

from the village of Coldingham Shore to the public seashore at the point called Burnmouth Harbour, and on to St Abb's Head, and to the seashore at Petticurwick or Pettico Wick, and to the harbour there, in or near the direction indicated by a line coloured yellow on the plan, No. 9 of process, which line is marked by the letters H E G C.

FRASER and DUNCAN, for the defenders, objected to these issues, that they did not put in issue, but assumed that the seashore and harbour mentioned in them were public places.

GIFFORD, for the pursuers, consented to strike out the word "public" in each issue, and also to put in a minute consenting that the question as to the seashore and harbour being public places should be determined at the trial. He had offered to do so in the Outer House.

The Court allowed this to be done without expressing any opinion as to whether or not it was necessary.

Agent for Pursuers—Thomas White S.S.C.

Agents for Defenders—Jardine, Stodart, & Frasers, W.S.

SECOND DIVISION.

WITHAMS v. WHITE AND YOUNG.

Landlord and Tenant—Sequestration—Landlord's Hypothec—Rotation—Mismanagement. A landlord presented a petition of sequestration for rent, in respect he had contravened the third year rotation. Held that the contravention took place when the lease was not operative, and there being, therefore, no action under the lease, petition dismissed.

This was an advocacy of a judgement of the Steward of Kirkcubright. A petition of sequestration for rent under the landlord's hypothec was presented by Mr and Mrs Maxwell Witham, of Kirkconnel, against Andrew White, writer in Cumnock, as trustee on the sequestrated estate of Alexander Young, lately farmer at Woodside, in the parish of Troqueer, and against the said Alexander Young for his interest. By letter Young agreed to conditions of let for fifteen years under certain modifications. A formal lease was afterwards entered into, dated 22d May 1862. The entry to the house, grass, and fallow, was at Whitsunday 1862, and to the land in crop at the year's separation. The farm was to be laboured on a five-course rotation. The rotation prescribed for the third year is the point on which the present case turns, and is as follows:—"The third year to be white crop sown out with at least two bushels of the best perennial ryegrass seed, and not less than six pounds of red clover and two pounds of white clover to the acre." The lease also contained a clause stipulating that if the tenant should mismanage or miscrop the farm he should be liable in a sum of £10 of additional rent per acre for each acre to which the mismanagement extended. Young entered in the third year of the rotation, and in accordance with the provisions of his lease and the usage of the district, he got possession between Candlemas and Whitsunday 1862. He sowed out "Timothy" grass seed along with the waygoing crop, and the petitioners say that this was a breach of the third-year rotation, which required him to sow out ryegrass and cloverseed. They accordingly say that he has brought himself under the obligation of the clause imposing addi-

tional rent. Young became bankrupt in May 1864, and the claim is applied to the two years of his occupation.

The respondent averred that he was allowed by the landlord to sow "Timothy" grass-seed, and the Steward-Substitute (Dunbar) allowed him a proof of his averment. The Steward (Hector) held that the formal lease must be the criterion of the obligations of parties, and as it contained no obligation on the respondent to sow out ryegrass seed with the waygoing crop of the preceding tenant, he had not incurred the penalty of additional rent. The Steward accordingly dismissed the petition.

The petitioners advocated.

GUTHRIE (with him JOHN MARSHALL) for them argued that the result of sowing "Timothy" grass seed instead of ryegrass and cloverseed was that by the failure of the former there was no hay crop and no pasture for the last year of the rotation. This proved that the respondent was guilty of mismanagement, and if guilty of mismanagement he had incurred the penalty of additional rent, because although the act libelled was done before Whitsunday—the date of the respondent's entry—he had got possession and had commenced operations under and in anticipation of the provisions of the lease.

WATSON and M'KIE for the respondents were not called upon.

The Court unanimously adhered to the judgment of the Steward, holding that although it was clearly proved that the respondent had committed a legal wrong, the act in which the wrong lay was performed at a time when the provisions of the lease were not operative between the parties. Whatever remedy the petitioners might have for the wrong which had been committed they had no action under the lease.

Lord COWAN remarked that if the Court could have held the respondent to be under the obligation of the clause imposing additional rent, it would have been a question for serious consideration, notwithstanding of the judgment in Robertson v. Clark, 4 D. 1317, whether additional pactional rent of the nature of that claimed in the present action was secured by the landlord's hypothec.

Agents for the Petitioners—Scott, Bruce, & Glover, W.S.

Agent for the Respondents—James Somerville, S.S.C.

Friday, June 15.

FIRST DIVISION.

MP.—BRITISH LINEN COMPANY v.

MACKENZIE AND OTHERS.

Donation—Deposit-Receipt—Proof. A deposit-receipt having been delivered to a party by a person deceased who had previously indorsed it, held (1) that it was competent to prove by parole evidence *quo animo* it was delivered; and (2) that it had been proved that it was delivered with the intention of making a donation of the contents.

