Nor am I satisfied that qualified restrictions, such as those which were prescribed by the Court in the cases of *Lady Massy*, December 5, 1872, 11 Macph. 173, and of *Gibson's Trustees* v. *Ross*, 14 Scot. Law Rep. 694, are called for in the present case. The case of *Gibson's Trustees* is so very different in its circumstances as really to have little or no application. And in *Lady Massy's* case there was an ulterior destination of a character so different from anything that is to be found in the present as to prevent it being a precedent. It appears to me that the case of *Allan's Trustees* v. *Allan*, December 12, 1872, 11 Macph. 216, where Lord Cowan took occasion to remark on the case of *Lady Massy*, is much more in point, and there the Court held that as there was a clear direction to the trustees to pay to the beneficiaries, and as the Court could not consistently therewith create a trust, which was the only mode of rendering their provisions inalienable, they were entitled to receive payment on their own receipts.

Adopting the principle of decision given effect to in that case, I am of opinion with your Lordship that the question submitted to the Court in the present case ought to be answered in the affirmative.

Lord Gifford concurred.

The Court answered the question in the affirmative.

Counsel for Houston or Mitchell and Others (First Parties)—Kinnear—Thomson.

Counsel for Second and Third Parties—Rutherfurd—H. Johnston. Agents—Gibson-Craig, Dalziel, & Brodies, W.S.

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* *Saturday, November* 17.

OUTER HOUSE.

[Lord Curriehill, Ordinary.

LORD ADVOCATE *v.* GRIERSON.

Revenue—Mortis causa *or* inter vivos *Donation?*—*Legacy Duty*

A deposit-receipt was taken in name of a party (whose only means of subsistence it was) and the daughter of her brother, payable to either of them and the survivor. The first party, *intuitu mortis* and shortly before her death, gave the receipt to the second party, desiring her to get the money placed in her own name, which she did.—*Held* (by Lord Curriehill, Ordinary) that in the circumstances of the case as proved, the donation was *mortis causa*, there not being sufficient proof by the donee that it was *inter vivos* and irrevocable, and legacy duty accordingly found payable upon it.

This was an information by the Lord Advocate on behalf of the Crown against the defender, concluding for—(1) The sum of £15, being the amount of stamp duty on the inventory of the personal estate and effects of the deceased Mrs Grace Grierson or Harper, which inventory the defender, as having intromitted with the said estate and effects, was bound to exhibit in terms of the Acts 48 Geo. III. cap. 149, and 55 Geo. III. cap. 184, schedule part 3, and 23 & 24 Vict. cap. 80, sec. 5; and (2) for the sum of £45, by virtue of the statutes 36 Geo. III. cap. 52, 45 Geo. III. cap. 28, 55 Geo. III. cap. 184, schedule, part 3, and 8 & 9 Vict. cap. 76, sec. 4, being legacy duty on the sum of £450 given by the deceased to the defenders as a donation *mortis causa*, and subject as such to duty as a legacy. At the hearing of the case the pursuer did not insist in the first count of the information, and in answer to the second count it was alleged by the defender that the sum in question had been gifted to her by the deceased absolutely and *inter vivos*, and that consequently legacy duty was not payable thereon. The facts of the case as admitted and proved in evidence are sufficiently stated in the note appended by the Lord Ordinary in Exchequer Causes (Curriehill) to his interlocutor, which was as follows:—

"*Edinburgh, 12th November* 1877.—The Lord Ordinary having heard the counsel for the parties and considered the closed record, proof, and whole process—(1) Finds that the pursuer does not now insist in the first count of the information, Therefore assoilzies the defender therefrom, and decerns: (2) Finds in terms of the second count of the information, and decerns.

"*Note.*—In this case the parties are agreed that a donation of £450 was made by the deceased to the defender, and the only question is, Whether the donation was *inter vivos* and absolute or was *mortis causa* and therefore revocable and a legacy; The defender maintains that the gift was absolute and *inter vivos*, and the *onus probandi* rests with her. The proof of such a donation must be clear and unambiguous.

"The circumstances of the case, as admitted on record and disclosed in the proof, are shortly as follows:—The defender, who is the illegitimate daughter of a brother of the deceased Mrs Harper, resided from her childhood with the deceased, who at the time of her death on 29th April 1871 was upwards of seventy years of age. She had been for a year before her death suffering from heart disease, and in April 1871 she became dropsical, and was plainly dying from the effects of her disease. Several years before her death Mrs Harper acquired a sum of about £450 through the death of her husband, and that sum she deposited in bank on a deposit-receipt taken in name of herself and the defender, and payable to either of them and the survivor. From time to time the money was uplifted and re-deposited, the interest being received by the deceased and applied towards her maintenance, and she always kept the receipts in her own custody. She had no other means of subsistence than the money in question except supplies of farm produce from one of her brothers to the value of about £20 per annum. The defender, who gave her evidence throughout with great candour, and I believe with perfect truth, stated that the money was originally deposited by her aunt in the terms above set forth in order that in the event of her decease it might be a provision for the defender. And she further stated that on 18th April her aunt, being aware of her precarious state of health, and fearing lest after her death the defender might have difficulty in getting the money for her own use, gave the deposit-receipt to the

* Decided 12th November.

defender and desired her to get the money placed in her own name so as to secure herself. This the defender accordingly did; and on 18th April she obtained a new deposit-receipt for the amount, payable to herself alone. And she accordingly, with her aunt's sanction, retained the receipt in her own custody as her own property until and after her aunt's death, which took place on 29th April 1871, and she ultimately uplifted the money and applied it to her own use. The defender also stated that nothing was ever said by her aunt as to the gift being revocable, or as to the repayment of the money in the event of her recovery.

