15s. 8d., with interest thereon at 5 per cent., and decerned, finding the pursuers entitled to expenses in the inferior Court since 30th November 1905, and to two-thirds of the expenses in the superior Court.

Counsel for the Pursuers (Respondents)—Aitken, K.C.—F. C. Thomson. Agents—Boyd, Jameson, & Young, W.S.

Counsel for the Defenders (Appellants)—Dickson, K.C. — Horne. Agents — Beveridge, Sutherland, & Smith, S.S.C.

Tuesday, February 5.

FIRST DIVISION.

[Lord Salvesen, Ordinary.

TRAIN *v.* BUCHANAN'S TRUSTEES.

Succession—Trust—Discretion of Trustees—Direction to Pay "either the Whole or only a Portion of the Annual Revenue," subject to Discretion of Trustees—Scope and Exercise of Discretion.

A testator directed his trustees to set aside and hold a certain sum and to pay to a beneficiary during his lifetime "either the whole or only a portion of the annual revenue thereof, and that subject to such conditions and restrictions, all as my trustees in their sole and absolute discretion think fit;" and on the beneficiary's decease to pay the sum, "with any revenue accrued thereon that has not been paid" to the beneficiary, to the beneficiary's children; and failing such children, the sum "and accumulations of revenue, if any," were to fall into residue.

In an action against the trustees by an assignee of the beneficiary, in which he claimed certain accumulations of income on the ground that the beneficiary had right thereto, the trustees never having of set purpose decided what portion of the annual revenue the beneficiary was to receive and having paid him only trifling sums, *held* that the testator's intention was that any revenue not paid to the beneficiary should be accumulated; that the payment to the beneficiary was in the discretion of the trustees; that it was not necessary that the trustees should have decided of set purpose from year to year what portion of the annual revenue the beneficiary was to receive, provided they exercised the discretion and that reasonably; and that such reasonable discretion having been exercised, the action fell to be dismissed.

Circumstances in which held that the actings of trustees were a reasonable exercise of the discretion conferred on them.

On August 8, 1904, Isabella Train, residing in Eskbank, brought an action of reduction, count, reckoning, and payment against, *inter alios*, Alan Ernest Clapperton, writer, Glasgow, and others, the trustees and executors of Hugh Buchanan, sometime wine and spirit merchant, Dumbarton Road, Glasgow. Train was assignee, in respect of a bond and assignation in security for £650, of Andrew Buchanan, 65 Yorkhill Street, Glasgow, the next-of-kin and heir-at-law of the said Hugh Buchanan, his brother. She sought to reduce Hugh's trust-disposition, or alternatively to obtain a count, reckoning, and payment with regard to the provision therein in Andrew's favour, but on learning of a prior unrevoked will she dropped the reductive conclusion.

The provision in Hugh Buchanan's trust-disposition in favour of Andrew Buchanan was—"(*Third*) I direct my trustees to set aside and invest in their own names, as trustees, a sum of £5000, and to pay to my brother Andrew Buchanan, during his lifetime, either the whole or only a portion of the annual revenue thereof, and that subject to such conditions and restrictions, all as my trustees in their sole and absolute discretion think fit: And after the decease of my said brother I direct my trustees to hold and apply, pay and make over, said sum of £5000, with any revenue accrued thereon that has not been paid to my said brother, less the expenses of administering and dividing said funds, to or for behoof of the whole lawful children of my said brother equally among them: . . . And in the event of my said brother Andrew dying without leaving lawful issue who shall take a vested interest as aforesaid, said sum of £5000 and accumulations of revenue, if any, less expenses of administration as aforesaid, shall fall into and form part of the residue of my estate."

Hugh Buchanan, the testator, died on 25th June 1899, and his trustees had since paid to Andrew Buchanan certain small sums which together came to about £24.

The pursuer, *inter alia*, pleaded—"(6) The defenders not having exercised their discretion as to the amount of income to be paid, within a reasonable time, are barred from exercising it now to the prejudice of pursuer; *or* otherwise, the defenders are bound to exercise their discretion annually, and as they have not hitherto done so, the whole annual income of Andrew Buchanan's provision up to the present date is due to him or to pursuer as his assignee, and available for the payment of pursuer's claim."

