18; *M'Callum* v. *Borrowman*, November 3, 1896, 2 Adam 197. In *Stewart* v. *Macniven*, February 7, 1891, 2 Wh. 627, it was possible to divide the sentence, which was entirely a pecuniary one, and to uphold the competent part of the penalty while quashing the incompetent. That case was not an authority where there was a sentence of imprisonment; if it was, it was overruled by the more recent cases cited above.

Argued for the respondent—The case of *Stewart* v. *Macniven* (*cit. supra*) was exactly in point, and was not an isolated decision, but followed *Bonthrone* v. *Renton*, November 14, 1896, 1 W. 279. The competent part of the sentence here, amounting to £10, might be saved, even although the extra 3s. 8d. were quashed.

LORD JUSTICE-GENERAL—The operative sentence of which suspension is sought here is a sentence by which the complainer is condemned to imprisonment for six weeks in default of payment of a fine of £7 and £3, 3s. 8d. of expenses. Unless he paid the aggregate of these sums, to prison he must go, and to prison he has gone. It turns out, and it is conceded by the prosecutor, that the sentence was illegal in so far as it found the complainer liable in expenses beyond the sum of three pounds, and therefore he was not bound to go to prison in default of paying £10, 3s. 8d., but only in default of paying £10. Now, the case put by Lord M'Laren in the commencement of the argument seems to illustrate very clearly the impossibility of sustaining such a sentence. For all that appears the complainer may have been perfectly able and ready to pay £10 though unable to pay £10, 3s. 8d. He is, then, suffering, on that hypothesis, for failure to pay a sum which the magistrates had no right to impose. I think that is a perfectly clear case of an illegal sentence. The cases referred to by counsel for the respondent appear to me to have no bearing on the point, and nothing that we can do here will reflect upon the authority of a case like that of *Stewart* v. *Macniven*, February 7, 1891, 2 Wh. 627, because the operative sentence there was a pecuniary one, and it was held that as there were two separate sums which the accused was decerned to pay, the expenses could be departed from without touching the sentence. Here I think we shall meet the justice of the case, and act in accordance with the cases on the subject, by suspending the conviction.

LORD M'LAREN—I am of the same opinion. I think it is clear that when a conviction can be resolved into two pecuniary decrees—the penalty and the expenses—then in the event of suspension or appeal the sentence may be separated into its component parts. They are, in fact, separate sentences, and there is no difficulty in enforcing the one and departing from the other. But then the suspension here is of a sentence and relative warrant of imprisonment for a certain period. The warrant makes no distinction between failure to pay the penalty and failure to pay the expenses. If it were possible to distinguish the imprisonment for non-payment of the expenses from the imprisonment for non-payment of the penalty, it might be theoretically possible to amend the conviction by striking out what is in excess of the magistrate's power. But when one term of imprisonment is imposed for failure to pay the penalty and the expenses, it being impossible to so reduce the imprisonment, the whole conviction necessarily falls.

LORD KINNEAR—I am also of the same opinion. When there is a sentence which inflicts a fine made up of two sums of money of which the magistrate was entitled to impose one but not the other it may be held that the part of the total fine which is incompetent may be separated from that which is competent, so that the sentence may be set aside in so far as it is bad, and allowed to stand so far as it is good. That appears from a series of cases. But the question we have to consider is totally different. The complainer here is in prison—that is, he was in prison, and has obtained interim liberation pending the discussion of this question—for failure to pay a sum of money which the magistrate had no power to impose upon him. It is conceded that the order to pay the sum fixed as expenses was in excess of the magistrate's power, and whatever might have been done to rectify the error before the sentence was put in force, it is impossible to apportion the term of imprisonment which has already begun so as to divide it between the penalty for failure to pay the legal fine and that for failure to pay the illegal award of expenses. The complainer is therefore suffering a penalty which the magistrate had no power to impose, and I agree with your Lordships that the conviction should be quashed.

The Court suspended the conviction.

Counsel for the Complainer—J. Clark. Agents—W. & J. L. Officer, W.S.

Counsel for the Respondent—Jameson, Q.C.—Cook. Agents—Fyfe, Ireland, & Dangerfield, S.S.C.

COURT OF SESSION.

Wednesday, July 20.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

MACFARLANE'S TRUSTEES *v.* MILLER.

Donation—Donation mortis causa—Deposit-Receipts—Delivery—Proof of Intention—Impetration.

M, a person in infirm health, on 13th September transferred certain deposit-receipts which had been standing in

her own name, in favour of herself and another, to be repayable to "either or the survivor." On 27th October she made a similar transference of other deposit-receipts. On 1st November she became insane. On her death the deposit-receipts were found undelivered in her repositories.

In an action at the instance of the donor's trustees to have it declared that the deposit-receipts formed part of the deceased's estate, the Court, after a proof, *held* (*aff.* the Lord Ordinary, *dub.* Lord M'Laren) that there was sufficient evidence to establish donation *mortis causa*, that at the time the donor was of sound mind, and that the gift had not been impetrated from her owing to her weakness and facility.

