LORD SHAND was absent.

The Court adhered.

Counsel for the Pursuers — Dickson. Agents—J. & J. Ross, W.S.

Counsel for the Defenders—M'Lennan. Agents—Ronald & Ritchie, S.S.C.

Friday, December 13.

SECOND DIVISION.

[Sheriff of Argyllshire.

MALCOLM *v.* CAMPBELL.

Parent and Child—Gift ex pietate—Donation—Presumption—Proof—Onus—Mandate.

A person on the occasion of his daughter's marriage bought for £89 a business for his son-in-law, from whom he took no acknowledgment. His whole estate at the time amounted to £500, and his daughter was one of five children.

In an action at his instance for repayment of that sum, *held* that although in the ordinary case donation was not to be presumed, the case raised a presumption of gift *ex pietate*, and that the pursuer had failed to discharge the *onus* which lay on him of proving a loan.

Archibald Malcolm, Paisley, formery dairyman there, sued Alexander Campbell, house-painter, Ardrishaig, his son-in-law, for payment of certain sums said to have been lent by him at different times to the defender.

The defender was married on 22nd April 1884. His wife, one of five children, had up till then been her father's principal assistant in his dairy business, which the pursuer recently sold owing to failing health. His whole estate consisted of about £500. Upon 13th June 1884 the pursuer, who was living with the defender and his wife at Ardrishaig, drew on the Union Bank of Scotland (Limited) in favour of James M'Bain for £89. In consideration of this payment M'Bain transferred his grocery business in Ardrishaig to the defender. The pursuer averred that he paid this sum "on defender's behalf and by defender's instructions." The defender wished to add an ironmongery business to the already established grocer's shop, and the pursuer purchased ironmongery goods at various times for the sums of £13, £5, 17s. 6d., and £7, 1s. 4d. He averred that these goods were bought by him on the defender's instructions. He further averred—"The pursuer, on or about 25th July 1884, gave the defender's wife a sum of £34 to take charge of and keep safely for pursuer, and said sum was taken by defender from her, which sum defender on being applied to by pursuer refused to give up."

The defender admitted the payments, denied that they were made as loans, and averred that the "money and goods were given to him by the pursuer as donations, or tocher on or in respect of his marriage with his daughter."

The pursuer pleaded—"(1) The pursuer having advanced the sums of principal sued for to or on behalf of the defender, and not having been repaid the same, is entitled to decree therefor. (2) The said sum of £34 having been handed by pursuer to defender's wife for safe keeping, and defender having taken the same from her, and thereafter refused to give up same to pursuer, the pursuer is entitled to decree against defender therefor, and for interest thereon."

The defender pleaded—"(6) The defender not being due the various sums sued for should be assoilzied from the conclusions of the action with expenses. (7) The pursuer having made a valid and irrevocable donation to the defender of the money and goods, with the exception of the sums of £8 and £34 sued for, is not entitled to decree as craved in respect of such money and goods given in donation."

On 26th October 1888 the Sheriff-Substitute (CAMPION) dismissed the petition in so far as it concluded for payment of the sum of £34 alleged to have been deposited with defender's wife for safe keeping, on the ground that there was no relevant averment to go to proof. With regard to the other sums concluded for, he allowed the defender a proof by writ or oath of the pursuer of the 7th plea-in-law.

On 15th December 1888 the Sheriff (FORBES IRVINE) allowed to the defender "a proof of the alleged donation, and to the pursuer a conjunct probation," and *quoad ultra* affirmed the interlocutor.

"*Note.*—The Sheriff concurs with the Sheriff-Substitute in holding that in so far as regards the sum of £34 claimed by the pursuer in article 9 of his condescendence there is no relevant averment to go to proof. In regard, however, to the limitation of the proof of the seventh plea-in-law for the defender to writ or oath, the Sheriff has come to a different conclusion.

"It is no doubt stated by Lord Stair (b. i., tit. 8, sec. 2,) that 'It is a rule in law *donatio non præsumitur*, and therefore whatsoever is done, if it can receive any other construction than donation, it is constructed accordingly—whence ariseth that other rule of law *debitor non præsumitur donare*, so that any deed done by the debtor is either presumed to be in security or in satisfaction of his debt.' Yet these rules he adds have their limitations, and these limitations he proceeds to set forth. See also iv. 42, 21, and 45, 17. In similar terms Mr Erskine writes, iii. 3, 92—'No deed is presumed a donation if it can bear another construction, for no person is presumed to do that which in place of bringing him profit must certainly be attended with some pecuniary loss.' And again, iii. 3, 93—'As a necessary consequence of the presumption against donation there arises yet a stronger, *Debitor non præsumitur donare*—for where a debtor gives money or goods, or grants bond to his creditor, the natural presumption is that he means to get free from his

obligation, and not to make a present unless donation be expressed.'

