to exclude its being used for any other purpose than the consumption of his own house of Ballogie. I entirely concur with the opinion of Lord M'Laren, and with the Lord Ordinary's interlocutor.

LORD ADAM concurred.

The LORD PRESIDENT was absent.

The Court adhered.

Counsel for the Pursuers—H. Johnston—W. Campbell. Agents—Henry & Scott, W.S.

Counsel for the Defenders—Sol.-Gen. Murray, Q.C.—Dundas. Agents—Auld & Macdonald, W.S.

Thursday, March 5.

FIRST DIVISION.

[Lord Moncreiff, Ordinary.

MOUNSEY (DUNN'S TRUSTEE) *v.* HARDY AND OTHERS.

Proof—Loan—Writ of Debtor—Parole Evidence—Writ of Executor—Delivery—Cheque.

Documents insufficient to prove a contract of loan are insufficient to let in parole evidence of the loan; for parole evidence is not admissible except for the purpose of establishing facts extrinsic to the writing, so as to enable a creditor to prove the loan, not by the parole evidence itself, but by his debtor's writ. *Laidlaw* v. *Shaw*, March 5, 1886, 13 R. 724, *distinguished*; *Williamson* v. *Allan*, May 29, 1882, 9 R. 859, *explained* and *approved*.

In a multiplepoinding raised for the purpose of distributing the estate of a deceased testator, a claimant averred that she had "from time to time made loans of money to him, several of which were of small amount," and that in 1865 she advanced him on loan a sum of £200, the total amount of the alleged loans being £390. In support of her averments the claimant produced (1) a cheque for £200 drawn by her in 1865 in favour of deceased, marked paid by the bank, but not endorsed by any payee; (2) an affidavit and schedule by the executrix of the deceased for return of inventory duty, which bore that at his death there had been outstanding, *inter alia*, a debt of £200 due to the claimant, which the executrix had paid; (3) a probative minute of agreement between the executrix and a son of the deceased, whereby the latter agreed to take over the stock and plenishing of a farm for a certain sum, less the amount of certain debts due by the trust estate which he undertook to pay. To this minute was appended a state of the trust funds, showing, in addition to the foresaid debts, a debt due to the claimant of £390. The state was signed by the parties to the agreement, and tested, and a docquet was added to the minute and state, signed by the testator's children, beneficiaries under the settlement, approving of the transaction recorded in the minute, and approving and holding as correct the state of the trust funds.

Held (*rev.* judgment of Lord Moncreiff, Ordinary, who had allowed a proof) that the claim must be repelled on the grounds (1) that the cheque afforded no evidence that the claimant's money had been drawn by the deceased, (2) that the affidavit was not evidence of the existence any more than it would have been evidence of the payment of the debt, (3) that the minute with accompanying state and docquet not being obligatory in itself, and not having been delivered to the claimant, was ineffectual to prove the debt; and therefore (4) that the principle above stated applied. *Duncan's Trustees* v. *Shand*, January 7, 1873, 11 Macph. 254, *approved*.

Observed (*per* Lord Kinnear) that even if the third document produced had purported to be an admission of debt by the executrix addressed to the claimant, and put into her hands to be held as her document, it would not be binding on the trust estate unless and in so far as the executrix was beneficially interested therein. *Briggs* v. *Swan's Executors*, January 24, 1854, 16 D. 385, and *M'Calman* v. *M'Arthur*, February 24, 1864, 2 Macph. 678, *explained* and *approved*.

By trust-disposition and settlement Thomas Dunn, who died in 1865, gave and disponed to and in favour of certain trustees his whole means and estate for certain trust purposes.

These purposes were the payment to his widow of the free income of his whole estate, and upon her death the division of his estate among his children in equal shares. The testator was survived by his wife and eight children.

On the death of the widow, who was the sole surviving trustee of her husband, in 1893, the pursuer and real raiser of the present action was appointed trustee by the Court. The trust estate when realised amounted to £1193, 4s., and constituted the fund *in medio*.

Certain questions having arisen with regard to the distribution of the trust estate, the trustee raised an action of multiplepoinding to determine the rights of the several claimants.

