under essential error as to his legal rights and the nature and effect of the deed.

"2. Whether the defenders, or one or more of them, by themselves, or by another or others, by wrongful misrepresentation, induced the pursuer William Bruce to sign the agreement, No. 120 of process.

"3. Whether the defenders, or one or more of them, by themselves, or by another or others, by wrongful concealment, induced the pursuer William Bruce to sign the agreement, No. 120 of process.

"4. Whether the pursuer's brother James Bruce, in signing the agreement, No. 120 of process, was under essential error as to his legal rights and the nature and effect of the deed.

"5. Whether the defenders, or one or more of them, by themselves, or by another or others, by wrongful misrepresentation, induced the pursuer's brother James Bruce to sign the agreement, No. 120 of process.

"6. Whether the defenders, or one or more of them, by themselves, or by another or others, by wrongful concealment, induced the pursuer's brother James Bruce to sign the agreement, No. 120 of process."

The SOLICITOR-GENERAL, for the defenders, objected to an issue of essential error alone. The only thing averred was fraudulent concealment and fraudulent misrepresentation, and the issue should be to that effect.

FRASER, for the pursuer, argued that the signatures were adhibited under essential error; that the pursuer's averments were relevant to support the plea, and that he was entitled to an issue to that effect. That, at all events, he was entitled to an issue to the effect that the deeds were executed by the pursuer and his brother under essential error, "induced by" the fraud of the defenders.—*M'Conachy* v. *M'Indoe*, Dec. 23, 1853, 16 D. 315; *Johnston* v. *Johnston*, March 11, 1857, and 9 D. 706, 3 Macq. 619; *Adamson* v. *Glasgow Water-Works Commissioners*, June 22, 1859, 21 D. 1012; *Wilson* v. *Caledonian Railway Co.*, July 6, 1860, 22 D. 1408.

LORD PRESIDENT—The questions of fact which arise in this case are contained in articles 12 and 13 of the condescendence, and upon these I cannot avoid the conclusion that the only case of the pursuer is one of fraud—that is the true character of the case as it appears upon the record. So I think there should only be one issue as regards each of the signatures, and the issue should be, whether the signature was obtained by the fraudulent misrepresentation or fraudulent concealment of the defenders. Perhaps it would be well to add the words "or of others acting for them," because an issue of this sort, without any such extension, has been held to confine the proof to the personal fraud of the defender.

LORDS DEAS, ARDMILLAN, and KINLOCH concurred.

The pursuer then proposed the following amended issues:—

"1. Whether the signature of the pursuer William Bruce to the deed of agreement, No. 21 of process, was obtained by the fraudulent misrepresentation, or fraudulent concealment, of the defenders, or one or more of them, or of others acting for them.

"2. Whether the signature of the pursuer's brother James Bruce to the deed of agreement, No. 21 of process, was obtained by the fraudulent misrepresentation or fraudulent concealment of the defenders, or one or more of them, or of others acting for them."

The Court approved the issues last proposed by the pursuer, but struck out the words "or of others acting for them," on the express understanding, however, that the issue as amended should include, and allow proof of, fraud on the part of agents.

Agents for the Pursuer—Ferguson & Junner, W.S.

Agents for the Defenders—Wotherspoon & Mack, S.S.C.

Friday, July 5.

MRS HELEN M'DOUGALL OR GIBSON AND HUSBAND *v.* MRS JEAN GRAHAM OR HUTCHISON.

Donation mortis causa—*Husband and Wife.*

A *mortis causa* donation by a husband to his wife *held* proved.

Donation mortis causa—*Husband and Wife—Deposit Receipt.*

A sum of money stood deposited in bank in the maiden name of a married woman, and continued so deposited till the husband's death. The *jus mariti* was not excluded by any deed. *Held* (*dissent* Lord President) that an effectual transference of the legal property in the same, by way of donation *mortis causa* by the husband to the wife, had been sufficiently instructed.

This was an action at the instance of Mrs Helen M'Dougall or Gibson—as executrix nominated by the late William Hutchison, India Place, Edinburgh, who died on 20th August 1870, in a trust-disposition and settlement executed by him on 28th July 1866—and her husband, against Mrs Jean Graham or Hutchison, widow of the said William Hutchison, to have it found that all sums of money deposited in bank in name of the said William Hutchison and the defender, or either of them, prior to the death of William Hutchison, form part of his executry. There were also conclusions of count, reckoning, and payment.

There were two sums in dispute between the parties—1st, A sum of £185, which had been uplifted by William Hutchison about five months before his death, and which the defender alleged he had gifted to her; 2d, A sum of £235, deposited in bank in the defender's maiden name, which the pursuer claimed as part of William Hutchison's executry, but as to which the defender alleged that her husband had effectually renounced his right of property in her favour.

