tainly a most indefensible proceeding. Nothing could justify that without the consent of the parents. The respondents, the directors of the institution, seem to have been sensible of that very soon after it took place, and they remonstrated with Miss Stirling, who had carried the children to Nova Scotia, and desired her to bring them back. In that I think they acted quite rightly. But then I think they acted very far short of their duty after the children were brought back to this country, because they allowed Miss Stirling, after she had brought the children to the neighbourhood of Edinburgh, to conceal these children—conceal them from their parents, and also from the respondents themselves.

Indeed there is an appearance on the part of the respondents of an indisposition to require any knowledge of where these children were, and to all applications on the part of the petitioner for access to his children there could be no satisfactory answer made. The consequence was that the children were again carried out of the country. Now, for that I think the respondents must be answerable, because they were thus violating the obligation which they had undertaken, to be responsible for the safe custody of the children while they were in the institution, and to deliver when the parents required them. It is therefore, I think, impossible not to say that the respondents are under an obligation to deliver these children now to the petitioner; and the only question which perplexes one in dealing with the case is, that as the children are not here it may require the lapse of some considerable time, perhaps proceedings in another country, in order to accomplish the object for which this petition was presented. I approve entirely of the spirit in which this minute is expressed, which Mr Lorimer has just read, and I am very glad to find from that that the respondents are now fully alive to what their responsibilities are. But I think it would be hardly consistent with the duty of the Court to abstain now from pronouncing an order against the respondents for the re-delivery of the children. Of course that must be qualified to this extent, that they must have time; and the order which I would propose, with your Lordships' concurrence, to pronounce is to ordain the whole parties called as respondents in the petition to deliver to the petitioner his children James, Annie, and Robina Delaney, named in the petition, and that on or before the first sederunt day in October next; and further appoint the respondents to report to the Court on Thursday 18th July next what steps have been taken in pursuance of this order.

Lord Shand and Lord Adam concurred.

Lord Mure, who had been absent during a part of the proceedings, delivered no opinion.

The Court ordained the respondents to deliver to the petitioner his children on or before the first sederunt day in October next, and further ordained the respondents to report to the Court on Thursday the 18th July next what steps had been taken in pursuance of this order.

Counsel for the Petitioner—James Clark. Agent—E. Denholm Young, W.S.

Counsel for the Respondent—Lorimer. Agent—R. C. Gray, S.S.C.

Tuesday, June 11.

SECOND DIVISION.

MACDONALD AND OTHERS *v.* MACDONALD'S EXECUTOR.

Deposit-Receipt — Donation — Value of Terms of Receipt where Gift alleged.

A deposited £286 in deposit-receipt in a bank in name of himself and B his brother, "to be drawn by them, or either or survivor," and retained the deposit-receipt in his possession. B and his daughter deponed that ten days before his death A, believing himself to be dying, made a donation of the money to B, and delivered to him the deposit-receipt.

Held that donation had been proved on the evidence of the donee and his daughter, corroborated by the terms of the deposit-receipt, as indicating some intention on the part of the deceased to benefit B.

The late John Macdonald died in Edinburgh, aged about seventy, unmarried and intestate, on 22nd December 1887. His brother Alexander Macdonald, 29 Marchmont Road, Edinburgh, was decerned his executor-dative *qua* next-of-kin. He delayed giving up an inventory of the deceased's estate and expeding confirmation, as he declined to include in said estate a sum contained in a deposit-receipt left by his brother, which was in the following terms:—

"*British Linen Company Bank*,
"£286, 19s. 2d. stg. *Inverness, 5th May* 1887.

"Received from Mr John Macdonald, Dochfour, and Mr Alexander Macdonald, his brother, to be drawn by them, or either, or survivor, Two hundred and eighty six pounds, 19/2 stg., which is this day placed to the credit of their deposit account with the British Linen Company."

There was also a deposit-receipt of the same date in the following terms:—

"*Caledonian Banking Company, Limited*,
"£280, 11s. 4d. *Inverness, 5th May* 1887.

"Received from Mr John Macdonald, Dochfour, and Mr Hugh Macdonald, Balmore, Abriachan, Two hundred and eighty pounds, 11/4 stg., repayable to either or survivor, which is placed to their credit on deposit-receipt with the Caledonian Banking Company, Limited."

