, no doubt, have been better if the document of debt had borne the true date at which it was granted, but there seems to be no question that there was a transference of money between the father and the son, nor, in my opinion, is there any doubt that that was of the nature of a loan and not of a donation.

It was, besides, very far from likely that the father would part with his whole means of subsistence at his time of life. There is apparently some confusion in the evidence, arising, no doubt, from the advanced age of the claimant, but any doubts occasioned thereby appear to me to be cleared up to a large extent by the terms of the proposal when the cash-credit was arranged with the bank. The bankrupt also when checking his account with the bank appended the note, showing in his estimation the sum advanced was by way of loan.

I therefore concur in the decision arrived at by your Lordship.

Lord Shand—If the respondent had rested his claim in this case upon the I.O.U. alone, I do not think that he could have succeeded, partly because the document bears a false date, and partly because it was granted after insolvency to a conjunct and confident person. But the respondent when the I.O.U. was challenged produced two deposit-receipts.

These deposit-receipts had been endorsed by him to his son, and were then endorsed by the bankrupt to the bank; with these in his possession, in addition to the I.O.U. the respondent claimed a parole proof. The endorsations are evidence that the bankrupt uplifted the money, and taking the documents together, I think that parole proof was competent.

Against this view the case of *Haldane* v. *Speirs* was pleaded, but it seems that the decision in that case was given by the barest possible majority, and should the point then determined arise again for consideration, it is not impossible that the decision might be reversed. But in addition to the documents which he has produced, the claimant might, I think, have maintained that the entries in the bank's books are his writs; if so, he has then proved that the bankrupt received those endorsed deposit-receipts and entered them in his pass-book.

The bank's books in fact make it clear that the father's money was transferred to the son, and passed by him into his own account.

The only question that remains is, was this sum so transferred from father to son a loan or a gift? Upon this point I agree with your Lordships in thinking that a loan and not a donation was intended.

The Lords adhered.

Counsel for Reclaimer (Appellant)—Darling. Agents—Mylne & Campbell, W.S.

Counsel for Respondents—Mackintosh—Low. Agents—Carment, Wedderburn, & Watson, W.S.