Friday, November 29.

FIRST DIVISION.

[Lord Salvesen, Ordinary.

BROWNLEE *v.* BROWNLEE.

Donation—Inter vivos Donation—Proof of Intention—Onus of Proof.

When one in possession of land, corporeal moveables, or money, alleges donation as a title, on challenge by another, representing the alleged donor either by special or universal title, the *onus* is upon the donee to prove, not only delivery, but also *animus donandi* on the part of the donor, and in this respect there is no difference between a donation effected by means of deposit-receipt and other donations.

On October 19, 1905, Mrs Margaret Irvine or Colquhoun or Brownlee, 18 Carrington Street, Glasgow, widow and executrix of the late Robert Brownlee senior, 24 Burnbank Terrace, Glasgow, brought an action against Robert Brownlee junior, Merrylee, Cathcart, for payment of the sum of £2000, with interest from March 15, 1904. The said sum was the amount contained in a letter of guarantee granted by the defender to his father, the said deceased Robert Brownlee senior, who had given a mandate to his law agents to pay one of his daughters, Mrs Marion Brownlee or Barr, £5000, and received the said letter of guarantee guaranteeing payment of £2000 thereof by another daughter, Catherine.

The mandate to the law agent and the letter of guarantee were as follows:—

"41 West George Street,
"Glasgow, 23*rd February* 1904.

"James Findlay, Esq., Writer, Glasgow.

"Dear Sir,—I hereby authorise you to make payment to my daughter Mrs Marion Brownlee or Barr of the sum of Five thousand pounds, in exchange for a discharge by her of her right of legitim and of all other claims which may be competent to her against me, my son Robert, my daughter Catherine, and Mrs Margaret Irvine or Colquhoun or Brownlee, or any of them.—Yours faithfully, ROBERT BROWNLEE.

"Alex. Agnew, of 41 West George Street, Glasgow, law clerk, *witness.*

"Robert Wyburn, of 41 West George Street, Glasgow, clerk at law, *witness.*"

"Glasgow, 23*rd February* 1904.

"Robert Brownlee, Esq.

"Dear Father,—With reference to the foregoing, I hereby guarantee payment to you by my sister Catherine of the sum of Two thousand pounds towards payment of the within-mentioned sum of Five thousand pounds.—Yours faithfully,

"ROB. BROWNLEE JR.

"Alex. Agnew, of 41 West George St., Glasgow, law clerk, *witness.*

"Robert Wyburn, of 41 West George St., Glasgow, clerk at law, *witness.*"

The *facts* of the case are given in the opinion (*infra*) of the Lord Ordinary (SALVESEN), who, after a proof, on November 6, 1906, gave decree for £1950, with interest from March 15, 1904, and expenses.

Opinion.—"The late Robert Brownlee senior was thrice married. By his first marriage he had one daughter, now Mrs Barr. By his second marriage he had two children, the defender and Catherine Brownlee. During the lifetime of his second wife he contracted an intimacy with Mrs Colquhoun, the pursuer in this action, who was then a widow. After the death of his second wife he continued this intimacy with Mrs Colquhoun until 1901, when he married her. The defender and his sister were much opposed to this marriage, and it was kept a secret from them, at all events from Catherine Brownlee. Although the deceased continued on affectionate relations with his wife and regularly visited her, they did not live together, but I see no reason to doubt the pursuer's statement that he would have married her much earlier but for his fear of the defender and Miss Brownlee.

"The deceased was in business for many years as a timber merchant, and was so successful that at one time he seems to have been possessed of a fortune of over £100,000. During his lifetime he distributed his means amongst his near relatives, so that at the time of his death he was absolutely without means, and his funeral expenses have not yet been paid by any of those who benefited by his bounty. The pursuer is his executrix and universal legatory under a holograph settlement which he executed about a year before his death.

