Thursday, December 22.

FIRST DIVISION.

[Lord Hunter, Ordinary.

MILLER'S EXECUTRIX *v.* MILLER'S TRUSTEES.

Personal Bar — Mora — Executor — Deposit-Receipt in Names of Mother and Daughter — Amount Uplifted by Daughter after Mother's Death and Redeposited in her Own Name — Claim by Executor quoad omissa.

A widow who carried on a licensed grocery business, in which she was assisted by an unmarried daughter, died in 1900 intestate, leaving, *inter alia*, deposit-receipts in both their names and payable to either or the survivor. The daughter uplifted the sums on deposit-receipt and redeposited them in her own name. About a year later the daughter and a son confirmed as executors to the widow, but the sums on deposit-receipt were not included in the inventory. No accounting was made by the executors or asked for by the other children. The son died in 1913 and the daughter in 1918, leaving a will and undischarged of the executry. Another daughter thereafter confirmed executrix *quoad omissa* on the estate of the widow, and brought an action of count and reckoning against the daughter's testamentary trustees. *Held* (*rev.* judgment of Lord Hunter, Ordinary) that the action was not barred by *mora*, and that in the absence of evidence to overcome the presumption against donation she was entitled to one-half of the sums on deposit at the date of the widow's death.

Bain v. *Assets Company* (1905, 7 F. (H.L.) 104, 42 S.L.R. 835) *distinguished.*

Mrs Agnes Miller or Cruickshank, Glasgow, executrix *quoad omissa* of her mother the late Mrs Agnes Jack or Miller, *pursuer*, brought an action against James Graham and John Jackson Coats, the testamentary trustees of the late Miss Isabella Miller, and others, and against certain charitable institutions for their interest, *defenders*, concluding for an accounting of the trustees' and the said Miss Isabella Miller's intromissions with the estate which belonged to the late Mrs Agnes Jack or Miller at the time of her death, and was taken possession of by the said Miss Isabella Miller.

The following narrative of the *facts* is taken from the opinion of the Lord President:—"The late Mrs Agnes Miller was left a widow in 1849 with a young family of six children. She had a licensed grocer's business and a farm which had belonged to her husband. The latter was given up, but by means of the former she succeeded in bringing up her children. As time went on, and all the children save one married or became self-supporting, she was able to accumulate a little money, and this she invested at first in heritable security, and later in shipping shares, and on deposit-receipt with her bank. Up to 1884 or thereby these investments took the form of heritable securities and deposit-receipts. The former were taken to Mrs Miller in liferent and her two then remaining unmarried daughters (Margaret and Isabella) in fee, while the deposit-receipts were taken in the names of Mrs Miller, Miss Margaret Miller, and Miss Isabella Miller, payable to any one of them or the survivor. Miss Margaret married in 1885. From about that time onwards investments in shipping companies took the place of the heritable securities. As the latter were repaid the amounts were subscribed by Mrs Miller to ship companies, the shares being issued sometimes in her own name and sometimes in the name of the then sole remaining unmarried daughter Isabella. From 1886 onwards the deposit-receipts were taken in the name of Mrs Miller and Miss Isabella Miller, payable to either or the survivor. In short, after Miss Margaret's marriage her name was allowed to drop out of the titles to the investments in which Mrs Miller placed her accumulated savings. When Mrs Miller died intestate in 1900 she was still carrying on the licensed grocer's business with the assistance of her daughter Miss Isabella Miller. One of the ship shares stood in Mrs Miller's name, the others in Miss Isabella's name. All the heritable securities had been repaid, and the deposit-receipts (to the extent of £3094, 14s. 1d.) were in the name of Mrs Miller and Miss Isabella Miller, payable to either or the survivor. It is not surprising in these circumstances that the pursuer, one of Mrs Miller's daughters who married in 1866, should believe and aver that the whole of these assets were her mother's, and notwithstanding the form of the titles in which they stood were *in bonis* of her when she died. But the pursuer and her brothers and sisters other than Miss Isabella Miller were content after Mrs Miller's death to leave the whole of them in Miss Isabella Miller's hands, and made no claim to any of them during Miss Isabella Miller's lifetime. Even the premises in which Miss Isabella Miller lived and the licensed business was conducted, and which belonged to one of her brothers, were allowed to remain in her occupation rent free. The licence was transferred to Miss Isabella Miller's name on 28th February 1901. The pursuer says that she and her brothers and sisters simply allowed Miss Isabella Miller to 'carry on,' trusting that she would do right in the matter of her mother's estate. She took no steps to administer that estate until 23rd October 1901, when she employed a solicitor to take out confirmation in her own name and in that of one of her brothers to (1) the household furniture, (2) the shipping share in Mrs Miller's own name, and (3) some trifling sums of cash amounting in all to £179, 18s. 11d. Nearly a year before, on 12th November 1900, she had uplifted the deposit-receipts and redeposited them in her own name. Not a word was said to the solicitor about them or the business or the other shipping shares. The solicitor tells us that the brother who became co-executor took no personal concern in the affair except in

