doubt has been thrown upon that tradition by the evidence of Balfour, I am disposed to concur.

LORD TRAYNER—The question—and the only question—raised in this case is, whether the pauper was born in the parish of Laurencekirk? The pursuer's case is based upon the averment that the pauper was born in that parish, and the *onus* of proving that averment of course is on the pursuer. In my opinion he has failed to discharge that *onus*.

The only evidence adduced by the pursuer is the statement of the pauper and of his sister that they were told by their mother that the pauper was born in Laurencekirk. That evidence is quite competent, because the pauper's mother is now dead. But it is the evidence of only one witness, although repeated by two. If the mother had been alive her unsupported testimony would have been insufficient to establish the pursuer's case; it does not become sufficient because, being dead, what she did say when alive, and what probably she would have said had she been examined *in causa*, is deponed to by the two persons to whom in life she said it. The Sheriff thinks this evidence is sufficient to prove the fact alleged because it is "family tradition." I think the Sheriff is in error in so describing the evidence, and in attributing to it the weight and importance which the law attributes in certain cases to what is properly called "family tradition." In questions of pedigree (including such a question as we are here dealing with, as to where a certain person was born) evidence of "family tradition" is of great importance, but I take it that it is so because being handed down from generation to generation, and spoken of among the various family relations of each generation, the fact spoken to would probably be contradicted or impugned by some of them if the statement made was not true. A statement current among persons most likely to know of its truth, and never impugned although often repeated, may very well be accepted as true in after time. And this is what I understand to be evidence by "family tradition." But the single statement or repeated statement by a mother to her two children is not of this character. In this case the children had no knowledge whether their mother's statement was correct or erroneous, and as far as the proof shows, the statement by the mother as to the birthplace of the pauper was made to nobody except her two children. The ground therefore on which the Sheriff proceeds seems to me not to be applicable to the case.

I leave out of account the evidence of the pursuer's own witness Balfour, which, if it does not contradict the pursuer's averment, rouses great doubt of the accuracy of the statement made by the pauper's mother, whose statement after all, although made with perfect honesty, may be wrong. Nor do I put much stress, if any, upon the fact that the pauper does not seem to be a witness whose accuracy in repeating what he says he heard can be entirely relied on. Not because of dishonesty or untruthfulness, but from want of accurate or distinct recollection. I will assume that the pauper and his sister repeat quite correctly what their mother said, but even on that assumption I think the evidence of the one witness—the mother—is insufficient for the pursuer's case. I therefore think with the Sheriff-Substitute that the pursuer has failed to prove the averment, proof of which is essential to his succeeding in the present action.

The Court recalled the judgment of the Sheriff and assoilzied the defender.

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

Counsel for Defender and Appellant—Crole. Agent—W. B. Rainnie, S.S.C.

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*Tuesday, December* 8.

## FIRST DIVISION.

[Lord Kincairney, Ordinary.

## DAWSON *v.* M'KENZIE.

*Donatio inter vivos—Deposit-Receipt Blank Indorsed by Deceased—Presumption.*

Evidence in support of an alleged *donatio inter vivos* which *held* insufficient to overcome the presumption against donation.

This was an action at the instance of Mrs Elizabeth Dawson against Thomas M'Kenzie, hairdresser, 291 Paisley Road, Glasgow, as executor or vitious intromitter with the estate of the deceased Mrs Mary Jane M'Kenzie, mother of pursuer and defender, concluding for decree ordaining the latter to produce a full account of the whole of said executry estate that the amount of the share falling to pursuer as one of the next-of-kin of her mother might be ascertained, and for payment of said share.

The pursuer averred that her mother had died intestate at 291 Paisley Road, Glasgow, on 27th December 1890, survived by six children, including the pursuer and defender; that the estate of her mother at the time of her death consisted (1) of the furniture in the house No. 291 Paisley Road, and (2) of a sum of £240 contained in a deposit-receipt of the Clydesdale Bank in her name dated 12th December 1890; that the defender had taken possession of these effects without right or title; and in particular, a few hours after the death of his mother, had illegally obtained payment from the bank of the £240 contained in the above-mentioned deposit-receipt, and had re-deposited the same in his own name. She claimed one-sixth of the furniture and of the £240.

The defender in answer averred that on 16th December 1890 his mother had made

him a donation of the deposit-receipt and the sum contained therein. He made no claim to the furniture.

A proof was allowed. The evidence showed that at the time of her death Mrs M'Kenzie was sixty-three years old. She was survived by four children besides the pursuer and defender, viz., Mrs Gebelmann, Mrs Pippin, and Alexander M'Kenzie, and another child who was resident in Australia. It was not suggested that any of Mrs M'Kenzie's children were in affluent circumstances, and Mrs Pippin was proved to be in receipt of parochial relief.

The defender and Mrs Gebelmann were the only persons said to have been present at the date of the alleged donation. The defender's account of the transaction, as given in his examination-in-chief, was as follows — "On Tuesday 16th December, when I came home for dinner about four o'clock, my mother told me that she had not been so well, and she asked me to have my dinner in the bedroom. After I had taken my dinner, she asked if I had enough money to pay the taxes, and I said that I still required £1. My mother then said she had a few pounds in the box which she would give me, and she told my sister Mrs Gebelmann to open the box and bring a pen and ink. She then put her mark on the deposit-receipt of 12th December 1890, asked me to sign it also, and handing the receipt to me said, 'Now, that is yours.' I took the deposit-receipt and placing it in the envelope returned it to the box, and my sister locked up the box again. I did not take the deposit-receipt out of the box again until the morning after the death, when I uplifted the money and re-deposited it in my own name." The box referred to contained articles belonging to the defender and Mrs Gebelmann as well as to Mrs M'Kenzie. In his cross-examination the defender deponed — "When my mother handed the deposit-receipt to me on the 16th December she made me promise that I would look after Mrs Pippin. . . . My mother did not say that when I got her money I was to pay something out of it to support Mrs Pippin. (Q) What did she say?—(A) She said 'You will look after Mrs Pippin.' . . . (Q) After taking out the deposit-receipt in her own name on 12th December, when do you think your mother first conceived the notion of giving the contents to you?—(A) On the following Tuesday, 16th December. She then said that she had got off it all she would require. . . . The transaction of 16th December originated in my stating that I was short of £1." Examined by the Court the defender deponed—"(Q) When your mother gave you that deposit-receipt, did she think she was never to be entitled to draw money from it any more?—(A) She said so. She said she would not require it any more, because she felt herself done. When my mother gave me the deposit-receipt she said she did not think she would get better."

