1742. *November* 3.

Mrs JEAN WHITEFOORD, &c. *against* CHARLES AYTON and his SPOUSE.

No 25.
A missive of the following tenor, "I give you my watch, chain, and seal, which you shall enjoy after my death," was found sufficient to constitute a legacy or *donatio mortis causa*.

Anno 1734, Doctor Hamilton, intending to make Mrs Whitefoord a present of his watch, chain, and seal, executed this intention, by writing a letter to her in the following words: "I give you my watch, chain, and seal, which you shall enjoy after my death."

The Doctor lived about two years after the date of the letter, and having fallen sick and died in the house of Charles Ayton, Mrs Whitefoord brought an action against Ayton, for delivering up the watch, &c. to her; and having referred the having thereof to his oath, he deponed, "That, when he attended the Doctor, *anno* 1736, at the goat-whey, he delivered the watch to the deponent, desiring him to keep the same for the use of the deponent's son."

To this the pursuer *objected*, That nothing had been referred to the defender's oath, but simply the having the watch; *ergo*, the quality which he had added, *scil.* "that it was given to him for the use of his son, was extrinsic, and ought not to avail him." Whereupon the defender offered to prove the particulars, mentioned in his oath, by witnesses.

Answered for the pursuer, That supposing the fact true, (which is very improbable,) it is not relevant; 1*mo*, Because, the letter imported an absolute and irrevocable donation *inter vivos*. The gift was simple, only the term of delivery was suspended till the death of the giver. The adding the death of the giver to a donation or promise, does not *per se* constitute a *mortis causa* donation, unless a clause of return, or power of revocation, were expressly reserved by the giver. See § 1. *Inst. De donat. l.* 42. *D. De mortis causa donat.* and Voet. § 4. *ad tit. D. De donat.* 5th December 1672, Galloway, No 57. p. 4959.

It is, therefore, of no importance to prove the particulars in the defender's oath; for, upon the supposition, that the prior donation in favours of the pursuer was absolute and irrevocable, as it did infer warrandice from fact and deed, so it was not thereafter in the granter's power to do any gratuitous deed in prejudice thereof. But supposing, for once, that the letter should only be interpreted a legacy, or donation, *mortis causa*, yet, even in that view, it is believed, the delivery to the defender, as narrated in the oath, must be constructed in the same manner, since the one seems to be done as much *intuitu mortis* as the other; if so, the question comes to this precise point, How far a special legacy, being once constituted by writ in favours of the pursuer, could thereafter be taken away by a nuncupative legacy of the same subject to the defender? As to which it is plain, that as our law is extremely jealous of all kinds of proof by witnesses, so it is a rule, that the testimonies of witnesses are not admitted to prove in cases where writ may, and uses to be adhibited.

No 25.

And if this holds in the general, it ought *a fortiori* to obtain, that a proof by witnesses ought not to be sustained, so as to take away a right or obligation which is once constituted by writ; since, in this case, the general rule is aided by the common principle of law, *unumquodque eodem modo, &c.* See the 18th February 1631, Houston, *voce* PROOF. Lastly, it was observed, That the watch was worth about L. 30 Sterling in value; and so could not be carried by a nuncupative testament, as such are not effectual beyond L. 100 Scots.

Replied, All the quotations from the civil law, adduced for the pursuer, relate to the case of donations completed by delivery, which does not apply to the case in hand, where the property and possession still remained with the Doctor; consequently, there was nothing to hinder him to dispose of it otherwise during his life, as he really did. Upon this principle, he could not be liable in warrandice on the missive; or supposing he was, yet those that got the bulk of his effects would be liable in the same; but it is very plain from the common principles of law, that the first delivery must be effectual to convey the property; and the quotation from Voet shows this to be the case, with an exception as to deeds granted by the Prince. In the next place, supposing the missive imported no more than a legacy, or *donatio mortis causa*, which is plainly the case, then it was absolutely in the Doctor's power to adhere to it or not, to give away the subject, or to leave it among his effects, to be furthcoming to the legatee or not. Could not the Doctor have gifted his watch to a stranger? and could he not have gifted it, even *mortis causa* to any person, by giving it out of hand? Indeed, if he had made only a verbal legacy in relation thereto, subsequent to the legacy by writ, there might be a doubt in the case; because verbal legacies cannot be proved by witnesses beyond L. 100 Scots; but in every case, the delivery of the *ipsa corpora* of moveables, may be proved by witnesses, and the intent for which the delivery is made, or title whereon, may be proved by witnesses, though the thing be of never so great value; as in all bargains about moveables, because the law supposes there is no danger of mistake in such a case.

THE LORDS found the defunct's letter does constitute a *donatio mortis causa*, in favours of the pursuer, and that a proof by witnesses is not competent, in this case, to take away the effect of a donation constituted by writ, and create a new legacy of the same.

C. Home, No 206. *p.* 342.