rity to be given for it, and shall thereafter dispense with their consents and proceed with the application as if they had been given.

"Now, it appears to me that the main purpose of that provision is to provide that the amount of the expectancy or interest of the next heirs shall be secured, and that the heir of entail in possession is given an absolute right to disentail (if that be the nature of the application) upon condition that the value of the expectancy of the heirs whose consents are required is secured. In so far as it provides that the value of the expectancy shall be secured, I look upon the section as imperative. So far as it contemplates certain procedure to accomplish that object, I look upon it rather as directory, and I am of opinion that if the main purpose of the section is fulfilled it is within the power of the Court, if the circumstances render it expedient to do so, to vary the procedure to some extent.

"Now, in a case of this sort, if there are questions as to the value of the expectancy which may result in prolonged litigation, I think that it is quite within the spirit of the Act to allow the petition to proceed if the heir of entail in possession is in a position to give ample security for the largest sum to which the next heirs could be entitled, because the purpose of the section of the Entail Act will be fulfilled by the amounts of their expectancies being absolutely secured to the next heirs."

"In the objections to the actuary's report lodged for the respondents they state the amount to which they are entitled as being not less than £50,000. I think, therefore, that I may hold that the value of the expectancies are ascertained to this extent, that they cannot be more than £55,000, and that consignation of that sum will absolutely secure that the next heirs will receive payment of the amount to which they may ultimately be found entitled.

"Further, it is plain from the objections lodged that the fixing of the precise amount to be paid to the next heirs will raise questions of difficulty, which will probably involve considerable delay.

"I am therefore of opinion that upon the condition of consignation being made of £55,000, I may dispense with the consents and grant warrant to disentail."

The next heirs reclaimed, and argued—The Legislature had given an heir of entail in possession authority to break the entail on condition that the formalities prescribed by the statute were strictly followed. The Legislature contemplated that some delay might ensue in carrying through these formalities, and the chance of the death of the heir in possession pending the procedure was a contingency that the next heir might with reason count upon. If the view of the Lord Ordinary was adopted, this contingency was lost to the next heir, and the consigning of a sum in bank would be held as an equivalent to the statutory procedure. The course adopted by the Lord Ordinary was in direct violation of the language of the statute—*Shand* v. *Home*, March 4, 1876, 3 R. 544; *M'Donalds* v. *M'Donald*, March 12, 1880, 7 R. (H. of L.) 41.

Argued for the respondent (the heir in possession)—The scheme of the statute was to facilitate disentails, but it was in the power of any next heir by obstructive and vexatious litigation to deprive the heir in possession of the benefits of the statute by great delay. What the statute aimed at was the safeguarding of the interests of the next heirs, and the consigning of this money, a sum more than the largest *cumulo* sum claimed by the appellants, fully protected their interests. Here, owing to a variety of complications, the delay before the whole formalities prescribed by the statute could be complied with would be very great, but by following the course adopted by the Lord Ordinary the interests of both sides were protected.

At advising—

LORD PRESIDENT—I regret that I cannot concur in the course adopted by the Lord Ordinary in this case. I think that he has failed to give effect to the very clear provisions of section 13 of the Act of 1882.

When a power of disentail is conferred by statute, with attendant conditions, it is imperative that a party seeking to take benefit from the Act must comply very strictly with the prescribed conditions. Now, the words of this section are imperative—[*His Lordship here read the clause quoted above*]. It follows from the language of this section that until the value of the interest of the next heir is ascertained in money no authority to disentail can be given. I do not know what more I can add to make this clearer. It seems to me that the language of this section is quite explicit and clear.

I think therefore that we must recal the Lord Ordinary's interlocutor, and remit to him to proceed in terms of the statute.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

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

Counsel for the Appellants—Ure. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Respondent—Salvesen. Agents—W. & F. Haldane, W.S.

Thursday, July 16.

SECOND DIVISION.

[Sheriff Court at Banff.

GEDDES *v.* REID.

