"I am much obliged for your favour enclosing cheque value £240 for the third party risk of the So. Staffd. Tramway Co. from the 24th inst." I do not think that in the absence of any qualifying words the terms of the receipt are ambiguous, and I think that they exclude liability for risk on the 24th. But it was maintained by the pursuers that the terms of the receipt were ambiguous, and might be read as either excluding or including the 24th, and that when read in connection with the correspondence of 19th and 20th November, they must be read as including that day.

But then I do not think that the receipt is to be construed by the correspondence. The subsequent accident had produced an entire change of circumstances. Mr Miller, the defenders' secretary, and Mr Hatchett, the pursuers' secretary, had a meeting on the 26th. What then passed is thus described by Mr Miller in his evidence—"I said"—"It is fortunate for us you have not paid the premium. He said if he had not had to send the cheque to one of his directors for signature it would have been duly paid. I referred him to the stipulation in our policy as to the payment of premium, and I said that now we should take care not to accept the premium except from the 24th in consequence of the accident." The defenders accordingly instructed Mr Mizon to accept receipt of the premium as from the 24th so as to exclude liability for the 24th. Mr Mizon accepted receipt in the terms I have quoted. The receipt was accepted without objection by the Tramway Company. It was not granted in the terms it bears with reference to the previous correspondence, but with reference to the supervening accident. I think that the defenders accepted payment of the premium in terms of the receipt, and not otherwise. I think that these terms, unless they are to be construed with reference to the previous correspondence, exclude liability for the accident on the 24th. But I think they are not to be so construed, and therefore that the Lord Ordinary's interlocutor ought to be adhered to.

LORD M'LAREN—I agree with the leading proposition of your Lordship in the chair, with one qualification or explanation, which I have no doubt your Lordship will assent to. If the preliminary contract between the parties be for cash against the issue of a policy, then if a casualty occurs before the policy is issued, and before the premium is paid, the nature of the risk is altered, and the company is no longer bound to proceed in the execution of the preliminary contract. But if the contract be for a running account, according to the practice in relation to marine policies, the occurrence of a casualty before the issue of a formal document does not entitle the underwriter to resile, because the agreement is for a running account. I merely mention this in order that it may not appear that we have overlooked this distinction, or may have decided anything contrary to the principles in the decided cases on marine policies. Now, it being once determined that the occurrence of a casualty while matters are entire does entitle the underwriter to resile, then I think all the rest follows plainly as set forth in your Lordship's opinion, and that in this case there was no obligation to issue a policy as from the date originally proposed. Accordingly, when the company agreed to issue a policy "from the 24th," they must be taken to have meant what their words primarily mean, and what is in accordance with their legal rights—a policy taking effect from the day after the casualty occurred.

LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuers—Asher, Q.C.—C. S. Dickson. Agents—Ronald & Ritchie, S.S.C.

Counsel for the Defenders — Dean of Faculty Balfour, Q.C. — Ure. Agents — Simpson & Marwick, W.S.

Wednesday, July 13.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

SHAWS *v.* MUIR.

Donation -Donatio inter vivos.

A, a tradesman, having executed a trust-deed for behoof of his creditors, B purchased his business from the trustee, and thereafter entered into an agreement with A, wherein he agreed to take him into his service in connection with the business at a weekly wage, and, without coming under any legal obligation on the subject, expressed his intention to apply one-half of the profits derived from the business, so long as A remained in his service, for the benefit of A's family. A remained in B's service for some years, and during this period B credited him annually in the books of the business with half the profits. After A's death B wrote to his children informing them of the sum standing at A's credit, and in a subsequent letter he talked of this sum as set aside for their benefit, and said that he would continue to make quarterly remittances until both principal and interest were exhausted. *Held* that by his letters to A's children B made them an irrevocable donation of the whole sum standing at A's credit at the date of his death, and that he was not entitled to make any deduction from this sum on account of bad debts incurred during A's life.

In the year 1876 the affairs of William Shaw, grocer and wine merchant in Helensburgh, became embarrassed, and he granted a trust-deed for behoof of his creditors. Shaw's business was sold by the trustee, and was acquired by Robert Muir, who thereafter, on 26th December 1876, entered

into an agreement with Mr and Mrs Shaw, whereby, on the narrative that he had purchased the business from motives of friendship for Mrs Shaw and her young family, he agreed to take Shaw into his service in connection with the business at the wage of £2 a week. The third article of the agreement was in these terms — "The said Robert Muir, without coming under any obligation on the subject which can be enforced by the second party or by either of them or by their creditors, records his intention to apply in such way and manner as he may think most expedient to or for the benefit of the second party or their family a proportion equal to one-half more or less of the free profits, if any, that may be derived from the said business so long as the said William Shaw remains in his service."

