habitable houses is referred to. He at once dealt with it with courtesy and a sense of justice, as might be expected, and Mr Hamilton's course is cleared.

"In these circumstances the Corporation cannot equitably be permitted to plead the statutory limitation of action. I have examined the cases referred to by the defenders, but I think they are all distinguishable from the present. In all of them but one there were mistakes in fact or in law, which it was as much open to the pursuers as to the defenders to find out. In the only exception to this, delay was caused by negotiations the tenor of which to my mind renders the judgment somewhat doubtful and the conclusion at best matter of impression. Here the mistake was one which could be known to one side only, and, further, a matter of opinion was involved of which one side only was master. The case of *Caledonian Railway* v. *Chisholm*, March 17, 1886, 13 R. 773, 23 S.L.R. 539, referred to in my previous judgment, is much more apposite.

"I shall therefore sustain the pursuer's fourth plea-in-law, and continue the case for further procedure."

The letter of 30th May 1907 referred to by his Lordship was :—

"City Chambers,
"Glasgow, 30*th May* 1907.
"Archibald Hamilton, Esq., Writer,
"170 Hope Street.
"64 *Rose Street.*

"Dear Sir,—Referring to your letter of 20th ult. (already acknowledged) with regard to the above property, I have to advise you that that communication was submitted yesterday to the Committee on Uninhabitable Houses, &c., who, while repudiating all liability on behalf of the Corporation in the matter, agreed, in respect of the illness of Dr Archibald, who alone is conversant with the facts of the case, to continue consideration thereof meantime.

"When the subject has again been before the Committee I shall duly advise you of the result.—Yours truly,

"J. LINDSAY, *S.C.D.*"

This interlocutor was pronounced:—"Sustains the fourth plea-in-law for the pursuer: Repels the second and third pleas-in-law for the defenders; and decerns: Allows the pursuer a proof of her averments on record of the damage alleged to have been sustained by her as trustee of the late Miss M'Innes, and to the defenders a conjunct probation, to proceed on a day to be afterwards fixed: Finds the pursuer entitled to expenses from 2nd January 1908, so far as not already dealt with in the Inner House: Allows an account thereof," &c.

The case was settled subsequently.

Counsel for the Pursuer—G. Watt, K.C.—Munro—Valentine. Agent—D. Maclean, Solicitor.

Counsel for the Defenders—The Lord Advocate (Shaw, K.C.)—M. P. Fraser—Crawford. Agents—Campbell & Smith, S.S.C.

Friday, October 23.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

PRENTICE (HUTCHIESON'S EXECUTRIX) *v.* SHEARER.

Donation—Mortis causa Donation—Delivery—Delivery through Medium of a Third Party—Proof of Delivery.

In a *mortis causa* donation delivery need not be made to the donee personally, but may be made through the medium of a third party.

In an action by H's executrix against S for payment of a sum of money, the defender pleaded that it had been donated to himself and others *mortis causa*, and that he had distributed it according to H's directions. His evidence was that, on the request of H, who was ill and wished to settle his affairs, he took to the bank and got cashed a deposit-receipt belonging to H; that he handed the money to H, who, after counting it, redelivered it to him, saying he would tell him what to do with it; that two nights afterwards he asked H in M's presence what he was to do with the money, and H told him how to divide it, naming the donees and specifying the sums. H died the same night. M corroborated the defender as to this conversation. The pursuer maintained that the defender had failed to prove delivery, because (1) there was no evidence, except his own, of redelivery, and because (2) in any case delivery could only be made to the alleged donees personally and not through the medium of another.

Held (1) that the defender was sufficiently corroborated by the conversation spoken to by M, which implied previous delivery, and that delivery was also proved by the indorsation and delivery of the deposit-receipt, seeing that the subsequent handing of the money to H, equally with its redelivery, depended solely on the defender's evidence; (2) that delivery need not be made to the donee, but might be made through the medium of a third party.

