circumstances the debtor himself is entitled to suspend, and I express no opinion on that question.

The Court recalled the decree of the Lord Ordinary and suspended the decree and charge complained of.

Counsel for the Complainers—Macmillan, K.C.—Fleming. Agents—Bruce & Stoddart, S.S.C.

Counsel for the Debtor—Dykes. Agent—John N. Rae, S.S.C.

Counsel for the Respondent—Fraser, K.C.—Garrett. Agent—Murray Oliver, S.S.C.

Wednesday, January 7.

FIRST DIVISION.

[Sheriff Court at Cupar.

SMITH *v.* REEKIE AND OTHERS.

Contract—Proof—Innominate Contract—Unusual and Anomalous—Engagement to Shipowners to Serve on Ship Chartered to Admiralty.

The owners of a steam drifter were said, in anticipation of its being chartered by the Admiralty for war service, in which event the owners had to supply a crew, to have offered to a fisherman a bonus of 1s. a-day to join the crew. The fisherman agreed to join the crew, and later when the Admiralty chartered the drifter did join the crew and served in the Royal Naval Reserve upon the drifter for 1363 days till he was discharged. He brought an action against the owners of the drifter for £59, 1s., being the amount at 1s. per day corresponding to his length of service, less a payment which he treated as to account. *Held* (1) that the alleged contract between the parties was an innominate contract; (2) that it was not of an unusual or anomalous character; and (3) that proof *prout de jure* of the contract was competent.

M'Fadzean's Executors v. *Robert M'Alpine & Sons*, 1907 S.C. 1269, *per* Lord Dunedin at p. 1273, 44 S.L.R. 936, at 938, *distinguished, per* the Lord President and Lord Mackenzie, and *doubted per* the Lord President and Lord Skerrington.

David Smith (Mackay), fisherman, St Monance, *pursuer*, brought an action in the Sheriff Court at Cupar against William Reekie (Smith) and others, the owners of the steam drifter "Janet Reekie," *defenders*, concluding for payment of £59, 1s. alleged to be due under a contract between the pursuer and the defenders. [The various parties involved are distinguished by their wives' surnames in brackets.]

The parties *averred*—"(Cond. 1) The pursuer is a fisherman residing in St Monance. The defenders are also fishermen residing in St Monance, and are the registered owners of the drifter 'Janet Reekie' of St Monance, M.L. 126. The first-named defender, as principal owner of the said drifter, takes chief part in its management on behalf of himself and the co-owners, his sons, with their authority. Defenders' statements in answer, so far as inconsistent with pursuer's averments, are denied. (*Ans.* 1) Admitted that the pursuer is a fisherman residing in St Monance, and that the defenders are the registered owners of the drifter 'Janet Reekie' referred to. Admitted also that the defenders, other than the said William Reekie (Smith), are fishermen residing in St Monance. *Quoad ultra* denied. Explained that the defender the said William Reekie (Smith) takes no part in the actual work of fishing. The said drifter is managed on behalf of the owners by Messrs John Bonthron & Sons, fishcurers, Anstruther. (Cond. 2) In the spring of 1915 the Admiralty made a request for drifters to be used on patrol and mine sweeping, a monthly rent to be paid the owners for the hire of the drifters, this rent ranging from £39 to £50 per month. It was a condition of such hire that the owners should supply a crew. Defenders' drifter the 'Janet Reekie' was available, but as the defenders themselves did not desire to go on patrol an arrangement was come to between the defender William Reekie (Smith), on behalf of himself, his co-owners, and William Tarvit, fisherman, St Monance, that the latter should take the 'Janet Reekie' on patrol. Subsequently Tarvit, considering he was too old to go as skipper, asked David Smith (Innes) to go as skipper, he, Tarvit, to go as mate. This arrangement was agreed to by the defender William Reekie (Smith). At this time the drifter owners were very anxious that their vessels should go on Admiralty service, as the fishing grounds had been closed owing to the war and the vessels were earning nothing. If they went on patrol the drifter owners stood to earn about £500 per annum net profit, as the vessels were kept up by the Admiralty. The deck hands' and trimmers' pay from the Admiralty was 3s. 6d. per day, and to induce crews to go the drifter owners were at that time offering these men, out of their own pockets, a bonus of 1s. per day. Believed to be true that the original rate of pay was subsequently slightly increased, but denied that a bonus was also granted by the Admiralty. A crew was got together, of whom pursuer was one, the last named agreeing to go provided the terms were satisfactory. Defenders' statements in answer so far as inconsistent with pursuer's averments are denied. Pursuer believes and avers that the person 'John Bonthron,' with whom the charter-party produced by defenders, dated 28th May 1915, purports to have been entered into, was non-existent at that date. The said charter-party is not admitted. In any event the crew, including pursuer, were engaged prior to the alleged date of the signing thereof. (*Ans.* 2.) The intimation, if any, issued by the Admiralty with reference to drifters required for patrol and mine sweeping is referred to. Explained that in the spring of 1915 the defenders had made arrangements to lay up their boat for a time at Queensferry as the

