conveyance. That is the case here, and it is the key to the decision of the case, because while for convenience the title was taken in favour of the two partners as owners each of one-half *pro indiviso* of the subject, the real purpose of the trust was to hold it as estate of the joint-adventure, and subject to the debts affecting such joint estate. I therefore agree with the Lord Ordinary that assuming the Allans to be *bona fide* onerous assignees, they took nothing beyond such rights in the property as their author could have insisted on, having regard to his contract with his copartner.

I also agree with your Lordship that in applying that principle to the accounting the Lord Ordinary has dealt with the case correctly and satisfactorily, and that no sufficient cause has been shown for re-opening the accounting.

LORD KINNEAR was absent.

The Court adhered.

Counsel for the Reclaimers—M'Lennan—Scott Brown. Agents—Cumming & Duff, S.S.C.

Counsel for the Respondent—Kennedy—Guy. Agents—Martin & M'Glashan, S.S.C.

Thursday, January 10.

SECOND DIVISION.

[Sheriff Court at Dingwall.

ROSE *v.* CAMERON'S EXECUTOR.

Donation—Donatio mortis causa—Essentials of Donatio mortis causa—Deposit-Receipt—Delivery—Expectation of Death.

Three deposit-receipts were found in the repositories of a deceased person after his death. They were dated five months before the date of his death, and were taken each respectively in name of himself and another person, payable to either or survivor. *Evidence* on which *held* that the joint payees had failed to prove *donatio mortis causa* of the sums contained in the deposit-receipts.

Question as to the essentials of *donatio mortis causa*.

Opinion (*per* Lord Young) that it is essential to the validity of a *donatio mortis causa* (1) that it should be made in expectation of death, and (2) that there should have been delivery or its equivalent.

Kenneth Cameron, sometime carpenter at Lews Castle, Stornoway, and afterwards residing at Dantryfail, Achterneed, in the parish of Fodderty and county of Ross and Cromarty, died at Dantryfail on 24th October 1899. After his death three deposit-receipts were found pinned together in a desk belonging to him, which was in a room occupied by him in the house of his niece Mrs May Cameron or Frank, Dantryfail aforesaid. These deposit-receipts were all granted by the National Bank of Scotland, Limited, and were as follows, viz.—(1) A deposit-receipt dated Stornoway, 10th May 1899, for £1000, in favour of himself and John Rose, farmer, Strathpeffer, payable to either or survivor; (2) a deposit-receipt dated Stornoway, 10th May 1899, for £1000, in favour of himself and Mrs May Frank, Strathpeffer, payable to either or survivor; and (3) a deposit-receipt dated Stornoway, 10th May 1899, for £650 in favour of himself and William Cameron, his nephew, payable to either or survivor.

Kenneth Cameron left no will of any kind, and he had never been married.

In January 1900 John Rose, Mrs May Frank, and William Cameron, as pursuers and real raisers, brought an action of multiplepoinding in the Sheriff Court at Dingwall, in which they called as defenders the National Bank of Scotland, Limited, as the holders of the fund *in medio* after mentioned, and Donald Cameron, furniture dealer, Inverness, Mrs Barbara Cameron or Campbell and her husband Donald Campbell, farm grieve, Dingwall, and Jessie Cameron or Macleod and her husband George Macleod, labourer, Achterneed. The fund *in medio* was the sum of £2650 contained in the three deposit-receipts referred to *supra*.

The pursuers and real raisers and the defenders Donald Cameron, Mrs Barbara Cameron or Campbell, and Mrs Jessie Cameron or Macleod, were all nephews or nieces and next-of-kin of the deceased Kenneth Cameron. After the raising of the action Donald Cameron was appointed executor-dative *qua* next-of-kin of Kenneth Cameron, and sisted himself in that capacity as a party to the action of multiplepoinding.

Claims in the action were lodged by the pursuers and real raisers, and by Donald Cameron as Kenneth Cameron's executor-dative.

The pursuers and real raisers averred as follows:— "(Cond. 2) The pursuers and claimants believe and aver that the said deceased Kenneth Cameron, who was their uncle, and was unmarried, intended to make, and did in point of fact make, a donation to them of the respective sums represented by the deposit-receipts above referred to, and that they are entitled to receive payment of the same. (Cond. 3) The said deceased Kenneth Cameron resided during the last two years or thereby of his life with the pursuer and claimant Mrs Frank, and was on friendly and intimate terms with her and the other pursuers and claimants John Rose and William Cameron, and frequently told them that he intended to provide for them, and the deposit-receipts referred to were taken in the terms stated for that purpose."

They pleaded—"The deceased Kenneth Cameron having made an effectual donation of the sums in the deposit-receipts for £1000, £1000, and £650 respectively to the claimants Mrs Frank, Mr John Rose, and Mr William Cameron, they are entitled to decree therefor with interest and expenses."

