would be extremely difficult to disprove. In general, the alleged debtor would have no evidence to oppose to the claim except his own denial of the receipt of the money; and after his death his executors would have no evidence whatever in disproof of the alleged loan. As a protection against unconscientious claims the requirement of the obligant's signature is sufficient, and I think that his signature is and ought to be sufficient to bind him.

In the view I take of the case, no question arises upon the statutes regulating the authentication of deeds; because the statutes presuppose a deed which either constitutes, transfers, or discharges a right, and do not apply to writings which are only put forward in evidence of a right.

I may however conclude what I have to say on the case by pointing out what I think is a fundamental distinction between the effect of deeds governed by the authentication statutes and the effect of the rule which the minority of the court proposes to lay down in this case.

I have not been able to figure any case of defective attestation in which the parties are not remitted to their original rights or the contract upheld. If for example it is a case of sale or lease of heritable estate and there is *rei interventus* the contract is upheld. If there is no *rei interventus*, the seller or lessor keeps his property, and the purchaser or tenant keeps the price or rent. If it were possible to figure a case of money being paid in such circumstances as would not amount to *rei interventus*, beyond all question the purchaser would get back his money. The same rule has been applied to guarantees; the advance of money to the principal obligant constitutes *rei interventus*, and disables the cautioner from taking any advantage from defects of attestation.

But here from the nature of the contract the advance of the money does not constitute *rei interventus*, and the effect of sustaining an objection to the writing on the ground of defective attestation would be that the borrower might keep the money which by his signature he acknowledges to have received in loan.

It may safely be affirmed that in no other case would such an effect follow from mere informality of execution, and the fact that it does follow from the principles maintained by the defender in this case strongly confirms me in the opinion that these principles are unsound.

LORD KINNEAR—I agree with Lord Kyllachy, and his Lordship's opinion is stated so fully that I think it unnecessary to recapitulate the reasons upon which my conclusion is founded. I only desire to add, therefore, that I entirely concur with your Lordship with reference to the form by which, through a long recognised practice, the allowance of proof is expressed.

The Court pronounced the following interlocutor:—

"The Lords having resumed consideration of the appeal, productions, and whole process, with the mutual minutes of debate and the opinions of the consulted Judges, in conformity with the opinions of the majority of said Judges, Recal the interlocutor of the Sheriff-Substitute dated 29th October 1896: Find that the proof of the loan alleged must be by writ or oath, but that such writ need not be holograph or tested; and decern: Remit to the Sheriff to allow to the pursuer a proof of her averments *habili modo*, and to the defenders a conjunct probation, and to proceed: Find the respondent (pursuer) entitled to the expenses of the appeal," &c.

Counsel for the Pursuer—Sol.-Gen. Dickson, Q.C.—Deas. Agents—Morton, Smart, & Macdonald, W.S.

Counsel for the Defenders—Salvesen—Hamilton. Agents—Campbell & Smith, S.S.C.

Wednesday, December 1.

FIRST DIVISION.

[Lord Low, Ordinary.

COMMERCIAL BANK OF SCOTLAND, LIMITED *v.* MUIR AND OTHERS.

Process—Multiplepoinding—Competency—Double Distress.

A and B were ranked and preferred jointly to a fund *in medio*, which they deposited in bank on deposit-receipt taken in their names jointly.

A subsequently raised an action of multiplepoinding in name of the bank to determine certain questions with B as to the division of the fund between them. It appeared that B claimed the whole fund, and A a-half.

B pleaded that, in respect, there was no double distress, the action was incompetent. *Held* (*dub.* L.-P. Robertson, and *rev.* judgment of Lord Low) that the action was competent, there being a proper fund *in medio*, and two competing claims upon it.

In 1892 James Muir, C.A., Glasgow, trustee on the sequestrated estates of John Patrick Alston and William Hamilton Alston, partners of the firm of Campbell, Rivers, & Company, raised an action of multiplepoinding to determine the rights of parties in certain assets standing in the names of the Alstons. Claims were lodged by the said James Muir, as trustee on the estate of Campbell, Rivers, & Company, and by Robert Lewis Maitland Brown as official assignee in Ceylon of the insolvent estates of Hector Cross Buchanan and Frederic William Bois, partners of the firm of Alstons, Scott, & Company, Colombo; and on 2nd June 1893 Lord Low, Ordinary, pronounced an interlocutor ranking and preferring these claimants jointly to the fund *in medio*.

