sent meaning, and not according to the meaning which it had some centuries ago, unless the statute expressly says the contrary.

I thus think it safer not to limit the meaning of this statute, although I do not think it at all clear that this action would have been excluded by the old Act.

LORD YOUNG—I have no doubt whatever about the case under consideration. The action was brought before the Sheriff Court in the summary form allowed by recent legislation in cases between £12 and £50 value, and the objection is not to the jurisdiction of the Sheriff Court, but rather of that character with which we used to be familiar in cases where it was objected that the case was not one for summary procedure, but ought to have been the subject of an ordinary action. A doubt occurred to me at an early period of the argument as to whether the High Court of Justiciary is the proper Court to resort to in a case where the subject matter is civil, and I confess, though I am of opinion that the form of appeal is a very suitable and convenient one for the purpose, that but for the concession which counsel for the defence has made in admitting that this is the proper tribunal, I would have had great doubt on the point. I am clearly of opinion, however, that the case is one altogether very suitable for a summary form of procedure, and that the statute relied upon by the appellants is quite applicable. One cannot look to the action before the Sheriff without being compelled to withhold all sympathy from the respondents. It would be difficult to conceive a case more suitable for the summary jurisdiction of the Sheriff, and I cannot understand how any party reasonably well advised could object to such a course being taken. For these reasons, I agree with Lord Neaves that the appeal should be sustained, and that the case should be sent back to be dealt with by the Sheriff in what I conceive to be the proper mode, and the only proper mode—viz., the summary mode contemplated and provided for by the Act in question.

The Court sustained the appeal.

Counsel for the Appellant—Dean of Faculty (Clark), Q.C., and Mair. Agent—D. Turner, S.L.

Counsel for the Respondents—M'Kechnie. Agent—G. M. Wood, S.L.

COURT OF SESSION.

Friday, November 27.

FIRST DIVISION.

[Sheriff Court of Fifeshire.

KERMACK *v.* KERMACK.

Prescription, Long Negative—Interruption—Payment of Interest—Writ—Act 1469, *c.* 28—*Act* 1874, *c.* 54.

It was pleaded that there had been interruption of the long negative prescription by payments of interest upon the debt. *Held* that such payments could only be instructed by writ.

This was an appeal from the Sheriff Court of Fifeshire in an action brought by Misses Elizabeth Kermack and Euphemia Kermack against their brother James Kermack.

The following narrative is taken from the note of the Sheriff (CRICHTON):—"By disposition and settlement dated 18th December 1809, the deceased Charles Kermack, feuar, Ceres, disponed certain subjects belonging to him to his eldest son William Kermack. By the said deed he also disponed certain other subjects belonging to him to his sons John and James Kermack, and these he burdened with payments 'to Elizabeth and Euphemia Kermack, my daughters, equally between them: and in case of one of their deaths without lawful issue, the share of the deceaser to fall into the survivor, of the sum of £500 sterling, payable at the death of the said Barbara Kyd, their mother, if they are major at her death, but if not, payable to them only when they are major,—but said sum is to bear interest from the first term of Whitsunday or Martinmas after their mother's death till the same is payable to them.'

"Mrs Kermack survived her husband, and died in 1831, at which date the Misses Kermack had attained majority.

"The present action is raised at the instance of the said Elizabeth Kermack and Euphemia Kermack against the said James Kermack, for payment of the sum of £250 of principal, being the 'one-half or portion payable by him of the sum of £500 sterling, conceived in favour of the pursuers by disposition and settlement executed by the said Charles Kermack, dated 18th December 1809.' Since the action was raised, the said Euphemia Kermack died, but her trustees and executors have been sisted in her room and place.

"The summons also concludes for a sum of £265 as arrears of interest.

"In defence to the action, it is pleaded that the pursuers have lost their right to the provision in their favour contained in their father's disposition and settlement, in respect that more than forty years have elapsed since it became payable on the death of their mother in 1831. To this it was answered that the running of the prescription had been interrupted by the payment by the defender of interest, as averred in the summons, on 25th November 1845, 25th December 1846, 19th May 1848, and 13th April 1850."

No receipts for the alleged payments of interest were produced.