"In 1891 the deceased made over to the defender a sum of £30,000, which is admitted by him to have been in large measure a gift. There is contemporaneous evidence that the deceased intended only to lend this sum to his son, but he did not obtain any acknowledgment of the terms upon which the money was given, and the defender refused to give any such acknowledgment, maintaining that the money had been gifted to him. Some years later Catherine Brownlee received a sum of £17,000, in respect of which she granted a full discharge of her rights of legitim. She said in evidence that she told her father at the time that notwithstanding this discharge she would expect him to make her further payments, and she admits having received at least £2100 worth of shares subsequently. The pursuer also from time to time obtained sums of money from the deceased, but there is no evidence which enables me to fix the amount. The defender and his sister seem to have entertained feelings of intense animosity towards Mrs Colquhoun, so much so that Miss Brownlee admitted in the witness-box that Mrs Colquhoun was to her like a red rag to a bull, and that she could not control either her language or her actings in her presence.

"In the beginning of 1904 Mrs Barr, having heard of her father's extensive alienations of his estate, thought that it was time that she too was putting in a claim for a share. She had reason to believe from what her father had told her that one-third

of the sum of £30,000 transferred to the defender's account had been intended as a provision for her. Her father seems to have recognised the justice of her claim, and negotiations were opened between the agents of the parties, which resulted in the deceased undertaking to pay Mrs Barr a sum of £5000. A hitch occurred in the settlement due to the fact that the deceased's only available means at that time seem to have consisted of a sum of £3000 due to him by the limited company which had taken over his business and mills. He accordingly endeavoured to withdraw from his obligation. The defender was aware that Mrs Barr claimed that a share of the money which had been transferred by his father to him had been so transferred for her behoof, and he was accordingly interested in having a settlement effected. Some negotiations followed, and finally a meeting took place on the 23rd February 1904, at which Mrs Barr agreed, on payment to her of £5000, to discharge her right of legitim and all other claims which might be competent to her against the deceased, the defender, Miss Catherine Brownlee, and Mrs Colquhoun, or any of them. In order to get this settlement carried through, the defender at the same time wrote and delivered the letter of guarantee which is printed in the record. He says that before doing so he had the authority of his sister Catherine to pay over a sum of £1718 which was standing at her credit in his books, and that he took the risk of inducing her to contribute also the balance. At the time that this arrangement was made the defender's position was that he declined to contribute any funds towards a settlement with Mrs Barr out of his own pocket, although he strongly resisted a proposed arrangement between Mrs Barr and the deceased that she should accept £3000 from him and have her claim against the defender reserved.

"Mrs Barr and her agent naturally expected that the settlement would be carried out at once, but as there was some delay in doing so, Mrs Barr served an action on the deceased for payment of the £5000. Further procedure, however, was obviated by the deceased paying on 14th March the sum at his credit in the books of Brownlee & Company, Limited, amounting with interest to £3018, 14s. 10d. About the same date the defender signed a cheque for £1718, 8s. as his sister's contribution to a settlement, but refused to make any further payment. The balance of £262 was thereupon advanced by the pursuer in order that the settlement might be carried through, and this was accordingly done. In return for the £5000 Mrs Barr delivered a discharge in terms of the letter of 23rd February 1904.

"The sum of £1718, 8s. paid by the defender's cheque is said to have consisted of a sum of £1653, 8s. 6d. and interest from 24th December 1903, which at that date stood at the credit of the deceased in the books of the defender, and bore to have been paid in cash. In the same books the exact amount is credited to Miss Brownlee on the same date, and it is to this transaction that the bulk of the evidence relates.

"The pursuer's case is a perfectly simple one. She sues upon the guarantee for £2000, which she found in the repositories of the deceased. She maintains that according to its true construction the defender guaranteed the payment by his sister Catherine out of her own funds of the sum of £2000 towards payment of the £5000 which the deceased had agreed to pay Mrs Barr, and she says that she has now discovered that no part of that sum has been contributed by Miss Brownlee. The deceased received no obligation from Miss Brownlee to pay any sum, and accordingly the pursuer now seeks to enforce the guarantee against the defender to its full amount.