A claim was lodged among others for Mrs Marion Brodie or Tait, formerly Mrs Smith, who averred—"(Cond. 2) The claimant Mrs Tait was the sister of the late Mrs Agnes Brodie or Dunn, wife and afterwards widow of the truster, and was on friendly terms with the truster Thomas Dunn during his life. She from time to time made loans of money from her separate estate to the truster, several of which were of small amount; but in particular, on or

about 1st February 1865, she advanced him on loan a sum of £200, as is instructed by her cheque of that date in his favour, which is herewith produced. The total amount of the advances made by the claimant to the truster due at the date of his death, including said sum of £200, but exclusive of interest, was £390. (Cond. 3) No part of said debt of £390, and no interest thereon, has been paid to the claimant. During the lifetime of the said Mrs Agnes Brodie or Dunn, and her enjoyment of the liferent of the deceased's estate, the claimant, out of regard for her sister Mrs Dunn, abstained from enforcing her claims to principal and interest. These claims were, however, all along well known to and acknowledged by Mrs Dunn and the family of the deceased. In particular, these claims were acknowledged by Mrs Dunn as the only acting trustee under the settlement of Thomas Dunn, the truster, and by the truster's son Robert Dunn, by the minute of agreement dated 31st March 1869, between Mrs Dunn as trustee foresaid and the said Robert Dunn, to which reference is made in article 4 of the condescendence annexed to the summons. There was annexed to the said minute of agreement, and signed as relative thereto by Mrs Dunn, as trustee foresaid, and by Robert Dunn, a state of the trust funds falling under the trust of the said Thomas Dunn, and among the outstanding debts due by the trust there is entered in said state the said capital sum of £390 as a debt due to the present claimant. Further, the said state of trust funds has appended thereto a docquet signed by five of the truster's children, namely, the defenders John Dunn, Thomas Dunn, Marion Dunn, now Mrs Hardy, Rachel Dunn, now Mrs Shaw, and Agnes Dunn, now Mrs Renton, whereby the said five children approved of the said minute of agreement, and also approved of and held as correct, and duly vouched the said state of trust funds, including the debt due to the claimant. The said debt was also known to and acknowledged by the other two children of the truster, viz., William Dunn and Jean Dunn, now Mrs Glover, who did not subscribe the docquet in consequence of their being under age at the date thereof. The claimant's claim is thus instructed and proved by the writ of the deceased's trustee and legal representative, and also by the writ of six out of the eight parties beneficially interested in the estate of the deceased Thomas Dunn. No sum, either of principal or interest, has been paid to the claimant to account of the said debt by any of the said parties, and the claimant has never had any intromissions with any part of the trust-estate."

The claimant accordingly claimed to be ranked and preferred *primo loco* on the fund *in medio* to the extent of £390 and interest thereon, and pleaded—"(1) The principal sum claimed by the claimant having been advanced on loan by her to the truster, and the said sum being still due and resting-owing, and no interest having been paid thereon since the truster's death, the claimant is entitled to be ranked and preferred in terms of her claim. (2) The claimant is entitled to be ranked and preferred as aforesaid, in terms of her claim, in respect that the same is proved by the writ of the trustee and legal representative of the truster, and also by the writ of the parties beneficially interested in the trust-estate (3) Alternatively, in respect of the written adminicles founded on, the claimant is entitled to a parole proof of the validity of her claim."

The minute of agreement above referred to was one between Mrs Dunn, the widow of the testator, and Robert Dunn, his son, who had succeeded his father in the tenancy of a certain farm, whereby the said Robert Dunn took over the crop, stocking, &c., of the farm at a valuation of £1491, under deduction of £718, which he undertook to pay in discharge of debts due from the trust-estate.

In addition to the aforesaid minute, the state of funds of the testator's trust-estate, both duly tested, and the docquet signed by six out of eight of the testator's children, which was not tested, all referred to in the condescendence above quoted, Mrs Tait produced the cheque drawn by her in 1865 on the Union Bank in favour of the testator or bearer for £200, marked paid by the bank but without any indorsation, and an excerpt from an affidavit and schedule for return of inventory-duty, showing among debts due by the deceased at his death and actually paid by the executor—"Voucher No. 25.—Mrs Margaret Smith, £200."

