

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. 11,680, 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 multiplepointing, 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, 29th 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

raised in the cause, but it shall not prevent a cause from being held as so decided that expenses, if found due, have not been taxed, modified, or decerned for." The "whole merits of the cause" in terms of the Sheriff Court Act is the same thing as "decision of the whole cause" in terms of the Court of Session Act. But it is quite plain that under sec. 53, the whole cause in the sense of the section may be decided more than once in a multiplepointing, for in one multiplepointing there may be more competitions than one, and so it is plain that in that process there may be more than one interlocutor disposing of the whole merits of the cause; but the question is, whether an interlocutor disposing of the whole question as to the fund *in medio* is an interlocutor disposing of the whole merits of the cause. It is maintained that the case of *The North British Railway Co. v. Gledden*, 26th June 1872, 10 Macph. 870, settles that question, and that when the fund has been ascertained, and the holder found liable in once and single payment, and the fund consigned, that is the whole case. But there is another question here, viz., whether the rule laid down in that case rules the present. What the Sheriff-Substitute has done by his interlocutor of May 29 is this, he 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." Now, in so far as that finding is concerned, it disposes of nothing at all; but he finds, "(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." Now all that is done here is to find that there is double distress, and to repel the defences; but nothing is said about the fund *in medio*; its amount is not ascertained, nor is there any order for consignment; there is no disposal of the question of expenses, but that is reserved. That clearly is not an interlocutor disposing of the whole merits of the cause; the holder of the fund is still in Court, and still holding it, and if there were nothing else in the case but the mere reservation of expenses, that would be conclusive, for it is necessary that they should be disposed of. So it seems to me that the case does not fall under the rule laid down in the *North British Railway Co. v. Gledden*, and this interlocutor has none of the characteristics of an interlocutor disposing of the whole merits of a cause.

The Court pronounced the following interlocutor:—

"Sustain the objection to the competency of the appeal; dismiss the appeal, and decern; find the appellant liable in expenses; allow an account thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for the Appellants—Kinnear. Agent—John Whitehead, S.S.C.

Counsel for the Respondents—Johnstone. Agent—John Galletly, S.S.C.

Tuesday, June 23.

SECOND DIVISION.

[Lord Gifford, Ordinary.]

MURRAY v. FINLAY.

Act 16 and 17 Vict. c. 80, § 32—Action of Removing—Minority—Tack-duty—Arrears.

Certain heritable subjects were let on a lease for 999 years: an action of removing was thereafter raised in the Sheriff-court against the heir of the original lessee, who was at the time in minority, on the ground that large arrears of tack-duty remained unpaid, and decree was granted. On attaining majority the heir raised a reduction of this decree, and this was opposed on the ground that the arrears at the date of the decree exceeded the value of the subjects at the time. Held (aff. judgment of Lord Gifford) that parties were entitled to a proof of their respective averments.

This case came up by reclaiming note against an interlocutor pronounced on the 16th June 1874, by the Lord Ordinary (GIFFORD.)

The pursuer's great grandfather, James Murray, mason, in Catrine, leased certain subjects in the village of Catrine from the defenders, James Finlay & Co., merchants, Glasgow, for 999 years from and after Whitsunday 1825. On the 18th of February 1861 the defenders, James Finlay & Company, as heritable proprietors of the subjects thus leased, raised an action of removing in the Sheriff Court of Ayrshire against the pursuer, John Murray, as great-grandson and nearest and lawful heir in general of the deceased James Murray, and the tutors and curators of John Murray, for their interest as tenants in the said subjects, and also against Helen Murray, mill-worker, residing in Catrine, designed as the present possessor of said subjects. The summons concluded that the pursuer and the said Helen Murray ought, in terms of the Act 16 and 17 Victoria, chapter 80, section 32, to be decerned and ordained to remove from the subjects, on the ground that the tack rent and burdens for 22 years at and preceding the term of Martinmas 1860 were in arrear. The amount of the arrears was said to be £27, 14s. 7½d. When this action was raised the pursuer was in a state of pupillarity, being only nine years of age, having been born in the year 1852. His father was dead, and he had no tutors or curators. The pursuer was therefore *non valens agere*, and not in a position to resist the conclusions of the action. On 9th July 1861 the Sheriff-Substitute held him as confessed, and decerned in removing, as libelled. No tutor *ad litem* to the pursuer was appointed. Immediately after the decree of removing was pronounced, James Finlay & Company entered into possession of the subjects, and have since continued to possess, and draw the rents thereof. The value of the subjects at the date of the decree of removing greatly exceeded the amount of arrears of tack rents alleged to be in arrear. The pursuer attained the age of 21 on 2d June 1873. The defenders in reply averred that since they entered on the possession of the subjects in 1861 they had expended £269, 8s. 1d. in erecting buildings thereon. They did not admit the age or identity of the pursuer, and they maintained that the decree in absence had the same effect, under 16 and 17 Vict., chap. 80 sec. 32, as a decree of irritancy *ob non sol-*