the statute. An abbreviate of the petition and deliverance was regularly recorded in the Register of Inhibitions.

The appointed meeting was duly held, and a trustee and commissioners were elected. A few days before the meeting, the petition with the Lord Ordinary's deliverance thereon, the certified copy thereof, the affidavit of the concurring creditor, and the relative voucher, were destroyed by a fire which occurred in the office of the agent in the sequestration. A special report by the trustee explaining the loss of the writs was annexed to the minute of the meeting. As the writs were not produced, the clerk of the Sheriff Court at Glasgow, to which the sequestration had been remitted, declined to receive the other documents into process except on the authority of the Court of Session.

The petitioners in the original petition, namely, the bankrupt and the concurring creditors, along with the trustee, presented this petition to the Second Division of the Court, praying the Court "to grant warrant to and authorise the Sheriff-Clerk of Lanarkshire at Glasgow to receive the minute of the said first general meeting of creditors, and other productions in the process of sequestration, in order that the said trustee's election may be duly declared and confirmed; that an act and warrant may be extracted, and that the sequestration may be otherwise proceeded with in terms of statute notwithstanding the loss of the said petition and other writs."

Section 15 of the Court of Session Act 1868 (31 and 32 Vict. cap. 100), provides:—"Where a summons, petition, or other original writ or pleading is lost or destroyed, a copy thereof, proved in the cause to the satisfaction of the Court before whom the cause is depending at the time, and authenticated in such manner as he or they shall require, may be substituted, and shall be held equivalent to the original for the purpose of the action."

Authority—*Foulis*, July 18, 1872, *ante*, vol. ix. p. 631.

At advising—

Lord Young—I am clearly of opinion that this application is incompetent. The petition and affidavit and the deliverance of the Lord Ordinary awarding sequestration have all disappeared. There must be some way to replace these writs if it is desired to proceed with this sequestration. The obvious mode at common law would be a proving of the tenor, which is applicable to all sorts of documents. It may be that an inexpensive procedure is competent here under sec. 15 of the Court of Session Act. If such procedure is competent, the application must be made in the Bill Chamber; if it is not competent, I see no way but a proving of the tenor.

Lord Craighill—I have come to the same conclusion, but unwillingly. Apart from authority I do not think we can do that which we are here asked to do. The case of *Foulis* was one merely of lost documents, not of a lost petition and deliverance and affidavits as here. I would gladly extend the decision in that case, but in the absence of any other authority, and in view of the fact that a remedy is open to the petitioner in an action of proving of the tenor, I find an insuperable difficulty in granting this application.

Lord Rutherfurd Clark—I say no more but that I am not sure how this case should be decided.

The Lord Justice-Clerk was absent.

The Court refused the petition as incompetent.

Counsel for Petitioners—Young. Agents—W. Adam & Winchester, S.S.C.

Wednesday, January 9.

SECOND DIVISION.

M'GREGOR'S EXECUTORS *v.* DUNLOP.

Succession—Donation—Donatio mortis causa—*Gift to Donee, with Condition of Distributing to Others—Nuncupative Trust, Incompetency of.*

In an action by the executors of a woman deceased, for payment to them, as part of her estate, of a sum of money which had belonged to her, but had been lodged in bank in name of herself and the defender, payable to either or the survivor, the defender alleged a donation of the money to him, and led evidence to show that the deceased had handed the bank-book to him shortly before her death, with instructions to make small payments out of the sum contained in it to certain persons whose names she had previously told him, and to keep the balance. *Held* that donation to the defender was not proved, but only an attempt to constitute a will by parole, which could not competently be done.

Observed that the element of administration was inconsistent with donation.

