sconded. It seems to me that even taking the case as one in which the only question is which of two parties innocent of the fraud of the common agent must suffer, the loss should fall on the pursuer (1) because he gave a peculiar facility for the committal of the fraud in signing a deed expressly in favour of the defenders; and (2) because he left that deed in the hands of Renton for a considerable time without insisting on being informed as to the particular use which had been made of it. While, on the other hand, the deed granted was one on which the defenders were entitled to rely, having given valuable consideration for it, and on which they must be held to have relied for a considerable time before any challenge was made to their serious prejudice if the deed were now set aside; for if the deed had been challenged even in the end of August, I see no reason to doubt they would by an immediate claim against Renton have averted any loss. On these grounds I am of opinion that the pursuer's action fails.

LORD PRESIDENT—I had the advantage of perusing several days ago the opinion which has been delivered by the Lord Justice-Clerk, and I concur in every word of that opinion.

The Court adhered.

Counsel for Pursuers — Kinnear — Strachan. Agent—D. Milne, S.S.C.

Counsel for Defenders—Moncreiff—Campbell Smith. Agent—John M'Millan, S.S.C.

Friday, May 28.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

CROSBIE'S TRUSTEES *v.* WRIGHT.

Bank — Deposit-Receipt — Succession — Donation mortis causa—Legacy—Presumption.

A deposit-receipt in names of R.C., A.W., and Mrs C.W., his wife, for £3500, "to be paid to any or survivor or survivors of them," was taken by R.C., who repeatedly told the said A.W. and C.W. (his sister and her husband) that its contents were to be for their benefit, he being for some time in knowledge that he was ill of a mortal disease. Some weeks after his death the receipt was accidentally discovered by Mrs W. in her house, in the leaves of a book which lay in a drawer seldom used. In an action raised by the trustees under R.C.'s trust-settlement against Mr and Mrs W.—*held* (1) (following *Cuthill* v. *Burns*, March 20, 1852, 24 D. 849, and subsequent decisions) that a deposit-receipt cannot of itself operate as a testamentary bequest; but (2) that the facts proved amounted to an effectual donation *mortis causa* of the contents of the receipt to Mr and Mrs W.

Observed that such a gift can be completed without proof of actual delivery.

Mr Robert Crosbie, contractor, Gilmerton, died on 26th June 1879, aged sixty-six, leaving a trust-disposition and settlement, under which the pursuers in this action were the trustees, original and assumed. By this deed Mr Crosbie, after various bequests, left the residue of his means and estate to be converted into cash for the benefit of the poor of the parishes of Liberton and Gilmerton. The defenders who appeared in the action were Mrs Wright, a sister of Mr Crosbie, and her husband Mr Alexander Wright. Mr Crosbie's estate consisted of heritable property to the value of £223 per annum or thereby, and personalty to the amount of about £1485. There was also a sum of £3500 contained in a deposit-receipt, which was the subject of the present action. This deposit-receipt was in the following terms:—

"£3500 stg. "*Newington Branch*,
"*British Linen Company Bank*,
"*Edinburgh, 21st June* 1878.

"Received from Mr Robert Crosbie, Gilmerton, Mr Alexander Wright and Mrs Christina Wright, 32 E. Preston St., Three thousand five hundred pounds stg., to be paid to any or survivor or survivors of them, which is this day placed to the credit of their deposit account with the British Linen Company.

(Signed) "J. W. URQUHART, Agent.
(Endorsed) "ALEXANDER WRIGHT.
"CHRISTINA WRIGHT."

It was the last of a series of similar deposit-receipts dating from 1872 onwards, which Mr Crosbie had taken from the British Linen Bank, his custom being to renew his receipt each year and draw the interest which had accrued.

The conclusion of the summons in the present action was for declarator that the sum contained in this receipt formed part of Mr Crosbie's trust-estate, the defenders Mr and Mrs Wright maintaining that it had passed to them as a *mortis causa* donation. The ministers for the respective parishes of Liberton and Gilmerton were also called as defenders, but no appearance was made for them. Proof was led, from which it appeared that for a considerable time before his death Mr Crosbie was labouring under a mortal disease, and knew that he was dying; that he had repeatedly told the defenders, with whom he was on terms of great intimacy and affection, that he intended the contents of the deposit-receipt which he was from time to time renewing to be for them; that the receipt itself was accidentally discovered on 4th August 1879 by Mrs Wright in the leaves of a book which lay in a drawer in her house, and which had not been used for a considerable time; and that Mr Crosbie's last visit to her house had been about six weeks before his death, on which occasion he was known to have been in the room where the drawer was.