"On record the defender disputes his liability to make payment of any sum, his defence being that his father wrote to him to make up the balance of £262, 17s. 3d., and that as the result of an interview between the parties he waived all claim under the guarantee. It is not, however, now disputed that the defender cannot rely upon this alleged verbal waiver as a discharge of his obligation, and that in any event he is liable for a sum of £281, 12s., being the difference between the £2000 guaranteed and the £1718, 8s. On the other hand the pursuer has not endeavoured to prove that the sum of £50 which was included in that remittance was not paid out of the proper funds of Miss Brownlee, and accordingly the sole controversy between the parties now relates to the sum of £1653 already referred to. The defender's case on record is that this sum was gifted by his father to Miss Catherine Brownlee on 24th December 1903, and that accordingly when he remitted it on 16th March thereafter he to that extent implemented his guarantee.

"On the motion of both parties a proof was allowed *habili modo*, and parole evidence bearing on the transaction of 24th December was led without objection. The defender's counsel, however, now pleads that the documentary evidence is all that can competently be looked at, and that that evidence instructs that there was in effect an assignment by the deceased to his daughter of this sum of £1653; that either this assignment was by way of gift or was made in trust for behoof of the grantor; that in the latter case the trust can only be established by the writ or oath of the trustee; and that the pursuer's position in this process cannot be any better than if she had brought her action against Catherine Brownlee for payment of the £1653. He protested accordingly against the view that it lay upon the defender to instruct that a donation of £1653 was made to Miss Brownlee on the occasion in question. This ingenious argument, which I hope I have correctly apprehended, was supported by a reference to the case of *Dunn*, 25 R. 461.

"In order to deal with this argument it is necessary to consider what are the documents founded on. They consist, in the

first place, of an account-current between the deceased and the defender. It contains an entry opposite the date 24th December 'To cash, £1653, 8s. 6d.,' which squares the account, and contains a docquet signed by the deceased in these terms, 'Settled this date.' There is also a simple receipt of the same date for the same sum. These are the only documents under the hand of the deceased, and so far as they go they instruct that the account was settled by a payment in cash. It is admitted, however, that no cash passed. The defender, however, founds upon two other documents, the first a simple receipt, bearing date 24th December 1903, in favour of Miss Brownlee for the sum of £1653, 8s. 6d., signed by himself, and a corresponding entry to her credit in his books. These four documents, taken together, he contends are equivalent in law to a simple assignment under the hand of the deceased in favour of Miss Catherine Brownlee. If accordingly an action had been brought against Miss Brownlee she would have been entitled to have pleaded the Act of 1696, and as no document has been produced qualifying the absolute character of the assignment, the pursuer's case must necessarily have failed, unless she had chosen to refer it to the oath of the trustee.

In my opinion this argument fails on two grounds. In the first place, I do not think that the documents are to be treated as equivalent to a formal assignation by the deceased in favour of Miss Brownlee. If such a document had been subscribed there would have been *prima facie* evidence of the authority to transfer. Here the documents unconnected by parole evidence instruct no authority. The case of *Dunn* v. *Pratt* is differentiated, because the pursuer himself supplied the link that would otherwise have been required by averring that the title to the property had, by his authority, been taken in the name of the defender. In the second place, the Trust Act can, I think, only be pleaded by the alleged trustee, and not by a third party. The defender suggests that an action for the £1653, 8s. 6d. might properly have been directed against Miss Brownlee. I cannot conceive what claim the pursuer could have had against her. On the assumption that the £1653 belonged to the deceased, it has, so far as Miss Brownlee is concerned, been paid. The action against the defender is based on his own letter of guarantee that £2000 of her money should be made available for payment of the money due to Mrs Barr.

