subject to this proviso, that "precognitions, so far as relevant and necessary for proof of the matters in the record between the parties, although taken before the raising of an action or the preparation of defences, and although the case may not proceed to trial or proof, may be allowed where eventually an interlocutor shall be pronounced either approving of issues or allowing a proof." Now, that, like all the other provisions of this Act of Sederunt, applies entirely to the practice in this Court, and the question here is, Whether an agent can charge in his account against the opposite party the expense of precognitions taken before the raising of the action in the Sheriff Court? So far as it has proceeded in this Court there has been no proof ordered, and no approval of issues, and I am therefore of opinion that the proviso does not apply, and that the main regulation does.

LORDS DEAS, MURE, and SHAND concurred.

The Court disallowed the charges reserved by the Auditor, amounting to £8, 12s. 4d., and decerned against the defender for the remainder, being £24, 16s. 2d.

Counsel for the Pursuer and Appellant—Dickson. Agents—Dove & Lockhart, S.S.C.

Counsel for Defenders and Respondents—R. Johnstone. Agents—Hope, Mann, & Kirk, W.S.

Saturday, December 22.

SECOND DIVISION.

THOMSON *v.* MILLER'S TRUSTEES.

Trust—Construction—Trusts (Scotland) Act 1867 (30 *and* 31 *Vict. c.* 97), *sec.* 7—*Advances from Capital.*

A truster directed his trustees to accumulate the income of certain funds for behoof of the children of a married daughter till they should reach majority, and then divide the capital, with the accumulated income, equally among them; but directed that, in the event of the death of the father of these children, but in that event only, before all or any of them reached majority, the trustees should have power to pay to the mother or lay out at their own discretion, for the maintenance and education of the children, such part of the children's shares as they might think right. Six months after the truster's death the daughter and her husband presented a petition (1) for warrant to the trustees to make payments to them, for the maintenance and education of the children, of such part of the annual income as the Court should think fit; or (2), alternatively, under sec. 7 of the Trusts Act 1867, for advances of capital for behoof of the children. The petitioners had an annual income of £350. The Court *refused* the application, on the ground (1) that payments out of the income were forbidden by the deed, and (2) (Lord Rutherfurd Clark reserving his opinion) that the Court had no power in the circumstances to order the payments out of capital under the Trusts Act.

John Miller, Esq., of Leithen, died on 8th May 1883. He was predeceased by his wife, and was survived by four daughters, Miss Miller, Mrs Cunningham, Mrs Webster, and Mrs Thomson. He left a trust-disposition and settlement by which he conveyed to trustees his whole estate, heritable and moveable, and further appointed them to be his sole executors.

By the fifth purpose of the trust-disposition and settlement he directed his trustees to hold £16,000 for his daughter Miss Miller, paying over to her while unmarried so much of the interest as they should consider proper, and accumulating the balance. He gave her power to dispose by will of £5000 of the capital, and directed that the capital so far as not disposed of by her will, and the accumulations so far as not disposed of by will by her, should be held in three shares for behoof of the children of Mrs Webster and of Mrs Thomson, and for behoof of Mrs Cunningham in liferent and her children in fee, declaring that the share of it falling to Mrs Thomson's children should be dealt with in the manner provided for them by the seventh purpose of the deed.

