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

duly signed. In doing so the pursuer intended to grant said defender a loan in accordance with the terms of her letter. The said defender, on or about 29th December 1902, presented said cheque at said branch bank and obtained payment of £48, 11s., being the amount then standing at the credit of the pursuer, and now sued for in the second part of the prayer hereof. The statements in answer, so far as not coinciding herewith, are denied. (*Ans.* 3) Admitted that pursuer was with others imprisoned for insubordination. . . . *Quoad ultra* denied as stated. Defender uplifted certain moneys from the Savings Bank in the end of 1902, but said moneys were her own property, and pursuer had nothing whatever to do with them."

The pursuer pleaded—"(3) The pursuer having granted the defender a loan of the sum second sued for, the defender is liable in repayment thereof, with interest, as concluded for."

The defender pleaded—"(1) The defender not being due the pursuer any sum, should be assoilzied, with expenses. (3) Pursuer's averments of defender's indebtedness to him are provable only by defender's writ or oath."

On 18th October 1905 the Sheriff-Substitute (HENDERSON) pronounced this interlocutor—". . . Finds that the pursuer's averments of the defender's indebtedness can be competently proved only by the writ or oath of the female defender: Allows the pursuer *primo loco* a proof of said averments *scripto*, and to the said defender a conjunct probation also by writ," &c.

The proof was led before the Sheriff-Substitute (GRAHAM) on 1st March 1906, when the pursuer produced the following order by him on the Savings Bank, Edinburgh, with a receipt written across it which was signed by the defender:—

"To the Manager of the £47, 10s.
Edinburgh Savings Bank. *December* 1902.

"Pay the bearer the sum of forty-seven pounds ten shillings on producing my deposit book No. 14914.

"W. Taylor, *witness*, JOHN GILL.
"Chief warder, H.M. Military
"Prison, Woking, Surrey."

The following was the receipt written across the above order:—"*Received the sum of forty-eight pounds and eleven shillings*, —GRACE GILL."

The sum of £48, 11s. was made up of (1) the money standing in the pursuer's name in the bank, and (2) the interest accrued thereon.

The parties admitted that the signatures on the order and receipt were genuine. No other proof *scripto* was adduced by either party, with the exception of a letter from the pursuer to the defender, of date 6th April 1905, which was not material. It was stated that the pursuer's pass-book had disappeared, nor was the letter from the defender to the pursuer mentioned in Cond. 3 produced.

The Sheriff-Substitute (GRAHAM), on 12th March 1906, found that the pursuer had failed to prove by defender's writ that the said sum of £48, 11s. was a loan by him to her, and appointed the pursuer, if so advised, to give in a minute referring the whole cause to the oath of the defender, and on 29th March 1906, in respect of the pursuer's failure to lodge a minute of reference to oath, he assoilzied the defender from the conclusions of the action, and found the pursuer liable in expenses.

Note.—"Counsel for the pursuer quoted the case of *Paterson* v. *Paterson*, 1897, 25 R. 144, to show that the defender's writ did not require to be holograph or tested. That is quite true, but it is equally clear by the case of *Haldane* v. *Speirs*, 1872, 10 Macph. 537, that the mere endorsement of a cheque is not sufficient to prove a loan. . . ."

The pursuer appealed, and argued—The entry in the bank pass-book was *prima facie* an acknowledgment by the defender that the money she uplifted belonged to the pursuer. In such circumstances there was a presumption in favour of loan, and the onus of proving *scripto* that the money was received upon a different footing was thrown upon the receiver—*Fraser* v. *Bruce*, November 25, 1857, 20 D. 115; *Thomson* v. *Geekie*, March 6, 1861, 23 D. 693; *Christie's Trustees* v. *Muirhead*, February 1, 1870, 8 Macph. 461, Lord President Inglis at p. 463. But no attempt had been made by the defender to show that the money passed on some other consideration than loan, such as payment of a prior debt or donation. She relied entirely on *Haldane* (*Speirs' Factor*) v. *Speirs*, March 7, 1872, 10 Macph. 537, 9 S.L.R. 317, which was quite a different case, as the only writ founded on there was an indorsement on an ordinary bank cheque. In proving a loan of money by writ it was not necessary that the writ should be holograph or tested—*Paterson* v. *Paterson and Another*, November 30, 1897, 25 R. 144, 35 S.L.R. 150. The defender had failed to produce any evidence to displace the presumption that the money was the pursuer's property, and the pursuer was therefore entitled to decree for the sum sued for.

Argued for the defender and respondent—The entry in the pass-book showed that a certain sum of money had passed between the pursuer and the defender. It did not necessarily follow that it was a loan; the money might have been given as a donation or for any other purpose. The pursuer must show the circumstances under which the money had been received, and this he had failed to do. Mere proof of receipt of money did not import an obligation to repay, and was not evidence of a loan, anymore than an indorsation on the back of a bank cheque—*Haldane* v. *Speirs*, *cit. supra*. The money was in the bank in the pursuer's name, but it did not follow that the person in whose name money stood was the owner of it. Should it be thought necessary, the defender was in any event entitled to have the case remitted back to the Sheriff in order that he might take a proof *habili modo* on this point—*Paterson* v. *Paterson*, *cit. supra*.

