Practically I do not think it matters to the appellant which view of the statute is adopted, as in either case he can never obtain any benefit from his expectancy.

If the expectancy is already part of the sequestrated estate, then his signing the assignation is a mere form to give a title to the trustee.

If it is not part of the sequestrated estate, then I suppose his discharge will be refused till the right vests in him, when it will equally pass to his trustee.

On the whole matter I am of opinion that the appeal should be dismissed.

LORD M'LAREN — I agree with Lord Rutherfurd Clark.

LORD KINNEAR—I have had the opportunity of reading the opinions both of Lord Rutherfurd Clark and of Lord Adam, and I concur entirely in that of Lord Rutherfurd Clark.

I only wish to add that I did not understand his Lordship to express any opinion—I myself have not formed any—as to the conditions on which the appellant will be entitled to demand a discharge.

LORD TRAYNER — I concur with Lord Rutherfurd Clark.

LORD PRESIDENT—After hearing the first debate on this case I thought that the Sheriff's interlocutor should be adhered to. The further consideration and consultation which have since taken place, and in particular a perusal of Lord Rutherfurd Clark's opinion, have led me to adopt the conclusion and the reasoning which his Lordship has stated.

The Court sustained the appeal and assoilzied the defender.

Counsel for the Defender and Appellant—Dickson—M'Clure. Agents—W. & J. Mackenzie, W.S.

Counsel for the Pursuer and Respondent—Ure. Agents—Webster, Will, & Ritchie, S.S.C.

Thursday, March 2.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

LORD ADVOCATE *v.* M'COURT AND FINNIGAN.

Donation inter vivos—Delivery—Revenue.

Two brothers, Hugh and Arthur Finnigan, carried on business together as pawnbrokers in Glasgow under the firm name of H. & A. Finnigan. They also lived together, and kept a saleroom for jewellery in their house. In February 1886, a little more than three months before his death, Hugh, who was then confined to bed, and suffering from a disease the nature of which precluded the hope of recovery, granted a receipt in Arthur's favour, in which he acknowledged that he had received £100 from his brother for his interest in the pawnbroking businesses, jewellery, household furniture, and cash in bank. About the same time Hugh endorsed the pawnbroking licences in his brother's favour, and the bank account which had been kept in name of the firm was closed and a new one was opened in Arthur's name. A month later the pawntickets and pledge-books were altered to Arthur's name. Hugh possessed no estate except what was referred to in the receipt, but that estate was of far greater value than £100. After Hugh's death Arthur declined to give up an inventory of his estate, on the ground that Hugh had conveyed his whole estate to him before his death, and he stated a like defence to an action brought by a sister for a share of Hugh's estate, though he subsequently compromised this action by agreeing to pay this sister, with whom he was going to live, £2 a-week during her life, and £1000 in the event of his predeceasing her. Arthur also mentioned to more than one person that Hugh had sold him his interest in the business. After Arthur's death the Crown claimed inventory or account duty and legacy duty on Hugh's estate from Arthur's executors.

The Court, on proof of the facts above stated, *held* that Hugh had made an absolute transfer of his estate to Arthur at the date of the receipt, and therefore that no duty was payable thereon.

Hugh Finnigan died on 28th May 1886, and his brother Arthur Finnigan on 6th April 1890. During Hugh's lifetime the brothers had for some years carried on a pawnbroking business in Caledonia Road and in Lyon Street, Glasgow, under the firm name of H. & A. Finnigan. They had also kept a saleroom for jewellery at 218 Argyle Street, Glasgow, where they lived. After Arthur's death, his sisters Mrs M'Court and Mary Finnigan were appointed his executors-dative *qua* next-of-kin, and his whole estate, amounting to £4723, was divided equally between them.

On 15th August 1892 the present action was raised by the Lord Advocate, on behalf of the Board of Inland Revenue, against Mrs M'Court and Mary Finnigan, with the object of having them ordained to exhibit a true inventory of the personal estate of Hugh Finnigan, duly stamped with inventory duty, or otherwise a true account, duly stamped, of the moveable property belonging to the said Hugh Finnigan, "taken from him as a donation *mortis causa* by the deceased Arthur Finnigan, and further, to pay legacy duty on said estate."

The pursuer averred—"(Cond. 2) On the death of the said Hugh Finnigan, the said Arthur Finnigan took possession of his whole estate and effects, including his share of the partnership property and the jewellery and furniture. The said Arthur Finnigan alleged a right to do this in

respect of a document bearing to be in the form of a receipt by the said Hugh Finnigan, dated 15th February 1886. This document did not represent an out-and-out sale or divest the said Hugh Finnigan, but was merely a simulate transaction. In any event, it did not effect, and was not intended to effect, more than a donation *mortis causa* in favour of the said Arthur Finnigan."

The defenders denied that the said receipt represented a simulate transaction, and averred—"In February 1886 the brothers entered into an arrangement whereby Hugh sold for £100 his interest in the pawnbroking offices and saleroom and stock of jewellery and household furniture to Arthur, and Arthur was to pay all the debts of Hugh and of the firm, and was to receive all debts due to the firm at the date of the said receipt. This arrangement was immediately acted upon and carried out. Hugh, as from its date, ceased to have any interest in the business, and had no interest therein at the time of his death, while Arthur took immediate possession of all that Hugh had sold to him, and obtained from Hugh the pawnbroker's and plate licences duly endorsed, and having paid Hugh the £100, obtained the receipt above referred to."

