and the will were found together, and found in a drawer in which three important deeds were discovered, confirming, if it required confirmation, the apparent resolution of the deceased—that after her death the right to recover the loan should be in her legatee.

In reference to the result of the examination generally, I may say that the apparent lateness of the discovery of these two documents is sufficiently accounted for, and the statement in the minute of Sir T. Cuming verified. It appears that a third document, viz., the cheque under which the £2000 was got by Sir James, was not found in the repository but among useless papers; but the view stated by one of your Lordships during the discussion seems sufficient to account for it. A used cheque is not likely to be reclaimed, and though Sir James' name is on the back, that is a mere acknowledgment of the fact of payment to him at the bank, and if it stood alone would not prove a loan. He might have been the mere hand of Mrs L. Cuming; and one employed as a hand only is presumed to have accounted.

I think, as the loan was evidenced by written acknowledgment, that is a case to which the doctrine of *taciturnity* and *mora* can scarcely apply. It is a case to meet which the law of prescription was devised. The opinion of Lord Glenlee, expressed in the report of *Cullen's* case, especially as given in the Jurist, vol. xi, p. 61, is valuable. The case of *Graham* (F.C. and 2 Sh. 594), was decided against the party pleading taciturnity in circumstances much more favourable than the present. There there was a presumption of extinction of payment in that case; here no such case arises. Nothing in the case goes to show that Sir James paid, or that Mrs Cuming received payment; and if Sir James had really paid the debt, the fact would have been easily proved. It is not capable of being seriously maintained that the debt was extinguished by payment.

I have no hesitation in coming to the conclusion that the defence must be repelled as to the principal sum concluded for; whether interest is exigible is not so clear. I have entertained some difficulty, arising from the near relationship of the parties, and the possibility that the aunt might not intend to accumulate such a considerable debt against her nephew, but I feel myself constrained on this point also to repel the defence. In the case of *Thomson* and *Geikie* (March 6, 1861, 23 D. 701), the general law on this subject is stated by the present Lord President, then in the chair of this Division, that an advance by way of loan implies an obligation to pay interest for the money. In that case it was a question whether there was a loan or not; here the money is expressly taken on loan, and that rule applies *a fortiori*.

I think that this exposition of the law is confirmed by the decision of the case of *M'Dowal* of Garthland, where, under circumstances in which it was extremely doubtful if money was sent in a gift or loan, the Court, finding that the transaction was one of loan, gave interest from the period of the monies being received. The executor has a good title to recover these arrears, whether they may be found ultimately to pass by the bequests or to form part of the executry estate.

Up to the date of this lady's death, as no year's interest was forty years due, I consider that she might have claimed payment. The mere fact of its not having been demanded and has not been paid, cannot of itself presume a discharge of the claim. It would require very strong presumption to destroy a positive obligation arising out of a contract or claim evidenced by writing. I hold that there is nothing here to justify such a result. At an earlier period of our law the claim for interest might have possibly met a different fate, not because of presumptions from the absence of demand, but because it might have been held not to be exigible. When we come to the conclusion that it is due *ex lege*, from the very nature of the transaction we cannot hold the claim extinguished on such presumptions.

The result may be considered hard, the amount of accumulated arrears is very large, but by the absence of periodical payments, Sir James' estate has in effect been relieved from compound interest. I therefore concur with the Lord Ordinary, and very much on the grounds on which he has proceeded.

Lord Benholme and Lord Neaves concurred.

Lord Cowan concurred on the first point; and, without dissenting on the second, was inclined to hold, in the circumstances of the case, that it was not contemplated between the parties that interest should be exacted.

Agent for Pursuer—James Dalgleish, W.S.

Agents for Defender—Scott, Moncrieff & Dalgety, W.S.

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*Saturday, May* 30.

## FIRST DIVISION.

### THOMS *v.* THOMS.

(*Ante*, p. 131).

*Compensation—Liquid Document of Debt—Due Time.* Plea of compensation *repelled*, in respect that the document of debt founded on was not liquid. Question as to plea being stated *tempestivè*.

John Thoms, on 18th January 1868, obtained a decree of the Court of Session against the complainer for payment of a sum of £600, with interest and expenses, and, on 17th February, he charged on the decree. On 28th February he obtained warrant for interim execution.

The complainer now suspended, and pleaded compensation. She produced a document which she alleged was holograph of the charger, and which ran thus:—

"*Rumgally*, 21*st January* 1862.—I hereby bind myself or heir to pay, within two years of your death, Five hundred pounds to whom you may direct. (Signed) John Thoms."

"To Alexander Thoms, Esq., of Rumgally."

There was endorsed on this document the following assignation:—

"I, Alexander Thoms of Rumgally, direct John Thoms, granter of the foregoing obligation, or heir, to pay the sum therein mentioned, being Five hundred pounds, to my daughter Robina Thoms, residing with me at Rumgally, or to her executors or assignees, and I assign said sum to her. In witness whereof, these presents, written by Charles Welch, writer, Cupar, are subscribed by me at Rumgally, the eighth day of May One thousand eight hundred and sixty-two years, before these witnesses, the said Charles Welch, and Thomas Lumsden, his servant.