spring fishing was not open owing to war conditions. The said William Tarvit (Mayes) applied to the defender the said William Reekie (Smith) to allow him to take the drifter on Admiralty service, and to this proposal the defenders agreed, on condition that they were to have nothing to do with the crew or the engaging thereof. The drifter was accordingly hired to the Admiralty in terms of a charter-party, dated 28th May 1915, entered into between the Admiralty and John Bonthron & Son for a monthly payment of £29, 16s. 2d. during such time from 14th April 1915 as she might remain in the employment of the Admiralty. The terms of said charter-party were subsequently modified by agreement dated 2nd January 1917, by which the rate of hire was increased to £39, 18s. 7d. per month. Said charter-party and agreement are herewith produced. It was not a condition of this hire that the defenders should supply a crew, and it is believed and averred that there was no general condition by the Admiralty in connection with the hire of drifters that the owners should supply the crew. A crew, of whom the pursuer was one, was engaged either by the said William Tarvit (Mayes) or by David Smith (Innes), who had, by arrangement between him and William Tarvit (Mayes), been made skipper of the boat with Tarvit as mate. Not known what the Admiralty pay at the time was, but it is believed and averred that the original rate of pay was increased, and that a bonus was also granted by the Admiralty. It is believed that the Admiralty executed any repairs which might be required on drifters while in their service. *Quoad ultra* denied. (Cond. 3) On or about 12th April 1915 the said David Smith (Innes), William Tarvit, the pursuer, and Alexander Innes, fisherman, St Monance, had an interview with the defenders William Reekie (Smith) and Robert Reekie (Morris), at which the first-named offered, *inter alia*, to give pursuer a bonus of 1s. per day. Pursuer accepted that offer and engaged to join and did in fact join the crew of the drifter on these terms. On the same occasion the said first-named defender told the said David Smith (Innes) to engage other two men to complete the crew on the same terms, which he did, and informed the said first named defender that he had engaged them and the terms of the engagement. (*Ans.* 3) Admitted that on or about the date mentioned the defenders the said William Reekie (Smith) and Robert Reekie (Morris) had a short conversation with David Smith (Innes), who was in the company of some other fishermen, regarding the crew which he was engaging. No offer of a bonus was made to the pursuer, and no authority was given to David Smith (Innes) to offer any members of the crew a bonus on behalf of the defenders. *Quoad ultra* denied. (Cond. 4) The 'Janet Reekie' left St Monance for Admiralty service on 16th April 1915 and went to Aberdeen, where the crew, including pursuer, joined the Royal Naval Reserve, and the vessel was engaged on patrol until demobilisation in 1919. Pursuer's length of service was 1363 days. (*Ans.* 4) Believed to be true that the crew of the said drifter, including the pursuer, joined the Royal Naval Reserve in or about April 1915. Explained that the pursuer thereupon became subject to Admiralty law, and could have been transferred to any other ship at any time or put to naval work on land. *Quoad ultra* not known and not admitted. Explained that in April 1915 the pursuer was about thirty years of age and unmarried, and that on the passing on 27th January 1916 of the Military Service Act 1916, he became liable to military service unless exempted in respect of naval service. . . . (Cond. 7) The amount due by defenders to pursuer is £59, 1s.—being bonus at 1s. per day for 1363 days, £68, 3s., less £9, 2s. paid to account as above mentioned. The defenders refuse or delay to make payment, and the present action has accordingly been rendered necessary. (*Ans.* 7) Admitted that the defenders refuse to pay the sum sued for. *Quoad ultra* denied."