Mrs Gebelmann's account of the alleged donation was as follows—"My brother and I were brought into my mother's room about four o'clock in the afternoon. My mother was in bed at the time. My brother Tom had come up for his dinner, and my mother asked him to come into the room. My mother said to my brother Tom, had he paid the taxes? and he said he had paid them all but one, for which he wanted £1. He said he would pay it himself. My mother told me to bring her the little box in which she had her deposit-receipt. I did so, and she gave me £4 which she had borrowed from me. There were three deposit-receipts in the box—one belonging to myself for £100, another belonging to my brother for £100, and the third deposit-receipt was my mother's. I handed my mother her own deposit-receipt at her request. She then asked me to bring her pen and ink, which I did. She made a cross on the deposit-receipt, and then my brother and I signed it at her request. She then handed the deposit to my brother Tom, saying, 'There, that's yours, as I have got all that I require of it, and I know you will look after your sister Jessie,' meaning Mrs Pippin. My brother then put the deposit-receipt into the box along with the other two deposit-receipts. That box was the common family repository where all our valuables were kept. *Cross-examined*—(Q) When your mother said that Tom was to look after Mrs Pippin, what did you understand her to mean?—(A) She meant that my brother would never see my sister want anything. (Q) Did you understand her to mean by that that Tom was to give her her share of the money which she had in the deposit-receipt?—(A) No, she meant that he would never see Jessie want. (Q) Where was he to get the money to give to Jessie?—(A) He always worked for money, and she knew that he would help Jessie. She said that she did not mean him to give her any money out of the deposit-receipt. (Q) Why did your mother make that statement, that she did not mean that Tom was to give her anything out of the deposit-receipt?—(A) She said the money was Tom's. . . . My mother said that she gave the whole of the furniture to me. She did so at the same time as she gave Tom the deposit-receipt." . . . The last statement was at variance with the evidence of the defender, who deponed—"My mother had also said that the furniture was to belong to my sister, Mrs Gebelmann, but that was some months before. She said nothing about the furniture at the time the deposit-receipt was handed over to me."

Mrs Pippin deponed—"About a fortnight before she died my mother said that she felt very ill, and that she was going to give this deposit-receipt to the defender to-night. When I called on the following day I was told that she had given the deposit-receipt to the defender. . . . My mother had told me the day after she had given the deposit-receipt to the defender what she had done, and the defender told me himself afterwards." This was the only evidence directly supporting the story of the defender, and it appeared that since the death of her husband in Sep-

tember 1889 Mrs Pippin had been partly supported by the defender, and that since his mother's death he had promised to take her to live with him.

With regard to the state of Mrs M'Kenzie's health at the date of the alleged donation the evidence was not clear. It appeared that for the last eight years of her life she had suffered from asthma; that in December 1890 she was suffering from an attack of this malady, and that she ultimately succumbed to this attack, but there was very little evidence to suggest that on 16th December 1890 she was looked upon by those around her as in a critical state, and the only evidence to suggest that she thought herself dying was that of the defender and Mrs Pippin, already quoted.

The evidence showed that Mrs M'Kenzie could not write, and that when she desired to draw money from the bank her custom was to put a cross on the back of the deposit-receipt. The cross was then attested by two witnesses, usually two of her children, one of whom took the receipt to the bank, drew the money required, and took out a fresh deposit-receipt in her favour for the balance.

The defender stated as the reason of the alleged donation in his favour that he had maintained his parents for years prior to their respective deaths. On this point he deponed—"My father died on 13th December 1882. He was residing with me at that time, and had done so for six years previous to his death. During all that time I had to maintain my father as he was unable to do any work. Besides my father, there were residing with me in the house my sister Martha, now Mrs Gebelmann, my mother, and my niece Agnes Duncan. . . . My father left no money. . . . After my father's death I kept my mother and my sister Martha and my niece Agnes Duncan until they were married. . . . I got no help from any of my brothers or sisters towards the support of my father and my mother. . . . My mother never helped to pay the household expenses."

Mrs Gebelmann and Mrs Pippin supported the defender's assertion that the expenses of the house in which he and his mother lived had been entirely borne by him.

On the other hand, it appeared that the £240 in question was the balance of a legacy of £490 received by Mrs M'Kenzie in the year 1883. That sum had been lodged on deposit-receipt in her name with the Clydesdale Bank, Paisley Road, and from time to time Mrs M'Kenzie had drawn various sums from the bank, with the result that the amount on deposit-receipt was reduced on 19th November 1888 to £340, on 26th November 1889 to £280, and on 12th December 1890 to £240. The defender explained the amount of his mother's expenditure by saying that she had been in the habit of spending ten or twelve weeks every summer at Carrickfergus, in Ireland, or else down the Clyde; that on these occasions she took several of the family with her, and defrayed all expenses, and that this was "what she did with the money." He admitted, however, that at Carrickfergus she used to stay with a cousin of her own, and that of £20 uplifted by his mother on 12th December 1890 he had received £10 to pay "taxes and some accounts," and failed to explain why, if his mother's expenditure had been caused solely by her visits in summer to Ireland and the Clyde, a sum of £20 had been drawn from the bank on 1st February 1888, and why money had been uplifted on ten different occasions between that date and 2nd July 1890.

