Counsel for the respondent were not called upon.

At advising—

Lord President—In the ordinary case, when under the Judicature Act the pursuer desires to abandon an action after the record is closed, he is allowed to do so on the understanding that the account of expenses incurred is to go to the Auditor to be taxed and reported upon. That, however, is not the rule which is to determine the present question. If the pursuer had abandoned the cause, then there would have been the usual taxation of the accounts, but it would have been open to him to have brought a new action against the defender. What was done here, however, was this—When the case reached the Procedure Roll the pursuer made up his mind to insist no further in his claim against the defender, and accordingly the Lord Ordinary assoilzied the defender from the conclusions of the summons, and fixed a sum which in his opinion would cover all the expenses which ought to have been incurred. His Lordship so acted to prevent the further expense which would necessarily be incurred by a taxation of accounts before the Auditor. I think that the Lord Ordinary acted rightly in the circumstances, and I am for adhering to his interlocutor.

Lord Deas and Lord Mure concurred.

Lord Shand—As your Lordship has observed, we have not before us the case of an action abandoned under the provisions of the statute, when it is usual that the account of expenses incurred by the parties be remitted to the Auditor for taxation. I am not, however, prepared to say that even under the Judicature Act the Lord Ordinary might not in certain circumstances do the duty of an Auditor. I think there are circumstances in which even under the statute the Lord Ordinary might, for the purpose of avoiding further outlay, fix the amount of expense to be paid by the party abandoning. What the Lord Ordinary does in the present case, however, is not to modify in the sense of striking off, but for the purpose of avoiding the expense of an audit fixes a sum, and in so doing I agree with your Lordship in thinking his Lordship has acted rightly.

The Court adhered.

Counsel for Pursuer—Moncreiff—Maconochie. Agents—Maconochie & Hare, W.S.

Counsel for Defender—Watt. Agent—D. Howard Smith.

Thursday, June 8.

FIRST DIVISION.

FLYNNE, APPLICANT.

Poor Roll—A.S., 21st Dec. 1842, secs. 2 and 3, Schedule A—Appearance of Applicant before Minister and Elders of Parish—Certificate of Minister and Elders.

Michael Flynne was an applicant for admission to the poor roll. He received an injury on 1st August 1881, while working in the parish of Lasswade, which caused the loss of a leg, and the proposed action was one of damages against his employer for alleged *culpa* on his part resulting in that injury. After the accident he removed to his native country, Ireland, and resided in County Mayo. In this note he alleged that he was in poverty and in weak health, and unable to travel to Scotland for the purpose of appearing before the minister and elders of Lasswade to emit the declaration required by the 2d and 3d sections of the Act of Sederunt. He further stated that due intimation of the note had been made to the defender in the proposed action. He craved the Court to permit him in these circumstances "to appear before Standish M'Dermott, Esq., resident magistrate, Cloongee, Texford, County Mayo, and emit the declaration or statement as prescribed by the said Act of Sederunt, and upon this being done and upon a certificate, in or as nearly as may be in, the form of Schedule A, under the hands of the said Standish M'Dermott, being produced, to hold that the intimation given to Archibald Hood the defender, and the declaration or statement before the said resident magistrate, are a sufficient compliance with the said requirements of the said Act of Sederunt."

It was stated at the bar that the resident magistrate above named had written a letter to the applicant's agent stating that he knew the applicant, and was willing to give the required certificate if the Court thought fit.

The applicant referred to *Rattray*, 8th July 1824, 3 S. (n.e.) 163; *M'Kellar*, 15th July 1863, 1 Macph. 1114; *Carrigan*, 17th Nov. 1881, 19 Scot. Law Rep. 118.

The Court in the special circumstances of the case granted the prayer of the note.

Counsel for Applicant—Sym. Agent—Thomas M'Naught, S.S.C.

Thursday, June 8.

SECOND DIVISION.

(Before Lords Young, Craighill, and Rutherfurd Clark.)

[Sheriff of Midlothian.

THOMSON *v.* THOMSON.

Donation—Husband and Wife—Deposit-Receipt and Current Account in Bank in Donee's Name—Delivery.

In an action raised by the executor of a deceased person against his widow for payment of two sums of money—one being contained in a deposit-receipt, the other being the balance on an account-current, the defender averred that in pursuance of an expressed intention the deceased paid these sums into the bank on deposit-receipt and current-account respectively in her name, and had thereafter delivered to her the deposit-receipt and the bank pass-book. The Lords, relying upon the defender's testimony, corroborated by the terms of the deposit-receipt and the pass-book, and supported by evidence *aliunde* of the goodwill of the deceased to his widow, and his desire to benefit her, *sustained* the defender's plea that she had right to the sums as a donation, and *assoilzied* the defender.

John Henry Thomson, residing at 16 Springfield Street, Leith Walk, Edinburgh, presented a petition in the Sheriff Court of Midlothian, in the character of executor-dative of the late John Thomson, praying the Court to grant decree against Mrs Mary M'Culloch or Thomson, widow of the said deceased John Thomson, ordaining her (1) to pay the sum of £465, 9s. 10d., with interest thereon, and (2) to deliver to the pursuer the whole writings and documents which were in the said John Thomson's house at the time of his death on 28th February 1881.