Writ—Informality of Execution—Proof—Onus—Conveyancing and Land Transfer (Scotland) Act 1874 (37 *and* 38 *Vict. cap.* 94), *secs.* 38 *and* 39.

By the 39th section of the Conveyancing Act of 1874 it is provided that no deed subscribed by the granter, and

bearing to be attested by two witnesses subscribing, shall be denied effect because of any informality of execution, but the burden of proving that such deed was subscribed by the granter and witnesses shall lie upon the party using or upholding the same.

Where the party by whom a deed of a probative character bears to be granted challenges its authenticity, and succeeds in proving that he did not subscribe it in presence of the attesting witnesses, or acknowledge his signature to them, the *onus* is laid upon the party upholding the deed of proving that it was subscribed by the granter and witnesses by whom it bears to be subscribed.

In an action by a proprietor for the delivery of title-deeds belonging to him, the defender produced and founded on a letter of mandate bearing to be signed by the pursuer, and duly attested, authorising the defender to retain the deeds in question in security of advances made and to be made to the pursuer. The pursuer denied the authenticity of this document, and it was proved that he had neither signed it in presence of the attesting witnesses nor acknowledged his signature to them.

Held (1) that the *onus* was laid upon the defender of proving that the letter of mandate was the genuine writ of the pursuer, and (2) that the pursuer was entitled to an order of delivery of the deeds, the defender having failed to discharge the *onus* laid upon him.

In the year 1886 James Geddes, fisherman, Portgordon, his son, and David Reid, agent of the North of Scotland Bank, Portgordon, embarked in a fishing adventure. The accounts of the joint-adventure were kept by Reid. In order to provide his share of the funds for the joint-adventure James Geddes found it necessary to borrow £65 on the security of certain house property in Gordon Street, Gollachy Village, Portgordon, of which he had a building lease. The loan was arranged by Reid on behalf of Geddes, and the latter granted a bond and assignation in security to the lender. In 1888 this house property was destroyed by fire, and a sum of £280 was received by Geddes from an insurance company for the loss occasioned by the fire. The sum of £280 was handed by Geddes to Reid in September 1888, with instructions that he was to pay off the bond for £65 out of this money, and Reid granted a receipt bearing that the money was received "as a loan until arranged for." The bond for £65 was paid off by Reid in November 1889, and he received the titles of the property from the lenders along with the bond and assignation and the discharge of the same.

In 1890 James Geddes presented a petition to the Sheriff Court at Banff, praying the Court to ordain David Reid to deliver to him the said title-deeds and writs. There was also a conclusion, with which it is unnecessary further to deal, for decree ordaining the defender to account for his intromissions in connection with the property.

In answer to the first conclusion the defender produced and founded on a letter of authority or mandate which he averred he had received from the pursuer, and which was in these terms:—

"*Portgordon, 28th February* 1889.

"This is to certify that I authorise Mr David Reid, bank agent, Portgordon, to lift the titles of my house, No. 13 Gordon Street, Portgordon, and pay the bond of £65 sterling thereon from Messrs Mair & M'Kean, solicitors, Buckie, and to retain them in security for advances made to me and my sons, and to be made by him for the rebuilding of said house. Also authorise him to get a loan on the property, and I bind myself to sign the assignation so soon as it is ready for signature, said loan to meet said advances. JAMES REID.

"John Reid, *witness*, clerk, Portgordon.

"Lizzie Taylor, *witness*, domestic servant, 7 Gordon Square, Portgordon."

The pursuer denied that he had ever signed the letter of authority upon which the defender founded.

The defender pleaded, *inter alia*—"(1) The defender is not bound to deliver up the said titles to pursuer until the pursuer pays off the defender's advance made for him, or at all events until pursuer makes reasonable provision for that purpose."

