of an injury to his side and thigh on 5th July 1907 while in the respondent's employment.

The next step was an application to the Sheriff as arbiter to review this weekly payment, and to end or diminish it, on the ground that the incapacity for work had entirely ceased, or at least become greatly lessened.

Upon a proof led on 30th June 1908 it was found by the Sheriff that he was still unable to work. It was quite competent for the employer to prove, if he could, that the original cause of the inability had ceased, and that a new cause had supervened; and if he had succeeded in proving that the Sheriff would have been warranted in declaring the compensation ended.

Now, the finding of the Sheriff is that a sufficient cause of inability has supervened, namely, a cardiac affection, and that this "was not proved to be in any way connected" with the original injuries — in other words, that it may or may not be so connected.

The Sheriff further finds, not that the appellant no longer suffers from his original injuries, but that it is not proved that he still suffers from them in such a way as to render him incapable of work. In other words, he still suffers from the injury; and these injuries may or may not be a sufficient cause of his continuing incapacity.

Obviously this raises a question as to the *onus probandi*. The Sheriff holds that there being now a supervenient cause sufficient to account for the incapacity, it lies upon the appellant either to prove that the supervening cause is derived from the original injuries, or that the original injuries still subsist as at least a concurrent cause of the inability to work. I cannot agree with this view of the position of the parties. I think it rests upon the employer to prove (1) that the supervenient cause was not connected with the original injuries, and (2) that the original injuries have ceased to operate as an effective cause of incapacity. On these two points the Sheriff's finding is a verdict of not proven; and, in my opinion, the result in law is that he had no sufficient ground for declaring the compensation ended.

As soon as the employer is in a position to prove the affirmation of these two propositions, but not till then, he will, in my view, be entitled to have the compensation ended.

LORD DUNDAS—I concur. The Sheriff-Substitute, probably from a laudable endeavour to be concise, has stated this case in a rather meagre fashion. But there seems to be enough in the facts as before us to warrant a negative answer being given to the question put for decision. The employer, it appears, has proved that the man "is now unable to work in consequence of a cardiac affection," but he has not proved that this affection is in no way connected with the injuries the man sustained by the accident. The employer, therefore, fails, in my judgment, to discharge the *onus* incumbent on him of justifying his application—under Schedule I (16) of the Act—to have the compensation ended.

The Court answered the question in the negative.

Counsel for the Appellant—Crabb Watt, K.C.—J. A. Christie. Agent—E. Rolland M'Nab, S.S.C.

Counsel for the Respondent—Hunter, K.C.—A. M. Mackay. Agents—St Clair Swanson & Manson, WS.

Saturday, November 21.

EXTRA DIVISION.

(Before Lord M'Laren, Lord Pearson, and Lord Dundas.)

YOUNG *v.* THOMSON.

Process—Proof—Payment—Goods Supplied on Credit—Written Receipts Retained by Creditor—Parole Proof of Existence of Receipts—Adminicles.

In a long course of dealing between a dairyman and his customer the accounts had regularly been kept in pass-books, and had been settled by monthly payments, which had at the time been entered in the current pass-book. The dairyman retained the pass-books in his own possession. In an action at his instance for the balance of his account he averred that no new pass-book had been kept for the period to which the action related, and he pleaded that the alleged payments on which the defender founded could only be proved by writ or oath. The defender averred that a pass-book had been kept in the same way as formerly, and that the account had already been paid in full and receipted in the pass-book. On proof being taken, the pursuer failed to give any intelligible explanation why, as he averred, a pass-book had, contrary to the established course of business, no longer been kept, and the Court was satisfied that the pass-book had actually existed.

Held, in the circumstances, that the substance of the written receipts could competently be founded on by way of exception to the action without a separate proving of the tenor, and that the pursuer being responsible for the disappearance of the written evidence, its tenor had been competently proved without adminicles.

On 7th May 1907 John Young, dairyman, New Pentland, Straiton, raised an action against Andrew Wilson Thomson, clockmaker, 22 Forrest Road, Edinburgh, for decree for the sum of £79, 14s. 8d., being the total price of milk and cream supplied between 19th December 1905 and 25th August 1906 to a shop kept by the defender. This amount was shown in an account produced by the pursuer.

