endeavoured to be raised between the same parties, the rule laid down in the Digest 44, 2, 3, being, *exceptionem rei judicatæ obstare quoties eadem questio inter easdem personas revocatur.* This plea is not competent, therefore, merely on the ground, that the point raised in the action has been previously determined in some former proceeding between the same parties, but it is exactly analogous to a plea in the English Courts of judgment recovered, in which it is necessary, in order to make the judgment operate as an estoppel, that it should be between the same parties and upon the same subject matter coming directly in question either in the same Court or in another Court of coordinate jurisdiction.

Without considering whether the pursuers are different or substantially the same in the present and in the former action, or whether the circumstances under which the question is now raised have been changed from what they were before by the Act of 23 and 24 Vict. c. 48, it is sufficient to say that the proceeding in the present case being for a different rate from that upon which the former judgment proceeded, the cause of action is different, and the plea of *res judicata* is consequently inapplicable.

If the learned Judges of the Court of Session had thought, that the same point was raised before them under precisely the same circumstances, it would have been right for them to adhere to the former decision, and to have assoilzied the defenders. And if they had done so there can be no doubt, I suppose, that their interlocutor might have been brought by appeal to this House, and the propriety of the former decision might have been questioned, and if found to be erroneous, might have been overruled.

In a case to which the plea of *res judicata* properly applies, and an appeal from an interlocutor in favour of the defender is made to the House, its jurisdiction is not taken away by effect being given to that plea. On the contrary, it is then deciding upon the whole subject of the appeal. The only question in such a case would be, whether there was a previous judgment between the same parties on the same subject matter; and that once established, there would be no possibility of going behind the judgment and examining the grounds on which it proceeded, for as long as it remained in force and unreversed, it would be conclusive between the parties.

For these reasons I think that the plea of *res judicata* cannot be maintained.

With regard to the objection to rating the port and harbour dues, and so including in the assessment the sum of £7680, I think a sufficient answer was given to that in the course of the argument by my noble and learned friend.

LORD KINGSDOWN.—My Lords, I quite agree with my two noble and learned friends.

Interlocutors affirmed, and appeal dismissed with costs.

Appellants' Agents, J. Phin, S.S.C.; Maitland and Graham, Westminster.—*Respondent's Agents*, A. Duncan, S.S.C.; Simson and Wakeford, Westminster.

MARCH 23, 1866.

LORD ADVOCATE, *Appellant*, *v.* DUGALD MACNEILL, Esq., of Kintarbet, *Respondent.*

Bill of Exchange—Donation—Delivery—Onus of proof of Donation—Inventory duty—*L. borrowed in* 1838 £6000 *from his mother, and gave her a bill of exchange accepted by him for that sum. After the death of the mother in* 1844 *and of L. in* 1852, *D., a brother of L., being executor of both, produced the bill indorsed by the mother to D. without any date, and on the back of it were marked receipts for interest up to the mother's death. It was not proved, that the bill had ever left the mother's possession, or that interest had been actually paid. D. claimed the sum as a gift to D. by his mother, therefore, that no inventory duty was due in respect of it as part of the mother's estate.*

HELD (reversing judgment), *That as D. had not proved delivery of the bill to himself by his mother, the presumption against donation was not rebutted; and, therefore, that the bill was part of the mother's estate.*[1]

The facts of this case were shortly these:—

Cross actions had been raised, the object of which was to determine whether inventory duty was payable on a sum of £6000, which had been secured by a bill of exchange, and indorsed to the respondent by his mother, Mrs. Margaret Macneill, to whom the money belonged. In the first action the respondent claimed a return of duty as follows:—He alleged, that he was the

[1] See previous report 2 Macph. 626: 36 Sc. Jur. 304. S. C. 4 Macph. H. L. 20: 38 Sc. Jur. 350.

executor of his brother, Lachlan Macneill Campbell, who died in 1852, and, as such executor, paid inventory duty, amounting to £120, on the amount of his brother's estate, which was valued at £6034. After realizing the estate, the debts were found to amount to £5892, thereby leaving only a free balance of £142, the duty on which was £2. The respondent consequently demanded from the Commissioners of Inland Revenue a return of £118, as the excess of duty paid. After great delay, and ultimately an appeal to the board in London, he was told that £70 would be allowed, but not until some additional duty due on his mother's estate was accounted for. The respondent was disposed rather to sacrifice part of his claim than continue the dispute; but a further claim was set up by the Inland Revenue, with respect to a sum of £6000, which was alleged to form part of the estate of the respondent's mother, who died in 1844. In respect to this sum of £6000, the Lord Advocate, on behalf of the Inland Revenue, in the cross action, claimed a duty of £88; and the respondent gave the following account of it:—The late Lachlan Macneill Campbell borrowed £6000 from his mother in 1838, for which he accepted the following bill of exchange:—

"DRIMDRISSAIG, *22nd Nov.* 1838.

