boy's head. The boy says that this was because he could not spell a word. It may have been to arouse him, and bring his attention back to his lessons. But the pointer was brought into contact with his head. The Sheriff-Substitute says very properly that it was "most imprudent and unjustifiable." The Sheriff, using milder language, says that he "does not mean to suggest that the defender was free from blame in rapping or touching the boys on the head with the pointer. He thinks he was to blame." Unfortunately this particular boy took ill on the Sunday after this took place, and on Monday the matter seemed so serious that the doctor was sent for. Congestion of the brain supervened, and he was confined to bed for six weeks. The doctor who attended him thinks, on the balance of probabilities, that his illness was attributable to some violence on the head, and that the use of the pointer on the previous Wednesday, although it left no marks, would account for the illness, and is the most plausible explanation of it. He does not say it may not be attributable to other causes. He considers this the most plausible supposition on the balance of evidence. Another doctor who had not the same opportunities, but who had opportunities approximately similar for applying his mind to the question, differs. The Sheriff-Substitute thinks with the first doctor, and the Sheriff with the second. In these circumstances it is impossible not to say that the matter is unattended with doubt, and the appellant's counsel pleading against the Sheriff's judgment—a judgment thoughtfully and carefully prepared—have satisfied me that the case is doubtful but not that the Sheriff is wrong. Therefore I humbly suggest to your Lordships, if the case appear to your Lordships in the same light, that the Sheriff's judgment ought to be affirmed. The defender, however, who will thus prevail, is a wrongdoer. It is a fact—both the Sheriffs says so, and it could not be reasonably disputed on his behalf—that he was wrong, because it is impossible to foretell the result of a blow on the head with a stick. Congestion of the brain here prevailed, and it is doubtful if it was a result of the blow. The Sheriffs differ indeed on that question. I think the transgressor should not have an award with expenses. I should therefore suggest that the Sheriff's interlocutor on the merits of the case, both as to facts and law, be affirmed, but recalled as far as expenses are concerned.

The Lord Justice-Clerk, Lord Craighill, and Lord Rutherfurd-Clark concurred.

The Court affirmed the interlocutor of the Sheriff, but found no expenses due in this Court or in the Sheriff Court.

Counsel for Pursuer (Appellant)—Scott—Watt. Agent—James M'Caul, S.S.C.

Counsel for Defender (Respondent)—Shaw. Agents—Fyfe, Miller, Fyfe, & Ireland, S.S.C.

Friday, November 10.

SECOND DIVISION.

[Sheriff of Dumfries and Galloway.

M'GAWS *v.* GALLOWAY.

Aliment—Donation—Donatio non præsumitur.

A brother lived with his sister (both being in poor circumstances), and contributed to their joint expenditure until his means failed. Thereafter she, with the assistance of her son-in-law, supported him for many years till her means were almost exhausted. He then obtained parochial relief. Before his death prospects of a succession opened, and he made a will leaving specific legacies and the residue to his sister and her son-in-law, and appointing the latter his executor. His sister constituted her claim for aliment after his death by decree against his executor. The funds in the executor's hands were insufficient to satisfy both his and the sister's claims for aliment and the legacies. In an action at the instance of the special legatees for the amount of their legacies, it was proved that the deceased was desirous to repay his sister and her son-in-law the money they had spent in his support. *Held* that in the circumstances there was no presumption that the aliment had been given by way of donation, and that the claims for aliment were therefore preferable to the legacies.

This was an appeal in conjoined actions raised in the Sheriff Court of Dumfries and Galloway at Stranraer, at the instance of William, James, and Alexander M'Gaw against James Galloway, as executor-nominate of the deceased John Corkran, or otherwise as vitious intromitter with his goods, and also as an individual, to recover legacies of £50, £50, and £20 bequeathed to them respectively by Corkran.

