liable to Lupton & Company in the contract price.

LORD YOUNG was absent.

The Court dismissed the appeal in the conjoined actions, found in fact and in law in terms of the interlocutor appealed against, and of new decerned in terms of the said interlocutor.

Counsel for the Appellants—W. Campbell, Q.C. — M'Lennan. Agent — George Matthewson, S.S.C.

Counsel for the Respondents—Solicitor-General (Dickson, Q.C.)—Constable—Constable & Johnstone, W.S.

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*Saturday, June 30.*

## SECOND DIVISION.

[Sheriff of Forfarshire.

## TAGGART *v.* HIGGINS' EXECUTOR.

*Donation—Donation mortis causa—Entry of Name in Saving's Bank Pass-Book—Proof of Intention to Make Gift of Amount in Pass-Book—Delivery.*

On 27th July 1896 A, a millworker, having a credit account for about £50 with a savings bank, got her sister B's name added to her own in the bank pass-book, and her account thereafter was kept in the name of herself and B, "to be repaid to either of them." Under the bank's rules B could have drawn money from the account, but she never did so. A was a weekly visitor at the bank, either putting in or drawing out money. The bank book was in A's possession when she died on 11th February 1899.

An action was raised at the instance of B to have it declared that the money payable by virtue of the bank pass-book had been validly donated *mortis causa* to her by A, and a proof was led from which it appeared that A had stated to certain witnesses that she had added the pursuer's name to her own in the bank-book because she intended her to get the money after her death, but had stated to certain other witnesses that she intended her brother to get a share of the money. *Held* that the pursuer had failed to establish a *mortis causa* donation by A to B of the sum contained in the pass-book.

In April 1899 Mrs Margaret Higgins or Taggart, wife of Moses Taggart, Dundee, with consent and concurrence of her husband as her curator and administrator-at-law, raised an action in the Sheriff Court at Dundee against John Cochrane, weaver, Dundee, executor-dative of the deceased Margaret Higgins, millworker there. The pursuer prayed the Court "to find and declare that the sum of £50, being the principal sum payable by the Dundee Savings Bank, under and in virtue of the bank pass-book No. 6485, in name of the deceased Margaret Higgins and pursuer, with interest accrued thereon, was validly donated *mortis causa* to pursuer by the deceased Margaret Higgins; to find that the defender as executor aforesaid is not entitled to obtain payment of said sum or to interfere with or prevent pursuer obtaining payment of the principal sum and interest as aforesaid, and to interdict him accordingly."

A proof led before the Sheriff-Substitute (SMITH) disclosed the following facts:—Margaret Higgins, a sister of the pursuer, died on 11th February 1899, aged seventy. She had an account with the Dundee Savings Bank from February 1876. On 27th July 1896, about which time she came out of the infirmary after undergoing an operation, she got the pursuer's name added to her own in the bank pass-book, and her account thereafter was kept in the name of herself and the pursuer, "to be repaid to either of them." From that date till the death of Margaret Higgins' the account stood in the two names, and the amount at its credit was always between £56 and £50. Under the bank's rules if the pursuer had come to draw money from the account it would have been paid to her, but for sums of £3 and upwards she would have required to sign her name before she got the money. The pursuer had never drawn money from the account. Margaret Higgins herself was practically a weekly visitor to the bank, either putting in or lifting money. The bank book was in the possession of Margaret Higgins at her death. She had a habit of talking to her relations and neighbours about her money, and a considerable amount of evidence was led as to what she said on the subject during the last three years of her life. The pursuer deponed that in 1896 Margaret Higgins "requested me to go down to the Savings Bank to get my name put into her bank account, as she wanted me to get the money;" that after the name was added, Margaret Higgins had said to her "that she wished me to give her a respectable funeral, and that I could keep the balance of the money in the bank to myself," and that Margaret Higgins "left the bank book repeatedly with me." Four other witnesses for the pursuer deponed that Margaret Higgins had declared to them that she had added the pursuer's name to her own in the bank book because she wanted the pursuer to get the money after her death, and that she intended that the pursuer should get it. One of these witnesses, however, also deponed that she had heard Margaret Higgins say that she might live to use the whole of the money herself. For the defender, James Higgins, a brother of Margaret, gave evidence that she had told him that the pursuer's name was put into the bank book in order that she might be able to go to the bank and draw whatever money Margaret Higgins wanted when the latter was unwell, and five other witnesses deponed that Margaret Higgins had declared to them that her brother James Higgins would get a share of her money when she died.