The pursuer *pleaded*—"Defenders being due and resting-owing to the pursuer the sum sued for, which they refuse or delay to pay, the pursuer is entitled to decree therefor as craved, with expenses."

The defenders pleaded, *inter alia*—"1. The pursuer's averments being irrelevant and insufficient to support the conclusions of the initial writ, the action should be dismissed. 2. The pursuer's averments can only be proved by the writ or oath of the defenders."

On 15th November 1919 the Sheriff-Substitute (DUDLEY STUART) pronounced the following interlocutor:—"Repels the first plea-in-law for the defenders: Finds that the averments contained in article 3 of the pursuer's condescendence regarding the alleged offer of a bonus to the pursuer can only be proved by writ or oath: Therefore sustains the second plea-in-law for the defenders: Appoints the pursuer to lodge a minute stating whether he proposes to tender evidence by writ, and continues the cause till 27th inst."

Note.—"The defenders' first plea-in-law is that the pursuer's averments are irrelevant. The pursuer's case is, shortly, that in 1915 the defenders being anxious to hire their drifter to the Admiralty, for which purpose they were obliged to provide a crew, resolved to offer a bonus on the Admiralty pay to induce men to engage to serve; that the first-named defender on behalf of himself and his co-owners offered the pursuer a bonus of 1s. per day if he would so engage; that the pursuer accepted the offer, and has served as a member of the drifter's crew in terms of his bargain. He has now been discharged and claims to be paid the promised bonus. I think he has set forth a relevant case. It is true, as the defenders point out, that the duration of the payment is uncertain in the sense that no definite period of time was fixed, as, say, a month or a year. It was to be paid, as I read the averment, so long as the pursuer was serving the Admiralty in the defenders' boat. The period, in short, was fixed by the occurrence of an event which must happen, viz., the pursuer's

discharge, although it was uncertain when that would happen. This seems to me to be sufficiently explicit and not open to the objection of irrelevancy.

"It was further urged by the defenders that the alleged agreement did not provide for the contingency that the pursuer might be transferred by order of the Admiralty to another vessel or even to land service, and it was asked, would the defenders in that case be bound to pay the bonus? I think the answer is that they would not. But in any view the fact that the agreement did not provide specifically for a contingency which the parties did not contemplate, and which in point of fact never arose, does not make the bargain bad. In all contracts circumstances may arise which the parties did not foresee and provide for. But that is not to say that they did not make a good and enforceable contract. I think the pursuer has averred such a contract here.

"The defenders' second plea-in-law relates to the mode of proof, which it is maintained must be limited to writ or oath—first, because this is said to be an innominate agreement of an unusual character, and second, because it is a promise to pay money. Upon the first point it was argued for the pursuer that this is simply a contract of service. This seems to be a double-edged argument, since a contract of service is provable if for more than a year only by writ or oath. But I do not think it can be regarded as a contract of service, in respect that an essential element of that contract, viz., the control of the servant by the employer, is absent. The agreement alleged is that the defenders should pay the pursuer not to serve themselves—although, no doubt, to serve their interests—but to serve another employer, viz., the Admiralty. This seems to me to be truly described as an innominate contract. Whether it is also of an unusual character is perhaps not so clear to-day as it might have been thought a few years ago. The test, I suppose, must be the test of common experience, and it is well known that the call for men for military service during the war gave rise to promises and agreements between employers and their servants similar to that which is here in question. The result may be that an agreement of this nature should be held among other changes arising out of war conditions to be no longer unusual in its character. I should be disposed to take this view of the matter if it were necessary for the disposal of the question whether a proof at large is admissible. But upon the second ground urged by the defenders I think their plea for a restricted proof must prevail. The pursuer's case appears to fall within the rule which is stated by the Lord President (Dunedin) in the following terms:—'I know of no case in which an obligation to pay money has been allowed to be proved otherwise than by writ or oath, except where the payment is an essential part of one of those contracts which can be proved by parole'—*M'Fadzean's Executor* v. *M'Alpine & Sons*, 1907 S.C. 1273. The obligation here averred is not essential to the contract of service. It is an obligation independent of the contract of service—a promise that if the pursuer will agree to serve under the Admiralty the defenders will give him a reward. I think, therefore, that the defenders' plea must be sustained, and I shall in the first place give the pursuer an opportunity to state whether he holds any writ of the defenders tending to instruct his averments."

