have already quoted, to the extent of £16,300 Duke Archibald's personal obligation, because while they did that they agreed to discharge the father's estate, and no doubt that has been done. If that be so, to my mind the whole debts are paid off and extinguished, and that being so, upon the construction of the deed which I have already referred to and commented upon, I think Duke Archibald became beneficially entitled to this art collection, and as a consequence that the Crown is right.

LORD M'LAREN — I concur with your Lordship in the chair. There is only one observation I propose to make regarding the manner in which the direction of Duke Alexander was carried out. I assume, for the reasons given by your Lordship, that according to a due construction of Duke Alexander's settlement the duty of his trustees, after the debts were paid and extinguished, was to make over the whole of what has been termed the art collection to the heir in possession absolutely. And I agree with your Lordship and Lord Adam that when funds were provided by Duke Archibald, and when the debts were paid out of those funds, the condition contemplated in the settlement was fulfilled. Now, instead of conveying the art collection absolutely, the trustees proposed to convey it to Duke Archibald in liferent, and to the heirs of entail in fee, and they do so on the narrative contained in the joint print. It is perfectly plain, I apprehend, that liability to legacy duty must depend upon the right which Duke Archibald had under his father's settlement, and if he had chosen to accept a conveyance in liferent, with a reversion to his heirs that might be binding on himself provided the proper steps were taken to secure the right to the heirs by vesting the property in trustees, or in some other way, that being a settlement proceeding upon the consent of Duke Archibald himself could not affect the claim of the Crown to legacy duty. That seems perfectly clear, and assuming the construction of the original deed, which I think your Lordship has clearly established, the right to legacy duty follows.

LORD KINNEAR—I agree with your Lordship and Lord Adam, and as my reasons for the opinion which I have formed have been already fully stated, I do not think it necessary to detain your Lordships by repeating them. I have only to add that I also agree with Lord M'Laren in thinking that if the transaction between the late Duke of Hamilton's trustees had been actually carried out in terms of the draft conveyance to which he has referred, the result would have been exactly the same in law as I hold that it is now in consequence of the arrangement which was actually made. The conveyance in question does not appear to have been ever executed, but the effect of it, if it had been executed, would have been exactly the same as if the deed was really carried out. I therefore agree with your Lordship.

The Court adhered.

Counsel for Pursuer — Lord Advocate Pearson, Q.C. — Young. Agent — David Crole, Solicitor of Inland Revenue.

Counsel for Defender — D.-F. Balfour, Q.C. — Ure — Macphail. Agents — Tods, Murray, & Jamieson, W.S.

Tuesday, December 8.

SECOND DIVISION.

[Sheriff of Aberdeenshire.

WALLACE *v.* ROSS.

Poor — Settlement — Proof — Evidence — Hearsay—Family Tradition.

In an action at the instance of a relieving parish against the parish alleged to be that of the pauper's birth, for repayment of funds expended on his behalf, the only evidence in support of the fact of his having been born there was that of the pauper himself and of his sister, who relied solely upon statements made to them by their mother, who was dead.

Held (*diss.* Lord Young, *dub.* Lord Rutherfurd Clark) that this was not a case of family tradition, and that the evidence, being virtually that of a single witness, was insufficient to establish the pursuer's claim.

James Wallace, Inspector of Poor of the parish of St Nicholas, Aberdeen, brought an action in the Sheriff Court at Stonehaven against George Ross, Inspector of Poor of the parish of Laurencekirk, for payment of sums expended and to be expended for the maintenance and support of a pauper John Duncan, on the ground that the pauper had no residential settlement, and that Laurencekirk, as the parish in which he was born, was liable for the expense of alimenting and providing for him.

The defender pleaded that the said John Duncan not having been born in the parish of Laurencekirk, he should be assoilzied.

The question in dispute was entirely one of fact, viz., whether or not the pauper had been born in the parish of Laurencekirk?

A proof was allowed, at which the pauper, aged sixty-nine, deponed—"After I grew up I was told by my mother that my father was working at Scotston when I was born. I was born six weeks before Whitsunday. My mother told me that. I am sure my mother told me I was born at Scotston, Laurencekirk. She said it was a stone and lime laigh house I was born in. She often told me the place of my birth. *Cross.*—I do not know that I was ever told the year I was born. I do not mind much about the conversation I had with my mother as to where I was born. It is thirty-three years since I had the conversation with my mother.

Mrs Robertson, aged seventy, deponed—"I am the only sister of John Duncan. He is twenty-one months younger than me.