The seventh purpose was in these terms—"In the seventh place, I direct and appoint my trustees to implement and fulfil the pecuniary obligation for £10,000 sterling undertaken by me in a bond and discharge entered into between my daughter Mary Miller or Thomson and the said Alexander Thomson and myself in contemplation of her marriage with the said Alexander Thomson . . . And further, I direct my trustees to hold and administer for behoof of the children (who may be alive at my death) of my daughter the said Mrs Mary Miller or Thomson, equally share and share alike, the sum of £4000 sterling, and in regard to the management and disposal thereof, I hereby direct my trustees to hold the same as above mentioned for the children of my said daughter Mary Miller or Thomson who may be alive at my death, equally share and share alike, and (with the exception under mentioned) yearly to receive and accumulate and invest for behoof of the said children respectively the annual income, interest, or proceeds of the said sum of £4000, and on the said children respectively attaining majority, to pay and make over to them respectively, not only their equal shares of the said principal sum of £4000, but also any income, interest, or proceeds that may have been accumulated in respect of their said shares, and in the event of any of the said children surviving me, but predeceasing majority, the share of such child shall accresce and belong to his or her surviving brothers and sisters equally among them; but I hereby declare, notwithstanding what is above written, that in the event of the said Alexander Thomson predeceasing me, or on his death if he shall survive me but predecease the majority of all or any of the said children, then my trustees shall have power to pay to the said Mary Miller or Thomson, or in the event of the death of the said Mary Miller or Thomson, whether before or after the death of the said Alexander Thomson, to lay out at their own discretion, for behoof of the said children respectively, the whole, or such part or portion as they may think right, of the income, interest, or proceeds of the shares of the said children, for the education, maintenance,

and upbringing of the said children respectively, aye and until they respectively attain majority, but that always only after the death of the said Alexander Thomson."

In the thirteenth purpose of the trust he directed his trustees to dispose of the residue of his estate by dividing it into four portions, one-fourth to be held invested for behoof of Miss Miller, one fourth for behoof of Mrs Webster, one-fourth for the children of Mrs Thomson, and one-fourth for her granddaughter Mrs Marjory Cunningham or Horne. The fourth falling to Mrs Thomson's children was to be dealt with in the manner provided as to them in the seventh purpose above quoted.

In contemplation of marriage between the truster's daughter Mrs Thomson and her husband, the truster had bound himself by bond and discharge (referred to in the seventh purpose quoted above) entered into between him and Mrs Thomson, dated 1st June 1814, to pay the sum of £10,000 sterling to the trustees therein named, Mrs Thomson accepting this provision in full of legitim or other claims on her father's estate; of this £10,000 the annual income was to be paid to Mrs Thomson, and on her death the capital was to be paid to her children, in such shares as she might appoint, or failing such appointment equally. There were four children—a girl and three boys—born of the marriage, of whom the eldest was born on 19th September 1875, and the youngest on 22d July 1879.

It was estimated that the residue of Mr Miller's estate would amount to about £40,000 sterling, one-fourth of which, or £10,000 sterling, fell to Mrs Thomson's children in addition to the capital of the provision of £10,000 on the death of the mother and the further sum of £4000 provided for them under the trust-deed. They had also a contingent right to one-third of the sum of £26,000 provided in all to their aunt Miss Miller under the deed.

In December 1883 this petition was presented by Mrs Thomson and by her husband Alexander Thomson for himself and as administrator-in-law for his children, praying the Court to authorise and direct Mr Miller's trustees to pay to the petitioner for his children's behoof so much of the "free annual income and produce of the sums of money and share of residue provided for the said children by the said John Miller in his said trust-disposition and settlement as your Lordships may deem sufficient for their proper maintenance and education, having regard to their position and prospects in life; or, alternatively, to authorise and grant warrant to the" trustees "to advance and pay to the petitioner the said Alexander Thomson, as tutor and administrator-in-law, and for behoof foresaid, the following sums out of the capital of the said sums and share of residue, viz.," the sum of £60 payable at two terms of the year for each of the three elder children, and the sum of £40 at two terms for the youngest child, these payments to be continued for such time as the Court should determine, "and to direct the expense of this application and all relative procedure to be charged against the shares of the trust estate of the said John Miller provided to the said" children of Mrs Thomson.

