Tuesday and Wednesday, Dec. 26 and 27.

SECOND DIVISION.

(Before the Lord Justice-Clerk.)

CLEMENTS AND MANDATORIES *v.* MACAULAY.

Mandatory—Ultra fines mandati. A discharge of accounts by a mandatory is vitiated as a settlement in full binding on his constituent if he has given credit for a sum with which, under his mandate, he was not authorised to deal.

Proof—Onus. A person complaining of a breach of contract by violation of a condition is bound to prove that there was a condition which was violated.

Proof—Secondary Evidence. A press copy of a letter admitted as evidence, it being proved that the principal could not be recovered.

Proof—Statement by Person Dead. Held not competent to ask a person who was a party to the cause what he had been told by a person now dead, but whose evidence in the case had been taken on commission in presence of the party.

Counsel for Pursuer—The Lord Advocate, Mr Patton, and Mr Alexander Moncrieff. Agents—Messrs Wilson, Burn, & Gloag, W.S.

Counsel for Defender—Mr Clark and Mr Lee. Agents—Messrs Hamilton & Kinnear, W.S.

In this case, in which Nelson Clements, sometime of Texas, and presently of No. 24 Chester Square, London, merchant, was pursuer, and Moncrieff, Paterson, Forbes, & Barr, writers, Glasgow, are his mandatories; and John L. Macaulay, merchant, carrying on business, and residing at New Orleans, in America, or elsewhere furth of Scotland, defender, the issues were as follows:—

"1. Whether in or about the months of February and April 1863, 280 bales of cotton, purchased on joint account of the pursuer and defender, were sold by the defender at Liverpool and Havannah, and whether the defender is indebted and resting-owing to the pursuer in the sum of £4223, 16s. 8d., or any part thereof, as the pursuer's share of the proceeds of said sales, with interest upon £300 from 1st February 1863, and on £3923, 16s. 8d. from 20th April 1863, under deduction of the sum of £1961, 18s. 4d. paid to account thereof, with interest thereon from 19th June 1863?

"2. Whether it was agreed that the defender, as acting for himself and the pursuer, should sell 376 bales of cotton purchased on joint account, at Havannah, or Liverpool only, and whether the defender, in or about the month of September 1862, wrongfully sold 96 bales of the said cotton elsewhere than at Havannah or Liverpool, to the loss, injury, and damage of the pursuer?

"3. Whether the said 96 bales of cotton, purchased on joint account of the pursuer and defender, were sold by the defender in or about the month of September 1862, and whether the defender is indebted and resting-owing to the pursuer in the sum of £1500, or any part thereof, with interest thereon from 30th September 1862, as the pursuer's share of the price of said cotton received by the defender?

Or,

"Whether, on or about 29th December 1863, the pursuer, by his attorney, Thomas M'Lellan, received payment of the sum of 10,762, 11/100 dollars in full payment of the balance due him for his interest in the said 376 bales of cotton?"

The action arose out of a contract of joint adventure, entered into verbally betwixt the pursuer and defender at the town of Houston, in the State of Texas, in May 1862. It was then arranged betwixt the parties that the pursuer was to purchase cotton in the interior of Texas, and to bring it down to the frontier, where it was to be received by the defender, and disposed of by him for the joint interest. The price of the cotton was to be paid in equal shares with Confederate money, and the price was so paid. So far the parties were agreed. But there was a dispute betwixt them as to whether it was part of the bargain that no part of the cotton was to be disposed of anywhere except in Havannah or Liverpool. The pursuer positively swore that it was, and that without that condition he would not have entered into the contract. The defender, on the other hand, swore that it was not. This was one of the two main questions raised. The other question had reference to the effect of a payment which was made by the defender on 29th December 1863 to Thomas M'Lellan, who at one time acted as mandatory for the pursuer, but whose mandate the pursuer alleged had been revoked. It was contended for the pursuer that the payment had been made by the defender to M'Lellan in *mala fide* when he knew, or at least had reason to suspect, that the pursuer had appointed another person to act as his mandatory. The defender, on the other hand, maintained that the revocation of M'Lellan's mandate, if it ever took place, had not been intimated to him, and that he made the payment in good faith. He also contended that the discharge which M'Lellan gave him was a settlement of all the pursuer's interest in the transactions, which could not now be opened up.