connection with the declaration of ownership in the shipping share which stood in Mrs Miller's name and the endorsation of some cheques for the dividends on it. The pursuer did not even know that this confirmation had been obtained, and it is certain that beyond payment of a few sums as dividends on the ship share above mentioned no accounting of any kind was made by the executors to any of the family for any part of Mrs Miller's estate, and they never asked to be and never were discharged. In 1904 a balance of £48 was handed over to the executors by the solicitor on an account of charge and discharge between him and them, but nothing more took place. The brother who had been appointed co-executor died in 1913, and Miss Isabella Miller employed the estate which came into her hands in the way just described in a series of successful operations on the Stock Exchange. She died on 12th September 1918, and by her will she bequeathed estate amounting to nearly £30,000 to the charitable institutions which have appeared along with the trustees to defend the present action."

Mrs Miller's trustees and the charitable institutions compeared as defenders and pleaded, *inter alia*—"2. The pursuer's claims are barred by *mora*, taciturnity, and acquiescence. 4. The estate included in the inventory of the said Miss Isabella Miller being her own personal property, the defenders should be assoilzied."

On 9th March the Lord Ordinary (HUNTER) after a proof sustained the fourth plea-in-law for the defenders and assoilzied them from the conclusions of the action.

Opinion.—[*After a narrative of the facts*] —"The real difficulty in the case is whether the pursuer as executrix *ad omissa* on her mother's estate is entitled to an account for the sum of £3094 on deposit-receipt in name of Mrs Miller and of Miss Isabella Miller and survivor, or any part thereof.

"It is well settled that a deposit-receipt does not operate as a will containing a bequest of money in favour of the person in whose name it is conceived, failing the deceased. If, however, it is shown that the money deposited belonged to the deceased the terms of the deposit-receipt may afford some evidence of intention which requires corroboration in order to instruct a gift—see *Crosbie's Trustees* v. *Wright*, 7 R. 823.

"So far as the present case is concerned the pursuer maintains that it ought to be inferred that the whole of the money on deposit-receipt came from funds belonging to the late Mrs Miller, but I do not think that this is proved or even that it would be a safe inference to make. Alternatively it was maintained that in the absence of proof as to the source from which the money came it must be assumed that to the extent of one-half it came from Mrs Miller. The defenders maintain that owing to the great lapse of time that has taken place before any question was raised I ought to assume either that the whole of the money had come from Miss Isabella Miller's funds or that to the extent to which this was not so I ought to assume that Mrs Miller had gifted it to her daughter. In *Bain* v. *Assets Company* (7 F. (H.L.) 104) the Lord Chancellor, speaking of delay in bringing an action similar in duration to that which has occurred here, said—'At this distance of time every intendment should be made in favour of what has been done as being lawfully and properly done, and that the persons who are now insisting upon these rights have lain asleep upon their rights so long that as a matter of fact we know that witnesses have perished and the opportunities which might have been had if the question had been earlier raised have passed away.' There is no doubt about the great prejudice which the defence has suffered from delay in bringing the present action. Not only is Miss Isabella Miller herself dead, but her brothers William and John and her sister Mrs Wilson are also no longer in life, while her sister Mrs Rankin is not in a position to give evidence.