On 13th December 1899 the Sheriff-Substitute (SMITH) pronounced the following interlocutor:—"Finds that the wish and intention of the deceased Margaret Higgins was that her sister Mary, the pursuer, should receive payment of her money in the Dundee Savings Bank is clearly proved, and that the mode of making a donation *mortis causa* adopted by the deceased though unusual is, in the circumstances of the parties, not incompetent, and is of sufficient legal validity to entitle pursuer to decree," &c

The pursuer appealed, and on 24th March 1900 the Sheriff (JOHNSTON) pronounced the following interlocutor:—"Sustains the appeal and recals the interlocutor appealed against: Finds that the deposit-account of the deceased Margaret Higgins, which for ten years had stood in her own name with the Dundee Savings Bank, was, on or about January 6th 1896, transferred to the names of said Margaret Higgins and Mary Higgins or Taggart, her sister, 'to be repaid to either of them:' Finds it not proved that the change was made *animo donandi*, or otherwise than for convenience in operating on the account: Therefore assoilzies the defender from the conclusions of the petition," &c.

The pursuer appealed, and argued—A *mortis causa* donation had been here constituted in favour of the pursuer. The Sheriff-Substitute, who heard the evidence, had found that it was the wish and intention of the deceased Margaret Higgins that the pursuer should receive the money at her death. The money was entered in the account by the wish of the deceased as payable to either herself or the pursuer. Delivery was not necessary to prove donation—*Crosbie's Trustees* v. *Wright*, May 28, 1880, 7 R. 823; *Blyth* v. *Curle*, February 20, 1885, 12 R. 671; *Macfarlane's Trustees* v. *Miller*, July 20, 1898, 25 R. 1201, Lord President Robertson 1208, and Lord M'Laren, 1211. This case was stronger than these, as the circumstances showed constructive delivery.

Counsel for the defender was not called upon.

At advising—

LORD TRAYNER—I have carefully considered the circumstances of this case, and I have come to be of opinion that the judgment of the Sheriff is right. It is no doubt settled that delivery is not necessary to the completion of *donatio mortis causa*. I do not quite understand how there can be donation without delivery. Donation is just giving, and giving is delivery. Sometimes, no doubt, there may be a donation of an incorporeal right, as, for example, in the case of a deposit-receipt, which is not money but a voucher for money. The right to the money may be transferred by the endorsation and delivery of the deposit-receipt, the receipt in that case representing the subject of the donation. I concede, however, that looking to the decisions, delivery of the thing, or of that which represents the thing, is not essential to *donatio mortis causa*. But although this is settled in principle, cases of this kind must always depend to a great extent on their own particular circumstances. It is noticeable here that the bank pass-book was not delivered to the pursuer. It is her own evidence that "she (the deceased) repeatedly left the bank book with me," which shows that it had not been permanently delivered to her. But delivery of the bank pass-book, though it may be some evidence of an intention to transfer its contents, does not go very far. It is to my mind insufficient to support the inference of *donatio mortis causa* unless accompanied by evidence which unequivocally proves that the deceased intended to make a present gift. Here I think that there is no evidence that the deceased ever intended a present gift to the pursuer. There is no evidence that she ever used words of present gift. There is evidence of such expressions as "I intend Mary to get my money," "I intend James to get my money." These are expressions of future intention, not of present gift, and many people give expression as to their intention with respect to the future disposal of their money, and alter that intention before they die. The entry of the pursuer's name in the bank pass-book is not evidence that the deceased did not alter her intention, assuming that she at one time intended to leave the money to the pursuer. The entry cannot operate as a *mortis causa* conveyance. If the pursuer fails to establish *donatio mortis causa* her case fails. Looking to the evidence I am of opinion that the pursuer has failed to establish her case. There is evidence on the one side, and there is evidence on the other, but I am of opinion that there is just about as much evidence to show that the pursuer's brother James was to get a share as that the pursuer was to get the whole. I am not satisfied that the deceased intended to leave her money to the pursuer, and I am clear that she did not in her lifetime give it to the pursuer *mortis causa*.

LORD MONCREIFF—I am clearly of the same opinion. After the decisions in *Crosbie's Trustees* and the other cases cited I think that we must hold that delivery of the bank book was not essential to instruct donation *mortis causa*. But that does not help us very far. We must be satisfied that the alleged donor had the *animus donandi*—that she intended that the appellant should get the whole of her money at her death. I do not think that the appellant has established that. I know of no case where a claim of this kind has been sustained upon evidence which showed that the alleged donor had during her life given two such different versions of what she intended to be done with her money after her death.

