legal question of bar, there was in England no divorce on the ground of desertion, and there being no release for the parties save by an action for decree of nullity, the injured party was bound to take that remedy timeously. In all the cases the time of delay had been much longer. There once was a rule in England that a three years' probation was necessary; that was not so now—*N.* v. *M.*, January 12, 1853, 2 Robertson 625; besides, that rule was founded on probabilities; a failure for three years was held to demonstrate impotency, but other evidence might be as cogent. There was such evidence in this case; it was proved that the man if not impotent to all was impotent as to this woman, and that was sufficient.

The defender argued—The evidence here showed an unwilling and cold wife. In such circumstances a longer period of probation was necessary—*Stagg* v. *Edgecombe*, June 16, 1863, 32 L.J., Mat. & Prob. Ca. 153; Fraser's Husband and Wife, i. 100; the repugnance of the wife was highly important—*H.* v. *H.* July 12, 1864, 33 L.J., Mat. & Prob. Ca. 159. This woman, too, knew her rights in 1879, and it was not until she was sued for divorce, and to hide her own guilt, that she brought her action. Where a party has any indirect motive—any motive other than the wrong done to him or her—the Court will give no aid—*B.* v. *B.* July 26, 1864, 33 L.J., Mat. & Prob. Ca. 203; *Hall* v. *Castleden*, 29 L.J. 81, 1 Swab. and Trist. 606, and 4 Macqueen 160; *M.* v. *C.*, March 2, 1872, L.R., 2 Prob. & Div. p. 414, *præsertim* p. 419.

At advising—

The LORD JUSTICE-CLERK said that the majority of the Court were of opinion that the Lord Ordinary's interlocutor should be recalled, and that decree should go out in terms of the conclusions of the summons.

LORD RUTHERFURD CLARK said that he dissented from the proposed judgment.

The Court pronounced this interlocutor:—

"Having heard counsel for the parties on the reclaiming note for the pursuers against Lord Kinnear's interlocutor of 24th January last, recal the said interlocutor: Find and declare, and decern, and ordain, in terms of the conclusions of the summons," &c.

Counsel for Pursuer (Reclaimer)—D.-F. Macdonald, Q.C.—Jameson. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for Defender (Respondent)—Trayner—Armour. Agent—Beveridge, Sutherland, & Smith, S.S.C.

Tuesday, June 4.

SECOND DIVISION.

[Lord Adam, Ordinary.

ROBB *v.* ROBB'S TRUSTEES.

Loan—Proof of Loan—Bank Cheque—Agent and Client—Current Account.

In an account-current extending over a series of years, between a client and his law-agents, which contained a long series of entries of money transactions of considerable amount, were certain items entered as "To paid you" or "To paid you in loan." Those entries were six in number, and for five of them the only vouchers produced were bank cheques drawn by the agents payable to the client "or order," and endorsed by him, there being produced for the sixth, in addition to the endorsed cheque, a promissory-note of the client of the same date and for the same sum as the cheque, the signature on which note had been deleted. In an action of count and reckoning by the widow of the client, who was liferentrix of his estate, against his testamentary trustees, she objected to the agent having received credit for these entries, on the ground that they were not properly vouched. *Held*, distinguishing the case from *Haldane* v. *Spiers*, March 7, 1872, 10 Macph. 537, that they were sufficiently vouched.

John Robb, builder and contractor in Edinburgh, died there in October 1875, leaving a trust-disposition and settlement dated a few days before his death, by which he conveyed his whole estate, heritable and moveable, to certain parties as trustees for certain purposes. By the first purpose the trustees were directed to pay to his widow during all the days of her life the free annual proceeds of his whole estate, but such proceeds to be liable to diminution corresponding to any advances which might be made out of the capital of the estate to his sons under directions to that effect in the immediately following purpose.

During the latter part of his life and up to the time of his death the deceased was engaged in large building transactions and contracts. For five or six years previous to his death he had employed Messrs Lindsay & Paterson, W.S., as his law-agents.

After his death the parties named in his trust-disposition accepted of the office of trustees and entered into possession of his estate, which they continued to administer according to his directions.