The defenders pleaded—"(2) The said deceased Hugh Finnigan having died without leaving any estate subject to duty, no inventory falls to be given up or duly paid."

Proof was allowed. It appeared that down to the year 1885 Hugh and Arthur Finnigan had both attended to the business, but that towards the end of that year Hugh, who had for some years been suffering from mortification in one of his legs, took to bed, and was confined to bed from that date until his death. The doctor who attended him during the month preceding his death deponed—"The condition of the leg showed me that the mortification was of some years' standing. The man was a living skeleton when I saw him, and the condition of his leg must have disabled him for a long time. . . . I should think that he was incapable of business for months before his death."

On 15th February 1886 Hugh Finnigan granted the receipt founded on by the defenders. It was in these terms—"Received from Mr Arthur Finnigan the sum of £100 sterling for my interest in pawnbroking offices and saleroom at 104 and 106 Caledonia Road, S.S., and 4 Lyon Street, also stock of jewellery and household furniture at 218 Argyle Street, cash in bank, all debts to be paid by Arthur Finnigan, and to receive all debts due to H. & A. Finnigan at this date." Hugh had no estate except what was mentioned in the receipt, but it was not disputed that the sum of £100 was totally inadequate as a consideration for the sale of that estate.

The day after the said receipt was granted, the bank account kept in the name of H. & A. Finnigan was closed, and a new account was opened in the name of Arthur Finnigan. About the same date the licences for the various businesses were endorsed by Hugh to Arthur, and from and after the end of the following month the pawntickets were issued in Arthur's name alone, and the pledge-books were kept in his name.

There was no evidence that Hugh Finnigan had ever mentioned to anyone that he had transferred his estate to Arthur, but there was the following evidence of statements made by Arthur. Stephen Henry, a witness examined for the pursuer, deponed—"(Q) Do you remember of Arthur Finnigan referring in conversation to the receipt that had been signed in his favour by Hugh some time before he died?—(A) He told me about it. I cannot remember the special conversation we had, but he certainly gave me to understand that as Hugh was in very indifferent health, and indeed as he was not likely to recover, he sold him his interest in the business. (Q) Did he tell you for what purpose the receipt had been granted?—(A) I really could not say positively that he gave me any other reason beyond what I have stated, viz., that owing to illness Hugh had made up his mind to part with his interest in the business. (Q) Do you remember of his saying anything to you about escaping duty?—(A) I should not like to say that that was really mentioned by Arthur, although at the time I may have had my own impressions. I don't think that Arthur said anything further than what I have already stated." James Marsh, who was also a witness for the pursuer, and who had been in the employment of H. & A. Finnigan and afterwards of Arthur Finnigan, deponed in cross-examination—"I knew the fact that Hugh Finnigan had parted with his interest in the business to Arthur. I remember him saying something to the effect that it had been given away." Another witness for the pursuer, James Allan, who had also been in the employment first of H. & A. Finnigan and afterwards of Arthur Finnigan, deponed in cross-examination—"Arthur Finnigan told me that he had acquired Hugh's interest in the business, but I cannot say whether that was before or after Hugh's death." There was no evidence that the £100 referred to in the receipt had ever been paid directly to Hugh, but Mr M'Groary deponed that Arthur had told him "that the expenses of Hugh's last illness were sufficient to swallow up the whole £100."

On 24th January 1888 Mr Dwight, Deputy Controller, Inland Revenue, wrote to Arthur Finnigan requesting him to explain why no inventory of Hugh's estate had been lodged. By Arthur Finnigan's instructions, his law-agent, Mr M'Groary, replied on 28th January in the following terms—"My client Mr Arthur Finnigan, 153 Oxford Street, Glasgow, has handed to me your notice to him of date 24th Jany. curt., regarding the estate of the late Hugh Finnigan, and I am instructed to intimate to you that he has in no way intromitted with the estate of the late Hugh Finnigan after his death (the deceased having left no estate), and cannot understand why he

should be called upon to give up an inventory. The late Hugh Finnigan was a partner of the firm of H. & A. Finnigan, pawnbrokers, Glasgow, of which my client was also a partner. On the 15th February 1886, three and a-half months before his death, the late Mr Finnigan conveyed his whole interest in the business carried on by that firm to my client. For many years before his death the late Mr Finnigan had been suffering from a lingering disease which ultimately took his life; the great expense incurred during the last stage of that illness swallowed up whatever means Mr Finnigan had. He had no estate at the date of his death." Mr Dwight then wrote asking Mr M'Groary to send him the deed of conveyance executed by Hugh Finnigan in his brother's favour, but this letter was apparently left unanswered. In November 1888 the Inland Revenue again wrote Mr M'Groary on the subject of Hugh Finnigan's estate, and to this letter Mr M'Groary replied—"I beg to refer you to my letter to Mr Dwight on the same subject, of 28th January 1888." The correspondence then closed.

