been quite clear if the bequest had stopped at the end of what has been called the second clause—the clause which concludes with the words "for the benefit of the legatees."

But then it does not so stop. It proceeds to make an ulterior destination which further qualifies the right of fee, and does so by, in a certain event, carrying it to other people—the legatee's issue—and failing such issue to the survivor of the two brothers. The question thus comes really to be whether this ulterior destination applies only to the event of the legatee dying before the testator or before the first term of Whitsunday or Martinmas after the testator's death, or whether it also applies to the event of the legatee dying before payment, that is to say, full and complete payment of the legacy.

I am of opinion that the latter is the correct view. Reading the deed fairly, and giving full effect to all recognised principles of construction, I think the testator intended the destination over to apply in the event of the legatee's death while any portion of the legacy remained undisposed of in the hands of the trustees; and that being so, there was not, and could not be—as regards the sum now in dispute—any vested right in the legatee. I am therefore of opinion that the interlocutors of the Sheriffs should be affirmed.

LORD STORMONTH DARLING—I quite concur, and shall only add this—the appellant argued that the word "share," in what has been called the third clause of the destination, means the whole share as it existed at the date of the testator's death. I do not think that that is the true meaning of the clause. The trustees are to apply "such deceaser's share . . . in any way they may think proper." They could not apply what they had paid away, and I think the meaning is that they were to apply any balance that remained after what they had paid away to or for behoof of Thomas. I agree with your Lordship's construction of the deed, and that the judgment of the Sheriffs should be affirmed.

LORD LOW—I am of the same opinion. I think that upon the death of Thomas Kirk his children became entitled to that portion of the legacy which was still in the hands of the trustees, free of any claim on the part of the widow. The solution of the question in the case lies where Mr Robertson put it. If what has been called the third clause was restricted in its application to the case of the legatee predeceasing the testator, or dying before the first term of Whitsunday or Martinmas after the testator's death, then it is plain that the fee vested in Thomas Kirk, he having survived both of these events. If, on the other hand, this clause is not restricted to that event, but applies to the event of Thomas Kirk's death at any time before the legacy had been fully paid to him, it is equally clear that any part of the legacy which had not been paid, was not *in bonis* of him at his death, and could not be made subject to a claim of *jus relictæ*. I am clearly of opinion that the clause in question was intended to cover the latter case. The testator had given power to his trustees either to pay the whole of the capital, or to pay part of it to Thomas Kirk, or to limit his enjoyment to the income. Having given that power, it was most natural that the testator should go on to provide what was to happen if any part of the capital was left in the hands of the trustees at the death of the legatee. In my judgment he did so by the third clause, and provided that in the event of Thomas Kirk's death the whole or any part of the capital which had not been paid to him should belong to his children, not as taking through or in succession to him, but in their own right.

I am therefore of opinion that the Sheriff's judgment should be affirmed.

LORD JUSTICE-CLERK—I am of the same opinion and have nothing to add.

The Court dismissed the appeal and affirmed the judgment appealed against.

Counsel for the Claimant Mrs Walker (Appellant)—M'Lennan, K.C.—J. A. T. Robertson. Agents—Dalgleish & Dobbie, W.S.

Counsel for the Claimants, the issue of Thomas Kirk (Respondents)—Macdiarmid. Agents—Bonar, Hunter, & Johnstone, W.S.

Friday, December 8.

SECOND DIVISION.

[Lord Low, Ordinary.

SCOTT'S TRUSTEES *v.* MACMILLAN.

Trust—Succession—Donation mortis causa—Subsequent General Trust-Disposition Revoking all Previously Executed Testamentary Writings.

A trust-disposition and settlement by which the testatrix conveyed to trustees her "whole means, estate, and effects, heritable and moveable, real and personal," contained the following clause:—"And I revoke and recall all testamentary writings of whatsoever kind, formal or informal, previously executed or authorised by me." The testatrix had at an earlier date made a *mortis causa* donation by means of a deposit-receipt.

