Counsel for the respondent were not called upon.

At advising—

Lord President—In the ordinary case, when under the Judicature Act the pursuer desires to abandon an action after the record is closed, he is allowed to do so on the understanding that the account of expenses incurred is to go to the Auditor to be taxed and reported upon. That, however, is not the rule which is to determine the present question. If the pursuer had abandoned the cause, then there would have been the usual taxation of the accounts, but it would have been open to him to have brought a new action against the defender. What was done here, however, was this—When the case reached the Procedure Roll the pursuer made up his mind to insist no further in his claim against the defender, and accordingly the Lord Ordinary assoilzied the defender from the conclusions of the summons, and fixed a sum which in his opinion would cover all the expenses which ought to have been incurred. His Lordship so acted to prevent the further expense which would necessarily be incurred by a taxation of accounts before the Auditor. I think that the Lord Ordinary acted rightly in the circumstances, and I am for adhering to his interlocutor.

Lord Deas and Lord Mure concurred.

Lord Shand—As your Lordship has observed, we have not before us the case of an action abandoned under the provisions of the statute, when it is usual that the account of expenses incurred by the parties be remitted to the Auditor for taxation. I am not, however, prepared to say that even under the Judicature Act the Lord Ordinary might not in certain circumstances do the duty of an Auditor. I think there are circumstances in which even under the statute the Lord Ordinary might, for the purpose of avoiding further outlay, fix the amount of expense to be paid by the party abandoning. What the Lord Ordinary does in the present case, however, is not to modify in the sense of striking off, but for the purpose of avoiding the expense of an audit fixes a sum, and in so doing I agree with your Lordship in thinking his Lordship has acted rightly.

The Court adhered.

Counsel for Pursuer—Moncreiff—Maconochie. Agents—Maconochie & Hare, W.S.

Counsel for Defender—Watt. Agent—D. Howard Smith.

Thursday, June 8.

FIRST DIVISION.

FLYNNE, APPLICANT.

Poor Roll—A.S., 21st Dec. 1842, secs. 2 and 3, Schedule A—Appearance of Applicant before Minister and Elders of Parish—Certificate of Minister and Elders.

Michael Flynne was an applicant for admission to the poor roll. He received an injury on 1st August 1881, while working in the parish of Lasswade, which caused the loss of a leg, and the proposed action was one of damages against his employer for alleged *culpa* on his part resulting in that injury. After the accident he removed to his native country, Ireland, and resided in County Mayo. In this note he alleged that he was in poverty and in weak health, and unable to travel to Scotland for the purpose of appearing before the minister and elders of Lasswade to emit the declaration required by the 2d and 3d sections of the Act of Sederunt. He further stated that due intimation of the note had been made to the defender in the proposed action. He craved the Court to permit him in these circumstances "to appear before Standish M'Dermott, Esq., resident magistrate, Cloongee, Texford, County Mayo, and emit the declaration or statement as prescribed by the said Act of Sederunt, and upon this being done and upon a certificate, in or as nearly as may be in, the form of Schedule A, under the hands of the said Standish M'Dermott, being produced, to hold that the intimation given to Archibald Hood the defender, and the declaration or statement before the said resident magistrate, are a sufficient compliance with the said requirements of the said Act of Sederunt."

It was stated at the bar that the resident magistrate above named had written a letter to the applicant's agent stating that he knew the applicant, and was willing to give the required certificate if the Court thought fit.

The applicant referred to *Rattray*, 8th July 1824, 3 S. (n.e.) 163; *M'Kellar*, 15th July 1863, 1 Macph. 1114; *Carrigan*, 17th Nov. 1881, 19 Scot. Law Rep. 118.

The Court in the special circumstances of the case granted the prayer of the note.

Counsel for Applicant—Sym. Agent—Thomas M'Naught, S.S.C.

Thursday, June 8.

SECOND DIVISION.

(Before Lords Young, Craighill, and Rutherfurd Clark.)

[Sheriff of Midlothian.

THOMSON *v.* THOMSON.

Donation—Husband and Wife—Deposit-Receipt and Current Account in Bank in Donee's Name—Delivery.