Mrs Mary Thomson or M'Gregor died without issue at Glasgow in December 1882. She was at the time of her death possessed of certain moveable estate, among which was a sum of £134 at her credit in the National Security Savings Bank. Shortly after her death, Robert, John, and Thomas Thomson, three nephews and next-of-kin of the deceased, presented a petition in the Sheriff Court at Glasgow against James Dunlop, teacher there, whom they alleged to be a vitious intromitter with her effects. They averred that they had presented a petition to the Commissary of the county of Lanark to have themselves decerned executors *qua* next-of-kin to the deceased; that the defender, who was in no way related to the deceased, had, without any legal right or title, taken possession of her whole moveable and personal estate, consisting of furniture, sums of money, and everything else in the house, and that he had sold part of the furniture. They prayed the Court "to interdict the defender from appropriating to his own uses, from selling, paying, or giving away, otherwise than as the Court shall appoint, any of the moveable and personal means and estate of the said deceased Mrs Mary Thomson or M'Gregor, and to ordain the defender forthwith to lodge in the hands of the Clerk of Court the whole moneys, goods, gear, and effects, including bonds, mortgages, deposit-receipts, bills, bank books, security writs, and every other document or paper connected with

the moveable and personal estate of the said deceased Mrs Mary Thomson or M'Gregor, at present in the defender's possession or under his control, to abide the future orders of Court."

They pleaded (1) that as next-of-kin they were entitled to make the application for the preservation of the estate; (2) that the defender being a vitious intromitter, should be ordained to consign the funds in the hands of the Clerk of Court. "(3) The defender having illegally, and without any right or title whatever thereto, carried away from the deceased's house her whole moveable means and estate, or the proceeds thereof, should be forthwith ordained to lodge the same in the hands of the Clerk of Court."

The defender admitted that he had, in terms of instructions from the deceased, attended to the requirements of her death and funeral, and given orders to sell and realise the household furniture and effects. He explained that this was done in fulfilment of her directions to him given shortly before she died. The proceeds, he averred, he had applied in necessary payments on behalf of the deceased. With regard to money belonging to deceased, he stated that there was a sum of £134 deposited in the Savings Bank in the name of the deceased and himself, payable to either or survivor, and that the pass-book had been delivered to him by the deceased some days before her death, and the sum contained in it was vested in him for purposes with which her next-of-kin had no concern.

He pleaded—(1) No title to sue. "(2) The action is inept and incompetent in respect the moveable effects of the deceased had been previously realised and disposed of in terms of her instructions."

The Sheriff-Substitute (SPENS), on 12th January 1883, granted "interim interdict against the respondent parting with or in any way allowing to pass from his control any goods or moneys in his hands, the property of the deceased Mrs Mary Thomson or M'Gregor, and specially a sum of £130 or thereby, being the amount admittedly uplifted by the respondent since Mrs M'Gregor's death from the Savings Bank, and which is said to have been in the joint names of Mrs M'Gregor and respondent, and which respondent alleges to have been a donation, until the future orders of Court."

A proof was subsequently allowed, and meanwhile the defender was appointed to consign in Court the sum of £130, which was done.

At the proof the evidence of the defender was to the following effect:—He had known the deceased from his infancy, but was not related to her. He and his mother were often in her house; he himself was there repeatedly for about six weeks before her death, and every day during her last illness, which lasted about a week, the deceased having frequently sent for him to come. Four or five years before her death the deceased told him of some parties whom she wished to give money to after her death, and he took a note of their names at the time. On the Thursday evening before her death (which occurred on Sunday following) she sent for him and gave him his bank pass-book and an accepted bill drawn by her. There were then present besides deceased and himself only his mother and a Mrs Gemmell, a niece of the deceased. "I got the bank book from Mrs M'Gregor in the house. It was brought to her in the house. The bill was along with it. The book was in a chest in one of the rooms. She sent for me on the Thursday night, and asked me to get it. She was very ill at the time, and Mrs Gemmell and my mother were present when she asked me to go and bring the book to her. I had had the book in my hands several times before. She gave me both the bill and the book. I put them in my pocket at the time. I took them home with me on the Thursday. (Q) Did she say what you were to do with the money which was in the bank pass-book?—(A) She handed the book to me, and said, 'You know what to do with it.' She did not say anything else. I knew what to do with it, because she told me. . . . . Mrs M'Gregor with her own hands placed the book in my hands." When she mentioned the names of the persons to which she wished to give sums of money she told him "to keep the balance." On the Thursday night before her death she added another to these names. She also told him during her last illness that she wished him "to give her a decent funeral, and to sell off the things in the house."

