occurrence. In such cases the Auditor acts on his own judgment, which is always excellent.

LORD CRAIGHILL and LORD RUTHERFURD CLARK concurred.

The LORD JUSTICE-CLERK was absent.

The Court approved of the Auditor's report.

Counsel for Owners of "Hilda"—Thorburn. Agents—Snody & Asher, S.S.C.

Counsel for Owners of "Australia"—Guthrie. Agents—Hamilton, Kinnear, & Beatson, W.S.

Wednesday, January 21.

SECOND DIVISION.

[Sheriff of Caithness.

TROTTER *v.* SPENCE.

Deposit-Receipt—Joint Property—Proof—Presumption.

Money lay in bank in the names of two brothers on deposit-receipts, payable to either of them or the survivor. On the death of one the survivor uplifted the money in the receipts, and deposited it in his own name. In a question as to the ownership of it he maintained that it consisted of his own earnings in business, and was his own property. *Held* that the presumption from the receipts was that each brother was owner of half the sum contained in them, and that on the evidence this presumption had not been redargued.

These were two conjoined actions of accounting at the instance of Mrs Margaret Spence or Trotter, residing in Thurso, against her brother John Spence junior, as executor or vitious intromitter with the estate and effects of (1) their mother, and (2) George Spence, their brother. There were other issues raised in the actions as originally laid, but these were eventually departed from.

John Spence senior, father of the parties, was a shopkeeper, innkeeper, and farmer at Dunnet, in Caithness. He died in 1853, survived by his widow and by two sons George and John, the defender, and by six daughters, including the pursuer. By his will he left his heritage to his sons, subject to his widow's liferent, and his whole moveable estate to his widow, whom he appointed executrix. After his death his widow continued to carry on the three businesses in which he had been engaged. In doing so she was assisted principally by her younger son George, and to some extent by John, the defender, until George's death in 1878, after which she was assisted by John till her own death in 1881. The lease of the farm was taken, shortly after the death of John Spence senior, in the joint names of Mrs Spence, John, and George.

The defender John Spence junior was salvage-agent for Lloyds at Dunnet, and along the shores of the Pentland Firth, as well as for several underwriters' associations. He also dealt in sheep and timber, and was engaged in lobster-fishing.

In the first action—that against the defender as executor and intromitter with his mother's estate—the pursuer claimed to succeed to one-sixth share of her mother's moveable estate as one of the next-of-kin along with her sisters; and in the second action she claimed to succeed to one-sixth share of George's moveable estate on the same ground. In answer to the first action the defender averred that he had already accounted to the pursuer for her share of their mother's estate, and had offered to pay her the amount of her share thereof due to her on the accounting. In the second action—that relating to George's estate—the pursuer averred, *inter alia*, that a sum of money amounting to £4026, which at George's death lay deposited in bank on deposit-receipt in the names of the two brothers, payable to either or the survivor, belonged solely to George. This the defender John denied, averring that none of the money deposited in their joint names belonged to George, but that the whole of it belonged to himself, and consisted of his earnings as Lloyds' agent, and as a trader in sheep, and in other ways. The disposal of this sum of £4026 came to be the main point in the case.

In carrying on business after the death of John Spence senior no regular books were kept by any member of the family, and the only materials for tracing and separating the personal estate of the defender John Spence, George Spence, and Mrs Spence respectively were very vague and indefinite. It was shown that no other than these three persons contributed to the accumulation of the moneys in question in the actions, the daughters of the family having all married early. It was also shown that while the defender John had undoubtedly made a considerable independent income, George had no sources of income apart from his interest in the joint industries of the family. As to the probability of the joint industries having been profitable there was a conflict of evidence, some witnesses declaring that they were undoubtedly lucrative, while the bank-agent at whose office the ordinary current accounts for the farm and inn were kept was impressed to the contrary by a course of accommodation bills which was maintained for many years between Mrs Spence and her son George.

The evidence obtained from the bank accounts—current and deposit-receipts—was also equivocal.

