

The other judges concurred.
 Agents for Pursuer—Scott, Moncrieff, & Dalgety, W.S.
 Agents for Defender—J. & F. Anderson, W.S.

Friday, January 31.

SECOND DIVISION.

M'CUBBIN'S EXECUTORS V. TAIT.

Donation—Deposit-receipt—Fraud—Facility and Circumvention. An old man having deposited in bank two sums of money, one in name of himself and his housekeeper, payable to either or the survivor of them, and the other in name of himself, for behoof of his housekeeper; and he having delivered to her both deposit-receipts, and allowed the money to remain so deposited until his death, held, in a question with his executors, that a donation of both sums of money had been effectually constituted; and a challenge of the donation, on allegations of fraud and facility and circumvention, held, after proof, not to be maintainable.

Mr Ebenezer Stott Black, writer in Wigtown, was appointed *curator bonis* to John M'Cubbin, sometime draper in Newton-Stewart, on 13th March 1866. Mr M'Cubbin was then possessed of about £3000, which was deposited in bank on deposit-receipts. The defender, who was his housekeeper, was found by the *curator bonis* to be in possession of two deposit-receipts, dated 27th October 1865 and 7th December 1865 respectively, one for a sum of £295, and the other for a sum of £200. These receipts were in the following terms:—

"National Bank of Scotland's Office,
 "Newton-Stewart, 27th Oct. 1865.

"Received from Mr John M'Cubbin and Margaret Tait, both Newton-Stewart, two hundred and ninety-five pounds sterling, to their credit in deposit-receipt with the National Bank of Scotland, payable to either or survivor of them.

"By order of the Board of Directors,
 "ALEXANDER WAUGH, agent."

"Clydesdale Banking Company,
 "Newton-Stewart, 7th Dec. 1865.

"Received from Mr John M'Cubbin, for behoof of Margaret Tait, his housekeeper, N.-Stewart, two hundred pounds sterling, which is placed to his credit with the Clydesdale Banking Company.

"THOMAS KERR, agent."

The *curator bonis*, on 7th August 1866, raised this action against the defender concluding to have her ordained to deliver up to him the said two deposit-receipts, and for declarator that the sums therein contained were the sole and exclusive property of John M'Cubbin. He averred on record:—

"Mr M'Cubbin is now upwards of seventy-eight years of age. He has been for several years labouring under mental and bodily weakness and imbecility, which render him quite incapable of managing his own affairs, or for the transaction of any kind of business. The defender has for several years lived alone with him as his housekeeper. From his mental and bodily condition she has had the entire management of him and of his affairs, and has acquired great influence over him. She has had access to all his repositories, and to all his writings and documents of every sort, and, in particular, to the two deposit-receipts which she now refuses to give up.

"Mr M'Cubbin did not give to the defender the deposit-receipts in question, or either of them, but, having access as aforesaid to his writings and documents, she has wrongfully taken possession thereof, and now refuses to give them up. Mr M'Cubbin did not, by taking the said deposit-receipts in the terms in which they bear to have been granted, place beyond his own control the money therein contained, or any part thereof. He did not thereby give to the defender any vested interest in the said deposit-receipts, or in the money therein contained.

"Mr M'Cubbin was—at the dates when the said deposit-receipts were respectively granted, and has ever since continued—incapable, from mental incapacity, of transacting any kind of business, or of making any donation of the said receipts or of their contents; or otherwise, he was weak and facile in mind and easily imposed upon, and the defender, taking advantage of her position, and the great influence she had acquired over him, did, by fraud and circumvention, or one or other of them, induce him to take the deposit-receipts in question, in the terms in which they respectively bear to be granted, and did induce him to give them to her."

These averments were denied by the defender, who made the following statement:—"The deposit-receipts, dated respectively 27th October and 7th December 1865, were obtained by Mr M'Cubbin for the defender's behoof, and were delivered by him to her while he was in a sound and disposing mind, in consideration of his attachment to and regard for her, which he constantly expressed to all his friends and acquaintances, and in consideration of her having, in compliance with his earnest request, engaged to remain with and take care of and attend to him from the term of Whitsunday 1863 to the time of his death, which the defender did."

Mr M'Cubbin died on 5th September 1866, and thereupon the executors named in his will sisted themselves as pursuers of this action.