The defender alleged that his mother had frequently expressed it to be her intention that he should get all her money, and this statement was corroborated by Mrs Gebelmann and her husband, Mrs Pippin, and Alexander M'Kenzie, the defender's brother and partner in business, and his wife.

Three independent witnesses, friends of the deceased—Mrs Forrester, Mrs Brash, and Mrs Crawford—were also examined for the defender on this point. Mrs Forrester and Mrs Brash both stated that they had frequently heard Mrs M'Kenzie say that she would leave what she had to the defender, and each referred specially to the last occasion on which they had heard her make a statement to that effect—the occasion spoken to by Mrs Forrester being about three weeks, and that spoken to by Mrs Brash being about four weeks before Mrs M'Kenzie's death. Mrs Crawford deponed—"About fifteen months ago Mrs M'Kenzie spoke to me decidedly about her money affairs. She said —'Tom, you know, has always been a good son to me, and I am going to tell you that I have left all to him.' At different times Mrs M'Kenzie has made similar statements to me about her affairs."

The defender also stated that on one occasion when his mother was ill, about a year before her death, she had sent Mrs Pippin to summon him in order that she might give him the deposit-receipt, but that he had not treated the summons seriously, as he did not think his mother's illness to be dangerous. Mrs Pippin corroborated the defender on this point.

The defender also stated that on one occasion, when advised to make her will by Mr Wilson, a writer, Mrs M'Kenzie had said that "there would be no will with her; what she had she would give me in my hand," and it was elicited in cross-examination that he had had some conversation with Mr Wilson on this matter. He deponed—"I had been told by Mr Wilson, after my mother would not make a testament, that it would be necessary to get delivery of the deposit-receipt, and that is the reason why I put it into the box, and thought no more about it after it was endorsed. I thought that after the deposit-receipt was given me nothing more was required." Mr Wilson was not called as a witness.

The residue account prepared by Mr Wilson, and signed by the defender, contained the following entry—"An immediate gift *inter vivos* on 12th December 1890 of the deposit-receipt after mentioned

to the deponent;" and in a letter to the pursuer's agent dated 14th January 1891 Mr Wilson wrote—"The amount of the deposit-receipt was £240, which was handed over to my client on the 14th December last in the presence of Mrs Pippin."

The evidence adduced for the pursuer was of little importance, and the case turned on the question whether or not the defender had adduced sufficient evidence to overcome the presumption against donation.

On 21st August 1891 the Lord Ordinary (KINCAIRNEY) pronounced this interlocutor: — "Finds (1) that Mrs M'Kenzie, mother of the pursuer and defender, died on 27th December 1890; (2) that on 16th December 1890 she made a donation *inter vivos* to the defender of a bank deposit-receipt in her favour for £240, and of the said £240 contained therein: Finds that the defender has not intromitted with any other part of the estate of the deceased: Therefore assoilzies the defender from the conclusions of the summons and decerns: Finds him entitled to expenses, &c.

"*Opinion.*—[*After stating the circumstances in which the case was raised*]—A proof has now been taken, in which the defender led. I do not think that the evidence adduced by him has been met to any serious extent by counter evidence; and what the defender has to overcome is not so much the pursuer's counter evidence as the very strong presumption against the donation which he avers.

"There is always a strong presumption against donation, either *inter vivos* or *mortis causa*.

"In this particular case the presumption is exceptionally strong. What is averred is not donation *mortis causa* but a donation *inter vivos* and absolute, and there is authority for the proposition that a more complete proof is required to establish the latter than the former—*Sharp* v. *Paton*, June 27, 1883, 10 R. 1000, *per* Lord Deas, 1008. Further, what is said to have been bestowed was practically Mrs M'Kenzie's whole estate. The gift would leave her penniless and dependent on her son; further, she had five other children with legal claim to legitim on her death, a right not readily or easily defeated, and not in all cases liable to be defeated; and lastly, the donation is alleged to have been made by a blank endorsation of a deposit-receipt —Mrs M'Kenzie's endorsation having been made by a cross on the back of the deposit-receipt (she being unable to write), attested by the defender and by his sister Mrs Gebelmann.

"The defender's case therefore requires careful examination, and it is not without hesitation that I have ultimately come to the conclusion that it has been made out.

"The facts are shortly these — Mrs M'Kenzie some years ago received a legacy of considerable amount for a person in her position, and at the same time her children received smaller legacies.

"These were deposited in bank on deposit-receipts, and all deposit-receipts were kept together in a box of which Mrs M'Kenzie kept the key.

"Mrs M'Kenzie was in the custom of drawing money from the bank from time to time; she did so by making a cross on the back of the deposit-receipt, which was attested by two witnesses, generally or always her children, one of whom took the receipt to the bank, drew the money required, and got a new deposit-receipt in favour of Mrs M'Kenzie for the balance.

"In that way the sum in bank gradually diminished.

"On 19th November 1888 it amounted to £340, on 26th November 1889 to £280, and on 12th December 1890, to £240; so that she had spent £100 the last two years of her life, and £40 in the year before she died. How she disposed of these sums does not clearly appear.

"Mrs M'Kenzie's husband had died in 1882.

"The defender depones that for some years previously his father had resided with and been maintained by him; that his mother had continued to reside with him, and that he had maintained her, and also his sister Martha, afterwards Mrs Gebelmann, and his niece Agnes Duncan, until they were married.

"It would rather appear, however, that Mrs M'Kenzie must have contributed either to the expense of the housekeeping or of the business.

"Mrs M'Kenzie had four other children, one resident in Melbourne, and the others had been married.

