tion therein, and there would have been a direct claim against the trustee rather than a claim to a preferable ranking among the creditors. But there has been no proper case of adoption presented to us upon the facts. The only facts founded on were that the trustee had right to the rents, and, secondly, that he was retaining possession of ground which had been resumed. Now, as to the rent, he was getting no benefit, for the tenant retained his rent in satisfaction *pro tanto* of his counter-claim. Nor, in the second case, was he taking benefit as a contracting beneficiary under the lease. In retaining the land of which the bankrupt landlord had resumed possession he took benefit simply from a contract which was begun, concluded, and acted upon before he became trustee on the estate. If the case be supposed that Mr Potter after resuming the land had sold it, or had sold the feu-duties for a capital sum, it could hardly have been then suggested that the trustee for the creditors was taking a benefit under the lease. Yet the argument, if sound, must go this length, that the tenant would in that case have been entitled to rank as a preferable creditor for the sum he is now asking. Or to suppose another case, that the arrangement had been that the tenant should have right to a capital sum in place of an annuity, could it have been maintained that he had right in that case to a preferable ranking? I see no ground for that view. It was a mere accident that the creditors happened to get the benefit of the feu-duties, and cannot affect the legal rights of parties. This is not a case where the principle of adoption takes effect. There has not been adoption in the sense that the trustee has taken benefit of a lucrative lease, and so rendered himself personally liable in fulfilment of certain stipulations. He has simply taken up the lands as he found them in the person of the bankrupt as proprietor.

I am therefore of opinion that this is not a case in which anything but an ordinary ranking can be allowed.

The Court recalled the Lord Ordinary's interlocutor, refused the appeal, and affirmed the deliverance of the trustee.

Counsel for Appellant (Respondent)—Asher—Dickson. Agents—Bruce & Kerr, W.S.

Counsel for Respondent (Reclaimer)—Kinnear—Lang. Agents—Campbell & Smith, S.S.C.

Tuesday, July 13.

FIRST DIVISION.

[Sheriff of Aberdeenshire.

JAMIESON *v.* M'LEOD AND ANOTHER (JAMIESON'S EXECUTORS).

Donation Mortis Causa—*Deposit-Receipt—Presumption.*

Facts and circumstances in which *held* that donation *mortis causa* of a deposit-receipt and its contents by a husband to his wife had not been instructed.

Observations on *Crosbie's Trustees* v. *Wright and Others*, May 28, 1880, 17 Scot. Law. Rep. 597.

William Jamieson, crofter, died on 15th January 1878, and Francis Jamieson was decerned his executor-dative *qua* one of the next-of-kin on 17th May following. The wife of the deceased, Mrs Barbara Moir or Jamieson, uplifted shortly after his death a deposit-receipt with the North of Scotland Bank at Turriff, which was in the following terms:—

"£50. "*North of Scotland Bank,*
"*Turriff, 25th May* 1877.

"Received from Mr William Jamieson and his wife, Mrs Barb. Jamieson, Milltack, King Edward (payable to either or the survivor), fifty pounds sterling, which is placed to their credit on deposit-receipt with the North of Scotland Banking Company."

Mrs Jamieson died about two months after her husband, leaving a last will and testament by which Alexander M'Leod and George Barron were appointed her executors.

The present action was raised by William Jamieson's executor against the executors of Mrs Jamieson to determine who had right to the contents of the deposit-receipt, and for the settlement of other claims between the parties in regard to Mr Jamieson's executry estate.

The pursuer pleaded—"(1) The said deposit-receipt belonging exclusively to the deceased William Jamieson, and the same being unwarrantably uplifted by his widow after his death, the same belongs to the estate of the said William Jamieson, and the defenders, as executors foresaid, are bound to repay the amount of it to the pursuer as his executor."

The defenders pleaded—"(1) The said deposit-receipt having belonged exclusively to the defenders' author, they ought to be assoilzied from the conclusions of the action so far as regards the sums contained therein."

A proof was led, from which it appeared that the receipt in question was the last of a series of receipts in the same or similar terms, dating from 1867 onwards, and that shortly before the date of the first of these a considerable sum of money for arrears of wages had been paid to Jamieson and his wife by their employer, the proceeds of which were probably contained in that receipt. The sum deposited had decreased from £308 to £50, and it had been operated upon mainly, if not solely, by the husband.

