Lord Young, after consultation with Lord Mure, in charging the jury, said that the case was a peculiar one and required some consideration. The prisoner, who was a mere lad, and of rather weak intellect, was a porter at fourteen shillings a week in this oil-store, and he was now charged with wilful fire-raising, or wicked, culpable, and reckless fire-raising, committed in the store. Dealing with the "wilful fire-raising" first, his Lordship explained that this was a *nomen juris*, and meant the unlawfully and intentionally setting fire to dwelling-houses and other erections, but in order to constitute the offence it was essential that the party should wilfully raise the fire. If he did so, it would not matter what motive he had. A common motive in practice was to realise the insurance on the premises, and that always made a very bad case. Another motive was revenge. These were illustrations, but it might be generally affirmed that if the act was done unlawfully the motive did not matter. The motive here alleged was that this weak silly lad, being drunk, somehow got it into his head that it would be a favourable opportunity for trying to carry out his peculiar views on the subject of fire-raising. This, however, was mere surmise—the evidence adduced that he held these peculiar views gave it no higher value than any other surmise, and there was no proof whatever of its having been the actual motive in this case. If proved to have existed, it would be a sufficient motive; but if it was not proved, there was an end of the charge of wilful fire-raising, for no other motive had been suggested. Indeed the only evidence was that this drunk lad had got into the store and lighted the gas, turning it off and on as occasion required. There was no direct evidence that he had set the place on fire. That was conjecture, founded on the circumstance that he was on the spot at the time. But the conjecture was unnecessary, for if he was only lighting his pipe and threw away the match, failing to stamp it out with his foot (as drunk men and even sober men would do), the place might go on fire; yet though his conduct in such a case would be careless—grossly careless—the jury could not be directed that he was necessarily guilty of a crime. He would certainly not be guilty of wilful fire-raising. Tipsy men, for example, not infrequently let a bed-room candle fall, with the result that a house was burned. Their action was very careless, but not at all criminal; otherwise persons with the most innocent intentions might be convicted because their proceedings resulted in some serious accident.

Coming, then, to the charge of "culpable and reckless fire-raising"—If a man was engaged in some illegal act, then should he raise a fire, although without intending or desiring it, he would be guilty of this charge. Again, in the case of *Macbean*, at Inverness in 1847 (Ark. 262), it was laid down that if a man was in such a state of reckless excitement as not to care what he was doing, it would certainly be a crime were premises to be set on fire by him—were he, for instance, to throw a lighted candle into a heap of inflammable materials. But the circumstances under which this crime could be committed were very special; and his Lordship, after consultation with Lord Mure, felt himself unable to push the principle of criminal responsibility further than was indicated by these illustrations. Now, here the young man, in a state of disgraceful intoxication, went to the premises in question, and having been taken away, immediately returned. Thereafter there was no account of his doings save that of a witness who watched him from her house on the opposite side of the street. She saw nothing criminal, and thought only of the possible danger to the man himself. He was also observed by the police to be in a drunken state, and their conduct in the circumstances was very strange. But neither did they see anything criminal; on the contrary, they considered themselves justified in assuming that there was nothing wrong.

In conclusion, his Lordship directed the jury that if they could find evidence that the panel wilfully set fire to the premises to test his notion about fires—that he deliberately lighted a match and applied it to the buildings—that would be wilful fire-raising. If, on the other hand, a tipsy or even a sober man carelessly raised an accidental fire, then he was not necessarily a criminal. And again, if in a state of excitement so great as not to care what happened, a man raised a fire without deliberate intention, he would be guilty of the crime of reckless fire-raising, in accordance with the authority of *Macbean's* case.

The jury, by a majority, found the libel not proven, and the panel was consequently *simpliciter* dismissed from the bar.

Counsel for H. M. Advocate—Innes (A.-D.). Crown Agent—Taylor.

Counsel for Panel—M'Lennan. Agent—James Lindsay, Writer.

COURT OF SESSION.

Thursday, June 21.

FIRST DIVISION.

[Sheriff of Lanarkshire.

WILSON *v.* THE WISHAW COAL COMPANY.

Reparation — Known Danger — Contributory Negligence—Manholes in Underground Plane—Coal Mines Regulation Act 1872 (35 *and* 36 *Vict. c.* 76), *sec.* 51, *rule* 10.

