title-deeds in his possession in the case of property qualification. I am of opinion that the Sheriff was right in repelling the objection in the present case.

Lord Gifford—I am of the same opinion. Mr Darling argued, with his usual ability and keenness, the general point that under the Act 1861 a written authority was absolutely needed. I should be sorry if that were so; and I do not think it is. This is a very technical objection. If an agent can sell an estate without a written authority, surely you can put a man on the register in a similar way; or take the case which was put to us of an illiterate voter—he would require four witnesses to put him on the roll. The objection is so technical a one that I think we should not sustain it unless compelled to do so.

Lord Craighill—I am of the same opinion. The first objection was abandoned by the counsel for the appellant, who conceded that it was not necessary that claims should be signed by the claimant himself, but that his agent may do it for him. On the question whether a written mandate to the agent is required, I concur in thinking that it is unnecessary, and that both on a consideration of the statutes and of the past practice as noticed by Lord Mure. Such being the case, the question is always just this, Where a claim has been signed by the claimant's agent, has it been proved that the agent had sufficient authority to do so. That is a relevant inquiry, as is shown by the cases cited to us from the bar. Here there is authority instructed in the ordinary way, and that being so, I am of opinion that all which the statutes require has been complied with. I should regret if any difficulty were put in the way of lodging claims, and that would be so were we to sustain this appeal.

The Court refused the appeal, with expenses.

Counsel for Appellant—Darling. Agent—J. Stormonth Darling, W.S.

Counsel for Respondent—Young. Agent—John Stewart, W.S.

COURT OF SESSION.

Tuesday, November 16.

FIRST DIVISION.

[Lord Craighill, Ordinary.

CLARK *v.* MELVILLE.

Process — Clerk of Court—Exhibition of Title-Deeds.

In an action for production and delivery of the titles to certain subjects by one alleging himself to be the heir of the last proprietor, against which the defender, who held the titles as law-agent, pleaded that the pursuer had failed to establish his propinquity, and that he was entitled to the production by the pursuer of a service or other habile title before exhibiting the deeds, the Lord Ordinary (Craighill) allowed the pursuer a proof of his averments, and to the defender a conjunct probation. On a reclaiming-note presented by the pursuer the Court unanimously recalled the Lord Ordinary's interlocutor, and expressed the opinion, that being satisfied that exhibition of the deeds called for was necessary, the proper course was that they should be exhibited in the hands of the Clerk of Court, not to form a part of the process, but merely put there for the temporary and limited purpose of being exhibited.

Counsel for Pursuer—Trayner—Watt. Agent—Alexander Morison, S.S.C.

Counsel for Defender—Robertson—Dickson. Agents—J. & A. Hastie, S.S.C.

Wednesday, November 17.

FIRST DIVISION.

[Sheriff of Lanark.

SCOTT *v.* MILNE AND ANOTHER.

Succession—Legacy—Intention—Double Portion or Substitution.

S. by a trust-disposition and settlement left a legacy of £400 to each of his three daughters—to two of them absolutely, but in case of the third to trustees, to hold for her in liferent and her issue in fee. This daughter having become a widow, and being in reduced circumstances, lived with her father till his death, and was entirely dependent on him. After executing his settlement S. took a debenture bond from a local authority for £400 in her name, the interest being paid to him during his life, and after his death to the daughter. *Held* that in the circumstances the testator's intention was to give her both sums of £400, and that the sum carried by the bond was not intended to be in substitution for the sum provided by the will.