The Sheriff-Substitute (Dove Wilson) pronounced this interlocutor:—"Finds in fact that the sum of fifty pounds sued for by the pursuer was deposited in bank by his author in name of himself and of his wife, or the survivor of them; that said sum was money which belonged to the pursuer's author; that during his lifetime he retained the control of it; and that it is not proved that he made a donation of it to his wife: Finds in law that the terms of the deposit-receipt did not constitute a bequest to the wife." . . . . He added this note:—

"*Note.*—This case seems to be ruled by the case of *Watt's Trustees*, 1st July 1869, 7 Macph. 930. The only difference is that here the parties in whose favour the deposit-receipt was granted were husband and wife, while there the parties were aunt and niece. The difference is immaterial. In this case, as in *Watt's*, there had been a series of similar deposit-receipts, and the deceased had all along dealt with them as being his

own property. In neither case is there any proof of the deposit-receipts having been delivered during the deceased's lifetime, unless for the temporary purpose of uplifting and re-depositing. And in both cases it appears that the money was the deceased's money. In *Watt's* case that was admitted. In this case it is proved, as the result of such evidence as is obtainable at this distance of time, from the date of the original deposit. It appears that very shortly before that date both the husband and the wife received large sums for arrears of wages from their joint employer. What became of the wife's share is not ascertained; but as the original sum deposited by the husband was within a few pounds of the sum then received by him from his employer, the great probability is that it consisted of his wages. It therefore appears, so far as can be seen, that the money was originally the husband's, and that during his lifetime he always retained the control of it. There was therefore no donation of the money to his wife during his lifetime either as a donation *inter vivos* or as a donation *mortis causa*.

"If it were permitted to sustain the deposit-receipt as a will bequeathing the money to the wife, it would probably be carrying out the husband's intention, for it is difficult to conceive what he could have meant by constantly taking the receipts in the terms he did, unless it was that he wanted that his wife should get the money in the case of his death. But it is settled by the case of *Watt's Trustees*, already quoted, that the terms of such a document are insufficient to constitute a will. It has been considered that receipts in similar terms might be taken for the mere sake of convenience, or for other reasons, and it has been held to be impossible to allow them to stand in the place of a will, which is a thing which can so easily be expressed in an unambiguous shape when it is wanted to be made."

On appeal the Sheriff (GUTHRIE SMITH) recalled the above interlocutor, adding this note—

"*Note.*—The question of the deposit-receipt is one of considerable legal interest, which in the present state of the authorities cannot be said to be free from difficulty.

"A deposit or banker's receipt is simply an acknowledgment that he holds a sum of money for which he shall be accountable to the person of whom it has been received. It is not a mercantile investment—it is not negotiable—it is (as is pointed out in the case of *Watt* v. *Watt's Trustees*, which is referred to by the Sheriff-Substitute) a writing incapable of any testamentary or dispositive effect, for the simple reason that it is not a writing of the party himself; it is a writing to the bank. But it may be the subject of a donation when delivered to the donee in circumstances implying that it was intended that he should uplift and keep the money—*M'Cobban* v. *Tait*, 6 Macph. 310; *Ames* v. *Witt*, 23 Bea. 619.

"It appears from the evidence that on the 25th November 1867 the late George Moir, in whose service the late Mr and Mrs Jamieson had been for many years, drew from his bank account the sum of £448 for the purpose apparently of paying to these persons arrears of wages. About £315 was paid to William Jamieson, and considerably over £100 was paid to his wife. Four days after there was deposited with the Turriff branch of the North of Scotland Bank, in the name of William and Barbara Jamieson, the sum of £308, and during the next ten years money was frequently uplifted and deposited, all the receipts being in both names. That Mrs Jamieson must have been aware of the terms of these receipts is proved by the fact that the one dated 1st December 1868, for £329, bears her endorsement along with the name of her husband; and the bank agent states, that although Jamieson chiefly operated on the account, his wife sometimes came to the bank and may have done so also. So standing the facts, it may be reasonably inferred that these two parties considered this as a joint fund in which they were equally interested.