The other claimants, being the children of the testator, the marriage-contract trustees of his son John Dunn, the trustee on the sequestrated estate of John Dunn, and the assignee of another son, Robert Dunn, concurred in maintaining that Mrs Tait's claim was wholly unfounded. They averred, *inter alia*—"The alleged debt to Mrs Tait being for loans which she is said to have made to the deceased, can only be proved by writ, and no sufficient writ is produced by her to establish constitution and resting-owing of the alleged debt." They pleaded—"The constitution and resting-owing of the alleged debt in respect of which Mrs Tait claims can only be proved *scripto*."

On 19th December 1895 the Lord Ordinary (MONCREIFF) allowed Mrs Tait a proof of her averments, and to two other claimants a conjunct probation.

Opinion.—"The claimant Mrs Tait (formerly Mrs Smith) was the sister-in-law of the truster Thomas Dunn, being the sister of his wife Mrs Agnes Brodie or Dunn. Thomas Dunn died on 2nd March 1865, and Mrs Tait avers that at the date of his death he was due her £390, being the amount of various advances in loan made by her to him. The truster's widow died on 28th October 1893. During the interval which elapsed between the death of Mrs Dunn's husband and that of Mrs Dunn herself, Mrs Tait did not claim payment of the debt, principal or interest, which she now alleges to be due. She now, however, claims payment out of the fund *in medio* of the principal sum of £390, with interest from the date of the truster's death.

"As a general rule loan must be proved by the writ or oath of the debtor. Writ there must be, but if writ under the hand of the debtor is produced which *prima facie* bears to be an acknowledgment of the debt, but which is not in itself conclusive, or which depends for its effect upon circumstances which require to be ascertained, the rule requiring writ is held to be satisfied and parole evidence is let in to set up the writing and complete the proof.

"Mrs Tait produces a cheque for £200, dated 1st February 1865, granted by herself to the truster, which she alleges instructs a loan of £200 made by her to him on that date. The cheque, taken by itself, simply instructs the fact that money passed. *Haldane* v. *Speirs*, 10 Macph. 537, has decided that it cannot be regarded as the writ of the payee to the effect of proving loan; and that parole evidence is incompetent to prove *quo animo* it was granted. I do not say that if a general proof is allowed the granting of the cheque is of absolutely no importance, but certainly by itself, apart from other writing, it does not instruct loan.

"The writing, however, which is relied on is No. 24 of process, which contains, it is maintained, an acknowledgment of an outstanding debt of £390 due to the claimant. It is dated in 1869, and is under the hand of Mrs Dunn, who was then the sole trustee and executrix of the alleged debtor. The entry is not a casual jotting; it was made in connection with a formal family transaction, and bears to have been signed before witnesses by Mrs Dunn. It appears from the minute of agreement that in 1869 Robert Dunn, one of the truster's sons, having obtained for himself a lease of a farm, of which his father was tenant at the date of his death, purchased from Mrs Dunn, as sole acting trustee, the stock, cropping, and implements upon the farm at a valuation of £1491, 18s. Of this sum it was arranged that he should pay the trustee £773, 9s. 11½d., and become responsible for and pay accounts payable from the trust-estate amounting to £718, 8s. 0½d. Appended to the agreement is a state of the trust-funds as at Martinmas 1868 signed by the widow, in which, among the 'outstanding debts' is entered—'2. Sum of debt due to Mrs Margaret Smith £390.' (I understand that there is no dispute that by 'Mrs Smith' the claimant is meant.) Then follows a schedule of the accounts paid or to be paid by Mr Robert Dunn, and the whole concludes with a docquet signed by five of the truster's children, in the following terms:—'We, the undersigned children of Mr Thomas Dunn, approve of the arrangement for conveyance of crop, stocking, and implements mentioned in the foregoing minute of agreement, being satisfied that the same is more to advantage than a sale of those by public roup, and we also approve of and hold as correct, and duly vouched, state of the trust-funds of our father as at Martinmas 1868 hereto prefixed.'

"Now, this is not an acknowledgment made direct to the alleged creditor—but that is not essential. An entry in the debtor's books, if sufficiently specific, is enough even if the creditor was ignorant of the existence of the entry until he recovered it under a diligence. In the case of *Briggs* v. *Swan's Executors*, in 16 D. 385, an illustration will be found of the effect attributed to a document of this kind. The question there was not one of loan, but whether a debt had been cut off by the long negative prescription. It was held that certain states prepared for and docquetted by the executors, and an inventory given up to the Stamp Office, in which the debts in question was entered as due, were sufficient to preserve them from the negative prescription. In that case a proof was allowed of the circumstances connected with the preparation and signing of the states. On consideration of the proof it was held, as I have stated, that the debts were saved from prescription.