William Scott, merchant, Strathaven, died on 13th May 1870 leaving two sons—William, who was appointed his executor, and James—and three daughters—Mrs Morton, Mrs Dykes, and Mrs Dewar. By his trust-disposition and settlement, which was dated 7th December 1866, his executor was taken bound to pay a legacy of £400 to each of Mrs Morton and Mrs Dykes. The settlement thereafter conveyed a sum of £400 to his trustees, in order that the "said trustees and their foresaids shall, as soon as can be done, invest said sum of £400 on good heritable security in Scotland in their own names as trustees foresaid, and apply the annual income and produce, deducting necessary expenses, for behoof of my daughter Agnes Scott or Dewar, wife of Alexander Dewar, teacher, Strathaven, in liferent for her liferent alimentary use allenarly; hereby providing and declaring that the said trustees shall be entitled to apply the whole or such part of the said principal sum of £400 as they may think proper, and of which they shall be sole judges, for the alimentary support and benefit of the said Agnes Scott or Dewar and her children after mentioned: After the death of the said Agnes Scott or Dewar the said trustees shall realise said capital sum of £400, or such portion thereof as may then be remaining,

and after deducting necessary expenses they shall divide the same among the children of the said Agnes Scott or Dewar, in such proportions, at such terms, and subject to such conditions (including a power to restrict the interests of any of the children in their shares to a liferent alimentary interest, and to destine the fee to their issue) as the said Agnes Scott may appoint by any writing under her hand, and failing such writing, then to the children of the said Agnes Scott or Dewar equally, or share and share alike, the issue of any child who may die before such period of division leaving lawful issue coming always in the room and place of the parent or parents so deceased, and receiving equally among them the share or shares which would have fallen to such parent or parents had he, she, or they been alive at that time, the division being always *per stirpes* —payable, in the case of sons, on their respectively attaining the years of majority, and in the case of daughters, on their respectively attaining to the years of majority or being married, whichever of these events shall first happen; and the annual interest of the shares prospectively falling to any of my said legatees who may not have attained to majority at the death of the said Agnes Scott or Dewar shall be paid to their legal guardians for their behoof; and failing issue of the said Agnes Scott or Dewar, or if there shall be no issue surviving the period appointed for payment of the fee or capital of this legacy, the same, or such part thereof as may be remaining, shall be paid equally to the said Helen Scott or Dykes and Martha Scott or Morton equally, and in the event of the decease of either or both of them, to their respective issue equally, the division being *per stirpes;* and failing any of them without leaving issue, then to the survivor, or the issue of such as may have left issue, the division being always *per stirpes*, and the child in all cases coming in the room and place of the parent deceased: With power to said trustees to nominate and assume any person or persons into said trust to act with or to succeed him or them." Mr Scott's personal estate amounted to about £2000.

In October 1868 he invested a sum of £400 on bond or mortgage with the local authority of the Uddingstone Special Drainage District, the bond narrating that the local authority having received the said sum from Mrs Agnes Scott or Dewar, bound themselves to repay the same to her or her heirs and assignees at a certain term, with interest, payable half-yearly, and in security of the said loan assigned to her and her foresaids the special sewer assessments authorised to be raised and levied within their district.

In December 1878 Mrs Dewar, whose husband had died in 1867, married Mr Milne, and subsequently, with his consent, raised a Sheriff Court action against her brother William, as executor under Mr Scott's will, concluding, *inter alia*, for delivery of the above-mentioned bond granted by the local authority, of which he was in possession. A proof was led, from which it appeared that after the death in 1867 of Mr Dewar, of whose marriage with his daughter Mr Scott had apparently disapproved, Mrs Dewar was left in very poor circumstances, and came to live with her father. She gave up at his request her right to a share of a policy of insurance for £150 on her late husband's life, and also to a share of his furniture, and her father supplied her with money and necessaries to the extent of £40 or £50 per annum until his death. The bond for £400 was found in his repositories. The two half-yearly payments of interest on it which fell due before his death were paid to him, and the interest had since then been drawn by Mrs Milne.

The Sheriff-Substitute (BIRNIE), after findings in fact, found in law—"(2) That the bond was not delivered to the pursuer during the lifetime of her father, but that it was an additional provision by him to her, and did not require delivery." He added this note:—

"*Note.*— . . . . 2d, I do not think the bond was surrogatum for the £400 in the settlement. Provisions by a parent to a child are presumed to be in addition to, not in lieu of, each other—Menzies on Conveyancing, 441; Ersk. iii. 3, 93. The pursuer also was at the time a widow dependent upon her father. She had given up at his request a right to a share of a policy of insurance for £150 on the life of her husband, and also to a share of her husband's furniture. She had received from her father, since her husband died, £40 to £50 each year—a sum larger than the interest which could be obtained from the two sums of £400. Her sisters were both married and in good circumstances, and her father's residue, it is admitted by the defender, exceeded £2000. It is also matter for observation that the pursuer by her father's settlement had only a liferent, whereas the bond was taken in her name absolutely.