Held that *Crosbie's Trustees* v. *Wright*, May 28, 1880, 7 R. 823, 17 S.L.R. 597, was a case in point, and, following it, that the general trust-disposition and settlement with its clause of revocation was not sufficient by itself to revoke the prior *mortis causa* donation

Donation mortis causa—Deposit-Receipt—Delivery.

Circumstances in which *held—approving* judgment of Lord Ordinary (Low)—that a *mortis causa* donation had been made by a deposit-receipt found in the donor's repositories after her death.

This was an action at the instance of William Tait, S.S.C., 33 York Place, Edinburgh, and David Macgill, 9 Carmichael Street, Govan, trustees and executors of Mrs Robina Tait or Scott, against Mrs Jane Robertson Gourlay or Macmillan, Archibald Macmillan, residing at 92 New Keppochhill Road, Glasgow, her husband, as her curator and administrator-in-law, and the Commercial Bank of Scotland, Limited. The pursuers sought declarator that they were entitled to payment of £100 contained in a deposit-receipt for that amount granted by the said bank in the joint names of Mrs Scott and Miss Jane Robertson Gourlay (subsequently Mrs Macmillan), and on it being so found and declared, that the defender Mrs Macmillan should be decerned and ordained to endorse the deposit-receipt, and if she failed to do so, that the said bank should be ordained and authorised to pay the said sum of £100. The action was defended by Mrs Macmillan.

Mrs Scott died on 19th February 1904, and left a general trust-disposition and settlement dated 10th November 1903, by which she conveyed to her said trustees her "whole means, estate, and effects, heritable and moveable, real and personal, of whatever kind and wherever situated, presently belonging and addebted, or which shall belong and be addebted, to me at the time of my death," in trust for certain purposes, and, *inter alia*—"(Second) For payment of the following legacies, *videlicet* . . . To Mrs Jeanie Gourlay or Macmillan, wife of Archibald Macmillan, 92 Keppochill Road, Springburn, Glasgow, the sum of £50 and my harmonium, and that as a tangible recognition of her long service to me."

The trust-disposition and settlement contained the following clauses:—"And I confer upon my trustees all requisite powers, including power to sell my heritable estate either by public roup or private bargain;" "And I revoke and recall all testamentary writings of whatsoever kind, formal or informal, previously executed or authorised by me." The residue of her estate was bequeathed to her nephew (and trustee) the said William Tait.

In the testator's repositories at her death was found a deposit-receipt, dated 10th July 1903, in the following terms:—"Received from Mrs Robina Scott and Miss Jane Robertson Gourlay, Crosspark, Hamilton, one hundred pounds sterling, repayable to either or survivor, which is placed to their credit on deposit-receipt with the Commercial Bank of Scotland, Limited."

The pursuers pleaded—"(1) The sum contained in the said deposit-receipt being part of the estate of the late Mrs Scott, the pursuers are entitled to decree in terms of the declaratory conclusion of the summons."

They maintained that the sum contained in the deposit-receipt had never been given to the defender Mrs Macmillan, but (2) that if there had been donation the donation had been subsequently revoked by the general trust-disposition and settlement.

On 25th October 1904 the Lord Ordinary (Low) allowed to the parties a proof of their respective averments, and on 17th May 1905 assoilzied the compearing defender from the conclusions of the summons. His opinion, in which the facts of the case as ascertained by the proof are fully set forth, was as follows:—"In this case the defender claims that she is entitled to a sum of £100, contained in a deposit-receipt which belonged to the deceased Mrs Scott, on the ground that the latter made a donation of that sum to her *mortis causa*.