"Again, in the case of *Williamson* v. *Allan*, 9 R. 859 (for the purpose of establishing loan) a proof was allowed to set up an I O U, which was open to the objection that, although it bore the date of 22nd May 1876, it was really granted in April 1880, by which time the granter was insolvent, although the document was signed more than sixty days before his bankruptcy. The sum also in the I O U was incorrect. Therefore taken by itself, the I O U, although *ex facie* a document of debt in the creditor's possession, was utterly insufficient to instruct loan. But parole proof was allowed of the circumstances in which the I O U was granted, and the alleged lender and the granter of the I O U were both examined on oath. On a consideration of the evidence the creditor was held to have established loan to the extent of £1554, 17s. 2d. Lord Kinnear remitted to the trustee to rank him accordingly; and the First Division of the Court adhered to that interlocutor with a slight variation.

"In the present case I think that the writing founded on is *prima facie* a sufficient acknowledgment of debt to let in parole proof. The other claimants have given no explanation as to how the entry which I have quoted came to be made. I therefore allow the claimant Mrs Tait a proof of her averments. The main object of that proof is to ascertain the circumstances in which the entry founded on was made; and the effect to be given to the writing may depend on the evidence adduced on the one side or the other; but I may add, to prevent misunderstanding, that I do not intend to exclude the evidence of the claimant herself."

The claimants Mrs Hardy and others, children of the testator (four of those who signed, and the two who did not sign the docquet), reclaimed, and argued—There was no writ produced by the claimant Mrs Tait sufficient to prove the constitution of the debt. (1) With regard to the cheque, that in itself was clearly not sufficient to entitle her to a proof—*Haldane* v. *Speirs*, March 7, 1872, 10 Macph. 537. (2) As regards the other documents, the minute of agreement had never been delivered, and the claimant did not even profess to be a party to it. Delivery was necessary—*Duncan's Trustees*

v. *Shand*, January 7, 1873, 11 Macph. 254. *Briggs* v. *Swan's Executors*, January 24, 1854, 16 D. 385, was quite special, and totally distinct from the present case. The party to whose oath the constitution and resting-owing of the debt might be referred was not the trustee, but the beneficiary—*Ker*, M. 12,478; *Eccles*, M. 16,270; *Stewart* v. *Syme*, December 12, 1815, F.C.; *Farquhar* v. *Farquhar*, February 23, 1886, 13 R. 596. No doubt the beneficiaries had signed the docquet, but that was only binding between them and the executrix, and could not be founded on by a creditor. Besides, the docquet founded on was not probative, and therefore could not be looked at for any purpose—*Alexander* v. *Alexander*, February 26, 1830, 8 S. 602; *Miller* v. *Farquharson*, May 29, 1835, 13 S. 838; *Hamilton's Executors* v. *Struthers*, December 2, 1858, 21 D. 51, *per* Lord Curriehill, p. 60; *Bowe & Christie* v. *Hutchison*, March 19, 1868, 6 Macph. 642, *per* Lord Deas, p. 646; *M'Adie, &c.* v. *M'Adie's Executrix*, March 9, 1883, 10 R. 741. The only case decided to the contrary was *Bryan* v. *Butters Brothers & Company*, February 23, 1892, 19 R. 490, which was not well decided, and where the opinion of Lord Young, who dissented, followed precisely the same line of reasoning as Lord Corehouse in *Miller*. As for the state of funds, the books of the debtor himself would not have been sufficient to instruct the loan; how then could the state do so?—*Waddel* v. *Waddel*, 1790, 3 Pat. App. 188; *Wink* v. *Spiers*, March 23, 1868, 6 Macph. 657. The document founded on must be in the hands of the creditor.

