Considering, however, that the liability of the sub-vassal and the tenants as intromitters is limited to the amount of the sub-feu-duties and the rent respectively, it may be thought immaterial whether they are sued for the sub-feu-duty or their rent, or on their intromissions to the amount of the sub-feu-duty or of the rent. In money there is no difference; but when it is fixed that the tenants are liable as intromitters only, it not only follows that they cannot be sued for rent, but that as intromitters they are not liable under this action. For it has been decided in a series of cases—*Rollo*, M. 4685; *Cockburn*, M. 4187; *Biggar*, M. 4191—that an intromitter cannot be made liable for feu-duties which have accrued due prior to the time when he entered into possession. Now, the feu-duties sued for were due at Martinmas 1882. It is not averred that any of the tenants who are called as defenders were in possession of the subjects let to them prior to that date, or for any part of the period for which the feu-duties were payable. Hence the action, even if it were laid on intromission, necessarily fails.

I have said that this is an action of maills and duties in ordinary form. To convert it into an action for the recovery of rents or for an account of intromissions would not, in my opinion, be legitimate. But I have regarded it in both of these aspects, and in both I am of opinion that it is not well founded.

I may add that I have considered the case as if the superior himself had been the pursuer. Exceptions might have been taken to the title of the pursuers as the mere assignees of the superior. But as the defender did not press them, or perhaps even state them, it is not necessary to enter into this matter.

Lord Justice-Clerk—No doubt there is a good deal of technical strictness about the argument which the majority of your Lordships propose to sustain. That is the inevitable result of applying the strict principles of the feudal law to the great sub-division of feus in modern times, and the difficulty of such application has been found in many cases. I should have been happy to agree with Lord Young on the ground of convenience on which he bases his opinion, but it is clear that if we are to decide this action on principles of law hitherto acted upon it cannot be sustained. I regard this case solely as an action of maills and duties and therefore as an action of entering into possession. The prayer of the petition is—"To grant a decree against the above named defenders, other than the said Henry Cheyne, ordaining them to pay to the pursuers the rents, maills, and duties of their several possessions of the subjects hereinafter described, and that during their possession thereof, with interest from and after the respective terms at which the same are or shall became due, until payment," followed by an enumeration of the tenants and their rents. In so far as the action may be regarded as a personal action, I do not think that it follows that because a man is a creditor of another he is a creditor of his debtor's debtor, unless he has acquired the rights of his debtor against the latter's debtor. The tenants here are due sums on personal contract with the vassal, and the superior seeks to put himself in the vassal's place to recover these sums. I do not think the superior can put himself in that position merely in virtue of his superiority—not until he has established a direct right, as by assignation of his vassal's rights, against the tenants. I therefore agree with Lord Craighill that the pursuers here have no title to sue.

The Court pronounced this interlocutor:—

"Find that the pursuers have no title to sue this action: Therefore sustain the appeal; recal the interlocutor of the Sheriff-Substitute appealed against; dismiss the action, and decern," &c.

Counsel for Pursuers (Respondents)—J. P. B. Robertson—Graham Murray. Agents—Dove & Lockhart, S.S.C.

Counsel for Defenders (Appellants)—Mackintosh—Rankine. Agents—Mackenzie, Innes, & Logan, W.S.

Thursday, June 5.

SECOND DIVISION.

[Sheriff of Elginshire.

MILNE *v.* CRUIKSHANK AND OTHERS (GRANT'S EXECUTORS).

