It was for the jury to consider whether the pursuer has made out a case for this.

Mr CLARK excepted to the Lord Justice-Clerk's direction as to his counter-issue; and the LORD ADVOCATE asked his Lordship to direct the jury that if they believed Mr Ruthven's evidence as to what passed betwixt him and the defender in November 1863, the defender was thereby put on his inquiry as to M'Lellan's authority; but his Lordship said he had left this to the jury.

The jury returned into Court about five minutes past eight, and the Chancellor proceeded to announce that they were agreed upon their verdict by a majority of eleven to one.

The LORD JUSTICE-CLERK observed that a verdict by a majority could not be received until after three hours' deliberation.

The counsel for the parties, however, expressed their willingness to receive the verdict at the present stage, and it was taken and recorded in the following terms:—Find for the pursuer on the first issue to the extent of £1369, 14s. 3d.; on the second issue, find for the pursuer, and assess the damages at £1104; find for the defender on the third issue, and for the pursuer on the defender's counter-issue.

Thursday, Dec. 28.

MURRAY'S EXECUTORS *v.* FORBES.

Mandate—Resting-Owing. In an action against a person for payment of money uplifted from bank on behalf of an old lady now dead, but which he alleged he had duly paid over to her—verdict for the pursuers.

Counsel for the Pursuers—The Solicitor-General and Mr Shand. Agents—Mr Alexander Morison, S.S.C., Edinburgh; and Messrs Gordon & Watt, solicitors, Banff.

Counsel for the Defender—Mr E. S. Gordon and Mr W. Watson. Agents—Messrs Webster & Sprott, S.S.C., Edinburgh; and Mr John Christie, solicitor, Banff.

In this case John Byres, residing at Percyhorner, near Fraserburgh, and Elizabeth Byres, residing at Pittullie, both in the county of Aberdeen, executors-dative *qua* children of the next-of-kin decerned to the deceased Ann Murray, sometime residing at Portsoy, thereafter at Reidstack, in the parish of Fordyce and county of Banff, are pursuers; and James Forbes, innkeeper, residing at Portsoy, is defender; and the following is the issue sent for trial:—"It being admitted that on or about the 14th day of January 1859, the defender received from the said deceased Ann Murray a deposit-receipt for £320, granted by the agent of the Union Bank of Scotland at Banff, dated 5th February 1858, endorsed blank by the said Ann Murray:

"Whether the defender uplifted from the branch of the Union Bank of Scotland at Banff the sum of £320, contained in the said deposit-receipt, with £6, 1s. 2d. of interest thereon; and is resting-owing the said sums of £320 and £6, 1s. 2d., with interest since 14th January 1859, to the pursuers, or any part of these sums?"

The action originated in the Sheriff Court of Banffshire, where, after a very long proof, the Sheriff-Substitute (Mr Gordon) decided against the defender; but his interlocutor was altered by the Sheriff-Principal (Mr B. R. Bell). The pursuers having brought an advocation, the Court quashed the proof which had been taken, in respect the Sheriff-Substitute had incompetently remitted to a commissioner to take the evidence, which the Sheriff Court Act provided should be taken by himself, and thereafter the Court allowed an issue for trial by jury.

As admitted in the issue, the defender on 14th January 1859 received from the late Miss Ann Murray, an old lady of seventy-eight years of age, a deposit-receipt by the Union Bank at Banff for £320, which receipt was endorsed blank by Miss Murray. It appeared that she was a distant relative of the defender, and had asked him to uplift the money in order, as the defender said, that she might deposit it in the branch office of the bank at Portsoy, where she resided. The defender alleged that he had uplifted the money and interest due thereon, and handed it to Miss Murray. She died about six months afterwards—namely, on 30th July 1859—and no trace of the money could be found. In fact there was not enough left in the deceased's house to pay the expense of her burial. By a curious coincidence, too, which was much relied upon by the pursuers, it was ascertained that the defender had, on 19th January 1859, just five days after he had received the deposit-receipt from the old lady, deposited a sum of £320 in the North of Scotland Bank at Portsoy, where he did not usually transact his bank business, in his own name. His evidence that he had paid over the money to Miss Murray was corroborated by his sister, Maria Forbes, who said she saw it done; and another sister, Marjory Forbes, who said that Miss Murray had told her that the defender had paid it to her. The defender accounted for the lodging of the money in the North of Scotland Bank by saying that he had on 1st December 1858 made an offer to Mr John Forbes, writer in Portsoy, to purchase the tenement, part of which was occupied by him, in his business, the price offered being £300, and for certain premises adjoining £70 more; that Mr Forbes was law-agent for the North of Scotland Bank; and that he wished, by making a deposit in that bank, to let Mr Forbes know that he was able to pay the price if his offer was accepted. He therefore, he said, borrowed £200 from his brother John, a flesher in Cullen; £40 from his father; and £58 from Alexander Watson, now an innkeeper at Cornhill. To these sums, amounting together to £298, the defender added £22, which he drew from his bank account at the Union Bank; and in this way the sum of £320 was made up.

