covers this case, especially as in the case of *Cooke* the House of Lords appear to have made no distinction between mere licensees and persons who have been actually invited on to the ground. As I read the decisions in this Court, the decision in *Cooke* is not entirely in accord with the decisions upon which Mr Crawford very rightly founded. In the cases of *Devlin*, November 19, 1902, 5 Fraser 130, 40 S.L.R. 92, and *Cummings*, February 24, 1903, 5 Fraser 513, 40 S.L.R. 389, what was considered a vital distinction was taken by the judge between a person who was there merely with the permission of the defenders or the owners of the ground and a person who is actually invited on to the ground by the defenders.

"With regard to the point advanced by Mr Crawford, that the case is more suited for proof than for jury trial, the case belongs to a class which is generally remitted to jury trial on an issue, and I do not think, although in one view of the case there may be delicate questions of law involved, there will be any difficulty in keeping the law of the matter quite clearly before the jury, and directing them accordingly. No exception has been taken to the form of the issue which is proposed, and I shall approve of it as the issue in the cause."

The defenders reclaimed, and argued—The action was irrelevant because the pursuer's averments disclosed no fault on the part of the defenders. In any event the proximate cause of the accident was the fault of the child's father in allowing her to stray into the pit, and therefore the defenders were not liable. The pursuer's averments only amounted to a statement that children went to the pit, and, even if the defenders knew that children went there, that would not make them responsible. The case of *Cooke* v. *Midland Great Western Railway of Ireland*, [1909] A.C. 229, was different, because in that case the ground was derelict and children habitually went on to it. The mere fact that the pit was attractive to children was not enough to render the defenders liable unless the pit was a public place, or a place which the defenders had dedicated to the public and to which they had invited the children—*Devlin* v. *Jaffray's Trustees*, November 19, 1902, 5 F. 130, 40 S.L.R. 92; *Cummings* v. *Darngavil Coal Company, Limited*, February 24, 1903, 5 F. 513, 40 S.L.R. 389. The pit could not have been dedicated to the public since it was in industrial occupation. The defenders were not liable unless they themselves had made the pit a playground for children. They were not liable if it was the children themselves who had put it to that use—*Ross* v. *Keith*, November 9, 1888, 16 R. 86, 26 S.L.R. 55. Even if the action was relevant, it was more suitable for proof than for jury trial—*Holland* v. *Lanarkshire Middle Ward District Committee*, 1909 S.C. 1142, 46 S.L.R. 758.

Counsel for the respondent was not called upon.

LORD JUSTICE-CLERK — I do not think that we should interfere with the judgment of the Lord Ordinary. As regards the mode of proof, I think he was quite right to allow an issue. It may be, and often is, said that certain cases would be better tried before a judge than before a jury, but this case is just one of the class which is generally remitted to a jury, and therefore my view is that we should not interfere in that matter.

As to the relevancy, I have no doubt that the case is relevant. It is averred that the defenders, knowing that their sand-pit was a dangerous place, allowed children to enter their ground and use the sand-pit as a playground. It is also averred that the place immediately adjoined a public path, in the fence of which there was a gap, and that it was a common resort of children for the purpose of recreation. What force is to be given to the averments as to the dilapidated condition of the fence will depend entirely on the evidence. But the real ground of liability as alleged is the fact that the defenders allowed the children to make use of the pit.

LORD SALVESEN — I am of the same opinion. I think the crucial distinction between this case and the cases of *Devlin* (*cit. sup.*) and *Cummings* (*cit. sup.*) is that the danger here was not manifest to a child of tender years. Every child which is able to go out by itself is supposed to know that a pond or a hole is dangerous, but not that a bank of sand may give way because it is at a greater angle than the angle of repose. As the case is to go to a jury, and the facts may turn out to be otherwise than the pursuer avers, I refrain from commenting upon these averments except to say that I agree with your Lordship in the chair that they disclose a relevant case.

LORD DUNDAS—I concur.

LORD GUTHRIE was absent.

The Court adhered.

Counsel for Pursuer and Respondent—Duffes. Agent — James G. Bryson, Solicitor.