Argued for the claimant Mrs Tait—It was quite true that there must be written adminicle of proof. But if there was such adminicle, parole proof would be allowed, and the two combined might instruct the debt—*Williamson* v. *Allan*, May 29, 1882, 9 R. 859. No doubt if a party rested his case solely on a document, it must be holograph or tested; but here the question was with reference to the docquet, whether a document neither holograph nor tested might not be enough to justify the admission of parole evidence. That question had been decided in the affirmative in *Bryan, ut supra*. As regards the nature of the other documents, there was a complete state of Mr Dunn's funds signed by the trustee. [*Per* Lord Kinnear—But can a trustee's or executor's writing in such circumstances be better than the parole evidence which he will give?—See *Farquhar, ut supra, per* Lord Shand, p. 598.] The case of *Briggs, ut supra*, showed that executors were the proper parties to acknowledge debts of a deceased testator. Entries in the account books of the debtor had been held sufficient, though they were written by different hands — *Lawrie* v. *Drummond*, M. 12,622; *Purveyance* v. *Cunningham*, M. 12,623; Ersk. Inst. iv. 2, 4. It was not necessary that the document should pass from debtor to creditor—*Gordon* v. *Glendonwyn*, February 23, 1838, 16 S. 645. A writ of the creditor found in the debtor's possession had been held to be writ of the debtor — *Wood* v. *Howden*, February 7, 1843, 5 D. 507. Among the writings which had been held sufficient to establish loan and the like obligations were the signature of the debtor in his creditor's bank passbook—*Fraser* v. *Bruce*, November 25, 1857, 20 D. 115; a schedule of debts given up by an executor to the Inland Revenue — *M'Calman* v. *M'Arthur*, February 24, 1864, 2 Macph. 678; letters from the creditor to the debtor, and entries in the debtor's private account book—*Thomson* v. *Lindsay*, October 28, 1873, 1 R. 65; a letter from the debtor's agent to the creditor—*Laidlaw* v. *Shaw*, March 5, 1886, 13 R. 724. A "fitted account" was expressly said by Erskine to be an exception to the general rule as to probative writings (Inst. iii. 2, 24). The case of *Ross* v. *Fidler*, November 1809, F.C., referred to with approval by the Lord President in *Haldane, ut supra*, was a direct authority in the present case, to the effect that parole proof was admissible. The case of *Wink, ut supra*, merely illustrated the limitations of the doctrine.

At advising—

Lord Kinnear—The question we have to consider is whether a proof at large should be allowed for the purpose of establishing the case alleged by the claimant Mrs Tait. The claim is for repayment of money lent to the testator, who died in March 1863, and the averment in support of it is that the claimant "from time to time made loans of money to him, several of which were of small amount," and "on or about the 1st of February 1865 she advanced him on loan a sum of £200, as is instructed by her cheque of that date in his favour," and finally that the total amount of her loans at the date of his death was £390. Except as regards the sum contained in the cheque of 1st February, there is no statement of the specific amount of any particular loan, or of the dates when any of the loans were made. The claimant gives no detail in support or in explanation of her case except what I have quoted; and it is this bare averment that she lent moneys to the deceased that the Lord Ordinary has remitted to proof. The claimant's counsel did not dispute the general rule of law, which, indeed, is too well established to admit of discussion, that a loan of money can only be proved by the writ or by the oath on reference of the alleged borrower. But he maintains that he has produced certain writings which are sufficient to satisfy the rule, either as being in themselves evidence of the loan, or as raising a *prima facie* case which may be completed by parole testimony.

The first of these documents is the cheque of 1st February 1863, and I agree with the Lord Ordinary that this is not a writ of the testator which is sufficient either to prove a debt or to displace the general rule of law so as to let in parole proof. If the cheque had been endorsed by the alleged borrower, and so had afforded evidence under his hand that he had drawn the lender's money from the bank by her authority, the case of *Haldane* v. *Speirs* would have been directly

in point. But it is payable to bearer, and it is not endorsed by any payee. It bears no signature except that of the drawer, and therefore it affords no evidence whatever that the claimant's money was drawn by the testator, or that the cheque ever came into his hands. It is in no sense the borrower's writ, and it does not even raise the question on which the Court was divided in *Haldane* v. *Speirs*.

