anomalous character, the proof thereof ought to be restricted to proof by writ or oath of the defender."

The following authorities were referred to at the discussion of the case in the procedure roll, in addition to those quoted in the opinion of the Lord Ordinary—*Rollo* v. *Magistrates of Perth*, March 13, 1902, 10 S.L.T. 25; *Duke* v. *More*, December 8, 1903, 6 F. 190, 41 S.L.R. 156; *Stewart & Craig* v. *Phillips*, February 2, 1882, 9 R. 501, 19 S.L.R. 376; *Garden* v. *Earl of Aberdeen*, June 24, 1893, 20 R. 896, 30 S.L.R. 780; *Edmondstone* v. *Edmondstone*, June 7, 1861, 23 D. 995; *Forbes* v. *Caird*, July 20, 1877, 4 R. 1141, 14 S.L.R. 672; *Reid* v. *Reid Brothers*, June 8, 1887, 14 R. 789, 24 S.L.R. 560; *Müller & Company* v. *Weber & Schaer*, January 29, 1901, 3 F. 401, 38 S.L.R. 305; *M'Murrich's Trustees* v. *M'Murrich's Trustees*, November 18, 1903, 6 F. 121, 41 S.L.R. 81; *Mungall* v. *Bowhill Coal Company*, May 21, 1900, 12 S.L.T. 80; *Thomson* v. *Fraser*, October 30, 1868, 7 Macph. 39; *Allison* v. *Allison's Trustees*, February 2, 1904, 6 F. 496, 41 S.L.R. 501; *Jacobs* v. *M'Millan*, November 8, 1899, 2 F. 79, 37 S.L.R. 58; *Bell* v. *Bell*, July 9, 1841, 3 D. 1201; Begg on Law Agents (2nd ed.), p. 85.

LORD ARDWALL—This is an action brought for the purpose of enforcing a contract alleged to have been entered into by the defender with the pursuer in connection with a proposed feuing transaction of land belonging to the pursuer. It is alleged in Cond. 3 that the defender agreed to pay the whole expenses incurred both to the surveyors and to the pursuer's law agents in connection with the granting of the feu, and that whether the said feu was ever completed or not, and the question discussed in the procedure roll was whether the pursuer was entitled to a proof *prout de jure* or whether the proof should be restricted to writ or oath.

I am of opinion that the proof should be restricted to writ or oath and that upon two grounds—(1) the obligation said to have been undertaken is really an obligation of relief, and it will be observed that the summons concludes that the defender should be decerned and ordained to free and relieve the pursuer of an account incurred by him to his law agents. Now, all actions of relief being founded upon a contract of a special nature have for long been held to be incapable of being proved by mere parole testimony—Erskine, iv, 2, 20; *Reid*, 1758, M. 12,344, and *Clark*, 9th March 1819, *aff.* 6 Paton 422; Dickson on Evidence, par. 606.

It has been held that obligations of relief can be proved by parole if they are part of a contract which itself is provable by parole, but in the present case the contract with which it was connected was a contract relating to heritage. Accordingly I am of opinion that the general rule must be applied that obligations of relief must be proved by writ or oath.

The second ground on which I think the pursuer must be refused a proof *prout de jure* is that the contract is an innominate one of a peculiar and unusual nature. The general rule is in such cases that if an inchoate transaction is not proceeded with, each party pays his own expenses, even although it were agreed that if the transaction went on the whole expenses should be borne by one of them. The dictum of Lord Rutherford in the case of *Taylor* v. *Forbes*, January 13, 1853, 24 D. 19, I think is still entitled to respect although it was not given effect to in the case of *Moscrip*, October 23, 1880, 8 R. 36, 18 S.L.R. 12, but that was a case very different in its circumstances. I think it may truly be said of the present alleged contract that it is one of such an unusual nature as that it should only be held to be provable by writ or oath. In negotiations about such a matter there might very well be misunderstandings, and the turn of an expression or interjection of a phrase would make all the difference. The defender admits here that he agreed to pay the whole expenses attending the contract of feu on the footing, of course, that it went on, but I do not think he should be held as committed to having agreed and promised to pay such expenses whether the business went on or not except upon proof by writing or his oath.

