has been no delivery of the deposit-receipts, and they remain in the husband's power during his life, and he operates upon them as he pleases, that cannot be construed into a testamentary bequest of the money to the wife. The Sheriff reasons that because by a regular deed taken by a husband from a third party in favour of his wife there may be such a testamentary bequest, therefore it follows that by a deposit-receipt or deposit-receipts from a bank the same thing may be operated in favour of the wife, though these had all along been in the husband's power. He refers to the case of a husband buying a house and taking the title in his wife's name; that no doubt might be done, and will receive effect, if so intended; but that is a formal donation in proper form in favour of the wife. In the case of a debenture, again, that is a regular probative deed. Then he puts the case of a husband taking a policy of insurance on his own life in favour of his wife; that may be done, though it is sometimes attended by difficulties which do not occur in the cases of a disposition or a debenture; and he concludes by saying—"The Sheriff considers that it is his duty to follow the principles of this last case in disposing of the question now before him;" that is, the principle which is applicable to all the three cases he has mentioned—the disposition of a house, the taking of a debenture, and that of a policy of insurance. The Sheriff thinks the same principle leads to holding that a deposit-receipt in such terms as we have here will have the same effect. I do not think it follows at all. A deposit-receipt is not a document which is used for any such purpose, and it does not therefore resemble the other cases at all.

I am therefore of opinion that the interlocutor of the Sheriff is erroneous, and that the Sheriff-Substitute was quite right in his principle. He held that this was a mercantile document not fitted for the purpose of conveying a legacy.

Lord Mure—The case has been dealt with here as one of donation, and was substantially so dealt with by the Sheriff-Substitute, though, as your Lordship has pointed out, this plea was not distinctly stated on the record in the Court below. But I agree with your Lordship that the question is whether donation *mortis causa* has or has not here been made out? and that on the authorities, unless it can be brought, upon the evidence, under the category of the cases of donation *mortis causa*, the defenders have no good claim to the money contained in the receipt. I confess that on the evidence I can see no sufficient proof here of intention on the husband's part to donate. I hold it to be settled by the cases to which your Lordship has referred, and by our opinions in the case of *Crosbie's Trustees*, that a deposit-receipt in terms such as we have here, taken by itself, cannot be held conclusive evidence of donation. Even the fact of there being a series of receipts is not of itself sufficient, though it is no doubt an element in favour of the parties maintaining donation. There is no evidence here, as there was in *Crosbie's* case, of the party during life having stated that he had put the money in on purpose to make a donation to the wife, and there being an absence of such evidence here, I think there is no ground for holding that donation has been here made out.

Lord Shand was absent.

The Court recalled the Sheriff's interlocutor and reverted to that of the Sheriff-Substitute.

Counsel for Appellant—Keir—Dickson. Agent—Geo. Andrew, S.S.C.

Counsel for Respondents — Black — Shaw. Agents—Curror & Cowper, S.S.C.

Tuesday, July 13.

FIRST DIVISION.

KENNEDY, PETITIONER.

Public Records—Transmission to English Courts—Registers of Births, Deaths, and Marriages.

Held that the Court will under no circumstances authorise the public registers of births, marriages, and deaths to be transmitted to England for the purposes of a trial there.

Public Records—Transmission to English Courts—Registered Deeds.

Circumstances in which the Court *refused* to authorise an extracted process of multiplepoinding and certain other registered documents to be transmitted to England.

Process—Order for Production of Writs in Public Custody—Lord Clerk-Register (Scotland) Act 1879 (42 *and* 43 *Vict. c.* 44), *secs.* 2, 3, 4, 10.

Observed that since the passing of the Lord Clerk-Register Act 1879, orders for the production of documents in public custody must be made upon the Deputy Clerk-Register, and not upon the Lord Clerk-Register.