"The defender was, with the exception of a short period about 1894, in Mrs Scott's service from 1887 until April 1902, when she was married. Mrs Scott suffered from an affection of the eyes which caused her great pain, and rendered her almost blind. She therefore required a considerable amount of attendance and of assistance in her affairs, and these she received from the defender, who was her only servant. There is no doubt that Mrs Scott was grateful to the defender for the way in which she served her, and intended to benefit the defender at her death. Mrs Scott made various writings of a testamentary nature. She first executed a formal settlement in 1887. That was just about the time when the defender entered her service, and naturally the settlement contained no bequest in favour of the former. In April 1897, however, Mrs Scott added a codicil to the settlement, in which she bequeathed to the defender £100 'if she should still be with me at the time of my death.' In May of the same year Mrs Scott got a friend to write a document purporting to bequeath £100 to the defender absolutely, and in the month of September a document bequeathing some furniture to the defender if she 'remain with me unmarried till my decease.' Finally, in November 1903, Mrs Scott executed a trust-disposition and settlement whereby she recalled all previous testamentary writings, and which contained a legacy of £50 to the defender. Mrs Scott died on 19th February 1904.

"The deposit-receipt for the £100 which the defender claims is dated 10th July 1903, and is in name of Mrs Scott and the defender, 'repayable to either or survivor.' That £100 was part of a sum of £150 which on 19th February 1901 had been placed in the bank on deposit-receipt in the same terms. The deposit in 1901 was made by the defender, who, at Mrs Scott's request, asked the witness Mr Keith, the Provost of Hamilton, to accompany her, which he did. In 1903 the £150 was uplifted, and £100 redeposited in the terms which I have stated—by Mr Keith upon the instructions of Mrs Scott. Immediately after the £150 were deposited in 1901 Mr Keith called upon Mrs Scott for the purpose of ascertaining whether the terms in which the receipt had been taken was in accordance with her intention. Mrs Scott told him that it was so, and (Mr Keith said) 'she stated that she considered that she was under an obligation to Jane Gourlay, and this was the method she adopted to liquidate the obligation, under the reservation that if during her lifetime she required money she

was still to be allowed to draw it out for her own use.'

"In 1903 Mr Keith says that Mrs Scott sent for him, and 'told me that she was needing money, and she would be obliged if I would go to the bank with the deposit-receipt and get £50 for her and redeposit the balance. I asked if it was to be redeposited in the joint names as this deposit-receipt was, and she said yes, she wished it to be on precisely the same lines as the other. I understood from what she said that she still wished Jane Gouriay to get the money at her death in the event of her not requiring it before that. That is what she said.'

"In cross-examination Mr Keith said:—'I would not say that in 1901 or 1903 she' (Mrs Scott) 'anticipated a long life. I think she was rather looking forward to death as not an improbable contingency in the near future.'

"It seems to me that the evidence of Mr Keith—an entirely independent witness—establishes that Mrs Scott's intention in depositing the £100 in the terms which I have stated, was to make a donation of that sum to the defender, subject to two qualifications—the one that the defender should survive her, and the other that she should have right during her life to draw upon the fund if she required to do so. The first qualification is that which is characteristic of all donations *mortis causa*, and in regard to the second qualification I do not think it prevented the gift taking effect in so far as Mrs Scott did not during her lifetime exercise the reserved power to draw upon the fund.

"The deposit-receipt was not delivered to the defender, but was retained by Mrs Scott, and was found in her repositories at her death. I think, however, that it must be regarded as settled that that did not prevent the donation being effectual, if the intention to make it is otherwise established—*Crombie's Trustees*, 7 R. 823; *Macfarlane's Trustees*, 25 R. 1201.

"The fact, however, that the deposit-receipt remained under Mrs Scott's control put it in her power to revoke the donation, or to render it ineffectual by disposing of the money otherwise. As I have said Mrs Scott a few months before her death executed a trust-disposition and settlement, whereby she conveyed her whole means and estate to trustees for the purposes therein mentioned. Now, I think that if there was clear evidence that Mrs Scott intended the deposited fund to be carried by the general conveyance in her trust-disposition and settlement, the result would be to revoke the donation. I think that the principle applicable is very much the same as in the case where a special destination of a particular subject is followed by a general conveyance. In such a case the special destination will remain effectual unless there is clear evidence of intention to evacuate it.