This multiplepointing was raised in regard to a sum of £100 contained in a deposit-receipt granted by the British Linen Company to the late Peter Ross, Justice of Peace Officer, College Wynd, Edinburgh, on 16th March 1863. The sum was claimed by his executors-dative and next of kin on the ground that Ross had died intestate, and also by Mrs Margaret Bertram or Muir, 86 Sauchiehall Street, Glasgow, on the ground that the deposit-

receipt and its contents had been given to her by Ross two days before his death. In support of her claim she averred—

"1. The deceased Peter Ross knew the claimant in her childhood. Her father and mother were then dead, and he interested himself warmly in her education and prospects. During the rest of his life he continued to entertain and evince a strong regard and affection for her.

"2. On 26th December 1863, the said claimant, at the anxious request of the said Peter Ross, came to Edinburgh and took up her residence in his house, with a view to wait upon him in the illness under which he was then labouring. Two days afterwards, on the 28th day of the said month of December 1863, he indorsed and delivered to her three deposit-receipts—viz. (1) A deposit-receipt for £100, dated on or about the 18th March 1863, granted by the pursuers, the British Linen Banking Company in his favour, which sum of £100, together with the interest which has accrued thereon since the date of the deposit, is the fund *in medio* in the present process of multiplepointing; (2) A deposit-receipt for £46, dated on or about the 22d May 1863, granted by the Union Bank of Scotland in his favour; (3) A deposit-receipt for £10, dated on or about the 23d November 1863, also granted by the said Union Bank of Scotland in his favour.

"3. The said Peter Ross expressly declared that by so indorsing and delivering the said deposit-receipts to the claimant, it was his intention to make an instant donation to her of the contents thereof, and he directed her to keep them in her own possession as being her own property.

"4. No other person was present on the occasion referred to, but the said Peter Ross had previously communicated to several parties with whom he was on intimate terms that it was his intention to give all his money in bank to the claimant; and he subsequently stated to the same parties and others that he had made a donation to her as aforesaid, and that no duty would be payable by her in respect thereof."

The other claimants pleaded that these averments were irrelevant; and the Lord Ordinary (Kinloch) sustained their pleas, and repelled Mrs Muir's claim. He explained his judgment in the following

"*Note.*—The fund *in medio* is a sum of £100 lodged on deposit-receipt with the British Linen Company's Bank, by the late Peter Ross, who died 30th December 1863. The deposit-receipt is dated 16th March 1863. The sum in question is claimed by Mrs Margaret Bertram or Muir, on the ground of Peter Ross having made a donation of the same to her on 28th December 1863, two days before his death. It appears to the Lord Ordinary that Mrs Muir has not established this alleged donation, nor offered to prove it by legally competent evidence. She avers that Peter Ross delivered over to her the deposit-receipt, blank indorsed; and the receipt has been produced by her in this condition. But the Lord Ordinary considers it to be fixed that the possession of a deposit-receipt, blank indorsed, is no evidence of a donation of the sum contained in it. To hold anything else would be in the highest degree perilous; for nothing is more common than for people to keep beside them deposit-receipts, blank indorsed; and the mere possession of such a receipt may evidence nothing but an unceremonious investigation of the repositories of the deceased. A deposit-receipt is not a negotiable instrument, and the indorsement of such a receipt is no legal transference of the sum contained in it.

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In practice, the indorsement is very commonly taken by the bank as a sufficient mandate to uplift the sum on behalf of the owner of the money. But at best it is only such a mandate in legal presumption; and the mandate falls if not executed before the death of the indorser, the mandant. The possession of the receipt being thus insufficient to prove donation, what besides does Mrs Muir offer to prove? She admits that when Ross made the donation to her no one else was present, but proposed, as the Lord Ordinary understood, to prove his making it by her own evidence as a witness. Farther, she offers to prove by other witnesses that anterior to the donation Ross orally expressed his intention of making it; and, after it was made, orally stated that he had made it. The Lord Ordinary is of opinion that this is incompetent evidence. The proposition is to prove a donation by parole proof, which the Lord Ordinary regards as legally inadmissible. It is true that in several of the cases relative to donation parole proof may be found to have been led to a greater or less extent. In most of the cases it was led somewhat loosely, and without any distinct consideration of the competency of its different parts. It may be by no means incompetent in this, as in many other cases, to lead parole proof of facts and circumstances in order to clear up ambiguities. But what is now proposed is something wholly different from a proof of facts and circumstances to constitute real evidence. It is to prove donation by proving an oral declaration by the donor of the gift being made; or, which is the same thing in another form, his oral declaration that he had previously made it. The Lord Ordinary is of opinion that this is inadmissible by our law. He considers a donation *inter vivos* to be as little probative by parole as a legacy or donation *mortis causa*. The Lord Ordinary has therefore repelled the claim of Mrs Muir. He thinks she must be liable in the expense of opposing her claim, but not in the expense of the other parties stated their own claim, and only as to one antagonist, as an opposition to her claim was sufficiently stated by one contradictor. "W. P."