"The defender depones that his mother frequently expressed her intention that he should have her money, and her desire to avoid, if possible, disputes about it after her death.

"It appears to have been generally understood in the family that the defender should have his mother's money, and to have been acquiesced in as natural, I suppose, because she had lived in his house.

"It happened that not long before her death Mrs M'Kenzie had occasion to consult Mr Wilson, a lawyer, and that he, noticing the frail state of her health, had advised the defender that she ought to make her will. The defender repeated this advice to his mother, and he depones that she replied that there would be no testament with her; what she had she would give into his, the defender's, hand. On another occasion Mr Wilson, when this was mentioned to him, advised the defender that it would be necessary that he should get delivery of the deposit-receipt.

"One would have wished to know the precise advice which Mr Wilson gave, but that gentleman has not been examined.

"It appears that Mrs M'Kenzie had been in failing health for several years, and that latterly she never left her house during winter. She suffered from asthma, and was much indisposed. The evidence is not so clear as might be wished about the state of her health shortly before her death.

"She died on 27th December 1890 at the age of sixty-three. On 12th December she drew £20 from bank, and a new deposit-

receipt for £240 in her favour was made out. The donation is said to have been made on 16th December, when she seems to have been seriously ill, though not in a condition materially worse than on the 12th.

"The defender depones that on that day she asked him to come to her room, that her daughter Mrs Gebelmann was present, and that Mrs M'Kenzie desired Mrs Gebelmann to bring her the deposit-receipt and pen and ink, and that she then made her cross on the deposit-receipt by way of endorsation, and that the defender wrote his name on it as a witness.

"She then handed it to him and said, 'Now, that is yours.' He then replaced the deposit-receipt in the box, which was locked by Mrs Gebelmann, and never touched it again until he took it out of the box after his mother's death and cashed it at the bank without informing the clerk at the bank that his mother had died. He says, on cross-examination, that his mother made him promise to look after his sister Mrs Pippin, who seems to have been very poor, and was indeed in receipt of parochial relief.

"The pursuer's counsel endeavoured to establish discrepancies between the defender's evidence and that of Mrs Gebelmann, but I think her evidence substantially corroborates her brother's on all material points. She mentions what he does not, that she also signed the deposit-receipt as a witness to her mother's endorsation.

"The defender and Mrs Gebelmann also depone that they understood that the gift to the defender was absolute.

"Mrs Pippin depones that her mother had told her of her intention to give the defender the deposit-receipt, and she was afterwards told (by the defender I suppose) that she had done so.

That, I think, is the whole of the direct evidence on the point.

"It is not, and indeed hardly could be contradicted. I have no right to hold that these witnesses are perjured, and I can find no solid reason to doubt their substantial veracity. It appears to me to be sufficiently, though not perhaps superabundantly, proved that on 16th December Mrs M'Kenzie had the deposit-receipt taken out of its box and brought to her for no other reason than that she might endorse it and give it to the defender. She had clearly no need to draw the money at the time, and if the occurrence took place at all, that was her only intelligible object.

"I therefore think it proved that she made a donation of the deposit-receipt and its contents to the defender.

"But the question of real difficulty remains, was this donation intended to be an absolute donation or only a donation *mortis causa?* Was it meant to be irrevocable or not?

"The defender, Mrs Gebelmann, and Mrs Pippin deponed that they understood that it was absolute and irrevocable.

"Mrs M'Kenzie died about a fortnight afterwards, and nothing that occurred after he 16th December throws any light on the oint.

"It is no doubt, generally speaking antecedently very unlikely that one should make an absolute gift of her whole property, and often an assertion to that effect might seem so incredible as to be almost incapable of proof. Nevertheless, if it be considered that Mrs M'Kenzie had lived in family with her son probably during all his life, and may have had the most ample reason to feel an absolute reliance on his filial affection, she may have done what the defender says she did. It is probably the case that what she desired was to secure that he should have the money after her death, but she may very probably have thought that the best way to secure that, was to give it to him during her life, and the notion of a donation *mortis causa* is probably too complicated and artificial to be plausibly ascribed to her.

"I have certainly difficulty on the point, but I am not prepared to reject the defender's evidence.

"The indirect evidence, at least the balance of it, is to the effect that Mrs M'Kenzie and the defender lived on cordial terms, that she entertained much affection for him, and received in return corresponding attention. It also shows that she had a fixed purpose that he should have her money, but the impression of the witnesses was that the defender was to get her money after her death and not during her life.

"It is in favour of the defender's case that his statement that his mother had given him her money did not surprise the other members of the family except the pursuer, is believed by them, and contentedly acquiesced in. This is even the case with the defender's brother Alexander M'Kenzie, who was called as a witness by the pursuer, but whose evidence is really strongly for the defender, and I am not able to say that any undue means have been used to bring about this state of feeling.

"It was argued for the pursuer that the gift, supposing it made, was not in any view an absolute donation, but was burdened with an obligation to support the defender's sister Mrs Pippin, and was really of the nature of a trust, and was, if that were so, wholly ineffectual. The case of *Thomson* v. *Dunlop*, January 23, 1884, 11 R. 453, seems to justify that position. But I am of opinion that the facts of this case do not raise the point, because assuming that there was *inter vivos* donation, I do not think that it can be held that any legal obligation to support Mrs Pippin was imposed on the defender. I think rather that she was commended to his care with that confidence which the gift to him, supposing it made, so amply demonstrates. I think it cannot be represented that the defender was not a donee but a trustee.

"It is proper to notice that no question as to the effect of this donation, presuming it to have been made, has been raised or decided.

"I think there is no other question properly raised in the case but this about the £240. Something is said in the proof about the furniture, but with that the defender appears to have no concern."