Per Lord President—"That delivery is not in law necessary to complete the donation *mortis causa* of deposit-receipts has been three times deliberately laid down, in the cases of *Gibson* v. *Hutchison* (10 Macph. 923), *Crosbie's Trustees* v. *Wright* (7 R. 823), and *Blyth* v. *Curle* (12 R. 674), and I cannot go against this series of decisions. Delivery can only now be regarded as a piece of evidence more or less strong but not indispensable."

An action was raised by the trustees of the late Mrs Macfarlane, 23 Park Crescent, Stirling, against Mrs Miller, Springfield, Dollar, and others, being the trustees and next-of-kin of the late Mrs Lawrie, for declarator that "the following deposit-receipts, viz.—(1) Ten deposit-receipts dated 16th June 1893 for the sum of £40 each, granted by the City of Melbourne Bank, Limited, in favour of Mrs Margaret Stoddart Macfarlane and Mrs Jessie Lawrie, repayable to either or survivor, and (2) Nine deposit-receipts dated 27th October 1893, granted by the National Bank of Scotland, Limited, in favour of Mrs Margaret Stoddart Macfarlane and Mrs Jessie Lawrie, repayable to either or survivor, four of them being for the sum of £25, 10s. 5d. each, three for the sum of £50, 16s. 8d. each, one for the sum of £50, 5s. 7d., and the remaining one for the sum of £50, 9s. 6d., together with the sums contained therein, and interest due thereunder, were the property of the deceased Mrs Macfarlane and were at her disposal at the date of her death; that the defenders have no right, title, or interest therein, and that the pursuers, as trustees foresaid, are entitled to uplift and administer the same as part of Mrs Macfarlane's trust-estate."

There was a further conclusion that the defenders should be ordained to endorse the receipts so as to enable the pursuers to uplift the money, for an accounting, and for payment of any money due by the defenders.

Mrs Macfarlane died on 9th January 1894. At the time of her death she was possessed of considerable property. On July 17th 1895 it was decided by the Court that in terms of an obligation undertaken by her to her late husband she was bound to leave two-thirds of her estate to certain relatives of her husband, but it was also decided that the obligation did not deprive her of the right to dispose of her estate by deeds *inter vivos*.

For a considerable period previous to her death Mrs Macfarlane was in weak health, and by 1st November she had become insane. For some time previous to that date she resided with the defender Mrs Miller, who was her cousin, and with Mrs Lawrie, a widowed daughter of Mrs Miller. Mrs Lawrie survived Mrs Macfarlane, but died on 2nd May 1895.

The deposit-receipts with regard to which the present action was raised were all found in Mrs Macfarlane's repositories at her death. Those granted by the City of Melbourne Bank bore to be dated the 16th June 1893—being the date of the reconstruction of the bank—but were really issued in September 1893 in exchange for two receipts for £200 each, which had stood in the name of Mrs Macfarlane alone. With regard to these receipts Mrs Macfarlane wrote on 9th September 1893 to her agent Mr Husband, expressing the wish that the new receipts should be taken in her own name, and failing her in that of Mrs Lawrie. Mr Husband replied on 11th September, explaining the effect of taking receipts in this way, and on 13th September she replied—"My wishes are to make the deposit-receipts, Melbourne Bank, repayable to me or Mrs Jessie Lawrie, that is, either or survivor."

The National Bank receipts were issued on 27th October 1893, in exchange for previous receipts which had stood in Mrs Macfarlane's name. With regard to them Mrs Macfarlane wrote to the bank agent on 27th October 1893—"Be kind enough to put the enclosed deposit-receipts in my own name and that of Mrs Jessie D. Lawrie." The bank agent called upon Mrs Miller the same day and saw her in the presence of Mrs Lawrie, and explained to her that when the new deposit-receipts were issued to her in the terms of her letter the bank would pay the money to herself or Mrs Lawrie, and that when she died the money could be uplifted by Mrs Lawrie as the survivor.

The sums in both these sets of deposit-receipts having been claimed by Mrs Lawrie and her representatives, the trustees raised the present action.

The pursuers averred—"For a considerable time before her death Mrs Macfarlane was suffering from a serious and complicated illness, which enfeebled both her body and her mind. For many months previously, and at any rate from a date prior to 16th June 1893, she had been weak and facile, and by the 30th October 1893 she had become quite insane. For some time previous to that date Mrs Miller, who was her cousin, and Mrs Lawrie, who was a widowed daughter of Mrs Miller and resided with her, or one or other of them, lived constantly with Mrs Macfarlane, to the exclusion of other relatives and friends. Both of them had great influence over her, and the pursuers believe and aver that if and in so far as the instructions and indorsations obtained from her relative to the said receipts were intended by her for other

than purely administrative purposes, the same were impetrated from her by Mrs Miller and Mrs Lawrie, or one or other of them, by the exercise of undue influence, and by fraudulently taking advantage of her said weakness and facility." They also averred that certain other deposit-receipts which had been cashed during Mrs Macfarlane's lifetime and re-deposited by Mrs Miller in her own name had either been endorsed by Mrs Macfarlane merely for administrative purposes or had been impetrated from her when she was weak and facile.