The LORD ORDINARY (KINLOCH), after a proof taken under the Evidence Act, pronounced the following interlocutor and note:—

"*Edinburgh, 22d February 1867.*—The Lord Ordinary, having heard parties' procurators, and made avizandum, and considered the process, proof, and productions—Finds it proved, 1st, That on 13th March 1865 the late John M'Cubbin deposited the sum of £295 in the National Bank, at their office in Newton-Stewart, on a deposit-receipt bearing the sum to have been received from him and the defender Margaret Tait, and to be payable to either, or the survivor; 2d, That on 27th October 1865 this receipt was, by the authority of the said John M'Cubbin and Margaret Tait, renewed by another for the same amount, taken in the same terms; 3d, That on 7th December 1865, a sum of £200 was deposited by the said John M'Cubbin in the Clydesdale Bank, at their office in Newton-Stewart, on a deposit-receipt taken by authority of the said John M'Cubbin in name of him, the said John M'Cubbin, for behoof of the defender Margaret Tait: Finds it not proved that at any of the dates when the said deposit-receipts were taken, the said John M'Cubbin was in such a mental condition as to render him incapable of authorising their being taken in the terms which they respectively bear: Further, finds it not proved that the said receipts were taken in the terms borne by them through fraud or circumvention on the part of the said defender; assolizies the defender from the

conclusions of the action, and decerns: Finds the defender entitled to expenses; allows an account of the same to be lodged, and remits to the auditor to tax and to report.

W. PENNEY.

"*Note.*—John M'Cubbin, formerly draper in Newton-Stewart, died in September 1866, leaving a fortune of about £3000, acquired by industry and penuriousness. The question now is, Whether the defender Margaret Tait, who lived with him for some years as his housekeeper, is entitled to two sums of £295 and £200 respectively, set apart for her behoof out of his funds in bank, in the previous year, 1865? The pursuers, who are M'Cubbin's executors, allege that at the time these sums were so set apart, M'Cubbin was in a state of mental incapacity; or at least was in a condition of weakness and facility, which made him, in this matter, a prey to the defender's fraud.

"It appears to the Lord Ordinary to be of great importance towards the right decision of the question at issue, to consider in the outset the precise character of the feelings entertained by John M'Cubbin towards the defender. She was engaged by him as his housekeeper in July 1862, but did not go to live in his house till Whitsunday 1863. Prior to her engagement as housekeeper, she had been in the habit for many years of making purchases at his shop; and for about two years previous to July 1862, she had occasionally done some work for him in his house, in which he lived alone, without even a servant. Now, what is a very peculiar feature of the case is, that in August 1862, immediately after engaging her as housekeeper, and nine months before she came to live in his house, John M'Cubbin executed a will in which he left her a legacy of £300. The will is not impeached, nor the pursuer's full right to this legacy. This first event in their joint history indicates an attachment to the defender on the part of this old man of seventy-four of a very unusual character, though perhaps not unnatural in a lonely old man like him, towards one whom he had found pleasing and serviceable. Perhaps it also indicates his peculiar mode of endeavouring to secure her services for the rest of his life, by an appeal both to her gratitude and interest.

"The evidence sufficiently shows that the defender was kind and attentive to this decaying old man. The Lord Ordinary holds it proved, by entirely credible testimony, that he more than once expressed an intention of giving her more of his fortune than he had already bestowed. He seems to have been afraid that she should leave him; and the death of her mother about Martinmas 1865 (an important date in the present inquiry), when there appeared some risk that the defender would go to live with her two brothers, naturally increased his solicitude. Towards his own relations, M'Cubbin does not seem to have possessed any remarkable feeling of favour. They lived at some distance; and he saw them only occasionally. He sometimes complained of his treatment by them, though there does not appear to have existed any positive alienation or difference. The case was eminently one in which an old man like M'Cubbin might naturally be found giving, to one who had lived in kindness with him for years, a portion of the means which his own industry had made peculiarly his own, without any impeachment thence arising either of his intellect or her integrity.

"The case generally so standing in regard to the position of the defender towards the deceased

John M'Cubbin, it is proper to consider, separately, the two benefactions alleged to have been bestowed on the defender, the validity of which is now brought under challenge.

