I agree, and think these words actionable, but it was argued for the respondent that the words here bear their own glossary, and that the statement that the pursuer only paid one shilling and sixpence in the pound explains and discloses the meaning the respondent gave to the use of the word "bad." I do not say what meaning I should put upon the words here if I were construing them, but that is the duty of the jury, and I think the innuendo might be sent to a jury.

But then the meaning of the words being ascertained to be as innuendoed for the purpose of the next question, that question is, whether or not they were in the circumstances privileged? Privilege is a very elastic expression, and is of various kinds. There is the absolute privilege of the Houses of Parliament, of judges, and of counsel. There are other cases of privilege where it is required not only to prove that the words were used maliciously but also without probable cause. Other cases, again, of lesser degree require malice to be inserted in the issue, and also facts and circumstances to be set forth showing special malice before an issue will be allowed. All these are cases of privilege. Here we have another. The pursuer was standing for an important office. He had been proposed and nominated as a councillor for the Town Council of Glasgow. That is not disputed, nor is it disputed that the defender was a ratepayer and an elector in the same ward, and that if the pursuer had been elected he would have represented him in the Town Council. The question before us is, whether to other electors an elector has a right to state matters germane to the election which he believes at the time to be true? This matter was germane to the election, because the pursuer states that it was so, and founds upon it as having been so germane as to have affected the result of the election. There is no difficulty in laying it down that such a statement as is here complained of is one of the disagreeable things a person who is standing for a public office has to face. If the statement is averred to have been made maliciously he will have an action, but not otherwise. I think the Lord Ordinary's judgment is right.

LORD KINNEAR—I am of the same opinion. If I were construing for myself the words ascribed to the defender I might not be disposed to put the innuendo upon them alleged by the pursuer, namely, that his bankruptcy had been bad because dishonest and disreputable. But if a jury, having heard the defender examined in the witness-box, and being informed of all the circumstances in which the language was used, had found that the words had been used in that sense, I should not be prepared to hold that it was such an unreasonable verdict that we should set it aside. I therefore think the Lord Ordinary was right in allowing the pursuer to prove that the words were used with the meaning alleged if he chooses to take upon him so heavy a burden.

But then I agree with his Lordship in thinking that the occasion was privileged, and that the pursuer would not be entitled to damages unless he proved malice. The pursuer's own statement is, that when the words of which he complains were uttered the defender was engaged in the exercise of a public right with a view to the performance of a public duty. If the defender was not acting in the honest discharge of a public duty, but from some indirect motive for the purpose of injuring the pursuer, or even if, although he had no personal ill-will towards the pursuer, he had taken up some unfounded notion about the pursuer's conduct without any reasonable ground, and spread abroad an injurious report against him, recklessly and without any concern for his neighbour's good name, the pursuer might have had a good ground of action whether the occasion was privileged or not, because he would then have been in a position to aver malice, and the jury would have been required to say whether the defender was speaking honestly in the exercise of a public right, or whether he was maliciously slandering the pursuer. But that is just the question which the pursuer declines to put to the jury. If he had been prepared to prove malice he might have had an issue, but when he declines to aver malice, he says in effect that the defender's statements, although false in fact, were not malicious or false in the knowledge of the defender, but such as a man with reasonable regard for his neighbour might have made, and that he did not make them for the purpose of injuring anybody or from any indirect motive, but only for the purpose of influencing the electors by considerations which it was proper for them to take into account; and since that is the true import of his averment, he is not entitled to an issue.

LORD M'LAREN was absent.

The Court adhered.

Counsel for Pursuer and Reclaimer—Young—A. S. D. Thomson. Agent—D. Howard Smith, L.A.

Counsel for Defender and Respondent—Comrie Thomson — Salvesen. Agents — W. R. Patrick & Wallace-James, S.S.C.

Tuesday, February 23.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

BRYAN *v.* BUTTERS BROTHERS & COMPANY.

Loan—Proof of Loan—Partnership—Power of Partner to Bind the Firm.

The wife of a partner of a mercantile firm lent to her husband a sum of money out of her separate funds for the purposes of the firm, stipulating that she should receive the firm's acknow-

ledgment of the loan. Her husband took the money to the cashier of the firm with instructions to put it to the credit of his private account. This was done, and it was paid into the firm's bank account. Acting on the husband's instructions the cashier wrote out in the name of the firm an acknowledgment of the loan which he signed as *per procuration* for the firm. It was booked in the firm's private letter book and delivered through the husband to the wife.

In an action by the wife against the firm for repayment of the loan, the defenders alleged (1) that the acknowledgment was neither holograph nor tested, and that therefore the loan was not instructed by legal evidence; (2) that it was the writ of the cashier, whose general procuration did not include authority to borrow money or sign such a receipt.

