decree. This would not be a warrant for every kind of diligence. Some diligence proceeds upon Signet letters at once, and in such cases it is necessary to have first obtained a decree of a Supreme Court having a Signet, or a *fiat* of this Court upon a bill, either of which entitles any Writer to the Signet to expede horning. But some diligence proceeds by action, as poinding of the ground and adjudication. And adjudication, especially adjudication against a living debtor, presents a close analogy to the proceeding we are considering. It is competent to adjudge at once on a liquid document without any constitution. An unprotested bill is sufficient, though it would not be a foundation for horning. So is an English penal bond, as was found in the *York Building Company* cases.

Why then should an English decree in proper form not be a sufficient basis for this diligence of confirmation? It would be unreasonable to disregard it. The creditor could do no more than constitute his debt against an English debtor in an English Court, and when driven to resort to confirmation here by the accident of there being funds due by a Scotch debtor, every facility should be given for such a supplementary proceeding.

The party may of course object to the evidence or authenticity of the judgment if he pleases; but to exclude this decree altogether would be a strong proceeding, tending to treat our English neighbours as outer barbarians. We should be placing ourselves beyond the pale of that courteous intercourse which should subsist between civilised countries, and especially between this Court and an English Court in the same island, and subject to the same sovereign.

Lord Justice-Clerk—I entirely concur with your Lordships. I think that the Lord Ordinary's finding is not very logically connected with the views expressed in his note. Assuming that the document before us is an English judgment in a form in which it would be received as evidence in the English Courts, it seems to be to me clear that it is a sufficient *constitution* of the debt. A party who has obtained a judgment of a competent court against his debtor, which liquidates the debt, has done all that can well be required to constitute that debt. It is surely *constituted* by a judgment so obtained; and it would be unjust to require him to constitute it of new in Scotland against the unrepresented estate of his deceased debtor. I agree with your Lordships that a document may be a sufficient basis of confirmation, though not in a form in which the creditor could at once obtain execution.

It is a different question whether this document would, in point of fact, be received in the English Courts as instructing a judgment of the Exchequer Court of Pleas, and, if that is disputed, we must have inquiry. Assuming that that inquiry results in its being ascertained that any English court would receive this document as evidence of a judgment, I cannot go into the view that the Commissary was not entitled, without taking proof as to its authenticity, to grant confirmation to Mr Stiven. *Prima facie* and presumably, the document was a good decree. It bears a seal of a Supreme Court, it purports to be an office copy of a judgment, and it contains a very formal narrative of judicial proceedings terminating in a judgment founded on a verdict. The case of the English penal bond, referred to by some of your Lordships, which has been held a sufficient basis for an adjudication, is, in my opinion, directly in point, for in adjudications a liquid document of debt or a decree is required, and a penal bond is not probative *per se* in Scotland.

The Court, on 7th February 1868, pronounced this interlocutor:—"Recall the said interlocutor: Find that the document No. 52 of process, purporting to be an office-copy of a judgment of the English Exchequer Court of Pleas, to the effect set forth therein, was, if authentic, *prima facie* evidence of the constitution of the debt alleged to be now due to claimant Stiven, and was thus a liquid document of debt, on which the Commissary was entitled and bound to proceed in the confirmation for which he applied as executor-creditor of the deceased Joshua Tattan; but, in respect that the authenticity of the document is denied on record, continue the cause till Tuesday next, that parties may be heard as to the proper mode of ascertaining this disputed matter; reserving all questions of expenses."

Thereafter, the parties having agreed to take the opinion of English counsel as to the effect of the document, the Court pronounced the follow interlocutor:—"Approve of the case for the opinion of English counsel, as adjusted by the parties; and, of consent of both parties, appoint the said case, No. 63 of process, with the document therein referred to, being No. 52 of process, to be laid before Mr George Mellish, Q.C., for his opinion thereon; and appoint case and opinion, when obtained, to be lodged in process *quam primum*."

Mr Mellish's opinion was to the effect that, except in the same court and in the same cause, the document would not be receivable unless either certified by the keeper of the original record to be a true copy, or sworn to as correct by a witness who had compared it with the original.

To-day the Court, on the analogy of the course which had been followed in reduction of services, held that the executor might still supply the necessary proof of authentication.