I may add that I do not hold that this was a contract with regard to heritage and therefore requiring to be constituted by writing on that account.

Counsel for the Pursuer—Craigie, K.C.—Dunbar. Agents—T. & R. B. Ranken, W.S.

Counsel for the Defender—Hunter, K.C.—Wilton. Agent—Alexander Bowie, S.S.C.

Tuesday, October 30.

SECOND DIVISION.

DAVIDSON'S TRUSTEES *v.* DAVIDSON.

Parent and Child—Aliment—Trust-Disposition—Duty of Trustees—"Debt"—Testator's Obligation to Aliment his Lunatic Legitimate Son.

A testator, who had a lunatic legitimate son in an asylum, conveyed his whole estate to trustees, and, *inter alia*, directed them to pay the income of his estate to his wife during her life, and on her death to pay certain specific legacies to B and C, his sons, and D, E, and F, his daughters, the said daughters being also his residuary legatees, "and with reference to my son" A, "presently a patient in the Royal Lunatic Asylum, Montrose, I hereby declare that my said wife, and after her death my said children," B, C, D, E, and F, "equally among them, shall be liable, as a condition of their receiving the provisions hereby made to them respectively, for his comfortable maintenance and support in a suitable asylum or other suitable institution or private home."

After the widow's death, *held*, in a special case, that the maintenance of

A was not a burden on the trust estate; that the trustees before distributing the balance of the trust estate were not bound to retain a sufficient sum to provide for A's future maintenance; and that B, C, D, and E were entitled to receive payment under the said obligation but without giving any security for the fulfilment thereof.

George Buckham Davidson, Upper Pitforthie, Arbuthnott, Kincardineshire, died on 29th December 1895, survived by his widow and by five sons and three daughters. One of his sons, Patrick Liddle Davidson, was a lunatic, an inmate of the Royal Lunatic Asylum, Montrose.

By his trust-disposition and deed of settlement Davidson conveyed to his trustees his whole estate in trust for the ends, uses, and purposes, and with the powers thereinafter mentioned. The purposes of the trust were as follows:—After providing for payment of his debts, for the transfer of his household furniture to his widow, and for the carrying on after his decease of the farm of which he might be tenant at the time of his death, the testator, in the fourth place, directed his trustees, on the expiry or sooner termination of the lease of said farm, to realise and convert into money the whole crops, stocking, etc., and having invested the sum realised therefrom, to pay the free annual proceeds thereof and of the residue and remainder of his estate to his widow during all the days of her life as an alimentary allowance. In the fifth place, the testator directed his trustees, as soon as convenient after the death of his widow, to realise and convert into money the whole of his means and estate under their charge, and to pay out of the first and readiest of the proceeds the following legacies to his children, viz.—To his son Robert Hebden Davidson £100, which, with the sums he had already received, the testator declared would make up a larger sum than his legal share of the estate; to his son James Cathie Scarth Davidson £800; to his son Andrew Davidson £800; to his daughter Jane Davidson £800; to his daughter Roberta Davidson £800; and to his daughter Annie Davidson (Mrs Annie Maitland) £800. By the sixth purpose of the said trust-disposition and settlement the testator directed his trustees, in the event of there being any residue of his means and estate remaining after fulfilling the foregoing purposes, to pay and divide the same to and among his said daughters equally, share and share alike. By a later clause the testator declared that the acceptance of the foresaid provisions in favour of his widow and children should be deemed and taken to be in satisfaction to them of all claims legally competent to them upon his decease.

The said sixth purpose also contained a clause in the following terms:—"With reference to my son Patrick Liddle Davidson, presently a patient in the Royal Lunatic Asylum, Montrose, I hereby declare that my said wife, and after her death my said children, James Cathie Scarth Davidson, Andrew Davidson, Jane Davidson, Roberta Davidson, and Annie Davidson, equally among them, shall be liable as a condition of their receiving the provisions hereby made to them respectively, for his comfortable maintenance and support in a suitable asylum or other suitable institution or private home."