The Lord Ordinary (GIFFORD) allowed a proof, the import of which was as follows:—

It was clearly proved that the sum of £235, which stood in Mrs Hutchison's maiden name, and which was the proceeds of her own industry, was never uplifted by Mr Hutchison, and for nearly twenty years he allowed his wife to uplift and re-deposit it as she pleased. The *jus mariti* was not, however, excluded by any deed.

On 28th July 1866, Mr Hutchison executed a settlement, by which he gave to his wife, the defender, the liferent of his whole estate, and the fee

to the pursuer, who was then his son's widow, and appointed the latter his sole executrix. He had then no children or other descendants living.

Mr David Hunter, S.S.C., deponed—"I am agent for the pursuer. In July 1866 I was asked by the late Mr Hutchison, news-agent, to prepare a settlement for him; and I had a meeting with him on the subject in the back room of Mr M'Dougall's shop, No. 8 India Place. Mr M'Dougall was present, and also Mrs Gibson, Mrs Aitchison, and old Mrs M'Dougall. Mr Hutchison told me on that occasion that he wished his settlement made to convey his whole property to Mrs Gibson. I asked him whether he did not intend to leave something to his wife, and he said she had money of her own deposited in bank. I asked him how it was deposited, and he said it was simply on bills, as he had called them. On making some more inquiry I found it was on deposit-receipts, and I told him that money would belong to him in virtue of his husband right, and that it would be carried by the will. I told him further, that if he did that, it would not be behaving right to his wife, and I advised him to give her a liferent of the whole. That was accordingly done."

Evidence substantially to the same effect was given by the pursuer and other persons present at the meeting, called as witnesses for the pursuer.

After this deed was made, the pursuer entered into a second marriage with her present husband Mr Gibson. Disputes arose between her and Mr Hutchison, and about Whitsunday 1868 Mr Hutchison instructed Mr Laurie to prepare a new settlement entirely in favour of his wife.

Mr Laurie's evidence was as follows:—"I am an accountant and cashier to Messrs Wortherspoon & Mack. . . . When he (Mr Hutchison) instructed me to prepare that deed (the new settlement), I asked him whether the proceeds of the shop were in his own name, and he said they were. I then asked him if his wife had got any money, and he said she had a little. I did not ask him the amount, as I thought that would be impertinent; but I said, How does it stand? and he said it was in her own name. I told him that the deed would, therefore, require to be a mutual deed between him and his wife, and I framed the draft on that footing, and sent it to him in November 1868. Hutchison said to me that he had never interfered with his wife's money from the time they were married. He also said she was the party who always went to the bank and dealt with it, getting it taken out herself, and putting it in. He said he did not wish to interfere with it, that she had worked hard for it, and had been a long time in business both before and after they were married. The draft was prepared in terms of Mr Hutchison's instructions to me. He returned it to me a considerable time afterwards, and told me it had been approved of both by his wife and him. It must have been far on in 1869 before he returned it, because the deed, as it was extended, bears date in 1869 . . . About the beginning of March 1870 Mr Hutchison brought back the settlement to me signed. I saw his name at it, and I asked him how it had been done, and when he told me I said to him that it would not do. He seemed to feel very much disappointed about that, and I said, 'if you and your wife cannot put your names to that deed, the better way would be for you to go to a notary-public, and he would do it for you.' He said that would be more expense, and asked what it would cost. I said perhaps £1 or 30s. or £2, and he demurred at that very much, and almost said he would not do it. Seeing that, I said, 'if you wish not to incur the expense of that way of doing it, then the better way would be for you to take the money out of the bank in your own name and give it to your wife as a present, and that would save all further trouble and annoyance about it.' I told him that would put his wife safe. I told him fully about the effect of handing over the money as a present to his wife. I said it was a legal mode of transferring his part of the estate to her, and that it would save all trouble and annoyance about signing the will. He spoke about the money that was in bank in his wife's name, and said it was all safe because it was in her maiden name. By that I understood him to mean that nobody could touch it except herself. I met him one day afterwards casually at the railway station when he was going home, and he told me he had uplifted the money as I had advised him.

