For the decision of the legal question on which we differ from the Lord Ordinary, the essential fact is that the writ when signed was delivered by the defender to M'Dougall without any special instructions, and, in particular, with no instructions to complete the testing clause. M'Dougall was *in hac re* the agent of the bank, and therefore delivery to him was delivery to the bank.

I cannot find in the survival of the words "in witness whereof" the constitution of a condition restricting the legal effect of signature and delivery, nor do I see in those words a silent mandate to M'Dougall to do something for behoof of a man who could speak if he wanted anything further done. I therefore answer in the affirmative the first alternative query put by the Lord Ordinary towards the end of his note.

The Court sustained the appeal and pronounced decree in terms of the summons.

Counsel for Pursuers and Reclaimers—Jameson — Maconochie. Agents — Mackenzie, Innes, & Logan, W.S.

Counsel for Defender and Respondent—Dickson—W. Campbell. Agents—Gill & Pringle, W.S.

Saturday, June 11.

FIRST DIVISION.

[Sheriff of Mid-Lothian.

BROATCH *v.* DODDS.

Reference to Oath—Admission of Debt with Explanation—Production of Writings—Evidence.

A law-agent brought an action for payment of his professional account. The account having prescribed, the constitution of the debt was referred to the oath of the defender, who deponed that he had employed the pursuer as averred, but explained that he had only promised to pay what he was able, and that he understood the pursuer was conducting his litigation as a speculation.

Held that the obligation to pay was not limited or conditional, and that the oath was affirmative of the reference.

Observations by Lord Adam, Lord M'Laren, and Lord Kinnear to the effect that in a reference to oath the deponer may refer to documents, and be interrogated with regard to them, but that they cannot be looked at as productions except so far as they have been made part of his evidence.

In January 1892 Robert Broatch, solicitor, 23 Dundas Street, Edinburgh, brought an action in the Debts Recovery Court there against Jonathan M. Dodds, 245 Morningside Road, Edinburgh, for £27, 2s., being the balance of a business account for professional services rendered in connection with two actions in 1884-86.

The account having prescribed, the cause was referred to the oath of the defender, who, in answer to the pursuer, deponed, *inter alia*—"I called upon you about these actions and got your advice. . . . You attended and conducted the proof on my behalf. . . . (Shown twenty-five letters)—I do not deny having received all these letters. (Q) On 30th January you received this postcard?—(postcard read)—(A) I had abandoned the action by that time. . . . You knew well enough when I started the case the means I had, and what I told you I would do. I understood you were carrying it on as a speculation. . . . (Q) Were you to pay no money at all?—(A) I said I would give you what I actually could, and I told you when I gave you the last 10s. I was afraid I was drifting into litigation, and I would have to abandon it. I gave you altogether £1, 12s. 6d. . . . After paying the last sum of 10s. I said I could go no further. My letters show how unwilling I was."

The letters were produced, docketed and subscribed as relative to the deposition by the defender and by the Sheriff-Substitute (HAMILTON), who on 19th February 1892 pronounced the following interlocutor:—" . . . Finds the oath negative of the reference: Assoilzies the defender from the conclusions of the libel, &c.

"*Note.* — The defender's deposition amounts to this, that when he first employed the pursuer an arrangement was entered into by which he was to give the pursuer 'what he actually could,' but beyond that was not to be liable—in other words, that the pursuer undertook to conduct the business in question 'as a speculation.' That is a qualified oath, the qualification is intrinsic, and the oath must be regarded as negative—*Cowbrough* v. *Robertson*, 1879, 6 R. 1301."

The pursuer appealed to the Sheriff (BLAIR), who adhered.

The pursuer appealed to the First Division of the Court of Session, and argued—The oath was affirmative of the reference. The defender had admitted that the pursuer conducted the legal business referred to in the account for him. He did not say he had formally abandoned the actions, although he might have thought of doing so. The admitted debt was not a conditional one. The defender plainly did not regard this as a speculation on the part of the agent, for he promised to pay—contrast *M'Larens* v. *M'Dougall*, March 16, 1881, 8 R. 626. His understanding as to what the pursuer would require him to pay was only a conjecture, and did not amount to a bargain limiting the extent of his obligation—*Hamilton's Executors* v. *Struthers*, December 2, 1858, 21 D. 51. Nor was his obligation limited by his promise to pay what he could—*Fair* v. *Hunter*, November 5, 1861, 24 D. 1 (Lord Justice-Clerk Inglis, 8-9); *Forbes* v. *Forbes*, November 4, 1869, 8 Macph. 85; *Christie's Trustees* v. *Muirhead*, February 1, 1870, 8 Macph. 461.