After some previous litigation with the trustees, Mrs Robb, in October 1881, raised the present action of count and reckoning against them, concluding for an account of their whole intromissions with the trust-estate, in order that the balance due to her in respect of the provisions of the deceased's settlement might be ascertained, and for payment of £1200 as the amount of the said balance. She produced certain accounts of the defender's intromissions with the trust-estate which had been rendered to her, and with regard to which she averred:—"The accounts are entirely incorrect. The first account is erroneous in regard to the following entry—

'1876, June 4.—Paid Messrs Lindsay, Paterson, & Company, W.S., amount advanced on the security of the reversions of all the properties, with interest due to date, £2252, 7s. 9d.' That sum was not due to Lindsay, Paterson, & Company, and should not have been paid by the trustees to them. It is arrived at on the footing of the correctness of an account-current between the firms of Lindsay & Paterson, W.S., and Lindsay, Paterson, & Company, W.S., and Mr Robb, commencing 5th March 1870 and ending 31st October 1875. The said account-current is erroneous in, *inter alia*, the following respects." The condescendence then went on to state in detail objections to separate items on the debit side of the account-current.

The Lord Ordinary (Fraser) remitted to the Auditor of Court *qua* accountant to examine and report on the trust accounts.

After the remit had been made several additional objections were made to other entries in the account-current, amounting in all (including those made in the condescendence) to thirty-six, a number of which were repelled by the reporter. Twenty-nine were not further insisted in by the pursuer, and of the remaining seven, one was departed from in the Inner House, leaving six which were still insisted in, and which formed the subject of decision there. The six entries objected to consisted of (1) five entries of various sums to the debit of the deceased as follows—

"1872, October 8, To paid you, . . £57 0 0
1873. September 13, To paid you, 70 0 0
,, October 17, To paid Mr Robb 50 0 0
,, November 28, To paid you, . 150 0 0
1875. July 21, To paid you, . . 114 0 0"

These items were objected to on the ground that the only vouchers produced for them were cheques drawn by the agents (Lindsay, Paterson, & Co.), payable to Mr Robb, "or order," and endorsed by him. With regard to these the Auditor reported—"The pursuer maintains, on the authority of the case of *Haldane* v. *Spiers*, 7th March 1872, Ses. Ca., 3d series, vol. x. p. 537, that such documents are not proof of indebtedness against the payee. The reporter is humbly of opinion that the case referred to does not warrant the pursuer's contention. The question there decided was that a bank cheque payable to bearer, endorsed by a party who admits having cashed the cheque and retained the money, is not to be held as the writ of such party in a question of loan, but it does not decide that cheques payable to order and endorsed by the payee are not good vouchers of an account-current between him and his law-agents, regularly entered in the agents' books, and extending over a course of years, and the reporter is not aware of any authority to that effect." (2) The other entry objected to was as follows—"1870, July 1, To paid you in loan, £100," for which the vouchers produced were an endorsed cheque like the others and a promissory-note of the deceased of the same date, and for the same sum as the cheque, the signature on which note had been deleted. The note bore no mark of having been discounted, was produced by the agents, and they alleged it had lain with them from its date. The reporter repelled this objection also.

The Lord Ordinary (Adam) pronounced the following interlocutor:— "Approves of said report, and finds (1) that the sums specified in appendix No. 6 appended to said report [being those above referred to] are properly charged against Mr Robb, and form proper items of discharge of his trustees; finds (2) that the sum of £100 taken credit for by Messrs Lindsay & Paterson, of date 1st July 1870, forms a proper item of discharge of Mr Robb's trustees."

"*Opinion*—With reference to the first finding of the interlocutor, the only vouchers produced are cheques on the bank, drawn by Messrs Lindsay, Paterson, & Hall, payable to Mr John Robb or order, and endorsed by Mr Robb.