Counsel for Defenders and Reclaimers—Horne, K.C.—Crawford. Agents—Webster, Will, & Co., W.S.

Saturday, November 16.

EXTRA DIVISION.

NATIONAL BANK OF SCOTLAND, LIMITED *v.* SHAW.

Crown — Volunteer Force — Bank — Overdraft — Volunteer Act 1863 (26 *and* 27 *Vict. cap.* 65), *sec.* 25, *and Article* 407 *of the Regulations for the Volunteer Force* 1901 *—Contract.*

An account was opened with a bank in the name of the finance committee of a Volunteer corps, of which committee the commanding officer was a member, cheques to be signed by

any two members. The bank having allowed the account to be overdrawn, sought to make the commanding officer liable on the ground (*a*) that under the Volunteer Act, section 25, and Article 407 of the Regulations for the Volunteer Force 1901, the property of the corps vested in the commanding officer, and he was personally liable on any contracts made in the name of the corps, or (*b*) that he had contracted with the bank as an individual, and that it was on his personal credit that the overdraft had been allowed.

Held (*a*) that the Regulations did not apply in the present case, and (*b*) that in fact there was no proof that the commanding officer had contracted with the bank so as to make himself personally liable.

The Volunteer Act 1863 (26 and 27 Vict. cap. 65) enacts—Section 25—"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 Volunteer permanent staff belonging to the corps or regiment, and the exclusive right to sue for and recover current subscriptions, arrears of subscriptions, and other moneys due to the corps or regiment, and all lands acquired by 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 proceeding 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 Regulations for the Volunteer Force 1901 enact—Article 407—"In accordance with section 25 of the Volunteer Act 1863, and section 9 of the Regulation of the Forces Act (44 and 45 Vict. cap. 57), the whole of the property of a Volunteer corps is vested in the commanding officer for the time being, and he is solely responsible for the proper administration of all moneys and other property belonging to the corps. The rules and bye-laws of a corps cannot relieve the commanding officer from full responsibility for the custody and administration of the property and moneys of the corps except as regards such portion of the property of 'a constituent corps' as was acquired before the date of consolidation, and was reserved to such corps under the Regulation of the Forces Act 1881; nor can they relieve him from responsibility or liabilities incurred on his behalf by officers commanding detachments. To aid him in the management of the finances of the corps, a finance committee will be appointed, consisting of not less than three members besides the commanding officer. Any rules or amended rules submitted for the approval of His Majesty will contain provisions for the appointment of such a committee. The rules will state what persons are eligible to be members of the committee, and whether the members are to be appointed by the commanding officer or are to be appointed by the corps; also the number of persons of whom the committee is to consist, and how many are to form a quorum. All orders to tradesmen on behalf of the corps should be given by the commanding officer alone and not by the finance committee, and the commanding officer alone should be a party to any necessary contracts, so that he alone may remain liable for such expenditure. If the finance committee give orders to, or enter into contracts with, tradesmen for supplies, they will become jointly and severally liable for the expenditure arising from such orders or contracts. The finance committee is responsible for limiting the expenditure of the grants made from public funds to such purposes as are sanctioned by the Regulations, for presenting annually to the corps a correct statement of the receipts and expenditure of such funds, and for advising the commanding officer from time to time as to the financial position of the corps."

The National Bank of Scotland, Limited, Edinburgh, *pursuers*, brought an action against James E. Shaw, solicitor, Ayr, lately lieutenant-colonel commanding the Second Volunteer Battalion Royal Scots Fusiliers, *defender*, for the sum of £775, 2s. 9d., being the amount of an overdraft due to the Bank.

