

and struck him with the step on the right thigh, and on the right shoulder with the wheel, and knocked him down, causing bodily injury. The driver was in the act of pulling up when the van came in contact with the man, and the van did not pass over him. The evidence conflicted as to the pace at which the van was being driven, and as to whether the driver called out to warn the man before the van struck him. The time of day was in the forenoon.

The Sheriff-Substitute (BIRNIE) assolized the defender, and the Sheriff (CLARK) on appeal adhered.

The pursuer appealed to the Court of Session.

The following cases were cited at the debate—*Clark v. Petrie*, June 19, 1879, 6 R. 1076; *Grant v. Glasgow Dairy Co.*, December 1, 1881, 9 R. 182.

At advising—

LORD YOUNG—This is an action of damages, the pursuer alleging as his ground of action that he was run over and severely injured by a van belonging to the defender and in charge of his servant, and that this was owing to the fault of the defender's servant, for whom he is admittedly responsible if he was in fault. The Sheriff-Substitute and Sheriff have assolized the defender on the ground that the van-driver was not in fault, the immediate view apparently of the former being that it is proved that he called out, and not proved that he was driving furiously or too fast, or indeed at any other than a moderate pace. The evidence was fully brought before the Court in the argument, and was fully commented on, although the appellant, being a poor man, the Court indulged him by dispensing with printing. Since the debate I have read the whole proof carefully and continuously, and I have come to the result that the driver was in fault. There is conflicting evidence as to the pace, and also as to whether the driver called out to the appellant, who was certainly knocked down. I think the pursuer's witnesses say that the pace was faster than it really was, and that the defender's witnesses say that it was slower than it really was. My opinion is not founded on the pace. The driver was going at such a pace that he could without difficulty have pulled up in time; if not, that itself would have been fault. The appellant was walking along the road where he was entitled to be, and he was knocked down and hurt. The driver was not entitled to knock him down; it was his duty to avoid him. He could quite well have done so; and that he could, but did not, seems to have been because he thought that the man must get out of his way. There is *prima facie* fault leading to liability if a driver of a carriage so knocks up against a passenger. It is his duty to be able to pull up, and to do it, and not just to run over one who even from stupidity does not get out of the way. A man may stupidly get into the way of a carriage. I express no opinion on such a case as that, for each case of that kind must be judged by its own circumstances, and it may be that a driver, having a clear road before him, may count on an intelligent and even an unintelligent being not getting in before his horse, and might not be responsible for his doing so. But here the man was walking steadily along the road, and the van

came up behind him and knocked him down. And my verdict is that the driver was to blame for not pulling up or turning to a side, but going straight on, leaving it to the appellant to get out of the way or take the consequences. I think we should recal the judgment, and find that the pursuer was knocked down and injured by the fault of the defender's servant, for whom he is responsible. The Sheriff-Substitute has given his opinion on the amount of damages, if any, which ought to be awarded, and he fixed £25—£10 for loss of wages and £15 for medical expenses and *solatium*. Nothing was said against that, and I propose that we should allow that sum.

The LORD JUSTICE-CLERK, LORD CRAIGHILL, and LORD RUTHERFURD CLARK concurred.

The Court found that the pursuer was knocked down and injured by the fault of defender's servant, for which he was responsible, and awarded £25 damages.

Counsel for Pursuer (Appellant)—Chisholm. Agent—W. J. Cullen, W.S.

Counsel for Defender (Respondent)—Moncreiff—Maconochie. Agents—Maconochie & Hare, W.S.

Wednesday, December 16.

FIRST DIVISION.

[Lord Trayner, Ordinary.]

NEWLANDS v. M'KINLAY.

Proof—Loan—Writ—Reference to Oath—Intrinsic or Extrinsic.