Mrs Jane Prentice, as executrix of the deceased Andrew Hutchieson, raised an action against William Shearer, in which, *inter alia*, she sought payment of £230, 11s. 7d.

The *facts* of the case are narrated in the opinion *infra* of the Lord Ordinary (MACKENZIE), who after proof pronounced, on 27th November 1907, the following interlocutor:—"Finds that the pursuer is entitled to recover from the defender the sum of £58, 10s. 1d., with interest at five per centum per annum from the 11th day of May 1907 until payment, subject to any right of set-off competent to the defender in respect of the expenses after mentioned, and under deduction of the sum of £6, being the admitted amount of the funeral expenses

paid by the defender: *Quoad ultra* assoilzies the defender from the conclusions of the action, and decerns: Continues the cause that the pursuer may produce her confirmation as executrix-dative of her uncle: Finds the pursuer liable to the defender in one half of his expenses: Allows an account thereof to be lodged, and remits the same to the Auditor to tax and report: Grants leave to reclaim."

Opinion.—"The pursuer of this action, Mrs Prentice, is the niece and executrix-dative *qua* next-of-kin of the late Andrew Hutchieson, a retired blacksmith, who died, aged 69, unmarried and intestate at Wanlockhead on 11th May 1907. She sues the defender for payment of £230, 11s. 7d. The defender William Shearer is a lead washer and resides at Wanlockhead.

"The defence is that the sum sued for was distributed by the defender in accordance with instructions given him by the deceased on the day of his death. The defender pleads that the sums of money were given as donations *mortis causa*.

"The facts of the case are that the deceased, who lived alone and had given up work four years before his death, was taken ill on Tuesday, 7th May 1907. On Wednesday, 8th May, the defender had a talk with him, when the deceased said—'I was just wanting to see you because I will never get better, and I want to see if you will go to Sanquhar and lift the money, because I want my affairs settled, because I will never be better this time.' The defender is 75 years of age and was an intimate friend of the deceased. He says he was 'mostly every day about his house in my spare time.' He explains that his stepmother was a sister of the deceased's father. The defender did all matters of business for the deceased, who 'could do nothing in that way,' though able to read and sign his name. When the deceased on Wednesday the 8th asked the defender to go to Sanquhar, he added 'You need not come back again when you go to-morrow morning.' At the same time the deceased handed the defender a deposit-receipt for £220 endorsed. On Thursday morning the defender went to Sanquhar, cashed the deposit-receipt, and received £10, 10s. 1d. of interest. In the afternoon he returned with the money and handed it, £230, 10s. 1d., to the deceased, who was sitting by the fireside. The witness explains what followed—'When I handed him the money I said "You had better count it," and he counted it and handed it back to me. He said, "Now, William, take that and put it past where you ken to get it, because I want you to settle the affairs, who it is to be given to, what I am going to do with it." I took the money into my own possession then and put it into a corner of the drawer, because I thought it was as well putting it into his drawer as taking it home, because it was there under my control. I put it into a drawer in the deceased's house. . . . He just said that I was to put that money past so that I could get his affairs settled, and he would tell me what to do or something to the same effect, how he was going to divide it.' No one else was present upon either Wednesday or Thursday. On Friday the defender saw the deceased, but other persons were present and nothing was said about the money.

"On Saturday the 11th the defender was with the deceased from twelve till three, when the doctor came. He had been up but was then in bed. The doctor asked him if he could not go to the infirmary, but the deceased said there was something materially wrong with him and there was no use going. The doctor sounded him and said there was no use of his going to the infirmary, his lungs and heart were entirely choked up, and he would not be there above a day or two at most before he was brought back. Later in the day the deceased saw John Mitchell and his wife, Mrs Laidlaw (these were all neighbours), and at about 8·30 p.m. the Rev. Mr Blair, the minister of the parish. Mr Blair judged that the deceased was in perfect possession of his mental faculties. He thought he was in a dying condition and engaged in religious exercises with him. After this he asked if he could be of assistance in arranging his worldly affairs, but received the reply 'No the noo.' The minister then indicated to him that he might not be spared to see him again. The deceased then said, 'Shearer kens' or 'Shearer 'll ken.' He also added that he would tell Shearer what to do. The minister then left. Mrs Mitchell and Mrs Laidlaw had also gone, leaving in the room with the deceased only the defender and John Mitchell. The latter was sitting at the fire, the defender at the side of the bed. The deceased was in bed. This was about nine o'clock at night.