"Charles Welch, *witness*. "A. Thoms."

"Thomas Lumsden, *witness*."

Alexander Thoms died on 15th August 1864. The complainer pleaded compensation in respect of this sum of £500, due to her under these documents, with interest from 15th August 1866, two years after Alexander's death.

The respondent denied that these documents were binding upon him; and explained, that on the 24th August 1866 the complainer raised, in the Sheriff-court at Cupar-Fife, an action against the respondent for payment of the said sum of £500, with interest; that, on 26th December 1866, the respondent put in defences to the said action; and that the complainer has taken no further steps in the said action, except to obtain every three months a renewal order to prevent the case from being dismissed under the Sheriff-Court Scotland Act. It is further explained, that the complainer stated no plea of compensation or retention in the action at the respondent's instance against her above mentioned.

He pleaded—"(3) The alleged claims at the complainer's instance against the respondent not having been pleaded in the action at the respondent's instance against her, or against the petition for interim execution, cannot now be competently insisted in.

"(4) The alleged counter claims at the complainer's instance being illiquid, unconstituted, and denied, compensation or retention in respect thereof is incompetent."

The Lord Ordinary (Ormidale) refused the note of suspension with expenses.

The complainer reclaimed.

Shand for reclaimer.

Solicitor-General (Millar) and Adam, for respondent, were not called on.

At advising—

Lord President—I do not know what your Lordships' view of this case may be, but it appears to me very clear that this is not a liquid document of debt. This document, which is signed by the respondent, the charger, is as follows (*reads*). It is clear that this is not a liquid document of debt, for there is no creditor, and then when you find a creditor set up by this assignation indorsed in the document, that raises a number of considerations which leave me in no surprise that it should be the subject of an action. It might raise some very delicate questions. It has been made the subject of an action in the Sheriff-court of Fife, and that action has been in dependence for two years. It is impossible to assent to the contention of this complainer that this is a liquid document of debt on which compensation may be pleaded either before or after sentence. And this matter is complicated by it being a plea after sentence. My simple ground of judgment is, that this is not a liquid document.

Lord Curriehill concurred in holding that this was not a liquid document of debt, as it neither contained the name of a creditor nor an averment of date.

Lord Deas—I have some difficulty in saying absolutely that this is not a liquid document of debt. It is quite true that the document itself is not, but we must take the probative assignation too, which makes it payable to the lady. Taking these two together, there is nothing to prevent this from being a liquid document, provided it is admitted to be holograph, but the vagueness as to the term of payment. I don't know that this in itself is sufficient to support your Lordships' views. But supposing that matter got over, every liquid document of debt cannot be pleaded in this way against a charge on a bill under decree. Questions may have arisen as to that liquid document, which may prevent it from being used in that summary way. It is impossible to look at the facts without seeing that very important questions have arisen as to whether this document can be enforced; and if we did not know enough to see that, it would be clear that there has been an action to enforce it. And when we see that there has been a litigation for two years, is it possible to say that it is within the category of liquid documents as to which there is no dispute? There may be other serious questions raised. There has been great delay in enforcing this document, and though we were told that the reason for the delay did not appear, I think if we look at the facts we may easily see how it might be expedient not to push on the matter. My only difficulty is as to which, out of so many grounds, our judgment should rest.

Lord Ardmillan thought that this could not be called a liquid document of debt, and therefore concurred with their Lordships. If this had been a proper bill of exchange, he thought there would be some difficulty in holding that it was too late for the complainer to state the plea.

Agents for Complainer—Hill, Reid, & Drummond, W.S.

Agent for Respondent—A. J. Napier, W.S.

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## *Saturday, May* 30.

### A. *v.* B.

*Husband and Wife—Divorce—Desertion*—1573, c. 55. Action of divorce by a wife against her husband on the ground of desertion, *dismissed*, on the ground that the pursuer had failed to prove desertion in the sense of the Statute 1573, c. 55.

A wife brought an action of divorce against her husband on the ground of desertion. It appeared that the parties were married in 1857, and lived together till October or November 1862. At the latter date they were abroad. The wife and children then returned to Scotland, the husband promising to join them in the following spring. The husband did not return, but went to the United States of America, and his friends were unable for a long time to discover where he was. The pursuer alleged that the defender had undutifully and unnaturally, as well as wilfully and maliciously, deserted the pursuer, his spouse, her society, fellowship, and company, and had, from and since the said month of November 1862, withdrawn, absconded, and withheld himself from her. He had contributed nothing towards the maintenance and support of her or her children during all that time, and pleaded that she was entitled to decree of divorce.

The action was undefended. A proof was allowed. Two letters were produced, written by the defender in March 1867, the one to his sister the other to his wife. In these letters the defender lamented his continued absence from his relations, and expressed a hope of being able to do something for them when he had bettered his position. The Lord Ordinary (Jerviswoode) found that the pursuer had failed to prove as matter of fact that the defender had deserted the pursuer in the sense of the Statute 1573, cap. 55, and therefore dismissed the action.