The pursuers averred—"(Cond. 1) The pursuers are bankers, and have branches throughout Scotland, one of which is in the town of Ayr. The defender was until about the end of February 1908 commanding officer of the Second Volunteer Battalion Royal Scots Fusiliers, the headquarters of which were in the town of Ayr. In February 1908 the defender resigned the command of said corps in order to enable him to take up the secretaryship of the County Association formed under the provisions of the Territorial and Reserve Forces Act 1907. . . . (Cond. 2) The banking account in connection with the said Volunteer corps has been for over twenty years kept with the pursuers' said branch. Prior to 1896 the said corps was known as the 'Second Ayrshire Rifle Volunteers,' but in that year the name was changed to the 'Second Volunteer Battalion Royal Scots Fusiliers,' and on 6th July 1896 an account in the latter name was opened in the books of the pursuers' said branch. To this account the balance standing at the credit of the account in the former name was transferred. The instructions received by the pursuers with regard to the account so opened were that cheques drawn thereon were to be signed by two members of the Finance Committee of the corps. . . . (Cond. 3) In the year 1900 instructions were received by the pursuers that cheques on

the said account were to be signed in future by the defender alone. In October 1906 these instructions were varied, and the pursuers were instructed to transfer the balance of the then existing account to a new account, the cheques on which were again to be signed by two members of the Finance Committee of the corps. A new account was accordingly opened by the pursuers, headed 'Royal Scots Fusiliers 2nd Volunteer Battalion—Finance Committee. Cheques to be signed by any two members of the Committee.' The names of the committee for the time follow, and these include the name of the defender, who was a member of the Finance Committee during the whole period of the account here in question. To this account the balance standing at the credit of the former account was transferred. The said instructions were given to the pursuers by or on behalf of the defender as commanding officer of the said corps. . . . Explained that the defender on 21st August 1908 wrote to the pursuers' agent at Ayr to the effect that the chief accountant had intimated to him that the War Office held him personally responsible for the balance at debit of the said account, but that he had denied liability. The defender at the same time stated that he withdrew any personal guarantee of his for the account, adding that 'the Bank will probably take whatever steps they consider proper for recovery of the amount due.' . . . (Cond. 4) On or about 1st April 1908 the said Volunteer corps was, in terms of section 29 of the Territorial and Reserve Forces Act 1907, by Order in Council transferred to the Territorial Force, and the said Volunteer corps accordingly then ceased to exist. The said account in the books of the pursuers' said branch continued to be operated on down to 16th July 1908 in connection with the winding-up of the affairs of the said Volunteer corps. At the end of February 1908 the balance due to the pursuers on said account was nearly £900; but by the operations thereon subsequent to that date (which include the payment in of two sums of £250 and £105, 13s. 6d., both of which were provided by the War Office for the discharge of the liabilities of the corps) the balance due to the pursuers was reduced to £714, 12s. 3d, at which sum it stood when the account came to an end, and which with accrued interest is the sum now sued for. The defender was or held himself out to the pursuers as being commanding officer and a member of the Finance Committee of the corps during the whole currency of the overdraft, the balance of which is now sued for, down to the end of February 1908, and the same was incurred by or on his behalf and with his authority for the purposes of the corps. . . ."

The defender pleaded, *inter alia*—"(2) The defender never having been the Bank's customer, and not having guaranteed the overdraft, is not liable for the balance due."

On 2nd November 1909 LORD GUTHRIE allowed a proof, but thereafter nothing was done in the process till 11th February 1911, when the cause was wakened. A joint-minute of admissions was prepared and counsel were heard on it, and on 25th April 1911 LORD GUTHRIE found that the admissions contained in the joint-minute were not sufficient for the disposal of the cause, and of new allowed a proof.

Opinion—"On 1st April 1908 the Second Volunteer Battalion Royal Scots Fusiliers was transferred to the Territorial Force. The defender had been commanding officer of the battalion from April 1904, and in the 'Gazette' of 12th May 1908 his resignation was gazetted to take place as at 10th February 1908. If, as the pursuers allege, the defender is personally liable for a balance appearing in 1908 in their books against the 'Second Volunteer Battalion Royal Scots Fusiliers,' two questions arise—first, as to the date when his liability is to be ascertained, and second, as to the amount of his liability. In the view I take of the case it is not necessary for me meantime to deal with either of these questions.