The facts of the case were as follow:—John Corkran, who had been unsuccessful as a farmer, gave up business about the year 1843, and went to live with his sister Mrs Elizabeth Corkran or M'Culloch. He had no means, or if he had 'any they were very scanty. She supported him almost entirely, chiefly with money received from her son James M'Culloch. In 1868 her means became nearly exhausted, and Corkran obtained parochial relief. He continued to live with her, and was supported until his death in 1878 mainly by the defender Galloway, Mrs M'Culloch's son-in-law. He was predeceased by a Miss Jane Milwie, a relative, who died in 1877 intestate, and he considered himself, and was considered by his relatives, as one of her next-of-kin, and as such entitled to succeed to one-third of her estate, which was known to be considerable. Shortly after Miss Milwie's death Corkran made a will, in which he bequeathed the legacies now sued for to the pursuers, and left the residue of the estate, one-half to his sister Mrs M'Culloch in liferent, with the fee to the defender, and the other half absolutely to the defender. He did this in anticipation of his expected succession, which, however, did not take effect as expected, since he did not prove to be entitled to succeed to Miss Milwie in the character which he believed that he held. About a year, however, after his death his exe-

cutor, under an arrangement and decree in terms thereof in an action of multiplepoinding which was raised for distribution of Miss Milwie's estate, acquired as in his right the sum of £150 which fell to his share under the arrangement. Mrs M'Culloch by assignation dated 7th February 1880, on the narrative that she had expended a sum of £200 in alimenting Corkran, and that thereafter Galloway had alimented, for ten years or thereby, both herself and Corkran, and that she was resting-owing to Galloway at least £200 on that account, assigned to him her claim to recover that sum from Corkran's estate. Thereafter, on 15th July 1880, she took decree in absence against Galloway in his capacity of executor for Corkran for the sum of £200. Galloway imputed to the amount of this debt which had been acquired by him by means of the assignation just narrated the sum of £141, 18s. 4d., being the whole of the £150 received by him under the arrangement in the multiplepoinding as above narrated, after deducting the expenses of giving up the inventory of the estate.

In these circumstances the pursuers raised these actions for payment of the amounts of their legacies.

The defender maintained that the amounts expended by himself and by Mrs M'Culloch (in whose right he now was) in alimenting the testator were debts of the estate which were preferable to the pursuer's legacies under the will. He explained that, reckoning these claims as debts, the estate of Corkran was exhausted, and that there was no fund out of which the legacies to the pursuers could be paid.

He pleaded, *inter alia*—"(4) The sums expended by Mrs M'Culloch and the defender respectively on behalf of or paid to the deceased, being debts due from his estate, are preferable to the legacies bequeathed in his settlement, and the defender in his own right, and as assignee of Mrs M'Culloch, is entitled to plead these debts, more especially the debt constituted by the foresaid decree, and paid as aforesaid, to the extent of the payment at least, against the pursuers' claim."

A proof was led. There was evidence that Corkran considered himself under an obligation to the defender and Mrs M'Culloch for the aliment they had given him, and when in the belief that he was entitled to succeed to Miss Milwie expressed himself as pleased that he would now be able to repay them.

The Sheriff-Substitute (RHIND) assoilzied the defender from the conclusions of the three actions raised by the pursuers for their legacies (which actions had been conjoined), and found the pursuers liable in expenses.