Answers were lodged by Mrs Miller, who averred that the deposit-receipts had been donated *mortis causa* to Mrs Lawrie, Mrs Macfarlane desiring to reduce the estate for division among her husband's, and to benefit her own, relations.

On 1st December 1896 the Lord Ordinary (STORMONTH DARLING) allowed a proof. The result of the evidence sufficiently appears in the opinions of the Court.

The Lord Ordinary on 30th June 1897 assoilzied the defender from the conclusions of the summons.

Opinion.—"There are three questions here—(1) whether certain deposit-receipts were made the subject of donation by the late Mrs Macfarlane to Mrs Miller and her late daughter Mrs Lawrie, (2) if so, whether the alleged donations were impetrated from Mrs Macfarlane while she was weak and facile, and (3) whether the defenders are liable to account for certain other deposit-receipts belonging to Mrs Macfarlane which they are said to have uplifted. In the first of these questions the *onus* is on the defenders, in the second and third it is on the pursuers.

"Now, the fact of donation which the defenders have to prove seems to me to be made out with exceptional clearness.

"I take, first, the case of Mrs Lawrie, to whom all the donations are said to have been made *mortis causa*. These consisted, first, of certain deposit-receipts with the City of Melbourne Bank, amounting in all to £400; and, second, of certain deposit-receipts with the National Bank, amounting in all to £355, 6s. 9d. With regard to the Melbourne receipts, there is to begin with the language of the receipts themselves ('payable to either or the survivor'), which has always been regarded as going a long way, although not the whole way, to prove the intention to make a donation; there is, further, the evidence of the donee herself, although from the fact of her being dead it had to be taken at second hand from her law-agent Mr Henderson. But there is much more. On 9th September 1893 Mrs Macfarlane wrote to her law-agent Mr Husband, expressing the wish that the new receipts should be taken in her own name, and failing her in that of Mrs Lawrie. Mr Husband replied on 11th September, carefully explaining the effect of taking the receipts in this way, so as to make sure that Mrs Macfarlane understood what she was doing. And on 13th September Mrs Macfarlane replied, 'My wishes are to make the deposit-receipts, Melbourne Bank, repayable to me or Mrs Jessie Lawrie, that is, either or survivor."

"Again, with regard to the National Bank receipts, it seems that the very same thing happened. On 27th October 1893 Mrs Macfarlane sent a letter to Mr Ferguson, her banker at Stirling, requesting that certain deposit-receipts which she held should be renewed in her own name and that of Mrs Lawrie. Mr Ferguson, like Mr Husband, wished to satisfy himself that Mrs Macfarlane clearly understood what she was doing. Accordingly, he called on her and saw her in her drawing-room. He explained to her what the effect of carrying out her instructions would be, and she told him that that was what she wanted. I can hardly imagine better evidence of the lady's intention to do what the documents themselves represent her as having done.

"In the case of the defender Mrs Miller, the alleged donations were not *mortis causa* but *inter vivos*—they consisted of deposit-receipts of the National Bank, which were handed to Mrs Miller and redeposited in her own name. Accordingly the transfer of title was completed absolutely in the lifetime of Mrs Macfarlane. As to the *animus donandi*, I see no reason to doubt the evidence of Mrs Miller herself, though I did not hear her examined. There was strong antecedent probability in Mrs Macfarlane desiring to benefit her. They were first cousins on the mother's side, a circumstance which derived additional importance from the bar sinister which prevented Mrs Macfarlane having any legal next-of-kin, and Mrs Miller, who was a widow, had lost her son, on whom she chiefly depended, in 1891. Mrs Macfarlane had already indicated her goodwill towards her by giving her £650 to buy a house, and by executing a deed, dated 23rd September 1892, under which she conveyed to her the whole of her household furniture, retaining possession of it during her life, But again, there is evidence, under Mrs Macfarlane's own hand, of her intention to make over some deposit-receipts to Mrs Miller, for there is a holograph note, dated 18th September 1893, not addressed to anybody, but containing the words, 'Please pay the amount of these deposit-receipts to myself or Mrs Margaret Miller, Elmbank, Dollar.' I am satisfied on the evidence that this note was put up with some deposit-receipts, and most probably with the deposit-receipts in question, in a box which contained all Mrs Macfarlane's important papers. It had fallen out of the box during a search made by Mr Husband, and was afterwards handed to him by the lady who was then in attendance on Mrs Macfarlane.