He was born in April. My mother told me about my own birth and my brother's. My mother's name was Jean Miller, and my father's name David Duncan. She told me they were married at Haddo. My mother was then housekeeper for her uncle at Haddo. My father was a ploughman at Haddo when my mother and he were married. My mother was in the family-way when she was married. I was born at West Caldhame, in the parish of Marykirk. I think my mother went there shortly after leaving Haddo. My mother left Caldhame the Martinmas after I was born. She went to Blackiemuir Avenue, Laurencekirk, at Martinmas of that year, and had a house for six months there. My mother went from Blackiemuir Avenue to Scotston. My brother John was born at Scotson. I have only my mother's word for it, but I have always minded what she told me. *Cross.*—It is more than twenty years since my mother died. I was about nine months old when my father and mother went to Scotston. I do not know how long they were there. My mother never told me the particular house in Scotston in which they lived."

There was no other evidence in support of Scotston being the place of the pauper's birth.

For the defender, an old man, William Balfour, aged eighty-nine, who knew the pauper's parents and the circumstances connected with his birth and that of his sister (examined on commission), deponed —"I have always understood John was born at Haddo or Scotston. I have sitten here and considered it many times, and I think he 'boot' to be born at Haddo, because use there was twenty-two months between them, and the girl was born at Caldhame."

Other evidence showed that if born at Haddo the pauper was born just outside the boundary line of the parish of Laurencekirk as there defined, and in the parish of Garvock.

The Sheriff-Substitute (BROWN) found that the pursuer had failed to prove that John Duncan, the pauper, was born in the parish of Laurencekirk, and assoilzied the defender.

"*Note.*— . . . Mrs Robertson and the pauper are quite clear that their mother, repeatedly and in different terms, told them that the pauper was born at Scotston, and the pursuer's contention is that he is entitled to prevail because he has the evidence of two witnesses. I am unable to concur in this view, the evidence amounting not to two witnesses to a fact, but only to a statement as to a fact, which is a wholly different thing. Of direct proof as to the birth in Scotston there is therefore on the pursuer's side only the evidence of the pauper's mother, as that is to be gathered from the statement imputed to her by the pauper and his sister. Whether in the circumstances such evidence, if standing by itself, would have availed the pursuer, and what force there is in some Sheriff Court decisions referred to at the hearing in which similar proof was accepted as sufficient evidence of birth, I do not find it necessary to say, because in my opinion there are important adminicles casting serious doubt on the alleged fact which is thus spoken to. [*After examining the evidence*]—I therefore come to the conclusion—in the end I must say without hesitation—that the pauper was born in Haddo, and not in Scotston. . . . The pursuer conceived himself to be in a strong position through the evidence of the pauper and his sister as to the birth in Scotston, and elected to peril his case on that ground. Although very ably and forcibly maintained, I have quite a distinct opinion that it fails."

The pursuer appealed to the Sheriff (GUTHRIE SMITH), who recalled the Sheriff-Substitute's interlocutor, found that the pursuer had proved that the pauper was possessed of a settlement by birth in the parish of Laurencekirk, and decerned in terms of the conclusions of the action.

"*Note.*—. . . The pauper and his sister say that it was to Scotston David Duncan returned and lived with his wife and child in a cottar-house somewhere near the scene of his employment. It is not denied that Scotston is entirely in the parish of Laurencekirk, but it is suggested by way of defence to the action that the cottar-house in question was not on Scotston but on the farm of Haddo (where Duncan resumed his employment in 1821) on the Garvock side of the line which, running through the farm, separates Garvock from Laurencekirk. In support of this theory an old witness of the name of Balfour is called, and were he a reliable witness I should agree with the Sheriff-Substitute that the locality of the birth had been left so uncertain that the burden of proof had not been discharged, and the relieving parish must remain saddled with the burden.

"But Balfour is an old man close on ninety years of age, and his memory does not seem to me to be trustworthy. Indeed, he admits that after sitting thinking over the matter 'many times' the only conclusion he could come to was that the pauper 'boot to be born in either Scotston or Haddo.' This is not enough to displace the family tradition to which the pauper and his sister speak positively, that after leaving Haddo in 1820 their father David Duncan never returned to it, but went to Scotston, and that it was in a cottar's house on Scotston where the family lived. Their mother always said so, and never mentioned Haddo. . . . I cannot imagine a man going through life and reaching the allotted three score years and ten completely mistaken on a point which with all men, poor as well as rich, is a matter of affectionate interest—the place where he first saw the light—without discovering the error. This it is that makes family tradition valuable as evidence, for it relates to matters on which people are careful to be accurate, and although it may be overturned by some opposing fact, it is not to be rejected for reasons which never pass beyond conjecture and surmise. I have therefore found the parish of Laurencekirk liable to relieve St Nicholas of this pauper."