In an action of damages by a miner against his employers for personal injuries sustained by his being knocked down by a train of hutches while going down an underground plane in their pit, it was proved that he started from the top in the knowledge that the hutches were ready to be sent off, but preferred to take the risk rather than wait. *Held* that his claim was barred by contributory negligence.

The Coal Mines Regulation Act 1872 provides—sec. 51, rule 10—"Every underground plane . . . . shall be provided in every case, at intervals of not more than twenty yards, with sufficient manholes for places of refuge."

Opinions that it is compliance with the statutory obligation if manholes are provided at distances of twenty yards, although on different sides of the plane.

This action was raised in the Sheriff Court of

Lanarkshire at Hamilton, at the instance of David Wilson, miner, Motherwell, against the Wishaw Coal Company, to recover damages for bodily injuries sustained by him on the 10th of January 1882 whilst in their employment—the nature of the accident being that whilst the pursuer was proceeding along an underground plane in the defenders' mine he was knocked down by a train of hutches which was running from the bottom to the top.

The pursuer averred that although by the provisions of The Coal Mines Regulation Act 1872 (35 and 36 Vict. cap. 76) it was imperative on the defenders to provide a series of sufficient manholes at distances of not more than twenty yards from each other, yet at the date of the accident there were not a sufficient number, and those there were were in such bad order as to be useless for places of refuge.

The defenders denied that there was any insufficiency in their mine in respect of the want of manholes or otherwise. They also pleaded, *inter alia*, that the accident having been caused by the pursuer's own negligence they were not liable.

The proof taken was to the following effect:—The pursuer was about sixty years of age, and prior to the accident had been working in the pit for five or six months; he had worked in the pit five or six years before that, but had not worked between those times. The underground plane in question was fitted with two sets of rails, the loaded hutches descending on the one side, and by their weight raising the empty hutches which came up on the other. The hutches started on a bell being sounded at the bottom as a signal that the empty hutches were attached, and it took the hutches about three minutes to travel the distance. This plane was 360 yards long, 9 feet wide, with an average height of about 5 feet. It was the only means of access the workmen had to their working faces, and the pursuer deponed that it took stronger men than himself about seven minutes to go down. The plane had been originally divided along its length by a brick wall extending from the top to the bottom, constructed for the purpose of ventilation. At the date of the accident the wall being no longer required in connection with the ventilation of the pit, was in process of being demolished, but parts of it were still remaining. On the day of the accident the pursuer left off work at four o'clock in the afternoon, and went to the top of the plane in order to go down; he there found a train of loaded hutches, and was told by the man in charge that although he could not tell whether there had been a signal from the other end the rake was ready to start. Rather than wait until the hutches had started, the pursuer at once set off, and what happened is thus described in his evidence:—"I commenced to go down the incline. The full hutches go down the left-hand side, the empty hutches come up the right. On this occasion the full waggons were on the left-hand side. I went down the side that the empty waggons were to come up. That would be on this occasion the right side. My idea was that I was safer on the one side than the other, because I have known of the chain of the full waggons breaking, and then coming down the incline at a dreadful rate. I was a good piece down by the centre of the incline when I heard the bell wire. I think I would be forty yards or so from the bottom. When I heard the wire jingle I understood that the full waggons and the empty waggons were in motion. I just wheeled about and ran up the brae as fast as I could, looking for a refuge. The refuge I wanted was a manhole in the coal or an opening in the brick wall. I could find neither the one nor the other, and I was struck. I could not find a manhole at all. I ran maybe fifteen or sixteen yards before I was overtaken. I was overtaken by the hutches and knocked down." The defender's overseer deponed—"The brakesman in charge of the wheel was told never to let anyone away except they left recklessly themselves. Mr Kirkwood, the manager, told him so before I went, and I have told him several times since I went. The brakesman's name is James Melville. He is still in the works, but the wheel is no longer working. His instructions were when the hutches were belled away from the top never to let any person away from the top of the brae. He was told to allow the men ten minutes to walk down. I told him to do that. He had these special instructions from me." He fur the deponed that when on the night of the accident he visited the pursuer along with Mr Kirkwood, the manager, the pursuer had said—"I put no blame on you, manager; it was my own fault." On the occasion in question the brakesman was not aware of the pursuer going down. There was no written regulation as to preventing miners from going down unless the line was clear.