"The element of antecedent probability is nearly as strong in the case of Mrs Lawrie as in that of Mrs Miller. She was Mrs Miller's daughter, and she had lost her husband in (I think) the year 1890. Mrs Macfarlane, who was childless, at one time desired to adopt her as a daughter. There is ample evidence, both oral and in letters, of the affectionate terms on which these two ladies stood towards Mrs Macfarlane.

They were probably the most intimate friends she had.

"There is one other circumstance to be noted as rendering in the case of this lady a donation by way of deposit receipt highly probable. She had been placed by her husband's will under an obligation to leave to his relations two-thirds of whatever she might possess at her death. There is evidence that she chafed a little under this restriction, and that she did not particularly care for her husband's relations. The report of the case of *Murray* v. *Macfarlane's Trustees*, 22 R. 927, shows that she executed various deeds during her life for the purpose of distributing part of her property among favoured friends. From an early period she indicated to her agent a wish to deal with her deposit-receipts in the same way. That is a form of testamentary gift which I imagine is never very popular with men of business, and Mr Husband did not encourage it. But the idea remained in the lady's mind, and I am not surprised to find that she carried it into effect.

"On the question of impetration the *onus* is, as I have said, on the pursuers, and I think that they have wholly failed to discharge it. Mrs Macfarlane died on 9th January 1894 at the age of seventy or a little more, and undoubtedly during the last two months of her life her mind was affected. She had for some years suffered from valvular disease of the heart, and she had latterly been affected with insomnia, for which drugs had been administered. Probably all these causes contributed to weaken her mentally as well as physically, but there is no evidence of anything like delusions till the month of November 1893, and nobody except Dr Moodie is so bold as to say that before that month she was incapable of understanding business and managing her own affairs. In a question of this kind I would naturally attach considerable importance to the opinion of the patient's regular medical attendant, but I am bound to say that Dr Moodie weakened his evidence by showing a certain animus against Mrs Miller and Mrs Lawrie, and by going a great deal too far. His statement that for at least six months before November he would have granted a certificate of incapacity is absolutely inconsistent with the evidence of every other witness who had the opportunity of judging, including Mrs Macfarlane's other medical man Dr Cuthbertson, her minister Mr Stuart, her bank agent Mr Ferguson, her friend Miss Cook, all the servants in her house, and her law-agent Mr Husband, who as late as 25th October took her instructions for a codicil to her will, and had no hesitation in allowing her to execute it.

"I do not leave out of view the opinion of Dr Clouston, who visited her on 15th November, that the mental incapacity which then existed had probably come on gradually. Dr Clouston, however, admitted that he was there in the region of conjecture, and that as to her actual condition at any particular time he would be guided by the testimony of those who had the opportunity from day to day of observing her conversation and conduct.

"If the evidence of facility is weak, the evidence of circumvention is still weaker. Dr Moodie suggests it, but he has only impression to go upon, and he can state no definite facts. Some letters of Mrs Miller, and some of the conversations which other witnesses report, do undoubtedly betray a certain anxiety that Mrs Macfarlane should dispose of a portion of her fortune in favour of herself and Mrs Lawrie—but anxiety of this kind, though it may be wanting in delicacy, does not prove undue influence, and even the indelicacy of it is largely mitigated if one comes to the conclusion (as personally I do) that Mrs Macfarlane had previously intimated her intention to benefit these ladies in this particular way.

"The only other evidence to which the pursuers can point as proving circumvention is that Mrs Macfarlane, in the closing weeks of her life, complained of having been induced by her Dollar friends to give away her money. But that I feel convinced was only one phase of the delusion of poverty under which she was then labouring. It was on a par with the notion that she was to be turned out of her house, and that she was to be devoured by dogs. Even in these mental wanderings, she never said anything to suggest that she did not wish Mrs Lawrie to get the proceeds of the deposit-receipts after her death, and as regards the remnant of her life, it was of course a pure delusion that she did not remain as much mistress of the money as she had been before. It may be that Mrs Miller was a stronger-minded woman than Mrs Macfarlane, and had a certain amount of influence over her. But there is a kind of influence which is legitimate and indeed inevitable, as well as a kind which is undue, and I fail to find in this case any convincing proof that either Mrs Miller or Mrs Lawrie in their dealings with Mrs Macfarlane overstepped the bounds of propriety.

"With regard to the conclusion for accounting, it seems to me that the pursuers have failed to establish the obligation to account. It is not proved that Mrs Miller or Mrs Lawrie cashed any of the deposit-receipts mentioned in condescendence 6, but if they did, the disposal of the greater part of the money is sufficiently accounted for by gifts and household expenses, particularly looking to the fact that Mrs Macfarlane kept no bank-account, and really paid her way by cashing deposit-receipts.

"The result is that, in my judgment, the compearing defender must be assoilzied, with expenses."

