tion of such a gift. The writing alone may not be sufficient to imply a gift, and that a gift was intended may be proved by parole; but to hold that a gift can be proved by the handing over of an unendorsed deposit-receipt is a contention which I cannot hold as sound. Besides, the only evidence here is that of the alleged donee, and that cannot be held as sufficient, otherwise there would be no such thing as presumption against donation. The defender explained that the donor knew that he had made a will giving her everything, but I do not see how she can reconcile the attempted donation with the will, for if there was the latter, the former was unnecessary.

I am sorry we cannot give judgment in the defender's favour, as it is quite evident in this case that the intention of the deceased has been defeated through his failure to adopt operative means for carrying out that intention.

On the whole matter, I am of opinion that no ground has been shown here for holding that there was a donation *mortis causa* by the deceased to the defender, and that the executor is entitled to succeed.

The Court pronounced the following interlocutor:—

"Find in fact and in law that there was no transference by the deceased Angus M'Nicol to the defender of the property in or right to the deposit-receipt libelled: Therefore sustain the appeal, recal the judgment of the Sheriff-Substitute appealed against: Ordain the defender to deliver the said deposit-receipt to the pursuer: Find the pursuer entitled to expenses in the Inferior Court and in this Court," &c.

Counsel for the Pursuer—Young. Agent—W. Kinniburgh Morton, S.S.C.

Counsel for the Defender—Guthrie Smith—Salvesen. Agents—Gill & Pringle, W.S.

Thursday, November 7.

SECOND DIVISION.

[Sheriff of Forfarshire.

MACKAY AND OTHERS *v.* WOOD AND OTHERS.

Church—Allocation of Seats—Right to Sell and Let.

The church in a landward parish, which included the burgh of Brechin, was re-seated in 1807. Seats were allocated to certain trade incorporations which then included a large number of the inhabitants of the burgh. The incorporations dwindled to one or two members, who were in the habit of letting the incorporation seats and spending the proceeds upon themselves. To put an end to this state of matters several of the members of the kirk session purchased the seats from the surviving members of the incorporations and took dispositions in their own favour. They intended, eventually, to hand over these seats to the kirk session to hold for the good of the congregation, but meanwhile they let them to pay off the expense of the purchase. In consequence of certain persons, who had for years occupied some of these seats, refusing to leave them, the purchasers brought an action to have them interdicted from using them.

Held that by the purchase the pursuers had acquired no legal right to allocate the seats, and had no title to demand interdict.

The parish of Brechin is a landward parish, embracing within the parish the burgh of Brechin. The Parish Church was re-seated in the early part of this century, and the sittings in the renovated church were thereafter allocated at a meeting of those interested, held in the church upon 24th December 1807, conform to formal minutes of division duly recorded. Among the allocations then made 212 sittings in the gallery were allocated to the Incorporation of Glovers, the Incorporation of Weavers, the Incorporation of Shoemakers, and the Incorporation of Tailors. These were voluntary trade incorporations in the burgh of Brechin, which at the date of the allocation included a very large number of the inhabitants of the burgh. Allocations were also made to the heritors, to other incorporations, and to certain individuals, but none were made to the Town Council on behalf of the community. By degrees, and especially after 1846 (in consequence of the Act 9 Vict. c. 17), the trade incorporations dwindled to one or two members who in no way represented any portion of the community. The surviving members let the sittings originally allocated to the incorporations and spent the money in feasting.

In 1886, in order to put an end to this unsatisfactory state of matters, the Reverend James Mackay, one of the ministers of the parish, which is a collegiate charge, and several of the other members of the kirk session, purchased the said 212 sittings from the few remaining members of the abovementioned incorporations and took dispositions from them in their own favour. They then let these sittings to members and adherents at a moderate charge, intending after the expense of the purchase had been paid off to hand them over to the kirk session to be held for the good of the congregation.

Alexander Wood, skinner, Brechin, and others, who were all members of and communicants in the said Parish Church of Brechin, objected to this proceeding.

They had all occupied certain of the above sittings for several years either gratuitously or as lessees of the incorporations, and they insisted upon their right to continue to occupy the sittings free of charge notwithstanding the said dispositions.

The Rev. James Mackay and the other

purchasers of the sittings thereupon brought an action in the Sheriff Court at Forfar to have Alexander Wood and others interdicted "from entering or using the seats numbered . . . in the gallery of the Parish Church of Brechin, or any of them, without permission from the pursuers, or from interfering with the pursuers, or those deriving right from them in any way, in their use and occupation of said seats." . . .