In reference to this matter the defender deponed that A. S. Ruthven, a former clerk of the pursuer, called upon him at Matamoras in November 1863, and asked him to settle the pursuer's claim, saying that he had full power from the pursuer to do so; that he declined to settle with Ruthven, because he had not then received full accounts of the sales, and also because the pursuer had arrested the proceeds in the hands of William Middleton & Co., of Glasgow. Ruthven deponed as to this interview—"I afterwards went to Matamoras. I there saw the defender in the early part of November 1863—I think about the 7th or 8th. I told him I had a power of attorney from the pursuer. I took it out of my pocket to show it to him, but he did not read it. I, as the pursuer's attorney, asked him for a settlement of the transaction about the cotton. He said he could not settle with me. He would settle with no one but Mr Clements himself. He said he could not do so because he had received a communication from lawyers in London forbidding him to settle with anyone except the pursuer, and that inasmuch as the date of that communication was subsequent to the date of my power of attorney, he could not settle with me. He said he was going to Havannah, and would settle with the pursuer there if he should see him. When the defender refused to settle with me I asked him for his statement of how the accounts stood between him and the pursuer. He promised to give me a statement before he left. He did not give me it. I wrote to the pursuer from Matamoras giving an account of my interview with the defender." The defender also deponed that in December 1863 he was at Havannah, and Thomas M'Lellan came to him there and demanded a settlement on behalf of the pursuer, saying he had a power of attorney, which he produced; that Vignier, Robertson, & Co. offered to advance as much as would satisfy the pursuer's share; that the accounts were made out, and M'Lellan was satisfied with them; and that he then paid M'Lellan the balance due to the pursuer, for which he received a receipt. He also deponed that when he made this payment he had no idea that the mandate to M'Lellan had been revoked, as no revocation had ever been notified to him.

In the course of the pursuer's examination it was proposed to show him a press copy of a letter which he had written to M'Lellan taken from his letter-book. The pursuer deponed that in August last he had gone to Paris for the purpose of finding M'Lellan, in order to get him to produce the principal

letter, and to attend the trial as a witness; and that he had got a friend last week to write a letter in order to ascertain where M'Lellan was, but he could not trace him.

Mr CLARK, for the defender, objected in the circumstances to the admission of the copy letter. The objection was repelled, and Mr Clark took an exception.

It was also proposed to ask the pursuer what a witness (Mr Ruthven) now dead had told him as to a certain matter. It appeared that Mr Ruthven had been examined on commission as a person in a dangerous state of health, and that he had not been examined on this subject although the pursuer was present. Mr Clark objected, aud the objection was sustained. The Lord Advocate, for the pursuer, took an exception.

It was proposed to ask the defender in his examination what Mr Ruthven had said to him. The Lord Advocate objected, and the objection was repelled.

After the evidence on both sides was closed, and the Lord Advocate and Mr Clark had spoken for their respective clients.