Proof was allowed, the material results of which were as follows:—The defender deponed that on 12th February 1889 he received from the agent of the party who had lent the £65 to the pursuer on the security of his property a letter calling up the bond, and that this notice was the reason which led him to obtain from the pursuer authority to uplift the titles of his house. He explained the terms of the latter part of the letter of authority by saying that he had made advances to the pursuer for the rebuilding of his house, and took this letter to secure himself in place of taking an assignation of the property in his own favour. He said that the pursuer came to see him on other matters of business on 28th February 1889, that he then showed him the letter he had received from the lender's agent, and obtained from him the letter of authority. Witness further deponed—"I had no conversation with the pursuer about his granting an authority previous to that date (28th February). The letter was signed by the pursuer in my office. There were present John Reid and Lizzie Taylor, who appear as witnesses on the letter. We four were present, and no more. Mr Geddes signed in their presence, and they saw him sign."

The pursuer denied that he had ever signed the letter of authority, or that he had ever signed any document in the presence of John Reid and Lizzie Taylor, by whom his subscription bore to be attested, or acknowledged his subscription of any document to them.

John Reid, the first of the attesting witnesses, was at the date of the document in the employment of the defender. According to his own account, "he attended to the pony and did any office work." Examined for the pursuer, he deponed that he had been in the habit of signing as

witness to deeds at the defender's request, that he knew the pursuer, and that he had signed the document in question. In answer to the question, who were present besides himself, he deponed—"I cannot recollect if Mr Geddes was present. I somehow think he was. (Q) Anybody else present?—(A) I could not say. . . . (Q) Did you generally look to see what name you were called to witness?—(A) I generally saw them sign. (Q) On this occasion did you look to see what signatures you were witnessing?—(A) I could not remember. (Q) Was Lizzie Taylor in the room when you signed?—(A) I think so. (Q) Anybody else?—(A) Yes. (Q) Who was there?—(A) Mr Reid. I some think James Geddes and his son George were there too. (Q) Did you see James Geddes sign any paper on that occasion?—(A) I cannot say. I cannot recollect. (Q) Did the girl Taylor sign at the same time as you?—(A) I cannot recollect. *Cross-examined for defender*—(Q) You say you several times witnessed papers at the defender's request. Did the defender ever give you any caution as to how you were to sign as witness?—(A) He told me always to see the person sign it. I mean the person whose signature I was witnessing. (Q) Did you ever sign a document as a witness when you did not see the party sign?—(A) No, I cannot recollect if I did. (Q) You said in your examination 'You some thought that James Geddes was there'?—(A) I could not adhere to that altogether; that means that I am not quite certain. (Q) Did you ever sign a document as a witness when nobody was present but Mr Reid?—(A) Never that I recollect. (Q) Would you have done it if he had asked you?—(A) No; I do not think I would have."

Lizzie Taylor, the second attesting witness, had been a domestic servant in the service of the defender in February 1889, but had since gone to America. She was examined upon interrogatories. The material part of her evidence was as follows—"(Q) Were you in the habit of signing your name as a witness to documents when you were in defender's service?—(A) Yes sir. (Q) Did you do so at his request?—(A) Yes sir. (Q) Did you, while in defender's service, ever see the pursuer sign any document in defender's office or room?—(A) Do not remember. (Q) Did you ever sign your name as a witness to pursuer's signature?—(A) Not while he was in the office. (Q) Did you ever sign your name as a witness to pursuer's signature, after he had signed, and on his acknowledgment of his signature, or at his request?—(A) No sir. (Q) Were you ever present in defender's office with him, the pursuer, and the said John Reid? If so, did you then see pursuer sign any paper, and did you thereafter add your name as a witness to his signature?—(A) No sir. (Q) Do you think that if you had ever seen the pursuer sign a paper in the defender's office, and you had signed as a witness, you would recollect it distinctly? If so, what is your reason for so thinking?—(A) Yes. For I was well acquainted with them. . . . (Q) If you signed as a witness the paper No. 5 of process, was the signature 'James Geddes' on it when you did so? If it was, did you see it put there, and by whom? If it was not, did defender explain to you what you were witnessing? What did he say?—(A) Do not remember what signature was there. I did not see it put there. Defender did not explain what I was witnessing. He just told me to sign as witness to that paper."