The evidence of defender's mother and Mrs Gemmell corroborated his evidence as to what passed on the Thursday evening. After the death he took charge of the funeral, and sold the furniture by auction for £27, 8s. 7d., while the expenditure on current house rent, servants' wages, deathbed and funeral expenses, and charges of sale, amounted to £26, 7s. 2½d. He then uplifted the money in the bank. The pass-book belonging to deceased began in 1878 (being a continuation of an older account in the name of the deceased alone) and was in the names of deceased and Mary M'Naught, or either or survivor, and was afterwards, in 1880, altered to that of the deceased, "Mary Thomson and James Dunlop (the defender), teacher, 644 Gallowgate, or either or survivor." It appeared that the deceased was unable to write, while Mary M'Naught and the defender were.

The Sheriff-Substitute found "(1) That the bank book referred to in the pleadings, and the amount therein contained, were donated by the deceased Mrs M'Gregor to the defender on the Thursday previous to her death, which happened on 24th December 1882; (2) that defender took possession of the furniture and other moveable property belonging to the said deceased Mrs M'Gregor, and immediately after the death of the said lady, and that he did so under the impression that, in terms of the verbal instructions of the deceased, he was entitled to do this; (3) that he sold off the household furniture very shortly after the death of the deceased, realising a little over £20: Therefore finds as matter of law that pursuers are not entitled to any part of the sum vouched for by the bank book referred to donated by the deceased, but that the defender had no legal title to intromit with the furniture and effects of the deceased other than the sum referred to above; and, with these findings, grants warrant to and authorises the Clerk of Court to pay over £100 of the consigned money to defender, and the rest of the consigned money three months after this interlocutor shall have become final, if by that time no action of count and reckoning has been raised against the defender by the pursuers, or any of them, with

reference to his intromissions with the estate of the deceased: *Quoad ultra* dismisses the action, finds no expenses due, and decerns."

The pursuers appealed to the Sheriff (CLARK), who on 14th June pronounced the following interlocutor:— . . . . . "Finds that the present action concludes for interdict against the defender appropriating or otherwise applying the moveable and personal estate therein referred to, and also claims that the defender be ordained to consign in the hands of the Clerk of Court the whole effects and documents therein specified, to abide the future orders of Court; but that said petition contains no conclusions as regards payment either to the pursuer or to any other person: Finds that in answer to this the defender pleads in effect that the pursuers possess no title to sue, and that the conclusions in general are unwarrantable and incompetent, and bases his contention on the allegation, not that any donation had been made to him by the deceased either of the bank book or its contents, but that said bank book was delivered to him, the defender, some days before the death of the deceased, and that the sum therein contained vested in him for certain purposes—in other words, that he was made trustee or executor under a nuncupative legacy: Finds, in point of law, that in the circumstances of the case the action is competent as a means of placing the moveable estate of the deceased in sure custody until it be ascertained in competent form who is entitled thereto, and that the title possessed by the pursuers as next-of-kin is sufficient to warrant their raising and insisting in the present action to the extent aforesaid: Finds that the order for consignation was, in the circumstances, properly made and duly implemented; but that no *termini habiles* exist in the present action, nor does it contain any conclusions in respect of which the funds so consigned can be distributed or apportioned: Therefore recalls the interlocutor appealed against, and sists procedure for one month in order that the proper course may be taken at the instance of the parties to ascertain in competent form in what way the consigned money should be dealt with, and decerns."

Pending the action the pursuers had obtained themselves decerned executors-dative *qua* next-of-kin of the deceased, and had thereupon raised a fresh action against the defender (the date of the first deliverance in which was 14th June 1883, the same date as the Sheriff's judgment just quoted) in that character. In this action they concluded for declarator that the sum of £134 above referred to was part of the executry funds of the deceased, and that they as her executors were entitled to uplift it.

The defender stated—"The deceased was interested in a sum of £134, 1s. deposited in the National Security Savings Bank, Glasgow, in names of the defender and the deceased, payable to either or survivor, which pass-book was delivered by the deceased to the defender some days before her death, and the sum contained therein was so gifted or donated to the defender in fulfilment of previously expressed intentions and arrangements on the part of the deceased, and vested in and became the property of the defender for certain purposes with which the pursuers have no concern."

He pleaded—"(5) The fund in question being a gift or donation by the deceased to the defender, for himself and others, validly and effectually made by the deceased, he is entitled to warrant to uplift the fund."