The petitioner here was the defendant in an action for recovering certain heritable property in Manchester which was to be tried at the Liverpool Assizes. The petition set forth—"That the right to the said property depends upon the genealogy of a Scotch family, which genealogy formed in the years 1872 and 1873 the subject of a litigation in the Court of Session in an action of multiplepoinding and exoneration at the instance of John Todd, surgeon in Colinsburgh, and another, the executors of the deceased Miss Anne Duncan of Balchrystie, in the county of Fife, against David Salmond, manufacturer, Islelane Cottage, Hawkhill, Dundee, and others; in which action the First Division of the Court of Session gave judgment. That the petitioner is advised that it is absolutely necessary for the proper conduct of his defence to said action before the said High Court of Justice, and for the determination of said case, that the process in said action of multiplepoinding and exoneration, the decree in which has been extracted, must be produced at the said trial, but for this purpose the order of your Lordships must be obtained. That it is further necessary, in order to establish the petitioner's defence to said action, that certain original records or registers, more especially referred to in the prayer hereof, now under the care of the Registrar-General for Scotland, should be produced at said trial in Liverpool. The petitioner is advised that he cannot competently tender in evidence copies or extracts

of the necessary entries in the said records or registers, but that it is absolutely essential to his case that the original entries should be produced. That it is further necessary that the original of the submission between Helen Duncan, widow, and others, and William Cunningham, and of the decreet-arbitral following thereon, as also the originals of the wills and whole other testamentary writings of the following persons, should and must be produced at said trial, viz., George Duncan and Helen Imrie, his spouse, of the Walltree of Fingask, in the county of Perth; of George Duncan and Ann Cunningham, his spouse, of Fingask aforesaid; of John Cunningham, in the Muirton of Balhousie, in the county of Perth; and of David Duncan of Balhousie aforesaid. The said deeds are now in the custody of the Sheriff-Clerk of the county of Perth. That the present application has been duly intimated to the Depute Clerk-Register, to the Deputy Keeper of Records, and to Mr John Thomas, Sheriff-Clerk of the county of Perth."

The petitioners therefore prayed the Court "to authorise and ordain the said Registrar-General for Scotland to produce and exhibit at said trial in Liverpool, under the custody of an officer to be selected by him, the parochial registers for the parishes of Perth, Rhynd, Dunbarney, Forgandenny, Forteviot, Tibbermuir, Abernethy, Scone, Kinfauns, Dron, and Kinclaven, all in the county of Perth, and of the parish of Newburgh in the county of Fife, for the period from the year 1700 to the year 1820; and also to authorise and ordain the Lord Clerk-Register, or his Depute, to transmit or produce and exhibit at said trial the foresaid process of multiplepoinding and exoneration; and also to authorise and ordain the Sheriff-Clerk of the county of Perth to produce and exhibit at said trial the foresaid submission and decreet-arbitral, and wills and whole other testamentary writings of the persons above mentioned presently in his custody or possession."

J. A. Reid, for the petitioner, admitted that he could find no case in which the Court had authorised registers of births, marriages, and deaths to be sent out of the jurisdiction of the Court. He referred, however, to *Cochrane* v. *Ferrier*, March 16, 1859, 21 D. 749; and also pointed out that under section 58 of the Registration (Scotland) Act (17 and 18 Vict. cap. 80) it appeared that certified extracts of registers were admissible as evidence only when the register books had been kept under the provisions of the Act, while the books here sought were of a date long anterior to 1854. [Lord President—I suppose that if we refuse this petition that will open the door to the admission of secondary evidence in the English Court.] As regards the process of multiplepoinding, he referred to *Power* v. *Lord Clerk-Register*, March 18, 1859, 21 D. 782; and *Shedden*, July 19, 1862, 24 D. 1446. [Lord President—You may be quite sure that what was done in *Shedden's* case will not be repeated.] As regards the other documents, he referred to *Duncan*, July 14, 1842, 4 D. 1517; *Adamson*, July 17, 1852, 14 D. 1045; *Dunlop*, Nov. 27, 1861, 24 D. 107; *Bayley*, May 31, 1862, 24 D. 1024; *Jolly*, June 25, 1864, 2 Macph. 1288; *Young*, Feb. 2, 1866, 4 Macph. 344; *Western Bank of Scotland*, March 20, 1868, 6 Macph. 656; *Macdonald*, Nov. 3, 1877, 5 R. 45. [Lord President—In all these cases the question was, What interest has the petitioner in the deed? but you have not shown what your interest is in these wills?]

