and Duncanson, the only parties interested, and they did so by putting so much into the inventory, as it was agreed that Duncanson should have a property title too. The only two parties interested agreed that that should be the position of affairs, and it is an observation of no value whatever that the articles were put into the inventory at lower prices than were to be paid to Green & King. That was a matter for the parties themselves.

Duncanson having paid the £10,000, and having the furniture representing it inventoried as his with the consent of Jefferis, proceeded to give Jefferis possession of it by lease, the rent to be paid being according to the legitimate arrangement of parties equivalent to interest at 5 per cent. on the price paid by Duncanson for the thing leased. It was to be £500 a-year. That was the bargain. It was carried out by being reduced to formal deeds in July and August, in pursuance of the agreement of parties, but these deeds expressed the arrangement which had been acted upon all along. I put the question during the argument—After all this had passed, after the furniture had been sent in and divided, and the inventory made and the rent fixed and paid by the tenant, what as between Jefferis and Duncanson themselves was the title on which Jefferis held? There could be but one answer. Jefferis put his name to a deed, being *sui juris* and solvent, and in pursuit of a legitimate end, in which he says he holds £10,000 worth of furniture on a contract of hire. Who can say that was not his position? If he could not say so, neither could his creditors. If he had been transgressing the bankrupt law or committing any fraud someone might have had a right to object; but it was a perfectly fair open transaction, and neither he nor his creditors, nor his trustee, who takes *tantum et tale* as he had, could object. The suggestion in such cases always is that there is something unfair to creditors. But how? Nobody is entitled to suppose that the tenant of a great hotel like this has the property of the furniture. It may be with him on hire. That is a matter for inquiry. The result of inquiry here would have been that Duncanson was proprietor and Jefferis lessee of the furniture. There was absolutely nothing in which the creditors of Jefferis were interested, and the case is undistinguishable from that of Duncanson going to his own tradesman and ordering the furniture and sending it to the hotel. It would then have been in the hotel all the same, and Jefferis' possession would have been all the same. I am therefore of opinion—and I believe that is really the opinion of the Court—that here Jefferis held this furniture as lessee, or upon a contract of hire with Duncanson, and that so far as he did not in pursuance of that contract purchase it and pay for it before his bankruptcy it does not pass to his creditors or to his trustee, but remains the property of Duncanson.

Lord Craighill and Lord Lee concurred.

The Court adhered.

Counsel for Complainer — Asher — Guthrie. Agent—Thomas White, S.S.C.

Counsel for Respondent—D.F. Kinnear, Q.C. — J. P. B. Robertson. Agents — Hamilton, Kinnear, & Beatson, W.S.

Monday, January 31.

OUTER HOUSE.

[Lord Curriehill, Ordinary.

YOUNG *v.* DUNCAN AND OTHERS (DONALD'S TRUSTEES).

Donation mortis causa—*Delivery*—*Writ.*

A deposited a sum of money with commissioners for certain public works, taking the receipt in name of himself and B, his housekeeper, the sum being made repayable to them or the survivor of them. B had for several years lived with A, who was her cousin, keeping his house and attending him through serious illness. She and a brother of A both deponed that he had frequently spoken of his intention of providing for her, and shortly before his death had told them where the said receipt was to be found. A died without making any other provision for B. *Held* that the circumstances were sufficient to instruct a donation *mortis causa* and to dispense with the necessity of delivery.

This was an action raised by Mrs Margaret Peacock or Young and her husband for declarator that a sum of £200 contained in an interim receipt by the Dundee Water Commissioners, dated 28th May 1879, became the absolute property of Mrs Young on the death of John Donald, in whose favour along with Mrs Young the receipt was granted. The defenders were the trustees under a trust-disposition and settlement executed by the said John Donald, and they resisted the action, claiming the sum as part of the executry estate of the deceased. The pursuer, who was a married woman, but had for fourteen years been separated from her husband, had lived for three years in a house belonging to Mr Donald, who was her cousin, immediately above his own dwelling-house, and had acted as nurse and housekeeper to his mother, who lived with him, so long as she lived, and thereafter to Mr Donald himself, he being given to drink and in a very precarious state of health. Mr Donald died on 28th April 1880. The pursuers averred that during the period she acted as nurse and housekeeper to Mrs Donald, she (Mrs Donald) "frequently told her son to recompense the pursuer for her kind services, and he promised to do so. Accordingly the said John Donald, who was possessed of considerable means and estate, both heritable and moveable, on or about the 28th May 1879, in implement of his promise, and out of gratitude to the pursuer for her services to himself, uplifted from the British Linen Company's bank at West Port, Dundee, the sum of £200, and invested it as a loan to the Dundee Water Commissioners, and took a receipt from Mr Donald Farquharson, their treasurer, for the said sum, which was to be repaid to himself and the pursuer, or the survivor of them, exclusive of the *jus mariti* and power of administration of any husband the pursuer might marry." She further averred that Mr Donald informed her "that he had invested the sum of £200 for her, and that the interest would pay a rent of £8 a-year, and that she could give the money to her friends after her