Mrs Muir reclaimed, and the Court having intimated that they were disposed to allow a proof before answer, the other claimants consented, and a proof was accordingly allowed.

The following passages are extracted from the evidence which was led:—

Mrs Muir deponed—I first knew Ross when I was at school in 1818. The school was I think in Anchor Close, High Street. The school was a Sunday school. It was a school of the Rev. Dr Brown, of the Old Church. Peter Ross was connected with that church. He sung in the choir. He taught us children to sing, and those of us that could sing were taken into the band. I don't remember how long I was at that school. I had to give up going to the school when I went as a servant to Ritchie's. I continued to know Ross while I lived with Ritchie. I saw him every day. I used to see him at the well; he went for water, and I went there also for water. He always filled my pitcher for me. I was three years with Ritchie, and after leaving him I went to Arthur Street. I afterwards, I think in 1825, went to live with my brother Andrew, and up to that time my intimacy with Peter Ross continued as before. Ross was then in the choir of St John's Episcopal Chapel. I was also a member of the choir in that chapel. It was Peter Ross who took me there. I was married in February 1827; and from 1825 till about three months after my marriage I continued

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to sing in the said choir, and Peter Ross was in the choir all that time. My husband was James Muir, a mason. He died in London in 1849. I was not in Edinburgh between 1830 and 1849, except for a visit on two or three occasions. I continued intimate with Ross after my marriage until I left Edinburgh. When I visited Edinburgh, as above deponed to, between 1830 and 1849, I met him on the street. After my husband's death I lived in Glasgow, and I live there now. I keep gentlemen lodgers. The first time I saw Peter Ross after I went to live in Glasgow was in 1854. I spent New-Year's Day 1855 with him in Edinburgh, and I saw him before our spring sacrament of that year in Edinburgh. On the last occasion he gave me a ring, which I now wear. He gave me that ring because he engaged me as his wife. He said that whenever he thought he was able to become a member of the church we were to be married. After 1855 Peter Ross occasionally sent me things. He once sent me money in a letter, and once by a young man called Forbes. I was unwell at the time, and I think I got the money in the letter through the Post Office in July 1863, and from Forbes in August same year. I next saw Peter Ross on the 1st of September following in Edinburgh, and I then arranged to see him on Christmas-day. I came to Edinburgh on Christmas-day, and found him very unwell. He sent me that night to my own house in Glasgow to bring back with me clothes and bedding as he wanted me to nurse him. I returned to Glasgow on Christmas night, and I returned to Edinburgh on the following morning, being 26th December 1863. On the Monday following he sent me out for three receipt-stamps. I brought back postage-stamps. He then sent me out again and I brought back receipt-stamps. He then put these stamps upon the back of three deposit-receipts, and he wrote his name upon the stamps. One of these deposit-receipts was a receipt by the British Linen Company for £100. He then gave me the receipts. He told me when he gave them to me that they were a gift to myself. He said that I was his betrothed wife, and he thought it little enough to give me. He told me not to lay the receipts into anything belonging to him, but to put them into my bosom, as they were mine. He told that me he had not made a will, but that he expected a person of the name of Tindal, I think, who belonged to the Justice of Peace Court, to come on that Monday evening, about a will. Tindal, however, never came. He told me that his intention was to make a will, leaving me a house at Newbigging. That was to be in addition to the deposit-receipts. I continued to nurse Ross until he died.

Alexander Mitchell Forbes deponed—I have two or three times heard Peter Ross speak of Mrs Muir. The first time I heard him speak of Mrs Muir was in my father's house in the year 1862, but I do not remember at what time of the year it was. Peter Ross also occasionally hinted at Mrs Muir, but without actually naming her. The first time he spoke of her, he asked me to take some money to her in Glasgow. I was going to Glasgow at the time. It was in August 1863. He told me that he believed that Mrs Muir was poorly, and he also said that he was sending the money because she was so old an acquaintance. He gave me a pound to take to her. I went to Glasgow and saw Mrs Muir at her house in Sauchiehall Street, and I gave her the money. She was then confined to bed. The next time I saw her was in Peter Ross' house before his death. This was either on Wednesday or Thursday, about three days before Peter

Ross died. Ross was buried on New-Year's Day, I think, of 1864. Peter Ross had sent for me to go to see him on the occasion above deponed to, when I saw Mrs Muir in his house. He then told me that he thought he was dying. His words were "I think its all over with me now." Interrogated, Did he say anything about a will? Depones, He did not. He had previously told me that he had no will, but he said nothing about a will on that occasion. Mrs Muir left the house to get some medicine for him. He told me that she had been sent for to Glasgow. He said either that he had sent for her himself, or that he had got some of his neighbours to send for her. He said that he had given Mrs Muir a present of two or three deposit-bills; that he had indorsed them and given them to her. He did not mention the number of bills or their amounts, but I understood from him that he had given her all the deposit-bills he could find in the house. Ross told me that his reason for giving the deposit-receipt bills to Mrs Muir was that she would get nothing after his death.