"James Nicoll, examined.—I am a grocer at Newbigging. I have been there nearly four years. I knew Mr and Mrs Hutchison. I remember Mr Hutchison coming down to my shop one day with a document. [Shown No. 20.]—That is it. I think that would be about the end of February or beginning of March (1870). He was then complaining. I suppose he brought the document to me because we were a little acquainted, and he was in the habit of coming into my shop now and again. He said he had got a paper here from Mr Laurie, Edinburgh, which he wished to put his name to, if I would sign as a witness. I agreed to do so, and sent for Mr Andrew Smart, baker, whose shop was almost next door to mine, and he came in. I read over the document aloud, and Mr Hutchison said it was all right, and then put his name to it. I assisted him. He was complaining of his eyesight at the time. He said to me that he wished the longest liver to get all. When I read the clause revoking previous deeds, he said that was what he was intending, and the way in which he wanted it drawn out. So far as I recollect, I wrote his name while he held the pen, and he afterwards made the cross himself at the end. Mr Smart and I signed as witnesses. Mrs Hutchison came down, not that day, but some time afterwards—I cannot say how long. She did not come that day because she was unwell. When she came, Mr Smart was there also, and I read over the deed to her in the same way as before. She also signed it, with assistance."

Mrs Jean Graham or Hutchison, the defender.—"My husband went up to Edinburgh, and uplifted the money in the bank. I think that was sometime in March (1870). He brought the money (£185) with him to Newbigging. He took it out of his pocket, and put it into my hand, and said, 'Tak' that as a gift, for thae devils M'Dougalls will be down upon you whatever may befal me.' He was then in very bad health, his back was bad. . . . . My husband died on a Saturday morning. On the previous afternoon he said to me, 'Nobody shall touch that money that you earned hard, for it is your own money.' He did not say anything more about my own money. These were the last words he said. He was looking for death at the time he said that. There was no one present at the time but himself and me. There was no one present when he gave me the £185, but he said he would not have taken the trouble of going in for it if he had not been wanting to give it to me."

The deposit-receipt for £185 was produced, bearing to have been paid by the bank on 18th March 1870.

The Lord Ordinary thereafter pronounced the following interlocutor:—

"*Edinburgh, 27th February* 1872. . . . Finds it sufficiently instructed in point of fact that the late William Hutchison, the husband of the defender, some time before his death, did make over in gift and donation to the defender, his then wife, a sum of £185 or thereby, which he uplifted from the bank in or about March 1870; and finds that the donation or gift of this sum by the said William Hutchison to the defender stood unrecalled and unrevoked at the death of the said William Hutchison, which took place in or about August 1870: Finds it farther sufficiently instructed in point of fact that the said deceased William Hutchison renounced in favour of the defender, his wife, and gifted and made over to her all right competent to him in a sum of £235 or thereby, deposited in the Bank of Scotland, Edinburgh, on deposit-receipt dated 9th May 1870, in name of Miss Jane Graham, 13 India Place, that being the maiden name of the defender, his wife; and finds that the gift or donation of this sum by the said William Hutchison, or of all right competent to him therein, stood unrecalled and unrevoked at the death of the said William Hutchison: Therefore, and in regard to both the sums above-mentioned, assoilzies the defender from the declaratory conclusion of the action, and decerns: *Quoad ultra* appoints the cause to be enrolled, that any further procedure may take place under the petitory conclusions of the action, if such procedure is competent or necessary: Finds the defender entitled to the expenses of process up to this date.

"*Note.* . . . . These questions are (1) Whether a sum of £185, which stood deposited in bank in name of the late William Hutchison, and which was uplifted by him in March 1870, formed part of his estate at the date of his death, or whether it had been effectually gifted by him to his wife; and (2) whether a sum of £235, which stood deposited in the maiden name of the wife, was or was not the property of the husband at the time of his death, or whether that sum also had not been effectually renounced and made over to the wife.

"In point of fact the wife had the absolute possession and control of both sums at the date of her husband's death, and in the Lord Ordinary's view it is a pure question of fact whether the monies at the date of the death—that is, at the date of the dissolution of the marriage—did or did not belong to the husband, or whether they or either of them had or had not been gifted or made over to the wife.

"Probably the presumption of law may be taken to be that both sums were the property of the husband. There was no contract of marriage between the spouses, either antenuptial or postnuptial. There is no averment of any deed either renouncing or excluding the husband's *jus mariti*, and if there be no evidence to the contrary, the Lord Ordinary would feel himself bound to hold that both sums fell under the *jus mariti*, and were in law the property of the husband at the time of his death.

"It would be no answer to this to show, as has been done in the present case, that one of the two sums formed the proper and separate earnings of the wife, and that the same had been accumulated by her, at least to a considerable extent, before marriage. The wife's moveable property, whether acquired by her before marriage or during its subsistence, falls under the husband's *jus mariti*, and must be dealt with as his estate where there is no effectual provision to the contrary. All this is quite clear, and was conceded in argument on both sides of the bar.

"But then it is equally clear that a husband may effectually make donations or gifts to his wife, and although all such gifts are in their nature revocable, still, if the husband dies without revocation, the gift will receive effect. It was urged that there is a legal presumption against such donations, and that at all events they cannot be proved to any extent by the testimony of the wife herself. This proposition, however, seems to be broad, for although it is true in one sense that there is a presumption against donation when there is room for any other contract, and the maxim probably applies *donatio nunquam presumitur*, still there is no special presumption against a husband making a donation to his wife, but rather in many cases a likelihood that he will do so, and in all cases the question is one of evidence, and the whole evidence and the whole circumstances must be taken into account.

