Cases referred to and distinguished—*Pollok* v. *Glasgow Water-Works Commissioners*, March 5, 1869, 41 S.J. 325; *City of Glasgow Union Railway* v. *Glover*, November 23, 1870, 8 S.L.R. 147.

LORD PRESIDENT—The theory of the sections of the Lands Clauses Act which we have to consider is, that moneys paid as compensation for land taken from persons having limited interests or prevented from treating will ultimately be applied to clearing off burdens on land or be invested in land, except in the case of any person who becomes entitled to payment of them absolutely, and in that case they may reach his hands in the form of money. It is not disputed that the petitioner is entitled to payment of the money now in question absolutely. A person so situated is entitled under the statutes to get from the undertakers the expense of an application necessary to obtain such payment. Now, it cannot be disputed that the present petition was necessary, in the situation in which the money stood at its date, in order to the petitioner obtaining such absolute payment, and that it brings about that result. *Prima facie*, therefore, the petitioner would seem entitled to these expenses. The respondent's argument against the claim is rested on the previous proceeding. Now, in the previous proceeding the money was invested and placed in trust for the heirs of what was then the existing entail. Inasmuch, then, as the money was not, as the result of the previous proceeding, invested in land or applied to reducing debt, and was not paid over to anyone absolutely, it seems to me that it was one of these intermediate and temporary investments which are contemplated by section 68 of the Act, and I think it fell within the proceedings authorised for that purpose. It must have been upon this footing that the respondents submitted to be found liable for the expense of that proceeding, for otherwise there was no warrant in the statute for fixing them with such liability.

I am therefore of opinion that the respondents are liable for the expense of this application in so far as it relates to obtaining payment of the moneys in question. The petitioner's counsel seemed to consider that the terms of the interlocutor were a little wider than is necessary, and it might well be that they should be restricted accordingly. This, however, is more a matter of expression than of the substance of the controversy.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court varied the interlocutor of the Lord Ordinary by substituting the word "uplift" for "acquire in fee-simple;" and by substituting the words "to obtain payment of the said sums" for "to acquire the said stocks in fee-simple;" *quoad ultra* adhered, and found the petitioner entitled to additional expenses.

Counsel for the Petitioner—Dundas, Q.C.—C. K. Mackenzie. Agents—J., C., & A. Steuart, W.S.

Counsel for the Respondents — Balfour, Q.C.—Cooper. Agents — Hope, Todd, & Kirk, W.S.

Wednesday, March 15.

SECOND DIVISION.

[Sheriff-Substitute of Lothians and Peebles.

MUSHETS LIMITED *v.* MACKENZIE BROTHERS.

Reparation — Disclosure of Character of Servant—Breach of Contract—Damages —Measure of Damages—Extrajudicial Costs.

The defenders, a firm of ironfounders, engaged an ironmoulder who had formerly been in the employment of the pursuers. Thereafter they sent to the pursuers a printed memorandum headed "private and confidential," and containing inquiries about the ironmoulder in question. In answer to one of these inquiries the pursuers stated — "He went on strike, leaving us without sufficient notice. . . . It is unfair to us if he is in your employment." The defenders thereupon dismissed the ironmoulder from their employment. They gave him as their reason for doing so that he had broken his engagement with the pursuers, and they ultimately communicated the contents of the pursuers' answer to the Ironmoulders' Association, who had taken the matter up. The ironmoulder then brought an action for slander against the present pursuers, in which, after proof, they were assoilzied with expenses. The judicial expenses were paid. The present pursuers thereafter brought the present action, in which they claimed payment of (1) the extrajudicial costs incurred by them in defending the action brought against them by the ironmoulder; and (2) a sum as compensation for the time occupied by their managers, directors, and staff in matters connected with the action during its dependence. The Court *dismissed* the action as irrelevant—*per* the Lord Justice-Clerk, on the ground that the pursuers could not recover the extrajudicial costs of an unfounded action brought against them, even although the wrongful conduct of the defenders had led to the action being brought; *per* Lord Young, on the ground that the disclosure of a character to the person therein referred to could not under any circumstances give ground for an action at the instance of the person who gave the character against the person to whom it was given; and *per* Lord Moncreiff, on the ground that in the special circumstances of this case the pursuers were not entitled to recover damages, in respect that they themselves had suggested the dismissal of the workman.