On 27th November 1919 the Sheriff-Substitute granted leave to appeal.

Argued for the appellant (pursuer)—The contract founded on was nominate, but if it was innominate it was not of an unusual or peculiar character, and was provable *prout de jure*. It did not fall within the dictum of Lord President Dunedin in *M'Fadzean's Executor* v. *Robert M'Alpine & Sons*, 1907 S.C. 1269, at p. 1273, 44 S.L.R. 936, at p. 938, for the contract was not peculiar. Further, it was incidental to a nominate contract, viz., service with the Admiralty. But in any event Lord Dunedin's dictum was emitted without citation of the authorities, and they did not support it—*Craig* v. *Hill*, 1830, 8 S. 833, and 1832, 10 S. 219; *Jaffray* v. *Simpson*, 1835, 13 S. 1122; *Thomson* v. *Fraser*, 1868, 7 Macph. 39, 6 S.L.R. 81. Apart from that dictum, if the contract was innominate it was of a very simple and intelligible character without peculiarity, and proof at large should be allowed—*Forbes* v. *Caird*, 1877, 4 R. 1141, *per* Lord Deas at p. 1142, 14 S.L.R. 672; *Downie* v. *Black*, 1885, 13 R. 271, *per* Lord President Inglis and Lord Shand at p. 273, 23 S.L.R. 188. *Taylor* v. *Forbes*, 1853, 24 D. 19, note, was an example of an unusual contract. *Binning* v. *Easton & Sons*, 1906, 8 F. 407, 43 S.L.R. 312, was referred to on the peculiarity of agreements under the Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58). Dickson on Evidence, section 568, also referred to. Contracts such as the present were common during the war—*Gilmour* v. *Scottish Miners' Federation Friendly Society*, 1918, 1 S.L.T. 39; *Budgett* v. *Stratford Co-operative and Industrial Society, Limited*, 1916, 32 T.L.R. 378.

Argued for the defenders (respondents)—The pursuer's averments were irrelevant for want of specification, but if they relevantly instructed a contract it was an innominate contract, being either a promise to pay money, or, if it was onerous, of a peculiar and extraordinary character. If it was a promise to pay money Lord President Dunedin's dictum in *M'Fadzean's* case applied. There was authority to support that dictum—Dickson on Evidence, section 565, referring to Ersk. Inst., iv, 2, 20; *Cochrane* v. *Traill & Sons*, 1900, 2 F. 794, *per* Lord Young at p. 799, 37 S.L.R. 662. Here the contract was not the onerous one of service—*Conlon* v. *Corporation of Glasgow*, 1899, 1 F. 869, 36 S.L.R. 652—but was a contract to serve as the servant of another. The fact that the defenders got a benefit from the Admiralty charter was immaterial. In a question with the pursuer the contract was unilateral. If the contract was not unilateral it was unusual. Unusual did not mean complicated or infrequent, but exceptional, peculiar, or anomalous, as was shown by the illustrations contained in the cases

which were collected in Gloag on Contract, p. 320. It was therefore immaterial that there had been many such contracts during the war. That rather pointed to an anomaly arising from anomalous circumstances. Many of the cases cited by the pursuer turned on the fact that the agreement sought to be proved was a compromise, *e.g.*, *Thomson's* case. *Edmonston* v. *Edmonston*, 1861, 23 D. 995, where proof was restricted, was analogous to the present case. *Hallet* v. *Ryrie*, 1907, 15 S.L.T. 367, was referred to.

LORD PRESIDENT—The defenders have taken advantage of this appeal to challenge the relevancy of the pursuer's statements on record. I agree with the learned Sheriff-Substitute in holding the statements to be relevant, though by no means so clear as they might be. The pursuer's case appears to be simply this—"I am a fisherman, you, the defender, own a drifter, you hired her out to the Admiralty, you invited me to join the crew and promised that if I would join the crew you would pay me 1s. a day, I presume so long as the hire lasts." He now sues for the sum of £59 odds, being the amount of the payment which the defender agreed, he says, to make to him.

Now it is urged that the terms of the third article of the condescendence are irrelevant, because they are susceptible of four different meanings. I entertain a tolerably clear view of which of these meanings is the true one; but even assuming that the terms might mean one or other of four different types of contract, I am of opinion that any one of them, if established, would entitle the pursuer to recover his money. Accordingly I agree entirely with the reasoning of the learned Sheriff-Substitute in his very careful note in so far as he deals with the relevancy of this action.