Succession—Donation—Donatio mortis causa—*Legacy—Mandate—Cheque.*

A person when in good health delivered to his housekeeper a bank cheque, which, as filled up by him, ran as follows:—"£100 stg. *Elgin*, 188 . The North of Scotland Banking Company, Elgin, Pay to me or Bearer, One hundred pounds, when am dead, sterling, on account of . (Signed) John Grant." He died some months afterwards, having a large balance at his credit in the bank to which the cheque was addressed. After the giving of the cheque he had made a will disposing of his whole estate. In an action by the housekeeper against his executors for payment of the sum in the cheque—*held* (1) that there was no *inter vivos* donation of the sum in the cheque, because it was made payable after the deceased's death, and he dispossessed himself of nothing by it; nor (2) was there a *donatio mortis causa*, because it was given when deceased was in good health, and nothing was immediately transferred by it; (3) that the cheque was not habile to constitute a legacy, and had it been so would have been revoked by the subsequent will.

Christina Milne presented a petition in the Sheriff Court at Elgin against Robert Cruikshank and others as executors under the will of the deceased John Grant, formerly a farmer, and latterly residing in Elgin, for payment of £100. She stated in her condescendence that for more than six years prior to Martinmas 1881 she had been in the deceased's service as housekeeper and general servant; that in consequence of her trustworthiness and attention to the deceased, who was then in infirm health, he had expressed to her and other of his friends his intention to leave her a sum of money after his death as a mark of his approval of her conduct and as a reward for her services;

that in February 1881 the deceased handed to her a cheque on the North of Scotland Banking Company, which he had filled in on one of the printed or engraved forms issued by that bank, and which was as follows:—"£100 stg. *Elgin*, 188 . The North of Scotland Banking Company, Elgin.—Pay to *me* or bearer *One hundred Pounds when am dead*, sterling, on account of *John Grant*." —the parts printed in italics being written, and the rest printed; that the deceased when he handed her the document stated that she had done more for him than all the kin he had, and that there was not a bank between Elgin and Aberdeen that would refuse to pay her; that she kept the cheque, and it was in her possession at his death; that the deceased had when he gave her the cheque, and also when he died, ample funds in the bank to meet the cheque. She maintained that by the delivery of the cheque an effectual donation, or otherwise a valid bequest, of the sum of £100 was thereby constituted in her favour.

The defenders did not dispute that the cheque was filled in and signed by the deceased. They denied that he was often in infirm health, and averred that he was often the worse of drink. They denied that a donation or bequest had been constituted in pursuer's favour. They produced his settlement, which was executed some months after the cheque was alleged to have been given by the deceased, and after he had dismissed the pursuer. This being a general settlement, had the effect of recalling all former bequests *mortis causa*. It did not mention the pursuer. It was admitted that the bank on which the cheque was drawn was the one at which the deceased kept his account, and that there was usually a large balance in his favour.

The defenders pleaded—"(4) The pursuer is not entitled to decree for the sum claimed as a donation, in respect that—first, the document libelled is wanting in one or more of the essentials necessary to confer any right on the holder of the same; second, the said document is not habile to constitute a donation; third, the mandate by the deceased to the pursuer fell on his death; fourth, if the pursuer be entitled to payment of the sum contained in the cheque, it can only be in trust to hand over the same to the defenders as the executors of the deceased. (5) The pursuer is not entitled to decree for the sum claimed as a bequest, in respect that—first, the document libelled is wanting in one or more of the essentials necessary to confer any right on the holder of the same; second, the pursuer is not referred to in the said document; third, the said document is not a habile form of testament; and fourth, any bequest contained in the said document was validly revoked by the last will and settlement of the deceased.

The Sheriff-Substitute (Macleod Smith) repelled the defences and decerned in terms of the prayer of the petition.