The pursuers pleaded—"(1) The sum of money deposited in terms of the deposit-receipt condescended on having been the property of the said Robert Crosbie at the time of his death, must be held to form part of the trust-estate conveyed to the pursuers."

The defenders pleaded—"(1) The deceased Robert Crosbie having made an effectual gift of the deposit-receipt and the contents thereof to the defenders, the same thereby became their property. (2) Alternatively, the deceased by placing the deposit-receipt where it was found, made an effectual donation of the said receipt and the contents thereof to the defenders *mortis causa*, and the same became irrevocable upon his death."

The Lord Ordinary (Rutherfurd Clark) decerned against the defenders, and found both parties entitled to their expenses out of the residue of the estate. No note was added to the interlocutor, but the following notes, taken by counsel, of his Lordship's remarks in giving judgment were printed and laid before the Court:—"The first question is, whether on the death of Crosbie this document was sufficient to pass property—whether, in other words, it could operate as a will without anything further being proved? The authorities are against this—deposit-receipts do not operate as wills, or contain operative destinations. It is difficult to distinguish such documents and ordinary personal destinations which do receive effect. But it is not necessary to inquire into this, for the Court has refused to give to those the same effect as to heritable titles, moveable bonds, or titles to shares. The document alone, therefore, is not sufficient to entitle the defenders to prevail. In all cases the Court has first to consider, not whether the document existed, but whether it was delivered. There is no case in which such a document was sustained unless delivery with intention was proved. The remaining question therefore is, was the deposit-receipt delivered? That the deceased wished the defender to benefit is as certain as day. The statements of the witnesses are absolutely truthful. Any expression of intention, however, does not operate as delivery, and the only thing instructing delivery is, that it was found, not in his own house, but in the house of his brother-in-law, in a parlour, in a drawer among articles of very little value with which deceased had no concern. How did it come there? I do not know, and nobody does. It is suggested that it was put there as the best means that a man shy and reticent could use to complete donation so as to avoid an outflow of gratitude; possibly, but nobody knows how it came there, and it cannot be held that it being there is a proof that it is there as a gift."

The defenders reclaimed, and argued—There was here a donation *mortis causa*. Mr Crosbie's intention was evident, and the circumstances in which the receipt was found amounted to delivery. The legal rule that gift is not to be presumed might apply in cases of debt, trust, or mandate, but the gift was here to be inferred from the facts and circumstances. But (2) apart from the proof, and assuming that delivery was not established, the terms of the deposit-receipt itself were sufficient to convey the sum to the defenders as having survived Mr Crosbie. The judgment in cases like *Watt's Trustees* proceeded mainly on the ground that deposit-receipts were documents of a mercantile character; but they were not enumerated as such in the books (*e.g.* Bell's Prin., sec. 2232), and were practically becoming less so every day. Personal bonds might be taken with a particular destination—why not deposit-receipts? This might be an instance of that *tertium quid* between donation *mortis causa* and legacy by will which Lord Neaves (*Watt's Trustees*, 7 Macph. 933) called an "investment with a destination."

The respondents (pursuers) replied—The document was in Mr Crosbie's legal possession at the time of his death, the facts proved not amounting to delivery *animo donandi*, and so passed to his executry estate. There was no *mortis causa* donation; the legal presumption was against this, and could only be rebutted by the clearest evidence. (2) It had been clearly established by the authorities that a deposit-receipt is not a habile document by which to convey a legacy.

Authorities—*M'Cubbin's Executors* v. *Tait*, Jan. 31, 1868, 6 Macph. 310, 40 J. 158; *Morris* v. *Riddick*, July 16, 1867, 5 Macph. 1036; *Watt's Trustees* v. *Mackenzie*, July 1, 1869, 7 Macph. 930; *British Linen Company* v. *Martin*, March 8, 1849, 11 D. 1004; *Collie* v. *Pirie's Trustees*, Jan. 22, 1851, 13 D. 506; *Allan* v. *Mannoch*, Jan. 30, 1861, 23 D. 417; *Barstow* v. *Inglis*, Dec. 5, 1857, 20 D. 230; *Walker's Executors* v. *Walker*, June 19, 1878, 5 R. 965; *Johnstone*, 1710, M. 11,351; *Munro*, 1712, M. 11,352; *Fowkes* v. *Pascoe*, 1875, L.R., 10 Chan. App. 343; *Ross* v. *Mellis*, Dec. 7, 1871, 10 Macph. 197; *Gibson* v. *Hutchison*, July 5, 1872, 10 Macph. 923; *Cruickshanks* v. *Cruickshanks*, Dec. 10, 1853, 16 D. 168; *Cuthill* v. *Burns*, March 20, 1852, 24 D. 849; *Miller* v. *Miller*, June 27, 1874, 1 R. 1107.