Held (Lord Young *diss.*) (1) that writing used not as a solemnity, but only *in modum probationis*, need not be probative, but is sufficient if shown to be genuine; (2) that the acknowledgment was the writ of the defenders, because the money was borrowed not by the cashier, but by a partner who directly authorised and instructed the cashier to grant such an acknowledgment as he himself could have competently granted.

Mrs Agnes Crawford or Bryan, Glasgow, wife of James Bryan who was lately a partner of Butters Brothers, machinery merchants, Glasgow, sued the firm and the remaining partner Butters for payment of £102, 12s. 10d., the amount of a loan of £100 advanced by her out of her private means to the firm on 29th October 1886, and interest from April to November 1890. Mrs Bryan and her husband separated in August 1890 under a written contract of separation.

The pursuer produced the following receipt signed by the cashier of the firm:—

"*Glasgow*, 29*th Oct.* 1886.

"From Butters Brothers,

"Contractors' Engineers.

"Received from Mrs J. W. F. Bryan, by the hands of Mr J. W. F. Bryan, the sum of one hundred pounds sterling (£100), on temporary loan, for which we are obliged.

"*p.p.* BUTTERS BROS.

"JOHN GIBSON.

£100

"29/10/86."

She averred that she received interest at the rate of 5 per cent down to 29th April 1890, and that the defenders knew that the sum of £100 had been advanced by her. The defender Butters averred that on the date mentioned the pursuer's husband had handed the sum of £100 to the cashier of the firm with instructions to place it to the credit of his private account, which was done; that the cashier Gibson had no power to borrow money for the firm, and that such a receipt could not bind the firm in payment to any other than the creditor in the books; and that the sum had been repaid to Bryan.

The pursuer pleaded—"(1) The sum sued for having been advanced by the pursuer out of her own proper funds and estate, and not having been repaid to her, or to any one authorised by her, is still due and resting-owing by the defenders to her, and she is entitled to decree as concluded for, with expenses."

The defender pleaded—"(2) The alleged loan can only be proved by writ or oath of the defenders. (3) The sum sued for having been received from the pursuer's husband, and placed to his private account with the firm, and having been repaid to him, they are not indebted therefor, and these defenders should be assoilzied from the conclusions of the summons with expenses. (4) The said receipt having been *ultra vires* of Mr Gibson, does not bind the firm to any creditor other than the true creditor, as appears in their books."

Upon 10th January 1891 the Lord Ordinary allowed the parties a proof of their averments before answer. It appeared that upon 29th October Bryan asked his wife to lend the firm £100, which she agreed to do, expressly stipulating that he should bring the firm's acknowledgment for the money. On the same day Bryan took the money to the cashier and told him to put it to the credit of his private account, not to the credit of the firm. He ordered the clerk to write out, and the cashier to sign, the above receipt. The money was then paid in to the firm's credit at the bank in the usual way. There was a press copy of the receipt made in the "financial letter book" of the firm. Bryan paid the pursuer 5 per cent. interest until April 1890. He did not repay the principal.

Gibson deponed—"I was in the habit of granting and subscribing receipts for the firm. (Q) Did it not occur to you that it was wrong to grant a receipt for the firm when Mr Bryan asked you to put the £100 into his private account?—(A) I was always acting under his instructions in connection with the firm, and did exactly what I was told. . . . I never repaid the £100 to Mrs Bryan directly, but it was paid through Mr Bryan. . . . On 5th November he drew out £100, which he told me was to repay Mrs Bryan, and I debited his private account with that sum on that date. Towards the end of the month he asked for an additional £5, and asked me to make it one transaction, so I erased the entry of 5th November and made it a debit of £105. I did not get back the receipt that I had signed. He was the chief party in the whole transaction, and was acting I understood for his wife, and I had full confidence in him, and did not think more about it. *Cross.*—The receipts which I usually granted on behalf of the firm were for the money I was receiving from day to day. I had no authority to borrow money for the firm, and I never did so that I am aware of. I never paid interest to Mrs Bryan. The

receipt is in the handwriting of Andrew Barclay, who was a clerk with the firm. The terms of the receipt were dictated by Mr Bryan to him on the date it bears."

The defender Butters denied all knowledge of the loan by Mrs Bryan to the firm until payment of the interest was demanded. The partnership was dissolved in October 1890.

Upon 13th June 1891 the Lord Ordinary (KYLLACHY) pronounced this judgment—"Having considered the cause, decerns against the defenders in terms of the conclusions of the summons."