The Sheriff-Substitute (BEATSON BELL), pronounced the following interlocutor and subjoined note:—

"*Cupar, 5th May* 1874.—The Sheriff-Substitute having heard parties' procurators on the Closed Record, before answer Allows to the pursuers a proof *pro ut de jure* of the averments in their summons as to payment of interest; allows the defender a conjunct probation thereanent; and appoints the case to be enrolled, that a diet of proof may be fixed.

"*Note.*—This is an action for payment of a testamentary provision, and payment is resisted on the ground that as more than forty years have elapsed since the provision became payable, the right to sue for it is absolutely extinguished by the long negative prescription established by the Act 1469, c. 28, in respect no 'document' has been taken on the debt within the forty years. The pursuers reply that payments of interest have been

made as averred by them in their summons, and that this saves the debt from prescribing. The defender answers that averments of such payments are entirely irrelevant, and, no matter whether interest had been regularly paid for forty years, the debt is absolutely extinguished by the lapse of time without document being taken. The Sheriff-Substitute has thought it right to allow a proof before answer. He does not mean to decide whether the payments of interest averred are sufficient or not to elide prescription, but he thinks that the circumstances under which they were made should be established before their effect is considered. Of course, had he come to be of opinion that the defender was right in his contention—that in no circumstances is it of the slightest importance whether interest is paid or not—he would at once have decided the case in his favour, but he is satisfied that, to say the least, the defender puts his case much too high, and that there may be circumstances under which payment of interest will stop the running of the negative prescription. The strict words of the Act do not include payment of interest as a means of interrupting prescription. At the date of the Act the payment of interest was illegal, and it was not till the Reformation that it was legalised, the first Act fixing a legal rate of interest being apparently 1587, c. 52. But very soon after the passing of the Act 1469, the courts began to interpret liberally the phrase 'taking documents,' and any act which clearly implied that the creditor had not abandoned his rights came to be considered equivalent. No express decision was quoted to the Sheriff-substitute in favour of the proposition that paying interest stops prescription, but it is clearly implied in the case of *Nicholson*, 1667, M. 11,233. Mr Erskine does not distinctly lay it down in his text, but a note to one of the earlier editions, quoted by Mr Badenoch Nicholson (3, 7, 39), lays it down 'that a payment of annual rent corresponding to the yearly interest of a particular debt necessarily infers that the capital sum of the debt is due at that period, and of course this being an acknowledgment of the debt must operate as an interruption.' Mr Bell, in his Principles, sec. 616, lays down the same law. It so appears in the 4th edition, revised by himself. In his Commentaries, the parallel passage does not contain the words, 'or by payment of interest,' in the 5th edition, the last revised by the author; so that the Commentaries cannot be quoted as an authority in favour of the proposition. Mr Duff, in his Feudal Conveyancing, says (p. 181) 'prescription is interrupted extrajudicially by partial payments of principal or interest.'

"Of living authors, Mr Mark Napier lays down the law clearly in the same sense, and argues in support of the reasonableness of the rule. Napier, (p. 674).

"In this state of the authorities, the Sheriff-Substitute thinks it vain to contend that in no case is the payment of interest of any relevancy in considering whether prescription has been interrupted. It may not be conclusive, but that payment of interest in certain circumstances will stop the running of prescription the Sheriff-Substitute cannot doubt.

"The next question is, how is such payment to be proved? The defender contends that the proof must be confined to writing. The Sheriff-Substitute is unable to agree with this contention either. If it were sound, the proof of payment would be entirely in the power of the debtor, as the receipt for the interest will naturally be in his hands, and unless he has preserved it, which he was not bound to do, the creditor would be unable ever to prove the payment. In the case where the object of proof is to establish a defence that a sum of money sued for has been paid, the rule undoubtedly is, that payment of money above £100 Scots can be proved only by writing; but here the proof is sought for no such purpose. It is the creditor who is seeking to show that his debt (to the amount of the interest in question) has been paid. In such circumstances the rule is, that proof *pro ut de jure* is allowed. Dickson on Evidence, sec. 844."

On appeal, the Sheriff (CRICHTON) pronounced this interlocutor:—

"*Edinburgh*, 25*th June* 1874.—The Sheriff having heard parties' procurators on the appeal for the defender, and considered the record, adheres to the interlocutor of the Sheriff-Substitute of 5th May 1874; dismisses the said appeal, and remits to the Sheriff-Substitute to proceed with the cause, and reserves all questions of expenses."