The defenders, *inter alia*, pleaded—"(7) In any view any claim to the revenue of the said provision competent to the pursuer as assignee of the said Andrew Buchanan is subject to the discretionary powers conferred on the defenders by the testator."

The facts with regard to the defenders' administration of the trust estate are given in the opinion of the Lord Ordinary (SALVESEN), who on 19th January 1906 pronounced an interlocutor, *inter alia*, finding "that the pursuer is entitled to the whole free revenue under deduction only of the sum of £24 of the capital sum of £2865, 3s. 6d., being the amount available to meet the provision of £5000 in favour of Andrew Buchanan, and that from 25th June 1899 to 2nd June 1904," &c.

Opinion.—"In this action the pursuer, who is the assignee of Andrew Buchanan under a bond and assignation in security granted by him in her favour, sues the trustees acting under the trust-disposition and settlement of the late Hugh Buchanan, who died on 25th June 1899. The summons contains reductive conclusions which have now been abandoned, and the only conclusion insisted in is one of count and reckoning in respect of the income of a provision made by the testator in favour of his brother Andrew Buchanan of a sum of £5000. In a previous action, to which neither the pursuer nor her author was a party, the amount in the defenders' hands available to meet the provision of £5000 was found to be £2865, 3s. 6d., and the pursuer accepts this for the purposes of the action as accurate. She says, however, that the trustees have not accounted for any but a small part of the income due to Andrew Buchanan of his provision, and that as his assignee she is now entitled to have that income paid over to her. . . . [*His Lordship here dealt with certain objections to the accounts lodged by defenders.*]

"The result of sustaining the objections which I have held to be well founded will obviously be to increase the income which had accrued upon the share set apart for Andrew Buchanan by a relatively large amount, and this has a material bearing upon the next question which was argued, namely, whether the pursuer has a title to sue at all. The trustees' contention is based on the special terms of the third purpose of the trust-disposition and settlement, under which they are directed— . . . [*Quotes first clause of purpose supra*]. The defenders contended that under this clause they had the absolute right of paying Andrew Buchanan only such portion of the annual revenue as they may think fit, and that the sum of £24, which is all that they have in fact paid him over a period of five years, is all that he or his assignee is entitled to demand.

"I do not doubt that under this clause the trustees have very wide powers, but I think the plain intention of the testator was that these powers were conferred by him upon his trustees for the benefit of his brother Andrew Buchanan, and that it was the duty of the trustees year by year as revenue accrued to exercise their discretion in the way of limiting the amount of the annual revenue to be paid or the conditions under which they should pay it. I apprehend that under this clause they are not entitled after five years have elapsed to say that they have paid a sum of £24 only, and that they in their absolute discretion now choose to treat this as the whole amount which Andrew Buchanan is to receive at their hands for that period. The discretion which falls to be exercised is something different from caprice. It must be a judicial discretion, and it must be *bona fide* exercised in the presumed interests of the legatee. The testator when he conferred the powers was dealing with the income of a sum of £5000 which might be presumed to yield anything between £150 to £200 a year. It is obvious that he intended this income to be devoted to the maintenance of his brother, and there might be circumstances in which it would be for the brother's advantage that an annual payment of so considerable an amount should be restricted, but it could scarcely have entered his mind that the trustees would exercise the discretion which he conferred upon them by giving his brother a sum of only £5 a year. If the trustees had professed to exercise their discretion in such an outrageous fashion, I do not doubt that there would have been ways by which this exercise might have been controlled.