"The defender then said to the deceased, 'Well, Andrew, what am I to do? What's to be done? He rose up on his elbow in the bed and told me how the money was to be divided to various parties and to give them the various sums, and I noted them down on a wee bit of paper, because my memory was not very good; when he was giving me it off in that way, I wrote it down to keep it in my mind.' The amounts so noted were—Mrs Mitchell, £60; William Watson, £20; Mrs Laidlaw, £15; the defender, £60; the pursuer, £10; Janet Mitchell, £5; James Williamson, £2. With reference to the sum of £10 to be given to the pursuer, the defender explains that the deceased proposed £5, and only raised it to £10 in consequence of his remonstrance. A watch was to be given to a son of John Mitchell, but it was not considered any use noting this. After this the defender said, 'Now, Andrew, there's part of the money left, and you have not made a will, you know, and Jane will heir everything in the house, and she will get the remainder when you have no will.' He said 'No, No.' I said 'Well, how will I do then? Will I appropriate it to myself,' and he gave me a nod. He did not reply in words, but he gave me a nod, as much as to say Yes, I expected.' John Mitchell corroborates the defender on all points except that he did not hear the deceased make any reply to the defender's last question. Nor did he see him make

any sign. He was not looking at the deceased. There is no evidence that there was any note on the paper about the balance. A few mintues after, while the defender was counting up what the sums came to, and after the next door neighbour, Robert Williamson, had come in, Hutchieson fell back in his bed, dead.

"The defender at once sent John Mitchell to the Rev. Mr Blair with the paper to let him see the amount given to the various persons. This he did. Mitchell then returned, and the defender took possession of the £230, 10s. 1d. in his presence. He took the money to his own house and put it away. On Monday he got envelopes, put the money for each person into a separate envelope and addressed each one. The funeral was on Tuesday, and after it the defender delivered the envelopes to the donees.

"There had been disagreements of old standing between the pursuer and her uncle, the deceased; he disliked her and told others of his dislike; she had for years seen little of him; and on more than one occasion the deceased said she would inherit nothing at his death. As regards the donees it is amply proved that there were good reasons why the deceased should desire to show them favour. They were neighbours, some of them related to him, and his housework had been done by some of them without remuneration. The pursuer herself in cross-examination has nothing to say against any of them except the defender. He had apparently been on friendly terms with her until she arrived, in response to his telegram, after the death. The defender would not tell her about the money gifted away, till after the funeral, and she seems to have been ill pleased. The following day (Monday) the defender took her to the house and gave her a deposit-receipt for £40, which was in the drawer, and also a store receipt for £4. She got her envelope with £10 in Mrs Laidlaw's house and handed one of the deceased's watches to the boy John Mitchell.

"The difficulty in the case is as regards the law. The defender maintains that these gifts are donations *mortis causa*. The decision appears to me to turn upon whether there was delivery, actual or constructive, of the contents of the deposit-receipt to the defender. If there was, then the principle laid down in several cases, the earliest being that of *Mitchell* v. *Wright* 1759, M. 8082, described as a very important case by the Lord President in *Morris* v *Riddick*, 5 Macph. 1036, would apply. There the father of the deceased had received from him 1000 merks on deathbed on the understanding that if the deceased recovered, it was to be at his disposal, but if he died it was to be given to his sisters. This was held not a legacy but a gift or donation *mortis causa*. On the other hand the pursuer's counsel contended that it was not possible to distinguish this from the case of *Thomson* v. *Dunlop*, 11 R. 453, where the deceased had handed a Savings Bank book kept in name of herself and another to that other person three days before her death, who claimed to distribute the money in accordance with directions given years before. This was held to be a verbal appointment of an executor to administer according to verbal directions, and therefore invalid as a donation and as a will. It was not contended that they should be regarded as nuncupative legacies.

