sum; for the appellants were entitled to any increase of value accruing during the litigation—*Mitchell*, March 10, 1855, 17 D. 682.

The Court unanimously held that the appeal was competent, but, on the merits, their Lordships adhered to the opinion of the Court below, and dismissed the appeal.

Agent for Pursuer—Archibald Melville, W.S.
Agent for Defender—W. B. Glen, S.S.C.

Thursday, December 7.

FIRST DIVISION.

MRS MARY ECKFORD OR ROSS *v.* THOMAS MELLIS.

Proof—Donatio mortis causa.

Held that the presumption of law was so far against donation that the evidence in support of it must be strong, clear, and unambiguous; that the proof must not consist of a mere balancing of conflicting evidence; and that it is enough to rebut the allegation of donation if the evidence be unsatisfactory or the circumstances suspicious.

Circumstances in which it was *held* (*diss.* Lord Kinloch) that the evidence was unsatisfactory and the circumstances suspicious.

This action was brought in the Sheriff Court of Aberdeen by Mrs Mary Eckford or Ross, niece and executrix-dative *qua* one of the next of kin of the late Janet Eckford. The pursuer had been served executrix in supplement and for execution of her aunt Miss Eckford's last will and testament. The object of the action was to obtain count and reckoning with the defender Thomas Mellis, the husband of another niece of Miss Eckford's, who was alleged to have intromitted with the effects of the deceased, and in particular to recover from him the contents of a deposit-receipt with the Aberdeen Town and County Bank for £40 which had belonged to the deceased, and which the defender had uplifted, and for which he had not accounted to her as executrix.

The defender pleaded donation under the following circumstances:—The deceased Miss Eckford died at the age of eighty-two, after a last illness of about two months' duration. Previous to this last illness she had made two successive wills, in which she bequeathed the bulk of her succession to the pursuer, appointing trustees, and employing a law agent. The only difference between the wills was that the latter was the more favourable to the pursuer. She was taken ill in the beginning of June 1868, and the witnesses Mrs Wyness (another of her nieces) and her husband, and the defender, took charge of her until her death. On the second day of her illness, on the defender's coming to see her, the following took place, as narrated in the defender's own evidence:—"After (my) inquiring for her health, she said she thought she would never rise again. She wished me to take charge of herself and what affairs she had while she was living. Margaret Eckford or Wyness came for me. This was on or about 2d June, about breakfast hour. Mrs Wyness and her husband were with Miss Eckford. She wanted me to take charge of her so long as she lived, and see her decently buried. She then told Mrs Wyness to go to her chest and get her purse. Mrs Wyness got it. Miss Eckford said—'Now, Thomas, this (referring to the deposit-receipt) is all the money I have got in the world. You will take it and give me what I require so long as I am in life. See me decently buried, and if there is a balance it is your own, and do with it what you please.' She got some wine that same night at her own request. It was a half bottle of port. She also got a gill of brandy. I was not in the way of sending her drink before, but she occasionally came for it before—perhaps once a month. All the drink mentioned in the account lodged was ordered by her, or by Mrs Wyness, or by a message-girl. In fact Miss Eckford lived on drink latterly. She died on 27th July." The two witnesses Mr and Mrs Wyness substantially corroborated this testimony. They also deponed that the same words were repeated when the defender, on finding the bank refused to cash the deposit-receipt without indorsation, brought it back for Miss Eckford to indorse. The defender thereon drew the amount in the deposit-receipt, being with interest £40, 11s. 7d., and paid accounts for the deceased, which came, on his own showing, to £21, 1s. 2d. The balance he claimed as his own in virtue of the alleged donation by the deceased.

After a proof was led, the Sheriff-Substitute (J. Dove Wilson) pronounced the following interlocutor:—