"I. On 13th March 1865, a sum of £295 was deposited in the National Bank at Newton-Stewart (the produce to the extent of £290 of previous deposits) on a deposit-receipt bearing the sum to have been 'received from Mr John M'Cubbin and Margaret Tait, both Newton-Stewart,' and to be 'payable to either or to the survivor.' The circumstances attending this deposit have not been spoken to by any witness. The accountant, Mr Paterson, who seems to have managed the transaction, is now dead; and he does not appear to have seen anything in the transaction so peculiar as to make him mention it to any one. A 'wanted slip' as it is called, has been produced from the Bank repositories, of this date of 13th March, purporting to bear the signature of M'Cubbin, and running, 'Wanted the National Bank of Scotland's D. R. (deposit-receipt) in favour of Mr John M'Cubbin and Margaret Tait, both Newton-Stewart, for the sum of £295, payable to either or the survivor;' and the deposit-receipt is framed accordingly. On the 27th October 1865, according to the evidence of the pursuer's brother John Tait, M'Cubbin gave the defender this receipt, and desired her to send her brother with it to the bank to draw the interest. Accordingly, the interest was paid, and a new deposit-receipt of that date made out for the principal, running in the same terms with the former. John Tait declares that he gave this new receipt to M'Cubbin; and, according to the evidence of Margaret Tait, M'Cubbin gave her the receipt to keep; and the interest drawn was equally divided between her and M'Cubbin.

"This is all which the evidence discloses in regard to this transaction. And it appears to the Lord Ordinary that the transaction stands wholly unimpugned. Though the subsisting document be the receipt of 27th October, it is to the original date of 13th March that the inquiry properly applies; the second receipt being merely a renewal of the first, in identically the same terms. The Lord Ordinary can discover no grounds whatever on which the deposit of 13th March (which, *prima facie*, is a deposit by the personal act of John M'Cubbin) is to be held susceptible of challenge. There is no evidence to show that at 13th March 1865 M'Cubbin was in a state of mental incapacity. As little is there any evidence that the deposit-receipt of that date was obtained in the terms borne by it by any fraud or circumvention on the part of Margaret Tait. On these two essential points the evidence, considered as applicable to this particular date, is an absolute blank. Unless the Court is to proceed on retrospective surmises and suspicions, to which the name of proof cannot be applied, the first deposit-receipt for £295 must, as the Lord Ordinary conceives, be held untouched by any evidence in the cause.

II. The other deposit-receipt, being that for the sum of £200, presents a case of much greater nicety and difficulty.

It is proved that, on the 7th December 1865, M'Cubbin had a sum of £400 in the Clydesdale Bank at Newton-Stewart, lying on a deposit-receipt in his favour, dated 5th September previous. On that 7th December, John Tait, the defender's brother, brought this receipt to the Bank, asking for £200 in cash, and a renewal of the receipt for the remaining £200. John Tait deposes that he

was instructed to this effect by M'Cubbin, from whom he received the receipt. The Bank officials felt a difficulty about making so large a payment to the party presenting the document; and the deposit-receipt was retained till Mr Thomas Kerr, the Bank agent, could communicate with M'Cubbin, which he did in the course of the day. M'Cubbin then told him that he wanted to leave Margaret Tait £200. What followed is thus narrated by Mr Kerr:—'When he told me that he wanted to leave Margaret Tait £200, I advised him to place £200 in his own name for her behoof; and I said he could alter that at any time, and would have full control over it. He agreed to that, and adopted my suggestion.' A deposit-receipt was accordingly made out in favour of Mr John M'Cubbin, for behoof of Margaret Tait, his housekeeper, Newton-Stewart. This receipt having been delivered to M'Cubbin, was by him, according to the evidence of Margaret Tait, given to her to keep as her own. The balance of the original receipt, with £4 of interest (making £204 in all) was placed on a new deposit-receipt in M'Cubbin's own name.