Thereafter, Messrs Muir & Brown pro-

ceeded to realise the assets forming the fund *in medio*, and they deposited the proceeds with the Commercial Bank of Scotland on deposit-receipt taken in the names of James Muir and Marcus John Brown, S.S.C., as attorney for R. L. M. Brown, jointly. The deposit-receipts bore that the sums deposited were the proceeds of certain assets to which Muir and Brown had been ranked and preferred in terms of a decree pronounced by Lord Low. At the end of 1896 the amount of the sums thus deposited was £6209.

In the meantime disputes arose between Muir and Brown as to their respective interest in the said sums. Mr Brown contended that the sums belonged to the creditors of Alstons, Scott, & Company, to the exclusion of the creditors of Campbell, Rivers, & Company, and maintained that they should be remitted to him in Ceylon for distribution. Mr Muir maintained, on the other hand, that he was entitled to half the sums in question to be distributed by him among the creditors of Campbell, Rivers, & Company, to the exclusion of the creditors of Alstons, Scott, & Company.

In these circumstances, on 13th January 1897, Mr Muir raised an action of multiplepoinding in name of the Commercial Bank, pursuer and nominal raiser, against himself, real raiser, and Brown, and Marcus John Brown, S.S.C., his attorney, defenders, to determine the rights of parties to the money deposited with the bank.

The defenders in answer to the pursuer's condescendence denied "that disputes have arisen as to the rights of parties to the said sums which make the present action necessary or competent. In a question with the pursuer, the real raiser and the defender R. L. M. Brown jointly are the sole and undoubted creditors in the sums on deposit, and there is no double distress."

The defenders pleaded, *inter alia*—(1) "In respect there is no double distress, the action is incompetent."

On 7th April 1897 Mr Brown's agent wrote to Mr Muir's agent—"I have to-day had a meeting with my client, who, however, does not consider that any good is likely to arise from a meeting. He wishes me, however, to urge upon you the desirability of your inducing your client to concur in having the funds in this country remitted to Colombo with a view to distribution there. Failing his so doing, I am to consider as to raising an action to compel him."

On the following day Mr Muir's agents replied—"Our client, the trustee on Campbell, Rivers, & Company's estate, is advised that he cannot agree to having the funds in this country remitted to Colombo, and the action at present in Court is brought for the purpose of having the rights of parties in this respect determined."

On 9th April Mr Brown's agent wrote—"My client is advised that the present proceedings at your instance will not accomplish the object you have in view as expressed in your letter under answer. I am therefore to take what action may be necessary to compel your client to join with mine in distributing the funds among the creditors of Messrs Alstons, Scott, & Company."

On 30th October 1897 the Lord Ordinary (Low) sustained the first plea-in-law for the defender, and dismissed the action.

Opinion— . . . "I am of opinion that the plea is well founded. I do not think that there is, in any proper sense, double distress in this case. The question is entirely one between Muir and Brown, and is a proper subject for a direct action and not for a process of multiplepoinding. No doubt the question between the parties might have been settled in this action, but as Brown has thought right to take the objection to the competency of the proceeding, I think that I am bound to sustain it."

The real raiser reclaimed, and argued—The Lord Ordinary was wrong. Whenever money was in the hands of a third party, and there were rival claims on it, a multiplepoinding was competent—*Winchester* v. *Blakey*, June 21, 1890, 17 R. 1046. It was true that no demand had been made on the bank, but such a demand would have been futile, for the bank would, of course, only pay on the joint endorsation by the parties of the deposit-receipts. Even if the money were so uplifted, matters would be advanced no further, for the money would simply have to be deposited again in the joint names of the competing claimants. The rights of parties could be worked out far more simply in the present action than in cross-actions between the parties, which formed the only alternative. The correspondence plainly disclosed a competition.

Argued for the defenders — The Lord Ordinary was right. It was admitted that the true test of the competency of the action was—are there competing claims? At the present stage there were no competing claims; no competing claims, that is to say, against the bank, which was the mere box or receptacle in which the money had been placed. No intimation had been given to the bank of the alleged competing claims; it had not been called upon to pay by either party. In short, it had not been subjected to double distress. The competition could only arise when the money had been uplifted, as it could be to-morrow. There was no reason here for allowing the degree of latitude customary when the holder of the fund was the real raiser. A direct action was the true method for determining the question at issue.