Towards the end of the year 1888 Mrs M'Court raised an action in the Sheriff Court of Glasgow against Arthur Finnigan for a share of Hugh's estate. In defence to this action Arthur Finnigan founded on the receipt, and stated that Hugh had died possessed of nothing, having conveyed everything to him. He did not, however, produce the receipt in process until after considerable pressure from Mrs M'Court's agent. In her revised condescendence Mrs M'Court averred that the receipt was a simulated receipt, granted by the deceased with the object of evading payment of the death duties, and that "a short time after the alleged pretended sale was executed the deceased stated to the pursuer and her husband and her daughter, both severally and collectively, that he was master of all the places of business, and would continue so as long as he lived." The agents of both parties were examined, and deponed that the averments made for their respective clients faithfully reflected their clients' instructions. On this point Mrs M'Court's evidence (which was not credited by the Lord Ordinary) was in conflict with that of her agent, and she denied that Hugh Finnigan had ever made to her the statement ascribed to him in the averment above quoted. Prior to the raising of the above-mentioned action by Mrs M'Court, Arthur Finnigan had been living with her, and after that action was raised he raised a counter action against Mr and Mrs M'Court for delivery of some articles of furniture which he alleged had been left by him in her house. These litigations were terminated by an agreement, whereby Arthur, who had returned or was about to return to the M'Courts' house, agreed to pay Mrs M'Court £2 a-week during her lifetime, and £1000 in the event of his predeceasing her.

On 27th January 1893 the Lord Ordinary (WELLWOOD) pronounced this interlocutor:—"Finds that the deceased Hugh Finnigan, pawnbroker, Glasgow, died on 28th May 1886: Finds that on his death his brother Arthur Finnigan took possession of his whole estate and effects, including his share in certain partnership property belonging to himself and the said Arthur Finnigan: Finds that shortly before his death Hugh Finnigan transferred his said estate and effects to Arthur Finnigan as a donation *mortis causa:* Finds that the said Arthur Finnigan died on 6th April 1890, and that the defenders Mrs M'Court and Mary Finnigan, as his executors *qua* next-of-kin, have intromitted with and divided his whole estate equally between them: Finds that no inventory or account has been given up of the personal or moveable means and estate of the said Hugh Finnigan: Finds that the defenders are bound to give up an account of the personal or moveable estate of the said Hugh Finnigan: Therefore appoints them to lodge such an account within four weeks for the purpose of ascertaining what account and legacy duties are due and payable in respect of such means and estate, &c.

"*Opinion.*— . . . Arthur Finnigan died on 6th Apil 1890. The present defenders, his sisters Mrs M'Court and Mary Finnigan, are his executors *qua* next-of-kin. His estate was given up at £4723, 15s. 2d., which has been divided equally between the two defenders. In this action the defenders are called upon to pay inventory duty, or otherwise account duty (as on a *donatio mortis causa*), and also legacy duty at 3 per cent. on the estate of Hugh Finnigan. The defence is that Hugh Finnigan possessed no estate at his death, and no duty therefore falls to be paid.

"This defence is rested upon the averment that on 15th February 1886 Hugh Finnigan sold his whole estate to Arthur Finnigan. No deed of transfer is produced, but the following writings and facts are founded on to instruct this statement—First, The following receipt, No. 9 of process, is produced—[*His Lordship then quoted the terms of the receipt*].

"Next, it is proved by the documents Nos. 11 to 14 of process that about the same date the licences for the various businesses carried on by the two brothers were transferred to the name of Arthur Finnigan, with consent of Hugh Finnigan.

"At the same time the pawntickets were altered to the name of Arthur Finnigan, and the bank account kept on in the name of H. & A. Finnigan with the Bank of Scotland was closed on 16th February 1886, and an account opened in the name of Arthur Finnigan.

"Now, these documents and facts certainly afford *prima facie* evidence that a sale or gift, *inter vivos*, of some at least of the estate took place. But the mere fact that delivery, actual or constructive, is proved, is not of itself conclusive that an absolute irrevocable sale or gift was intended or made. If it were so, such questions would seldom arise. In the present case I think that this view of the transaction is negatived or overcome by certain considerations which I shall enumerate. I preface

my observations, however, by observing that undoubtedly Hugh Finnigan had it in his power either to sell his whole estate for what he pleased or to give it away by absolute gift *inter vivos*, and that such a transaction would be unchallengeable, even though its object was to escape inventory duty, provided always that he was completely divested. I think, however, that the evidence shows that although Hugh Finnigan professed to have sold his whole estate to his brother, it was intended and understood, as between him and Arthur Finnigan, that the transfer should only become absolute on the death of Hugh Finnigan, and that the transfer or gift was at most a *donatio mortis causa*.