The Sheriff conjoined the actions, and thereafter pronounced this interlocutor:— "Recalls the interim interdict granted on 12th January last: Finds and declares in terms of the prayer of the petition of the second of the conjoined processes: Grants warrant to the Clerk of Court to pay to the pursuers the amount consigned in his hands on 8th February last, reserving to pursuer, and to the defender, and all other persons, such claims as they may have in relation to the executry estate of the deceased Mrs Mary Thomson or M'Gregor, and decerns."

"*Note.*—The pursuers claim the consigned fund as forming part of the estate of the deceased, in relation to which they have been decerned executors. The defence to this practically is, that the fund in question was a gift or donation by the deceased to the defender for himself and others, and he explains this to mean that, in virtue of certain verbal communings or directions, he was to uplift the money and divide it in certain proportions among various parties, he himself to retain what remained over. It seems quite clear that this cannot be called a donation in the proper sense of that term. In order to constitute donation in circumstances like the present, it is necessary for the maintainer thereof to exclude the element of administration—and this doctrine has more than once been given effect to in the Supreme Court. In point of fact, unless this were so, it would be competent to make a verbal testament to any extent, under the mere cover of a donation. In the present case, not only is the element of administration not excluded, but it is directly founded upon by the defender, who by his own showing was not merely to receive the money but to administer it in terms of the intentions of the deceased, verbally expressed. If I am right in this view, he has no title to refuse payment of the consigned money to the officers duly appointed by law to administer the estate of the deceased. Of course if he or others have any claims which they can validly constitute against such officers, they will be in a position to make them, and insist for them in the proper form—*Mackenzie* v. *Brodie*, June 24, 1859, 21 D. 1048; *Inglis* v. *Barstow*, December 5, 1857, 20 D. 230; and *Sharp* v. *Paton*, June 21, 1883, Scot. Law Rep., vol. xx. p. 685."

The pursuer appealed to the Court of Session, and argued—The evidence was sufficient to instruct a donation *mortis causa* to the defender, and to discharge the *onus* incumbent on him to prove it according to the rules for such donations formulated in the leading case of *Morris* v. *Riddick*, July 16, 1867, 5 Macph. 1036, and modified by subsequent decisions. Delivery was not necessary to such a donation as had now been fixed (after conflicting decisions in *M'Cubbin's Executors* v. *Tait*, Jan. 31, 1868, and *Walls' Trustees*, July 1, 1869, 7 Macph. 930) by *Crosbie's Trustees* v. *Wright*, May 28, 1880, 7 R. 823. It was therefore unnecessary to argue whether delivery of the pass-book was delivery of the sum in the bank or not. It was enough to prove from facts and circumstances the *animus donandi* on the part of the donor—the doctrine of *Ross* v. *Mellis*, December 7, 1871, 10 Macph.

197, on that point having been modified by later decisions — *Thomson's Executors* v. *Thomson*, June 8, 1882, 9 R. 911; *M'Skimming* v. *Stenhouse*, June 14, 1883, *ante*, p. 3. The directions to give small sums to other parties did not interfere with the *animus donandi* in favour of the defender; and there was no authority that a gift so conditioned was an attempt to make a will, as held by the Sheriff. Any question between these parties and the defender was not in the present case. The case of *Sharp*, relied upon by the pursuers, was one of conflicting evidence, and did not apply, for here there was no conflict of evidence.

The pursuers replied—The *onus* had not been overcome—*Sharp* v. *Paton*, *supra*; *Durie* v. *Ross*, July 8, 1871, 9 Macph. 969. The evidence of *animus donandi* from the occurrence of the pursuer's name in the pass-book failed, for his name was put there (as formerly Mary M'Naught's) merely because the deceased could not write. The defender's claim was vitiated by the quality of administration attached to the alleged gift, which made it in reality a trust, and that could not be constituted by parole.

