fiar, for the estate of Williamston was conveyed to him under burden of payment of the amount. It appears, therefore, from the structure of the deed that the fiar really was the lady enjoying the liferent. I do not think it is necessary to go over the clauses in detail, for it appears to me that the fee was in her, subject always to defeasance in the event of her having issue, in which event she would be fiduciary fiar for them. There would be the same result if she was survived by her brothers or sister.

The Court pronounced the following interlocutor:—

"Find and declare that the second party, as trustee and executor of the late Jane Fraser, is entitled to receive and can validly discharge the sum of £2000 declared to be a real lien and burden on the estate of Williamston, and that the first party does not hold the said estate of Williamston free from the said burden: Of consent, appoints the expenses as taxed to be paid out of the funds found to belong to the second party," &c.

Counsel for First Party — Solicitor-General (Asher, Q.C.) — Pearson. Agent — Alexander Morison, S.S.C.

Counsel for Second Party—Trayner—Strachan. Agent—William Manuel, S.S.C.

HOUSE OF LORDS.

Tuesday, November 27.

(Before the Lord Chancellor, and Lords Blackburn and Watson.)

CLYDESDALE BANK *v.* M'LEAN.

(*Ante*, March 2, 1883, vol. xx. p. 459, and 10 R. 719.)

Bank—Bank Cheque—Right of Drawer to Countermand—Onerous Indorsee—Bill of Exchange.

M. drew a cheque on the Bank of Scotland in favour of C., for C.'s accommodation, to enable him to reduce an overdraft on his account with the Clydesdale Bank. C. paid the cheque into his account, and it was placed to his credit, and the overdraft *pro tanto* reduced. Two days thereafter M. instructed the Bank of Scotland not to pay the cheque. *Held* (*aff.* judgment of First Division) that the cheque having been given and used for the purpose of reducing C.'s overdraft with the Clydesdale Bank, M. was not entitled, in a question with that bank, to stop payment of it, and was therefore liable to make good its amount to that bank.

Observations on the nature of cheques on bankers.

This case was reported in the Court of Session on March 2, 1883, *ante*, vol. xx. p. 459, and 10 R. 719.

The following was the interlocutor of the First Division of March 2, 1883:—"Find that on Saturday 14th January 1882 the defender granted to the witness W. B. Cotton a crossed cheque drawn in his favour on the Bank of Scotland for the sum of £265, 2s. 6d., said cheque being to the extent of £250 an accommodation to Cotton granted to enable him to reduce the balance at his debit with the pursuers, and the defender agreed that the said cheque should be so used by Cotton and the pursuers: Find that in pursuance of the said agreement between Cotton and the defender, Cotton, on receipt of the defender's cheque, endorsed it to the pursuers, and gave it them as cash, and the contents being put to his credit, the balance at his debit was thereby reduced to £28, 15s. 5d. sterling: Find that on Monday forenoon the pursuers passed the cheque through the clearing-house—that is to say, one of their clerks in conjunction with a clerk of the Bank of Scotland ascertained the difference in the amount between the value of the cheques payable between the two banks, and placed the difference to the credit of the bank having the preponderance in value: Find that on Monday afternoon the defender directed the Bank of Scotland not to honour the cheque, and in consequence the pursuers were not credited by that bank with the amount contained in it: Find that the pursuers have thus suffered loss to the amount of the value of the cheque by the act of the defender in stopping payment of it: Refuse the appeal, and allow the decree pronounced by the Sheriff-Substitute on 14th July 1882 to go out and be extracted in name of the Clydesdale Bank (Limited), incorporated under the Companies Acts 1862 to 1880, and decern: Find the appellant [defender] liable in expenses," &c.

The defender appealed to the House of Lords against this interlocutor.

Counsel for pursuers and respondents were not called on.

At delivering judgment—

Lord Blackburn—My Lords, the Lord Chancellor being unfortunately hoarse has requested me to give the leading opinion in this case.