The pursuer reclaimed, and argued—(1) What was done with regard to the deposit-receipts was done at a time when Mrs Macfarlane was really incapable of managing her affairs, and was in the hands of Mrs Miller and Mrs Lawrie. Accordingly there could not be an *animus donandi* if she were thus incapable, and the mere fact of proving that certain things were done

which would instruct donation on the part of a sane person was not enough. The Lord Ordinary was wrong in keeping the question of donation and impetration apart, since the evidence with regard to the latter bore strongly upon the former—*Sharp* v. *Paton*, June 21, 1883, 10 R. 1000. (2) There had been no delivery in the case of the deposit-receipts to Mrs Lawrie, and accordingly the donation was not complete. The deposit-receipt did not itself constitute a donation, and accordingly it was only in very exceptional cases that donation could be set up without delivery, and there must be stronger proofs of intention than existed here. The case of *Crosbie's Trustees* v. *Wright*, May 28, 1880, 7 R. 823, was the only one where it had been held that delivery was not necessary. In other cases there was constructive delivery—*Blyth* v. *Curle*, February 20, 1885, 12 R. 674; *Gibson* v. *Hutchison*, July 5, 1872, 10 Macph. 923. For the true definition of a *mortis causa* donation see *Morris* v. *Riddich*, July 16, 1867, 5 Macph. 1036; *M'Nicol* v. *M'Dougall*, October 25, 1889, 17 R. 25.

Argued for respondent—(1) It was proved that Mrs Macfarlane had special cause to dislike her husband's relations, and accordingly there was a presumption in favour of her trying to dispose of her estate to her own relations by *mortis causa* donations, since she could not by bequest. This was strengthened by the fact of the gifts, which it was not disputed she had made—*Dawson* v. *M'Kenzie*, December 8, 1891, 19 R. 261. (2) Delivery was not essential to donation. The real question was whether the intention of giving was proved, and the fact of delivery was merely a link in the chain of evidence—*Gibson* v. *Hutchison*, *supra*; *Crosbie's Trustees* v. *Wright*, *supra*; *Blyth* v. *Curle*, *supra*; *Jamieson* v. *M'Leod*, July 13, 1880, 7 R. 1131; *Connell's Trustees* v. *Connell's Trustees*, July 16, 1886, 13 R. 1175, at 4187. There was here an equivalent to delivery, viz., constructive delivery—*Martin's Trustees* v. *Martin*, January 22, 1887, 24 S.L.R. 484.

At advising—

Lord President — The most general ground upon which the pursuers have taken their stand is that during the whole period in which these alleged gifts were made Mrs Macfarlane was in a state of mental weakness. If this were established to the extent of derangement, the pursuers would necessarily succeed, but even if the lady was not insane but weak and facile, this enters deeply into the question whether there is adequate evidence of intelligent and voluntary donation. Now, in this question of fact it is a remarkable circumstance that the lady admittedly was insane on and after 1st November 1893, and as one of the alleged acts of donation took place on 27th October, it would not be difficult to believe that the mental derangement which was apparent on 1st November existed five days before. Still, this is a question of fact, and I think it is satisfactorily established that Mrs Macfarlane was of sound disposing mind on and previous to 27th October. The evidence on this matter is all one way, so far as it comes from observers at the time, with the exception of Dr Moodie, and for the reasons given by the Lord Ordinary, the testimony of that gentleman has not the weight that would naturally belong to the impartial observation of a medical man. Dr Clouston never saw the lady till the middle of November, and while in the absence of direct evidence one would readily accept Dr Clouston's inference from what he saw, yet I cannot prefer it to what we have on the unimpeachable testimony from those who saw the lady day by day and tell us of her actual conduct. The true conclusion seems to be that the mental powers of Mrs Macfarlane broke down suddenly, and that, to quote a hostile witness, Miss Margaret Cook, Mrs Macfarlane's state of health during October did not affect her mental powers in any way.

In what I have said it is not implied that this case is free from the difficulty which surrounds all cases of gifts by invalids, and Mrs Macfarlane, during the whole period which which we have to consider, was in declining health. I find no absence in the Lord Ordinary's opinion of the vigilance which is required in scrutinising a case of donation in such circumstances, and after careful examination of the evidence I have come to be satisfied that donation is proved in the case of all the deposit-receipts.

It is fortunate for the defenders that the gift which we have first to deal with is of the Melbourne deposit-receipts, for I agree with the Lord Ordinary that it is made out with remarkable distinctness. As regards Mrs Macfarlane's mental condition in September, there is practically nothing to impeach it; the letters between her and Mr Husband show that the thing was presented to her clearly and in detail, and was done by her intelligently and voluntarily. We are here on the solid ground of independent proof, and the case does not depend on interested evidence.