"In cond. 5 the pursuers base the defender's liability on the terms of section 25 of the Volunteer Act 1863 and Article 407 of the Regulations for the Volunteer Force 1901, and in cond. 4 they allege—'The defender was, or held himself out to the pursuers as being, commanding officer, and a member of the Finance Committee of the corps during the whole currency of the overdraft, the balance of which is now sued for, down to the end of February 1908, and the same was incurred by or on his behalf, and with his authority, for the purposes of the corps.' But in cond. 7 they make the general averment that they dealt with the defender alone in connection with the said current account, and made the advances on his credit, by which I assume they mean his credit as an individual. In answer the defender maintains that the pursuers are not entitled to found on the Volunteer Act of 1863, section 25, or on the Regulations for the Volunteer Force 1901, Article 407; he avers in answer 3 that the pursuers' customer was the battalion, and he pleads—'2. The defender never having been the Bank's customer, and not having guaranteed the overdraft, is not liable for the balance due.'

"The parties have adjusted a minute of admissions, but they did not renounce probation.

"If the pursuers can found, without inquiry, on section 25 of the Volunteer Act of 1863 and on Article 407 of the Regulations for the Volunteer Force 1901, the defender's liability for a certain amount of the balance claimed is admitted. The question really turns on Article 407 of the Regulations.

"Under that Article (quoted in full in cond. 5) it is provided—'All orders to tradesmen on behalf of the corps should be given by the commanding officer alone, and not by the finance committee, and the commanding officer alone should be a party to any necessary contracts, so that he alone may remain liable for such expenditure. If the finance committee give orders to, or enter into contracts with tradesmen for supplies, they will become

jointly and severally liable for the expenditure arising from such orders or contracts.'

"The defender maintains that these Regulations, or at least this article of the Regulations, have no effect except as between the War Office on the one hand, and the Volunteer corps and its commanding officer and Finance Committee on the other. In particular, he says that tradesmen supplying the corps are not entitled to found on this article as imposing any obligation on the commanding officer or the Finance Committee other than arises from the particular contract made between them and the officer or committee, any more than the commanding officer or committee could plead exemption from an express contract of personal liability by founding on a regulation declaring that they should not be personally liable. In any case he maintains that the pursuers as bankers cannot bring themselves within the category of 'tradesmen,' or the account now sued on as within the category of a tradesman's account.

"I think the defender is right on both points.

"A banker is not a 'tradesman' either popularly or technically. But the pursuers say that the balance sued for represents the sums received from the Bank to pay tradesmen's accounts. To a certain extent this may do so, but a substantial part of the money must have gone to pay capitation, camp, travelling, and other allowances, and in payments to instructors, railway companies, &c.

"As to the Regulations, they are not made to have the force of statute, and they appear to me to be matter of domestic legislation as between the War Office and the Volunteer Force. As appears from Articles 510 to 602, Volunteer funds consisted of Government allowances and funds from private sources. Both had to be accounted for annually to the War Office, and, as I read these Articles, the War Office could disapprove of any part of the expenditure and could refuse to sanction any charge on the funds of the corps, at all events as against Government allowances. If so, it was necessary that they should be able to surcharge some person or persons connected with each corps, and make him or them, as in a question with the War Office, personally liable for what the War Office thought improper expenditure. Thus, if the improper expenditure had been already made and paid for, the person or persons liable to the War Office would be bound to pay into the funds of the corps the amount improperly paid away, leaving him or them without recourse, unless in the case of special bargain with the tradesman. If the improper expenditure had been made but not paid for, the funds of the corps could not be burthened with the cost of the expenditure, and the liability of the person or persons connected with the corps to pay the tradesman would depend on whether the tradesman had contracted with him or them on the footing of personal liability, or on the footing of being paid for whatever the corps got the benefit of, or on the footing of being paid only out of available corps funds.

"A case is conceivable where a commanding officer and a bank, misreading Article 407 of the Regulations, contracted mutually in express view of personal obligation arising as between them under the article. But no such case is made here. It is not said that the pursuers knew of the existence of the Act or the Articles, or that they transacted in view of or in reliance on them.