"*Note.*— . . . . The fact of the terms in which the document is expressed, and that the pursuer is in possession of it, shows presumably, in a way which is not met by any adequate counter-explanation on the part of the defenders, that the cheque or order was a gift, and that the pursuer is the person for whom it was intended. There is nothing unlikely or improbable in its having been so handed to her by Mr Grant. All the facts indicate the contrary. There seems to be no other possible explanation of it, and no other person except the pursuer is making any claim to it. Gratitude or affection, or expectation on the part of Mr Grant, may or may not have been, in whole or in part, the cause of his making such a gift. The pursuer is not bound to show or prove any ground for it, because Mr Grant was quite entitled, with or without reason, at his own pleasure, or even at his own whim, without any cause whatever, to have given to her or any other person anything of the kind whenever he might have chosen to do so. The bill or order so given being drawn on the holder of a negotiable fund, standing at his credit at the time, then and since, the pursuer or any other person bearing the bill or order, and not shown to have acquired it illegally, might at any time have presented it at the bank, and desired that the necessary amount should be set aside for his or her behalf, or some other proper provision made for meeting it when it might fall due. This would at once have constituted the claim as a *debitum in presenti solvendum in futuro*, which would immediately vest, and which would if necessary transmit to the representatives of the holder of the order. It makes no legal difference that the pursuer did not sooner present the bill or order, because the money is still extant, and the interests of all concerned are represented by the defenders.

"It cannot be said that the effect of the bill or order fell as a mandate by the death of Mr Grant, because by the express terms of it it was only to be fulfilled after his death.

"The delivered bill or order must be held to be rather a donation than a bequest, because after it was delivered Mr Grant had no legal right or power to resume or recover possession of it, either out of the pursuer's own hands or out of the hands of any other 'bearer' to whom she might have handed it. In the same way, any other 'bearer' not shown to hold it on an illegal footing, would be quite as much entitled to sue on it as the pursuer.

"Neither could Mr Grant have prevented the bank from giving effect to it, in the manner above referred to, at any time when presented.

"Mr Grant's settlement does not contain any clause of revocation. Even if it did, if these views are correct, the donation completed by the delivered bill or cheque could not have been recalled by it.

"It is not surprising, looking to the anomalous and unusual nature of the document founded on by the pursuer, that the executors should require the judgment of the Courts of law before recognising or giving effect to it. But its meaning and purpose are evident, and the technical objections urged against it seem to be insufficient to defeat its operation. Reference may be made to the case of *Steel's Trustees* v. *Wemyss*, 18th December 1793, M. 1409; to the observations of the late Lord Ivory in his Note on Erskine's Inst. iii. 2, sec. 38; and to the case of *Bryce* v. *Young's Trustees*, 20th June 1866, 4 Macph. 312. See also the Stamp Act 1870, sec. 48, and the new Bills of Exchange Act 1884, sections 3, 8, 11, 31, and 53/2. The order being expressly made payable after death does not seem to be affected by the qualification in section 75.

"The counterfoils of the cheque-book from which the order was taken are or ought to be in

the hands of the defenders. No explanation has been given in regard to them. It is possible that they might have confirmed the case of the pursuer; but she does not require them."

On appeal the Sheriff (IVORY) recalled this interlocutor and allowed a proof.

The pursuer deponed to the facts stated in her condescendence. She was working in the kitchen on a morning in February 1881 when deceased came with the cheque in his hand and gave it to her. He said it was a cheque for £100. Witness had a niece named Jessie Jenner, who sometimes came to sleep in the house with her. Jenner was then in her bedroom, and deceased went in and showed the cheque to her, and witness followed him. He said he gave it to witness for her attendance on him during his illness. He left it with her and went away. The deceased was often the worse of drink, and was gradually getting worse in his drinking habits. The night before he gave her the cheque he said he intended to give her a present. He was then the worse of drink. He did not appear to be so in the morning when he gave her the cheque. He dismissed her at Martinmas thereafter because he said nobody could come into his house for her. She used to go to the bank and lodge and draw money for him.

Jessie Jenner corroborated the pursuer as to what occurred on the morning when the deceased came into the bedroom to show her the cheque.

The accountant of the North of Scotland Bank deponed that the deceased had spoken to him about pursuer, and had said that he was to give her something. Deceased mentioned £200 as what he proposed to give her. On one occasion, when he was in deceased's house, the pursuer was in the room, and she asked him, in deceased's presence, whether a cheque payable after his death would be good, to which he (witness) answered that he thought it would be a good voucher.