The claimant the executor-dative averred as follows:—"(Cond. 6) The deceased was a

very reserved man, and he does not appear to have been in the habit of discussing his money matters with anyone. It was known that he had saved money, but the amount of his means was known only to his bankers. In any case, the fact of his having left over £3000 came as a surprise to his friends. He occasionally spoke to those with whom he came in contact about leaving his money in such a way as to escape the payment of Government duty, and it is believed and averred that his object in taking the said deposit-receipts in the terms he did was with that object, and with the view of facilitating the administration of the estate. In any case, a deposit-receipt not being a habile document by which to convey a legacy, the claimant maintains that the whole fund should be paid over to him as executor foresaid for distribution among the next-of-kin of the deceased according to the rules of intestate moveable succession, and he claims to be ranked and preferred to the whole fund *in medio*"

He pleaded—"(1) The sums of money contained in the deposit-receipts in question having been the property of the said Kenneth Cameron at the time of his death must be held to form part of his executry estate, and the claimant, as executor foresaid, is entitled to be preferred to the fund *in medio*."

Proof was allowed and led.

The proof showed that the deposit-receipts in their present form were not taken under any immediate apprehension of death. The first and second had been taken in the same terms, first, on 21st August 1891, and had been annually renewed in similar terms down to 1899. The third deposit-receipt, although it varied from time to time in amount and in the name of the payee, had been first taken on the same date as the other two, and had been similarly renewed. In the case of the deposit-receipt last mentioned the joint payee was at first the deceased's brother Donald, then on the latter's death Donald's son Kenneth, and on Kenneth's death Donald's son the pursuer and real raiser William Cameron.

The pursuer John Rose deponed that the deceased had offered him money in 1897 to build a house, but that he had refused to take it, and that when the house was being built the deceased had suggested some improvement, whereupon witness remarked, "You think I have money like shells," and the deceased replied, "You have that but you don't know of it," and went away laughing. He further deponed that the deceased before his death gave him £200 (which witness did not claim), to put in bank in their joint names, and said he was giving witness that £200, and added, "I am leaving you a few hundreds more than that." He also deponed—"After his death, but before his funeral, Mrs Frank mentioned to me the sum of £1000 as having been left to me."

Mrs Frank deponed that the deceased never showed her the deposit-receipts or communicated their precise terms to her, though impelled by curiosity she had looked in his desk and had seen them; that she urged deceased to make his will; that he said "he did not make a will, but that he had made out three bills in favour of three parties whom he was leaving his money to; he did not mention the names of the parties"; that on another occasion "he said he had made better than a will; he made three bills, which would save Government duty"; that on another occasion "he held up his hand and said he had made a bill with John Rose's name and his own, and my name and his own, and William Cameron's name and his own, and that we would get possession of it at his decease." She further deponed, with reference to a later date—"I said to him to make things secure, so as not to be a bother after his death, and he said, Will you do as I tell you? I said, If I can I will. He said, Go to your banker for what is left for you and get your money, and let others do the same, for you don't need to tell anybody what is left for you." In cross-examination the witness said—"He (the deceased) told me the reason why he did not make a will. He made these bills as he called them to save Government duty. He said this two or three times. He understood that we should take possession of it after his death."

The pursuer William Cameron spoke to a conversation between him and the deceased when no witnesses were present. "He (the deceased) said, Yes, I am going to leave some money for you. I thanked him. I said it was very good of him to save so much money. From what he said I knew he had at least £1000. He did not say how he was leaving it . . . I had no conversation with him on any occasion about the money in the deposit-receipts."

John Maclennan, miller in Stornoway, examined for the pursuers (real raisers), deponed that on various occasions the deceased had said that he had money to give to three parties of his own relations, and that he had sometimes mentioned John Rose, Mrs Frank, and William Cameron as the parties concerned. "When he spoke about these three people he willed his money to, he did not use the word will. (Q) What words did he use? (A) That they would get his money after his departure. He did not at that time say how much each of them would get; he did not say that one would get more than the other. I said he should remember Mrs Frank particularly. He said he would look to that." He further deponed that he told Mrs Frank that deceased said "he was to leave some of it to her."

Kenneth Cameron, Mrs Frank's brother, also examined for the pursuers and real raisers, deponed that in the beginning of June 1899 the deceased said to him—"There are ways of a man leaving his money to whom he likes without leaving a will; by making a will the Government wants so much duty . . . I am leaving my money for your sister and for John Rose and William Cameron."