The defender pleaded, *inter alia*—"(4) The account sued for having been paid, decree of absolvitor should be granted.

The pursuer pleaded, *inter alia*—"(2) The defender's averments can only be proved by writ or oath."

The legal point involved in he case was as to whether the defender could establish his defence of payment by parole proof of there having existed a pass-book covering the period in question, kept according to the custom of parties in the custody of the pursuer, and, without written adminicles, of receipts therein for the sum sued for.

The *circumstances* under which the case arose are narrated, and the *evidence*, so far as material for its decision, is summarised in the opinion (*infra*) of Lord Dundas.

On November 26th 1907 the Lord Ordinary (GUTHRIE), after a proof, gave decree in favour of the pursuer for the sum sued for.

Opinion.—"The defender is sued for payment of £79, 14s. 8d. for milk supplied by the pursuer, a dairyman, to the defender, who, through his late wife, carried on a dairy business during the period of the account sued on. The defender alleges payment, and avers that receipts under the hand of the pursuer for the whole sums due by him to the pursuer were contained in a pass-book which was retained by the pursuer, and which has not been produced.

"The pursuer objected to any attempt on the part of the defender to prove either the existence of this pass-book or its contents without an antecedent process of proving the tenor or a concurrent conclusion to that effect in the summons. This is a purely technical objection, seeing that the counter averments are complete on the question of the alleged missing pass-book, and the proof on the point is exhaustive. The cases show that there is no absolute rule, and I think the circumstances of this case, where both the contents and the existence of the book are denied, are sufficiently exceptional to make a separate process or a separate conclusion for proving the tenor unnecessary. At the worst the defect could be cured by amendment.

"The true question is, whether by proving the existence of the pass-book and the alleged receipts therein by the pursuer, the defence therein has been established. Even were such evidence competent there is no parole proof of payment. . . . . [*His Lordship considered the evidence*]. . . . All this is difficult to understand, but I am not able to draw from it the inference suggested by the defender, namely, that the sum now demanded had been already paid or was then paid. The supply of the goods and the value not being denied, and there being no room for prescription, the defender has the ordinary *onus* to prove payment. This he has tried to do by proving the existence of discharges under the pursuer's hand. Although not satisfied on which side the truth lies I hold the defender's evidence insufficient to discharge the *onus* which he has necessarily undertaken."

The defender reclaimed, and argued—Proving of the tenor was unnecessary, but even in that form of process the existence of the alleged pass-book could be proved by parole. Payment must be presumed where circumstances are irreconcilable with the subsistence of the debt—Bell's Prin., sec. 566; Dickson on Evidence, sec. 618; *Graham* v. *Veitch*, December 18, 1823, 2 S. 594 (2nd ed.) 509. Parole evidence of payment was competent, because in a long course of dealing the pass-books were usually in the hands of the pursuer, who was the granter of the receipts therein contained—*Brown* v. *Mason*, December 6, 1856, 19 D. 137. The *onus* was on the pursuer to show why he had left off keeping a pass-book with his customer. And also the existence of the pass-book had been sufficiently proved by positive evidence. Parole evidence was rendered competent by the pursuer's failure to produce the pass-book or explain its non-existence—*Mitchell* v. *Berwick*, February 4, 1845, 7 D. 382. The tenor might be proved without adminicles, because the obligant was responsible for its disappearance—*Seton* v. *Paterson*, June 17, 1766, 5 Br. Supp. 924; *Leckie* v. *Lecky*, July 12, 1884, 11 R. 1088, 21 S.L.R. 737: *Ritchie* v. *Ritchie*, June 10, 1871, 9 Macph. 820, 8 S.L.R. 554; *Lillie* v. *Smith*, December 4, 1832, 11 S. 160.