"The question, however, remains, whether the £1653 was, in March 1904, the property of Miss Brownlee or of the deceased. If it was Miss Brownlee's, it can only have become so by its having been gifted to her by the deceased on the 24th of December. The *onus* of proving donation is, of course, upon the defender; but I am far from saying that the evidence of the donee and of the defender, who is mainly interested in supporting the theory of donation, might not be sufficient, corroborated as it is by the receipt in the deceased's own hand, if that evidence had satisfied me that the deceased intended to make such a donation, and fully understood that he had done so. The value of the receipt as an adminicle of evidence is, however, completely destroyed by the letter No. 85 of process and the subsequent letter, the draft of which is No. 94 of process. The first of these letters is dated 19th January 1904, less than a month after the alleged gift, and followed upon an examination of the deceased's account by him in the books kept at the office of the limited company. It is in these terms — 'Yesterday I understood you to say that my account with Mr Robert was squared, while according to your own statement of 24th December last there was at that date a balance of £1653, 8s. 6d. in my favour. Will you kindly explain by return what became of this balance, and oblige.— Yours truly, Robert Brownlee.' The reply to this letter, dated 20th January (No. 94) was admittedly instructed or dictated by the defender, and is a merely formal letter that the statement had been settled 'as per enclosed copy receipt.' To this a reply was sent asking particulars of the alleged settlement in a perfectly civil way. The defender does not think he received a letter in these terms; but I am satisfied from the evidence of Sinclair that he did, and that it made him very angry. The letter itself was destroyed and was never answered. These two letters are, to my mind, most instructive. They show that the deceased Robert Brownlee did not know when he wrote them that he had made a gift of the money to his daughter, and, what is even more important, the defender did not venture to suggest that at the time, although in evidence he puts forward a more or less circumstantial story. If he believed that his father's memory was failing him nothing would have been easier than for him to have reminded his father of what had taken place, and of the £1653 having been transferred to his sister's name with his authority. The letter of 20th January is, to my mind, most disingenuous, because it relies on a receipt for payment of a sum in cash which the defender well knew had never been made.

"It does not avail the defender to say, as he now does, that the two letters I have referred to were written by young Colquhoun, and that his father could not have known the contents of what he was subscribing. If that were so it would equally apply to the receipt and docquet on the account, and would destroy their value as adminicles of evidence in support of the alleged donation. But further, I am of opinion that if there was undue influence used, it was by the defender and his sister, and not by the Colquhouns; and an incident which arose later, and which depended mainly on the evidence led for the defence, illustrates this.

"The defender says he received a third letter, now destroyed, from his father, asking him for payment of the balance of £262, being the amount which had been supplied by Mrs Colquhoun in order to make up the £5000. The defender was

admittedly due this, and even a larger sum, under the guarantee; but the receipt of the letter seems to have put him into a violent temper. He at once went off to his father, and according to Miss Brownlee there were high words, I should imagine entirely on the defender's side, which resulted in the defender's father, an old man of 88 or 89, apologising for having made such a demand. This matter is founded upon by the defender in order to establish a verbal waiver by his father of what is now admitted to be a good claim of debt. It could obviously not be used for such a purpose with any effect, seeing that the obligation said to be verbally waived rests upon a writing preserved by the obligee; but it throws a strong light on the defender's methods of dealing with his father, and of the dominant influence which he possessed over him.

"I am not overlooking the fact that at the same time as the deceased is alleged to have made the gift of money to his daughter, he also executed gratuitous transfers in her favour of certain shares, and that these have not been challenged. There is no evidence, however, in this process, such as we have in the two letters before referred to, that the deceased did not know what he was doing; and the two transactions, therefore, stand upon an entirely different footing.

"With regard to the parole evidence of gift, it consists almost entirely of the evidence of the defender, but slightly corroborated by his sister, for at the interview when the gift is said to have been made nothing seems to have been said by the deceased; but he simply signed the documents, which were already made out for his signature, without observation. The conclusion which I draw from the evidence is that the deceased knew that the money was being transferred into his daughter's name for his behoof, but that he never intended to make her a present of it, and what Miss Brownlee is reported to have said to Mrs Barr is strong confirmation of this theory. It may have been in the defender's mind that he would be able to appropriate this sum standing in his sister's name in his books towards implement of the guarantee, and that he had previously obtained her consent to his doing so, but if, as I hold, it was really the deceased's money, this will not avail the defender. Besides, I do not believe that Miss Brownlee was the kind of person who would readily have consented to give up to the Barrs so large a sum as £1653 if she really thought that it belonged to herself. On the other hand, the defender was most anxious to have a settlement with the Barrs carried through, so that he might be protected against claims at their instance with regard to the £30,000—a matter in which Miss Brownlee was not concerned.

"As regards the interval of time which elapsed without any challenge by the deceased, I attach very little importance to it. At his age, and in the state of health in which he was, it was very unlikely that he should wish to expose himself to further altercations with his son.

