engaged in this game with the overseas soldiers on the principle, heads I win, tails I don't lose. And the way in which he secured his "tails I don't lose" was simply this—if the soldiers were seen to be making a selection of the right card they were prevented from putting their money on it by one or other of the appellants' party turning up the card in question and showing what it was before either of the soldiers had time to make his bet. It is not therefore surprising that the judge of police drew the conclusion which he did draw, and it is a conclusion which would be drawn by a court of law as well as by the man in the street, that this manœuvre was adopted to cheat the soldiers and prevent them winning.

That appears to me to be quite sufficient to establish all that was necessary in order to convict in the present case, whatever may be the proper category in which to put the three-card trick as a game *per se*, and it is apparent that when played under those conditions it is an unlawful game. I read the complaint as meaning that when the conditions under which the game is played are as described here then that does make the three-card trick an unlawful game.

I should say only a word in regard to the position of matters in England, because there was pressed upon our attention the case of *Rex* v. *Governor of Brixton Prison*, [1912], 3 K.B. 190. It is quite enough for the purpose of this case to point out that the terms of the statute of 8 and 9 Vict. cap. 109, section 17, are totally different from the section with which we are dealing here, because in that case what the Court had to decide was whether there was any fraud, unlawful device, or ill-practice in playing with the cards. The Court held that inasmuch as the three-card trick was a trick in which one person backed his ability to spot the position of a particular card and the other backed his sleight-of-hand or quickness of hand against him, there was no fraud, unlawful device, or ill-practice in the game. But that was a very limited question that had to be dealt with there, and the Court were tied down by the words of the statute. Apparently in England the players would by no means have gone unpunished, because I see it was pointed out in the argument that the man who practised the three-card trick was generally dealt with in England as a rogue and a vagabond. The reason why the statute of 8 and 9 Vict. was founded upon in the case referred to was apparently because the offence was committed in Norway, and what was being applied for was extradition. And I take it that there would have been some difficulty in obtaining extradition for a merely statutory offence, and that therefore proceedings were taken against those charged for obtaining money under false pretences, and the prosecution failed.

Apparently in England what is required is what is figured in a case handed up to me —*John Moore*, 10 Cr. App. R. 54—where under section 17 of the English Gaming Act of 1845 it is a question for the jury whether a particular incident in the play in the three-card trick is a fraud, or unlawful device, or ill-practice. What was done there was that the end of one of the cards was turned up and the person playing thought apparently he was certain to spot the right card because of that. It was held by the jury that that was an unlawful device or ill-practice.

That shows how limited the question is in England. Fortunately the terms of the Scottish Act are wide enough to enable us to stamp out an altogether reprehensible practice.

LORD ORMIDALE—For the reasons just stated by Lord Mackenzie, I concur in thinking that the judge of police was right in convicting under this complaint.

LORD JOHNSTON—The Court are of opinion that they ought not in this case to modify the expenses, but that full expenses should be given. And I take this opportunity of saying that we are moved to this somewhat unusual course by reason of the inadequacy of the statutory penalty to meet the case of previously convicted card-sharpers such as those at the bar. We cannot be parties to showing any leniency to them. It is a blot on our statute book that however often men like these may come up for trial they must be tried under the Summary Jurisdiction Act, and that the presiding judge can do no more than repeat the sentence of sixty days' imprisonment, coupled with an order to refund the panels' ill-gotten gains.

The Court answered the question of law in the affirmative.

Counsel for the Appellants—Jameson. Agent—John Robertson, Solicitor.

Counsel for the Respondent—Constable, K.C.—W. J. Robertson. Agent—W. J. Dundas, W.S., Crown Agent.

COURT OF SESSION.

Wednesday, June 5.

FIRST DIVISION.

[Lord Anderson, Ordinary.

COCHRANE *v.* CHALMERS.

Crown — Volunteer Forces — Battalion Funds—Responsibility of Commanding Officers — Relief against Predecessors — Regulations for the Territorial Force 39 *and* 241 *— King's Regulations* 1130 *and* 1143.

A deficiency was discovered in battalion funds on the retiral of the commanding officer, who was held responsible therefor by the War Office, but was urged by them to obtain the decision of a civil court upon the question of liability as between him and his predecessor. He raised an action against his predecessor concluding for an accounting by the defender of his intro-

missions as officer in command and also as treasurer. The pursuer averred that the deficiency had occurred when his predecessor was in command, and that the defender had failed to furnish a certificate disclosing the state of the funds of the battalion on his retiral, as he was bound to do under the King's Regulations 1143. The pursuer also averred that he had paid some of the debts for which the War Office had held him liable, but he did not aver that the defender had had intromissions with the funds in question or that he, the defender, had any personal liability for any of the debts for which the pursuer had been held accountable. The pursuer also averred that on his, the defender's, appointment as commanding officer the defender, being no longer qualified to hold the office of treasurer to the finance committee of the regiment, had appointed a clerk who was not a member of the regiment to act as treasurer, but that the appointment was merely nominal and was made on the understanding that the defender would retain the whole books and accounts. The pursuer did not aver that the defender had *de facto* acted as treasurer and had had intromissions with the funds. *Held* that so far as laid against the defender as commanding officer the action was one of relief and the averments of the pursuer did not relevantly instruct a claim of relief, and so far as laid against the defender as treasurer the averments were irrelevant for lack of specification, and pursuer allowed to amend those latter averments.

The Regulations for the Territorial Force provide—"39. A C.O. is responsible for the proper application of all regimental funds, and will supervise and control the committees formed for their management. As soon as the accounts for the year are ready the C.O. of each unit will assemble an audit board consisting of the three next senior officers present at headquarters. The board will examine all vouchers, and will satisfy themselves that liabilities are not omitted from the balance sheet, that assets are not overestimated, and that the cash credits are actually available. The balance of the funds will be entered in the proceedings which will be made out on A.F. A2, and the board will record thereon that these instructions have been carried out. The proceedings will be laid before the C.O. for approval, and placed before the inspecting officer at his annual inspection. . . . 241. If an officer's or a sergeant's mess is established in a unit under the authority of the C.O., that officer will be responsible that it is organised on the lines laid down in the King's Regulations, that discipline is maintained, and that the accounts are properly kept and audited."