By the Coal Mines Regulation Act 1872 (35 and 36 Vict. cap. 76) it is provided, sec. 51, rule 10—"Every underground plane on which persons travel, which is self-acting or worked by an engine, windlass, or gin, shall be provided (if exceeding thirty yards in length) with some proper means of signalling between the stopping-places and the ends of the plane, and shall be provided in every case, at intervals of not more than twenty yards, with sufficient manholes for places of refuge."

It was proved that there were on the incline eighteen manholes, one old mine, and a stowhole. These manholes were sufficiently large to admit three persons in safety, and were cleaned on the day of the accident. No portion of the dividing wall which was left standing was more than twelve yards in length.

The Sheriff-Substitute (BIRNIE) on 23d November 1882 pronounced this interlocutor:—"Finds in fact—(1) That on 10th January last the pursuer was crushed by a train of empty hutches on an incline in a pit belonging to the defenders, and at or near the part of the incline marked on the sketch No. 14 of process; (2) That he is about sixty years of age; that he had three ribs broken and was otherwise bruised; that he has not been able to work since, and that he will not again be probably able to work as a miner; (3) That the incline is 360 yards long, with a gradient of one in six, and an average height of from four feet nine inches to five feet six inches; that there is a double set of rails, the traffic being worked with a rope, the full hutches running down pulling the empty hutches up; and that the hutches run the 360 yards in from two to three minutes; (4) That at one time the two lines of rails were separated by a brick wall for the purpose of ventilation; that since a change in the plan of

ventilation, made at least two years since, this wall has become unnecessary, and been gradually removed as the bricks were required for other purposes, and that at the time of the accident the pieces of wall were as marked on Nos. 13 and 14 of process, or nearly so; that on either side of the incline there were manholes within twenty yards of each other, but that on the left side, where the pursuer was injured, there was no manhole for a distance exceeding twenty yards; (5) That the incline was the only passage by which the pursuer and certain of the other miners could proceed to or return from their work; (6) That there was a brakesman at the top of the incline, who generally told the miners when a train was ready to start; but that there were no rules directing how the miners were to be allowed to go up and down the incline, and no signals to tell when the incline was clear of miners or not: Finds in law that the pursuer was injured through the fault of the defenders: Finds the defenders liable in damages: Assesses the same at eighty pounds: Finds the defenders liable in expenses, &c.

"*Note.*—The pursuer on the afternoon of 10th January last was returning from his work down the incline referred to in the interlocutor when caught by a rake or train of empty hutches coming up the incline. He says the defenders were in fault (1) in not having sufficient manholes, (2) in leaving portions of the brick wall after they ceased to be required, and (3) in not having proper rules and signals as to the miners passing along the incline.

"I am not inclined to hold that the defenders were so clearly in fault, either in regard to the manholes or the wall, as to render them liable. On one or other of the sides there were manholes within the statutory distances, and at the spot where the pursuer was injured the portions of wall were of no great continuous length, but that there was no manhole on the side where the pursuer was walking for a distance exceeding twenty yards, and that there were pieces of wall at irregular distances which prevented a miner passing from one set of rails to the other are important as increasing the danger of the incline. It seems to me that, keeping this in view, as also the length of the incline, the lowness of the roof, the speed at which the hutches ran, and that the incline was the only road by which upwards of twenty-five miners could pass to or from their work, it was the duty of the defenders to have rules and signals for their safety. The defenders argued, that having complied with the statutory provision as to manholes, they did all that could be required of them, and that the pursuer could not recover damages because he had not complained of the danger, and had gone down the incline when he knew a train of loaded hutches was ready. But compliance with the statutory rules will not protect defenders where they have failed to take reasonable precautions, and the rule as to a miner complaining of danger applies to a discovery of fire-damp, or a threatened fall in the roof, or such like,—not to an alleged danger from an arranged plan of working, on complaining as to which he would probably be told not to interfere. Nor can I think the pursuer was so far in the wrong in going down the incline when hutches were ready as to bar his claim. The evidence is that the miners generally asked the brakesman if they had time to go down; but that it was not unusual to go down after the hutches were ready, and that they were allowed to do pretty much as they pleased." . . .