"But it would seem that the force of these weighty opinions—conclusive it may also be said at the time when they were written—has been, to say the least, considerably weakened by a long current of later decisions, and afford ample ground for the statement by Mr Nicholson, Note (d) to Ersk. iii. 3, 92, that 'like most other mere presumptions of fact the presumption against donation has been much weakened by the changes in the law of evidence, which tend to admit all circumstances and documents, leaving the consideration of their weight to the Court or jury. The presumption cannot now be said to do more than place the *onus probandi* in the first instance on the party pleading donation.' See Dickson on Evidence, edition 1887 (by Grierson), secs. 158-165; *Balfour* v. *Balfour's Trustees*, March 10, 1842, 4 D. 1044, a case which underwent the most thorough discussion, and in which all the authorities were reviewed; also *Scott* v. *Scott*, June 2, 1846, 8 D. 791.

"It is true that in *Robertson* v. *Robertson*, January 9, 1858, 20 D. 371, it was held that 'proof of an allegation of donation was competent only *scripto vel juramento*, but it has been laid down in later cases that pure donation equally with donations *mortis causa* may be proved by parole—*Wright's Executors* v. *City of Glasgow Bank*, January 24, 1880, 7 R. 527; *Thomson's Executors* v. *Thomson*, June 8, 1882, 9 R. 911; and opinion of Lord Deas in *Sharp* v. *Paton*, &c., June 20, 1883, 10 R. at p. 1008 of the report."

At the proof the pursuer deponed that the advances were made in loan, and that he had taken no acknowledgment for them. With regard to the ironmongery goods he deponed—"I did not get any instructions from defender to purchase these things. I thought that when he was starting the shop I would make the shop better and the like of that, and I might have been stopping with him yet." He further declared—"When defender spoke about money for the business I asked him if his father would not put his name down along with me, and he said no, his father had nothing. . . . Defender and I went up to Paisley; we went to Glasgow on the same day and called on James Taylor junior, ironmonger, and Gentles, the papermaker, and we went to Mr Semple's office. Mr Semple (the pursuer's law-agent) had charge of money for me; he had the proceeds of my sale. The money came to about £400 altogether. The object of my calling on Mr Semple was to ask if the money could be got to assist the defender." It appeared that in June 1884 the pursuer's estate amounted to about £500.

Mr Semple was not called as a witness by either party.

The defender deponed that the sum of £89 was given as a marriage present—that he was not able to marry without this assistance. With reference to the interview with Mr Semple he deponed—"He (the pursuer) said to Mr Semple that he was going down to buy a stock for me, and that was all. (Q) Was there anything said then to indicate whether it was a gift or loan?—(A) No; and Mr Semple never interfered in my hearing."

Several disinterested witnesses deponed to having spoken of the advance of £89 to the pursuer without having heard it suggested that the money was advanced in loan.

It appeared that on the sale of the pursuer's business he had presented to some of his family who had been engaged in it certain parts of the business stock. He declared, however, that their value was not equal to the advance to the defender.

Upon 31st January 1889 the Sheriff-Substitute found "that the pursuer had failed to prove his averments relative to" the sums of £89 and those paid for the ironmongery goods, sustained the seventh plea-in-law for the defender, and assoilzied him from the conclusions of the petition.

Upon 10th April the Sheriff affirmed that interlocutor.

"*Note.*—The Sheriff cannot say that he has much difficulty in concurring with the Sheriff-Substitute as to this case. The general evidence on the part of the defender is given with almost exceptional clearness, and what is of the first importance in such a case, the testimony of witnesses unconnected with the defender or his family, and thus presumably unprejudiced and disinterested, is to the same effect.

"As regards certain payments by the defender to his father-in-law when he feared that the landlord was going to poind his things if he did not pay the rent, these seem to the Sheriff to have been given simply *ex pietate* from natural affection and duty rather than in discharge of any legal obligation."

The pursuer appealed, and argued—Proof of donation must be clear and unambiguous, but it was not so here—*Ross* v. *Millis*, December 7, 1871, 10 Macph. 197. The money had been given by desire of the defender, who was bound to repay it. The defender had not discharged the *onus* of proving donation. The pursuer had an estate of about £500 altogether, and it was not to be presumed that he would give such a large part of his means to one of the children. There was not sufficient ground for holding that the money was given *ex pietate*—*Henderson* v. *Henderson*, June 12, 1839, 1 D. 927. The evidence of the defender and his wife was not enough—*Crosbie's Trs.* v. *Wright*, May 28, 1880, 7 R. 823. The pursuer's evidence must prevail.