Questions having arisen, on the death of the widow on 1st May 1900, in regard to the obligation to maintain the lunatic son and the disposal of the balance remaining of the estate, a special case was presented. To it the parties were (1) David Forbes and Arthur Wellesley Kinnear, the surviving trustees, original and assumed, acting under the testator's trust-disposition and settlement, first parties; (2) the said James Cathie Scarth Davidson, Andrew Buckham Davidson, Jane Davidson, Roberta Davidson, and Mrs Annie Davidson or Maitland, with consent of her husband, second parties. The second parties were the beneficiaries under the settlement other than the son, Robert Hebden Davidson, who had received the small legacy of £100.

The total moveable estate left by the testator amounted in value to £4003, 5s. 7d. At the date of the testator's death his son Patrick, born on 2nd March 1859, continued insane, and when the special case was presented he was still confined in the Montrose Royal Lunatic Asylum. He had been an inmate of that institution for over twenty years, and there was no prospect of his recovery. The average cost of his maintenance there was £33 per annum, and it was agreed that the Royal Lunatic Asylum was a "suitable asylum" in the sense contemplated by the testator, and that the sum of £33 was a proper sum to expend for his comfortable maintenance and support. The trustees had regularly paid the cost of his maintenance out of the income of the trust-estate. The balance of income had in terms of the testator's directions either been paid to the widow up to the date of her death, or accounted for to her executrix. Subsequent to that date the trustees had realised the assets of the estate and converted them into money. After deducting expenses of management, etc., the balance of free estate available for distribution, including advances made to the legatees, was £3670, 12s. 8d., which was insufficient to meet the legacies in full. The parties were agreed that the share of the estate which effeired to the son Patrick in name of legitim was £150 or thereby. The trustees had since the date of death of the testator expended on his maintenance sums amounting, *in cumulo*, to the sum of £332, 17s. 2d. The said Patrick Liddle Davidson was possessed of no means.

The second parties maintained that they were now entitled to receive payment of the legacies bequeathed to them under the settlement on granting to the first parties their obligation to make provision for the comfortable maintenance of the said Patrick Liddle Davidson. They further maintained that they were under no obligation to purchase an annuity or otherwise grant security for the fulfilment of their said obligation. On the other hand, the first parties, as the trustees under the settle-

ment, maintained that the maintenance and support of the said Patrick Liddle Davidson was and continued to be a debt chargeable on the estate administered by them; that they were bound to make due provision for his future maintenance and support by retaining in their hands such a sum as might be deemed by them reasonably sufficient for this purpose; or, alternatively, that the second parties, as a condition of the first parties paying over to them the balance of the estate at present in their hands, were bound to secure the said Patrick Liddle Davidson in such an allowance by the purchase of an annuity or otherwise to the satisfaction of the first parties.

The questions of law for the opinion and judgment of the Court were—"(1) Did the maintenance of the said Patrick Liddle Davidson become, as from and after the date of death of the testator, a burden on the estate administered by the first parties? (2) Are the first parties, before distributing the said balance of the trust estate, bound to retain in their hands such a sum as will be sufficient to provide for the future maintenance and support of the said Patrick Liddle Davidson during all the days of his life? Or (3) are the second parties entitled to receive payment of the said balance of the estate in the hands of the first parties only on condition of providing security for the maintenance and support of the said Patrick Liddle Davidson by the purchase of an annuity or otherwise, to the satisfaction of the first parties? Or (4) are the second parties entitled to receive payment of the said balance under the said obligation without giving any security for the fulfilment thereof?"