The petitioner averred that the petitioner the said Alexander Thomson had not been successful in business, and had sustained severe losses in farming operations during the past few years, and his affairs had consequently become embarrassed. The only income on which he and his wife could rely for their own maintenance and the maintenance and education of their children was that derived from the interest on the said sum of £10,000 payable by the said John Miller under the bond and discharge above referred to. The average income to be derived from this source, after deduction of the expenses of the trust, could not, it was believed (looking to the rate of interest on first class landed securities) exceed £350 per annum or thereby. That sum, it was submitted, was insufficient to enable the petitioners, the said Alexander Thomson and his wife, both to maintain themselves and to maintain and educate their said children in a manner suited to their position and prospects in life. [*After stating the nature of the children's expectations under their grandfather's settlement as above explained*].—In consequence of the direction in Mr Miller's trust-disposition and settlement to accumulate and invest the annual income of the sums provided to the said children, Mr Miller's trustees felt unable, without judicial authority, to apply any portion of the annual income to the maintenance and education of the said children, and as the result would be injurious to the interests and prospects of the said children, the petitioner the said Alexander Thomson had felt it incumbent on him to present this application.

By The Trusts (Scotland) Act 1867 (30 and 31 Vict. cap. 97), section 7, it is enacted—"The Court may from time to time, under such conditions as they see fit, authorise trustees to advance any part of the capital of a fund destined either absolutely or contingently to minor descendants of the truster, being beneficiaries, having a vested interest in such fund, if it shall appear that the income of the fund is insufficient or not applicable to, and that such advance is necessary for, the maintenance or education of such beneficiaries, or any of them, and that it is not expressly prohibited by the trust-deed, and that the rights of parties, other than the heirs or representatives of such minor beneficiaries, shall not be thereby prejudiced."

If it was considered inconsistent with the directions contained in the foresaid trust-disposition and settlement to authorise Mr Miller's trustees to pay a proportion of the annual income of the shares provided to the said children under the said deed, the petitioner submitted that authority should be given to the trustees to make, in virtue of the powers conferred upon the Court by the aforesaid Trusts (Scotland) Act 1867, to or for behoof of the children as a provision for their suitable maintenance and education, viz., the payments out of capital alternatively prayed for in the petition. As the accumulated interest in the latter case would fall into capital, these payments would not diminish the amount of residue as it at present stood.

Answers were lodged by the trustees, who maintained they were not entitled to make the payments asked in the prayer of the petition without judicial authority, and further pleaded—"(2) The payments asked by the petitioners are, the respondents submit, expressly prohibited by the said trust-deed, to which reference is hereby made. (3) The payments craved in the prayer of

the petition being expressly prohibited by the trust-deed, are not such as can be authorised under section 7 of the said Trusts (Scotland) Act 1867."

The petitioner argued—(1) At common law the trustees were bound to pay him the sum necessary for the maintenance and education of the children out of the income—*Mackintosh* v. *Wood*, July 5, 1872, 10 Macph. 933. (2) If, however, such was considered inconsistent with the truster's direction in the trust-deed, then the trustees were bound, under sec. 7 of the Trusts Act 1867, to make such payments out of the capital of the fund—*Pattison and Others, Petitioners*, Feb. 19, 1870, 8 Macph. 575.

The respondents replied—(1) The truster had the whole position of affairs in his contemplation when he executed the deed. It was too soon (within six months of the truster's death) to come and ask the Court to order to be done something which he had not provided for in that deed. (2) The 7th clause of the Act only contemplated such advances as were here craved where they are "not expressly prohibited by the trust-deed." The prohibition was clearly by implication made by the trust-deed.

At advising—

Lord Young—We do not think it necessary to call for further argument here. I think that there is an express prohibition in this trust-deed. Express words of prohibition are not necessary. An express direction to do something else inconsistent is just the same as an express prohibition against doing the thing that is in question. Here the truster, who died within the last six months, has directed his trustees to accumulate the income of £4000 (and the residue is in the same position) till his grandchildren attained majority, and then to divide the capital amongst each of the children in equal shares. That is an express direction, and is necessarily an express direction not to do anything else. But then the truster authorises his trustees under certain circumstances to act otherwise, and this is very significant. If the children lose their father, and their mother is alive, the trustees are directed to pay to her so much of the income as is necessary for the maintenance of the children until they attain majority, or in the event of her death they are authorised to expend it for behoof of the children according as they may think proper. But this direction is expressly confined to the case of the father's death, and that is the same thing as expressly prohibiting it so long as he lives.