"If the pursuers cannot found on Article 407, the question arises—What was the contract between them and the defender? In the case of *Samuel Brothers* v. *Whetherley* (1907, 1 K.B. 709; 1908, 1 K.B. 184), although Mr Justice Walton may have expressed views on the application of the Act and Regulations different from those above stated, the case was decided by him on the facts. He said (p. 716)—'I think that the plaintiffs are entitled to succeed, because the goods were in fact ordered by the commanding officer or on his behalf. He was, in fact, the principal in the transaction, and the plaintiffs are entitled to look to him for payment.' The question then is—Was the defender, as an individual, the pursuers' customer, or was the corps their only customer, the defender, as commanding officer and a member of the Finance Committee, acting as the known agent of the corps? I cannot decide that question in the pursuers' favour on the documents and the minute of admissions. But these do not necessarily exhaust the whole competent and relevant evidence, and I therefore allow a proof."

The pursuers reclaimed, and on 9th June 1911 the First Division (LORDS KINNEAR, JOHNSTON, and MACKENZIE) adhered. Proof was taken, and on 15th March 1912 the Lord Ordinary (HUNTER) sustained the second plea-in-law for the defender and assoilzied him from the conclusions of the summons.

Opinion.—"In allowing a proof, after hearing parties on the joint minute, Lord Guthrie wrote an opinion dealing with the pursuers' case so far as it is founded upon the Volunteer Act 1863 and the Regulations for the Volunteer Force 1901. He expressed the opinion that the pursuers were not entitled to succeed upon the Act and Regulations, but allowed a proof of the question whether the defender as an individual was the pursuers' customer, or whether the corps was their only customer, the defender as commanding officer and a member of the Finance Committee acting as the known agent of the corps. Taking the case up at the stage at which I do, I think that I am bound by Lord Guthrie's opinion, and that what I have to consider is the answer to the question of fact upon which evidence was allowed.

"As appears, the pursuers in 1906 opened an account in name of R.S.F. Second Volunteer Battalion Finance Committee. There is a note at the head of the account that cheques are to be signed by any two members of the committee, and the six members of the committee

—one of them being the defender—are named. The pursuers also issued a pass-book in the name of the 'Second Volunteer Battalion R.S.F. Finance Committee,' which contains the instruction 'Cheques to be signed by two members.' Specific signatures of the various members of the Finance Committee were provided for the pursuers. The account so opened was allowed to be overdrawn, and it is for the overdraft that the defender is sought to be made personally responsible.

"All the cheques upon this account were drawn for Battalion purposes, and each bears the stamp 'On His Majesty's Service.' Many of these cheques are signed by the defender and one of the other members of the Finance Committee, but some are not signed by the defender at all. No claim has been made against the Finance Committee or against any member thereof other than the defender.

"The liabilities of a corps to a bank are in ordinary circumstances met by Government grants, but in the present case the War Office, as fully explained in the joint minute and by the defender in his evidence, held him, as commanding officer, personally responsible for certain expenditure which they refused to sanction. In a letter written by the general manager of the pursuers to the Secretary of State for War, dated 23rd September 1908, the following statement is made—'The balance due to the Bank amounts to £714, exclusive of interest, overdrafts having been allowed to that extent in expectation that Government grants would be forthcoming as hitherto.'

"Mr Wilson, the pursuer's agent at Ayr, says that in allowing the overdraft he relied upon the personal credit of the defender. From what he frankly admitted in cross-examination this belief was not founded upon any statement or admission made by the defender. He does not appear to have been aware of the terms of the Volunteer Act or Regulations, although, if the view already expressed by Lord Guthrie is sound, that would have been immaterial. Belief on the part of the pursuers' agent as to the defender's being personally liable, if not well founded, cannot, in my opinion, exclude the defence that the Bank's customer was the battalion or the Finance Committee, and not the defender. It was open to the pursuers to disallow an overdraft, or in the event of their honouring cheques in excess of the amount standing at the credit of the account, to insist upon the personal guarantee of the defender or others. This they did not do.