"To do them justice, however, I do not think the trustees until 2nd June 1904 ever considered that in making payments to Andrew Buchanan they were limiting him to these payments in terms of the clause above quoted. The defenders had a very difficult trust to administer. The principal asset of the testator was the goodwill and stock-in-trade of a public-house which he had tenanted, and which the trustees were unable to realise for some considerable time. They had accordingly to carry on the business, with the result that the second year of their trading resulted in a heavy loss. Until this asset was realised they could not say what the capital of the trust was likely to be. Scarcely had they completed the realisation by April 1901 when an action of count, reckoning, and payment was raised against them at the instance of the other legatees, which depended in Court until 29th November 1904, when decree of absolvitor was pronounced in their favour. The present action of reduction and accounting had in the meantime been raised. All this procedure more or less paralysed the administration of the trust, although it is difficult to understand why the trustees did not at an early period invest at least the greater part of the provision liferented by Andrew Buchanan in some permanent form of investment instead of being content with deposit-receipt interest at the rate of one or one and a-half per cent.

"This being the position of the trust, it is not surprising that when the trustees were asked for payment of his share of the income by Andrew Buchanan they were not in a position to deal with the matter except by making him small payments towards the relief of his immediate necessities. By their minute of 3rd November 1901 the trustees instructed their agent 'in respect of the necessitous circumstances of the legatee Andrew Buchanan to pay him the sum of £18 to account of his interest in the trust-estate.' The minute dated 18th April 1902 further records the following—'The agent explained that on Andrew Buchanan's arrival from abroad he had paid him £8 to account of revenue on the strength of Mr Buchanan's assertion that he was really destitute. The trustees approved.' The minute of 1st May 1902 contains the engrossment of a letter written by agents on behalf of Andrew Buchanan asking them to pay over to him the income

of a fund of about £3000 or so in their hands. They enumerate the reasons which made it impossible for them to accede to the request, and conclude their minute as follows—'The trustees could not tell what sum might ultimately be available out of revenue from which payment may be made at their discretion to Mr Andrew Buchanan, and that in the meantime they proposed making him an alimentary allowance of £1 a-month.' No such payment was ever made, but in the minute of 30th October 1903 the trustees record that they instructed the agent to make Andrew Buchanan a temporary allowance of £1 a-month proposed in the minute of 1st May 1902, provided he signs a minute of concurrence in and acceptance of the provisions in his brother's will. This minute has not been acted upon, nor has any payment been made under two subsequent resolutions of the trustees recorded in the minutes of 2nd June 1904 and 29th May 1905. In the former of these minutes the trustees resolved 'to pay Mr Andrew Buchanan the sum of £40 out of income for his alimentary use only, not affectable by his debts or deeds; and they further instructed the law-agents to raise an action of multiplepoinding to decide the rights of parties to that sum.' In the minute of 29th May 1905 the trustees record their opinion 'that they were not under any obligation to account to Mr Andrew Buchanan's creditors or assignees, and that to make payment, either directly or indirectly, to them would be actually to defeat the very object the testator had in view in framing as he did the terms of the bequest in favour of his brother.' They also resolved to cancel the previous resolutions regarding payments which had not been implemented, and in the meantime to pay Mr Andrew Buchanan the sum of 15s. per week as from the term of Whitsunday 1905 as a strictly alimentary allowance. The alimentary allowance in each of the latter cases amounted substantially to the whole income of the provision after making the deductions which the trustees considered they were entitled to make. In this action the pursuer has no interest to challenge the last resolution, and as regards that of 2nd June 1904 her interest must be very slight seeing that it only affects some two months of the period the income of which she claims.

"The trustees founded on the case of *White* (23 R. 836) as an authority in their favour. In my opinion it has no application. The question there related not to the income but to the capital of a share of residue which the trustees were empowered to withhold payment of even after the residuary legatee had attained the age of twenty-five, as they should from time to time determine. The residuary legatee died two years after he had attained the age of twenty-five without having claimed payment of his share, and it was held that, in a question with his representatives, the trustees were entitled to exercise their discretion to withhold payment of the capital. There was, however, a provision that the interest should meanwhile be paid. The case is therefore entirely different from the present, where the discretionary power relates to the income which ought to be paid year by year, and does not give any sanction to the notion that after the trustees have failed to account for the income and the liferenter has incurred debt on the faith of his right to the income, the trustees can defeat, for the benefit of the fiars, the rights of the liferenter and his assignees to receive any portion of the accrued income. Still less does it support the view that when payments to account of income have been made at a time when the rights of the beneficiary were still unascertained, and when the trustees were wholly ignorant of the amount which would be available under the bequest, such payments are to be treated as in exercise of the discretionary powers and as excluding the beneficiary's right to income that has since been ascertained to be available. The case of *Chambers* v. *Chambers' Trustees* (5 R. (H.L.) 151) does not advance the argument except that it supports the view that the trustees may exercise their discretion notwithstanding that the interests of the legatee's creditors have meanwhile emerged."