"The three last deposit-receipts, dated 18th March 1875, 15th May 1876, and 25th May 1877, are for £50 each, and run in the name of 'Mr and Mrs Jamieson, payable to either or the survivor.' The question relates to the last, which was uplifted by Mrs Jamieson, who did prove the survivor, on 26th January 1878, a few days after her husband's death. It is now well established that a husband may make a provision for his wife after his death, as, for instance, by effecting a policy of insurance on his own life payable to the wife and her assignees (*Galloway* v. *Craig*, 4 Macq. 267), or by buying a house and taking the title in her name (as in *Rust* v. *Smith*, 3 Macq. 378). And more recently it has been decided (*Walker* v. *Walker*, 5 R. 965) that where a man lends a sum to a statutory board, and receives in return a bond of the nature of a debenture, payable 'to himself and wife and the survivor, and the assignees of the survivor,' the widow on her survivance takes the fund in virtue of the special destination.

"The Sheriff considers that it is his duty to follow the principle of this last case in disposing of the question which is now before him. There is no substantial difference between a deposit-receipt and a debenture. Both issue out of a contract of *mutuum*, and both mean the same thing. Indeed, many companies who receive money on loan give indifferently either a deposit-receipt or a debenture, and if the special destination is to be accepted as a specific appropriation, such as a court of law is bound to respect in the one case, it is difficult to assign a reason for rejecting it in the other.

"The only difference between them may be this:—The deposit-receipt may be taken in terms stated, for convenience in operating on the account. The husband may wish that it should be in the power of either spouse who happens to be going to the market to call at the bank and uplift the money; and when this is established, it will of course negative the notion of a provision, and at his death the wife's claim will fail (as in *Marshall* v. *Crutwell*, L.R., 20 Eq. 328). In this case, however, there is no evidence of that kind. Both parties being dead, there is no direct proof of what they intended; but looking to the fact that they both came to be possessed of funds about the same time, and that uniformly with the knowledge of both the receipts were taken in their joint names, it may be inferred that it was the wish and expectation of both that the money should pass to the survivor. This being so, the Sheriff sees no technical reason why their intention should not receive effect."

The pursuer appealed to the Court of Session, and argued—There was here no donation *mortis causa* of the receipt and its contents by Jamieson to his wife. A deposit-receipt by itself

was not a document habile to convey a legacy, and there was here no evidence of delivery or of intention to donate.

Additional authority — *Crosbie's Trustees* v. *Wright and Others*, May 28, 1880, 17 Scot. Law. Rep. 597, and authorities cited there.

At advising—

Lord President—The late Mr William Jamieson died on January 15, 1878. He was survived by his widow, but she survived him only for a period of about two months, and during the interval between his death and hers she uplifted a sum of £50 which was contained in a deposit-receipt dated 25th May 1877. The executor of Mr Jamieson contends that the sum contained in this receipt formed part of his executry estate. Mrs Jamieson's executors, on the other hand, contend that it belonged to her, but it does not appear to me that they have ever properly realised the grounds of their claim. When they are charged on the record with being indebted in the sum of £50 on account of the widow having uplifted this receipt, they state "that the £50 contained in the said deposit-receipt, and interest thereon, belonged exclusively to the said Barbara Jamieson, and that the said deposit was made from her own funds;" and their plea-in-law applicable to the above statement is this—that "the said deposit-receipt having belonged exclusively to the defenders' author" (*i.e.*, to the widow), "they ought to be assoilzied from the conclusions of the action so far as regards the sums contained therein." Now, if that ground of defence were established, the result would be that the money in the deposit-receipt belonged to the widow as her own property exclusive of the *jus mariti*. But that defence does not seem to have been understood in that sense by the Sheriff-Substitute or the Sheriff, and it was not maintained before us here. The Sheriff-Substitute dealt with the case on the footing that the money contained in the deposit-receipt was the property of the husband, and the question to which he directed his attention was, whether or not it had been transferred by him to his wife by donation *mortis causa?* He rejects very properly the suggestion that the terms of the deposit-receipt taken by themselves could constitute a legacy, and that view is quite supported by a series of cases; and on the circumstances of the case he thinks there is no ground for holding it proved that there was any donation *mortis causa*. But the Sheriff deals with the case in a way not very intelligible to me. He does not determine whether there was or was not a legacy or a donation *mortis causa* or a donation *inter vivos*. From his reasoning in the note it might be any one of these, and the terms of the interlocutor from their generality throw no light upon his grounds of judgment.