"It was argued that in this case there was sufficient to show that Mrs Scott intended the deposited fund to be carried by her trust-disposition and settlement. What is chiefly founded on is the fact that unless the £100 were carried by the settlement, the pecuniary legacies bequeathed by Mrs Scott were largely in excess of the funds possessed by her. Mrs Scott left legacies amounting to £750, and at the time when her settlement was made, her funds, including the £100 in question, amounted to £730, namely, £500 Glasgow Corporation Stock, £50 on deposit with the Royal Bank, £80 on deposit with the British Linen Company's Bank, and the deposit in question with the Commercial Bank. In any view, therefore, the legacies left by Mrs Scott exceeded the capital sum at her disposal, although if she intended the £100 to be available for legacies the excess was trifling.

"Mrs Scott was, however, possessed of heritable estate of some value, and the scheme of her settlement was that she conveyed her whole means and estate, heritable and moveable, to her trustees, with power to sell the heritage, and directed them to pay the legacies to which I have referred, and to make over the whole residue to the pursuer Mr Tait. There is, therefore, no doubt that the trust estate is sufficient to pay all the legacies in full. The pursuers' case is that Mrs Scott intended Mr Tait (who was her heir-at-law) to take the heritage clear of all burdens. Such an intention, however, cannot be gathered from the settlement itself, in which Mr Tait is only given right to the residue, whatever that may be, and the pursuers rely upon the evidence given by Mr and Mrs Tait as to what Mrs Scott said in reference to her intentions when giving Mr Tait instructions for her settlement.

"Both Mr and Mrs Tait say that Mrs Scott expressed her intention to be to leave the heritable property to Mr Tait free of burdens, and that she mentioned a sum of £100 deposited in bank as available for payment of legacies. Mr Tait's evidence is as follows—'She told me that she had £500 deposited with the Glasgow Corporation. She also mentioned that she had a sum of £100 on deposit in the Commercial Bank. (Q) How did she come to mention that?—(A) At that meeting, seeing that she said that she wanted to leave me the stone and lime clear, I thought it right in my own interest to draw her attention to the fact that if she conveyed the property to me in her lifetime there would be a saving in duty. She did not like that suggestion, and when she referred to the £500 and the £100 she said there would be sufficient there to pay the legacies and give me the property free. She made no reference to any other investment, but she certainly dealt with the £100 in the Commercial Bank as her own property.'

"Mrs Tait's evidence is as follows—'(Q) Do you remember whether, on the occasion when your husband received instructions, reference was made to a particular deposit of £100?—(A) The only reference I remember is that, in talking over what she had, she said there was £500 with the Glasgow Corporation and £100 on deposit-receipt. She did not say where it was, so far as I remember. (Q) Did she refer to that £100

as money which would be available for any particular purpose?—(A) She meant it to be available to meet the legacies, and it was to be thrown into the estate. (Q) Did she say so? — (A) She said to my husband, 'There is this £500 and the £100, and I want to give you the property free.'

"Although I need hardly say that I do not doubt the honesty of Mr and Mrs Tait as witnesses, I do not think that that evidence aids the pursuers' case. It is to be observed that when enumerating the funds available for legacies, Mrs Scott made no mention of the sums—amounting to £130—which were deposited in the Royal and British Linen Banks, and which were undoubtedly available for legacies. She may have forgotten about these sums, but it seems to me to be just as probable that what she intended to refer to was the money deposited in her own name, and that she had got confused as to the banks in which the different deposits were made. In any view she spoke as if she only had £600 available for legacies, which was very near the mark if she did not intend to include the £100 in question. It is also to be remembered that Mrs Scott was very ill at the time—indeed, she was on her death-bed, although she lived for several months afterwards—and she may very well have been not quite clear in regard to details.