"I am of opinion that the present falls under the class of cases of which *Mitchell* v. *Wright* is an example, and not under *Thomson* v. *Dunlop*. The view I take of the evidence is that the deceased intended the defender to take possession of the money when he uplifted it from the bank, and to deliver it in accordance with the instructions he was to give him. The defender placed the money in the deceased's drawer, because he thought that it was as well there, but he regarded it as under his control. No doubt it may be said that the fact of delivery depends on the evidence of a single witness, the defender. I think, however, there is sufficient corroboration in the evidence of John Mitchell, who heard the defender ask the deceased who he was to give the money to. This implies that the money had previously been put into the possession of the defender, and that he had it to give.

"It was strongly maintained that delivery was not necessary—on the authority of the cases of *Macfarlane's Trustees*, 25 R. 1201; *Gibson* v. *Hutchison*, 10 Macph. 923; *Crosbie's Trustees*, 7 R. 823; and *Blyth* v. *Curle*, 12 R. 674. Deposit-receipts, however, taken in name of donor and donee, payable to either or survivor, are in a different position from money as regards delivery. There must be delivery or its equivalent. In the case of cash or bank notes I think there is here sufficient to instruct this—see Lord Deas in *Gibson* v. *Hutchison*, *supra cit.*

"I have no doubt that the defender was a perfectly honest witness.

"The instructions given him, so far as noted on the paper, are I think proved by his evidence and that of John Mitchell. The Rev. Mr Blair also corroborates their evidence to a certain extent. The defender, however, has not made out to my satisfaction his right to retain the balance of £58, 10s. 1d. There is a presumption against donation which must be rebutted. The evidence of the donee alone is not sufficient — *Thomson*, 9 R. 911, *per* Lord Young; *Sharp* v. *Paton*, 10 R. 1000, *per* Lord M'Laren. There is no corroboration of what the defender says, that the deceased nodded when he asked if he was to appropriate the balance. The deceased instructed him to put down £60 opposite his own name, and to that extent I think this gift to him is proved. The gift of £58, 10s. 1d. I hold not proved. This is not because I do not believe what the defender says on the point, but because the evidence of the person to whom the gift is said *to* have been made is not sufficient, in the circumstances brought out in the proof, to instruct donation. The sum of £58, 10s. 1d. accordingly falls into intestacy. The pursuer will be found entitled to this amount,

but under deduction of £6, the amount of the funeral expenses paid by the defender.

"In the circumstances I think the defender is entitled to one-half of his expenses."

The pursuer reclaimed, and argued—The defender in order to establish the alleged *mortis causa* donations must prove delivery as well as *animus donandi*—*Brownlee's Executrix* v. *Brownlee*, 1908, S.C. 232, 45 S.L.R. 184. There was no evidence of delivery except that of the defender. Mitchell could only corroborate defender as to the directions to distribute. [LORD SALVESEN — Was not the delivery and endorsation of the deposit-receipt proof of delivery?] They did not deny that the defender had received the money from the bank, but after he had handed it to the deceased there was no evidence of its redeliverance to the defender except his own. [LORD PRESIDENT—But that the defender ever handed the money to the deceased equally depends on his evidence alone; you cannot accept merely the half of his story that suits you.] (2) In any case there had been no delivery except perhaps as regards the £60 to defender's self, for delivery must be personal, and could not be through the medium of a third party—*Thomson* v. *Dunlop*, January 9, 1884, 11 R. 453, *per* Lord Young at p. 458, 21 S.L.R. 277. In *Mitchell* v. *Wright*, November 21, 1759, M. 8082, this point had not been argued. As in *Thomson, cit. sup.*, so here there was a mere verbal appointment of an executor to administer according to verbal directions.