It appears to me, in the first place, that the notion of a legacy may be dismissed at once. It is settled law that a deposit-receipt can never be a testamentary paper; and though it be conceived in favour of a person other than the depositor, it is not able to constitute a good legacy. In the second place, I think we may dismiss, on looking at the circumstances here, any idea of a donation *inter vivos*. The only remaining question is therefore, whether there is anything to support the argument (for there is no allegation) that there was here constituted a donation *mortis causa* by the husband to the wife. I think the only circumstance of any importance is the fact that this deposit-receipt is the last of a series extending over a period of about ten years, all conceived in the same terms, payable to Mr Jamieson and his wife, and in some cases to the survivor of them. It must also be observed in reference to that series of receipts that the sum contained in the first of them is £308; that sum was increased after two years to £329; and it then diminished rapidly, and ended by being for £50 only; so that it is plain that notwithstanding the terms of the receipt the money was used by Mr Jamieson for his own purposes just as he required it. The series of receipts which, if they had been for the same sum, or if the amount had been added to as in *Crosbie's* case, might have supported the case of the respondents here, affords them no support at all when we see that the money was continually diminishing and the husband was drawing it out just as he required it.

Now, what more is there in the case? There is no parole evidence to support the allegation of *mortis causa* donation. It is not said that at the date of any one of these receipts Mr Jamieson either was or believed himself to be labouring under a mortal disease, which would be an essential condition of donation *mortis causa*. It is not shown that he at any time expressed in the presence of witnesses his intention of making, or that he did make, such a donation. All evidence of that sort is wanting. Therefore it appears to me that the Sheriff-Substitute's judgment is well founded, and that the Sheriff has gone entirely wrong. The Sheriff seems to have fallen into the mistake (and I am surprised he should have done so at this time of day) of supposing that a legacy may be made by a deposit-receipt; for he says, after referring to the case of *Walker*, in which a bond was taken in favour of a wife—"The Sheriff considers that it is his duty to follow the principles of this last case in disposing of the question which is now before him. There is no substantial difference between a deposit-receipt and a debenture. Both issue out of a contract of *mutuum*, and both mean the same thing"—and he goes on to give effect to the deposit-receipt as the Court did to the bond in *Walker's* case. But the opinions in the case of *Crosbie* show that there are three deliberately decided cases to the opposite effect of what the Sheriff has assumed to be the law. I therefore differ from the Sheriff's decision, and I think the Sheriff-Substitute's interlocutor ought to be reverted to.

Lord Deas—It was quite settled by the case of *Morris* v. *Riddick*, and we recently explained in the case of *Crosbie's Trustees*, what evidence will or will not suffice to constitute donation *mortis causa*. I think it is perfectly clear on reference to these cases that there is no such thing as donation *mortis causa* here. That is not pleaded on record, nor stated on record, and all the facts necessary to constitute it are wanting. But the Sheriff has found that these deposit-receipts, more particularly the last, constitute a testamentary bequest by the husband to the wife. Now, I agree with your Lordship that to hold that would be going quite in the teeth of *Watt's Trustees* and the other two cases to which your Lordship has alluded. I think it is well settled that when there

has been no delivery of the deposit-receipts, and they remain in the husband's power during his life, and he operates upon them as he pleases, that cannot be construed into a testamentary bequest of the money to the wife. The Sheriff reasons that because by a regular deed taken by a husband from a third party in favour of his wife there may be such a testamentary bequest, therefore it follows that by a deposit-receipt or deposit-receipts from a bank the same thing may be operated in favour of the wife, though these had all along been in the husband's power. He refers to the case of a husband buying a house and taking the title in his wife's name; that no doubt might be done, and will receive effect, if so intended; but that is a formal donation in proper form in favour of the wife. In the case of a debenture, again, that is a regular probative deed. Then he puts the case of a husband taking a policy of insurance on his own life in favour of his wife; that may be done, though it is sometimes attended by difficulties which do not occur in the cases of a disposition or a debenture; and he concludes by saying—"The Sheriff considers that it is his duty to follow the principles of this last case in disposing of the question now before him;" that is, the principle which is applicable to all the three cases he has mentioned—the disposition of a house, the taking of a debenture, and that of a policy of insurance. The Sheriff thinks the same principle leads to holding that a deposit-receipt in such terms as we have here will have the same effect. I do not think it follows at all. A deposit-receipt is not a document which is used for any such purpose, and it does not therefore resemble the other cases at all.

