Christina Fairbairn was the sole witness who deponed to certain familiarities relied on by the pursuer, and she was contradicted on all sides.

Counsel for the pursuer opposed the motion.

At advising—

Lord Justice-Clerk — The proof was adjourned from July to October, when three months after Christina Fairbairn had been examined it was proposed to challenge the veracity of her testimony on the ground that both before and after her examination she had made statements inconsistent with what she had said in her examination. I think the course which the Lord Ordinary took was the right one. With regard to statements made by the witness after her examination, I must say I know no precedent for holding her recal competent. With regard to statements made by her before her examination, if distinct and specific, I think her recal would probably be competent under the provisions of the Evidence Act. But in my opinion the allegations contained in the motions before us are not capable of proof. They are not sufficiently specific as regards the time and place, and the precise words said to have been used by her. It is true that it may be said that there is a certain specification in the words "a day or two before," but then the motion is lacking further in place and detail of words. I am unwilling, like the Lord Ordinary, after three months had elapsed, and the witness had been examined, to open up her evidence on such meagre statements as were contained in the motion. Therefore on the whole matter, and without deciding that it would be incompetent to allow parties to make the statements more specific if we thought necessary for the justice of the cause, I am of opinion that as the case stands we ought not to sanction the additional inquiry.

I have thought it right to indicate my opinion on this question as it was fully argued before us, although it is not necessary for the decision of this case in the view I take of it.

Lord Craighill—It is obvious that a distinction must be taken in the two motions relating to the additional evidence proposed to be taken in virtue of the 4th section of the Evidence Act. The first relates to things which were said by Christina Fairbairn after she had been examined as a witness, and the second to things said by her prior to her examination. Now, although it is not necessary for the decision of the case, I may say that in my opinion the matter of the first motion is not covered by the section of the Act as I understand it, and I should for my own part disallow such a motion. As regards the second motion, the matter is different, though I may say that I could not have allowed it without a more precise specification of the things which are to be the subject of the examination.

Lord Rutherfurd Clark—There is here a motion made on the part of the defender to recal Christina Fairbairn for further examination, and it may be divided into two parts—first, to recal her in order to examine her as to statements made by her before her examination as a witness; second, to recal and examine her with respect to statements made by her after she had been examined as a witness. The motion, as I understand it, is made under the Evidence Act of 1852. Now, I am clearly of opinion that the Act gives no warrant whatever for the motion to examine the witness as to statements made by her after being examined as a witness. The purpose of the Act was, shortly stated, to enlarge the subject-matter of cross-examination, but I do not think the Act intended for that could be further extended or applied to statements made after cross-examination. The other part of the motion is clearly within the Act, and so far as I can judge is sufficiently precise and detailed to allow us to grant it, and I myself should have been inclined to allow the witness to be recalled and examined on that part of the motion.

The Court refused the motion, and after hearing counsel on the proof adhered to the judgment of the Lord Ordinary.

Counsel for Pursuer—Balfour, Q.C.—Jameson. Agents—Stuart & Stuart, W.S.

Counsel for Defender—Johnstone—Lorimer. Agents—Crombie, Bell, & Mathieson, W.S.

Saturday, February 26.

SECOND DIVISION.

WEBSTER AND OTHERS *v.* MILLER'S TRUSTEES.

Trust—Nobile Officium—*Trusts (Scotland) Act* 1867 (30 *and* 31 *Vict. cap.* 97), *secs.* 7 *and* 16.

Held that a petition presented to the Court in the exercise of its *nobile officium*, and alternatively under the seventh section of the Trusts (Scotland) Act 1867, was competently presented to the Inner House.

Trust—Nobile Officium—*Advances out of Income directed to be accumulated, and out of Capital.*

A truster in his trust-disposition and settlement directed his trustees to accumulate the income of certain funds for behoof of the children of a married daughter till they should severally reach majority, and then to pay over to each his or her share of the capital and of the accumulated income; and further, in the event of the death of the father, but in that event only, before all or any of the children should reach majority, the trustees were empowered to pay the mother, or to lay out at their discretion, such part of the income as they might consider right for the maintenance and education of the children. The trustee in his daughter's marriage-contract, had provided her in the income of a sum of £10,000. Four years after the truster's death the daughter's children, who were all in pupillarity, presented a petition in which they prayed the Court either to authorise subpayments to be made out of the income directed to be accumulated for behoof of the children as the Court might deem sufficient for the proper maintenance and education of the children; or to authorise, under the 7th sec. of the Trusts Act 1867, certain annual payments to be made out of the capital sum itself for the same purpose. The petition

stated that the only available income for support of the family was £380 per annum, and further set forth circumstances showing that such advances were specially required in the interests of the children. The trustees were desirous that the application be granted.