This well-established case of voluntary donation has an important bearing on the more difficult case of 27th October. It forms part of a series of transactions which prove that Mrs Macfarlane was of a mind to part, and was in fact parting with, considerable portions of her estate during her life. It helps to displace the strong presumption against donation which is founded upon the general conduct of mankind. Of a like importance in this relation are several undisputed deliberate gifts by deed and otherwise, including the gifts to Mrs Miller of £600 to buy a house, and of £50 to Mr Niblock Stuart. Moreover, the peculiar position in which Mrs Macfarlane was placed by her husband's settlement in regard to the disposal of her estate makes it more natural in her case than in the case of other people that she should resort to this method of benefiting her friends. Accordingly, when we understand the antecedent and surrounding circumstances, we approach the proceedings of 27th October with less than the usual incredulity as to donation, and on the evidence I think that it did take

place. I ascribe, as does the Lord Ordinary, chief importance to the evidence of Mr Ferguson. It would have been still more satisfactory if Mrs Lawrie had not been present during Mr Ferguson's interview with Mrs Macfarlane, but making allowance for this, I consider that the evidence of intelligent intention to donate is adequate.

On the personal relations between Mrs Macfarlane and the two ladies, it seems clear that they were close and affectionate, and apart from the mode of benefiting them, they would seem sufficiently natural recipients of some part of Mrs Macfarlane's fortune. I do not like some things in the conduct of Mrs Miller, and I am quite sure that the two ladies met their benefactress at least half way. But this must not affect our judgment beyond what is due, and I think that the Lord Ordinary's remarks on this subject are sensible and just.

It was maintained that the absence of delivery of the deposit-receipts is fatal to the defender's case. That delivery is not in law necessary to complete the donation *mortis causa* of deposit-receipts has been three times deliberately laid down, in the cases of *Gibson* v. *Hutchison, Crosbie's Trustees* v. *Wright*, and *Blyth* v. *Curles*, and I cannot go against this series of decisions. Delivery can only now be regarded as a piece of evidence more or less strong, but not indispensable, and in the present case I think there is enough without it.

I am for adhering.

LORD M'LAREN—I cannot say that I am a warm supporter of the judgment proposed, and giving all weight to your Lordship's views, I still find my mind in a somewhat balanced state. I shall, however, say a few words as to the element of intention in the case, and also as to the necessity for delivery to complete a gift.

I agree—and this is the only point as to which I have a clear opinion—that it is proved that Mrs Macfarlane intended to make a gift of the City of Melbourne deposit-receipts, because in answer to a letter written to her by her law-agent she expressly stated her wish that Mrs Lawrie should have the deposits, failing herself. At that time there is nothing to suggest Mrs Macfarlane was weak and facile, and there was no evidence of solicitation, and I must take it that she intended to confer what she considered to be testamentary benefit by the transfer. But we must remember what these securities were—money deposited in an Australian bank which had suffered from the financial crisis and was practically compounding with its creditors—money which was not payable till a distant period which Mrs Macfarlane did not expect to see. Accordingly, it is natural that these securities which could not be realised for a long period should be dealt with as the subject of a gift, especially as Mrs Macfarlane wished her money to go to her own and not to her husband's relatives.

But as to the deposits in the National Bank the case is very different. And I must say in the first place that I demur altogether to the manner of considering the subject as if it were first necessary to set up the gift and then to pull it down by proving weakness, facility, and circumvention as in a jury case. The whole question rests upon proof of intention to give by the dying person,—whether there is unequivocal evidence of intention to make a gift, not obtained under such circumstances that the donee could not conscientiously take benefit by the gift. Looking at the facts of the case, I have great difficulty in affirming the conclusion arrived at by your Lordships. We have almost all the elements which in a jury case constitute facility and impetration. It is not necessary to prove that Mrs Macfarlane was insane at the date of the gift, and I do not suppose she was, but the gift was made within five days of unequivocal manifestation of insanity. The testimony of the highest medical authority on the subject of mental disease is that this disease was coming on gradually, and it is impossible to believe that at the date of the gift Mrs Macfarlane's mind and will were not weakened by brain disease. But there is direct evidence that her will was impaired; her solicitor states in his evidence that she could have been influenced by any one to do what he wished. Then there are present in this case elements usually associated with influencing a gift, such as the exclusion of other relatives, solicitation conclusively proved, and there is this ugly fact, that when the bank agent came to visit Miss Macfarlane with regard to the transfer of the deposits, Mrs Lawrie, the donee, stayed in the room to prevent the banker from seeing Mrs Macfarlane alone. Now, if I were considering the case for the first time I should hold that the intention to make a spontaneous gift had not been proved. But the Lord Ordinary, who heard the evidence, has taken a different view of the case; and in particular his Lordship has expressed an unfavourable opinion as to the value of Dr Moodie's evidence. I should have thought that the animus of this gentleman was not the result of private pique but of prejudice produced by what he saw of the conduct of the donees. But we have been told on high authority that in a question of credibility the judgment of a judge who heard the evidence ought not in general to be disturbed, and as your Lordships' opinions are to the same effect as that of the Lord Ordinary, I am not prepared to dissent.