On appeal the Sheriff (CLARK) adhered.

"*Note.*—Without calling in question the grounds upon which the Sheriff-Substitute has decided this case, and which in themselves seem sufficient justification for his interlocutor, it seems to me that the defenders were in fault in not having manholes on each side of the way through which trucks ran at a distance on both sides of not more than twenty yards. The provisions of the statute in that respect are contained in rule 10 of 35 and 36 Vict. c. 76, sec. 51—[*His Lordship here quoted the rule, which is printed above.*]

"Now, originally the passage in question was divided by a brick wall throughout so as plainly to form, not one, but two separate planes in the sense of the Act, in each of which planes there should have therefore been manholes at a distance of not less than twenty yards. This brick wall gradually became broken down, and was in part removed; but as appears from the plans in process, and also from the evidence, not by any means entirely so at the date of the accident. The result was that until such brick wall had been entirely removed it could not be regarded as a single plane. Furthermore, there were two lines of rail, one on each side of this brick partition, for carrying the loaded hutches down and the light hutches up simultaneously—the weighted hutches pulling up the light ones by gravitation. Within each of these separate lines of rail an iron rope worked, so that to cross from one side to the other of the foresaid passage a man would have not only to pass over the remains of the brick partition, but over the two lines of rail, and over one and in some portions over two lines of rope, and this with the risk of meeting not one but two trains of hutches proceeding in opposite directions. From this it seems to me clear that, notwithstanding the old brick wall having been allowed to fall into decay, and in part removed, the two lines of rails really formed as before two separate planes, and required each, therefore, to have manholes for itself, just as was the case while the partition still stood intact. I do not see that the provisions of the Act can be read as applicable in any other sense to a case of this kind. Now it is quite clear that the defenders had failed to provide the statutory manholes in each of the said planes. Whether originally, while the brick wall was entire, they had manholes of the required number on each side or not, it is quite clear that when the accident occurred this was not the case. The defenders having therefore failed in complying with the statutory requisites in respect of the manholes, are upon that ground alone responsible for what occurred.

"The plea of contributory negligence occurs in the record, and was very strongly urged at the debate as barring the pursuer's claim, even if the defenders were admitted to have contravened the statutory provisions. But while the plea was stated on record, the statement of facts contains no specification of what the alleged contributory negligence was, and therefore the pursuer has throughout the proof been placed at the disadvantage of not knowing on what point he was

to meet the defenders' allegation in this respect. Furthermore, it appears to me that the pursuer at the date of the accident was acting to the best of his judgment in circumstances when there might be great difference of opinion as to what was proper to be done, and when there certainly was no rule or set of rules laid down and published for his direction."

The defenders appealed to the Court of Session. Their argument appears from the opinions *infra*.

At advising—

Lord Shand—The pursuer here was on 10th January last, and had been for some months previously, in the employ of the Wishaw Coal Company, and was working in their coalpit at Dalziel, Motherwell. He claims damages because of severe personal injuries sustained on that date in this pit.

It appears from the evidence and from the statements on record that there was in the pit an underground plane, by which the loaded hutches are on the one side lowered from the top to the bottom, while on the other side the empty hutches are drawn up. The fault which is alleged by the pursuer as leading to the accident is that there was not a sufficient number of manholes provided on this plane for the safety of the workmen who required to pass up and down on their way to and from their work. On this occasion the pursuer before starting from the top saw that there was a train of loaded waggons waiting ready to be sent down on the usual signal being given that the empty waggons were attached at the foot ready to be drawn up.

The Sheriff-Substitute has given judgment against the defenders, and found them liable in damages to the extent of £80, not, however, on the view that the manholes were insufficient, for, on the contrary, he indicates an opinion that there was in this case compliance with the statute. But the ground of his judgment seems to be that there ought to have been a better set of regulations for working the hutches on this incline, having regard to the practice by which the men were in use to go and come along the plane.

The Sheriff's judgment is to the same effect, but on a different ground, for he holds that there was not a sufficient number of manholes in this incline, and holds that it was in consequence of this that the accident happened.

