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

such burgh prior to the passing of this Act to contribute to the burgh school out of the common good of the burgh. . . ."

From the middle of the eighteenth century the Town Council of Greenock contributed annually out of the common good of the burgh to the two burgh schools of Greenock. In 1851 the Greenock Academy was instituted with the aid of public subscriptions. The two burgh schools were amalgamated with it by arrangement with the Town Council, who secured one half of the management and undertook to continue the contribution from the common good.

In 1881 the Academy was transferred by its directors to the School Board of the burgh. In 1887 the Town Council declined to continue the contribution out of the common good, on the ground that the Academy was not a burgh school in the sense of the Education Act and that they had lost the management in consideration of which the payment had been made.

Held that the Academy was a burgh school in the sense of the Act, and that the Town Council were bound to continue the contribution.

The School Board of the Burgh of Greenock brought an action against the Provost, Magistrates, and Town Council of the Burgh of Greenock to have it found and declared that the defenders were bound, in terms of the 46th section of the Education (Scotland) Act 1872, to make payment annually to the pursuers of the sum of £145 which the defenders had been, prior to the passing of the said Act, in the custom of contributing annually to the Greenock Academy now administered by the pursuers, and to have the defenders decerned and ordained to make payment to the pursuers of the sum of £145, together with interest thereon from Martinmas 1887, and further, to make payment to the pursuers at Martinmas yearly, in time coming, of the said sum in perpetuity beginning the first payment thereof at Martinmas 1888.

By the 46th section of the Education (Scotland) Act 1872 it is enacted 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 such burgh, prior to the passing of this Act, to contribute to the burgh school out of the common good of the burgh, or from other funds under their charge, and the same shall be applied and administered by the said school board for the purpose of promoting higher instruction;" and by the first section of the said Act it is enacted that "Burgh school shall include any school to which that term is now legally applicable, although it may be called an academy or high school, or a grammar school, or any other name."

The pursuers pleaded—"(1) The said Greenock Academy being, in the sense of the 46th section of the Education (Scotland) Act 1872, a burgh school, the pursuers, as the administrators thereof, are entitled to the customary payments contributed by the defenders to the said school prior to the passing of the said Act. (2) The defenders having been in the custom, prior to the passing of the said Act, of contributing to the said school the annual sum concluded for, and having continued to pay the same to the pursuers until the term of Whitsunday 1887, the defenders are bound to continue payment thereof to the pursuers in terms of the conclusions hereof."

The defenders pleaded—"(3) The school in question not being a burgh school in the sense of the statute, the defenders should be assoilzied. (4) Any sum paid by the defenders not being of the nature of the sums contemplated by the said statute, the defenders should be assoilzied."

It appeared from a joint-minute of admissions for the parties, the minutes of the Town Council of Greenock, the minutes of the Greenock Academy, and other documents, that in 1741 the Town of Greenock first began to be managed by magistrates and councillors, that at that date there was one burgh school and that subsequently there were two, the one called the Grammar School and the other called the Mathematical School. In 1749 a contribution was made from the burgh funds towards the salary of the schoolmaster of the Grammar School. From 1751 till 1767 his salary was partly paid by the Town Council. From 1767 onwards the Magistrates and Town Council appointed the masters of the two burgh schools. In 1785 the amount of contributions annually made from the common good of the burgh to these schools was £48, 13s. About 1805 the Corporation found it necessary to discontinue all contributions out of the common good for educational objects excepting only the grants to those two schools which were continued to be paid and which in 1818 amounted to about £80 per annum. From 1836 until 1854 the amount contributed to those schools varied from £147 to £106 per annum. In 1851 a scheme was instituted by the leading educationists of Greenock to found and maintain a school worthy of the growing commercial importance of the town. Subscription lists were opened to raise a capital sum of £3000 in 300 shares, afterwards increased to £7000 in 700 shares of £10 each. The proposed constitution of this new school, called the Greenock Academy, which *inter alia* provided that the directors should be the Provost, five members of the Town Council, the Sheriff-Substitute of the Lower Ward of Renfrewshire, and five gentlemen chosen from the subscribers, was approved of by the Town Council, who resolved to transfer to the directors of the Academy their existing rights of patronage and allowances hitherto made to the Grammar School and Mathematical School, said patronage and allowances to be enjoyed by the directors of that institution in all time coming. The new Academy was opened in 1855. The allowance from the common good was thereafter paid to the directors of the new Academy, and from 1860 until it ceased to be paid it amounted to £145 per annum. In 1872 it was proposed to include the Greenock Academy in

Schedule C appended to the Education (Scotland) Act of that year, which enumerated the higher public schools to be handed over to the school boards. That however, was not done owing to the representations made to Government by the subscribers and others. In 1881, with the consent of the Scottish Education Department, the directors of the Greenock Academy, in consideration of the sum of £3000, transferred the said Academy to the School Board of the burgh of Greenock to be maintained and administered by them as a higher class public school. The £3000 were to be applied primarily to pay off a bond on the Academy buildings, and the residue was to be invested so as to yield a sum for bursaries for higher education at the Academy.

