Tuesday, July 16.

BROWN'S TUTORS, PETITIONERS.

Tutor-Nominate—Lease—Advertisement—Valuation. Tutors-nominate authorised to grant a new nineteen years' lease to the tenant presently in occupation, at the rent offered by him, after judicial remit to ascertain the sufficiency of the tenant's offer, but without advertisement of the farm for public competition.

This was a petition at the instance of tutors-nominate for authority to grant a lease.

The pupil succeeded to an entailed estate in Berwickshire on the death of his grandfather, Major Brown, in 1866. The estate had been leased by Major Brown, along with some unentailed land belonging to him, to Mr James Weatherley, who held a lease of the whole lands, entailed and unentailed, as one farm, for a period of nineteen years from Whitsunday and separation of crop of 1848, at a rent of £400 per annum, the tenant also paying certain rent charges payable to Government in respect of money spent on drainage and improvement.

The unentailed lands are now held by Major Brown's trustees.

Weatherley's lease expiring on Whitsunday and separation of crop of 1867, Major Brown's trustees and the petitioners obtained a valuation of the lands from Mr Dickson, Saughton Mains. Mr Dickson estimated the rent to be got for the whole lands at £522, £442 being for the entailed lands. This valuation proceeded on the footing of a nineteen years' lease being granted, and certain necessary repairs executed on the farm-house and offices, the proprietor paying the remainder of the rent charges, which expire in a few years.

The tutors-nominate of the pupil now presented a petition to the Court, stating the facts above set forth, and that Major Brown had, shortly before his death, been in treaty with the present tenant, Mr Weatherley, for a renewal of the lease; that Mr Weatherley had made an offer to retake the whole land at an advance of rent slightly above the estimate of Mr Dickson, the effect of this offer being an immediate increase of rent of £37, 5s. for the entailed lands, rising gradually as the rent charges fall in, to £89, 5s., or upwards of twenty per cent. upon the present rent; and craving authority to let the entailed lands to Mr Weatherley at the rent offered by him, or otherwise to let them at such rent as might be obtained.

The Court made the usual remit to the Junior Lord Ordinary, who remitted to Mr Kermack, W.S., to report whether it would be for the interests of the pupil and succeeding heirs of entail that the authority craved by the petitioners should be granted. Mr Kermack, after obtaining another report from Mr Dickson as to certain matters in the petition, reported in favour of the petition. The entailed and the unentailed lands were proposed to be included in separate leases.

The Lord Ordinary then reported the case to the Inner House. The Court thought there were two peculiarities in the case—(1) That there had been no advertisement of the lands, so as to secure competition; and (2) that the valuation founded on in the petition was obtained *ex parte*. They inclined to hold that if it was the practice in such cases to dispense with advertisement, as was indicated by the Lord Ordinary, it would be necessary to make a judicial remit for a valuation of the lands.

The Lord Ordinary accordingly remitted to Mr Low, Berrywell, who gave in a report agreeing substantially with that given by Mr Dickson, and recommending that the petitioners should be authorised to let the lands to Mr Weatherley at the rent offered by him. Mr Low reported against the expediency of advertising the farm for competition.

The Lord Ordinary again reported the case.

The Lord President thought that the question was a delicate one, and that it was indispensable to look at the circumstances of the case. As to the power of the Court there was no doubt. That question was fairly raised in the case of *Morison*, 20th February 1857, 19 D., 493. The matter came again before the Court in another case relating to the same parties in 1861 (*Morison*, 19th July 1868, 23 D., 1313), and there the Court thought it right to consult the Judges of the Second Division. The Lord President in that case stated, in his judgment, the result of that consultation, which was in favour of granting the prayer of the petition. In the circumstances of this case it was very expedient to grant the power craved. In some cases it was quite right to test the value of an offer by public advertisement, but this case differed. There was here a good tenant in occupation, whom it was desirable to retain, and who was not likely to demand such a large expenditure by the proprietor in the way of meliorations as a new tenant would require. The power should therefore be granted.

The other Judges concurred.

The petitioners were accordingly authorised to let the lands to the present tenant on a nineteen years' lease, at the rent offered by him, the details of the lease to be arranged by the tutors at their discretion.

Counsel for Petitioners—C. G. Spittal.
Agents—Paterson & Romanes, S.S.C.

Tuesday, July 16.

MORRIS *v.* RIDDICK.