The pursuers pleaded—"(1) The pursuers are, in virtue of the said minutes and dispositions, entitled to interdict as craved with expenses."

The defenders pleaded—"(1) No title to sue. (3) The allocation being to the so-called incorporations or voluntary associations by their descriptive name only is effectual as a title to possess or assign the said seats or to levy rents for the same. In any case, said allocations being in trust strictly to and for the use of the incorporations allenarly, it is *ultra vires* of them, or of any office-bearers or members, to sell, assign, or dispone their seats. (4) The alleged purchase of seats by the pursuers being invalid and illegal, and the conveyances founded on being null, no right of action lies to support or enforce the same."

A proof was allowed under reservation of the plea "No title to sue."

The Sheriff-Substitute (ROBERTSON) thereafter pronounced the following interlocutor:—"Repels the pleas taken by the defenders, in so far as these are preliminary: Sustains the title of the pursuers to sue the present action; Finds in fact that from time immemorial the seats in the Parish Church of Brechin mentioned in the petition have been possessed by certain corporations, who have levied seat-rents for them without challenge: Finds that these corporations have now sold and assigned these seats to the pursuers, and that regular *ex facie* probative dispositions to these seats are produced in process: Finds in law that seats in a landward-burghal church are not *res religiosæ* in the sense of being *extra commercium:* Finds that until these documents by which these seats have been transferred to the pursuers are reduced in the Supreme Courts, the right and title to the seats remains with the pursuers, and must be given effect to in the Sheriff Court; Therefore, and in respect it is admitted or proved that the defenders are, and have been, occupying the seats in dispute without paying rent for them, and have done so contrary to the wish of the pursuers, interdicts the defenders as craved."

The defenders appealed to the Sheriff (COMRIE THOMSON), who adhered.

The defenders appealed to the Court of Session, and argued—The pursuers were no doubt all members of the kirk-session, but they were not here as members of the kirk-session—indeed the kirk-session was not unanimous on the subject—but solely as individuals. They were not enforcing decorum; they were trying to establish a right derived from these old incorporations which never could have given them a title, and which, as matter of fact, had ceased to exist. The defenders here were members of the church, with an interest to oppose such an illegal proceeding as this pretended sale. If the pursuers obtained interdict it would mean that though they were reduced to one the defenders might still be prevented from sitting in any part of about a fifth of the area of the church although it was unoccupied. That was almost enough to show the unreasonableness of the remedy sought. If this was a landward parish these incorporations were just in the position of heritors who get seats for themselves and their tenants, but cannot alienate them to third parties apart from the lands—*Stephen* v. *Anderson* (*Elgin* case), November 18, 1887, 15 R. 72, *per* Lord President, 77. If this was a landward burghal parish these incorporations were in the position of magistrates of a burgh—to whom such allocations were usually made—and held the seats for the community. At any rate, they held the seats in trust for the members of the various incorporations, and had no right of selling any of these seats. If these incorporations had virtually ceased to exist, then the trust was at an end. It did not give the one or two survivors the right of selling 212 sittings to, it might be, strangers to the parish—Erskine, ii. 1, 8, and iii. 6, 11; Connell's Parochial Law, Suppl. p. 72 (*St Andrews* case); *Skirving and Young* v. *Vernor*, 1796, Mor. 7930; *Lockhart* v. *Lockhart*, January 24, 1832, 10 Sh. 243; *Duke of Roxburghe and Others* (*Jedburgh* case), June 1, 1876, 3 R. 728, and June 29, 1877, 4 R. (H. of L.) 76.

Argued for pursuers — The facts here must be looked at in considering whether the interdict should be granted. The defenders were not really here because they objected to the allocation made by the pursuers, but because they objected to all seat rents. The pursuers were all members of the kirk-session, and their object was to secure decency and order, and to put an end to a public scandal. They should be helped in attaining it. Possibly the interdict asked was too wide. All that the pursuers really wanted was such an interdict as a heritor could obtain with regard to his own seat, viz., to keep out intruders, which he was entitled to do, at least till service had begun. This was a landward burghal parish, and the seats allocated to the incorporations were in the same position as the seats in burgh churches allocated to the magistrates. In such churches the magistrates, or as here trade incorporations, could let the seats, but only to meet the expenses connected with keeping up the church—*Clapperton* v. *Magistrates of Edinburgh*, July 14, 1840, 2 D. 1385. This was what the pursuers desired to do. The position of the old trade incorporations had become most anomalous, and the pursuers had done their best quietly to find a remedy. They were now in the place of the old incorporations, and were desirous of doing what the incorporations could no longer do—of holding the seats for the good of the community. They had never attempted nor did they claim any right to allocate or let to persons unconnected with the parish.