The last contribution by the Town Council out of the common good of the burgh to the Academy was made at Whitsunday 1887, and in consequence of their refusal to make any further payment this action was raised.

Upon 29th October 1889 the Lord Ordinary (KINNEAR) decerned and ordained in terms of the conclusions of the summons.

"*Opinion.*—It is not seriously disputed that prior to the arrangements of 1851-55 the Grammar and Mathematical School in Greenock was a public burgh school under the management and control of the Magistrates. But it is said that when these arrangements were carried out the public school ceased to exist, and that a private adventure school, under the management of the shareholders, was established in its place.

"I do not think the Greenock Academy can be properly described as a mere private adventure school. The object of the promoters was not to make money but to establish a better public school, more suitable than the old Grammar School, for a town such as Greenock. The old burgh school therefore was not extinguished, but incorporated in the new institution; and it was in respect of that incorporation that the Magistrates in 1851 resolved to transfer to the direction of the Academy 'their rights of patronage and the allowances hitherto made to the Grammar and Mathematical School in all time coming,' and that on the other hand they stipulated that they should still retain a large share in the management, by appointing one-half of the directorate from their own body.

"The allowances which in terms of this resolution were thereafter made to the Academy were not made for the private advantage of the shareholders, but for the same purpose for which they had been originally granted, that is to say, for the support of a burgh school which, as the constitution expresses it, had been 'comprehended' in the new Academy, and which the Magistrates would otherwise have been obliged to maintain. The sums which were in use to be paid to the Academy, therefore, before the transference to the School Board, were, in my opinion, contributions to a burgh school in the sense of the 46th section. But they were contributions which did not rest entirely upon custom, but upon a distinct undertaking by the Magistrates that they should be continued in all time coming. It may be that this obligation was not unconditionally transferable. If the school had been made over to private persons, under conditions by which its public character might have been lost, the Magistrates might probably have been entitled to withhold their contributions. But the body to which the management is in fact transferred is the school board, which is invested by the statute with all the powers and duties in regard to burgh schools which formerly belonged to the Town Council and Magistrates. The school in these hands will be a public burgh school; and there is nothing in the terms or legal effect of the transference from the directors to the board which can relieve the Magistrates of their obligation."

The defenders reclaimed, and argued—The consideration for which the contribution sued for had been made, viz., a large share in the management of the Academy, had been lost. They were therefore no longer liable to contribute anything. The contribution was not one which fell under section 46 of the Education Act, because this was not a burgh school. It did not satisfy the definition contained in the first section of the Act, for in 1872 the term "burgh school" was not legally applicable to the Greenock Academy which was a school owing its origin to the enterprise and voluntary subscriptions of the citizens of Greenock. It was not included in Schedule C, and the manner in which it had been acquired by the School Board was conclusive on the matter. If it had been a burgh school the School Board would have acquired it in 1872 by virtue of section 24 of the Act, without payment, whereas they had purchased it. Reference to section 62 was irrelevant unless there was a contribution due out of the common good under section 46.

Argued for the respondents—This Academy was just the Burgh School enlarged and extended. Down to 1851 a contribution out of the common good had been made to the Burgh School, which was then amalgamated with the new Academy. It did not thereby lose its character of the Burgh School—*Gordon* v. *Bell's Trustees* (*Madras College, St Andrews*), December 13, 1843, 6 D. 222; *Presbytery of Elgin* v. *Magistrates and Town Council of Elgin*, January 16, 1861, 23 D. 287 (*per* Lord Deas); *School Board of Dunbar* v. *Magistrates and Town Council of Dunbar*, March 18, 1876, 3 R. 631; *School Board of Perth* v. *Magistrates and Town Council of Perth*, October 19, 1878, 6 R. 45; *School Board of Dunfermline* v. *Magistrates and Town Council of Dunfermline*, October 19, 1878, 6 R. 51. The difficulty as to the form of transference, viz., by purchase, was to be explained by reference to the interests of the subscribers. Their interests were thus met but the Burgh School was not thereby purchased. It was only because the subscribers had to be consulted and humoured that the Academy

had not been transferred to the School Board in 1872. That transference had now taken place, and the School Burgh were entitled under section 46 of the Act of 1872 to have the contribution out of the common good continued as formerly.