Donatio mortis causa—*Mode of Proof—Legacy.* A person *intuitu mortis* gave to another a sum of £300, on condition that if he recovered the money was to be returned to him. The donor died in three days thereafter. In an action at the instance of his executor, for repetition of the money, held that the gift was a *donatio mortis causa*, and not a legacy; and that it could be, and had been, proved by parole evidence.

The pursuer of this action was the executor-dative of the late Hugh Morris, wine and spirit merchant in Greenock, who died on 3d November 1862. The pursuer averred, that on 31st October 1864 the defender had uplifted from bank the contents of a deposit-receipt for £300 belonging to his late brother, and that, instead of paying over the amount to the deceased, that he had retained it, and still retains it in his own possession. The defender averred that the deceased had, on the occasion specified, given to him the said deposit-receipt blank indorsed, and another paper bearing to be an order for payment of its contents; that the indorsation and delivery of the said deposit-receipt were, with the object and for the purpose, as was stated at the time, of making a gift of the contents of the receipt; the sole condition of the gift being, that in the event of Hugh Morris recovering

from a fever, under which he was labouring, the money was to be returned to him. The defender further averred, that although the said gift had been made deliberately, he was anxious that Morris should have an opportunity of reconsidering it if he so desired, and that he accordingly sent the money, after he had uplifted it, to Morris, who again on the same day handed over the money to him, stating that it was a gift made on the foresaid condition. Hugh Morris was then taken to the Infirmary, where he died in three days thereafter without recovering from the fever.

The Lord Ordinary (JERVISWOODE), of consent, allowed a proof before answer; and thereafter pronounced the following interlocutor:—

"The Lord Ordinary having heard counsel and made avizandum, and considered the record, with the proof allowed before answer, in terms of the interlocutor of 14th March last, productions and whole process: Finds, first, as matter of fact, that on or about the 31st October 1864 the deposit-receipt (No. 13 of process) granted by the National Bank of Scotland in favour of the deceased Hugh Morris, mentioned in the record, was indorsed by him, and was, with the document No. 14 of process, which is holograph of the said Hugh Morris, delivered by him to the defender, for the purpose of enabling the latter to uplift from the bank the sum therein contained; that the defender uplifted the said sum accordingly, and handed or caused the same to be handed to the said deceased Hugh Morris, who in the course of the same day redelivered the said sum to the defender as a gift, subject to a condition that, if he recovered of an illness by which he was then affected, the money was to be returned to him: Finds that the said Hugh Morris did not recover of the said illness, but died in consequence thereof on the 3d November following (1864): Finds, in point of law, that the said sum of £300, and interest thereof, must be held as a gift to the defender by the deceased, and that the pursuer as executor-dative of the latter, has no right to the said sum or interest: Therefore assoilzies the defender from the conclusions of the summons, and decerns: Finds the defender entitled to expenses, of which allows an account to be lodged, and remits the same to the auditor to tax and to report.

(Signed) "CHARLES BAILLIE."

His Lordship observed in his Note:—"It seems to be abundantly obvious that the deceased had it in his mind to transfer the moveable funds of which he was possessed, and which seem to have been chiefly lodged in bank on deposit-receipts, so that the contents of the same should be divisible in the event of his death among certain near relatives in the manner deponed to by the witness Hugh B. Crawford; and having entertained and so far acted on this idea, it was natural enough that he, assuming that he wished to confer a benefit on the defender, should, with that view, adopt a somewhat similar though not identical course. Accordingly, while he delivered certain deposit-receipts to Crawford, he retained, without communicating the fact to him, the receipt for £300, the sum in which, with interest, forms the subject of the present action. This he indorsed and delivered to the defender. Along with the receipt so handed over he gave to the defender the document No. 14 of process, which was delivered to the bank agent by the latter at the time he drew the sum in the deposit-receipt, and which the Lord Ordinary reads thus:—'Gentlemen, be so kind as pay the bearer, Mr James Riddick, the sum enclosed, Hugh Morris. 31 October. Greenock.' Thus it is clear the defender received the money from the bank through the direct act and under the authority of the deceased; and having so received it, he sent it, if the evidence is to be credited at all, to the deceased by the hands of his daughter, and afterwards obtained redelivery of it from the deceased. The Lord Ordinary has been unable to see reasons sufficient to enable him to hold that the *res gestæ*, as respects the act of uplifting and transferring this sum of £300 to the defender, were other than those to which he has thus referred; and if this be so, can it be held that the pursuer has here established legal grounds on which he is entitled to succeed in reclaiming under this action this sum from the defender? The Lord Ordinary thinks otherwise, and that he would be doing violence to the true intent of the deceased were he to arrive at such a result.