But further, even if there had been no express prohibition here, I am of opinion that this Court ought not in the circumstances, assuming they have been proved, to interfere. The testator had manifestly in his contemplation at the date of the deed the position of the grandchildren, and the failure in business of their father, and he directed that no more than the income of £10,000 of the marriage fund should go to them, that of the £4000 being accumulated till their majority. He was under no obligation to give anything at all. But within six months of his death, and while the eldest child is only eight years of age and the youngest four—in infancy—to give away to the father what the truster anxiously put out of his power is in my opinion a proposal that cannot be entertained; therefore, on the grounds that it is not within the statute—the proposal being that we should do something contrary to the express direction of the truster's deed, and that the Court would not be fairly and reasonably exercising its power, assuming that it has the power—I am for refusing the petition.

Lord Craighill—I am of the same opinion. The circumstances now existing are the same as those with reference to which the testator made his will, and yet the Court are here asked, within six months of his death, to make what in effect would be a new will for him. We are asked to allow a certain portion of the income of the estate to be applied to the maintenance and education of these grandchildren, but as the effect of that would be to over-ride the express directions of the testator with regard to the application of the income, we are asked alternatively to allow a certain portion of the capital to be applied in the same way. Now, I agree with Lord Young in his construction of the Act of Parliament, and I think that to grant even this alternative prayer would be to do what is expressly prohibited in the deed. But without going on that ground, and holding that what is here proposed is strictly a thing expressly prohibited by the trust-deed in the sense of the statute, I think that we should be over-riding the obvious intention of the testator in granting this petition. And over and above that, I do not see how it is possible for the Court to say that this will does not provide all that in the circumstances can reasonably be required for these grandchildren from their grandfather. We are here asked to do something which the grandfather himself did not provide for being done. He knew the whole circumstances, and thought that the income of the £10,000 alone would be sufficient for all the exigencies of the case, yet six months after his death we are asked to alter his whole arrangements. This is a proposal of a kind which, so far as I am aware, is entirely novel. In all the cases that have occurred the pretext has always been that if the testator had known that which had subsequently come to pass, and which the Court had been made to know, he would presumably have made his will differently, and in the way in which it is proposed the Court should make it for him. But such a pretext can have no application to the case here, where the circumstances have in no way changed, and therefore I am of opinion that this petition should be refused.

Lord Rutherfurd Clark—On the question, arising on the construction of the statute whether we have power to deal with the capital of this provision, I should prefer to reserve my opinion, but assuming that we have the power, and that it is within our discretion to authorise an interference with the capital, I am very clearly of opinion that we should not exercise that discretion by granting the prayer of the petition. I think that the petition has been presented much too soon after the testator's death. Whether in the event of a change of circumstances the petitioners might not come back in a more favourable position I do not know. At present I think we have no alternative but to refuse the petition both as regards the capital and the income of the estate.

The LORD JUSTICE-CLERK was absent.

The Court refused the petition.

Counsel for Petitioners—Mackintosh—Pearson. Agents—Morton, Neilson, & Smart, W.S.
Counsel for Respondents—Jameson. Agents—Neilson & Bell, W.S.

Saturday December 22.

SECOND DIVISION.

[Lord Lee, Ordinary.

PATERSON *v.* WILSON.

Loan — Acknowledgment of Debt—I O U — Proof —Presumption.

A person signed and delivered to another two I O U's. In a subsequent action for the amount contained in them, he alleged that they were truly granted as receipts for repayment of money which had been previously advanced by his brother to the pursuer. *Held*, after a proof *prout de jure*, that he had failed—the *onus* of proof being upon him—to establish his averment, and decree pronounced against him for the amount of the I O U's.

Process — Expenses — Decree in Name of Agent-Disburser.

