great importance. The case has formed the subject of anxious consideration by the Court, and I am entirely of the same opinion as your Lordships.

No doubt it has not been shown that when this donation of the money put in the bank pass-book was made the deceased was under any apprehension of immediate death. If therefore the appellant's argument were sound, that a *mortis causa* donation can only be made by one who is under apprehension of immediate death, then she must succeed. But I am of opinion that the donation here was made in contemplation of death. The deceased thought his life was short and uncertain, and that his wife would probably outlive him. In these circumstances I think that this *mortis causa* donation was good, and that it was not necessary that the donor should be in immediate peril of death, provided he intended that on his death the subject of the donation should become the property of the donee. I cannot see any sound principle for the necessity of there being immediate peril. Both on principle and on the authorities I am of opinion that this was a *mortis causa* gift which ought to receive effect.

The Court affirmed the judgment of the Sheriff.

Counsel for the Appellant—Strachan. Agents—Mack & Grant, S.S.C.

Counsel for the Respondent—Darling. Agent—J. H. S. Graham, W.S.

Saturday, February 21.

FIRST DIVISION.

[Lord Lee, Ordinary.

FLETCHER *v.* H. J. & J. WILSON.

Reparation — Slander — Res noviter — *Issue in Justification.*

In an action of damages for slander contained in a newspaper which had erroneously stated that the pursuer had been seven times convicted of theft, the verdict was for the pursuer, damages £50. At the trial the pursuer stated that he "was never convicted of theft, or of any dishonesty." The defenders subsequently discovered that he had twenty-three years previously, when a boy of fourteen, been twice convicted in the same year of petty theft, and had been sent to a reformatory. They obtained a rule for a new trial, on the ground that the damages were excessive, because the jury had been misled by the pursuer's evidence, and because these two convictions had come to their knowledge, which constituted *res noviter*, entitling them to an issue in justification. *Held* that the two convictions would not support an issue in justification, and that the damages were not excessive, and rule *discharged.*

This was an action of damages for slander at the instance of John Fletcher, against H. J. & J. Wilson, proprietors of the *Edinburgh Evening News*. The alleged libel was published in the newspaper of 25th September 1884, and was to the following effect:—"ASSAULT ON A MAN.—For striking a man several times on the face, in a house at South Richmond Street, on 23d inst., John Fletcher, who had been seven times previously convicted of theft, was sent ten days to jail by Sheriff Baxter, at Edinburgh Sheriff Summary Court this afternoon."

The defenders admitted that the statement in the paragraph that the pursuer had been previously convicted of theft was erroneous. They explained that the error was merely clerical, and was corrected whenever the defenders became aware of it, by their publishing in the newspaper of 9th October the following paragraph:—"In our report of a case, which came before the Sheriff Summary Court on the 25th ult., it was stated that a man named John Fletcher, who was sent to jail for ten days for assault, had been seven times previously convicted of theft. The previous convictions were for assault, and we regret that by a clerical error it should have been made to appear that Fletcher had been guilty of theft."

The defenders denied that the pursuer had suffered any damage, and pleaded that they were therefore entitled to absolvitor, but judicially tendered £10, which the pursuer refused, and the case went to trial before a jury on an issue whether the paragraph, which was admittedly of and concerning the pursuer, falsely and calumniously represented him to have been seven times convicted of theft, to his loss and damage. No counter issue was taken.

At the trial the pursuer in his evidence deponed—"It was not true that I had been seven times convicted of theft. I was never convicted of theft, or of any dishonesty."

The jury returned a verdict for the pursuer, damages £50.

Subsequently to the trial it was discovered by the defenders' agent that the pursuer had been twice convicted of theft in the year 1862. He was then fourteen years of age. The first conviction was on 8th August 1862, when the pursuer pleaded guilty along with two others to the theft of an empty purse, for which they were ordained to find caution for their good behaviour for twelve months. The second conviction was on 20th November 1862, when the pursuer along with two others pleaded guilty to the theft of 20s., for which he was sentenced to be imprisoned for fifteen days, and to be sent to a reformatory for five years.

An affidavit was then lodged, sworn to by the defenders' agent, setting forth these two convictions, and the defenders moved for, and obtained, a rule for a new trial, on the ground of *res noviter* and excess of damages.

The pursuer thereafter showed cause—It would not have been competent to lay this *res noviter* before the jury, as there was no counter issue—*Paul* v. *Jackson*, January 23, 1884, 11 R. 460. The case simply went to the jury for the assessment of damages. There was no fraud, for the question which had caused this difficulty was put to the pursuer without his being in any way prepared for it. [LORD PRESIDENT—It was quite an incompetent question, which the defenders might very well have objected to].