It was pleaded both before the Sheriff-Substitute and Sheriff that in any view of the case the pursuer had been guilty of rushing into a danger that was obvious, and that therefore his claim was barred. This plea, however, was not sustained by the Sheriff-Substitute, who says—"Nor can I think the pursuer was so far in the wrong in going down the incline when hutches were ready as to bar his claim. The evidence is that the miners generally asked the brakesman if they had time to go down; but that it was not unusual to go down after the hutches were ready, and that they were allowed to do pretty much as they pleased." And the Sheriff in dealing with this point says—"But while the plea was stated on record, the statement of facts contains no specification of what the alleged contributory negligence was; and therefore the pursuer has throughout the proof been placed at the disadvantage of not knowing on what point he was to meet the defenders' allegation in this respect. Furthermore, it appears to me that the pursuer at the date of the accident was acting to the best of his judgment in circumstances when there might be great difference of opinion as to what was proper to be done, and when there certainly was no rule or set of rules laid down and published for his direction." The case, I think, substantially raises two points—first, Whether adequate provision was made on the incline for the safety of the men? and second, on the assumption that the decision of the Court is against the defenders on that point, Whether there was not such recklessness on the part of the pursuer in going down the incline at the time he did as to deprive him of any claim for compensation?

Undoubtedly a case of a somewhat formidable nature has been made out for the view that the provision for the safety of men was not adequate. On the other hand, if it had not been for one peculiarity which seems to have distinguished this incline, I think the manholes which were provided were quite sufficient. There was a sufficiency of manholes to satisfy the statute but for the peculiarity that there was an old wall originally constructed for the purpose of ventilation which separated one set of rails from the other. It was of no use. There can be no doubt that there were parts of this wall remaining which certainly increased the danger of using the incline, and made it more difficult for the person so using it to avail himself of the manholes. The miner seeking to cross from the one side to the other might encounter pieces of the wall. Accordingly if the case had been one in which it appeared that the pursuer had been making use of the incline at a time when he was fairly entitled to use it, I should have been disposed to adhere to the judgment of the Inferior Court. I think the wall was improperly allowed to remain, and that being so, that there ought to have been a more careful provision of manholes to ensure safety.

But the very fact of there being a danger in the use of the incline is a circumstance which weighs very strongly with me in considering the question whether there was contributory negligence or not on the part of the workman. It appears that he was aware before he started that there was a loaded train ready to be sent off. He further knew that he would take some minutes to get to the bottom, and that the hutches might be despatched at any time, and that he would run a great risk of their overtaking him if he started. It appears to me that in these circumstances it was his obvious duty either to wait until the waggons were sent off or to have communicated with the person in charge so that they should not be sent off until he had reached the bottom. I am very much impressed with the soundness and importance of that view from the circumstance that more than once after the accident the pursuer attributed the blame to himself alone, and to no one else. He said that the accident was his own fault, and in that view I concur. I think the evidence shows that there was a stepping into a known danger, and that the pursuer ought to have remained where he was. He must therefore be held to have taken the risk upon himself.

I have therefore come to be of opinion that if this had been a case in which it had been neces-

sary to find that the employers were in fault with regard to the provision for the workman's safety, the action would still have been barred by the pursuer's contributory negligence. I think the accident is to be attributed to his own conduct.

Lord Deas—I think this is the narrowest and most difficult case we have had to decide against the employee for some time. The fault upon the side of the employers is obvious. They were bound by statute to make provision for the safety of the miners whom they employed, and more especially so in this very peculiar mine. I agree with what I take to be the opinion of Lord Shand, that the employers did not make all the provisions they ought to have done for securing the safety of their workmen. There were manholes in the passage, but these were not at sufficiently short distances apart, considering the fact that there was an intervening wall between the two ways. My great difficulty in concurring in the proposed judgment has been, seeing that the masters have failed to provide the statutory protection, whether, upon the other hand, there is enough of contributory negligence to deprive this man of all right to a remedy against them. I cannot help thinking that the failure on the part of the masters to perform their statutory duty is to a considerable extent a reason for requiring that the fault upon the workman's part should be somewhat more palpable than would have been requisite if the masters had done their duty. The object of the Legislature was to provide protection for men of all ages, both for those advanced in life, and for others very much younger. If this man had been somewhat younger than he was, and more nimble, he probably would have escaped the accident which befell him. As I have said, this is certainly to my mind a difficult case in which to refuse compensation to the injured man, but no doubt there was rashness upon his part. He knew that there was a loaded train ready to start down the way, and that he was incurring a risk in going on before it. So that I cannot shut my eyes to the fact that the pursuer went knowingly into this danger, and that leads me reluctantly to concur in the judgment which your Lordships propose to pronounce.