The pursuer reclaimed, and argued—There was a strong presumption against donation, and in the case of a *donatio inter vivos* the presumption was even stronger than in that of a *donatio mortis causa*. Here the evidence in favour of donation was insufficient to overcome the presumption—*Ross* v. *Mellis*, December 7, 1871, 10 Macph. 197. Such direct evidence as there was in favour of donation was that of the donee or person subject to his influence, and in the absence of independent evidence the alleged donation could not be upheld—*Sharp* v. *Paton, &c.*, June 21, 1883, 10 R. 1000; *Gibson* v. *Hutcheson*, July 5, 1872, 10 Macph. 923; *Crosbie's Trustees*, May 28, 1880, 7 R. 823. Assuming the gift to have been made out, it was made in part subject to a trust in favour of Mrs Pippin, and was thereby rendered of no effect—*Thomson, &c.* v. *Dunlop*, January 23, 1884, 11 R. 453.

Argued for the defender—This was not a case where the question was on which side the balance of evidence lay. The evidence was all on one side, and the sole question was whether it was sufficiently strong to overcome the presumption against donation. It was proved that the defender's mother had for years intended that he should get all her money, and a satisfactory reason for her entertaining this intention was made out. The *animus donandi* being thus proved, the direct evidence in favour of an *inter vivos* donation was sufficiently strong—*Macdonald* v. *Macdonald*, June 14, 1889, 16 R. 758; *Blyth, &c.* v. *Curle*, February 20, 1885, 12 R. 674. If the Court were of opinion that an *inter vivos* donation had not been made out, the defender could fall back on a *donatio mortis causa*, for it was not necessary to the validity of such a gift that it should be made in immediate prospect of death—*Blyth, &c.* v. *Curle, supra.*

At advising—

LORD PRESIDENT — The defender in this action rests his claim to the money for which he is sued, on an alleged donation by his mother shortly before her death. A well-settled rule in such cases—I quote from the late Lord President in *Sharp* v. *Paton*, June 21, 1883, 10 R. 1006—is that "there is a strong presumption against donation, and it requires very strong and unimpeachable evidence to overcome it." I have anxiously examined the evidence in this present case, and have come to the conclusion that it distinctly falls short of this requirement.

The deposit-receipt, which was the subject of the alleged gift, constituted with her furniture the sole estate of the deceased. The defender is one of her six surviving children, and of the other five none are said to be affluent, and at least one is in indigence. The facts regarding the maintenance of the family in former years do not seem to support the suggestion that the estate of the deceased had been to any large extent saved by the defender during her lifetime, from burdens which would naturally have fallen on it.

Although the case of the defender is donation *inter vivos*, he is of course well entitled to derive what support he can from the age or health of the deceased, or her notions about her health, as diminishing the inherent improbability of her divesting herself of her whole estate during her life. The facts, however, do not go far in this direction. The deceased was only sixty-three. Apart from her having died a fortnight later, there is nothing to show that at 12th December her illness was critical, or that a conviction had been borne in upon her that her use of worldly goods was over. The testimony of Mrs Pippin comes nearest this point, but it is diluted and not strengthened by its references to former occasions, and it is not supported either by her own opinion of her mother's health or by the subsequent speech and conduct of the deceased and the other members of the household.

On two occasions, spoken to by independent witnesses, the deceased seems to have expressed intentions of leaving her money to the defender. The defender, indeed, has himself thrown some doubt on the accuracy of his mother's recorded statements to friends on this subject by examining a witness (Margaret Crawford), who says that months before her death the deceased told her she had already "left all to the defender," which was certainly not the case. I am disposed, however, to consider that the other two women establish that when she spoke to them she had testamentary intentions of that kind more or less deliberate.

I have mentioned these matters first, not because they are of primary importance, but in order to see how far the defender gathers antecedent probability to sustain him in the case which he has to make out by direct evidence. To that evidence I now come, and I shall state first in summary why I consider it insufficient to establish donation. First, there is no real evidence whatever; second, the testimony directly relating to the gift is solely that of interested persons; third, the testimony of those interested persons, taken as it is given, does not clearly, circumstantially, and consistently tell what was said or done so as to demonstrate donation.

In all previous cases of this kind there has been at least some act of the deceased donor which is admitted or proved by real evidence to have taken place, and which goes so far towards donation. The money is invested in name of the donee, or the deposit-receipt is endorsed in his favour under the hand of the donor. Here, there is a blank endorsation attested by a mark. The illiteracy of the deceased of course renders this form of signature consistent with the defender's case if it were otherwise made out, but not the less is he without what is generally the first step in such cases—independent proof by a signature telling its own story, that the deceased did something to realise or part with the fund. Apart from testimony there is nothing to show that Mrs M'Kenzie put pen to paper on the occasion in question, or that it ever occurred.

In considering the testimony, the salient feature is that only the defender and Mrs Gebelmann are said to have been present when the gift was made. Now, the estate of their mother having consisted of the deposit-receipt and the furniture, Mrs Gebelmann depones that at the same time as she gave the deposit-receipt to the defender she gave the furniture to her, Mrs Gebelmann. The defender, on the other hand, depones that his mother said nothing about the furniture on that occasion, although she had done so some months before. I cannot regard this discrepancy otherwise than as of grave importance. It throws doubt on the story, and it at least shows that there is not on the part of both that pointed recollection of what the deceased woman really said about her property which enables us to proceed with confidence regarding the other part of it, or to be clear whether she was minded to divest herself of all she had or only of her money.