In a subjoined Note the Sheriff, after the narrative above quoted, says:—"The first question, therefore, which presents itself for consideration is—Assuming that interest was paid by the defender as alleged, did these payments interrupt the running of the negative prescription? It was very strenuously urged on the part of the defender that they did not; and the argument in support of this view was maintained chiefly on the terms of the statutes 1469, cap. 29, and 1474, cap. 55, which enact, that all creditors by obligation shall follow forth their right, and 'take document' thereupon within the space of forty days; otherwise that the right shall prescribe. The payment of interest, it was argued, could not be said to be the taking document upon the obligation. Undoubtedly there is some plausibility in this argument, but after fully considering the authorities on this point, the Sheriff is of opinion that payment of interest does interrupt the running of the negative prescription. Mr Erskine (b. iii. t. 7, sec. 39) says that partial payments made by the debtor interrupt the long negative prescription; and Professor Bell, in his Commentaries (vol. i. p. 352, M'Laren's edition), says that it may be interrupted by an acknowledgment of the debt, or a partial payment of interest. It was maintained that although a partial payment might interrupt the prescription, a payment of interest would not have this effect. The Sheriff is unable to see any principle for a distinction between a partial payment of the debt and payment of interest. Mr Erskine says, 'Partial payments made by the debtor interrupt the long negative prescription: because that long prescription is grounded on the presumption that a creditor has relinquished his claim, which is plainly elided by his receiving a partial payment.' The Sheriff thinks that the presumption that the creditor has relinquished his claim is equally elided by his receiving payment of interest upon it.

"There are, however, authorities where it is laid down that the payment of annualrent or interest does interrupt the running of the negative prescription—Stair, b. ii, tit. xii. sec. 26; More's Notes, p. 267; More's Lectures, vol. i. p. 423; Bell's Principles, sec. 616; Napier on Prescription, p. 674. Hume in his Lectures, M.S. copy Advocates Library, vol. ii, p. 115, says, "The only

other way of interrupting prescription is by the creditor's actual enjoyment of his right, such as a partial payment of the sum in the bond, interest, &c. See also cases of *Nicolson* v. *The Laird of Plilorth*, Dec. 18, 1667, M. 11,233: *Blair* v. *Blair*, July 22, 1671, M. 11,235; *Skene* v. *Campbell*, Feb. 1686, M. 11,256; *Guthrie* v. *Nisbet*, June 6, 1696, M. 11,257. Hume, however, in his Lectures, considers the case of *Skene* v. *Campbell* of doubtful authority.

"The second question which was argued before the Sheriff was as to the proof which was to be allowed of the fact of payment of interest. The defender contended that the pursuers ought only to be allowed a proof by writ or oath. The Sheriff concurs with the views stated by the Sheriff-Substitute on this point. The fact of payment—the transference of a sum of money from one person to another—is not a matter which, in its nature, is incapable of being the subject of parole proof."

The defender appealed to the Court of Session.

Argued for him—The statute of 1469 was followed by that of 1474, which made an important alteration upon the law, for the words "sal take document thereon" are omitted. Under the latter statute taking document is no longer necessary: and all that is required is, that there shall be a practical admission of the debt, as by payment of interest. The obligation must be followed out, and following out does not mean legal pursuit only, but the doing of something in pursuance of the obligation.

The pursuers argued—The statute of 1474 made no alteration upon the provision of the Act of 1469 as to taking document. The provision still stood that if document was not taken the obligation was absolutely extinguished. The obligation prescribed if it was not followed to the effect of taking document. So the mere payment of money alleged to have been paid on account of the particular debt did not interrupt the prescription of that debt unless it was proved by writ.

Authorities—Act 1469, c. 28; Act 1474, c. 54; *Nicholson*, M. 11,233; *Hislop* v. *Howden*, 5 D. 507, 7th Feb. 1843; *Soutar* v. *Soutar*, June 29, 1827, 5 S. 876; *Sprott*, M. 11,126; *M'Tavish* v. *Saltoun*, 25th Jan. 1825, 3 S. 482; *Black* v. *Common Agent, in the ranking of Shand's Creditors*, 16th Jan. 1823, 2 S. 118; *Garden* v. *Rigg*, M. 11,274, 4 Paton, 409; *Hay*, M. 12,359; Ersk. 3. 3. 50; Dickson on Evidence, p. 609.