"One day after date pay to me or order, £6000 sterling for value.

(Signed) "MARGARET MACNEILL.
(Accepted) "L. M. CAMPBELL."

Indorsed on the back of the bill were the words:—

"Pay the within to Dugald Macneill.

(Signed) "MARGARET MACNEILL."

Dugald had held the bill ever since, and it purported to have marked on the back of it for each year from 1839 to 1845 a receipt of interest, signed by him. He received £1000 to account, which was also marked on the back. In January 1833, Mrs. Macneill wrote a letter to Dugald, thus:—

"MY DEAR DUGALD,—Circumstances have occurred that have prevented my executing a settlement of my money. Until that is in my power, I now write to say that all I have is yours - -you making up Bella's money to £3300, she having all my little trinkets, etc.

(Signed) "MARG. MACNEILL."

After his mother's death, the respondent paid to Bella, his sister, a legacy of £1300, to make up her money to £3300; and he paid the duty on this sum, but he said it was done under mistake. The mother had no other money beyond the £6000 which she gave to Dugald, except a small annuity. She lived with Lachlan till her death, without paying for her board; and it appeared that no interest was ever paid to her on this bill, but that she got money from Lachlan when she wanted it. The respondent's plea in law was, that, as the £6000 had been given to him absolutely as a gift, it was no part of the mother's estate when she died; and therefore he was not bound to pay duty upon it. On the other hand, the Inland Revenue pleaded, that the money was not given absolutely as a gift, but was put into his hands as a trustee.

The Lord Ordinary (Ormidale), by his interlocutor, held, that there was no satisfactory evidence that there had been a donation of this £6000 by the mother to the respondent, and no proper account of what had become of the bill before it was produced. On reclaiming note, this interlocutor was reversed by Lord President M'Neill and Lord Curriehill; but Lord Deas dissented.

The Lord Advocate appealed, and in his *printed case* prayed for a reversal for the following reason:—Because the presumption of law is against donation, and the respondent had failed to prove his averment that the bill for £6000 was transferred to him as a gift.

The respondent in his *printed case* submitted, that the interlocutor of the First Division should be affirmed for the following reasons:—1. The bill for £6000 referred to in the record in the inferior Court, and in the interlocutor of the Lord Ordinary, having been specially and duly indorsed to the respondent by the late Mrs. Macneill, the drawer of the bill, the burden of shewing that the said bill, notwithstanding the indorsement, remained the property of the drawer and chargeable on her death with succession duty as part of her estate, lay upon the Crown. 2. Because the appellant had failed to prove that the indorsement of the bill to the respondent was made in trust for the late Mrs. Macneill, or with any other intention than that of transferring the property of the bill to the respondent. 3. Because the whole evidence in the case is consistent with and supports the legal presumption deducible from the indorsement of the bill for £6000 to the respondent.

Lord Advocate (Moncreiff), *Solicitor General* (Collier), and *Agnew*, for the appellant—The judgment of the Court below was wrong, for it assumes that the indorsation of a bill of exchange without any proof of delivery, or of any other transaction, between the parties produced long after the death of the indorser, is evidence of a donation to the indorsee. There is a presumption of law against donation—Stair, iv. 45, 17, and i. 8, 2; Ersk. iii. 3, 92. Where a dispute arises whether the handing over of a security amounts to a gift, or was meant to be held as a trust, it is considered strong evidence against the donation, that the alleged donor would thereby have

impoverished himself—*Henderson* v. *Macculloch*, I D. 927. That was the case here, for Mrs. Macneill's whole property consisted of this bill. That case proved, that if there is a blank indorsation by A of a deposit receipt, and nothing more proved, the presumption is against a donation to B, who produces it. Such was also the case of *Heron* v. *Macgeoch*, 14 D. 25; *British Linen Company* v. *Martin*, 11 D. 1004. In this respect there is no substantial distinction between the case of a deposit receipt, and of a bill of exchange. In *Macfarquhar* v. *Calder*, Mor. 3600, the case of a bill of exchange was held to be the same. But whatever the presumption of law may be, the evidence here clearly shews, that this was not a donation, but a testamentary gift, and this result is confirmed by the fact that Dugald paid £1300 to the sister out of the proceeds of the bill; that he had been made residuary legatee of his mother; that the sister Isabella never heard of this donation, and that there is no proof of payment of interest on the bill.