Now, it appears to me that the evidence of the defender — which is indeed substantially the whole evidence in the case—is not sufficient to establish an absolute gift of the money *inter vivos*. On the contrary, I think it clearly shews that the gift was made *intuitu mortis*, and I cannot doubt that had the deceased recovered and sought to retain the money the defender would have been compelled to restore it to her aunt. In short, the donation was a *mortis causa* gift and a legacy, and is therefore chargeable with the legacy duty claimed. In the circumstances of this case I do not think that expenses should be given against the defender."

The interlocutor was acquiesced in.

Counsel for Pursuer—Lord Advocate (Watson) — Solicitor-General (Macdonald) — Rutherfurd. Agent—David Crole, Solicitor of Inland Revenue.

Counsel for Defender—Scott. Agent—W. P. Stuart, S.S.C.

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* *Saturday, November* 17.

OUTER HOUSE.

[Lord Craighill, Ordinary.

M'CARROLL *v.* KERR.

Parent and Child—Father's Objection to Aliment an Illegitimate Child, where he Offers to take it himself.

The father of an illegitimate child, against whom there was a decree standing for its aliment, offered when it reached the age of seven to take it into his own custody, and refused aliment accordingly. The mother, with whom the child had been brought up, declined to give it up, *inter alia*, because the father (a married man) and his family were Roman Catholics and she was a Protestant and desired the child to be brought up as such.—*Held* (by Lord Craighill, Ordinary), in a suspension by the father of a charge for aliment, that, looking to the circumstances of the case, the objection taken by the mother afforded good ground why the father's offer should be refused, and reasons of suspension repelled according.

M'Carroll was father of an illegitimate child born in 1868, of which Kerr was the mother. She in 1869 got decree against M'Carroll for aliment at the rate of £8 a-year; there was a restriction in the decree reserving the defender's right to apply for the custody of the child on its attaining the age of seven. The aliment was paid till the child was past eight years of age, when it was refused, and Kerr accordingly, on the 20th December 1876, gave M'Carroll a charge upon the decree for the sum of £2, being the one quarter's aliment due on 6th December preceding.

This was a note of suspension of that charge, and of interdict of a poinding which had followed upon it. The complainer stated, *inter alia*—"The complainer has since the said decree regularly paid aliment for the said child; but the said child having attained the age of seven years, the complainer is desirous and has offered to take the child into his own custody, and to aliment the child under his own care. He wishes to bring the boy up to his own business in his own house and shop. The boy in question is in good health, and his aliment and education can be best attended to by the complainer. The charger is the sole servant, employed from 8 A.M. to 11 P.M., in a small public-house in Ardrossan, and the boy goes about the said public-house, where he gets his meals in company with an elder son of the charger, also illegitimate. The boy sometimes sleeps in the charger's house or lodging and sometimes in that of her aunt; but he is practically houseless and under no sufficient control. The complainer is entitled, and now demands, to discharge his obligation of aliment by taking the boy into his own keeping."

The respondent answered—"Admitted that till recently the complainer has paid aliment for the child, which is now past eight years of age. Admitted also that the complainer has offered to aliment the child in his own house, but explained that since the birth of the child the complainer has been married to another woman, by whom he has had several children, and that it would be unsafe and injurious to the best interests of the complainer's natural child that it should be taken to his house and brought up along with his wife and lawful children. The complainer's wife has an antipathy to the child, both because of its being the child of her husband by another woman and because it has been trained as a Protestant, while she and her husband are Roman Catholics. On one occasion, when the child accidentally strayed into the complainer's shop, his wife struck and ill-used it in a most cruel manner." She further stated that the complainer's offer was not made *bona fide*, and that though living quite near he had never taken any interest in the child.

A proof was led, the purport of which appears from the note to the Lord Ordinary's interlocutor. His Lordship repelled the reasons of suspension and interdict, and found the charge orderly proceeded, and decerned. He added the following note:—

"The question is whether the complainer, who for eight years has been contributing to the aliment of a bastard child, now nearly nine years old, of which the respondent is the mother, is henceforth to be relieved of liability by an offer to take and support the boy? Whether the complainer really desired to have the child may be doubted. Affection indeed is not put forward as the motive, and the offer, were it to be accepted, would be pecuniarily unprofitable to the complainer. The Lord Ordinary is disposed to think that the complainer is speculating on the

* Decided 15th June