"So far as the defender personally is concerned—on the assumption that as commanding officer he is not liable for the overdraft from the bank on the battalion's account—I do not think he did anything to indicate that he assumed personal responsibility. He had, no doubt, for a considerable time taken an active interest in the finances of the battalion. Before the 1906 account was opened he had, for a period from 1904, alone signed cheques drawn on the battalion's bank account. Further, on the difficulty arising as to the present account, owing to the views taken by the War Office as to improper expenditure, he wrote to the pursuers' Ayr branch a letter in which, *inter alia*, he said—'I have to intimate that I withdraw any personal guarantee of mine for the account.' He explains, however, in his evidence—and I see no reason to reject his explanation—that what he meant by this expression was—'If you are looking to me to keep you right, or anything of that sort, I withdraw any guarantee there is, but there was no guarantee in fact.' He also adds that he called at the head office of the Bank and saw the manager, when he took up the position which he had taken up all along, of no personal liability.

"As a result of the evidence the pursuers have failed to satisfy me, as they allege, that they dealt with the defender alone in connection with the current account of the battalion, or that they made the advance which they did upon his credit. In view, therefore, of the opinion expressed by Lord Guthrie in his note, dated 25th April 1911, I think that the second plea-in-law of the defender falls to be sustained, and the defender, as commanding officer of the Second Volunteer Battalion R.S.F., in which capacity he is sued, assoilzied."

The pursuers reclaimed, and argued—(1) The defender was liable as commanding officer. The Volunteer Act (26 and 27 Vict. cap. 65) being a public statute was binding as much on civilians as on soldiers, and the Bank was entitled to found on the Act and on the Regulations, which were made on the authority of section 16 of the Act. Under section 25 of the Act and Article 407 of the Regulations the commanding officer was the only person who could be held liable for this overdraft. If the action had been raised against the Finance Committee those sections would have furnished a complete defence—the corps could only be treated as individuals. If a contract was made on behalf of the corps, with the approval of the commanding officer, which was admittedly done in this case, the commanding officer was liable—*Samuel Brothers* v. *Whetherley*, [1907] 1 K.B. 709, *aff.* [1908] 1 K.B. 184. (2) Alternatively the defender was liable as an individual. There was no suggestion that the Bank dealt with the corps as individuals. The defender was the only person who instructed the account to be opened and the only person with whom the Bank dealt. It was immaterial in what name he instructed the account to be opened, for it was with him that the contract was made—*The Struthers Patent Diamond Rock Pulveriser Company, Limited* v. *The Clydesdale Bank*, January 14, 1886, 13 R. 434, 23 S.L.R. 291. A sum of money paid into the bank account by the defender during its currency became appropriated to the account—*Cory Brothers & Company* v. *Owner of Turkish Steamship "Mecca,"* [1897] A.C. 286, and *Clayton's* case, 1816, 1 Mer. 585.

Argued for the defenders—There was no ground for liability against the defender stated on record. No liability attached, under the Volunteer Act or under the Regulations, to the commanding officer, in a case of this kind; section 31 of the Volunteer Act showed that the corps was recognised as capable of undertaking obligations. The word "vest" in section 25 did not mean to "become his property." It obviously did not mean vest in him as an individual but in his official capacity. He required no statutory authority to make contracts binding on himself. In regard to Article 407 of the Regulations a bank was not a trader. In any case this regulation was made by the War Office to regulate the liability of officers to itself, and it was not meant to be read into every contract made by the commanding officer. In regard to the question of fact, the account was opened in the name of the Scots Fusiliers and the Bank accepted the corps as its debtor. The account was never placed under Colonel Shaw's name, and in the circumstances there was no contract with him as an individual—*Overton* v. *Hewett*, 1886, 3 T.L.R. 246; *Jones* v. *Hope*, 3 T.L.R. 247, note. The pass-book was issued in the name of the committee and the cheques bore O.H.M.S. In any event an overdraft must be distinguished from a loan—*In re Cefn Cilcen Mining Company*, (1868) 7 Eq. 88; *Waterlow* v. *Sharp*, (1869) 8 Eq. 501.