After the execution of the agreement Shaw entered upon the management of the business, but the drawings were collected by Muir every evening for payment into the bank. Muir also struck annual balances in the books of the business, in which he credited the profits in equal proportions to Shaw and himself, and out of the profits so credited to Shaw, Muir paid him considerable sums every year in addition to his weekly wage. Shaw died in 1881, having been predeceased by his wife in 1880. The amount standing at his credit in the books of the business at the balance preceding his death was £750. After Shaw's death his children went to live with their grandmother Mrs Robb, to whom Muir made quarterly payments for their behoof out of the sum standing at the credit of Shaw's account.

On 7th September 1882 Muir wrote to Mrs Robb sending a statement "showing how the ledger stands at date." The statement enclosed showed a sum of £532 still standing at Shaw's credit.

In 1885 Muir declined to make any further payments for behoof of Shaw's children, though a sum of £223, 2s. 9d. still remained of the amount which stood at Shaw's credit at the date of his death.

The present action was brought by Shaw's children against Muir's executrix for payment of this sum of £223, 2s. 9d.

The pursuers referred to the agreement executed on 26th December 1876, and to the statement enclosed in Muir's letter of 7th September 1882, and averred (in condescendence 6) that Mr Muir "continued thereafter to make quarterly payments to Mrs Robb on account of board, &c., for the pursuers, and both verbally and by letter declared his intention of continuing these payments until both the principal and the interest of the sum which stood at the credit of their father's account at his death were exhausted.

The defender denied this averment, and stated that after Shaw's death it was discovered that Shaw had pursued a reckless system of giving credit to all and sundry, which had led to the accumulation of book debts of a worthless kind; that the debts which had proved irrecoverable amounted to £367, 3s. 4d., one-half of which Mr Muir had written off against his own share of the profits, and the other half against Shaw's share, and that the amount thus written off was £223, 2s. 9d.

The defender pleaded—(3) The pursuers' statements are irrelevant and insufficient in law to support the conclusions of the action.

In support of the averment made by them in condescendence 6, the pursuers produced a letter written by Mr Muir to Mrs Robb on 21st January 1884, which concluded with this passage—"Regarding the money that I from feelings of friendship at the time set aside for the benefit of your grandchildren (Shaws), I shall continue to remit to you regularly every quarter the sum fixed on for their board, &c. until both the principal and interest are exhausted."

On 4th March 1892 the Lord Ordinary (STORMONTH DARLING) sustained the third plea-in-law for the defender, and in respect thereof dismissed the action.

"*Opinion.*—This action is brought by the children of the late William Shaw, who was at one time a grocer and wine merchant in Helensburgh, against the executrix of Robert Muir, who was a draper there, and their demand is, that the defender should pay them the sum of £223, 2s. 9d. which they say was the unpaid balance of profits arising on the business carried on in Helensburgh under the name of Shaw & Company.

"It seems that Mr Shaw's affairs became embarrassed, and he found it necessary to grant a trust deed for behoof of his creditors. In order to benefit his wife and children, and incidentally to confer some benefit on Shaw himself, Mr Muir came forward and purchased the goodwill of the business, and he entered into an agreement with Mr and Mrs Shaw, which is No. 12 of process. Under that agreement, upon the narrative that he was acting entirely out of goodwill towards Mrs Shaw and her family, it was agreed that Mr Shaw should take charge of his business as his servant, and that so long as he remained in the service, Mr Muir, without coming under any obligation on the subject which could be enforced by Mr and Mrs Shaw or either of them, or by their creditors, recorded his intention to apply in such way and manner as he might think most expedient, to or for the benefit of the Shaws or their family, one half of the free profits, if any, that might be derived from the businees. It is not maintained by the pursuers that under that agreement they or their late father derived any right as at law to a share in the profits. They admit that it was left entirely in the option of Mr Muir to apply for their behoof a portion of the profits or not as he saw fit, and also to decide in what way and manner that should be done. But they say that the moment he set aside in his books a certain share of the profits in name of Mr Shaw, there then arose a vested right in Mr Shaw to receive that share of the profits.