"*Aberdeen, 12th May* 1871.—Having considered the record and proof, finds, in point of fact—(1) That the deceased Janet Eckford died on 27th July 1868; (2) that the pursuer is her executrix; (3) that on 18th June 1868 the deceased was possessed of the sum of £40, and certain interest thereon, lying on deposit-receipt in the Town and County Bank, Aberdeen; (4) that on or about said date the said receipt was endorsed by the deceased, and that on said date the contents thereof were uplifted by the defender; (5) that at said date the deceased required the proceeds of the receipt, or part thereof, for her maintenance; (6) that at said date she was incapacitated by illness from personally uplifting the money; (7) that the defender has failed to prove that the deceased made to him a donation of any part of the contents of the deposit-receipt; (8) that the deceased died of the illness during which she was suffering at the date of uplifting the money, and that between that date and her death she was not able to resume management of her own affairs; (9) that during that period the defender applied part of the proceeds of the receipt to the deceased's maintenance; (10) that after her death he applied part in payment of funeral and other expenses; (11) that he retains the balance; (12) that he also intromitted (after deceased's death) with other effects belonging to her: Finds, in point of law, that the presumption is that the defender, in uplifting the contents of the receipt in the circumstances herein set forth, acted as agent for the deceased, and that having failed to prove donation, he is bound to account for his intromissions with the contents of the receipt; and further, that he is also bound to account for his intromissions with the deceased's other effects; therefore repels the pleas-in-law for the defender; decerns *ad interim* against him for the sum of £20 sterling; further, ordains the defender within ten days from this date to lodge an account of all his intromissions with the contents of said deposit-receipt, and with all other monies or effects belonging to the deceased," &c.

"*Note.*—The principal question is, Whether the deceased Janet Eckford made a donation to the defender of the contents of the deposit-receipt for £40, or any part of them? The competency of

proving the donation by parole evidence cannot well be disputed, but where a verbal *mortis causa* donation is set up against a will it is reasonable to require that the evidence be clear and distinct. The Sheriff-Substitute is far from being satisfied with the evidence which has been offered in this case.

"The deceased, while in health, made two successive wills, by both of which she bequeathed the bulk of her succession to the present pursuer. The only difference between them is, that the later one is the more favourable to the pursuer. The witnesses by whom the donation is proposed to be proved are three of the persons whom those wills disappoint. There is no independent testimony, and there are no corroborative circumstances. The deceased took ill about the beginning of June 1868. She lived alone, and the witnesses, James Wyness, his wife, and the defender, undertook the burden of attending to her. The deceased remained ill for some eight or nine weeks, till she died. During that time, though it is impossible to doubt that she required it, and though she was able to pay for it, she received no medical advice; and though previously not of intemperate habits, she was constantly supplied with such quantities of spirits as ought not to have been administered to a sick person except by medical authority.

"It was on the third or fourth day of this illness that the alleged donation was made. The account of it is given by the three witnesses (James and Margaret Wyness and the defender), and they are substantially agreed as to what took place. That the deceased endorsed the receipt, and that the contents were got from the bank is clear enough. It is also to be taken as proved that the contents were got from the bank by her desire. The question is, Whether it is proved that the deceased said to the defender that the balance (after her own wants had been provided for) was to be his own. That she used the words to that effect attributed to her by the witnesses is possible. That they expressed her deliberate intention is not proved, and is not probable. What she was disposing of was a large part of her means; she was a person aware of the propriety of making a disposition of her effects by will; she was still capable of making one, even according to the defender's account; and yet the only means she takes of revoking two solemn bequests to the pursuer is a few words addressed to interested parties. The risk of such words being either intentionally or accidentally misunderstood by interested parties is too great to make it safe to rely on them, and the Sheriff-Substitute therefore thinks proof of this kind quite insufficient.

"In many cases like the present a defender has received great assistance from the fact of his having had the deposit-receipt in his possession. In this case that is a matter of no moment. The presumption here is that the defender cashed the deposit-receipt in the capacity of the deceased's agent. She was in want of money, and could not go to the bank herself, and therefore was obliged to send some one.

"If the preceding views are correct, it is needless to say that the defender must account for his intromissions with the deceased's effects."

The Sheriff (GUTHRIE SMITH), on appeal, recalled the said interlocutor, and found the donation satisfactorily proved.

The pursuer appealed to the First Division of the Court of Session.

FRASER and STRACHAN for her.

WATSON and KEIR for the respondent.

Authorities—*Bryce* v. *Young's Executors*, Jan. 20, 1866, 4 Macph. 312; *Swan's Executors* v. *M'Dougall*, July 9, 1868, 5 Scot. Law Rep. 675, H. of L., no report; *Muir* v. *Ross's Executors*, June 15, 1866, 4 Macph. 820; *Macfarquhar* v. *M'Kay*, May 18, 1869, 7 Macph. 766; *Little* v. *Little*, Feb. 28, 1856, 18 D. 701; *Allan* v. *Munnoch*, Jan. 30, 1861, 23 D. 417.