If then there was no proof of, or presumption in favour of, donation, the necessary consequence is, that a trust is presumed. The Statute 1696, c. 25, does not apply in a case which is not between truster and trustee, and therefore the proof *prout de jure* is admissible.

Anderson Q.C., and *Sir H. Cairns* Q.C., for the respondent.—The respondent produces a title to this money which is *ex facie* correct, and indorsation being the appropriate mode of transferring the right to the money contained in the bill, there is no room for resorting to the presumption of law in such a case as to donation.

The case of a bill of exchange is different from a deposit receipt, the mere indorsation of which is not an assignation, for a deposit receipt is not a negotiable instrument; it is merely a mandate to the party named to draw the money—that is to say, the indorsee of a bill of exchange can sue in his own name, but the indorsee of a deposit receipt cannot. The cases cited on the other side are all cases of deposit receipts, except the case in Mor. 3600, and that is unintelligible. As to the institutional writers, Stair (i. 8, 182) expressly says, that bonds and other rights to children are presumed to be donations, because the law assumes a consideration of natural affection. Erskine, iii. 3, 92, says, unless between debtor and creditor donation is presumed; so Bankton, i. 9, 9; i. 9, 19. It is a well settled rule, that so far from the presumption being against donation, it is in favour of donation to children—*Murray* v. *Todd*, Hume, 275; *Braidwood* v. *Braidwood*, 14 S. 64; *Fife* v. *Kedslie*, 9 D. 853.

[LORD KINGSDOWN.—It is not of much use to refer to the circumstances of other cases. Here we have a certain state of circumstances ascertained to a very small extent, and the rest are inferences to be derived from them.]

[LORD CHANCELLOR.—There used to be a number of rules which were held to be important in the construction of documents, such as that the latter part of a will was to prevail, and the earlier part of a deed, and a variety of things of that kind, but they have all come down to common sense at last. It is now held, that you are to look at the whole meaning of a will, and see what the intention of it is, taken all together.]

In Mor. 11498 *et seq.*, *voce* Presumption, many cases are to the same effect. Here, as Dugald's title to this bill was completed by special indorsation, the *onus* is on the other side to shew, that there was no intention in his mother to transfer the bill. Now, the evidence does not prove that Mrs. Macneill did not intend to pass the bill.

[LORD CHELMSFORD.—There is no evidence in whose possession the bill was.]

There is no evidence, but the natural presumption is, that Dugald had possession. The indorsements of payment of interest confirm this. There is a presumption of law, that the indorsation was made the same day as the drawing of the bill, if no other date appears—*Rossie* v. *Ogilvy*, Mor. 1501; *Smith* v. *Home*, Mor. 1502. It is said there is no evidence of delivery. That point was not made in the Court below, but the presumption is, that it was delivered at the time of indorsation—*Maitland* v. *Forbes*, 5 Brown, Sup. 431.

No adverse presumption is to be drawn from the fact, that the mother intended to avoid paying inventory duty, for such an object is quite lawful—*Per* Wood, B. in *Attorney General* v. *Jones*, Price, 368; *Advocate General* v. *Brown*, 1 Macq. App. 79; *ante*, p. 138.

Lord Advocate replied.

Cur. adv. vult.

LORD CHANCELLOR CRANWORTH.—My Lords, this is a claim of inventory duty on a sum of £6000 as part of the movable estate of Margaret Campbell or Macneill. She died on 4th May 1844, leaving three children, Lachlan her eldest son, Dugald her second son, and a daughter Isabella. Dugald on her death, intromitted with her personal estate as her executor, but no inventory was recorded till 4th October 1852, when he gave up an inventory with an affidavit stating his mother's effects to have amounted to only £198 16*s.* 1*d.* Lachlan died on 2nd May 1852.

