granter, but out of his succession. In all such marriage contract provisions, where there is no trust constituted during the granter's life, and the provision is payable after his death, it is, his Lordship thought, an implied condition that the child shall survive the granter. The same condition is implied in bonds of provision. In this case, failing children, the fund is otherwise destined. The competition here is the same as if it had arisen between the child's nearest agnate and the granter's own heirs. His Lordship therefore thought that this provision had been granted under an implied condition, which had not been fulfilled; but at all events that there was an implied condition that the child should survive the dissolution of the marriage. His Lordship also referred to the case of Thomson *v.* Scougalls, 9th July 1834 (12 S. 910), and 31st August 1835 (2 S. and M'L. 305), as supporting this view.

Lord DEAS—I agree that the question here is whether the fee vested at the birth of the child or at the dissolution of the marriage. The Lord Ordinary introduces a finding which puts the decision on the ground that the child did not survive the granter. I am very clear that that is not the question. Suppose Mr Anderson had survived the spouses, the interest would have continued payable to their children if any had existed and survived. I think the obligation undertaken was in its nature and terms absolute from the date of the contract. In one sense it was a *mortis causa* provision. It was not to be separated from the granter's own funds and separately invested till after his death. But it is only in that limited sense that the provision can be called a *mortis causa* one. It is contained in an *inter vivos* contract. There was to be a trust for the protection of the sum, but the sum was fixed and due from the beginning. If old Mr Anderson had become bankrupt, there would have been a ranking on his estate for the liferent, and also contingently for the fee. But although the obligation was absolute, it might be conditional. I think it was conditional on there being children. Mr Anderson did not undertake to pay the sum unless there was a child; but if there was one, the obligation to pay the fee was as absolute as that to pay the interest. Was it meant, therefore, that he was to pay the sum in the event of there being a child, or in the event of one surviving the dissolution of the marriage? I think the latter was meant. I agree that in the ordinary case provisions for children in a marriage contract mean children in life at the dissolution of the marriage. This rule may be easily affected by showing that the meaning of parties was otherwise. Are there, then, circumstances in this case to take it out of the general rule? The main circumstance is that the interest is payable from the first, and though it is payable to the parents, it is apparently given for the benefit of the children also; for, so long as the parents were to live in family with Mr Anderson, they were to get no interest. But that circumstance is weakened by the fact that the *jus mariti* of the husband is excluded from the interest; and I don't think it is sufficient to take the provision here out of the ordinary rule.

Lord ARDMILLAN differed. He thought it of the greatest importance to keep in view the character of this deed. It was not a testamentary deed but an onerous marriage contract. Mr Anderson might have bequeathed the sum, in which case survivance would have been necessary, in order to taking, but he did not do so; he bound himself by an onerous deed, in which the liferent was given to the parents and the fee to the children. There was no trust, and the principle of law was that in such cases there was a fiduciary fee in the parents for the children from the date of the marriage. After careful consideration of all the authorities, his Lordship was of opinion that in this case the *jus crediti* in the fee which the parents held fiduciarily for the child or children opened at the birth of William Grant in 1831, and excluded the ultimate destination. His Lordship referred to the cases of Maxwell *v.* Wylie, 25th May 1837 (15 S. 1005); Watson *v.* Marjoribanks, 17th February 1837 (15 S. 586); Baillie *v.* Seton, 16th December 1853 (16 D. 216); Beattie's Trustee, *ut supra;* and Romanes *v.* Riddell, 13th January 1865 (3 Macp. 348). He thought the construction of this deed now adopted by the Court was in most cases most reasonable and proper; but it involved this, that if William Grant, the child, had lived till 1861, when he would have been thirty years of age, and then died, an assignation of the provision in his own marriage contract would not have been valid. The clause as to interest was opposed to this, and in cases as to the vesting of family provisions, an obligation to pay interest is always of the greatest importance (Kennedy *v.* Crawford, 20th July 1841, 3 D. 1266).

OUTER HOUSE.

(Before Lord Jerviswoode.)

RICHARDS *v.* CUTHBERT.

Title to Sue—I O U—Delivery—Assignation—Bankrupt. Held (diss Lord Jerviswoode) that a person had no title to sue for payment of an I O U, bearing a specific address, who alleged (1) that the creditor in the document had handed it over to her in payment of a debt; and (2) that he had assigned it to her after the sequestration of his estates.