Turning now to what is spoken to as having been said about the deposit-receipt, the first thing which strikes one is that this important and affecting act of the mother giving away her all has a most inept beginning or occasion. "The transaction," says the defender, "originated in my stating that I was short of £1"—for the taxes, as appears. The account of the gift itself had better be given as it stands—"On Tuesday 16th December, when I came home for dinner about four o'clock, my mother told me that she had not been so well, and asked me to have my dinner in the bedroom. After I had taken my dinner, she asked if I had enough money to pay the taxes, and I said that I still required £1. My mother then said she had a few pounds in the box which she could give me, and she told my sister Mrs Gebelmann to open the box and bring a pen and ink. She then put her mark on the deposit-receipt of 12th December 1890, asked me to sign it also, and handing the receipt to me said, 'Now, that is yours.' I took the deposit-receipt and placing it in the envelope returned it to the box, and my sister locked up the box again. I did not take the deposit-receipt out of the box again until the morning after the death, when I uplifted the money and re-deposited it in my own name." Now, apart from everything else, it seems to me that it would be impossible to accept this excessively bald and blank story as importing a donation, and yet this is the defender's case, where it ought to be at its best, in his own examination-in-chief. The pursuer, it is true, by her cross-examination succeeded in infusing some colour into the narrative, and Mrs Gebelmann's account is a little fuller. Yet the only speech ascribed to the deceased never reaches higher than the following—"There, that is yours, as I have got all I require of it, and I know you will look after your sister Jessie." Now, this might mean all that the defender requires if it were led up to, or followed, or explained, or acted on. But when all is said, the substance of the interview is simply that the conversation having begun about the £1 for the taxes, the money-box is asked for, the deposit-receipt taken out and endorsed (as it had been often before when money was required); it is handed to the defender with the words which I have quoted, in their briefer or ampler form; and the defender apparently without a word in reply puts the deposit-receipt back into its place.

Nobody seems to have said or done anything further on the subject (with one doubtful exception) until Mrs M'Kenzie died. Then the defender that very morning went to the bank and uplifted the money, omitting to tell the bank that the depositor was dead.

The doubtful exception to which I refer is a communication said to have been made by the deceased to Mrs Pippin. "My mother," says Mrs Pippin, "had told me the day after she had given the deposit-receipt to my brother, what she had done, and the defender told me afterwards." Now, it is obvious that such evidence is perfectly useless, for it does not even profess to tell what the deceased said, and even if it is to be taken as meaning that she used the word "gave," that is wholly ambiguous and proves nothing.

The fact that the defender kept the alleged gift secret from all the rest of the family except Mrs Pippin, who appears to be dependent on him, cannot be overlooked. The Court is, I think, bound to peculiar caution in such a case. There may have been good reasons for such secrecy, but the means of testing the facts are thereby proportionally diminished.

But further, in a case where the defender has at the time acted with such reserve towards his relatives, it became him to be specially frank and aboveboard in possessing the Court of all available evidence. Now, I do not think he has done so. As he presents his case, his attitude was that of the passive recipient of his mother's bounty. But it incidentally appeared in cross-examination that before the alleged gift he had been taking counsel with a lawyer, and I have found and heard no satisfactory explanation of the following sentence—"I had been told by Mr Wilson after my mother would not make a will that it would be necessary to get delivery of the deposit-receipt, and that is the reason why I put it into the box, and thought no more about it after it was endorsed." Now, Mr Wilson was not examined; he and the defender may have had quite legitimate occasion for this conversation, whether it took place with or without the knowledge of the deceased, but the importance of the incident was manifest, and the suggestion of the sentence which I have read is rather sinister, but it at all events shows that there is an omitted chapter in the narrative, and the omission confirms my indisposition to hold the case to be proved.

I should have hesitated to propose, as I now do, that the Lord Ordinary's interlocutor be recalled if the question had been one of mere credibility. But I consider the evidence, even as it stands, to be insufficient in quality to establish donation.

LORD ADAM—The question in this case is, whether it is proved by the defender that a donation of a sum of £240 contained in a deposit-receipt was made to him by his mother in 1890? There is always a strong presumption against donation—so strong indeed that it is almost within my own recollection that parole proof has been held sufficient to establish it. I agree that, in the words of the late Lord President, "it requires strong and unimpeachable evidence to overcome the presumption against donation, and that in the present case this presumption is specially strong, looking to the facts adverted to by your Lordship, that this woman was only sixty-three years old, and though frail was at the time of the alleged donation in the same condition of health that she had been in for years, and that the alleged donation is of her whole estate.

Now, what is the reason given by the defender for the alleged donation? He says that he kept his mother, and paid the household expenses, and that that consideration was one of the motives which led his mother to make the donation. It was pointed out to him in cross-examination that the legacy received by his mother in 1883 amounted to £490, that on 1st February 1888 it had diminished to £380, and on 12th December 1890 to £240, and he is asked to account for the decrease. His answer is that the money had been spent on visits to Carrickfergus, where she generally went in June of each year. It was further pointed out that there were ten deposit-receipts between 1st February 1888 and 2nd July 1890, and he is unable to account for that. There is other evidence showing that the defender's mother did contribute to the expenses of the household, because it appears that a sum of £20 was drawn on 12th December 1890, and the defender admits that he got £10 of it to pay taxes and some accounts. The defender therefore is not accurate in stating that he supported his mother.

These observations, however, merely go to the general probability or improbability of the donation having been made, and I agree that his case must depend upon the evidence of the only two persons who were present when the donation is said to have been made, and that when such a case depends on the evidence of two witnesses only, one of whom has so great an interest in the result, we cannot give effect to their evidence unless it appears to be thoroughly satisfactory and reliable. I agree with your Lordship that that evidence is not satisfactory. I do not think that any of your Lordships would accept what is said by the defender in his examination-in-chief—when if he were a candid man we should expect to have a full account of what took place—as sufficient to constitute donation. In cross-examination he makes various additions. He says, for instance, with regard to Mrs Pippin—"When my mother handed the deposit-receipt to me on the 16th December she made me promise that I would look after Mrs Pippin;" and again, "My mother had said to me when handing me the deposit-receipt, 'That is yours.' She also said, 'Promise me that you will look after Mrs Pippin.' She said that when she handed over the deposit-receipt to me," and he follows this up by saying, "I have promised to take her and her family into my house to live." In another passage he says that when his mother made the donation "she said that she had got off it now all that she would require," making for the first time the suggestion that when she made the donation his mother thought herself *in articulo mortis*. This suggestion, however, he repeats in a subsequent passage of his evidence in answer to a question by the Court—"She said she would not require any more money because she felt herself done. When my mother gave me the deposit-receipt she said that she did not think she would get better." It appears to me to be a very important consideration that these additions to his story are made by the defender under the pressure of cross-examination. If he had been a candid man we would have had the whole account in his examination-in-chief.