In an action raised by the executor of a deceased person against his widow for payment of two sums of money—one being contained in a deposit-receipt, the other being the balance on an account-current, the defender averred that in pursuance of an expressed intention the deceased paid these sums into the bank on deposit-receipt and current-account respectively in her name, and had thereafter delivered to her the deposit-receipt and the bank pass-book. The Lords, relying upon the defender's testimony, corroborated by the terms of the deposit-receipt and the pass-book, and supported by evidence *aliunde* of the goodwill of the deceased to his widow, and his desire to benefit her, *sustained* the defender's plea that she had right to the sums as a donation, and *assoilzied* the defender.

John Henry Thomson, residing at 16 Springfield Street, Leith Walk, Edinburgh, presented a petition in the Sheriff Court of Midlothian, in the character of executor-dative of the late John Thomson, praying the Court to grant decree against Mrs Mary M'Culloch or Thomson, widow of the said deceased John Thomson, ordaining her (1) to pay the sum of £465, 9s. 10d., with interest thereon, and (2) to deliver to the pursuer the whole writings and documents which were in the said John Thomson's house at the time of his death on 28th February 1881.

The pursuer, who was the only son (by a former marriage) of the late John Thomson, averred that the money sued for formed part of his father's executry estate, which was under his management, and that he was entitled to the delivery of all documents relating to that executry estate.

In her statement of facts the defender made the following averments—On the 25th January 1879 Mr Thomson, in pursuance of an intention which he communicated to the defender to make her a gift, paid into the branch at Newington, Edinburgh, of the British Linen Company Bank the sum of £424, 19s. 10d. upon a deposit-receipt in name of the defender, and at the same time paid into said bank a sum of £100 upon a current account, also in name of the defender. Upon leaving the bank he took along with him the deposit-receipt and bank pass-book for the said sums so paid in by him, and on his return home he handed the deposit-receipt and bank pass-book to the defender, and stated that the sums which these represented he then gave her as a present, gift, or donation from him, to be her own free and absolute property, adding at the same time that the money being in bank in her own name alone she had complete control over it herself. The gift was no doubt prompted by the fact that the deceased had been nursed by the defender through a dangerous illness. The defender took possession of the deposit-receipt and bank pass-book. Prior to the death of Mr Thomson sums were withdrawn on three separate occasions from the said account-current. These were by cheque signed by the defender alone, and were given by her to her husband in loan. Some months before his death the deceased suggested to the defender the propriety of the deposit-receipt in question being put into the drawer used by the deceased for safe-keeping on behalf of the defender. The defender acquiesced in the propriety of the suggestion, and the deposit-receipt was accordingly placed in the drawer on the defender's behalf, the deceased at the same time telling the defender where the deposit-receipt was placed in the drawer, as well as the key of the drawer. Between this time and the date of the deceased's death the defender had frequent occasion to go to the drawer, but as no necessity arose for her removing the deposit-receipt she allowed it to remain there, where it was found after deceased's death, and was then taken possession of by defender as her property. The bank pass-book in defender's name was not considered of such importance, and it remained continuously in the defender's drawer. The sums due under the said deposit-receipt and account-current, as well as the deposit-receipt and bank pass-book vouching these sums, the defender held as her own individual property, and declined to recognise the claim now put forward by the pursuer thereto. They were given by the deceased to his wife, the defender, as a donation, and were her absolute property. The donation was never revoked by the deceased. Prior to the raising of the action the defender delivered to the pursuer all the documents which were in the deceased's house at the time of his death.

The pursuer pleaded—"(1) The defender's statements of alleged donation as between husband and wife, whether *inter vivos* or *mortis causa*, are irrelevant. (2) The alleged donation *inter vivos* can only be proved *scripto*. (3) The defence being unfounded in fact and untenable in law, falls to be repelled. (4) In respect the sum sued for forms part of the executry estate under the pursuer's management, and is in the defender's possession or under her control, she is bound to pay over the same to the pursuer as executor foresaid, and decree falls to be pronounced accordingly. (5) The pursuer, as executor foresaid, is entitled to delivery of all writings and documents belonging to the truster or relating to the executry estate, and the defender ought to be decerned to deliver those in her possession or under her control."