The Court did not call upon counsel for the respondent to reply.

LORD PRESIDENT—I have very little to say except that I entirely agree with the careful judgment of the Lord Ordinary. The case has been very well argued by the counsel for the unsuccessful party, but my opinion remains undisturbed that the judgment of the Lord Ordinary is sound.

Two points were argued to us. In the first place, it was maintained that there had been no delivery of the money which it was said had been donated. I think that argument is unsound. I agree with the Lord Ordinary that if the witness Shearer is believed, all that is required in law is some corroboration. Now I think that corroboration is amply given in the conversation between the deceased and Shearer, spoken to by the witness Mitchell, which is only explainable on the assumption that delivery had previously been made to Shearer. But further, there is clearly delivery in the fact of the delivery and endorsation of the deposit-receipt. That, coupled with the fact that Shearer actually got the money, clearly proves delivery. I do not lose sight of the fact that that does not go far to prove *animus donandi*. I had occasion in the recent case of *Brownlee's Executrix* (1908 S.C. 232) to point out that the two essentials to constitute donation were delivery and *animus donandi*, and that separate proof was required of each. But while I say that the endorsation of the deposit-receipt and the receipt of the cash by Shearer is not proof of *animus donandi*, I cannot entertain the argument that it is not proof of delivery. If that were so it would always be necessary to have a separate delivery contemporaneous with the donation. If B were in possession of certain money of A, say in the capacity of custodier, and A wished to give that money to B, it is absurd to suggest that A in order to accomplish his purpose and to put an end to the custodiary relation of B, would have to take back the money from B and of new deliver it to him.

In the second place, we are told that the case is ruled by *Thomson* v. *Dunlop*, 11 R. 453. I have no hesitation in saying that *Thomson* v. *Dunlop* was rightly decided, but it is impossible to read out of *Thomson* v. *Dunlop* a general rule of law to the effect that there must be personal delivery to effect a *mortis causa* donation—that is to say, that there cannot be a *mortis causa* donation where delivery is made through the medium of a third person. If that were so, the old case of *Mitchell* v. *Wright*, 1759, M. 8082, quoted by the Lord Ordinary and approved by the Lord President in *Thomson* v. *Dunlop*, would have been wrongly decided, because it contravened that rule. I know of no such rule, and can see no reason in common sense for such a rule, and no necessity for extracting such a rule from *Thomson* v. *Dunlop;* all that there was in that case was the transfer of a bank pass-book and the decision of the case proceeded upon the simple ground that there was not sufficient evidence of the *animus donandi*.

LORD KINNEAR—I am entirely satisfied with the judgment of the Lord Ordinary, and agree with your Lordship.

LORD SALVESEN—I agree with your Lordships. The chief point of interest in the case consists in the attempt which was made in argument to extract from the opinion of Lord Young in *Thomson* v. *Dunlop* a general rule of law to the effect that you cannot have a *mortis causa* donation in favour of a person who is not actually the recipient of the money or subject donated. That general proposition, assuming that it can be fairly deduced from Lord Young's opinion, was not necessary for the decision of that case, and is quite inconsistent with what had already been decided in the case of *Mitchell* v. *Wright*. I accordingly agree with the view that the Lord Ordinary has given effect to.

LORD M'LAREN and LORD PEARSON were sitting in the Extra Division.

The Court adhered.

Counsel for the Pursuer (Reclaimer)—Morison, K.C.—Morton. Agent—R. J. Calver, S.S.C.

Counsel for the Defender (Respondent)—G. Watt, K.C.—Mercer. Agents—J. & A. Hastie, Solicitors.