At advising—

LORD PRESIDENT—By disposition and settlement, dated 18th December 1869, the late Charles Kermack disponed certain subjects to his eldest son, and burdened him and the subjects with payment 'to Elizabeth and Euphemia Kermacks, my daughters, equally between them; and in case of one of their deaths without lawful issue, the share of the deceaser to fall into the survivor, of the sum of £500 sterling, payable at the death of the said Barbara Kyd, their mother, if they are major at her death, but if not, payable to them only when they are major,—but said sum is to bear interest from the first term of Whitsunday or Martinmas after their mother's death till the same is payable to them." Mrs Kermack died in 1831, and both the daughters being then major, the sum was payable to them. This action is brought at the instance of the daughters against their brother, James Kermack, for payment of £250, being one-half, or portion payable by him of the £500, and also £265 of interest.

The defence is prescription—that is to say, the long negative prescription introduced by the statute of the reign of James III, and the reply is, that the defender made four different payments of interest, viz., "£10 on or about the 25th November 1845, for the year from Whitsunday 1843 to Whitsunday 1844; £10 on or about the 25th December 1846, for the year from Whitsunday 1844 to Whitsunday 1845; £10 on or about the 19th day of May 1848, for the year from Whitsunday 1845 to Whitsunday 1846; and £10 on or about the 13th day of April 1850, for the year from Whitsunday 1846 to Whitsunday 1847.' These payments are said to interrupt prescription, and this raises a question of some importance. These alleged payments of interest are said to have been made for half-years considerably prior to the time of payment, and there is nothing to show that they were made on account of interest on the debt in question, except the bare allegation to that effect in the summons. It is not alleged that there are any extant receipts. Upon this record, as it stands, the Sheriff-Substitute has, before answer, allowed the pursuers a proof *pro ut de jure* of the averments in their summons as to payment of interest.

Now, we have before us two questions:— 1st, whether payment to account of interest on a bond is sufficient to interrupt prescription? and 2d, whether the payment can be proved *pro ut de jure*?

I have no doubt on the first point. There are two cases, at least, in which payment of interest has been held to interrupt prescription. On the authority of one of these, *Nicholson* v. *Plilorth*, Stair (ii. 12, 26), lays down "so likewise payment of annual rents within forty years interrupts prescription of bonds, and that not only as to the party paying, but payment made by the principal debtor was found to interrupt prescription as to the cautioner, who never paid, nor was pursued, during the space of forty years." The ground on which payment of interest is held to interrupt prescription is, that it indicates on the part of the creditor that he has not relinquished his claim, but, on the contrary, insists in it. In this respect, payment of interest is on the same footing of partial payment of principal. The ground upon which partial payment of principal has been held to interrupt prescription is very well stated by Lord Kilkerran in the case of *Eardon* v. *Rigg*, Nov. 16, 1743, M. 11,274, in the following words:—"The reason why partial payments interrupt prescription of the debt is, that the acceptance of a receipt, in part payment of a particular debt, implies an acknowledgment that such debt is a subsisting debt at the time; but an indefinite receipt of money, applying to no particular debt, is no acknowledgment of any particular debt; and therefore would not have been sustained as an interruption of either the one or the other of the debts pursued for, but for the defender's acknowledgment." It is acceptance by the debtor of a receipt so expressed, as it shows that the payment is made to account of a particular debt, which interrupts prescription.

This leads on to the inquiry whether it is competent to prove payment of money to account of interest on a bond, or to account of principal otherwise than by writing. I am of opinion that on this point the Sheriff and Sheriff-Substitute

have gone wrong. The provision of the statute is that the debt shall prescribe unless the creditor take document thereupon. That provision is not to be satisfied by mere proof by witnesses, 1st, that money was paid, and 2d, that it was applied for the purposes of a particular debt. In many cases the fact that money was paid may be proved by witnesses, but not to relieve the debtor, but for collateral purposes. In all the cases in which the payment of interest or partial payment of principal has been held to interrupt prescription, the proof has been by receipts or by judicial admission, and I think it would be highly inexpedient to allow any other proof now.

I am therefore of opinion that the Sheriff's interlocutor should be recalled.