Opinion (*per* Lord Young) that there may be cases in which extrajudicial expenses might be recovered as damages where they have been incurred as the ordinary and natural result of some legal wrong.

Opinion on this point *reserved* by Lord Moncreiff.

This was an action brought in the Sheriff Court at Edinburgh by Mushets Limited, Edinburgh, and Lewis Irving Cadell, liquidator thereof, against Mackenzie Brothers, ironfounders, Edinburgh Foundry, Edinburgh.

The following summary of the averments in the action is in substance taken from the note appended to the interlocutor of the Sheriff-Substitute (MACONOCHIE):—Mushets Limited in this action sue Mackenzie Brothers for payment of £60, 10s. under very peculiar circumstances. In January 1897 the defenders engaged an ironmoulder, Robert Morrison, who had formerly been in the pursuers' employment. In February 1897 the defenders sent to the pursuers a printed memorandum of inquiries regarding Morrison's character.

This memorandum, with the answers made by Mushets Limited to the questions it contained, was as follows:—

"PRIVATE AND CONFIDENTIAL.

"*East of Scotland Association of Engineers and Ironfounders.—Employment of Workmen.*

"MEMORANDUM.

"*From* 5*th February* 1897.
Mackenzie Bros., Ironfounders, Edinburgh. *To Messrs Mushets Ld., Dalkeith Foundry, Dalkeith.*

"*Robert Morrison* has applied here for employment as a *moulder*. Will you kindly answer the following inquiries with regard to him in course of post?

1. Has the applicant been in your employment? If so, how long? And how engaged?	*For many years as a moulder.*
2. When did he leave your employment?	*About the beginning of Decr. last.*
3. What was the cause of his leaving?	*Wanted 8d. per hour when on time.*
4. Is he at present free from any engagement with you?	*Yes.*
5. What rate of wages did he receive?	*Usual piece prices, and 7½d. per hour when on time.*
6. General remarks?	*He went on strike, leaving us without giving sufficient notice. He has been paid all along at 7½d. per hour when on time, and when other founders were paying less. It is unfair to us if he is in your employment.*

"*For Mushets Limited,*
"*G. R. Pearson, Manager.*"

On receipt of this letter the defenders dismissed Morrison, and informed him that their reason for doing so was that he had broken his engagement with the pursuers, and told him the import of the pursuers' answers in the memorandum. The Ironmoulders' Association then took the matter up and asked to see the memorandum. The defenders communicated the contents of the memorandum to the Association, and eventually an action of damages for slander was raised by Morrison against the pursuers, the writers of the memorandum. Mushets Limited intimated the service of the summons to Mackenzie Brothers and stated that they must hold them liable for any expenses incurred by them, but Mackenzie Brothers repudiated all liability, and refused to intervene in the action. On 17th November, after proof had been led, the Sheriff-Substitute assoilzied Mushets Limited with expenses, and on 17th December the Sheriff adhered with additional expenses.

In his interlocutor pronounced in that action the Sheriff-Substitute found in fact —(1) That the letters complained of were written by the manager of Mushets Limited, and (2) that Mushets Limited were not aware that the said letters had been written until after they had both been dispatched, and that they did not authorise their manager to make the statements in the letters which were complained of, and found in law that Mushets Limited were not liable in damages in respect of the statements in said letters, or either of them.

