estate, and that for that purpose they ought to value, in manner directed by the settlement, all unrealised securities belonging to the estate; and further, that in case they should allot to any settled share any security or a portion of any security not falling within the power of investment specified in the settlement, the life-tenant would be entitled to interest at the rate of £4 per cent. per annum on the sum at which such security or portion had been valued, and that the costs of all the parties to this appeal be paid out of the estate as between agent and client.

Counsel for the Appellants (the Third Parties)—Haldane, K.C.—J. Wilson, K.C.—R. D. Melville. Agents—Mitchell & Baxter, W.S., Edinburgh — Helder, Roberts, Walton, & Thomas, London.

Counsel for the Respondents (the Fourth Parties)—Lord Advocate (Graham Murray, K.C.) — Solicitor-General (Dickson, K.C.) Agents — Webster, Will, & Co., S.S.C., Edinburgh—Grahames, Currey, & Spens, Westminster.

COURT OF SESSION.

Wednesday, November 5.

SECOND DIVISION.

[Lord Low, Ordinary.

LAURENCE HENDERSON, SONS, & COMPANY, LIMITED, AND LIQUIDATOR *v.* WALLACE & PENNELL.

Bill of Exchange—Cheque—Name of Payee left Blank—Advance by Bank to Drawers—Liability of Drawers—Singuli in solidum or pro rata—Blank

In exchange for a cheque, signed by three persons as drawers, and left blank in the name of the payee, the bank upon whom the cheque was drawn, by way of advance to the drawers, paid the sum in the cheque to one of them, and opened an account in name of the three drawers which was debited with the sum so paid and advanced.

Held that the cheque was a bill of exchange, and that the three persons who signed the cheque as drawers were liable *singuli in solidum* to the bank as holders for the amount advanced on the cheque.

In this action Laurence Henderson, Sons, & Company, Limited, in liquidation, and James Craig, C.A., Edinburgh, liquidator thereof, claimed to be freed and relieved by the defenders Wallace & Pennell, W.S., Leith, and the partners of that firm, of all claims at the instance of the National Bank of Scotland under an overdraft granted upon a certain cheque signed by Wallace & Pennell, Laurence Henderson, formerly managing director of the Company and the Company.

The pursuers concluded (1) for declarator that the defenders were bound to so free and relieve them, and (2) for payment of all sums drawn by the Bank as dividends in the liquidation upon their said claims, and in particular of a sum of £704, being a dividend so drawn by the Bank.

The question in the case was whether the cheque, in which the name of the payee was left blank, was a bill of exchange, and whether the drawers were liable to the bank, who continued to hold the cheque, *singuli in solidum* or only *pro rata*.

The cheque upon which the Bank made the claims from which the pursuers now sought to be freed and relieved was as follows:—

123 LEITH WALK,
LEITH, *26th November* 1898.

No. 519.

THE NATIONAL BANK OF SCOTLAND, LIMITED
(Leith Walk Branch).

(Stamp 1d.)

Pay to or order,
Three thousand five hundred pounds stg. which charge to the account of

(Stamped.) The National Bank of Scotland, Limited, Leith Walk, Leith. £3,500

WALLACE & PENNELL.
LAURENCE HENDERSON.
For LAURENCE HENDERSON, SONS, & Co., Ltd.
LAURENCE HENDERSON, *Managing Director.*

Paid 7th Dec. 1898.

M. C. GRANT, *Director.*
RICH. W. HUIE, *Director.*
DAVID CALLENDER, *Secretary.*

Note.—This Cheque is watermarked—Laurence Henderson, Sons, & Co., Limited, Leith, Glasgow, and Carluke.

This cheque had been presented to the Bank by Wallace & Pennell, who received the sum of £3500 thereon from the Bank. This sum Wallace & Pennell paid into their own account with the Royal Bank. On the same day they drew a cheque for £3500 upon their own account in favour of Laurence Henderson, Sons, & Company, Limited, and this sum was put to the credit of the Company's account. Upon the same day the Bank also opened a new account in name of the Company, Laurence Henderson, and Wallace & Pennell, which they debited with £3500, the sum in the cheque. The sum at the debit of this account at the date when the Company went into liquidation, being the sum upon which the Bank claimed, was £3524.

Wallace & Pennell lodged defences, in which, while not disputing that by reason of certain transactions, which it is unnecessary to specify, they were liable to relieve the liquidator of any sum in which the Company was indebted to the Bank, they maintained that the Company was only liable in a question with the Bank for one-third of the sum advanced.

They pleaded, *inter alia*—"(2) The pursuers not being liable to the National Bank for more than their *pro rata* share of the loan advanced by the Bank, the conclusions for relief against the defenders should be restricted to that extent."

