Lord Mure was absent on Circuit.

The Court pronounced the following interlocutor:—

"Recal the interlocutors of the Sheriff and Sheriff-Substitute, dated respectively 1st February 1883 and 23d November 1882: Find as matter of fact that the pursuer, while in the employment of the defenders on 10th January 1882, was preparing to leave his work at the head of the incline in their pit at Motherwell, when he was informed in answer to his own inquiry that there was a rake ready to go down the incline: Find that he proceeded down the incline before the rake had started: Find that the rake following before he could reach a manhole, he was overtaken by the hutches, knocked down, and seriously injured: Therefore find in law that the pursuer's own negligence in not waiting till the rake had started contributed to his injury; assoilzies the defenders, and decerns."

Counsel for Appellants—Strachan. Agent—Adam Shiell, S.S.C.

Counsel for Respondent—Comrie Thomson—Watt. Agent—Andrew Urquhart, S.S.C.

Thursday, June 21.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

SHARP *v.* PATON.

Donation — Deposit - Receipt — Presumption — Onus.

Evidence in support of an alleged donation of the contents of three deposit-receipts *held* insufficient to overcome the legal presumption against donation.

This was an action at the instance of Mary Sharp, grandniece and executrix-dative *qua* one of the next-of-kin of the late William Matthew, mason, Markinch, who died on 28th October 1881, against Mrs Margaret Paton, a niece of the deceased, to recover payment of the sum of £250, the contents of three deposit-receipts for £175, £60, and £15 respectively, granted by the Commercial Bank, Markinch, to William Matthew, and uplifted by the defender on 19th October 1881.

The defence was that during his last illness William Matthew endorsed the deposit-receipts, and on 18th October 1881 handed them to the defender, intending thereby to make a donation to her of the contents.

The pursuer averred that for some weeks prior to his death William Matthew was confined to his bed, and was mentally incapable of transacting any business or doing anything for himself, and that the deposit-receipts and their contents were not transferred by him to the defender by way of donation or on any other title.

From the proof (in which the Lord Ordinary appointed the defender to lead) it appeared that at the date of William Matthew's death there were alive a brother named George, who died in March 1882, leaving two children, Agnes and George, three nieces, Janet, married to her cousin George, Cecilia, and the defender, and two grandnieces, Mary Sharp, the pursuer, and Elizabeth Sharp. The sums of money contained in the deposit-receipts composed the whole moveable estate of the deceased, who was also possessed of some house property, the value of which did not appear. The deceased died of heart disease and bronchitis at the age of seventy-five; and the doctor who attended him during his last illness deponed that he was seriously ill from the time he began to attend him on 13th October, though sometimes out of bed up to near the end; that there was nothing wrong with him mentally, though he became very weak for the last few days of his life; that previous to that he knew quite well what he was about, and that he was naturally shrewd. It was proved that he was in the habit of taking stimulants against the advice of the doctor because he thought it did him good, but none of the witnesses deponed to having seen him under the influence of drink at any time during the last three years of his life. He was attended to during the last four years of his life principally by a neighbour named Mrs Gilmour, who did his household work. During his last illness the defender and her son, who lived in Markinch, were constantly with him, and no intimation of his illness was sent by them to any of his relatives, with the exception of Mrs Janet Matthew, a sister of the defender, who was summoned by her from South Shields, where she lived, and arrived on 19th October. The pursuer lived with her mother at Ladybank. On Sunday the 16th the defender was with the deceased the whole day, and with reference to what then passed between them depones—"He told me to send up my boy—that he was going to endorse the bills to-morrow, and give him the bills to go to the bank. (Q) Did he say for what purpose he was going to endorse the bills?—(A) Yes, he said he was going to give me the whole of the money to myself, because I was the only one he had there who seemed to care for him." In accordance with instructions received from his mother, the defender's son Francis Paton obtained the deposit-receipts from the deceased the following day (Monday) and took them to the bank, where payment was refused because they were not endorsed. Francis Paton gave them to his mother, who took them the same evening to the deceased. She asked him (according to her evidence) "Why he gave them to the boy without being endorsed. He said there was no matter, he would get them done. He said he would sign them, but he said not that evening." The defender then took the deposit-receipts home with her, and on the following evening went with her son to the deceased, who endorsed the receipts, and "handed them back to me, and told me he had made me all right." In cross-examination she deponed—"He endorsed the bills, and said that he had made me all right, and he had nothing now. (Q) Did he say that he had given you all charge?—(A) Yes, and the whole power of his house. (Q) When was it that he used the words 'all charge?'.—(A) After he gave me the bills he said he had given me all the money, and to do as I pleased, and the whole of his house. (Q) Were these the words he used, that he had given you the money and all charge?—(A) Yes."

