Saturday, June 26.

SECOND DIVISION.

SPECIAL CASE—MILLER AND OTHERS.

Trust-Disposition and Settlement—Deposit Receipt—Promissory Note—Intention.

A died leaving a trust-disposition and settlement directing his means, after payment of certain legacies, &c., to be divided among his children so that the share of each son should be one half more than that of each daughter. A number of deposit-receipts and promissory-notes were found in his repositories taken in the names of his children, an equal sum being by these documents apportioned to each, except the youngest child, born two months before A's death, to whom only a very small sum was provided. *Held* (1) that these documents were not donations, not having been delivered; (2) that they were not testamentary writings, not being under the hand of the truster; (3) that the sums of money contained in these documents formed part of the residue of the testator's estate, and as such fell to be apportioned among his children in terms of his will.

This was a Special Case presented for the opinion and judgment of the Court by Robert Hogg Miller, aged twenty; Martha Ferguson Miller, aged seventeen; Agnes Elizabeth Miller, aged fifteen; Jessie Williamina Miller, aged nine; and Isabella Eadie Miller, aged four; with the tutors and curators named by their deceased father's trust disposition, all as parties *of the first part*, and Mary Jane Miller, born 24th September 1873, and her tutors nominate, as parties *of the second part*.

Robert Miller, the testator, died on 25th November 1873, survived by his widow Agnes Hogg or Miller, and by the six children who were the parties to this case. By a trust-disposition and deed of settlement, dated 24th August 1863, to which his widow was a party, he nominated and appointed certain persons trustees and executors of his heritable and moveable estate, and tutors and curators for such of his children as should be in minority at his death. The purposes of the trust were as follows:—*first*, Payment of the testator's debts; *second*, Mrs Miller to have the use of the testator's household furniture so long as she shall remain a widow; *third*, A provision of £30 to Mrs Miller for the purchase of mournings, &c.; *fourth*, An annuity of £20 to Mrs Miller during her life, payable quarterly, and commencing at the first term of Candlemas for the quarter succeeding that term; *fifth*, provisions for the disposal of the testator's burying-ground at Sighthill; *sixth*, The testator's gold watch and appendages to be given to Robert Hogg Miller, his son; and, *seventh*, the residue to be divided amongst the children of the marriage between the testator and Agnes Hogg or Miller, and the survivors or survivor of them, and the lawful issue of any of them who might predecease him leaving such issue, equally among them if such children should be all sons or all daughters; but if otherwise, then so that each of the sons should receive in the proportion of a half-share more than the share of each of the daughters, the said shares to be payable to the children on their respectively attaining the age of twenty-one years, and until they should attain that age the trustees were authorised to make such interim payments to account of their shares as they might consider prudent and advisable, towards their maintenance, clothing, education, or advancement in life. After Robert Miller's death there were found in his repositories undelivered deposit-receipts and promissory-notes amounting to the sum of £4270, and consisting of money which belonged exclusively to the testator. These documents are of the following tenor:—

1873.