LORD JUSTICE-CLERK—The facts proved here are that there was a sum standing in the name of the pursuer in the Savings Bank at Edinburgh amounting to £47, 10s.; that he, being in prison at the time, wrote —it is said at the instigation of the pursuer, but that does not signify—giving authority to the manager of the Savings Bank to pay the money to the defender; that the money was paid accordingly, and that not only was the sum mentioned paid but the interest accrued also, with the result that the whole account was closed. There is no ground for saying that this money was not the pursuer's. Presumably as it was standing in his name, and as he was the only person who had power to draw it out, it was his. Thus if it was his money the defender's acknowledgment that she had received payment of his money was enough to prove that she received it as a loan. This is not a case like *Haldane*, 10 Macph. 537, where there was nothing but an indorsation of a cheque. If the defender had any case to make in defence one would have expected it to be stated on record. But there is no relevant averment of any counter case. Her only allegation is a vague general statement that the money was hers. If she had any case of that kind to make she could only be allowed to prove it by writ. But she offered no such proof. She admitted she had no writ. I think the Sheriff-Substitute was quite right not to allow a proof *habili modo*. An allowance of proof *habili modo* does not mean that parole proof is competent. It leaves the question whether any particular fact can be proved by parole or only by writ to the judge at the proof. Here there was nothing alleged which could be proved by parole. I think therefore that the Sheriff-Substitute was right in so far as he allowed a proof by writ only, but I think the Sheriff-Substitute was wrong in holding that the pursuer had failed to prove that the sum received by the defender was a loan from the pursuer to her. I am of opinion that a loan is proved by the writ of the defender.

LORD STORMONTH DARLING — I agree. The Sheriff-Substitute has decided the case upon the ground that it is ruled by the case of *Haldane* v. *Speirs*, 1872, 10 Macph. 537. Now *Haldane* v. *Speirs* was a case where the only writ founded on was the indorsation of an ordinary bank cheque, and it was decided by a majority of a Court of Seven Judges that a cheque, being an ordinary way of paying a debt (which was the footing on which the defender averred that he received the money), was not by itself sufficient evidence of loan, and that it was not sufficient even to let in a proof *prout de jure* in order to show *quo animo* the money was paid. Here the document founded on is exactly the same as that with which the Court had to deal in the case of *Fraser* v. *Bruce*, 1857, 20 D. 115, namely, an entry in a savings bank pass book, and in that case Lord Mackenzie said—"I think the entry in the bank pass-book must be held as an acknowledgment by the defender that he received the sum of £40 from funds belonging to the pursuer. Such an acknowledgment *in dubio* implies an obligation to repay unless the receiver can prove he received the money upon some different footing. There has been no attempt by the defender to show this." Every word of this applies to the present case. The order on which the receipt by the defender is indorsed is evidence that the money which she received belonged to the pursuer. There is not a suggestion on record that she received the money on any other footing than as her son's money except a bare statement that certain moneys uplifted by her in the end of 1902 were her own property. If the money belonged to her how did it come to be deposited in her son's name? If she desired to show that the money was her own she would have required to do so by writ. I think the late Sheriff-Substitute (who originally dealt with the case) did quite right in restricting the proof on both sides to one *scripto*, and that it would have been wrong to allow a proof *habili modo*. An allowance of proof *habili modo* is appropriate according to our practice only when it appears that some parts of the case may competently be proved *prout de jure* and others only by writ or oath, in which case it will rest with the judge to decide during the course of the proof which method is admissible. Especially since the decision in the case of *Paterson*, 1897, 25 R. 144, it has been the practice of the Court in such cases to allow a proof *habili modo* as the more convenient form, but where as here it is a case in which it is obvious that only one method of proof can be admitted, the practice is still to restrict the allowance of proof to one by writ only. I accordingly think that the procedure adopted by the Sheriff was correct, and that the pursuer has succeeded, in the absence of any evidence to displace the presumption that the money was his property, in proving by writ that the defender received the money on loan. I think that the Sheriff-Substitute has mistaken the true effect of the judgment in *Haldane* v. *Speirs*, and that his interlocutor should be recalled and the loan held proved by writ.

