of Charles Crawford Hay predeceasing the testator.

LORD PRESIDENT—I concur entirely with the view of this destination, which has been taken by my brother Lord M'Laren, and I desire only to add that a destination in the terms in which it is expressed in the present case differs very materially from that in the case of *Bryson's Trustees*. There the direction was to convey certain heritable subjects to A and the heirs of his body, whom failing to B, whom failing to C, whom failing to certain other parties *nominatim*, "and their heirs," and it was with reference to that destination that I gave the opinion a portion of which is quoted by the Lord Ordinary. The passage is in these terms—"It is in vain to review the authorities in a question of this kind, but I think they amount to this, that when nothing is expressed in favour of a beneficiary except a direction to trustees to convey to him on the occurrence of a certain event, and not sooner, and failing him, to certain other persons as substitutes or conditional institutes to him, then if he does not survive the period he takes no right under the settlement;" and I added, "I think that is settled law," and also that it was applicable to that case, and in that view the other Judges concurred. Now, I do not think that anything which we are doing here in any way interferes with what the Court in that case declared to be settled law.

With regard to the case of *Bell* v. *Cheape*, it does not appear to me that it has any application to the present case. I do not desire in any way to call in question the authority of that decision, and what my brother Lord Shand has termed the more matured state of our law on the subject of vesting subject to defeasance does not appear to me to be in any way inconsistent with the decision in *Bell* v. *Cheape*.

The Court recalled the Lord Ordinary's interlocutor and ranked and preferred the claimant Mrs Ellen Francis Hay and another (Charles Crawford Hay's trustees), to the whole fund *in medio*.

Counsel for the Pursuers and Real Raisers—Low—Burnet. Agents—Pringle, Dallas, & Company, W.S.

Counsel for Charles Crawford Hay's Trustees—Low—Burnet. Agents—Pringle, Dallas, & Company, W.S.

Counsel for Charles Douglas Hay—Sir C. Pearson — Gillespie. Agents — Dundas & Wilson, C.S.

Wednesday, June 18.

SECOND DIVISION.

[Sheriff of Perthshire.

MORRISON *v.* FORBES.

Deposit-Receipt—Donation Mortis Causa—Proof.

Circumstances in which it was *held* that a person who had acted as his deceased aunt's manager, and who had taken a deposit-receipt in her and his names jointly, "payable to either or the survivor," which had been afterwards handed over to him, had failed to prove that the sum contained therein had been gifted to him by donation *mortis causa*.

James Morrison, joiner, 19 Kinloch Street, Dundee, executor-dative of the deceased Isabella Cameron, East Haugh, Pitlochry, who died intestate upon 1st September 1888, brought an action in the Sheriff Court at Perth against Duncan Forbes, joiner and builder, Pitlochry, for payment of £184, 19s. 11d., being the sum contained in a deposit-receipt with the branch of the Bank of Scotland at Pitlochry dated 25th June 1888, with interest from 3rd September 1888. The deposit-receipt bore that the money had been received from Miss Isabella Cameron and Mr Duncan Forbes, and was payable to either or the survivor. The pursuer averred that notwithstanding the terms of said deposit-receipt the sum contained therein belonged wholly to the said Isabella Cameron, and formed part of her executry estate, but that upon 3rd September 1888 the defender had uplifted the said sum from the bank. The defender, who was a nephew of the deceased, admitted that he had uplifted the money, but explained that the sum contained in the deposit-receipt had been donated to him by the deceased by donation *mortis causa*.

A proof was allowed, at which the defender deponed—"My aunt lived with me from January 1880, when my mother died. . . . I conducted her business for her from the time she came to live with us. I went to the bank and drew her interest for her. . . . About twenty months before she died the deposit-receipt was changed. Till then it had been in her own name. In February 1887 it was changed to the joint names of herself and me. I think that after that it was just renewed twice. . . . The renewals of the receipt were in our joint names. The last time the interest was drawn I got it for myself to keep. My aunt could neither read nor write. . . . She had always been talking about the kindness I had shown to her. . . . About three weeks before the receipt was changed into our joint names she spoke about leaving me all she had. She said in Gaelic, 'It is yourself that will get it all,' or something to that effect. The next conversation would be about three weeks after that. I was going to the bank, and she told me to take the deposit-receipt and change it into our joint names. . . . The receipt had been in

our house long before she came to live with us, and even then I was occasionally acting as her manager. When it was changed to our joint names no change took place in its custody. . . . In February 1887 when she told me I was to get the money in the bank she was not well in her health. She told me to go to the bank and lift the money. She said she wished it entirely put in my name. My brother was present, and he said, 'No; . . . if I died before my aunt the money might be claimed by my heirs.' . . . It was then suggested that my name should be put into the receipt with hers and 'survivor,' and that was done. When I brought the receipt back with me my brother was present when I handed it to my aunt. She gave it to him, and he read it to her twice, and then folded it up and handed it back to her again, and she handed it to me and said, 'Here Duncan.' My brother said, in reply to her, that if she was to die now I would get the money, and she said that was right.