Jan. 30.	Interest-receipt, Robert Miller, Esq., and Mrs Agnes Miller, or the survivor, in trust for Robert Hogg Miller,				£800	0	0
July 15.	Do. the said Robert Miller and Agnes Miller, or either, or the survivor, in trust for Robert Hogg Miller,				40	0	0
24.	Do. the said Robert Miller, in trust for Robert Hogg Miller,				10	0	0
					£850	0	0
Jan. 30.	Interest-receipt, the said Robert Miller and Agnes Miller, or the survivor, in trust for Agnes Elizabeth Miller,	£800	0	0			
July 18.	Do. the said Robert Miller in trust for the said Agnes Elizabeth Miller,	40	0	0			
24.	Do. the said Robert Miller in trust for Agnes Elizabeth Miller,	10	0	0			
					850	0	
June 30.	Interest-receipt the said Robert Miller and Agnes Miller, or the survivor, in trust for Isabella Eadie Miller	£420	0	0			
July 10.	Interest-receipt, the said Robert Miller, in trust for Isabella Eadie Miller,	20	0	0			
24.	Do. the said Robert Miller in trust for Isabella Eadie Miller,	10	0	0			
June 30.	Promissory-note at twelve months by William Darcy Conway to the said Robert Miller and Agnes Miller, trustees for Isabella Eadie Miller,	200	0	0			
July 17.	Promissory-note at twelve months by William Conway to the said Robert Miller, trustee for Isabella Eadie Miller,	200	0	0			
					850	0	
Jan. 30.	Interest-receipt, the said Robert Miller and Agnes Miller, or the survivor, in trust for Jessie Williamina Miller,	£800	0	0			
July 18.	Do. the said Robert Miller, in trust for Jessie Williamina Miller,	40	0				
24.	Do. the said Robert Miller, in trust for Jessie Williamina Miller,	10	0	0			
					850	0	
Jan. 30.	Do. the said Robert Miller, and Agnes Miller, or the survivor, in trust for Martha Ferguson Miller,	£800	0				
July 18.	Do. the said Robert Miller, in trust for Martha Ferguson Miller,	40	0	0			
July 24.	Interest-receipt, the said Robert Miller in trust for the said Martha Ferguson Miller,	10	0				
					850	0	
Oct. 28.	Do. the said Robert Miller, in trust for Mary Jane Miller,				20		0
					£4270	0	

The testator left no heritable property, and the moveable estate, other than the sums of money represented by these deposit-receipts and promissory-notes, and his household furniture and books is estimated at £1625, this consisting of his in-

terest in a pawnbroking business. It was maintained by the five children, the parties of the first part, that the several sums of money invested in their names respectively, and secured by the deposit-receipts and promissory-notes (amounting to £850 to each of them), constituted provisions in their favour, and that the same were valid donations or bequests to the persons respectively named in the documents. It was maintained by the youngest child, the second party (to whom the sum of only £20 has been similarly provided), that the destinations contained in the deposit-receipts and promissory-notes were not effectual as bequests or testamentary dispositions, as not being under the hand of her father; and further, that they were not effectual as donations, in respect that the documents were never delivered to the alleged grantees, or to any person for their behoof. Mary Jane Miller accordingly claimed that the sums contained in these documents should be brought into residue, and disposed of in terms of the seventh purpose of the trust-disposition and settlement. She maintained, further, that in the event of the sums being held to constitute donations or bequests, they fell to be imputed *pro tanto* in satisfaction of the shares of residue effeiring to the legatees, in whose favour they might be respectively held to have been granted.

The following questions of law were submitted to the Court:—(1) Do the sums of money contained in the said several deposit-receipts and promissory-notes pertain to the children to whom the same bear to be respectively granted through the medium of a trust, as donations or provisions *inter vivos* granted in their favour by their father? (2) Do the said several sums of money pertain to the said children respectively as legatees of their father in virtue of the destinations contained in the said documents of debt. And *alternatively* (3) Do the said several sums of money form part of the residue of Mr Robert Miller's trust estate? (4) In the event of either of questions first and second being answered in the affirmative in regard to all or any of the said documents of debt, do the sums of money thereby accruing to the respective legatees fall to be imputed *pro tanto* in satisfaction of their shares of residue?

Argued for parties of the first part—These documents form a special provision in favour of those children in whose names they are granted. We maintain that the first two queries should be answered in the affirmative, and queries 3 and 4 in the negative. The case is somewhat different as regards the deposit-receipts and the promissory-notes; and to deal with these documents separately we find (1) as regards deposit-receipts, there are two cases which especially bear on the present (*Kennedy* v. *Rose* and Lord President there, and *British Linen Company's Bank* v. *Martin*). As regards (2) the promissory-notes, there are a number of authorities (Thomson on Bills, *Barber*, *Carrick*, *Murray*, *Steele*), and in England a similar rule prevails (Williams on Executors, *Jones*). It must be borne in mind that the residuary destination deals with the children unequally, giving to sons a preference over daughters, and a larger portion. On the other hand, these documents do not make any distinction, but provide to each £850, except to Mary Jane Miller, thereby not acting in the way of an anticipatory carrying out of the directions of the will.