Hugh Macdonald therein mentioned was a brother of the deceased, and had died in April 1887. The money contained in that deposit-receipt admittedly formed part of the estate of the deceased. Besides the money in these two deposit-receipts the deceased left about £35.

Duncan Macdonald and the children of another brother, as the next-of-kin of the deceased, raised this action of count, reckoning, and payment against the executor in the Sheriff Court at Edinburgh, by which they sought to have the sum of £286, 19s. 2d. included in the estate of the deceased.

The defender averred—"The deposit-receipt for £286, 19s. . . . consisted of moneys belonging jointly to the deceased John Macdonald and the

defender. It was the intention of John Macdonald that the whole of the contents of the said deposit-receipt should belong to and be the property of the defender in the event of his survivance. John Macdonald, some time before his death, delivered over to the defender the deposit-receipt as his sole property, and gifted the contents thereof, so far as belonging to him, to the defender, and the same is his sole and exclusive property."

At proof before the Sheriff the only witnesses examined for the defender were himself and his daughter. He deponed:—"My brother John came . . . to my house about the end of October 1887. He was in bad health at that time, and came to reside with me on that account to see if the change would do him good. . . . His health did not improve after he came down to Edinburgh; he got weaker, and died on 22nd December 1887. I recollect his taking an airing in a cab about ten days before his death. When he came into the house after the airing, he said to me that the doctor had told him he was not likely to get rid of his trouble, and he wished to settle matters. He opened his desk and took out a paper which he handed to me, and said, 'That is for you, Sandy; that is for you wholly.' [Shown deposit-receipt for £286, 19s. 2d., by the British Linen Bank, dated 5th May 1887.] That is the paper which my brother handed to me on that occasion. . . . When I got the deposit-receipt from him, I put it into my own trunk. I never gave it back to him again. It remained in my possession in the trunk until the Saturday night after the funeral." The defender further deponed that he had from time to time handed various sums, amounting in all to about £100, to the deceased for deposit in bank. He believed that this money was included in the deposit-receipt in question. In cross-examination the defender repeated substantially his previous account of the alleged donation. He denied that he had expressed surprise to the pursuers that his brother had inserted his name in the deposit-receipt, and that he had displayed to them any other document than the receipt in question. He was charged by the deceased to look after his brother Duncan, who was weak mentally.

His daughter Margaret Macdonald, aged 30, deponed:—"My uncle died on 22nd December 1887. I recollect him going out for an airing in a cab about ten days before his death. When he came back I helped my father to bring him into the house. He said, 'The doctor told me—and I am afraid he is right—that I won't get better.' He then asked for his writing-desk, and went to it, saying, 'As long as I am able, I would like to settle affairs if I can.' He opened his desk and took out a deposit-receipt by the British Linen Bank, and handed it to my father. I am now shown the deposit-receipt. It was handed to me at the time, and I read it. When my uncle handed it to my father, he said, 'Sandy, here take this; I give it to you wholly for yourself, and I hope that you will remember that Duncan has been my care all my life, and that you will always see to him, that he may never want.' My father put the deposit-receipt into his pocket, and afterwards into his own box."

The only witnesses examined for the pursuers were John Macdonald, aged 30, a nephew, and Maggie Macdonald, aged 35, a niece of the deceased.

They had been summoned to Edinburgh by the defender, but found their uncle dead when they arrived. Their evidence related to circumstances in the defender's house after they arrived, and especially after the funeral, and in some particulars their account of what then occurred, while consistent, differed from that given by the defender and his daughter.

On March 18th 1889 the Sheriff-Substitute (RUTHERFURD) found that the defender had failed to prove donation.

His note contained the following statements—"The Sheriff-Substitute thinks it right to say that the witness Margaret Macdonald, who is a woman thirty years of age, gave her evidence in apparently a very truthful manner. . . .