After Dugald had given up the inventory, circumstances occurred which led the Crown to claim duty on a much larger sum than £198. The officers of the revenue alleged, that besides that sum Mrs. Macneill was at her death possessed of a sum of £6000 secured to her by a bill of exchange for that amount bearing date the 22nd of November 1838, drawn by her upon, and accepted by, her son Lachlan, payable one day after date. Dugald denied that this sum formed any part of his

mother's property at her death, but nevertheless, for reasons which it is unnecessary to explain, he paid duty on £1300, part of that, under protest. Dugald was executor of his brother Lachlan, and he had paid duty on his estate to the amount of £70 in excess of what was really due from him. The officers of the revenue refused to return this sum to him, claiming to set off the duty due on the balance of the £6000 not yet paid.

Two actions were raised, one by Dugald against the Lord Advocate as representing the revenue, claiming repayment of that sum of £70, the other by the Lord Advocate against Dugald, claiming payment of duty on the balance of £4700.

It was admitted that the case in both actions depended entirely on the question, whether the £6000 bill did or did not form part of the personal estate of the mother at her decease. If it did, then Dugald was liable to pay duty on the £4700. If it did not, then the Board of Revenue admitted their liability to return to Dugald the £70 which they had received in excess on account of what was due from him as executor of his deceased brother.

That Mrs. Campbell was at one time possessed of this bill, and entitled to the money thereby secured, was not disputed; but the case made by Dugald was, that at, or immediately after, its date, it was indorsed by his mother to him by way of gift; and so formed no part of her personal estate at her death. It was not disputed that the bill bears the genuine indorsement of Mrs. Macneill, and a special indorsement in favour of Dugald, and he relies on that as a valid gift to him of the bill and the money secured thereby.

But it is to be observed, that mere indorsement, if that word is to be understood as expressing only the writing on the back of the bill, is not sufficient to transfer the bill or its contents to the person named as indorsee. In order to transfer the property in the bill, the indorsee must prove that it was delivered to him, for until delivery the property remains unchanged.

In ordinary cases, no question arises as to whether the bill has or has not been delivered. When, as is always the case, the indorsee is the holder, the fact that he is so, is *primâ facie* evidence that the bill was delivered to him according to the indorsement, and no further proof of delivery is necessary. If, therefore, Dugald could have shewn, that he was the holder of the bill in the lifetime of his mother, he would at all events have proved the first proposition, which it was incumbent on him to establish in order to make out his title as donee, namely, that the legal title to the bill had been transferred to him by his mother.

But he has failed to make any such proof. There is nothing to shew, that he was the holder of the bill in his mother's lifetime; and inasmuch as he was, or at all events assumed to be, her executor, the fact that since her death the bill has been in his possession proves nothing. That possession may be attributed to his character of her executor just as reasonably as to his alleged title as indorsee. And as the *onus* of proof was on him to shew a title on the latter head, he has failed to establish that which is the necessary foundation of his claim.

The original bill was produced, and there are indorsed on it yearly receipts for interest dated every year on the 22nd of November, beginning on 22nd November 1839, and ending on 22nd November 1845. These receipts are all signed by Dugald, and it was argued, that they afford strong evidence to shew, that the bill must have been in his possession at the time when they were made. This would have been cogent evidence to prove, that the bill had been delivered to him by his mother, if it could have been shewn that the indorsements were made at the time when they bear date, but there is nothing to shew that this was the case. On this head the evidence is a perfect blank, and looking at the bill itself I was satisfied from its appearance, that all the receipts prior to that of 22nd November 1844 (*i.e.* prior to the death of the mother) were made at the same time. They are all apparently written with the same ink and at the same time, and seem to have been written shortly after the death of the mother with the object—a very honest one—of shewing that, in some way not clearly explained, all interest was to be considered as satisfied. The two entries of 22nd November 1844 and 22nd November 1845, made after the mother's death, appear to have been written at times different from that when the prior indorsements were made. But they are not important, as the bill had certainly at that time come into the possession of Dugald. The argument, that these indorsed receipts were made for the purpose of excluding any future claim for interest, and not as indicating the actual receipt of money, derives strong confirmation from the fact, that none of them mention any particular sum as having been received, and all of them (seven in number) bear date the exact day on which the interest would be due. It is hardly credible that for seven years, interest should have been paid on the very day on which it became due, more especially when one of these days, 22nd November 1840, fell on a Sunday.