At advising—

Lord President—In this case the defenders Mr and Mrs Wright claim that they are entitled to a sum of £3500 contained in a deposit-receipt which belonged to the late Mr Crosbie, who was a brother of Mrs Wright, and consequently a brother-in-law of the other defender Mr Wright, on the ground that Mr Crosbie made a donation of the said sum to the spouses *mortis causa*. Mr Crosbie died at the age of sixty-six on 26th June 1879, and he left a considerable estate for a person in his position of life. He was a contractor at Gilmerton, and it appears from a statement on record that he "left personal estate to the amount of £1485 or thereby, and heritable property in Edinburgh yielding £223 or thereby."

Now, the inquiry in a case of this kind as to whether donation has been made out will always depend a good deal on the nature of the testamentary arrangements which the deceased has made in reference to the disposal of his estate, and we have here an account by Mr Innes, the agent of the deceased, who gives us light not only as to the settlement which he made on the very day he died, but also as to a previous settlement which was cancelled or revoked on that occasion and the new one substituted in its place. I think it is enough to say that the previous settlement gave certain provisions to his sister, and the residue to his nephews and nieces; but that he subsequently changed his views as to the residue, and in the settlement which he executed on the day of his death he left the residue to the poor of the parishes of Liberton and Gilmerton. The provisions of that settlement are not very complicated nor very many; the important thing is that the estate left, independently of the sum contained in the deposit-receipt, is sufficient to satisfy the provisions of the settlement, and to leave a residue for the poor, and so that sum is not necessary to enable the executors to fulfil the purposes of the settlement. If there was a donation made in the terms alleged by the defenders, there is nothing inconsistent with it in the deceased's settlements, and I think there is no legal principle which compels us to prefer the general conveyance in the settlement, though it is to be held as subsequent in date to the alleged donation, to a

special gift made (if it was so made) immediately before that.

The terms of the deposit-receipt of 21st June 1878 are that the bank have "received from Mr Robert Crosbie, Gilmerton, Mr Alexander Wright and Mrs Christina Wright, 32 East Preston Street, £3500 stg., to be paid to any or survivor or survivors of them, which is this day placed to the credit of their deposit account." Now, I agree with the Lord Ordinary in holding that this is not sufficient by itself to operate as a bequest of £3500 in favour of Mr and Mrs Wright. A document of this kind can have no testamentary operation or effect. I think that is well settled by three consecutive cases—those of *Cuthill* v. *Burns*, *Watt's Trustees* v. *Mackenzie*, and *Miller* v. *Miller*. In the first of these judgments I took part myself when presiding in the Second Division, and the others were determined by Judges of weight and authority. I hold it therefore as settled that a document of this kind cannot of itself operate as a bequest of money in favour of the persons in whose names it is conceived, failing the deceased. But while that is clear, the question remains whether the sum contained in this deposit-receipt was not gifted *mortis causa* to Mr and Mrs Wright, and in that inquiry the terms of the deposit-receipt are very important, and they indicate some sort of purpose on the part of the deceased when he took the receipt in these terms. That indication becomes stronger when we see that this receipt of 21st June 1878 was only one of a series of receipts conceived in the same or similar terms, beginning with a deposit-receipt on 1st May 1872 taken in name of Mr Crosbie himself and Alexander Wright; and the same form was adopted in 1873, 1874, and 1875, it being Mr Crosbie's custom to renew the deposit-receipt annually and take payment of the interest which had accrued for the year. In 1876 a change is introduced in the terms of the receipt for that year, and continues down to the end. Mrs Wright's name is introduced; and it will be seen by-and-bye that this was communicated to Mrs Wright by Crosbie himself. From the terms of the deposit-receipt, which must be held to be a very important article of evidence as to whether a gift *mortis causa* can be here made out, we have thus undoubtedly indications of a purpose of some kind in Mr Crosbie's mind that the money contained in the receipt should in some way be for the benefit of his sister and her husband. All that, however, would not make the deposit-receipt effectual as a bequest or a testamentary paper. All the length it goes is to show that he had some intention of benefitting them to the extent of the sum contained in the deposit-receipt.