"But, unfortunately for the defender, the case presents some features which are very unfavourable to his claim. It must be kept in view that the deceased died in the defender's house, at a distance from his friends and relatives, other than the family of the defender, who had uncontrolled access after his death to the repository in which he kept his papers. It would have been easy for him to have made an informal will, or to have left some written instructions with reference to the disposal of his property, but it is said that he died intestate, and no legal adviser was called in. Now, the pursuer John Macdonald and his sister have given an account of what passed subsequent to the funeral, which in several respects directly contradicts the statements in evidence of the defender and his daughter. They say that the defender took both the deposit-receipts out of his own box, whereas the defender says that he only had in his possession the one in dispute, and that the other was in the desk of the deceased. The pursuers also say that the defender expressed surprise at his name having been put in the deposit-receipt, and that he did not at first state that it had been given to him by his brother before his death. They also say that the defender told them that he (defender) had given his brother's gold watch to his daughter Mary (Bella), while the defender and his daughter allege that the deceased gave it to Mary as a present for nursing him; but she has not been examined as a witness. . . .

"In the case of *Ross* v. *Mellis*, 1871, 10 Macph. 197, Lord Deas observed that in none of the cases in which effect had been given to the proof of donation was there any room for doubting the evidence. 'Wherever the evidence was at all doubtful we have invariably refused to give effect to the alleged donation. In a case of this kind we must look to the whole circumstances. It is not a question as to the mere balance of evidence where there is no balance either way. The party alleging donation is bound to overcome the presumption against donation.'"

The defender appealed to the Court of Session, and argued—Donation had been proved. The history of the transaction given by the defender was corroborated by his daughter, and was in itself likely. The terms of the deposit-receipt, though they did not *per se* confer a title, indicated some purpose in the deceased's mind associated with his brother Alexander, when he

deposited the money. There had been delivery here which made the case all the stronger—*Crosbie's Trustees* v. *Wright*, May 28, 1880, 7 R. 823 (Lord President); *Blyth, &c.* v. *Curle*, February 20, 1885, 12 R. 674; *Connell's Trustees*, July 16, 1886, 13 R. 1175 (Lord Shand, p. 1187). Some of the money at least had come from Alexander. The Sheriff-Substitute had placed too much weight upon the slight discrepancies in the accounts of what occurred after the funeral. To refuse the appeal would be equivalent to saying that the defender and his daughter had concocted the story to defraud the other relations, and had committed perjury.

Argued for the pursuers and respondents—The judgment of the Sheriff-Substitute was right. The deposit-receipt *per se* conferred no title—*Cuthill* v. *Burns*, March 20, 1862, 24 D. 849; *Watt's Trustees* v. *Mackenzie*, July 1, 1869, 7 Macph. 930; *Connell's Trustees*, *supra*. There had not been sufficient evidence to overcome the strong presumption against donation. The only witnesses were the defender and his daughter, both interested parties, in whose house the deceased had died, and whose evidence, where it was capable of being tested, had been contradicted—*Ross* v. *Mellis*, December 7, 1871, 10 Macph. 197; *Sharp* v. *Paton*, June 21, 1883, 10 R. 1000. If the deposit-receipt was handed over at all, it was in trust for Duncan, and this as a verbal will was invalid—*Thomson, &c.* v. *Dunlop*, January 9, 1884, 11 R. 453. The argument of intention from the terms of the deposit-receipt here lost its force, because another deposit-receipt taken on the same day was in the names of the deceased and of a brother who was then to his knowledge already dead. Probably the bank suggested the two names for convenience in uplifting the money.

At advising—

Lord Justice-Clerk—The late John Macdonald upon 5th May 1887, and from that time onwards until a short time before his death, had in his possession a deposit-receipt of the British Linen Company Bank in these terms—"Received from Mr John Macdonald, Dochfour, and Mr Alexander Macdonald, his brother, to be drawn by them, or either or survivor, £286, 19s. 2d. stg., which is this day placed to the credit of their deposit-account with the British Linen Company."