Francis Paton, aged eighteen, the defender's son, deponed that when he and his mother went on Tuesday the deceased said he had made a mistake in not having endorsed the receipts on the previous day. "(Q) Did he not say that he had given your mother all charge of the money?—(A) Well, he might; I do not know. (Q) Will you swear that was not the expression used?—(A) I do not remember the very words he used, but they were to that effect. (Q) That he had given your mother charge of all his money?—(A) Yes." "*By the Court.*—There was nothing said to me about my mother getting the money as his executor, or to take charge of for others as well as for herself; it was as a gift. I understood it to be a gift to her. (Q) Was that just your own belief, or did Mr Matthew say that?—(A) He said so. (Q) But you told us that what he said on the Monday morning was to have the money deposited in your mother's name?—(A) Yes. (Q) There was nothing then said about its being a gift?—(A) No. (Q) Then are you sure that he ever used the word gift?—(A) I have heard him say several times that he had given my mother the money. (Q) Tell us any of the occasions on which he said that he had given the money to your mother.—(A) I went over nearly every night before that, and he spoke about it to me just when he and I were present. (Q) Do you mean every night after you had got the receipts changed at the bank?—(A) It was before they were changed. He said he was meaning to give my mother the money. He said she was the only one he had to give it to, that the rest of his friends had all forsaken him, he thought."

On Wednesday the 19th the defender's son uplifted the contents of the deposit-receipts and re-deposited the money in his mother's name.

Mrs Janet Sharp or Matthew deponed that when she arrived on the 19th the deceased said, with reference to a remark as to the expense of the journey, that the defender would make that all right, for he had "given her his money to do just as she pleases." She also deponed that he said the same thing on another occasion, assigning as the reason that she alone of his relatives had any affection for him, and that he was "determined to make her all right," and that he had said to her that all she might get depended on her sister's generosity. Another person who heard one of these conversations said that the deceased's words were that the defender had all his money "to do as she pleases, and has all power."

A neighbour deponed that on the deceased making a similar remark to her, she had said "It appears you are going to make her your heir;" and he said "There is no other person coming near me to be it."

Both the defender and the pursuer's mother Mrs Sharp deponed that to their knowledge the deceased had at one time made a will dividing his money, but this will was not found at the time of his death.

The defender (in addition to what is above narrated) deponed — "I went to his house again on the night of Wednesday the 19th. He asked me then if I would write a wish. (Q) A wish?—(A) A wish or will, just a line to keep me right. I wrote it. He did not sign it. He told me that everything was mine, and that I could do as I pleased. I asked him to sign it, and he told me to do it myself, as it was only a memorandum for my own use; it was only a line or two to keep me right. I signed it. George Matthew threw that paper into the fire on the day of the funeral, saying that it was of no use." (Q) "What did the line contain?—(A) To give his brother George the east house, and my two sisters the west house, and I got the money, and I was to give the two girls £10 each at any time that I thought proper, and if they made any dispute to give them nothing. (Q) What was your sister Mrs Matthew to get?—(A) She was to get the east house, and my other sisters the west house between them. (Q) And there was to be a division of the residue?—(A) I was to get the money, and to give the two girls, the pursuer and her sister, £10 each."