"The considerations which have led me to this conclusion are these—1. The transfer was made *intuitu mortis*. In February 1886 Hugh's health had become decidedly worse, and death at no distant day appeared to be imminent. 2. On the face of the transfer Hugh was, on the statement of the defenders now, and of Arthur Finnigan in 1888, divested of the whole of his means and estate. After the transfer, according to them, he possessed absolutely nothing. If he had recovered, he would have been destitute; and if Arthur had predeceased him, the estate would have passed under Arthur's will, if he left one, or to his legal representatives. 3. It is said that Hugh received an equivalent for his estate—£100. Taking the roughest view of the value of the property possessed by the brothers, that sum was absolutely absurd as a consideration for the transfer, but apart from that, there is strong evidence to lead us to the belief that no money passed. Neither do I find, at least as regards the stock of jewellery and household furniture in Argyle Street, where Hugh lived, satisfactory evidence that actual transference or delivery took place. 4. Arthur Finnigan's own conduct is, in my opinion, tantamount to a confession that the transaction was not in truth a sale. He concealed the receipt No. 9 of process, and obstinately refused to produce it or show it until his hand was forced by the defender Mrs M'Court in a Sheriff Court action in 1888. He evaded the demand for its production made by the Board of Inland Revenue, and it was only produced in the Sheriff Court action under pressure of Mrs M'Court's agent Mr Smith. Arthur Finnigan having at length been forced to produce the receipt, the litigation in the Sheriff Court proceeded. In it the present defenders called upon Arthur Finnigan to account for his intromissions with Hugh Finnigan's estate, on the footing that he left considerable means and died intestate, and to make payment to each of them of £4000. Arthur Finnigan's defence was that now stated by the defenders, that Hugh died possessed of nothing, having conveyed everything to him. In the revised condescendence for Mrs M'Court it was averred that the receipt produced by Arthur Finnigan was simulate, and was granted in order to evade inventory and legacy duty. Arthur Finnigan also raised a counteraction against Mr and Mrs M'Court, claiming certain articles of furniture said to have been left in the house in which he and the M'Courts had been residing. The end of the litigation was that Arthur Finnigan and Mrs M'Court settled their disputes by the minute, No. 29 of process, dated 26th February 1889, the result of which was that Arthur Finnigan undertook to make the following payments to Mrs M'Court—Two pounds a-week during the whole of her lifetime, and £1000 on his death, and to pay Mrs M'Court's agent's business account as between agent and client. Those were pretty substantial undertakings on the part of a man who, according to his own account, was under no legal obligation to pay a farthing. The statement can only be explained on the supposition that Arthur Finnigan was forced to admit that the transfer of 15th February 1886 was not really a sale. The settlement of the action was no doubt hastened in consequence of its being seen to be for the interests of both parties that undue attention should not be drawn to the terms of the receipt No. 9 of process, which the Board of Inland Revenue at the time were anxious to inspect. Lastly, I think it right to say that I find myself unable to attach any weight to the defender Mrs M'Court's evidence given in this action. In the action at her instance against her brother Arthur Finnigan, she had instructed her agent to make certain statements which she now finds inconvenient for, if not fatal to, her present defence. She accordingly in the box endeavoured to throw the responsibility for those statements upon Mr Smith, and actually charged him with having said to her that she should have burned the receipt No. 9 of process when she had it in her hand. That was not put to Mr Smith when he was examined for the pursuer, and he was allowed to leave the Court. I allowed him to be recalled on a subsequent day, when he solemnly denied the averments of Mrs M'Court and her husband. He was not cross-examined. I believe his evidence and disbelieve that of the said defender. She also equivocated badly as to the settlement between herself and Arthur Finnigan. She was evidently well aware of the importance of the bearing of that transaction on the present case.

"Now, all these things satisfy me that the pretended transaction of 15th February 1886 was not truly a sale, but was given that colour in order to evade payment of inventory and legacy duty. As matters now stand, it is not material to inquire whether Hugh Finnigan died intestate or made a *donatio mortis causa* to Arthur, but I am inclined to think that the latter is the true view. I think there is sufficient evidence of *animus donandi* in favour of Arthur Finnigan.

"The defenders relied upon the case of the *Lord Advocate* v. *Galloway*, February 8, 1884, 11 R. 541, as an authority to the effect that where actual delivery is proved to have taken place, it will be held that an absolute irrevocable gift has been made. Although from the shape the case took in the Inner House it gives some colour to

this contention, I think that when it is examined it does not go far to support the defender's argument. The deceased Robert Tervit was possessed of certain stocks and debentures, and also of certain deposit-receipts containing considerable sums of money. He died on 28th July 1879, but from the year 1875 he had been gradually carrying out a scheme to avoid payment of inventory duty and legacy duty on his death by transferring from time to time the various stocks and deposit-receipts to the name of his nephew Galloway, whom he intended to make his heir. By the time of his death he had practically made over to Galloway the whole of the capital of his moveable estate. But then there was a distinction between the way in which the securities so transferred were dealt with. It appears that the interest on the deposit-receipts was used for the purposes of a farm carried on by Mr Tervit, and that after the change made in the deposit-receipts, no change was made in the application of the income derived from them. In contrast with this treatment of the deposit-receipts was the way in which the stocks and shares were dealt with. The transfers were formally executed by Tervit, and thereafter duly registered, and after the transfer the dividends were credited to Galloway, and apparently were not applied for the benefit of Tervit. I confess it seems to me that the evidence on this head was very slight, because the stocks and shares were not transferred until March or April 1879, and Tervit died in July of the same year. Perhaps that part of the case did not receive close attention in the Inner House, because the case went there, not on a reclaiming-note by the pursuer, but on a reclaiming-note by the defender, in whose favour the Lord Ordinary had decided as regarded the stocks and shares, although he had decided against him in regard to the deposit-receipts. The point, however, is that there were facts in the case apart from the mere transfer of the shares which enabled the Court to draw the distinction. I may also draw attention on this point to the exhaustive opinion of Lord Chancellor Truro in the leading case of *Staniland* v. *Willott*, 1850, 3 M'N. & G. 664. He says, p. 675—'As to the gift being made by an actual transfer in such a way as to pass the complete legal interest as much as if a purely irrevocable gift, *inter vivos*, had been intended, I would observe that the plaintiff may have thought that an actual transfer was necessary to the completeness of the *donatio mortis causa*.' And at p. 676—'But it has never been held that because the act of delivery is such as would in the case of a gift, *inter vivos*, confer a complete legal title, the gift cannot be a *donatio mortis causa*.' In *Staniland* v. *Willott* a transfer of the shares in question which belonged to the plaintiff was duly executed in favour of the defendant, and yet on the plaintiff recovering from his illness the defendant was ordered to retransfer the shares and to account, on the footing of his having held them as trustee for the plaintiff.