Now, the question is, whether that deposit-receipt, which remained in the hands of John Macdonald, was or was not delivered by him as a donation to Alexander Macdonald, the person named in the body of the deposit-receipt. First consider the terms of the deposit-receipt itself. These do not in any way settle whose is the money in the deposit-receipt, but they have a bearing upon that question. They bear that the money was received from those two persons, and that it was payable to either of them or the survivor, and it has been decided in the case of *Crosbie's Trustees* that the terms of a deposit-receipt are matter for consideration in determining the question whether there has been donation by one of the parties to the other. In *Crosbie's* case the deposit-receipt differed in terms from this one, and had been altered from time to time, and had been changed into its final form at a particular date. Here the terms do not seem to have been changed, but they are different from those used in the other deposit-receipt in the names of John Macdonald and his brother Hugh. Some purpose must have been intended to be served by the different terms of these two deposit-receipts. The case for the defender is that the sum contained in the British Linen Company Bank's deposit-receipt was made up from money belonging to both of them. He says that when he was visiting his brother it was put together, and put in the bank by his brother. It is said that that is not a likely thing to have happened in the circumstances. It is not more unlikely than that the deceased should take a receipt in the names of himself and Alexander if Alexander contributed nothing, especially as they did not live in the same place. There is no evidence to support the contention of the pursuers' counsel that the terms of the receipt had been suggested by the bank officials, and we must take it that the terms of the receipt were such as were desired by John Macdonald when he made the deposit.

The case of *Crosbie's Trustees* is of great importance, for it has settled that in such an inquiry as the present "the terms of the deposit-receipt are very important elements of evidence, because they indicate some purpose of the deceased when he took the deposit-receipt in these terms."

Now, the deposit-receipt being in those terms, it is said to have been delivered by the one person named in it, and who had it in his possession, to the other person named in it, and that this took place when the former was in the immediate contemplation of death. The defender and his daughter distinctly concur in the account they give of this matter. They repeat on different occasions, not identically but substantially, the same words. True, there was added to the words of donation a desire that the defender should take good care of his brother Duncan, but having carefully looked into this matter I do not think that this was a condition attached to the donation. It was given with a pious request, not in trust for Duncan. The question comes to be, whether the defender's evidence commends itself to our judgment? I may say at once I believe it, and think that the daughter's evidence is confirmatory of it. It is said that there is contradictory evidence, and undoubtedly there is, but not as to what occurred at the time of the alleged donation, only with regard to what took place after the funeral between the defender and the other relatives.

The question in my judgment is, not whether there is contradictory evidence in this proof, but whether the contradictory evidence so shakes our faith in the evidence of the defenders as to produce doubt in our minds with regard to the donation. The donee is not to be put at the mercy of another interested party by mere contradiction on other matters. The contradictions to receive weight must be such as affect the evidence of donation. I believe the evidence of the defenders, and no substantial doubt has been produced in my mind by the evidence of the pursuers. The discrepancies as to what occurred after the funeral are just such as will occur where parties suspicious of each other are giving an account of what took place. They do not affect the *bona fides* of the defender and his daughter, and have

received, I think, too much weight from the Sheriff-Substitute.

I am accordingly for sustaining the appeal.

Lord Young—I am of the same opinion, and generally upon the same grounds. I venture to point out for myself that although donation was in a sense the question involved here, yet the case was peculiar in this respect, because the true question was whether or not the defender was the lawful owner of this document of debt as creditor therein. It is decided—and I say nothing of the decisions here—that the terms of such a document of debt taken payable to either of two persons, and the survivor will not operate as a destination in the same way as they would if contained in a document of debt granted by another than a banker. There is a great deal to be said in support of that view, and there is a great deal to be said against it, but I only venture to indicate that when the proper case arises it might be re-considered whether there is any real difference between an obligation by a banker and by anyone else, and whether a deposit-receipt is distinguishable from a receipt by the borrower in a bond. Upon the question whether the defender is the lawful creditor we have evidence, and upon that evidence the Sheriff-Substitute, whose opinion is entitled to very great weight, has decided that the defender is not entitled to the deposit-receipt as creditor therein.