Lord Deas—The real question in this case is whether this sum of principal and interest sued for has undergone prescription, or whether there has been interruption of prescription, or a relevant averment of payments such as will interrupt prescription.

It is said for the defender that by force of the Statute of 1469, c. 28, the claim is cut off, and that there has been no interruption of prescription. The statute is short, and I shall accordingly read it—[*Lord Deas here read the statute.*] Now it is clear that the interruption must be by taking document thereupon. But it was powerfully argued that the provisions of this statute were altered by the Statute of 1474, c. 54. That statute is as follows:—[*Lord Deas read the Act of* 1474, c. 54.] Now the Solicitor-General's argument was that the taking of document is here purposely omitted. But on looking at these two statutes it is clear that the object of the second statute was to explain that all obligations which had not been followed out for forty years, whether they were entered into before or after the passing of the statutes, should prescribe. There is no alteration intended with reference to the taking document; on the contrary, what is said in the second statute is that all obligations "not followed" within forty years, prescribe—followed *i.e.* by taking document. Accordingly I don't find that it has ever been judicially suggested that taking of documents was not the test of interruption of prescription. What has happened since the statutes is that the Court has put a liberal interpretation on the statute (apparently on the ground that the prescription was an odious one, an opinion with which I cannot agree) and held that taking of document was constituted by payment of interest for which receipts were granted and found in the custody of the debtor. That document in the hands of the debtor becomes a document taken by the creditor. This is, I think, a stretch of the provisions of the statute, and clearly proceeded on the notion that it was an odious prescription, to be got over in every possible way.

In all the cases which have been so strongly founded on—in *Nicholson*, *Guthrie*, and *Garden*—it is clear that there were documents. Now in this case it is not said that there are any receipts, or that there ever were any, and I am clearly of opinion that there is no authority for the statement that the taking of document can in any circumstances be otherwise than essential. Mr Erskine, 3, 7, 15, says—"All our lawyers are agreed that in the long negative prescription the creditor, barely by his silence for the whole course of prescription, is understood to have abandoned his claim, and so looseth his right of action without the necessity of *bona fides* of the debtor." In my manuscript notes of Hume's Lectures I also find it laid down that the effect of forty years' prescription is absolute extinction of the obligation, without room for reference to the oath of the debtor. Now it would be very strange if this prescription, by which the obligation is absolutely extinguished, could be elided by partial payment of interest not instructed by writing. Unless document has been taken, the question of payment is not a competent one. Thus if this case stood on the older statutes alone, I think the answer would be conclusive, but even if it were not so, there is still another statute which it would be necessary to answer, namely, the Act of 1617, c. 12. It is there enacted "that all actions competent of the law, upon heritable bonds, reversions, contracts, or others whatsoever, either already made or to be made after the date hereof, shall be pursued within the space of forty years after the date of the same." Now we can't look at that enactment without seeing that the obligation in this case comes under it.

I therefore concur with your Lordship.

Lord Ardmillan not having been present at the argument declined to give an opinion.

Lord Mure concurred.

The Court recalled the judgment appealed against.

Counsel for Pursuer—Rhind and Dean of Faculty (Clark), Q.C. Agents—D. Crawford & J. Y. Guthrie, S.S.C.

Counsel for Defender—Balfour and Solicitor-General (Watson). Agent—Charles S. Taylor, S.S.C.

Friday, December 4.

SECOND DIVISION.

[Lord Mure, Ordinary.

WILLIAM MITCHELL *v.* CURRER AND OTHERS (SCOTT'S TRUSTEES).

Sale—Contract—Writ—Essentials—Designation of Writer.

The testing clause of a missive offer to sell certain heritable subjects bore to be written by "the said John Smith," who was also one of the witnesses; but in the body of the writ the writer was simply mentioned as "Mr John Smith." *Held* (1) that this designation was insufficient, and (2) that the objection was not obviated by the description given of the writer in the acceptance of the offer, and in the document signed by Mr Smith and annexed to the acceptance, such acceptance not being holograph.

Observed (*per* Lord Gifford) that although the law permits an objection to a defective offer to be cured by homologation on the part of the person whose writ is defective, yet that the docquets at the end of the missives in this case could not make them into a complete and valid document.

Observed (*per* Lord Neaves) that to permit one agent to act for both parties in contracting would be to authorise one person to enter into a bilateral contract.