The respondent argued—There was no inequality in the sum given to the defender's wife in relation to the other sums given to the remaining children of the pursuer. In the circumstances the presumption was that the pursuer had given to the defender and his wife the sums sued for as tocher—Dickson on Evidence (Grierson), secs. 158 and 159. No doubt in cases as between children one who had received a sum of money from his parents might be called upon to collate, or to impute it to legitim,

but that did not affect the principle that sums of money given to children in such circumstances as the present, which were not clearly meant to be given in loan, were to be taken as given *ex pietate*—*Nisbet's Trustees* v. *Nisbet*, March 10, 1868, 6 Macph. 567; *Farquhar's Trustee* v. *Stewart*, February 27, 1841, 3 D. 658; *Anderson's Trustees* v. *Webster*, October 23, 1883, 11 R. 35.

At advising—

LORD LEE—The first question is as to £89 which the pursuer alleges to have been paid by him "on defender's behalf and by defender's instructions," as the price of a business bought by the defender.

The documents which are produced show that £89 of the pursuer's money was paid to Mr M'Bain for the premises sold by him to the defender.

The question is whether the money was paid to M'Bain by the defender's instructions as alleged on record, or whether the circumstances disclosed in evidence do not rather raise a presumption that it must have been a payment made *ex pietate* by a father to his daughter and her husband with a view to her establishment in life.

The first observation one would make with regard to the pursuer's averments is, that he took no acknowledgment for the money. It was paid on the occasion of the daughter's marriage, and on account of a business then purchased by the man who married the pursuer's daughter.

Now, I think that the evidence, although pretty evenly balanced, rather supports the defender's view. I do not read the pursuer's evidence as altogether inconsistent with the defender's. He says that the defender spoke to him about money for the business, and that he (the pursuer) asked him if his father would not "put down his name along with me." And when he was told that the defender's father had nothing, it plainly appears that the pursuer went with the defender to Mr Semple (pursuer's agent in Paisley) for the purpose of arranging it. Mr Semple is not examined by either party, and therefore it can only be said that he neither corroborates the pursuer nor contradicts the defender. But it is remarkable that the defender distinctly swears the pursuer told Mr Semple he was going to buy a stock for him, and that the pursuer admits that the object of calling on Mr Semple was to ask if the money could be got to assist defender. That seems to indicate that there had been a proposal by the defender that money should be given him to aid him in setting up in a business. Now, assuming that the evidence is evenly balanced, we have the father-in-law paying £89 on account of the husband of the child who was marrying. That left him with about £400 and four other children. I think it is not unreasonable to presume that on such an occasion and in his circumstances he should make such a provision. If the balance of evidence be equal, much will depend on the question on whom the *onus* lies. On that question of *onus* we have heard an argument, and have had authorities cited to us. Now, I assent to the doctrine in the Sheriff's note that donation is not presumed, but where the person said to have made it is under a natural obligation to provide for the person to whom it is said to be made, there is no *onus* on the person receiving. The presumption rather is that it may have been a gift *ex pietate*. That is the principle of the case *Nisbet's Trustees* v. *Nisbet* in 1868. Here the pursuer, the father, was certainly under some natural obligation—not, indeed, an obligation to provide a tocher, but to support his child—and when he made payment of £89 to buy a business for his daughter's husband, my opinion is that the *onus* of proving that he did so otherwise than as a donation lies on the pursuer rather than on the defender, and I think the pursuer has failed to prove this.

Therefore as regards the £89 I think the pursuer's case fails. Even had the *onus* been on the defender, I am inclined to think that the balance of evidence is in his favour. But I put my opinion rather on this, that the pursuer has not established his allegation.

As to the sums said by the pursuer on record to have been paid to Taylor for goods ordered by him (pursuer) on the defender's instructions, I think his case fails, because it appears from his own evidence that he had no instructions at all to buy the articles in question.

As to the sum of £34 mentioned on record, the pursuer's counsel said nothing against the Sheriff's judgment, and it must consequently be affirmed.

LORD KYLLACHY—I am of the same opinion. As to the three sums which the pursuer says he paid to Taylor there is no doubt. There is no legal evidence of loan, and there is no proof of mandate. The pursuer's case therefore fails because he fails to instruct any contract on which he can sue.