"It is clear that the case in regard to this sum differs materially from any which could arise in regard to the deposit-receipts, the sums in which together amounted to £1100, and which were handed to the witness Crawford in the manner deponed to by him. But it appears to the Lord Ordinary to be legitimate to bear in mind and here to consider the evidence in relation to these receipts, and also to another receipt for £100, which was also in the possession of the deceased, as reflecting light upon the probabilities of the case which is here made on the part of the defender.

"It is obvious from that evidence that the deceased had it in his contemplation to divide his pecuniary means among those he intended to favour, in the event of his death, by transferring the vouchers to them, or for their behoof, and if he made the gift in favour of the defender more directly, and without the interposition of a third party, this may be accounted for through that propensity to conceal the amount of his means which seems to have existed in his mind.

"The case of *Bryce* v. *Young's Executors*, January 20, 1866, was here referred to mainly, as the Lord Ordinary understood, on the part of the pursuer, to point out the distinction between the circumstances which there existed and those of the present case.

"That the facts there disclosed differed from the present in various particulars admits of no doubt, and did so in the prominent circumstances that the document delivered to Miss Bryce was an ordinary cheque on the bank account of the granter, and that it was not cashed by her until after the death of that party, while here the document, the sum in which is in question, was a deposit-receipt indorsed by the party in right of the same, and, under a separate holograph authority from him, uplifted by the defender.

"The real question thus comes to be, as the Lord Ordinary thinks, whether in the whole circumstances, as established by the evidence, the pursuer is in a position which enables him, as executor of and so far representing the deceased, to call on the defender to pay over this money to him or not?

"It has appeared to the Lord Ordinary that on the whole it must be held that the defender obtained the money through and by the act of the deceased himself, and that his executor cannot now so reclaim it."

The pursuer reclaimed.

GIFFORD and STRACHAN for him argued—The right claimed by defender is of the nature of a donation *mortis causa*, which cannot be proved by parole. They cited the following authorities:—Just. Inst., 2, 7, 1; Dig., 39, 6; Ulpian (2); Cod., 8, 57, 4;

Savigny System of Roman Law, 1st. ed., vol. 4, pp. 262 and 272; Ersk., 3, 3 91; Bankton, 1, 9, 16; Stair, 3, 8, 39; Dict., p. 3591, *voce*, *Donatio mortis causa; Fyfe* v. *Kedzlie*, 6th Mar. 1847, 9 D., 853; *Miller* v. *Milne's Trustees*, 3 i Feb. 1859, 21 D., 377; *MacFarquhar* v. *Calder*, 15th June 1779, M. 3600, Fol. Dict., vol. 3, p. 185; *Mitchell* v. *Wright*, 21st Nov. 1759, M., 8082. 3 Fol. Dict., p. 378; *Smith* v. *Taylor; Muir* v. *Ross's Executors*, 4 Macq., 820; *Barstow* v. *Inglis*, 20 D., 230; *Mackenzie* v. *Brodie*, 21 D., 1048; *Little* v. *Little*, 18 D. 701.

SCOTT and BURNET for defender answered—The defender has proved donation, as found by Lord Ordinary, by parole evidence. It is admitted that if this is a donation *inter vivos* it could be so proved. It is a donation *inter vivos* which took instant effect, the money having been delivered; but even though it is to be regarded as a donation *mortis causa*, it is proveable by witnesses. They cited Bankton, 1, 9, 6; 1, 9, 16; 1, 16, 18; and 1, 19, 17; Ersk., 3, 3, 91, and 3, 3, 11; *Galloway* v. *Duff*, 5th Dec. 1672, M., 4959; Stair, 1, 8, 2 and 1, 14, 5; More's Notes, p. 54 and p. 58; 1 Bell's Com., 237-9; Dickson's Evidence, § 367; *Whiteford*, 3d Nov. 1742, M., 8072; *Mitchell* v. *Wright*, *supra; Mather* v. *Tod*, Hume, p. 275, 1818, 1 Murray, J. C. R., p. 222; *Anonymous*, 30th Nov. 1752, 5 Br. Supp., 802; *British Linen Co.* v. *Martin; Heron* v. *M'Geoch*, 14 D., 25; *Cruikshank*, 16 D., 168; *Wilkie*, 16 D., 961; *Little* v. *Little*, 18 D., 701; *Barstow*, 20 D, 230; *Robertson* v. *Robertson*, 20 D., 371; *M'Kellar* v. *Hunter*, 20 D., 761.