Alexander Milne, M.D., deponed—I was not acquainted with Peter Ross previous to his last illness. I was called in as his medical attendant. I think it was Mrs Muir who came for me to go to see Ross. At first I had some doubts as to whether he was dying, but after a visit or two he began to sink, and I then had no doubts. His mind was perfectly collected. There was nobody living in the house with him at the time but Mrs Muir. Another woman, younger looking than Mrs Muir, seemed occasionally going out and in. I remember Ross speaking to me about Mrs Muir more than once. What he said was to the effect that they had been long acquainted with each other, that he felt grateful to her, and that he wished to make her comfortable. Ross mentioned that he had given Mrs Muir two deposit-receipts, and I remember that he added very emphatically that he wished to make her all right. I don't remember that he said anything about indorsing the receipts. I don't remember distinctly that he said there were two deposit receipts, but he spoke of more than one.

Alexander Forbes deponed—I knew the late Peter Ross. I frequently urged him to make a will, but he always put of making one. I knew that he had money and house property, but not the extent of either. Interrogated, When he talked of making a will, did he give any hint of the person to whom he would leave it? Depones, He spoke of leaving a house in the neighbourhood of Musselburgh to Mrs Muir. That was before Mrs Muir came to Edinburgh during his last illness; it was a considerable time before.

Henry Morris deponed—I knew the late Peter Ross very intimately, and frequently visited him. He told me he did not want his relations to come about him. I remember the week before his death, during which he was ill of his last illness. His mind was quite acute. It was not different from what it had always been. About a month before his last illness he told me that he had written to Mrs Muir in Glasgow, but had got no answer from her; and he also stated that he had remitted some money to her—a pound or two. I remember Mrs Muir coming to Edinburgh during Ross' last illness. Interrogated, How did he speak of Mrs Muir? Depones, He said she was a very old acquaintance of his, and a cleanly body, and one that he had confidence in. Interrogated, Did it appear to you from the way in which he spoke of her that he had a great regard for Mrs Muir?

Depones, Oh, yes. Interrogated, Did he ever tell you that he was to marry Mrs Muir? Depones, I don't think he ever did, though "I had chaffed him about her being a former sweetheart of his." This was after she came to the house, and he was then in good spirits. He and I frequently spoke about his money affairs. He told Mrs Muir, in my hearing, after she had come to the house, to go to a chest of drawers, and take from the top drawer on the left-hand side two or three papers, which he said would do her good. There was no sum mentioned. I do not know what the papers were. The witness adds, I did not ask him, because it was a peculiarity of his never to answer questions that were put to him while he was telling us anything. Interrogated, depones, I knew that he had money in bank. When Ross told Mrs Muir to take the papers, he said to her, "Take them immediately; for if you wait till the minister comes, you wont get them;" and Ross then told me that he had repeatedly told Mrs Muir to take the papers. The minister was Mr M'Lean, the claimant.

After the proof was led,
JOHN LORIMER and HALL, for Mrs Muir, argued—The evidence instructs that the deceased intended, when he delivered the deposit-receipt to Mrs Muir, to make a donation to her of its contents. We don't contend that an indorsation, either blank or special, passes the property of the contents of a deposit-receipt; but it is a mandate, and the Court is entitled to inquire *quo animo* it was indorsed or delivered. This may be proved either by writ or by facts and circumstances. In *Barstow v. Inglis* there were no facts and circumstances averred. On the general question, the Judges in that case were not at one. But besides, the mandate which was there averred was not one *in rem suam*, as is the case here.

GIFFORD and M'EWAN, for the executors, answered—If this claim is to be made good, the Court will go further than it has done in any other case. The indorsation is blank, and there is nothing but parole proof. The indorsation is not sufficient to constitute Mrs Muir as assignee. It was not in the power of Mr Ross to transfer the receipt to another by simple indorsation. Further, on the evidence, the case is a suspicious one, and has not been proved.

WATSON, for the next-of-kin, adopted the preceding argument.

The following cases were cited in the course of the discussion, viz. :—*Reid v. Milne*, 29th Nov. 1808, Hume 60; *Barstow v. Inglis*, 20 D. 230; *M'Kenzie*, 21 D. 1048; *Rose*, 1 Macq. 1042; *Bryce*, 4 Macq. 312; *Heron v. M'Geoch*, 14 D. 25.

