transaction, or where the presumption of onerosity was neutralised by the admissions of the holder, or the unquestionable facts of the case. In such instances parole proof has been admitted, though not without difficulty. But the present case is not of that kind. It is not alleged that there was anything in the slightest degree suspicious or irregular in the way in which the note was taken by the Bank. Nor does their statement as to the purpose for which it was taken and held by them in any degree conflict with the presumption of onerosity. It merely amounts to an admission that the liability under it is limited to the balance due on the account, which would entitle the defenders to resist the claim, wholly or in part, on the ground that there is no balance due, or that it is of smaller amount than the sum in the bill. It does not appear to the Lord Ordinary that it can entitle them to a proof by parole that it was granted for a totally different consideration, which has been discharged. Their averment is, that it was granted as a security for a specific debt due by Alexander Kelly to the Bank, which has been paid. It does not appear that it would have made any difference with reference to this question if the averment had been that it was granted as security for an advance by the Bank to any other party, which had been paid by the debtor. If, as the Lord Ordinary must hold, such an averment could not be proved by parole in the ordinary case, it does not seem to let in such a proof that the holder states that the note was granted as a security, but for a different debt. In the case of *M'Gregor* v. *Gibson*, 9 S. 483, it was held that the statement by the drawer suing upon a bill, that all the parties, including himself, had joined in it for the accommodation of a third person, did not entitle the acceptors to a proof by parole that the bill was for the accommodation of the drawer and his brother. The interlocutor of Lord Fullerton, which was adhered to, remitted to the Sheriff to find, 'in respect that the pursuer's averment of the equal responsibility of himself and each of the defenders for the amount of the bill, truly forms, in a question between these parties, a restriction of the liability appearing *ex facie* of the bill to be contracted by the defenders, that that averment must be sustained, unless disproved by the pursuer's writ or oath.' The importance of that decision in the present case is, that effect was given to the legal presumption which excludes parole proof, though by the admission of the holder it appeared that, in the words of Lord Fullerton, 'the liability really contracted was different from that appearing to have been contracted on the face of the document of debt.' On the whole, the Lord Ordinary thinks that it would be going beyond any of the previous decisions if the defenders were allowed to prove the averment by parole.

"He has only to add that, in his opinion, the account of the transaction given by the Bank is strongly confirmed by the terms of the note, which is payable at one day's date, and is for £700, while there was not a balance of that precise amount due by Alexander Kelly, either at the date of the note or on 17th January 1865, when the defenders seem to say it was handed to the Bank. There is thus nothing in the aspect of the case to aid the demand for a relaxation of the ordinary rule of law as to the mode of proof."

The defenders reclaimed.

BURNET (with him SOLICITOR-GENERAL) argued —There is no question here as to value. The defenders do not dispute that the note was granted for value. The matter of fact to be ascertained is the footing on which the note was given to the Bank. In regard to that, the defenders should not be limited to proof by writ or oath. There is no presumption that a promissory note given to a bank is in all cases given as a continuing security.

CLARK and LANCASTER, for the pursuers, were not called on.

The Court adhered.

Agents for Pursuers—H. & A. Inglis, W.S.

Agent for Defenders—John Thomson, S.S.C.

Tuesday, May 18.

MACFARQUHAR *v.* M'KAY.

Donation mortis causa—*Irrevocable Gift—Proof—Account of Daily Expenses—Tender. Held,* on a proof, that money had been given as a donation *mortis causa*, which was afterwards revoked, and that the donee was bound to refund under deduction of all expenses incurred by him for behoof of the donor on the footing that the gift would not be revoked.

Opinion, that these expenses were sufficiently proved, being entered in a regularly kept daily account, being of a character for which it was not natural to take vouchers, and there being no counter evidence.

Expenses to donee, he having tendered a larger sum than was found due by him.

In this action the pursuer sought to recover payment of the contents of a deposit-receipt which she had handed to the defender. The defender alleged that the pursuer had, when ill, stated to him that she wished him to take her money, she getting the interest while she lived, or he otherwise providing for her. He took the money, and after some time, the pursuer having recovered, took her to reside in his own house, and made sundry advances for her behoof. He tendered £40 for a discharge of the pursuer's claim in this action. After a proof, the Sheriff (IVORY), recalling the interlocutor of his substitute, found that the pursuer had made an irrevocable donation of the money to the defender, on the condition that he was to provide for her if she lived, and see her respectably buried if she died.

The pursuer advocated.

MACKAY for advocator.

KERR for respondent.

At advising—

LORD PRESIDENT—The ground of the Sheriff's judgment is to be found in his first finding, which is, "that on or about 4th February 1865 the deposit-receipt for £120, of which No. 14 of process is a certified copy, granted by the British Linen Company, Inverness, in favour of the pursuer, was indorsed by the latter, and delivered by her to the defender, as an irrevocable donation thereof, and of the sum contained therein, but upon the condition that he was to provide for her if she lived, and see her respectably buried if she died." Now, apart from the question, whether there is evidence to support this finding, I am of opinion that it is in law self-contradictory. If the Sheriff means that this was a *donatio inter vivos*, he would be right in distinguishing it as an irrevocable donation, but I cannot understand how a donation that is irrevocable can be coupled with a condition of an onerous kind. That is no donation at all. It may be a gift in a certain sense, but it cannot be what is known to the law as donation.