The defenders argued—There was here *res noviter*, from which it was evident that the jury had been misled. They were entitled to an issue in justification founded on these two previous con-

victions. The jury would not have given such an amount of damages if they had known of these two convictions. The damages were therefore excessive, and the verdict had been obtained by what almost amounted to fraud and stratagem—Adam on Jury Trials, 278; *Ritchie* v. *Barton*, March 16, 1883, 10 R. 813; *Craig* v. *Jex-Blake*, July 7, 1871, 9 Macph. 973. The pursuer must show real damage, and he had shown none.

At advising—

Lord President—The paragraph complained of in the newspaper was this:—"Assault on a Man.—For striking a man several times on the face, in a house at South Richmond Street, on 23rd inst., John Fletcher, who had been seven times previously convicted of theft, was sent ten days to jail by Sheriff Baxter, at the Edinburgh Sheriff Summary Court this afternoon."

Now, there can be no doubt about the meaning or import of that statement, for to say that a man has been seven times convicted of theft means nothing less than this, that he is a notorious and habitual thief, and well known to the police and to the public as such.

The question which first occurs to one's mind is whether, according to the defenders' present state of information, they could put upon record a statement in justification? The defenders have discovered that twenty-three years ago, when the pursuer was fourteen years old, he had fallen into bad company, and that twice in the same year, in August and November 1862, he was convicted of petty theft, one theft being of an empty purse, and the other of 20s. in silver. The end of that part of his career was that he was sent to a reformatory and went through a full course of discipline, and from that time down to the present day there has not been ever the slightest imputation on the honesty of the pursuer.

I am of opinion that the defenders could not have justified what was said in the paragraph, and that even if they had put on record the fact of these two convictions they could not have obtained an issue in justification. If therefore they had gone to trial without an issue in justification, they could not have put in evidence these two trifling convictions. The circumstance that they were obtained twenty-three years ago, when the pursuer was so young, would have made it all the more cruel that the pursuer should now be charged as a notorious and habitual thief.

Even if in consequence of an imprudent and incompetent question put to the pursuer by his own counsel the defenders could have introduced two old convictions in cross-examination, I very much doubt whether they would have affected the verdict of the jury. Some jurymen—and I would have been much disposed to agree with them—would have considered that such a raking up of old stories was an aggravation of the libel.

For these reasons I am for discharging the rule, and I may further say that as I do not suppose that the pursuer expected such a question to be put to him, it is not to be assumed that when it was put, without his being in any way prepared for it, the answer which was given was wilfully false. The pursuer has, I daresay, been trying for twenty-three years to forget what had occurred and I should think it very strange if it were thought that the reply amounted to false swearing, and still less to wilful perjury on his part.

Lord Mure—The ground upon which a new trial is here asked is that the damages awarded are excessive. Now, the Court will only interfere in such a case if they are clearly of opinion that the jury have taken a grossly exorbitant view of the amount of the damages. It is said that here the jury have given too much because it turns out that some twenty-three years ago the pursuer was twice convicted of theft. I do not think that if these convictions had been laid before the jury they would have given less damages. On the contrary, I think that such a raking up of the boy's previous life would not have impressed the jury favourably. It has been proved by the evidence that for the last fifteen or twenty years the pursuer has been a respectable and honest man, and I cannot come to the conclusion that the jury have gone wrong.

Lord Shand—The case went to the jury simply for the assessment of damages for this serious slander. It was admitted that the charge had been made in this newspaper, and the only question for the jury was as to the amount of damages. The defenders offered £10, and the defence was simply insisted in in the hope that the verdict would be below the tender. The verdict was for £50 of damages, and a motion is now made for a new trial on the ground that the damages are excessive, and it was argued by the defenders that the pursuer must prove real damage. Now, I must express my entire dissent from the view that if a man is branded as a thief—as a habit and repute thief—it is necessary for him to show that he has suffered real damage. The only point here is, whether, seeing that a question was put to the pursuer by his counsel in regard to a matter which could not properly be laid before the jury, the damages would have been less if that question had not been put. I think that even if the jury had been aware that the pursuer had been previously convicted of two petty thefts, and had in consequence been sent to a reformatory, they would not have reduced the damages. I think that after the pursuer had for twenty-three years led a life of honesty it would have told against the defenders to take up such a matter as that. It is said, however, by the defenders that if this verdict is set aside they will take an issue as to the *veritas;* and it is true that such an issue may be taken so far as regards a separate and substantial part of the libel. But this was substantially a charge that the pursuer was habit and repute a thief, and it would have been no justification of that to prove that he had twice been convicted of petty theft twenty-three years ago.