At advising—

LORD ADAM—The fund *in medio* in this case consists of a series of deposit-receipts granted by the Commercial Bank for money consigned in their hands in terms of the specimen receipt set forth on record. That document bears that the money was received from James Muir, trustee on the sequestrated estate of Campbell, Rivers, & Company, and Marcus John Brown as attorney for the official assignee of the insolvent estates of Hector Cross Buchanan and Frederic William Bois jointly, and of

course it follows, as far as the bank was concerned, that it was only bound to pay the sums deposited on the endorsation of the depositors jointly. But so far as the rights of these persons are concerned, the terms of the receipts raise a presumption only, which may be set aside by proof to the contrary.

That being the character of the fund *in medio*, the two claimants are (1) Mr Muir, as the trustee on the sequestrated estates of Campbell, Rivers, & Company, who says that he is entitled to one-half of the sum deposited for distribution among the creditors of Campbell, Rivers, & Company; and (2) Mr Brown, the official assignee of the estates of Mr Buchanan and Mr Bois, who says that he is entitled to the whole fund for distribution among the creditors of Scott, Alston, & Company. We have therefore conflicting claims made to the fund *in medio*, the one claimant claiming the whole, and the other the half of the fund, and it is not denied that these are *bona fide* claims; and the facts standing thus, I do not see why this is not an appropriate case for an action of multiplepoinding. It is said that the claims ought to have been intimated to the bank, and that no intimation having been made, the bank has not been subjected to double distress. I do not think that such intimation was necessary in the case of a fund in the position of the present fund *in medio*. There are two competing claimants to funds in the hands of a third party, and that, I think, is enough to make the action competent. It is said that the question lies behind, and will not arise until the parties get the fund into their hands, but I do not see that that is at all the case. The two claimants are trustees, and it is for them to distribute the fund in proper proportions among the parties entitled to it.

LORD M'LAREN — The determination of the competency of a multiplepoinding is not quite so simple a matter as might appear from the numerous cases in which no dispute as to the competency is raised, but there must at least be a fund in neutral custody, a dispute as to the persons entitled to the fund, and conflicting claims made to it, and in general a demand on the holder by one or more of the disputants. But as to the degree of strictness with which these requisites have to be complied with, that depends, as the decisions show, on the nature of the fund and the general circumstances of the case, and the decision on one question of competency is not of very much value in determining other questions arising in different circumstances. In the present case there can be no doubt that there is a proper fund *in medio*. Then as to the dispute, it is equally plain on the face of the record that there is a dispute on the question who is entitled to the fund, because one of the persons who are joint-creditors in the deposit-receipts claims that by the effect of supervening circumstances he is entitled to the whole fund, while the other maintains that he is entitled to the half of it, and claims that the money should be equally divided. In some cases the objection to the competency is put on the ground that, although there are disputed claims, these have not been constituted so as to be a proper subject of multiplepoinding, or have not been intimated in such a way as to put the holder of the fund on his inquiry whether he is in safety to pay. I have no conception, for example, that a party by merely intimating a random claim on the fund thereby becomes entitled to bring an action of multiplepoinding. The practice undoubtedly is that where a claim is illiquid it must be constituted, and the claimant may put in the decree of constitution as the basis of his claim. I think these are sufficiently constituted claims, because there has been a decree in a previous action in regard to the rights of the claimants, and the question now raised is really on the construction of the decree in the circumstances in which it was obtained.

Then as to the necessity for intimation to the bank, if intimation of the competing claims to the holder of the fund were always necessary, the failure to intimate would be a fatal objection in this case. But then I think that the Dean of Faculty answered this objection very satisfactorily when he said that it was notorious that you could not call upon a bank who holds of two parties jointly to pay to one of these parties. To make such a demand would be a futile proceeding, and therefore I think that this is a case for relaxing the strict rule in a matter which has really very little substance in it in view of the certain refusal of the bank to comply with the separate demands for payment.

Then it is said that the bank would have paid on the joint demand of both claimants, and that is true, but it seems to me to be rather an avoidance than a solution of the difficulty, because the parties being in dispute as to their rights to the fund could do nothing but re-deposit the money, and the question which is now raised would again arise. There is a fund which is the subject of dispute. The question is not merely one of debt or contractual right, but as to the right to a specified fund held by a neutral person, and on the whole matter I think that the objection to the competency is not made out.

