Friday, October 25.

SECOND DIVISION.

[Sheriff of Argyll.

M'NICOL *v.* M'DOUGALL.

Donation mortis causa — Deposit-Receipt Unendorsed—Proof.

Angus M'Nicol, an old man, took a deposit-receipt from a bank for £344 in his own name. Upon his death it was found unendorsed in the possession of Isabella M'Dougall, an old woman and his cousin, who had attended him. His executor brought an action against Isabella M'Dougall for recovery of the document. She averred that a year before his death the deceased had made a donation *mortis causa* to her of the deposit-receipt. At a proof allowed by the Sheriff-Substitute the defender was the only witness to the donation. *Held* that there had been no transference by the deceased to the defender of the property in or right to the deposit-receipt.

Opinion (*per* Lord Young) that a donation *mortis causa* must be made in immediate contemplation of death, and will not survive for a year.

The late Angus M'Nicol, labourer at Ardkinglass, near Inverary, was for many years employed on the Ardkinglass estate, and resided in one of the office-houses of the mansion.

On 23rd July 1887 he lodged in the Inverary branch of the National Bank of Scotland (Limited) the sum of £344, which was practically his whole estate, in exchange for which he received a deposit-receipt of that date in his own name.

About the beginning of August 1888, being seventy-six years of age, and in a very frail state of health, he was removed to the porter's lodge on the Ardkinglass estate, occupied by Isabella M'Dougall, where he died upon 18th August 1888.

His nephew Peter M'Nicol, yacht master, Church Place, Gourock, was appointed executor-dative *qua* next-of-kin, and in virtue of the powers conferred upon him by that appointment applied to Isabella M'Dougall to hand over the deposit-receipt which was in her possession. Upon her declining to do so M'Nicol raised an action against her in the Sheriff Court of Argyllshire at Inverary to have her ordained to deliver up the deposit-receipt.

The defender, in answer 5 of the condescendence, "admitted that the deposit-receipt in question is in the possession of the defender, and that she declines to deliver up the same to the pursuer. Explained that the said Angus M'Nicol and the defender were cousins-german. They were brought up as children together at Ardkinglass, and resided there almost all their lives. They were to have been married long ago, but some of their relatives objected to their marriage because of their being cousins, and consequently the marriage never came off. They were, however, on most friendly terms all their lives, and for many years the defender attended to the deceased when ill. He was removed to her house a fortnight before his death, and she attended to him and nursed him till his death. None of his paternal relatives ever visited the deceased or took any interest in him. The deceased, who was all his life a labourer on the Ardkinglass estate, by rigid economy saved the sum in the deposit-receipt out of his small earnings. On the 22nd day of December 1886 the said Angus M'Nicol executed a last will and testament, whereby he bequeathed his whole estate and effects to the defender. Explained and averred further, that the said Angus M'Nicol, sometime before his death, delivered the said deposit-receipt to the defender, and that he made a donation *mortis causa*, or a bequest of the sum therein contained, and of the remainder of his means and estate, in her favour, which was never revoked by him."

The defender pleaded—"(2) Alternatively, the deceased having made an effectual donation *mortis causa* or bequest of the said deposit-receipt and the contents thereof, and of the residue of his estate, to the defender, the same became irrevocable on his death. (3) In any case, the deceased having delivered the said deposit-receipt to the defender, and having made an effectual gift thereof and of its contents to her, they became her property, and she is entitled to warrant to uplift said contents, and the action ought to be dismissed, with expenses."

The Sheriff-Substitute (CAMPION) allowed the defender a proof, and to the pursuer a conjunct probation.

From the proof it appeared that a will had been informally executed in favour of the defender. The defender's agent at the proof and debate abandoned the case so far as founded on the will. The only evidence in support of a donation *mortis causa* having been made was that of the defender, who deponed—"Most of my life at Ardkinglass for the last forty years. Angus M'Nicol was my first cousin. He came to Ardkinglass before me. . . . For the last few years before his death he was not able to work. He always got his pay. He gave me his money every month. He told me I was to pay all his accounts, which I did. What was over I was to put in the National Bank at Inverary. I put the money in there when it was a certain amount, sometimes in the half-year and sometimes in the year. Every penny he saved he put into the bank. I always went to the bank with the money. Angus was very accurate about money; he counted every penny. He always looked at the paper I got from the bank on my return. He called that paper 'the cheque.' After he looked at it, he said it was all right, and handed it back to me to be kept in my house. He often said to me, 'Now, Bella, the money will be yours, and devil a M'Nicol will ever get a penny.' Before going to the bank, Angus always gave me the old deposit-receipt, and the money to be put in. The old deposit-receipt was never endorsed by Angus. I gave the old paper to the bank along with

the money, and got a new one back from the bank for the whole money. Angus never took a penny out of the bank. It was more than a year before his death when I last put money into the bank. When I came back with that last paper from the bank I handed it to Angus. (Shown deposit-receipt, No. 17 of process.) That is the paper I got from Mr Guthrie at the bank. Angus looked at it when I came back, and said, 'Bella, its all right. Keep it, Bella. When I'm gone it will do you good.' I handed the deposit-receipt to him, and he gave it back to me. He told me to keep it in my own house. I did so till I gave it up to my agent sometime after the funeral. . . . A long time ago he wished us to get married. Our friends did not wish it. Angus and I were always good friends. I have attended and nursed him for a long time."