The pursuer, who was the only son (by a former marriage) of the late John Thomson, averred that the money sued for formed part of his father's executry estate, which was under his management, and that he was entitled to the delivery of all documents relating to that executry estate.

In her statement of facts the defender made the following averments—On the 25th January 1879 Mr Thomson, in pursuance of an intention which he communicated to the defender to make her a gift, paid into the branch at Newington, Edinburgh, of the British Linen Company Bank the sum of £424, 19s. 10d. upon a deposit-receipt in name of the defender, and at the same time paid into said bank a sum of £100 upon a current account, also in name of the defender. Upon leaving the bank he took along with him the deposit-receipt and bank pass-book for the said sums so paid in by him, and on his return home he handed the deposit-receipt and bank pass-book to the defender, and stated that the sums which these represented he then gave her as a present, gift, or donation from him, to be her own free and absolute property, adding at the same time that the money being in bank in her own name alone she had complete control over it herself. The gift was no doubt prompted by the fact that the deceased had been nursed by the defender through a dangerous illness. The defender took possession of the deposit-receipt and bank pass-book. Prior to the death of Mr Thomson sums were withdrawn on three separate occasions from the said account-current. These were by cheque signed by the defender alone, and were given by her to her husband in loan. Some months before his death the deceased suggested to the defender the propriety of the deposit-receipt in question being put into the drawer used by the deceased for safe-keeping on behalf of the defender. The defender acquiesced in the propriety of the suggestion, and the deposit-receipt was accordingly placed in the drawer on the defender's behalf, the deceased at the same time telling the defender where the deposit-receipt was placed in the drawer, as well as the key of the drawer. Between this time and the date of the deceased's death the defender had frequent occasion to go to the drawer, but as no necessity arose for her removing the deposit-receipt she allowed it to remain there, where it was found after deceased's death, and was then taken possession of by defender as her property. The bank pass-book in defender's name was not considered of such importance, and it remained continuously in the defender's drawer. The sums due under the said deposit-receipt and account-current, as well as the deposit-receipt and bank pass-book vouching these sums, the defender held as her own individual property, and declined to recognise the claim now put forward by the pursuer thereto. They were given by the deceased to his wife, the defender, as a donation, and were her absolute property. The donation was never revoked by the deceased. Prior to the raising of the action the defender delivered to the pursuer all the documents which were in the deceased's house at the time of his death.

The pursuer pleaded—"(1) The defender's statements of alleged donation as between husband and wife, whether *inter vivos* or *mortis causa*, are irrelevant. (2) The alleged donation *inter vivos* can only be proved *scripto*. (3) The defence being unfounded in fact and untenable in law, falls to be repelled. (4) In respect the sum sued for forms part of the executry estate under the pursuer's management, and is in the defender's possession or under her control, she is bound to pay over the same to the pursuer as executor foresaid, and decree falls to be pronounced accordingly. (5) The pursuer, as executor foresaid, is entitled to delivery of all writings and documents belonging to the truster or relating to the executry estate, and the defender ought to be decerned to deliver those in her possession or under her control."

The defender pleaded—"(1) The sums in the said deposit-receipt and pass-book being the absolute property of the defender, she ought to be assoilzied with expenses. (2) The said deceased John Thomson having made a donation or gift to the defender of the sums put by him upon deposit-receipt and in account-current in defender's name, and said donation or gift having never been revoked or recalled by the deceased, the whole sums due under the said deposit-receipt and upon said account-current, together with the said deposit-receipt and the bank pass-book instructing the sum due upon the account-current, belong absolutely to the defender as her own individual property, and the defender should be assoilzied from the conclusions for payment, with expenses. (3) The defender having already delivered to the pursuer, as executor foresaid, all writings and documents belonging to the deceased or relating to the executry estate, in so far as the same were in her possession or under her control, she also falls to be assoilzied from the conclusions for delivery of writings and documents, with expenses."

The Sheriff-Substitute (HALLARD) allowed the defender a proof of the alleged donation, and to the pursuer a conjunct probation. The defender was examined and deponed—"I remember my husband being ill in the beginning of January 1879 from an affection of the bronchial tubes, of which he died. He was pretty seriously ill at the date I have mentioned. I attended him myself, and Dr Burn, Teviot Row, was the medical man who was called in. My husband almost completely recovered from that attack. He had been confined to bed. He was very pleased to have recovered his health, and said he attributed it a good deal to the care that had been taken of him during his illness by me, and by the doctor's orders being carried out. I acted as his nurse myself. He was sufficiently well to go out very soon after he got better. He went out without telling me where he was going. When he returned he found me up in the bedroom, where I was accustomed to sit. I think I was sitting on an easy-chair. He put the deposit-receipt in question into my hand. He had a bank pass-book in his hand, and I think he laid it on the