Seats in a burghal parish church or in the burghal portion of a landward burghal parish church could be let or even sold if the lessee or disponee belonged to the parish, and consequently the sale to the pursuers was perfectly legal — Dunlop's Parochial Law, p. 38; Duncan's Parochial Law, pp. 227-228; *Watson* (*Dundee* case), Mor. 5431 and 7917; *Fairey* v. *Leitch* (*Ruthergien* case), February 2, 1813, F.C.; *Magistrates of Greenock*, November 27, 1822, 2 Sh. 38; *M'Intosh* v. *Fraser* (*Inverness* case), February 8, 1825, 3 Sh. 354; *Smith* v. *Crawford*, June 22, 1826, 4 Sh. 746; *Milne* v. *Wills* (*Montrose* case), January 20, 1869, 7 Macph. 406.

At advising—

LORD JUSTICE-CLERK—The pursuers are the first minister of Brechin and certain gentlemen in Brechin, who desire to obtain interdict against the defenders, parishioners of Brechin, from entering or using certain seats in Brechin Parish Church without the permission of the pursuers. The titles which the pursuers found upon as giving them the right to interdict consist of dispositions by certain trade corporations of Brechin, by which these corporations sold a number of sittings in the church to the pursuers. It appears that in 1807 a meeting was held of the "heritors and others concerned in the property of Brechin Church," at which certain seats were allocated to the trade corporations. They were allocated to the corporations as such, and not to the individual members of the corporations.

These corporations were voluntary associations, and embraced a large number of the inhabitants of Brechin, no fewer than 456 sittings being allocated to them. It appears that for many years these corporations have had no substantiality, but have dwindled down to a few individuals in each, who have no business to transact, and no powers that they can exercise. They have, however, been in the practice of making money by trading in the church seats allocated to their corporations, and which are now no longer required for the members of the corporations and their families. The pursuers, on the allegation that they have bought these seats, maintain their right to exclude parishioners from them by interdict, on the ground that they have let them for money to persons with whom they have bargained for them.

The defenders maintain that the pursuers have no right or title to these seats, and have no official or public trust in connection with them, and that there is consequently no right in them to ask for interdict against parishioners using these seats.

The Court had the advantage of able and learned arguments from both sides of the bar, and a large number of cases and book authorities were quoted. It is difficult to say that much assistance was derived from these. Nor do I think that it is necessary to decide any of the points of law which they were intended to illustrate.

It seems to me that when the exact circumstances are kept in view the real point to be decided is not attended with serious difficulty.

The parish in which the question has arisen may be held to be a landward burghal parish. That appears to be clear from what is before us in the case. Being a landward burghal parish the community in the burgh would naturally be represented by the Provost or the Chief Magistrate and his colleagues. And as the allocation of seat accommodation has usually been matter of arrangement, it would be quite natural that in a burgh where there were numerous trade corporations, embracing the great mass of the inhabitants, that the space at the disposal of the authorities of the burgh should be allocated to the corporations in proportion to the requirements of each. Each corporation thus became a kind of trustee for its members, holding the seats for the purpose of apportioning them among the members, and practically arbitrating between the members as to the allocation. But the corporations had and could have no right to deal with these seats for purposes of general gain. Had they done so, those for whom they held the seats could have called on a court of law to interfere to compel them to give the use of the seats to them, and to cease to trade in them outside the trust committed to the corporation. It may be true that on occasions when some seats allocated to a corporation were not required for members such seats may have been let to others. Such things may be done, and no one may care to interfere—indeed there may be no injury to anyone in the doing of it. But it is a different question whether it is possible for a corporation to make merchandise of the whole area committed to it by selling to a few individuals the space which it has received in trust so that these individuals may dispose of it as they please. I am of opinion that they in doing so commit a breach of the trust imposed on and accepted by them. It is no answer to this to say that the corporation is now a mere name, as it consists of only a few individuals, and that it has no members towards whom it can fulfil its trust in allocating the seats which were committed to it. That is a reason for holding that the trust, and therefore the rights under the trust, have come to an end, not for allowing the two or three persons who are the corporation in name to barter away the subject-matter of the trust.