Again, when we come to compare his evidence with the evidence of his sister—the other witness to the alleged donation—we do not find that she gives the same account of the matter. She adds various points of which we hear nothing from the defender; she says very distinctly that her mother gave her a gift of the furniture at the same time as she gave the defender the deposit-receipt, but the defender says that that gift was made months before. It seems to me that evidence such as this cannot be relied on.

There is also another passage in Mrs Gebelmann's evidence to which I would like to advert. It is as follows—"(Q) When your mother said that Tom was to look after Mrs Pippin, what did you understand her to mean?—(A) She meant that my brother would never see my sister want anything. (Q) Did you understand her to mean by that that Tom was to give her her share of the money which she had in the deposit-receipt?—(A) No, she meant that he would never see Jessie want. (Q) Where was he to get the money to give to Jessie?—(A) He always worked for money, and she knew that he would help Jessie. She said that she did not mean him to give her any money out of the deposit-receipt." One can see the motive of these questions, for if no money was to be given to Mrs Pippin out of the deposit-receipt, then there was no trust imposed on the defender, but it seems to me a very odd thing that the old lady should have limited her directions as to Mrs Pippin in the way spoken to by Mrs Gebelmann. The statement may be true, but it is not very credible.

Now, if we cannot rely on the evidence of the two principal witnesses the defender's case must fail. There is no real evidence to support it. The evidence of the other witnesses for the defender, with the exception of Mrs Pippin, is to the effect that his mother intended to leave him her money at her death, and that appears to

me rather against than in favour of the defender's case. As to Mrs Pippin's evidence, I cannot in the circumstances accept it as reliable. We know that she is a needy woman, and that since the date of the alleged donation the defender has promised to take her and her family to live with him. Further, there seems to have been considerable confusion on the side of the defender as to the date of the alleged donation. In the residue account prepared by his agent we find the date stated as 12th December, and in a letter by the same agent written on 14th January 1891 the donation is said to have been made on 14th December? How did this confusion arise? No explanation is given. In such a state of the evidence the Court would, I think, be very wrong were it to hold that there was here such strong and clear evidence as to leave no reasonable doubt that a donation was made to the defender.

LORD M'LAREN—I agree entirely with the view of the evidence presented by your Lordship in the chair, and further developed by Lord Adam. But as the principles of law involved in cases of this kind are of great importance I desire to add a single word. It must be remembered that all cases of donation which come before the Court, whether described as donations *mortis causa* or *inter vivos*, are really cases of gifts or alleged gifts by a moribund person to those around him, and when I had occasion to consider the subject very seriously in taking the proof in *Sharp* v. *Paton*, it appeared to me that some of the previous decisions had come alarmingly near to the point of giving effect to a nuncupative will. It is very difficult to find a real distinction between what is called a nuncupative or verbal will and a gift of bank money not admitting of actual delivery, bestowed in contemplation of death, and accompanied by words of testamentary intention. I doubt, if the matter were open for re-consideration, whether the Court would accept the possibility of a transfer of money in bank, vouched by a deposit-receipt, being made by handing over or pointing to the receipt. Assuming, however, that such a transfer was theoretically possible, I ventured in the case of *Sharp* to propose what appeared to me to be a reasonable limitation, namely, that we should in no case sustain a case of deathbed donation where the evidence in support of it was only that of the alleged donee, and persons subject to his or her influence. That limitation was adopted by the Court on a full consideration of all the authorities, and I am unable to find in this case anything to take it out of the category of cases condemned by *Sharp* v. *Paton*.

The proper case of donation *mortis causa* is where a moveable subject is handed over to the donee in the presence of witnesses, with the implied condition that it is to be restored if the giver recovers from the sickness from which he is suffering. The endorsation of a deposit-receipt does not seem to me to be the proper way of transferring money in bank, and certainly where the deposit-receipt is endorsed in blank it is altogether inadequate to transfer any right whatever. The defender's case is not strengthened by referring it to the category of donations *inter vivos*, because in that view the mandate to uplift the money falls upon the death of the mandant. There is therefore wanting in the present case what is necessary to constitute a good *donatio inter vivos*, either the actual handing over of the subject of the gift during life, or a power given to the donee to receive it after death.

But if this was a donation *inter vivos* we should expect that the first thing the donee would do would be to cash the receipt. If the defender had done so in this case, and this had been an action at the instance of the defender's mother to compel him to account for the money he had received, the Court would never have entertained the theory of donation in the face of an assertion by her that she had merely given him the deposit-receipt that he might uplift the contents and hand them over to her, and still less if she had asserted that the cross upon the deposit-receipt had not been put there by her. We must scrutinise the case for donation carefully, though we have not the evidence of the deceased to oppose to that of the defender. If we have not her evidence, it is because the defender waited until the death of his mother before he acted on the alleged donation.