"3d, I do not think the bond was a donation requiring delivery. There is no reason why her father should have given her a donation, and especially of such a sum. She had no present need for it, as he was supporting her, while, on the other hand, she might marry again and not require it.

"4th, I do not think the bond was delivered, but I think it was a provision by a father to a child, and did not require delivery. . . . . Provisions by parents to children may be taken in the shape of bonds from third parties—*Hamilton* v. *Hamilton*, Jan. 9, 1741, M. 11,576; *Munro* v. *Munro*, Dec. 16, 1712, M. 5052; *Spence* v. *Ross*, Nov. 17, 1826, 5 S. 17; and whether they are or are not revocable, and the date on which they came into force, will depend on circumstances—*Spence* v. *Ross*, *supra; Berry* v. *Henderson's Trustees*, June 24, 1836, 14 S. 1008. They do not require delivery—Menzies on Conveyancing, 173; *Munro* v. *Munro*, *supra.*"

On appeal the Sheriff (CLARK) adhered to the above finding.

The defender appealed to the Court of Session, and argued—The bond in question had not been delivered to pursuer—*Walker's Executor* v. *Walker*, June 19, 1878, 5 R. 965. In England the presumption was against double portions, though this did not seem to be the case in our own law—*Kippen's Trustees* v. *Kippen*, July 3, 1856, 18 D. 1137, 3 Macq. 303; *Lord Chichester* v. *Coventry*, 1867, L.R. (H. of L.) 2 Eng. and Ir. App. 71; *Cowan* v. *Dick's Trustees*, Nov. 1, 1873, 1 R. 119. This was a question of the testator's intention, and the will being prior in date to the bond, the presumption was in favour of the £400 under the bond being in satisfaction of the same sum left by the will. The result of the evidence pointed to the same view. An equal amount (£400) had

been left to each of the three sisters, and that was also the amount carried by the bond. There was no evidence to show that Mr Scott had mentioned the bond to pursuer, though they were living in the same house.

The pursuer replied—Delivery was not necessary—*Hamilton* v. *Hamilton*, 1741, M. 11,576; *Creditors of D. Turner*, 1783, M. 11,582; *Hill*, 1755, M. 11,580; *Gilpin* v. *Martin*, May 25, 1869, 7 Macph. 807. There was no presumption in our law against double portions. And in the circumstances of this case the presumption was that the testator intended both provisions to stand. The *onus* was with the defender to show that the sum carried by the bond was intended to be in satisfaction of the provision under the settlement. He had failed to do so.

At advising—

Lord President—In this case I am quite satisfied with the judgment of the Sheriff-Substitute on all points. I think he has disposed of the case in a most satisfactory way, and on very sound and solid reasoning.

The only question of importance or difficulty is what may be called the question on the merits, viz., as to whether the £400 bond which was taken by Mr Scott in favour of his daughter Mrs Dewar was intended to form an additional provision to her, or to be in substitution of the provision he had made for her and her children in his settlement. Such questions are always more or less difficult, and must be decided on a review of the whole circumstances of the testator and his family, and in particular of the situation of the person who would be favoured beyond others by the double portion.

The provision made by Mr Scott in his will, which was dated 7th December 1866, in favour of Mrs Dewar is a different one from that in favour of his other daughters. The other daughters were each to get a similar sum of £400, but their provisions were given to them absolutely; whereas the £400 set aside for Mrs Dewar is settled in this way, that it is to be paid to trustees and is to be invested in heritable security, and the annual income paid to Mrs Dewar during her life for her liferent alimentary use allenarly, the fee to be given after her death to her children, if any, and failing them to her sisters. Now, there may have been various reasons for this difference in the terms of the two provisions, and it has been suggested that one reason was that the testator had a want of confidence in Mrs Dewar's husband, who was then alive, and that he arranged the terms of the bequest so as that his rights should be excluded. That is not, I think, perfectly clear, and we are not entitled to assume it; the exclusion of the husband's rights is only one part of the conditions of the settlement. Another motive was to secure that the fee should go to the children independently of the husband and also of the wife, and the children's rights remain secure under the deed of settlement unless a subsequent testamentary writing should deprive them of these rights.