The King's Regulations provide—"1130. Every officer of the corps will be a member of the regimental mess. The C.O. is responsible that all the regulations relating thereto are observed. He will also ensure that the mess is conducted without unnecessary expense or extravagance, and by his personal example and advice will encourage economical habits and careful management. The cost of living in the mess will be that which obtains throughout the service generally. Semi-private account books, in which extra charges and unauthorised subscriptions are shown, will not be kept in the mess. The C.O. will be held responsible that every charge is shown in the official mess accounts which are produced at the inspection of the brigade commander. . . . 1143. Before handing over the command of a unit or portion of a unit in which an officers' mess is maintained the C.O. will send to the brigade commander a certificate that all debts owing by the mess have been paid, or that a sufficient amount is in hand to meet all liabilities. Should the C.O. be unable to furnish this certificate he will explain the reasons which have necessitated the contracting of debts, so that the brigade commander (when not below the rank of brigadier-general) may decide whether they will be paid by the C.O. or can be taken over by his successor. A copy of the certificate will be handed to the officer assuming the command, who will report to the brigade commander whether he is satisfied with the state of the funds. In the case of units changing stations where station messes are maintained a similar certificate will be furnished by the C.O. of the outgoing unit."

John Paterson Cochrane, sometime Lieutenant-Colonel of the 6th Battalion Highland Light Infantry, *pursuer*, brought an action against Hugh Dunlop Dempster Chalmers, sometime writer in Glasgow and formerly Colonel of the 1st/6 Battalion Highland Light Infantry, *defender*, concluding for decree, *inter alia*, that the defender should be decerned and ordained to exhibit and produce a full and particular account of his whole intromissions as officer commanding and also as treasurer of the Second Volunteer Battalion, now the Sixth Battalion, Highland Light Infantry, whereby the true balance due by him to the pursuer as Lieutenant-Colonel foresaid might appear and be ascertained, and for £1000 or such other sum as should be ascertained to be the balance of his intromissions.

The pursuer *pleaded, inter alia*—"1. The defender being bound to account to pursuer as commanding officer of the regiment for any balance due to the regimental funds as at the date of his demitting office as Colonel, and for any further balance accruing during the subsequent period during which he acted as treasurer to the Finance Committee, decree should be pronounced in accordance with the first two conclusions of the summons."

The defender pleaded, *inter alia*—"1. No title to sue. 2. The action as laid is incompetent."

On 12th July 1917 the Lord Ordinary (ANDERSON) repelled the first and second pleas-in-law for the defender and ordained him to lodge accounts of his intromissions as craved in the summons, and granted leave to reclaim.

Opinion, from which the *averments* of the parties appear:—"The pursuer was for some

time Lieutenant-Colonel of the 6th Battalion Highland Light Infantry, and he sues in that capacity. The defender was the immediate predecessor of the pursuer in the command of said battalion, which prior to the Territorial and Reserve Forces Act 1907 was known as the 2nd Volunteer Battalion of the Highland Light Infantry. The defender is asked to produce accounts of his intromissions as officer commanding and also as treasurer of said 2nd Volunteer Battalion and to make payment to the pursuer of £1000.

"The defender, who is a writer in Glasgow, had been while holding the rank of captain appointed treasurer of the battalion in 1894. He held that office until 1905, when he was appointed commanding officer of the battalion, and as such was debarred from continuing to act as treasurer. A clerk of the defender named Munro was then appointed treasurer. This appointment, according to the pursuer's averments, was merely nominal, the defender as before controlling all financial matters connected with the battalion. Munro is said to have left the defender's service in 1913, but the defender gave no notice of this to the Finance Committee of the battalion, and continued to act as treasurer till October 1914.

"The pursuer was appointed commanding officer of the battalion in 1912, and as such he became responsible for the state of the regimental funds. He repeatedly called on the defender to furnish an account of his intromissions, but it was not until 1914 that the defender submitted accounts. The pursuer obtained a report on these accounts from a chartered accountant, which showed that £800 or thereby was not accounted for and was owing to the regimental funds. Thereafter the matter was taken up by the War Office, and on 7th November 1916 a letter was issued holding the pursuer responsible for this shortage in the regimental funds, and giving him an opportunity of obtaining the decision of a civil court as to the question of liability as between himself and the defender.

"In a question with the War Office the pursuer is responsible, because the deficiency was discovered during the period of his holding the command of the battalion. The pursuer ceased to be commanding officer of the battalion in 1915. The present action was raised on 21st March 1917.

"I heard a debate in the procedure roll on the first two pleas stated for the defender. These pleas, as I understood the argument, raise the same point, viz., that the pursuer having ceased to be commanding officer in 1915 was not entitled in 1917 to sue for and recover moneys due to the corps or battalion.

"These pleas are purely technical, as the defender conceded that he is bound to account to someone for his intromissions with the regimental funds. The suggestion made that the defender might have to account a second time is obviously not well founded. The theory of the whole matter is this, that on a change of command the new commanding officer is entitled and bound to demand an account from his immediate predecessor in office and is bound to account to his immediate successor. If, then, the defender accounts to the pursuer he has a complete answer to any demand for accounts made against him by the pursuer's successor, to wit, that he has already accounted to the proper person from whom alone the present commanding officer is entitled to demand an accounting.

"The pleas in question fall to be determined on a consideration of the terms of the 25th section of the Volunteer Act 1863, and the Regulations for the Territorial Force and the Army.

"The said 25th section occurs in Part IV of the Act of 1863, which is headed 'Rules and Property of Corps.' The section is rubricked 'Vesting of property of corps in commanding officer, &c.,' and enacts—'All money subscribed by or to or for the use of a volunteer corps or administrative regiment, and all effects belonging to any such corps or regiment or lawfully used by it, not being the property of any individual officer or volunteer or non-commissioned officer of the Volunteer permanent staff belonging to the corps or regiment, and the exclusive right to sue for and recover . . . money due to the corps or regiment . . ., shall vest in the commanding officer of the corps or regiment for the time being and his successors in office, with power for him and his successors to sue, to make contracts and conveyances, and to do all other lawful things relating thereto; and any civil or criminal proceedings taken by virtue of the present section by the commanding officer of a corps or regiment shall not be discontinued or abated by his death, resignation, or removal from office, but may be carried on by and in the name of his successor in office.'