The SOLICITOR-GENERAL maintained for the pursuers that the defender's story was incredible, and that he and his witnesses had not spoken the truth.

Mr GORDON, for the defender, said that the case was of the greatest importance to his client and his family, because the jury could not find for the pursuers without holding that the defender and his brother and two sisters had committed deliberate perjury. In all cases, he argued, the pursuer must prove his case, and if there was a doubt, the defender was entitled to the benefit of it. He founded strongly on the fact that Ann Murray had lived for six months after January 1859, and had never made any claim upon the defender, or any complaint to her friends, that the defender had not paid her her money. In reference to the coincidence of the defender lodging £320 in bank on 19th January, he urged that whatever suspicion it might at first sight create, it was not proof; but any suspicion aroused by it was removed by the evidence which had been led. He also maintained that it was highly improbable that if the defender had cheated Ann Murray out of her money, as was alleged, he would have made this deposit in a small place like Portsoy, where everything which happened was known by everyone. It was just proclaiming to the public the theft which he had committed. Finally, it would not do for a jury to rest a verdict against the defender on the simple fact that the money had not been traced. That was a most dangerous ground to proceed upon, for the money might cast up yet, old ladies being in the habit of putting away their money in curious places.

The LORD JUSTICE-CLERK, in his charge to the jury, said that the case was one to be left entirely in their hands. It involved no principle of law, but a simple question of fact; and it was for the jury to judge of the credibility of the witnesses. The deposit-receipt was admittedly received by the defender; and the question is whether he uplifted its contents and is now resting-owing the same to the pursuers, who are Miss Murray's executors?

It was quite true, as stated by Mr Gordon, that in every case the pursuer must prove his issue; but this is a rule which has various meanings and many qualifications, according to the nature of the case. In this case the pursuer must prove that the money was uplifted, and that he has done by the defender himself. He farther undertakes to prove that the money has not been paid. Now, that is a negative; and no one is bound to prove a negative in the same sense in which he is bound to prove an affirmative. Still, undoubtedly, the burden of proof is, in the first instance, on the pursuer. This old lady dies, and when her representatives look into her affairs they find that although she had been possessed of a considerable sum of money six months before, there is no trace of it. They find next that this £320 had been uplifted by the defender; and on 7th November 1859 they direct their agent Mr Wilson to address the following letter to the defender:—

"Macduff, 7th Nov. 1859.

"Sir,—I have, on behalf of John and Elizabeth Byres, executors-dative of the deceased Ann Murray, Portsoy, who died at Reidstack, to apply to you for the key of the room in Portsoy occupied by her, and in which are her articles of furniture—which key you have. To save you trouble, I have instructed your police constable, John Grant, to receive the key from you.

"I understand that, at your desire, Mr William Thomson took an inventory of the articles in the house. I shall be obliged by your sending me it, or a copy certified by Mr Thomson.

"I have also to request you to let me know what became of the £320 which belonged to Ann Murray, and which you on 14th January last drew from the Union Bank, Banff, with £6, 1s. 2d. of interest, and where it is now.

"I shall be glad to hear from you satisfactorily on these points.—I am, Sir, your obt. servt.,

"GEO. WILSON.

"Mr James Forbes, innkeeper, Portsoy."

That letter contained a very reasonable request; and if the defender had then come forward and said, "I handed over the money to Miss Murray, and I don't know what has now become of it," that might have been very satisfactory. But he does not answer the letter at all; and on 19th November he directs his agent to write to Mr Wilson the following letter:—

"Banff, 19th Nov. 1859.