"*Note.*—[*After stating the facts*]—It was manifestly with the view of satisfying the claims [of defender and Mrs M'Culloch] that Corkran appointed the defender his executor, and left him and Mrs M'Culloch the residue of his means. He said he hoped he would get from Miss Milwie at least what would discharge the debt he owed to them. Corkran's will was made after the death of Miss Milwie, and in it he bequeathed the legacies now sued for, and the residue to the defender and Mrs M'Culloch. The questions raised in this action are—Whether the advances made in the circumstances mentioned were pure donations without any expectation or intention of repayment, or were they debts, and claimable upon his estate as such? It is true that the brocard *Donatio non præsumitur* has not recently been so strictly the overruling principle, and has been held to yield to circumstances in special cases. But in the same degree there are cases where donation might have been presumed, but in which it is removed. Such cases are to be decided according to their special circumstances. The sustentation or the giving of money to a brother may sometimes be pure donation when the donor is in prosperous circumstances, while in other circumstances it may be a debt which, where there is no written acknowledgment, may be made good by proof of the repeated verbal acknowledgments of the debtor and by his acts and deeds. The present case is one of that description. Not only is there no evidence to the contrary, but the whole circumstances confirm the presumption of loan. It is clear that the legacies sued for, which Corkran was under no obligation to make, were made under essential error as to the amount he would receive from Miss Milwie, and the proof shows that he never would have made these bequests if he had not expected a large sum from that source. On the other hand, if the furnishings made by the defender and Mrs M'Culloch were intended to be repaid, the circumstance of the testator making the defender his executor, and giving to him and Mrs M'Culloch the residue of his expected means, is an additional proof that their claims were recognised by him as a debt, and it was frequently referred to him as such during his lifetime. In point of fact, Corkran had no estate to bequeath when he made his will; it was entirely a prospective and only possible event that he might become possessed of means to pay any debt or make any bequest. But in his mind and intention it is manifest that in that event this debt was first to be paid. It is true that neither the defender nor Mrs M'Culloch either asked or received from him any written acknowledgment of debt, but his repeated verbal acknowledgments of it, and his avowed intention to repay them whenever he was able, through succession or otherwise, proves that he considered their advances of whatever kind made to him to be a debt owing by him which he was bound to repay. The legacies to the pursuers were evidently made by Corkran under an essential error as to his expected means, and should therefore, in consistency with his intentions, be postponed to the repayment of his debts. The chief authority to which I was referred is inapplicable, the present being a case between the defender as a creditor and the pursuers as general legatees. The defender's claim being a debt must first be paid. With reference to the pursuers' argument regarding Mrs M'Culloch's assignation, and the decree following on it, it is enough to say that the defender as executor was entitled to act as he has done without regard to them, and any objections to their validity, even if well founded, are not within these actions, which are only for decision upon the question whether the advances made to Corkran by Mrs M'Culloch and the defender were in the special circumstances donations or loans."

The Sheriff (MACPHERSON), on appeal, pronounced this interlocutor:—"Having resumed consideration of the appeal against the interlocutor of 16th March 1882, with the proof and whole process, Recalls the said interlocutor: Finds that the deceased John Corkran, who died

on 19th April 1878, by his settlement, dated 20th November 1877, appointed the defender to be his executor, and also bequeathed to the pursuers of the actions, which have been conjoined, the legacies which are the subject of them—viz., to Alexander M'Gaw the sum of £20 sterling, to James M'Gaw the sum of £50 sterling, and to William M'Gaw the sum of £50 sterling; and that he bequeathed to the defender one-half of the residue of his estate, the other half of which he bequeathed to Mrs Elizabeth Corkran or M'Culloch in liferent, and to the defender in fee: Finds that the defender, as executor foresaid, has in hand, after payment of all debts proved to have been due by the estate of the deceased, free funds sufficient to pay the legacies bequeathed to the pursuers: Therefore decerns against the defender, as executor of the deceased John Corkran, to make payment to the pursuers respectively of the above-mentioned legacies: Finds the defender liable in expenses as executor foresaid, and as an individual, allows an account thereof to be given in, and remits the same," &c.

"*Note.*—The results expressed in the above interlocutor involve great hardship on the defender, and have been arrived at with great reluctance, because no doubt is entertained that the leading facts are correctly stated in the interlocutor under appeal. It seems that the defender for many years has been the main support of his mother-in-law and her brother, and has given that support in a generous spirit at a time when he had no reason to expect that he would receive repayment. He accordingly took from them no document of debt or acknowledgment on which a claim for repayment could be founded. His generosity has been recognised by his mother-in-law to the best of her power; and there is no doubt that the same was intended by her brother after he came to believe that a considerable succession had opened to him. His purpose he proposed to effect by making the defender his residuary legatee, and leaving the pursuers the legacies sued for,—substantial, yet small in amount compared with what he thought the residue would be. As to the amount that he was to get through the succession, which he believed open to him, he was under an entire mistake; but the Sheriff is not aware of any power that the Court has to correct a will made under such a mistake, or to make a legacy of a certain sum abate in order to leave something for a residuary legatee. Speaking of rewarding or of repaying people for their kindness by a legacy is truly an acknowledgment of the kind of indebtedness which a beneficiary comes under to his benefactor, but does not imply acknowledgment of an enforcible debt, although it would apply to such a debt if there were other evidence of its constitution. The general rule is, that aliment or entertainment to majors is intended as a donation, and does not fall under the maxim *donatio non præsumitur;* and the case for donation is thought to be stronger, not weaker, when the party to whom advances are made, and entertainment given, is a pauper in receipt of parochial relief.