At advising,
The LORD PRESIDENT—This question arises in a process of multiplepointing in reference to a sum contained in a deposit-receipt for £100, which had been deposited in bank by the late Peter Ross, and among the claimants are the representatives of the deceased, and the reclamer Mrs Muir, who founds upon certain proceedings, which she says gave her right to the deposit receipt and its contents. The question is, whether that right has been established by competent evidence. The claimant had made statements on record in reference to the manner in which she came to be possessed of this receipt, which amounted in substance to this, that Ross had indorsed and handed over the receipt to her for her own use. The Lord Ordinary was of opinion that there was not a competent case stated for allowing a proof. In his note he explains the grounds of this judgment. It appeared to the

Court that the case was not in a position to exclude inquiry, and we allowed a proof. We have now to determine whether there is enough of competent evidence to prove the claimant's case. In many of the Lord Ordinary's observations I entirely concur. The question always is, what facts and circumstances offered to be proved are sufficient. I am not disposed to hold that the mere possession of a deposit-receipt is sufficient, more especially if the person has been living as here in the same house as the deceased. On the other hand, there may be cases where the property may be transferred by giving possession. The position of the parties is always of importance. It may have been the practice of a person to send another to the bank, and all the circumstances surrounding the case are to be considered. If it be alleged that the document has been surreptitiously obtained, then I think it is competent to inquire into that by parole evidence. The basis of the right here is the deposit-receipt indorsed, which is a basis in writing. How Mrs Muir came to be possessed of it, whether surreptitiously or otherwise, is a fair matter for inquiring into by parole evidence. There is plenty of evidence to show that it was not obtained surreptitiously, but with the full consent and approbation of Ross. The indorsation is a circumstance showing that Ross had the intention of dealing with the receipt in some way, and the evidence of Mrs Muir is corroborated by others whose evidence indicates that there was no surreptitious possession, but that Ross had put the document into Mrs Muir's possession. Still, the question remains that such possession is not a thing that gives right to the contents. I have already suggested cases in which it would not do so. Still, I think in the case of an indorsed deposit-receipt put into the possession of another, the other question *quo animo* may be ascertained from facts to be established by parole evidence. The doctrine that donation cannot be proved by parole has been quoted sometimes rather too widely where there was admitted or proved possession, the possession being legal. The putting into a person's power of a cheque or deposit-receipt will generally raise the question *quo animo* that was done. When, then, I look to this case, I think the circumstances indicate that it was the intention of Mr Ross to give Mrs Muir a right to uplift the money for her own behoof. It was an authority to the bank to pay according to the practice of bankers. A blank indorsation is sufficient authority for this, and the bank may write over the indorsation a receipt. In this case, too, there are circumstances which make it not at all unreasonable that the deceased should have given Mrs Muir a right to the deposit-receipt. We see some evidence of the long intimacy that had subsisted, and there are some indications of an intention to marry. It is also pretty clear that Ross believed himself to be dying, and in that view felt himself called upon to deal with his estate. It was reasonable that he should not be unmindful of Mrs Muir, who had been apparently more attentive to him than any one else. He had expressed this intention to others, and also told others afterwards what he had done. There is a little circumstance which shows a deliberation in what he was doing. His name is written on a receipt stamp. How it came to be there is described by Mrs Muir. That stamp indicates that Mr Ross supposed a stamp was required; and although it was not, it does to a certain extent indicate that he thought there was to be a receipt given for the money. I do not mean to challenge

the doctrine that the delivery of an indorsed deposit-receipt does not transfer the contents; but it is an authority to receive the money, and the question always must be what was the intention. It is said the indorsation was a mandate, and it is so in a sense. But it is also a mode of dealing with these documents which may give a right to their contents. I am therefore disposed to sustain Mrs Muir's claim.

Lord CURRIEHILL—Concurring as I do in all that your Lordship has said, I shall only add a few remarks on the important principle raised by this case. The sum in question was deposited in bank by Ross. That deposition raised betwixt him and the bank the relation of debtor and creditor. No notice had been given to the bank of a transfer to any other party, and the relation, therefore, had not been altered at the time of his death. Had nothing else taken place, the right would have gone to his representatives. But then Mrs Muir is found to be in possession of the deposit-receipt with a blank indorsation on it. She alleges that it was delivered to her as a donation in order that she should go to the bank and uplift the money, and retain it for her own use. We have had a proof, in which she adheres on oath to this statement, and it is not contradicted by other evidence. Had we had no proof, I would have agreed with the Lord Ordinary that the possession of a deposit-receipt blank indorsed is no evidence of a donation of the sum contained in it. But I concur in holding that we have evidence by parole that Mr Ross delivered the document as a donation. I hold that to be established. Therefore if this had not been a deposit-receipt, but bank notes, I could have no doubt whatever that the donation was complete. There is a difference when it is a document which only establishes the *jus crediti*. There were two questions argued to us of great importance. It was said that Ross had no power to transfer the *ius crediti* by these means. Now, I think that is in point of principle unsound. The view I take is that the delivery of the document was a mandate. I have no doubt it was. But was it not a mandate *in rem suam*? And is it not practicable for a person to give such a mandate to another? It is said to require a formal assignation. I think that is not necessary. An assignation is nothing but a mandate *in rem suam*. Stair states this distinctly (3 1. 2-3 and 8). In strict law, the relation of debtor and creditor cannot be altered, except by consent of both parties; but it may be by granting a mandate *in rem suam*. In this case, the true difficulty is whether the *animus* with which the mandate is given is proveable by parole. I have considered that point carefully, and the result is that I concur in holding that parole evidence of the *animus*—there being delivery of the endorsed document—is admissible. I think it is proveable by facts and circumstances. In the case of Heron *v.* M'Geoch, this question was very fully considered, and I think this principle was there held to be established.