Argued for the pursuer (respondent)—A process of proving of the tenor was necessary—*Shaw* v. *Shaw's Trustees*, June 13, 1876, 3 R. 813, 13 S.L.R. 526. Payment at anyrate could only be proved by writ or oath where the obligation was constituted by writing—Bell's Prin. sec. 565; Ersk. Inst. iv, 2, 21; and the only exception to the rule was in ready-money transactions. Proof of payment for goods supplied on credit fell under the rule requiring writing—*Shaw* v. *Wright*, November 23, 1877, 5 R. 245; *Tod* v. *Flockhart*, February 13, 1799, Hume 498. Money advances must be proved by written receipt—*Birnie's Assignees* v. *Darroch*, January 12, 1842, 4 D. 366. The existence of the alleged pass-book had not been sufficiently proved, and therefore secondary evidence of its contents was incompetent—*Drummond* v. *Thomson's Trustees*, August 15, 1834, 7 W. & S. 564, *per* Lord Brougham. No case could be cited in the affirmative of the proposition that presumptions might be substituted for proof by writ or oath. *Maxwell* v. *Maxwell*, M. 15,820, was also referred to.

At advising—

LORD DUNDAS—In this action John Young, a dairyman at Straiton, sues Andrew Thomson for payment of an alleged account amounting to £79, 14s. 8d. The defender is by occupation a clockmaker, but the account in question is for milk supplied between 19th December 1905 and 25th August 1906 for a milkshop business which his late wife carried on in Edinburgh during (and for a number of years before) the said period. This business was discontinued in November 1906, owing to Mrs Thomson's illness, and was sold. Mrs Thomson died on 23rd February 1907. The action was raised on 7th May of that year. There seems to be no dispute as to the quantity and price of the milk. The

defender's principal plea is—"4. The account sued for having been paid, decree of absolvitor should be granted." A proof was led in the Outer House, and the Lord Ordinary decerned for payment as concluded for. The defender reclaims against that interlocutor.

The pursuer raises certain objections as to competency of evidence and mode of probation, with which I shall deal presently. But I propose first to consider the import and effect of the proof as it stands. I respectfully differ from the Lord Ordinary's conclusion, because I think that upon the evidence the defence of payment is sufficiently established. I have less difficulty than I might otherwise have felt in so differing upon an issue of fact, because the Lord Ordinary, while he nowhere indicates any doubts as to the honesty and general reliability of the defender's witnesses, states that "the evidence of the pursuer (a very intelligent witness) and of his wife was not in all respects satisfactory," and in regard to important parts of the evidence, "not entirely intelligible," and "difficult to understand"; and he concludes with the observation that he is "not satisfied on which side the truth lies."