Mushets Limited's account of expenses was taxed by the Auditor, and the account, as taxed, was paid. Mushets Limited now brought this action against Mackenzie Brothers for (1) £25, 9s. 10d. of extrajudicial expenses incurred to their solicitor Mr Kinniburgh Morton, S.S.C.; (2) £14, 0s. 2d. of expenses incurred to their ordinary agents Messrs Cadell & Wilson, W.S.; and (3) £21 as compensation for the time occupied on the action by their manager, directors, and staff during its dependence, from 15th May 1897 to 15th February 1898. These sums amounted to £60, 10s., the sum sued for.

The pursuers pleaded—"(1) The defenders having obtained from the pursuers the said information regarding the said Robert Morrison upon a contract or guarantee of confidentiality, and having broken said contract or guarantee by disclosing said information as libelled, they are liable to the pursuers in the loss and damage sustained by them in consequence of said disclosure. (2) The letter libelled being the property of the pursuers, and having been entrusted to the possession of the defenders for a specific purpose, and the defenders having, in violation of the pursuers' proprietary rights, employed the same for other purposes, they are liable to the pursuers in the loss and damage thereby occasioned to them. (3) The loss and damage libelled having been caused to the pursuers by the said breach of contract or guarantee by the defenders, or otherwise

by their illegal and unwarrantable violation of the pursuers' proprietary rights in the said letter, the pursuers are entitled to decree as concluded for, with expenses."

The defenders pleaded — "(1) The pursuers' averments are irrelevant and insufficient to support the conclusions of the action, and it should be dismissed with expenses."

On 31st October 1898 the Sheriff-Substitute pronounced the following interlocutor:—"Finds that the pursuers have not stated facts relevant to sustain the conclusions of the libel; therefore sustains the first plea-in-law for the defenders; dismisses the petition, and decerns: Finds the pursuers liable in expenses."

Note.—[After narrating the averments]— "The action is certainly a strange one, and the pursuers' agent admitted that he knew of no precedent for it. The pursuers' contention is that the defenders having obtained the information on the memorandum under a contract that it should be confidential, and only to be used for a special purpose, and having broken that contract, are liable in the special damage averred. The special damage averred comes really to be the amount of the extrajudicial expenses which the pursuers did not recover from Morrison, as it does not seem to me that there is any relevant averment of damage under the third head. Now it seems to me, in the first place, that the action is simply an attempt to turn extra-judicial expenses into a claim of damages. It is settled that that is an incompetent course as between the parties to the original suit (*M'Dowall* v. *Stewart*, December 1, 1871, 10 Macph. 193), and in my opinion the principle also applies to a case where a third party is sought to be brought in, as here. The judicial costs of the action are the damages which a pursuer has to pay to the defender for bringing a groundless claim (see Lord Gifford in *Kennedy* v. *Fort-William Commissioners*, December 12, 1877, 5 R. 302), and the extrajudicial costs are those costs which the defender chose to incur over and above the costs which the law entitles him to incur at the cost of his adversary. It may be hard that he should not come out of the groundless action without being the poorer for it, but that is a risk which every man who is wrongfully dragged into Court must face (see Lord Ormidale's opinion in *Stephen* v. *Lord Advocate*, November 30, 1878, 6 R. 282).

"But again, in my opinion, though the pursuers use the words 'loss and damage,' this seems to me to be truly an action of relief, and if so, it must be founded (to use the words of Lord Neaves in *Colt* v. *Caledonian Railway Company*, July 2, 1859, 21 D. 1108) 'on some special obligation of warrandice, or mandate, cautionary or conjunct obligation, or the like.' Now, it is not averred that there was any obligation undertaken by the defenders to pay the expenses now claimed, and even if a wrong has been done by the defenders, an action of relief appears to me not to be the appropriate remedy, as the original claim—that is, a claim for damages against the pursuers for slandering a third party—is not in any way commensurate with the claim for relief which arises out of an alleged breach of contract (*Ovington* v. *M'Vicar*, May 12, 1864, 2 Macq. 1066). The defenders here could not have been forced to take up the former case and defend the pursuers from Morrison's action; indeed, they could not have appeared in that case if they had wished to do so. I cannot see how in these circumstances the defenders can be made liable for the special damages condescended on, viz., the extrajudicial expenses incurred by the pursuers in defending a groundless action founded on their alleged delict. But further, even if the case is regarded as one for general damage, I do not think that such a claim is relevantly averred. The pursuers were assoilzied in the former action, and their case therefore now comes to be that the defenders are liable in damages because Morrison was wrongly advised in bringing his action for slander, and that the damages due by them are to be measured by the amount of the expenses which the wrongdoer Morrison is not bound to pay. Such a claim is, I think, too remote to be entertained. On these grounds I am of opinion that the pursuers' case is not relevant to infer a liability on the defenders for the damages craved."