There is no doubt, I think, that the decision appealed against is perfectly right. The first question (and it would be one of considerable importance if there were any doubt about it) is, whether a cheque drawn as this is a negotiable instrument or not? and upon that point I should have myself thought beforehand that there could not be any possible question raised. The general law merchant for many years has in all countries caused bills of exchange to be negotiable. That is a common ground which belongs to all or almost all countries, and it has been adopted as the law in all civilised countries. There are in some cases differences and peculiarities which by the municipal law of each country are grafted upon it, and which do not affect other countries, but the general rules of the law merchant are the same in all countries, and before the recent Act (the Bills of Exchange Act), which received the royal assent in August 1882, the general law of Scotland and the general law of England were the same. Some peculiarities there were in the municipal law of Scotland as to the mode in which it was to be enforced, and there may have been some things (though we have not been able to discover them) which according to the law of England might be enforced which could not have been enforced in Scotland. We need not, however, decide that matter. Upon the general question of negotiability the law has always been the same in both countries, and we have always been in the habit of treating the authorities of each country as

authorities in the other. We constantly in the English Courts, upon the question what is the general law, cite Pothier, and we cite Scotch cases where they happen to be in point, and so in a Scotch case you would cite English decisions, and cite Pothier or any foreign jurists provided they bore upon the point.

That being so, let us now see what is the question which is here raised. There is a cheque drawn upon a banker, and that cheque is, upon the face of it, payable to order. It is said very confidently by Mr Campbell Smith that such a cheque drawn upon a banker is not by the law of Scotland negotiable. Why that is said we will see in a moment. I do not think that the Act which received the royal assent on the 18th of August 1882 (the Bills of Exchange Act) applies to this case, for it did not receive the royal assent until some months after the cheque had been issued, but I do think that the enactments in that Act are very good evidence of what had been the general understanding before it was passed, and of what was the law upon the subject. Now, the definition which in that Act is given of a bill of exchange is one which I think will be found in most treatises as the definition of a bill of exchange, and has always been considered the right one—"A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person, or to bearer." That definition completely embraces in it a cheque. A cheque is such an order—an unconditional order in writing addressed to a banker requiring him to pay a sum certain in money at a fixed or determinable future time—that is to say, on presentation—and coming within that definition it would clearly be a bill of exchange. Why should a cheque not be a bill of exchange? No reason whatever that I am aware of can be assigned for its not being so. The fact is, that for the purpose of fiscal regulations, on grounds which were supposed to be satisfactory to the Legislature, it was enacted that cheques on bankers, or on persons acting as bankers, should not be liable to stamp duty. But there were qualifications put upon that; they were not to be liable to stamp duty provided they were only payable to bearer, and provided they were issued within fifteen miles of the place of business of the banker. These qualifications have long ceased, but while they existed cheques upon bankers were very much confined in their negotiability and use, because the heavy penalties which would have been incurred if those limits had been transgressed prevented their being transgressed, openly at least. I believe, as a matter of fact, cheques were drawn for enormous sums more than fifteen miles distant from the place of business of the banker, the parties resolutely shutting their eyes to the facts of the case, and running the risk of the penalty. All that, however, is now done away with.