The Sheriff-Substitute found that donation *mortis causa* had been effectually made, and assoilzied the defender.

The pursuer appealed to the Second Division of the Court of Session, and argued—The will was admittedly invalid. The alleged donation was donation of an unendorsed deposit-receipt, which, even if proved, carried nothing. But the only evidence of donation was that of the donee, unsupported by any writing. In the cases of *Crosbie's Trustees* v. *Wright*, May 28, 1880, 7 R. 823, and *Blyth* v. *Curle*, February 20, 1885, 12 R. 674, upon which the Sheriff-Substitute based his judgment, the name of the alleged donee appeared on the face of the deposit-receipt and Savings Bank book respectively along with that of the donor. That was not the case here. Whatever may have been the intention of the deceased he had failed to make a donation. He had remained creditor in the deposit-receipt, and his right to the money was now vested in his executor, who was entitled to decree. The Sheriff-Substitute's judgment ought to be recalled—Williams' Principles of the Law of Personal Property (13th ed.), pp. 422-423; Snell's Principles of Equity (8th ed.), p. 187.

Argued for the defender—The question was whether donation was proved. The relation of the parties created an inherent probability which had been desiderated by the Court in such cases. There was certainly the intention to donate, and the evidence of the defender, if believed, proved there had been donation. The Sheriff-Substitute, who saw the witness, believed her. The case was stronger than in *Crosbie's Trustees*, which was also the case of an unendorsed deposit-receipt, for here there had been delivery, and the deposit-receipt was in the defender's house before the deceased came to live there. Endorsation was of no consequence. A deposit-receipt was not a negotiable instrument, and endorsation carried no right to the money. It was only a mandate to uplift, which fell with the mandator's death. Here the donor had done everything which he thought was necessary to make a good donation. He did not know that endorsation was necessary at all, because the bank had always renewed his deposit-receipts, and paid interest upon them, without their being endorsed. The Court was bound to look at the intention of the parties, and not to defeat it because of no endorsation. The English cases were also entirely in the defender's favour. In the most recent cases, cited below, an unendorsed banker's deposit-note and an unendorsed cheque were both held good subjects of a donation *mortis causa*—*Gibson* v. *Hutchison*, July 5, 1872, 10 Macph. 923; *Crosbie's Trustees* v. *Wright*, *supra* *Blyth* v. *Curle*, *supra*; *Martin* v. *Martin*, January 22, 1887, 24 S.L.R. 484, *per* Lord M'Laren; *Macdonald* v. *Macdonald*, June 11, 1889, 16 R. 758; Cavanagh's Law of Money Securities, pp. 574-575; *Duffield* v. *Elwes*, June 29, 1827, 1 Bligh (N.S.), 497, or *Duffield* v. *Hicks*, June 29, 1827, 1 Dow, 1, *per* Lord Chancellor Eldon; *Veal* v. *Veal* (and cases there cited), July 1859, 27 Beavan, 303, *per* Romilly, M.R.; *Arnis* v. *Witt*, November 16, 1863, 33 Beavan, 619, *per* Romilly, M.R.; *Clement* v. *Cheesman*, July 30, 1884, L.R., 27 Ch. Div. 631, *per* Chitty, J.

At advising—

LORD YOUNG — The question here is, whether a donation *mortis causa* was made of the deposit-receipt referred to in the record, which means whether by donation *mortis causa* the donee was put in the position of creditor in the deposit-receipt, with right to demand payment either directly or indirectly from the debtors therein—that is, from the bank.

Now, a donation *mortis causa* is a donation, and it resembles any ordinary donation or gift in many respects, but it differs from an ordinary donation in these two—First, it is always revocable, and secondly, it is made in contemplation of death, and in my opinion, whatever may have been said to the contrary, in the immediate contemplation of death. Then, if that apprehension is not realised, and death does not follow, but the apprehensive donor recovers, I think that the donation is revoked by that very fact, and that it will not survive the donor's recovery.