At advising—

LORD JUSTICE-CLERK—The academy with which this case deals seems to have been an amalgamated institution by which the magistrates of Greenock provided so much of the education of the burgh and public subscribers the rest. The history of the school clearly indicates that it was a burgh school. Before 1847 the magistrates contributed out of the common good to the funds of the Grammar School and the Mathematical School, which were under the management of the Town Council. That they did so showed that they regarded it as their duty to provide for the education of the burgh. At that date a desire arose to improve the education of Greenock, and accordingly in 1855 a new academy was started with the help of public contributions. The directors of the new academy were the Provost and five members of the Town Council, the Sheriff-Substitute, and five persons chosen by the contributors. To those directors the Town Council transferred their existing rights of patronage and allowances hitherto made to the Grammar School and Mathematical School, the said patronage and allowances to be enjoyed by the directors in all time coming, and to them they continued to pay a sum annually from the common good. What I have called an amalgamation thus took place, the Burgh School not being extinguished but combined with the new school as the best way of improving the education of the burgh. Then came the Act of 1872, when the shareholders naturally saw that their interest might be affected unless a scheme were devised to meet their interest in the event of the school being handed over to the School Board as was anticipated. In 1872 accordingly means were taken to exclude the academy from the schedule of secondary schools, but in 1881 the school was purchased by the School Board of Greenock. This was a competent proceeding under the Act of 1872 with the consent of the Education Department, which was obtained. I think the purchase price was not a money payment for the school, but that what was purchased was that part of the amalgam which had been provided by the voluntary shares, and accordingly that it had nothing to do with the Burgh School. The purchase therefore is not, as at first sight appeared, a disturbing element in determining whether this school has or has not the character of a burgh school. I agree with the Lord Ordinary that it has, that the magistrates contributed to it as such, that the obligation remains, and that they cannot decline to pay in the future what has been paid in the past.

LORD YOUNG—I had very considerable difficulty at the conclusion of Sir Charles Pearson's argument in regarding this school as a burgh school seeing that the School Board in 1872 and down to 1881 did not think of taking it over as such in the performance of their statutory duties and in the exercise of their statutory rights on behalf of the community, and further, seeing that when they acquired it in 1881 it was by a proceeding applicable to schools of another class, and by a money payment. Mr Guthrie's argument however, and further consideration, have satisfied me that these proceedings form no real difficulty and need not prevent us from concurring in the opinion of the Lord Ordinary.

Clause 46 of the Education Act, which is here founded upon, was framed for the very purpose of retaining any customary application from the common good of a burgh for the purposes of education, whilst transferring the administration of that grant from the administrators of the common good to the School Board. Now, I begin with this question, is this a burgh within the meaning of that clause? and I must answer that by saying clearly it is, for it is a burgh with magistrates and town council and returns a Member of Parliament. Has it a common good? It has. Has it been the custom to pay anything out of the common good for education? I think it clear that there has been such a custom. The minute of admission goes back to the middle of last century, and it comes down to the present day. From about 1836 to 1855 payment was made by the magistrates to a school of their own within the burgh which was under their management and was in fact the Burgh School. The payment was just such a contribution as the Act of 1872 contemplated and provided for. The common good, as I endeavoured to explain in one of the cases cited (*Perth School Board* v. *Magistrates of Perth*, October 19, 1878, 6 R. 45) is given to the burgh for certain purposes. These are various but limited, education being one of them. That property constituting the common good is under the management of the magistrates and town council, and it is their duty to administer it, and seeing that out of it a contribution was made from last century down to 1855 to the Burgh School, I must assume that the magistrates and town council considered that a proper contribution. That is not to cease. Well, in 1851 the magistrates for good reasons no doubt were concurring parties to the formation of a school or academy of somewhat greater dignity. Aid was required for its formation and was got from the wealthier citizens of Greenock. By amalgamation that became in future the Burgh School, the magistrates agreeing to continue the contribution out of the common good and stipulating for a large share in the management. Whether there was any irregularity on the part of the magistrates in this proceeding I do not stop to inquire. Probably there was none. The Burgh School thus developed into a large school just as the High School of Edinburgh did. It became difficult in Edinburgh for a small burgh school to succeed. Private endowments and subscriptions led to the erection and constitu-