"*Opinion.*—The facts of this case do not present any difficulty. The pursuer is the wife of a late partner of the defenders' firm, and on 29th October 1886 she lent to her husband, out of her separate funds, as she understood for the firm's purposes, a sum of £100, stipulating that she should receive in exchange the firm's acknowledgment of the loan. I have no doubt of the pursuer's good faith, and that the account which she gives of the transaction is entirely true. Her husband took the money to the cashier of the firm, and it was paid into the firm's bank account, and applied to the firm's purposes, and acting on the husband's instructions the cashier, who appears to have had the charge of the firm's financial transactions, granted to the pursuer the acknowledgment which is quoted in the record. This acknowledgment was written out by a clerk, signed by the cashier, booked in the firm's private letter book, and delivered through her husband to the pursuer. The money, however, although applied to the firm's purposes was, it now appears, put to the credit of the pursuer's husband in the books of the firm, and it is said that he shortly afterwards drew it out, and that the firm is now dissolved, and that there is no sum now at his credit in the firm's books.

"In these circumstances the pursuer sues the firm and the remaining partner (her husband and she having apparently separated) for repayment of the loan, and, as I indicated at the close of the proof, I have no doubt of her right to recover provided the loan is proved by competent evidence. That is to say, I hold it to be sufficiently clear that it was within the authority of the husband, as a partner of the defenders' firm, if not also within the authority of the firm's cashier, to borrow money on the firm's credit, and that the credit of the firm was in fact pledged by both of those parties for the amount of the loan. I have delayed, however, disposing of the case because of the averment and plea proposed to be added by the defender to the effect that the acknowledgment produced is neither holograph nor tested, and that therefore the alleged loan is not instructed by legal evidence.

"The question thus raised appeared to me to require a careful examination of the authorities—the point being sharply taken that the loan of money, according to our law, cannot be proved except by a probative writing unless, which is not the case here, the transaction falls within the exception of *res mercatoria*.

"The result has been to satisfy me not only that the contract of loan, like other consensual contracts, may be constituted without writing — in other words, that writing is not required as matter of solemnity, but also that where writing is required not as matter of solemnity but only by way of proof, the writing need not be probative, but is sufficient if it be shown to be genuine.

"On principle I confess I should not have much doubt that this must be the law. The question depends after all upon the construction of the old Scots statutes regulating the authentication of deeds, and these statutes, in my opinion, relate not to writings produced *in modum probationis*, but only to operative writings—writings founded on as constituting a title or constituting an obligation. An improbative obligation, at least if within the class to which the statutes apply, is no doubt inoperative—that is to say, it cannot (except in *res mercatoria* or where there is *rei interventus*) form the substantive *vinculum* on which action may be raised. Possibly also—although the distinctions here run into subtlety—an improbative obligation cannot be received even in evidence of an antecedent obligation lying behind it, and such antecedent obligation may require to be proved by competent evidence *aliunde*. But while that is the law with respect to obligatory writings, I can find nothing in the statutes or in the principles of our law of evidence to require that all writings put in evidence shall be *per se* probative. The constitution of obligations is one thing. Their proof is another; and where—as in the case of loan—the obligation may be constituted verbally, and may be proved either by writ or by oath, it would require, I think, some positive rule of law to make more necessary than that the writ, if writ is adduced, shall be genuine.

"An examination of the authorities leads, I think, to the same result. There are no doubt some *dicta* to be found in the books which are incautiously expressed, and have given rise to misapprehension. But certain points are established by decisions which are, I think, quite conclusive of the principle. Thus, it is settled that in the proof of trust (where by statute writ or oath is necessary), any writ of the truster proved to be genuine is sufficient—Bell's Prin. 1995; *Bathie* v. *Wharncliffe*, 11 Macph. 490; *Thoms* v. *Thoms*, 6 Macph. 174; *Ross* v. *Fidler*, November 24, 1809; *Fraser* v. *Bruce*, 20 D. 115; *M'Laren* v. *Howie*, 8 Macph. 106. So in the case of leases and other contracts relative to land where there has been *rei interventus*, and writing is only required by way of proof, the writ requisite may be any genuine writing, and may even be a writing which is not subscribed. So also in the case of acknowledgments of the receipt of money paid, and in the case of acknowledgments granted to rebut the presumptions arising on bills of exchange.

These are all cases, I think, quite *in pari*

casu with loan. But even in the case of loan itself the authorities are numerous—Ersk. iv. 2, 4. Thus entries in a debtor's books, although in the handwriting of a clerk, have been held sufficient. So also have indorsations or signatures appended to accounts, *e.g.*, in the books of a bank. So also, at least in some cases, have writings in the handwriting of the creditor but found in the debtor's possession, and so dealt with as to be constructively the debtor's writ. In all these cases loan of money has been held sufficiently instructed by improbative writings.