The evidence as to this interview was corroborated by his brother.

The Sheriff-Substitute (GRAHAME) found "in point of law that, in the circumstances above stated, the deceased, in getting the deposit-receipt in question made payable to herself and the defender jointly and to the survivor, intended to make, and did make, a *donatio mortis causa* of its contents to the defender, and that the said sum of £184, 19s. 11d. contained in the deposit-receipt is now the defender's property."

"*Note.*—The main question in this case is whether the defender is in rightful possession of and entitled to retain as his property the contents of a deposit-receipt, dated 25th June 1888, for the sum of £184, 19s. 11d., with the branch of the Bank of Scotland at Pitlochry, standing in the joint names of Isabella Cameron (his deceased aunt) and himself, and payable to either or survivor, or whether the contents of this deposit-receipt form part of her executry estate, and are therefore rightfully claimed by the pursuer as her executor. The defender maintains that the contents of the deposit-receipt belong to him, in respect of a *donatio mortis causa* made to him by the deceased. The grounds on which he seeks to support this contention are, that he has proved that his aunt, the deceased, having a special affection for him, and to which she had frequently given expression, had in the view of her death, which took place twenty months afterwards, instructed the defender to get the deposit-receipt—which up till that time had been standing in her own name only—transferred to the joint names of herself and the defender, and to be payable to either or survivor; and that she had caused this to be done with the intention of then and there making a *donatio mortis causa* of the contents to him; and that having handed the receipt to him with this view, he is entitled to hold it and deal with it as his own, and that the pursuer is not entitled to claim it as part of the executry estate. The position thus taken by the defender is, the pursuer contends, a false one. In the first place, he maintains that even assuming that the circumstances of the case are as the defender alleges, still they were not such as to fulfil the conditions required to constitute a *donatio mortis causa;* and secondly, that even although the deceased was, at the time of the alleged donation, in a condition to make the donation, she did not effectually do so. In regard to the first of these objections, the pursuer's argument was that a *donatio mortis causa* cannot be constituted when the alleged donor was, as in the present case, at the date of the transaction merely looking forward to her death as probably not a very distant event, but was not in a condition in which that event could be regarded as certainly or even probably imminent, which latter state at least, he maintained, was a condition necessary to the constitution of a *donatio mortis causa.* The question thus raised is one which has been frequently considered by the Courts, and in the late case of *M'Nicol* v. *M'Dougall*, October 25, 1889, 17 R. 25, Lord Young in giving judgment said—"A donation *mortis causa* is a donation, and it resembles any ordinary donation or gift in many respects, but it differs from an ordinary donation in these two—First, it is always revocable; and secondly, it is made in contemplation of death, and whatever may have been said to the contrary, in the immediate contemplation of death. Then if that apprehension is not realised, and death does not follow, but the apprehensive donor recovers, I think that the donation is revoked by that very fact, and that it will not survive the donor's recovery." It must be admitted that if this view is adopted as an authoritative judgment on the question, there is an end of the defender's case, and he cannot here plead a *donatio mortis causa* in bar of the pursuer's claim. But with reference to this opinion of Lord Young upon the point in question, that it is to be considered that it was not put forward by him as forming the ground of his decision of the case, and that the case with which he was dealing was one in which, apart from any question as to the physical condition of the alleged donor, the Court held that there were good grounds for deciding that the alleged donation had not been effectually made; and further, that the opinion referred to was not adopted by any of the other judges. The question as to what must be held the essential conditions of *donatio mortis causa* has no doubt been the occasion of much discussion and variance of opinion in the Courts, but looking to the general tenor of the opinions given by the judges, I think it must now be held as authoritatively decided that it is not an essential condition that the donor be, at the time of making the gift, in such a state of health as to make death certainly or even apparently imminent. In the case of *Blyth* v. *Curle*, February 20, 1885, 12 R. 674, in which the preceding decisions were carefully reviewed, and the whole question gone carefully into by Lord President Inglis, it was held that a *donatio mortis causa* can be effectually made even though the donation was not made in respect of