Lord President—I also concur in the proposed judgment. As regards the fault of the defenders, I am disposed to take the view of the Sheriff-Depute. The statute requires that—[*reads as above*].

This passage was originally used for ventilation purposes only, and while it was so used it was divided into two parts by a brick wall. This wall seems to have completely occupied the centre of the plane, and to have united the roof and the floor, but when alterations came to be made it was disused as part of the ventilating system, and thereafter served as a passage for the waggons or hutches which were conveyed full down the mine, the empty ones being at the same time conveyed in the opposite direction. If the brick wall had at that time been entirely removed it appears that there would then have been only one passage, and I should not have construed the statute so strictly as to say that it required that there should be a manhole every twenty yards on each side of that passage. It is sufficient that there shall be one on either side. There were actually as many as nineteen manholes, which is more than sufficient to meet the requirements of the statute. The peculiarity is, that although the brick wall has been partly removed, it still remains in some places quite entire and not broken down. On that ground I think that the defenders did not sufficiently discharge their duty by having the manholes on one side of the passage only, and, counting that passage as one plane, having them on the one side or the other. The brick wall made an undoubted obstacle, and I think for that reason that the plane was in a very dangerous condition, and upon that ground I should have been prepared to hold the defenders liable if it had not been for the plea of contributory negligence which has been raised by them.

Although I have the greatest sympathy with the pursuer in the suffering to which he has been subjected, I do not think that there is much difficulty in sustaining the plea of contributory negligence. The pursuer rushed into a very plain and palpable danger. He had been for five months in their works; although he had been away from them for some little time before that, he had previously been there for five or six years, and further, had had occasion to pass through the passage twice on each day. The passage is one through which a man cannot pass rapidly. It is a little over a third of a mile in length, and the height is such that a man cannot walk if he stands upright. At least it would require the greatest possible caution to do so. Although the length of the passage was not much more than the fifth of a mile, we find that the most agile could not accomplish the distance in less than seven minutes. The average time was ten minutes. That being the nature of the passage, and two pairs of rails occupying a very large portion of the vacant space, it is obvious that there was not much more room to spare. It is accordingly very evident that to go along the passage while the hutches were being run was an operation attended with great risk, and unless one were to get into one of the manholes, and so allowed them to pass him, he must have suffered. What did the pursuer do? He went to the top of the incline, where he finds that a set of hutches are ready to start. Although he is aware that in all human probability he will not be able to reach the other end before they overtake him, he goes on. Several of the workmen who were examined express themselves very strongly as to the inadvisability of starting in the circumstances in which the pursuer did. Some think they would have been able to reach the other end in safety. But all concur in thinking that it was a very dangerous thing to do. The option which the pursuer had was to wait until the loaded waggons were put in motion, and then to follow them. He would then have incurred no risk of the accident which overtook him. He went into peril unnecessarily when he might have avoided it. The statements of the oversman and by the workmen, when looked at, agree upon this matter. And it was the expression of the pursuer's own honest belief at the time that the accident was due to his own fault. I cannot, therefore, hesitate to concur in the view that the contributory negligence has been proved, and that but for the pursuer's own negligence the injury would not have been sustained.

Lord Mure was absent on Circuit.

The Court pronounced the following interlocutor:—

"Recal the interlocutors of the Sheriff and Sheriff-Substitute, dated respectively 1st February 1883 and 23d November 1882: Find as matter of fact that the pursuer, while in the employment of the defenders on 10th January 1882, was preparing to leave his work at the head of the incline in their pit at Motherwell, when he was informed in answer to his own inquiry that there was a rake ready to go down the incline: Find that he proceeded down the incline before the rake had started: Find that the rake following before he could reach a manhole, he was overtaken by the hutches, knocked down, and seriously injured: Therefore find in law that the pursuer's own negligence in not waiting till the rake had started contributed to his injury; assoilzies the defenders, and decerns."