"The 39th regulation for the Territorial Force provides that 'a C.O. is responsible for the proper application of all regimental funds,' and regulation 241 makes a C.O. responsible for the organisation of an officers' mess on the lines laid down in the King's Regulations and for the accounts being properly kept and audited. The King's Regulations dealing with mess accounts for which the C.O. is responsible are Nos. 1130, 1132, 1134, and 1143.

"Both parties maintained that the 25th section of the Volunteer Act of 1863 was still in force, but it is a moot point whether this Act has not been repealed by implication. The Territorial Reserve Forces Act 1907 does not expressly repeal the Act of 1863, nor does it expressly keep it alive. The Act of 1907 swept away the Volunteer Force, and it is arguable that all statutes regulative of the Volunteer Force were thereby impliedly abrogated. On the other hand it must be kept in mind that repeal of a statute by implication is not readily admitted—*Bain*, 2 R. (J.) 32, at pp. 35 and 36, 12 S.L.R. 490. Moreover, the provisions of section 25 of the Act of 1863 are not restricted to Volunteer corps but extend to administrative regiments, a phrase which would include a territorial battalion. There is no similar provision in the Territorial Forces Act giving a C.O. a title to recover regi-

mental funds. These considerations give weight to the contention that the section is still in force. The pursuer's counsel doubtless considered that it was essential for him to maintain that the section was still operative in order that his client's title to sue might be unquestioned. The defender's counsel was just as firm in maintaining this contention, as he relied on the terms of the section to make out that the pursuer had no title to sue.

"I therefore proceed on the assumption that the said section is still in force.

"There are two answers to the defender's contention, each of which seems to me to be conclusive—(1) The meaning of the section is not that contended for by the defender. The defender's contention is that the only person who could raise this action in March 1917 was the officer then in command; that with demission of office the title to prosecute an action is lost and that a fresh pursuer must be sisted every time a new C.O. is appointed until the litigation comes to an end. This argument was based on the terms of the section, and in particular of the words 'for the time being,' and of the last clause of the section. It was suggested that the words 'for the time being' applied to the date of raising the action. I am unable to accept this view. The phrase plainly refers to the period of the command of the officer in whom vesting of regimental property is to take place. During that time all property coming to the regiment vests in the C.O. In the present case a sum of £800 or thereby wrongously withheld by the defender vested in the pursuer at the commencement of his period of office, and he is endeavouring to vindicate by the present action the sum so vested in him. He is the creditor of the defender for this sum, both under the terms of the Act of 1863, of the foresaid Territorial Force Regulations, and of the order of the War Office referred to on record. The section expressly gives 'him'—*i.e.*, the officer in whom vesting has taken place—power to sue. This view is confirmed by an examination of the language of the concluding clause of the section. That clause presupposes that proceedings have been taken by the proper creditor—in this case, the pursuer. Such proceedings so originated may in certain eventualities be 'carried on' by the pursuer's successors in office. But the section does not say that such proceedings may, as contended for by the defender, be originated by a successor in office of the true creditor. The clause was obviously framed to meet the case where it was really necessary to have a change of pursuer, as where the pursuer who as true creditor has properly originated the action has died or been removed from office for misconduct. If the action had been raised by the present C.O. I think the defender would have had a much better chance of success on the question of title to sue.

"(2) The concluding provision of the section is permissive merely and not imperative. This is indicated by the use of the word 'may' and by the common-sense of the matter. If the defender's contention is right, that the title to sue depends upon the holding of the post of C.O., then the following situation in present circumstances is conceivable. The litigation may last for two years and the C.O. may be changed every month. According to the defender, it would thus be necessary to have two dozen fresh pursuers sisted, each of whom would probably desire to be advised by his own agent and counsel. I am unable to hold that the provisions of the foresaid section lead to a result so preposterous.

"I shall accordingly repel the defender's first two pleas-in-law and order accounts."

The defender reclaimed—Thereafter the pursuer amended his record, and the defender lodged answers to the pursuer's amendment.

In the *record as amended* the pursuer *averred*—"(Cond. 1) The pursuer was in January 1912 gazetted as Commanding Officer of the 1st/6 Battalion of the Highland Light Infantry of His Majesty's Territorial Forces in succession to the defender, and as such commanding officer became responsible for all the regimental funds of the battalion, in terms of the Territorial and Reserve Forces Act 1907, and the Orders and Regulations following thereon. The said 1st/6 Battalion Highland Light Infantry was until the Territorial and Reserve Forces Act 1907 known as the 2nd Volunteer Battalion of the Highland Light Infantry. (Cond. 2) The defender, who was then an officer in the said 2nd Volunteer Battalion was gazetted to the command of the battalion in the year 1905, and continued to occupy that position down to the date of the pursuer's appointment. At some date unknown to the pursuer, but at least six years prior to obtaining command of the battalion, the defender was appointed by the officers of the battalion to act as treasurer to the finance committee of the battalion, and as such it was his duty to keep the accounts and books of the regiment and the officers' mess, and to receive and out of the funds contributed by the officers to pay the various accounts and charges incurred by said officers in connection with the regiment. . . . (Cond. 3) The defender on being appointed commanding officer of the battalion was no longer qualified to fill the position of treasurer to the finance committee of the regiment, and at that date, and on his suggestion, it was arranged that the appointment of treasurer should be given to a clerk, by name John Munro, who was employed by the defender in connection with his business as a writer in Glasgow. The said John Munro was not a member of the regiment, and his appointment was agreed to by the finance committee of the regiment on the understanding that the appointment was in fact a nominal one, and that the defender should retain the whole books and accounts in his office, and that Munro's appointment should subsist only so long as he remained in defender's employment. It is believed that the said John Munro left defender's employment in or about the year 1913, but the only notification of this given to the finance committee, or received by them, was an intimation in