Agent for Stiven—James Webster, S.S.C.
Agents for Myer—Stuart & Cheyne, W.S.

Friday, May 29.

MONTGOMERY CUNNINGHAME *v.* BOSWELL.

Loan—Abandonment—Taciturnity—Interest. Circumstances in which *held* that there was no presumption from taciturnity and lapse of time that a claim for a sum given in loan was meant to be abandoned, and that interest was due on the principal sum in absence of any stipulation to the contrary.

This was an action brought by Sir Thomas Montgomery Cunninghame of Corsehill, as executor-dative of the late Hon. Mrs Leslie Cuming of Skeldon, against the Dowager Lady Boswell, as executrix of the late Sir James Boswell of Auchinleck. The summons concluded for payment of the sum of £2000, said to have been advanced to the late Sir James Boswell by his aunt, the late Mrs Leslie Cuming, on 30th January 1829, together with interest at 5 per cent. since the date of the advance. The loan was instructed by holograph receipt granted by Sir James of the date in question, and which was found in Mrs Leslie Cuming's repositories on her death in 1863; and the questions raised were two,—(1) whether the circumstances, including the long period which had intervened without any demand being made for payment, presumed abandonment or discharge of the debt?

and (2) whether the circumstances presumed an agreement between the creditor and debtor, or at least an intention on the part of the creditor that *interest* should not be exacted?

The pursuers made the following statements:—"The Honourable Mrs Leslie Cuming died on or about 22d February 1863, and the pursuer, Sir Thomas Montgomery Cuninghame was decerned executor to her *qua* child of a predeceasing next of kin, conform to decreet-dative of the Commissary of the county of Edinburgh, dated 24th September 1863, and was confirmed executor-dative to her in various sums of money due to and belonging to her, but which did not include the said sum of £2000, and interest thereon, conform to testament dated 5th October 1863. As executor, the pursuer is now in right of the sum and interest sued for. The pursuer will produce an eik to the confirmation, including the sum now sued for, before extract."

The defender pleaded:—"1. The documents of debt libelled are not *habile* grounds of debt or claim against the defender. 3. The pursuer's claim is excluded by taciturnity and *mora*. 4. In any view the claim for interest is excluded, (1) in respect that there was no stipulation and no demand ever made for payment of interest; and (2) in respect of taciturnity and *mora*. 5. Even if the debt was ever contracted, it must, in the circumstances, be presumed that it has been extinguished and discharged by the creditor."

The Lord Ordinary (Ormidale) repelled the defences, and found that the pursuer was entitled to recover both principal and interest. His Lordship added the following note:—

"The sum sued for is acknowledged to have been received by the late Sir James Boswell, in terms of the two holograph documents founded on by the pursuer; and as these documents expressly bear that the money was given to him in loan, the law implies an obligation on him to repay the amount, with interest. Nor does the defender, who, as representing Sir James Boswell, is liable for his debts, allege that the loan in question, or any part of it, either principal or interest, has ever been repaid. She merely pleads taciturnity and *mora*. But the Lord Ordinary does not consider that the circumstances founded on by the defender are sufficient to support such a plea. The silence of Sir James Boswell, the debtor, and his acts and conduct, to which the creditor was no party, cannot affect the matter. It is no doubt said that, although an advertisement after the death of Sir James Boswell was inserted in the *North British Advertiser* for claims on his estate, no claim was preferred in respect of the debt in question. It is not said, however, that the creditor then in the debt, Mrs Leslie Cuming, ever saw the advertisement. Beyond, therefore, the somewhat vague and general allegation that Mrs Leslie Cuming was latterly in pecuniary difficulties, there is nothing to support the defence but the apparent silence and forbearance of the creditor. The claim, however, is not prescribed; and, in the circumstances, the Lord Ordinary is unable to see how, on any sound principle, the pursuer's claim has been cut off merely by the lapse of time. The relationship betwixt the parties of aunt and nephew may in some degree account for the absence of any evidence of pressure by the former against the latter for payment of the debt; but that Mrs Leslie Cuming must have held it to be a debt owing to her by Sir James Boswell is clear, not only from the terms of the documents libelled on, but also from one of her testamentary writings (No. 12 of process), in which she says,—'I give the £2000 I lent Sir James Boswell, my nephew, to his mother, Grace, Lady Boswell, at my death.' Accordingly, counsel for Mrs Vassall, as in right of the said Grace, Lady Boswell (the latter having died subsequently to the death of Mrs Leslie Cuming), attended at the debate, and concurred in asking that decree should be pronounced in favour of the pursuer."