"The only decision the other way which was cited, or which I have been able to discover, is that of *Stewart* v. *Syme*, December 12, 1815, F.C., which is said to derive importance from being referred to without disapproval by the Lord President in the case of *Haldane* v. *Speirs*, 10 Macph. 539. I am bound to say that I think the judgment in that case does appear to require explanation, but the case was one of a rather special character, arising on a bill of exchange, and where the acknowledgment of indebtedness founded on was not only not probative, but was, as the Court held, not sufficiently connected with the bill to which it was sought to be applied. I cannot think that this case is an authority for the proposition that loan must always be proved by a probative writ, and I am satisfied that in citing the case, which he did for another purpose, the Lord President did not intend to affirm that proposition.

"Therefore, both on principle and authority, I think an acknowledgment proved to be the writ of the debtor is sufficient evidence of the loan, and it may be proper to observe that in the case of loan there is this additional consideration. It is elementary law, that even where writing is required by way of solemnity, the solemnities of execution are dispensed with where the circumstances exclude *locus pœnitentiæ*. In other words, where there has been *rei interventus*, an improbative obligation is as good as one that is probative. And if this be so—and it is not disputed—I confess I do not see how any question as to the statutory solemnities can arise under the contract of loan, where, from the nature of the case, there can be no *locus pœnitentiæ*, or, to put it otherwise, where there must always be *rei interventus*. Having borrowed money, you cannot—money having passed—resile from your contract, or if you do resile, you can only do so on the footing of restoring matters, which just means repayment of the money. I do not speak of contracts to make a loan or to take a loan. There writing is probably required as matter of solemnity, and there being no *rei interventus* the writing probably must be probative. But in the case of an obligation granted as here in exchange for money borrowed, I do not at present see how any question of the improbativeness of the document of debt can well arise.

"On the whole, I think the pursuer is entitled to decree, with expenses."

The defender reclaimed, and argued—The pursuer's husband had no power to borrow money for the firm. It was not part of a partner's duty to do so unless the borrowing of money was part of the firm's business—Lindley on Partnership, 126, 5th ed. It could not be said that Bryan had borrowed money as necessary for the firm's business, nor was it borrowed in the way of business at all. Even assuming the right of Bryan to borrow money for the use of the firm without acquainting his partner with the details of the matter, he could not delegate his right to bind the firm to the cashier. It was the cashier's signature only that appeared upon the receipt. But the receipt itself was useless for the purpose to which the pursuer wished to put it. It was not a probative document. The law of Scotland required that proof of loan could be only by writ or oath. If the question was referred to the debtor's oath nothing was looked at but the oath itself. In the same way, if loan was to be proved by writ, then nothing but the writ could be looked at, and this was not the probative writ of the firm—*Christie's Trustees* v. *Muirhead*, February 1, 1870, 8 Macph. 461; *Hamilton's Executors* v. *Struthers*, December 2, 1858, 21 D. 51; *Smith* v. *Smith*, December 4, 1869, 8 Macph. 239; *Haldane* v. *Spiers*, March 17, 1872, 10 Macph. 537.

The respondent argued—The first question was whether one partner had power to borrow money and bind the firm in repayment although the other partners did not know of the transaction. That he had such a power was undoubted, and had been recognised—*The Bank of Australasia* v. *Breillat*, December 14, 1847, 6 Moore's Privy Council Reps. 152, 193-194. The principle had also been recognised in Scotland, although it had been held that an agent had not power to bind his principal in fraudulent transactions. The firm here were in difficulties, and the money might have been necessary to carry on the business—*Sinclair, Moorhead, & Company* v. *Wallace & Company*, June 4, 1880, 7 R. 874, Lord Young, 877, 878. A case very similar to this had been decided in England in favour of the plaintiff—*Okell & Eaton* v. *Okell*, November 4, 1874, 31 Law Times Reps. 330. Assuming that the partner had power to borrow money, had he bound the firm by the receipt given? It was true it was signed by the cashier, but it was so signed by order of a partner of the firm, and was therefore the signature of the firm. The pursuer did not sue upon the receipt as sufficient to make the firm liable in itself, but as a piece of real evidence. It was not necessary that it should be a probative document; all that was necessary was to prove that the signature was genuine—*Neilson's Trustees* v. *Neilson's Trustees*, November 17, 1883, 11 R. 119. Here they had proved it was the signature of a partner, and therefore the firm was liable to repay the money to the pursuer.