Counsel for Pursuer—Mr C. T. Couper and Mr A. C. Lawrie. Agent—Mr R. P. Stevenson, S.S.C.

Counsel for Defender—Mr John Burnet. Agent—Mr William Mason, S.S.C.

In this case the pursuer sues for payment of £100 contained in an I O U granted by the defender to his brother William Cuthbert in the year 1855. She alleges that William handed it over to her in 1857 in payment of money he owed to her, and also that the document had been assigned to her by him by a written assignation in 1863. The defender pleaded that the delivery of the I O U in 1857 gave the pursuer no title to sue for payment of it, and that when the assignation was granted in 1863 William Cuthbert had been divested of all right to the document by the sequestration of his estates, which took place in 1858. The Lord Ordinary has dismissed the action in respect the pursuer has no title to sue. To his interlocutor is appended the following

"*Note*—The Lord Ordinary is not altogether free from a feeling that the pursuer may have been hardly dealt with as respects her claim against the bankrupt, in respect of which it is alleged he delivered the I O U to the pursuer. But it appears to him that as regards the merits of the present action against the defender as the granter of that acknowledgment of debt, the pursuer had no title whatever to sue, as in right of that document, until she obtained an assignation from William Cuthbert, who was named as the creditor therein. It was not in its own character a negotiable instrument, and bore, *ex facie*, a specific address.

"But, further, long before she had obtained any formal title by assignation, Wm. Cuthbert had been sequestrated; and consequently, by force of that process, all right which he had in the I O U had been carried to and vested in the trustee in the sequestration, and he (Wm. Cuthbert) was no longer in a capacity validly to assign the I O U to the pursuer.

"If this be so, the assignation now founded on by the pursuer as a title is inept and ineffectual. It is said, it is true, by the pursuer that the trustee in the sequestration has resigned, and that the bankrupt is discharged; but it is not denied, as the Lord Ordinary understands, that the latter was discharged without a composition, and was therefore not reinvested in his estate; and there is no evidence to show that the process of sequestration is truly at an end, while it is denied that it is so,

"However, therefore, the case might have stood, had the pursuer been able to verify all the statements

made on her behalf, the Lord Ordinary finds himself unable to see grounds on which to give effect to her alleged title. She had no such title, as he thinks, at the date of the assignation by Wm. Cuthbert, because the right to the I O U was then in his trustee and creditors; and if the pursuer cannot show how and when that right has now become effectual to her she must fail in her action."

(Before Lord Kinloch.)

BIRRELLS *v.* ANSTRUTHER AND OTHERS.

Reparation—Relevancy—Consequential Damage. An action of damages for breach of obligation dismissed (per Lord Kinloch) as irrelevant, because (1) the obligation never arose; and (2) the damage alleged was consequential.

Counsel for the Pursuer—Mr Campbell Smith. Agent—Mr James Somerville, S.S.C.

Counsel for the Defenders—Mr Fraser. Agents—H. G. & S. Dickson, W.S.

This was an action of damages brought by the widow and children of the late Rev. Alexander Gibb Birrell, schoolmaster of the parish of Pettinain, for reparation of the injury caused to them by his death, which the pursuers allege to have been occasioned by the defenders, who are the heritors of the parish, not providing him with a suitable house, which they were bound to do by the Acts 43 Geo. III., c. 54, and 24 and 25 Vict., c. 107. On account of the damp and cold of the house acting on his constitution, Mr Birrell's health gave way. In 1857 he was attacked by violent rheumatism, which afterwards set in in his right ankle with such severe effects that his foot had to be amputated. He died in 1864. The pursuers further aver that all the proper steps were taken by Mr Birrell to have his house put into proper condition, but that his request was set aside by the heritors on pretence of its being expressed in such terms as to preclude its being acted upon.