The Lord Ordinary (M'Laren) on 2d December 1882 pronounced this interlocutor—"Finds and declares that the sum of Two hundred and fifty pounds libelled is part of the executry estate of the deceased William Matthew, and that the pursuer as his executrix is entitled to uplift the said sum from the Commercial Bank of Scotland at Markinch, with the interest which has run thereon; and grants warrant on the said bank to pay the same to the pursuer, and decerns: Finds the pursuer entitled to expenses," &c.

"*Opinion.*—In this case the pursuer, as executrix of William Matthew, seeks to recover the value of certain deposits uplifted by the defender on the endorsation as alleged of the deceased holder, and re-deposited in the defender's name. It is not proved to my satisfaction that the deceased William Matthew made a gift of these deposits to the defender, and I shall accordingly find that they are part of his estate, and are to be brought into the executry account as desired by the pursuer.

"Without attempting to make an analysis of the evidence, I shall indicate the considerations which have weighed with me in forming this opinion.

"In consequence probably of the large amount of personal property invested by way of deposit in the Scotch banks, and the facility which the banks afford for the transfer of such deposits by accepting an endorsation in blank as equivalent to a mandate to pay to bearer, the cases as to the right of property in these documents or the sums of money which they represent are very numerous, and may almost be said to constitute a chapter in our law.

"The property of the deposited money may be separated from the title in two ways,—by the owner taking a receipt for the deposit in the name of another person, or where the receipt is in the owner's name, by the owner giving the receipt endorsed in blank to such other person, and thereby enabling him to uplift the money or get it transferred to an account in his own name.

"In the former case there is an actual transfer of the money into the possession of the person named in the receipt. It is money at his credit in the books of the bank in a deposit account standing in his name, and the possession of the bank is his possession. In such a case evidence of intention is all that is necessary to complete the proof of donation, because the form of a transfer has been accomplished by the act of the depositor, and the agreement of the bank to accept payment into an account opened in the name of the donee.

"In the second class of cases, of which the present is an instance, the deposit stands in the name of the alleged donor, and the endorsation in blank is neither a transfer nor evidence of an intention to transfer the contents of the document of debt. Where donation is alleged, it is therefore necessary that the words used should amount to an actual gift or transfer with intention, and such transfer and intention must be established by the clearest evidence. Moreover, as the receipt of the money by the endorsee in blank in law implies an obligation to account or repay, I think it would be contrary to the spirit of the law of evidence of this country to allow this presumed obligation to be overcome by the evidence of the donee. No authority was cited, and I know of none in which a transfer of a deposit by endorsation to the effect of constituting a donation was established by such evidence. The cases of *Crosbie's Trs.* v. *Wright*, 7 R. 823, and *Thomson* v. *Thomson*, 19 S.L.R. 653, where the donation was effected by deposit taken in name of the donee, may be referred to by way of contrast. In the latter case Lord Young observed —'So material a fact in a donation as the gift could not be established by the unsupported testimony of a single witness.'

"The case of the defender here is that the deceased gentleman employed her son to take the endorsed deposit-receipts to the bank and have the sums transferred to her name. It is an awkward circumstance in the story that the son took them to the bank without the necessary endorsation, and that payment was refused. On this being mentioned to the deceased he did not at once append his endorsation, but according to the evidence of the defender and her son, adjourned the business to next day, when he endorsed the documents and gave them to the young man to be transferred into the name of his mother. It is true that the evidence of the defender and her son is to some extent supported by that of friends or neighbours of the deceased, who stated that he acknowledged having transferred his money to the defender, and gave her 'all power,' or 'all charge.' But their evidence is consistent with the theory that the deposit-receipts were transferred for purposes of administration, and it must be remembered that Mr Matthew, the deceased gentleman, was at the time suffering from heart-disease, and was, against the advice of his physician, partaking of stimulants to an extent which may probably have affected his understanding of the legal effect of what he was doing.

"In a case of this kind, where the *onus* lies on the party alleging donation to set up the gift, I did not think that I could exclude from the conjunct probation evidence which would have been admissible in a reduction of a testamentary gift upon the usual extrinsic grounds. I say nothing as to the evidence in disproof of the authenticity of Mr Matthew's signature. I am unwilling to entertain the idea that the endorsations were not his writ, and there is no proof that his hand was led. But the evidence of the defender on this subject did not impress me favourably, and that of her son, though more satisfactory, is open to the observation that he is a person under his mother's influence.