The LORD JUSTICE-CLERK charged the jury. He first explained the counter-issue for the defender, because if it was proved there was no necessity for considering the pursuer's issues. If the pursuer has through his attorney settled his whole claims, he is not now entitled to insist in them. But he thought it right to tell the jury at once that this receipt could not be regarded as a settlement in full. Having been made by an attorney acting for another, it is only a final settlement as against the principal, if the balance received was that which he was entitled to receive, and for which he was entitled to grant a full discharge. There was included admittedly in the settlement a sum of £64 odds, as to which Mr M'Lellan was not empowered to act for the pursuer, and to this extent, at all events, M'Lellan received less than the sum for which he was empowered in any view to grant a discharge. His authority was special, and he could not go a step beyond it. The discharge, as a settlement in full, is therefore vitiated, and on the defender's counter-issue the verdict must be for the pursuer. In regard to the other issues, the utmost extent of the pursuer's claims was as follows—260 bales were sold at Liverpool, which produced £5963, 5s. 2d., and 20 at Havannah, which produced £700 These two sums amount together to £6663, 5s. 2d., one-half of which was £3331, 12s. 7d. But of this half the pursuer had received to account £1961, 18s. 4d., thus leaving £1369, 14s. 3d. as the extent of his claim under the first issue. Then under the third issue the pursuer's claim amounted to £979, which was one-half of £1958, being the amount which was netted by the sale of the ninety-six bales at Matamoras. Lastly, under the second issue the pursuer says—I am not bound to be content with what the ninety-six bales brought at Matamoras, because they were sold there in breach of contract, and they ought to have been sold at Havannah or Liverpool. If sold at Havannah they would have yielded £1402, more than they did at Matamoras, the pursuer's half of which was £701; and if sold at Liverpool they would have yielded to the pursuer as his half, in addition to the £979, a sum of £135, or in another view £125. This last view depended upon whether the defender was entitled to charge a commission paid to a person named San Roman for doing what the pursuer maintained was the defender's own duty under the contract. It seemed that the cotton was shipped in his name, because he was a Spaniard, and if it had been captured by the Federals, it fell to be restored to him as belonging to a neutral nation, if he proved that it was his; whereas if, on the other hand, it had been shipped in the name of the pursuer or defender, or of both, and had been captured, it would have been forfeited as the property of the subjects of one of the belligerent Powers. The commission had been paid for the use of his name. His Lordship then examined the issues in detail. He noticed the question involved in the second issue first. That question was whether there was a breach of contract; and that again depended on what the contract was. The pursuer and defender contradict each other as to the condition referred to in the issue. The only other witness who says anything on the subject was Mr Ruthven, the pursuer's clerk. He deponed—"I was present when the terms of the agreement were arranged. The agreement was that Mr Clements was to purchase cotton for himself and Mr Macaulay; that it was to be sent to the Rio Grande, and thence to a foreign market—Liverpool or Havanah—for sale, the profits to be equally divided. Interrogated—Did you hear the terms of the agreement? Depones—I heard that the cotton was to be purchased and sent to the Rio Grande on joint account. I don't recollect of hearing anything more, except that he was to purchase cotton and use his exertions in the transaction. Interrogated—Did you hear anything said as to where it was to be sold? Depones—Yes, it was to be sold in Liverpool." His Lordship observed that this evidence seemed to him very unsatisfactory. It seemed to contain two different accounts of the matter. The jury would therefore consider whether this issue was proved, keeping in view that the burden lies upon the party complaining of a breach of contract to prove that there was a condition which has been violated. It was said that the correspondence threw some light on this matter. The contract was made in May, but there was no writing until 7th October, when the following letters were exchanged by the parties. The pursuer wrote to the defender—

"You will oblige me, when at Richmond, to obtain from the general Government a pass which will enable the steamer Union to run the blockade without detention. (I will change her name of Missy.) I also wish you would obtain a permit from the general Government to ship through Mexico 1000 bales of cotton. You will please place all funds that you will have of mine in your hands to my credit with Messrs Vignier, Robertson, & Co, Havannah, unless our joint shipment should go forward to Europe, in which case please pass it to my credit with Messrs Baring Brothers & Co., London. I have forwarded my signature to these houses. Should we see a good thing during your absence, I would like to take a riffle with you. Wishing you a safe and pleasant trip, I am, &c., "NELSON CLEMENTS."