At advising—

LORD JUSTICE-CLERK—The pursuer is the wife of Mr Bryan, who at the time of the transaction in question in this case was a partner of the defenders' firm. The pur-

suer demands repayment of a sum of £100 which she alleges she lent to the defenders' firm at the request of her husband. She produces in proof of the receipt of the money by the firm an acknowledgment in the following terms — [*His Lordship read the receipt quoted supra*]. Mr Gibson, who signs this receipt bearing to be by procuration for the firm, was the cashier of the defenders' firm. The question is whether the pursuer can by this document prove the debt to be due? For it is of course clear that a debt for borrowed money can only be proved by the writ or oath of the alleged debtor. The document is neither holograph nor tested, nor does it bear the signature of any member of the defenders' firm. The questions therefore are, (1) whether such a document can be used *in modum probationis* to establish a loan, and (2) whether this document has been established *habili modo* to have been granted for the firm by the authority of the firm, and therefore to be an acknowledgment of debt on which the pursuer can sue. I am of opinion that both of these questions must be answered in the affirmative. The facts are within small compass. Bryan, the partner, borrowed the money from his wife for the firm, delivered it to the cashier Gibson, and directed Gibson to make out and sign as *per procuration* the acknowledgment, which he delivered to his wife. If, then, Bryan had an express or implied mandate to borrow for his firm, there can be no doubt that the defenders received the amount of the loan through Bryan, who borrowed for them, and Gibson who received the money and gave the acknowledgment. For there can be no doubt that if the money was received on loan, the partner who got it on loan ordered Gibson to acknowledge the loan as for the firm. Now, here I cannot doubt that Bryan, as a partner of a mercantile trading firm, did have an implied mandate to borrow money and bind the firm for it. It is, I think, settled law that a partner can bind his firm in such circumstances. If Bryan himself had granted the acknowledgment, it seems to me clear that that would have been conclusive. If a partner of a firm asks for a loan of cash for his firm, and obtains such a loan, the lender is entitled to rely on his acknowledgment for the firm. But if Bryan could bind his firm by his own writ, could he not equally do so by giving orders to the cashier of the firm to sign for the firm the acknowledgment which was to be handed to the lender? I hold that he could.

But then it is said that the acknowledgment of the loan is not established by the document signed by Gibson even if signed by procuration for the firm, because it is not holograph nor tested. I do not think that this contention is sound. The document is used in proof only of the existence of the loan, and it is founded on as writ to prove the truth of the pursuer's allegation of subsisting loan, and that being so, I think if it be shown to be the writ of the defenders it is not a good objection to its being used as a document of debt by the pursuer producing it from her custody as proof that the debt subsists and is undischarged, to say that it is not holograph nor tested. I agree with the observations of the Lord Ordinary upon this point.

I have purposely avoided saying anything as to the facts spoken to in evidence as occurring after the £100 reached the coffers of the defenders, which they certainly did, as they were duly entered as cash received in the firm's cash-book. What was done afterwards with the money does not appear to me to affect the question. Bryan, the partner, borrowed the money for the firm from the lender, directed Gibson, as the servant of the firm, to sign the acknowledgment for the firm, and handed the money to him as the cashier of the firm. In these circumstances it is in my opinion sufficiently established that the firm is liable to pay the sum claimed by the pursuer, and that the interlocutor of the Lord Ordinary should be affirmed.

LORD YOUNG—As your Lordship has said, this is not in itself a case of any magnitude. Mr Bryan was a partner with his uncle Mr Butters; he got a loan from his wife of £100, which she supposed was lent to the firm of Butters Brothers; he is now separated from her, and the question is, whether in respect of this sum of £100 his wife or his uncle shall bear the loss? The case, however, raises legal questions of some importance and interest, but after giving my best attention to these questions I have come to be of a different opinion regarding them to what your Lordship has expressed, as well as, I understand, to what is Lord Trayner's opinion. It is, however, my duty to state the opinion I have formed upon the matter.

The first question of importance is, what is the law of Scotland with regard to the proof of contracts of loan? and involves the consideration of the provisions of our law in respect to the necessary formality and authentication of writs. Our law is in some part different from that of England, but, as explained both by Stair and Erskine, we have, generally, this law, that bargains which are usually the subject of writings cannot be proved by parole, and both these writers instance the loan of money as a bargain of this kind. There is also this law regarding the formalities of writings concerning these bargains, that they must be either holograph or tested. That law is subject to the well-known rule of exceptions which excepts writings *in re mercatoria* from these formalities. This phrase is elastic, and has been extended to bargains in all matters in which the exigencies of business or the rapidity necessary in carrying them out would make the formality of having all writings holograph or tested inconvenient and hampering. It is therefore an important enough rule that all matters of moment shall be reduced to writing, so that all risk of misunderstanding or absence of evidence may be avoided. I do not understand that this law relates only to bargains regarding landed property,

and if it be a rule of our law that all matters of importance must be reduced to writing, and matters of importance be interpreted to mean, as explained by Erskine, obligations granted for a sum exceeding £100 Scots, that rule will apply to all contracts which are not mercantile of importance, the measure of importance being £100 Scots.