The Court *authorised* the advances craved to be made out of the income of the money and share of the residue provided to the children by the truster.

John Miller of Leithen died on 8th May 1883, survived by four daughters, of whom Mrs Webster, wife of John Webster, Esq., of the Inner Temple, was one. By the seventh purpose of his trust-disposition he directed his trustees to implement the obligation undertaken by him in a bond and discharge entered into in 1874 in contemplation of Mrs Webster's marriage (by which he bound himself to pay £10,000 to the trustees therein named, the annual income to be paid to Mrs Webster during her life, and the capital to her children on her death, which provision she accepted in full of legitim and other claims), and he further directed his trustees to hold and administer the sum of £4000 (made up of a freehold in Somerset worth £1500 and £2500 in money) "for the children of my said daughter Jessie Miller or Webster 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 their shares 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" 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 predeceasing 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 John Webster 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 Jessie Miller or Webster, or in the event of the death of the said Jessie Miller or Webster, whether before or after the death of the said John Webster, 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 John Webster."

By the thirteenth purpose the truster further directed a fourth of the residue of his estate to be held and administered for behoof of Mrs Webster's children in the same manner as the £4000 above mentioned, and he also, under the same conditions, made another contingent provision in favour of the children, but there was no other provision beyond the £10,000 in favour of Mrs Webster herself.

At the date of the truster's death there were three children of the marriage of Mr and Mrs Webster—a son, John Alexander, who was born on 23d November 1874, and two daughters, Mary Elise and Isobel Kennedy, born respectively on 9th December 1880 and 20th November 1881.

This petition was presented to the Second Division of the Court of Session by the children, together with John Webster, their father, and in it they prayed the Court to authorise Mr Miller's trustee to pay over to the petitioner John Webster, as administrator-in-law and for behoof of the other petitioners, the children, so much of the income of the sums of money and share of residue provided to the children by the trust-disposition and settlement as the Court might 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 John Webster, as administrator-in-law and for behoof foresaid, the following sums out of the capital of the said sums and share of residue, viz., £90 for behoof of John Alexander, £60 for behoof of Mary Elise, £50 for behoof of Isobel Kennedy, to be continued for four, five, and six years respectively, or for such other periods as the Court might appoint.

The alternative prayer was founded on the 7th section of the Trusts (Scotland) Act 1867 (30 and 31 Vict. cap. 97), which enacts—"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."

The petitioners stated that the whole income of Mr and Mrs Webster from every source did not exceed £380 per annum, which was insufficient to enable them to maintain themselves and to educate and maintain their children in a manner suited to their position and prospects in life; that John Alexander Webster, the eldest child, who was now twelve years of age, had received a good education, and the promise of a nomination to a naval cadetship, to secure which it was imperative that he must go up for competition in June 1887; that his outfit would cost £40, and the charge for board, &c., on the training-ship "Britannia," to which he was to go, would average £70 a-year, while other expenses would amount to £20; that the income of the parents would not enable them to afford these sums, and that unless the advances craved, or a part thereof, should be made, the benefit of the nomination would be lost; that the two daughters, particularly the elder, were in delicate health, and required the attendance of two nurses, Mrs Webster herself having become almost entirely blind; and further, that their education must now be provided for. They also stated that the accumu-

lations of income to which the children would be entitled on majority were estimated thus—for John Alexander, £1787; Mary Elise, £2784; Isobel Kennedy, £2965; and the total shares, including accumulations, to which they would be entitled, exclusive of their interest in the £10,000 liferented by Mrs Webster, were—for John Alexander, £5933; Mary Elise, £6931; Isobel Kennedy, £7112; further, that the children had a contingent right to one-third of £25,000 provided to their aunt Miss Miller under the settlement.