The question is now raised, whether the receipt for £200 in favour of M'Cubbin, 'for behoof of Margaret Tait, his housekeeper,' has been successfully impugned by the pursuers, on the ground either of want of capacity, or of weakness and frailty, practised on by fraud or circumvention. On this question, the Lord Ordinary conceives the *onus* to lie on the pursuers, as much as if they were now in a proper action of reduction at their instance, with the two well known issues on these points sent to trial. It is proved that the deposit-receipt was taken by, at least, the ostensible authority of M'Cubbin. The pursuers must set it aside, on evidence establishing its invalidity. The Lord Ordinary is of opinion that the attempt to do so has been unsuccessful.

In regard to the alleged mental incapacity, there has been a great deal of conflicting evidence led. The most prominent portion of this evidence consists of the testimony of the medical men who visited M'Cubbin with reference to a petition for the appointment of a *curator bonis*, presented on 2d February 1866, by two of his next-of-kin. This application was resisted on the part of M'Cubbin, and, as testified by Mr Alexander Waugh, the agent employed by him, under his express authority, given with a full cognizance of the circumstances. The opposition was at last withdrawn, on Mr Waugh's suggestion, adopted by M'Cubbin, that, on the whole, it was most expedient that a respectable neutral person should undertake the management of his affairs. In the meanwhile, there had been prepared for the Court a good deal of medical testimony, comprised in certificates; and the living doctors were examined, in the course of the recent proceedings.

It is impossible for the Lord Ordinary to entertain any other feeling than that of the most sincere respect for the men of skill, at once intelligent and candid, who were examined before him. But he would find it difficult to rest a satisfactory judgment either on an opinion (like that contained in Dr Gilchrist's certificate) founded on information from a number of un-named individuals, or an opinion formed after a single visit to M'Cubbin. The risk of resting such an opinion on the conclusions of a single visit is demonstrated by the fact that two of the medical men who testified, after one visit, to M'Cubbin's complete mental competence, found reason on a second to doubt, or en-

tirely change, that opinion. A third visit, made in a brighter moment, might possibly have sent them back to their first impression. But the observation which the Lord Ordinary would mainly apply to the whole evidence on this subject is, that it was almost altogether away from the true question at issue. The question in the present case is not as to M'Cubbin's general fitness to manage his own affairs. It was probably a right conclusion that he was not. He was evidently a man who was growing gradually weaker in mind as well as in body. But the question is, whether there was such a want of mental capacity as prevented him from understanding Mr Kerr's explanation,—made him incapable of rationally expressing his desire to leave Margaret Tait £200 additional,—and rendered ineffectual the authority given to Mr Kerr to take the receipt in his name 'for behoof of Margaret Tait.' The Lord Ordinary is of opinion that no such want of mental capacity has been proved.

"Amidst all the diversity of opinion on the subject of M'Cubbin's mental capacity, there is real evidence of its existence in the mode in which those around dealt with him. The very fact of Mr Kerr's seeking his authority for the terms of the receipt naturally implies that he had sufficient competence to give that authority. Undoubtedly Mr Kerr now says that he went into the transaction, not because he considered M'Cubbin fit for it, but because he thought its terms made him safe. But the Lord Ordinary can scarcely take this explanation at the hands of a regular man of business, who ought not, in any circumstances, to take and act on a mandate where the party granting it has no sufficient capacity to do so. It happens, singularly enough, that this is not the only transaction engaged in at this period by Mr Kerr on behalf of M'Cubbin. Seven days thereafter, viz., on the 14th December 1865, he and Mr David Stroyan, the agent for the British Linen Company's Bank, engaged in the important proceeding of transferring, under M'Cubbin's authority, a sum of £1600 from the last-mentioned Bank to the Clydesdale, for which Mr Kerr was agent. It is difficult to receive a statement of entire mental incapacity from the gentlemen who held M'Cubbin competent to authorise a transaction like this. The mode in which M'Cubbin was spoken with and consulted on business matters—as, for instance, in regard to the petition for a curator—shows that he was not esteemed the incapable person which he is now said to have been. The legal representatives themselves accepted and acted on his withdrawal of opposition to the petition, as the proceeding of a man competent legally to bind himself. It is true that there were circumstances in his case which naturally made men of business cautious about engaging in large transactions, where he and his housekeeper were concerned. But the question now is, not whether such caution was proper, but whether M'Cubbin at that time laboured under such a total destitution of mental capacity as disabled him from authorising Mr Kerr to take the receipt in the terms borne by it. The Lord Ordinary is of opinion that such want of capacity has not been established.