The LORD PRESIDENT after stating the nature of the case, and the import of the proof, said that he thought the defender had proved his averment. There had been little argument in the matter, for the parties were agreed that the facts averred by the defender were proved by bank evidence, the defender himself being the principal witness, they being corroborated in essential particulars by other evidence. His Lordship then read extracts from the defender's proof, and said, that if that evidence was competent and sufficient the *species facti* to be dealt with was simple. It was this, that Morris handed over this money to the defender, and the condition on which that delivery was made was, that so long as Morris was in life he should hold it for him, but in the event of Morris dying he was to use it for himself. It had been represented that this was in practical effect a legacy, though it were more correctly described as a donation *mortis causa*. But the argument of the pursuer was, that whichever it was, it could not be constituted except by writing, and therefore that this attempt to prove it by proof *prout de jure* was incompetent. This raised an important point. It is necessary, his Lordship continued, in the first place, to understand what is meant in the law of Scotland by *donatio mortis causa*.

A *donatio mortis causa* in the law of Scotland is not in all respects the same as in the Roman law. It answers the definition of the Institutes as being a gift, to take effect in favour of the receiver on the death of the granter, and to have no effect if the granter repent of his gift, or revoke it, or survive the grantee. The motive and intention of the giver is also in both systems understood to be the same. He prefers the donee to his heir or executor, but himself to both. But in the Roman law there were three kinds of *donatio mortis causa*, while I think we have received only one kind into our practice, which does not precisely answer to any head of the Roman division. *Donatio mortis causa* in the law of Scotland may, I think, be defined as a conveyance of an immovable or incorporeal right, or a transference of moveables or money by delivery, so that the property is immediately transferred to the grantee upon the condition that he shall hold for the granter so long as he lives, subject to his power of revocation, and, failing such revocation, then for the grantee on the death of the granter. It is involved of course in this definition, that if the grantee predecease the granter the property reverts to the granter, and the qualified right of property which was vested in the grantee is extinguished by his predecease. Such, I apprehend, is the doctrine laid down by Erskine, more largely expounded by Bankton, and supported by the general tenor of the decisions of the Court; and such also, it appears to me, is the nature of the case now before us.

The question immediately before us is, whether writing is essential to the constitution of a donation *mortis causa*, as it is to a legacy beyond £100 Scots. Such donations unquestionably savour much of legacies, as Lord Bankton says. But there is this important distinction between them, that in donations *mortis causa* there must be an immediate transfer of property—no doubt a qualified right of property—but still a present transfer of that qualified right. Now it appears to me that whatever is sufficient in law to constitute and prove such a transfer must be sufficient to make the donation effectual. The transmission of an heritable or an incorporeal right, whether absolutely or qualified, cannot be accomplished without writing. But the property of moveables is transferred by bare tradition; and I cannot resist the conclusion that if the absolute property of a moveable subject, or if a sum in cash, may be transferred either onerously or gratuitously by mere tradition, *de manu in manum* (which is clear law), it would be most unjust and against all the principles and analogies of the law to hold that the gratuitous transference shall be ineffectual without writing, because the recipient acknowledges that the gift he received was under a condition. In short, I cannot find any satisfactory ground for such a distinction between donation *mortis causa* and donation *inter vivos* as shall involve the legal necessity of writ to the constitution of the one and not to the constitution of the other.

It is of much importance to observe the precise terms of the question. It is not a question as to mode of proof, though, if the necessity of writing to the constitution of the donee's right were affirmed, it would of course follow that parole evidence to support it would be inadmissible. But so would writ or oath of party. If writ be as much essential to the constitution of a donation *mortis causa* as it is to a legacy, then it would be incompetent to prove it by the admissions of the executor either on oath or in writing, and equally incompetent if the executor referred the libel to the oath of the donee, to prove it by a quality of the oath though intrinsic. The true question is, Whether the rule which obtains in legacies applies also to donations *mortis causa?* I make this observation chiefly as conducing to a thorough understanding of the very important case of *Mitchell* v. *Wright*, in which the father of the deceased had received from him 1000 merks on deathbed on the understanding that if the deceased recovered it was to be at his disposal, but if he died it was to be given to his sisters. The executor sued the father, and referred the libel to his oath, and it was on his oath that these facts appeared. Upon advising the oath, the Sheriff found that this was a legacy good only for