I shall merely, in conclusion, follow up what your Lordship has said in regard to the fact that the pursuer having had the question suddenly put to him, I think he may quite honestly have said that he never was convicted of theft or of any dishonesty. Looking to the fact that he was sent to a reformatory on the second of the two occasions, and that he was a mere boy at the time, I think he may very well have had in his mind that fact rather than that he had been previously convicted. I think he may have been well entitled so to forget it. I therefore agree that the rule should be discharged.

Lord Lee—This case went to the jury as one

of libel by mistake—the defenders maintaining that the libel was published in a newspaper notoriously well conducted, and which did all that it could to put the matter right, and the question argued to the jury was whether the pursuer had suffered in character or not. The jury paid great attention to the case, and I have no doubt that they decided it to the best of their ability. I did not understand that it was contended to the jury that real damage must be proved. If it had been so contended, I had beside me two cases referred to in Odger on Libel, p. 7, the first of which is there stated as follows:—"A barrister writing a book on the Law of Attorneys referred to a case, *Re Blake*, reported in 30 Law Journal, Q.B. 32, and stated that Mr Blake was struck off the rolls for misconduct. He was, in fact, only suspended for two years, as appeared from the Law Journal report. The publishers were held liable for this carelessness, although, of course, neither they nor the writer bore Mr Blake any malice. Damages £100."—*Blake* v. *Stevens and Others*, 4 F. & F. 232. The second case was this—"The printers of a newspaper, by a mistake in setting up in type the announcements from the *London Gazette*, placed the name of the plaintiff's firm under the heading 'First Meetings under the Bankruptcy Act,' instead of under 'Dissolutions of Partnership." An ample apology was inserted in the next issue. No damage was proved to have followed to the plaintiff, and there was no suggestion of any malice. In an action for libel against the proprietor of the paper, the jury awarded the plaintiff £50 damages. *Held* that the publication was libellous; that the damages awarded were not excessive."—*Shepheard* v. *Whitaker*, L.R., 10 C.P. 502. This case was, however, decided apart from any argument as to the necessity of proving real damage. On the question of excess of damages I do not think the contention of the defender can be entertained, and I cannot think that the new matter which has been discovered affords any relevant ground for believing that it would have affected the jury favourably for the defenders. I think that the risk would have been that the jury would have increased the damages because of the raking up of the early history of the pursuer.

The Court discharged the rule.

Counsel for Pursuer—Young. Agent—David Forsyth, S.S.C.

Counsel for Defender—Strachan. Agent—W. T. Sutherland, S.S.C.

HIGH COURT OF JUSTICIARY.

Saturday, February 21.

(Before Lords Young, Craighill, and Adam.)

H. M. ADVOCATE *v.* FLEMING.

Justiciary Cases—Indictment—Breach of Trust and Embezzlement—Relevancy—Latitude in Time.

I. A person who as factor comes into possession of money on behalf of his employer, and feloniously appropriates it, is guilty not of theft but of embezzlement.

A person who had as a factor come into possession of a specified sum of money, was charged with embezzlement, in so far as, he having as factor obtained the money under the trust and duty that he should forthwith hand it over to the trustee in a sequestration, and should in no event appropriate it to his own uses, he did fail to hand it over or account for it to the trustee or to his constituent, and "did on the said 6th day of January 1881, or on some other of the days of that month, or of the month of February immediately following, or between the said 6th day of January 1881 and the 30th day of June 1882 both inclusive, the time more particularly being to the prosecutor unknown," wickedly and feloniously in breach of the trust incumbent on you, as aforesaid, embezzle and appropriate to your own uses and purposes the said sum, being the property of his constituent, or of the trustee. It was objected (1) that there was no sufficient specification of the separate acts of appropriation constituting the failure in duty or trust to hand over or to account; and (2) that the latitude of time in the libel was unwarranted. *Held* that the charge was relevant.

Indictment—Relevancy—Specification.

II. A prisoner was charged with theft or breach of trust and embezzlement, in so far as he, having as sub-factor received from the tenants of certain heritable subjects in payment of rents "sums of money amounting to" a certain specified total sum, and it being his duty, and according to his trust and the instructions of the factor by whom he had been appointed, to pay the rents regularly to him, and in no event to appropriate them to his own use, he did steal the specified total sum, or otherwise did embezzle it.

It was objected that the charge was irrelevantly libelled either as one of theft or embezzlement, in respect that there was no specification of the particular sums received by the panel, or of the persons from whom they were received. *Objection sustained.*

Theft—Embezzlement—Relevancy.

III. A prisoner was charged with theft or breach of trust and embezzlement, in so far as he, having been sequestrated in bankruptcy, and having thereafter got into his custody and control, as general manager of a joint-stock banking company promoted by himself, and of which there were no directors