"On the other branch of the alternative, to wit, that the receipt was obtained by fraud or circumvention on the part of Margaret Tait, practised on weakness and facility on that of M'Cubbin, the Lord Ordinary is equally of opinion that the pursuers have not proved their case. The mode in which the terms of the receipt were arranged with M'Cubbin by Mr Kerr go a great way to negative

the position. It is extremely probable that Margaret Tait possessed a good deal of influence over M'Cubbin. Their relative position infers as much. It was quite possible that she should exercise this influence unduly, for her own benefit. Some of the circumstances disclosed in evidence may at first blush suggest an unfavourable surmise. But the question always reverts, Whether there is sufficient proof that this particular receipt was obtained by her by fraud or circumvention? The Lord Ordinary cannot discover such proof. He thinks that what took place might very naturally occur in the circumstances, without the slightest fraud being necessarily present. The pursuers seem to proceed on the assumption (not an uncommon one) that whenever a man in decaying health puts money past his legal representatives, something wrong must have occurred. But the assumption is without good foundation either in law or reason. The proceeding may be one on whose propriety differences of opinion may arise. The act may be a sick man's caprice. It may arise out of what others may consider an unreasonable partiality. Conceivably, it may be the product of a long course of not illegitimate influence, unconsciously sustained. But all this is something very different from a direct acquisition by fraud or circumvention, which is the case put in issue by the pursuers. The conclusion arrived at by the Lord Ordinary involves, in his apprehension, a not unimportant principle—the principle, namely, that the decay, both bodily and mental, which attends old age, and precedes dissolution, shall not be held to vitiate an act of ownership performed on a man's own property, without conclusive evidence, either of entire want of capacity, or the perpetration of fraud. In the case of personal property, our law wisely recognises and supports a man's right to dispose of his own, so long as exercised freely and with understanding, down to the latest period of life. There is no law of deathbed in moveables."

M'Cubbin's Executors reclaimed.

SOLICITOR-GENERAL (MILLAR) and SKELTON, for them, argued:—1. The proof established that in October and December 1865 the deceased John M'Cubbin was weak and facile, and that the defender, taking advantage of his weakness and facility, got the deposit-receipts conceived in the terms which they bear. 2. At all events, the receipt of December was obtained in these circumstances. 3. The defender has not proved that the receipts were ever delivered to her by M'Cubbin. 4. M'Cubbin had the absolute disposal of the money until his death, and therefore this was not a case of donation *inter vivos*. 5. Neither was it a donation *mortis causa*, because there had not been delivery. 6. It could not be a legacy, because a legacy above £100 Scots cannot be constituted by means of a deposit-receipt, however expressed.

LORD ADVOCATE (GORDON) and BURNET, for the defender, replied:—1. There was no evidence of either facility or fraudulent impetration; at least there was not evidence of both. 2. Delivery of the receipts was also proved, but this was not required, as the receipts bore *in gremio* that they were the property of the defender after M'Cubbin's death. 3. Donation can be constituted in this way as effectually as by means of a destination in a bond.

The following cases were referred to in argument:—*Murray v. Tod*, Hume, 274, and 1 Murray's J.C.C., 222; *Mitchell v. Wright, M.*, 8082; *Fyfe v. Kedzie*, 9 D., 853; *British Linen Co. v. Martin*,

11 D., 1004; *Heron v. M'Geoch*, 14 D., 25; *Cruickshanks v. Cruickshanks*, 16 D., 168; *Barstow v. Inglis*, 20 D., 230; *Cuthill v. Burns*, 24 D., 849; *Kennedy v. Rose*, 1 Macph., 1042; *Bryce*, 4 Macph., 312; *Muir v. Ross*, 4 Macph., 820; *Morris v. Riddick*, 5 Macph., 1036.

At advising—

LORD JUSTICE-CLERK—The question before us involves the right of the defender to the contents of two deposit-receipts; one for £295, and the other for £200. The defender's claim was contested before the Lord Ordinary on the ground that the deceased John M'Cubbin, who is said to have given her right to these sums, was at the time of the alleged gift in a condition of such mental incapacity as to disable him from intelligently completing any transaction. It was also impugned upon the ground that, if not in a state of mental incapacity, the granter was in a weak and facile condition of mind, and that advantage was taken of his facility by the defender to circumvent him, and to procure by undue arts and influence the completion of the gifts. The Lord Ordinary has found that the challenge is good upon neither ground. A separate objection, founded upon the nature of the documents, and the effect of the proceedings of the deceased in relation to them, was raised before us, as to which no argument was submitted to the Lord Ordinary.