It appeared that there were numerous current accounts. The defender had a current account with the Commercial Bank at Thurso, and another at a later date at Castletown. George had (1) a current account with the Commercial Bank at Thurso, on which there was due at the date of his death the sum of £80, 7s. 6d. It was proved that the transactions in this account were connected with the shop and inn; (2) George had another account with the same bank, called "No. 2 Account," on which there was due to him at his death the sum of £41, 16s. 7d.; and (3) he had also a current account at Castletown, on which there was due by him at his death the sum of £30. It was shown that the second account ended at the date when the third began, and that they in succession contained the ordinary transactions relating to the farm. The balance due to George on these three accounts was thus £92, 4s. 1d. This balance was subsequently reduced by a transaction in Mrs Spence's lifetime, but there was no evidence that the defender had ever interfered with those accounts, and he was relieved by

the Sheriff from all liability regarding them.

After George's death the current-account business of the shop, inn, and farm was transacted by the defender in his Castletown account-current above-mentioned, and the result was a balance to his debit with the bank (at Mrs Spence's death in 1881) of £129, 19s. 5d., for which credit was allowed in the accounting as to Mrs Spence's estate.

The defender maintained that these current-accounts contained all the drawings and profits of the joint family businesses, and that the whole of the £4026 standing on deposit-receipts was his separate estate. The history of the deposit-receipts, however, was against this argument.

The first deposit transaction of the family at Dunnet after the death of John Spence senior was in 1854. On 11th September of that year a sum of £80 was lodged on deposit-receipt with the Commercial Bank at Thurso in the joint names of Mrs Spence and her two sons John and George.

That money appeared to have been uplifted on 21st September 1855, the receipt being indorsed by Mrs Spence and her two sons, and the money redeposited in the same three names. From this time onwards there was a series of deposit-receipts in the Thurso Commercial Bank, sometimes in the names of Mrs Spence and John and George, sometimes in the names of Mrs Spence and one or other of the sons, and sometimes in the names of the two sons. On 29th April 1878, when George Spence died, there was in this bank, as shown in the report of an accountant to whom a remit was made during the process, standing in the joint names of John and George Spence, a sum of money on deposit-receipt amounting with interest to £501, 4s. 2d. There was a further small deposit of £27, 7s. 8d. standing in name of Mrs Spence and George, which was afterwards uplifted by Mrs Spence and placed to the credit of an overdrawn account-current in George's name.

Similar transactions went on in the National Bank at Thurso. On 19th September 1861 there was placed on deposit-receipt in the National Bank at Thurso, in the joint names of Mrs Spence and her sons John and George, the sum of £100, payable to either. This was drawn out in the following year; but in 1864 there commenced a series of deposit-receipts in the names of the two brothers, which were never drawn upon, and grew constantly until the date of George's death, at which date there stood in the names of John and George Spence fifteen receipts, amounting with interest to £2257, 12s. 7d.

Similarly at George's death there were in the Aberdeen Town and County Bank at Thurso seven deposit-receipts in the joint names of John and George, amounting with interest to £1267, 17s. 2d. These sums of £2257, 12s. 7d., £1267, 17s. 2d., and £501, 4s. 2d. made up the £4026, 13s. 11d. in dispute.

Besides these deposit-receipts in joint names, John had a series of deposit-receipts with the Commercial Bank at Thurso in his own name, commencing on 9th May 1856; at the date of George's death in 1878 the amount of these with interest was £469, 11s. 11d. He also had a number of deposit-receipts in the Castletown branch of the Commercial Bank, amounting, without interest, at said date to £267, 12s. 9d.

With one exception the terms of the deposit-receipts which stood in names of the two brothers were practically identical, and the following deposit-receipt of the Aberdeen Town and County Bank at Thurso will serve as an example. It was dated 13th March 1868.—"Received from Messrs John and George Spence, Dunnet, payable to either of them or the survivor, the sum of £109 sterling, which is placed to their credit on deposit account." In the exceptional case referred to the receipt bore that the money was to be "payable to them conjunctly or to the survivor of them," and there was some evidence that the defender had given special instructions to the bank agent to frame it so. The defender failed to trace more than a small part of the money in the various deposits to sources connected with his separate industries. Indeed the money remained almost entirely untraced. It was only shown that it had not been drawn out of the accounts-current kept for the family businesses.