At advising—

Lord Young — This case relates to certain furniture, and also to a sum of money which admittedly belonged to the deceased, and was deposited in the National Security Savings Bank at the time of her death. No question was argued to us regarding the furniture; the defender admits he was liable to account for it. The question which was argued to us is that which the Sheriff-Substitute refers to as the principal point in dispute, namely, whether there was or was not a donation of the money in bank to the defender. The bank book which was produced at the proof has since gone amissing, but from the account we have of it we may assume that it was in ordinary terms. The defender's allegation is that "the deceased was interested in a sum of £134, 1s. deposited in the National Security Savings Bank, Glasgow, in names of the defender and the deceased, payable to either or survivor, which pass-book was delivered by the deceased to the defender some days before her death, and the sum contained therein was so gifted or donated to the defender in fulfilment of previously expressed intentions and arrangements on the part of the deceased, and vested in and became the property of the defender for certain purposes with which the pursuers have no concern."

Now, the law of gifts—I mean of gifts *inter vivos*—is, speaking generally, quite clear. If the owner of money is minded to bestow it on another person, he is at perfect liberty to do so by simply transferring it to the person he intends to make his donee, and if that is legally done then there is a completed gift. But an expression of an intention to make a gift is quite ineffectual in law, unless that intention be executed by a transference of the subject of the gift to the donee; when that is done, the donee requires no other title in law than merely to retain what he has got. If there has been a transference of the gift to him, he does not require to come to a court of law to obtain a title to it. But if he has not been made custodier and proprietor of the gift, and seeks aid from the law to make him so, the law will not aid him.

I am of opinion that we do not require to determine here the question whether the delivery of such a book as this is equivalent to delivery of money. The delivery of bank notes—which are strictly obligations to pay, but which form at the same time the circulating medium of the country—though a delivery of them is a delivery merely of obligations to pay, would be held equivalent to a delivery of so much money—to a passing of the subject of the gift. I think we are not called upon to determine here whether the delivery of this bank book, in which there was a balance due to the customer, would be equivalent to delivery of money, and on that question I abstain from giving an opinion.

The defender here says the money in the bank book was gifted to him "for certain purposes." Now I doubt whether that is a relevant averment, but I look to the evidence, and it there appears that the case which he seeks to establish is that the deceased intended him to administer certain money which belonged to her and was under her control, from the time of her death, in accordance with her wishes.

Now, there is here clearly no donation *inter vivos*; if there be donation, it is donation *mortis causa*. But I am of opinion that it is not a donation *mortis causa*, but that it is an attempt to make a will by parole, and if that attempt fails—if the will is not made as the law requires—effect cannot be given to it as a donation *mortis causa*; and I agree with the Sheriff that the element of administration must be excluded from donation. In my view a donation *mortis causa* is a beneficiary gift to the recipient for himself—a transferring of the property to him, not that he may execute the will of the deceased, but to be retained as his own property, if the giver shall die without having changed his benevolent intention. But the transferring of a fund to one person to be administered for others, even where the person who was to execute the will was to have an advantage personally, is a trust for administration as distinguished from donation *mortis causa*. The thing established here is that the custody of money, or the means of ready access to it, was given, not in any gift, but towards the execution of a will in favour of a variety of beneficiaries, and including instructions for the payment of deathbed and funeral expenses, and then, if any balance remained, the alleged donee was to get it. I think that to sustain the defender's contention here would be to make what is bad as a will good as a donation *mortis causa*. As I do not think that can be done by the law of Scotland any more than it can be done by the law of England—which is quite clear—I am of opinion that the defender has no case. A donation *mortis causa* is a distinct and quite recognised thing. The property of the subject is given to the donee to be retained by him in case the donor shall die without changing his mind. If what is done is good to the effect of carrying a mere intention to give into effect, then it will be good as a will; but if, being an attempt to make a will, it is bad as a will, it cannot be good as a donation *mortis causa*. I think this is sufficient for the decision of the case. I substantially agree with the Sheriff, and with the grounds on which he has proceeded, and differ entirely from the decision and grounds of the Sheriff-Substitute.

