often used to enable the agent of the true owner to deal with the money for his behoof, the principle upon which the Act 1696, cap. 25, is based has no application. Where a title to land or to scrip is taken in the name of any person the presumption is that it is so taken because he has the ownership of the property thus absolutely transferred to him. The same thing does not apply to a deposit-receipt except as in a question between the bank and the payee named in it. There is no authority which favours such a contention, and the consequences of so holding might operate great injustice in many cases.

I have hitherto dealt with the matter on the assumption that the defender's name was the only one mentioned in the deposit-receipt. The case is, however, much less favourable for him. The deposit-receipt is payable only on the joint signature of Robert Cairns and the defender. Robert Cairns makes no claim to the money, and is a consenting party to the action being raised. It has never yet actually been decided whether in a proper deed of trust in favour of two trustees, where one admits the existence of the trust and the other denies it, the latter shall still have the benefit of the limitation of proof enacted by the Act 1696. In my opinion, however, it cannot be so, for one of two joint payees can qualify no right, as in a question with the bank, to any particular part of the deposit-receipt. The security that the true owner has where a deposit-receipt is so made is that he cannot be defrauded except by both of the payees acting in concert. If, therefore, proof by writ was not forthcoming against the defender, and his oath were negative of the reference, there would be a resulting *impasse*, for the money would still be retained by the bank until Robert Cairns authorised payment, and in an action against him by the defender to compel him to concur in a discharge to the bank it would be perfectly open to him to plead that the money truly belonged to the pursuer.

On the above grounds I have come to be of opinion that we must allow the parties a proof of their averments on record. It will be just as easy for the defender, if he has an honest case, to prove that part of the contents of the deposit-receipt in question belonged to him as it will be for the pursuer to establish that it is all his money.

LORD GUTHRIE—It is sufficient for the decision of this case to hold, as Lord Salvesen has done, that the deposit-receipt is not a deed of trust in the sense of the Statute of 1696, chapter 25. But I am not prepared to differ from the Lord Ordinary where he says, "Even if the case be one of trust, the well-known principle which was applied in the case of *Grant* v. *Mackenzie*, 1899, 1 F. 889, comes in, and as both parties are agreed that the title does not accurately express their legal rights, no alternative remains but to allow general parole proof."

I concur also in the separate ground not founded on by the Lord Ordinary on which Lord Salvesen has proceeded, namely, the specialty in this case that the deposit-receipt was in favour not only of the defender William Davidson but of Robert Cairns, the pursuer's brother, who not only adopts a different attitude in regard to the nature and reality of the transaction from the defender but is a consenting party to the action.

LORD DUNDAS—I concur, but I reserve my opinion on the matters on which Lord Salvesen has expressed doubts.

The LORD JUSTICE-CLERK was not present.

The Court adhered.

Counsel for the Reclaimer (Defender)—Keith. Agents—Simpson & Marwick, W.S.

Counsel for the Respondent (Pursuer)—Wilton. Agents—Henderson & Munro, W.S.

Friday, July 11.

SECOND DIVISION.

[Sheriff Court at Glasgow.

MICKEL *v.* M'COARD.

(*Reported ante*, 50 S.L.R. 682.)

Expenses—Sheriff—Taxation—Higher or Lower Scale of Taxation—Power of Court to Determine Scale—Timeous Application—C.A.S., M, ii, 1 and 2 (3).

The Codifying Act of Sederunt provides—"M, ii, 1—In the ordinary Sheriff Court, except as after stated, there shall be two scales of taxation, viz., *first*, for causes where the amount of principal concluded for does not exceed £50; and *second*, for causes exceeding that amount. . . . . 2. (3) In actions of damages the scale for taxation of the account between party and party shall for the pursuer's agent be regulated by the sum decerned for, unless the Sheriff shall otherwise direct."

In an action of damages brought in the Sheriff Court the Sheriff-Substitute awarded the pursuer £100 damages. On appeal the Court reduced the damages to £50, and found the defender liable in expenses. The Auditor taxed the account of expenses in the Sheriff Court on the lower scale. On a note of objections to the Auditor's report the Court *held* that the Auditor had rightly taxed the account on the lower scale, having received no contrary instructions from the Court, and although the Court had power to determine the scale, it was too late for the pursuer to raise the question after the remit to the Auditor had been made.

Robert Mickel, timber merchant and property owner, Glasgow, *pursuer*, brought an action in the Sheriff Court at Glasgow against Mrs Sarah M'Coard, Kilcreggan,

Dumbartonshire, *defender*, for £350 in respect of damage caused by flooding to a house in Glasgow belonging to the pursuer, of which the defender was formerly the tenant.