I am therefore of opinion that the interlocutor of the Sheriff is erroneous, and that the Sheriff-Substitute was quite right in his principle. He held that this was a mercantile document not fitted for the purpose of conveying a legacy.

Lord Mure—The case has been dealt with here as one of donation, and was substantially so dealt with by the Sheriff-Substitute, though, as your Lordship has pointed out, this plea was not distinctly stated on the record in the Court below. But I agree with your Lordship that the question is whether donation *mortis causa* has or has not here been made out? and that on the authorities, unless it can be brought, upon the evidence, under the category of the cases of donation *mortis causa*, the defenders have no good claim to the money contained in the receipt. I confess that on the evidence I can see no sufficient proof here of intention on the husband's part to donate. I hold it to be settled by the cases to which your Lordship has referred, and by our opinions in the case of *Crosbie's Trustees*, that a deposit-receipt in terms such as we have here, taken by itself, cannot be held conclusive evidence of donation. Even the fact of there being a series of receipts is not of itself sufficient, though it is no doubt an element in favour of the parties maintaining donation. There is no evidence here, as there was in *Crosbie's* case, of the party during life having stated that he had put the money in on purpose to make a donation to the wife, and there being an absence of such evidence here, I think there is no ground for holding that donation has been here made out.

Lord Shand was absent.

The Court recalled the Sheriff's interlocutor and reverted to that of the Sheriff-Substitute.

Counsel for Appellant—Keir—Dickson. Agent—Geo. Andrew, S.S.C.

Counsel for Respondents — Black — Shaw. Agents—Curror & Cowper, S.S.C.

Tuesday, July 13.

FIRST DIVISION.

KENNEDY, PETITIONER.

Public Records—Transmission to English Courts—Registers of Births, Deaths, and Marriages.

Held that the Court will under no circumstances authorise the public registers of births, marriages, and deaths to be transmitted to England for the purposes of a trial there.

Public Records—Transmission to English Courts—Registered Deeds.

Circumstances in which the Court *refused* to authorise an extracted process of multiplepoinding and certain other registered documents to be transmitted to England.

Process—Order for Production of Writs in Public Custody—Lord Clerk-Register (Scotland) Act 1879 (42 *and* 43 *Vict. c.* 44), *secs.* 2, 3, 4, 10.

Observed that since the passing of the Lord Clerk-Register Act 1879, orders for the production of documents in public custody must be made upon the Deputy Clerk-Register, and not upon the Lord Clerk-Register.

The petitioner here was the defendant in an action for recovering certain heritable property in Manchester which was to be tried at the Liverpool Assizes. The petition set forth—"That the right to the said property depends upon the genealogy of a Scotch family, which genealogy formed in the years 1872 and 1873 the subject of a litigation in the Court of Session in an action of multiplepoinding and exoneration at the instance of John Todd, surgeon in Colinsburgh, and another, the executors of the deceased Miss Anne Duncan of Balchrystie, in the county of Fife, against David Salmond, manufacturer, Islelane Cottage, Hawkhill, Dundee, and others; in which action the First Division of the Court of Session gave judgment. That the petitioner is advised that it is absolutely necessary for the proper conduct of his defence to said action before the said High Court of Justice, and for the determination of said case, that the process in said action of multiplepoinding and exoneration, the decree in which has been extracted, must be produced at the said trial, but for this purpose the order of your Lordships must be obtained. That it is further necessary, in order to establish the petitioner's defence to said action, that certain original records or registers, more especially referred to in the prayer hereof, now under the care of the Registrar-General for Scotland, should be produced at said trial in Liverpool. The petitioner is advised that he cannot competently tender in evidence copies or extracts