"Nor is there any difficulty in the present case about the competency of parole evidence. What is to be proved is not an obligation to give, or an agreement to give, but a *completed donation*, the full possession of the thing said to be gifted being undoubtedly with the alleged donee. The Lord Ordinary sees no ground for holding that in such a case the proof of donation must be limited to writ or oath. On the contrary, in all such cases he holds that donation may be proved *prout de jure*.

"So standing the question, the Lord Ordinary thinks that in the present case donation unrevoked has been sufficiently made out by the defender. Undoubtedly the proof is somewhat narrow, and it may be said the defender has barely made out her case. Still the Lord Ordinary thinks there is enough, and he is satisfied that the defender's claim is in accordance with the intentions of her late husband and the equities of the case.

"The two sums stand in some respects in different positions, but in great part the evidence is applicable to both. A very few words will explain the view which the Lord Ordinary takes of the evidence.

"The pursuer claims as executor-nominate and residuary legatee or beneficiary under a *mortis causa* settlement made by the late William Hutchison on 28th July 1866, whereby he made his wife, the defender, the liferentrix of his whole estate, and gave the fee thereof to the pursuer. The pursuer was then the widow of William Hutchison's son, and the deed bears to be made for the love and favour which the testator had to his wife and daughter-in-law.

"Some evidence has been led about this deed, and it may be taken as proved in point of fact, in accordance with the presumption of law, that at its date the testator intended it to regulate the disposal, not only of the money which stood in bank in his own name, but also of that which stood in name of his wife. This seems to have been explained to him by the agent, and there is no reason to doubt that he fully understood it. The

whole funds were to be liferented by his widow, and then to go to his daughter-in-law. He had no children or descendants.

"After this deed was made, however, Mrs Hutchison, the daughter-in-law, entered into a second marriage with her present husband, and became Mrs Gibson. It is in evidence that this marriage was not approved of by the late William Hutchison, and very serious disputes took place between him and the pursuers Mr and Mrs Gibson. Indeed, a Court of Session litigation was begun between them, and although that action was abandoned, it seems clear that Mrs Gibson's relations with her father-in-law were not what they had been before her second marriage.

"In particular, it is proved that in the year 1868 the late Mr Hutchison resolved to make a new settlement in favour of his wife, giving her, in the event of her survivance, his whole property of every description. On the instructions of Mr Hutchison this deed was prepared by Mr Thomas Laurie. The draft of the deed is No. 24 of process, and after the draft was approved of, the deed was extended by Mr Lawrie, and sent in 1869 to Mr Hutchison to be executed. The extended deed is No. 20 of process. This deed was attempted to be executed in the beginning of 1870, not only by the late Mr Hutchison, but also by the defender, his wife, but unfortunately their hands were led by one of the instrumentary witnesses, Mr Nichol, and thus the deed was not effectually signed. Owing to this error or defect in its execution, the deed is inoperative as a will, but it becomes a very pregnant piece of evidence in considering the proof of the donation which followed. It is quite plain, upon the proof, that the late William Hutchison, when he attempted to make his second will, intended his wife, if survivor, to get his whole estate, whether it stood in his name or in her own. Mr Laurie's evidence, and the other evidence regarding the abortive settlement of 1870, is quite conclusive on this point, which, indeed, admits of no dispute.

"The next point of importance is, that when the deceased brought back the settlement of 1870, and explained how the signatures had been affixed, he was told that the deed was bad and ineffectual, and that he would require to get a notary to sign for him. He demurred to the expense, when he was informed that if he chose he might take his money out of the bank and give it to his wife in a present, and that this would be effectual. Acting on this advice he did lift the money, he did give it to his wife, and he reported to Mr Lawrie that he had done so. This evidence is confirmed by the evidence of the defender, and, if believed, seems not far from conclusive on the subject. The Lord Ordinary entirely credits the evidence of the defender herself, of Mr Laurie, and of Mr Begg, as well as the evidence of Mr Nichol, whose want of skill or experience led to the mal-execution of the settlement of 1870. He thinks it proved that the late Mr Hutchison, finding that his attempted settlement was inoperative, and being advised that he might make a donation of the money to his wife, took that advice, and did make the donation accordingly. The donation never having been revoked, remains effectual to the present defender.