But I differ in the conclusion to which he comes. As I read his note he holds that the contract is innominate and unusual, and that being so, on the supposed authority of a dictum of Lord Dunedin in the case of *M'Fadzean's Executor* v. *M'Alpine & Sons* (1907 S.C. 1269, at p. 1273, 44 S.L.R. 936) he finds that it can only be proved by writ or oath. If the dictum of Lord Dunedin, on which the learned Sheriff-Substitute founds, be truly interpreted by him, then I disagree with the dictum; but I do not agree with the Sheriff-Substitute's interpretation of that dictum. Read as the Sheriff-Substitute reads it, the dictum is in conflict with certain prior decisions to which our attention has been drawn to-day, but read in connection with the case with which his Lordship was dealing it may be sound. I say it may be, as I, in common with, I understand, Lord Dunedin and Lord Kinnear, certainly entertain a doubt about the soundness of the decision pronounced in *M'Fadzean's* case. It is difficult to see how it can be reconciled with certain prior cases, which I observe were not cited to their Lordships when they came to the conclusion they did. If the question ever arises again I think the suggestion of the Lord President and Lord Kinnear that it should be remitted to a larger Court for reconsideration is well worthy of attention.

But I take the law of Scotland to be that even on the assumption that this was an innominate contract, still if it is not of an unusual, anomalous, or peculiar character it is susceptible of proof by parole. On the authorities that have been cited to us I think there can be no doubt about that; and I desire to associate myself with the opinions expressed by Lord Neaves in *Thomson* v. *Fraser* (1868, 7 Macph. 39, 6 S.L.R. 8,) and by Lord Deas in *Forbes* v. *Caird* (1877, 4 R. 1141, 14 S.L.R. 672.) Both these learned Judges appear to me to state the law of Scotland with accuracy and precision when they say that it is not enough to exclude parole proof that the contract is innominate; you must further say that it is unusual, anomalous, and peculiar in its terms.

This appears to me, as I understand it likewise appears to your Lordsips, a very plain and simple contract under which the defender agreed to give the pursuer 1s. a day if he were a member of the crew of their drifter in the service of the Admiralty. The Solicitor-General contended that this was a gratuitous promise made by the defender. I do not think it was a gratuitous promise. I think it is plain upon the face of it that the defenders believed that they would receive the full money value of the services for which they agreed to pay, and accordingly if the pursuer proves his averments he would be entitled to have his decree. I propose to your Lordships that we should recal the interlocutor of the learned Sheriff-Substitute and remit to him to allow a proof *prout de jure*.

LORD MACKENZIE—I agree that there should be a proof *prout de jure*. I read the pursuer's averments as containing a statement of these facts—that the defenders had a boat, that the Admiralty wanted that boat, that the boat required a crew, and that the defenders promised to pay a bonus of 1s. a-day to the pursuer if he shipped on board the boat as one of the crew. He says that he accepted the offer so made, and that he did ship as one of the crew, and has served for the specified period as a member of the crew. That appears to me to be a contract on which one side engaged to pay and the other side engaged to render service, and to be a contract of an innominate character, not of an unusual description, but a contract which can be proved by parole.

I do not think it necessary to construe the dictum of Lord Dunedin in *M'Fadzean's* case (1907 S.C. 1269, at p. 1273, 44 S.L.R. 936) as conflicting in any way with the decision we are pronouncing in this case.

LORD SKERRINGTON—The pursuer has no one but himself to thank for the fact that he lost his case in the Sheriff Court. If his case had been stated in his condescendence simply and intelligibly the learned Sheriff would have concentrated his attention much more closely than he has done upon the question whether it is really in accordance with the law of Scotland that an

innominate contract of an exceedingly simple character cannot be proved by parole if it so happens that the contract involves a payment of money. For my part I know of no authority in favour of that proposition—I think there is authority against it. Therefore I agree with your Lordships.

LORD CULLEN—As I read the averments of the pursuer, the contract which the pursuer proposes to prove is not a contract of service between himself and the defenders. It is, however, a bilateral contract whereby the pursuer, on the one hand, bound himself to further the interests of the defenders by serving the Admiralty on the vessel if accepted by the Admiralty; and the defender, on the other hand, bound himself in respect of such service to the Admiralty, if given, to pay the pursuer 1s. a-day while the service lasted. So described, the contract appears to me to be of the character of an innominate contract; and I do not think that it is a contract of a kind so anomalous or unusual that the mode of proving it falls to be restricted to writ or oath.