Here the alleged donation was made a long while before death. The donor survived about a year. I doubt, and indeed I am individually of opinion, that no donation *mortis causa* will endure for a year. I do not think that it is of the nature of a donation *mortis causa* to last anything approaching a year. In any case, the subject of donation here was a deposit-receipt, which, as has been rightly pointed out, is a mere document of debt granted by a debtor to a creditor, and containing, or at least implying, an obligation to pay money.

Now, the creditor in that document of debt is invested in the right to recover from the debtor under it, and to make a gift of it he must divest himself and invest the donee. I think that is essential of any gift whether *inter vivos* or *mortis causa*. If anything remains to be done—taking the case of an *inter vivos* gift—there is no gift, for the Court will not interpose to compel that to be done which remains to be done. If the gift is complete it is irrevocable,

otherwise there is no gift at all.

Now, lay aside for the moment the element of *mortis causa*, and consider the deposit-receipt as the subject of an ordinary gift. If a party in possession of a deposit-receipt in name of another were to allege he had received it as a gift, would the Court give heed to such an allegation and refuse to compel restoration to the creditor on the face of the receipt, even although he admitted that he intended it as a gift? I think it clear that there could be no gift *inter vivos* of a deposit-receipt divesting the creditor and investing the donee without at least indorsation. Whether that would divest the donor and invest the donee, or give him the means of getting the money from the bank, if there was no interposition in the meanwhile, I do not require to say. My opinion inclines to this, that even with endorsation it would be no completed gift, and the donor could interpose and stop the payment of the money at the bank by saying, "I have revoked my mandate implied in the endorsation."

Mr Guthrie Smith said that a deposit-receipt was not a negotiable instrument—that is, the property does not pass from hand to hand even with endorsation. I think therefore the property would not pass to a donee even with endorsation, and that until the donee got the money everything might be undone, although after he had got the money the gift would be irrevocable.

A *mortis causa* donation requires the same divestiture and investiture as one *inter vivos*, otherwise it would be a mere verbal legacy, and as such not good at all. "I declare that you shall have my money after my death"—What distinguishes that from a donation *mortis causa*? Just delivery, which operates the divesture of the donor and the investiture of the donee, and without which the gift is worthless, however well proved. I think there is no such thing in this case—no divestiture and investiture—no delivery, or anything that could be considered as equivalent. That, I think, is conclusive of this case. The alleged donee was never in a position to claim this money. The donor never had transferred the money to her. I assume he had expressed his intention of doing so, but he should have done so by will. He could easily have done so by will or by donation *mortis causa* by getting the money and handing that to the donee.

As to what has been said in regard to the law of England. I think in general principles their law of donation *mortis causa* is exactly the same as ours. It is not the same as ours as to what is necessary to transfer the property, or the right to the property. By their law all right to be had in a certain thing will pass by passing the document. It will not pass with us. I am disposed to accept the statement of Mr Williams that anything may be made the subject of a donation *mortis causa*, the property in or right under which will pass on delivery; and he says it has been said that a bond may be the subject of a donation *mortis causa*, it being held that the property of the bond will pass by delivery, and if that is so, the proposition is sound and in accordance with the principle, in my view, underlying the laws of both countries.

So with title-deeds to property. Title-deeds handed to mortgagees, with the documents constituting the mortgage, will all pass by delivery. It is accordingly upon that ground, as explained by Mr Williams, that title-deeds to estates and mortgage deeds may be the subject of donation *mortis causa*, the whole right of the original possessor passing by delivery to the donee. That is all I can say on the English cases cited to us. The principle of the law of donation *mortis causa* is well explained in Snell's Principles of Equity, and is in accordance with our law, and when we attend to the distinctions as to what is necessary to pass the property in both countries all the cases are reconcileable to our law.

I think the judgment of the Sheriff-Substitute proceeds upon an erroneous ground, and I therefore think we should find in fact and in law that there was no transference by the deceased to the defender of the property in or right under the deposit-receipt in question, and that the executor of the deceased is entitled to have delivery of it.

LORD RUTHERFURD CLARK—I also think the pursuer is entitled to our judgment. In my opinion the alleged donation of the deposit-receipt could not have been made without endorsation, and upon that ground I desire to base my judgment.

LORD LEE—My opinion is that mere delivery of a deposit-receipt in name of A B as the creditor is not sufficient to pass the right of credit, and that an allegation that such delivery was intended to make a donation *mortis causa*, which is to be proved by parole evidence, is irrelevant.

I think that the intention to pass the right of credit must be supported by writing. Whether endorsation would be sufficient if coupled with delivery to pass the right to a person whose name does not appear on the face of the writ as a creditor, I do not say. But I think that where the terms of the receipt are purely in favour of A B there must be, in order to transfer the right of credit to C D, something in writing equivalent to an assignation or procuratory in his favour. I give no opinion upon whether a donation *mortis causa* must be in immediate apprehension of death, nor that it will not last for a year.