"The sum deposited in the defender's own name raises a point of some subtlety, but really stands in the same position as the money uplifted and handed over by the husband. As the sum was already in the wife's name, there could of course be no actual transference or handing over, but there was everything of which the circumstances admitted. In addition to the evidence of the defender, the evidence from the abortive settlement, the evidence of Mr Laurie, Mr Begg, and Mr Nichol, there is really the evidence of the pursuer herself, who proves that Mr Hutchison, while aware that he could take his wife's money if he wished, stated that he did not want to do so, as he did not want any of his wife's money. Independent of the pursuer's evidence, however, the Lord Ordinary thinks there is enough to instruct donation to the defender of the money which lay in her own name. The very fact that the husband allowed it to continue in his wife's name for nearly twenty years, allowed the wife to uplift and re-deposit it at pleasure, and never interfered therewith in any way, goes a long way to prove or to imply donation; and when to this be added the circumstances which followed on the abortive settlement of 1870, the Lord Ordinary thinks that neither in law nor in justice is there any room for any distinction between the money which originally stood in the husband's name and that which stood in the name of the wife. The husband intended the wife to get the whole, and although the case may not be free from doubt, it is thought he has sufficiently effectuated this intention.

"Practically, the declaratory conclusion of the action exhausts the whole dispute, and, accordingly, the Lord Ordinary has disposed of the question of expenses. In point of form, however, the conclusion of count and reckoning remains, and, if the parties wish it, the case may be put to the roll to exhaust that conclusion."

The pursuers reclaimed.

MARSHALL and STRACHAN for them.

SOLICITOR-GENERAL and SCOTT for the defender.

Authorities cited—*Morris* v. *Reddick*, July 16, 1867, 5 Macph. 1036 (where the previous cases will be found referred to); *Robertson* v. *Taylor*, June 12, 1868, 6 Macph. 917; *Wood* v. *Menzies*, May 26, 1871, 8 Scot. Law Rep. 517.

At advising—

LORD ARDMILLAN — (*After a narrative of the facts*)—In regard to the £185, I am of opinion that that sum has been by satisfactory evidence proved to have been the subject of a *donatio mortis causa* by Mr Hutchison to his wife, and I have no doubt of the competency of a proof by parole evidence. That is now settled by repeated decisions. It is only necessary to refer to the cases of *Bryce* v. *Young's Executors*, Jan. 20, 1866, 4 Macph., and *Morris* v. *Riddick*, July 16, 1867, 5 Macph., and *Robertson* v. *Taylor*, June 12, 1868, where the point was carefully considered. Such evidence being competent, is in my opinion sufficient in this instance to sustain the averment of donation. The change of circumstances on the marriage of Mrs Ralph Hutchison to Mr Gibson, and the ineffectual attempt by Hutchison and his wife to make a mutual settlement, the survivor to take all, renders such a *mortis causa* gift natural and probable; and the testimony of Mr Laurie, Mr Begg, and Mr Nichol, confirming the clear and direct testimony of Mrs Hutchison herself, leaves in my mind no room for reasonable doubt on the matter, in regard to which I concur with the Lord Ordinary.

The second question, viz., the alleged donation of the sum of £235, which was deposited in the wife's own name, is attended with more difficulty. There is no doubt that this sum was the property of Mr

Hutchison. A sum accumulated and laid aside by a wife, and deposited in bank in her own name or deposit-receipt, is not hers. It belongs to her husband. Unless and until it is made the subject of gift by her husband, it remains his property. I think that Mr Hutchison was told this in 1866, and understood it, and framed his settlement accordingly, disposing *mortis causa* of his whole means and estate. I think that the pursuer herself, and her husband Mr Gibson, and her brother James M'Dougall, and her sister Mrs Aitchison, all concur in stating that Mr Hutchison knew the money to be his, and at his disposal. Now, knowing this, and having attempted in vain to make a settlement in favour of his wife, and having considered and consulted about another mode of doing what he had intended to do by settlement, the course which he takes is this—First he uplifts from the bank the money deposited in his own name, and he makes a donation *mortis causa* of that sum to his wife. Then, finding his end approaching, and, as the witness says, "looking for death"—knowing how the other sum stood on deposit, knowing that it was his own, though deposited in his wife's name, having no child or near relative, and retaining the desire that his surviving wife should take all he had, he said to her that "she had earned it"—that "it was all her own"—"nobody shall touch that money that you earned hard, for it is your own money." Now, it is true that the use of these words rests on the testimony of the surviving wife, who claims the gift. That testimony is not, however, shaken by cross-examination, nor contradicted by other evidence, nor is the fact which she states unnatural or improbable, or inconsistent with the other facts and circumstances of the case. In regard to the first sum, the £185, the testimony of Mrs Hutchison is corroborated so far as corroboration was possible, and that corroboration tends to sustain her credibility as to the second sum, while the attempt by the husband, though accidentally unsuccessful, to leave all he had to his surviving wife, renders natural, probable, and reasonable, the act of making a dying gift, to which she swears. That he knew the money was in her own name, uplifted and re-deposited by her repeatedly during many years—that he permitted and sanctioned it, and though informed that the money was legally his own, never desired to disturb it—and that he attempted by settlement to leave all his funds to his wife—all this does not prove the money to have been hers while he lived. It was not so; but it tends strongly to corroborate the statement that, in the near prospect of death, he made to his wife a donation *mortis causa* of this sum, to be enjoyed by her after he was taken away. The position of this money on deposits in her own name rendered the uplifting of the money unnecessary; and her personal possession of the receipt—a fact known to her husband—rendered its transference or handing over needless and unsuitable. If the testimony of Mrs Hutchison is credible, as I think it is, then there is, in my opinion, such corroborative evidence as to make it sufficient. This second question, regarding the sum of £235 standing on deposit in the wife's name, is one of great delicacy. It is not without difficulty and hesitation that I have arrived at the same conclusion as the Lord Ordinary. But the whole facts, circumstances, and evidence must be taken together, and, so reading them, I have formed the opinion, that after failing in the attempt to make a mutual settlement, Mr Hutchison, adopting the advice of his friend, when he found death approaching, substituted a gift *mortis causa* for a settlement, and made the donation of both sums which the defender has alleged.