On 7th February 1902 the Lord Ordinary (Low) pronounced the following interlocu-

tor:—"Finds, decerns, and declares, and Finds, decerns, and ordains, in terms of the conclusions of the summons."

Note.—[*After a statement of the facts*]—"The question therefore is whether the three parties who drew the cheque are liable to the Bank jointly and severally or only *pro rata*. [*His Lordship then dealt with certain matters not relevant to the present report.*]

"Now, what was the effect of the cheque granted by all the three obligants? A cheque is a bill of exchange drawn upon the banker, and, with certain exceptions which do not affect the present question, is subject to the same rules as other bills of exchange. Now, according to the law of Scotland, drawers or acceptors of a bill of exchange are liable jointly and severally—Bell's Prin., sec. 61; 1 Bell's Com., 362; Ersk. iii. 3, 74; and I see no reason why that rule should not apply in this case as between the granters of the cheque and the Bank.

"The defenders argued that the cheque, being blank in the name of the payee, was not a bill. But a bill blank in the name of the payee may be completed by anyone having express or implied authority to do so, and in this case the Bank was requested to pay the cheque to Wallace & Pennell, and were thereby authorised to complete the bill by filling in their name as payee.

"I therefore do not think that it can be successfully maintained that the cheque in question was not a bill of exchange, and upon the whole matter I have come to the conclusion that the defenders were jointly and severally with the other obligants liable to the Bank for the sum advanced.

The defenders reclaimed, and argued—The real question in the case was—Were the parties who signed the cheque liable *singuli in solidum* jointly and severally or only *pro rata*. The ordinary presumption was that the liability of a co-obligant was *pro rata*—Bell's Prin., sec. 51; Ersk. iii. 3, 74; *Campbell* v. *Farquhar*, 1724, M. 14626. But the other side contended that this cheque was a bill of exchange. That was not so. The bank had never filled in the name of the payees. The definition of a bill of exchange in section 3 of the Bills of Exchange Act 1882 necessarily required a payee to be named in the bill. A cheque left blank did not fall within the definition. Further, the bank were in the position of acceptors of a bill. Sections 54 and 55 of the Act set forth the obligations enforceable under a bill. The present action did not deal with any such obligation. This was not a case of liability between a drawer or acceptor of a bill and the payee. The question of liability was one between the acceptor and the drawer. Such liability did not rest on the bill alone, and the law always allowed evidence of the relations between a drawer and acceptor.

Argued for the pursuers—Each of the parties signing the cheque authorised payment of the cheque. This cheque was a bill of exchange, and the obligants under it were liable *singuli in solidum* — Bell's Prin., sec. 61. It was of no significance that the name of the payee was not filled in. If necessary it could be filled in by the holder at any time.

At advising—

LORD JUSTICE-CLERK—[*After stating the facts and dealing with points not relevant to the present report*]—The cheque which was granted stands in the same position as a bill of exchange, and those who draw or accept a bill of exchange are jointly and severally liable to the holder. I am unable to see that the fact that the cheque is not filled in with the name of a payee makes any difference, as the bank, on paying the money to Wallace & Pennell, were as holders of the cheque entitled to fill in the names.

On the whole matter I agree with the Lord Ordinary.

LORD YOUNG concurred.

LORD TRAYNER—The facts of this case, in so far as at all material, admit of the briefest statement. The defenders Messrs Wallace & Pennell were requested and agreed to render the firm of Henderson & Co., Limited, some pecuniary assistance. The mode in which this was done was by means of a cheque drawn by these defenders along with the firm of Henderson & Co., its manager, and directors upon the National Bank of Scotland. Upon this cheque the National Bank (who held the funds out of which the cheque could be honoured) advanced to the drawers or makers of it £3500. It does not appear to me to be material to consider which of the parties to the cheque were the principal debtors, and which, if any, only cautioners, for whatever might be their rights and obligations *inter se*, they each and all were liable to the bank *in solidum* for repayment of the advance. This joint and several liability to the bank arose from the fact that they were each and all makers of the cheque. Now, as a cheque is just equivalent to a bill of exchange, the rule applies that everyone whose name appears on the bill, whether drawer, acceptor, or indorser, is liable in full payment to the holder of it. The defenders admit that they are bound to relieve the pursuer of whatever sum he has or may be obliged to pay to the bank in respect of the cheque, and maintain that the pursuers' obligation to the bank was only one *pro rata*. For the reason I have given I think this view is untenable, and that being so leads to the conclusion that the pursuer is entitled to the decree he concludes for. The defenders contended that the pursuers who signed the cheque were the drawers, and the bank the acceptors, and that on a bill (and therefore equally upon a cheque) there was no debt by the drawer to the acceptor. This is fallacious. The drawer (so called) of a cheque given for an advance, but not drawn upon funds in the banker's hands, is not in the position of one who draws a bill on his debtor who accepts. He is really the maker or granter of the obligation, and

stands in the position rather of the maker of a promissory-note, who undertakes payment of the amount therein contained to the payee or his order. Here the bank who advanced money on the cheque was the payee, and to that payee, being also the holder, payment must now be made by each and all of the makers or granters of it. I think the judgment of the Lord Ordinary should be affirmed.