On 15th February 1912, after a proof led, the Sheriff-Substitute (CRAIGIE) decerned against the defender for £100 as damages and found the pursuer entitled to expenses.

The defender appealed to the Second Division of the Court of Session, the note of appeal being received on 26th March 1912, and on the same day the defender lodged a minute tendering £50 with expenses in full of the conclusions of the action.

On 16th May 1913, after hearing counsel for the parties, the Court recalled the interlocutor of the Sheriff-Substitute; decerned against the defender for payment of £50 as damages; found the defender liable to the pursuer in expenses down to the date of the minute of tender, but subject to modification; found the pursuer liable to the defender in expenses subsequent to the date of the tender; allowed accounts thereof to be lodged, and remitted the same to the Auditor to tax and report.

At advising, the pursuer made no motion with regard to the scale on which the account of his expenses in the Sheriff Court should be taxed, and the pursuer having stated it on the higher scale, the Auditor taxed it on the lower scale.

Thereupon the pursuer lodged a note of objections to the Auditor's report "in so far as the Auditor has taxed the pursuer's account in the Sheriff Court on the lower scale," and on the case appearing in the Single Bills on 11th July 1913, argued—The sum of damages decerned for in the Court of Session could not settle the scale of taxation of the account of expenses in the Sheriff Court. That fell to be determined by the amount of the Sheriff Substitute's award. Since his award was one of £100, it involved taxation on the higher scale, and under the Codifying Act of Sederunt, M, ii, 2 (3), he alone had power to alter the scale. *Thomson* v. *Glasgow Taxi-Cab Company*, [1911] 1 S.L.T. 375, was different, because there the pursuer had accepted the sum of £25. The Court ought therefore to find that the expenses should be taxed on the higher scale, or else should remit the question to the Sheriff-Substitute to settle as was done in *Reid* v. *North Isles District Committee of County Council of Orkney*, 1912 S.C. 627, 49 S.L.R. 511.

Argued for the defender—The Court had decerned for a sum of damages which did not exceed £50, and therefore under the Codifying Act of Sederunt, M, ii, 1 and 2 (3), the Auditor was bound to tax the expenses on the lower scale. In any event it was now too late to raise the question after the remit had been made to the auditor. The pursuer should have raised the question at the time when he moved for expenses by moving at the same time for an instruction to the Auditor to tax the account on the higher scale.

LORD JUSTICE-CLERK—A question has been raised regarding the scale upon which the pursuer's expenses in the Sheriff Court should be taxed. It is too late now to raise this question. According to the Act of Sederunt the scale of taxation in an action of damages is determined by the sum decerned for; and as our decerniture was for a sum of £50, the Auditor has acted rightly in taxing the pursuer's expenses upon the lower scale. If the pursuer desired a different scale to be applied, he should have made the appropriate motion before the account was remitted to the Auditor.

As to the amount of modification, this is a matter which can only be determined in a general way. My view is that the expenses of the pursuer in the Sheriff Court should be modified to £100.

LORD DUNDAS—I am of the same opinion.

LORD SALVESEN—The only point of general interest is what is to happen when an award by the Sheriff for a sum which implies taxation on the higher scale has been reduced by this Court to one for a sum to which the lower scale is in ordinary circumstances appropriate. I am clear that we have power to deal with the scale of taxation. I am also clear that if any question is to be raised on that point, it should be raised at the time when judgment is pronounced, for the Auditor should receive his instructions at the time when the account is remitted to him. There need be no difficulty if counsel have the provisions of the Act of Sederunt in view when the case is disposed of, and move the Court then to tax the accounts upon the scale which they think appropriate. It is too late to come back to the Court after the Auditor has dealt with the matter. The question comes up upon a note of objections, but these objections are untenable, seeing that the Auditor has already taxed the account upon the only scale which it was competent for him to apply.

As regards modification, I think that substantial justice will be done if the pursuer's account is modified to the extent indicated by your Lordship.

LORD GUTHRIE—I concur with your Lordship in the chair.

The Court approved of the Auditor's report as taxed, modified the amount thereof, and decerned for the amount so modified.

Counsel for the Pursuer—Horne, K.C.—D. P. Fleming. Agent—W. B. Rankin, W.S.

Counsel for the Defender—Maclennan, K.C.—MacRobert. Agents—Cumming & Duff, S.S.C.