At advising—

LORD MACKENZIE—This is an action at the instance of the National Bank of Scotland, Limited, against James E. Shaw, solicitor, County Buildings, Ayr, lately lieutenant-colonel commanding the 2nd Volunteer Battalion Royal Scots Fusiliers, in which the pursuers seek to make the defender individually liable for an overdraft at their branch in Ayr amounting, with interest, to £775, 2s. 9d.

The account in question is headed "Royal Scots Fusiliers 2nd Volunteer Battalion—Finance Committee. Cheques to be signed by any two members of the Committee." From the pass-book produced it appears that the account commences on 25th October 1906. On 29th May 1908 there was a debit balance of £714, 12s. 3d., the amount sued for being this sum, with interest. The defender's resignation as commanding officer was in the "Gazette" on 12th May 1908. The Volunteer corps was transferred on the 1st April 1908 to the Territorial Force, and the defender became secretary of the County Association.

The ground upon which the pursuers say liability attaches to the defender is thus stated in Cond. 7—"The defender, with whom alone the pursuers dealt in connection with the said current account, and on whose credit they made the advances, the balance of which is now in question, is liable to the pursuers for the balance remaining due on said account." The argument of the pursuers in support of their case is that the defender is either liable (1) under the terms of the Volunteer Act 1863, sections 16 and 25, and Article 407 of the Regulations made under the powers of the Act; or (2) because he was the person who as an individual contracted with the Bank.

An opinion upon the first of these points was expressed by the Lord Ordinary (Guthrie), before whom the case first depended, and I arrive at the same conclusion. Section 25 vests the property of the corps in the commanding officer for the time being, with power to him to sue and make contracts. This, however, does not conclude the question what the nature of any contract is that the commanding officer has made. Article 407 of the Regulations provides that all orders to "tradesmen on behalf of the corps should be given by the commanding officer alone, and not by the finance committee, and the commanding officer alone should be a party to any necessary contracts, so that he alone may remain liable for such expenditure." In the case cited to us of *Samuel Brothers* v. *Whetherley*, [1907] 1 K.B. 709, affirmed [1908], 1 K.B. 184, where it had been established that the goods had been ordered from tradesmen for the use of the corps by or on behalf of the commanding officer, the consequence followed from the Act and Regulations that his executors were personally liable. The only question of fact which required to be cleared up in that case was whether the orders were given with the colonel's knowledge and approval. The case of *Whetherley*, however, does not help the pursuers here. As the Lord Ordinary points out, a bank cannot be regarded as a tradesman in the sense of the Regulations, which therefore do not apply to the present case. Nor is the question one of ordering goods, but relates to the nature of the contract made with the Bank, and the extent of the obligations undertaken by the defender.

The question here is one of fact, and the opinion of the Lord Ordinary (Hunter), who has sustained the defender's second plea, proceeds upon the facts, accepting Lord Guthrie's view of the Act and Regulations. The second plea is—"The defender never having been the Bank's customer, and not having guaranteed the overdraft, is not liable for the balance due." It is for the pursuers to show how the defender comes to be individually liable for the sum sued for. When the account in question was opened, a previous account with the Bank kept in name of the 2nd Volunteer Battalion Royal Scots Fusiliers was closed, and the balance at credit of that account, £444, 16s. 1d., was transferred to the new account. This was done by Mr Douglas, a clerk in the employment of the defender, acting on his instructions. The pay-in slip was in these terms:—"Paid to the National Bank of Scotland, Limited, the sum of £444, 16s. 1d. to the credit of the Finance Committee, 2nd Volunteer Battalion Royal Scots Fusiliers. Cheques to be drawn by any two members of the Committee." Attached to the slip was an envelope containing the names of the Finance Committee, who were Lieutenant-Colonel James

E. Shaw; Major Dunlop, Girvan; Major Craig, Sanquhar; Major Smith, Maybole; Captain Ker, Troon; and Captain and Quartermaster Hyslop. Specimens of their signatures were furnished to the Bank.