The other documents are of a different description. They are not writs of the borrower himself; but they are writings under the hand of his testamentary trustees which are said to bind the trust-estate. The first is an affidavit in support of a claim for return of inventory duty, in which it is deponed that the executor had actually paid debts, amounting to £1128, due and owing by the deceased at the time of his death, and payable out of his personal estate; and one of the debts so paid is said to be a sum of £200 due to the claimant. If the loan had been otherwise established this would not have been evidence to prove payment, but just as little is it evidence of the debt. So far as it goes it is against the claim.

The second document on which the claimant's counsel mainly relied is a note of the debts of the trust-estate outstanding at Martinmas 1868, which includes a "sum on debt due to Mrs Margaret Smith, £390." This list of debts is appended to a minute of agreement between Robert Dunn, one of the sons of the testator, and his widow, who was one of his trustees, whereby the son, who had obtained a lease of certain farms of which his father had been tenant until his death, agrees to take over the crop, stock, and implements upon the farms, and to pay to the trustee the sum of £1491, 18s., as fixed by certain referees, under deduction of certain "sums payable from the trust-estate, out of proceeds from the farms for crop 1868, paid or to be paid by him, and amounting in all to £718" odds. This agreement is a probative writ, being executed by the parties before witnesses and duly attested; and there is appended to it a state of the trust funds, showing the assets and outstanding debts, and a schedule of accounts, showing the sums paid or to be paid by Robert Dunn in terms of the agreement. The alleged debt to Mrs Smith is not one of these sums, and therefore it forms no part of the subject-matter of the agreement. But it is entered in the list of outstanding debts, and that as well as the other lists I have mentioned is signed by the two parties and by witnesses to the agreement. There follows a docquet signed by five of the testator's children, who are said to have been of age at the time, by which they "approve of the arrangement for the conveyance to Robert of the stock, crop, and implements mentioned in the agreement, being satisfied that the same was more to advantage than a sale by public roup, and also approve of and hold as correct and duly vouched prefixed state of the trust funds of their father as at Martinmas 1868."

It is obvious on the face of it that the main purpose of this document was to embody the agreement for the sale of the crops and farm stock and implements to the testator's son, and to preserve evidence that it had been made with the assent of such of the beneficiaries as had attained majority. But incidentally it contains a state of trust funds signed by the widow and certain of the children in which the existence of a debt of £390 to the claimant is said to be acknowledged. The claimant, however, was no party to the transaction. It is not alleged that the document was delivered or exhibited to her, or that she knew anything about it. So far as the children are concerned, it is not a probative writ, because their signatures to the docquet are not attested. But assuming it to be sufficiently proved, it is nothing more than a discharge to the mother, by which as in a question with her they agree to treat certain claims as duly vouched. The signature of such a docquet may be effectual to preclude the beneficiaries who have signed it, from challenging payments which may have been made by the executrix. But it did not oblige her to admit claims which were not vouched, nor did it relieve her or her co-trustees of their duty to see that debts were well constituted, before paying them out of the trust funds. Accordingly, the claimant's counsel said that the strength of his case did not depend upon the docquet signed by the beneficiaries, but upon the admission of the acting trustee and executrix. But the supposed admission of the executrix is just as ineffectual to prove a debt against the estate as that of the beneficiaries, and for the same reasons. The list of debts is not a writ on which the claimant had any right of interest. Even if it had purported to be an admission of debt by the widow, addressed to the claimant, and put into her hands as an acknowledgment to be held by her as her document, it does not follow that it would have been binding on the present trustee. The cases which were cited to show that an executor's acknowledgment is sufficient to bind the trust estate are really authorities to the contrary. In *Swan* v. *Briggs* it was held that although executors are entitled, as an ordinary act of administration, to grant acknowledgments which will prevent prescription running against a debt that is truly due, they can go no further, and therefore, that as the writ of the executor is not the writ of the debtor, it will not prove the debt, so that if they go on to pay without sufficient evidence, the payment may be disallowed on an accounting with the parties really interested in the executory estate. In *M'Calman* v. *M'Arthur* an improbative writing by the deceased was found to have been homologated by his executor, but the executor was the principal beneficiary and trustee for his own behoof, and the Lord President pointed out that he might be liable to other beneficiaries if the debt was not truly due. But it is unnecessary to consider what might have been the effect of an acknow-

ledgment delivered to the claimant, for the list of debts in question is not an obligatory document, nor was it delivered so as to enable the claimant to proceed upon it against the trust-estate. For whatever purpose it was drawn up, it remained the private document of the trustee and beneficiaries. The observations of Lord Neaves in *Duncan* v. *Shand* seem to me to be in point when he says that a written acknowledgment of the receipt of money will not infer a loan or a debt unless the writing has been delivered to the creditor. His Lordship says—"The doctrine as repeatedly laid down is that he who gives another a document acknowledging the receipt of money, without qualification or explanation, as a chirographum to be preserved against him, infers an obligation to repay, and this obligation arises not so much from the document itself as from its possession by the other party. That is the case of *Ross* v. *Fidler* and a whole series of decisions."