Authorities (Scotch)—*Kennedy* v. *Rose*, 1 Macph. 1042; *The British Linen Company's Bank* v. *Martin*, 11 D. 1004; Thomson on Bills, p. 20; *Barber* v. *Blackwood*, M. 6097; *Carrick* v. *Cay*, M. 17,009; *Murray* v. *Tod*, Hume, p. 275; *Steele* v. *Wemyss*, M. 1409. (English)—Williams on Executors, vol. i. p. 105; *Jones* v. *Nicolay*, 7 Adm. and Eccl. Cases, 534.

Argued for parties of the second part—We are safe in relying upon the intention of the testator. [Lord Neaves—It is certainly a very remarkable thing that these documents begin in August 1873, and continue at short intervals thereafter, that they are *all* constituted in favour of *all* the children then existing, and that the moment the sixth child is born the father begins to make a like provision in her favour.] The father died only two months after the birth of Mary Jane, his youngest child. We submit (1) that these documents are not donations, because they were not delivered; (2) that they are not testamentary writings, because they were not under the hand of the deceased. Some of them are taken in his own name in trust for the particular child, and some in the names of himself and wife. (*Cruikshanks*, *Watt's Trs.*, *Cuthill.*) [Lord Justice-Clerk—The question in this case is whether the father held for himself or for his children. His possession is attributable to either view, and the point is, to which.] Three propositions may be laid down—(1) Where a document directs the payment of certain sums contained in a specified bill it is good, because the writing is a testamentary one; (2) where a deposit-receipt has been delivered it is good, because there is donation; (3) where a deposit-receipt has been merely taken in a certain person's name, and not delivered, but retained by the giver, no effect can be given to it. They cannot be regarded as invested securities with a destination, because such a use of a deposit-receipt or of a promissory-note is unknown.

Authorities—*Cruikshanks*, 16 D. 168; *Watt's Trs.* v. *Mackenzie*, 7 Macph. 930; *Cuthill* v. *Burn*, 24 D. 348, Bell's Lect., vol. ii. 913; *Fulton*, M. 1411.

At advising—

Lord Justice-Clerk—My Lords, the question raised by this Special Case presented for the opinion and judgment of the Court is whether certain deposit-receipts and promissory-notes found in the repositories of Mr Miller constituted donations in favour of those children in whose names they were taken, or whether they are intended as only so far in implement of the provisions left by the testator in his previously made settlement. [*His Lordship proceeded to narrate the circumstances under which these documents were granted.*] It may be observed that although the youngest child does not get the sum of £850 given to each of the others, yet she was not born until after the sum had been provided to each of them, and within a month after her birth it is apparent that her father intended to do for her as for the rest, and he begins by taking a deposit-receipt in her name for £20, dying, could ever, a month afterwards, before his purpose howbe further carried out.

My Lords, as regards intention, I have not any doubts; it cannot be held that these sums thus deposited constituted donations during Mr Miller's lifetime. There was, in the first place, no delivery, but, yet further than that, there was no intention on the part of the testator to part with the control of the sums of money now in question. These promis-

sory-notes and deposit-receipts are commercial instruments, they are not in any respect testamentary writings, and the way adopted was not one at all calculated to leave money. I cannot doubt that Mr Miller's real intention in acting as he did was merely to evade the legacy-duty on the funds so apportioned, and I am further led to regard this as the real state of matters by the fact that the residue, the £1625, provided enough to yield a similar provision of £850 to Mary Jane Miller, his youngest child.

The promissory-notes, as I have already indicated, appear to me to be in a similar position, and accordingly I think the sound and just view of matters is that we have here only an allotment of residue, and consequently that the questions fall to be answered in accordance with this.

Lord Benholme—I concur. There is, however, I think, some doubt as to the way in which we must answer these queries so as to give effect to our judgment.

Lord Neaves—I think these sums of money were *in bonis* of the deceased at the time of his death. I quite concur.