any existing fatal illness, or even in expectation of imminently approaching death, provided that the donor was at the time looking forward to the inevitable event, and that in such circumstances an immediate transference of the property intended to be gifted could be made, which if not revoked, the donee could make effectual when the anticipated death arrived. The opinion given by the Lord President in the case referred to was to the effect that '(1) if a donation *mortis causa* cannot be sustained according to the law of Scotland unless the donor at the time of making the gift believes himself to be in imminent peril of speedy death, then the law of Scotland has adopted the third, and the third only, of the three kinds of donations *mortis causa* known to the Roman law; and (2) that if there be superadded the further condition that, in the event of death not occurring from the specific peril apprehended, the gift falls to be returned, then the law of Scotland has introduced a new species of gift which was unknown to the Roman law, from which it professes to be borrowed, and that, in the state of the authorities, an objection founded on the absence of an immediate apprehension of death could not be sustained.' In the face of the law thus laid down, and which has not been since altered by any judgment of the Court, I am unable to give effect to the pursuer's contention, and I hold that the condition of the deceased Isabella Cameron at the date of her alleged donation to the defender was not such as to make the intended gift ineffectual. In regard to the second ground of the pursuer's argument, and assuming that in the present case there was no personal disqualification to prevent the deceased from making an effectual *donatio mortis causa* of the contents of the deposit-receipt in question to the defender, the point remaining to be determined is whether or not there are sufficient grounds for holding that she intended to do so and took effectual means to carry out her intention. It seems to me that the evidence adduced in support of her intention to make the donation is sufficient. The relations between the deceased and her nephew, the defender, had evidently been all along of a very kindly and affectionate character, and such as specially to render him the person to whom she would naturally be most anxious to give the benefit of her money after her death. It is proved, moreover, that on several occasions she gave expression to such a feeling, and acted generally in such a way towards the defender as clearly to indicate that the transference of the deposit-receipt from her own name solely to the joint names of herself and the defender, and making it payable to either or survivor, was made for the defender's own personal benefit, and not merely, as the pursuer alleges, for administrative purposes, and to enable the defender to draw the interest on her behalf. Unless both the defender and his brother have been guilty of perjury, their testimony clearly proves the intention of the deceased to make the donation in question, and that she gave actual delivery of the deposit-receipt to the defender with that view. It is difficult to imagine with what other object the transference of the deposit-receipt to the defender could have been made, for it is to be kept in mind that he had previously been the holder of the deposit-receipt, and had been all along drawing the interest on it on behalf of the deceased, and unless she had intended to make a transference of the receipt in his favour, there seemed to be no reason why she should have desired to make any change in its terms and not allowed matters to go on as they had been doing. Nor does there appear to have been anything in her conduct after the transaction had been made unfavourable to the idea of donation." . . . .

The pursuer appealed to the Sheriff (PEARSON), who adhered.

"*Note.*—The donation of the deposit-receipt and its contents is alleged to have taken place in February 1887, about twenty months before the death of the donor Isabella Cameron. She appears to have been about seventy years of age, but she was at work in the interval, and (so far as appears) in fair health, and the illness which resulted in her death lasted only three days. The first question therefore is, whether, according to the law as it at present stands, it is necessary to a *donatio mortis causa* that it be made 'in contemplation of immediate death'—*M'Nicol*, 17 R. 27, and whether, being so made, it is revoked by the fact of recovery. In my opinion the Sheriff-Substitute has accurately stated the law on this matter. To quote the words of Lord M'Laren in *Martin's Trustees*, January 1887, 24 S.L.R., 485—'It is now settled that such a gift will be sustained although the giver is not apparently in immediate danger of death; and it is enough that the gift is made in contemplation of death at some future time.' This is the kind of case referred to in the Roman law (Dig. 39, 6.1), '*cum quis . . . sola cogitatione mortalitatis donat*'—a donation 'proceeding from general views of mortality' (*per* Lord Justice-Clerk in *M'Cubbin's Executors*, January 31, 1868, 40 Jur. 161.) On the other question, it appears to me that the defender has discharged the *onus* of proof which lay upon him, and has sufficiently proved both the *animus donandi* and the actual donation. The findings of the Sheriff-Substitute on this head seem to me to be fully borne out by the proof." . . .

The pursuer appealed to the Second Division of the Court of Session, and argued—A deposit-receipt was not a testamentary writing, and its terms alone conferred no right of property on the survivor—*Watt* v. *Mackenzie*, July 1, 1869, 7 Macph. 930; *Cuthill* v. *Burns*, March 20, 1862, 24 D. 849; *Miller* v. *Miller*, June 27, 1874, 1 R. 1107; *Jamieson* v. *M'Leod*, July 13, 1880, 7 R. 1131; *Connell's Trustees* v. *Connell's Trustees*, July 16, 1886, 13 R. 1175. It might be the subject of a donation *mortis causa*, but there must be evidence of present gift. Here the evidence was insufficient. At the most it amounted to an intention to leave money to the defender which had