If, on the other hand, the Sheriff means that this was a *mortis causa* donation, that is wrong also, for a *mortis causa* donation is not irrevocable. So that he is wrong in either view. I think on the evidence that there was a gift, and that it was a donation *mortis causa*, and one of that kind which was recognised in *Morris* v. *Riddick*. I think the gift was made in the prospect of death, to take immediate effect as a transfer of property in favour of the donee, but on the condition that the donee should hold for the granter so long as she lived, subject to her revocation, and, failing such revocation, then to hold for his own behoof. Now, it is said that there was appended to this an understanding that if the old lady recovered the donee was to provide for her. If the annexation of that condition prevents it from being a proper *mortis causa* donation, and makes a composite transaction, then I am of opinion that that transaction cannot be proved by parol. It is only on the footing that it is a *mortis causa* donation that we can receive the evidence led in the Inferior Court. There is no doubt here that the donee did maintain the old lady, and made advances directly and for her behoof.

The result is, that I think the pursuer is entitled to revoke the gift, and I think she does so effectually by this action. But she cannot recover the entire sum handed over to the donee, but must suffer deduction of the sums advanced, and the expenses incurred by the defender on the faith of this gift remaining unrevoked, and becoming his property on the death of the pursuer. The only question is, What deductions are to be made? The first thing to be considered is the account of £36 for advances of money to and for behoof of the pursuer. The pursuer only admits them to a limited extent, and I think the Sheriff-substitute has allowed them only to the extent of the admissions of the defender. I cannot agree with him there. Here is a detailed account kept in a note-book to which the man swears. They are not advances for which he would naturally take vouchers, and I think it is sufficient to prove a series of advances of this kind, which are made the subject of a daily account, if the party keeping the account swears to it, and there is no counter evidence. Therefore, I think the defender is entitled to make this deduction of £36. Then there is £52 claimed for board. It can hardly be disputed that as this pursuer lived for twenty-one months in the house of the defender, and was maintained there, with apparently considerable attention to her wants, the rate of board to be allowed is not to be such as would be justified by a poor-law board. The amount of 7s. a-week is I think too low. The amount proposed by the pursuer is ludicrous. I think we ought to allow 12s. a-week for board. In round numbers the sum for which the pursuer is entitled to decree will be £35.

The other Judges concurred.

Expenses awarded to defender, in respect of his having made tender of £40.

Agent for Advocator—C. S. Taylor, S.S.C.

Agents for Respondent—Murdoch, Boyd & Co., S.S.C.

Tuesday, May 18.

KENMORE *v.* KENMORE'S TRUSTEES.

Trust — General Settlement — Revocation — Special Legacy—Husband and Wife. A husband, having received from his wife loans of money from her separate estate, delivered to her two holograph writings, bequeathing to her certain bank stock. Some years after, he executed a trust-disposition and settlement conveying his whole estate to trustees for payment of his debts, and of a certain special legacy to his sister-in-law, and conveyance of the residue to his daughter. After his death, *held* that the widow was entitled to the stock conveyed by the holograph writings, these writings not being revoked either explicitly or by implication.

Mr and Mrs Kenmore were married in 1860. By their marriage-contract Mrs Kenmore conveyed to trustees her whole estate except £400 and certain moveable property, which money and property were to be held by her exclusive of her husband's *jus mariti* and right of administration. Mr Kenmore provided an annuity of £60, besides another annuity to which his widow would be entitled from a widows' fund. After the marriage, Mrs Kenmore advanced certain sums of money to her husband, whereof £140 remained unpaid at her husband's death. On 23rd July 1862 Mr Kenmore delivered to Mrs Kenmore a holograph writing which remained in her possession, in the following terms, viz., "I, William Frederick Kenmore, advocate, Edinburgh, hereby leave, bequeath, and make over, to my wife Catherine Russell Hill or Kenmore, three shares of my Commercial Bank Stock in payment of money lent me by her. W. F. KENMORE. Edinburgh, 23 July 1862." On 7th June 1865 Mr Kenmore delivered to Mrs Kenmore another holograph writing which remained likewise in her possession, in the following terms:—"Edinburgh June 7th 1865.—I, William Frederick Kenmore, advocate, hereby leave and bequeath to you, Catherine Russell Hill or Kenmore, my spouse, Five hundred pounds Stg. worth stock of Commercial Bank of Scotland. W. F. FENMORE. You, Mrs Kenmore, should sell and heritably invest the amount which, as according to quotations from *Scotsman* of June 3d, sold at Two hundred and thirty pounds Stg. per one hundred pounds Stg. stock; that I would advise you to do in regard that a woman should not be in any mercantile firm." W. F. K. "To Mrs Kenmore."

In 1867, Mrs Kenmore obtained decree in an action of separation and aliment, brought by her against her husband. On 23d June 1868 Mr Kenmore executed a trust-disposition and settlement by which he conveyed to trustees his whole estate, heritable and moveable, in trust for the purposes therein mentioned. The deed proceeds on the narrative that the testator had "resolved to settle my affairs during my life," and the purposes are "in the first place, for payment of all my just and lawful debts, deathbed and funeral charges, and the expenses of executing this trust. In the second place, that my said trustees shall assign and convey over to Maria Jane Dalziel, sister of my first wife, one share of the stock of the Commercial Bank of Scotland, belonging to me and part of my trust-estate, to be held and enjoyed by the said Maria Jane Dalziel as her absolute property, and all dividends and profits that may fall due thereon. In the third place, I direct my trustees to hold the whole residue of my means and estate, heritable and moveable, before conveyed, for behoof of the said Catherine Margaret Kenmore, my daughter, while she shall survive me, and to lay out the annual return derivable from the said residue for her education and maintenance until she shall