The first thing for us to determine is, Whether or not the deceased is proved to have been destitute of sufficient mental capacity to confer any right on the defender at the time when the transactions were carried through? or whether, assuming capacity, there is evidence of circumvention and the undue procuring of the right from a party in a state of facility by the defender?

I am of opinion, with the Lord Ordinary, that the pursuer has failed on both points. The result of the evidence is to prove, as it appears to me, beyond all question, that the granter, on and before the 7th December 1865, the date of the latter deposit, had sufficient intelligence and mental capacity to act in such transactions. And I am further of opinion that in conferring a right upon the defender through these transactions—if he has conferred one—he carried out a purpose deliberately entertained by him, and dictated by his own wishes, and as to which it is not established that he acted under any undue influence, or was in any way circumvented. The deposit-receipt for £295 is dated on 27th October 1865, but it is a renewal of a previous receipt in precisely the same terms, which was dated on the 13th March previously. There is really no evidence at all to show incapacity at that time, and not a vestige of proof is brought to show that it was obtained by means of any undue arts practised, or influence unfairly used on the part of the defender.

It appears, according to the statement of the defender, which is in that respect uncontradicted, that instructions were personally given as to the former deposit by the deceased to a party connected with the Bank, since dead, who carried through these instructions.

As to the £200 receipt, the deposit was made on the 7th December, I see no case of incapacity proved as existing at that date, and I find that the transaction ending in the deposit was actually proposed to the deceased by the witness Mr Kerr as a modification of an amount proposed by the deceased more favourable to the defender. It was carried out in the particular form in which it was completed through Mr Kerr, outwith the presence of

the defender, and when the exertion of improper influence on her part was impossible.

So far from the acts done being impetrated, I have a very strong conviction, formed upon a perusal of the proof, that the conferring of the right to these sums was not merely in accordance with the full volition of the deceased, but that the result of the interference of other parties has deprived the defender of further considerable sums which the deceased had the full wish and desire to have given to her. I hold it proved that he did not regard his own relations with any favour; that he did regard and esteem the defender, and desire her to be benefited by succeeding to a considerable portion of his fortune. In the history of the relation between the parties—in her excellent conduct towards him throughout—I see an abundant motive for his acts, and I, with the Lord Ordinary, hold it clearly established by unimpeachable testimony that he had intention, and expressed it, to add to the provision which he had already made for her in his will, and which provision was made before she came to reside with him.

The evidence of medical men is conflicting. The issue which they were called upon to decide was one in which they had to determine a capacity of general management of affairs, and was raised only in the month of February 1866. Had the period been the same, and the issue one as to capacity for a donation, or the expression of testamentary disposition, I confess I am disposed to lean in such a case rather upon parties who were in constant and familiar intercourse with the deceased, than on the opinion of medical gentlemen, formed upon short interviews, and while the party examined is subject to influences that may affect him, so as to cause him to present an appearance different from that habitual to him. It is a case of the absence of capacity, not the presence of insanity; and an appearance of lethargy may be deceptive. I see nothing in any single act done or said by the deceased intimating disordered intellect, and in one observation made to Dr Gilchrist, in reference to the doctor's position, I thought there was no inconsiderable indication of knowledge as to his position in reference to the inquiry then proceeding, and the position of the party who was inquiring. If Mr Waugh is to be credited, and, for my own part, I do credit him, the proceedings of the deceased as to his opposition to the application for a curator, and its withdrawal, were characterised by intelligence and good sense. The only witness whose testimony bears strongly in matter of opinion against the capacity of the deceased is Mr Kerr, but as Mr Kerr took instructions from the deceased in reference to a transfer of £1600 from another bank to his own, and acted on them on the 14th of December of that very year, I feel it difficult to follow his statement as to Mr Cubbin's inability to give a sum of £200 on the 7th to a person who was kind and useful to him, in preference to relations other wise amply provided for, and not standing high in his estimation. It is difficult to reconcile a suggestion made by the witness to the deceased that this £200 should be put in the form of a deposit specially conceived for a purpose, with a conviction of mental incapacity to carry out that very transaction. It is a very subtle mind which can act upon instructions as given by a man having mental capacity to transfer an account from one bank to another in order to accomplish the purpose of having all his funds together, which Mr Kerr admits that he did with the same party not having

mental capacity to give away £200 for the purpose of rewarding faithful service.