On 17th March 1906 the Lord Ordinary pronounced a further interlocutor finding the sum of available income due to the pursuer amounted to £246, and giving decree for that sum against the defenders as trustees and executors.

The defender Clapperton, as sole trustee, his co-trustees having resigned, reclaimed, and argued—The Lord Ordinary was wrong. The trustees had an absolute discretion to pay or not to pay, and when and how to pay. The gift here was one "subject to a power reserved to trustees to be exercised, paramount to the beneficiary, and in his despite"—*Chambers' Trustees* v. *Smith*, April 15, 1878, 5 R. (H.L.) 151, Lord Blackburn at p. 162, 15 S.L.R. 541. The discretion thus conferred could be exercised at any time. It was unnecessary, nay, even contrary to their power, that the trustees should annually or at any particular time consider the year's income and resolve how much was and how much was not to be paid, and record a minute to that effect. When they did not pay they were to be presumed, unless the contrary were proved, to be exercising their discretion—*White's Trustees* v. *White*, June 20, 1896, 23 R. 836, 33 S.L.R. 660. There was nothing to show that the trustees had not, hampered as they were by the nature of the trust estate and litigation, duly exercised their discretion and the beneficiary was in part himself to blame for not receiving more. It was only gross dereliction from duty or a misconception of it which would justify the interference of the Court—*Douglas* v. *Douglas's Trustees*, July 6, 1872, 10 Macph. 943, Lord Deas at p. 946, 9 S.L.R. 600. No distinction could be taken between the income of a year and the accumulations of income. The accumulations were available for the exercise of the trustees' discretion at any time when required—*Edwards* v. *Grove*, 2 De G. F. and J. 210, Lord Chan-

cellor (Campbell) at pp. 219 and 220. The effect of the Lord Ordinary's view was to make the beneficiary a liferenter, and because he refused to take part of the income to give him the whole of it.

Argued for the respondent—The Lord Ordinary was right. The gift here was of the whole annual income to the beneficiary. No doubt that gift was subject to a certain discretionary power to trustees, but the initial gift was of the whole annual income, and the testator's intention was that the beneficiary should in ordinary course have that income. It therefore vested in him unless something were done by the trustees to the contrary. The trustees had done nothing to the contrary; indeed, they had never attempted to exercise the discretion conferred upon them, and it was too late to do so now. The discretion given was a power which required to be exercised and could not be waived—*Weller* v. *Ker*, March 2, 1866, 4 Macph. (H.L.) 8, 1 S.L.R. 188. But if it were held competent for the trustees still to exercise the discretion, yet they could not resist the present claim. The gift was intended for the maintenance of the beneficiary, and he had received nothing, practically, for his maintenance. To a claim for maintenance the trustees could not merely table their discretion. The Court would if necessary intervene—*in re Sanderson's Trust* (1857), 3 K. & J. 497 at p. 507.

At advising—

LORD PRESIDENT—The late Mr Hugh Buchanan left a trust-disposition and settlement by which he conveyed his whole property to trustees, and the third purpose of his trust-settlement was conceived in the following terms:—"... [*quotes purpose supra*] . . ., and then there is a destination-over that if nobody takes it shall fall into the residue of estate.