"I shall therefore order the defenders to lodge an account of the personal or moveable property belonging to the deceased Hugh Finnigan taken from him as a donation *mortis causa* by the deceased Arthur Finnigan."

The defenders reclaimed, and argued—Although there was a general presumption that a man would not divest himself of his whole estate during his life, the strength of that presumption varied according to the circumstances of each particular case, and it was greatly weakened where, as here, the alleged transfer was made by a man whose state of health precluded any hope of recovery. At all events, the presumption entirely disappeared if the fact that a transfer had actually been made by the alleged donor during his life was satisfactorily established, and the evidence showed clearly that Hugh Finnigan, after granting the receipt dated 15th February 1886, had proceeded at once to divest himself in favour of his brother. No other conclusion could be drawn from his indorsation of the licences in his brother's favour, or from the alteration made in the bank account, the pawntickets, and the pledge-books, and that conclusion was supported by the attitude which it was proved Arthur had consistently maintained with regard to the transaction. What Mrs M'Court had averred in the proceedings in the Sheriff Court was of little importance, as there was evidence to show that the averments then made by her had been founded on knowledge derived from either Hugh or Arthur Finnigan. Besides, she did not sign the pleadings, and so they were not evidence against her—*Marianski* v. *Cairns*, July 1, 1852, 1 Macq. 212; *Fenwick* v. *Thornton*, 1827, 1 Moody & Malkin; *Boileau* v. *Ruthin*, 1848, 2 Exch. (O.S.) 665; Taylor on Evidence, i. 710. The result of the whole evidence was to establish the fact that an *inter vivos* transfer or donation had been made by Hugh Finnigan—*Lord Advocate* v. *Galloway*, February 8, 1884, 11 R. 541. A donation would rather be presumed absolute than *mortis causa*—Bankton, i. 9, 19—and the consideration for the transfer stated in the receipt was against the idea of a *mortis causa* donation. Indeed, the case presented none of the usual features of a *mortis causa* donation—*Morris* v. *Riddick*, July 16, 1867, 5 Macph. 1036; *Blyth* v. *Curle*, February 20, 1885, 12 R. 674; *Crosbie's Trustees* v. *Wright*, May 28, 1880, 7 R. 823.

Argued for the pursuers—The transaction between the brothers could not be looked upon as a *bona fide* sale, for the consideration was confessedly grossly inadequate, and this threw suspicion on the whole transaction. If the transaction were viewed as a donation, the defenders had a strong presumption to overcome, for there was always a strong presumption against a man divesting himself during life of his whole estate. In this case there was no proof that the alleged donor was convinced in his own mind that his recovery was hopeless, and the evidence must not be

considered on the footing that he had given up all hope of recovery. The result of the evidence was that the presumption against donation *inter vivos* had not been overcome—*Sharp* v. *Paton, &c.*, June 21, 1883, 10 R. 1000. The most reasonable inference from the whole circumstances of the case was that the transaction embodied in the receipt was a simulate one entered into with the view of evading payment of the death duties—*Buchanan* v. *Buchanan*, March 7, 1876, 3 R. 556.

At advising—

LORD PRESIDENT—The question in this case is, whether the defenders have made good the case stated by them on record regarding the estate which undoubtedly at one time belonged to Hugh Finnigan. The statement as given in the record is this—"In February 1886 the brothers entered into an arrangement whereby Hugh sold for £100 his interest in the pawnbroking offices and saleroom and stock of jewellery and household furniture to Arthur, and Arthur was to pay all the debts of Hugh and of the firm, and was to receive all debts due to the firm at the date of the said receipt. This arrangement was immediately acted upon and carried out, Hugh, as from its date, ceased to have any interest in the business, and had no interest therein at the time of his death, while Arthur took immediate possession of all that Hugh had sold to him, and obtained from Hugh the pawnbroker's and plate licences duly endorsed, and having paid Hugh the £100 obtained the receipt above referred to." Now, that averment relates to an alleged transaction between two persons both of whom are dead—Hugh necessarily dead because the question arises as to his estate, but this action is not brought into Court until the brother also had passed away.