The defender pleaded—"(1) The sums in the said deposit-receipt and pass-book being the absolute property of the defender, she ought to be assoilzied with expenses. (2) The said deceased John Thomson having made a donation or gift to the defender of the sums put by him upon deposit-receipt and in account-current in defender's name, and said donation or gift having never been revoked or recalled by the deceased, the whole sums due under the said deposit-receipt and upon said account-current, together with the said deposit-receipt and the bank pass-book instructing the sum due upon the account-current, belong absolutely to the defender as her own individual property, and the defender should be assoilzied from the conclusions for payment, with expenses. (3) The defender having already delivered to the pursuer, as executor foresaid, all writings and documents belonging to the deceased or relating to the executry estate, in so far as the same were in her possession or under her control, she also falls to be assoilzied from the conclusions for delivery of writings and documents, with expenses."

The Sheriff-Substitute (HALLARD) allowed the defender a proof of the alleged donation, and to the pursuer a conjunct probation. The defender was examined and deponed—"I remember my husband being ill in the beginning of January 1879 from an affection of the bronchial tubes, of which he died. He was pretty seriously ill at the date I have mentioned. I attended him myself, and Dr Burn, Teviot Row, was the medical man who was called in. My husband almost completely recovered from that attack. He had been confined to bed. He was very pleased to have recovered his health, and said he attributed it a good deal to the care that had been taken of him during his illness by me, and by the doctor's orders being carried out. I acted as his nurse myself. He was sufficiently well to go out very soon after he got better. He went out without telling me where he was going. When he returned he found me up in the bedroom, where I was accustomed to sit. I think I was sitting on an easy-chair. He put the deposit-receipt in question into my hand. He had a bank pass-book in his hand, and I think he laid it on the

table. He said, when giving me the deposit-receipt—'That is for you.' I said, 'Is it really mine?' and he said, 'Yes; it is really yours—so much yours that I could not draw it though I wished to draw it without your signature.' I said, 'Oh then, I consider it mine.' He said, 'Well, you may consider it yours—it is yours.' He told me how to use it, and then he began to speak about the pass-book. He said, 'When you have finished one hundred, deposit another, and use it as you require it.' The pass-book was in my own name. I produce the pass-book in question. When my husband spoke about finishing one hundred and depositing another, I understood I was to draw £100 out of the deposit-receipt and put it into my own account with the bank. I then had the deposit-receipt and bank book both in my possession. My husband did not leave the room at that time. About half-an-hour afterwards I opened my drawer and put in the deposit-receipt and pass-book." She was corroborated by a servant as to the feeling of gratitude entertained to her by her husband for her attention to him during his illness; and from her own testimony and that of others it appeared that after this time and up to his death, which took place on 28th February 1881, he had borrowed money from his wife as he required it in small sums. Thereafter the Sheriff-Substitute found, with reference to the sum of £465, 9s. 10d. concluded for in the first prayer of the petition, that the alleged donation by the late John Thomson to his wife (the defender) had not been proved, and that said sum formed part of the executry estate of the said John Thomson; repelled the first two pleas for the defender, and decerned against her in terms of said prayer; and found the pursuer entitled to expenses.

He added this note:—"It would be easy to criticise the defender's evidence, and to show that it is altogether unreliable. This, however, is unnecessary; for even on the assumption that when Mr Thomson deposited the £529, 19s. 10d. in bank in his wife's name he intended to make a gift of that money to her, it is not proved that he carried his intention into effect. On the contrary, such evidence as there is goes to show that the money referred to never passed out of his own possession or control. At the time of his death the deposit-receipt for £424, 19s. 10d. was found in a locked drawer where he was in the habit of keeping his business papers, and any sums drawn from the account-current during his lifetime were so drawn by his directions, and were used by him exclusively for purposes of his own.

"Although the petition has been dismissed as regards the prayer for delivery of documents, the Sheriff-Substitute considers that the pursuer should get expenses without modification."