Argued for the first parties—There was an obligation on the deceased to aliment his lunatic child, and this obligation transmitted against his trustees and executors—Ersk. i, 6, 58, Lord Ivory's note, referred to by Lord Stormonth Darling in *Anderson* v. *Grant* (*infra*); Fraser on Parent and Child, 2nd ed. p. 107; *Thomson* v. *Wilkie*, July 23, 1678, M. 419. They admitted that it was only a debt if there was free estate after paying ordinary debts of the testator, and that the lunatic being legitimate was not in so favourable a position as an illegitimate child, but nevertheless his aliment was a debt. Thus a widow's claim for aliment had been held to be that of a creditor and payable even out of capital—*Anderson* v. *Grant*, January 28, 1899, 1 F. 484, 36 S.L.R. 369—and children had been held entitled where legitim failed to the expense of their upbringing out of their father's estate—*Urquhart's Executors* v. *Abbott*, July 12, 1899, 1 F. 1149, 36 S.L.R. 896. The indigence or otherwise of the beneficiaries who took the estate did not affect the question. They only took the estate subject to the debts of the testator being discharged. Thus the obligation to provide for a posthumous child was a debt on the estate which executors were bound to meet—*Spalding* v. *Spalding's Trustees*, December 18, 1874, 2 R. 237, 12 S.L.R. 169. The trustees as executors and intromitters with the estate would be personally liable if they did not retain sufficient to satisfy the debt—*Heritable Securities Investment Association, Limited* v. *Miller's Trustees*, December 17, 1892, 20 R. 675, 30 S.L.R. 354. If the trustees parted with the estate and the lunatic came on the rates they would become personally liable to the parish council—*Parish Council of Leslie* v. *Gibson's Trustees*, February 23, 1899, 1 F. 601, 36 S.L.R. 426. The case of *Mackintosh* v. *Taylor*, November 5, 1868, 7 Macph. 67, 6 S.L.R. 68, was inconsistent with other authorities; in any case the rubric in it was wrong, for the assumption of the decision was that the heir was not *lucratus*. The argument for the second parties was inconsistent with the fact that actions had been allowed against mere official holders of estates in the following cases—*Blake* v. *Bates*, December 19, 1840, 3 D. 317; *Spalding's Trustees* (*supra*); *Anderson* v. *Grant* (*supra*). Lord Kyllachy asked for a reference to *Beith* v. *Mackenzie*, November 30, 1875, 3 R. 185, 13 S.L.R. 113.

Argued for the second parties—The obligation to aliment a legitimate child was in no proper sense a debt on the father when alive nor on his estate when deceased; its nature appeared in the opinion of Lord President (Inglis) in *Reid* v. *Moir*, July 13, 1866, 4 Macph. 1060, at p. 1063, 6 S.L.R. 199. The obligation ceased at the father's death—*Mackintosh* v. *Taylor* (*cit. supra*); it was not a burden on his estate, just as the maintenance of a widow was not a burden on her husband's estate — *Howard's Executor* v. *Howard's Curator Bonis*, May 25, 1894, 21 R. 787, 31 S.L.R. 661; but the child had a personal claim on equitable grounds, originally only against the heir, and then extended to a universal legatory—*Scott* v. *Sharp*, 1759, M. 440—and then to those representatives taking substantial benefit—Ersk. i, 6, 58—the origin of the rule being the superfluity of the heir and the destitution of the testator's child—*Ormiston* v. *Wood*, December 22, 1838, 4 Sc. Jur. 232; *Riddells* v. *Riddell*, March 6, 1802, M. *voce* Aliment App., No. 4. Thus while the aliment of an illegitimate child was a debt, that of a legitimate child was not—*Clarkson* v. *Fleming*, July 7, 1858, 20 D. 1224; *Downs* v. *Wilson's Trustee*, July 7, 1886, 13 R. 1101, 23 S.L.R. 776; *Oncken's Judicial Factor* v. *Reimers*, February 27, 1892, 19 R. 519, *per* Lord Adam at 523, 29 S.L.R. 384. In the *Heritable Securities Association, Limited* (*cit. supra*) there was a debt. In *Anderson* v. *Grant* and *Spalding's Trustees* it was to avoid circuity that the action was against the executors, *i.e.*, as debtors of the debtor. The *Parish Council of Leslie* was special in that the grandfather had admitted liability and the child was competing only with stranger disponees while there was £600 of the grandfather's estate in the hands of his trustees and due to the missing father, the person primarily responsible. In any case the lunatic here had had provision made for him, and the absence of provision was necessary before any claim could arise.