The Lord Clerk-Register did not lodge answers, but the Deputy Clerk-Register appeared at the suggestion of the Court. He was not called on.

At advising—

Lord President—This is a very unprecedented demand so far as regards the proposal that the registers of births, marriages, and deaths of eleven parishes in Perthshire should be sent out of the country for the purposes of a trial in England. The period over which the inquiry extends is 120 years, and what the number of volumes embraced in that period is I do not know. It must be very great indeed. But apart from that specialty, I may just at once say—and so far as I am concerned I say it without hesitation—that nothing could induce the Court to order a public register to be sent out of the country. I think that we have no power to do so. It would be a violation of the fundamental principles of registration which have prevailed in this country.

The other writings which the petitioner desires to have are in a somewhat different position. The petitioner says that they are calculated to throw light on a question of pedigree which is to be tried in the English Court. But he is not a party to these writings, and so far as appears he has no interest in them. The writings are, in the first place, the wills of various deceased persons, and in addition a submission and decree-arbitral and a process of multiplepoinding which is now extracted. Now, every one of these documents sought to be recovered forms part of the public registers of the country. The wills are all recorded in one of the public records, the submission and decree-arbitral are in the books of the register of Perthshire, and the multiplepoinding being an extracted process is one of the records of this Court. And added to all this, the right of the petitioner to recover these documents, apart from the proposal to take them out of the kingdom, is of the most doubtful kind. I think it is very doubtful whether if the action depended in a Scotch Court he could get a diligence for their recovery. On the whole matter I am clear that we must refuse the petition.

Lord Deas and Lord Mure concurred.

Lord Shand was absent sitting in the Second Division.

Darling, for the Depute Clerk-Register, pointed out that the petitioner asked the Court "to authorise and ordain the said Registrar-General for Scotland to produce," &c., and referred to the Lord Clerk-Register (Scotland) Act 1879 (42 and 43 Vict. cap. 44), secs. 2, 3, 4, and 10, which he contended showed that such an order ought now to be made upon the Deputy Clerk-Register, not on the Lord Clerk-Register. The Court intimated that this was so, the Lord President observing "that under the late Act all the registration duties of the Lord Clerk-Register appeared to have been transferred to the Depute Clerk-Register, except those of Keeper of the Signet."

The Court refused the prayer of the petition

Counsel for Petitioner—J. A. Reid. Agents—Ronald & Ritchie, S.S.C.

Counsel for Deputy Clerk Register—Darling. Agents—Tods, Murray, & Jamieson, W.S.

Tuesday, July 13.

SECOND DIVISION.

[Lord Rutherfurd-Clark, Ordinary.

LOGAN HOME *v.* LOGAN HOME.

Entail—Clause of Denuding—Birth of Nearer Heir.

H. succeeded to his father as heir of entail entitled to succeed to the two estates of B. and E. A clause in the B. entail provided that "if any of the heirs of entail shall succeed to another estate of the annual value of £300 they shall forfeit the estate of B., but the irritancy shall not be incurred if the heirs shall renounce the same." H. elected to take the estate of B., and accordingly conveyed the estate of E. to his brother and the other heirs of entail called under the E. entail. About two years afterwards he married, and a daughter was born of the marriage. In an action by him as his daughter's tutor-at-law, *held* that as she was a nearer heir of entail than her uncle, the latter was bound to denude of the estate of E. in her favour.