The defender appealed to the Court of Session, and argued—The pursuer had failed to prove his case. The proof must be as complete in cases like the present as in any other class of cases—See Lord President in *Leman* v. *Wallace*, November 26, 1887, 15 R. 92. There was no case here of "family tradition," but only the evidence of one person, which could receive no additional force because it was repeated by her two children. That unsupported statement by the mother was insufficient, even if there were no conflicting evidence, but here the evidence of Balfour threw grave doubts upon Scotston being the pauper's birthplace. As to "family tradition," see *Macpherson, &c.* v. *Reid's Trustees, &c.*, November 17, 1876, 4 R. 132 (espec. the Lord President's opinion, 138).

Argued for pursuer and respondent—No one knew so well as the mother where her child was born, and being dead, hearsay of her evidence was competent by the law of Scotland. Apparently in *King* v. *Inhabitants of Erith*, June 15, 1807, 8 East. 539, the similar evidence of a father given by hearsay would have been held sufficient if it had been competent, which, being in England, it was not—Taylor, secs. 645-646; Phillipps, i. 201; Greenleaf, i. 126. The understanding of the pauper and of his sister as to his birthplace, derived from their mother, and unshaken all throughout their somewhat long lives, amounted to "family tradition," and was sufficient evidence in support of the pursuer's claim.

At advising—

LORD JUSTICE-CLERK—The pursuer in this case is the Inspector of Poor of the parish of St Nicholas, Aberdeen, which has granted relief to a pauper of the name of Duncan. The pursuer now raises this action against the Inspector of Poor of the parish of Laurencekirk to have the aliment repaid, on the ground that Laurencekirk is the parish of the pauper's birth, and as such liable for his relief. The Sheriffs have differed as to the result of the evidence, the Sheriff-Substitute having held, as he has stated, as a matter of inference that the pursuer has failed to prove his case, and the Sheriff having decided in the pursuer's favour.

I think it is not necessary to go into the evidence in detail. The evidence upon which the pursuer relies is the evidence of the recollection of the sister of the pauper, and of the pauper himself, as to what their mother had told them was the place of the pauper's birth. Beyond that there is no evidence at all in support of the pursuer's claim, and I do not think that that is sufficient to establish his case. It was put by the pursuer's counsel as a case of "family tradition," but I do not think it is a case of "family tradition" at all. The pauper's mother seems to have told him that Scotston was the place of his birth, and I take that as if the old lady had been alive and had told us so herself. In that case it is difficult to believe that she would not have been able to find some adminicles of evidence to aid her evidence, but if she had been alive, and there had been no corroborative evidence either in the way of witnesses or of adminicles, I should have held that, founding on her evidence alone, the pursuer had equally as in the present circumstances failed to prove his case. His case cannot be better, but is rather weaker, because two people both say they remember the old lady saying so, for that evidence is just the evidence of one witness, and it is not now open to being tested by cross-examination as it would have been if she had been still alive.

I am therefore of opinion that the pursuer has not legally proved that the aliment legally falls to be paid by Laurencekirk. According to the view I take, it is not necessary to go into the evidence of Balfour, although, if the question of insufficiency of evidence were got over, it might be important as throwing doubt upon Scotston having been in fact the birthplace of the pauper. The ground of my judgment is that the pursuer has failed in his legal obligation to prove his case, and I am for reverting to the judgment of the Sheriff-Substitute.

LORD YOUNG—I was and am disposed to agree with the Sheriff-Principal. The question is raised whether the pauper's relieving parish is Laurencekirk or Garvock. That is the question, for it seems to me to be admitted that it is the one or the other. He certainly has no settlement in Aberdeen, which is at present supporting him. Aberdeen accordingly raised this action against Laurencekirk, which the Aberdeen authorities seem to think the evidence shows to have been the pauper's place of birth, rather than against Garvock. His mother always said so. His sister always understood so, and the pauper himself always understood so—and he is not a young man now. He never seems to have had any doubt about it. Of course his mother knew best, but there is some conflict of evidence tending to show that the mother was mistaken, and that the birth took place over the boundary line, and in Garvock parish. There is no principle involved. It is a question of evidence merely. I do not go into detail, especially as I understand Lord Rutherfurd Clark, who was inclined to my view, is not going to give effect to that inclination, but is now willing that the interlocutor of the Sheriff-Substitute should be given effect to. The question is of interest to the parties, and I cannot quite concur in that view. Indeed, I think that where the opinion on the bench is divided we should not reverse the judgment appealed against, but at the same time I think it desirable that the case should stop here. I content myself with saying that my views concur with those of the Sheriff-Principal.