The result of the rest of the evidence was that it was not proved to the satisfaction of the Court that the pursuer had signed the writ in question.

By section 38 of the Conveyancing and Land Transfer Act of 1874 it is provided—"It shall be no objection to the probative character of a deed, instrument, or writing, whether relating to land or not, that the writer or printer is not named or designed, or that the number of pages is not specified, or that the witnesses are not named or designed in the body of such deed, instrument, or writing, or in the testing clause thereof, provided that where the witnesses are not so named and designed their designations shall be appended to or follow their subscriptions; and such designations may be so appended or added at any time before the deed, instrument, or writing shall have been recorded in any register for preservation, or shall have been founded on in any court, and need not be written by the witnesses themselves." By section 39 it is provided—"No deed, instrument, or writing subscribed by the granter or maker thereof, and bearing to be attested by two witnesses subscribing, and whether relating to land or not, shall be deemed invalid or denied effect according to its legal import because of any informality of execution, but the burden of proving that such deed, instrument, or writing so attested was subscribed by the granter or maker thereof, and by the witnesses by whom such deed, instrument, or writing bears to be attested, shall lie upon the party using or upholding the same, and such proof may be led in any action or proceeding in which such deed, instrument, or writing is founded on or objected to, or in a special application to the Court of Session, or to the sheriff within whose jurisdiction the defender in any such application resides, to have it declared that such deed, instrument, or writing was subscribed by such granter or maker and witnesses."

On 10th April 1891 the Sheriff-Substitute (GRANT) pronounced this interlocutor:—"Finds in fact that the document No. 5 of process is the writ of the pursuer, and in law that the said writ warrants the defender retaining the titles of which delivery is craved; therefore sustains the first plea-in-law for the defender."

"*Note.*—In this case the pursuer's first crave is for the delivery of the titles of a house in Portgordon belonging to him; the defender produces a letter of authority (No. 5 of process) as his warrant to retain them. It is not argued that this letter would be insufficient to warrant retention

if genuine, but the pursuer's reply is that it is not genuine because the signature bearing to be his is not truly his but is forged.

"It is remarkable, at the outset, that both the attesting witnesses speak to the genuineness of their own signatures; if James Geddes' signature be forged, the witnesses must have adhibited their names to that signature already forged, or to a writing that had no principal signature at all.

"John Reid, the first of these witnesses, was personally examined, and deponed in cross-examination that the defender (who was in the habit of using him as a witness) always told him to see the person sign when he acted as a witness, and that he could not recollect ever not having done so; and further, that he does not think he would have signed as a witness to a paper in presence of the defender alone; beyond this he is even more hazy, and cannot remember whether the pursuer was present or not when he signed as a witness, or who else precisely were there, whether there were any names on the paper before he put his own on, or whether the pursuer wrote his name in his (John Reid's) presence.

"All this is of little value in itself; at the best, for the pursuer, it does not actively strike at the proper execution of the document; and at the worst, for the defender, it merely amounts to a *non memini* in essentials. Lizzie Taylor, the other witness, was examined by interrogatories on commission—not a satisfactory method in such a case as this, but unavoidable. She also was in the habit of witnessing deeds at the defender's request. She does not remember if she ever saw the pursuer sign any document in the pursuer's office or room, but she is positive she did not ever witness the pursuer's signature when he was in the defender's office. To the general question if she ever witnessed a blank paper, she says she does not remember, nor does she remember if James Geddes' signature was there before she signed, and if that signature is forged, one or other must have been the case, but she is fairly consistent in maintaining that she did not see James Geddes sign or acknowledge his signature until the answer to the last cross-interrogatory, when she merely 'cannot remember' if the pursuer was present when she signed as a witness—a presence which might under some circumstances be regarded as a tacit acknowledgment. This witness does give evidence which practically impeaches the validity of the execution, but the grounds for that evidence, when they come to be tested in detail, are not such as to warrant me in placing much reliance on her memory. The mere *non memini* on the part of an attesting witness is not enough to cut down the validity of an execution (*Morison* v. *Maclean's Trustees*, L.J.C. Inglis, 24 Dunlop, 625), and even when one gives evidence that directly impugns the deeds, there is still the presumption in its favour which would appear to require extraordinarily clear evidence on the part of that one to rebut (*Clelland* v. *Clelland*, 15 Shaw, 1246; *Baird's Trustee* v. *Murray* 11 R. 153).