As regards the necessity for delivery, my difficulty arises from the circumstance that the Court is fettered by previous decisions. The most recent and authoritative definition of donations *mortis causa* is given in *Morris* v. *Riddick* in 1867, where the Lord President says—"Donation *mortis causa*, in the law of Scotland, may be defined as a conveyance of an immoveable or incorporeal right, or a transference of moveables or money by delivery, so that the property is immediately transferred to the grantee upon the condition that he shall hold for the granter as long as he lives, subject to his power of revocation, and failing such revocation, then for the grantee on the

death of the granter" (5 Macph. p. 1041).

Lord Deas delivered an opinion to the same effect, and the Judges accentuate the distinction existing between the law of Scotland and that of Rome, where delivery was not required. But then about ten years after—in the case of *Crosbie's Trustees* v. *Wright*, where there was no delivery *in manum* but a deposit-receipt was found in a drawer in the donee's house—the same Court held that it was a mistake to say that delivery was necessary, and sustained the transfer as a donation *mortis causa*. I could have understood that as a decision that there had been constructive delivery, because there was no doubt of intention, and the receipt had passed out of the giver's power into that of the donee. But the judges do not rest their opinion on this ground. They say that delivery is not necessary. Why it should not be in the case of a deposit-receipt, where it is easy to make a mistake as to the purpose of transference, while necessary in other cases, I cannot comprehend. The Judges rest their opinion upon the case of *Gibson* v. *Hutchison*, but there is nothing in that case to support their view except an *obiter dictum* that delivery is not in all cases necessary. I should have been glad if the present case could have been considered by a Court not bound to follow the decision or rather the opinions delivered in *Crosbie's* case, but sitting here as a Judge in the same Court, I see the difficulty of proceeding on a different principle, though I must say that I prefer the opinions of the late Lord President and Lord Deas in *Morris* v. *Riddick* to the later views of these distinguished judges as to deposit-receipts, which I think come very near to making them the subjects of a destination.

Lord Adam—[*After reviewing the facts his Lordship proceeded*]—This brings us down to the alleged donation of the ten deposit-receipts of the City of Melbourne Bank. These receipts are all taken in the names of Mrs Macfarlane and Mrs Lawrie, payable to either or the survivor, and though dated in June 1893 were not issued till the 15th September of that year. I think it is perfectly clear from the correspondence passing between Mrs Macfarlane and her agent at the time that she instructed her agent to have the receipts made out in these terms, with the intention and for the express purpose of making a donation *mortis causa* of them to Mrs Lawrie.

These receipts were not delivered to Mrs Lawrie, but were found in Mrs Macfarlane's repositories at her death, or rather when her papers were taken possession of by her agent.

In the absence of delivery the terms of the deposit-receipts would not have been sufficient in law to give Mrs Lawrie a right to the contents, but where, as here, we have in addition clear evidence of Mrs Macfarlane's intention to make a donation of them to Mrs Lawrie, I think that that is sufficient.

The next case of alleged donation is that of the three deposit-receipts which stood in Mrs Macfarlane's name and were brought to the bank by Mrs Lawrie on 17th October 1893, endorsed by Mrs Macfarlane. Two of these were then cashed by Mrs Lawrie, and redeposited in name of Mrs Miller. The endorsement of the third was objected to by Mr Ferguson as being insufficient, and was taken away by Mrs Lawrie, who brought it back again properly endorsed on the 27th October, and it was then cashed by her and the contents redeposited in name of Mrs Miller.

This case differs from the preceding, in respect that it is not a donation *mortis causa* but a present donation *inter vivos*. Mrs Miller's title to these deposit-receipts appears to me to be complete.

The next case is that of the nine deposit-receipts of the National Bank dated 27th October 1893, taken in names of Mrs Macfarlane and Mrs Lawrie, payable to either or survivor.

It is said that in this case there is no sufficient evidence of Mrs Macfarlane's intention to make a donation of them to Mrs Lawrie.

My opinion is that Mrs Macfarlane meant to deal with those receipts exactly as she had done with the Melbourne Bank receipts on 15th September. She had been told on that occasion by her agent—erroneously, no doubt—that deposit-receipts taken in the terms in which these were taken were sufficient of themselves, without further evidence, to give the contents to Mrs Lawrie. But however that may be, I think that there is sufficient evidence to show that Mrs Macfarlane intended to make a donation of them *mortis causa*. There is not only the evidence of Mrs Lawrie herself to that effect, but there is the clear evidence of Mr Stuart, and I think that Mr Ferguson certainly understood that to be Mrs Macfarlane's intention. It is not easy, indeed, to see what other intention Mrs Macfarlane could have had in making the receipts payable to Mrs Lawrie. It could not have been for administrative purposes during Mrs Macfarlane's life, as Mrs Lawrie did not live with her, and there would seem to be no object in making them payable to Mrs Lawrie merely that she might hand the contents over to somebody else after Mrs Macfarlane's death.

I think, therefore, that it is sufficiently proved that Mrs Macfarlane intended to make a gift of the deposit-receipts in question to Mrs Miller and Mrs Lawrie respectively, and that they are entitled to them, unless it be proved that when Mrs Macfarlane did so she was weak and facile in mind and that they were obtained from her by improper means.