"If these views be correct, there is no occasion to deal with the difficulty arising from the fact that the advances made by the defender were, with one exception, all made through Mrs M'Culloch.

"The assertion of Mrs M'Culloch's older claim for entertainment to her brother prior to 1868, and which she has assigned to the defender, is attended with still more difficulty, because of its older date, because of her nearer connection with the recipient, and because there is not a trace in the evidence of her having assisted her brother in the expectation of repayment.

"It is extremely hard that the defender should suffer from the generosity of his own conduct and that of Mrs M'Culloch, but except as regards one sum of £10 the Sheriff sees no trace of repayment having been expected of any advance made, and even if that were proved by competent evidence there would still remain sufficient executry to meet the pursuers' demand—Stair, i. 8, 2, and iv. 4, 5, 17, 18; and Erskine, iii. 3, 92.

"As the executor has been defending in his own interest, there seems no course open but to treat him in the matter of expenses as a creditor who has failed to establish his debt. But an admission of facts not difficult of ascertainment would have shortened the proof materially, and the rights of parties might have been ascertained in the action for the £20 legacy, and therefore expenses are allowed, subject to taxation according to the first scale."

The defender appealed, and argued—The decree establishing the debt still stood unreduced. It is always a question of circumstances whether aliment is given *animo donandi* or not. The maxim *donatio non præsumitur* does not apply except in cases of persons of means, nor is it to be given effect to in cases of prospective succession.

Authorities—*Wilson* v. *Archibald*, February 15, 1701, M. 11,427; *Chisholm* v. *Steedman*, January 15, 1703, M. 11,428; *Ker* v. *Ruthven*, July 25, 1673, M. 11,436; *Gourlay* v. *Urquhart*, November 17, 1697, M. 11,438; *Melville* v. *Fergusson*, June 25, 1664, M. 11,433; *Lugton* v. *Hepburne*, June 13, 1672, M. 11,435.

Argued for pursuers—Aliment was here given out of charity. The law was that where aliment was given to a person of full age without any bargain for repayment, donation was presumed.

Authorities—Stair, i. 8, 3, and iv. 45, 18; Ersk. iii. 3, 92; *Drummond* v. *Stewart*, M. 412; *Wilson* v. *Paterson*, July 8, 1826, 4 S. 817 (N.E. 824); *Campbell* v. *Macalister*, January 18, 1827, 5 S. 219 (N.E. 204); *Drummond* v. *Swayne*, January 28, 1834, 12 S. 342; *Henderson* v. *Smith or Alexander*, July 18, 1857, 29 J. 559.

At advising—

Lord Justice-Clerk—I am of opinion that there are no good grounds for reducing the decree in favour of Mrs M'Culloch although granted in absence. The circumstances of this case are somewhat remarkable. It affords an example of a very praiseworthy attempt to maintain relatives in adverse circumstances. This man Corkran gave up his farm and went to live with his sister. He contributed to the household expenses so long as his means lasted, but these ran short after some years. His sister, however, maintained him until her resources were almost exhausted. He then obtained parochial relief. Towards the end of his life a prospect opened up to him of a share in a succession to a relative, a Miss Milwie. This was the subject of discussion, and this old man believed he would receive a share. He dis-

counted this expectation, for he wished to do something for those who had done so much for him. He made a will leaving certain specific legacies, and the residue to his sister Mrs M'Culloch and her son-in-law, the latter of whom he appointed executor. It turned out that there was no residue—£150 was all that the executor acquired. An action was brought against the executor in the name of his sister Mrs M'Culloch, concluding for payment of £200 in name of maintenance to Corkran, and a decree in absence was granted by the Sheriff-Substitute. The question now arose whether this debt of £200 was to be paid before any legacy should be payable. If not, the sum of £150 was sufficient to satisfy the legacies. I consider that this old man was bound to make payment if he had any funds. The presumption of aliment being a gift and not a debt has here no place at all. The fact of a joint establishment is inconsistent with it being a gift, and puts this case under a different category to the case of aliment to persons unable otherwise to provide for themselves. In these circumstances there is no room for the presumption. In the second place, the testator considered himself under an obligation, and used expressions indicating this view. I think—though the case is not without difficulty—that this support was not regarded by him as a gift, but as a debt which he felt bound to discharge.