Now, the evidence consists to a large extent of that of the defenders Mr and Mrs Wright, and I am not disposed to say that a donation *mortis causa* can in the general case be proved merely by the testimony of the donee. I think that would be a dangerous doctrine, and in one of the cases cited I expressed my decided opinion that such evidence would not be sufficient. But the case here does not depend entirely on the evidence of the donees. On the contrary, besides the terms of the deposit-receipts themselves, and the fact that the money was left in this last receipt so as to indicate a purpose on the part of Mr Crosbie to benefit those relatives, we have this further important consideration, that the evidence of Mr and Mrs Wright corresponds exactly with that history of these deposit-receipts, if I may so express it. The statements which they ascribe to Mr Crosbie as indicating *animus donandi* harmonise exactly with what he was doing in his dealings with his bankers. Mr Wright's evidence on this subject is as follows; and I may say before reading it that Mr and Mrs Wright were living on terms of the most affectionate intimacy with Mr Crosbie during all the year referred to, Mr Crosbie constantly visiting them, and having a room in their house appropriated to him. He says—"On one occasion, early in the summer of 1872, Mr Crosbie told me he had lodged money in bank for my family and myself. He did not tell me the amount, and I never asked him. I said something to the effect that I was very thankful. That was all that passed then. I remember his shortly afterwards buying some house property in East Preston Street. On that occasion he said he would require to lift some of 'that money' to pay the price of the property; but he said there was as much left over as would carry on the business, and he would put it back to the deposit-receipt when convenient, or something to that effect." Here the correspondence with Mr Crosbie's actual doings is of a marked kind; for the facts disclose that in May 1873 (the "shortly afterwards," of Mr Wright's evidence) he drew out £1400 from the former deposit-receipt, reducing it from £4000 to £2600. Then he is asked—"(Q) Did you understand him to be referring to the deposit-receipt that he had spoken of previously to you?—(A) Certainly I did. It was often spoken about. I went to live in East Preston Street in 1874. Previous to that I had been living in Fountainbridge. I remember Mr Crosbie coming on one occasion to my house in East Preston Street, some time after I went there, and speaking to my wife and myself about money matters. It was on a Saturday about the middle of June 1876. He showed the deposit-receipt to my wife and me, and said—'That is for you, Teenie, and your husband.' On that occasion my wife broke down, and said she hoped he would live longer than she or I would. He either said no—that according to nature that was impossible; but should anything happen, that was intended for her and for me. He had the document in his hand and showed it to us. I read it over distinctly. It was a deposit-receipt for £3000 in favour of himself and Alexander and Christina Wright, or the survivor of either of them." All that corresponds exactly with the deposit-receipt of 16th June 1876, in which, as I have already noticed, Mrs Wright's name is for the first time introduced. It also shows that Mr Crosbie had so far fulfilled his purpose of replacing the money he had drawn out, for it amounts now to £3000, and afterwards to £3500. "After that he spoke about the deposit-receipt frequently. On the last occasion when he changed the deposit-receipt, which I think was in June 1878, I was at the bank with him. He went into the bank while I held the pony outside. We had gone to the bank in his pony carriage. When he came out of the bank I remarked to him that he was looking very bad, and asked him why he had stayed so long, as I was afraid he had turned ill in the bank. He said—'Oh, I have

been putting a wee pickle more to yon.'" That must have been in 1877, for it was then that the receipt was increased to £3500. "I smiled, and said it would not be getting less. He said no, no, he did not mean that. I understood him to mean that he was putting more money to the deposit-receipt." Then it appears that Mr Crosbie had several attacks of illness in September 1878, but even previously to that he had been in failing health and was afflicted with a disease which his medical men told him was sure to be fatal. Dr Moir in particular says—"In the summer of 1878 he knew that he was probably dying." Mrs Wright's evidence is to much the same effect as her husband's. I need not read it at length; but I am glad to find that the Lord Ordinary who heard these two persons examined, and had therefore an opportunity of judging as to their credibility, says—"That the deceased wished the defenders to benefit is as certain as day. The statements of the witnesses are absolutely truthful." I therefore accept and trust this evidence as an absolutely faithful statement of what passed between Mr Crosbie and Mr and Mrs Wright.