The result, therefore, is, that Dugald, the respondent in the first appeal, has failed to satisfy me, that the bill ever was delivered to him by his mother, or that it did not remain in her possession at her decease. The whole foundation, therefore, of his claim, that it was indorsed over to him as a gift, fails. If he had been able to shew, that it was indorsed and delivered to him by his mother in her lifetime, so as to give him the absolute legal title to it, then would have arisen the important question discussed by the learned Judges below, and on which they did not agree, whether the mother, by indorsing and delivering the bill to her son, ought to be considered to

have intended to make him a present of it, or only to have put it into his hands as a trustee for herself. In many cases the mere transfer of property without consideration has been held not to alter the beneficial ownership. The want of consideration has been held sufficient to rebut the presumption arising from a transfer of the legal interest, or rather to raise a presumption sufficient to rebut the *primâ facie* legal title of the transfer. Whether the circumstances of this case would have been sufficient to raise such a presumption against the respondent, if he could have shewn, that the bill ever was indorsed and delivered to him by his mother, I need not stop to inquire; but I may observe, that as the indorsement and delivery of a bill of exchange enable the indorsee to negotiate and deal with the bill as his own, such a transaction affords stronger evidence of an intention to part with all beneficial interest than is the case in many other kinds of transfer. This, however, is a point which, for the reasons I have given, does not seem to me to arise in this case.

My opinion is, that the interlocutors complained of ought to be reversed, and that of the Lord Ordinary sustained.

LORD CHELMSFORD.—My Lords, the question upon this appeal being one entirely of fact, if I had found that a majority of the Judges below had arrived at the same conclusion upon it, I should have submitted to their judgment, even if I had felt a doubt as to its propriety. But although there was a majority of the Inner House in favour of the interlocutor appealed from, yet, taking the Lord Ordinary into account, there is an equal division of opinion on the case, and I therefore consider myself at liberty to follow my own judgment upon it.

In determining the question it seems to me to be necessary to ascertain with accuracy, upon which of the parties the *onus probandi* ultimately rested. The summons in the action by the Crown (the only one necessary to be considered) claimed the sum of £88 for inventory duty due and payable by the defender (the respondent) as executor of his mother. Upon this summons it was incumbent upon the pursuer to prove, that the defender had possessed himself of some personal estate of his mother upon which duty was payable. In his condescendence the pursuer alleged, that the estate in the defender's possession upon which the duty attached consisted of money due to the defender's mother at her death, upon a bill or promissory note to the amount of £6000. In the revised statement of facts the defender states, that his brother having contracted a considerable debt to his mother, he, on the 22nd December 1838, granted to her a bill for £6000, and that at or about the same date she indorsed over that bill to the defender and delivered it to him as a gift. The parties being at issue upon this alleged statement of facts, it would have been sufficient for the defender in the first instance to produce the bill of exchange indorsed, and to prove the delivery of it to him before his mother's death. If he had done so, he would not have been compelled to adduce any further proof of the gift of the bill, the special indorsement upon it and delivery to him being *primâ facie* (and if unanswered conclusive) evidence to establish his defence. The defender, however, gave no evidence at all, that the bill was in his possession before the death of his brother. Isabella Macneill, his sister, who was called as a witness for the Crown, never saw the bill, nor did she know of her own knowledge that it had ever been granted. The indorsements of payment of interest from the 22nd November 1839 to 22nd November 1844, and an indorsement of the payment of a sum of £10,000 on 5th June 1840, appear to have been all written at the same time. Under these circumstances the Crown might, I think, have rested upon the failure on the part of the defender to prove, that the bill had passed from his mother to him, for no presumption in his favour could have arisen by his possession of it after her death.

But the pursuer met the imperfect case of the defender by evidence tending to establish the great improbability of there having been an absolute gift of the bill. From the testimony of Isabella Macneill, it appeared that the £6000 represented by the bill was the whole of the mother's property which she could dispose of at her death. She had an annuity, the amount of which did not appear, and a liferent on two sums of £2000 and £1000. On the 23rd May 1837, Mrs. Macneil made an invalid will leaving all her property to the respondent, and instituting him her sole executor. That this will did not contain her final intentions appears from the fact, that on the 21st January 1838, she made a holograph will in the form of a letter to the respondent in these words: "Circumstances have occurred that have prevented my executing a settlement of my money. Until that is in my power, I now write you to say, that all I have is yours, you making up Bella's money to three thousand three hundred, she having all my little trinkets, etc." At the time this letter was written, the £6000 had not been advanced to her son Lachlan. The money was not lent, nor was the bill given until the following November. This money constituted the only fund out of which the £1300 given to Isabella Macneill could be paid. It is therefore highly improbable that ten months only after Mrs. Macneill had made this additional provision for her daughter, she should have deprived her of it by absolutely disposing of the whole of the means available for its payment. That Mrs. Macneill intended to the last that the holograph will should regulate the disposition of her property, appears from the fact of her having kept it in her possession or under her control down to the time of her death, and also from her having placed it in a box which she gave to Isabella Macneill to give to her brother after her mother's death. It may fairly be asked, Why was the will given to the daughter to keep, except on account of the interest