LORD KINNEAR—I am of the same opinion. I think the respondent's counsel were quite justified in saying that where the real raiser of a multiplepoinding is not a mere stakeholder but one of the parties who maintain a claim upon the fund *in medio*, it is necessary and proper to scrutinise the condescendence upon which the summons is supported somewhat more closely than in the case where the holder of the fund is the real and not merely the nominal raiser, because in the latter case the raiser of the multiplepoinding may not be able to set forth the grounds of the competing claim with the same precision which may be expected from the real raiser who is himself a claimant. But that only comes to this, that we must see that the claims which are said to be competing are not mere random

claims, but are real and intelligible claims upon a fund *in medio*, set forth upon grounds which may or may not be well founded in law, but which are at most stated with sufficient precision to show that there is in truth a double claim upon one fund maintained by persons having hostile interests. If that be set forth, then I think that all is done which is necessary to sustain the competency of the multiplepoinding.

Now, I think that in the present case the fund *in medio* must be held to be the sums in the deposit-receipts. The question is, whether there is any sufficient statement of a competition of hostile claims upon this fund, and I must say that I cannot entertain any doubt that there is a sufficient statement to that effect, for the condescendence sets forth that the agent for the official assignee on the estates of Mr Buchanan and of Mr Bois has called upon Mr Muir, as trustee on the sequestrated estates of Campbell, Rivers, & Company, to consent to the funds being remitted to him in Ceylon. That is a very clear statement of a specific claim, and the condescendence goes on—"Mr Muir, on the other hand, maintains that he is entitled to half of the sums in question in terms of the ranking, and that such half falls to be distributed among the creditors of Campbell, Rivers, & Company, to the exclusion of the creditors of Alston, Scott, & Co." There is, therefore, as clear and distinct a competition between hostile parties as could be conceived.

But it is said (and I think that this argument requires consideration) that this competition could never result in double distress against the bank, for whatever be the rights of those competing parties, neither could go to the bank and demand payment for himself, and therefore it follows not only that neither could use diligence against the bank, but that neither could state an intelligible claim against the bank, the bank being always protected by the terms of the deposit-receipts. But whatever may have been the original conception of the process as a protection against double diligence, it is now settled by long-continued practice that actual diligence is not necessary to support a multiplepoinding if there be two conflicting claims upon the same fund; and while it is quite true that the bank could not safely pay to either of the claimants without consent of the other, that is just the condition which makes a multiplepoinding competent. What, then, is the substantial result of this argument? There is a competition for the moneys represented by these deposit-receipts, and the argument must go as far as this, that the proper course was for the competing claimants to take up the money from the bank, and then to put it *in medio* in some other form and compete upon it; for the only result of their getting the money on a joint-receipt from the bank must be, so long as the dispute continues, that they should obtain a judicial determination of the dispute in some form of action. It is by no means, as the respondents argued, a mere question of trust administration upon which trustees have differed. The claimants are not trustees for the same interests, but the money was put in their joint names because they represented different interests which might come into conflict with one another. Nor is the action raised from an anticipation of a possible or future conflict. If we assume, as for this purpose we must assume, the truth of the condescendence, the conflict has actually arisen, and either of the parties is entitled to submit the question between them to the judgment of the Court by any competent form of process.

I must say I think the whole argument creates rather a logical perplexity than a real and substantial difficulty, for the substance of the matter is that there is a dispute as to the right of these two persons to a whole or a part of this sum, and therefore there is, in my opinion, a sufficient competition to support the action of multiplepoinding.

Mr Shaw raised a point which made some impression on my mind, for he said that, having regard to the purpose of the action and the nature of the questions between the competing parties, it became clear that there would be a difficulty in working out their competing claims in such a form as would make the rights so clear and manifest that a judgment ranking one or other would form a sufficient guide for the courts of Ceylon. Now, if we were clear that a true competition could not be determined in this action, I should have sustained that view, but I think it only comes to this, that it will be necessary for the parties, whether they make their claims in this or in any other action, to have careful and deliberate consideration of the forms in which their claims are stated. But I cannot see for myself that, however great the difficulty may be in formulating the rights which either desires to be determined, it should be greater in an action of multiplepoinding than in an action of declarator. I think the terms in which the right is claimed may be the same in the one as in the other. I am not therefore disposed to give effect to that consideration, and I observe that the Lord Ordinary says that he has no doubt that the question between the parties might be settled in this action. If that be so, I think it would be unfortunate to throw out an action in one form, which will be sufficient for determining the question, merely for the purpose of introducing the question in another form. I do not know whether an action in any other form would be as adequate as this one for determining the question between the parties, for it might quite well be that one declaratory action would only lead to another. On the whole matter, therefore, I agree with your Lordships, although I do not think the case is altogether free from difficulty.