But the Lord Ordinary's great difficulty was, that though there appeared to have been a clear intention and desire on Mr Crosbie's part to benefit his sister and her husband to the extent of this sum, yet the gift was not completed; and his Lordship seems to think that it could not have been so except by delivery of the deposit-receipt. I am unable to concur with his Lordship. I do not think delivery is absolutely necessary in cases of this kind. The subject of the gift was not the deposit-receipt itself, but the money contained in it; the receipt itself is a mere voucher for the money in the bank. The question is, Was there a previous *animus donandi* in regard to the money so deposited in the bank? I think the Lord Ordinary uses the word "intention" somewhat ambiguously. In one part of his opinion he uses it of an intention *de futuro;* but I think in 1878, when the deceased was afflicted with this disease, and knew he was dying, he had an *animus donandi de presenti;* and if that is conclusively proved, I am not prepared to say that more is required to constitute donation *mortis causa* provided the other elements of such donation be present. All that is necessary is that the giver should be under the impression that he is dying, and that the distinct present desire and intention should be to give the subject to the donee, with a qualified right of property in it—the qualification being, that if the giver survive, the subject may still belong to him; if he die, the donee becomes absolute proprietor of it. I do not say that this is not rather a narrow case, but in the circumstances I think there is sufficient evidence to show, as regards the money deposited in bank, that the intention and desire of the deceased was to make a present gift of it to these relatives, and that he effectually did so.

One other peculiar circumstance of the case must not be left out of view—viz., that the deposit-receipt was not found in the repositories of the deceased. Now, without saying that the circumstance of it having been found in the house of the donee amounts to delivery, we have here a piece of evidence which in connection with the rest goes some way to satisfy my mind of the *enixa voluntas* of the deceased to make a *mortis causa* donation.

Taking the whole matter into consideration, I have come to an opposite conclusion to the Lord Ordinary. I cannot adopt his absolute rule, that the gift cannot be completed without delivery. In the case of *Gibson* v. *Hutchison* Lord Deas and myself held that delivery was not absolutely necessary, and I am reported to have said—"I do not think that actual delivery is necessary to make a donation *mortis causa* effectual, especially if the money stands in the name of the donee." In that case the money stood in the donee's name in very peculiar circumstances. It had stood in the wife's name since before her marriage, and continued to do so for some twenty years after that date; and it was questioned whether the husband thought it belonged to her and not to him; and I had difficulty in holding, in the circumstances, that he could have meant to give it to her. But apart from these specialties there is good authority for the doctrine that the circumstance of there having been no actual transition from the hand of the donor to that of the donee is not necessary fatal to the theory of donation.

On the whole matter I am for sustaining this as a *mortis causa* donation in favour of Mr and Mrs Wright.

Lord Deas—In this case the defenders Mr and Mrs Wright claim to retain from the trustees under the *mortis causa* deed of settlement of the late Robert Crosbie £3500 as having been a *mortis causa* donation by him in favour of them or the successor of them. It is not contended on either side that the sum was a legacy. It was either a *mortis causa* donation or nothing.

Consequently the question is not whether the evidence would be competent and sufficient to prove a legacy, but whether there be evidence competent and sufficient to prove a *mortis causa* donation? The pursuers Mr Crosbie's trustees say that there is not so, and on that point the *onus* is undoubtedly on the defenders. The trustees say further that even supposing the donation to be competently and sufficiently proved, it has been revoked by the trust-deed and settlement in their favour executed by the deceased on the day of his death.

The difference in the kind of evidence admissible in a question of *donatio mortis causa* and in a question of legacy is extremely material. In reference to a *mortis causa* donation it is settled law that parole testimony and improbative writings are admissible, and that in some circumstances the evidence may be entirely parole. For instance, I do not suppose that anyone will doubt that such a case as I put in *Morris* v. *Riddick*, 5 Macph. 1043, of a soldier mortally wounded on the field of battle handing over to a comrade his money or valuables to be given to his mother or sister, may be taken not only as an illustration of a *mortis causa* donation by the Roman law, but also as an example of a donation of that class which, although proved solely by parole testimony, would be recognised by us equally effectual as it would have been by that warlike people. Indeed, the whole case of *Morris* v. *Riddick* was itself decided upon that footing, for the gift there was made, not by handing over a deposit-receipt, but by handing over £300 in money, and the purpose for which the money was so handed over depended entirely

upon, and was held to be proved by, the parole testimony. There was no deposit-receipt in that case payable to the donee either eventually or otherwise. The depósit-receipt bore to be payable to Morris himself, who sent Riddick to the bank with it with a written authority addressed to the bank teller, which enabled Riddick to uplift the money, not for his own behoof, but for behoof of Morris, as was evident from the fact that Riddick did not attempt to retain the money, but sent his daughter with it to Morris, who, being then ill of fever in bed, put it under his pillow, where it remained till the evening, when Riddick having called to arrange about getting Morris conveyed to the infirmary, Morris pulled out the money, consisting of £20 notes, from under his pillow, and handed it to Riddick, telling him if he (Morris) came back from the infirmary to return it to him, and if not to keep it and use it himself. The delivery and the purpose of it were proved by parole alone. Morris died in the infirmary and the donation was sustained.