"The pursuer was in defender's house or office on the day in question. I think that is clear from his evidence, and from his endorsation of the £7 cheque. He denies absolutely that he ever signed No. 5 of process, and he and his son James point out the alleged differences between the writing of the words 'James Geddes' on number 5 and other admittedly genuine signatures; but neither father nor son could stand cross-examination on this point. *Comparatio litterarum* is not a wholly satisfactory test at the best, but the pursuer's evidence showed me that I could put no reliance on his opinion founded on this alone. His signature is not a very clearly defined one, and of the numerous specimens in process the variations are so great that I do not wonder that their author was sometimes puzzled himself as to the authenticity. That he did not and would not have signed such a document is far more credible, but here we have his oath balanced by the defender's. Without believing the pursuer to be wilfully untruthful, I think the intimate and friendly business relations at the time between him and the defender offer a reasonable ground for believing that he did sign it, possibly without a very clear idea of all that it implied, or sufficiently realising its importance to impress the fact on his memory. It is an *ex facie* probative writ; the burden of improbation is on the party challenging; and on the whole evidence I am not satisfied that it is not the genuine writ of the pursuer, and I therefore give it effect."

The pursuer appealed, and argued—The pursuer denied that he had ever signed the writ in question, and it was clearly proved that he had not signed or acknowledged his signature in presence of one, if not of both, the attesting witnesses. The probative character of the writ was thus destroyed, and the *onus* was laid on the defender to prove that it was the genuine writ of the pursuer. This *onus* he had not discharged; indeed the result of the proof was to show that the pursuer never signed the writ in question. The pursuer was therefore entitled to the order craved.

Argued for the defender—This was a probative writ, and required no proof to set it up—Act of 1874, sec. 38; *M'Laren, &c.* v. *Menzies*, July 20, 1876, 3 R. 1151; *Thomson's Trustees* v. *Easson, &c.*, November 2, 1878, 6 R. 141; *Brown*, December 22, 1883, 11 R. 400; *Addison, &c.*, February 23, 1875, 2 R. 457. The *onus* therefore lay on the pursuer to prove that it was not his genuine writ but a forgery—*Baird's Trustee* v. *Murray*, November 21, 1883, 11 R. 153; *Clelland* v. *Clelland*, June 6, 1837, 15 S. 1246. What was necessary in a civil action to establish a charge of forgery appeared from the case of *Arnott, &c.* v. *Burt*. November 14, 1872, 11 Macph. 62. The pursuer had failed to discharge the *onus* laid upon him, and the judgment of the Sheriff should be affirmed.

At advising—

LORD YOUNG—The facts of this case are to a large extent admitted, though the record brings out some points of difference distinctly. It seems that the pursuer, his son, and the defender entered into a fishing adventure in 1886. The defender kept the accounts, and had charge of the incomings and outgoings, and that account is not settled yet, though five years have elapsed since the adventure was started. It appears that the pursuer in 1886, in order to raise money for his share of the initial expenses of the adventure, borrowed a sum of £65 on the security of some house property which he possessed in Portgordon. This property he had insured through the agency of the defender. It was burnt down in 1888, and he received the sum of £280 from the insurance office. On 8th September of that year he handed that sum to the defender on the receipt No. 5 of process. It is according to the evidence that the pursuer told the defender, when he handed him the money, that he must pay off the debt of £65 secured on the property I have mentioned. Curiously enough that was not done till Martinmas 1889, but it was done then, more than a year after the money was received, and on making application the defender got the titles of the property from the lender's agents. These are the documents which the pursuer asks now to be delivered to him.