Now, why should a cheque drawn on a banker for that reason be in any different position, as far as negotiability goes, from a cheque or bill drawn upon anybody else? There is no apparent reason for it whatever. There is one difference at least, and there may be more, between a cheque and a bill of exchange in this respect—a bill of exchange would, unless something appeared to show that it was not to be so, have the days of grace, while a cheque has no days of grace; there is that difference, but it makes no further difference that I am aware of. Looking at the thing according to reason and sense, it would appear that a bill of exchange or a cheque drawn upon a banker should be in all respects equally negotiable as if it were not drawn upon a banker, but were drawn upon someone else. Accordingly it has been repeatedly so held in England, and I do not think that is disputed. I think that the case in which that was positively decided in England was the case of *Keene* v. *Beard*, 8 C.B. (N.S.) 372. The question there was very much indeed like that which was afterwards decided by the Court in Scotland in the case which has been referred to of *Macdonald* v. *The Union Bank*, March 29, 1864, 2 Macph. 963. The question there was, whether when a cheque had been drawn upon a banker, payable to bearer, and the person who received it had afterwards written his name upon it as the indorser of it, and had passed it away in that manner, the person who had thus indorsed it to another was liable to that other as endorser. It was decided that he was. That decision proceeded upon the ground that a cheque was in no respect different from an Inland bill of exchange. So those who drew the Bills of Exchange Act thought, for in their part 3 they begin with this definition of a cheque—"A cheque is a bill of exchange drawn on a banker payable on demand"—and then they proceed to declare and enact that a cheque in future at all events, is to be like a bill of exchange in all respects. Why should that not have been the law before? Mr Campbell Smith says that it is not the law of Scotland. Now, for all I know to the contrary, there may be some respects in which in the law of Scotland a bill of exchange and a cheque are not the same. I have already pointed out one difference, namely, that there are days of grace in the case of a bill of exchange which there are not in the case of a cheque. That is not material to the present case. But besides that, it may be that there are other differences in the law of Scotland, such as summary diligence, and modes of enforcing it, and privileges of that sort. It may be (I do not know anything about it) that those remedies are by the law of Scotland not applicable to cheques, but are applicable to bills of exchange, and some of the passages which Mr Campbell Smith has quoted from Lord Neaves, and has relied upon, look very much as if he had thought so. But when you come to see whether a cheque is not a negotiable instrument as well as a bill of exchange, the authorities in Scotland seem to be uniformly to the effect that it is negotiable, and that it is to be recovered upon under exactly the same circumstances as any other negotiable instrument would be. I myself think, especially now when the fiscal laws are taken away, and when we all know in point of fact that a large number of cheques are drawn for entirely the same purpose as bills of exchange—(for example, a gentleman resident in London draws a cheque upon a Scotch banker, and transmits it to a tradesman, or some other person, to whom he has to pay money, in order to accomplish the proper object of a bill of exchange, namely, to transfer money from one country to another, or from one person to another)—it would be extremely injuri-

ous to commerce if there was any doubt at all upon the point that a cheque is a negotiable instrument like other bills of exchange.

Now, on this point the authorities seem to be uniform. There may be that distinction which Lord Neaves put, that some of the summary remedies which are applicable to the one instrument are not applicable to the other; but otherwise the authorities are uniform to the effect that a cheque given in this way is a negotiable instrument in Scotch law, and consequently that the holder of it to whom the property in it has been transferred for value, either by delivery or by endorsement, is entitled to sue upon it if upon due presentation it is not paid.

There was also some confusion in the argument in this respect—it was put as if it made some difference that this cheque could not be paid because M'Lean, the drawer of the cheque, had ordered the bank not to pay it. His liability was because he having drawn the cheque upon the bank, the bank did not pay it on presentation. If the bank had not paid it because they had no funds in their hands, or if the bank having funds in their hands had stopped payment and had become insolvent, the liability of M'Lean would have been the same. It was not because he countermanded the cheque, and forbade the bank to pay it upon presentation, but because they did not pay it upon presentation, that the cause of action arose.

My Lords, that being so, it only remains to see (the cheque being handed in this way to the bank, as the interlocutors find, and the bank taking it as having been properly transferred to them) whether that was merely a handing of it in the same way as a merchant would hand a cheque to his clerk to carry that cheque to the bank in order to get the money for it, or as he would hand a draft to his clerk to carry that draft in order that he might get it accepted, and the like. In such a case, of course, the servant or agent to whom he gives it has no property in it—it was not intended that he should have any, and he has none. Now, in the present case, did the bank get the cheque in that way as a mere agent, and nothing else, or did they get it in order that they might have the property in it transferred to them, and that they might become holders of it? The condescendence makes this averment—"The said draft or cheque was endorsed by the said W. B. Cotton, and was by him delivered to the pursuers on or about the 14th day of January 1882, on their paying to him the said sum of £265, 2s. 6d., or placing the same to the credit of his account, which was then overdrawn to an amount in excess of the said sum, and thereby extinguishing the said account to that extent." That is the averment. The conclusion of law is—"The pursuers are thus onerous holders of the said draft or cheque for full value." The conclusion of law is drawn from the fact. Is the fact true? In this particular case we have not to look at the evidence to see how it was, but we have to see whether or not it is found to be so. No evidence outside the interlocutor is admissible, and I can read the interlocutor in no other way than that it is found to be so. The Court of Session have no doubt inquired and found the fact that M'Lean had given the cheque to Cotton expressly in order that Cotton might use it in this way by handing it to the bank, and consequently there was no breach of faith in Cotton handing it to the bank. They have found that. That is evidence going to show that it came to the bank without any *mala fides*. Something was said in the argument about the rule of law which is quite clear, and which has been long established in England at least, that though *prima facie* you presume value in the person who holds, yet if you show that the instrument was obtained from the person who formerly held it by fraud, it raises a presumption that he would pass it away to somebody in order that it might be sued upon, and that that person would not really be a holder for value; consequently when that is shown the *onus* is shifted, and the person who holds that bill of exchange is put upon proof, and can no longer rely upon the mere presumption in law of its being a negotiable instrument. If such a question had arisen here, and proof had been given, I think that the fact that the cheque was given by M'Lean to Cotton for this very purpose would have prevented the burden of proof being shifted. But that is not material for decision here. What the Court below has found (and we are bound to take it as truly found) is, "that Cotton on receipt of the defender's cheque indorsed it to the pursuers, and gave it to them as cash, and the contents being put to his credit the balance at his debit was thereby reduced to £28, 15s. 5d. Now, how can it be said gravely that that is not a distinct and intelligible finding that the cheque was paid to the bank as cash with the intent that they might be the owners of it, and that Cotton's debt to them should be reduced by that amount?