I ought to guard myself against being thought to make any imputation on the truthfulness of the parties in the case. From the nature of cases of this kind we can never know where the truth really lies, and possibly the witnesses in favour of donation may be speaking the truth, but the question for our decision is, whether we can hold that there has been a transference of property where there is no testimony other than that of those who will benefit by the alleged transfer. It would be contrary to all the analogies of our law to hold upon evidence of that description that there has been a transference of property from a dead to a living person. Though the Lord Ordinary may be correct in thinking the case one of difficulty, the tendency of decisions in recent cases has been to establish a more definite ground of judgment, and I hope in the future that persons desiring to transfer money in bank on deathbed will do so by less doubtful methods than the endorsation of deposit-receipts.

LORD KINNEAR concurred.

The Court recalled the interlocutor of the Lord Ordinary; found that the defender had failed to prove that the deceased Mrs M'Kenzie made a donation to him of the said deposit-receipt for £240 mentioned on record, and that he, the defender, is bound to account for said sum, with interest at the rate of 5 per cent. per annum from 27th December 1890, as part of the estate of the deceased, and decerned, &c.

Counsel for Pursuer—J. Reid. Agents—Macpherson, & Mackay, W.S.

Counsel for Defender—Guthrie—Gunn. Agents—Whigham & Cowan, S.S.C.

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*Wednesday, December 9.*

## FIRST DIVISION.

[Lord Kincairney, Ordinary.

## MALCOLM *v.* CAMPBELL.

*Contract—Sale of Heritage—Written Agreement—Unilateral Obligation.*

The proprietor of a house, in pursuance of a verbal agreement, wrote as follows—"I have agreed to sell my house at corner of High Street, Leven, for one hundred and fifty pounds to M." This document was duly attested, but was withdrawn by letter upon the same day. In an action by M for declarator that a valid contract of sale had been effected, *held* that although the owner of heritable property might by unilateral obligation bind himself to sell it, the document in question did not set out any such obligation, but formed one side of a bilateral obligation, and that as both parties were not thereby bound, there was no concluded contract of sale.

Miss Agnes Malcolm, a stationer in Leven, entered into a verbal arrangement with Mrs Campbell, the proprietrix of an adjoining house, for its purchase, and in pursuance of this arrangement Mrs Campbell signed the following document—"*Leven, 16th June* 1891.—I have agreed to sell my house at corner of High Street, Leven, for one hundred and fifty pounds to Miss A. C. Malcolm." This document was duly attested and was at once delivered to Miss Malcolm. On the same day Mrs Campbell's agents wrote to Miss Malcolm's agents—"Mrs Campbell instructs us to withdraw any offer to sell her property Miss Malcolm may have got from her to-day." Miss Malcolm thereupon raised an action for declarator that Mrs Campbell had sold her the property by a valid and effectual sale; and alternatively she sued for £250 in name of damages.

The defender pleaded—"(1) The action is irrelevant. (2) There being no concluded contract of sale between the parties, the defender should be assoilzied. (3) The defender having timeously resiled from the offer contained in the missive libelled on, is under no obligation to sell her house to the pursuer."

The Lord Ordinary (KINCAIRNEY) on 12th November 1891 sustained the first and second pleas-in-law for the defender and assoilzied her from the conclusions of the action.

"*Opinion.*—I am of opinion that the defender should be assoilzied.

"The pursuer's averment is that on 16th June 1891 the defender stated to the pursuer that she (the defender) desired to sell her property, and that both parties agreed on £150 as the price, and that the defender agreed to give immediate entry. The pursuer further avers that the parties having concluded the contract of sale the defender signed the following agreement—'*Leven, 16th June* 1891.—I have agreed to sell my house at corner of High Street, Leven, for £150, to Miss A. C. Malcolm.' This document was duly attested. It was not signed by the pursuer, and no corresponding agreement or missive was executed by her. I do not read this document as a disposition of the house or as a unilateral promise to dispone it, but as—what the pursuer herself calls it—a contract or agreement, and therefore mutual and bilateral.

"The defender, on the day on which this document was signed and delivered, withdrew her offer. It is not pretended that by that time there had been any *rei interventus*, and the question therefore is, whether the bargain was by that time beyond recall, or whether the defender had a *locus pœnitentiæ*? The defender maintained that she had, and referred to *Goldston* v. *Young*, December 8, 1868, 7 Macph. 1888.

"The pursuer maintained that that case did not apply, because there the contract in form and expression was mutual, and was embodied in two deeds—an offer and acceptance—and she maintained that this case fell under the proposition stated in Bell's Principles, sec. 889, that a promise in writing to dispone land if delivered is good without acceptance, and his counsel referred in support of that proposition to the following authorities—*Ferguson* v. *Paterson*, November 23, 1748, M. 8440; *Muirhead* v. *Chalmers*, August 10, 1759, M. 3414; *Fulton* v. *Johnstone*, February 26, 1761, M. 8446; and *Barron* v. *Rose*, July 23, 1794, M. 8463. Of these cases *Ferguson* v. *Paterson* seems to be most in the pursuer's favour, and it does indeed resemble this case somewhat closely, but it appears to be of doubtful authority. It was stated from the bench in *Barron* v. *Rose* to be special, to have been misunderstood, and to decide no general point. In *Muirhead* v. *Chalmers* there was ample *rei interventus* to warrant the judgment on that ground. In *Fulton* v. *Johnstone* the defender was assoilzied, although the ground of absolvitor may have been that the deed was not delivered. *Barron* v. *Rose*, in which the defender was assoilzied, is rather against the pursuer than for her. It is true that in that case there were two missives, the one probative and the latter improbative. But the judgment would, I think, have been the same had the latter missive not been executed, and if that had been so, the case would have been much the same as this. *Shedden* v. *Sproul Crawford*, July 6, 1768, M. 8456, seems in favour of the defender. In *Sproat* v. *Wilson and Wallace*, January 24, 1800, Hume, 920, a missive of lease signed by both parties and holograph of one was held not binding, and in *Sinclair* v. *Weddell*, December 8, 1868, 41 Scot. Jur. 121, a judgment was pronounced to a similar effect.