Two other witnesses, one of them being one of the defenders, spoke to the deceased's having expressed an intention to do something for the pursuer.

William M'Kenzie, farmer, deponed that deceased had told him that he had given pursuer a cheque for £100, but said it was not worth anything, and "made a laugh of it."

The Sheriff-Substitute on 24th October 1883 pronounced this interlocutor:—"Finds that the pursuer is the holder of a document in the following terms [quoted *supra*]: Finds that it is not disputed that the document, in so far as not engraved, and the signature, are in the handwriting of the late John Grant, sometime farmer in Scarffbanks, and afterwards residing at Advie House, Elgin, who died on 17th June 1882: Finds that the defenders are his executors, and that the pursuer now sues them for the amount set forth in the said document: Finds that it is admitted that in February 1881, when the same is stated to have been delivered to the pursuer, and all along thereafter, Mr Grant had funds in the said bank at his credit more than sufficient to meet the same: Finds that it is not alleged or proved that the said document was obtained by the pursuer in any fraudulent or illegal manner, or that she is not the person to whom it was delivered, and for whom it was intended: Finds, in law, that the said document is one which Mr Grant was entitled to give to the pursuer or any other person, either as a gratuitous donation or otherwise at his pleasure, and that the same is a valid and subsisting bill, or cheque, or order, for which the defenders, as Mr Grant's representatives, and as now holding the funds left by him in the said bank, are liable to the pursuer: Therefore repels the defences, and decerns in terms of the prayer of the petition: Finds the pursuer entitled to her expenses," &c.

The defenders appealed to the Sheriff, who pronounced the following interlocutor:—. . . . "Finds that in February 1881 the pursuer received from the late John Grant, sometime farmer at Scarffbanks, and afterwards residing at Advie House, Elgin, in payment of a donation, or otherwise, a document in the following terms: . . . . Finds that the said document, which is stamped with an impressed stamp of one penny, is not a bill of exchange or cheque payable on demand, but is a bill of exchange or cheque of another kind, drawn and expressed to be payable in the United Kingdom, and is chargeable under the Stamp Act 1870 with the duty of one shilling: Finds in law, that the said document not being duly stamped, the pursuer is not entitled to recover thereon, or to make the same available for any purpose whatever: Therefore assoilzies the defenders, but in the circumstances finds no expenses due to or by either party, and decerns.

"*Note.*—By the Stamp Act 1870 a bill of exchange or cheque payable on demand is chargeable with the duty of one penny, and a bill of exchange or cheque of any other kind (except a bank note) drawn or expressed to be payable in the United Kingdom, where the amount for which it is drawn exceeds £75, but does not exceed £100, is chargeable with the duty of one shilling. The document sued on being payable only on the death of John Grant, is not a bill of exchange or cheque payable on demand. It is a bill of exchange or cheque of another kind, which is chargeable with the duty of one shilling, and being stamped only with the duty of one penny, must be held to be insufficiently stamped under the Stamp Act. Now, it is provided by section 54 (1) of the said Act that the person who takes or receives from any other person any bill of exchange or cheque, liable to duty, but which is not duly stamped, either in payment or otherwise, shall not be entitled to recover thereon, or to make the same available for any purpose whatever. The pursuer, therefore, having received from the said John Grant the insufficiently stamped bill of exchange or cheque sued on, is not entitled to recover the amount thereof in the present or any other action."