This leads me to make an explanation with reference to an observation I am reported to have made in that case, and to which my brother Lord Mure has called my attention, to the effect that one of the differences between our law and the Roman law as to such donations is, that while we require delivery the Roman law did not.

Now, at the distance of some thirteen years I am not prepared to say what the precise words I used were. But the donation I was there speaking of was, it will be observed, a donation of a sum of money to which delivery of the money was essential, just as it would have been in the case of an article of jewellery or other corporeal moveable. I may have expressed myself too broadly, but I certainly was not then, any more than now, of opinion that where the foundation of the claim is a written document, such as a deposit-receipt payable to the donee, no amount of parole testimony as to the purpose of the donor will suffice to prove the gift unless the document itself has been delivered. Passages which have been read in the course of the discussion from my opinions in other cases show that I could not have meant to lay down that general doctrine as applicable to all classes of cases, although it was quite applicable to the class of cases then under consideration.

It is most important, as I think I have repeatedly said, that in all cases of alleged *mortis causa* donations we should jealously guard against giving effect to any parole testimony which is not beyond doubt truthful and reliable. But we could not, I think, have a better example than the present case, that where the donor has taken a deposit-receipt, payable either to the donee directly or to the donee in the event of his surviving the donor, the parole testimony may possibly be of such a nature as satisfactorily to prove the gift, although there has been no delivery of the document itself.

In the present case the deposit-receipt was found, not in the donor's house, but in the house of the donee. There is not the slightest suspicion that it came there otherwise than by the act of the donor himself, who must either have meant that it should be found there after his death or left it there by accident. Proceeding, however, on the assumption that it may have been left by accident, and that delivery is not sufficiently proved, I entertain no doubt that the actual *mortis causa* donation is sufficiently established. The case is peculiarly satisfactory in one respect, viz., that the parole testimony, both from internal evidence and upon admissions which could not well have been withheld, is to be regarded as throughout truthful and reliable.

Taking it so, we find from the deposit-receipts received from time to time according to the practice of the bank, from May 1872 to June 1878, that the donor, who had been long in bad health, had deliberately formed the design of leaving to his younger sister and her husband a considerable sum of money, varying somewhat according to what he had at his command in the bank for the time, and we find from the testimony of the sister and her husband, the truth of which is not impeached, that in the course of the period over which these receipts extend he mentioned to both of them the fact, more or less explicitly, that he had made a provision for them by depositing money in the bank. In June 1876 he showed them the existing deposit-receipt for £3000, and said it was for them. The latest receipt, which is the one found in the house of the defender, is dated 21st June 1878, and it is unnecessary to go back upon the previous receipts. That was a renewal of the immediately previous receipt, and when he went to the bank to obtain it he said to the defender Wright that he had been adding a little to the previous deposit for him, which was thus far correct that the renewal was for £500 more than the receipt which he had previously shown to Wright in 1876. He had had a shock of paralysis in September 1878, and again in February 1879. From that time forward he had no hope of recovery, and expressed himself so to his sister, the defender, who assiduously attended him. He neither made nor proposed to make any alteration on the terms of the deposit-receipt of 21st June 1878, which stood at his death in these terms—"£3500. Received from Mr Robert Crosbie, Gilmerton, Mr Alexander Wright and Mrs Christina Wright, 32 East Preston Street, Three thousand five hundred pounds, stg., to be paid to any or survivor or survivors of them which is this day placed to the credit of their deposit-account with the British Linen Company."

The only question that remains is, whether, as the trustees contend, the donation, assuming it to have been otherwise validly made, was revoked by a general trust-disposition and settlement in their favour executed by the deceased on the day of his death?

Now, it is settled that a general conveyance in *mortis causa* deeds does not necessarily revoke either a prior legacy or a prior special conveyance. It is a question of intention to be gathered from the circumstances and the terms of the deed in each particular case. In the present case all the circumstances seem to me to point strongly to the conclusion that Mr Crosbie had no intention of revoking this *inter vivos* donation by his deathbed deed of settlement. In summer 1872 he had told Mr Wright that he had made the gift by depositing money in the bank, although he did not then mention the amount. In June 1876 he showed Mr and Mrs Wright the deposit-receipt by which failing himself he had made the gift to them and the survivor of them, which at that time stood at £3000. In June 1878,

when he went to the bank, he told Mr Wright that he had been adding to it. And what is probably the most significant part of all, in February 1879 he spoke to Mrs Wright in terms which I think distinctly intimated that the gift was still subsisting, although in January preceding we have it from his agent Mr Innes that he had executed a general disposition and settlement which equally with the deathbed deed disposed of his whole means and estate, although it dealt with the residue differently by giving it to his nephews and nieces, whereas by the deathbed deed it was given to the poor. Then it is to be observed that without infringing upon this gift he had plenty for all his purposes. His relatives, including his nephews and nieces, are perfectly satisfied with what they got, and in these circumstances I can hardly doubt that if he had meant by his deathbed deed to revoke this long standing gift which he had so recently renewed, he would have said so to his agent Mr Innes, to whom, on the contrary, he never mentioned the gift at all.