The case was then attempted to be argued in this way, that that being so, nevertheless though the bank were holders of the cheque they could not sue upon it. Something was said about the case of *Currie* v. *Misa*, L.R., 10 Exch. 153—*aff.* June 26, 1876, L.R., 1 App. Ca. 554. It does not seem to me that the question which arose in that case is really necessary to be decided here. In the present case we have it found distinctly that the bank were paid this cheque for the very object of its being received by them precisely as if it had been a £250 Bank of England note which had been handed in by Cotton for the purpose of reducing his debt. If so, no such question as that which was raised in the case of *Currie* v. *Misa* would arise here. But I must own that I have never been able to perceive any ground for doubting that the Court of Exchequer Chamber were perfectly right in the case of *Currie* v. *Misa* when they held that the payment of a cheque, or a bill payable on demand on account of a debt to a banker—a payment by which it was intended to be handed to them as property, and not merely handed to them as a servant or agent, but handed to them as cash with the object of reducing a balance—was a payment for perfectly good and valuable consideration, but I do not know that it is necessary to decide that point here, because it is not raised.

Now, the other points which have been endeavoured to be raised come to very special demurrers, as I may call them, upon the form of the interlocutor, and so on. It seems to me, as I have already said, that the point which is raised by the pleadings is this, Was this a negotiable bill? As I have already said, I can see no reason why a cheque should not be a negotiable bill both by the law of England and by the law

of Scotland. This then is a negotiable bill; if so, did the bank have it endorsed to them for value, so that they became, as is averred in the third condescendence which I have read, "onerous holders of the said draft or cheque?" If so, when it was presented and dishonoured was there a recourse against the drawer who had handed it to them to sue for that dishonour, no matter whether it was because M'Lean ordered the bank to do it, or whether it was done for any other reason? I see no possible reason for saying that they would not be able to recover upon that ground; I think that that is the very ground upon which it goes. All the rest, whether there was fraud, whether there was *mala fides* and the like, are matters which, if there had been any ground for them, ought to have been raised by the defender, and no one of them having been found we must take the case accordingly. Looking at it as we are obliged to do, and taking the facts upon the finding of the Court, and treating it as a special verdict, I think that upon matters of law the decision is right, and I accordingly move your Lordships that this interlocutor be affirmed, and that the appeal be dismissed with costs.

Lord Watson—My Lords, notwithstanding the very long and able argument which has been addressed to the House by the learned counsel, I have felt throughout that this is a very plain case according to the well-known principles of the law of Scotland, and in order to support or give a colour to the contentions of the appellant it was necessary for his counsel to impeach a great number of those principles which are settled by decision. I quite agree with the observations which have been made by my noble and learned friend as to the scope of the findings of fact contained in the interlocutor of the Court of Session. They are undoubtedly within the record, and I apprehend that your Lordships in deciding as between the parties must take into account all the findings of fact pronounced by the Judges, whether they are derived from the condescendence or from the defender's statements. It is quite true that a pursuer would not be allowed, in consequence of anything which is to be found in the interlocutor, to alter the foundation of his action. But in this case there is no pretence for saying that the respondents desire to alter the foundation of their action, which throughout is based upon this, that it was a legal wrong upon the part of the appellant to direct his bankers to refuse payment of a cheque which he was in law bound to make good to the pursuers.