We have first, I think, to consider what is the evidence available as to this alleged transaction, and in the first place is there any evidence, and if so what, as to Hugh, the party who is alleged to have handed over the estate, said upon this subject? It is in that relation, I think, that the receipt No. 9 of process derives its chief importance. It is not disputed that that document is in the handwriting of Hugh, or at least is signed by Hugh, and it purports to record that he has given to Arthur all "my interest in the pawnbroking offices and saleroom . . . also stock of jewellery and household furniture . . . and cash in bank." It is said as against that document that it is merely a simulate document made up to record a simulate transaction. Well, then, I turn to the facts regarding the transaction—and it seems to me this is a part of the case of the highest importance, because it may turn out, and I think does turn out, that the proved facts of the case show that for one reason or another, for one consideration or another, Hugh did divest himself of the business, and did invest Arthur with the estate mentioned in that receipt. Those facts are these, that the bank account was closed the day after the date of the receipt—the bank account having stood in the name of the two brothers who were partners in the pawnbroking business—and that thereupon a new account was opened in the sole name of Arthur; that the pledge books from about that time were opened in Arthur's name; that the month following the pawntickets were issued in Arthur's name, these documents having therebefore been in the name of the firm; it is proved also—and here comes another overt and indisputable act of Hugh—that the licences both for the pawnbroking business and for the plate were endorsed by Hugh to Arthur, and that he thereupon carried on the business which he was authorised to do by those licences, the copartnership having ceased to exist so far as these outward and visible signs of existence were concerned. Now, suppose this were a completely undisputed transaction; suppose the two brothers had called the Revenue authorities down to see them go through the operation of transferring the property, divesting the one and investing the other, what more could anybody have suggested? There was of course no removal of effects, because the two brothers were living together and carrying on business together, and the natural thing, supposing this to have been a transaction completely above board, was that there should be no removal of effects, and therefore I sum up this part of the case by saying that I think there is there proof of the most definite description of the divestiture of Hugh and the investiture of Arthur.

But then I go on to ask, what record have we of what Arthur said as to the transaction which is now averred by his executors to have taken place? Here again there is no deficiency of evidence, because we find on the evidence of a gentleman—Mr M'Groary—who is called as a witness for the Crown, that at the time of the demand being made, or, I should not say a demand being made, but an inquiry made, by the Revenue authorities, he wrote the letter which is printed, and that he did that on the instructions of Arthur. Now, what is said there is this—"The late Hugh Finnigan was a partner of the firm of H. & A. Finnigan, pawnbrokers, Glasgow, of which my client was also a partner. On the 15th February 1886, three and a-half months before his death, the late Mr Finnigan conveyed his whole interest in the business carried on by that firm to my client." Now, I take another case proved by the same witness—that witness, I again observe, called for the Crown—and I find that Mr M'Groary was the compiler of the statements made for Arthur during Arthur's life in the Sheriff Court action; and Mr M'Groary says in very pointed terms—"I faithfully put down the instructions which had been received from Arthur;" and that statement, so far as material to the present question, is a most complete and lucid statement exactly of the transaction which is now asserted to have taken place, and completely in accordance with the account given of the matter to the Revenue autho-

rities when they applied for information. I take another source of information as to the saying of Arthur upon this subject, and that is again another witness called for the Crown—Stephen Henry. In examination-in-chief he was asked, "Do you remember of Arthur Finnigan referring in conversation to the receipt that had been signed in his favour by Hugh some time before he died?—(A) He told me about it. I cannot remember the special conversation we had, but he certainly gave me to understand that as Hugh was in very indifferent health, and indeed, as he was not likely to recover, he sold him his interest in the business. (Q) Did he tell you for what purpose the receipt had been granted?—(A) I really could not say positively that he gave me any other reason beyond what I have stated, viz., that, owing to illness, Hugh had made up his mind to part with his interest in the business. (Q) Do you remember of his saying anything to you about escaping duty?—(A) I should not like to say that that was really mentioned by Arthur, although at the time I may have had my own impressions. I don't think that Arthur said anything further than what I have already stated." Setting aside in the meantime the impressions of this witness, and confining oneself to what he actually attests, there you have a perfectly explicit statement by one whom the Crown must regard as a credible witness of the account given by Arthur, and that is in complete conformity with all the pieces of evidence which I have up to this moment referred to.