And the defender wrote to the pursuer—"The 376 bales cotton you purchased for our joint-account and sent to the Rio Grande, I will render you a statement of as soon as I receive account sales and proceeds from Havannah or Liverpool, and will place the amount that may be due you on same with Baring Brothers & Co., London, or Vignier, Robertson, & Co., Havannah, as you may direct—Yours, &c., "J. L. MACAULAY."

It is said by the pursuer that these letters were altogether inconsistent with the notion that any of the cotton was to be sold in America. It occurred to his Lordship, however, that the letters seemed to square with both theories, but the jury would judge of this. There was a variance again in the evidence of the pursuer and defender as to what passed betwixt them when at Houston on this occasion. The defender said that his brother, James Macaulay, told the pursuer that San Roman had been instructed to sell or ship the ninety-six bales as he might think best for the interest of all concerned, and that the pursuer made no objection. The pursuer contradicts the defender as to this, and on this occasion it is the defender who is corroborated by the only other witness on the subject—namely, his brother, who depones as follows:—"On our way to Houston in October 1862, we met the pursuer in a railway car a short distance from Houston, and accompanied him to Houston. Interrogated, depones, I had conversations with the pursuer about the cotton at Houston at

that time, telling him how I had disposed of it, and that the 20 and 96 bales had not come to hand when I left Brownsville, and of the instructions I had left with San Roman about the 96 bales. I also told him what I had done about the 20 bales. Interrogated, What did the pursuer say? depones, He seemed satisfied, and was very glad I had got off 260 bales. Our conversation was short, and ceased then. Interrogated, Did he make any objection to your leaving it to San Roman to ship or sell as he, might think best? depones, None. Interrogated depones, I told him I left it in San Roman's power to ship or sell as he might think best. Interrogated, Did the pursuer at that time say anything whatever about an understanding that all the cotton was to go to Havannah or Liverpool? depones, No, he did not. He seemed perfectly satisfied." Then there are other documents. The pursuer left Houston on 29th December 1862, and he left there a letter for the pursuer, in which he said — "The object of this is to request you to address Messrs Vignier, Robertson, & Co. a letter informing them that I am jointly interested with you in the shipment of 376 bales of cotton, and requesting them to pass one-half of net proceeds to my credit, and honour my drafts for the amount, or, if any of said 376 bales of cotton have been shipped to Europe, give me the necessary documents to enable me to collect it on my arrival there."

The pursuer complains that the defender had improperly shipped the goods to Havannah in his own name and not in the names of both parties. But the request contained in this letter is unintelligible, except on the supposition that the pursuer knew that the cotton was shipped in the defender's individual name. In any other view the letter was unnecessary. Then, on 21st February 1863, the pursuer grants authority to M'Lellan to settle with the defender, and he does not then complain of any breach of contract. He says:—

"You are hereby authorised in my name to collect from said J. L. Macaulay or his agents my undivided one-half interest in said three hundred and seventy-six bales of cotton, and you are fully empowered to do all in the premises that I can do, which shall be as binding as if done by myself, hereby ratifying and confirming all your acts.—I am, respectfully yours, NELSON CLEMENTS."