Now the present action is an action of reduction, count, reckoning, and payment at the instance of Miss Isabella Train, who is assignee of the Andrew Buchanan mentioned in the passage I have just read, of his interest under the settlement. The action of reduction which seeks to set aside the will altogether on the averment that the testator was in a weak and facile condition and unable to make a will, is not now insisted in, but under the petitory conclusions the Lord Ordinary has given the pursuer decree for the sum of £246, which is the sum of interest on the £5000 in the hands of the trustees as ascertained by an accountant.

The way in which the Lord Ordinary has reached that conclusion is this. He reads the passage that I have already read as imposing upon the trustees the duty of considering from year to year what precise portion of the income Mr Andrew Buchanan was to get. He found that as a matter of fact the trustees, although they have made some small payments to Mr Andrew Buchanan, have not considered as of set purpose what proportion of the income he should get, and he therefore found that the trustees having failed to do that, the whole income really belongs to Mr Andrew Buchanan, that he is entitled to payment of it, and that accordingly it passes under his assignation to the present pursuer.

I am unable to take that view of the settlement. I think that one cannot read the settlement without seeing that it was the wish of the testator to leave it to the absolute discretion of the trustees what proportion of the income Andrew Buchanan was to get, and that is made I think abundantly clear by the fact that the testator himself provides for the destination of the portion of the income which is not paid over in any particular year to Andrew Buchanan, because he says that the fee is to be paid to the children with "any revenue accrued thereon which has not been paid to my said brother."

Now really that provision seems to me straight in the teeth of the result the Lord Ordinary has come to, and I cannot help thinking that in the judgment the Lord Ordinary is rather confusing two things. I am not doubting that the trustees are not entitled simply to button their pockets and say that they will not exercise any discretion whatever, and if they did take up that impossible attitude, certainly I think the Court would find a remedy by managing to give an order for the money, but the Court will never take upon themselves the exercise of a discretion which the testator particularly stipulates is to be exercised by trustees.

Now I agree also that the view of the testator was that Andrew Buchanan was to get something, because he says—"Either the whole or only a portion of the annual revenue thereof;" and I do not think it would be carrying out that direction if the trustees said—"Well, we will give you nothing." If the trustees had taken up any such attitude I think the Court would have interfered, but until the trustees take up that attitude then it seems to me that the matter must always be in the discretion of the trustees, and it is not for the Court to exercise that discretion for them.

The whole question, therefore, seems to me in this case to rest upon whether the trustees have really taken up an unreasonable attitude or not. I cannot find that the trustees took up an unreasonable attitude at all. On the contrary, I think they have been very long-suffering individuals. They were left with a property which was not an easy property to manage or realise, because the chief item of it was a going public-house. They tried carrying on the business for nearly two years while they were trying to sell. They then managed to sell, and accordingly it seems to me, as we see from the accounts, that it was really only after April 1901—the death took place in 1899—it was only after April 1901, when the public-house business was realised, that they began to be in a position to see how far they could set aside the £5000 and pay the legacies and so on. It became apparent that there was not going to be enough to pay everybody, and consequently all the legacies, including the £5000, would be diminished; but they paid some of the

legacies to a certain modified extent. No sooner had they begun to consider what they could do about the £5000 than they were at once met with a litigation in the shape of a count, reckoning, and payment. That count, reckoning, and payment was raised by some of the other beneficiaries, but it was promptly taken up by the said Andrew Buchanan. Now the trustees ran the gauntlet of that count, reckoning, and payment, and eventually emerged from it successfully. But no sooner was that done than another series of—I was going to say threatening—letters arrived from Mr Andrew Buchanan's agent, in which the idea was now tabled of reducing the settlement. Propositions were made to the trustees which really were tantamount to their giving up the settlement altogether and paying Mr Andrew Buchanan the whole income. All these propositions, I need scarcely say, the trustees were not in a position to meet. In fact, they would not have done their duty as trustees if they had met them, provided of course they honestly believed that the truster had been in his sound senses when he made the settlement.