"It was also urged that it was very improbable that Mrs Scott should have intended to give the defender both a legacy and a donation, and that the presumption was that the legacy under the settlement was intended to come in place of the donation. I think that the answer to that argument is that at one time, at all events, Mrs Scott certainly intended to make a donation *mortis causa* to the defender, and also to leave her a legacy. Thus, when the £150 were deposited in 1901, the codicil to the settlement of 1887 was still unrevoked, and if Mrs Scott had died before the defender left her service, the latter would have been entitled both to the £150 and to the legacy bequeathed to her in the codicil.

"There is one consideration to which I am inclined to give considerable weight. The £100 were deposited in the circumstances which I have stated on 10th July 1903, and Mrs Scott gave the instructions for the preparation of her trust-disposition and settlement in October of that year, and the settlement was executed on the 10th of November. It is improbable that Mrs Scott should have forgotten the terms in which and the purpose for which the deposit was made. As I have already said, there seems to me to be no doubt that Mrs Scott directed the receipt to be taken to herself and the defender and the survivor for the purpose of giving the defender right to the sum if she was the survivor, and I think that there is as little doubt that Mrs Scott believed that if she did not uplift the money, the terms in which it was deposited would be sufficient to effect that purpose. Now, Mrs Scott seems to have been a shrewd and capable woman, and if she had changed her mind between July and October and no longer intended that the defender should have right to the £100 in the event of her death, I think that it would have occurred to her that it was necessary to alter the arrangement which she had adopted, and that she would either have uplifted the money and re-deposited it in her own name, or would have stated in her settlement that the legacy of £50 was to come in place of the £100.

"For these reasons I am of opinion that the defender is entitled to absolvitor."

The pursuers reclaimed, and argued — Admitting that there had been donation of the £100 in the deposit-receipt, there was sufficient evidence to show that the donation had been recalled. Testatrix' moveable estate amounted to £730 at the time the settlement was made, though £30 more came in prior to her death, which she could hardly have had in view when she made her settlement—the legacies amounted to £750, so that unless the £100 in the deposit-receipt was regarded as part of her estate, there was not enough, or, as it turned out, barely enough, to pay the legacies. The same evidence that was sufficient to prove a donation was sufficient to revoke it. The deposit-receipt was not by itself sufficient to establish donation, but had required the evidence of Mr Kirk to show the intention of the testatrix at the time it was made. If the defender was entitled to show the testatrix' intention at one time, the pursuer could show it at a subsequent time. The testatrix' change of intention was shown by the following circumstances—That the trust-disposition and settlement of 10th November 1903 was a general conveyance of her whole means and estate, and at its date the money in question was her property; that the said settlement revoked prior testamentary writings; that it contained a legacy, generous by itself, to Mrs Macmillan "as a tangible recognition of her services;" that it was likely the gift would be revoked, for in prior deeds the provisions to Mrs Macmillan had been made conditional on her being in the testatrix' service, which she was not; that there was evidence that Mr Macmillan was not much liked by testatrix.

The defender (respondent) argued —The personal estate was sufficient to pay legacies, but in any case there was no sharp division in the scheme of settlement between heritable and moveable, for it contained a power to sell heritage. There was no evidence of an intention to revoke, for the execution of a general conveyance did not recall a prior donation *mortis causa*, nor did the clause of revocation apply to a donation *mortis causa*, but only to testamentary writings. The case was ruled by *Crosbie's Trustees* v. *Wright*, May 28, 1880, 7 R. 823 (Lord Deas, 831; Lord Shand, 834), 17 S.L.R. 597.

LORD JUSTICE-CLERK—I do not see any reason for interfering with the judgment in this case. There is no doubt that a donation was made, and the only question is whether it was subsequently revoked. I think it was not revoked, and, concurring entirely as I do with the view which the

Lord Ordinary has taken, I do not think it necessary to say more.