"On the whole matter the conclusion which I reach is that the defender has failed to prove the alleged donation of £1653, 8s. 6d., and that decree falls to be pronounced against him for the sum sued for, less £50 provided by Miss Brownlee towards implement of the guarantee."

The defender reclaimed, and argued—The entries in the defender's books showed that Brownlee senior had discharged his right to the sum of £1653 in question conditionally on its being given to his daughter Catherine, and the transfer of the money was proved. A valid donation had therefore taken place unless the pursuer could prove a latent trust. That could only be done by writ or oath of the trustee, and the pursuer had not done so. Here there was no question as to *animus donandi*, for there had been a complete transference to Miss Brownlee by *inter vivos* gift, her father being divested, and her title being complete—*Macfarlane's Trustees* v. *Miller*, July 20, 1898, 25 R. 1201, Lord Adam at p. 1208, 35 S.L.R. 934. The cases cited by pursuers where the *animus donandi* must be proved were those in which transference was incomplete, or rested on documents of title which might be ambiguous, *e.g.*, deposit-receipts — *Macfarlane's Trustees* v. *Miller*, *ut supra*. The position of endorsed deposit-receipts in this respect was indeed peculiar, the same effect not being given to them as to other documents. Even, however, if the *onus* had rested on the defender to prove donation it had been discharged by the documentary evidence. The Lord Ordinary's interlocutor should be recalled.

Argued for the pursuer—There was a strong presumption against donation, and the *onus* of proving donation was on the donee. If an alleged gift was challenged, there was always room for inquiry where the subject-matter of gift had not been transferred actually, but was alleged to have been transferred by means of documents—*Sharp* v. *Paton*, June 21, 1888, 10 R. 1000, L.P. Inglis at p. 1006, 20 S.L.R. 685. Mere delivery of deposit-receipts endorsed or in joint names did not infer *animus donandi* without proof—*Jamieson* v. *M'Leod*, July 13, 1880, 7 R. 1131, 17 S.L.R. 757; *Crosbie's Trustees* v. *Wright*, May 28, 1880, 7 R. 823, 17 S.L.R. 597; *Dawson* v. *M'Kenzie*, December 8, 1891, 19 R. 261, Lord M'Laren at p. 277, 29 S.L.R. 226. Here there was no document of gift under the deceased's hand, and it was a pure question of fact whether this sum of money had been given to Catherine Brownlee. No written or parole evidence had been tendered consistent with the theory of donation. The Lord Ordinary was right, and the Court should affirm his judgment.

At advising—

LORD PRESIDENT—The facts out of which this case arose are so clearly and fully stated by the Lord Ordinary that it would be useless

for me to repeat them. The story of the gradual absorption of old Mr Brownlee's fortune by his nearest relatives is pathetic enough, and were it adequately described would seem more like the closing scenes of the life of Père Goriot than the history of a middle class family in Glasgow. Sympathy, however, is an ill basis for a judgment, and even if it were not so I do not think there is room for any in this case. As was naively said in the proof by the defender, "the old man had been ground between two millstones," and what your Lordships have to decide is to which of the two millstones this, the very last piece of grist, shall stick.

The case of the pursuer is simple enough, being based on an undisputed guarantee by the defender, and the defence is simply that the sum guaranteed, with the exception of a small sum, has been already paid by Miss Brownlee. All turns on whether the sum of £1653 really belonged to old Mr Brownlee or to Miss Brownlee. That sum of £1653 admittedly first appears as a sum of money due by the defender to his father old Mr Brownlee. Appearing in the defender's books as a credit entry in an account between the deceased and him, it is squared by a debit entry to cash of the same amount. Admittedly no cash passed. But at the same time a receipt was granted by old Mr Brownlee, and in the defender's books, in an account with his sister, a credit entry of the same amount is made to her, and eventually it is this sum which is paid away for the payment secured by the guarantee. In these circumstances the Lord Ordinary, treating the case as one of donation, has held that the *onus* on Miss Brownlee to prove donation has not been discharged, and that accordingly the £1653 being the property of old Mr Brownlee no payment was made by Miss Brownlee of that sum, and the obligation in the guarantee becomes prestable.