£100 Scots. But this Court, in a suspension, altered the judgment, and gave effect to the gift. The ground of judgment, as stated in the Faculty Collection of Reports, is, "This is not a legacy, but a gift or donation *mortis causa*, which differs from a legacy in so far as it is done *de presenti*, though the effect of it is suspended till the donor's death . . . . The rule as to writ being essential therefore does not apply to this case, in respect of the delivery of the money, which was the same as if it had been made to the sisters themselves, and was a deed *inter vivos* though only *mortis causa*."

That seems to me to be clearly in point, and to establish that, to the constitution of a donation *mortis causa*, such as we have to deal with in the present case, writ is not essential.

Lord Curriehill concurred; and added, that the great difficulty in understanding the nature of donations *mortis causa* was, that while the right of property passes to the donee, yet all the essential powers, the combination of which constitutes the essence of property, appear to remain with the donor. His Lordship further observed that the same difficulty was disclosed in the law as now established in *mortis causa* conveyances of heritage. You cannot make a legacy of heritage even by writing. The owner cannot leave his heritable property past his heir but by *verba de præsenti*. Even if writing were employed, if there were merely a provision that some other should succeed after his death, that would be utterly insufficient to transmit a right to heritage. In this case, as well as in a *mortis causa* conveyance of immoveable property, the dispositive act must be complete at the time, and powers reserved to the disponer to deal with the subject of the gift during his survivance.

Lord Deas thought it would be a very unfortunate state of the law if every messenger sent to a bank with a deposit-receipt, to draw the money was entitled to say—"I am in possession of the money, and you must prove it to be yours, and refer to my oath." No doubt the party getting the money, if he alleged it to be his property, must prove it. Here the party said—"It is true that I got the money, but I got it as a gift, and I handed it back to the deceased, and he gave it back to me on the condition that if he did not recover from his illness it should be mine." Whether or not that was sufficient in law to discharge the burden on the defender, there was no doubt it was true here. It was enough to say on the evidence that it was satisfactory in proving that that was really the case. And it was incumbent on the defender to give very satisfactory evidence. There remained only the question of law. It was not an irrevocable gift. The question turned on whether there was, in the law of Scotland, such a thing as a *mortis causa* donation, as distinguished from a legacy? It was clear that a legacy could only be left by writing; but if we had the *donatio mortis causa* of the Romans, this was an instance. It was the very thing the Romans recognised, a sum of money delivered to take effect only in the case of death. Although we had donation *mortis causa*, it was not quite the same as in the Roman law. The difficulty was to see precisely what a donation *mortis causa* was, as distinguished from an *inter vivos* irrevocable gift, and a legacy—for he could not feel satisfied in holding that this was to receive effect, without satisfying himself as to the qualities of a *donatio mortis causa*. Now (1) it must be made with a view to death. (2) It takes effect only if death result from that particular illness. The object seemed to be to give a peculiar facility to a party apprehending death, without, in many cases, an opportunity of doing more formally what he wished. For example, a soldier, mortally wounded, pulls out a bundle of notes, and in presence of witnesses says, "Give that to my mother if I die." It would be a strong thing to say that writing was necessary then. And so in many cases; and the exception was not unreasonable that in cases of that kind there should be a mode of making a gift recognised by law applicable only to cases of illness. If a party in health handed over money which was to go to the donee if the donor died fifty years after, it didn't follow that that would stand. (3) The third condition was not required by the Roman law, but with us the subject must be delivered, delivery taking the place of writing, which would otherwise be necessary. On the other hand (1) A gift of this kind is revokable—it is revoked if the donor recovers or redemands it. (2) It remains liable to the granter's debts, if there is a deficiency of funds. (3) It only affects the dead's part. (4) It is subject to succession duty. On the other hand, it differs from a legacy; for (1) it does not require writing; and (2) it is preferable to legacies. The authorities made this pretty clear; Bankton, 1., 9, 16–18—Erskine, iii., 3, 91—Stair, iii., 8, 39; iii., 4, 24. His Lordship then referred to the cases of *Mitchell* v. *Wright* and *Milroy* (Hume's Dec., p. 285), and to his own notes of Baron Hume's Lectures. It was true that *donatio mortis causa* did not occur often, but there was no doubt our law recognised it, and there could not be a better instance of it than here.