Argued for the respondent—If there was admission of the constitution of the debt, it

was of a conditional constitution. The respondent was only to pay what he could, and this he had done. Further, the respondent had abandoned his actions, and the pursuer had gone on with them at his own risk. In the circumstances the oath was plainly negative of the reference, as the Sheriffs had held.

At advising—

LORD PRESIDENT—This case having been referred to the oath of the defender, the question is, what is the true meaning of the defender's deposition? Now, the defender admits that the pursuer acted as law-agent for him in two actions, and did the business shown in the account sued for. He says that at the commencement an arrangement was made between him and the pursuer—"(Q) Were you to pay no money at all?—(A) I said I would give you what I actually could."

The main question is, what is the legal result of that arrangement? I do not agree in the view of the Sheriffs. The words of the deposition import that the pursuer was to be remunerated by the defender, and the remaining question is, what is the effect of the qualification that the amount is measured by the ability of the defender. Now, the cases cited by the pursuer seem in point, and they settle that such words do not set up any limit to the liability other than the whole means of the person undertaking.

This, then, being the legal meaning of the words which I have quoted, I do not think their effect is abated by the words, "I understood you were carrying it" (*i.e.*, the case) "on as a speculation." This is not, like the words I have commented on, a statement of the bargain made, but a conjecture of the defender as to the pursuer's estimate of the comparative values of the liability of the defender and the liability of his opponent in the litigation in the event of success. Nor can I adopt the suggestion of the defender that the deposition imports that he terminated the employment of the pursuer. The words founded on are too vague to support this contention, the proposition being the substantive one that there was a cesser of an employment sworn to as having commenced. I am therefore of opinion that the oath is affirmative, and that the pursuer must have decree.

LORD ADAM—I concur with your Lordship. I have only to add with reference to the documents which have been printed, and to which we were referred in the course of the debate, that I think they cannot be looked at. The oath must be construed by itself, and without any reference to these documents.

LORD M'LAREN—I concur. I wish only to add a word with regard to a point noticed by Lord Adam—the competency of referring to the correspondence which is printed in this case. There is a good deal of law in previous cases upon the question how far writings may be made available for the construction of an oath of reference, but it seems to me that consistently with all that has been laid down in the decisions the rule is, and ought to be, exactly the same as the rule which regulates the use which may be made of one document which is referred to in another document for purposes of construction. The rule is, that you can only make use of the writing referred to for the purpose for which it is referred to in the principal writing. Accordingly, where a deponent under a reference to his oath has referred to his letters as containing his answer to an interrogatory, you are entitled to look at the whole correspondence as part of the evidence in answer to the particular question, but you are not entitled to look at it as contradicting or illustrative of his evidence upon any other point regarding which he has made no reference to the correspondence.

LORD KINNEAR—I am of the same opinion. I entirely agree with your Lordship. With reference to the point to which Lord Adam and Lord M'Laren have referred, I think the law is very clearly laid down by the late Lord President in *Gordon* v. *Pratt*, February 24, 1860, 22 D. 903, where he says—"It is not difficult to make writings available in an examination on reference if what is necessary is done—that is, placing the writings in the hands of the deponer and interrogating him in reference to them, his answers to which interrogatories are part of the evidence. But all that is evidence is what the deponer says on his oath."

The Court sustained the appeal and found the oath affirmative of the reference.

Counsel for the Pursuer and Appellant—M'Lennan—M'Laren. Agent—Party.

Counsel for the Defender and Respondent—Guy. Agents—Wishart & Macnaughton, W.S.

Saturday, June 11.

FIRST DIVISION.

[Sheriff-Substitute of Perthshire.

RATTRAY *v.* YEAMAN (LESLIE'S TRUSTEE).

Landlord and Tenant—Lease—Alteration of Written Lease—Proof—Return to Valuation Roll.

A landlord having allowed a tenant a reduction on the rent stipulated in his lease for the years 1885 and 1886, returned the reduced rent to the valuation roll for the years 1887 to 1889. In the year 1890 the tenant's estates were sequestrated, and at the date of the sequestration part of the rent for crop 1888 and the whole of the rent for crop 1889 was in arrear.

Held that the return to the valuation roll was not sufficient proof that the written lease had been departed from,