The question then comes to the validity of the acts to confer a right on the defender to the contents of these deposit-receipts. What are the facts in reference to these documents? In March 1865 by an act of deceased, which, under the assumption on which we are now to dispose of the case as I regard it, there was, by his authority and direction duly given, deposited the sum of £295, which deposit the bank received and agreed to hold as money received from the deceased and Margaret Tait, and engaged to pay it to these two parties or the survivor. Interest on this deposit-receipt appears to have been paid and shared in conformity with the nature of the obligation, one-half to her and one-half to deceased, a new receipt being taken. The fact of the division of the interest stands upon the testimony of the defender, but interest was paid, and, according to the conception of the instrument, the interest was due by the bank to these two parties, and I hold, therefore, that statement corroborated. Again, the documentary evidence of the fact of deposit and obligation was delivered by the deceased. The defender depones to this, but her testimony is corroborated by the fact that during his life, and when the question arises as to the deceased being put under curatory, she is in possession of it, while the deceased retained possession of the receipts which he had for sums his own property. From this it seems to me to result, first, that an immediate gift was made of an interest in the sum deposited to the extent of one half, with a contingent right to the whole, the right depending on survivorship. The acceptance of the donation, if there was one, is clear; and the definitive purpose of the deceased to complete a right in her, proved by delivery of the written evidence of the obligation, which, in accordance with usage, enabled the holder to act upon it. Further, there was no revocation of the gift. I see in this transaction a finished and accomplished act of donation, to take immediate effect. It is not of the nature of a bequest of property of which the deceased was to have full enjoyment all his life, and the defender to succeed to him in the full right on death. It is a position of matters similar or identical to that of an arrangement following on contract. If founded on contract, it does not seem to be capable of dispute after the judgment in the case of *Brown* in the House of Lords (1 Macph.), not only that such a transaction would be good, but would not be of the nature of succession. But that there was a donation made and accepted, and an immediate right conferred in a half, with a contingent interest in the whole, created, seems conclusive evidence of the right of the defender.

I am not curious to inquire into the class of donations under which this is to be placed. We know that under the Roman law three classes, according to one authority, and two according to another, of *mortis causa* donations were recognised. (Dig. 39, 6, § 1; Pothier, 3, 607.) I think that in this case we have the first of these; not the proper *mortis causa* donation of a gift made conditionally on a pending sickness terminating in death, but an actual present donation, proceeding from general views of mortality. But here the donation is a present right vested. The transaction was followed by delivery of the instrument of acknowledgment of the deposit, and there was no revocation or attempt to revoke.

The direct right under the deposition being in both cases in the defender, we are relieved from

any necessity to inquire as to the effect of the indorsation of such instruments, which has given rise to numerous questions. Questions might arise as to the purpose of a party taking such receipts in the name of another; but here the purpose and object could only be to carry out by means of them an intention to gift, and, that being so, there is no ground in law upon which, so far as I can see, effect should be denied to what the deceased did when he was in a state of mind which made him capable of doing it.

The other Judges concurred.

An interlocutor was pronounced finding that the defender was entitled to uplift the sums contained in both deposit-receipts.

Agents for Executors—Tods, Murray, & Jamieson, W.S.

Agent for Defender—D. J. Macbrair, S.S.C.

Saturday, February 1.

FIRST DIVISION.

SYME v. EARL OF MORAY'S EXECUTORS.

Reparation—Game—Landlord and Tenant—Issue.

Form of issue approved of by the Court in action of damages by a tenant against his landlord for injury to crops by game.

This was an action of damages at the instance of George Syme, tenant of certain farms in the parishes of Aberdour and Dalgety, and county of Fife, originally directed against the Right Hon. John Stuart Earl of Moray, heritable proprietor of the said lands; the ground of action being alleged injury to the pursuer's crops on the said lands, in the year 1865, by the unreasonable and excessive stock of game kept thereon, wrongfully and by the fault of the defender.