At advising—

LORD PRESIDENT—This action is at the instance of the niece and executrix of the late Janet Eckford, who resided in Aberdeen, and it is directed against Thomas Mellis, the husband of another niece of the said Janet Eckford. The first conclusion of the summons calls on the defender to account for a sum of about £40, contained in a deposit-receipt with the Aberdeen Town and County Bank, in the name of the deceased Miss Eckford, which sum of money had been uplifted by the defender, and not accounted for. The defence is that the deposit-receipt was handed by the deceased to the defender as a gift *mortis causa*. It is needless to say that this may be the case, but the nature of the defence throws the *onus probandi* on the defender, for the presumption of law is very strong against donation.

The Sheriff has stated this point in the case with great clearness and precision in his interlocutor, where he says—"The one requirement of the law is, that in cases of this description the proof must be clear and unambiguous, and also sufficiently strong to redargue the presumption that in delivering possession the donor, in the words of Lord Stair, meant rather 'to give in custody or in trust, than in gift'"—Stair, iv. 45, 17. Now, the question is, Whether the defender has proved enough to overcome the legal presumption? This presumption may be fortified by the circumstances of the particular case. And unquestionably here there are some circumstances which go to fortify it very strongly. This lady did not die intestate. On the contrary, though she had very little to leave, she seems to have taken a good deal of trouble about making a scheme of division of her worldly means, and to have been alive to the advisability of employing a man of business, and actually to have executed two wills not long before her death. Ultimately, however, the person chiefly entrusted with the management of her affairs was the defender. Now, there is an extreme improbability that under these circumstances the deceased should, by a mere *mortis causa* donation, have intended to revoke her formally executed settlement, for such would have been practically the result of the donation, the deposit-receipt containing the most of her property. The very existence of a probative settlement is strongly against the donation.

The proof adduced in support of the donation consists entirely of the defender's own evidence, and that of two other persons swearing to the utterance of certain words at the time that the deceased handed the receipt to the defender, and to their repetition at the time she afterwards endorsed it. The words of Miss Eckford's sworn to are these—"Now, Thomas, this is all the money I have got in the world. You will take it, and give me what I require so long as I am in life. See me decently buried, and if there is a balance it is your own, and do with it what you please." The mere possession of the deposit-receipt by the defender does not form a piece of real evidence at all. Everything depends upon the object of the deceased in handing the deposit-receipt to the defen-

der. It was likely, under the circumstances, that the deceased should hand it to some one to uplift for her, and the defender was a likely person to be selected. The subsequent indorsation of the deposit-receipt does not advance his case at all. The words, therefore, employed on the occasion of handing him the receipt form the sole evidence in support of his case. I have already read these words as sworn to by the defender, and he is substantially corroborated by the two other witnesses. But the whole of these words, except the last part, would be in themselves insufficient. The proof, therefore, of donation depends entirely upon the concluding words, "if there is a balance, it is your own, and do with it what you please." Now, undoubtedly, if these words were used by the deceased, she knowing and intending that they should make a donation of the balance to the defender, that, in law, would be quite sufficient. But we must always look to the circumstances in which they were uttered, and the evidence by which they are proved. And the evidence, to my mind, is not satisfactory. The deceased was a very old woman, eighty-two years of age, I think, of respectable and temperate habits up to the time of her last illness. But from the time that this donation was made it is the case of the defender and his witnesses that she commenced to drink a considerable quantity of liquor, and continued to do so until her death—enough, in fact, when taken in connection with her abstinence from food, to produce marked consequences, and to interfere with that deliberation of will and purpose which there must be if this is to be held a good donation. This wine and spirits, moreover, was given by the defenders without any authority of a medical or any other kind. The contents of the deposit-receipt in question would have furnished ample means for calling in medical attendance where it was evidently required. There is no explanation of this procedure, except the very inadequate one, that the lady herself would not hear of such a thing being done. I cannot but think that there was great dereliction of duty on the part of the defender and his two witnesses in not summoning medical aid or advice on an occasion when it was undoubtedly their duty to do so. Their failure in this manifest duty gives rise at once to suspicion, especially when we find that they proceeded to administer, at their own hand, considerable quantities of stimulants to a woman in the situation in which Miss Eckford then was. The import and effect of the evidence in this case depends entirely on our knowing the very words used by the deceased, or on our obtaining certain equivalents for them. A very slight variation of phrase might make all the difference, and convert what is alleged to be a donation into a trust. The question therefore comes to be, Whether we have that clear and unambiguous evidence which the Sheriff desiderates, and, at the same time, so strong as to redargue the legal presumption which exists against donation? I have come to the conclusion that the evidence is not sufficient either in clearness or strength; and on that account I am obliged to differ from the Sheriff, and to return to the Sheriff-Substitute's interlocutor, in which I find a very distinct and able statement of the case.