Mrs Macfarlane died on the 9th January 1894, and certainly for some time before her death she suffered from delusions, and was incapable of managing her affairs or of disposing of her property. The question is, how far back did this state of mind extend? As the Lord Ordinary says, great weight in such a matter would naturally attach to the evidence of her medical attendant, but I think, for the reasons stated by him, that in this case little reliance can be placed on Dr Moodie's evidence. Dr Clouston's evidence, however, requires to be seriously con-

sidered. He saw her only once on 15th November. The mental condition in which he then found her was one, he says, which he would expect would come on gradually, and that he should think it extremely improbable that on the 27th of October she could have been in a fit state to manage her own affairs, and, in answer to the Lord Ordinary, he says that it is impossible to be absolutely dogmatic, but taking the general condition in which she was when he saw her, he should have thought it very unlikely she would have been able to make a valid will three months before.

Notwithstanding Dr Clouston's evidence as to the improbability of Mrs Macfarlane being able to make a valid will within such time, I think that the evidence in this case discloses that Mrs Macfarlane, up to the end of October, was quite intelligent, and as far as her mind was concerned capable of managing her own affairs, but that, from whatever cause, on the 1st of November there was a distinct change for the worse in her mental condition. Up to that date she suffered from no delusions, at least no one observed any. Her servants noticed no change in her mental condition. Her friends Dr Cuthbertson and Mr Stuart noticed no change. Her agent transacted some business with her on the 25th and her banker on the 27th, and he says that it never occurred to him that there was anything wrong with her mind. Subsequent to 1st November, however, she constantly suffered from delusions, and became gradually worse till she died. I therefore concur with the Lord Ordinary in thinking that it is not proved that she was facile in mind at the time when she made the second donations in question.

I also concur with the Lord Ordinary that there is no sufficient evidence to show that these donations were impetrated from her by improper means.

That Mrs Miller and Mrs Lawrie were very willing to receive these donations from Mrs Macfarlane is clear enough, but I see no reason to think that the motive she had in making them was other than the affection and regard which she entertained towards them.

Had Mrs Macfarlane been free to test as she pleased on the means and estate, I think it is probable that the benefits she conferred upon them would have taken the place of legacies, and in that case I do not think anybody could have said that they were otherwise than right and proper.

On the whole matter I agree with the Lord Ordinary.

LORD KINNEAR was absent.

The Court adhered.

Counsel for Reclaimers—H. Johnston, Q.C.—Constable. Agents—Dundas & Wilson, C.S.

Counsel for Respondents—Campbell, Q.C. —Graham Stewart. Agents — Mylne & Campbell, W.S.

Wednesday, July 20.

OUTER HOUSE.

[Lord Pearson.

MARQUESS OF NORTHAMPTON, PETITIONER.

Entail—Provisions to Younger Children—Free Rental—Policies—Rent of Policies Let as Grass Parks.

In estimating the free rental of an entailed estate, for the purpose of fixing provisions to younger children, *held* that the rent derived from the policies of the mansion-house was not to be included, notwithstanding that the mansion-house was in a ruinous condition and the policies were let as grass parks from year to year.

This was a petition at the instance of the Marquess of Northampton, heir of entail in possession of the lands and barony of Kirkness, Kinross-shire, for authority to restrict a provision of £6000 granted by his father, the late Marquess, in favour of his younger children not succeeding to the entailed estate, and to fix the amount of said provision at £1472, 0s. 9d. The said provision of £6000 bore to be granted as a sum equivalent to three years' free rental of the said entailed estate, but from a statement lodged on behalf of the petitioner it appeared that this sum had been fixed under a misapprehension, and that the free rental for the year in which the granter of the provision in question died amounted only to £490, 13s. 7d. That statement excluded from the free rental the rent of the mansion-house £10, the policies £99, 10s., and of certain woodland adjoining the policies, £12, 13s. 6d.

On 4th June 1898 the Lord Ordinary (PEARSON) remitted to Mr John Rutherford, W.S., to report on the petition. Mr Rutherford presented a report, in which he made the following remarks:—"A question arises with reference to the deduction of 'policies' in this case. The mansion-house is stated to be almost ruinous, and is occupied partly by an overseer and partly let, its whole value being entered as £10.

"The policies are entered at £99, 10s., which is actual rent derived from letting the fields as grass parks; the fields extend to 55 acres. They would naturally form the policy ground if the mansion-house were properly kept up, but are and for many years have been in use to be let from year to year as grass parks separately from the farms. They are not described as policies in the entry of the estate in the valuation of the county, but are there entered under their names as House Park, Doll Park, Bankhead Park and Highgreen Park.

"The deduction of the value of policies from the rental is not prescribed by the words of the 4th section of the Aberdeen Act. Indeed, that section in specifying the amount of the provisions to younger children declares that they shall not exceed certain proportions of the free yearly rents