The pursuers appealed to the Court of Session, and argued — There was here a contract of confidentiality which had been broken by the defenders—*Brown's Trustees* v. *Hay*, July 12, 1898, 25 R. 1112. The precise object of desiring that the communication should be private and confidential was to prevent it being made the basis of a vexatious and unfounded action, and the defenders had done the very thing which the pursuers when answering the questions had been led to understand and had trusted would not be done. The damages sued for were the natural result of the defenders' breach of confidence, and were consequently recoverable from them under the rule in *Hadley* v. *Baxendale* (1854), 9 Ex. 341—*Baxter* v. *Boswell*, January 13, 1899, 6 S.L.T. No. 351, in which case the Court on reclaiming-note allowed a proof before answer, February 14, 1899 (not reported); *Agius* v. *Great Western Colliery Company*, [1899], 1 Q.B. 413; *Hammond & Company* v. *Bussey*, (1887), 20 Q.B.D. 79, *per* Lord Esher, M.R., at page 90. Morrison's action failed because the pursuers' manager had no authority to write as he did. Apart from that it was apparently held to be well founded. It was held relevant. Damages and costs paid by the unsuccessful party in an action were recoverable from a person whose breach of contract had led to the action being brought — *Hammond & Company*, *cit.*; and extrajudicial costs were in the same position in this respect as judicial costs — *Agius*, *cit.* As regards the contention that Morrison was dismissed at the suggestion of the pursuers, it was to be noted that the defenders represented that Morrison was applying for employment,

and not that he had been already engaged as was the fact.

Argued for the defenders and respondents —1. There was here no breach of contract on the part of the defenders. The pursuers asked the defenders to dismiss Morrison, and the defenders could not do so without giving Morrison the reason and showing him the pursuers' letter, because otherwise a general strike might have resulted. 2. Morrison's action did not result from the defenders showing him the letter. If the defenders had refused to show it to him, he could have brought his action and recovered the letter from the present defenders under a diligence. 3. Extrajudicial costs could not be recovered as damages—*M'Dowall* v. *Stewart*, December 1, 1871, 10 Macph. 193; *Stephen* v. *Lord Advocate*, November 30, 1878, 6 R. 282, *per* Lord Ormidale, at p. 287. 4. The defenders could not have intervened in the action brought by Morrison against the present pursuers even if they had desired to do so, and they could not now be made liable for any costs incurred in that action.

At advising—

LORD JUSTICE-CLERK—I agree with the Sheriff - Substitute that this action is a strange one.

The defenders had dismissed a workman in consequence of a letter from pursuers' manager regarding him, which was marked "private and confidential." The pursuers complain that the defenders did not keep the statement in the letter private, and that this led to an action of damages by the workman, which they successfully resisted. But they say they have incurred a considerable amount of extrajudicial expense, and expenses caused by time occupied in the case by their staff, and this they demand from the defenders as damages. In short, it is making extrajudicial expenses to be damages due to them by someone, who by his action indirectly led to their being sued for damages by another, but who had no case against them. I am unable to see how there can be any claim against the defenders for these extrajudicial expenses. If there was no ground for the action there can be no claim against the defenders for having caused an action to be raised which never should have been raised. I do not attach any weight to the question of confidentiality, for it does not seem to me in any way to affect the case. I cannot hold that costs which cannot be recovered from the losing party in an action can be claimed as damages from a party whose proceedings may have led to someone raising an unfounded action, in which they obtained absolvitor and a decree for the expenses. I concur in the views expressed in the Sheriff-Substitute's interlocutor.