LORD LOW—I am of the same opinion. I think the Sheriff-Substitute was wrong in regarding this case as being ruled by the judgment in *Haldane* v. *Speirs*, 10 Macph. 537, because it seems to me that we have here just what was awanting in that case. There the only writ was an ordinary bank cheque with the payee's name indorsed upon it. As I read the judgment the view of the majority was that the document founded on proved that money passed, but proved nothing as to the consideration on which it passed, whether loan or payment of debt due, or donation, or whatever it might be. The pursuer alleged that it was loan, but that could be proved by writ only, and the majority of the Court held, as I have said, that the indorsation of the cheque only proved that money had passed from the drawer to the drawee. But there is another rule which is well established—and

indeed was not disputed—that if a person grants a receipt acknowledging payment of money, and saying nothing as to the purpose for which it was paid, then the presumption is that the person receiving the money must account for and repay it, unless he establishes that he received it upon a footing which did not involve an obligation to account or repay. If there had been such an acknowledgment in *Haldane's* case (10 Macph. 537) I apprehend that it would have been decided differently. Here we have an unqualified acknowledgment of the receipt of money. What the defender says in the acknowledgment founded on is, that she has received the sum of £48, 11s., and that acknowledgment is indorsed upon an order signed by the pursuer, which directs payment to bearer on production of the pursuer's deposit-book. It is clear that that is an acknowledgment of the receipt of the pursuer's money, and there is no relevant averment that the money was received upon any other footing than one which involved an obligation to repay. I am therefore of opinion that the Sheriff-Substitute was wrong, and that a loan by the pursuer to the defender is proved by the defender's writ.

LORD ARDWALL—I do not think that this case is ruled by the case of *Haldane* v. *Speirs*. In my opinion it more resembles *Fraser* v. *Bruce*. The document No. 14 of process proves that the defender received £48, 11s., and that that money belonged to the pursuer. The defender gives no reason for her receiving the money, and it must therefore be presumed that she received it in loan. There is no averment contradicting this presumption except an irrelevant averment to the effect that the money was not the pursuer's but the defender's property. No explanation is given as to how it became the defender's property. The defender, however, was allowed a proof of that averment *scripto*, and she produced no writ of any kind. She is therefore in the position of having had an opportunity of proving her averment and having failed to do so.

The nature of the document relied on by the pursuer in this case is very different from that under consideration in *Haldane* v. *Speirs*, but it bears on its face that the defender received £1, 1s. more than the sum in the order, or £48, 11s., being the whole amount, principal and interest, standing at the credit of the pursuer with the Savings Bank. That alone is enough to differentiate this case from *Haldane* v. *Speirs*, for the reason that it disposes of the presumption that the order was granted in payment of a debt; and further, this document contains a distinct acknowledgment of the receipt of the money. I accordingly agree with your Lordships that the interlocutor of the Sheriff-Substitute should be recalled so far as regards the sum of £48, 11s.

The Court sustained the appeal, recalled the interlocutor appealed against, ordained the defender to make payment to the pursuer of the sum of £48, 11s., and decerned.

Counsel for the Pursuer (Appellant)—Malcolm. Agents—Bruce & Black, W.S.

Counsel for the Defender (Respondent)—A. R. Brown. Agents—Gardiner & Macfie, S.S.C.

Friday, February 8.

FIRST DIVISION.

[Sheriff Court at Glasgow.

LEADBETTER *v.* THE DUBLIN AND GLASGOW STEAM PACKET COMPANY AND OTHERS.

Process—Sist—Ship — Action of Damages for Loss of Life Occasioned by Collision —Order of English Admiralty Court Limiting Owners' Liability and Staying Proceedings—Effect of Order on Action of Damages Pending in Scottish Courts—Merchant Shipping Act 1894 (57 *and* 58 *Vict. cap.* 60), *sec.* 504.

The owners of a ship which had been in collision applied for and obtained an order in the Admiralty Division of the High Court in England, under section 504 of the Merchant Shipping Act 1904, limiting their liability, and ordering that "all proceedings in actions pending . . . except for the purpose of assessing the damages in such actions be stayed."

An action, which had been raised by the widow of the master of the other ship in the collision, to recover damages from such owners for the loss of her husband, was appealed for jury trial. The defenders moved for a *sist in hoc statu*, founding on the English order.

The Court *refused* the motion, *holding* that the order did not apply to the action, though no decree upon which diligence could proceed would be therein pronounced.

Process — Proof or Jury Trial—Ship — —Reparation —Action of Damages for Loss of Life at Collision — Nautical Assessor.

Circumstances in which the Court *refused* a jury trial, and ordered proof before one of themselves, in an action of damages for loss of life in a collision at sea raised by the widow of the master of the one ship against the owners of the other, the defenders asking for proof with a nautical assessor.

The Merchant Shipping Act 1894 (57 and 58 Vict. c. 60), sec. 504, enacts—"Where any liability is alleged to have been incurred by the owner of a British or foreign ship in respect of loss of life, personal injury, or loss of or damage to vessels or goods, and several claims are made or apprehended in respect of that liability, then the owner may apply in England and Ireland to the High Court, or in Scotland to the Court of Session, or in a British possession to any competent Court, and that Court may