Now, what is the position of the pursuers? Their objects are most praiseworthy, and they are entitled to sympathy in endeavouring to carry them out. Their desire plainly is to put an end to a most scandalous state of things by getting rid of these skeleton corporations which trade in the seats they can no longer use, and spend the proceeds in feasting. They have therefore endeavoured to buy out the corporations, and having done so, they propose to treat the seats of the corporations as being their property, and to allocate them as they may choose. Certain parishioners object to this, maintaining that these moribund corporations had no right to sell, and that the pursuers could not buy the rights of the corporations as against the other parishioners, and having no title except from the corpora-

tions can have no right to interdict parishioners from occupying any particular seat in the church.

I am of opinion that the defenders are right in this contention. The pursuers cannot take over the trust which was committed to the corporations as such, and they do not profess to carry out any trust, but claim to act as proprietors by purchase of the seats. I see no ground for holding that they have any right to do so. They cannot carry out their excellent object in this way if parishioners object to their taking upon themselves to allocate seats. I hold that the pursuers have no right to ask for the interdict which is sought in the prayer of their petition, and that we ought to recal the interlocutors of the Sheriff and Sheriff-Substitute, and refuse the interdict.

LORD YOUNG and LORD RUTHERFURD CLARK concurred.

LORD LEE was absent at the hearing, and consequently gave no opinion.

The Court pronounced the following interlocutor:—

"Find in fact (1) that on 14th December 1807, at a meeting of the heritors of the landward parish of Brechin, certain seats in the church of that parish were allocated to the Incorporation of Glovers, the Incorporation of Weavers, the Incorporation of Shoemakers, and the Incorporation of Tailors, all of the burgh of Brechin; (2) that the said seats were allocated for the use of the members of the said incorporations respectively; (3) that said corporations have ceased to exist as real trade organisations, and consist only of a few individuals who do not represent any portion of the community or parishioners of Brechin; (4) that these individuals have sold or otherwise sought to alienate the same to persons now represented by the petitioners: Find in law that the pursuers did not by the purchase of said seats acquire any legal right to allocate the same as they might choose, or to exclude any parishioners from occupying any seat in said parish church, and have no title to demand interdict against any parishioner occupying such seat: Therefore sustain the appeal: Recal the judgments of the Sheriff and Sheriff-Substitute appealed against: Refuse the prayer of the petition: Find the defenders entitled to expenses in the Inferior Court and in this Court," &c.

Counsel for the Pursuers—Low—Ure. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Defenders—Gloag—Law. Agents—J. & J. Galletly, S.S.C.

Thursday, July 18.

OUTER HOUSE.

[Lord Kinnear.

MACDONALD *v.* WARREN.

Agent and Client—Fraud.

G, a law-agent, who was insolvent, having obtained a sum of money from his client W to invest in loan upon a particular heritable security appropriated it to his own uses. After the money had been spent he was instructed by another client M to obtain a loan upon a property belonging to her. He induced M, upon the representation that it would facilitate the obtaining of the loan, to execute a disposition of the property in his favour. This disposition was never recorded. Some days prior to the date of this disposition G executed a bond and disposition in security over the property in favour of W in security of a part of the money which had been entrusted to him by W for investment. No intimation of this bond was made to M, and no money paid to her in respect of the loan. The law-agent shortly thereafter died insolvent. M then became aware of the existence of the bond, and raised an action against W for its reduction, and for declarator that she had an undoubted title to the property unburdened by the bond. *Held* (1) that the disposition by M to G not having been recorded, W had no real right to the lands under the bond and disposition in security; (2) that W had no personal right to enforce completion of her right under the bond, there being no contract between her and M; (3) that no right accrued to W by virtue of the disposition (which enabled G to execute the bond) having been granted by M to G, as the granting of the bond was not a fraud upon W, but was an attempt to benefit W at the expense of M.

Rose v. *Spaven*, June 15, 1880, 7 R. 925, *distinguished.*

In January 1886 James Young Guthrie, S.S.C., Edinburgh, was entrusted by Mrs Warren, Edinburgh, with the duty of procuring an investment for a sum of money. On 12th January he transmitted to her a proposal for a loan of £1800 over certain subjects at Morningside Drive and Comiston Road, Edinburgh, and received from her on 21st January a sum of £1550 to account of the proposed loan. Mr Guthrie, who had been insolvent for several years before this money was put into his hands, appropriated the money to his own purposes. He paid the money into his account with the Clydesdale Bank, which was then considerably overdrawn, with the result that a sum of £912, 0s. 6d. was placed to his credit. This credit balance was reduced by 23rd March 1886 to £88, 2s. 7d. From that time till 10th May 1887, when he died, the account fluctuated. It was generally overdrawn, and was so at the date of his death. From the time