the petitioner, was signed by her on the last page, and her signature was properly attested, the two subscribing witnesses being James Mowat, superintendent, and John Clark, attendant, District Asylum, Haddington, near which the deceased happened to be residing when the said codicil was executed. But owing to an oversight the first of the two pages on which the codicil was written was omitted to be signed by the testatrix. The codicil is contained in two pages, which are on separate sheets. The will occupies three pages and part of a fourth of a sheet of paper, and is signed by the testatrix on each of the said four pages. The codicil begins on the said fourth page of the sheet on which the will is written, immediately below the deceased's signature of the will, and ends on the first page of a separate sheet. The page of the codicil omitted to be signed is the first of the two pages on which it is written, and is thus the fourth page of the sheet on which the will is written."

A proof was led before Lord Mure, from which it appeared that the facts were as above narrated, and it also was proved that when the will was signed it was backed "Last Will and Testament of Miss Ann M'Intosh," and that no change was made on the backing when the codicil was added.

Argued for the petitioner—The case was ruled by *M'Laren* v. *Menzies*, July 20, 1876, 3 R. 1151.

At advising—

Lord President—The case of *M'Laren* v. *Menzies*, although carried by a bare majority of Seven Judges, yet settled the practice, and I think it applies here. We must therefore grant the prayer of the petition.

Lords Deas, Mure, and Shand concurred.

The Court granted the prayer of the petition.

Counsel for Petitioner — Guthrie. Agent — Andrew Urquhart, S.S.C.

Saturday, December 22.

FIRST DIVISION.

[Sheriff of Lanarkshire.

CHURCH *v.* CALEDONIAN RAILWAY COMPANY.

Process—Expenses—A.S., 15th July 1876—*Expense of Precognitions in Action raised in Sheriff Court—Precognitions—Appeal for Jury Trial—*6 *Geo. IV. c.* 120, *sec.* 40.

The third general regulation of the Act of Sederunt of 15th July 1876 provides that the expenses to be charged against an opposite party shall be limited to proper "expenses of process," subject, however, to this provision, that, *inter alia*, the expense of precognitions taken before the raising of the action may be allowed where eventually there is an interlocutor approving of issues or allowing a proof.

An action was brought from the Sheriff Court, after a diet of proof had been fixed, to the Court of Session by an appeal for jury trial under sec. 40 of 6 Geo. IV. c. 120, and was there compromised before an issue was approved of or a proof allowed. *Held*, under the above regulation, that the pursuer could not charge against the defender the expense of precognitions taken before the raising of the action in the Sheriff Court, on the ground that the Act of Sederunt applied only to the practice of the Court of Session, and that in the Court of Session there had been no approval of issues or allowance of proof.

An action of damages for bodily injury was raised in the Sheriff Court of Lanarkshire at the instance of Adam Church against the Caledonian Railway Company, and a record having been made up, an interlocutor was pronounced on 4th October 1883, closing the record, allowing a proof, and fixing the diet of proof. Against this interlocutor the pursuer on 9th October appealed under sec. 40 of the Judicature Act 1825 (6 Geo. IV. c. 120) to the Court of Session with a view to jury trial. This appeal appeared in the Single Bills of the First Division on 31st October, and an order for issues was then pronounced. Immediately thereafter a tender was made which was accepted, and on 7th November the order for issues was discharged.

In taxing the pursuer's account of expenses the Auditor reserved for the consideration of the Court the question of the liability of the defenders for £8, 12s. 4d., being the amount of expenses incurred by the pursuer in taking precognitions before the raising of the action in the Sheriff Court.

In a note appended to his report the Auditor stated—"The pursuer contends that under the proviso in the third general regulation appended to the Act of Sederunt of 15th July 1876, which is in these terms: 'Precognitions, so far as relevant and necessary for proof of the matters in the record between the parties, although taken before the raising of an action or the preparation of defences, and although the case may not proceed to trial or proof, may be allowed where eventually an interlocutor shall be pronounced either approving of issues or allowing a proof,' —he is entitled to the expense of precognitions in respect of the interlocutor of the Sheriff allowing a proof and fixing a diet. The defenders, on the other hand, maintain that the pursuer by his appeal set aside that order, and that their tender having been made and accepted before the approval of issues they are not liable for these expenses."

The case then appeared in the Single Bills for the approval of the Auditor's report, and the pursuer argued that the charge for precognitions should be allowed, on the ground that the action having been brought to the Court of Session by appeal must be held to have originated there. *Ewing* v. *Cochrane*, July 20, 1883, 20 S.L.R. 842.

At advising—

Lord President—By the third of the general regulations contained in the Act of Sederunt of 15th July 1876 it is provided in the main part of the section that "the expenses to be charged against an opposite party shall be limited to proper expenses of process, without any allowance (beyond that indicated in the table) for preliminary investigations." That general rule, however, is

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

LORDS DEAS, MURE, and SHAND concurred.

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

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

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

Saturday, December 22.

SECOND DIVISION.

THOMSON *v.* MILLER'S TRUSTEES.

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

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

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

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

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