Now, the other provision is in the form of a bond for money advanced by Mr Scott to the local authority of the parish of Bothwell; but though the money was advanced by him, the bond is in the name of Mrs Dewar—the granters "having borrowed and received the sum of £400 sterling from Mrs Agnes Scott or Dewar," bind themselves to repay her, or her heirs or assignees, and they assign to her in security the special assessments which the local authority are authorised to raise. Some parole evidence was referred to as to conversations between the testator and his sons William and James Scott, but I attach no value to it; it is quite loose and imperfect as to what may have been Mr Scott's intention in taking the bond in this form.

In favour of the contention that the two provisions cannot stand together, and that the bond was intended to be substituted for the provision in the will, the most important consideration is that Mrs Dewar had received under her father's settlement a sum equal to that of each of her sisters, and that the sum in the bond is precisely the amount which is settled on her by the will. But these considerations, though undoubtedly of some weight, must yield to others which seem to me to counterbalance them. Mrs Dewar stood in a different position from her sisters; they were well married, and had husbands alive and prosperous. Mrs Dewar after her husband's death was in a different position, living with her father and being dependent on him. At his desire she had given up her interest in a policy of insurance on her husband's life, and her interest also in his furniture, and Mr Scott maintained her in family with himself, and at an expense of about £40 or £50 per annum. The interest of the two sums—that under the will and that under the bond—would not be so much as he was actually paying for her. She was perfectly dependent on him, and if after his death she was to have nothing but the one sum of £400 by the will or under the bond, she would be in a state of extreme poverty; and so it seems reasonable, and consistent with the condition of affairs, that he should have provided for this daughter to a larger extent than for her sisters. These are very important considerations in reaching the intention of the testator in this matter. He was also possessed of quite sufficient means to make the larger provision for Mrs Dewar, if he so wished, besides fulfilling the other purposes of his will. Taking these circumstances into view, and the fact that the bond was taken in the terms in which it was, and was kept in his custody until his death, I think the natural inference is that it was meant to take effect independently of the provisions of the will.

And there are two considerations beyond those I have named which strongly fortify this view. The first is that the gift in the will is to different persons from those in whose favour the bond is taken. The trustees under the will are to settle the £400 in fee upon the children of Mrs Dewar, and failing these upon her sisters. She has only a liferent interest. Under the bond the gift is absolute to herself. The second is, that if Mr Scott's intention had been what it is assumed by the defenders to have been, and if his purpose was to substitute an absolute gift for the provision in the will, it was certainly an odd method he took of effecting his purpose. It is said that in consequence of Mr Dewar's death it was no longer necessary to tie up the money in any way. If we assume that to be so, his natural course would have been to make a codicil to his will. I cannot help thinking that if he really had the intention which is ascribed to him, he might have

revoked that part of his will which deals with Mrs Scott's provision, and might have given her an absolute gift, putting her in the same position as her sisters. The form he used was sufficient to create great doubt even on the face of the documents themselves, apart from the surrounding circumstances to which I have adverted, whether he did not make a separate provision for her.

On the whole of this question I entirely agree with the Sheriff-Substitute and the Sheriff.