LORD MONCREIFF was absent.

The Court adhered.

Counsel for the Pursuers and Respondents—Salvesen, K.C.—Younger. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for the Defenders and Reclaimers—Campbell, K.C.—Constable. Agents—Wallace & Pennell, W.S.

Wednesday, November 12.

FIRST DIVISION.

[Lord Low, Ordinary.

STEAMSHIP "DEN OF OGIL" COMPANY, LIMITED *v.* CALEDONIAN RAILWAY COMPANY.

Contract—Breach of Contract — Damages —Carriage of Goods — Measure of Damages—Consequential Damages—Notice of Special Circumstances — Carrier — Railway.

The owners of a steamer which had broken her piston, ordered another, and arranged for its carriage by passenger train. Through a mistake for which the railway company were admittedly responsible, the piston was several days late in arriving, with the result that the steamer was detained. The owners of the steamer brought an action against the railway company, claiming damages for the expenses to which they had been put, the wages and coal expended while waiting for the piston, and the loss of the profit which the steamer would have earned had she been able to sail. On a proof it was established that the servants of the railway company were aware that they were carrying a casting; that it was going to a ship, and that the effect of non-delivery would be that the ship would be unable to sail; but they were not informed of the size of the ship or the number of her crew. The Lord Ordinary awarded £10 as damages, being the amount of the extra expense incurred in fitting the piston owing to the fact that it ultimately arrived on a Sunday, and the expense incurred in seeking to recover it. On a reclaiming-note the Court *altered* the interlocutor of the Lord Ordinary and assessed the damages at £50, *holding* that while the pursuers were not entitled to damages for loss of profit, they were entitled to a portion of the amount expended on wages, coal, &c., while the ship was waiting for the piston.

This was an action at the instance of the Steamship "Den of Ogil" Company, Limited, against the Caledonian Railway Company for £300 in name of damages for the failure of the Railway Company to deliver timeously a piston which had been consigned to them for carriage by the Clyde Shipbuilding and Engineering Company, Limited, acting on behalf of the pursuers.

It was admitted on both sides that the steamship "Den of Ogil" had broken her piston; that in November 1900 she was lying at Plymouth unable to proceed for want of it; that on 27th November 1900 the Railway Company received from the Clyde Shipbuilding and Engineering Company a new piston for carriage from Port-Glasgow to Plymouth; that the piston was to be sent by passenger train at special rate; that it ought to have arrived at Plymouth on 28th November, but that through a mistake for which the Railway Company admitted responsibility the waggon containing the piston was sent back to Scotland, with the result that it did not arrive in Plymouth until Sunday, 2nd December.

The Railway Company in their defences did not dispute that they were in breach of their contract, and offered to pay £5 of nominal damages. The question between the parties therefore came to be solely as to the measure of damages.

The pursuers made the following averment of damage:—"(Cond. 5) The 'Den of Ogil' is a screw-steamer built of steel, and having a tonnage of 3920 gross and 2522 net register, and triple expansion engines, and she is classed 100 A1 at Lloyds; and the loss and damage sustained by the pursuers through the detention of said vessel by the fault of the defenders condescended on is moderately estimated at £300, the sum sued for."

The defenders pleaded, *inter alia*—"(4) The delay in delivery of the casting in question not being the proximate cause of the loss and damage sued for, the defenders ought to be assoilzied. (5) The loss and damage sued for not being the ordinary and natural consequence of the delay in delivery, and the defenders having had no notice of the consequences of delay in the case in question, the pursuers are not entitled to the special loss and damage sued for."

Proof was allowed and led. The import of the proof appears from the opinions of the Lord Ordinary and the Lord President *infra*.

On 5th December 1901 the Lord Ordinary (Low) pronounced the following interlocutor:—"The Lord Ordinary having considered the cause, decerns against the defenders for payment to the pursuers of the sum of £10 sterling in name of damages in full of the conclusions of the summons: Finds no expenses due to or by either party."