The result of their saying that they would not accept these propositions was that the present action was launched at their heads; and without making a long story of it I think the result is that during all this time up to the present the trustees have been subjected to litigation, and it is only at the very end of the day that they know that the pursuer is now not any further insisting on the reductive conclusions. It is perfectly true that they have not during that time made any, what is called a regular, allowance to Mr Andrew Buchanan; but they have from time to time paid him small sums, and in particular on 30th October 1903 they "instructed the agent to make Andrew Buchanan a temporary allowance of £1 a month, proposed in the minute of 1st May 1902, provided he signs a minute of concurrence in and acceptance of the provisions in his brother's will." That was a perfectly right provision, because of course they were not going to pay money under the settlement to a man who at that time was going to reduce the settlement altogether. Therefore if Mr Andrew Buchanan did not get the alimentary allowance of £1 per month it was entirely his own fault. Now I take it that giving him an allowance of £1 a month would really have satisfied what the Lord Ordinary required when he said that they must do something.

The justice of the view of the testator is very strongly brought out by what has happened. The one thing which the testator did not want is what Mr Andrew Buchanan has done, namely, to assign, putting another in his shoes. If we were to give decree as the Lord Ordinary has done we would cut out the discretion of the trustees as to the amount, and also as to the condition regarding restriction to a temporary allowance. I am for recalling the interlocutor of the Lord Ordinary and assoilzieing the defenders.

In what I have said I am not at all proposing that the defenders should not at once, after having got rid of this action, apply their minds to the question of what in their discretion Mr Andrew Buchanan ought to get. That he ought to get something is perfectly clear; but I am not disposed to take the matter out of the hands in which the testator wished to put it.

LORD M'LAREN—I agree, and I only add that in the face of such a qualification as exists as to the payments to Andrew Buchanan, his assignee could have no such right as would prevent the trustees from dealing with the fund as they think proper in accordance with the will.

LORD KINNEAR—I also agree. I see no reason to doubt that the trustees have hitherto exercised an honest discretion. Whether they have done the utmost that could have been done for Mr Andrew Buchanan is not a question which we can consider, because the discretion is committed to them by the testator, and we are not called upon to review their decision in the exercise of it. I am very clearly of opinion with your Lordships that we cannot pronounce a decree which would determine the discretion of the trustees in the future, and the fund must be left in their hands to be administered according to the directions of the truster. I think the trustees have conducted the administration of the estate under difficulties owing partly to the position of the estate itself, and partly to the persistent litigation of the legatee or the assignee who brings the present action. I see no reason more than your Lordships for interfering with their conduct of the trust.

LORD PEARSON—On the questions of mere accounting I agree with your Lordships, and have nothing to add. On the main question in the case the Lord Ordinary has found the pursuer as the assignee of Andrew Buchanan entitled to the whole free revenue already produced by the sum now available to meet the provision of £5000, under deduction only of the sum of £24, 5s. already paid to Andrew Buchanan since his brother's death. The Lord Ordinary has arrived at this conclusion on the footing that Andrew Buchanan and the pursuer as his assignee have right to the whole net income accruing from year to year, except in so far as the trustees can be shown to have restricted his right to it during the currency of the year. I cannot so read the clause in the will, which remits to the sole and absolute discretion of his trustees the amount of the payment to be made to Andrew Buchanan out of the annual revenue of the fund. I agree that the trustees must not be governed by caprice, and that they must exercise the power in good faith in the presumed interest of the legatee. It is said that the trustees have paid him only £24, 5s. during the five years since the truster's death, and have in hand an accumulation of income of over £200; that the payments already made were expressly minuted by the trustees as payments to