In an action for payment of the balance of an account one of the entries in the account sued upon was a cash advance of £300. The pursuer recovered from the defender, under a diligence against havers, a cash-book kept by him while manager of his father's business (to which he had succeeded at the date of the action), containing this entry, "13th July 1874. To Alexander M'Kinlay, per W. H. R., £300." The pursuer then referred the constitution of the debt of £300 to the defender's oath. The defender deponed that the entry in the cash-book was made for the purpose of recording the receipt by him of £300 from Newlands, the pursuer, on that day, and that the original entry had been "per W. N." over which he had superinduced the letters "W. H. R." The defender further deponed that the money had been repaid. *Held* (1) that the debt had not been proved *scripto*; (2) that the qualification of repayment was intrinsic of the defender's oath. Defender *assolizaid*.

This was an action at the instance of William Newlands, horsedealer, Watson Street, Glasgow, against Alexander M'Kinlay, horsedealer, London Street, Glasgow, for payment of £1968, 7s. 6d. as the balance due upon an account for horses sold and delivered, and for cash advanced by the pursuer to the defender, commencing 1st January 1872 and ending 28th November 1881. The action was raised on 5th November 1884.

The defender averred that there was no transaction outstanding between the parties entered into in or subsequent to November 1881.

He pleaded—“(2) The last item in the pursuer's account being fictitious, and inserted merely in order to evade prescription, the account sued for, so far as bearing to be for the price of horses, is prescribed. (3) So far as the account sued for is composed of alleged cash advances, it can only be proved by the defender's writ or oath.”

The only question of importance in the case related to the following entry in the account sued for:—

“1874.

“July 13. Cash lent you at the bank . £300.”

A proof having been allowed, the pursuer obtained a diligence against havers for the recovery of certain books, under which the defender was examined with regard to this entry in one of his cash-books under date 13th July 1874:—

“1874.

“July 13. To Alex. M'Kinlay, per W. H. R. £300.”

The defender was then asked—“Does not that refer to the entry in the account sued for, under date July 13, 1874, for £300? Depones, I don't consider that it does.”

Having obtained the defender's business books, including the cash-book in which the above entry was made, the pursuer declared his proof by writ closed.

On 2nd June 1885 the Lord Ordinary (TRAYNER) pronounced this interlocutor:—“In respect it is admitted by the pursuer that the last item of the account sued for, dated 28th November 1881, is not now due, but was paid and discharged as of that date,—Sustains the second plea-in-law for the defender; and having considered the cause with the proof adduced, finds that the pursuer has failed to prove by the writ of the defender the constitution and resting-owing of the debt sued for.”

The counsel for the pursuer then lodged a minute of reference to the defender's oath, in which he stated that he maintained “that the constitution of the debt sued for is proved by the defender's writ, to the extent of the items specified in the schedule”—that is to say, all the items in the account other than the £300 above mentioned—and that “the pursuer referred to the defender's oath the constitution of the remainder of the debt sued for [*i.e.*, the £300], and also the resting-owing of the debt sued for, so far as consisting of the price of horses and other goods.”

The Lord Ordinary on 3rd June sustained the minute of reference in so far as the same was a reference to the defender's oath.

Under this reference to his oath the defender deponed with regard to the entry of £300:—“In the account sued on, under date 13th July 1874, there is an entry of cash lent me at the bank—£300. (Shewn No. 5)—That is my cash-book. On p. 288, under date 13th July, there is an entry, ‘To Alexander M'Kinlay, £300.’ That entry is in my handwriting. It records the receipt of money. Following the words ‘To Alexander M'Kinlay,’ there is written ‘per W. N.,’ but over the ‘W. N.’ there is superinduced ‘W. H. R.’ That superinduction was made by me. I originally wrote there ‘per W. N.,’ meaning I had got £300 from Mr Newlands, which I paid back to him. That entry was a private memor-