Suppose M'Lellan had settled the matter without claiming damages for breach of contract immediately after this authority was granted, and before there was any question as to revocation, his actings would have been binding on the pursuer. If, then, the jury were satisfied that there was an express condition in the contract that no cotton was to be sold except at Havannah or Liverpool, they would find for the pursuer under the second issue; but they must be satisfied that there was this condition, and if they were not, this issue might be dismissed altogether. If they were to find for the pursuer upon it, then they must consider whether he was to receive in name of damages the price which the cotton brought which was sold at Havannah, or the price which was brought at Liverpool. It was remarkable that the Havannah theory was not thought of by the pursuer while leading his evidence. He got the facts for it out of the defender's witness, Mr G. A. Jamieson. His Lordship also said on this point that the pursuer was bound to have proved that the same price which was got at Havannah for twenty bales could have been got there for the larger quantity of ninety-six bales. If damages were to be given under the second issue, then the third was out of the case, for it was alternative; but if the jury found for the defender on the second issue, then on the third the pursuer seemed entitled to claim £979. These two sums—£1369, 14s. 3d. under the first issue, and £979 under the third—made together £2348, 14s. 3d. The defender, however, says that that sum, or almost all of it—viz., £2205, 7s. 2d., was paid by him to M'Lellan, acting for the pursuer, on Dec. 29, 1863. Now, was this payment equivalent to payment to the pursuer himself? The pursuer says M'Lellan's power was withdrawn, and defender either knew or so strongly suspected this that he was not in good faith in making the payment. It is to be observed that M'Lellan's power was special to settle this particular matter, and when it was granted, he intimated the fact to the defender by letter. This letter defender did not recollect having received; he is therefore not entitled to say that he made the payment because of it; but, the letter having been sent, the pursuer should have been very careful to intimate also the withdrawal of the authority if it took place. This would have been right in all fair dealing. But was the authority really withdrawn? It is not said that the pursuer had lost his confidence in M'Lellan. Indeed, he continues afterwards to correspond with him about this and other matters. On 24th April 1863, the pursuer's clerk, Mr Ruthven, is going out to America, and he gives him a general power of attorney to attend to all his business, and instructs him to call at Havannah on his way and see the defender. Ruthven takes out with him a letter from the pursuer to M'Lellan, dated 1st May 1863, in which he says:—

"I hope Mr J. L. Macaulay has given you an order for the proceeds of the 188 bales of cotton. If not, Mr A. S. Ruthven has my full and complete power of attorney, and will settle with Mr Macaulay. Hoping to hear favourably from you, I am, &c.,
"NELSON CLEMENTS."

This is said to be a withdrawal of M'Lellan's authority. That is a question which his Lordship left to the jury, with this observation, that Ruthven's general powers did not seem to be inconsistent with the existence of a special power in another person. Was it not the pursuer's intention that either Ruthven or M'Lellan might settle with the defender? That was for the jury to consider. It is not a question of law. But, in the next place, whatever M'Lellan's position was, it is to be borne in mind that if the defender paid him in good faith he is entitled to the benefit of the payment. No notice of revocation is given to him. M'Lellan writes the pursuer on the 25th May still in the most confidential terms. He gives the receipt to the defenders on the same sheet of paper as his power of attorney, and the receipt is in these terms:—

"I, Thos. M'Lellan, attorney-in-fact for Nelson Clements, of Texas, now in Europe, have this day received of John L. Macaulay ten thousand seven hundred and sixty-two 11-100th dollars, in full for balance due said Nelson Clements for one-half interest in 376 bales cotton, with said J. L. Macaulay, as per accounts rendered.

"$10,762 11/100. THOS. M'LELLAN,
Attorney-in-fact for Nelson Clements.

"Havannah, 29th December 1863.

"Signed by Thomas M'Lellan in my presence at Havannah this 29th day of December 1863.
"JOS. T. CRAWFORD,
Consul-General in Cuba."

If the defender was not in good faith in paying M'Lellan, it is difficult to conceive why he paid him. But, further, if the payment was improperly made, one would have expected some complaint from the pursuer when he heard of it. Well, M'Lellan did write the pursuer on 6th January 1864 that he had received the payment from the defender; and the pursuer, in answer, wrote to M'Lellan on 1st February—"So far as this amount is concerned, I am entirely willing you should receive the amount of £2367, 3s., and send me your receipt in full, that being the amount I collected for the drafts you handed me." He was M'Lellan's debtor to this extent. He also wrote the defender on the same day —"If you pay to Mr M'Lellan the amount of £2367, 8s., I shall gladly allow that amount, accompanied with his receipt in full." The pursuer now contends that this payment is to go for nothing, and that the defender must pay the sum twice over.

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

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

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

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

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

Thursday, Dec. 28.

MURRAY'S EXECUTORS *v.* FORBES.

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

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

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

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

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

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

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

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

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

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