death. He also informed her brother George that he had invested the money for the pursuer, and very shortly before his death he told the pursuer where she would get the paper for the money." It will appear from the Lord Ordinary's note that the substance of these averments was established.

The pursuer pleaded—"(1) The sum of money deposited, in terms of the receipt condescended on, having on the death of the said John Donald become the property of the pursuer, she is entitled to decree as concluded for."

The defenders pleaded—"(3) The pursuer having no right to the sum contained in said receipt, the defenders are entitled to absolvitor. (4) The sum contained in said receipt being the property of the said John Donald, the receipt having been retained by him, and being undelivered to the pursuer, passed on the said John Donald's death, to the defenders as his trustees and executors."

The Lord Ordinary after hearing evidence led pronounced the following interlocutor:—"The Lord Ordinary having considered the cause, Finds, decerns, and declares against the defenders in terms of the declaratory conclusions of the summons: Decerns and ordains the defenders to pay to the pursuer the sum of £200, with interest as concluded for: Finds the pursuer entitled to expenses," &c.

His Lordship appended this note:—"In this action the pursuer Margaret Peacock or Young asks to have it found and declared against the executors of the deceased John Donald, plumber, Dundee, that 'the sum of £200 sterling contained in an interim receipt by the Dundee Water Commissioners, dated 28th May 1879, in favour of the said John Donald and the pursuer or the survivor of them, became the absolute property of the pursuer on the death of the said John Donald,' and she asks payment of that sum.

"The money unquestionably belonged originally to John Donald. It had been lodged in his own name on a deposit-receipt (dated 12th December 1878) with the British Linen Company's branch bank at Dundee, and it was uplifted by him about the end of May 1879, and was at the same time lent by him to the Dundee Water Commissioners, who granted therefor the interim receipt referred to. The terms of the receipt are as follows:—'I, Donald Farquharson, treasurer of the Dundee Water Commissioners, and as acting on their behalf, hereby acknowledge that I have instantly received from Mr John Donald, plumber, Upper Pleasance, Dundee, and Miss Margaret Young, his housekeeper, repayable to them or the survivor of them, and that exclusive of the *jus mariti* or power of administration of any husband the said Miss Margaret Young may marry, the sum of £200 sterling as a loan to the said Commissioners for the purposes of the Dundee Water Acts, for the period to the term of Whitsunday 1884. To bear interest from this date at the rate of four per cent. per annum until paid. And I undertake that a statutory mortgage shall be granted for the said sum when required, or, alternatively, that it shall remain on receipt and be repayable at anytime on a month's notice.' It is proved that this investment was made personally by John Donald immediately after he had uplifted from the bank the proceeds of the deposit-receipt.

"John Donald died on 28th April 1880, and the pursuer, who had been informed by him where she would find the receipt, took possession of it immediately after his death, but having been shortly thereafter compelled by his executors to hand the receipt to them, she has brought this action to vindicate her alleged right to the money. She maintains in the record that on the death of John Donald the money so invested by him at once became her absolute property. In course of the argument, however, her counsel maintained that she was entitled to the decree sought by her on one or other of three grounds, viz., (1) That by taking the receipt in these terms John Donald made to her an *inter vivos* donation of one-half of the money and a donation of the other half contingent on her survivance; (2) That it was equivalent to a personal bond with a destination which on the death of John Donald vested the property absolutely in her as the survivor; and (3) That it was a donation *mortis causa*.