As to the £89 paid to M'Bain as the price of the business in Ardrishaig, I agree with the Sheriffs, but not quite on the same grounds. They have held that the *onus* rested on the defender to prove donation, and that he has discharged that *onus*. I do not agree with that view of the proof. Apart from what appear to be the relations and circumstances of the parties, the only thing I think proved is that the pursuer bought this business on the defender's behalf, and with his authority, and that he paid for it, and that the defender got it, and still holds it. But the question is, what, looking to the relations of the parties, is the legal presumption as to the footing on which this took place? In the general case it is clear that the presumption would be for repayment. A mandatory is in general entitled to reimbursement of his authorised outlays. But the presumption is the other way where, as here, the case is one between parent and child, and especially where the occasion of the advance is the marriage of a daughter, and the advance is made to her husband at the time of the marriage. There the presumption is not for repayment, but

for donation, or, more properly, for tocher or advance to account of legitim. In short, the legal presumption is that which received effect in the case of *Nisbet* and the other cases of that class. It is, I think, settled by these cases that where a father makes advances to a child for his or her outset in life, and takes no document of debt, that advance is presumed to be to account of or in satisfaction of legitim.

It is in my opinion clear that the present case fails, and therefore I concur with the result of the Sheriff's judgment.

LORD JUSTICE-CLERK—I also concur. It was urged as a reason against the donation that the sum of £89 was so much in excess of what would have been a reasonable gift by a man in the defender's position to make to his child on her marriage as to make it most unlikely that it was advanced as a gift. But I do not consider it to be made out that there was any such extravagant disproportion between this sum and his other means as to exclude the idea of a gift. I think the pursuer's estate at the time may be taken to have been about £500. He had £400 in cash after the bond was paid off, and he had some stock besides, which belonged to the business which he was giving up. He felt his health failing, having had paralytic seizure, and his business was, from want of ability to attend to it, becoming unprofitable, and it was very natural for him to think that if his daughter were respectably married to a man whom he could set up in business that would the be best prospect of comfort for himself in his old age. If he set up her and her husband in life that would provide an asylum for him in his remaining years. With that view, as it appears to me, he advanced this £89 out of the £500—a sum not unreasonable, seeing that Mrs Campbell was one of five children, and indeed less than she might have received if he had died then.

Now, I agree with your Lordships that in such a case—the case of a father making a provision for a child and her husband on her marriage—the ordinary presumptions do not apply. Such cases are frequent. An illustration, which is of frequent occurrence, is that of a parent handing a sum of money to a daughter on her wedding-day—for example, laying an envelope with a bank-note of large value on her plate at the wedding breakfast. The child could not, surely, be asked after an interval to return that sum with interest as having been an advance by way of loan and not a donation. I think this case is substantially the same. The ordinary rule that donation is not to be presumed, and that the receipt of money implies an obligation to repay it, does not necessarily apply in such a case, in which it is according to the ordinary and natural course of things that there should be such a gift as the defender maintains. I think that the *onus* was therefore on the pursuer to prove his case rather than on the defender to rebut a presumption against donation. The Sheriffs treated the case as an ordinary one with a presumption against donation, and appointed the defender to lead. They hold he has discharged that *onus* laid upon him, and they have reached a result which is in consistency with what I hold to be right. Therefore I am for affirming their judgments. But at the same time I think it right to point out that an improper burden was put upon the defender, as it might lead to great injustice to deal with such a case as is done with those in which there is not the special feature which exists in this case, and to which I have referred. This case must not be a precedent for putting the *onus* on a defender in similar cases in future.

The Court pronounced this interlocutor:—

"Find that the pursuer does not now maintain his averments with regard to the sums of £34 and £8 specified in the condescendence: Find that the pursuer has failed to prove his averments relative to the sums of £13, £5, 17s. 6d., and £7, 1s. 4d., referred to in articles 5, 6, and 7 of the condescendence: Find that the sum of £89, referred to in articles 3 and 4 of the condescendence, was advanced by the pursuer to or for behoof of his daughter and the defender, her husband, on the occasion of their marriage without taking any document of debt, and without any agreement as to repayment: Therefore dismiss the appeal, and of new assoilzie the defender from the conclusions of the action," &c.

Counsel for the Appellant—A. S. D. Thomson — Greenlees. Agent — David Dougal, W.S.

Counsel for the Respondents—R. Johnstone—Sym. Agents—Forrester & Davidson, W.S.

Saturday, December 14.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

GOWANS AND OTHERS (GOWANS' TRUSTEES) *v.* GOWANS AND OTHERS.

Process — Multiplepoinding — Reclaiming Note—Competency.

The Court of Session Act 1868 (31 and 32 Vict. cap. 100), sec. 53, provides—"It shall be held that the whole cause has been decided in the Outer House when an interlocutor has been pronounced by the Lord Ordinary which, either by itself or taken along with a previous interlocutor or interlocutors, disposes of the whole subject-matter of the cause or of a competition between the parties in a process of competition, although judgment shall not have been pronounced upon all the questions of law or fact raised in the cause; but it shall not prevent a cause from being held as so decided that expenses if found