"The endorsation by Mr Robb is sufficient evidence that he got the money. It is said, however, on the authority of *Haldane* v. *Spiers*, 10 Macph. 537, that it is not proof that Mr Robb got the money in loan. But we have not to deal with an isolated transaction of alleged loan, but with a series of cash transactions between a client and his agents, in the result of which, and, as I understand, during the whole course of which, they were his debtors, the whole payments on one side or the other bearing to be duly debited and credited in an account kept by the agents. In these circumstances it appears to me that the principle of the case of *Nicol* v. *Reid*, Nov. 23, 1878, 6 R. 216, applies, and that the sums are rightly placed to his debit in the account recording the transactions.

"With reference to the second finding in the interlocutor, there is in this case, as in the preceding cases, a bank cheque drawn by Lindsay & Paterson in favour of Mr Robb or order, and endorsed by Mr Robb. But there is, in addition, a promissory-note of the same date, 1st July 1870, for the same sum, £100, signed by Mr Robb. The promissory-note was in the possession of the trustees, and was produced by them. The signature of Mr Robb is deleted, and it is said that this raises a presumption that the sum was repaid. The note bears no marks of having been discounted, and there is no evidence when or by whom or for what reason the signature was deleted. I think there is sufficient evidence that Mr Robb got the money, and I do not think that the fact that the signature to the note is deleted is sufficient to prove that the amount was repaid, and therefore I concur with the reporter as to this matter also." . . .

The pursuer reclaimed, and argued — These items were not sufficiently vouched. Two things were settled by the case of *Haldane* v. *Spiers* (*supra cit*), viz., (1) that loan must be proved by writ or oath, parole being inadmissible; and (2) that an endorsed cheque, as this here, was not a writ sufficient to prove it. There was no authority for taking a distinction where the loan was as here part of a series of transactions. The case of *Nicol* (*supra cit.*) had been misapprehended by the Lord Ordinary. The present case was nearer *Haldane* v. *Spiers* than *Nicol* v. *Reid*. The result of applying the rule of *Haldane* v. *Spiers* to this case was merely that each item must be separately proved by writ or oath. They could not be made to support each other; each item must rest independently on any competent proof tendered in support of it. The relation of the parties as agent and client made no difference in the application of the principle.

Additional authorities—*Birnie* v. *Darroch*, January 12, 1842, 4 D. 366; *Roxburgh* v. *Barlass*, January 15, 1876, *ante*, vol. xiii. p. 216; 45 and

46 Vict. c. 61, sec. 63; *Gow's Exec.* v. *Sim*, March 15, 1866, 4 Macph. 578; *Hamilton* v. *Richmond*, 1 Wil. and Sh. 35.

The defenders replied—They did not dispute the authority of *Haldane* v. *Spiers*, but they distinguished the present case from that one. That was an isolated case of loan between ordinary contracting parties, while these items were imbedded in a lengthened series of transactions between agent and client. The character of the transactions and the relation of parties must be looked at. This was not a case of loan in the ordinary sense, but of advances of money in a course of dealing. All they were called on to prove was receipt of the money. The rule of *Haldane* v. *Spiers* was not to be dragged out beyond its own class of circumstances. The kind of circumstances here were not before the consideration of the Court when it was decided. The account must be taken as a whole and the entries read together—*juncta juvant*. It was absurd to say that in an account between agent and client each item was to be looked at as in a single transaction.

Additional authority—*Williamson* v. *Allan*, May 29, 1882, 9 R. 859.

At advising—

LORD JUSTICE-CLERK.—This is a reclaiming note against an interlocutor of Lord Adam, pronounced in an action between the widow of the late Mr Robb, who was a builder and contractor in Edinburgh, and his testamentary trustees. Mr Robb was largely engaged in building transactions, in the course of which he employed Messrs Lindsay, Paterson & Company and subsequent firms as his agents; and in the course of the employment a great variety of transactions, business and financial, passed between Mr Robb and his agents, and are recorded in accounts extending from 1870 to 1875. It appears from these accounts, which do not seem to have been rendered during Mr Robb's life, that large cash advances were from time to time made by the agents on account of their client, while on the other hand sums of very considerable amount were received by them on his behalf. These sums form to a large extent the staple of the accounts now in question, and the interlocutor in question relates to several items for which credit is claimed by the agents, and which are said to be insufficiently vouched.