The defender objects to restore the titles, on the ground that he holds them under a letter of authority or mandate from the pursuer dated 28th February 1889. That letter bears to be a certificate on the part of the pursuer authorising Mr David Reid "to lift the titles of my house, No. 13 Gordon Street, Portgordon, and pay the bond of £65 stg. thereon from Messrs Mair & M'Kean, solicitors, Buckie, and to retain them in security for advances made to me and my sons, and to be made by him for the rebuilding of said house. Also authorise him to get a loan on the property, and I bind myself to sign the assignation so soon as it is ready for signature, said loan to meet said advances." When this letter of authority is produced in answer to the pursuer's claim to have his own titles delivered to him, he says that it was not signed by him. It bears his name, and the names of two attesting witnesses, John Reid and Lizzie Taylor. John Reid is designed as "clerk, Portgordon." His evidence, however, shows that he is quite an uneducated lad, and the account he himself gives is that he took charge of the defender's pony and did "any office work." In short, he was just the stable-boy. The other witness, Lizzie Taylor, was a domestic servant. Now, the pursuer swears that the signature to this document was not his, and his sons say that it is not his signature. The defender, on the other hand, swears that the pursuer did sign the document. With regard to the instrumentary witnesses, the boy says that he cannot say that he saw the pursuer sign the document, and cannot say that he heard him acknowledge his subscription. He was asked if the pursuer was in the room, and he says, "I cannot recollect if Mr Geddes was present. I some think he was." The servant girl Lizzie Taylor says explicitly and distinctly that the pursuer was not in the room when she signed as witness at defender's request, that he did not sign in her presence, and never acknowledged his signature to her.

Now, the question is, what is the law on this matter? We were referred to sections 38 and 39 of the Conveyancing Act of 1874, and it was contended for the defender on the former clause that there being here the names of two subscribing witnesses, with designations appended to their signatures, this was a probative deed, and must receive effect unless it was proved to be forged on such evidence as would convict a man of forgery in a criminal court. I am going to assume, though I abstain from expressing any decision on the point, that this is a probative instrument, and must have faith if nothing is proved to the contrary. But we have here to consider the matter on the evidence, and it is proved to my satisfaction that this document was not subscribed by the pursuer in the presence of witnesses, and that he did not acknowledge his signature to one or other of them. Therefore, if the deed was executed at all by the pursuer, it was quite irregularly executed, for the law still remains that in order to the regular execution of a deed, the granter's subscription must be adhibited or acknowledged in the presence of the attesting witnesses. If there is an omission of this formality it is not now fatal to the deed as formerly, but it puts upon the party using the deed, and founding upon it, the burden of proving the deed to be genuine. My opinion in this case is founded on the proposition in fact that it may be doubtful, more or less, on the evidence whether the pursuer subscribed the deed at all, but it is quite certain that he did not do so in the presence of the witnesses, or acknowledge his signature to them. Perhaps it is proper that I should guard against any application of the rule which I hold applicable to this case being made to cases to which it is not applicable. We have no concern here to consider the case of an old deed, or the case where the attesting witnesses are dead or not to be found. Nor is there occasion to consider the case of a *non memini* on the part of the attesting witnesses. Cases of the denial of the authenticity of deeds are fortunately very rare, but it might frequently occur in such cases—indeed nothing could be more natural—that the attesting witnesses should have no recollection of the circumstances, and it would be quite enough for such a witness to say—"That is my signature, and I would not have adhibited it unless the granter of the deed had signed in my presence, or acknowledged his signature to me."

I think, in considering a question of this kind, the character of the deed, the relation of the parties thereto, the circumstances of execution, and the position of the witnesses called in, must all be taken into

account. Here the character of the deed was, that it was taken by an agent from his client of a sudden, and for the agent's advantage, the client having no advice or assistance but his own. The witnesses were a stable-boy and a servant girl, and the servant girl is certain that the alleged granter of the deed did not sign in her presence or acknowledge his signature to her. I therefore hold that the deed was irregularly executed, though the consequences of the irregularity might be removed by evidence that it was really executed by the pursuer, by whom it bears to be executed.