"I am more impressed by the argument that if this had been a case of facility and circumvention, there was strong evidence to go to a jury on the point of exclusion of the deceased's relatives other than the defender and her sister. It is proved that while the defender summoned her sister from England, the other relatives, who were resident in the deceased's county, were not informed of his illness, and that the deceased was under the impression that the defender and her sister were the only relatives who cared for him. The exclusion of relatives, coupled with the weakness of mind and irresolution of the deceased (illustrated by his declinature to endorse the deposit-receipts on the day when the refusal of the bank to cash them was communicated to him), tend in my judgment to negative the idea that this was a spontaneous and uninfluenced donation by Mr Matthew in favour of the defender. I am not at all satisfied that he meant to make a donation, or to do anything more than give the defender the powers of a mandatory or executor. But even if he did mean to make a gift, it is my opinion that a gift obtained in such circumstances, in the absence of neutral advice, and upon the solicitation of the donee (for the evidence amounts to solicitation), ought not to be supported by the Court.

"I conclude these observations with the remark that it is very well known in this part of the United Kingdom that the law requires no peculiar solemnities to the execution of a will. Anyone who wishes to make a will of his personal estate can do so in words expressing his intention. There is therefore the less reason for attributing a testamentary intention to the act of endorsing a deposit-receipt, which is not a proper mode of making a will, and which may have been made for reasons entirely different from that which are alleged in the action."

The defender reclaimed.

The argument turned entirely on the special circumstances of the case referred to in the opinions of the Judges.

Authorities—*Ross* v. *Mellis*, Dec. 7, 1871, 10 Macph. 197; *Crosbie's Trustees* v. *Wright*, May 28, 1880, 7 R. 823; *Thomson's Executor* v. *Thomson*, June 8, 1882, 9 R. 911.

At advising—

Lord President—This is an action raised by the executrix-dative of William Matthew, a mason residing at Markinch, who was well advanced in life at the time of his death, had retired from business, and had accumulated a considerable sum of money. The pursuer seeks to recover the sum of £250 lying in the Commercial Bank at Markinch, on the deposit-receipts alleged by the defender to have been transferred by the deceased as a gift to her shortly before his death.

The case belongs to a class by no means uncommon, and depends upon principles which are very well settled. In the first place, there is no doubt that such a donation may be proved by parole evidence; for the delivery of corporeal moveables or money being generally from hand to hand, and not by writing, but by simple tradition, therefore as writing is not necessary for the constitution of the donation, it would be against rational legal principles that writing should be required to prove the existence of it.

There is another rule which is equally well settled, and that is, that there is a strong presumption against donation in such a case, and it

requires very strong and unimpeachable evidence to overcome it.

The question is, whether we here have such evidence, and in reference to that the Lord Ordinary makes an important distinction between the two ways in which deposit-receipts may be transferred; in the one case by the owner taking a receipt for the deposit in the name of another person—and certainly that would be a fact going a long way to overcome the presumption against donation, and would leave nothing to be proved but the intention to make the gift. But the other case, in which the deposit-receipt is blank endorsed, is in a different position, for a blank endorsement may mean many things; it may be a mere mandate to uplift money, but for a variety of purposes, and therefore a transference in this form is not at all favourable to the case of donation; and it is a case of that latter kind that we have here. The *species facti* are rather peculiar as stated by the defender and her son. According to them, the accused had been talking of the money he had in bank, and asked the defender to count it; he then said that he intended to transfer it to her, and after more than one conversation he did endorse the deposit-receipts and give them to her. But this was not until after another thing had happened, which it is not easy to explain, and that was the delivery of those deposit-receipts unendorsed. The defender has not explained how this came about, and how the son came to go to the bank with the receipts in this condition; but however that may have been, her son did go to the bank with the deposit-receipts unendorsed, and he was told that the bank could do nothing unless they were endorsed. Then the defender went back to the deceased, but on that occasion he declined to endorse them; she says that he told her he would do it another day, and accordingly it is said that he did do it on another day; the money was then uplifted and redeposited in the defender's name. These are the facts in favour of donation.