Amid much that is disputed, it is common ground that the pursuer received a payment, and the last payment he got, on or about 10th December 1906. The pursuer says its amount was £6, 8s. 4d., and that it was to square off the unpaid balance of account down to 18th December 1905—a year previous; and he points to the pass-book (No. 9 of process), where that sum is entered in pencil at the end of the account, though the book does not show at what date the payment was actually made. The defender, on the other hand, says the sum paid in December 1906 was £7, 11s. 4d., and was to square off the last instalment of account down to August 1906, when dealings between the parties admittedly ceased. The defender's story is *prima facie* the more probable one; and I think it is proved to be true. The crucial question here arises, whether or not a pass-book existed and was used for the period in question, viz., 19th December 1905 to 25th August 1906? The pursuer and his wife absolutely deny that such a pass-book ever existed; but I think the contrary is established by the evidence. A continuous series of pass-books is produced (Nos. 23, 24, 25 and 9 of process),—and produced, be it observed, by the pursuer,—covering the parties' dealings from the year 1899 down to 18th December 1905. The defender swears that after the latest of these pass-books (No. 9 of process) ceased to be used, "the account was kept in the same way in a book similar to that;" and further, "I am quite clear that the milk supplied during 1906 was paid for by my wife. (Q) Did you see your wife make payments and have the book marked as paid during 1906?—(A) Yes; pretty often." He also gives a most circumstantial account of the occasion in December 1906, when he says the pursuer received £7, 11s. 4d., in notes, silver, and copper, marked the 1906 pass-book, and took it away with him. The Lord Ordinary thinks that "the defender's evidence, so far as consisting of himself, his son, and daughter, is too vague to prove the existence, or the contents, or the loss of the book." I do not consider that the evidence is vague, and I shall quote portions of it sufficient, I think, to support this view. The daughter depones—"There was a small pass-book kept, like No. 9 of process. The account for milk was kept in a book like that pass-book. Every four weeks the pursuer brought it up for payment. . . . . I have frequently seen him paid. When he was paid he receipted the book. I think he then took it away with him to make up the next four weeks, but I could not exactly say; I just know that he marked the book as paid. (Shown No. 9 of process)—I have seen that book before. I see it stops on 18th December 1905. After that date there was a new book started in December 1905. It was just an ordinary pass-book. I could not say it was exactly like No. 9 of process. I don't know how long the new book was used. *By the Court*—(Q) Was there more than one book after that, or all in one book?—(A) All in one book, beginning in December 1905. *Examination continued*—(Q) Do you remember if during 1906—that is, the period for the supply sued for here—the new book was in use from that time?—(A) From December 1905. During 1906 the pursuer used to bring his book for settlement. I remember that distinctly took place during 1906. *By the Court*—(Q) How often during 1906, between January and August, did you see the book in use for milk then being supplied?—(A) Ever so many times. *Examination continued*—I have seen my mother paying money to pursuer during 1906. When the money was so paid he receipted the book. He did exactly the same thing in 1906 as in former years." The defender's son depones—"The account was kept in a pass-book similar to No. 9 of process. The account was paid every four weeks. Pursuer made up the pass-book at home. Then he brought it, and the account was paid, and the pass-book taken away again. That system continued as long as I can remember, right on till July 1906. There was no difference between the system employed in 1906 and the system in vogue in former years as to payment. I have many a time seen my mother paying. I have seen her pay him many a time in 1906. . . . When she paid in 1906, pursuer marked the book. I had the book in my hands in 1906. I saw it in July of that year. (Q) On that occasion was the pursuer there, or did you just happen to see the book lying about?—(A) I just happened to see it lying about. It was paid right up to July 1906." Mrs Carlin and Mrs Yorkston speak generally as to the existence and use of a pass-book in 1906. But the matter seems to me to be put beyond doubt by the corroborative testimony of a perfectly independent witness—Mr Cowan. The Lord Ordinary says he is "not persuaded that the book seen by Mr Cowan may not have been No. 9." But when I read Mr Cowan's evidence with