"The pursuer, however, contends that the defenders cannot plead the prejudice they have suffered, as the action is founded upon breach of duty of an executor. In certain cases there would be force in this argument. It has to be kept in view, however, that Miss Isabella Miller was only one of two executors of her mother. I find it difficult to suppose that Dr John Miller and Mr William Miller did not know about the deposit-receipts, or that their reason for refraining from calling upon their sister to account for them was not due to the circumstance that they knew that she had a just claim to the contents thereof. The pursuer herself admits that she knew there was money in the bank, and she gives, so far as I follow her evidence, no satisfactory explanation for refraining from asking an accounting in the lifetime of Miss Miller. At this distance of time I presume the facts as regards these deposit-receipts in favour of the defenders.

"In my opinion the fourth plea-in-law for the defenders ought to be sustained, and they ought to be assoilzied from the conclusions of the action."

The pursuers reclaimed, and argued—The Lord Ordinary was wrong in presuming the facts as regards the deposit-receipts against the pursuers. *Bain* v. *Assets Company* (1905, 7 F. (H.L.) 104, 42 S.L.R. 835) did not apply in a case like this where executors had failed in their duty to account and had never applied for a discharge. The onus of proof was therefore on Miss Miller's trustees. There was a strong inference that the sums on deposit-receipt, the source of which was the widow's business, were her property at the time of her death, and in the absence of proof of donation the widow's executrix was bound to account for the amount of these sums, or alternatively for half of that amount. Further, Miss Miller had by her actings taken upon herself the character of a trustee who was bound to account for the profits—*Cochrane* v. *Black*, 1855, 17 D. 321. The relations between the pursuer and Miss Miller's trustees could not be regarded as merely that of creditor and debtor—*Ainslie and Others* v. *Ainslie*, 1886, 14 R. 209, *per* Lord President Inglis at p. 211, 24 S.L.R. 164.

Argued for defenders—The pursuer having in full knowledge that Miss Miller was using the assets as her own property waited without making any objection until all the people who could give evidence were dead, was barred by *mora* and acquiescence from making her present claim. The source of the money could not be proved. It must now be assumed that Miss Miller had acted properly, and the onus was on the pursuer to prove that the money deposited was not hers—*Bain* v. *Assets Company, cit. sup.* In the absence of such proof it was not for the defenders to maintain that there was donation, but donation should also be assumed — *Brownlee's Executrix* v. *Brownlee*, 1908 S.C. 232, 45 S.L.R. 184. Donation could be proved by facts and circumstances corroborating the terms of the deposit-receipts — *Crosbie's Trustees* v. *Wright*, 1880, 7 R. 823, 17 S.L.R. 597, such as the terms of the share certificates. Further, Miss Miller was not a trustee for creditors, and the pursuer, who was in the position of a creditor and not of a beneficiary, could not claim profits—*Globe Insurance Company* v. *M'Kenzie*, 1850, 7 Bell's App. 296; *Jamieson* v, *Clark*, 1872, 10 Macph. 399, *per* Lord President Inglis at p. 405, 9 S.L.R. 233; *Ainslie and Another* v. *Ainslie, cit. sup.*; *Stewart's Trustee* v. *Stewart's Executrix*, 1896, 23 R. 739, *per* Lord M'Laren, p. 744, 33 S.L.R. 570; *Philp's Executor* v. *Philp's Executor*, 1894 21 R. 482, 31 S.L.R. 384; Ersk. iii, 9, 42.