My Lords, I think that three at least of the Judges of the First Division, namely, the Lord President, and Lords Deas and Mure, have based their judgment upon this special circumstance, that the appellant in this case giving his cheque for the accommodation of Cotton, did so in the knowledge that it was to be given to the bank in payment of an overdraft then due to them by Cotton—that he gave it for that purpose, and that it was given by him for no other purpose. I am inclined to agree with the view which their Lordships took of the case upon that state of facts, I think that in law, and viewed in the light of that fact, it is the same as if the appellant had gone to the bank, and had there undertaken to pay, and had confessedly paid, the overdraft with his cheque, handing it across the counter to the bank. There would have been no negotiation whatever in that case.

But apart from these specialties I entirely agree with the view of the Scots law which has been stated by my noble and learned friend. I have no doubt that according to the law of Scotland a cheque in the form of that which was given by the appellant to Cotton is a negotiable instrument—in other words, is substantially a bill attended with many though not all of the privileges of a bill. The law upon this point appears to me to have been stated with great accuracy by the late Lord Cowan in the case of *Macdonald* v. *The Union Bank*. His Lordship there said—"A banker's draft or cheque, according to all the authorities, and according to the practice of bankers, is a negotiable instrument, and such documents are as negotiable as bills of exchange or promissory-notes." And the law does not rest upon that judgment alone, I find that in the case of *M'Gilchrist* v. *Arthur*, decided by the Court of Session in the year 1794 (January 16, 1791, F.C.), precisely the same doctrine was laid down as to the negotiable character of a banker's draft or banker's cheque. Not only so, but I find this also, that all the text-writers of this century who deal with or treat of banker's cheques lay down the law in precisely the same terms, so that it is out of the question to say that this is recondite law which requires to be dug out or found out for the purposes of this particular case. It has been a well-known and well-understood and well-settled rule of the law of Scotland for at least about a century past, and I rather think that if one were to go back to the older cases it would be found that according to the law of Scotland the distinction between a banker's cheque and a proper mercantile bill was even less in degree then according to the principle recognised in those cases.

Well, my Lords, one other question remains which has been argued on the part of the appellant. He says, "*Esto* that this draft was a negotiable instrument, the respondents gave no value for it, and therefore they are liable," to use the language of the law of Scotland, "to all the exceptions pleadable against the original holder of the cheque"—in other words, against Mr Cotton, to whom the appellant gave it, and undoubtedly for his accommodation only. Now, my Lords, for that contention we have had no authority whatever. It would be a strange doctrine, even if one were dealing with it for the first time; and in the able argument of the learned counsel who opened the case reliance was mainly rested upon the case of *De la Chaumette* v. *The Bank of England*, 9 B. & C. 208. But it is impossible for me to accept that case as an authority according to the interpretation which the appellant's counsel put upon it; I prefer the explanation given of the ground of judgment by the late Lord Hatherley in the case of *Currie* v. *Misa* in this House. He said there (1 App. Ca. 570)—"It appeared from the circumstances of that case that the party suing was suing simply as an agent of a person who was bound to show that he had given good and valuable consideration." If that be a correct representation of what was held, or of the ground of the judgment in the case of *De la Chaumette* v. *The Bank of England*, how is it possible to say that it is an authority for this proposition that a

third party taking a cheque as in payment of an account, and not taking and holding it as agent for the person who paid it to him, does not hold it for value? But the *rationes*—the grounds—upon which, apart from all authority on the point, I should proceed as a matter of principle, are fully expressed in the opinion of the majority of the Judges in the Court of Exchequer Chamber in the case of *Currie* v. *Misa*. It is true that another ground of judgment was adopted by the House of Lords when that case was before them on appeal, but I cannot find anything in any observation made by the noble and learned Lords who decided the appeal in *Currie* v. *Misa* to throw the least discredit upon the doctrine laid down by the majority of the Judges in the Court of Exchequer Chamber, whilst, on the contrary, I find a great deal of observation which tends to support the view taken by the majority.