The first of these items are five in number, and raise substantially the same question—namely whether an advance of money charged to the debit of the client in this account is sufficiently vouched by a cheque drawn by the agents, and cashed by the client, whose signature appears on the back of it.

The accounts in question were remitted by the Lord Ordinary to the Auditor of Court, who has reported very fully on them. Objections were stated for the pursuer to these items, on the ground that it has been decided by the well-known case of *Haldane* v. *Spiers* that such evidence is insufficient by the law of Scotland to prove the receipt of money in loan. But the Auditor did not sustain the objection, holding that the case of *Haldane* v. *Spiers* did not support it. He says—"The question there decided was that a bank cheque, payable to bearer, endorsed by a party who admits having cashed the cheque and retained the money, is not to be held as the writ of such party in a question of loan; but it does not decide that cheques payable to order and endorsed by the payee are not good vouchers of an account-current between him and his law-agent, regularly entered in the agents' books and extending over a course of years; and the reporter is not aware of any authority to that effect."

The Lord Ordinary has arrived at the same conclusion; and I am of opinion that his judgment is right, and that we should adhere to it.

These cheques are the vouchers produced for certain of a very large number of cash advances made by the law-agents during the currency of the accounts in question. Sometimes the payments are vouched by bills, as well as cheques, sometimes by I O U's, sometimes by receipts; while the five instances which are the subject of the interlocutor are vouched by the cheques only. But the items are entered in the heart of a crowd of dealings, in which the agents appear to have acted as much as cashiers as law-agents, the balance possibly shifting from time to time—although the Lord Ordinary has stated that the balance was against the agents throughout. In these circumstances it is plain that the presumption raised by the endorsation of this cheque by the client and its entry to his debit is entirely different from that which arose in the case of *Haldane* v. *Spiers*. That was an isolated transaction, and the Court held, as I think rightly, that while the endorsation proved, or might be held to prove, that the endorsee received the money, it afforded no presumption that it was received as a loan. Here, in my opinion, if the client received the money from the funds of the agent, which I think is proved by the writ of the recipient, there is no rule in the law of Scotland by which we are excluded from coming to the inevitable conclusion that it was received on the same footing as the other sums which are entered to his debit.

LORD YOUNG—I am of the same opinion, and I only wish to add a word about the case of *Haldane* v. *Spiers*. I think that case determines conclusively that a loan of money is not proved by a cheque and the endorsation of the alleged borrower on the back of it, which is just an acknowledgment that he has received the contents. I should be very sorry to say anything to interfere with the authority of that decision, for I think that point is very well and certainly conclusively decided—that by the law of Scotland a loan is not proved by an endorsed cheque—for, as I have said, that is really the point of the case of *Haldane* v. *Spiers*—and that parole is not admissible to supplement it. It proves nothing but the receipt of money. And the receipt of money may be proved by parole evidence for a thousand purposes. It may be proved that you paid a sum of money to a carrier, for instance, to carry for you in one way or another. It is a very common case, for instance, for you to give it to your servants or to a clerk without any document passing; you just prove that he got the money from you, and that is quite satisfactorily proved by parole evidence. There is no rule of the law of Scotland against that, but there is a rule of the law of Scotland is that you shall not prove the establishment of the relation of borrower and lender by parole. A cheque is very satisfactory proof that money was paid. Accordingly, when a debtor sends his creditor a cheque for the amount of his