If the documents are insufficient to prove the alleged loan, I am unable to see upon what grounds they should be held sufficient to let in parole evidence. The rule is that loans cannot be proved except by the writ of the borrower. It is quite consistent with the rule to admit parole evidence of facts extrinsic to the writing, in order to prove that it is in truth and in law the borrower's writ. It may be necessary and it is perfectly competent to prove handwriting or to prove delivery, or it may be to prove the authority of an agent. There may be other purposes which might be figured similar to these. But parole evidence is not admissible except for the purpose of enabling the creditor to prove the loan, not by the parole evidence itself but by his debtor's writ. It cannot be admitted to prove the essential facts which go to constitute loan without violating the rule of loan. Now, what are the facts which it is proposed to prove by parole? There is no averment whatever except that the claimant from time to time made loans to the deceased. If that is to be remitted to proof, the case must turn not upon the purport and effect of writings but entirely upon the parole evidence. It would be contrary to the rule of law to allow a loan to be proved partly by the writing and partly by the acts and words of the alleged borrowers. But in the present case there is no writing of the testator which could be treated as an item of evidence if a parole proof were allowable.

I do not think it necessary to examine in detail the cases which were cited to justify a departure from the rule. In some of these cases it may have been doubtful whether the writing founded on was sufficient, or whether it was the writ of the borrower. But in all the result depended upon its being held that the loan was proved *scripto*. The case of *Laidlaw* v. *Shaw* is an apparent exception. But that was a case of intromission, to which the rule is inapplicable, and not of the direct loan of money. The money contained in a deposit-receipt belonging to one sister was uplifted by her agent and applied in payment of debts due by another. It was not thought doubtful that this could be proved by the testimony of the agent. The case of *Williamson* v. *Allan* on the other hand is no exception to the rule. A loan was proved by an I O U. But that is an obligatory document which requires no evidence to support it. Parole evidence was led not to set up the document or to supplement its deficiencies, but because it was alleged to have been granted by a bankrupt in fraud of creditors. It was found to be an honest document, and that being established the debt was held to be proved by the writ of the borrower, and not by the parole evidence.

For these reasons I am of opinion that the claimant's case can only be proved by the writ of the deceased, and that as no such writ has been produced the claim must be repelled.

The LORD PRESIDENT and LORD ADAM concurred.

The LORD PRESIDENT intimated that LORD M'LAREN, who was not present at the advising, concurred.

The Court recalled the interlocutor of the Lord Ordinary and repelled the claim of Mrs Tait.

Counsel for Pursuer and Real Raiser, and for Claimants and Reclaimers—Salvesen—Chree. Agent—Keith R. Maitland, W.S.

Counsel for Claimants John Dunn and his M.-C. Trustees—W. Campbell. Agent—Thomas Liddle, S.S.C.

Counsel for Claimant Mrs Tait—M'Lennan—Gray. Agents — Donaldson & Nisbet, Solicitors.

Counsel for Claimants the Trustee on Sequestrated Estate of John Dunn and Assignee of Robert Dunn—Wilson—Clyde. Agent—Hugh Martin, S.S.C.

Friday, March 13.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

REID'S TRUSTEES *v.* WATSON'S TRUSTEES.

Landlord and Tenant—Lease—Validity of Lease Granted by Bona fide Possessor without Title—Assignation to True Owner—Homologation.

A lease of minerals, upon which the tenant possessed for upwards of eight years, was granted by a *bona fide* possessor whose title to the lands was afterwards reduced. On the reduction of his title the lessor granted an assignation of existing leases upon the lands in favour of the persons in whom the property was found to be vested, the latter undertaking to guarantee possession to the tenants. In an action