My Lords, these observations seem to me to be quite sufficient to dispose of the appeal before the House. I shall not go into the view (which in the main is correct according to my opinion) taken by Lord Shand in the Court of Session. His Lordship was of opinion (and I do not at all disagree with him) that the case ought to be decided upon broader grounds than those which were adopted by the majority of his brethren. I think that the grounds of judgment relied upon by Lord Shand, and the grounds of judgment relied upon by the majority of the Court, are equally sound, and equally fatal of course, to the contentions of the appellant at your Lordships' bar. I have only to add this observation, that I do not think that the principles involved in this case at all relate to or touch the doctrine laid down by the Court in the case referred to by Lord Shand of *The Clydesdale Bank* v. *The Royal Bank*, March 11, 1876, 3 R. 586. The whole question in that case related to the character in which the bank got possession of and held Mr Paul's cheque. The Court there decided according to the view which they took of the circumstances of the case that the bank held simply as agents for Mr Paul. But what was decided in that case cannot in the least degree affect the present, because the question in what character a bank holds a cheque which has been given to them by their customer is a question of fact. In the present case it is conclusively established by the findings of the Court contained in the interlocutor appealed against that the Clydesdale Bank held the cheque in question, not as agents for Mr Cotton, but as onerous holders, the cheque having been given to them in payment of what was due by Cotton to them.

In these circumstances I have no hesitation in concurring in the proposal which has been made by my noble and learned friend, that this appeal be dismissed with costs.

LORD BLACKBURN—My Lords, I wish to add one word upon a matter which was not present to my mind before, namely, that the question whether the opinion of Lord Coleridge, who was in the minority in the case of *Currie* v. *Misa*, or that of the majority of the Court of Exchequer Chamber, is the right one, can never arise at all in future, for the 27th section of the Bills of Exchange Act says this—"Valuable consideration for a bill may be constituted by an antecedent debt or liability. Such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time."

The House affirmed the judgment of the First Division, and dismissed the appeal with costs.

Counsel for Appellant—Solicitor-General (Herschell, Q.C.) — Campbell Smith. Agents — A. Beveridge, Westminster—W. Officer. S.S.C.

Counsel for Respondent—Davey, Q.C.—Readman. Agents—Murray, Hutchins, & Stirling—Morton, Neilson, & Smart W.S.

COURT OF SESSION.

Wednesday, November 28.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

LOCHHEAD *v.* GRAHAM.

Diligence—Poinding — Competency of Poinding Goods in Creditor's own Custody.

Held (*aff.* judgment of Lord Kinnear) that it is no good objection to the validity of a poinding that the goods of the debtor pointed are in possession of the creditor at the time of poinding.

Poinding—Procedure—Service of Warrant of Sale by Registered Letter—Statute 1 *and* 2 *Vict. cap.* 114, *sec.* 26—*Citation Amendment* (*Scotland*) *Act* 1882 (45 *and* 46 *Vict. cap.* 77), *sec.* 3.

Held that section 3 of the Citation Amendment Act applies to judicial intimations in the course of diligence as well as to citations, and that a warrant of sale under a poinding was validly served by a copy being sent to the known address of the debtor, who was then resident out of the jurisdiction of the Sheriff who granted the warrant.

Section 26 of the Personal Diligence Act 1838 enacts, with regard to sales under the diligence of poinding, *inter alia*—"The Sheriff shall order a copy of the warrant of sale to be served on the debtor, and on the possessor of the pointed effects if he be a different person from the debtor, at least six days before the date of the sale."

Section 3 of the Citation Amendment Act enacts—"From and after the commencement of this Act, in any civil action or proceeding in any court or before any person or body of persons having by law power to cite parties or witnesses, any summons or warrant of citation of a person, whether as a party or witness, or warrant of service or judicial intimation, may be executed in in Scotland by an officer of the court from which such summons, warrant, or judicial intimation was issued, or other officer who, according to the present law and practice, might lawfully execute the same, or by an enrolled law-agent, by sending to the known residence or place of business of the person upon whom such summons, warrant, or judicial intimation is to be served, or to his last known address, if it continues to be his legal domicile or proper place of citation . . . a registered letter by post containing the copy of the summons or petition or other document re-