Before your Lordships, however, the Dean of Faculty strenuously urged that there was here no necessity to prove donation, because the transaction between old Mr Brownlee and Miss Brownlee was a completed one, and that the *onus* of proving donation only arose when there was no completed transference, but where the *titulus transferendi* was a document of ambiguous import, such as, for instance, an endorsed deposit-receipt. Indeed, he went so far as to urge that the law on deposit-receipts formed a kind of special chapter which could not be applied to other subjects. In my opinion this position is unsound. I do not think there is any difference in principle between the cases of donation where the subject of the donation is money exigible as against the bank with which it is deposited in virtue of a deposit-receipt and cases where the subject is something else. The only peculiarities of deposit-receipts consist in the consideration of how far endorsation of the deposit-receipt is equivalent to delivery of the money alleged to be donated.

The rule seems to me this. When a person is asked to give up something, be it land, corporeal moveables, or money which he has reduced into possession, he can assume the defensive and put the claimant to show his title. But if in answer to the claimant he is willing or forced to admit that the something only came into his possession by donation from a person whom the claimant, whether by special or universal title, represents, then the *onus* is put upon him to prove the *animus donandi* as well as the delivery of the thing. No doubt the fact of delivery may be evidence of the *animus donandi*—its strength as evidence will vary with the circumstances. But none the less the *animus donandi* is a separate question, and must be proved as well as the delivery. I think this proposition is amply borne out by many cases. In particular, I would refer to the remarks of Lord Young in *Milne* v. *Grant*, 11 R. 887. His Lordship there expresses himself thus—"Gift *inter vivos* — I quite agree that a gift of any amount of money or of any article of property may be completely made and well established by parole evidence. But it must be made. The expression of an intention to give anything—a piece of plate, or a horse—is nothing of itself, it will impose no legal obligation. But if the donation is once made, if the donee gets the money—if the donor hands the money or gift out of his own possession into that of the donee — then that he has so handed it over with the intention of bestowing it in gift is always capable of being proved by parole. But it must be handed over. The party giving must dispossess himself—put it entirely beyond his own control and his own use—and put it in possession of the party to whom he gives it. There has been a marvellous amount of difficulty manifested in the language of some of the decisions upon this, to me, very obvious matter. I ventured to suggest in the course of the argument that the typical case of a gift was of bread or meat, or money given to a beggar — the amount is of no consequence to the legal principle. Upon considering the evidence whether it was a donation or not, the beggar would easily be able to prove that a shilling was given to him; another kind of beggar would be able to prove a gift of £5. He would probably have difficulty in proving by parole alone a gift of a piece of plate, because people would not believe him that a piece of gold plate had been given to him. But the gift of a piece of gold plate is quite capable of being proved by parole. Indeed, many people who have received presents of gold plate would have no other way of proving the gift. They do not take a written deed from the donor in order that they may keep the gift."

Now, in all these instances Lord Young, assuming that delivery is perfected, still seeks for the proving of the gift, and says it may be proved by parole. But if the other argument was correct the gift would be perfected by delivery, and it would be for the opposing party to cut it down. And accordingly we find many cases in which that inquiry is prosecuted even

when the delivery was quite complete, and with varying results according as the *animus donandi* was held proved or not. In the negative may be taken the case of *Sharp* v. *Paton*, 10 R. 1000. I refer in that case to what was said by my brother Lord M'Laren, who was the Lord Ordinary in the case, and also by Lord President Inglis. The Lord Ordinary says (p. 1004)—"The property of the deposited money may be separated from the title in two ways—by the owner taking a receipt for the deposit in the name of another person, or, where the receipt is in the owner's name, by the owner giving the receipt endorsed in blank to such other person, and thereby enabling him to uplift the money or get it transferred to an account in his own name. In the former case there is an actual transference of the money into the possession of the person named in the receipt." In *Sharp's* case there had been actual transference of the money. His Lordship goes on—"It is money at his credit in the books of the bank in a deposit account standing in his name, and the possession of the bank is his possession. In such a case evidence of intention is all that is necessary to complete the proof of donation, because the form of a transfer has been accomplished by the act of the depositor and the agreement of the bank to accept payment into an account opened in the name of the donee." And in the same way the Lord President says (p. 1096)—"The question is whether we here have such a case"—that is, where strong and unimpeachable evidence has been brought forward—"and in reference to that the Lord Ordinary makes an important distinction between the two ways in which a deposit-receipt may be transferred — in the one case by the owner taking a receipt for the deposit in the name of another person, and certainly that would be a fact going a long way to overcome the presumption against donation, and would leave nothing to be proved but the intention to make the gift." I need scarcely point out that both of these learned Lords do not think that mere transference is enough.