It is proved that after this date no moneys were drawn from the account except under the authority of the Finance Committee, who had control of the account. Meetings of that committee were held periodically, accounts were submitted, and cheques were signed by two members. The cheques were made out by William Douglas on the instructions of the Finance Committee. The signature of the defender is upon most of the cheques, together with that of one of the other members of committee, but any two members of the committee could sign cheques. An examination of the pass-book shows that the account was practically square in the middle of October 1907; that then it began to be overdrawn; and that the amount of the overdraft steadily increased down to 29th May 1908, by which time it had reached the figure already mentioned of £714, 12s. 3d. It is common ground between the parties that it is not relevant to the present case to inquire how the moneys drawn out between October 1907 and May 1908 were spent. They were drawn out by means of cheques supplied by the Bank, all stamped "On His Majesty's Service," duly signed by two members of the Finance Committee, in accordance with the instructions of that committee. All the documents in connection with this account bore on their face that it was a trust account. No case is made on record of any other ground of liability against the defender than that which they say rests on the contract he made with them.

The credit entries in the account to a great extent consisted of Government grants. These, as explained in the proof, were not, according to the practice, paid to any individual, but were paid by the Accountant's department of the War Office direct to the Bank. As the agent for the pursuers' branch at Ayr admits, he knew what the source was from which the sums paid into the account to square it were derived, viz., Government grants. When the present dispute arose the head office of the Bank wrote to the War Office on 23rd September 1908 that the balance due was £714, "overdrafts having been allowed to that extent in expectation that Government grants would be forthcoming as hitherto."

It is in these circumstances that the Bank seeks to make the defender individually liable. Mr Wilson, their agent at Ayr, says that he had the understanding that the colonel was responsible for the debts of the regiment, and that the Bank certainly looked to the defender to make good any ultimate loss should such arise. The pursuers were not the defender's own bankers. It is not suggested that the defender gave any personal undertaking, or that he made any representation upon which Mr Wilson relied. No personal guarantee was ever given by the defender to the Bank, and the terms of the letter written by the defender to the pursuers' Ayr branch, dated 21st August 1908, withdrawing any personal guarantee of his for the account, cannot be construed as an admission that he ever gave such a guarantee.

In my opinion the correct view of the facts is that the Bank allowed the overdraft in question on the faith of the Government grants, and that they have failed to establish a contract with the defender under which he is personally liable. There is in the proof and correspondence an indication of the difference which had arisen between the defender and the War Office in regard to certain expenditure in past years. It is, in my opinion, beside the present question to go into these matters at all. They are not founded upon as inferring liability on the part of the defender to the Bank. Throughout the record the case made against the defender is a totally different one—that the defender pledged his credit.

For the reasons given I am of opinion the pursuers have failed to prove the case they seek to make. The result is that, in my opinion, the interlocutor of the Lord Ordinary should be affirmed.

LORD DUNDAS—I have found this case a rather difficult and anxious one, but I have come to the conclusion that the Lord Ordinary is right. I have had an opportunity of reading the opinion just delivered by Lord Mackenzie and I entirely concur therein.

LORD KINNEAR—I also concur in Lord Mackenzie's opinion.

The Court adhered.

Counsel for Pursuers (Reclaimers)—Blackburn, K.C.—Hon. W. Watson. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for Defenders (Respondents)—Dean of Faculty (Scott Dickson, K.C.)—Pitman. Agents—J. & F. Anderson, W.S.

HIGH COURT OF JUSTICIARY.

Tuesday, November 19.

(Before the Lord Justice-Clerk, Lord Dundas, and Lord Guthrie.)

M'COURT *v.* H. M. ADVOCATE.

Justiciary Cases—Habitual Criminality—Proof—Evidence—Prevention of Crime Act 1908 (8 *Edw. VII, c.* 59), *sec.* 10 (2).

The Prevention of Crime Act 1908, sec. 10 (2), enacts—"A person shall not be found to be a habitual criminal unless the jury finds on evidence (*a*) that since attaining the age of sixteen years he has at least three times previously to the conviction of the crime charged . . . been convicted of a crime . . ., and that he is leading persistently a dishonest or criminal life."