Now, I should be disposed to hold that the case stated upon record by the defenders is proved by these facts and that evidence. But then it is suggested for the Crown that colour is given to that evidence by the statement introduced by Mr Henry, which I take as a specimen, that this transaction was entered into with a view of escaping duty, and one of the witnesses, Mr M'Groary, hints at the same thing, or at least he says that he had heard in his intercourse with Arthur Finnigan that Hugh had all along intended to give to him if he survived, while he on the other hand was to give to Hugh if he survived, the succession. Now, it seems to me the legal question thus raised is solved by the case of *Galloway*—solved I mean in the view which I take of the facts regarding the transfer of the estate in question. Let it be that Hugh and his brother Arthur had been minded that the survivor of the two should succeed to the common property of both, and that that frame of mind was never interrupted, yet the facts show that Hugh when death drew near abandoned the idea of mere testamentary disposition of his affairs, and then and there handed over his property to his brother. That is just the case of *Galloway*, the mode of transference being in this case different, merely because the nature of the estate is somewhat different. Now, we are asked to attach importance to the extreme improbability of the transaction thus attested by evidence and recorded under the hands of Hugh ever having taken place. I think it would be a strong conclusion to discard the evidence which I have referred to, but I cannot see that the antecedent improbability when scrutinised is nearly so great as at first sight would appear. It is one of the commonplaces in argument in such cases that it is very improbable that a man would denude himself of all he has and leave himself at the mercy even of a brother. But then when we turn to the facts about this unfortunate man, it appears that he was in such a state of health that practically the door of hope of recovery was closed. There is a most painful account given of his condition about the time of this transaction—there is no use being particular about dates, because he was dying of mortification in his leg which had gone on for years. He had been worn to a skeleton by the month of May, and he died towards the end of May. But that state of matters, although it had of course got worse, had been substantially the same for months and years, and I cannot doubt that Hugh, like everybody who saw him, was aware that it was merely a question of time, probably a very short time, how soon his lease of life would be over. Now, what is said on behalf of the Crown is that the £100 which is said to have been the price paid for Hugh's interest in the estate is out of all conscience and belief, because his interest in the estate was as the Crown represent something like £3000 or £4000 or more if we are to assume, contrary to all the presumptions of the case, that he had a larger interest than one-half in the business. But then does that question not come to depend very much on what it is likely that the man would be willing to take, lying as he was, dying by inches, worn to a skeleton, and looking death in the face? It seems to me to be very likely he might say, "I might give it you altogether, but I wont denude for less than £100, and £100 will be the price." It is not necessary in the view which I take of the case that we should be satisfied either that he attached any importance to the £100, and still less that the £100 was paid, if we are satisfied that Hugh divested himself of his estate *de presenti* in favour of Arthur, and I think it proved that he did. But I have examined that part of the case, because I cannot say that the case impresses me as one the decision of which in favour of the next-of-kin would at all open the door to fraud, or suggest that fraud is easily perpetrated in such cases, and I say the probabilities make it an eminently acceptable view that this transaction was entered into by a living man handing over his property to his brother, and if that be the case the Crown have no interest in this estate.

The Lord Ordinary has taken a view which I confess I cannot very well appreciate, at all events so far as its logic is concerned; because his Lordship finds that shortly before his death Hugh Finnigan transferred his estate and effects to Arthur

Finnigan, but he adds "as a donation *mortis causa*." Now, the facts of the case, for the painful reason I have mentioned, make it not highly probable that there should be need to make such provision as is implied in the words donation *mortis causa;* because I think, as was put from the bar, this was a doomed man who recognised the very short span of life he had alone to count upon, but I cannot discover anything at all in the evidence to support the view that there was a condition in this case of the kind which is implied in the expression donation *mortis causa.*

It is right that I should refer to one point in the case which has been made much of in argument for the Crown, and that is the proceedings in the Sheriff Court action, and its termination. Now, so far as Mrs M'Court's statements in that record are concerned, I don't think that they have much importance unless as prejudicing the evidence given by Mrs M'Court herself in this case. Mrs M'Court's evidence, however, is viewed with suspicion by the Lord Ordinary, and probably with good reason; but in all I have said, and in the argument addressed to us from the bar for the next-of-kin, nothing is made to depend upon Mrs M'Court's evidence, for I think the case is proved apart from Mrs M'Court's evidence. But what she said in the Sheriff Court action would only be important if it went to prove that she derived her information from what her brother Hugh or her brother Arthur had told her, for of the transaction itself she knew nothing one way or the other. Now, there is no evidence as to her knowledge from Arthur or Hugh of the facts, and therefore I don't think that what she said there is of very much importance. Then when we turn to the compromise which terminated the action, I do not think it is very impressive as real evidence in the case. This man Arthur compromised an action which sought to make him hand over his brother's estate for distribution, and he compromised it by doing what? Nothing very onerous. He was living or going to live with his sister. He agreed to pay her £2 a-week; he bound himself to leave her £1000, which probably he would have done without any obligation, for it does not appear that he had any other relatives than his sisters, and he had, according to the statement of the Crown, several thousand pounds to dispose of, so that I do not think that is a very cogent fact one way or the other.

That, therefore, seems to me to leave the ground clear for the inference being drawn in this case from what I think are the adequately proved facts of transference, of divestiture of Hugh and investiture of Arthur during the life of Hugh; and upon that ground I am prepared to decide the case by repelling the Lord Ordinary's judgment.

Lord Adam—It appears to me that the question in this case is whether Hugh divested himself of his property during his life in favour of his brother Arthur. If he did so with the intention, as rather appears, of evading the Crown's taxes, I think that does not in the least invalidate the result of what he did; and I think the question is, did he, or did he not, during his life divest himself of his property?

Now, the first document by which it is said he accomplished that end is the receipt of February 1886, but it has been said that that sets up an entirely simulate transaction. I do not at all agree with that view. I think if the question were whether the transaction was a true sale for true value or not, the result might be doubtful, but that is not the real question here. I do not think it matters in the very least degree, if it be a real transaction, whether you call it a transaction of sale, a transaction of donation, or a transaction in which there is a mixture of both. The cardinal question is, whether it was a real transaction? Was it followed by a *de facto* transfer of Hugh's property to Arthur? If it was, then I think the case for the Crown must fail; if it was not, then I think the case for the Crown must succeed.