In the affirmative there is the case of *Thomson* v. *Thomson*, 9 R., p. 911, where again the transference was complete, and where, notwithstanding, it was found necessary to go into the question of whether the intention had been made out. To the same effect is the dictum of Lord President Robertson in the case of *Dawson* v. *Mackenzie*, 19 R., p. 272, where he says this—"In all previous cases of this kind there has been at least some act of the deceased donor which is admitted or proved by real evidence to have taken place, and which goes so far towards donation. The money is invested in name of the donee, or the deposit-receipt is endorsed in his favour under the hand of the donor"—pointing out clearly again that even transference at the instance of the donor himself is not sufficient without other proof. The defenders relied on the dictum of Lord Adam in *Macfarlane's Trustees*, 25 R., p. 1201. That was a case where there was a question both upon donation *inter vivos* and donation *mortis causa*. The donation *inter vivos* had been perfected by the endorsation of a deposit-receipt which was followed up by transference of the money to the account of the donee, and the dictum of Lord Adam on which the defenders relied was this. His Lordship, speaking of these deposit-receipts, says (p. 1208)—"This case differs from the preceding in respect that it is not a *donatio mortis causa* but a present donation *inter vivos*. Mrs Millar's title to these deposit-receipts appears to me to be complete." Upon that dictum of Lord Adam the defenders argued that it was complete simply because transference was completely made. But if the case is more narrowly looked at I think it will be found that his Lordship does not mean that, but means that it is complete taking the evidence as it stands as a whole. On looking back to the Lord Ordinary's judgment, which was being reviewed, the Lord Ordinary treats the matter just in the way in which I have urged that it should be treated, and says this (p. 1203)—"In the case of the defender Mrs Millar the alleged donations were not *mortis causa* but *inter vivos*. They consisted of deposit-receipts of the National Bank, which were handed to Mrs Millar and re-deposited in her own name." That is to say, the money was re-deposited in her own name—"Accordingly the transfer of title was completed absolutely in the lifetime of Mrs Macfarlane. As to the *animus donandi*, I see no reason to doubt the evidence of Mrs Millar herself, though I did not hear her examined." I think when Lord Adam says that it is made out it is quite evident he means that it is made out upon the evidence as a whole, and that in that case there was what their Lordships thought was satisfactory evidence of the *animus donandi*.

I am therefore of opinion that the Lord Ordinary was right in treating the case as one in which donation had to be proved. As to the *onus*, there is the well-known dictum of Lord President Inglis in *Sharp* v. *Paton*, approved by Lord President Robertson in *Dawson* v. *Mackenzie*, that "there is a strong presumption against donation, and it requires very strong and unimpeachable evidence to overcome it." On the facts, tested by that criterion, I agree with the Lord Ordinary, and have nothing to add to what he has said.

LORD M'LAREN and LORD KINNEAR concurred.

LORD PEARSON—The letter of guarantee on which this action is founded was granted by the defender to his father with reference to a claim by his half-sister Mrs Barr for a sum of £5000 in discharge of her claim for legitim. It appears that the deceased was unwilling to contribute more than £3000; and it was arranged that Mrs Barr's half-sister Catherine should furnish the balance of £2000, and that a letter should be granted by the defender guaranteeing payment to his father by Catherine of that balance. The guarantee was duly signed and delivered by the defender, and was

found in the father's repositories at his death. The sum of £5000 was paid over to Mrs Barr, who granted a discharge on 23rd February 1904.