George died, as already stated, on 29th April 1878. On 18th October following the defender uplifted the deposit-receipts standing in the joint names of himself and George in the National Bank, and placed the money on a deposit-receipt in his own name. He dealt in the same way with the receipts in the Aberdeen Town and County Bank and the Commercial Bank. After George's death Mrs Spence and the defender, as already stated, carried on the business. Mrs Spence died on 29th October 1881. On 10th December 1881 an inventory and valuation of her estates was prepared by the defender amounting to £998, subject to deduction of debts. This state was finally adjusted in this process at £229, 9s. 7d., for which sum the defender was willing to account.

The Sheriff-Substitute found—"(2) That the pursuer is entitled to one-sixth of the moveable estate left by her mother Mrs Spence; (3) that the said moveable estate consisted of . . . (*b*) the sum of £4054, 1s. 7d. as at 29th April 1878, being money which, on a sound construction of the evidence, must be held as forming part of Mrs Spence's estate; (4) that these moneys are admittedly in the hands of the defender, who is bound to account to the pursuer for her share of the same."

The defender appealed to the Sheriff (Thoms), who sustained the appeal, recalled the interlocutor of the Sheriff-Substitute, and appointed parties to attend to be heard as to further procedure.

"*Note.*— . . . The deposit-receipts in which George at his death on 29th April 1878 was interested as a grantee along with the defender, amount, per the Accountant's said report, head VI., to £4026, 13s. 11d. As regards this amount, the evidence does not satisfy the Sheriff that it was other than the property of George to the extent of one-half, or £2013, 6s. 11½d.

"The defender in his reclaiming petition frankly says—'The appellant while fully satisfied that the whole sums in the deposit-receipts in name of himself and his brother George were derived from his funds, cannot pretend to have displaced entirely the presumption in favour of George's part ownership, arising from the introduction of his name and his presence at the bank. The specific sums have not been traced so as absolutely to disprove George's interest.' He thus admits that the result at which the Sheriff

has arrived is the correct one, except for decisions which 'decide by implication that the survivor of such joint depositors is entitled to the whole fund, under the terms of a receipt payable to either or the survivor.' 'In the present case original joint ownership, coupled with delivery and possession at the date of death, seems to establish a far stronger case for the appellant to be preferred as owner of the whole amount.'

"The position thus taken up comes too late in the day, as no such case is made by the appellant on record, even as amended.

"Were he to be allowed to assume this position now, the Sheriff fails to see that the appellant has proved delivery to him of the deposit-receipts as a gift by his brother George, or even possession (which is not enough of itself in the circumstances of this case) at the date of George's death. That he and the mother took possession at the death of everything belonging to George Spence *sine titulo*, has already been found to be proved as the ground of the defender's liability to account to the pursuer and the other next-of-kin of George.

"On these grounds, as well as otherwise, the cases of *M'Cubbin's Executors* v. *Tait*, January 31, 1868, 6 Macph. 310, and *Bank of Scotland* v. *Robertson*, January 12, 1870, 8 Macph. 391, are not authorities in the appellant's favour." . . .

The Sheriff thereafter remitted to an accountant to report on the accounts of George's and Mrs Spence's estates, and finally found that the defender had *sine titulo* intromitted with the personal estate of George and Mrs Spence, and that he had in his hands and was due to the pursuer certain sums from these estates, and gave decree for payment to her of these sums to the amount of her shares of these estates. The practical effect of his judgment was—(1) that £2013, 6s. 11½d., being one-half of the joint deposit-receipts, belonged to the deceased George Spence; (2) that two-thirds of this was divisible among his six sisters as next-of-kin, the pursuer thus getting one-sixth; (3) that the remaining one-third of George's estate fell to his mother (who survived from 1878 to 1881), and was, along with her other estate, consisting mainly of the £229, 9s. 7d. above mentioned, divisible among her son and six daughters, the pursuer thus getting one-seventh of this part of the estate.