account; and that as no express restriction was laid by the trustees upon the amount to be paid by him in any one year, they are bound now to pay over the whole accrued income to his assignee, and so the Lord Ordinary has decided. But I take it that the assignee has no higher right than Andrew Buchanan, and that he could not possibly make a good claim against the trustees for the whole annual income merely on the ground that a year had elapsed without any formal and definite restriction of the amount of income payable to him. I should say that the trustees are bound to consider the position from time to time—it may be at shorter or longer intervals than twelve months according to circumstances—and I am disposed to think that the only effect of the resolutions to make payments to account was to enable the trustees to retain their control over the accrued income as being within their sole and absolute discretion in terms of the third purpose. I hold that it is still within their discretion, and that for that very reason no decree for payment should be pronounced against the trustees. The circumstances as disclosed to us, and particularly the history of the various litigations, suggest to me anything but a capricious exercise of the trustees' powers, and it is at least possible to regard the proposed payment of £246, being the accrued income down to the date of the summons, as one of the things which the testator would have deprecated, and against which he desired to provide. It is no answer to say that it is to be paid not to him but to his assignee; for the clause, as I read it, and as might have been expected, is so expressed as to withhold from him the power of effectual anticipation.

The Court recalled the interlocutor reclaimed against, and assoilzied the defenders from the whole conclusions of the summons.

Counsel for the Defender and Reclaimer—Aitken, K.C.—C. H. Brown. Agent—F. J. Martin, W.S.

Counsel for the Pursuer and Respondent — Guthrie, K.C.—Macmillan. Agent — A. W. Gordon, Solicitor.

Friday, February 8.

SECOND DIVISION.

[Sheriff Court at Edinburgh.

GILL *v.* GILL.

Proof—Loan—Writ or Oath—Receipt Endorsed on Savings Bank Order.

A soldier brought an action against his mother for repayment of an alleged loan of £48, 11s. He produced in proof thereof an order written by him while in prison authorising the Savings Bank to pay the defender £47, 10s. Across the order was written a receipt, signed by the defender, for £48, 11s., which was the amount at the pursuer's credit in the bank with the interest accrued. The defender admitted receipt of the money, but under the qualification that it was in reality hers though it had been in bank in her son's name.

Held (1) that the order with endorsement was an acknowledgment of the receipt of the money by the defender; (2) that the onus therefore lay on her to prove, *scripto*, that she had got the money otherwise than as a loan; and (3) that as she had failed to do so the loan was instructed *scripto* by the said receipt and the pursuer was entitled to decree.

Haldane v. *Speirs*, March 7, 1872, 10 Macph. 537, 9 S.L.R. 317, *distinguished.*

Observed by the Lord Justice-Clerk and Lord Stormonth Darling that as it would have been incompetent for the defender to prove otherwise than by writ that the money which was deposited in her son's name belonged to her, the Sheriff-Substitute had rightly restricted the proof in the case to writ.

John Gill junior brought an action in the Sheriff Court at Edinburgh against his mother, Mrs Grace Greig or Gill, wife of and residing with John Gill, and against his father, the said John Gill, as her curator and administrator-in-law, in which he concluded (2) for payment of the sum of £48, 11s., alleged to have been received by his mother from him on loan.

The pursuer's averments, with the answers thereto, were—"(Cond. 2) The pursuer also arranged, prior to leaving for South Africa, that a sum of 3s. per day of his allowance from Government should be handed to the female defender in order that she might place same in bank on his behalf, which she undertook to do. In accordance with said arrangement there was paid by Government to the said defender the sum of 3s. per day from the said 5th April 1901 to 17th March 1902. The said defender deposited with the Union Place branch of the Edinburgh Savings Bank from time to time the said 3s. per day in the name of the pursuer. The statements in answer are denied. (*Ans.* 2) Denied. Pursuer's father was, when pursuer left for South Africa, in bad health and unable to work. Pursuer accordingly, as he was bound to do, made an allotment of his pay to support his father. Said money was uplifted periodically and applied for the purpose for which it was intended. (Cond. 3) The pursuer, while serving with his regiment in South Africa, was, along with twenty-four others, convicted of insubordination and sentenced to a period of imprisonment. On or about 26th December 1902, while the pursuer was serving said period of imprisonment in the military prison at Woking, the said female defender wrote to him, enclosing a blank cheque on the said branch bank, with a request to him to sign and return the same to her so that she might uplift the sum then standing at his credit, as she desired a loan of it. Said cheque was handed to the pursuer by the governor of said prison, and the same was returned to the said defender