October 1913 that Munro was temporarily absent through illness. The defender, without further advising the finance committee, continued to discharge the duties of treasurer down to October 1914. So far as the pursuer is aware the only authority which he obtained from the finance committee was when, on 12th August 1914, he was authorised by the committee to sign cheques in the absence of the pursuer with the battalion at the war, which the committee then believed to be temporary. . . . (Cond. 4) In terms of section 1143 of the King's Regulations it was the duty of the defender on giving up the command of the regiment in 1912 to send to the brigade commander a certificate that the funds of the regiment were all in order, or a statement of the position of the regimental accounts for which he was then responsible, in order that it might be decided whether the pursuer should take over the responsibility for the liabilities of the regiment. Had any statement been sent to the brigade commander truly setting forth the state of the regimental accounts at that date, and showing the amount of liability in excess of the assets, the pursuer, had he been aware thereof, would, as he was entitled to do in terms of the Regulations, have expressed dissatisfaction with the state of the funds and have declined to accept responsibility for the deficit. The defender, however, failed to disclose the state of the accounts, and the pursuer having no reason to suspect the true state of matters, took no other steps at that time than to call on the defender to furnish him and the finance committee with a statement showing the position of the regimental funds and of the intromissions therewith by himself and the said John Munro. The defender, who never disputed his liability to account to the pursuer for any balance which might be due to the regimental funds at the date of his demitting office as colonel, or for the period subsequent thereto during which he acted as treasurer, repeatedly put the matter off, but eventually after the regiment had been mobilised in 1914 he supplied the pursuer with a note of balances and various books and accounts to 10th October 1914. The pursuer and his fellow officers were unable to gather from these documents and books the position of the regimental and officers' mess funds, and accordingly handed them over to a chartered accountant to have statements made up. The said chartered accountant obtained from defender certain other books and vouchers, and after examination of these, reported to the pursuer that apparently a sum of about £800 was not accounted for and was owing to the regimental funds. . . . (Cond. 5) When the pursuer retired from the command of the regiment in 1915 his successor, Colonel Miller, declined to accept responsibility for the deficit in the regimental accounts, and the same course has been followed by the present commanding officer Colonel Anderson. In 1916 the matter became the subject of a court inquiry by the military authorities. The only question at issue was whether the pursuer, by having failed to insist on a statement of accounts being submitted in terms of section 1143 of the King's Regulations immediately on his taking over command of the regiment and by continuing in command for nearly two years without obtaining any such statement had lost his right to decline responsibility for the deficit in terms of the said section and had rendered himself liable therefor in terms of section 39. It was not, and could not be, maintained under the circumstances that any liability attached to either Colonel Miller, Colonel Anderson, or the officers of the regiment. As a result of this inquiry the following letter from the War Office was communicated by the Territorial Force Record Office to the pursuer:—'*7th November* 1916. Sir,—With reference to your communication C. R. No. 95813 (A) dated 14th October 1916, and previous correspondence, regarding the Accounts of the 6th Battalion Highland Light Infantry (T.F.), I am commanded to inform you that as matters stand at present, having in view paragraphs 39 and 241 Regulations for the Territorial Force, the Army Council must hold Lieutenant-Colonel J. P. Cochrane, V.D. (T.F. Reserve), responsible for the funds unaccounted for, but that before taking any action the Council are prepared to give Lieutenant-Colonel Cochrane every opportunity of obtaining the decision of a civil court as to the question of liability, as between himself and Lieutenant-Colonel H. D. Chalmers, if he desires to raise and contest that question, and upon condition that he prosecutes any such civil remedy with all possible dispatch. I am to add that the Council are of opinion that the matter should be pressed to a definite conclusion without delay.—I am, Sir, Your obedient servant, B. B. CUBITT. The General Officer, Commanding-in-Chief, Southern Command, Salisbury.' (Cond. 6) This decision of the Army Council proceeds on an interpretation of the two sections therein referred to, and as by Order of His Majesty prefixed to the Regulations for the Territorial Force it is enacted 'that the Army Council shall be the sole administrators and interpreters of the said Regulations,' the sole responsibility for immediate payment of the debts, so far as unpaid, which were outstanding when the defender retired from the command of the regiment or were incurred during the pursuer's period of command rests with the pursuer. He has accepted the decision of the Army Council as he is bound to do, and has since this action was raised personally settled several of the regimental accounts which were outstanding when the defender retired from the command of the regiment. He believes and avers that on an accounting with the defender it will appear that sums amounting to £800 or thereby have not been accounted for which should have been credited to the said accounts either during the period when the defender was in command and therefore responsible for the regimental funds, or after the date on which the said John Munro left his office and during the period in which the defender discharged the duties of treasurer without having been so appointed. The defender has been called upon to pay over the said

sum of £800, or such balance as may on an accounting be found due by him, to the regimental funds but declines to do so, and the present proceedings have accordingly become necessary."

The pursuer *pleaded*—"1. The defender being bound to account to pursuer, as commanding officer of the regiment during the years 1912-1915, for any balance due to the regimental funds as at the date of his demitting office as colonel, and for any further balance accruing during the subsequent period during which he acted as treasurer to the Finance Committee, decree should be pronounced in accordance with the first two conclusions of the summons."

The defender pleaded—"1. The pursuer not being in command of the battalion in question has no title to sue, and the action falls accordingly to be dismissed. 2. The action is incompetent. 3. The averments of the pursuer being irrelevant and insufficient to support the conclusions of the action, *et separatim* being wanting in specification, the action should be dismissed. 4. The defender having duly accounted for his intromissions while holding the appointment of treasurer of the battalion, and during his subsequent command of the regiment, is entitled to be assoilzied from the conclusions of the summons."

Argued for the pursuer (respondent)—The War Office had held the pursuer responsible for the funds unaccounted for, but had given the pursuer the opportunity of getting the decision of the civil courts on the question of liability as between him and the defender. When the defender demitted the command of the battalion there was a balance unaccounted for upon his intromissions. The pursuer in these circumstances took over the command of the battalion, but in handing over the funds the defender had not observed the King's Regulation No. 1143, under which he was bound to render a statement showing the position of the funds, which statement fell to be laid before his successor, who before accepting liability could have insisted on an accounting with the defender. The pursuer's successors had refused to accept liability, and the pursuer himself had been held liable for the deficit which had been incurred during the defender's command. Consequently the pursuer had a title and interest to call the defender to account. His title could not be lost by the fact that the defender had delayed to produce the accounts which the pursuer had demanded from the moment he assumed command. Neither had he lost his title by the fact that he had ceased to be in command when the action was raised. Further, at common law the pursuer had a right of relief against the defender as treasurer of the battalion.