LORD RUTHERFURD CLARK—At one time I was strongly impressed with the view that we should give effect to the family tradition, and I was not prepared to hold it was insufficient because it arose from one witness, but as two of your Lordships think it insufficient, and as considerable

doubt has been thrown upon that tradition by the evidence of Balfour, I am disposed to concur.

LORD TRAYNER—The question—and the only question—raised in this case is, whether the pauper was born in the parish of Laurencekirk? The pursuer's case is based upon the averment that the pauper was born in that parish, and the *onus* of proving that averment of course is on the pursuer. In my opinion he has failed to discharge that *onus*.

The only evidence adduced by the pursuer is the statement of the pauper and of his sister that they were told by their mother that the pauper was born in Laurencekirk. That evidence is quite competent, because the pauper's mother is now dead. But it is the evidence of only one witness, although repeated by two. If the mother had been alive her unsupported testimony would have been insufficient to establish the pursuer's case; it does not become sufficient because, being dead, what she did say when alive, and what probably she would have said had she been examined *in causa*, is deponed to by the two persons to whom in life she said it. The Sheriff thinks this evidence is sufficient to prove the fact alleged because it is "family tradition." I think the Sheriff is in error in so describing the evidence, and in attributing to it the weight and importance which the law attributes in certain cases to what is properly called "family tradition." In questions of pedigree (including such a question as we are here dealing with, as to where a certain person was born) evidence of "family tradition" is of great importance, but I take it that it is so because being handed down from generation to generation, and spoken of among the various family relations of each generation, the fact spoken to would probably be contradicted or impugned by some of them if the statement made was not true. A statement current among persons most likely to know of its truth, and never impugned although often repeated, may very well be accepted as true in after time. And this is what I understand to be evidence by "family tradition." But the single statement or repeated statement by a mother to her two children is not of this character. In this case the children had no knowledge whether their mother's statement was correct or erroneous, and as far as the proof shows, the statement by the mother as to the birthplace of the pauper was made to nobody except her two children. The ground therefore on which the Sheriff proceeds seems to me not to be applicable to the case.

I leave out of account the evidence of the pursuer's own witness Balfour, which, if it does not contradict the pursuer's averment, rouses great doubt of the accuracy of the statement made by the pauper's mother, whose statement after all, although made with perfect honesty, may be wrong. Nor do I put much stress, if any, upon the fact that the pauper does not seem to be a witness whose accuracy in repeating what he says he heard can be entirely relied on. Not because of dishonesty or untruthfulness, but from want of accurate or distinct recollection. I will assume that the pauper and his sister repeat quite correctly what their mother said, but even on that assumption I think the evidence of the one witness—the mother—is insufficient for the pursuer's case. I therefore think with the Sheriff-Substitute that the pursuer has failed to prove the averment, proof of which is essential to his succeeding in the present action.

The Court recalled the judgment of the Sheriff and assoilzied the defender.

Counsel for Pursuer and Respondent—Comrie Thomson—Watt. Agent—Andrew Urquhart, S.S.C.

Counsel for Defender and Appellant—Crole. Agent—W. B. Rainnie, S.S.C.

Tuesday, December 8.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

DAWSON *v.* M'KENZIE.

Donatio inter vivos—Deposit-Receipt Blank Indorsed by Deceased—Presumption.

Evidence in support of an alleged *donatio inter vivos* which *held* insufficient to overcome the presumption against donation.

This was an action at the instance of Mrs Elizabeth Dawson against Thomas M'Kenzie, hairdresser, 291 Paisley Road, Glasgow, as executor or vitious intromitter with the estate of the deceased Mrs Mary Jane M'Kenzie, mother of pursuer and defender, concluding for decree ordaining the latter to produce a full account of the whole of said executry estate that the amount of the share falling to pursuer as one of the next-of-kin of her mother might be ascertained, and for payment of said share.

The pursuer averred that her mother had died intestate at 291 Paisley Road, Glasgow, on 27th December 1890, survived by six children, including the pursuer and defender; that the estate of her mother at the time of her death consisted (1) of the furniture in the house No. 291 Paisley Road, and (2) of a sum of £240 contained in a deposit-receipt of the Clydesdale Bank in her name dated 12th December 1890; that the defender had taken possession of these effects without right or title; and in particular, a few hours after the death of his mother, had illegally obtained payment from the bank of the £240 contained in the above-mentioned deposit-receipt, and had re-deposited the same in his own name. She claimed one-sixth of the furniture and of the £240.

The defender in answer averred that on 16th December 1890 his mother had made