If the case stood there the Court would have little difficulty in holding that the evidence was not sufficient to overcome the presumption against donation, but then there is additional evidence, in the shape of statements by the deceased subsequent to the transference of the money, which undoubtedly are of considerable importance, and we must also look to certain other circumstances which throw suspicion on the truth of the evidence.

This man had several nieces, equally near relatives, and also several grandnieces, the children of a deceased niece, and it appears that at one time he had made a will, so far as we can gather (for the will has not been found), of a more general kind than the defender seems to think he intended—that is to say, that by it he divided his money very much among his relatives; but though there was such a document, it has disappeared, and has not been found in his repositories.

Now, if the deceased had intended to alter the destination of his money, it would have been natural, instead of this method of doing so, which he is alleged to have taken, for him to have altered his will, for this alleged donation was not merely of a part, but was a gift of his whole money; he had some houses, but this formed his whole personal estate. It is not credible that he should have taken that mode of altering his previous arrangement without taking any steps to destroy his will. If he wanted to leave his money to the defender, he could have made an alteration on his will, or he could have made a new one. It may here be observed that the defender alone was going about the deceased when the alleged donation was made, and was plainly desirous that the other relatives should not approach him. She summoned her own sister from South Shields when the deceased was in his last illness, but another grandniece living within eight miles of the place was kept in ignorance of his condition, and of the fact that he was daily expected to die—in fact, she did not hear of his illness until after his death. These circumstances are unfavourable to the defender, and must be kept in mind in dealing with that part of the evidence I am now about to consider, viz., the statements made after the donation to different persons, first of all to the sister of the defender who was summoned, and also to two or three neighbours, who are presumably honest witnesses.

In the first place, it must be observed that the statements made are of an ambiguous nature, particularly because none of the witnesses adhere to any one form of words; they vary from one another in their account; nor do they adhere throughout to one particular form of expression, giving one version in their examination-in-chief, another in cross, and a different one sometimes in re-examination. Only a slight variation would make all the difference in the result of the evidence. The pursuer contends that the money was given in charge to the defender to administer, while the defender maintains that the words used are not susceptible of such a construction, and that the defender was made sole legatee. Between these two competing claims, I have not much difficulty in deciding, for the presumption being against the contention of the defender, I must say that I do not think her case has been made out. I am therefore for adhering to the judgment of the Lord Ordinary.

Lord Deas—We have frequently had cases of this class before us, and it is quite fixed, as your Lordship says, that the presumption is against donation. The donation here is said to have been effected by the delivery of some deposit-receipts which were endorsed by the deceased. Now, deposit-receipts are not negotiable documents. I do not mean to say that they may not be transferred, and the delivery proved by parole, but they are certainly not transferred from one hand to another by endorsation. The donation which is here alleged to have been made was not what we know as a *donatio mortis causa*—that is to say, a donation by handing or transferring the things given, to be the property of the transferee in case the donor happens not to survive. That is different from a donation out-and-out whatever occurs, and does not require the same amount of parole proof to establish it. But the donation here, although not of a kind in which writing is imperative, was yet of a kind in which writing might naturally be expected; and more particularly, it might be expected where it has not been proved that a regular writing could not be had. So the first thing that strikes me strongly in the case is, that the donee has not proved that

a writing could not have been prepared by a man of business, for it is always a strong case for letting in other evidence when it is proved that a man of business could not be got; there is no such evidence here, and it is not even denied that a regular writing could have been had here. This must be taken along with the fact I have previously stated, that this was not a *mortis causa* donation, but a donation out-and-out. In donations of that class either of two things may be fatal to the donee. In the first place, it is enough if the whole transaction be suspicious, or if the donee does not exclude the possibility of suspicion; and in the second place, even if there be not enough to amount to suspicion, if the proof of donation is not perfectly satisfactory.