The pursuer appealed to the Court of Session, and argued—(1) The Sheriff's judgment was wrong under the Stamp Act, for this cheque being an order to pay out of a particular fund, *i.e.*, the sum at deceased's credit in his bank account, was a bill payable "on demand," and therefore chargeable only with a penny stamp —33 and 34 Vict. c. 97, sec. 48, subsec. 2, and schedule. (2) The delivery of this cheque constituted a gift *inter vivos* of the sum contained in it, by the deceased to pursuer, for it was payable on demand after a date certain. The pursuer acquired, by possession of the cheque, a right to uplift the sum at once after the occurrence

of an event which was certain to happen. The deceased had dispossessed himself of the amount, and put it beyond his reach, and therefore the question of revocation did not arise. (3) Alternatively, if not a *donatio inter vivos* it was a *donatio mortis causa*, for it was to be paid in the event of death. The delivery of the cheque, and the circumstances attending it, were sufficient evidence to satisfy the Court of the man's intention to bestow this sum in gift on the pursuer—*Morris* v. *Riddick*, July 16, 1867, 5 Macph. 1036, *per* Lord President, 1041; *Bryce* v. *Young*, Jan. 20, 1866, 4 Macph. 312; *Mitchell* v. *Wright*, 1759, M. 8082; *Thomson* v. *Dunlop*, Jan. 23, 1884, 11 R. 453; *Macarthur Stewart* v. *Fullarton*, 1782, M. 1408; *Steel* v. *Wemyss*, 1793, *ib.* 1409.

The defenders replied—(1) The document was invalid under the Stamp Act for the reasons given by the Sheriff. (2) There was here no *donatio inter vivos*, for there was no present delivery of a sum of money. The deceased did not part with anything. (3) Nor was it a *donatio mortis causa*, because (*a*) no property passed; (*b*) it was not made in contemplation of death, the deceased being in good health at the time of giving it; (*c*) if it was so intended, it was revoked by his will. If it was anything, it was an attempt to make a bequest, but not a valid one.

Authorities quoted by pursuer (*supra*).

At advising—

Lord Justice-Clerk—There are some peculiarities in this case. The question relates to a cheque drawn by John Grant, a retired farmer who resided in Elgin, and delivered to his housekeeper, who lived with him for some time, and the terms of it are these:—"The North of Scotland Banking Company, Elgin.—Pay to me or bearer one hundred pounds, when am dead, sterling, on account of John Grant." It cannot be denied that whatever the object was with which that cheque was drawn and delivered, it is an unusual document. And it is now said by the pursuer, who sues upon it against the executors of John Grant, that it was a donation *de præsenti* of one hundred pounds, but subject to a contingency—or rather a condition—that it was not to be payable till the period of his death.

A question has been raised by the Sheriff-Principal as to whether the document is sufficiently stamped. I do not think it necessary in this case to deal with that question at all. It is a difficult question no doubt, but the judgment pronounced goes considerably further than the necessities of this particular case require.

What is said by the pursuer is this, that that document was delivered to her by the deceased, and that it constitutes a *mortis causa* donation, or a present gift with the operation suspended until the death of the granter. I am of opinion that that document did not and could not constitute a donation of any kind. The mere delivery of it carried nothing, and I am inclined to think that the adjection of these words "after my death" rendered the whole transaction nugatory and null. I think it made it so anomalous a donation, as was said in the case of *M'Arthur-Stewart* (M. 1408), that it was not capable of receiving any effect at all. As a donation it clearly carried nothing, because it could not even be acted on or presented while the man was alive. It was a peculiar way of making a bequest, and I venture to say that the proper application of a credit with the bank could not be so far innovated on as to make it a vehicle of a testamentary conveyance. And this document is either a testament or it is nothing at all. It is a bequest of a certain sum of money which a banker happened to hold belonging to the drawer of the cheque, to be paid after his death. Now, how are we to regard such a thing? I do not think that that is a habile mode of making a testamentary bequest, because this cheque might be countermanded at any time. I therefore think it is a document that carries nothing at all.

In the second place, this man granted this cheque, and sometime afterwards disposed of his whole estate, conveying his residue to certain testamentary legatees. I am of opinion that that necessarily destroyed any testamentary character which this writing had before. It was his last will, and was dated subsequent to the alleged donation. I am therefore of opinion that this action must fail entirely. There is no ground whatever for it to rest upon.