Lord DEAS—I agree that this is a very important question, and it arises in a more delicate form in this case than in any we have had. The proof was allowed before answer, and we therefore left the question quite open whether it was competent to any extent, and to what extent. Laying aside the question of competency, the result of the proof is to my mind quite satisfactory. If the proof be competent, I think it proved beyond all reasonable doubt that this deposit-receipt was given by Ross as a gift at a time when he knew he was dying, but also knew perfectly well what he was about.

There is not only parole testimony to that effect, but there is also the evidence of facts and circumstances. The parties had been very intimate for many years. He never had any relations in whom he took any interest. When ill, he sent for Mrs Muir instead of any of them, and before his death he handed over to her this indorsed receipt, the indorsation being written on a receipt stamp, which is important as a piece of real evidence, proving that his object was to put the document in such a form as to show that it was substantially discharged, so far as he was concerned. The whole question therefore, is one of law—namely, the competency of that evidence. I agree with Lord Curriehill that, if instead of a deposit-receipt it had been a £100 bank note that had been handed over, there could be no doubt of the competency of the evidence. We held the same rule applicable to a cheque in the recent case of Bryce. But a deposit-receipt is not a negotiable document, and indorsation of it does not pass the property. The most important thing is the delivery of the receipt. If it is competent to prove by parole the delivery, it seems very difficult to hold that it is competent to prove the purpose of the delivery. I agree that the mere possession, even with the indorsation, would go a very little way. A person living in the house of a dying man may easily get that. I think that possession without proof of the actual delivery and its purpose would not be sufficient, but I think it competent to prove these by parole, and I think the claimant Mrs Muir has done so. It was a donation *inter vivos*, and irrevocable. Ross believed he was dying. He might have recovered, but he took his chance of that, and acted on the supposition that he would not. It is not an unusual thing for people to act on suppositions of that kind, which turn out to be mistakes, but that does not touch the question, that what is done is irrevocable. Therefore I hold that we are here dealing with an irrevocable donation. It does not follow that the same rule applies to donations *mortis causa* or *de futuro*, or revocable donations. I will deal with such cases when they occur. Now, the delivery being the material thing—the mandate fully more than the indorsation—and it being proved that the delivery was *in rem suam*, I think the claimant's case is made out. It can hardly be said that if she had drawn the money in Mr Ross' lifetime there would have been any doubt about the matter. I agree with Lord Curriehill, that if a mandate is *in rem suam*, it does not fall by death. A formal assignation is a mandate *in rem suam*. It is not necessary to hold that delivery of a formal assignation is required to warrant payment. Although a deposit-receipt is not a negotiable document, the debt in it is extinguished by delivery. Possession of it by the bank would have been proof that the debt was discharged. (Ersk. 3. 4. 5.) But if the bank had paid the money to Mrs Muir, it would have been open to enquire whether she had authority to receive it. Consequently, the bank very probably would not have paid on mere delivery without indorsation. But if it had been presented with a regular receipt (I agree that a stamp was not necessary), then it would be clear that it was handed over in a discharged state, making it safe for the bank to pay; so that Mrs Muir had full means given her of insisting on payment of the debt. In these circumstances I think we are not trenching on any principle in the law of evidence in holding this donation proved.

Lord ARDMILLAN—I have anxiously considered this case, and have come to be clearly of the opinion which has been expressed. As the point is

of great importance, I shall shortly state the grounds of my opinion. The claimant, Mrs Muir, holds a deposit-receipt blank indorsed. That indorsation, whether blank or special, is a mandate to the holder to draw, and a warrant to the bank to pay, the sum in the receipt. It does not of itself convey the *right* to the money, and it creates no presumption of gift. But the question remains, *quo animo* was the receipt indorsed? or perhaps it may be as accurately put, how, and on what footing, did Mrs Muir obtain possession of the receipt? Several modes have been suggested as probable or possible—1st, She may have stolen it. For this suggestion, which has scarcely been urged, I think there is no foundation. The *genuineness* of the indorsation is not disputed; and therefore, if stolen, it must have been stolen after indorsation, that indorsation being, as I understand, written over a receipt stamp. The surrounding facts and circumstances of the case do not tend to support an accusation of theft, which is most improbable in itself, and opposed to the presumption of innocence, which those who rely so much on the presumption against donation should not forget. The notion of the theft of the receipt is out of the question. But two other modes of obtaining possession of the receipt are respectively alleged by the parties. The executors say it must be *presumed*—and so presumed that no evidence to the contrary can be received—that the receipt was indorsed and delivered merely in order that the holder might draw the money for Mr Ross himself. They maintain that the circumstances are not examinable, that no proof other than the writ of Mr Ross is competent, that although Mr Ross had, in presence of witnesses, indorsed and delivered the receipt, and stated that he gave the indorsed receipt as a donation to Mrs Muir, that would not avail. They maintain their right to exclude investigation of the facts. They stand on the presumption against donation, and claim the receipt from the holder without inquiry. Now, I am not prepared to adopt this view. The indorsed receipt delivered to the holder is a good mandate to draw the money; but it is not a negotiable document, and mere indorsation does not transfer the fund. Possession of the indorsed receipt creates no presumption of gift. The intent and object of the indorsation, not being apparent, remains to be ascertained. The question, *quo animo—ad quem effectum* that receipt was indorsed and delivered is not solved for the holder by the mere indorsation and possession. But surely it is not solved conclusively against the holder at once and without inquiry. The case of Barstow *v.* Inglis, 5th Dec. 1857, is an authority to support the proposition that such a receipt is not negotiable. Beyond that, it is a very special case, and was, in so far as regarded donation, decided chiefly on the peculiar character of the pursuer's averments. Donation to the holder or indorsee was not there alleged. Donation is not presumed. But donation may be inferred from facts and circumstances, if the inference be clear. The law is so stated by the Lord President in the case of Allan *v.* Munnoch, 30th Jan. 1861, and again in the case of Kennedy *v.* Rose, 8th July 1863, and also by Lord Deas in the case of Bryce *v.* Young's Executors, 20th Jan. 1866, and all the cases in which proof was allowed or inquiry ordered are practical confirmations of the rule, that, in the case of the holder of an indorsed deposit-receipt, or a bank cheque, the investigation of the facts and circumstances is not excluded. That Mr Ross sent for the claimant, that she went