The entry in the bank book alone is not enough; it is merely evidence of intention *pro tanto*, and requires to be supported by other evidence. In the present case we have a body of evidence on both sides. Some witnesses say that Margaret Higgins told them that the whole of the money was

to go to her sister the appellant; others testify that she assured them that her brother James was to get a share. She seems to have intentionally played upon their hopes and fears, and possibly did not know her own mind. In these circumstances I do not think there is sufficient evidence to sustain the present claim.

LORD JUSTICE-CLERK—The view which your Lordships have taken I take also. While the case of *Crosbie's Trustees* must be followed in similar circumstances, I do not think that it is an authority which should rule except in practically similar circumstances. The present is a different case altogether. If the doctrine laid down in *Crosbie's Trustees* is to be followed, the circumstances of the case must prove the intention of the donor absolutely and conclusively. But here the evidence comes to this, that on different occasions this old lady expressed diverse intentions to different people, so that no-one can find out the decision which she arrived at, or whether she definitely intended to dispose of her funds in a particular way. I think it is impossible to say that there is no doubt as to the intention of the alleged donor. I am therefore of opinion that the conclusion which the Sheriff has arrived at is right.

LORD YOUNG was absent.

The Court refused the appeal.

Counsel for Pursuer—Guthrie, Q.C.—T. B. Morison. Agents—Mackay & Young, W.S.

Counsel for Defender—Younger. Agents—Curror, Cowper, & Buchanan, W.S.

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*Saturday, June* 30.

## SECOND DIVISION.

[Sheriff of Forfarshire.

## MONCRIEFF *v.* LANGLANDS.

*Parent and Child — Illegitimate Child — Aliment—Offer by Father to Place Male Child of Seven Years in Care of a Stranger.*

An offer made by the father of an illegitimate male child seven years of age, to place it in the care of a stranger, is a good defence to a claim by the mother for future aliment, provided that the Court is satisfied as to the suitability of the person in whose custody the father proposes to place the child.

This was an action at the instance of Mrs Alison Moncrieff, with consent of her husband Alexander Moncrieff, yarn dresser, Dundee, against Charles Langlands, overseer, Dundee, for the aliment of her illegitimate male child born on 19th August 1892, of which the defender was admitted to be the father.

The petition concluded (1) for certain arrears which the pursuer alleged to be due for the period prior to 19th August 1899, when the child reached the age of seven; and (2) for a sum of £7, 16s. yearly thereafter as aliment for the said child.

The defender stated that he had paid aliment up to 24th August 1899, on which date he offered to take the custody of the child, and that his offer was refused by the pursuer, and he therefore refused to pay any further aliment. He stated further, that being temporarily absent from this country in pursuit of his calling he had arranged to place the child either under the care of one Mrs Macdonald, residing near Dundee, or with his brother.

He pleaded (2) "The defender is entitled to make his own arrangements for the upbringing and education of the child, in respect the child is over seven years of age, and pursuer has been married since its birth."

On 22nd December 1899 the Sheriff-Substitute (CAMPBELL SMITH) decerned in terms of the prayer of the petition.

The defender appealed to the Sheriff (JOHNSTON), who on 9th March 1899 pronounced an interlocutor in these terms—(After dealing with the claim for arrears), "Finds that the defender not being in this country his offer to board the child with strangers, or even his brother, is no sufficient answer to the claim for aliment: Therefore decerns him to pay aliment at the rate of 3s. per week from said 24th August 1899 until the date hereof, and thereafter quarterly in advance, with interest as craved: Finds the defender liable to the pursuer in three-fourths of her taxed expenses. Allows an account," &c.

*Note.*—"I think the law is that unless there is something exceptional in the case, a father of an illegitimate child is entitled at the age of seven years to say, in answer to a claim to contribute further aliment, that he is willing to receive the child into his own house, but I do not think that this extends to entitling him to say that he will provide for its support in someone else's house. I have not given decree for future aliment down to any definite date, because the defender may return home and then make a legitimate offer to receive the child into his house."

The defender appealed to the Court of Session. It was stated by his counsel at the bar that he now proposed to entrust the child to the care of Mrs Macdonald.

Argued for the defender and appellant—The father of an illegitimate child was entitled when it reached the age of seven to provide for its support and upbringing as he thought best, subject to the condition that his offer must be made in *bona fide*, and that the proposed arrangement was suitable—*Grant* v. *Yule*, February 29, 1872, 10 Macph. 511; *Shearer* v. *Robertson*, November 29, 1877, 5 R. 263; *Westland* v. *Pirie*, June 1, 1887, 14 R. 763. The Sheriff's view that the father was not entitled to provide for the child's upbringing elsewhere than in his own house was unsound. It was not said here that the person with whom the defender proposed