"The first of these propositions appears to me to be distinctly negatived as well by the terms of the document as by the evidence in the cause. During the life of John Donald it is quite plain that the pursuer could not have uplifted or demanded the money in whole or in part, and if she had predeceased him the whole fund would certainly have belonged absolutely to him, and the evidence shows that he himself uplifted the interest when it fell due, and applied it to his own purposes.

"The second proposition, viz., that the document operated as a personal bond with a destination appears to me to be equally untenable.

"If indeed a statutory mortgage had been granted in favour of John Donald and the pursuer and the survivor of them, the case might have been different, but the character of the document of debt as actually taken by him is more nearly that of an ordinary banker's deposit-receipt than any other document known to the law.

"It may be that the money which was to be repayable on a month's notice could not have been repaid during their joint lives without the signature both of the pursuer and of John Donald, but I cannot doubt from the whole evidence in the cause, and particularly from the pursuer's own statement, that she did not consider she had any indefeasible right whatever to interfere with the money during John Donald's life, and that all she expected was that it would belong to her on his death; and further, I do not think that the receipt itself operated either as a donation of the money or as a bequest of it to the pursuer.

"The case of the pursuer therefore appears to me to depend upon the third branch of her argument, viz., that the money was given to her as a donation *mortis causa*. It is now settled that delivery of such a document is not essential to the constitution of a donation *mortis causa*, but there are several matters which are essential to such a donation. There must be clear proof—(1) That the donor truly intended to make to the donee a gift of the money for which the receipt is the voucher; (2) That he did or said something equivalent to delivery, such as declaring in an unequivocal manner that the money should belong absolutely to the donee at his death, and

the evidence of the donee alone is not sufficient proof of these material facts, but must be supported by satisfactory oral or written evidence or by pregnant facts and circumstances; and (3) That the donor was either labouring under the disease of which he died, or at all events was in the belief, whether well or ill founded, that he was a dying man when the gift was made.

"In all cases of this kind the history of the connection of the parties—the donor and donee—is important. John Donald resided with his mother, the late Martha Donald, in Dundee, where he carried on business as a master plumber. He had several brothers and sisters, the oldest of the family being George Donald, who acted as his foreman, and used to take his meals in his brother's house at least five days a week. In the latter years of his life John Donald seems to have lapsed into drunken habits, and in the year 1877 his mother, who was then far advanced in years, asked the pursuer (who was her niece and a cousin of John Donald's) to come and look after her and her son John. This the pursuer did, and she and her daughter Betsy Young went to reside in a cottage belonging to John Donald, adjoining his own house, but it appears that by far the greater part of her time was spent in Donald's house waiting upon and nursing him and his mother. Old Mrs Donald died early in 1878, but during the latter months of her life it is proved that she repeatedly requested her son John to reward the pursuer for her attention and kindness, and indicated that the reward should take the shape of a free house to her. John Donald promised to take care of the pursuer, and after his mother's death the pursuer continued till his own death to be in constant attendance upon him, and she seems to have been a kind and watchful nurse—the task being by no means an easy one owing to the unfortunate habits of the deceased.

"In or about April 1879 Donald appears to have had a severe illness, and while recovering from that illness he informed the pursuer that he meant to invest £200 for her behoof, the interest of which would be hers alone, and he also informed her that his intention was that the money which then lay in the British Linen Company's Bank on deposit-receipt in his own name should be invested for her behoof with the Dundee Water Commissioners. Now, this does not rest upon the pursuer's statement alone, because George Donald, the brother of the deceased, was not only present and heard what took place, but was actually sent to the bank with the deposit-receipt in order that he might uplift the money and make the investment with the Water Commissioners. There seems to have been some difficulty about cashing the deposit-receipt, in consequence of John Donald's ordinary current account being then overdrawn with the bank, and on George Donald reporting this John Donald said that he himself would look after the money as soon as he was able to go out. Now, if we are to believe the testimony of the pursuer and of George Donald on this branch of the case—and I can see no ground for doubting its truth—the fact seems clear that John Donald did at that time intend to benefit the pursuer to the extent of that sum of £200, and I think it was not unnatural that John Donald, on recovering from his severe illness in April, should take advantage of his returning health to fulfil his promise to his mother, and to make some provision for the pursuer in case another and more serious attack might supervene and carry him off with his promise unfulfilled. And accordingly, as soon as he was able to go out, he himself went to the bank, cashed the receipt, and took the money to the Dundee Water Commissioners, and made the investment in the terms already cited, which are certainly not inaptly conceived, if his intention was to confer this benefit upon her at his death. It is said by the defenders that the taking of the receipt in this form was a common practice with John Donald — their statements on this point being that 'owing to the habits of the deceased for some years before his death, which had the effect of in a great measure disabling him from easily transacting business or managing his pecuniary affairs, Mr Donald had been in the habit of investing and depositing his funds not simply in his own name, but conjoining with his own the name of some other person in order that it may be realised without putting him to any trouble, and even without it being necessary that his own signature should be obtained. In these instances the documents were usually made payable to either or the survivor as in the present case. This was done without intending to confer, and without conferring, any right whatever on the person whose name was joined with Mr Donald's, but was solely for Mr Donald's convenience.'