The Court recalled the interlocutor of the Sheriff-Substitute and remitted the case to him to allow proof *prout de jure.*

Counsel for the Pursuer—Sandeman, K.C. —King Murray. Agents—W. B. Rankin & Nimmo, W.S.

Counsel for the Defenders—The Solicitor-General (Morison, K.C.)—T. G. Robertson. Agents—Pringle & Clay, W.S.

Thursday, January 15.

FIRST DIVISION.

(SINGLE BILLS.)

MILL AND OTHERS *v.* LADY DUNDAS.

Process—Expenses—Jury Trial—Certification of Skilled Witnesses—A.S., 15th July 1876, *V*, 3 (2).

In an action of damages for personal injuries to the pursuer and for the death of his wife, a tender was lodged some time before the trial and was accepted by the pursuer after most of his evidence, including the evidence of some of his skilled witnesses, had been taken at the trial. The judge directed the jury to return a verdict for the pursuer and to assess the damages at the sum tendered. *Held* on a motion to apply the verdict that the A.S., 15th July 1876, V, 3 (2), did not apply, and certificates for skilled witnesses *refused.*

The Act of Sederunt, 15th July 1876, V, 3 (2), enacts—". . . In cases where it is found necessary to employ professional or scientific persons, such as physicians, surgeons, chemists, engineers, land surveyors, or accountants, to make investigations previous to a trial or proof, in order to qualify them to give evidence thereat, such additional charges for the trouble and expenses of such persons shall be allowed as may be considered fair and reasonable, provided that the judge who tries the cause shall, on a motion made to him, either at the trial or proof, or within eight days thereafter if in session, or if in vacation within the first eight days of the ensuing session, certify that it was a fit case for such additional allowance."

George Haldane Mill as an individual and as the tutor of his three pupil children, his two minor children, with his consent and concurrence, *pursuer*, and others, brought an action against Lady Dundas, widow of Sir Robert Dundas of Arniston, *defender*, concluding for various sums as damages in respect of a motor car accident whereby the pursuer's wife was killed, and the pursuer himself sustained injuries.

After sundry procedure, in the course of which other pursuers, except George Haldane Mill, accepted sums tendered to them, and George Haldane Mill increased the sum for which he sued, the Lord Ordinary fixed a diet for trial, and the defender on 19th November 1919 made a tender to George Haldane Mill of £850 with expenses to date, which was not accepted. On 21st November 1919 the case was sent to trial at the sittings. The trial began on 23rd December, and on 24th December, after certain of the pursuer's skilled witnesses had been examined, the pursuer accepted the defender's tender of £850. The Judge at the trial (LORD SKERRINGTON) thereupon directed the jury to return a verdict for the pursuer and to assess the damages at £850.

On a motion to apply the verdict, counsel for the defender moved that his skilled witnesses should be certified under A.S., 15th July 1876, and that certificates should be refused for the pursuer's skilled witnesses.

Argued for the defender—The defender was entitled to have his skilled witnesses certified; he was within the terms of A.S., 15th July 1876, for the trial had gone on, not indeed to its natural conclusion, but sufficiently far to enable the Judge to certify that it was a suitable case. The defender had had to bring his skilled witnesses and keep them in readiness to give evidence, and but for the acceptance of the tender they would have gone into the witness-box. The pursuer could not have his skilled witnesses certified even though they had been examined, for he was not entitled to any expenses after the date of the tender. His acceptance of the tender implied that the case should never have gone to trial.

Argued for the pursuer—The defender was not entitled to have his skilled witnesses certified, for the A.S., 15th July 1876, only applied where the case had been fully tried. Apart, however, from the A.S. the pursuer was entitled at common law to all reasonable expenses incurred by him up to the date of the tender accepted, including the expense of skilled witnesses, to enable him to prepare his case—*Clements* v. *Corporation of Edinburgh*, 1905, 7 F. 651, 42 S.L.R. 536. Alternatively, if the A.S. applied the pursuer was entitled to have his skilled witnesses certified at least *quoad* the expense incurred prior to the date of the tender.