"I cannot assent to that view of the agreement. The defender says that after Mr Shaw's death he became satisfied that

the profits had been over-estimated, and that in order to make allowance for debts which had proved to be irrecoverable, the share of profits intended for the Shaws had to be reduced by the sum of £223, 2s. 9d. Now, it seems to me that under the agreement Mr Muir remained absolute master both of the question whether or not he should pay a share of the profits to the Shaws, and also of the question what these profits were; and I cannot think that by the mere entry in his own books of a sum as appropriated to Mr Shaw, he in any way debarred himself from afterwards correcting that sum, or even of saying that he had changed his mind and would no longer make a gift of these profits—for it was a gift—in the only way in which such a gift could effectually be made, namely, by payment."

The pursuers reclaimed, and argued—The expression of an intention to give followed by an overt act done in pursuance of the donation, and relied on by the donee, constituted donation — *Smith* v. *Smith's Trustees*, November 26, 1884, 12 R. 186. So here, when Muir, after expressing his intention to give, intimated to Shaw's family that he had placed a certain amount to their father's credit, and declared that he would make it forthcoming to them, there was a completed and irrevocable act of donation.

The defender argued — The agreement placed Muir under no legal obligation to give, and the subsequent letters merely expressed the friendly intentions he entertained of assisting Shaw's family, and did not constitute a donation—*Thomson, &c.* v. *Dunlop*, January 23, 1884, 11 R. 453.

At advising—

Lord President — The Lord Ordinary has dismissed this action on the ground that the averments are irrelevant. His Lordship's note shows very clearly that the view of the case present to his mind when he gave his decision was more limited than, and different from, that presented to us to-day. His Lordship treats the pursuer's averments as amounting to no more than this, that Mr Muir set aside in his books a certain sum in name of Mr Shaw; for, after stating that, his Lordship says, "I cannot think that by the mere entry in his own books of a sum as appropriated to Mr Shaw, he in any way debarred himself from afterwards correcting that sum, or even of saying that he had changed his mind and would no longer make a gift of these profits." In that observation I entirely concur.

It is necessary to turn to the agreement to see the precise position reserved by the agreement to Mr Muir, and the degree of control retained by Mr Muir over the business which had belonged to Mr Shaw. In the first place Mr Muir undoubtedly bought Shaw's business, and bought it to the exclusion of Shaw, but then the agreement provides—"Third, The said Robert Muir, without coming under any obligation on the subject which can be enforced by the second party or by either of them, or by their creditors, records his intention to apply in such way and manner as he may think most expedient, to or for the benefit of the second party or their family, a proportion equal to one-half more or less of the free profits, if any, that may be derived from the said business, so long as the said William Shaw remains in his service." I take the result of the agreement to have been that Muir was master of the situation as to how much he would give to Shaw and his wife or their children. He might give to any or to none as he pleased, and he was the absolute dictator of the amount of the gift. The result accordingly was that Muir did not require to acquaint Shaw or his family with the mode in which he arrived at the determination of the amount of the profits. He could make up his mind in any way or by any method he pleased, and the books of the business being his, any entry made in them was an entry in his private books, and the sum entered was entirely in his own control.

At this stage I think we reach the point in the case which was not before the Lord Ordinary. It is not the entry in the defender's books that the pursuers now rely on. They allege that intimation was given by the defender to their grandmother, with whom and in whose care they were living, that he had made a statement setting forth the money which he had resolved to give them, and that he transmitted it to her for her information, and that following upon that "Mr Muir continued to make quarterly payments to Mrs Robb on account of board, &c., for the pursuers, and both verbally and by letter declared his intention of continuing these payments until both the principal and the interest of the sum which stood at the credit of their father's account at his death were exhausted." In illustration of these averments the pursuers have produced the letter which is quoted, and I may say at once that I read the last paragraph of that letter as declaring that the sum set forth in the statement of account was the children's money, and that the writer (that is, Mr Muir) would pay it over by instalments until it was exhausted for their benefit. When I say I so regard the letter, I am taking it according to the averment on record, and I say that if the pursuers succeed in proving the genuineness of that letter, the paragraph I have referred to contains a declaration by Mr Muir that he was the debtor of Mr Shaw's children for the amount specified in the statement of account, and precludes him from going back upon it. At present we are merely dealing with the averments of the pursuers on record; and the answer of the defenders to the averments which cover the letter in question is "denied." Accordingly, while defining my opinion on the meaning of the letter put before us by the pursuers, I think we must allow a proof. At the same time, it would not, I think, be fair to the parties were I to reserve my opinion as to the relevancy of the statements made by the defender as to the loss suffered owing to bad debts. As I have said, Mr Muir was master of the situation

as to the sum which was to be set aside. He fixed the amount of that sum, and he could have, and may have, provided for the chance of bad debts occurring. In my opinion he has turned himself into the children's debtor for the amount set aside by what he has done. The defence, therefore, which is founded on the occurrence of bad debts, is in my judgment not relevant. It is necessary, in order that the pursuers may have an opportunity of proving the documents on which they rely, that the parties should be allowed a proof, but the defender will probably not deem it necessary to go through that procedure.