Lords Young, Craighill, and Rutherfurd Clark concurred.

The Court sustained the appeal and assoilzied the defender.

Counsel for Appellant (Defender)—Rhind. Agent—William Ross Garson, L.A.

Counsel for Respondents (Pursuers)—Strachan. Agent—David Milne, S.S.C.

Friday, October 20.

FIRST DIVISION.

[Lord Lee, Ordinary.

M'DONALD *v.* CHEYNE'S TRUSTEES.

Master and Servant—Factor—Liability to Account.

A was employed by B to superintend his stock and farms, to keep the books of day labourers, and to account for all moneys passing through his hands, but not to collect rents. B sold the estate to C, who engaged A to act in same capacity as he had done under B. After eighteen months C discharged A, and demanded factorial accounts, which A refused as not being a factor but a grieve. *Held*, after a proof, that his true position was that of a grieve, and that he was not bound to account as a factor for the whole stock as committed to his care, but only for actual intromissions with money entrusted to and spent by him, and that he had sufficiently discharged himself of this liability.

On the 28th February 1860 an action of count, reckoning, and payment was raised at the instance of Mrs Francis Cheyne of Lismore, relict of the deceased James Cheyne of Kilmaron, against Donald M'Donald, Soroba, near Oban, concluding against him to exhibit an account of his intromissions as factor for the pursuer, or to make payment of £500 or such other sum as should be found to be the balance of his intromissions. Decree in absence was on 20th May pronounced against the defender in terms of the second alternative conclusion of the summons.

The pursuer of this action had in 1857 acquired by purchase the estate of Kilchiaran in the island of Lismore, in Argyllshire, which had been for some years in the possession of the trustees of her late husband Mr James Cheyne.

The defender had been employed by the said trustees to act as a kind of local manager or overseer, to buy and sell stock, to engage the necessary servants, and to superintend their operations. Mr Gregorson, banker, Oban, acted as agent for the trustees, and was virtually the factor upon the estate. When Mrs Cheyne acquired the estate in 1857, she arranged with M'Donald to act for her as he had done for the said trustees, and his engagement with her lasted from 1st December 1857 until Whitsunday 1859. His salary was at the rate of £70 per annum, with an allowance for a dwelling-house. At the time when the trustees made over the estate to Mrs Cheyne there was a valuation and inventory made out by Mr Gregorson, with M'Donald's assistance, to enable them to determine the price which was to be paid for the estate and stock. Mrs Cheyne continued to manage the estate, with the assistance of M'Donald as grieve, for about a year, during which time communications passed between M'Donald and Mr Sprot, W.S., Mrs Cheyne's Edinburgh agent, as to the way in which the accounts were to be kept, and various instructions were given as to furnishing monthly reports and accounts of expenditure. The only accounts which M'Donald appeared ever to have kept were a day labour list and workmen's accounts.

In 1859 Mrs Cheyne resolved to let her farm and to discharge M'Donald, and Mr Sprot, W.S., wrote to M'Donald to this effect, and asked him to render his accounts. During M'Donald's engagement various sales of stock had taken place, some by Mr Sprot, some by Gregorson, and some by M'Donald under direction of Mrs Cheyne, and it was for an accounting upon these sales, and also for all the stock which it was alleged had been put into M'Donald's hands, that Mr Sprot's demand was made. M'Donald maintained that he was not a factor but merely a grieve, and that he had no factorial accounts to render, and it was to compel him to give an account of his intromissions that the action of count, reckoning, and payment already referred to (and in which decree passed in absence against M'Donald, the defender) was raised. A charge was given upon this decree, and M'Donald was arrested at Falkirk by a messenger, acting upon the instructions of Mr Sprot, who would have incarcerated him but for the intervention of his brother Mr John M'Donald, who gave to Mr Sprot a cheque for £70 and an order for £200, and granted a letter of presentation binding himself to present the alleged debtor in Edinburgh on the 14th November 1860. A note of suspension of the decree in absence was presented on the 14th of November 1860 by M'Donald, craving supension of the decree in absence, and asking to be reponed. On the same day the note was passed by the Lord Ordinary