LORD YOUNG—I concur in holding the action irrelevant. I do not proceed exclusively on the ground that the damages here claimed consist of extrajudicial expenses. I think that there may be cases in which extrajudicial expenses may be recovered if they are incurred as the result of an actionable wrong. But in this case I am clearly of opinion that there was no actionable wrong, no *culpa*, and no violation of any legal right.

The facts here are as simple as can be. There is a form of an application for the characters of workmen which is issued by the East of Scotland Association of Engineers and Ironfounders. It is stamped at the top with the words "private and confidential." There are two columns, one containing certain queries as to the workman in question, and the other left blank for the answers. Now, I assume without evidence that it is very common for those engaged in trade to send some such queries as are printed on this form, when they are inquiring as to the character of a workman. It is just as ordinary a thing as the request for the character of a servant in domestic life. I do not think that when such inquiries are made and answered any legal relation of obligation is constituted between the person making the inquiries and the person answering them. I do not think that calling the communication "private and confidential" makes any difference. Ordinary considerations of good sense and honour and good taste generally indicate that such things should not be communicated, but if they are communicated that does not give ground for an action in any circumstances which I can conceive.

Here I would not think that even considerations of good sense and good taste would forbid the answers from being revealed. It was conceded that the first five queries and the answers to them were not private and confidential. But the pursuers say that the replies to the queries were their private property. Were the statement in the first five answers their private property? Then they say that the defenders had only a qualified possession of the answers for the purpose of their own private information, and that any other use by them of the pursuers' said property was illegal and unwarrantable, and we had an argument seriously presented that what the defenders did was a violation of the pursuers' proprietary rights. I do not think that argument statable as regards at least the first five answers. But the last question is "General Remarks," and the pursuers' answer to that question is this. [His Lordship read the sixth answer]. In consequence of this answer the Messrs Mackenzie told the workman that he must go and work out his notice with the pursuers, and that they could not employ him till he did so. That is said to be a violation of the proprietary rights of the pursuers. I do not see how it can be.

I should have thought that Morrison's action against the pursuers should have been thrown out as irrelevant. But inquiry was allowed, and both the Sheriffs ultimately concurred in holding that the action was utterly unfounded. I agree with that result. Even if there had been an attack on the man's moral character, he could have had no action unless the accusation was malicious and false. If there had been

any claim of that kind in this case, I do not think it would have been any defence that the accusation was contained in a writing marked "private and confidential." But here there was nothing malicious. It appears there was some dispute as to whether Morrison was bound to give notice. Mushets maintained that he was. The Workmen's Association contended that he was not, for they were the authors of the litigation. I think the action which they brought in Morrison's name against the present pursuers was utterly unfounded.

Then what claim can an utterly unfounded action by Morrison against Mushets give Mushets against Mackenzie Brothers? Morrison might have brought an unfounded action upon any of the first five answers as well as upon the last.

I see nothing reprehensible in the conduct of Mackenzie Brothers, and certainly no violation of the pursuers' proprietary rights. Therefore, irrespective of what is said as to the claim here being for extrajudicial expenses, I think it is quite untenable. There may be cases in which a person might be entitled to extrajudicial expenses if they were incurred as the ordinary and natural result of some legal wrong which has been done to him. But here I think there was no legal wrong done to the pursuers.