Now, the document which is founded upon here to establish a loan of money is not *in re mercatoria*. It is not incident to or connected with mercantile matters at all. It is very short—[*Here his Lordship read the document referred to*]. It is not suggested that Mrs Bryan had any mercantile dealings with the company, or was connected with their business in any way, but she says that she lent £100 to the company. It might have been £10,000; the rules of law would have been the same. How is this document to be characterised; under what category does it fall? It is simply a bond for borrowed money—an obligation by the bonder to pay the lender £100. Now, does our law require that a bond for borrowed money shall be either holograph or tested, or does it not? I am of opinion that it does, and therefore I think this document is not a bond for borrowed money, because it is not executed with the formalities our law requires. The idea that the exigencies of business or the rapidity with which matters of business must be carried through are inconsistent with formalities is out of the case here; there were no exigencies or necessity for haste. That is the view I take of this matter, and I think it is of importance, because if we take the other view, it is, in my opinion, adverse to the rule of our law which prescribes that matters of importance shall be reduced to writing according to certain forms which the law prescribes.

This document is not signed by the alleged borrower, but it is said that it is signed *per procuration* of the alleged borrower. Put aside the feature in this case that the money is alleged to be lent to a mercantile house. The case then is a bond for borrowed money signed *per procuration* of the borrower. That is a novel proposition in the law of Scotland, and I know of no principle or authority in the law of Scotland which permits that. I think it would require a very carefully written mandate to authorise anyone to sign a bond for another.

Then take the case of a firm borrowing this money; what would be the material question? It would be, what is the power of a partner to sign documents or to borrow money for the firm? To begin with, is there any authority for the proposition that any partner can grant procuration to anyone to sign documents for the firm? The whole partners may, but can a single partner do it? You cannot state a rule of law that a partner can grant procuration to a cashier or servant of the firm to sign documents for the firm; it must be stated generally to anyone he chooses to select. Is that tenable? The only evidence we have of the procuration is the cashier's own testimony. His story is that the nephew of the principal partner and a partner of the firm told him to put his name to the document, and he did so. The nephew is not examined, probably because he has absconded and cannot be found; therefore all that we have here is the statement of the cashier, who had a regular procuration from the firm to sign documents of a totally different character from this—which makes the case all the stronger—that he was told to sign this document by a partner and did it, and what we are asked judicially to affirm is, that that order was a procuration to the cashier to sign a bond for borrowed money. I cannot assent to that. I do not think this bond was properly signed at all.

Now, with respect to the power of a partner to borrow money and to bind the firm to repayment, I assent to the general proposition as stated, but with this important qualification, that it is in matters relating to the company's business only. The most typical case is a partner discounting a bill with the bank, which is a loan of money in a sense. Another illustration is, where money has been obtained upon the deposit of goods, not pawned, but where in the ordinary course of business goods have been deposited with an agent for sale, and the agent has in the ordinary course of business made an advance of money upon them. But it is stated in some authorities that a partner has, for example, no authority to brrow money to increase the capital of the partnership. That is a pointed illustration of the difference. The moneylender is not advancing money; he is giving it in loan, and a partner is not entitled to bind the firm for that. The whole firm may do it, but a single partner is not an authorised agent to borrow money.

The case which I think goes furthest in holding that a partner may bind his firm for a loan in matters not connected with the business of the firm was *Rothwell & Humphry* v. *Howell*, 1 Espinasse 405, December 14, 1795. The partner of a London firm was in the habit of travelling about the country to purchase goods for the use of the business. He went to Birmingham and purchased goods as for the firm. The goods were to be sent to London and a bill drawn for the amount, but the purchaser said, I am short of money to take me back to London—it was in the stage-coach days—lend me £10 and include that in the bill, and the seller did so. The question afterwards arose whether he had authority to bind the firm for that £10. The firm was bankrupt before the goods were sent, so that the action was only for the £10. Lord Kenyon directed the jury—"You may consider this loan as incidental to the mercantile transaction, and if you think that it was so you may give a verdict against the company." Now, does that even approach this case? A man goes to his wife and says—"Give me £100 and I will lend it to the company in your name, and give authority to the cashier to bind the firm in repayment." The proposition is a startling one. I do not think that the partner had

authority to get his wife's money for behoof of the firm.