andum. The book was not my own at the time. The entry ‘To Alexander M'Kinlay, per W. N., £300,’ was written by me to record the fact that I had received that sum from Mr Newlands, and which I repaid him. I was examined as a haver before Professor Berry, at Glasgow, on the 18th of May last. My attention was then directed to that entry in the cash-book of £300, and I was asked—‘Does not that entry refer to the entry of £300 in the account sued for, under date 13th July 1874,’ to which I deponed, ‘I do not consider that it does.’ (Q) Then on the 18th of May you did not consider that that entry referred to the £300 given to you by Mr Newlands? (A) I did not, because I repaid the money long ago; I got that in my private capacity, and paid it back again. (Q) Did you or did you not, on the 18th of May, consider that that entry related to the £300 received by you from Mr Newlands? (A) I did not consider it had anything to do with the matter at all, because I had repaid the money. I knew that Newlands in the account sued for was debiting me with £300 lent to me upon 13th July 1874. I now depone that the entry in the cash-book was put in for the purpose of recording the receipt by me of £300 from Mr Newlands on that day. (Q) With that knowledge, how did you say on the 18th of May that you did not consider that the entry in the cash-book referred to the entry in the account sued for under date 13th July 1874, for £300? (A) My explanation is this, that I got the money, and repaid it years ago. That is the only explanation I can give.” With regard to the statement that the cash-book was not the defender's own at the time the entry of £300 was made, it was explained that the business at that time belonged to the defender's father, and that the defender was his father's manager, but no question was raised as to the defender's liability for the business debts as he succeeded to his father.

On 16th June the Lord Ordinary (TRAYNER) found that the defender's oath was negative of the reference, and assolizied the defender from the conclusions of the summons.

“*Opinion.*—The parties in this case were allowed a proof in common form, but on 2d June, before the proof proceeded, the pursuer admitted that the last item of the account sued for had been discharged as of its own date, and that the defender's plea of prescription fell to be sustained. The pursuer thereupon called the defender as a haver, and having obtained under his call the defender's business books, he declared his proof by writ closed. The pursuer was invited to show how the books produced by the defender proved either the constitution or resting-owing of the sum sued for, but his counsel did not offer any observation whatever on the books or entries therein. I therefore pronounced the interlocutor of 2d June, finding that the pursuer had failed to prove his case by the writ of the defender.

“The pursuer then lodged the minute of reference to the defender's oath, under which the defender appeared and emitted the deposition. The counsel for the pursuer admitted that the oath was negative of the reference except as regards the one item of the account sued for, dated 13th July 1874, which runs thus—‘Cash lent you at the bank, £300.’ As to this item the pursuer contends that he has, by the defender's oath,

proved the constitution of the debt, and that as the defender has not produced any discharge for that debt, he (the pursuer) is entitled to decree for £300. The defender under his deposition admits that he got £300 in loan, but adds that he repaid it. The pursuer maintains that he is entitled to take the defender's admission of debt, and to disregard the qualification of repayment, in respect that while he referred the constitution of that debt to the defender's oath, he did not refer the question of resting-owing. I am of a different opinion. The pursuer has not proved the constitution of the debt in question by the writ of the defender. If, therefore, he disregarded the defender's oath, there being no proof of the debt at all, the defender would be assoilzied. On the other hand, if the pursuer relies on the defender's oath, he must take it as it was given. I regard the qualification that the loan was repaid as an intrinsic qualification. The debt was not constituted by any writing, and did not therefore need any written discharge."

The defender reclaimed, and argued on the question of the £300—(1) The debt was proved *scripto*. It was not essential that there should be an obligatory writing. There was here a writing under the defender's hand which necessarily imported the receipt of money on loan. It was no doubt necessary to have an explanation of the entry "per W. N.," but that was explained by the defender's oath, and there was no objection to getting at the defender's writ through his oath.—*Fraser v. Bruce*, Nov. 25, 1857, 20 D. 115; *Dickson on Evid.*, sec. 1183. (2) There had only been a reference to oath of the constitution of the debt of £300, and the defender's oath was affirmative of that. The qualification of payment was extrinsic—*Ersk.* iv. 2, 11. It could not be intrinsic, because the question of resting-owing was not referred. Therefore the constitution of the debt was proved, and the defender had not proved payment.—*Naismith v. Bower*, M. 12,621; *Purveyance v. Cunningham*, M. 12,623; *Cowbrough v. Robertson*, July 18, 1879, 6 R. 1301; *Cowper v. Marshall*, Nov. 28, 1877, 5 R. 258; *Thomson v. Duncan*, July 10, 1855, 17 D. 1081; *Knox v. M'Cauley*, Nov. 8, 1861, 24 D. 16.