LORD M'LAREN—I agree in holding that by the two letters of 7th September 1882 and 21st January 1884 intimation was given by Mr Muir to the children of Mr Shaw, through their grandmother and natural guardian, that he had appropriated a certain sum as their share of the profits of their father's business which Mr Muir had purchased. He was under no obligation to make the appropriation, but when the business was purchased Mr Muir certainly held out the prospect that such an appropriation would be made, and be it that Mr Shaw could not have sued upon the terms of the agreement, I think it follows that after the sum had been fixed there was an irrevocable appropriation made for the benefit of Shaw's family in accordance with the intention expressed in the agreement. I should therefore deprecate any inquiry into the amount of the profits of the business, and undoubtedly there does not seem to be any subject for inquiry but the validity of the letters. But as the record is not in such a form as to raise this question very well, I think we may allow a proof in general terms in case anything may have been overlooked.

LORD ADAM and LORD KINNEAR concurred.

The Court allowed the parties a proof of their averments.

Counsel for the Pursuers—Cook. Agents—Sang & Moffat, S.S.C.

Counsel for the Defender—A. S. D. Thomson. Agents—Thomson, Dickson, & Shaw, W.S.

HIGH COURT OF JUSTICIARY.

Thursday, July 14.

(Before the Lord Justice-Clerk, Lord Young, and Lord Trayner.)

EASTBURN *v.* WOOD.

Justiciary Cases—Bye-Law ultra vires of County Council—Suppression of Nuisances—52 and 53 Vict. cap. 50, sec. 57.

Section 57 of the Local Government (Scotland) Act 1889 enacts that the county council may make "such bye-laws as to them seem meet . . . for prevention and suppression of nuisances not already punishable in a summary manner by virtue of any Act in force throughout the county."

A bye-law providing that "Every person who writes upon, soils, defaces, or marks any wall, fence, hoarding, or building with chalk or paint or in any other way, or who without authority affixes or causes to be affixed to any church, chapel, or school-house, or, without the consent of the owner and occupier, to any other building, or to any wall, fence, hoarding, door, gate, pillar, post, tree, or notice board lawfully exhibited, any bill or other notice," should be liable in a penalty, *held* to be *ultra vires* of the county council under the said section.

By section 57 of the Local Government (Scotland) Act 1889 (52 and 53 Vict. cap. 50) it is enacted "(1) The council of a county may from time to time make such bye-laws as to them seem meet for the administration of the affairs of the county, for the prevention of vagrancy, and for prevention and suppression of nuisances not already punishable in a summary manner by virtue of any Act in force throughout the county, and may thereby appoint such penalties not exceeding in any case £5 as they deem necessary for the punishment of offences against the same."

On 13th May 1891 the County Council of the county of Midlothian adopted the following bye-laws for the suppression of nuisance and vagrancy under the said section—"1. Every person who writes upon, soils, defaces, or marks any wall, fence, hoarding, or building with chalk or paint or in any other way, or who without authority affixes or causes to be affixed to any church, chapel, or school-house, or, without the consent of the owner and occupier, to any other building, or to any wall, fence, hoarding, door, gate, pillar, post, tree, or notice board lawfully exhibited, any bill or other notice; and 2. Every person who causes any hand-bill, waste or soiled paper, rags, or other similar material, to be strewn, laid down, or to fall upon any street, road, or other thoroughfare, or adjoining fences; and 3. Every person who, in any street, road, close, court, thoroughfare, or public place, wilfully and indecently exposes his person, or commits any nuisance, or places or lays down any ashes, rubbish, or other filthy or offensive matter or other thing, except for immediate removal; and 4. Any street musician or singer or other person who continues to sound or play any musical instrument or sing in the neighbourhood of any inhabited house after having been required by any inmate of such house, or by any officer of police, to depart; and 5. Every person found begging, or placing themselves or otherwise acting so as to induce, or for the purpose of inducing, the giving of alms, and all persons conducting themselves as vagrants, having no fixed place of residence, and no lawful means of gaining their livelihood within the county,