Lord Deas—I am entirely of opinion with your Lordship, and agree with the Sheriff-Substitute, who has stated the grounds of his judgment very clearly and satisfactorily. It is a valuable privilege accorded, that persons on deathbed are allowed to make gifts *mortis causa*. But it is a privilege which requires to be very carefully guarded in order to prevent abuse; and we could hardly have a better example of its liability to abuse than the present case. Here we have a party who was practically in possession of this old lady's person during her last illness, and able to take all the advantages which his position and her situation threw in his way, claiming a donation of a large portion of her funds.

Now, we have had occasion repeatedly to consider such questions of donation, but in none of the cases where we have given effect to the alleged donation has there been anything the least unsatisfactory about the evidence. Where there is anything the least suspicious, I agree with your Lordship that, as in *Allan's* case, we must look to the whole circumstances. Nor is the question like an ordinary one, depending on a balance of evidence. On the contrary, the party founding on donation is bound not only to prove it, but to prove it most clearly and satisfactorily. The extent of the proof required must always be a question of circumstances. In the present case it is a circumstance to be kept in view that the lady alleged to have made the donation had not long before executed a will, and was in all respects capable, and apparently anxious, of disposing of her property in the ordinary way. This has a good deal of bearing upon the amount of proof to be required. But farther, we must consider the position of this lady—eighty-two years of age—labouring under a last illness, she sends for the defender. This is in the beginning of June 1868, and what do we find in the defender's account of matters? Why, the moment the defender comes, the first thing he does is to supply her with liquor, which he continues to do during the remainder of her life. Then follows the alleged donation. Now, there is not the slightest suggestion of the lady being addicted to drink before that, while the party who supplied it we find to be the person in whose favour the donation is made.

Now, even supposing the defender acted in *bona fide*, and with the best intention, Was this lady in a proper position to make a donation of all she had in the world? I think not. And in this state of matters it is simply because she uttered certain words, sworn to by the defender and his witnesses, that we are asked to uphold the alleged donation. It would be a most unsatisfactory case, on the evidence, in which to do so, even presuming *bona fides*. If it is unsatisfactory, that is to my mind quite enough, and here lies the importance of the case in point of principle. It is not a case of the balancing of evidence. It is a case in which you must hold the defender's averments either clearly proved or else not proved. It is a qualification to be put on the doctrine of donation from the beginning, that in order to secure the safety of the public the evidence of the donation must be clear and unambiguous. There is no hardship in this. A party pleading donation ought to know in what a delicate position he is in, standing on this privilege, and he should be prepared accordingly, while a necessary security is reared up for the benefit of the public in general.

Lord Ardmillan concurred.

Lord Kinloch—I have arrived at the same conclusion as the Sheriff, and therefore am obliged to

differ from the opinion expressed by your Lordships. We have three witnesses speaking distinctly to words clearly importing donation, and nothing adduced sufficient to discredit their testimony. It was proved that the lady objected to a medical man being called in, and she seems to have been dying of nothing but old age, which it was not in the power of any doctor to cure. I do not see ground for holding that stimulants were applied for the purpose of affecting the mind of the deceased, and obtaining a donation in favour of the defender; and I believe, on the other hand, that the words of gift were spoken. I think that these words expressed her deliberate intention, and that they ought to receive effect.

Agent for Appellants— T. F. Weir, S.S.C.
Agents for Respondent—Morton, Whitehead, & Greig, W.S.

Saturday, November 18.