The defender appealed, and argued — The parole evidence of Mrs Thomson as to the intention of her deceased husband to make her a gift of the sums in question was amply corroborated both by the evidence of witnesses who were aware of that intention and also by the real evidence in the case, *i.e.*, the deposit-receipt and current account. There was therefore sufficient evidence to instruct the defender's contention that there was donation.

Authorities — *Crosbie's Trustees* v. *Wright*, May 28, 1880, 7 R. 823; *British Linen Company* v. *Martin, &c.*, March 8, 1849, 11 D. 1004; *Gibson* v. *Hutchison*, July 5, 1879, 10 Macph. 923.

The pursuer replied—There was no instance where the Court had sustained a gift of a sum of money lodged in bank on deposit-receipt in name of the donee on the evidence simply of the donee. This was the character of the evidence here. It was the evidence solely of the person most interested in the sum. There was no corroboration by the evidence of witnesses who were present when the husband made the alleged donation. The defender's contention must then be repelled.

At advising—

Lord Young—The question here raised is, Whether the sums of money which the late Mr Thomson placed in the bank in his wife's name (consisting of £400 odds on deposit-receipt, and £100 on current account) were gifts to her, and are now her property, or whether they were not intended to be gifts, and thus fell into the executry estate?

The Sheriff-Substitute says—"Even on the assumption that when Mr Thomson deposited the £529, 19s. 10d. in bank in his wife's name he intended to make a gift of that money to her, it is not proved that he carried his intention into effect." And certainly evidence, however satisfactory, of intention to make such a gift, leads to nothing unless the gift be actually made. If the alleged gift consists only in intention, or is inchoate, as not to have taken tangible form, or be merely a gratuitous promise—in fact, if the gift be not actually given—this Court will not interfere in order to complete it.

But here the money in question was in pursuance of an express intention (assuming that the intention is established) paid by the donor into the bank on documents of debt in name of the donee, and the subject of the gift in a sense parted with. That was done, I assume at present, in pursuance of intention. These two documents made the bank a debtor to the donee, and that being so, the documents were, if Mrs Thomson's evidence is to be relied on, delivered to her with an expression of her husband's good will for having nursed him through a serious illness.

Now, I put the question to counsel for the executor in course of the argument—Assuming the intention and truth of Mrs Thomson's evidence as to the delivery of the document, what more could have been done to effectuate it? The answer was, that nothing more could have been done, except that he might have by deed of gift have expressed his intention to make the gift. There is no question here as to the donor's intention; the only question is as to doing all that is necessary to carry out that intention. The money was paid into bank in name of the donee, and the documents of debt given her and the intention assumed, nothing more could have been done. Therefore the Sheriff's ground of finding fails. But it was maintained by counsel for the respondent that if the intention to give depends on the evidence of Mrs Thomson, that must be rejected unless she is better corroborated, because she is an interested party, being the alleged donee. Now, I am not of that opinion, and I know of no principle or authority for it. Of course so material a fact in a donation as the gift could not be established by the unsupported testimony of a single witness. The rule is that one or two facts in a case may be proved by the testimony of a

single witness, but that the whole case cannot stand on the testimony of a single witness unsupported, and I need not say that this Court would not in such circumstances affirm it. But Mrs Thomson's evidence is not unsupported; it is conform to documents called significantly the real evidence in the case. It is also corroborated by the testimony of others, who say the husband expressed an intention to make such a gift.

I am of opinion therefore that there is sufficient corroboration to make it legal evidence, and to entitle the Court to judge of it on the question of sufficiency to supply the facts which it is brought to support.

There was a gift of money completed in so far as there was power to complete it, and as I have no doubt as to the intention of the donor, I think the interlocutor of the Sheriff must be recalled, and the view of its being a gift sustained.

LORD CRAIGHILL—I am of the same opinion. It appears to me that the ground of the Sheriff-Substitute's judgment cannot be maintained, because I am satisfied that if the intention to make the gift is once established all that was necessary to carry out that intention was performed. I am satisfied that there was such intention (1), because he lodged the money in bank in her name, and (2) because of the evidence on that matter given by the defender.