LORD DEAS—In regard to the question whether Mr Scott intended to give a double portion to his daughter or not, there is a great deal of parole testimony bearing in both directions. I doubt the relevancy of some of it. But to my mind the terms of the formal written bond, as contrasted with the terms of the formal written will, are conclusive. It is quite clear, if we take the writings *ex facie*, that the one provision is not substituted for the other, but that they are quite separate provisions to separate and distinct parties. The provision in the will is limited to a liferent to Mrs Dewar; the fee is given to her children. By the bond the fee is vested in Mrs Dewar; it is payable to her and to no one else. It is no doubt quite possible that notwithstanding the difference in the terms of the two documents the intention may have been to satisfy the one provision by the other. But it is open to great dispute whether the second case can be said to be a fulfilment of the first, the investment being, as I have stated, for behoof of a different party altogether. While there may be some doubt with regard to the matter of fact, I am quite clearly of opinion that in point of law the two provisions must be held to be separate.

LORD MURE—I have had no difficulty in coming to the conclusion that the bond for £400 is not to be held as operating a discharge of the provision for £400 in favour of Mrs Dewar under the will. The sums in each are the same, but in other respects it appears to me that the terms of the two documents are very different. The provision in the will is declared to be for Mrs Dewar's liferent alimentary use allenarly, and there are certain other restrictive provisions, with a destination-over in favour of her children. The trustees under the settlement are to make over that single provision to other trustees who are nominated specially for the purpose of administering it; so that the terms of the settlement in dealing with this sum are most distinct and anxious. When we turn to the bond it is quite different. In these circumstances the presumption is rather against a person so acting as to give the sum in the bond in substitution of that under the will, and I am not disposed to take it that it was so intended by Mr Scott. There are other strong reasons for inducing me to hold that both provisions must receive effect. Mrs Dewar was in poor circumstances. It is clear that at the date of her husband's death, subsequent to the execution of the will in question, she was in great pecuniary difficulties, and would not have been able to provide for her children had it not been for her father. The provision in the bond was thus the more intelligible, and I think was quite distinct and separate from the other, and must not be held to be in substitution of it, or to prevent it from likewise receiving effect.

LORD SHAND—I have felt this question to be attended with considerable difficulty. One has to balance the considerations upon both sides in arriving at a conclusion upon the question of intention. It is not without some doubt that I have come to agree with your Lordships. On the one hand, the sums in the testamentary disposition and in the bond are the same. Secondly, there is this to be said against the theory of a double portion, that exactly the same sum has been bequeathed under the will to the other two daughters. In the third place, it is a little remarkable that although Mrs Dewar was living in the house with her father nothing was said by him as to the provision he had made for her, or proposed to make for her, when she agreed to give up her interest in her husband's estate. On the other hand, there was a distinct change in Mrs Dewar's circumstances in life after her husband's death. The other sisters were comfortably married and in a good position, pecuniarily and otherwise. Mrs Dewar had little or no means, and on her father's request had given up the claims she had on her husband's estate. In the second place, the sum in the bond was settled on Mrs Dewar herself, and not upon her children, as was the case in the testamentary disposition. In the third place, the difference in the form of making the two provisions is not to be left out of view, but I do not put so much strength upon that consideration as I think your Lordships are inclined to do. If the second provision had been contained in a codicil to the will, I am not sure that that would not have made a stronger case for the double provision than we have under present circumstances.

The Court found Mrs Milne entitled to the £400 under the bond as well as to the legacy of that amount under her father's will.

Counsel for Defender (Appellant)—J. G. Smith — J. A. Reid. Agents — Adamson & Gulland, W.S.

Counsel for Pursuer (Respondent) — Lord Advocate (M'Laren, Q.C.) — Dickson. Agent — John Gill, S.S.C.

Friday, November 19.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

GUTHRIE AND ANOTHER *v.* SMITH.

Superior and Vassal—Feu-Duty—Assignation—Right of Third Party who tenders Payment of the Feu-Duty to Demand Assignation of Superior's Rights and Remedies—37 and 38 Vict. c. 94 (*Conveyancing (Scotland) Act*), *sec.* 4, *sub-sec.* 2.

Held (*diss.* Lord Shand) that a third party tendering payment to a superior of the feu-duty due by his vassal was not entitled to demand an assignation of the superior's rights and remedies for recovery of the same, though he offered to insert a clause in the assignation reserving the superior's rights and remedies for recovering all other feu-duty due and to become due.