Argued for the defender (reclaimer)—The debts paid by the pursuer were not debts which either the pursuer or the defender, his predecessor in the command, were bound in law to pay, for a commanding officer was not in law liable for the debts of his battalion—*National Bank of Scotland* v. *Shaw*, 1913 S.C. 133, 50 S.L.R. 81. Hence the pursuer had no right of relief against the defender. Further, the pursuer did not aver that the defender had ingathered funds, and the King's Regulation No. 1143 only gave the pursuer a title in circumstances which did not exist in the present action. Further, there was no relevant averment inferring liability upon the defender as treasurer of the battalion, for the pursuer averred that when the defender assumed command a third party was appointed treasurer. The pursuer was not without a remedy. He could sue the defender for negligence in failing adequately to supervise the proper application of the regimental funds—Regulations of the Territorial Force, articles 39 and 241—but that question could not be raised in the present proceedings, for the necessary averments and pleas were wanting.

At advising—

LORD PRESIDENT—So far as this action is directed against the defender in his capacity as commanding officer of a battalion of the Highland Light Infantry of His Majesty's Territorial Forces, I cannot regard it otherwise than as an action of relief. Thus viewed it fails in relevancy, for the pursuer does not aver that he has paid, or has been called upon to pay, any debt for which the defender as commanding officer is legally responsible.

It appears that the pursuer himself was for a period of three years from January 1912 the officer in command of this battalion. There was an officers' mess established in connection with it, and in terms of the Regulations for the Territorial Force, Article 241—"If an officers' . . . mess is established in a unit under the authority of the commanding officer, that officer will be responsible . . . that the accounts are properly kept and audited." Further, by Article 39, "A commanding officer is responsible for the proper application of all regimental funds, and will supervise and control the committees formed for their management."

Now when the pursuer retired from the command it was found that there was a deficit on the regimental accounts, and by an Order of the Army Council dated 7th November 1916 he was held responsible as commanding officer of the battalion for that deficit. The ground on which he was so held responsible was that he had committed a breach of the two articles I have just read. This was neither more nor less than a penalty imposed upon him as commanding officer by a competent military authority for a breach of the Regulations of the Territorial Force.

The pursuer, however, avers that the deficit for which he was held accountable occurred during the period when the defender was in command of the battalion, that the defender committed a breach of the same Regulations, and that in addition he committed a breach of Article 1143 of the King's Regulations which provides that "Before handing over the command of a unit or portion of a unit in which an officers' mess is maintained, the commanding officer will send to the brigade commander a cer-

tificate that all debts owing by the mess have been paid, or that a sufficient amount is in hand to meet all liabilities. Should the commanding officer be unable to furnish this certificate he will explain the reasons which have necessitated the contracting of debts, so that the brigade commander (when not below the rank of brigadier-general) may decide whether they will be paid by the commanding officer or can be taken over by his successor."

It is common ground that Article 1143 was not obeyed by the defender. But he was not held responsible by the Army Council for a breach of any regulation. In short, the penalty which has been imposed upon the pursuer was never imposed upon him. And it is nowhere alleged on record that he was liable for any of the debts which the pursuer has been held accountable for. Nor is it alleged that he as commanding officer ever intromitted with the regimental funds, ever ingathered subscriptions, or ever paid accounts. In short, it is neither said that he was legally liable for these debts as commanding officer, nor is it said that he actually has in hand, or ought to have in hand, the funds for which the pursuer was held accountable. On the contrary, although the pursuer says that he "has, since this action was raised, personally settled several of the regimental accounts which were outstanding when the defender retired from the command," he does not say that the defender could have been made liable for these accounts. But he specifically avers that "the sole responsibility for immediate payment of the debts, so far as unpaid, which were outstanding when the defender retired from the command of the regiment, or were incurred during the pursuer's period of command, rests with the pursuer."

In short, it is nowhere said on this record that the defender as commanding officer was liable in payment of any debt which the pursuer either has paid or has been called upon to pay, and under these circumstances I do not see on what grounds we could hold the defender as commanding officer liable to account to the pursuer for regimental funds.

It remains to consider the action in so far as directed against the defender in his capacity as treasurer of the mess. The pursuer here avers that the defender, who was an officer in the battalion and was gazetted to the command in 1905, "continued to occupy that position down to the date of the pursuer's appointment," and that "at some date unknown to the pursuer, but at least six years prior to obtaining command of the battalion, the defender was appointed by the officers of the battalion to act as treasurer to the Finance Committee of the battalion, and as such it was his duty to keep the accounts and books of the regiment and the officers' mess, and to receive, and out of the funds contributed by the officers, to pay the various accounts and charges incurred by said officers in connection with the regiment."

The pursuer further avers that "the defender on being appointed commanding officer of the battalion was no longer qualified to fill the position of treasurer to the finance committee of the regiment, and at that date and on his suggestion it was arranged that the appointment of treasurer should be given to a clerk, by name John Munro, who was employed by the defender in connection with his business as a writer in Glasgow. The said John Munro was not a member of the regiment, and his appointment was agreed to by the finance committee of the regiment on the understanding that his appointment was in fact a nominal one, and that the defender should retain the whole books and accounts in his office, and that Munro's appointment should subsist only so long as he remained in defender's employment."

Now the averment that the appointment of Munro was merely a nominal one, and made on a certain understanding with the finance committee, is very loose and very indefinite. It will be observed that the pursuer does not say that when he assumed the command of the battalion in 1905 the defender continued to act as treasurer just as he had done before. He does not aver that the defender as treasurer intromitted with the regimental funds, that he ingathered subscriptions, and that he paid accounts. In short, he does not allege that the defender *de facto* acted as treasurer and is now in possession, or ought to be in possession, of the sums for which the pursuer has been held to be accountable by the Army Council. Nor is there any plea appropriate to such a case as I have figured. On the contrary, the first plea-in-law for the pursuer appears to me to exclude altogether the case against the defender resting on the footing that the defender was throughout the treasurer of the regiment, or at all events acted as such and intromitted with the funds as such.

I am, however, prepared even at this late stage to give the pursuer an opportunity of making definite and pointed averments to the effect that the defender really acted as treasurer of this battalion, and that he intromitted with the funds, and is now in possession of or ought now to be in possession of the very funds for which the pursuer was held to be accountable, for in face of the explicit averment that as commanding officer he could not be treasurer of the finance committee, and that John Munro was appointed to be treasurer in unqualified terms, it appears to me that we would require to have much more definite and specific averments on the lines I have indicated before we can possibly allow an inquiry. If the pursuer is able to make and to establish such averments, then I consider that he ought to be allowed to have an accounting with the defender as *de facto* treasurer of the finance committee of this battalion.