LORD KINLOCH—The pursuer, the executrix of the deceased William Hutchison, now sues the defender, his widow, for payment of two several sums of £185 and £235, alleged to have belonged to the deceased, and to be in the possession of the defender. The substantial question is, whether these sums, or any of them, formed a donation *mortis causa* by the deceased William Hutchison to his wife.

In regard to the first sum of £185, originally lying in bank on a deposit-receipt in William Hutchison's name, I conceive that no doubt can be entertained. It is proved that in 1870 William Hutchison intended, and in fact attempted, to execute a disposition and settlement, under which his wife, if she survived, would have right to everything he possessed. An attempt was made by both husband and wife to place at the bottom of the deed what would be held to be their subscriptions; but their hands being led, the proposed signatures were ineffectual. The agent employed by them, Mr Thomas Laurie, depones that in this state of things he said to Hutchison—"If you wish not to incur the expense of that way of doing it, then the better way would be for you to take the money out of the bank in your own name, and give it to your wife as a present, and that would save all further trouble and annoyance about it." Mr Laurie depones that on a day afterwards he met Hutchison, "and he told me he had uplifted the money as I had advised him." The widow herself depones that the husband did uplift the money and give it over to her, saying—"Take that as a gift, for these devils Macdougalls will be down on you whatever may befall me." This was in March 1870, when the husband was in bad health; and he died in August following.

I cannot have any doubt that the deceased was in this performing an act intended to form a substitute for the execution of the settlement, and that he made to his wife a donation *mortis causa* of this sum. I entirely believe the testimony of the widow, which is confirmed by that of Laurie, and by the real evidence of the case. The effect, as I think, was just to give to his wife this sum by actual delivery, as she would have got it by means of the settlement. This sum, I therefore think, clearly cannot be recalled.

There is more difficulty as to the other sum of £235, which stood on a deposit-receipt in name of Mrs Hutchison, the wife. It was originally her own money, but came of course to her husband by the legal assignation of marriage; and I think it is sufficiently proved by the evidence of the pursuer's own witnesses that the husband perfectly understood this to be the case. The difficulty on this point lies in the fact that there was no uplifting of the money and formal delivery of it to the wife, as in the other case, and there was no assignation executed in her favour. But the observation at once occurs, that the formal title being in the wife, such an act would naturally appear unnecessary; and it cannot be maintained that a donation *mortis causa* cannot be made of money so situated. It is reasonably, and I think effectually urged, that a distinct declaration of the intention to make the donation ought to be in such a case

sufficient. This being so, the evidence of donation is, I think, sufficient in this case. The widow expressly depones that on the very day before he died, and in immediate prospect of death, her husband said to her—"Nobody shall touch that money that you earned hard; for it is your own money;" or, as she expresses it in another place, "It belongs to nobody but yourself; it was your own working for." I cannot put on this statement any other construction than that it was an intentional expression of a donation *mortis causa.* The evidence of the pursuer's witnesses as to the husband knowing that the money was legally his own, prevents the supposition that he was here enunciating a mere truism as to its being his wife's; and, I think, leaves no other inference than that he was then expressing his wish and purpose that what was legally his should be truly and legally hers. I entirely believe the widow's statement. It is confirmed by the whole course of conduct on the part of the husband during their married life of nineteen years; for he never touched this money from the time of the marriage downwards, and expressed on more than one occasion an intention never to meddle with it. I am clear that it was his purpose to let it go down to his wife as her own property in the event of his predeceasing her, which would in truth have been the result of the intended settlement if it had not proved abortive. It was only to follow out this intention, to make the formal declaration on his deathbed to which the widow depones; and, in the special circumstances, I think that this declaration is sufficient to satisfy the law, and to render this donation also effectual.