Lord Young—I concur. The action is directed against the executors of the deceased Mr Grant for the sum of £100, and it is laid—as I think it only could be laid—in the record upon either donation in the sense of gift *inter vivos* or a valid bequest. These are the two alternatives—either that he gave her a hundred pounds during her lifetime (which was a somewhat difficult position to maintain), which the executors of the deceased could somehow make an effectual gift, or that the deceased had made a valid bequest of that amount. Mr Strachan put the case entirely on gift *inter vivos*, Mr Campbell Smith put the case entirely on *donatio mortis causa*, which are entirely different grounds I need hardly say. Both of them repudiated legacy. There is therefore no doubt about this, that it is either a gift *inter vivos* or a *donatio mortis causa*, or a legacy, for there may be an opinion that it was a legacy. Let me first say a word or two upon the case considered under each of those heads.

1. Gift *inter vivos*:—I quite agree that a gift of any amount of money or of any article of property may be completely made and well established by parole evidence. But it must be made. A promise of anything—of £1, £10, £1000, a piece of plate, or a horse—is nothing if mentioned only as a probable intention, and it will impose no legal obligation. But if the donation is once made—if the donee gets the money—if the donor hands the money or gift out of his own possession into that of the donee, the person to whom he gives it, then that he has so handed it over with the intention of bestowing it in gift is always capable of being proved by parole. But it must be handed over. The party giving must dispossess himself—put it entirely beyond his own control and his own use—and put in possession of it the party to whom he gives it. There has been a marvellous amount of difficulty manifested in the language of some of the decisions upon this to me very obvious matter. I ventured to suggest in the course of the argument that the typical case of a gift was of bread or meat or money given to a beggar, and the amount is of no consequence to the legal principle, though it may be

of vast importance in connection with the person claiming the gift. Upon considering the evidence whether it was a donation or not, the beggar would easily be able to prove that a shilling was given to him; another kind of beggar would be able to prove a gift of £5. He would probably have difficulty in proving by parole alone a gift of a piece of gold plate, because people would not believe him that it had been given to him. But the gift of a piece of gold plate is quite capable of being proved by parole. Indeed, many people who have received presents of gold plate would have no other way of proving the gift. They do not take a written deed from the donor in order that they may keep the gift. It is quite capable of being proved by parole if it is disputed, and if there is no other way of proving it. I go further and say—for I think it equally clear—that an excellent mode of making a gift, and a very common mode of making a gift is by giving a cheque. If a pious or charitable person, at the same time wealthy, makes a gift to a pious or charitable or religious institution, and gives a cheque for that purpose, the gift is perfectly complete. The donor cannot recal it. For I quite assent to that contention. It is not in his power to recal the gift, except for some very good reason. If there has been deception or fraud, there may be, so to speak, a stoppage *in transitu*, but if he has honestly and intentionally made a gift of his £5, £10, or £50, according to his wealth, by giving a cheque to the person who solicited his contribution, it is beyond his power altogether, and given gratuitously into the possession of another. It may be a necessitous individual upon whom he has compassion, or it may be an institution; it does not in the least signify if he has given his cheque as a donation. That gift shall be completely effectual, and shall be proved by parole evidence. Now, here if a cheque had been given to this woman as a cheque is given to a necessitous individual, instead of a £5 note which the party has not at hand, and it had been proved that this one was meant as a manifestation of his bounty to her, I should have thought the case clear beyond all possibility of doubting it, even although he had died before she presented the cheque, because then he would have meant to dispossess himself of the money, to possess her of it, and put it completely in her control and out of his. If he had not done it, the law would not have sustained any action against him; but the law, as I understand it, is, that while it will completely uphold a completed gift, and retain the donee in possession, yet it will not aid the donee to recover what he has not got, for then the gift is not complete.