"Now, in the first place, the receipt in question is not taken in name of John Donald and the pursuer 'or either or the survivor.' It is in name of John Donald and the pursuer 'or survivor,' so that he could not have uplifted the money without himself being at the trouble of signing the receipt along with the pursuer. But in the next place the evidence shows that of four deposit-receipts produced by the defenders, viz., 13th September 1876 for £150, 29th August 1877 for £100, 27th November 1877 for £100, and 12th December 1878 for £200, only the first two are taken in name of John Donald and his mother 'payable to either or survivor,' and it is impossible now to say why he took these receipts in those terms. One thing however is certain, that they were both cashed by him on his own endorsation alone, although his mother was then alive. The other two receipts were taken in name of himself alone, although at the date of the earlier of the two (November 1877) his mother was then alive. It is not immaterial also to observe that in 1878 he had deposited with the Water Commissioners another sum of £200, the receipt thereof being taken in his name alone. And as regards his ordinary account-current with the bank, while it is true that for a year or two before his mother's death that account was so kept that it might be operated upon by either himself or his mother, it is proved that this was done to enable her to draw money for the purposes of his business in the event of his absence, but that from the time of her death in January 1878 till 3d March 1880 the account was kept in name of himself alone. At the last-mentioned date (within seven or eight weeks of his death), John Donald being then confined to the house and believing himself to be dying, caused the account to be kept in name of himself and his brother George, to enable the latter to draw

money for the business. It is thus quite clear that the terms in which the receipt in question was taken were not intended to facilitate the realisation of the money and save John Donald trouble, and I am on the whole satisfied that he intended by means of that receipt to secure the money at his death to the pursuer. And I further think that it is clearly proved that he made statements to that effect not only to the pursuer but to his brother George at the time. And I should here observe that George Donald appears to be a witness *omni suspicione major*. I was favourably impressed with his appearance in the witness-box, and his interest is adverse to that of the pursuer, whose success in this action will materially diminish the share of the deceased's succession to which he is entitled under his brother's settlement.