Here the proof not only is not satisfactory, but in some cases is suspicious. Further, there is evidence of a certain amount of solicitation on the part of the defender, and although the man was so far in the possession of his faculties, yet he was old and ill, and in such a position as to render this transference subject to the criticism that it was not satisfactory. I think, therefore, that the defender has not made out a case of donation.

Lord Shand—I concur with your Lordships in thinking that the defender has failed to show sufficient grounds for disturbing the judgment of the Lord Ordinary.

It is true, and a point in the defender's favour, that the deposit-receipts were endorsed and are in her possession. A question was raised in the course of the proof whether the signatures are those of the deceased, but it was not pressed, nor has it been urged upon us in the argument for the pursuers. Endorsation is an ambiguous act, and may be done for the purpose of administration or of making a donation, and the presumption is strongly against donation. It appears to me that in the circumstances of this case the defender has failed to overcome that presumption. I think it a strong circumstance against her that those deposit-receipts constituted the whole of William Matthew's personal estate; by giving them he made a clean sweep of all that he had, so that it was not a donation in favour of one relative of part of his estate only. In the next place, though there were plenty of neighbours about who could have been witnesses to the alleged donation, the only persons who were witnesses to it are the defender, who says she got the deposit-receipts, and her son, who was under her influence, and who was sent to get delivery of them. In the third place, it appears that while it would have been natural and proper, if there was to be any transference of William Matthew's personal estate, his other relatives should have had an opportunity of visiting and seeing him, that was purposely prevented by the defender, who sent them no intimation of his illness. So that these facts make thus a case which must be proved very clearly by evidence besides that of the defender and her son. The question is whether the evidence of three neighbours is enough to overcome the presumption against the donation, strengthened as it is by the facts. But it must be remarked that the evidence of these neighbours is quite consistent with the idea of administration. No doubt it goes to corroborate the evidence of the donee, but then witness after witness expresses the belief that the testator talked of giving "charge," and that would be administration and not donation. The possibility of the gift being made for purposes of administration is not excluded by independent evidence, and before the defender can succeed she must exclude such a possibility. Even her son when asked as to this matter is not distinct, for he says—"(Q) Did he not say that he had given your mother all charge of the money?—(A) Well, he might; I do not know. (Q) Will you swear that was not the expression used?—(A) I do not remember the very words he used, but they were to that effect. (Q) That he had given your mother charge of all his money?—(A) Yes." With that testimony of the defender's son, and particularly with the ambiguous expressions spoken to by the independent witnesses, I think the defender has failed to make out her case.

There are other circumstances not so material which have influenced me in arriving at this conclusion. There is the fact that this woman set about making a will herself, on the footing that the deceased was making some sort of settlement. She took the position of testator herself instead of calling in some-one, not necessarily a writer; it would have been quite sufficient if some respectable person in the neighbourhood had been called in to witness the donation.

I do not think that such loose expressions as we have in this evidence can overcome the presumption against donation, and therefore I think we should adhere.

Lord Mure was absent on Circuit.

The Court adhered.

Counsel for Pursuer—Scott—Watt. Agent—James M'Caul, S.S.C.

Counsel for Defender—Jameson—G. W. Burnet. Agents—Boyd, Jameson, & Kelly, W.S.

Thursday, June 21.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

TOD & SON *v.* THE MERCHANT BANKING COMPANY OF LONDON (LIMITED) AND JAMES BROWN & CO.

SOMMERVILLE & SON *v.* THE SAME.

Security — Agent and Principal — Diligence — Arrestment.

B. R. & Co. having purchased a cargo abroad, arranged with their bankers in this country that the latter should accept bills drawn by the seller for the price, receiving in security the bills of lading for the cargo blank endorsed. On the arrival of the cargo B. R. & Co. effected sales in their own name, the arrangement between them and the bank being that the bank, as holders of the bills of lading, would authorise delivery to be made on receiving letters from the purchasers engaging to pay the price direct to the bank. In two cases the bank authorised delivery before obtaining such letters, on the undertaking of B. R. & Co. that they would be sent by the purchasers. After delivery had been made, creditors of B. R. & Co. used