"My Dear Sir,—Mr James Forbes, innkeeper, Portsoy, has handed me for recovery the enclosed account against Ann Murray's executors, consisting of articles supplied to the deceased, and of the expenses of the funeral, amounting to £15, 9s. 5d., subject to the deduction of 20s. received by Mr Forbes in July 1859. The vouchers of the account are in my hands, and you may see them whenever you desire.

"At the end of this account has been added a claim of Mr Peter Forbes, at Reidstack, for board, &c., to the deceased, running from 1st May last up to the time of her decease, and amounting to £6, 6s.

"J. CHRISTIE."

The pursuers farther find that on 19th January 1859 the defender made the deposit in his own name of exactly the same sum as he had uplifted. Suppose that were the case presented, and nothing else, the jury would be very much inclined to infer that the defender had appropriated the money. His Lordship did not say that such was the state of the case, but he stated the circumstances, for the purpose of telling the jury that they had the effect in this case of shifting the burden of proof. Accordingly, the pursuer commenced his case by putting the defender into the box and asking him to explain himself. His explanation is a very curious one. He says he was very intimate with Ann Murray, and she placed great confidence in him; that she asked him one morning to do some bank business for her at Banff, and that he refused to go, because, as he said, he did not think it was quite proper for him to mix himself up with the money matters of another; that she kept at him for about a week, when he consented to go, and got the deposit-receipt from her endorsed blank. It also occurred to him to get a separate writing from her in the following terms:—

"Portsoy, 14th January 1859.

"Mr Rust.—Sir,—Please give the bearer, James Forbes, the whole of my money lying in your bank.—I am, Sir, yours truly,

(Signed) "ANN MURRAY."

This mandate was written by the defender, and signed by the deceased. It is contended that the terms of this mandate negative one of the pursuer's theories—namely, that the object of the deceased sending the defender to the bank was to get up the interest only, as had been Miss Murray's practice. There is a great deal of force in that observation, for the mandate was to get up the whole money. But, on the other hand, if the money was to be redeposited after the interest was paid on a new receipt, it would require for this purpose also to be all first uplifted. The defender says he gave the money to Miss Murray, and took no acknowledgment from her. It was said that it was not usual to do so in such circumstances; but the transaction was a most unusual one, and his Lordship thought that it was very rash in the circumstances not to take an acknowledgment. The defender's sister, Maria, says she saw her brother hand over the money; but it is very singular that while she recollects perfectly well all that was said and done, and describes the appearance of the notes, she is undoubtedly in error as to the silver. The sum was £326, 1s. 2d., and there was and could be but one shilling. Yet she says she is certain there were at least more than two. There is another part of the case which the defender has undertaken, as he was bound to do, to explain—that is, the striking identity of the sum he uplifted and the sum he lodged in his own name. His statement on the subject is very singular. He has not explained why he fixed upon lodging the sum of £320. That was not the amount of the contributions of his friends added together, which was only £298. The pursuers say this explanation given by the defender is all plainly false, and the defender says there is nothing false about it. The defender is corroborated by his brother, and, what is of more importance for him, by Alexander Watson, who had no interest in the parties, and whose evidence there was no reason to doubt. The Solicitor-General said that it was improbable that Watson, who at the time drove a beer-cart for Messrs Younger for £20 a year, besides his board and expenses, should have so large a sum as £58 lying by him, which he could have lent to the defender. But supposing Watson's evidence to be true, it was quite possible that he might have lent and been repaid the money without any other part of the defender's story being true. His Lordship concluded by saying that the duty of the jury was by no means an easy one; that the question depended entirely on the credit to be attached to the defender and his witnesses; and that it was no part of his function to guide them farther.

The jury unanimously returned a verdict for the pursuers.

Saturday, Dec. 23.

OUTER HOUSE.

(Before Lord Kinloch.)

CONNELL *v.* GRIERSON.

Entail—Clause—Destination. Held (per Lord Kinloch)—(1) That a destination in a deed of entail to heirs-female was to be read as meaning heirs-female of the body; and (2) That a destination to "my own nearest of kindred" was