LORD JUSTICE-CLERK—If answering the questions in this case, as I propose to your Lordships to do, would have the effect of casting any doubt upon the proposition that after a man's death his estate is liable for his debts, I would not be a party to any decision which could have that result. But the claim in question here is not in the position of an ordinary debt. It is not easy to define exactly what it is, but it is not a debt in the proper sense of that word. It could not be put in competition with the debts of ordinary creditors. It may at once be admitted that there was an obligation upon the deceased during his life, and upon his estate after his death, to provide for this lunatic son. By his will he did provide for him. What he did was to declare that after his wife's death her children, whom he named, should be liable—as a condition of receiving the provisions made in their favour—for their brother's comfortable maintenance and support in an asylum or elsewhere. That seems to me to put the obligation of maintaining the lunatic upon the children if there is free estate of the testator which they receive. They are the persons who are to be liable. It is to be observed that the testator here did not contemplate a trust which might continue for fifty or sixty years. We are familiar with such trusts, but there is nothing of that kind here. The estate is not directed to be kept up, and the obligation of providing for the lunatic is not directed to be discharged, by anyone else than the children. The obligation imposed upon them can be easily expressed in the receipts granted by them for their legacies, and they will be under legal obligation to carry it out. I am therefore of opinion that the questions should be answered as Mr M'Lennan proposes.

LORD KYLLACHY—I agree. If this had been an ordinary debt due by the deceased, I do not doubt—indeed, it was not disputed—that the trustees, before payment to the beneficiaries, must have retained enough in their hands to meet the claim. If they had done otherwise it would have been at their own peril, for they would have been personally liable. That is clear. Nor would they be absolved from that liability by anything which the deceased might say or direct in his will. That also is, I think, sufficiently clear. But then this claim for aliment was not an ordinary debt due by the deceased at his death. In a sense, no doubt, it was a debt, and a debt due by him. For he was undoubtedly bound, while he lived, and so long as he was not himself indigent, to provide for his lunatic son. At least he was so bound while no conflict arose with the claims of his ordinary creditors. The claim was also, in a sense, a debt which affected the deceased's estate after his death. It did so, inasmuch as it transmitted to and affected persons taking gratuitous benefits in his succession—such persons becoming liable to continue the aliment to the extent of the benefit taken by them, except perhaps in the case where they were themselves indigent. But the liability did certainly not constitute an ordinary debt—a debt due unconditionally, and for which the trustees of the deceased were (at least directly) liable to action and diligence. It was, strictly speaking, a debt, as I have already said of the beneficiaries; and that the trustees should be bound to retain, as against the beneficiaries, the amount necessary to provide for its payment, and to do so irrespective of the truster's directions and of the beneficiaries' readiness to undertake the burden themselves, is a proposition for which I can only say that I know no authority.

LORD STORMONTH DARLING—I agree. The claim here made on behalf of the lunatic is of a peculiar nature. I say so in full view of the admission that the lunatic in this case is forty-seven years of age, that there is no prospect of his recovery, and that therefore the claim will in all probability subsist for a considerable period. But still the debt is contingent and depends on his survivance. I do not doubt that anyone who is in possession of the father's estate may be liable so far as he is *lucratus* as and when the claim emerges. But the question is whether the trustees are bound *as such* to provide for this particular debt by holding up the estate. Now, the answer to that, I think, is the answer which your Lordship has made, that they are not bound to do more than the testator has directed them to do, which is to hand over the estate under the obligation which the beneficiaries are willing to give.

LORD LOW—I agree with the result at which your Lordships have arrived, and with the reasons given by your Lordships, and I do not think it necessary to add anything to what has been said.

The Court answered the first three questions in the negative and the fourth in the affirmative.

Counsel for the First Parties—Cullen, K.C.—A. R. Brown. Agent—W. B. Rainnie, S.S.C.

Counsel for the Second Parties—M'Lennan, K.C.—C. D. Murray. Agents—Hossack & Hamilton, W.S.

Thursday, November 1.

FIRST DIVISION.

[Lord Ardwall, Ordinary.

AIRD AND OTHERS *v.* TARBERT SCHOOL BOARD AND OTHERS.

Expenses—Process—Reclaiming Note on Question of Expenses—Point Raised in Inner House not Taken before the Lord Ordinary—Competency.

The Court will not entertain a reclaiming note dealing with a question of expenses on a point which was not argued before the Lord Ordinary.