But what was the thing given here? An order to pay something to himself or to the bearer after he was dead—a sum of money. Did he thereby dispossess himself of anything? Did he possess her of anything? Not one farthing. His whole property was his own to give away to anybody he pleased other than her—to squander it if he liked. He may not have left a farthing to satisfy her or anybody after his death. He would be taking nothing from her in using all his means. In short, as I have already said, he did not dispossess himself and possess her of anything by giving her this cheque. Therefore there was no completed gift. A completed gift was incapable of being made by handing a document in such terms to another. There is an end therefore of the case of gift. It could not take place. He did not possess her of anything, for he did not dispossess himself.

2. *Donatio mortis causa*:—*Donatio mortis causa* is a technical expression, and it means a gift *sub modo* by a person ill and in expectation of speedy death, it being revocable—indeed, not taking effect if he does not die—that is, if he recovers from his illness—revocable by him at any time while the breath is in his body. It resembles a gift *inter vivos* in this, that it must be given with the intention of benefitting the donee—that there must be delivery to the party benefitted—that is, that the donor must be dispossessed. But it differs in this, that it is *sub modo*. It is revocable if he recovers from his illness. Now, here the alleged donor was not ill of anything but whisky. He was not in any contemplation of death at all. There was no reason, if he meant to benefit her or anybody else by the gift of £100, why he should not make his will and put the gift in it. A *donatio mortis causa* is an exceptional proceeding in an emergency by a dying individual—"There, take you that clock, take you that watch, take you that £10 note; if I die, as is most likely, keep these as your own. There is no time to make a will. If I do not die, why there is nothing done." The doctrine as it exists in our law is very well stated by Mr Snell in his book on Equity, where he states the law of England, the principles of which I believe to be entirely the same with respect to this matter as our own. He says—"It is essential to a valid *donatio mortis causa* that it should be made in such a state of illness or expectation of death as would warrant a supposition that the gift was made in contemplation of that event. A *donatio mortis causa* is always made on the condition, expressed or implied, that the gift shall be absolute only in case of the donor's death, and shall therefore be revocable during his life. Therefore if the donor recover from his illness, or if he resume the possession of the gift, it will be defeated . . . And to the validity of *donatio mortis causa* there is the further and all essential requisite of delivery. For if the intention be expressed in writing (which is also more formal than words), but no delivery takes place, even though the document be signed by the donor it will be ineffectual as a *donatio mortis causa*, for in effect it is a legacy, and the writing will be held a testamentary document." I do not know how you could distinguish *donatio mortis causa* from legacy if you have no delivery. Whether expressed orally or in writing it is just a legacy, or an intention of the person giving, that a certain other person should at his death have a certain sum of money. Our law admitting of the exception from a distinct class of cases of the *donatio mortis causa*, in the peculiar circumstances requires wills and legacies to be in writing, and to be expressed as such. Now, it was not maintained for a moment that this was a will. If it had been, then nothing could be more clear than that it was not the last will. There was a later will which revoked this will, if it was a will.

These, then, are the three heads—gift *inter vivos*, *donatio mortis causa*, and legacy—and under all three the case entirely fails; and it is impossible to say that it fails more clearly under any

one head than under another. It is equally clear under all.

Lord Craighill—I concur. If the document founded on is anything it is a bequest. It is not a donation *inter vivos*, because no money was delivered. The cheque no doubt was given, but that, as it was to be payable only after the granter's death, was delivery of nothing by him. His estate remained what it would have been had the document in question been neither made nor delivered. Further, there was not the condition of a *donatio mortis causa*, for Mr Grant was in perfect health at the time, and thus a necessary condition of *donatio mortis causa* was not fulfilled. If anything, therefore, the document was a testamentary bequest, and as such, whatever was intended, it was inefficacious, because the document is neither holograph nor tested. A cheque is inhabile for the constitution of a legacy. Were it otherwise, a man's estate might, though in his power and possession at his death, be carried to a stranger after his death though he left neither will nor testamentary disposition.