The defender reclaimed.

Solicitor-General and Nevay for her.

Fraser and Gifford in answer.

The following authorities were quoted:—

Ersk. 3, 7, 29; *Seath* v. *Taylor*, 21 Jan. 1848, 10 D. 377; *Hamilton* v. *Hope*, 26 March 1863, 15 D. 594; *Black* v. *Hardie*, 29 May 1834, 12 S. 643; *Scott* v. *Mitchell*, 27 May 1830, 8 S. 820; *Moncrieff* v. *Haugh*, 21 D. 216; *Mackenzie*, Oct. 15, 1831, 5 W. & S.; *Earl of Rosslyn* v. *Earl of Strathmore*, 17 Nov. 1843, 6 D. 90; *Condie* v. *Peddie*, 10 March 1848, 10 D. 941; *Earl of Wemyss* v. *Trail*, 23 Nov. 1810, F.C. 45; Addison on Contracts, 1068–9; Dickson on Evidence, p. 616; *Currie*, 6 S. 1119; *Graham*, 2 S. 594; *Hamilton* v. *Struthers*, 21 D. 51.

At advising—

Lord Justice-Clerk—In this case the executors of the late Mrs L. Cuming sues the representatives of the late Sir James Boswell for a sum of £2000, said to have been advanced in loan to Sir James on the 30th January 1829, with interest since that date.

The executor founds upon, as proving the fact of loan, a document in which, of the date of the alleged advance, Sir James, in a holograph writing, acknowledges the receipt of the loan of £2000. The pursuer says that, the fact of the loan being established, it follows necessarily that the borrower must repay it, and repay it with interest. The case made in the record on the part of the defender is, that the demand is excluded by *taciturnity* and *mora*. It is said that no demand was made down to the date of Mrs Cuming's death for principal or interest, and that the absence of a demand for principal or interest during a period extending from January 1829 to February 1863, when Mrs Cuming died, is in itself a ground for establishing the defence, viewed in connection with the fact that Mrs Cuming was an aunt of Sir James; that Mrs Cuming was herself for some time in difficulties, and that invitations were made on Sir James' death to creditors to claim, but none was made. That Sir James, who was at one time in difficulties, and framed a schedule in which all his debts were set out, did not include this debt among the number, —from all of which facts it was to be inferred that the claim was in some way extinguished or abandoned.

Mrs Cuming's executor, in answer to the case of presumption raised by the defenders, refers to a document nearly contemporaneous with the loan. On the 10th February 1829, she, by a holograph writing, dealt with the sum, but as one which was on her death to be paid as a legacy from herself to the mother of the debtor. He argued,—that any presumption from the mere absence of demand for payment, even under circumstances in which the claim would be naturally expected, was not to be entertained. Now demand of the principle was accounted for as she had destined it to be taken by bequest after her death.

The examination which was allowed by us into the circumstances under which the documents were found, establishes that the acknowledgment

and the will were found together, and found in a drawer in which three important deeds were discovered, confirming, if it required confirmation, the apparent resolution of the deceased—that after her death the right to recover the loan should be in her legatee.

In reference to the result of the examination generally, I may say that the apparent lateness of the discovery of these two documents is sufficiently accounted for, and the statement in the minute of Sir T. Cuming verified. It appears that a third document, viz., the cheque under which the £2000 was got by Sir James, was not found in the repository but among useless papers; but the view stated by one of your Lordships during the discussion seems sufficient to account for it. A used cheque is not likely to be reclaimed, and though Sir James' name is on the back, that is a mere acknowledgment of the fact of payment to him at the bank, and if it stood alone would not prove a loan. He might have been the mere hand of Mrs L. Cuming; and one employed as a hand only is presumed to have accounted.