The defender replied—(1) There was no proof of the debt *scripto*. The so-called writ did not occur in a book which recorded transactions between the pursuer and defender, but in a cash-book or cash-journal which was kept by the defender as his father's manager. Even if the entry charged the defender with receipt of money, the pursuer was still bound to prove that the transaction was a loan.—*Haldane v. Spiers*, Mar. 7, 1872, 10 Macph. per Lord President, 541. (2) If the defender's oath had been affirmative of the reference, that would not have proved the pursuer's case, because there was no reference of the resting-owing of the debt. The qualification of payment, however, was intrinsic of the oath, because the debt was constituted without writing, *unumquodque eodem modo dissolvitur quo colligatur*.—*Ersk.* Inst. iv. 2, 13. The doctrine in *Ersk.* Inst. iv. 2, 11 was erroneous, as pointed out in 1 Bell's Com. 350; *Dickson on Evid.*, secs. 1641-1645; *Gallbraith v. Cuthbertson*, Jan. 18, 1866, 4 Macph. 295; *Wyllie*, 5 B. Supp. 913. The cases of *Cowper* and *Cowbrough* did not apply, for they were cases of compensation, not of payment, and

each of them was decided upon its own peculiar circumstances.

At advising—

LORD PRESIDENT—This action was raised for the recovery of a large sum which is alleged to be the balance upon an account embracing a number of transactions in regard to horses between the pursuer and the defender, and also for the recovery of certain sums alleged to have been advanced on loan, of which the important item with regard to which we have had a discussion is a sum of £300, which is alleged to have been advanced somewhere about the month of July 1874.

As regards the part of this account which contains entries other than the sums advanced on loan, that was disposed of by the interlocutor of 2d June 1885, in which the Lord Ordinary sustained the second plea-in-law for the defender, *i.e.*, the plea of prescription, and then the interlocutor goes on to say that the Lord Ordinary "sustains the second plea-in-law for the defender, and having considered the cause with the proof adduced, finds that the pursuer has failed to prove by the writ of the defender the constitution and resting-owing of the debt sued for."

That interlocutor is not challenged, and indeed it would hardly be possible after the reference to oath to go back upon the finding that the triennial prescription applied to the entries relating to horses.

But that reference to oath was obviously intended to keep the matter open if possible, and it was so constructed, for the counsel for the pursuer stated that he maintained "that the constitution of the debt sued for is proved by the defender's writ, to the extent of the items specified in the schedule hereto annexed." That means the whole items in the account except the entry of £300. And then he proceeds further to say "that the pursuer referred to the defender's oath the constitution of the remainder of the debt sued for, and also the resting-owing of the debt sued for, so far as consisting of the price of horses and other goods."

Now, the defender has been examined under that reference, and he has deponed *negative* with regard to the entries for the price of horses in the account. With regard to the entry of £300, the way the matter stands is this—There is an entry in a cash-book kept by the defender, which consists of two or three words only, under date 13th June 1874. The entry is this—"To Alexander M'Kinlay, per W. N., £300;" and then the letters "W. N." as originally written have been converted, by writing over the last letter, into "W. H. R."

The first question argued was whether there was proof by writ of the constitution of the debt. As regards that, the book was no doubt kept by the defender, but the defender was not asked whether the entry was in his handwriting. It was not intended by that entry to record a transaction between the defender and the pursuer, for the book was not, properly speaking, the defender's own book, but his father's, who at that time had the business to which his son has now succeeded. Taking these circumstances into account, and also taking into account the impossibility of extracting a meaning from this entry without something else, I think this entry is not a writing sufficient to prove the constitution

of the debt. Moreover, I think that the pursuer, when he made this reference to the oath of the defender, must have been satisfied that he had failed to prove the constitution by writ. But he now says that by putting together the defender's deposition on oath and the entry in his book he has made out his case.