At advising—

LORD PRESIDENT—[*After the narrative quoted supra*]—The Lord Ordinary has assoilzied the defenders on the same grounds as those which were adopted and expounded by the House of Lords in the case of *Bain* v. *Assets Company*, 7 F. (H.L.) 104, [1905] A.C. 317. The two principles there founded on were that the presumption *omnia honeste acta* gathers power with the lapse of time, and that the relative disfavour with which the law regards the claims of persons *dormientium non vigilantium* reaches its height when loss of important evidence is the result of their delay. But mere delay within the prescriptive period is no bar to action, and where, as here, the delay is accompanied with serious loss of evidence, the result is only to put a very heavy onus of proof upon the pursuer. See *Bosville* v. *Lord Macdonald*, 1910 S.C. 597, *per* Lord President Dunedin, at p. 608. This aggravated onus may be so heavy as to make it impossible to discharge it, *e.g.*, in a case where (as in *Bain* v. *Assets Company*) the pursuer claims after twenty years to open up on the ground of fraud a formally closed transaction or compromise. But it does not follow that it must be so in the case of the affairs of an executry, commenced twenty years ago, in which the executors never performed their duty to account, and never even asked to be discharged. Whatever may be thought of the probabilities in the present case it seems to me to be clear that the pursuer has not succeeded in proving that the ship shares which were in Miss Isabella's name at the date of her mother's death were truly the property of Mrs Miller. She has to overcome the force of the title in which these assets stood, and particularly in view of the loss by death of the evidence of the co-executors and of most of the other members of the family it is quite impossible to hold that she has succeeded. Indeed the pursuer gave up her claims to these. In like manner the pursuer has failed to prove that the licensed business had any value in goodwill apart from the premises which belonged to one of the brothers, and from the licence which had to be transferred, and was actually transferred, to Miss Isabella Miller herself. Further, although the stock at Mrs Miller's death appears to have been simply taken possession of by Miss Isabella Miller (it is not included in the inventory) its value has not been and cannot now be proved, and it may be that it did not exceed debts due by the business at Mrs Miller's death. But I see no reason in the circumstances of this case to infer that the title on which the deposit-receipts for £3094, 14s. 1d. stood at Mrs Miller's death was not in accord with the proprietary rights in them of Mrs Miller and Miss Isabella Miller respectively. I assume in the defenders' favour not merely that it is proved that contributions were made to the funds thus invested out of the dividends on the ship shares which stood in Miss Isabella Miller's name during her mother's lifetime, but that those shares, and therefore the dividends paid on them, were Miss Isabella Miller's. The significance of the fact that the deposit-receipts were in the joint names still remains, and it is not doubtful that the mother's savings from the business and from the investments which stood in her own name went to swell the deposit-receipt account. The argument for the defenders came in the end to this, that we ought to infer a donation of the receipts *inter vivos* or *mortis causa* by Mrs Miller to her daughter; but there is no evidence at all in the case by which the legal presumptions against donation can be overcome.

My opinion accordingly is that the pursuer as executrix-dative of Mrs Miller *ad omissa* is entitled to recover one-half of the sum of £3094, 14s. 1d. As she and the other members of the family were content to allow the mother's estate to remain in Miss Isabella Miller's hands, I do not think the pursuer can ask more — whatever rights might otherwise have been competent to her—than five per cent. simple interest on that amount from the date of Mrs Miller's death. The question as to the small balance of executry estate paid over to the co-executors by the solicitor in 1904 does not fall within the present action, as it is not and could not be one of the *omissa* to which the pursuer has confirmed.

LORD SKERRINGTON — I agree with the Lord Ordinary when he says that "the real difficulty in the case"—by which I understand him to mean the only serious question —"is whether the pursuer as executrix *ad omissa* on her mother's estate is entitled to an account for the sum of £3094 on deposit-

receipt in name of Mrs Miller and of Miss Isabella Miller and survivor, or any part thereof." The Lord Ordinary has answered that question adversely to the pursuer upon the authority of the case of *Bain* v. *Assets Company*, 7 F. (H.L.) 104, [1905] A.C. 317. I respectfully think that he has misapplied the principle of that decision. He has treated the pursuer as if she had been a party to a settlement of accounts or to a compromise of some kind, and as if, many years afterwards, she was seeking to rip up that arrangement although valuable evidence had been lost through her delay. There was, however, in the present case no transaction to which the maxim *omnia præsumuntur rite peracta esse* can be applied. Both the pursuer as one of her mother's next-of-kin and her sister Miss Isabella Miller as one of her mother's executors, and afterwards as sole executor, were to blame for not bringing their mutual claims and liabilities to a settlement within a reasonable time. The prejudice consequent upon the delay must therefore remain where it naturally falls. Owing to the loss of evidence each party has failed to establish a claim to the whole of the money in question, which must therefore be divided equally between them in terms of the title. In the case of a deposit-receipt it is of course settled that the words of survivorship do not operate as a destination. For the reasons stated by your Lordship and in view of the form of the conclusion the pursuer will be allowed simple interest at 5 per cent.