account, and the creditor draws the money, which the cheque with his name on the back of it shews, there is no better evidence of the payment of the account. It is excellent evidence, I repeat, of the payment of money; it is only not good evidence—indeed no evidence at all—of money lent on a contract of *mutuum*, and it would be very dangerous if it were, and that for very many reasons. People send cheques on so many grounds, cheques are always passing from one person to another; and if you were to allow parole evidence to explain that that was upon a contract of loan, that would just be oversetting or disregarding the established law of Scotland that loan can only be proved by writ or oath. Money given by cheque may be for an infinite number of reasons, or for no reason at all, for if you want to give a person a gift of £5 all you do is to send him a cheque for it. It is a common way of giving a small tip or making a small present or sending a little gratuity. Now, to decide otherwise in such a case would be to say that the law requiring loan to be proved by writ or oath was displaced, and to say that loan might be proved by parole would be to overturn a wholesome and established rule of the law of Scotland, and to disregard what was the feature of the case of *Haldane* v. *Spiers*. But when you come to an account-current between factor and principal, or between agent and client, with receipts and disbursements *hinc inde*, what you have got to do is to establish the receipt of money and the payment of money—the very thing which a cheque is most fitted to do. It is not a contract of loan there—not the constitution of the relation of borrower and lender; but the vouching of items of payment on the one side and receipt on the other. There are some difficulties raised in this case by sometimes a receipt and sometimes an I O U being taken; but the Auditor and the Lord Ordinary being agreed that those items which are specially objected to are of the same character which your Lordship has stated, I should be the furthest in the world from being disposed to alter the conclusion at which you have arrived. I have said all, indeed more, than I intended, which was merely to guard myself against being supposed to doubt or to hesitate about the authority of the case of *Haldane* v. *Spiers* on the matter which it decided.

LORD CRAIGHILL—In the action in which the interlocutor reclaimed against was pronounced, Mrs Robb, widow of John Robb, a builder in Edinburgh, is pursuer; and the testamentary trustees of her husband are defenders. They have since his death in 1875 been in the administration of his estates; and what is sued for is an account of their intromissions, and payment of such sum, if any, as may be found to be due to the pursuer. Accounts have been produced, and those which relate to their own administration are not now in controversy. But it appears that for over five years before Mr Robb's death the management of his monetary affairs had been placed in the hands of his agents, and their accounts, which were rendered to the trustees, and which consequently form part of the trust accounts, are the subject-matter of the present dispute. The accounts are long—the sums entered on the one side and on the other are numerous, and some of these are large; but fortunately the six items which are set forth in the appendix to the accounts are all which are now in dispute; and the question which as to them we are called upon to decide is, whether the only vouchers produced being cheques by the agents, payable to Mr Robb, those items of discharge are sufficiently vouched? The contrary was maintained by Mrs Robb, her argument being rested on the decision in *Haldane* v. *Spiers*, cited in the note to the interlocutor of the Lord Ordinary. There the defender being sued for repetition of an alleged loan, the pursuer produced in proof of the loan a bank cheque in favour of the defender and endorsed by the defender, who admitted that he had received the money, but with the qualification that the cheque had been given in payment of a debt. And a majority of the Seven Judges constituting the Court held that the loan had not been instructed by the cheque. This decision was that of only a bare majority; and it has, when opportunity offered, or the exigencies of a case required, been made the subject of conflicting observations.

But *Haldane's* case on the present occasion appears to me inapplicable. In the first place, in *Haldane's* case, there was only one cash transaction, while in this case there is a long series, on both sides of the account, resulting from Mr Robb's employment of his agents as the managers of his monetary affairs. And in the second place, and as a consequence, the issue is not 'loan or not loan,' but whether a sum was received by Mr Robb from his agents. The rule on which the Court decided that case is therefore not the rule by which the present controversy must be settled. If we are satisfied that by the vouchers produced, there are proved the payments to Mr Robb for which credit is taken, that is enough in the circumstances for our judgment. Had it been shown that the payments in question were not covered by the employment under which the agents were acting in the other pecuniary affairs of their client, that might have assimilated this case to the case of *Haldane*, and necessitated the same decision. But such a thing is not even alleged; and consequently mere receipt of money, and not a loan, is all that has to be proved. The principle by which we are enabled to reach that conclusion was, I think, recognised and acted on in *Nicol* v. *Reid*, 2 R. 216, also cited by the Lord Ordinary. For these reasons I concur in the judgment reclaimed against, and think that the reclaiming-note ought to be refused.

LORD RUTHERFURD CLARK—I have found this case attended with considerable difficulty, but I concur.

The Court refused the reclaiming-note and adhered to the judgment of the Lord Ordinary.

Counsel for Pursuer (Reclaimer)—Rhind—Salvesen. Agent—R. H. Miller, S.S.C.

Counsel for Defenders (Respondents)—Lang—Graham Murray. Agents—Paterson, Cameron, & Co., S.S.C.