I think, as the loan was evidenced by written acknowledgment, that is a case to which the doctrine of *taciturnity* and *mora* can scarcely apply. It is a case to meet which the law of prescription was devised. The opinion of Lord Glenlee, expressed in the report of *Cullen's* case, especially as given in the Jurist, vol. xi, p. 61, is valuable. The case of *Graham* (F.C. and 2 Sh. 594), was decided against the party pleading taciturnity in circumstances much more favourable than the present. There there was a presumption of extinction of payment in that case; here no such case arises. Nothing in the case goes to show that Sir James paid, or that Mrs Cuming received payment; and if Sir James had really paid the debt, the fact would have been easily proved. It is not capable of being seriously maintained that the debt was extinguished by payment.

I have no hesitation in coming to the conclusion that the defence must be repelled as to the principal sum concluded for; whether interest is exigible is not so clear. I have entertained some difficulty, arising from the near relationship of the parties, and the possibility that the aunt might not intend to accumulate such a considerable debt against her nephew, but I feel myself constrained on this point also to repel the defence. In the case of *Thomson* and *Geikie* (March 6, 1861, 23 D. 701), the general law on this subject is stated by the present Lord President, then in the chair of this Division, that an advance by way of loan implies an obligation to pay interest for the money. In that case it was a question whether there was a loan or not; here the money is expressly taken on loan, and that rule applies *a fortiori*.

I think that this exposition of the law is confirmed by the decision of the case of *M'Dowal* of Garthland, where, under circumstances in which it was extremely doubtful if money was sent in a gift or loan, the Court, finding that the transaction was one of loan, gave interest from the period of the monies being received. The executor has a good title to recover these arrears, whether they may be found ultimately to pass by the bequests or to form part of the executry estate.

Up to the date of this lady's death, as no year's interest was forty years due, I consider that she might have claimed payment. The mere fact of its not having been demanded and has not been paid, cannot of itself presume a discharge of the claim. It would require very strong presumption to destroy a positive obligation arising out of a contract or claim evidenced by writing. I hold that there is nothing here to justify such a result. At an earlier period of our law the claim for interest might have possibly met a different fate, not because of presumptions from the absence of demand, but because it might have been held not to be exigible. When we come to the conclusion that it is due *ex lege*, from the very nature of the transaction we cannot hold the claim extinguished on such presumptions.

The result may be considered hard, the amount of accumulated arrears is very large, but by the absence of periodical payments, Sir James' estate has in effect been relieved from compound interest. I therefore concur with the Lord Ordinary, and very much on the grounds on which he has proceeded.

Lord Benholme and Lord Neaves concurred.

Lord Cowan concurred on the first point; and, without dissenting on the second, was inclined to hold, in the circumstances of the case, that it was not contemplated between the parties that interest should be exacted.

Agent for Pursuer—James Dalgleish, W.S.

Agents for Defender—Scott, Moncrieff & Dalgety, W.S.

Saturday, May 30.

FIRST DIVISION.

THOMS *v.* THOMS.

(*Ante*, p. 131).

Compensation—Liquid Document of Debt—Due Time. Plea of compensation *repelled*, in respect that the document of debt founded on was not liquid. Question as to plea being stated *tempestivè*.

John Thoms, on 18th January 1868, obtained a decree of the Court of Session against the complainer for payment of a sum of £600, with interest and expenses, and, on 17th February, he charged on the decree. On 28th February he obtained warrant for interim execution.

The complainer now suspended, and pleaded compensation. She produced a document which she alleged was holograph of the charger, and which ran thus:—

"*Rumgally*, 21*st January* 1862.—I hereby bind myself or heir to pay, within two years of your death, Five hundred pounds to whom you may direct. (Signed) John Thoms."

"To Alexander Thoms, Esq., of Rumgally."

There was endorsed on this document the following assignation:—

"I, Alexander Thoms of Rumgally, direct John Thoms, granter of the foregoing obligation, or heir, to pay the sum therein mentioned, being Five hundred pounds, to my daughter Robina Thoms, residing with me at Rumgally, or to her executors or assignees, and I assign said sum to her. In witness whereof, these presents, written by Charles Welch, writer, Cupar, are subscribed by me at Rumgally, the eighth day of May One thousand eight hundred and sixty-two years, before these witnesses, the said Charles Welch, and Thomas Lumsden, his servant.

"Charles Welch, *witness*. "A. Thoms."

"Thomas Lumsden, *witness*."