LORD JOHNSTON — The defender Lieutenant-Colonel Chalmers was an officer in what is now the 6th (Territorial) battalion of the Highland Light Infantry from 1895 to 1912. Prior to 1905 he was a company officer and treasurer of the battalion. In

1905 he became commanding officer, and therefore as we were informed necessarily ceased to be treasurer, at least officially. He commanded the battalion from 1905 to 1912, when he was succeeded in the command by the pursuer Lieutenant-Colonel Cochrane, who commanded from 1912 to 1915. On Lieutenant-Colonel Chalmers retiring and Lieutenant-Colonel Cochrane taking up the command, the procedure which according to the Army Regulations ought to have been followed in order to ascertain the position of battalion funds, and determine the respective responsibilities of Lieutenant-Colonel Chalmers and Lieutenant-Colonel Cochrane, was neglected. As the result the War Office has held Lieutenant-Colonel Cochrane as commanding officer taking over from Lieutenant-Colonel Chalmers in 1912 without protest liable to make good a shortage of funds, ascertained to have existed, although not reduced to a figure of exact accounting, which must have originated during a period prior to his assuming the command, and they have left him to any civil remedy he may have. It is perhaps desirable to quote the exact terms of the War Office letter of 7th November 1916 which was written to the general officer commanding at Salisbury, where apparently the 6th battalion of the Highland Light Infantry were then stationed, and by his orders communicated to Lieutenant-Colonel Cochrane. They are—"I am commanded to inform you that as matters stand at present, having in view paragraphs 39 and 241 Regulations for the Territorial Force, the Army Council must hold Lieutenant-Colonel J. P. Cochrane, V.D. (T.F. Reserve), responsible for the funds unaccounted for; but that before taking any action the Council are prepared to give Lieutenant-Colonel Cochrane every opportunity of obtaining the decision of a civil court as to the question of liability, as between himself and Lieutenant-Colonel Chalmers, if he desires to raise and contest that question."

This action, raised accordingly by Lieutenant-Colonel Cochrane, calls upon Lieutenant-Colonel Chalmers to produce a full and particular account of his whole intromissions as officer commanding, and also as treasurer of what is now the 6th battalion of the Highland Light Infantry, whereby the true balance due by him to the pursuer as lieutenant-colonel commanding the battalion may appear and be ascertained by the Court, and that decree for the ascertained amount should go out. Even if the terms of the summons are wide enough to cover the true claim of the pursuer against the defender, which I doubt, when the record is examined it is apparent that the pursuer has not had a clear and correct understanding of what that claim really is. In particular, I refer to the pursuer's sole plea-in-law, viz. — "The defender being bound to account to pursuer as commanding officer of the regiment during the years 1912-15 for any balance due to the regimental funds as at the date of his demitting office as colonel, and for any further balance accruing during the subsequent period during which he acted as treasurer to the finance committee, decree should be pronounced," &c. I may say in passing that the reference to the defender acting as treasurer for a period is a side issue which may be ignored. He did so only *pro tem.* after he had retired from the command, and while the pursuer was at the front. The plea which I have quoted subsumes a liability by the commanding officer giving up the command of a battalion to account for the balance of regimental (by which is meant battalion) funds to the commanding officer succeeding him, resulting in an obligation to pay over such balance.

Where I think that the pursuer has gone wrong is in not recognising that while there may be a military liability, that liability is not one to be enforced by civil process; that there may notwithstanding be a civil liability independently of the military regulations, but that any such civil liability proceeds on common law considerations, and on those alone. The pursuer has not kept these two things distinct, with the result that even if the summons could be stretched to cover the pursuer's claim the record is confused and irrelevant. The ordinary consequence would be that the defender's plea to the relevancy ought to be sustained. But this is not a matter of personal considerations merely. The pursuer and defender have each been giving practically gratuitous services to their country. Whatever liabilities have been incurred *hinc inde* have been incurred in their official capacity, and I think that they are both entitled to the utmost consideration from the Court, and I may almost say assistance, for the Army Regulations, though they may work satisfactorily *intra familiam militarem*, are wanting in definiteness and leave much to be desired when a situation such as the present arises. If a civil remedy cannot be found they may work serious hardship to one or other of the parties concerned. I am therefore for giving the pursuer yet a further opportunity of reconsidering his position and, if so advised, re-writing his record, of course subject to conditions, as he has already had such an opportunity and failed to take advantage of it. I am the more disposed to this course as the question involved is one of general importance. Should he take advantage of this opportunity I think that he would be well advised to consider whether some alteration of his summons is not also necessary in order to present the true question between the parties in such form that the Court may be able to dispose of it.

I should add that, as I read the record, although the pursuer sues for an accounting of the defender's whole intromissions as officer commanding and also as treasurer, when one comes to read the record as a whole, and particularly the plea which I have quoted, it is perfectly evident that this suggestion of a subsidiary obligation to account as treasurer is intended only to cover the intromissions of the defender in the later stage of his connection with the regiment, to which I have adverted, while the pursuer was absent on active service

abroad, and the retired Colonel Chalmers took up voluntarily and *pro tempore* merely the office of treasurer. It was not intended to cover the suggestion that all through his command he was truly acting as treasurer through the sides of his clerk John Munro, to be afterwards mentioned; and I question whether it would not be necessary to advert to the terms of the summons as well as to the terms of the condescendence and pleas if the pursuer is to make a proper case.

That I may make my views more intelligible to the parties I shall venture respectfully to state them, not necessarily as a concluded judgment in all details, but as indicating the considerations which have weighed with me. These considerations may be modified, if the case is further prosecuted, by more complete and accurate information than I have at present.

By section 39 of the Territorial Regulations a commanding officer is declared to be "responsible for the proper application of all regimental funds, and will supervise and control the committees formed for their management." To this end he is, when the accounts for the year are ready, to assemble an audit board, who are to examine vouchers and satisfy themselves that liabilities are not omitted, that assets are not overestimated, and that cash credits are actually available. The balance of the funds are then to be entered in the proceedings, and the board are to record therein that the instructions to them have been carried out; and then finally "the proceedings will be laid before the commanding officer for approval, and placed before the inspecting officer at his annual inspection."