Nothing has been said to make me doubt the credibility of that evidence, and I concur with your Lordship that her testimony, though not sufficient by itself, still, corroborated as it is both by other witnesses and by the real evidence in the case, sufficiently establishes the donation of this money.

LORD RUTHERFURD CLARK—I am of the same opinion. Whatever questions were raised in the discussion, the case ultimately turned, according to the concession of the counsel for the respondent, on a short point—Whether or not in depositing the money in the bank the late Mr Thomson intended to make a gift to his wife?

I am of opinion (1) that there is sufficient legal evidence to establish that he did intend to do so; and (2) I see no reason to doubt the credibility of the evidence led in support of the donation.

The Lords pronounced the following judgment:—

> "Find that on the 25th January 1879 the deceased John Thomson paid to the branch at Newington, Edinburgh, of the British Linen Company Bank, the sum of £424, 19s. 10d. in exchange for a deposit-receipt for that sum in name of the defender, his wife, and at the same time paid to the said branch of the said bank a sum of £100, and directed it to be placed to the credit of the defender on current account then opened by him in her name with the bank: Find that in so paying the said sums he intended to make, and did make, a gift of the same to the defender: Therefore sustain the appeal, recal the interlocutor of the Sheriff-Substitute complained of, assoilzie the defender from the conclusions of the action, and decern: Find the pursuer entitled to the expenses incurred by him in the Inferior Court in relation to the second conclusion of the action."

Counsel for Appellant—Mackay—Thorburn. Agent—John Rutherfurd, W.S.

Counsel for Respondent—Keir—A. J. Young. Agents—W. Adam & Winchester, S.S.C.

Thursday, June 8.

SECOND DIVISION.

[Sheriff of Fife and Kinross.

TODD *v.* ARMOUR.

Sale—Stolen Property—Effect of "Open Market" in Ireland—Vitium reale.

An Irishman raised an action to recover a horse in the hands of a Scotsman, on the averment that it had been stolen from his field in Ireland, and that he was entitled to restitution of it. The defender replied that he had bought it at Falkirk Tryst from a third party who had bought it in "open market" in Ireland. It was conceded that by the law of Ireland such a sale extinguished the *vitium reale* which would otherwise attach to stolen property. The Court *dismissed* the action, being satisfied on a consideration of the proof that the horse had been in point of fact sold in Ireland in "open market" to the defender's author, who thereby acquired an unexceptionable title to sell to the defender.

Sale—Vitium reale—*Where Sale in Scotland and Theft in a Foreign Country.*

Does the *vitium reale* which by Scots law attaches to stolen property apply in cases where there has been a sale in open market in Scotland, but the theft has been committed in a foreign country where such a sale is held to cure the defect in the title?

Opinions—affirmative per Lord Justice-Clerk and Lord Craighill; *negative per* Lord Young.

James Todd, farmer, at Ballynaskergh, County Down, Ireland, presented a petition in the Sheriff Court of Fife and Kinross, in which he prayed the Court to ordain John Armour, farmer near Leslie, to deliver to him a dark chestnut horse belonging to him, and failing such delivery to pay the pursuer the sum of £60 sterling.

The ground of action was stated in the pursuer's condescendence as follows:—The pursuer was on the 3d of August 1881 in the lawful possession of a dark chestnut horse, which was then in a field on his farm of Ballynaskergh. On the morning of the 4th it was stolen. The pursuer learned afterwards that the said horse had come into the possession of a person named David Black, who sold it to the defender for the sum of £23 at Falkirk. The pursuer called on the defender to deliver up the horse to him, but this request was refused.

In his statement of facts the defender made the following averments in reply:—On the 10th August 1881 he was introduced at Falkirk Tryst to David Black, farmer, Portadown, Ireland, who said he had a horse for sale. This horse he bought for £23. The horse was a sooty black animal with four white feet, a white spot on its forehead of a peculiar shape, like a leaf with two tails, a white strip on the near nostril of about two-and-a-half inches in length, and part of his mane grey, which is very uncommon. On or about 3d September Black was arrested