attention, having regard to the circumstances under which he saw the book, and his object in looking at it, I find it impossible to accept the view indicated by the Lord Ordinary. Mr Cowan, it seems, was in the defender's house on 30th November 1906, having been asked to advise in connection with the sale of the milk business. He says he saw various pass-books, and in particular one in the pursuer's name. "It contained entries day by day, made up every week, and seemingly was settled at the end of every four weeks. . . . . (Q) Did you notice dates in the book?—(A) I noticed them down to July 1906. The book was regularly kept up to that date. (Q) Are you quite sure about the year?—(A) Yes, certainly. I cannot say the date when it started in December 1905, but it certainly finished up in 1906." The witness was unshaken by cross-examination; and in answer to questions put to him by the Lord Ordinary he makes the matter plainer still. He says—"It was part of my object to see to what extent accounts had been paid or were still outstanding. . . . I wanted to see generally what the accounts were. They said, 'They are all in the books.' That is the reason why I looked over the books—to see what was still due unpaid. . . . (Q) You say it could not have been that book" (*i.e.*, No. 9 of process) "because the date was different?—(A) Yes. The date is the first thing that catches one's eye on the top of every page. . . . I wanted to ascertain their indebtedness as at November 1906. . . . (Q) Then of course a book ending 1905 would not have enabled you to know whether they were still indebted?—(A) Undoubtedly not." The defender bears out Mr Cowan's evidence, and says, "the pass-book which was shown to him was the one that had been in use during 1906." It seems to me clear that the book which Mr Cowan saw cannot have been the 1905 pass-book (No. 9 of process) but must have been a pass-book in use during 1906; and that this book, when he saw it, was regularly made up and periodically discharged down to July of that year. The pursuer's story breaks down completely. He cannot explain his alleged cessation in December 1905 of the system of dealing which had for years been in use between the parties. His suggestion that he was forced to it because the defender, though repeatedly asked to do so, declined to give him the book (No. 9 of process) can scarcely be listened to seriously. He could obviously have begun a new pass-book, though the current one was not completely full—as in fact he did in August 1904, when the pass-book then in use (No. 25 of process) was succeeded, though not half filled, by a new one (No. 9 of process). Nor am I impressed by the pursuer's production of a scribbling-diary. His evidence about it is unsupported, unless by his wife, and the appearance of the book itself suggests obvious criticisms. It is curious that the Lord Ordinary seems to have overlooked the pursuer's failure to discharge the *onus* put upon him by the long course of previous dealing, by explaining in some satisfactory way its alleged abrupt termination. I notice that upon record (cond. 1.) the pursuer states that on the occasion when the last payment was made to him in December 1906 "the defender asked if the rest of the account would amount to £50. The pursuer told him then that it would be more." In the witness-box, however, the pursuer gives up this position, and distinctly says—"On 10th December I did not mention about the further account which was due to me." He attempts to locate the alleged conversation (which the defender altogether denies) in March 1907, and not in 1906 at all. I find the pursuer's whole story impossible of acceptance. He says that he allowed this (to him) large account of £79 to run up in 1906 without demur, apparently because he wanted to be "lenient" with the defender (though the proof does not, to my mind, disclose any necessity for such leniency); and even after August 1906, when dealings admittedly ceased, he made no request for payment of the sum now sued for. On 3rd December 1906 Mrs Thomson wrote the pursuer a postcard—"Sir, Kindly call any morning between 8 and 9 o'clock for p——," which parties are agreed meant "payment." In response to this he went some days later and received the payment to which I referred at the outset. The terms of the postcard certainly suggest a payment in full settlement of the subsisting debt, rather than for a stale instalment of the 1905 account. But the pursuer says that on receipt of the postcard he understood and expected that he was only to get, and that in fact he only got, the latter; and that no word was said on the occasion about the comparatively heavy account which had been incurred in 1906. The Lord Ordinary finds this "difficult to understand"; I confess that I find it impossible to believe. A passage occurs in the pursuer's evidence which I think rather significant. He says—"I heard of Mrs Thomson's death about the beginning of March. I had never asked for payment of this account before her death. It was after I heard of her death that I thought I would collect my accounts." Upon the proof thus summarised I cannot resist the conclusion that there was a pass-book in use in 1906, and that it was that book (and not the pass-book for 1905, No. 9 of process) which the pursuer took away with him in December 1906. It was put to the defender that he ought to have kept the pass-book, once the account was paid and discharged, as his receipt; and he frankly says, "I understand that now . . . It was my neglect." But it is to be remembered that the removal of the book by the pursuer would apparently be in accordance with the established usage of the parties; for all the pass-books which are produced were produced from the custody of the pursuer. The defender's son, being asked if it did not occur to him in December 1906 that his father should retain the book, replied, fairly enough, "I had seen him" (pursuer) "put the book in his pocket for years; it just seemed the usual thing." I hold it therefore proved that a pass-book

for 1906 did exist, and was used, and that it is finally traced to the pursuer's custody; and further, that the book was regularly kept and periodically discharged down to July 1906, as spoken to by the witnesses I have mentioned; and that the final instalment of the account, for August 1906, was also paid in December of that year, and marked as discharged by the pursuer in the missing pass-book. Assuming, then, the competency of the whole evidence, the defender has, in my opinion, sufficiently established that the money now sued for was in fact paid; and the pursuer's case must therefore fail.