On 24th July 1900 the Sheriff-Substitute (SHENNAN) pronounced the following inter-

locutor—"Finds in fact (1) that the late Kenneth Cameron, sometime carpenter at Lews Castle, Stornoway, died at Dantryfail, Achterneed, on 24th October 1899; (2) that in his repositories after his death were found the three deposit-receipts, Nos. 20, 21, and 22 of process (these were the deposit-receipts above mentioned), being respectively *primo* a deposit-receipt for £1000 in favour of the deceased and Mr John Rose, farmer, Strathpeffer (payable to either or survivor), *secundo* a deposit-receipt for £1000 in favour of the deceased and Mrs May Frank, Strathpeffer (payable to either or survivor), *tertio* a deposit-receipt for £650 in favour of the deceased and Mr William Cameron, his nephew (payable to either or survivor)—all bearing date 10th May 1899; (3) that the said John Rose, Mrs May Frank, and William Cameron claim the sums contained in the said deposit-receipts as belonging to them respectively in virtue of donation *mortis causa*; (4) that the said claimants have failed to prove facts and circumstances showing on the part of the deceased an intention of direct *de præsenti* donation: Finds in law that the sums contained in the said deposit-receipts were *in bonis* of the deceased at the time of his death, and fall to his executor: Therefore repels the claim for John Rose, Mrs May Frank, and William Cameron, and ranks and prefers the claimant Donald Cameron, deceased's executor, to the whole fund *in medio*."

The claimants, the pursuers and real raisers, appealed to the Court of Session, and argued—The case of *Blyth* v. *Curle*, February 20, 1885, 12 R. 674, showed that the gift need not be made under immediate apprehension of death. The fact, therefore, that the deposit-receipts were dated five months before Kenneth Cameron died did not affect the validity of the donations. The case of *M'Farlane's Trustees* v. *Miller*, July 20, 1898, 25 R. 1201, decided that it was unnecessary to prove delivery of the deposit-receipt to the donee. In view of these decisions sufficient proof had been led to show *animus donandi*, and these claimants had made out their claim.

Counsel for the claimant Kenneth Cameron's executor were not called upon.

LORD JUSTICE-CLERK—It is unnecessary to go into many of the questions discussed in this Court, especially as to whether delivery is or is not requisite in order to constitute donation *mortis causa*. This case depends upon the evidence led. The only elements in the case not in dispute are that these deposit-receipts are made out in favour of the pursuers, and that they were not in their possession at the date of the testator's death. Accordingly, it is necessary that the pursuer's case should be supported by evidence of intention on the part of the deceased of *de præsenti* donation. Without going into the evidence I think that its effect is to show, not that the deceased intended to make a donation, but that he intended to make a testamentary disposal of parts of his estate in such a way as to evade paying Government duty.

On the whole matter I have come to the same conclusion as the Sheriff-Substitute.

LORD YOUNG—I also concur in the judgment of the Sheriff-Substitute, which I think clearly right. I have referred to Snell's Principles of Equity, and I find that at the very commencement of his dealing with the subject of *donatio mortis causa* he says (ninth edition, p. 197)—"It is essential to the validity of a *donatio mortis causa* that it should be made in the expectation of death; and such a gift being always made on the condition that the gift shall be absolute only in case of the donor's death, it is revocable during his life—so that, if he recover from the illness or resume possession of the gift it will be defeated. Also to the validity of a *donatio mortis causa* there is the further and all-essential requisite of delivery; for if the intention be expressed in writing, but no delivery takes place, the document, even though signed by the donor, will be ineffectual as a *donatio mortis causa*; and although it might possibly be good as a declaration of the trust, still that is not at all likely, at least in the general case; for what is clearly intended to operate in one way, and fails to do so, is not as a rule construed by the Court to operate in another way in favour of a volunteer; but if there is an effectual delivery the gift will be good although the writing should not be attested at all, and even although the gift should be unaccompanied with any writing whatever; and an antecedent delivery to the donee, although in the character of bailee and not of donee, will apparently suffice if the quality of the possession is changed before the death." Now, if we apply this, in my opinion, correct statement of the law to the present case we find that it is not stated that the donor was anticipating death or was even unwell when the donation was made, and the case as presented is therefore in the same position in point of law as if the granter of the deposit-receipt had been a young and vigorous man. Further, in order to constitute *donatio mortis causa* I am of opinion that delivery or its equivalent is necessary. Of course, a man may come under an obligation to give by a deed which is enforceable against him in his lifetime or against his executor after his death, and the Court will sustain an action founded on such an obligation, but a verbal statement of intention to give is not a thing which the Court will listen to or enforce. I think abundance of authority to that effect might be cited. Here we have no evidence of donation except that this old gentleman took out three deposit-receipts, each of them in name of himself and one of the pursuers, payable to either or survivor. The deposit-receipt may be a document expressing an intention to give a person a sum of money, but it is not a gift of that sum. The alleged donee is not asking the Court to protect him in anything he has got possession of. He has neither the money nor the document that would enable him to uplift the money. I agree with your Lordship that there is no evidence of any intention to make a dona-

tion. I think it plain on the evidence that what the old gentleman had in view was that on his death, if he had not devised the money otherwise, the sums in the deposit-receipts should be taken by the pursuers. But there was nothing to prevent him making a will and providing that the pursuers should not get the sums in question. But a will would not affect a donation *mortis causa*.