The defender appealed to the Court of Session, and argued—The question was as to the property in the money lodged in bank on these deposit-receipts. No doubt a deposit-receipt in joint names such as these were, implied *ex facie* a joint and equal property in the sums deposited, but this presumption could be redargued, as, for example, when the custody of the receipts was shown to be in one person only, or by evidence as to the source from which the money came—*Watt's Trs.*, July 1, 1869, 7 Macph. 930. Here there was no evidence that any of the money came from George, and there was evidence that all or most of it belonged to John. (The argument maintained before the Sheriff on the ground of survivorship was not pressed.)

The pursuer replied—It was settled that a deposit-receipt in joint names was evidence as to the property of the amount being jointly and equally in those in whose names it was taken, in the absence of any evidence to a contrary effect, and there was none such here. There was only the statement of the defender—*Kennedy* v. *Rose*, July 8, 1863, 1 Macph. 1042; *Bank of Scotland* v. *Robertson*, July 12, 1870, 8 Macph. 391.

At advising—

LORD YOUNG—This case, as I apprehend it, may be stated in a very few words. A man named John Spence, who combined the pursuits of a farmer, an inn-keeper, and a shop-keeper, died in 1853 leaving a widow and grown-up family. By his will he left his heritage, which it has been explained to us is of the annual value of £40, to his two sons, and his whole personal estate, including the stocking in the farm and in the shop, to his widow. The value of it as personalty—I do not speak of the goodwill of the business—was somewhat over £500 as given up to the Revenue Office.

After her husband's death in 1853 the widow carried on the three businesses of farmer, inn-keeper, and shop-keeper until 1881, when she died. Until 1878 she was assisted chiefly by her younger son George, although also to some extent by her son John, and after George's death in 1878 she was assisted by her son John. The two sons got their father's heritage, subject to their mother's liferent, John succeeding to George's share of it upon his death in 1878. The only trace we have of the personal estate is in twenty-three deposit-receipts in no less than three banks for the total sum of £4026 in the names of John and George. Between the father's death and sometime in George's lifetime, in 1862 and 1863, the receipts were not uncommonly taken in the mother's name, but in 1878, when George died, the receipts—twenty-three in number, and of the amount stated—were in the names of John and George. John then uplifted them, and put them into his own name. In the present action he is asked to account for that money, one-half of which it is contended belonged to George. And the Sheriff has so decided. He is of opinion that the deposit-receipts in name of the two brothers, bearing the bank's acknowledgment that the money was received from them, and is to be payable to them, were to the extent of one-half the property of George at his death, and that the sum thus fixed is divisible accordingly among those who are entitled to share in George's succession, namely, his mother, who survived him, and his six sisters, and that after the mother's death in 1881 her moveable succession is divisible among her son John and six daughters. His judgment accordingly is to the effect that John must account for one-half of the money as the successor of George, and for the succession to the mother as ascertained by the Sheriff through the medium of an accountant. John, of course, is entitled to none of the personal estate of his brother, because he took the heritage. John's answer to the case is, that of the £4026 standing in the twenty-three deposit-receipts, no part belonged to George at all, but was really all his own money, made by him in the course of trade as Lloyd's agent, dealing in sheep, and so on, as he himself expresses it. Had that really been so, he might have proved it, but he certainly did not prove it to the satisfaction of the Sheriff, who has held that the legal result, in the absence of satisfactory evidence to

the contrary is, that one-half of the money was George's property at his death. If that be the true result, then everything for which the pursuer contends admittedly follows. I cannot say that I am altogether without misgivings that John may have made less of this money himself, and that more of it should belong to the family, and on the other hand I am not without misgivings either that the truth may be that a larger proportion than the half was his own earnings. George's money was the money belonging to the family, and his (John's) own earnings ought to have been kept entirely separate. He ought to have been able to show what of George's money he got, and what moneys included in the deposit-receipts were his own earnings. But he has not done that, and so if he suffers any injustice he has himself to blame for it. I think we have no evidence on which it would be safe to alter the Sheriff's judgment to the effect that he must account for one-half as if it belonged to George as the legal result of the documents in the absence of satisfactory evidence to the contrary.