Lord Ardmillan—This action has been brought by the pursuer Daniel Morris, as executor of the late Hugh Morris, for payment of £300, 6s. 3d. It is alleged by the pursuer, and is indeed the foundation of his case, that Riddick, the defender, was, two or three days before the death of Hugh Morris, in possession of a deposit-receipt for £300, bearing to be indorsed by Morris; that during Morris' life the defender presented the deposit-receipt at the bank office in Greenock of the National Bank, and got the money, and was in possession of the money at the date of Morris' death. Besides the indorsation of his receipt, it appears that the defender was also in possession of a document in the following terms, which was delivered to the bank-agent when the deposit receipt was paid:—"Gentlemen, be so kind as pay the bearer, Mr James Riddick, the sum enclosed.—Hugh Morris. 31st October, Greenock." Morris died on 3d November 1864. The pursuer, as his executor, demands payment of this £300 as part of Morris' personal estate, though the sum was, at and prior to the date of the death, in the defender's possession, obtained on a deposit-receipt indorsed by Morris. The document which, along with the receipt the defender held, is at least equal to a special indorsation, and instructs that the deposit-receipt indorsed was, in point of fact, delivered by Morris to the defender. A proof has been allowed before answer; and I have carefully considered that proof, and formed an opinion on its import and effect. But before considering the evidence, a preliminary question is raised. The pursuer maintains the plea that parole evidence is incompetent; and that, without investigation or inquiry, he is entitled to decree for payment of the £300.

The question thus raised is one of great importance, and it has been ably and anxiously pleaded.

The Lord Ordinary has assoilzied the defender. The mere possession of an indorsed deposit-receipt, whether the indorsation be blank or special, is not evidence of a donation of the sum in the receipt, and does not necessarily operate as a transference of that sum. Though a deposit-receipt is not a negotiable instrument, yet the indorsation thereof is a good mandate to the holder to draw, and a good warrant to the bank to pay, the sum in the receipt. It does not, however, necessarily convey to the holder the right to the money, nor does it create a presumption of gift. But on the other hand, I do not think that there is any presumption against the holder of an indorsed deposit-receipt. It is not to be presumed that the receipt was obtained by theft or fraud, nor is it to be presumed, without inquiry into the circumstances, that the holder is only a messenger or mandatory for behoof of the indorser. The important question is, On what footing and for what purpose did the holder become possessed of the receipt? *Quo animo* was it indorsed and delivered? I cannot come to the conclusion to which the pursuer seeks to bring us—that inquiry is excluded, and that the holder must at once, and without ascertainment of the facts and circumstances, be ordained to pay the money to the executor. In my opinion, an investigation with a view to ascertain all the facts and circumstances attending the indorsation and delivery of the receipt, was absolutely necessary to the ends of justice. That must be a strong reason which stands at the gate of justice and forbids the ascertainment of truth. I see no such reason in this case.

The fact of the defender being in possession, first, of the deposit-receipt, and then of the money, is not to be altogether lost sight of, but it is a fact the importance of which may vary greatly, according to the circumstances of the case. I concur entirely with Lord Deas in regard to the necessity of demanding from the person in possession of a bank receipt or cheque, or a sum of money, under such circumstances as these, the explanation and proof of delivery, and of donation if that is alleged. Donation is not presumed. In many cases, but not in all, there is a presumption against donation. In no case is there a presumptipn for donation. But, as is well observed by Lord Fullarton in *British Linen Co.* v. *Martin*, 8th March 1849, 2 D., 1004, when we say that donation is not to be presumed, the only practical result is, that it must be sufficiently proved. When the fact of delivery of an indorsed deposit-receipt clearly appears, then justice requires that the circumstances and the purposes of that delivery shall be ascertained.

I think that the Court has repeatedly directed inquiry in such cases, and I agree with the opinion of the Lord President (Colonsay) in the case of *Muir* v. *Ross*.