LORD CULLEN—I have had an opportunity of reading the opinion of the Lord President and I concur in it.

The Court recalled the interlocutor of the Lord Ordinary and decerned against the defenders Miss Isabella Miller's trustees for payment to the pursuer of £1547, 7s., being half of the sum contained in the deposit-receipts referred to in the pleadings, with interest at 5 per cent. from the date of Mrs Miller's death.

Counsel for the Pursuer—Dean of Faculty (Constable, K.C.) — Henderson, K.C. — Cullen. Agents—Guild & Shepherd, W.S.

Counsel for the Defenders—Chree, K.C.—D. Jamieson. Agents—Graham, Johnston, & Fleming, W.S.

Wednesday, March 1.

SECOND DIVISION.

[Sheriff Court at Glasgow.

STEVENSON *v.* GLASGOW CORPORATION.

Reparation—Master and Servant—Scope of Employment—Violent Act of Servant—Relevancy.

Process—Removal to Court of Session for Jury Trial—Proof or Jury Trial—Case Involving Liability of Master for Servant's Wrongful Act — Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, cap,* 51), *sec.* 30.

In a Sheriff Court action of damages for personal injuries brought by a passenger in a tramway car against a corporation as owner of the tramway system, the pursuer averred that the conductor after the car had started, and while she was standing on the platform, requested her to leave the car, giving as his reason that the car was overcrowded, and before she had an opportunity of alighting had forcibly ejected her from the car whilst it was in motion and so caused her injuries. The defenders pleaded that the action was irrelevant in respect that they were not responsible for the act of the conductor. The case having been removed to the Court of Session under section 30 of the Sheriff Courts (Scotland) Act 1907 the defenders objected to the relevancy of the action and in any event to the suitability of the case for trial by jury. The Court repelled the objection and (*dub.* Lord Salvesen) remitted the cause to a Lord Ordinary for trial by jury.

Mrs Elizabeth Warnock or Stevenson, 37 Old Dalmarnock Road, Glasgow, with consent of her husband Alexander Stevenson, *pursuer*, brought an action of damages in the Sheriff Court at Glasgow for payment of £200 for personal injuries against the Corporation of the City of Glasgow, *defenders*.

The pursuer averred, *inter alia*—"(Cond. 2) About 3 o'clock in the afternoon of 10th September 1921 the pursuer boarded a tramway car belonging to the defenders which had stopped at or near the stopping place provided at the junction of Green Street and Great Hamilton Street, Glasgow, for the purpose of letting off and taking on passengers. Pursuer boarded said car immediately after several other persons had descended from same, and was followed by other passengers. The conductor of the car, after pursuer had boarded it and while she was standing on the platform at the rear end thereof, gave the driver of the car a starting signal, and then after the car had started in obedience to said signal requested the pursuer to leave the car. The said conductor gave as a reason for his request that the car was overcrowded, but before the pursuer had an opportunity of alighting and when the car was travelling at a high rate of speed, the said conductor forcibly ejected her from said rear platform of the car on which she was as aforesaid then standing, and in doing so pushed her with such force that she fell backwards from the car on to the roadway with great violence, and with the result that she received the serious injuries as after mentioned. (Cond. 3) The pursuer's said injuries were wholly due to the fault and the culpably reckless acting of the defenders' said servant, the conductor of said car, in ejecting her from the car when it was in motion, and in the manner above mentioned. The said conductor was a servant of the defenders, who define the duties of their said servants, and on whose instructions said servants act. It is believed that the duties of the conductors on the defenders' tramway cars are, *inter*