The pursuer of an action having obtained decree and been found entitled to expenses, the defender objected to decree for these expenses going out in the name of the agent-disburser, on the ground that in another litigation in which the pursuer was truly though not nominally the party interested, and which had been decided some time previously, and the subject-matter of which was different, he had obtained a decree for expenses which he desired to set off against the pursuer's claim. The Court *repelled* the objection, and allowed decree to go out in name of the agent-disburser.

Thomas George Paterson raised this action against Thomas Wilson for payment of two sums of £20 and £30 which he alleged to have been lent to him on 4th October and 4th November 1878, and for which defender had granted I O U's or acknowledgments of these dates. The defender stated that the pursuer had obtained advances from his (defender's) brother D. H. Wilson, and that he had repaid them on the dates mentioned, and that the documents founded on were truly receipts for these sums.

LORD ADAM, Ordinary, allowed a proof. The import of the evidence led fully appears from the opinion of the Lord Ordinary.

The Lord Ordinary (LEE) found "that the I O U's libelled were holograph of the defender, and were granted by him to the pursuer of the dates they respectively bear, repels the defences, and decerns against the defender in terms of the conclusions of the summons."

"*Opinion.*—This action concludes against the defender for payment of two sums of £20 and £30, and is laid upon two I O U's dated respectivly 4th October and 4th November 1878, and alleged to have been granted by the defender to the pursuer of these dates.

"The pursuer's allegation is denied; and it is alleged by the defender that the only sums of £20 and £30 which he received from the pursuer at that time were received by him as cashier for his brother David Hay Wilson, S.S.C., in repayment of two previous advances by the latter to the pursuer of these amounts.

"Lord Adam allowed a proof; and the proof has been taken before me. The parole evidence, in my opinion, is not satisfactory on either side. On the one hand, if the I O U's libelled were taken at the time as a record of the transaction, the pursuer appears to have made, or suffered to be made, in his books a most unfortunate mistake. For the first sum was originally entered by his brother as a loan to D. H. Wilson, and the second sum was originally entered as a loan to the firm of D. H. & T. Wilson. I cannot say that the correction of this mistake is satisfactorily cleared up. On the other hand, if the I O U's were intended to represent (as alleged by the defender) mere receipts for sums got in repayment of previous loans, it is remarkable that each sum should be entered in the books of the firm of D. H. & T. Wilson as received from the pursuer in loan and that the defender and his brother should only be able to represent them now as not received in loan by going into an alleged adjustment of accounts upon which no final settlement and discharge has taken place.

"The first question between the defender and the pursuer is, whether these I O U's were written by the defender of the dates they bear, and were delivered to the pursuer to be held as his writs? If so, each of them is an acknowledgment of debt instructing a loan, and constituting a good ground of action. I did not understand this to be disputed. At all events, I hold it to be well settled (*per* Lord President, *Haldane* v. *Speirs*, 10 Macph. 541). Now upon this question of fact I think that the evidence is clear. It shows that whatever may be said now about the money having been paid over by the defender to his brother D. H. Wilson, and as to D. H. Wilson being the true borrower, it was the defender who received the money and who granted the documents of debt. I think that these documents must be regarded as records of the transactions. I think that they were given as such at the time, and that to allow the defender—a man of business—to represent them now as recording transactions in which he had no concern, excepting as a mere hand, is inadmissible.

"But a second question is raised upon the proof which has been adduced, viz., whether these documents of debt, though bearing to instruct loans, did not truly represent payments of money in extinction of debt? I must assume that proof on the subject is competent, for proof has been allowed. But the *onus* here is upon the defender (*Ross* v. *Fiddler*, Nov. 24, 1809), and I think that he has failed to prove his averment. The averment is not reconcileable with the evidence. Indeed, both the defender and his brother practically admit that the money was at the time received in loan, and that it is only by a subsequent statement of accounts that they are able to represent the sum as payments to account.

"A third point is raised by the defender, viz., that the pursuer in May 1879 adjusted an account with Mr D. H. Wilson, in which he