Now, what would have been the legal view in the absence of any evidence on either side? The defender is in possession and has the custody of the document; he holds it, his name is on it as creditor therein, he is the only creditor therein in the circumstances which have occurred. Is it of any legal significance that his name stands second, and not first? I think that absolutely immaterial. Therefore in the absence of all evidence I think Alexander, being the survivor and in possession, is in the same position as John would have been in if he had survived and kept possession of the receipt. But there is evidence, and the evidence must determine the question. It appears that John paid money into the bank, being accompanied by Alexander at the time, upon a deposit-receipt in the terms quoted, which he kept. Laying aside in the meantime the only evidence of where the money came from—which is that of Alexander, who says he contributed £100, and that the rest was out of John's pocket, and take it that it was John's wholly. He took the deposit-receipt in these terms, he alone was the creditor, and he was under no obligation to his brother Alexander. He might have got the money, he could have uplifted it and re-invested it, changing the terms of the receipt. All that he kept in his own power by keeping possession of the receipt. It is only upon evidence that I know he paid in the money, and how upon evidence does the receipt pass into Alexander's possession, in whose hands we find it now? The only evidence and the whole evidence upon that matter is this, that some days before John died he handed it to his brother saying, "That is for you, Sandy, wholly," meaning thereby that Alexander was to be in lawful possession of it as creditor therein for his own use entirely. The evidence of Alexander and his daughter has every antecedent probability and likelihood, because the terms of the receipt signify an indication of John's to act as these witnesses say he acted. They signify this intention as clearly as if he had said to a friend, "I intend to give this deposit-receipt to Alexander when I feel my end approaching." It was an expression in writing of intention, not binding upon him, but nevertheless a record of intention at the time of taking the deposit-receipt. It is not from law or upon decisions, but because the human mind cannot resist giving more credence to evidence of something having happened, which was likely to happen, and for which there was an antecedent probability, that we are more ready to believe a highly probable story such as this is. John might have changed his mind, but it was highly probable that he would act as he is alleged to have done.

On these grounds I am of opinion that the findings in fact in the Sheriff-Substitute's interlocutor should be altered, and that we should find that the appellant is in the lawful possession of this document as creditor therein on his own account and for his own behoof.

Lord Rutherfurd Clark—I think the question whether this deposit-receipt was given as a donation *mortis causa* to the appellant a difficult one, but on the whole I am of opinion that the donation was made, and I therefore concur in the proposed judgment.

Lord Lee—I always feel a difficulty in altering the judgment of a Sheriff where that judgment proceeds upon evidence led before him, and if the Sheriff-Substitute here had said he disbelieved Alexander Macdonald and his daughter, I should have thought it exceedingly difficult to reverse his decision, but the Sheriff-Substitute does not say that he disbelieves them. Indeed he says the daughter gave her evidence in a favourable manner, and therefore the question is still open as one of evidence. I think it is not necessary to give an opinion upon the defender's right as holder of the deposit-receipt. That right depends upon the title upon which he held it, and that again depends upon evidence. He held it either as absolute owner or as donee under a donation *inter vivos* or under a donation *mortis causa*. Upon which of these titles the document in qestion was held depends entirely upon evidence. It is therefore not possible to decide it upon the terms of the document apart from evidence. It is not proved that any of the contents of the deposit-receipt came from Alexander, and he was therefore bound to prove donation *inter vivos* or donation *mortis causa*. It is not the same case as if the deceased brother had called in a witness and handed over the receipt in his presence to the defender, saying, "That is yours for yourself." If that had been so it would probably have amounted to a donation *inter vivos*. The question here is, whether there was a donation either *inter vivos*, and revocable, or *mortis causa*, and nothing more, and the *onus* of proving donation lies upon the defender Alexander. I think that question is open, and not decided by the Sheriff-Substitute. After examining the evidence I have come to the conclusion that the great weight of it amounts to this, that there was donation here. I would only add that in considering whether there was donation or not I think it legitimate to look at the

fact that the deposit-receipt was in terms showing an antecedent probability of the deceased acting as he is alleged to have done, and therefore making the account given by the defender and his daughter more likely than it might otherwise have been.

The Court pronounced the following interlocutor:—

"Find in fact that the late John Macdonald delivered the deposit-receipt for £286, 19s. 2d., mentioned in the record, to the defender Alexander Macdonald, to be held by him for his the defender's own behoof: Find in law that the defender is in the lawful possession of the same as creditor therein, and that it does not form part of the estate of the said John Macdonald: Therefore recal the judgment of the Sheriff-Substitute appealed against," &c.

Counsel for the Pursuers (Respondents)—A. S. D. Thomson. Agent—Alex. Ross, S.S.C.

Counsel for the Defender (Appellant)—Sym. Agent—David Milne, S.S.C.

Tuesday, June 11.