I am of opinion that the Lord Ordinary's interlocutor ought to be adhered to.

Lord Deas—It is plain that both donations were donations *mortis causa,* and parole testimony is quite competent to establish a donation *mortis causa.*

As regards the sum of £185, there is no room for doubt. The testimony of the widow is clear and distinct, and although I do not say that is sufficient of itself, it receives ample corroboration. The declaration by the deceased of his intention to leave her all he had, his attempt to execute a deed, and his conversations thereafter, leave no doubt as to the truth of the widow's statement.

As to the £235, there are two questions—*first,* assuming that donation can be made in the way in which it was said to be made, Whether the deceased did make the donation? That depends on whether he knew it to be in his power. If he supposed it to be his wife's money, that would raise a still nicer question, Whether it would be sufficient that he plainly intended to give up all right he had in the money (whatever that might be) to his wife? But it is clearly proved that at one time he knew that this money was in his power. This is proved by no less than five witnesses, three of them witnesses for the pursuer. (*His Lordship proceeded to examine the evidence on this point at some length.*)

But there remains the question, Whether what was done amounted to donation?—in short, Whether there was delivery or anything equivalent to delivery?—For delivery is necessary to a *mortis causa* donation. I am disposed to think that, while there must be delivery, the essential thing to look at is the intention. Suppose the money had been lying in a drawer in another part of the house, and the deceased had told his wife to go and take it, I do not think there would have been any objection to that mode of transfer, although it could hardly be said to be delivery in the ordinary sense. Again, suppose he had directed her to uplift money lying in his name, and redeposit it in her own name, I think that would be sufficient. I think the facts here, that the money was in her own name before, and that he expressly authorised her to keep it, make the kind of delivery the law requires in a case like this, where the intention is clear.

Lord President—I think the donation of £185 is clearly proved. The witness Laurie says that when he told Mr Hutchison that the settlement would not do, and when Mr Hutchison hesitated to employ a notary public, he suggested to him that the better way would be for him to take the money out of the bank, and give it to his wife. Mr Laurie says this occurred in the beginning of March 1870. The next piece of evidence we have is the deposit receipt, which bears to have been paid on the 18th of that month. Mr Laurie further says that he met Mr Hutchison afterwards, and that he told him that he had uplifted the money as he had advised him, which implies that he had uplifted the money and given it to his wife, according to the advice of Mr Laurie. These pieces of evidence would, of themselves, go far to prove the donation, but they are made quite complete by the evidence of the widow, who tells us that sometime that March her husband brought the money from Edinburgh to Newbigging, and gave it to her with certain expressions, which I need not repeat. While clearly of opinion that a donation *mortis causa* cannot be proved by the single evidence of the donee, I think this donation proved by the most satisfactory evidence.

But the other sum of £235 stands in a very different position. That was lodged in Mrs Hutchison's maiden name. She had the ostensible title to it, and could have drawn it. It was possible for her husband, the true owner, to make a gift of it to his wife, but he could hardly do so by the same way as he did with the sum of £185. Indeed the circumstance of it standing in the name of the wife made the donation, or at least the evidence of donation, more difficult. I do not think that actual delivery of the money is essential to donation, particularly if the money already stands in the name of the intended donee. The *animus donandi,* and the expression of that as a present intention, may be taken as sufficient. But less will not do. The question is here, Whether, on the part of Mr Hutchison, there was ever an expression of present intention to transfer the property of this money from himself to his wife as a donation *mortis causa?* It appears to me that great difficulty arises in the evidence of this being entirely found in the testimony of the wife. The donation of this sum, if it was ever made, was not made at the same time as that of the other sum. The sum of £185 was given in March, and the sum of £235 is said to have been given on the day before Mr Hutchison's death, in August following. What was it his wife says took place on that day? "My husband died on a Saturday morning. On the previous afternoon he said to me—'Nobody shall touch that money that you earned hard, for it is your own money.'" Now, assuming these words to be sufficient to express a present intention of transferring the property of the money from himself to his wife, are they sufficiently proved? There are some circumstances which render it not improbable that he intended to leave