which she was intended to take under it? And why was the box in which it was placed to be given to her brother after the death of the mother, except that it was then, and not before, to take effect as her will?

Upon this evidence on the part of the Crown (if not before), the burden of proof was undoubtedly shifted to the respondent, and he was called upon to prove, that the bill was his property, and not the personal estate of his mother. It may be, that, if the respondent had himself been able to give evidence, he might have explained away the circumstances which press against his case and have clearly proved an absolute gift to him of the bill. But if in consequence of his impaired memory no such explanation can be furnished, and we are left in ignorance (as I believe we are) of the real circumstances of the transaction between him and his mother, the presumption of a gift of the bill not having been raised by its mere production without proof of delivery, or at all events being rebutted by the evidence produced on the part of the Crown, I am compelled to come to the conclusion, that the bill continued to be the property of the respondent's mother down to the time of her death, and that he is bound to pay inventory duty upon it.

For these reasons, I think the interlocutors appealed from ought to be reversed.

LORD KINGSDOWN.—My Lords, the question in this case is, whether the respondent has proved, that the sum of £6000 secured by the bill for that amount was given to him by his mother for his own use without any condition or restriction whatever. This is the allegation which he has put upon the record.

He alleges the gift to have been made at or about the date of the bill, that is, in 1838. He states, that he was to all intents and purposes the true owner of the bill, and in proof of this fact he alleges, that the bill was delivered to him at the time of the indorsement, and that he received the interest which became due upon it from time to time during Mrs. Macneill's lifetime, and applied it to his own use, and that on the 5th June 1840 he received and applied to his own use £1000, part of the principal money.

Supposing these statements to be proved, and no counter evidence to be produced in explanation of them, there can be no doubt, that the respondent has established his case. But all these statements were put in issue on behalf of the Crown, and it was alleged, that any intromissions with the bill by the respondent were merely as custodier in trust for Mrs. M'Neill, who was the true owner of the bill. It was further stated on behalf of the Crown, that the respondent had been called upon to produce the bill. This was in June 1862. When the bill was first produced does not appear. It was produced, however, in the course of the proceedings, and its production with the indorsements upon it formed the only evidence supplied by the respondent in support of his case.

I agree with my noble and learned friend on the woolsack, that in the circumstance of this case the indorsements on the back of the bill afford no proof as against the Crown either of the payment of any of the sums, either principal or interest mentioned in them, or of the fact of the delivery of the bill to the respondent in the lifetime of his mother. He acted as the executor of his mother, though under an instrument which turned out to have been informally executed, and the bill may have come into his hands in that character after her death. The indorsements bear an appearance, which, as regards the payment of interest at least, is quite consistent with that hypothesis. The respondent had been challenged to prove these different payments, he had every facility for doing so; he was the representative of his mother, the drawer and indorser of the bill; he was the representative of his brother, the acceptor of the bill; he had access to all their papers: he had his own papers and documents, his agent's and his banker's books, and not the slightest proof is given either of the delivery of the bill or of the payment of one single shilling upon it.

But the conduct of the respondent seems to me quite inconsistent with the case now made. Mrs. M'Neill died in May 1844. The last indorsement of payment of interest on the bill is 22d November 1845. Lachlan, the acceptor of the bill, lived till 1852. During all that time no interest appears to have been paid, or is alleged to have been paid, by Lachlan. Yet the respondent states, that the bill has never been paid, but that the £5000, with an arrear of interest, is still due upon it. In 1852 the respondent became the executor of his brother Lachlan, and returned an inventory of his property under the Revenue Acts, amounting to about £6000. In 1854 he made an application to the Revenue department for return of the duty, on the ground that the executry had been exhausted in payment of debts. The £5000 due upon this bill was not mentioned amongst the debts so paid. So that the respondent, having a right to receive payment of the whole sum with interest from November 1845, had nevertheless not paid himself any part of it.