"But even although the pursuer has up to this point succeeded in proving her case, something more is needed to establish a donation of the receipt to her *mortis causa*. She must show that the deceased indicated or expressed his intention of giving her that money after he had contracted his last illness, or, at all events, he believed himself to be dying. Now, the pursuer depones, that at all events from the beginning of March 1880 until 28th April, when he died, John Donald believed that he was a dying man, and when in that condition he told the pursuer to look into a tin box in a drawer in his room and that she would there see the Water Commissioners' receipt, which was to belong to her at his death. All this is corroborated by the testimony of George Donald, whose deposition is as follows—'(Q) Have you heard your brother John speaking to the pursuer about having made provision for her?—(A) Yes. I have heard him say she would be all right, and so would we too—his brothers and sisters. (Q) Did you hear him say anything about this receipt?—(A) Yes. I understood him to say it was the pursuer's when he died. (Q) Did you ever hear your brother say anything about the money that was invested with the Water Commissioners?—(A) Yes. He said it was hers after his death. I first heard him say that shortly after he deposited it. I don't remember the dates. (Q) Did you hear him say that at any other time?—(A) He always spoke back and forwards about it when he was sitting at the fire. If I happened to be up all nights writing or anything he would begin cracking about it and say we would be all right as he was wearing away. On the Sunday before my brother died I had a conversation with him. He spoke about the receipt incidentally like, and said, "I do not think, George, I will be long living," and I said "I hope you will get better yet." He said "I do not think it;" and after mentioning one thing and another and cracking away, he said, "You will be all right, and Mrs Young." Mrs Young was not there at the time. She was "but" in the kitchen.' And in cross-examination he says—'(Q) When did your brother first begin to think that his health was breaking down, and that he was likely to come to an end?—(A) As far as I could say, just about a month or two before he died. He used to crack to me and say he would never get better. It might be a couple of months before his death when he first said that to me, and it might not be so much. I can say nothing more definite than that. I have heard him complaining before that of not being well, but not expressing any apprehension that his health was breaking up. I know that my brother had disposed of his property by will. I expected that I would benefit by his will, but I did not know before his death what I was to get. I got a share of his moveables and a share of his heritable property. By his will he provided for everybody connected with him—all his relatives—to some extent. (Q) Did your brother in your presence make any reference to the money invested with the Water Commissioners on the Sunday, Monday, or Tuesday before his death?—(A) Not particularly that I recollect of. (Q) Why did you tell the pursuer to take the Water Commissioners' receipt after your brother was dead?—(A) Because John told me it was hers. He told me that after he had invested the money in her name in 1872. He said the money was hers after he died. He never spoke of it particularly after that, but generally he did. (Q) What do you mean by generally?—(A) Just that we were all made right, and Mrs Young too. (Q) Did he ever mention the deposit-receipt or bring up that special sum of money at the time when he deposited it?—(A) Yes. He told me to look into the box and I would see it there. That was about the beginning of the year I think. He was speaking about it and other things. There was a a bill in the box, and he was speaking about it being due, and he asked me to look into the box and see when it was due. (Q) What was the purpose or need for you looking at the receipt of the Water Commissioners in the beginning of 1880?—(A) To let me understand it was for the pursuer. That is the only purpose I can see.' And Betsy Young, the daughter of the pursuer, also swears that John Donald frequently said to her that her mother would be all right, and that she would be all right through her mother.

"Now, if John Donald in making all these observations about having provided for the pursuer, or having made her all right, was not making reference to the Water Commissioners' receipt of £200, then he was saying what he must have known was not true, because in his will, which was dated 4th April 1876, he had made no provision for her, and if she does not get this Water Commissioners' receipt she simply gets nothing. Now, the evidence of these three witnesses, viz., the pursuer, her daughter Betsy Young, and the deceased's brother George Donald, who was almost constantly in his brother's house until his death, and seems to have been cognisant of all his affairs, is in itself both consistent and highly probable, and is entirely unshaken by cross-examination, and uncontradicted by counter evidence.

"It is said, indeed, by the defenders that the gift of the sum of £200 is not the kind of provision which John Donald promised his mother to make for the pursuer, namely, a house rent free, and that he might have easily given her the liferent of one of his houses. That is quite true, but I do not think that the observation weakens the pursuer's case. John Donald had in 1876, and before his promise to his mother, made his settlement, by which he conveyed all his houses to trustees, with directions to give the rents and annual produce thereof to his brothers and sisters, and after their death to realise and divide the whole proceeds among his grandchildren. And

I can quite understand that he might be unwilling to alter his settlement or make a codicil thereto for the purpose of literally fulfilling his promise. Indeed, I think it was a most natural proceeding on his part on recovering from his illness in the spring of 1879 to resolve to make a sure provision for the pursuer, who had faithfully nursed him, by investing at once some money for her behoof. It appears to me that the terms of the receipt in question, when contrasted with those of the other receipts of the Water Commissioners for £200, dated 1st June 1878, in his own name alone, go very far indeed to prove that at all events in May 1879 the deceased had a fixed intention of giving the pursuer £200 at his death. I think it is proved that he then communicated that intention not only to the pursuer but also to his brother George, and that he repeatedly during his last illness, and when he believed himself dying, referred to that document as being a provision for the pursuer on his death. On the whole, I am of opinion that the pursuer has established as matter of fact that the deceased gave her this receipt as a donation *mortis causa*.