LORD KYLLACHY — The only question raised by this reclaiming note is the question whether the donation made to the defender by Mrs Scott was afterwards revoked. It was not seriously contended that the clause of revocation in the general settlement of the deceased necessarily operated revocation, or that, apart from the revocation clause, the general conveyance in the settlement necessarily carried this deposit-receipt. Any such suggestion is excluded by the judgment in the case of *Crosbie's Trustees*, which was decided in very similar circumstances. Therefore the only question is whether it has been shown that there has been a competent revocation in some other manner. I am satisfied of the contrary, and find it enough to say —waiving all questions of competency or relevancy—that the proof here fails to establish that there was even any change of intention on the part of Mrs Scott. I entirely concur in the judgment of the Lord Ordinary.

LORD STORMONTH DARLING—I concur. I have little to add, because I entirely agree with the opinion of the Lord Ordinary.

The important dates in the case are as follows—the deposit-receipt, which the defender claims to retain, is dated 10th July 1903; the final trust-disposition and settlement is dated 10th November 1903; and Mrs Scott died on 19th February 1904.

The will contains a general clause of revocation, which it is not now seriously contended is sufficient by itself to revoke the gift. Is there, then, other evidence of an intention to revoke a gift made so lately as 10th July 1903?

The act is proved to have been done with the full knowledge of its effects; the evidence of Provost Keith shows that he satisfied himself that it was Mrs Scott's intention to make a donation. Now, I cannot find evidence that there was ever any intention to undo what had been solemnly and deliberately done in July.

LORD LOW—I considered this case very carefully in the Outer House, and the argument which I have heard to-day has confirmed me in the view which I then formed.

The Court adhered.

Counsel for Pursuers (Reclaimers)—A. J. Young—Graham Stewart. Agents—Tait & Johnston, S.S.C.

Counsel for Defender (Respondent) — Crabb Watt, K.C.—Irvine. Agents—Dove, Lockhart, & Smart, S.S.C.

Friday, December 15.

SECOND DIVISION.

[Lord Dundas, Ordinary.

J. & F. FORREST *v.* GOVERNORS OF GEORGE WATSON'S HOSPITAL.

Superior and Vassal—Feu Charter—Condition of Feu Charter—Building Restriction — Interest to Enforce Condition of Feu Charter.

The singular successors of the original feuars of a piece of ground, about an acre in extent, brought an action against the superiors for declarator that they were entitled to remove a villa situated on the feu, and to erect tenements of dwelling-houses on the ground as they might think proper. The feu charter provided, *inter alia*, that the feuar "shall be bound to build and maintain on the area or piece of ground hereinbefore disponed, a dwelling-house of the value of not less than £800, according to a plan to be approved of by" the superiors, "and that within two years from the date hereof, and such house shall not be built nearer to the road or street on the north thereof than 26 feet, unless a deviation therefrom shall be specially sanctioned by the superiors;" it also contained a declaration that "all acts and deeds done or omitted to be done contrary to the conditions and provisions before expressed, or any of them, shall be *ipso facto* void and null;" with resolutive clauses. There was no general prohibition in the feu charter against dwelling-houses additional to that stipulated for being built on the feu, and certain tenements had already been erected. The ground on which the pursuers sought the declarator was, that the said tenements already built fulfilled the conditions required in the stipulated dwelling-house and that the superiors had no longer any interest to object to the erection of additional tenements involving the demolition of Napier Villa.

Held that even if it were necessary for the superiors to shew an interest to insist on the maintenance of said dwelling-house (which the Court did not hold that it was) the stipulation itself implied interest, and that nothing had occurred to take away that interest.

This was an action by the feuars of a piece of ground extending to about an acre situated at the corner of Morningside Road and Merchiston Place, Edinburgh, against the superiors, the Governors of George Watson's Hospital, concluding for declarator (1) that the pursuers were entitled to remove a dwelling-house called Napier Villa situated on said piece of ground, and (2) that they were entitled to erect tenements of dwelling-houses on the said ground in such way or manner as they might think proper. The defenders by feu charter dated 1st August 1854 had disponed the said piece