I have stated my own view of this case, because this matter of characters is important. There is a moral and honourable duty on the part of the receiver of a character not to communicate anything slanderous in it to the person concerned, and not to publish it. But there is no legal duty not to communicate it, and if it is communicated, there is no violation of right as against the giver of the character. There is no legal relation between the giver and the receiver which gives a right of action to the giver of the character against the receiver for violation of the giver's proprietary right in the character, if the receiver violates the secrecy which it is usually desirable to preserve with regard to it.

LORD MONCREIFF—I am also of opinion that the pursuers' case as stated is irrelevant. There may be cases in which if a person who stands in a confidential relation to another commits a breach of confidence in consequence of which injury results to the latter, the former will be liable in reparation if damages are relevantly averred and instructed.

So also if a person applies for and obtains information on the assurance that the communication if given will be treated as confidential, and thereafter in violation of his undertaking divulges it to the injury of his informant. A typical case is that of a person applying to a former master for the character of a discharged or dismissed servant. Such information is usually given on the condition of secrecy for the very purpose of avoiding the risk of vexatious and unfounded claims of damages on account of wrongous dismissal or defamation.

But if damages are to be claimed in respect of such breach of confidence, the pursuers' averments must clearly disclose both that there has been such a breach of confidence as will support an action at law, and that the loss in respect of which damages are claimed is such as the law will recognise as entitling the pursuers to damages.

In the present case I should have been disposed to treat the memorandum No. 10 of process and the answers thereto as private and confidential (as indeed the memorandum is described in the heading) if the replies had been of a confidential character, and if the pursuers had contented themselves with replying to the specific questions put to them. In the 6th answer they practically called upon the defenders to dismiss the workman—"He went on strike, leaving us without giving sufficient notice. He has been paid all along at 7½d. per hour when on time, and when other founders were paying less. It is unfair to us if he is in your employment."

Now, the defenders, as requested or suggested by the pursuers did dismiss Morrison, and in doing so they were obliged for their own protection to state their reasons for doing so, and thus disclose the information which they had received from the pursuers. Thus through the pursuers' own action their reply was deprived of the confidential character which it otherwise might have possessed.

In this view it is not necessary to consider the other question raised, viz., whether, assuming breach of confidence to be proved, the pursuers could recover damages in respect of extrajudicial expenses incurred by them in the action at Morrison's instance against them. A distinction might possibly be drawn between the case of a litigant who undoubtedly is not liable to his opponent in more than judicial expenses, and the case where a party has been exposed to a litigation through breach of confidence on the part of one to whom he made a communication in strict confidence, and to whom he trusted to protect him by his silence from the risk of litigation. In the latter case there might possibly be grounds for dealing with the expenses as between agent and client.

Without indicating a different opinion from that which the Sheriff-Substitute has expressed, I prefer to rest my judgment on the ground first stated.

LORD TRAYNER was absent.

The Court pronounced the following interlocutor:—

"Dismiss the appeal and affirm the interlocutor appealed against: Of new dismiss the action and decern: Find the pursuers liable in expenses in this Court, and remit the same and the expenses found due in the Inferior Court to the Auditor to tax and to report."

Counsel for the Pursuers and Appellants—Guthrie, Q.C.—John Wilson. Agent—W. Kinniburgh Morton, S.S.C.

Counsel for the Defenders and Respondents—Salvesen—D. Anderson. Agents—Coutts & Palfrey, S.S.C.

Wednesday, March 15.

SECOND DIVISION.

[Sheriff-Substitute at Glasgow.

THIEM'S TRUSTEES *v.* COLLIE.

Debt — Document of Debt—I O U — Holograph — Proof — Competence of Parole Evidence.

Held (*diss.* Lord Young) that a holograph I O U admitted to be genuine is a document of debt sufficient in itself to instruct the constitution and resting-owing of a debt, payment of which can only be proved by writ or oath, and not by parole evidence.

Opinion by Lord Trayner that allowance being made for the difference of the technicalities of practice and the right in England to challenge a document not under seal on the ground of want of consideration, the law of England and Scotland do not differ in the views they take of the import and value of an I O U, either as evidence of indebtedness on the part of the granter or as to its affording a sufficient ground of action.