With reference to a deposit-receipt indorsed by a party and put into the hands of another, the farther question, *Quo animo?* is a matter which may be inquired into, and as to which one conclusion may be ascertained from facts and circumstances established by parole evidence. I concur also in the opinion of Lord Deas in the same case of *Muir* v. *Ross*, that "the important thing in the case of a deposit-receipt is the delivery. Now, it is competent to prove the delivery by parole testimony; and, if it is competent so to prove delivery, it seems difficult to hold that it is not competent to prove, in the same way, what the purpose of the delivery was, when that purpose is consistent with the form of the writing delivered." These observations are, I think, quite sound, and they are applicable to the present case. Where the holder of a deposit-receipt, indorsed to him, has drawn the money, and is called on to account for it, it appears to me clear that he must be permitted to account for it by whatever satisfactory proof he can adduce of the manner, the circumstances, and the purpose of indorsation and of delivery. Accordingly, in the case of *Heron* v. *M'Geoch*, 13th Nov. 1851, 14 D., 24, in the case of *M'Kellars* v. *Hunter*, 5th March 1858, 20 D., 761; in the case of *Bryce* v. *Young's Executors*, 20th Jan. 1866, 4 Macph., 312; in the case of *Kennedy* v. *Rose*, 8th July 1865, 1 Macph., 142; in the case of *The Lord Advocate* v. *M'Neil*, 6th Feb. 1861, 2 Macph., 626; in the case of *Muir* v. *Ross*, 15th Jan. 1866, 4 Macph., 820; and several other cases, the facts and circumstances attending the indorsation and delivery have been investigated, parole testimony has been received, and the case has ultimately been decided on considering the import of the evidence. Every case decided, whether for or against donation, on consideration of parole testimony, is an authority in favour of the competency of that testimony. I am of opinion that in such cases the matter is examinable, and that the exclusion of parole testimony would frustrate or defeat the examination, and shut out the truth. To compel a man to account for his possession and refuse to receive his proof would, I think, be a denial of justice. On the question of the competency of evidence, therefore, I really cannot see any sufficient ground in law for refusing inquiry, or for excluding parole testimony in support of the indorsation and delivery of the receipt.

But another question is raised. It is said that, even assuming the competency of parole evidence in certain cases of *dontaio inter vivos*, it is not competent here, because this is a *donatio mortis causa*, which is said to be truly a species of legacy, and to fall under different rules—for a legacy above the value of £100 Scots cannot be proved by parole.

After the best consideration which I have been able to give the subject, I have formed the opinion that *donatio mortis causa*, as a proper testamentary act, or a form of legacy, has not been admitted or adopted by our law. There may be an effectual donation made during life, but of which payment is suspended till the death of the donor. It is a donation, and it is *mortis causa*, but it is not a legacy; nor is it precisely that form of legacy which in the Roman law was termed *donatio mortis causa*. Of that species of donation, or of the nature of a legacy, we have few examples, and Mr Erskine says that it is "little known in our practice." (Ersk. 3, 3, 91). Lord Glenlee says, in the case of *Duguid* v. *Caddell's Trs.*, 29th June 1831, "We have nothing like the Roman doctrine as to their peculiar *donatio mortis causa*." On this point, which I have carefully considered, I can really add nothing to what your Lordships have already stated; and, in particular, the views explained by Lord Deas in the latter part of his opinion, and fortified by his reference to Baron Hume's Lectures, are in entire accordance with the opinion I have formed.

On the import of the evidence I do not intend to dwell. I concur with the Lord Ordinary and with your Lordships in holding it to be satisfactory; and I think it is only justice to the defender to say, that the fact of his handing Mr Morris the money drawn at the bank on the deposit-receipt—thus giving him the opportunity of reconsidering

his gift—is creditable to him, and favourable to the weight of his testimony.

The Court adhered.

Agent for Pursuer—John Gillespie, W.S.

Agent for Defender—A. K. Morison, S.S.C.

Tuesday, July 16.

SECOND DIVISION.

MORITZ UNGER, APPELLANT.

Bankruptcy—Appeal—Compearing Creditors—Examination—Adjournment—Commission. Circumstances in which held that the adjournment of a diet for examination of a bankrupt, and the granting of a commission on the application of certain compearing creditors to take evidence in regard to matter embraced in a previous deposition of the bankrupt, were incompetent.

This was an appeal in the sequestration of Moritz Unger, pearl and diamond merchant in Edinburgh, and the question was as to the competency of an order for proof granted to certain creditors, pending the examination of the bankrupt.