It clearly appears from the evidence that this balance of £2000, though ostensibly paid out of a credit standing in name of Catherine, was, to the extent of £1653 and interest, paid out of moneys which originally belonged to the father, and which in the December previous had existed in the form of a debt due by the defender to his father on account. Admittedly this was a liquid debt, presently due, and bearing interest in favour of the father; and by a series of book entries, no one of which represented the passing of cash or of securities, the defender so arranged matters that the credit, which was originally in favour of his father, found its way into another account in favour of Catherine. Thus the payment by Catherine towards the £5000 which was required for the settlement with Mrs Barr was really made out of money or credit which had belonged to the father; and if that be the true view, the guarantee by the defender which was found in the repositories of the deceased remains unfulfilled, and the pursuer is entitled to insist for implement of it.

It is said that the documents themselves are conclusive in favour of the defender. I cannot assent to that view. There are here no documents of title properly so called; and it appears to me that the documents which do exist urgently demand explanation. The real defence here is donation; or, as it is put in answer 4 for the defender, "that on 24th December 1903 Robert Brownlee, senior, made a gift to his daughter Catherine of a sum of £1653, 8s. 6d., which was lying in the hands of the defender at interest." It is said that this money, originally the father's, was gifted by him to his daughter in order to enable her to make the contribution towards the settlement of Mrs Barr's claim; and that the defender's letter of guarantee was thereby rendered unnecessary, and was practically discharged. In such a case I have no doubt of the competency of a proof of the facts and circumstances in order to determine the question of donation. But it lies upon the defender to make good his position, and I think he has entirely failed to do so. On the question of the intention to make a gift the statements of the alleged donor and the alleged donee would in general be the best evidence. In this case we have only secondary evidence as to the intention of Mr Brownlee, the alleged donor, and so far as it goes it is adverse to the argument on intention. As to Catherine Brownlee, the alleged donee, her evidence conveys the impression that she knew nothing about it except what she was told by her brother. Then as to the documents on which the defender relies, these are, to my mind, highly unsatisfactory. They include an exchange of receipts, which gives an appearance of formality to the transaction. But the exchange of receipts in such circumstances, where no moneys or securities pass, may import any one of several things. There is not enough, in my opinion, to instruct the donation alleged; and whether the documents are regarded in themselves or in the light of the parole evidence I think the defender's case fails.

The Court adhered.

Counsel for the Pursuer (Respondent)—Hunter, K.C.—Morrison, K.C.—T. Graham Robertson. Agents — Dove, Lockhart, & Smart, S.S.C.

Counsel for the Defender (Reclaimer)—The Dean of Faculty (Campbell, K.C.)—Graham Stewart, K.C.—More. Agents—Davidson & Syme, W.S.

Friday, November 29.

FIRST DIVISION.

[Lord Salvesen, Ordinary.

GLASGOW CORPORATION *v.* CALEDONIAN RAILWAY COMPANY.

(See *ante*, March 20, 1906, 43 S.L.R. 534, 8 F. 755.)

Road—Railway—Railway Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 33), *sec.* 39—"*Public Highway*"—*Use by Public de facto but not de jure.*

A road dedicated to the use of feuars, who could, acting with their superior, close it at pleasure, is not a "public highway" within the meaning of the Railway Clauses Consolidation (Scotland) Act 1845, section 39, by reason of its having been for a period short of the prescriptive period unrestrainedly used by the public.

Road—Railway—Obligation to Maintain Roadway — Diversion of Private Road Specially Provided for in Railway Company's Act—Private Road Subsequently Taken Over by Local Authority—Caledonian Railway (Additional Powers) Act 1872 (35 *and* 36 *Vict. cap. cxiv.*), *secs.* 4 *and* 26 (3)—*Railway Clauses Consolidation (Scotland) Act* 1845 (8 *and* 9 *Vict. cap.* 33), *sec.* 39.

A railway company was by Private Act authorised to make and maintain a railway, and it was enacted that in constructing the railway certain provisions should be binding on the company, including a provision that a particular road might be diverted as shown on the plans and should be carried over the railway by a bridge of a certain width, the diverted portion of the road to be also of that width. The road was at the date of the railway's construction a private road, but was subsequently taken over by the Local Authority, who raised an action to have the company ordained to maintain the roadway on the bridge and approaches.

Held that the company was under no obligation to maintain the roadway,