It appeared that the pursuer's brother, Robert Syme, had become tenant of Meikle Couston and Muirton Park under minutes of agreement dated in June 1853, and tenant of Chesters and New Kirk Parks under minutes of agreement dated February 1855; and that, on Robert Syme's death in 1858, the pursuer had entered on possession of the lands as tenant, acknowledged by the defender. The pursuer had become tenant of the Barns Farm and of Hattonhead Park under verbal agreements of lease dated in 1859 and 1862 respectively. The pursuer alleged:—

"**COND. 8.** When the said deceased Robert Syme became tenant of the lands mentioned in articles 1 and 2 hereof, as also when the pursuer succeeded him as tenant of these lands, the stock of game and rabbits thereupon did not exceed a fair average stock; nor was there above a fair average stock of game and rabbits upon the lands mentioned in article 5 hereof when the pursuer became tenant of these lands. The said Robert Syme and the pursuer entered into the said leases, and agreed to pay the rents thereby stipulated, on the faith and in reliance that the said stock of game and rabbits would not be increased, or at least not materially increased, and, in particular, that it would not be increased to an excessive and destructive extent.

"**COND. 9.** At the dates when the first-mentioned leases were entered into, and thereafter down to about the years 1860 or 1861, the game was kept for the sport of the landlord and his friends, and no unusual means were taken to increase its amount. But within the last few years the defender has not

lived at Donibristle, and the game has since been bred and dealt with exclusively as a marketable commodity. Its amount has, by careful preserving and unusual means employed by the defender, or those for whom he is responsible, been wrongfully increased to a very great extent beyond a fair average stock, and the defender has annually realised large sums by selling it. The defender has of late years regularly fed the pheasants until the pursuer's crops were sown and ready to afford them food. In particular, the game, especially hares and pheasants, has within the past three years increased enormously beyond the stock which existed on the said lands at the dates when the said Robert Syme and the pursuer respectively entered into and took up the leases above mentioned, and agreed to pay the rents thereby stipulated, and which rents have since regularly been paid. The rabbits have also increased to some extent."

The pursuer proposed the following issue:—

"It being admitted that the defender was during the year 1865, and still is, proprietor of the lands of Meikle Couston and Muirton Park, in the parishes of Aberdour and Dalgety, as also of the lands of Chesters and Kirk Park, Hattonhead Park, and Barns Farn, also in the parish of Dalgety; and that the pursuer was during the year 1865, and still is, tenant of the said lands under the pursuer:

"Whether, during the year 1865, or any portion thereof, the defender wrongfully kept upon the said lands, or any part thereof, an unreasonable and excessive stock of game and rabbits, to the loss, injury, and damage of the pursuer?

"Damages laid at £270."

The LORD ORDINARY (BARCAPLE) reported the case, with the following note:—

"The defender does not dispute that an action may lie at the instance of an agricultural tenant against his landlord for damage done by undue increase of game, but he maintains that the pursuer's averments in the present case are not sufficient to entitle him to an issue. He contends that it is necessary for the pursuer in such a case to aver that there has been a material change in regard to the mode in which game has been dealt with on the lands, and that the increase complained of has been brought about by artificial means. The Lord Ordinary doubts whether either of these contentions can be maintained consistently with the judgments in previous cases; and, at all events, he is of opinion that articles 8 and 9 of the Condescendence contain sufficient averments on these points. The parties were not at one as to the precise ground on which such a claim is to be sustained—whether upon contract or on the ground of a wrong done to the tenant as possessor of the farm. The former view seems to be countenanced by the authorities, and the claim to be put upon the ground of implied obligation by the landlord to warrant the tenant in the beneficial possession of the land. If this is the true view of the relative position of landlord and tenant in this matter, it may possibly support the claim, even where there has been no preserving, or other means used to increase the game, and where all ordinary means have been used to keep it down, if it has nevertheless increased owing to strict preserving on a neighbouring estate, or any other cause, which cannot be attributed as a wrong to the landlord. On this point the Lord Ordinary expresses no opinion. The defender maintains that, if there is to be an issue, the damages should