The Lord Ordinary dwells on the fact that the money was put in the company's account, and that therefore the company got the use of it. I think that is a fallacy. The evidence on either side is not very full, but suppose we take it as true that the money was lent to the company, it was put to the credit of Bryan's private account. That is not the place in which to put the company's money. Suppose Gibson, the cashier, had insisted on getting half the money for assisting Bryan to play this trick, and half of it had been put to Gibson's private account, it would still in the same sense have been lent to the company, but it is ridiculous to speak of money dealt with in that way as having been applied to the company's business. It was at Bryan's call when it was put to the credit of his private account, and he called it up in six days with five pound more. It would not have been different if there had been a balance on his private account of £100 against him and he had paid in this sum to square it up. I am of opinion that this was a trick by a knavish husband upon his wife, and she cannot make her husband's uncle responsible for the repayment of the sum because he happened to be the husband's partner. I am of opinion that the contract of loan has not been proved.

Lord Trayner — The following facts have, in my opinion, been established in this case:—(1) That the pursuer's husband in October 1886 asked the pursuer to lend the defender's firm (of which her husband was then a partner) the sum of £100; (2) that the pursuer, in compliance with the request addressed to her, gave her husband, out of her own private means and estate, the sum of £100 as a loan to his firm; (3) that the pursuer's husband in direct course handed the £100 so received by him to the cashier of the defender's firm; (4) that on the express instructions of the pursuer's husband, as a partner of the defender's firm, the acknowledgment of the loan produced by the pursuer was prepared and signed by the cashier of the defender's firm as on behalf of the firm; and (5) that that acknowledgment was delivered to the pursuer by her husband as the acknowledgment or voucher for said loan, of the date it bears, and that it has been in the pursuer's possession ever since. If these facts are established, I should think it clear that the pursuer is entitled to the decree which the Lord Ordinary has pronounced in her favour. Indeed, I do not understand the defenders to maintain anything to the contrary of this—their defence rather being (1) that these facts have not been established *habili modo*, and (2) that their partner (the pursuer's husband) had no power to bind them as obligants for borrowed money. In a word, the facts themselves are not disputed, but the parties are at variance as to the legal consequences of these facts.

I think it is a proposition good in law—and one which is now long past the region of controversy — that the partner of a trading or mercantile firm (and the defenders' firm was of that class) has an implied mandate to borrow money in the name and on the credit of his firm, and to bind his firm as obligants therefor by granting an acknowledgment or voucher in his firm's name for the money so borrowed. This being so, the defenders' liability for the sum sued for (undoubtedly borrowed from the pursuer by her husband for his firm) cannot be disputed if the alleged loan is established *habili modo*. Such a loan can only be proved, according to our law, by the writ or oath of the borrower. Accordingly the real question — indeed the only question—in the case is, whether the document produced by the pursuer is the writ of the defenders proving the loan. On this question the defenders maintain, first, that the document produced by the pursuer cannot be looked at as their writ or receive any effect, because it is not probative or holograph. I think this view cannot be sustained for the reasons which the Lord Ordinary has given. Whatever the law may have required in regard to deeds constituting obligation or title, it does not require the same, as matter of solemnity, in documents used only *in modum probationis*. I add no more upon this point, because I adopt what the Lord Ordinary has said.

The defenders maintain, in the second place, that the writ (the genuineness of which is admitted) is not their writ but the writ of their cashier Gibson, who had no authority to borrow money for the firm, and no authority in their name to grant such a writ. I assume that Gibson had no power to borrow money in the name and on the credit of his employers, the defenders, but I scarcely see the bearing of that fact on this case. Nobody suggests that Gibson borrowed the £100 now sued for. It was borrowed by Mr Bryan, one of the partners of the firm. It is a different matter whether Gibson had not authority to sign the document in question. Here again I assume that the general procuration granted by the defenders' firm in Gibson's favour enabling him to sign for the firm certain documents in connection with their banking transactions, did not authorise him to grant such a document as that now produced by the pursuer. He might have authority however, to sign that document apart altogether from the general procuration I have referred to, and an authority derived from the same source. I take it for granted that Mr Bryan having power to borrow money on the credit of his firm, had also the power to grant an acknowledgment in the firm's name that he had done so, and if he had adhibited the firm's signature to the document in question, it would have been the writ of the firm. But it seems to me to be quite as much the writ of the firm although signed by the cashier for the firm, because the cashier so signed it on the authority and by the direct instructions of one of the partners who himself had power to grant such a writ. In signing that document Mr Gibson says—"I was always acting under

his (*i.e.* Mr Bryan's) instructions in connection with the firm, and did exactly what I was told." Mr Gibson therefore signed the document in question on the direct authority of that partner who could have validly signed it himself, and the signature of an authorised agent is equal to the signature of the principal and binding upon him. Mr Gibson's general procuration is not needed to validate his signature in the present instance. The direct authority on which he acted was a procuration *quoad hoc*. I come therefore to the conclusion that the writ produced is the writ of the defenders, and that it establishes the loan to them of the sum sued for.