SECOND DIVISION.

[Sheriff of Stirling.

SEMPLE *v.* WILSON.

Agreement—Condition—Payment.

A merchant who had bought goods from a farmer whose crop and stock had been sequestrated at the instance of his landlord, agreed to pay cash to the landlord's factor on the condition that he should guarantee delivery of the goods, and in sending a cheque for the price he stipulated that such guarantee should be granted. The factor retained and cashed the cheque, but refused to guarantee delivery of the potatoes.

In an action by the merchant against the factor for re-delivery of the cheque, or for the amount thereof, *held* that the defender was not entitled to retain the cheque except on the condition attached by the pursuer, and that he was bound to repay the amount.

On 2nd November 1887 Thomas Semple, grain merchant, Glasgow, bought 60 tons of potatoes from James MacAuslan, Kirkmichael Farm, Helensburgh, at 40s. per ton, for delivery up to 1st March 1888, payment to account to be made in eight days. MacAuslan's crop and stock having in August previously been sequestrated at the instance of his landlords, the trustees of the late Sir James Colquhoun, he applied to their factor James Wilson, Helensburgh, for permission to carry out the sale, who gave his consent on condition that the price was paid to him, to be applied in payment of rent then due. Shortly after the sale MacAuslan informed the pursuer of his position, and at a meeting with Wilson it was agreed that the price should be paid to him by Semple.

Semple received the account, and acting on his understanding of the agreement concluded at the meeting, he sent on 18th November his cheque for the price, £120, and requested the defender to grant a receipt in the following form:—"£120. — Received from Mr Thomas Semple, grain merchant, 57 West Nile Street, Glasgow, the sum of £120 stg., in full payment of sixty tons potatoes—'Champion'—to be delivered free on rail at Helensburgh, in good order and condition, at time specified, from Mr James MacAuslan, farmer, Kirkmichael, which I bind and oblige myself to deliver."

Wilson next day forwarded to the pursuer a receipt for £120, the price of 60 tons of potatoes sold to him by MacAuslan, to be delivered as *per* agreement entered into between the parties. On the same day Semple wrote to Wilson that he would prefer something more definite, and again requested a guarantee of delivery, to which no written answer was made, although Semple was informed by Wilson's clerk, when he called shortly afterwards at the office, that no further guarantee would be granted.

In March and April following Semple would have taken delivery of the potatoes, but this was not given. Finally he repudiated the bargain, and raised this action in the Sheriff Court of Dumbarton against Wilson for re-delivery of the cheque for £120, or failing re-delivery for payment of the amount, with interest from 18th November 1887.

After a proof the Sheriff-Substitute (GEBBIE) assoilzied the defender, and the Sheriff (MUIRHEAD) on appeal adhered.

The pursuer appealed to the Court of Session, and argued—The cheque was given only upon the condition that Wilson should guarantee the delivery. If he did not undertake to carry out that condition, then he ought to have returned the cheque. To keep the cheque after he had received information that there was a condition attached to the bargain was to intimate that he intended to observe the condition—*Dominion Bank of Toronto* v. *Anderson & Company*, February 10, 1888, 25 R. 324; *M'Grigor* v. *Alley & M'Lellan*, March 4, 1887, 14 R. 535; Bell's Prin. 1244; Rankine on Leases, 355, and cases cited there.

The defender argued—The pursuer and MacAuslan had entered into a bargain for the sale of a specified quantity of potatoes. After Semple learned that MacAuslan was under sequestration at the instance of his landlord he wished to have a guarantee that the latter would not interfere to prevent the execution of the bargain, but the original bargain between pursuer and MacAuslan still subsisted. There was no assignation by MacAuslan to Wilson, and if the pursuer had applied to MacAuslan at the proper time he would have got delivery of the potatoes without any interference from the landlord. Wilson was therefore entitled to keep the cheque, and apply it to the purpose of reducing MacAuslan's rent.

After the hearing the Court ordered the case to be argued before five Judges.

At advising—

LORD JUSTICE-CLERK—The Court having had the benefit of a re-hearing of this case and the assistance of Lord Wellwood in considering it, we are all of opinion that although the contract between MacAuslan and the pursuer may have continued to subsist, and might, with the consent of the defender, have warranted an