to nurse him, that he had a great regard for her, that he delivered to her the indorsed receipt, these are facts which cannot be shut out. They are the surrounding circumstances, in midst of which the question arises, for what end and with what intention was the receipt indorsed and delivered to her? There is presumption against donation. There is no presumption against the onerosity of the holder. I am not speaking of the *onus probandi*. Some delicate questions may arise on that subject, and the *onus* may shift at different stages in the inquiry. I am, however, of opinion that, in such a case as the present, the burden of proof at starting is with the claimant. But the plea of the executors here is urged, not to fix the *onus*, but to exclude the inquiry, to reclaim the receipt from the holder without any investigation. That plea I do not think well founded. There is no recent authority in support of it. The cases decided after inquiry, such as Heron *v.* M'Geoch, 13th Nov. 1851, are authorities to the contrary, so also is the case of Henderson *v.* Henderson, 12th June 1839, where the holder offered no proof, but stood on the indorsation alone. That case was decided expressly on the footing that there was no proof to overcome the presumption against donation. The point was specially considered in the case of Rose *v.* Kennedy, and in the very recent case of Bryce; and in both cases proof was allowed, and the case decided on considering the proof. And finally, it is my own humble opinion that the spirit and tendency of law in our day is away from the theory that justice is protected by forbidding testimony and excluding investigation, and towards the theory that truth is best sought, and most surely attained, by using all the light which inquiry into the facts and circumstances can supply. On the other hand, the claimant holding the indorsed receipt alleges that it was given to her. She has sworn to that effect. I see no reason to doubt her truthfulness, and there is evidence corroborative of her testimony. The story of the old acquaintance of the claimant and Mr Ross, which there seems no reason to doubt, renders the gift probable. He had no very near relations. He was drawing near his end, and had no use for the money. He had sent for her to nurse him, and he expressed his regard for her, and his gratitude for her kindness. It seems to me not unlikely or unnatural that, touched by her kind attention in his sickness, and softened by the memory of the old days of childish intimacy, when they sang hymns together in the choir, and he met her tripping to school, or filled her pitcher at the well, he may have given her this money. The testimony of Dr Milne, of the two Forbes', and of Morris, confirms in important particulars the distinct testimony of Mrs Muir herself. Taking the evidence as a whole, it appears to me quite sufficient to support the claimant's assertion, that the receipt of which she is the holder, and which bears the indorsation of Mr Ross, was presented to her by him as a donation. In addition to the fact of possession, and of indorsation, and of delivery, there has been proof, to my mind sufficient, that the intent of the indorsation and delivery was to make a gift. Indeed, if the executors' plea of a legal presumption excluding inquiry is repelled, as I think it ought to be, then the question of evidence does not admit of much doubt, and has not been very seriously argued. I am, therefore, of opinion that the Lord Ordinary's interlocutor should be recalled, and that Mrs Muir's claim should be sustained.

The Court therefore ranked and preferred Mrs Muir to the fund *in medio*, and found her entitled to expenses.

Agents for Mrs Muir—Neilson & Cowan, W.S.
Agent for Executors—George Cotton, S.S.C.
Agents for Next-of-Kin—Grant & Wallace, W.S.

UNION BANK *v.* ROSS.

Fixing Trial. A pursuer having given notice of trial for the July sittings, and the defender having moved the Lord Ordinary to fix a day for the trial before himself—trial fixed for the sittings.