It is true that besides containing a general conveyance the deathbed deed contains this clause—"And I do hereby revoke, cancel, and annul all former settlements or testamentary writings executed by me at any time whatever, and declare the same to be void and null." But these are not the terms in which it would have occurred either to his own mind or to his man of business to have recalled the gift in question if it had been so intended. The deposit-receipt was neither a "settlement" nor a "testamentary writing." It was an *inter vivos de presenti* donation, revocable no doubt, but the language it used does not revoke it, and I am satisfied the deceased never meant to do so. I am therefore for recalling the Lord Ordinary's interlocutor and assoilzieing from the conclusions of the libel.

Lord Mure—This is an important question both in law and on the evidence.

As to the law, I concur with your Lordship in holding that a receipt of this description, taken by itself, is not sufficient to instruct donation. That, I think, is well settled. On the other hand, I do not think that it has ever been held that actual delivery, in the strict sense of that expression, was necessary, provided there was distinct evidence of an intention to make a donation. In the case of *Martin*, March 8, 1849, 11 D. 1004, the receipt was not delivered in the strict legal sense, and yet the donation was sustained. In *Ross* v. *Mellis*, Dec. 7, 1871, 10 Macph. 197, the question of delivery was scarcely raised. But in *Gibson* v. *Hutchison*, which has been already referred to, it was laid down that actual delivery is not essential; and the import of the leading cases from the date of that of *Martin* is, that the question must be dealt with as one of intention, to be gathered from the terms of the receipt in each case and the import of the other evidence adduced in support of the alleged donation.

Holding these views of the law, I concur in thinking that there is here sufficient proof of intention on the part of the deceased to make this sum of money a donation *mortis causa* in favour of the present defenders. It is not necessary to go over the evidence, as that has already been done. But it is important to notice the terms of the deposit-receipt, and of the series of receipts during the years 1872 to 1878, which all seem to indicate that the deceased had something different in view from the mere deposit of money on his own account, while it is clear that at the time the receipt was renewed in 1878 the deceased knew he was dying. The terms of these receipts, moreover, are in direct contrast to those of the receipt of 21st June 1878 for £700, placed to his own credit in the Union Bank, thereby showing that where the deceased intended the money to remain as part of his own estate he used terms different from those of the receipts which he intended to make donations to his sister and her husband. Then it is clear from the evidence of the Wrights—the reliable nature of which is placed beyond doubt by the Lord Ordinary—that the deceased showed them one of the receipts, and told them it was intended as a provision for them. It is remarkable that the receipt was kept, not in the repositories of the deceased, but in a drawer in the defenders' house, where it must, I think, have been placed by the deceased himself. And although it is not proved how it came there, the fact that it was placed there does away with any presumptions which in other cases have been held to arise from the receipts having been left in the repositories of the party. It is also important to keep in view that in so deciding there will be no interference here with the general purpose of the deceased's settlement. For it is conceded that there will still be residue left, though smaller in amount, for the gift to the poor of the parishes mentioned in the settlement.

I concur therefore with your Lordships that the Lord Ordinary's interlocutor ought to be recalled.

Lord Shand—I entirely concur with the Lord Ordinary and with your Lordships as to the import of the evidence in this case. The proof shows—assuming, as I do, that the Wrights are to be absolutely believed—that the deposit-receipt with which we have to deal was taken by the deceased in the terms in which it is expressed with a deliberate purpose, that purpose being to make a *mortis causa* donation of the contents to his sister and her husband. The receipt is expressed as being for money advanced by Mr Crosbie and the Wrights, and is made repayable by the bank to any "survivor or survivors of them." This shows clearly enough a purpose either of a trust to be constituted or of a donation to be given. Everything that tends to exclude the idea of a mere trust is therefore confirmatory of the purpose of donation. In cases of this kind the relation of the parties is perhaps the most important element in determining whether trust or gift was intended. If the money is taken in name of a clerk, or man of business, or other person to whom the granter might naturally trust the management of his affairs, it is extremely difficult to establish donation. On the other hand, in such a case as this, where the receipt is taken by the deceased in favour of one of his nearest relations, with whom he was on terms of the closest intimacy, and for whom he had the warmest affection, the presumption of trust is very much weaker, and therefore more easily overcome by evidence of the surrounding parts of the statements and conduct of the deceased. It is proved, I think, quite satisfactorily that the deceased had a clear intention to benefit the reclaimers. It is strongly in favour of this view that the receipts were renewed annually in the same terms for seven years, and

that on the occasion of the last renewal the deceased took the receipt in the terms it bears, while at the same time he took another receipt simply in favour of himself alone.