"I ought, perhaps, before concluding, to say that the defenders argued strongly against donation, on the ground that the deceased, who himself dictated the terms of the receipt, therein described the pursuer as Margaret Young his housekeeper, and excluded the *jus mariti* of any husband she might marry, although he must have been aware that she was then a married woman. I confess I am unable to see how the mistake (if it be a mistake) in the designation of the pursuer should affect the donation in her favour if otherwise competently proved. I may further mention that she had for fourteen years been separated from and had had no intercourse with her husband, and it is quite possible that at the time he took the receipt John Donald may have forgotten that she was anything but a widow, but, as I have already said, an error of the kind pointed out by the defenders cannot, in my opinion, affect the present question. The result of the whole case is that the pursuer is entitled to the decree which she asks, with expenses."

In this judgment parties acquiesced.

Counsel for Pursuer—Macfarlane. Agent—Thomas M'Naught, S.S.C.
Counsel for Defenders—J. A. Reid. Agent—J. Smith Clark, S.S.C.

Saturday, February 26.

FIRST DIVISION.

CAMPBELL AND ANOTHER (RANKINE'S TUTORS-NOMINATE), PETITIONERS.

Tutor-Nominate — Nobile officium — *Powers* — *Necessity and Expediency.*

Tutors-nominate petitioned for authority to accept a reconveyance of certain building feus. It appeared that the feuar was unable to pay the feu-duty, which was considerably in arrear, and that the rate of feu-duty was higher than the depressed state of the building trade in the locality warranted; but the pupil's estate was in no way embarrassed in its circumstances. The Court (*dub.* Lord Deas) *authorised* the tutors to accept the reconveyance on the ground that the expediency of the course proposed was so great as to amount to necessity in the legal sense.

This was a petition by the tutors-nominate to the children of the late W. M. Rankine of Dudhope. The estate of Dudhope lies wholly within the burgh of Dundee, and previous to his death Mr Rankine had feued to David Bremner, builder, certain areas of building ground belonging to the estate at the rate of 8s. per pole or £64 per acre, Bremner being taken bound to erect dwelling-houses within four years of the date of the feu-disposition to the value of £6000 at least, and being entitled in disposing of the subjects in parts to allocate the feu-duty in sums of not less than £24, so that each part was to be liable for its allocated feu-duty only. Houses to the value of £6000 were erected within the stipulated period, and the feu-duty relating thereto allocated as above; but with reference to the areas as yet unbuilt upon the petition set forth "That at the date of the death of the said William Macbean Rankine the said David Bremner was due a considerable sum for arrears of feu-duty. In consequence of the great depression in the trade of Dundee the building trade has suffered likewise, and there is now no prospect of laying out money to advantage in the erection of houses on the ground feued. Mr Bremner feels himself unable to pay the annual feu-duty for which he is still liable; nor is he able to give your petitioners any security for the future payment of the feu-duty for the ground still unbuilt on." In these circumstances Mr Bremner requested the petitioners to accept a reconveyance of the areas still unbuilt upon, and in consequence this petition was presented to obtain the authority of the Court to that act of administration, the petitioners further stating that they "are satisfied that the said David Bremner is not in a position to be able to pay the annual feu-duty for the portion of ground he now wishes to reconvey to your petitioners; and your petitioners are satisfied that it would be for the benefit of the estate that such reconveyance should be accepted by them."

The Court remitted the petition to the Junior Lord Ordinary (Adam), who remitted to Mr Patrick Adam, S.S.C., to inquire and report. The substance of Mr Adam's report sufficiently appears from the following note added by the Lord Ordinary (Lee) to his interlocutor reporting the petition to the Court:—

"*Note.*—This is an application by the tutors-nominate of the heir of the late Mr Campbell Rankine of Dudhope for power to transact with a feuar—to whom the deceased proprietor, by his factor and commissioner, had granted certain feus—for a discharge of his obligations under the feu-disposition to the extent of £139 per annum, upon payment of arrears of feu-duty to Martinmas 1879, and upon his granting a reconveyance of the feus which have not been built upon.

"The circumstances in which the application has been made are set forth in the petition, and the Lord Ordinary understands from the petitioners' counsel that although the report of Mr Adam does not expressly bear that these circumstances have been found by him to be accurately