Issues in this case were adjusted before the Lord Ordinary on 12th June. On the 14th the pursuers gave notice of trial for the July sittings. The defender to-day moved the Lord Ordinary to fix a day for the trial before himself. The Lord Ordinary reported the case.

MILLAR, for the pursuers (with him LEE), argued that they were entitled to the lead for ten days after the adjustment of issues. They had given notice for the sittings, which would take place in five weeks. He cited *Faulks v. Park*, 16 D. 93; and *Bell v. Anderson*, 24 D. 603.

PATTISON, for the defender (with him F. W. CLARK), answered—The case is a short one, and will be conveniently tried before the Lord Ordinary. The second meeting for the adjustment of issues took place on 6th June, when the Lord Ordinary pronounced an interlocutor reporting them; but the pursuers thereafter gave up an issue which they had proposed, and the issues were then approved of.

THE LORD PRESIDENT—There is very little time to be gained by having the trial before the Lord Ordinary, and I think there is good reason for depriving the pursuers of their lead.

The trial was accordingly fixed to take place at the sittings.

Agents for Pursuers—Mackenzie & Kermack, W.S.

Agent for Defender—James Paris, S.S.C.

SECOND DIVISION.

BAIN *v.* MATTHEWS.

Agreement—Sale—Proof. The pursuer alleged that under a verbal agreement the defender had agreed to take from him at a valuation the furniture of a mill of which he was tenant, and brought an action for the value thereof—*Held* that the agreement was not proved.

This was an advocacy from the Sheriff Court of Aberdeenshire, and involved a simple question of fact. The pursuer (advocator) sued the defender for £108, 16s. 6d. sterling, being the value of mill machinery, and gearing, mill and barn furniture, household furniture, implements, pailing, and other effects belonging to the pursuer, in and about the Mill of Sclattie, and cottage and office-houses attached thereto, and alleged to have been sold by the pursuer to the defender, on or about the 31st of May 1864, according to the valuation of parties mutually chosen. The pursuer was tenant of the Mill of Sclattie, under a sub-lease till Martinmas 1864. Previous to that, and at the preceding term of Whitsunday, the defender had obtained from the landlord a lease of the Mill of Sclattie for 19 years, commencing as at Martinmas 1864. The pursuer was willing that the defender should get possession of the mill at Whitsunday; and he says that he met the defender on the subject, and agreed with him that he should take

the machinery, gearing, &c., of the mill, at a valuation to be put upon them by valuers mutually chosen. The pursuer alleges that this was done, and the subjects handed over to the defender. He accordingly sues the defender for the price of the valued subjects. The agreement set forth by the pursuer was denied by the defender, who said that the contract was that the defender should pay £15 for the use of the mill-gearing, &c., for six months, being the period of the pursuer's yet unexpired lease. A proof was led.

The Sheriff-Substitute (Watson) found the pursuer's case proved, and decerned.

The Sheriff (Davidson) altered. The pursuer advocated.

GORDON and MAIR supported the advocacy.

A. R. CLARK and KEIR argued that the Sheriff's judgment was well founded.

The Court adhered to the judgment of the Sheriff.

Lord COWAN dissented, holding that the facts instructed the view of the case taken by the Sheriff-Substitute.

Agent for Pursuer—James Finlay, S.S.C.

Agents for Defender—Webster & Sprott, S.S.C.

SCOTT *v.* HOGG.

Parent and Child—Paternity—Proof. Circumstances in which held that the pursuer of an action of filiation and aliment had failed to establish the paternity.

This was an advocacy from the Sheriff Court of Roxburghshire. The pursuer (advocator) sued the defender for the aliment of twins, of which she alleged he was the father. A proof was led in the course of which the pursuer swore that the defender was the father of her children, and the defender denied that he had ever had connection with her. There was no corroboration of the pursuer's testimony, and no evidence of familiarities. The defender produced with his defences a letter, which he said he had received from the pursuer in answer to one which he had written to her in consequence of rumours which had reached him that she was with child to him. The letter was dated six weeks before the birth of the children, and was as follows:—

“Sunlaws Mill, April 16.

“Dear Thomas,—It is with grief that I have to write to you, but I have to do it. You know as well as me I can't keep people from saying; but I never said it was yours, for I know different. My father was down, and he told me he would not let me home, so you need to believe what no one says; for I never said no such thing. I am to lodge in Heiton or Roxburgh, and my way will be paid without you; so you have nothing to do with me and my affairs.—Yours truly,

“MARY SCOTT.”

The pursuer denied that she had written this letter, and alleged that it was a forgery.

The Sheriff-Substitute (Russell), chiefly on the ground that he was satisfied that the above letter was not written by the pursuer, found her case proved.

The Sheriff (Rutherford) recalled this interlocutor, and assozied the defender.

On advocacy, the Lord Ordinary (Ormidale) adhered to the Sheriff's judgment, and explained his reasons in the following

Note.—Whatever may be thought of this case otherwise, and whatever doubt may be supposed to attend it, certain it is, at least, that one or other of the parties must have sworn falsely—unfortunately a too common feature of such cases as