We have thus two elements, first, a receipt with a distinct destination inserted by the desire of the deceased, giving the Wrights a title as survivors to receive the money from the bank and grant an effectual discharge; and secondly, clear evidence of intention to make a donation and not merely to create a trust. As your Lordships have said, a question might be raised whether, in the circumstances of the case, delivery took place or not? but it is unnecessary to consider that question, as delivery, in my opinion, is unnecessary. As Lord Mure has observed, in the cases which have hitherto occurred, a receipt in the name of the person maintaining donation has usually been the sole element before the Court, the claimant founding on the document with no extrinsic evidence of donation, and that has been held insufficient. In another class of cases a receipt in favour of the deceased only, with a general indorsation on the back has been founded on; and the question raised has been, whether the person who got the document handed to him has in the circumstances proved donation? I am not aware of any case which contains, in the same way as here, the two elements—first, the special destination, and second, the clear evidence of intention. The only case perhaps approaching to it is that of *Gibson*, and I agree with your Lordship and Lord Deas that in cases of that class, where there is clear evidence of the purpose to make a donation, that delivery is not necessary.

A distinction must be drawn between two classes of documents with which we may have to deal in questions of this kind. The first includes deeds relating to heritable or personal subjects, in which the deceased in taking a conveyance or bond and disposition in security, or personal bond, causes a destination in favour of a third party to be inserted. If such a deed is found in the deceased's repositories, no delivery is necessary to operate the effect of giving an absolute right to the property or fund to the exclusion of all questions of trust—an effectual bequest. The second class consists of such writings as a deposit-receipt, or it may be a transfer on a purchase of consols, or annuities, followed by a certificate in the ordinary form in which the title to the money or stock is taken to the deceased and to another or the survivor of them. There the effect is not at once to give right to the person named in the document to the fund as his own, as in the case of a formal conveyance or security. The question remains—Was the intention of the deceased to create a trust or to make a donation? That is a question of fact to be cleared up by parole testimony. But the rule or principle dispensing with the necessity of delivery in the one class is, in my opinion, equally applicable in the other, whether the right conferred be called a legacy or a donation *mortis causa*. In the former class delivery is not required, because the donation is only to take effect after the deceased's death. The same reason equally applies in the other class. Donation in the event of death only is intended; so much so, that even if delivery had taken place during the lifetime of the donor, that would not give an absolute right in the subject to the donee. In the case of recovery the deceased might demand repayment. It is obvious that in the case of a donation *mortis causa* totally different principles are applicable from the case of donation *inter vivos*. The latter to be effectual requires delivery. In the former case the benefit is to result after the donor's death; hence formal delivery is not necessary, but a little of such a kind as occurs in this case, and evidence of purpose to make a donation, will be enough to operate the transfer.

As to the general disposition and settlement executed by Mr Crosbie on the day of his death, I have only to say that the general principle, which has received effect so often as applicable in cases of special destination, is applicable here. A special destination is not evacuated simply by a general disposition and settlement. A very recent case of this kind in which that principle was applied is very similar to the present. I refer to the case of *Walker's Trustees*, 5 Rettie, p. 965. In the repositories of a deceased husband a bond or mortgage for £500 was found in favour of himself and his wife and the survivor of them. Subsequent to the taking or assigning of that deed the deceased had executed a general disposition and settlement. Two questions arose—the first, Whether the fund in the security had not been the wife's property all along? and the second question—Whether, at least, the general disposition and settlement did not destroy the effect of the deed? The Court held, in the first place, that the property and certain control of the fund remained with the husband until his death, but that at his death the fund became the absolute property of his wife notwithstanding the general disposition; and the principle on which the decision rested was that the destination in the deed did not affect the special destination in the security. The principle of that case disposes of the argument that the general disposition in this case operated as a revocation of the *mortis causa* donation.

I am therefore of opinion that the Lord Ordinary's judgment should be recalled, and Mr and Mrs Wright found entitled to the sum claimed.

The Court recalled the Lord Ordinary's interlocutor, sustained the defenders' first plea-in-law, assoilzied them, and decerned, and found the defenders entitled to their expenses.

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