Upon the whole matter, therefore, I do not think we can safely arrive at any other conclusion than that we have no satisfactory grounds upon which we can interfere with the judgment of the Sheriff.

LORD CRAIGHILL and LORD RUTHERFURD CLARK concurred.

The LORD JUSTICE-CLERK was absent.

The Court dismissed the appeal, and affirmed the Sheriff's interlocutor.

Counsel for Pursuer — Pearson — Guthrie. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for Defender—Mackintosh—M'Lennan. Agents—Philip, Laing, & Trail, S.S.C.

Friday, January, 23.

SECOND DIVISION.

STEVENS *v.* STEVENS.

Process—Poor's-Roll—Poverty—Probabilis causa litigandi.

A man earning an income of £138 a-year, out of which he was obliged, for the purposes of his business, to make an outlay of £85 a-year, and who was burdened with the aliment of a grown-up son unable to work, *held* entitled to the benefit of the poor's-roll to enable him to sue an action competent only in the Court of Session.

William Stevens, Main Street, West Calder, petitioned the Court for admission to the poor's-roll to enable him to carry on an action in the Court of Session against his wife for reduction of a final decree in an action of separation and aliment at her instance against him.

Mrs Stevens opposed the application, and a remit was made to the reporters on the *probabilis causa litigandi* to inquire into the circumstances. They reported that he had a *probabilis causa*, and that he had stated that he was in the employment of the Parochial Board of West Calder at a salary of £138 per annum, from which he had, in the course of his employment, to provide for a man, horse, and cart, which cost him £85 per annum; that further, for more than a year he had been burdened with the support of an invalid son able formerly to earn 21s. a-week; and that they were satisfied that these statements were substantially correct.

Mrs Stevens maintained that the petitioner's pecuniary circumstances as reported on did not show poverty sufficient to entitle him to the privilege of suing *in forma pauperis*, and referred to the cases of *Duncan* v. *Morrison*, January 16, 1383, 1 Macph. 257; and *Williamson* v. *Irvine*, November 21, 1863, 2 Macph. 126.

At advising—

LORD CRAIGHILL—I have grave doubts about this application. The applicant is the owner of a cart and horse, and that seems to me to be inconsistent with the idea of his being put on the poor's-roll. Rightly or wrongly we have no doubt of late been opening the door very widely in cases of this sort, but I cannot remember any case in which an application similar to the present has been granted, and if this man is found to be entitled to be put on the poor's-roll, many persons will find themselves entitled to sue *in forma pauperis* who have no idea that they possess any such right.

LORD RUTHERFURD CLARK—As this is the only Court in which this applicant's case can be brought, and as he has a *probabilis causa*, I think we can do nothing else than grant the application.

LORD YOUNG—I should have thought that too clear for argument until I heard the opinion of Lord Craighill, for which I have the greatest respect. I understand the benefit of the poor's-roll is for those who have a *probabilis causa litigandi*, and who from poverty are unable to bear the expenses of litigation in Court. This man has a *probabilis causa litigandi*, and it is ridiculous to say that a man who has a free income of £53 a-year—just about a pound a-week—and who has to support an invalid grown-up son, is in circumstances to bear the expenses of a litigation in this Court. In point of fact he cannot. As to the horse and cart, they are not stated to be his property, but I assume that they are, and it is by means of them that he earns his pound a-week, and that if he did not have them he would not be able to earn that pound a-week, and would be in absolute poverty. If we take it that he has a *probabilis causa litigandi*, and that he is certified as having a pound a-week, then in admitting him to the poor's-roll we do no more than say that a man in these circumstances is not in a position to meet the expenses of a litigation in this Court.

The Court granted the application.

Counsel for Mrs Stevens—Campbell Smith. Agent—Thomas Carmichael, S.S.C.