From this it is very difficult to deduce a liability on the part of the commanding officer to account for or to make good the balance which the audited accounts may show. So far as I know the battalion funds consist of Government grants, though how far the responsibility for accounting for them is not that of the paymaster, and how far any portion falls into the regimental funds for the application of which under head 39 of the Regulations the commanding officer is responsible, I do not know. They consist further of contributions by officers for various common battalion purposes, of mess funds proper, of canteen funds, &c. It is not suggested that the commanding officer has any personal intromissions with them *qua* commanding officer. Responsibility for proper application expressly imports a proper supervision of the committees and individuals charged with their management. If a commanding officer is lax in such supervision and there is a shortage of funds, I can understand that the Army Council may have the lever in hand of being able to deprive him of his command and even of his commission, and that indirectly there may thus be a compulsitor on him to accept liability for shortage. But liability which could be directly enforced there is none.

Turning, then, to the King's Regulations, so far as I have been allowed to see these, all that they add is that in head 1130 it is declared that "the commanding officer is responsible that all regulations relating to [the regimental mess] are observed." But there is a further head, 1143, also entirely confined to mess accounts, which provides for the occasion of a change of command. Let it be premised that there are mess assets —funds contributed and officers' liability for mess bills being, I suppose, the chief items —and that there are mess liabilities in the form of tradesmen's accounts. Bank balances may be either assets or liabilities, but these relate to the regimental mess only, and whatever the commanding officer's duties are thereanent the sphere of responsibility is even more limited than that imposed by the Territorial Regulation, head 39, already referred to, for "all regimental funds." This King's Regulation, head 1143, then provides for the handing over of the command of a unit in which an officer's mess is maintained, and the object is to ascertain "that all debts owing by the mess have been paid, or that a sufficient amount is in hand to meet all liabilities." When debts have been contracted, and the commanding officer cannot certify that they are sufficiently covered by assets, reasons have to be given, and it is left to the brigade commander, if of the rank of brigadier-general, to decide "whether they will be paid by the commanding officer or can be taken over by his successor." An opportunity is further given to the officer assuming the command to report to the brigade commander his dissatisfaction with the state of the funds. And that is all. Even the military responsibility for a shortage of mess funds to meet liabilities is arrived at in a very left-handed way, and though it may be indirectly enforced, as I have above indicated, by the Army Council, creates no legal liability which, so far as I am at present advised, could be enforced at law by anybody.

Now it is the procedure provided by this Regulation 1143 which was neglected on the defender demitting and the pursuer assuming command in 1912. In these circumstances the Army Council, who have apparently absolute authority to place their own interpretations on the Regulations, have decided, not under the King's Regulations, head 1143, but under the Territorial Regulations, head 39 and head 241, that the pursuer is responsible for the funds unaccounted for. Their grounds for this decision are therefore not very intelligible, but it is at any rate to be inferred that it is an ascertained matter that funds generally are unaccounted for, which is a different thing from, though it may result in, mess assets being insufficient to meet mess liabilities. Though I am disposed to think that Lieutenant-Colonel Cochrane might have disputed this liability, which apparently is a heavy one, though probably at the risk of his commission, I am not surprised that as an officer he accepted the ruling of the Army Council, and has so far met the demands upon him as to have paid certain outstanding battalion accounts. This is, however, short of clearing himself of responsibility "for the funds unaccounted for." But the importance of the Army Council's action and the pursuer's acquies-

cence in their ruling is, I think, that the pursuer in making payments under that ruling is no mere volunteer. He is paying under compulsion, though it may be indirect. This gives him a good title to claim relief. But then on what grounds? Surely only on the ground that he has paid what is somebody else's debt. He cannot certainly obtain relief from his predecessor in command on any ground of what I have called the latter's military liability. He cannot plead the Military Regulations, even though both he and the defender may have been amenable to them, as giving him right of action against the defender. His remedy is, I think, purely civil, and therefore dependent on one of two things—either, 1st, the defender's personal intromissions with funds, or, 2nd, his responsibility for someone who has had such personal intromission.

Before the situation which is shadowed forth in the condescendence is cleared up I think that proof will be necessary. Yet it is difficult to say that this proof can be satisfactory and complete until accounts have been brought in.

At present we know nothing judicially or definitely about the finance committee of the battalion or about its treasurer, nor about the liabilities of the battalion. We do not even know whether a treasurer is a regimental official recognised by the Regulations. But it is impossible to avoid seeing that the main questions involved are these —1st. Given that there were liabilities of the battalion, using the term generally, which exceeded the assets of the battalion at the date on which the defender resigned and pursuer took up the command, what were these liabilities and what these assets? 2nd. How far were these assets extant and available, and if not extant and available, why not? And 3rd. What was the position of John Munro in relation to the battalion finance? Did he default? And was the defender responsible for him?

I take leave to think, reading between the lines of the present record, that the real question between the parties is the last I have stated. If so, there is no use beating about the bush. The pursuer must, in my opinion, make a much more definite statement than that contained in condescendence 3. The law knows what is meant by the terms of an appointment and by the conditions of an agreement, but it knows nothing of understandings as modifying either. I do not know what is meant by an appointment being agreed to "on the understanding" that it was in fact a nominal one, or "on the understanding" that the defender should retain the whole books and accounts in his office. One sees what is vaguely in the pursuer's mind. But if anything is to be made of it he must have the courage of his convictions and become more articulate and specific. While prepared, so far as I am concerned, to give him an opportunity of becoming so, my difficulty has been whether the pursuer can be so to the full extent necessary to bring the case into shape for decision, unless the defender is first required to table accounts. But after having reconsidered the matter in the light of your Lordships' views expressed at consultation, I think that matter is capable of being brought to a point thus—from condescendence 4 it would appear that the defender has supplied the pursuer with a note of balances and with various books and accounts, and that these have been examined by an accountant on behalf of the officers of the battalion and reported on. If so, the pursuer is in a position to make a specific statement of what has thus been ascertained and of what deductions are to be drawn affecting the defender's personal liability to account and to relieve the pursuer of payments which he is called on to make, or funds which he is called on to make good.

In these circumstances, while I am of opinion that the pursuer's record as it stands is irrelevant, I am for giving him a further opportunity if he is so advised of amending, or I should rather say rewriting, it in order that he may define what is the real question at issue between the parties, and which the Court have to try and to decide.

LORD MACKENZIE—I agree with your Lordship in the chair that the pursuer should have an opportunity of amending his record.