his widow all he could; but is there enough evidence to surmount that presumption which the law raises against donation? The moment you accept the evidence of the donee as sufficient, you put an end to that presumption. But suppose the words were used, Are they words of gift? They seem to me rather the utterances of a man who believes that the money belongs to his wife. Now it is said that he was quite aware—was in fact made aware, and expressed his knowledge—that he had the power to dispose of this money, though it was lodged in his wife's name. This is true at a certain date, and down to a certain date, when in consultation with Mr Hunter he received that advice from him, and expressed his knowledge on more than one occasion. But was there not some change in his mind induced by his communication with Mr Laurie? Laurie's evidence is:—"He mentioned about that time that his wife had some money, but he did not state what the amount was. He was peculiarly reticent upon that point. When he instructed me to prepare that deed I asked him whether the proceeds of the shop were in his own name, and he said they were. I then asked him if his wife had got any money, and he said she had a little. I did not ask him the amount, as I thought that would be impertinent; but I said, how does it stand? and he said it was in her own name. I told him that the deed would, therefore, require to be a mutual deed between him and his wife, and I framed the draft on that footing, and sent it to him in November 1868. Hutchison said to me that he had never interfered with his wife's money from the time they were married. He also said she was the party who always went to the bank and dealt with it, getting it taken out herself, and putting it in. He said he did not wish to interfere with it, that she had worked hard for it, and had been a long time in business both before and after they were married." The draft was prepared and given to Hutchison. In the beginning of March 1870 Hutchison brought back the settlement to Laurie, and in the course of the conversation which they had, Laurie says that Hutchison "spoke about the money that was in bank in his wife's name, and said it was all safe because it was in her maiden name. By that I understood him to mean that nobody could touch it except herself." And that seems to have been Laurie's impression—that the money belonged to the wife and not to the husband. The words which Mr Hutchison used the day before his death look very like an expression of the views which he had got from Mr Laurie. If so, how is it possible to impute to the deceased an intention to transfer the property of the money from himself to his wife by way of donation *mortis causa?* Unless there was a transference on that occasion, she has no title to that money. By law it was her husband's, and now belongs to his executor. In short, I think that donation of this sum is not proved—first, because the evidence of donation is to be found entirely in the testimony of the donee; secondly, the words which she says were used are not words of gift, not words expressive of a present intention to make a donation *mortis causa*. I am sorry to differ from your Lordships on this part of the case, for one cannot help having an impression that in a general way there was an intention on the part of the husband that this money should be the wife's.

The Court adhered, and assoilzied the defender from the remaining conclusions of the summons.

Agent for Pursuer—David Hunter, S.S.C.
Agent for Defender—George Begg, S.S.C.

Friday, July 5.

SECOND DIVISION.

SPECIAL CASE—MACKINTOSH AND OTHERS.

Parent and Child.

Trustees, who were directed to invest a fund for a mother in liferent and children in fee, to be paid to the children on their majority, are bound, after the mother's death, to pay out of the fund to the father, while the children are in minority, a reasonable sum for their maintenance and education.

Legacy—Vesting.

A legacy, which was directed to be paid on the marriage or death of a certain person, vests at the death of the testator, the term of payment being postponed till one or other event should happen.

A legacy directed to be paid on the marriage of a certain person does not vest till the marriage take place, as that event may never happen.

This Special Case was submitted by Æneas William Mackintosh, Esq. of Raigmore, and Charles Stewart, Esq. of Dalcrombie, executors of the late Mrs May Clark or Boileau, of the first part; Madeleine Wood, and others, children of the late Mrs Isabella Anne or Annie Boileau or Wood, daughter of Mrs May Clark or Boileau, and the said Edward Wood, as administrator-in-law for his said children, of the second part; and Stewart Clark, executor-nominate of the late Charles Elliot Boileau, son of the said Mrs May Clark or Boileau, of the third part.

Mrs May Clark or Boileau died on 8th October 1856, leaving a last will and testament and two relative codicils. The will contained the following clause:—"I ordain and appoint my said executors to invest the free residue of my said personal estate and executry either in the best heritable or personal security, and pay over the annual interests, dividends, or proceeds thereof to my daughter, Isabella Ann or Annie Boileau, in liferent during all the days of her lifetime, or until the period of her marriage, whichever of these events shall first happen; and in the event of the marriage of the said Isabella Ann or Annie Boileau, I ordain and appoint my said executors, immediately thereafter, to make payment to Thomas Theophilus and Charles Elliot Boileau, my sons, the sums of £600 sterling each; and the residue and remainder of my said personal estate and executry I ordain them to settle, by such deeds and documents as they may think necessary and requisite at the time, on the said Isabella Ann or Annie Boileau, in liferent during all the days of her lifetime, but for her liferent use only, exclusive of the *jus mariti* of any husband whom she may marry, and not affectable by his debts or deeds, or by the diligence of his creditors, in any way or manner, and to the child or children of the said Isabella Ann or Annie Boileau, in fee, equally and share alike, on their respectively reaching the years of majority or being married,