LORD JUSTICE-CLERK—I concur in the opinion of all your Lordships. This is not a case where the gift was of such a nature that the *corpus* could be handed over from the donor to the donee. That could only have been done by going to the bank and getting the money. But in previous cases it has been recognised that the gift of a deposit-receipt can be made by making the donee the creditor. I think, however, that some writing is essential to the constitu-

tion of such a gift. The writing alone may not be sufficient to imply a gift, and that a gift was intended may be proved by parole; but to hold that a gift can be proved by the handing over of an unendorsed deposit-receipt is a contention which I cannot hold as sound. Besides, the only evidence here is that of the alleged donee, and that cannot be held as sufficient, otherwise there would be no such thing as presumption against donation. The defender explained that the donor knew that he had made a will giving her everything, but I do not see how she can reconcile the attempted donation with the will, for if there was the latter, the former was unnecessary.

I am sorry we cannot give judgment in the defender's favour, as it is quite evident in this case that the intention of the deceased has been defeated through his failure to adopt operative means for carrying out that intention.

On the whole matter, I am of opinion that no ground has been shown here for holding that there was a donation *mortis causa* by the deceased to the defender, and that the executor is entitled to succeed.

The Court pronounced the following interlocutor:—

"Find in fact and in law that there was no transference by the deceased Angus M'Nicol to the defender of the property in or right to the deposit-receipt libelled: Therefore sustain the appeal, recal the judgment of the Sheriff-Substitute appealed against: Ordain the defender to deliver the said deposit-receipt to the pursuer: Find the pursuer entitled to expenses in the Inferior Court and in this Court," &c.

Counsel for the Pursuer—Young. Agent—W. Kinniburgh Morton, S.S.C.

Counsel for the Defender—Guthrie Smith—Salvesen. Agents—Gill & Pringle, W.S.

Thursday, November 7.

SECOND DIVISION.

[Sheriff of Forfarshire.

MACKAY AND OTHERS *v.* WOOD AND OTHERS.

Church—Allocation of Seats—Right to Sell and Let.

The church in a landward parish, which included the burgh of Brechin, was re-seated in 1807. Seats were allocated to certain trade incorporations which then included a large number of the inhabitants of the burgh. The incorporations dwindled to one or two members, who were in the habit of letting the incorporation seats and spending the proceeds upon themselves. To put an end to this state of matters several of the members of the kirk session purchased the seats from the surviving members of the incorporations and took dispositions in their own favour. They intended, eventually, to hand over these seats to the kirk session to hold for the good of the congregation, but meanwhile they let them to pay off the expense of the purchase. In consequence of certain persons, who had for years occupied some of these seats, refusing to leave them, the purchasers brought an action to have them interdicted from using them.

Held that by the purchase the pursuers had acquired no legal right to allocate the seats, and had no title to demand interdict.

The parish of Brechin is a landward parish, embracing within the parish the burgh of Brechin. The Parish Church was re-seated in the early part of this century, and the sittings in the renovated church were thereafter allocated at a meeting of those interested, held in the church upon 24th December 1807, conform to formal minutes of division duly recorded. Among the allocations then made 212 sittings in the gallery were allocated to the Incorporation of Glovers, the Incorporation of Weavers, the Incorporation of Shoemakers, and the Incorporation of Tailors. These were voluntary trade incorporations in the burgh of Brechin, which at the date of the allocation included a very large number of the inhabitants of the burgh. Allocations were also made to the heritors, to other incorporations, and to certain individuals, but none were made to the Town Council on behalf of the community. By degrees, and especially after 1846 (in consequence of the Act 9 Vict. c. 17), the trade incorporations dwindled to one or two members who in no way represented any portion of the community. The surviving members let the sittings originally allocated to the incorporations and spent the money in feasting.

In 1886, in order to put an end to this unsatisfactory state of matters, the Reverend James Mackay, one of the ministers of the parish, which is a collegiate charge, and several of the other members of the kirk session, purchased the said 212 sittings from the few remaining members of the abovementioned incorporations and took dispositions from them in their own favour. They then let these sittings to members and adherents at a moderate charge, intending after the expense of the purchase had been paid off to hand them over to the kirk session to be held for the good of the congregation.

Alexander Wood, skinner, Brechin, and others, who were all members of and communicants in the said Parish Church of Brechin, objected to this proceeding.

They had all occupied certain of the above sittings for several years either gratuitously or as lessees of the incorporations, and they insisted upon their right to continue to occupy the sittings free of charge notwithstanding the said dispositions.

The Rev. James Mackay and the other