The trustees lodged answers, in which they stated that they "agree with the petitioners as to the reasonableness of the amounts of the proposed annual payments to the children, and they are further of opinion that it would be greatly for the benefit of the children themselves that the proposed payments should be made. Having regard, however, to the terms of the trust-deed, they are advised that they cannot make the proposed annual payments except under the authority of the Court, and in the interest of the beneficiaries they respectfully submit that it is desirable that such authority should be granted."

The petitioners argued—(1) This petition was competently presented in the Inner House, it being an appeal to the *nobile officium* of the Court. The 16th section of the Trusts Act, which provided that application under the Act should be brought in the first instance before the Lord Ordinary, did not apply. The Distribution of Business Act enumerated the petitions to be presented to the Lord Ordinary, but this class was not in the list—Mackay's Court of Session Practice, i. 218. (2) Looking to the facts disclosed in the petition, this was a case of such strong expediency and urgency, that the Court might grant the prayer for advances so far as they concerned the annual income of the capital of the estate—*Latta*, June 5, 1880, 7 R. 881. It was true that in the previous case which dealt with this question, with reference to the children of Mrs Thomson, another of Mr Miller's daughters, the Court had refused a similar application. But in that case all the Court refused to allow was that the capital should be tampered with. There too the trustees opposed the petition, while here they concurred in thinking it reasonable, only desiring the authority of the Court to the proposal—*Thomson, &c.* v. *Miller's Trustees*, December 22, 1883, 11 R. 401.

At advising—

Lord Justice-Clerk—I think we are all inclined to think this application a reasonable one. There is nothing to prevent our allowing the trustees to do what is proposed out of the income of the estate. As to the competency of the petition, I do not think we are prevented entertaining it.

Lord Young—I agree.

Lord Craighill—*Thomson's* case depended on the circumstances under which it was presented by the parties, and if the children were to come back, I am far from saying that they would not now obtain the authority of the Court for what they asked which was refused to them then.

Lord Rutherfurd Clark concurred.

The Court pronounced this interlocutor:—

"Authorise, direct, and appoint George Miller Cunningham and William Howat, as trustees acting under the trust-deed and settlement of the late John Miller of Leithen, to pay over to the petitioner John Webster, as administrator-in-law and for behoof of the petitioners John Alexander Webster, Mary Elise Webster, and Isobel Kennedy Webster, out of the free annual income and produce of the sums of money and share of residue provided to them by the said John Miller in his said trust-disposition and settlement, the following sums of money, viz., (1) the sum of £90 sterling for behoof of the said John Alexander Webster, payable in two equal portions at Whitsunday and Martinmas in each year, commencing the first payment thereof at Martinmas 1886, and continuing the same payment for the period of four years thereafter; (2) the sum of £60 sterling for behoof of the said Mary Elise Webster, payable in two equal portions at Whitsunday and Martinmas in each year, commencing the first payment thereof at Martinmas 1886, and continuing the said payment for the period of five years thereafter; and (3) the sum of £50 sterling for behoof of Isobel Kennedy Webster, payable in two equal portions at Whitsunday and Martinmas in each year, commencing the first payment thereof at Martinmas 1886, and continuing the said payment in each year for the period of six years thereafter."

Counsel for Petitioners—C. K. Mackenzie. Agents—John Clerk Brodie & Sons, W.S.

Counsel for Trustees — Jameson. Agent—R. C. Bell, W.S.

Saturday, February 26.

SECOND DIVISION.

[Sheriff of Lothians and Peebles.

M'GHIE AND OTHERS *v.* NORTH BRITISH RAILWAY COMPANY.

Reparation—Railway—Relevancy—Contributory Negligence.

An engine-driver who was leaning over the side of his engine to see if the brakes were working properly down an incline, was killed by his head coming in contact with the side of a bridge over the railway. In an action of damages for his death raised by his widow and children, they averred fault on the part of the railway company in having the bridge dangerously and unusually narrow. *Held* that there was no relevant allegation to support an issue of fault on the railway company's part, in respect the deceased was aware of the condition of the bridge when he projected his head from the engine.

This was an action of damages at common law, and alternatively under the Employers Liability Act 1880, against the North British Railway Company at the instance of the widow and children of Andrew M'Ghie, an engine-driver, who when driving an engine attached to a passenger train on the defenders' line between Edin-