Ernest William Thiem, restaurateur, Glasgow, died on 7th January 1897. After his death there was found in his repositories the following document—"*Glasgow, 16th September* 1886. E. W. Thiem, Esq., St Enoch Hotel. I O U the sum of two hundred and twenty-five pounds sterling, interest to be at 4 (four) per cent. per annum from date.—Alexander Collie."

Alexander Collie was a tailor and clothier in Glasgow. The trustees under Mr Thiem's trust-disposition and settlement requested Collie to make payment of the debt, but he refused to do so.

Mr Thiem's trustees thereupon raised an action against him in the Sheriff Court at Glasgow for payment of £225, with interest at 4 per centum per annum from 16th September 1886.

The defender admitted that the I O U was holograph of him, and had been granted by him to Mr Thiem on 16th September for money lent to him. He, however, averred that he had repaid the full amount of the debt to Mr Thiem in instalments between March 1887 and January 1889, and pleaded—"(1) The sum sued for, together with the interest thereon, having been repaid by the defender to the late Mr E. W. Thiem, the defender is entitled to absolvitor, with expenses. (2) *Separatim*, taciturnity."

On 26th May 1898 the Sheriff-Substitute (Guthrie) allowed a proof.

Note.—"The pursuer maintains that the loan is admitted on record, and that payment can be proved only by writ or oath.

"But this is not according to the state of the pleadings and of the law. The pursuer founds on an I O U, which would not be sufficient without explanatory proof to prove indebtedness. The proof required for this purpose may, however, be dispensed with by reason of the defender's candid admission that the I O U was granted for money lent. But the pursuer forgets that by a wholesome rule of the law a judicial admission can be founded on only subject to the qualifications attached to it by the party making it, and that whether these qualifications are intrinsic or extrinsic—*Milne* v. *Donaldson*, 14 D. 849; *Picken* v. *Arundale*, 10 Macph. 987, and other cases in Bell's Pr., sec. 2218. The pursuer, however, is at liberty to disprove the qualifications annexed to the admission, and an order for proof is made to enable him to do so. That is how the Judges express the course of procedure in such a case, as it is assumed that the pursuer has always to prove his case. Here he is found in possession of the document of debt, an element of some moment in disproving the qualification, though it may not be conclusive. If I could hold it conclusive, and the original debt proved, the contention that the defender can prove payment only by writ or oath would deserve serious consideration, but even then, though I doubt, there is some authority for holding that he has stated facts and circumstances inferring payment which require an allowance of proof."

The pursuers appealed to the Sheriff (Berry), who on 9th July 1898 adhered.

Note.—"The authorities place it beyond question that if the pursuers rely on the admission in the defender's pleadings, they must take it subject to the qualification of payment which is attached to it. The rule laid down in *Milne* v. *Donaldson*, 14 D. 849, has been recognised as authoritative in subsequent cases. It is true that in *Picken* v. *Arundale*, 10 Macph. 987, where the rule was applied, hesitation regarding its expediency was expressed on the part of some of the Judges; but again in *Gelstons* v. *Christie*, 2 R. 982, it was held that it could no longer be questioned. It was there said by Lord Deas—'The pursuers are not obliged to accept the admission with its qualifications, but failing their doing so there is nothing to absolve them from proving their debt in the ordinary way.'"

The proof, which was led before Sheriff-Substitute Fyfe, brought out the following facts:—The I O U was found in Mr Thiem's repositories after his death put up with a number of documents of debt granted by other persons, including several I O U s, all of which were admittedly due and unpaid. Mr Thiem and the defender were intimate friends. Mr Thiem sold spirits, wine, and cigars to the defender, while the defender supplied clothes to Thiem, each paying regularly for what he got from the other The defender's clothes' accounts against Thiem between January 1889 and the date