LORD CRAIGHILL—Without any difficulty I have come to the same conclusion as your Lordship. [*After narrating the facts.*]—The question then is, whether the defender, having drawn this money belonging to the deceased from the bank, is answerable therefor to the executors of the deceased? It is plain that he must show that it was her intention at the time of her death to make donation of the money to him, to take effect immediately after it. The question is, was there here a *donatio mortis causa?* Now, the statement of the defender is of a very extraordinary character. He says the money was a gift to him, to be used for a purpose with which the executors have no concern. This is a very strange statement. He tells us in his evidence what this purpose was—that it was to distribute certain sums of money to certain other persons. Plainly, if this is an effectual way of transferring these sums to these persons—for there is no direct gift to them—then a trust has been created, and if this were to be recognised as a trust, writing would be unnecessary to create a trust. But the defender maintains that whatever may be the rights of these other parties, there was at least a donation *mortis causa* to him of this money. But this depends entirely upon negative evidence. His name was in the pass-book, not because he was associated with the deceased as owner of the money but merely because his services were necessary to enable her to operate on her account. I think it is therefore clear that the defender here has no claim to this money, which therefore belongs to the executors.

LORD RUTHERFURD CLARK concurred.

The LORD JUSTICE-CLERK was absent.

The Court pronounced this interlocutor:—

"Find that it is not proved that the deceased Mrs Mary Thomson or M'Gregor made a donation to the defender of the bank-book mentioned in the record, and the sum thereby ascertained to be due by the bank: Dismiss the appeal: Affirm the judgment of the Sheriff appealed against," &c.

Counsel for Pursuers (Respondents)—Guthrie Smith—Alison. Agent—John Gill, S.S.C.

Counsel for Defender (Appellant)—Rhind—Lang. Agents—Ferguson & Junner, W.S.

Thursday, January 10.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

SCOTT'S TRUSTEES *v.* CARTER (ALEXANDER'S TRUSTEE).

Payment—Indefinite Payment—Appropriation—Account-Current.

A, one of the joint-tenants of a colliery, undertook to buy from S, the other, to whom the plant belonged, the whole plant of the colliery, for which he was to pay in instalments of at least £500 each. He was also to relieve S of various debts and obligations, and work the colliery, and pay the rent, receiving the surplus profit after payment of his various obligations. The property of the plant was to vest in him only on full payment of the price. A having become bankrupt, the trustees of S, who had died, brought an action against A's trustee for declarator that the property of the plant was still theirs, at least so far as the price was unpaid, and produced an account showing a balance due to them. It was in the form of an account-current, the first item in which showed the price of the plant as due by A, and it showed on the other side a variety of payments made by A, some of which in connection with matters unconnected with the colliery, but were not specifically appropriated, and if applied in their order to the price of the plant would extinguish it. *Held* that they must be so applied, and that the price must be held as paid.

By minute of agreement between William Scott and C. J. Alexander, dated 1st and 19th December 1870, on a narrative that the parties were joint-tenants of a colliery at Jawcraig belonging to the Earl of Zetland, that Scott was proprietor of the whole plant, machinery, buildings, and fittings on the colliery, and that Alexander had undertaken, or was about to undertake, certain obligations for behoof of Scott, and to pay certain of his debts and liabilities, and was to work the colliery on the terms contained in the agreement, it was provided that the parties were to hold the colliery, machinery, plant, and lease for behoof of themselves and each other for their respective rights under the agreement, and that the whole machinery and plant was to be purchased by Alexander from Scott at a price to be fixed by valuators, which was, when fixed, to be paid by instalments of at least £500 yearly, making the first payment at Martinmas 1871. Alexander was to pay the rent and implement the other obligations incumbent on the tenants under the lease; to pay interest at five per cent. on the price of the machinery and plant, or on such part as might be unpaid, until paid; also to pay certain royalties on out-put, and a sum of £40 as rent of certain colliers' cottages. The surplus was then to belong to Alexander. By the fifth article it was agreed that the machinery should absolutely vest in the said Charles Jameson Alexander as purchaser at and only on payment of the price, or proportionately and partially to the extent to which the same might be paid, and upon the whole price and interest due thereon at the time being paid by him to Scott, the whole machinery, working plant, and others foresaid should become the absolute property of Alexander, subject to his relieving Scott of his obligations under the agreement. It was also declared that "on the complete payment" by Alexander of the price or value of the machinery, working plant, and others foresaid, Alexander should be deemed the sole party in right of the colliery and lease thereof foresaid. It was also provided that Alexander having undertaken to provide for certain of Scott's debts and obligations, in order to provide for such payment Scott should draw under the agreement a sum of not more than £200 a-year till the same should be paid off, the remainder to be applied by Alexander to these obligations, and Alexander, in order to put him in funds to