never been carried out. It would form a dangerous precedent to hold that a donation had been made upon the evidence of the person benefited, especially when, as in this case, he was the "doer" or agent of the alleged donor. It was at least doubtful whether the deceased had authorised the change in the investment. That change, even if authorised, did not transfer the property of the money. It might have been made for purposes of administration. The defender had continued to draw the interest as interest on his aunt's money, and subject to her instructions as to its disposal. The want of evidence of donation was sufficient for the decision of this case, but in law the facts, even if proved, did not constitute a donation *mortis causa.* The gift was not alleged to have been made in contemplation of death, and the donor had survived for twenty months—*Morris* v. *Riddick,* July 16, 1867, 5 Macph. 1036; *Milne* v. *Grant's Executors,* June 5, 1884, 11 R. 887; *M'Nicol* v. *M'Dougall,* October 25, 1889, 17 R. 25; the Lord President's opinion in *Blyth, &c.* v. *Curle,* February 20, 1885, 12 R. 674, was entitled to great weight, but was not conclusive.

Argued for the respondent—The judgments of the Court below were right. Unless the defender and his brother had perjured themselves there was ample proof of present donation, and more than in the recent case of *Macdonald* v. *Macdonald,* June 11, 1889, 16 R. 758. This case was stronger than *Crosbie's Trustees* v. *Wright,* May 28, 1880, 7 R. 823, for here there had been delivery of the document, although that was unnecessary. It was not necessary the gift should be made in immediate contemplation of death — *Blyth, &c.* v. *Curle, supra; Martin's Trustees* v. *Martin, &c.,* January 22, 1887, 24 S.L.R. 484. That the defender being her nephew helped the deceased in her money matters did not incapacitate him from receiving a gift from her.

At advising—

LORD YOUNG—I have the misfortune to differ from the judgment both of the Sheriff-Substitute and of the Sheriff. I think that we have here no evidence of a donation *mortis causa.* I am not going into the general law which in my opinion governs the question of donation *mortis causa.* I have sufficiently indicated my own views in the course of the debate, but without reference to the controversy as to the true principle upon which the doctrine of donation *mortis causa* rests, I am of opinion that there is here no evidence of a donation *mortis causa.* I do not impeach the integrity of the defender in the least, but at the time of the occurrence of taking this deposit-receipt he stood in the relation of trustee or agent or "doer" to the deceased. He was not a professional man of business, but he had sufficient intelligence and capacity to manage her affairs, including the sum contained in this deposit-receipt. This sum had always been invested in a deposit-receipt, but it was his duty to uplift the interest and pay it over to her, or to expend it as she might direct. Now, he says that about twenty months before her death, when she was not in particularly feeble health or contemplating immediate death or making a will, she told him to go to the bank and take the deposit-receipt in the terms which have been read to us, and that when these terms were explained to her, and the document put into her hands, she gave it to him, saying, "Here Duncan."

Assuming all that to have passed, I think it is clear that she was divested of no right, but remained beneficial owner as before, and that he remained as before, her trustee. His duty of drawing the interest, and accounting for it to her as her property, continued unchanged, and matters were allowed to stand thus until her death, which occurred twenty months afterwards. It might have been twenty years afterwards without making any difference in principle so far as I can see. Upon that evidence I think that he has not established that a donation *mortis causa* was made to him.

I therefore propose—without entering upon the general doctrine, which at some future date and in a suitable case, which this is not, is in my opinion well worthy of reconsideration—that we should recal the judgments appealed against, and find the donation *mortis causa* not established.

LORD RUTHERFURD CLARK, LORD LEE, and the LORD JUSTICE-CLERK concurred.

The Court found that the defender had failed to prove that the sum contained in the deposit-receipt was donated to him by Isabella Cameron, and therefore sustained the appeal, recalled the interlocutors appealed against, and ordained the defender to make payment to the pursuer of the sum of £184, 19s. 11d., with interest as concluded for.

Counsel for the Pursuer and Appellant—M'Kechnie—Craigie. Agent—R. J. Gibson, S.S.C.

Counsel for the Defender and Respondent—Low—Dewar. Agents—Carmichael & Miller, W.S.

Thursday, June 19.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

SCHOOL BOARD OF GREENOCK *v.* PROVOST, MAGISTRATES, AND TOWN COUNCIL OF GREENOCK.

School—Education Act 1872 (35 *and* 36 *Vict.* c. 62), *sec.* 46—*Customary Payments by Burgh out of the Common Good.*

The Education (Scotland) Act 1872 (35 and 36 Vict. c. 62), by sec. 46 enacts that " . . . The town council of every burgh shall at the term of Martinmas yearly, pay to the school board thereof, such sum as it has been the custom of