The Lord Ordinary sustained an objection stated by the defenders to the relevancy of the action. In his note his Lordship observed — "The Lord Ordinary dismisses the action on the ground that it is founded on an illegal breach of obligation, when the steps were not taken by the deceased schoolmaster necessary to raise the obligation; and the obligation therefore never arose. Another objection was pleaded against the relevancy of the action—viz., that the damage stated is not direct but consequential damage, which the law does not recognise. The Lord Ordinary is disposed to think that this objection is also well-founded. If a house which a particular individual is bound to keep in repair falls down and injures the inhabitant for want of the repairs stipulated, this may be considered direct damage raising a claim of reparation. But it is a different thing to say that the insufficiency of the house brought on a fit of rheumatism; still more that this rheumatism led to a supervening malady, and that this malady issued in death. And rheumatism, however painful, is in its nature by no means a mortal disease. It would be difficult to trace the death of the schoolmaster to this cause with the certainty which the law requires in every case of reparation."

Friday, Feb. 2.

FIRST DIVISION.

SPINKS *v.* INNES.

Bank Cheque—Mandate—Revocability—Proof—Onus Probandi. (1) A bank cheque is a mandate, and irrevocable if given for an onerous cause, but revocable if it is not; (2) A person alleging that a cheque was given to him in payment of a debt must prove his averment; (3) Circumstances in which held (aff. Lord Ormidale) that onerosity had not been proved.

Counsel for Pursuer—The Solicitor General and Mr Pattison. Agents—Messrs J. & W. C. Murray, W.S.

Counsel for Defender—Mr Patton and Mr Gifford. Agents—Messrs Patrick, M'Ewen, & Carment, W.S.

This action was raised by Charles Spinks, turner, Kirkgate, Leith, against John Innes, engineer, residing in Alloa, for payment of £100 contained in a bank cheque or draft, dated 21st April 1864, drawn by the defender on the manager of the City of Glasgow Bank, and payable to the pursuer. It was averred by the pursuer that the cheque was given in payment of money due to him "for advances of money made and services rendered by him to the defender at various times during a long course of years, when the defender was often in pecuniary difficulties, and pressed for money to meet the daily requirements of himself and family, and otherwise embarrassed and in trouble." The defender averred on record that on the Edinburgh Fast Day in April 1864, the pursuer, who knew that the defender had succeeded to a considerable sum of money, came to Alloa to visit him, and that after they had been drinking together for some time, the pursuer proposed that the defender should lend him £100 on the security of his property in Leith, which was already fully burdened. The cheque was therefore written out, but at the time it was done, "and when the arrangement was made for the security to be given for the loan, the defender was intoxicated, and incapable from intoxication of doing any business, or of understanding the nature of the transaction into which the pursuer endeavoured to induce him to enter." Next morning the defender went in search of the pursuer in order to accompany him to Leith to see after the heritable security, when he found he had gone to Glasgow. He therefore telegraphed to the bank there, and payment of the cheque was stopped. No value, he said, was given for the cheque by the pursuer, and it was fraudulently impetrated from the defender in the manner above described.

With the concurrence of parties, the Lord Ordinary (Ormidale) allowed a proof before answer. Thereafter his Lordship found as matter of fact (1) that no value was given by the pursuer to the defender for the cheque; (2) that when the cheque was obtained by the pursuer, the defender was in such a state of intoxication from excessive drinking as to be easily imposed upon and taken advantage of; and (3) that the pursuer, taking advantage of the defender when in that state, fraudulently impetrated the cheque from him. He therefore assoilzied the defender. The pursuer reclaimed, and the Court adhered.

The LORD PRESIDENT said—The question is whether the pursuer is entitled to recover. He does not allege any donation, but says the cheque was given in payment of a debt due to him by the defender. The defender, on the other hand, says in his evidence that he has no recollection of giving the cheque, and is quite oblivious as to what passed at the time; but that next morning when he found out that he had given it he went to the telegraph office and stopped payment. Which of these statements has been made out more satisfactorily? Was there a debt due by the defender to the pursuer, and may it reasonably be inferred that the cheque was given in payment of it? I think the Lord Ordinary has taken the right view. Taking the pursuer's own statement, he has only proved loans of very small sums—a few shillings or so at a time. As to the amount of the pursuer's incapacity at the time, that is somewhat obscure; but certainly there was a great deal of drinking, and no doubt the pursuer was not capable of attending his business as he should have been, and was thus more easily imposed on. Whether or not he was wholly incapable is a point on which the witnesses differ, and which depends on the different criteria on which they form their opinion, but on which I think it unnecessary to enter.

Lord CURRIEHILL—This cheque contains no personal obligation. It is a mandate to the bank to