The plain justice of the case points also to the pursuer being entitled to decree. Her £100 was not returned by her husband. It was actually delivered by him to the cashier of the firm, and went into the firm's bank account and should now be accounted for by them; that their cashier subsequently allowed one of the partners to deal with that money as his own by putting it to his private account and afterwards withdrawing it, is a matter with which the pursuer has no concern. The pursuer can scarcely be called on to suffer for what she could in no way control. But that the pursuer's money was a *bona fide* loan to the defenders' firm, and was so treated when the money first reached the hands of the defenders' cashier, is quite evident from the facts which have been proved, among which are these important items, namely, that the acknowledgment for the money was copied into the firm's financial letter book which all the partners might see, and the money itself duly entered when received in the columns of the firm's cash book.

LORD RUTHERFURD CLARK was absent.

The Court adhered.

Counsel for the Appellant — Fleming. Agents—Forrester & Davidson, W.S.

Counsel for the Respondent — G. R. Gillespie — Dykes. Agents — E. A. & F. Hunter & Company, W.S.

Tuesday, February 23.

FIRST DIVISION.

[Lord Low, Ordinary.

DUKE OF SUTHERLAND *v.* MARQUESS OF STAFFORD.

Entail—Power to Disentail Estate Entailed in Pursuance of Agreement — Entail Amendment Act 1882, *sec.* 13.

By minute of agreement the Duke of Sutherland, heir of entail in possession of an entailed estate, and the Marquess of Stafford, the heir-apparent under the entail, and whose consent was necessary to the disentail of the estate, agreed for certain onerous causes that the estate should be disentailed, and thereafter re-entailed along with other lands which the Duke held in fee-simple. In the narrative of the agreement one of the inducing causes was stated to be "that it is desirable for the preservation of the dignity and honour of the Earldom of Sutherland that the said estates should be secured by fetters of entail, so far as legally may be done, from being alienated from the Earldom of Sutherland, or wasted or charged with debt except as after mentioned." In pursuance of the agreement the estate was disentailed, and afterwards re-entailed along with the fee-simple lands. The Entail Act of 1882, sec. 13, gave power to the heir of entail in possession to have the consent of the apparent heir dispensed with in an application to disentail. In 1891 the Duke of Sutherland presented a petition to disentail a portion of the estate entailed in pursuance of the agreement of 1878. The application was opposed by the Marquess of Stafford. *Held* that the application was not barred by the agreement of 1878.

Entail—Petition to Disentail a Portion of an Entailed Estate—Power of Court to Dispense with Consents of Next Heirs—Entail Amendment Acts 1848, *sec.* 3; 1875, *sec.* 5; *and* 1882, *secs.* 3 *and* 13.

Held that the power of the Court to dispense with consents of next heirs is not confined to the case of an application to disentail the whole of an entailed estate, but applies to the case of an application to disentail a fourth of such estate.

The Duke of Sutherland was institute of entail in possession of the entailed estate of Reay, under a deed of entail dated 16th October, and recorded in the Register of Entails 6th December, and in the Register of Sasines 20th December 1861, and in the Books of Council and Session 22nd January 1863, executed by the Duke in favour of himself and the heirs whatsoever of his body, whom failing the other heirs of entail therein mentioned.

The Duke of Sutherland was also institute of entail in possession of the entailed estate of Sutherland in virtue of a deed of entail dated 16th July, and recorded in the Register of Entails 3rd October, and in the Register of Sasines and the Books of Council and Session 5th November 1878, executed by the Duke in favour of himself, whom failing the Marquess of Stafford, his eldest son, and the heirs whomsoever of his body, whom failing the other heirs therein mentioned. This deed of entail was executed in respect of a minute of agreement between the Duke of Sutherland and the Marquess of Stafford, dated 20th and 23rd February, and recorded 25th July 1878. The minute of agreement set out that considering that the Duke was heir of entail in possession of the estate of Sutherland in virtue of a deed of tailzie dated in 1835, that the Marquess was the heir-apparent next entitled to succeed to the entail estate, and that having been born after 1st