"The said George Dingwall Fordyce, as returning officer foresaid, in terms of the 17th of said General Rules of Procedure, duly published in said burghs a list of election petitions presented to the Second Division of the Court of Session, and lodged in the office of the said Harry Maxwell Inglis, the prescribed officer pursuant to section 10 of the statute and General Rules of Procedure No. 16.

"Afterwards on 11th February 1869 the said George Dingwall Fordyce gave notice throughout the said burghs, in terms of the Parliamentary Elections Act 1868 and said relative General Rules of Procedure, of an application by the said Edmund Beatty Lockyer for leave to withdraw the said petition, and the deliverance of my Lord Jerviswoode thereon.

"In making said publications expenses were incurred by the returning officer to the extent of £23, 1s. 11d.

"Application for payment of said expenses has been duly made to the parties to the said petition, but they have declined to make payment, and deny liability for the same; and the returning officer now respectfully craves your Lordship to move the Court for a remit to the Auditor to tax the same, and after the same is taxed, or without taxation should taxation be deemed unnecessary, he respectfully craves your Lordship to move the Court to grant an order on the said Edmund Beatty Lockyer and George Loch, conjunctly and severally, to pay the said expenses to the returning officer, together with the expenses of this application, under such pains and penalties as to your Lordship shall seem proper."

The application was made under the 41st section of the Corrupt Practices Act of 1868, which provides that all costs and charges not otherwise provided for in the Act shall be borne by "the parties to the petition," and the contention was that under this claim both petitioner and sitting member were primarily liable, although the successful party had relief against the unsuccessful party, in the same way as in the case of the former's ordinary expenses. It was explained that the delay in making the application arose from attempts having been made to obtain the money from the Treasury, which attempts had ultimately failed. In February 1869 Mr Loch's expenses had been taxed, and decree given therefor against Mr Lockyer; but Mr Lockyer's cautioner's bond still remained in the clerk's hands.

The Court, after hearing parties in the course of the week before last, ordered intimation to Mr Lockyer's cautioner, and he having to-day appeared, pleaded that no decree could go out against him, because, *inter alia*, the Act provided that parties entitled to go against him should proceed by registering his bond and charging upon it. Mr Loch, on the other hand, pleaded that no liability attached to him for procedure which was connected with the bringing into Court of the petition against him, and that by "the parties to the petition," the statute meant the parties according to their several liabilities. Mr Lockyer, while admitting that if anybody was liable he was, contended that the expenses sued were not provided for by the statute at all, and fell to be defrayed by the returning officer, with recourse against the Treasury for reimbursement.

Their Lordships unanimously held that no liability attached to Mr Loch, and that no decree could be pronounced by them against Mr Lockyer's cautioner; but they decerned against Mr Lockyer himself, leaving it to the returning officer, if so advised, to proceed against the cautioner under his bond, as to the competency of which proceeding their Lordships offered no opinion.

Agents for Returning Officer—Philip & Laing, S.S.C.

Agent for Mr Lockyer and Cautioner—Mr Spink, S.S.C.

Agents for Mr Loch—Mackenzie & Black, W.S.

Wednesday, December 6.

SHOTTS IRON CO. *v.* GEORGE KERR.

Appeal—Competency—Value of Subject-matter. A petition to the Sheriff craved delivery of four lambs, failing which, decree for £10 as the price or value of the lambs, "or such other sum as shall be ascertained to be the price or value." *Held* that the appeal was competent.

This was an appeal from the Sheriff-Court of Lanarkshire. The appellants, the Shotts Iron Co., on 28th March 1871 presented a petition to the Sheriff, setting forth that, on or about 2d January preceding, four one-year-old lambs or hoggs belonging to them strayed or were taken away by some unknown person from their farm, which marches with the respondent's; that the petitioners' grieve recently discovered the lambs in the possession of the respondent on his farm, and applied for delivery thereof, which was refused. The petition prayed the Sheriff "to decern and ordain the respondent instantly to deliver up to the petitioners, or to the said Andrew Robb for their behoof, the said four one-year-old lambs or hoggs, the property of the said Shotts Iron Co.; and failing the respondent doing so within such period as your Lordship shall appoint, to decern and ordain the respondent to pay to the petitioners the sum of £10 sterling as the price or value of the said four one-year-old lambs or hoggs, or such other sum as shall be ascertained to be the price or value thereof in the event of appearance being entered." After proof, the Sheriff-Substitute (LOGIE) assoilzied the defender, and the Sheriff (BELL) adhered; whereupon this appeal was brought by the petitioners.

No objection was taken to the competency when the appeal appeared in the Single Bills. When the case was called on the short roll, GUTHRIE SMITH and R. V. CAMPBELL, for the respondent, without pleading the incompetency of the appeal, called the attention of the Court to the amount involved in the case, leaving it for the Court to decide whether there was jurisdiction. The following cases were referred to—*Cooper* v. *Bone*, 2 Sh. 5; *Cameron* v. *Smith*, 9 D. 507; *Purves* v. *Brock*, 5 Macph. 1003.

MILLAR, Q.C., and SCOTT, for the appellants, maintained that the appeal was competent. The first part of the prayer of the petition was for delivery; that was the primary conclusion; and the conclusion for payment of money could not be reached till the decree for delivery had been granted, and the respondent had failed to make delivery. Further, as to the sum of £10 specified in the second part of the prayer, that was followed by the words, or such other sum as should be ascertained to be the price or value of the lambs, which might therefore be a much larger

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