Lord Rutherfurd Clark—I also concur. I think there could be no donation in this case. There is certainly no donation of money, for there could be nothing given except the cheque which is said to have transferred the money from the deceased to the donee. But it is certain that no money passed from the deceased during his lifetime; and this document could not operate any transference of money from the deceased during his lifetime. It was not intended that it should do so, because in effect, according to its expression, it was only intended to operate in his succession. Hence I think it is a document in accordance with its true character testamentary, and not being a legally sufficient testamentary document, I think it fails.

The Court pronounced this interlocutor:—

"Find that the pursuer has failed to prove that the late John Grant made a *donatio mortis causa* or a bequest to her of the sum sued for: Therefore sustain the appeal; recal the judgment of the Sheriff-Substitute of 24th October 1883; assoilzie the defenders from the conclusions of the action, and decern," &c.

Counsel for Pursuer (Appellant)—Campbell Smith — Strachan. Agent—William Officer, S.S.C.

Counsel for Defenders (Respondents)—Mackintosh—Jameson. Agents—Boyd, Jameson, & Kelly, W.S.

Thursday, June 5.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

WILSON *v.* ROBERTSON.

Jurisdiction — Foreign — Extension of Foreign Judgment—A. S., 21st June 1883—*Prorogation.*

An application made in the Court of Bankruptcy in England by "D. H. & T. W.," a firm of law-agents in Edinburgh, having been unsuccessful, an order for costs was pronounced in that Court, which bore to be against "D. H. W. & T. W." That order having been registered in the Bill Chamber in terms of the English Bankruptcy Act 1869 and relative Act of Sederunt of 21st June 1883, the holder charged "D. H. W." individually to pay the amount contained in it. He brought a suspension in the Bill Chamber, in which he alleged that he had been no party to the proceedings in the English Court, not having been at the time of the application a partner of "D. H. & T. W.," and that his individual name had been fraudulently or erroneously inserted into the order for costs. The charger maintained that the Court had no jurisdiction except to enforce the order without inquiry, but the Lord Ordinary having allowed a proof he took part therein without taking the judgment to review. The facts alleged by the suspender were proved, and the Lord Ordinary suspended the charge. The charger reclaimed and argued that the proof was incompetent, since the Court was bound to enforce the order without examination or inquiry into it. *Held*, that having acquiesced in the judgment allowing a proof, and taken a judgment on the facts, the charger was not thereafter entitled to object to the jurisdiction of the Court to examine whether the suspender's name had been erroneously introduced into the decree.

Opinion (*per* Lord Justice-Clerk and Lord Young) that it was competent for the Court, when its jurisdiction was invoked by the charger for the purpose of enforcing the decree as a decree of the Court of Session, to examine into the allegation that the name of a person not a party to the proceedings had been by fraud or error introduced into the order, and on this being proved to give the remedy of suspension of the charge.

Opinion (*per* Lord Rutherfurd Clark), that the Court could only stay execution to enable the party wronged to apply for a remedy to the English Court which granted the order.

In July 1881 Andrew Ross Robertson filed a petition in the Court of Bankruptcy in London for liquidation under the English Bankruptcy Act 1869. In that petition he was designed as of 12 Calthorpe Street, Gray's Inn Road, in the county of Middlesex, agent. In his affidavit the petitioner swore that he had resided in England since 1876, and had had no residence or domicile in Scotland or elsewhere other than in England since that date, and had no intention of residing in Scotland. He obtained his discharge, and after he had obtained it an application was filed in the same Court on behalf of "D. H. & T. Wilson, law-agents and conveyancers, Edinburgh," for an order to annul and vacate the said discharge and other proceedings in the liquidation, on the ground that the English Court had no jurisdiction to entertain the proceedings, as the petitioner was then, and had been since 1876, domiciled in Scotland, and that no notice of the proceedings had been given to them as creditors. This application was, after sundry proceedings, dismissed with costs (which were afterwards, on 4th August 1882, taxed at £75, 3s. 5d.), to be paid by the applicants to Robertson, the petitioner.