The oath, no doubt, explains the entry; and the explanation amounts to this, that at the date specified £300 was advanced to the defender, and if there was nothing more in the oath, that would be proof of the constitution of the debt. But in the oath there is adjected the qualification that the advance of £300 has been repaid. It is objected by the pursuer that that cannot be taken into account because it is extrinsic to the oath. The pursuer contends that he is entitled to found on the admission by the defender of the loan, but that he is not bound to take along with that the statement that the obligation has been extinguished in the proper manner, that is to say, by repayment. Why not? If there had been constitution of this debt by a proper writ there would have been a good deal to say for that argument, for then the defender's oath would not have been necessary in order to constitute the debt, and therefore the pursuer would not have been bound to take the qualification of repayment contained in the oath. Again, if the loan had been contracted by a writing, then it could not be extinguished except by writing. But it is just because the pursuer has no writ to constitute his debt that the qualification becomes of importance, because the constitution of the debt is proved by the defender's oath and nothing else.

The fact that a man's books are put into his hands when he is being examined in a reference to his oath, either for the purpose of stimulating his memory or pricking his conscience, would not make the books written proof of the debt.

Taking it, then, to have been proved by the defender's oath that this £300 was advanced, is there any doubt that the dissolution of the obligation can be proved in the same way as its constitution? The leading authority on this matter, Mr Erskine, lays down the law so accurately and distinctly that I prefer to put the ground of judgment in his words rather than in my own—"Where a debt not constituted by writing is referred to the oath of a defender, the quality of payment adjected to it is intrinsic, and so ought to be deemed part of the oath; for where no written vouchers exist against the debtor, he need take no written voucher for the discharge of the obligation; since his oath, by which alone the constitution of the debt can be proved, ought to be as effectual for proving the extinction of it, according to the rule, *unumquodque eodem modo dissolvitur quo colligatur*."—Ersk. Inst. iv. 2, 13. That is the ground of my judgment, and I think the case is a clear one. We have had a very satisfactory argument, and I do not regret its length because it has brought out enough to render the judgment very clear.

LORD MURE, LORD SHAND, and LORD ADAM concurred.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Asher, G. C.—M'Kechnie, Agents—Gill & Pringle, W. S.

Counsel for Defender (Respondent)—W. Mackintosh—Graham Murray, Agent—J. Stewart Gellatly, S. S. C.

Saturday, December 5.

SECOND DIVISION.

STUART v. MOSS.

Reparation—Slander—Issue—Malice—Privilege.

A theatre manager who had contracted with the conductor of a troupe of actors to perform at his theatre cancelled the engagement, and in the course of the correspondence which followed in consequence wrote to him—"You made your engagement under false pretences; you advertise what you are not capable of performing." The actor sued him for damages, placing on these words the innuendo that it represented him as guilty of fraudulent conduct and wilful deceit in his communications with the defender and in the pursuit of his profession. *Held* (1) that the latter was capable of bearing the innuendo, and entitled the pursuer to an issue; but (2) that it having been written in the course of a correspondence about a disputed contract, it was written on an occasion when there was legitimate ground for the defender expressing his opinion on the matter, and that therefore there must be an issue of malice.

In June 1885, Henry Stuart, a pantomimist, raised an action against H. E. Moss, proprietor of a theatre of varieties in Edinburgh, concluding for £750 damages for alleged slander. The pursuer stated that on 28th October he and his troupe had been engaged by the defender to appear at his theatre for a week, beginning 11th May 1885. "(Cond. 2) . . . The defender, however, without any good or sufficient reason, cancelled the said engagement, and the pursuer has in consequence been obliged to raise an action against the defender for breach of contract, which action is presently in dependence in the Sheriff Court at Edinburgh. (Cond. 3) On or about 25th April 1885, the defender falsely, calumniously, and maliciously, and without probable cause, or any cause, wrote and transmitted, or caused to be written and transmitted, to the pursuer a note or letter in the following terms:—'April 25th, 1885—To Mr Harry Stuart, Scotia, Glasgow.—You made your engagement under false pretences; you advertise what you are not capable of performing. Under these circumstances I decline to have you in my establishment. I have too much respect for my audience. You may come to Edinburgh if you choose—that is your business—but you will not be announced; and as I have to be away that week, I shall leave strict orders that neither you or your luggage will be allowed to enter the doors.—Yours, &c., H. E. Moss. P.S.—I have a letter from you admitting the fact of inefficiency of your company, &c., &c.'"