GEORGE AULDJO JAMIESON (POTTS' FACTOR), PETITIONER,

Judicial Factor — Powers — Audit of Accounts. Where a trust created before the passing of 31 and 32 Vict. c. 84, § 17, threatened to become unworkable from the multiplication of liferenters, the judicial factor who had been appointed to manage it incurred an account of expenses in an attempt to go to Parliament for a Private Act to authorise the winding up of the trust. This account consisted of items spent in obtaining advice, and items spent in the attempt to go to Parliament. *Held* that the former, as expenses incurred in obtaining advice to guide him in the conduct of the factory, were proper charges against the factory estate; but that the latter had been properly disallowed in the audit of the factor's accounts.

The petitioner was appointed judicial factor in 1861 upon the trust-estate of the deceased Mrs Isabella Potts, who died on January 17, 1826.

By her trust-deed Mrs Potts left certain legacies, and over the residue of her estate she created a series of liferents to the heirs of certain parties, so long as any of them should exist. Since the death of Mrs Potts these heirs had increased so much in number that the trust threatened to become unworkable from the gradual diminution of the shares of the liferent payable to each beneficiary, though the total sum liferented was of considerable amount. Under these circumstances the factor felt it to be his duty to apply to Parliament for a Private Act enabling the trust to be wound up. In course of doing so he incurred an expense of £81, 17s. 8d., and the attempt ultimately proved abortive.

In the present petition for interim audit of his accounts, the accountant (Mr William Moncreiff) drew the attention of the Lord Ordinary to the circumstances in which this account of expenses had been incurred, in the following terms:—"In the year 1869, in consequence of the difficulties in the management of the trust, arising from the gradually increasing numbers of the beneficiaries, and the very small amount of the shares of annual income payable to each, the judicial factor, by desire of some of the beneficiaries, instituted proceedings for obtaining an Act of Parliament authorising the trust to be wound up and the funds divided. These proceedings fell through from the whole of the beneficiaries not consenting, or rather omitting to intimate their concurrence, in the application as required by Parliament, but certain expenses were incurred, amounting to £81, 17s. 8d., which have been stated in the factor's accounts as a charge against capital. As the judicial factor took these proceedings on his own responsibility, without having obtained special powers from the Court, the accountant has thought it right to report the circumstances, in order that the Lord Ordinary may judge whether the above sum of expenses ought to be sustained and sanctioned. In reference to this the factor explains:—Before the application was made to Parliament for an Act, the opinion of counsel was taken by the factor, and counsel advised that the factor should not apply to the Court for special powers, as in his opinion the Court could not be expected to sanction the winding up of the trust by giving the fee to the liferenters, and thus acting in a way not authorised by the trust-deed; but he recommended that, with the concurrence of some of the beneficiaries who were in receipt of the larger annuities, the factor should apply to Parliament, and he thought that the provision in the 17th section of the Entail Amendment Act, 31 and 32 Vict. c. 84, preventing the creation of a series of liferents, would justify Parliament in passing a similar Act in this particular case. The section of the statute referred to would have enabled the trust to be wound up if the trust-deed had been executed after the passing of that Act. The factor accordingly, in conformity with the advice of counsel, made application to Parliament for an Act, but, as before stated, the proceeding had to be abandoned in consequence of the consent of the whole of the beneficiaries not having been obtained."

The Lord Ordinary (MACKENZIE), in approving the petitioner's accounts, disallowed the above sum of £81, 17s. 8d.

Against this the petitioner reclaimed.

SHAND and BRAND for him.

At advising—

LORD PRESIDENT—It is, of course, impossible for us to deal with the items of this account one by one, as the account itself has not been properly placed before us. But I am not disposed to say that, even if we had the account before us in a shape that we could consider, it would be the province of this Court to extricate these items and deal with them in detail. I have, however, a distinct opinion upon the question of principle to be applied to the case. I think that, whatever charges embraced in the account were incurred by the factor in obtaining necessary advice for his clients, these are good charges against the estate. On the other hand, whatever charges were incurred merely in an attempt to go to Parliament to obtain a private Act, are bad charges against the estate. I think, therefore, that the proper course for us to take is to send back the case to Mr Moncreiff, who has already reported on it, with instructions to separate the items for us on these principles, and again report.

The other Judges concurred in the propriety of this course.

The Court accordingly pronounced the following interlocutor:—"Find that any expenses embraced in the sum of £81, 17s. 8d., disallowed by the Lord Ordinary, which were incurred by the factor in obtaining advice to guide him in the conduct of the