Now, I concur with your Lordship that the facts in this case show that the transaction, whether it be sale or whether it be absolute donation, was carried out by a transfer of this property. The nature of the property here must be kept in view. So far as appears, the only property which Hugh had was property which he and Arthur had in common, namely, a joint share in the business of pawnbroking, which they carried on in partnership. How did they deal with it? Immediately after this transaction was entered into the name of the firm was changed—the name of Hugh disappeared, and the businesses were in future carried on in the name of Arthur. The bank account, as your Lordship has pointed out, was at the time transferred from the firm name to the sole name of Arthur, and that could not have been done, as your Lordship pointed out in the discussion, unless the bank had direct authority. The licences also were altered, and the pawntickets altered, and everything was done that could be done *de facto* to transfer the property which had formerly been the property of Hugh to Arthur—to the sole administration of Arthur. If that be so, what more was wanted to divest Hugh and invest Arthur in the property? I see nothing more. I think the transfer was accomplished *de facto.* I am far from saying that the Crown, if they could get behind the transaction—be it a transfer in consequence of purchase and sale, or of an absolute donation—and show that nevertheless it was a transaction of the nature of *donatio mortis causa*, might not make out that Hugh had not divested himself of his whole property during his life, on the ground that the transfer was not *de facto* intended to take place or have absolute effect except in the event of Hugh's death. But I do not think there is any presumption in favour of the Crown that the transaction was of such a nature, and I think the question is whether the Crown have made that out in point of fact.

Now, as your Lordship said, the conclusion that a person during his life has divested himself of almost his whole estate is in certain circumstances one which the Court would have extreme difficulty in reaching. Suppose a person in the prime of life is said to have made over his estate to somebody else, making himself a beggar, it is very difficult to accept the statement. But it is entirely a question of circumstances, and the presumption arising from the state of a man's health may lead to a very opposite conclusion. If a man, as in this case, is on deathbed, ill of a disease from which there is no hope of recovery, in that case there ceases to be a presumption against his divesting himself, and a presumption arises that he would do so. Therefore in the particular circumstances of this case I do not think the presumption is at all against the view that Hugh made an absolute donation of his estate. On the other hand, I think there is but a feeble presumption in favour of the view that the transaction was a donation *mortis causa*.

The only other things I recollect being founded on by the Crown are the proceedings in the Sheriff-Court action, viz., the statements of Mrs M'Court in that action. Now, I agree with your Lordship that very little weight is to be put upon what Mrs M'Court said in that action, and for the plain reason that she knew nothing about the real facts of the case. The real weight, if there is any weight in these proceedings, is not in what Mrs M'Court said, but in what Arthur did; because I think it is quite a reasonable thing to say that no man will give up a large sum of money without having cause for it; and that the reason here was that he knew he could not keep it. But I agree with your Lordship that, if we look to the real facts of the transaction by which the proceedings in the Sheriff-Court were compromised, they do not turn out to be very material.

On the whole matter I agree with your Lordship that the Lord Ordinary's interlocutor should be reversed.

LORD M'LAREN—After giving my best attention to the views of the Lord Ordinary, I am unable to concur in the results at which he has arrived.

The question really is, as it appears to me, whether Hugh Finnigan divested himself of the estate and gave it to his brother to the effect of constituting an irrevocable or revocable donation. Your Lordship has stated the reasons which induce me to think that in this case the donation must be presumed to be and was in fact an irrevocable donation, and the only difficulty which attends the case arises not so much from any doubt as to what Hugh Finnigan meant, as from the circumstance that he did not take the most direct mode of accomplishing his object. Instead of saying in plain words that he made over his share of the business without consideration to his brother, he put in what may be held in the circumstances to be the nominal consideration of £100, and that throws a certain element of suspicion over the transaction. But when that element is fairly regarded, it does not appear to me to throw any doubt upon the reality of the transaction, and the probability is that the sum was merely mentioned as being the probable amount which Hugh would have to draw during the few weeks that he expected to live, or which would have to be paid for him by his brother out of the fund which he received. Now, it seems to me that this case must be considered exactly as we should do if we had an action by a donor who had recovered, or who thought he was going to recover, and desired to get back his estate. And while it must be taken as part of our law that a donation *mortis causa* remains to the end subject to the condition that upon recovery, in the event of recovery, the property shall be given back, yet I agree with an observation which was made in argument and with Lord Adam, that such a condition in the general case would be very easily presumed. If a man who is very ill, it may be, of some disease which has not undermined the constitution, but has a tendency to cut of life, such as a fever or epidemic, makes over his estate in the form of a donation, the law will very easily presume that he meant that donation to be conditional on his death, and that it was merely a substitute for what our law does not allow in express terms, a nuncupative will. In such a case where the circumstances were such as to lead irresistibly to the conclusion that the donation must have been conditional on the party dying of the disease, then of course the Crown would be entitled to legacy-duty. But the reason why, in common with your Lordships, I think there is no such right in the present case is the peculiar nature of this man's condition, which rendered it impossible that he could recover. The nature of the disease was such that he could not possibly recover, and he was doubtless apprised of that, and knew that he had only a few weeks or months to live. That being so, there was no occasion for any implied condition about recovery, and I am not going to read in such a condition where the circumstances were not such as would give rise to it, and it is not expressed on the face of the written document purporting to make over the property. The result is, that as this donation was made and carried into effect more than three months before the death of Hugh Finnigan, it is excepted from the operation of the Act which constitutes the account duty, and is to be regarded as in all respects a donation *inter vivos*.

LORD KINNEAR concurred.

The Court assoilzied the defenders.

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