The case has two aspects—one which may be described as the military and the other the civil. On the military aspect I am unable to find that the pursuer has any averment that he has paid a debt or has been made responsible for a debt for which the defender as commanding officer is legally responsible. The domestic tribunal—the Army Council—has by Order of 7th November 1916 held him—Lieutenant-Colonel Cochrane—responsible for the funds unaccounted for. "He has," he explains, "accepted the decision of the Army Council, as he is bound to do, and has since this action was raised personally settled several of the regimental accounts which were outstanding when the defender retired from the command of the regiment." There is an absence of any relevant averment of the liability of the defender as commanding officer, and therefore I think on that part of the case the pursuer fails.

But then as indicated in the Order of the Army Council every opportunity is to be given to Colonel Cochrane to obtain a decision of the civil court as to the question of liability. And when we come to deal with that aspect of the case then the common law rules apply. The first question to be ascertained in the case is whether there is a liability on the part of the defender Colonel Chalmers, not as commanding officer but on grounds which are good in a court of law, to pay the debt.

It appears to me that it is impossible to order the production of accounts in any shape until first of all the question of liability to account has been determined. And that question cannot be raised on the present pleadings, because the averments are in such a shape that we cannot remit the question of liability to proof on the record as it stands.

What the grounds are on which proof could be allowed has already been sufficiently explained by your Lordship. To a certain extent they are adumbrated in condescendence 3 and depend upon the actual relation of the defender to the funds, either in the capacity of treasurer or in his capacity as the employer of Munro, and as a person who *de facto* and *de jure* was liable for what John Munro did or failed to do.

Accordingly it is necessary that the record should be rewritten. The plea-in-law is obviously not directed to the point which we now consider to be the relevant matter in the case. As regards the conclusion in the summons, in point of form it appears to me the conclusions are wide enough, but it is quite obvious when they are linked up with the present averments that the reference to the defender's relation with the regiment as treasurer is intended to be of a very limited character. It is for the pursuer to consider whether the wording of the conclusion should remain; that is, whether when he writes the appropriate averments he may not stretch the conclusions of the summons to an extent never intended.

LORD SKERRINGTON—I agree with your Lordships that the action fails on the principal ground upon which it is laid, namely, that the defender as former commanding officer is under a duty to account to the pursuer.

Whether or not it may be possible to convert this action into a common law action of relief I do not know, but I do not advise the pursuer rashly to throw good money after bad by amending his record for the second time. If, however, your Lordships think that he should have the opportunity of doing so, I do not dissent.

The Court recalled the interlocutor of the Lord Ordinary and continued the cause to allow the pursuer an opportunity of further amending his pleadings if so advised, reserving all questions of expenses.

Counsel for the Pursuer—Blackburn, K.C. —Macquisten. Agent—Francis S. Cownie, S.S.C.

Counsel for the Defender — Sandeman, K.C.—Wilton. Agents—Dalgleish, Dobbie, & Company, S.S.C

Tuesday, May 28.

SECOND DIVISION.

[Sheriff Court at Edinburgh.

GENERAL GUARANTEE CORPORATION *v.* ALEXANDER.

Process—Appeal—Sheriff—Competency of Appeal—Action ad factum præstandum.

In an action for the delivery of a piano the pursuer averred in the condescendence that the value of the piano was £22, 2s., and in answer the defender stated that its value did not exceed £9, 17s. 6d. The Sheriff having granted decree for delivery of the piano the defender appealed to the Court of Session. *Held* that the value of the cause being below £50 the appeal to the Court of Session was *incompetent.*

The General Guarantee Corporation, Limited, Glasgow, *pursuers*, brought an action in the Sheriff Court at Edinburgh against Mrs Kate Alexander, 3 Gillespie Place, Edinburgh, *defender*, and also against her husband as her administrator-in-law, whereby they craved the Court "to ordain the female defender, within such short period as the Court shall appoint, to deliver to the pursuers a pianoforte, No. 1383/2575 Brooklyn, and failing delivery as aforesaid to grant warrant to officers of Court to search for, take possession of, and deliver the same to the pursuers; and to find the female defender in any event, and the male defender in the event of his opposing the conclusions of the writ, liable for expenses, and to decern therefor."

The pursuers averred, *inter alia*—"(Cond. 4) . . . The value of the said article is £22, 2s."

The defender averred, *inter alia*—(Ans. 4) . . . Explained that the value of the said piano is not more than £9, 17s. 6d."

On 5th March 1918 the Sheriff-Substitute (ORR) dismissed the action.

On 28th March 1918 the Sheriff (MACONOCHIE) recalled the interlocutor of the Sheriff-Substitute, and ordained the defender to deliver the piano to the pursuers within seven days.

The defender having appealed to the Court of Session the pursuers objected to the competency of the appeal, and argued —The appeal to the Court of Session was incompetent by reason of the value of the cause being less than £50. Section 7 of the Sheriff Courts (Scotland) Act 1907 (7 Edw. VII, cap. 51) so far as dealing with the value of actions *ad factum præstandum* was repealed by the Act of 1913 (2 and 3 Geo. V, cap. 28), which thereby restored the practice under the Act of 1853. The value of the cause fell to be ascertained from the conclusions of the summons or from the record or from any other appropriate source. Both the parties here admitted that the piano in question was less than £50 in value, and there was no added sentimental value attached to it. Counsel referred to the following cases:—*Purves* v. *Brock*, (1867) 5 Macph. 1003, 4 S.L.R. 174; *Henry* v. *Morrison*, (1881) 8 R. 692, 18 S.L.R. 438; *Singer Manufacturing Company* v. *Jessiman*, (1881) 8 R. 695, 18 S.L.R. 496; *Cameron* v. *Smith*, (1857) 19 D. 517; *Dickson & Walker* v. *John Mitchell & Company*, 1910 S.C. 139, *per* Lord President Dunedin at p. 145, 47 S.L.R. 110.

Argued for the defender (appellant)—The present case being an action *ad factum præstandum* the appeal was competent. An action *ad factum præstandum* was not in the same category as one involving pecuniary conclusions, where the value of the cause was to be ascertained either by reference to the conclusions of the summons or the prayer of the petition. In the present case it was impossible to ascertain from the conclusions whether the cause fell within the limit or not, and the condescendence could not be held to qualify the conclusions. The