The bankrupt was first examined on 12th March last, when he made certain statements as to the loss of a pocket-book containing upwards of £2500 worth of money and jewellery, which he said had dropped from his pocket into the sea when travelling between Hamburgh and Leith in the month of February preceding. The examination having been adjourned to the 18th March, was, on that date, again adjourned till the 2d April, when the bankrupt was examined at great length by counsel on behalf of certain creditors. He repeated his statement as to the loss of the pocket-book; and the Sheriff thereupon again adjourned the examination till the 1st July that inquiries might be made. Upon 1st July a further examination took place, at the close of which the counsel for the compearing creditors moved for a further adjournment, and, having offered to guarantee the estate against any further expense that might be thereby incurred, obtained from the Sheriff-Substitute (HALLARD) the following deliverance:—"The Sheriff-Substitute, in respect of the guarantee above set forth, adjourns the further examination of the bankrupt till the 2d day of October next, at eleven o'clock forenoon; further, grants commission to Robert Stuart, Esq., of Lincoln's Inn, London, barrister-at-law, and to the British Consul at Hamburgh, to examine witnesses and receive documents with reference to the various matters contained in the bankrupt's previous examination; said commission to be reported against the diet to which this meeting is now adjourned."

The bankrupt appealed against this deliverance, maintaining that the adjournment of the examination was incompetent, and that there was no authority in the Bankrupt Act for granting such a commission as proposed.

The Court to-day sustained the appeal, holding that the Sheriff had no power to adjourn the examination for so long a period, and that the proposed commission to examine witnesses in London and Hamburgh was an unheard of and incompetent proceeding. The 90th section of the statute no doubt gave certain powers to the *trustee* in the way of obtaining information, but that section did not contemplate that its machinery should be set in motion by individual creditors, and certainly did not contemplate a roving commission to take the evidence of parties not named, and not in any way described or defined.

Appeal sustained, with costs against the compearing creditors.

Counsel for the Appellant—The Dean of Faculty and Mr Pattison.

Counsel for the Compearing Creditors—Mr Alexander Moncrieff.

Counsel for the Trustee in the sequestration—Mr Mackintosh.

Tuesday, July 16.

GRANT *v.* MACDONALD AND OTHERS.

Mandatory—Sufficiency—Objection. Circumstances in which objection to the sufficiency of a mandatory repelled.

The pursuer, as creditor of John Grant, timber merchant in Wales, raised a reduction of certain transfers of a vessel named "Skylark." He called as defenders—1, the said John Grant, who had at one time been the owner, and who had executed a transfer in favour of a Mr R. H. Macdonald, residing in Glasgow; 2, the said R. H. Macdonald; 3, the pupil children of the said John Grant, in whose favour Macdonald had executed a transfer. The action sought to have set aside the transfer by Grant to Macdonald, and that by Macdonald to Grant's children, on the ground that they were all granted for the purpose of defrauding Grant's creditors. Grant's children being resident in Wales, they were ordered by the Lord Ordinary to sist a mandatory. They accordingly sisted a Mr Johnston. The pursuers then lodged the following note of objections to the mandatory:—

"PATTISON for the pursuer, objected to the sufficiency of the mandatory proposed by the defenders, who is named and designed in the mandate, 'Mr James Johnston, insurance agent, residing at East Drummond Street, Edinburgh.' The said mandatory has no known or ostensible business or means. His name is not in the 'Edinburgh Directory,' nor has he any place of business. Acting on the information of the defender's agent, who gave his description as 'collector and insurance agent, No. 23 East Drummond Street,' the pursuer's agent made inquiries at that address. He found that the house where he resides consists of a garret at the top of a common stair, having all the appearance of poverty and wretchedness. There is no name-plate on the door, the bell-wire is broken; and the only person in the neighbourhood who had any knowledge of Mr James Johnston stated he believed him to be a collector for a burial society. Nobody else knew anything of him. He does not, so far as the pursuer can learn, represent or act for any insurance office."

Lord Kinloch pronounced the following interlocutor:—

"19th June 1867.—The Lord Ordinary having heard parties' procurators on the minute for the pursuer, No. 22 of process, remits to the Sheriff of Edinburghshire to inquire into the sufficiency of the proposed mandatory, and to report.

(Signed) "W. PENNEY."

The Sheriff issued the following report:—

"Edinburgh, June 25, 1867.—The Sheriff has directed inquiry through the Sheriff-clerk as to the sufficiency as mandatory of James Johnston, and the result of the inquiries made is the following:—Johnston resides in the fifth flat of No. 23 East Drummond Street. There is no name-plate on the