Lord Ormidale—The first point into which we have to enquire here is whether or not these sums of money were donations. On this point I quite agree with the conclusion to which your Lordships have come, and would only make this further remark, which goes far to show that these sums were never intended to be donations. We find that the testator leaves at his death £1625, whereas the amount of the sums under these documents in all is £4270. Can it even be supposed that Mr Miller ever intended *inter vivos* absolutely to divest himself of this large proportion of his means, leaving himself but £1625. I cannot conceive it possible, and this, to my mind, enters most deeply into the question of whether there was donation here. It is quite clear, moreover, that these deposit-receipts and promissory-notes were not delivered, and it may be observed that it is not always to be held that a document in a father's hands is there merely as in custody for his children, frequently this may become a question of intention and of circumstances. I may here refer to the case of *Hill* v. *Hill*, decided in 1755 (M. 11,580, under head Presumption).

The next point is whether these documents can be held as testamentary writings. Here again the principle of intention rules. But it can hardly be conceived that a promissory-note in these circumstances could be a testamentary writing. It would become exigible before Miller and his wife intended to die; they would then get the money, and there was nothing to prevent their mixing up this money so obtained with the rest of their means. As to the deposit-receipts, I have nothing to add, and upon the whole case have no hesitation in concurring with your Lordships.

The Court answered questions 1 and 2 in the negative, and the 3d query in the affirmative.

On the question of expenses—

Lord Justice-Clerk—As the testator chose to divest himself in this way, his estate, I think, ought to pay for it, and the expenses will be allowed out of the fund.

Counsel for Parties of the First Part—M'Laren. Agents—M'Ewen & Carment, W.S.

Counsel for Parties of the Second Part—H. J Moncreiff. Agents—M'Ewen & Carment, W.S.

Friday, June 26.

FIRST DIVISION.

[Sheriff of Dumfriesshire

JOHN GRAHAM *v.* HENRY GORDON.

*Process—Appeal—*16 *and* 17 *Vict. cap.* 80, *sec.* 24—31 *and* 32 *Vict. cap.* 100, *sec.* 53—*Final Interlocutor.*

Held that an interlocutor in the Sheriff-court finding, in a multiplepoinding, that there was double distress, repelling the defences, and reserving the question of expenses, was not one disposing of the whole merits of the cause, and was not consequently appealable.

This was an appeal from a judgment of the Sheriff-Substitute of Dumfriesshire. On the case appearing in the Single Bills, it was objected on the part of the respondent that the appeal was incompetent, on the ground that the interlocutor appealed against was not an interlocutor which came under the Sheriff-Court Act, 1853, sec. 24, and the Court of Session Act, 1868, sec. 53.

The Sheriff-Substitute's interlocutor was as follows:—

"*Dumfries*, 29*th May* 1874.—The Sheriff-Substitute having considered the debate on the closed record, Finds (1) that the question raised in the *first* head of defence involves the merits of the competing claims, and does not fall to be disposed of at this stage; and (2), That there is double distress in reference to the fund *in medio:* Therefore finds that the action has been competently raised repels the defences, and decerns, reserving the question of expenses; further appoints claims to be lodged within ten days."

At advising—

Lord President—An objection has been taken to the competency of this appeal, which depends on the construction to be put upon sec. 24 of the Sheriff Court Act, 1853, 16 and 17 Vict., cap. 80, and sec. 53 of the Court of Session Act, 1868, 31 and 32 Vict., cap. 100. The former statute provides that "it shall be competent, in any cause exceeding the value of £25, to take to review of the Court of Session any interlocutor of a Sheriff sisting process, and any interlocutor giving interim decree for payment of money, and any interlocutor disposing of the whole merits of the cause, although no decision has been given as to expenses, or although the expenses, if such have been found due, have not been modified or decerned for." The latter of these statutes provides, with regard to reclaiming notes from the Outer House, and appeals from the Sheriff Courts, "It shall be held that the whole cause has been decided in the Outer House when an interlocutor has been pronounced by the Lord Ordinary which either by itself or taken along with a previous interlocutor disposes of the whole subject-matter of the cause or of the competition between the parties in a process of competition, although judgment shall not have been pronounced upon all the questions of law or fact