But what makes the case stronger is, that in this schedule of debts paid, he took credit for £3300 principal money, and £2000 interest as paid to his sister out of the executry of Lachlan. Whatever the case might be with respect to the £2000, the £1300 and interest were clearly payable, not out of the assets of Lachlan, but out of the assets of Mrs. M'Neill, unless, what is very possible, some arrangement had been made by the mother with her two sons respecting the £6000 for which the note was given. Nearly half the claim for reduction made by the respondent

on behalf of Lachlan's estate was disallowed, but the debt upon the bill, as far as appears, is still unpaid.

It is said in excuse of all the deficiencies of evidence and the inconsistencies in the respondent's case, that he has lost his memory, and is unable to give the necessary explanations. But the fact of the alleged gift has been in controversy for many years. It was alleged generally soon after the mother's death. It was again insisted on in 1852, when the dispute took place with Miss M'Neill. It was raised again in 1854, when the disputes with the Stamp Office began, and has continued ever since. Law agents have been employed by the respondent during, at all events, a great part of this period. He has himself made several affidavits, and all the circumstances of the case, and the documents to prove them, must no doubt be in the possession of the agents, who could give the proper explanations, if any satisfactory explanation could be given.

If the evidence of Miss M'Neill be referred to, so far from proving the case of the respondent, it is quite inconsistent with it. His case is, that the money was the property of Mrs. Macneill in November 1838, and was then given to him by her for his own use, with no condition, restriction, or trust as to any part of it. Her testimony is, that several years before this date her mother told her, that she had made over all her property to the respondent, subject to the payment of £1300 to her, the witness. That this statement was made by the mother is strongly confirmed by the holograph letter in May 1838, under which the payment of this sum of £1300 has been awarded to her. That some arrangement was made by the mother with her sons with respect to this money for the benefit of the family is extremely probable. It is very likely, that the object was to defeat any claims of the revenue upon it at her death. What that arrangement was it is impossible to say; that it was such as the respondent alleges not only he has failed to prove, but all the facts and all the probabilities of the case, in my opinion, tend to disprove. I have no doubt, that the interlocutor must be reversed.

Interlocutors reversed, and interlocutor of Lord Ordinary affirmed.

Appellant's Agent, J. Timm, Somerset House.—*Respondent's Agents*, W. Sime, S.S.C.; Maitland and Graham, Westminster.

APRIL 20, 1866.

THE MAGISTRATES OF GLASGOW, and Others, *Appellants*, *v.* JAMES PATON, and Others, *Respondents.*

Church—Parish—Process of Disjunction—Special intimation to Heritors—7 and 8 Vict. c. 44, § 3—*The Statute 7 and 8 Vict. c.* 44, § 3, *provided, that in a process of disjunction of a parish the Lords of Session may appoint special intimation in such form and manner as the Lords should direct, to such heritors as should not have already consented or dissented, and may sist proceedings for a definite time to allow such heritors to state judicially their consent or dissent, and such of them as should not, within a time to be fixed by the Lords, to be specified in such intimation, judicially state their dissent, should be reckoned as consenting. An interlocutor under this section appointed intimation of the summons from the precentor's desk after forenoon service on Sunday, and in two newspapers, "to be made at least ten days before the process should be again moved in Court."*

HELD (reversing judgment), *That the interlocutor was void, because either it did not clearly express, that the time for expressing dissent was the same as that to which the process was sisted, or, if it did, then the period, to which the process was sisted, was not distinctly stated:* (LORD CHELMSFORD diss.)[1]

The defenders, the Magistrates of Glasgow, and the University of Glasgow, appealed to the House of Lords against the interlocutors, and in their *printed case* prayed for a reversal on the following grounds :—1. Because, having regard to the facts disclosed as the grounds of action, and to the conclusions of the summons founded thereon, the case should not have been dealt with as falling under the 3rd section of the Act 7 and 8 Vict. c. 44, but as under the 4th section of that Act, whereby the appellant heritors are not precluded from stating their dissents at any time, and are entitled to be reckoned as dissenting from, unless they have expressly consented to

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[1] See previous report 2 Macph. 1307 : 36 Sc. Jur. 654. S. C. 4 Macph. H. L. 26 : 38 Sc. Jur. 369.