tion of a school of more dignity and importance, but not the less did the High School continue to be and is the Burgh School of Edinburgh. So in Greenock this new Academy replaced the Burgh School. The important point for us here is that the magistrates continued to make a payment to that school—a payment in my opinion from the common good to the Burgh School. It continued the Burgh School although with extended wings. That payment was a contribution to a burgh school falling under clause 46 of the Education Act. From 1860 until 1881, when the School Board took over the School, the amount of that contribution was £145. Accordingly I do not think the Lord Ordinary was wrong in holding that the customary contribution from the common good to the Burgh School has been £145 a-year, and I do not consider the determination to hand over the Academy to the School Board and the manner of its acquisition by that body relieves the town council of their liability to contribute to its support out of the common good as formerly.

The result therefore I arrive at is that the School Board, who are now managing the education of the Burgh, are entitled under clause 46 to have the sum of £145 annually handed over to them.

LORD RUTHERFURD CLARK—I am of the same opinion.

LORD LEE—I agree. The history of this school shows that whether it was a proper burgh school or not it was in 1851 a burgh school within the meaning of the Education Act. The difficulty lies in this, that in 1872 it was under a constitution which, in form at least, took it out of the definition in that Act of a burgh school and was not taken over by the School Board as such. But when the difficulty is explained away, as I think it has been, I am of opinion that in 1872 there was a customary payment provided by the magistrates which it is incumbent upon them to continue to provide for the educational purposes of the burgh. The Act intended that customary contributions should not be put an end to by such a form of transaction and transference of administration as we have here.

The Court adhered.

Counsel for the Pursuers (Respondents)—Low — Guthrie. Agents — Maconochie & Hare, W.S.

Counsel for the Defenders (Reclaimers)—Sir C. Pearson—Shaw. Agents—Cumming & Duff, S.S.C.

Friday, June 20.

SECOND DIVISION.

[Lord Trayner, Ordinary.

BAINE & JOHNSTON AND OTHERS *v.* M'COWAN.

Maritime Insurance — Construction of Policy—Collision Clause—Tug and Two.

A ship was insured "from the Clyde (in tow) to Cardiff" upon a policy which bore that "if the ship hereby insured shall come into collision with any other ship or vessel, and the insured shall in consequence thereof become liable to pay, and shall pay, to the persons interested in such other ship or vessel . . . any sum of money, . . . we (the underwriters) will pay the assured three-fourths of the sum so paid." A tug while towing said ship collided with another vessel and sank it. Both the tug and the tow were by the Admiralty Court in England found liable in damages to the owners of the vessel sunk.

Held that the owners of the tow were entitled to recover under the policy of insurance, although the tow had not itself been directly in collision.

Messrs Baine & Johnston, shipowners, Greenock, managing owners of the iron ship "Niobe," upon 1st April 1887 insured the said ship with David M'Cowan, insurance broker, Glasgow, and others, for the sum of £8000, the amount underwritten by David M'Cowan being £100. The policy of insurance bore that the "Niobe" was insured "at and from the Clyde (in tow) to Cardiff," . . . and provided that "if the ship hereby insured shall come into collision with any other ship or vessel, and the insured shall in consequence thereof become liable to pay, and shall pay, to the persons interested in such other ship or vessel, or in the freight thereof, or in the goods or effects on board thereof, any sum or sums of money not exceeding the value of the ship hereby assured, we (the underwriters) will severally pay the assured such proportion of three-fourths of the sum so paid as our respective subscriptions hereto bear to the value of the ship hereby assured, or if the value hereby declared amounts to a larger sum, then to such declared value, and in cases where the liability of the ship has been contested with our consent in writing, we will also pay a like proportion of three-fourth parts of the costs thereby incurred or paid."

On the night of the 23rd March 1887 the "Niobe" was on a voyage from Greenock to Cardiff, in ballast, in tow of the steam-tug "Flying Serpent." Shortly before 11·40 p.m., while in St George's Channel, off South Tuskar Light, the "Flying Serpent" came into collision with the ship "Valetta." The "Flying Serpent" with her stem and starboard bow struck the port bow of the "Valetta." Very shortly thereafter the port quarter of the "Niobe" struck the starboard quarter of the "Valetta," doing no substantial damage. Such damage was