On that last question I am of opinion that it is not proved that the pursuer ever subscribed this deed at all. I do not go the length of saying that he did not subscribe it, but I have no difficulty in saying that it is not proved that he did. That is sufficient for this part of the case, for the letter of authority or mandate, on which the defender relies as the ground for withholding the title-deeds of the pursuer, thus fails, and therefore I am of opinion that we must pronounce the order craved in the first part of the prayer.

LORD RUTHERFURD CLARK and the LORD JUSTICE-CLERK concurred.

LORD TRAYNER was absent.

The Court pronounced this judgment:—

"Recal the interlocutor appealed against with respect to the letter of authority or mandate dated 28th February 1889, No. 5 of process: Find in fact (1) that it was not executed or subscribed by the pursuer in presence of the subscribing witnesses John Reid and Lizzie Taylor, or either of them, and that neither of them saw the pursuer subscribe the same or heard him acknowledge his subscription; (2) that it is not proved that the pursuer did subscribe the said letter or mandate: With respect to the title-deeds and documents specified in the prayer of the petition, Find in fact (1) that they were the property of the pursuer, and that they were delivered to the defender on account of and as acting for the pursuer on the occasion of his paying, at the pursuer's request and with the pursuer's money a debt of £65 which was incurred over the property of the pursuer to which they refer; (2) that the defender has no authority or mandate by the pursuer to retain the possession or custody of the said titles and documents, or to withhold them from the pursuer: Find in law that the pursuer is entitled to the order which he prays for ordaining the defender to deliver to him the said titles and documents: Therefore decern and ordain the defender to deliver to the pursuer the said titles and documents in terms of the prayer of the petition," &c.

Counsel for the Pursuer—Reid. Agents—Macpherson & Mackay, W.S.

Counsel for the Defender—Shaw—Salvesen. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Thursday, April 2.

OUTER HOUSE.

[Lord Low.

MILLAR (LIQUIDATOR OF THE PROPERTY INVESTMENT COMPANY OF SCOTLAND, LIMITED) *v.* THE NATIONAL BANK OF SCOTLAND, LIMITED, AND OTHERS.

Company — Winding-Up — Preference — Lien by Creditor over Call.

The directors of a limited company having resolved to make a call upon the shareholders to meet certain liabilities of the company, applied to a bank for an advance, and the bank agreed to grant the advance upon the guarantee of certain of the directors "with a lien over the call to be made." A call letter was issued making the call payable to the bank. No assignation or mortgage of the call was executed. Shortly thereafter a petition for the winding up of the company by the Court was presented, and after the usual procedure a winding-up order was pronounced, and an official liquidator appointed. Subsequent to the presentation of the petition certain sums were paid into the bank in respect of the call. *Held* that the bank had no lien over the sums so paid.

Company — Winding-Up — Liability of Shareholders — Compensation — Guarantee granted for Company's Debt.

The directors of a limited company resolved to apply to a bank for an advance on the security of a call upon the shareholders and the personal obligation of certain of their number, which they agreed to give "under the express condition that the calls upon their own shares when made in due course, and the first and readiest of the company's funds, shall be paid to the bank in repayment of said advances." The bank agreed to give the advance on these terms. A call was made, and a letter of guarantee in ordinary terms was granted by certain of the directors. Shortly thereafter a winding-up of the company by the Court was begun. Subsequent to the commencement of the winding-up certain sums were paid to the bank by the directors who had granted the guarantee in respect of the call. In the winding-up these directors claimed that the sums so paid must be imputed to the extinction *pro tanto* of their obligation under the guarantee, and that they were entitled to compensate their liability for the remainder of the call by their obligation under the guarantee. *Held* that their liability for the call was not compensated by their liability under the guarantee, and accordingly that the sums paid by them since the commencement of the winding-up belonged to the liquidator, and their