I am therefore of opinion that the Sheriff-Substitute has come to the right conclusion in deciding that there is no evidence on which the Court can find that donation *mortis causa* or otherwise has been proved.

LORD TRAYNER—I am also of opinion that the Sheriff-Substitute's judgment is right. There have been a good many points touched on by Mr Kennedy on which I do not think it necessary to express any opinion. It is enough for the decision of this case to hold, as I do, that the appellants have failed to show that the deceased made the donation in their favour on which their claim is based.

LORD MONCREIFF—I am of opinion that the Sheriff-Substitute has come to a sound conclusion. I think that it is unnecessary in this case to decide whether delivery is essential in order to constitute *donatio mortis causa*. The decisions on the point are not uniform, and any judgment in regard to it would require careful consideration. Even assuming that delivery is not necessary, I think it plain that there must be clear and complete evidence that the donor intended to make a donation *mortis causa*. I am of opinion that the pursuers have entirely failed to make that clear. On the evidence I am inclined to think that the deceased in acting as he did intended no more than to make bequests to the pursuers in such a way as to evade the Government duties on the legacies. He failed to carry out his intention, whatever it may have been, in such a way that legal effect can be given to it. He neither made a donation *mortis causa* nor bequeathed effectual legacies. The sums in the deposit-receipts must therefore go to his executor.

The Court pronounced this interlocutor—

"Dismiss the appeal: Find in fact and in law in terms of the findings in fact and in law in the said interlocutor appealed against: Of new repel the claim for John Rose Mrs Mary Frank, and William Cameron, and rank and prefer the claimant Donald Cameron, executor of the deceased Kenneth Cameron, to the whole fund *in medio*, and decern.

Counsel for the Claimants, the Pursuers and Real Raisers—W. Campbell, Q.C.—Kennedy. Agents — Ronald & Ritchie, S.S.C.

Counsel for the Defender and Claimant Kenneth Cameron's Executor — Dundas, Q.C. — Fleming. Agents — Mackenzie & Black, W.S.

Thursday, January 10.

FIRST DIVISION.

[Sheriff-Substitute at Wigtown.

POLLOCK *v.* MAIR.

Process — Appeal — Appeal for Jury Trial —Proof or Jury Trial—Remit to Sheriff Court for Proof.

In an action of damages for wrongous dismissal brought in a Sheriff Court by an agricultural labourer against his employer, the pursuer craved decree for £80 as damages for "loss of wages, and loss of character and reputation." He averred no separate or specific case of slander or defamation, but he made a detailed statement as to the wages which he would have earned had he not been dismissed, and which he alleged would have amounted to £56. The case having been appealed for jury trial, the Court, in respect that the pursuer's claim was mainly for loss of wages, and also in respect of the local character of the case, *refused* the appeal, and remitted the case for proof in the Sheriff Court.

James Pollock, yearlyman, Killantrae, Wigtownshire, brought an action of damages in the Sheriff Court at Wigtown, against John Mair, farmer at Killantrae, in which he craved decree for payment of £80.

In this action Pollock made the following averments—"(Cond. 1) Pursuer has been employed as a yearlyman by defender for some years back, and some time prior to Whitsunday 1900 he and defender entered into a verbal agreement whereby pursuer was to be engaged by defender as a yearlyman, to do all the work usually performed by yearlymen, from Whitsunday 1900 to Whitsunday 1901, and occupy a house at Killantrae. He was further bound to supply two milkers, one of whom—pursuer's cousin Elizabeth Pollock—was to be bound to do out-door work for the half-year ending 28th November next, and the other of whom (Janet Pollock) was to get constant day's work during the whole period to Whitsunday 1901 (the time occupied at harvest in each case not to be included). (Cond. 2) In return for these services defender bound and obliged himself to pay pursuer at the rate of 12s. 6d. per week, and further give him three tons of coal and two carts of potatoes. The wages to be given to his milkers were to be 3s. per week for milking, the said Elizabeth Pollock to get 7s. 6d. per week for out-door work, except during harvest, for which she was to get £3, and the said Janet Pollock was to get 1s. 3d. per day for each day she was engaged, except during harvest, for which she was to get £3, 10s. (Cond. 4) On Friday 21st September while pursuer, the said Elizabeth Pollock, and Janet Pollock were all busily engaged in the stackyard at Killantrae aforesaid, at harvest work, the defender approached them, and without