LORD PRESIDENT — The decision your Lordships have come to is, I think, convenient in result, both as regards the present case and also what must be the

numerous class of cases relating to deposits in bank. I have little doubt, also, that it is sound in principle, as your Lordships are versed in this practice. My doubt is raised by the fact that the bank has had no conflicting claims made on it, and, indeed, the counsel for the reclaimers emphasised as a point in his favour that no claim on the bank was possible but one, viz., the claim of the holders of the deposit jointly. Now, I had thought that, whether made in one form or another, there must be conflicting claims on the holder of the fund, and that it would not do to support a multiplepoinding by showing that in the sequel, after the holder had paid, a dispute would arise. In other words, it had seemed to me that while the fund is the money, the competency of the multiplepoinding was to be determined, not by the identity of the fund, but by the hands in which the fund is at the time of the action. The other view would seem to ignore the difference between a debtor and a debtor's debtor, which I thought was essential in these questions. All this, however, is formal and technical, and I do not dissent from the judgment proposed.

The Court recalled the interlocutor reclaimed against, and remitted to the Lord Ordinary to proceed.

Counsel for the Real Raiser—D. F. Asher, Q.C.—Clyde. Agents—Menzies, Black, & Menzies, W.S.

Counsel for the Defenders—Shaw, Q.C.—Cullen. Agent—Marcus J. Brown, S.S.C.

Tuesday, November 30.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

FAIRBAIRN *v.* SHEPHERD'S TRUSTEES.

Domicile—Acquisition of Domicile—Public Servant—Double Residence.

S., whose domicile of origin was English, obtained an appointment in the General Post Office at Edinburgh early in life, and took up his residence there in 1845. He retired on a pension in 1878, and thereafter continued to reside in Scotland till his death in 1895. S. was owner of a small property in Westmoreland, which had been in his family for a long period. The greater part of this property he kept in his own hands, and spent his yearly holiday there while in the service of the Post Office. After his retirement from the Post Office his visits were more frequent, but he never made it his home, and allowed the house to be occupied by his relatives. He always regarded his Westmoreland connection and his property there with pride and affection.

In 1858 S. married a Scotswoman, and by the terms of his marriage-contract he assumed that the rights of his wife and children at his death would be regulated in accordance with Scotch law.

In 1863 a daughter, B, was born of the marriage. *Held* (*aff.* Lord Kyllachy) that at that date S. had lost his domicile of origin, and had acquired a domicile in Scotland, and that B's domicile of origin consequently was Scottish.

Observed (by the Lord President) as regards the acquisition of a a domicile different from that of origin, "that in the case of a public servant, just as in the case of professional men or traders, the nature, or the tenure, or the prospects of the occupation, form only an element of evidence stronger or weaker in the question of intention."

Domicile—Acquisition of Domicile—Proof.

B, whose domicile of origin was Scotch, survived her father, who died in 1895, for fourteen months, during which period she resided in England, where she had taken a house for three years. At the same time she entertained the idea of building a house in Edinburgh, and employed an architect to prepare plans. During the period of her survivance B was suffering from consumption, and was in a weak and nervous condition. Her views as to a choice of a home, as expressed to her relatives, were inconsistent and changeable.

Held (*aff.* Lord Kyllachy) that she had not lost her domicile of origin.

Expenses—Trust-Estate—Action by Legatees with Conflicting Interests—Expenses of Unsuccessful Party.

An action contested by two sets of legatees with conflicting interests for the purpose of ascertaining the validity of a testamentary trust-deed, was watched on behalf of the trustees administering the trust in question, and by the *curator ad litem* appointed to certain pupil children with a beneficial interest in the estate. No part, however, was taken by them in the conduct of the case. The unsuccessful parties moved for expenses out of the estate on the ground that it had been necessary to raise the question, and that the children, whose curator opposed the motion, had greatly benefited by the decision given.

The Court *refused* the motion.

Miss Jessie Shepherd, daughter of the late John Shepherd, sometime an official in the General Post Office, Edinburgh, died in Penrith on 17th May 1896. She left a trust-disposition and settlement, which was executed in Scotland in the Scottish form, by which she conveyed her whole estate to trustees. She directed her trustees, *inter alia*, to pay the following legacies:—"Five hundred pounds to RACHEL WILSON, Domestic Servant in my employment, for her devoted services to our family for a number of years, and to my dear friend and 'sister in deed if not in word,' JEANETTE