Lieut.-Colonel George Logan Home was heir of entail in possession of the estates of Edrom and Broomhouse at the date of his death, which took place on 28th June 1870. He succeeded to the Edrom estate under the name of George Logan of Edrom by virtue of deed of entail granted by his grandfather dated 3d August 1802, and recorded in the Register of Taillies the 4th July 1818. He afterwards succeeded to the Broomhouse estate on the death of his maternal uncle Lieut.-General (formerly Colonel) James Home of Broomhouse, who died without issue in 1849, under a deed of taillie dated 16th February 1830. By this deed the lands and estate of Broomhouse were conveyed "with and under this condition, as it is hereby expressly provided, that the heirs-male of my body, and the whole other heirs of tailzie above mentioned, shall be obliged constantly to use, bear, and retain the surname of Home, and arms and designation of Home of Broomhouse, and none other, in all time after their succession or attaining possession of the said estate, but with power to the heirs-male of my own body, and the other heirs-male of tailzie above mentioned, to conjoin any other arms therewith but no other surname; and in case any of my heirs-male of tailzie have already succeeded or shall succeed to another estate where they shall be obliged by the entail thereof to assume another name and designation than 'Home of Broomhouse,' then and in that case he or they shall forfeit, amit, and lose all right, title, and interest which they can have to my lands and estate, and shall be holden and obliged immediately thereupon to denude themselves of my said lands and estate hereby disponed, and to convey and dispone the same *habili modo* to the next heir-male called to the succession of the said lands and estate by these presents, unless they choose to relinquish the said other estate and continue 'Home of Broomhouse,' which they are at liberty to do, in their option; excepting always in the cases of titles of honour conferred by the King's Majesty on any of my said heirs-male of tailzie, which they shall be at liberty to use and conjoin with the said name and designation of 'Home of Broomhouse;' and with and under this further condition, that in case any of the heirs-male of my body, or of the other heirs-male of tailzie above mentioned, have already succeeded or shall succeed as heir to any other heritable estate than the lands and others above disponed, of the annual value of £300 sterling or upwards, then, and so often as the same shall happen, such heir-male of tailzie so succeeding shall forfeit, amit, and lose all right, title, and interest in and to my said lands and estate above described, and the same shall fall, accresce, and devolve to the next heir-male hereby called to the succession thereof, in the same manner as if the heir-male succeeding as aforesaid to such other estate had been naturally dead: Declaring, nevertheless, that this irritancy shall not be incurred if the heir-male who has already succeeded or so succeeding to another heritable estate of the value above mentioned shall renounce and relinquish the same within a year and day after his succession to and possession of the same jointly with my aforesaid lands and estate hereby disponed."

By a separate deed of alteration of this deed of entail of Broomhouse executed by the entailer Lieut.-General James Home, dated 23d January 1846, and recorded in the Register of Tailzies of the same date as the deed of entail was recorded therein, viz., 9th March 1850, so much of the entail as prevented and prohibited Lieut.-Colonel George Logan Home (then George Logan), the entailer's nephew, from holding and enjoying the estate of Broomhouse along with his own estate of Edrom was revoked, recalled, and withdrawn, but there was a provision that in case Lieut.-Colonel George Logan Home should have more than one son, the estate of Broomhouse should not be divided, but should descend and devolve whole and entire as it then stood to one proprietor. This prohibition was fenced with an irritant clause; and the granter confirmed and approved the deed of entail so far as not altered. Accordingly Lieut.-Colonel George Logan Home of Edrom assumed the additional surname of "Home," and in accordance with the relaxation in his favour of the provisions of the entail of Broomhouse contained in the deed of revocation and alteration he held the two estates of Broomhouse and Edrom till his death on 28th June 1870.

He was survived by four sons. The eldest, William James Logan Home, succeeded him as heir of entail and was infeft on both estates, but in compliance with the entail of Broomhouse he conveyed the estate of Edrom by disposition and deed of denuding, dated 3d February 1873, to his next younger brother George, who was infeft on 6th March. At the same time William dropped the surname of "Logan," and was thereafter known as "William James Home of Broomhouse;" and George, dropping the surname of "Home," thereafter bore the surname of "Logan," as required