If this be, as I believe, the truth and substance of the matter, it would be most regrettable that we should be debarred from giving the defender his just remedy by any rule of our law or practice; and I am glad to be able to hold that such is not the case. The pursuer's counsel argued that the existence and loss of the alleged pass-book could only be established by a separate process for the proving of its tenor; and that, even if strictness of procedure were so far relaxed as to dispense with the necessity of a separate action, the proof must fail owing to the absence of any written adminicles. I do not think there is any real substance in either point. The first is, as the Lord Ordinary points out, purely technical at the best, and I agree with him in thinking that a separate process is quite unnecessary in the circumstances of this case. The missing document is not of the quality, *e.g.*, of a title-deed, but of a much humbler kind, and is not substantively founded upon as the basis of an action, but pleaded by way of exception to prove the extinction of a debt. The other point also, in my judgment, fails. The circumstances of this case are very special, but I think they bring it well within the class of cases where the Court has from time to time dispensed with production of written adminicles, having regard especially to the fact that the missing pass-book is (as I hold) proved to have gone astray in the hands of the person who would be prejudiced by its production, and who takes up the position (which I consider to be disproved) that it never existed. In deciding this case in the defender's favour we shall not, I apprehend, do the slightest violence to the established rule that payment of sales upon credit (as the sales here in question were) may not be proved by parole evidence; for the basis of my opinion is that payment is here sufficiently established *scripto*. The legal requirement of "writ" is satisfied by proof of the existence of a regularly kept pass-book containing entries of monthly settlements. And then the pursuer cannot take any benefit from the difficulty as to proving the contents of the pass-book in detail, because the disappearance of the pass-book is the result of his own fault or negligence. We were referred to a considerable number of authorities—*inter alia*, Bell's Prin., sec. 883; *Seton*, 1766, 5 B. S. 924; *Maxwell*, 1742, M. 15,820; *Shaw*, 1876, 3 R. 813; *Lillie*, 1832, 11 S. 160; *Leckie*, 1884, 11 R. 1088. But I do not propose to comment upon them, because the question is, not so much as to the general principles of our law and practice, as whether this particular and peculiar case falls within them.

For the reasons I have stated, I am of opinion that the Lord Ordinary's interlocutor ought to be recalled, and that decree of absolvitor should be pronounced.

LORDS PEARSON and M'LAREN concurred.

The Court recalled the interlocutor of the Lord Ordinary and assoilzied the defender.

Counsel for Pursuer and Respondent—D. Anderson—Armit. Agent—Arthur C. M'Laren, Solicitor.

Counsel for Defender and Reclaimer—Anderson, K.C.—A. M. Hamilton. Agents—Clark & Macdonald, S.S.C.

Friday, November 13.

FIRST DIVISION.

MACKAY'S TRUSTEES *v.* MACKAY AND OTHERS.

Succession — Accumulations — "Raising Portions" — Accumulations Act 1800 (39 *and* 40 *Geo. III, c.* 98) (*Thellusson Act*), *secs.* 1 *and* 2.

A testator directed his trustees, after paying an annuity to his widow, to accumulate any surplus income for behoof of his children, and to divide among them, as they attained majority, the income derivable from the said accumulated surplus. On the death or second marriage of the widow the trustees were directed to set apart for each child an equal share of the capital estate and accumulations, if any.

In a Special Case presented after the lapse of twenty-one years from the testator's death (the widow being still alive), *held* (1) that the direction to accumulate the surplus income for behoof of the testator's children, and to pay to them the income derivable therefrom, was not a "provision for raising portions" within the meaning of section 2 of the Thellusson Act, and that the Act applied; and (2) that as there was no present gift of the fund directed to be accumulated, the surplus income fell into intestacy.

The Accumulations Act 1880 (39 and 40 Geo. III, cap. 98) (Thellusson Act) enacts, sec. 1—"No person or persons shall after the passing of this Act, by any deed or deeds, surrender or surrenders, will, codicil, or otherwise howsoever, settle or dispose of any real or personal property so and in such manner that the rents, issues, profits, or produce thereof shall be wholly or partially accumulated for any longer term than the life or lives of any such grantor or grantors, settler or settlers, or the term of twenty-one years from the death of any such grantor, settler, devisor, or testator,