Counsel for Appellants—Strachan. Agent—Adam Shiell, S.S.C.

Counsel for Respondent—Comrie Thomson—Watt. Agent—Andrew Urquhart, S.S.C.

Thursday, June 21.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

SHARP *v.* PATON.

Donation — Deposit - Receipt — Presumption — Onus.

Evidence in support of an alleged donation of the contents of three deposit-receipts *held* insufficient to overcome the legal presumption against donation.

This was an action at the instance of Mary Sharp, grandniece and executrix-dative *qua* one of the next-of-kin of the late William Matthew, mason, Markinch, who died on 28th October 1881, against Mrs Margaret Paton, a niece of the deceased, to recover payment of the sum of £250, the contents of three deposit-receipts for £175, £60, and £15 respectively, granted by the Commercial Bank, Markinch, to William Matthew, and uplifted by the defender on 19th October 1881.

The defence was that during his last illness William Matthew endorsed the deposit-receipts, and on 18th October 1881 handed them to the defender, intending thereby to make a donation to her of the contents.

The pursuer averred that for some weeks prior to his death William Matthew was confined to his bed, and was mentally incapable of transacting any business or doing anything for himself, and that the deposit-receipts and their contents were not transferred by him to the defender by way of donation or on any other title.

From the proof (in which the Lord Ordinary appointed the defender to lead) it appeared that at the date of William Matthew's death there were alive a brother named George, who died in March 1882, leaving two children, Agnes and George, three nieces, Janet, married to her cousin George, Cecilia, and the defender, and two grandnieces, Mary Sharp, the pursuer, and Elizabeth Sharp. The sums of money contained in the deposit-receipts composed the whole moveable estate of the deceased, who was also possessed of some house property, the value of which did not appear. The deceased died of heart disease and bronchitis at the age of seventy-five; and the doctor who attended him during his last illness deponed that he was seriously ill from the time he began to attend him on 13th October, though sometimes out of bed up to near the end; that there was nothing wrong with him mentally, though he became very weak for the last few days of his life; that previous to that he knew quite well what he was about, and that he was naturally shrewd. It was proved that he was in the habit of taking stimulants against the advice of the doctor because he thought it did him good, but none of the witnesses deponed to having seen him under the influence of drink at any time during the last three years of his life. He was attended to during the last four years of his life principally by a neighbour named Mrs Gilmour, who did his household work. During his last illness the defender and her son, who lived in Markinch, were constantly with him, and no intimation of his illness was sent by them to any of his relatives, with the exception of Mrs Janet Matthew, a sister of the defender, who was summoned by her from South Shields, where she lived, and arrived on 19th October. The pursuer lived with her mother at Ladybank. On Sunday the 16th the defender was with the deceased the whole day, and with reference to what then passed between them depones—"He told me to send up my boy—that he was going to endorse the bills to-morrow, and give him the bills to go to the bank. (Q) Did he say for what purpose he was going to endorse the bills?—(A) Yes, he said he was going to give me the whole of the money to myself, because I was the only one he had there who seemed to care for him." In accordance with instructions received from his mother, the defender's son Francis Paton obtained the deposit-receipts from the deceased the following day (Monday) and took them to the bank, where payment was refused because they were not endorsed. Francis Paton gave them to his mother, who took them the same evening to the deceased. She asked him (according to her evidence) "Why he gave them to the boy without being endorsed. He said there was no matter, he would get them done. He said he would sign them, but he said not that evening." The defender then took the deposit-receipts home with her, and on the following evening went with her son to the deceased, who endorsed the receipts, and "handed them back to me, and told me he had made me all right." In cross-examination she deponed—"He endorsed the bills, and said that he had made me all right, and he had nothing now. (Q) Did he say that he had given you all charge?—(A) Yes, and the whole power of his house. (Q) When was it that he used the words 'all charge?'.—(A) After he gave me the bills he said he had given me all the money, and to do as I pleased, and the whole of his house. (Q) Were these the words he used, that he had given you the money and all charge?—(A) Yes."