have considered that the citation here was sufficient to satisfy the provisions of that statute also.

LORD M'LAREN was absent.

The Court refused the appeal.

Counsel for the Appellant—M'Kechnie. Agent—J. D. Macaulay, S.S.C.

Counsel for the Respondent—C. S. Dickson. Agents—Torry & Sym, W.S.

Wednesday, June 10.

SECOND DIVISION.

[Sheriff of Lanarkshire.

COCHRANE *v.* RUSSELL.

Process—Amendment by Stating New Defence—Expenses—I O U Sued on without Specification of Debt.

In an action in the Sheriff Court for the amount of an I O U without specification of the debt for which it was granted, the defender pleaded that the document was not that granted by him, as the pursuer had torn off a note to the effect that interest at 5 per cent. was to be charged. There was no plea to the relevancy. In an appeal from the decree of both Sheriffs, the defender proposed to amend his record by alleging that the I O U had been granted for a gambling debt, and could not be founded on. The pursuer refused to amend his record by setting out the debt for which the I O U was granted.

The Court *allowed* the defender to amend on paying £15, 15s. of expenses—*diss.* Lord Young, who was of opinion that the pursuer should amend his record by specifying the debt for which the I O U was granted, leaving the defender to amend if he considered this necessary.

William Cochrane, residing in Govan, sued John Russell, commission agent, Airdrie, for payment of a sum of £54 sterling, with interest. He averred—"The pursuer is the holder of an I O U, dated 25th October 1887, for £59, granted by the defender on that date in favour of the pursuer."

The defender answered—"Denied. The pursuer is called upon to produce the alleged document. Explained that the document now produced is not that granted by the defender, in so far as a part of it has been torn away."

The pursuer alleged that the defender on 4th March 1890 paid £5 to account.

The defender pleaded—"(1) The defender not being due the pursuer the sum sued for, he is entitled to absolvitor, with expenses. (2) The document produced not being that granted by the defender, the action should be dismissed, with expenses."

At a proof before the Sheriff-Substitute (MAIR) the defender deponed that he granted the I O U; that he had paid £5 to account; that he owed the pursuer no other sum of £59 than that for which he had granted the I O U; but that the document as originally granted by him contained a note to the effect that interest was to be charged at the rate of 5 per cent., which the pursuer had since torn off.

The Sheriff-Substitute held that even assuming the defence to be proved, which he did not believe, the I O U was not affected as a document of debt.

On appeal the Sheriff-Principal (BERRY) adhered.

The defender appealed to the Court of Session, and when the case was called the defender's counsel proposed to amend the record by averring that the I O U was granted for differences in stocks, delivery of which was never contemplated or enforceable, and no action in law could be founded on it.

Argued for the pursuer—The expenses previously incurred must be the condition of stating a new ground of defence by amendment—*Arnott* v. *Burt*, 11 Macph. 62. [LORD YOUNG—The pursuer should amend his record; he should sue upon the debt and not upon the I O U, which is only evidence of the debt.] The pursuer was prepared to stand on his record. There was sufficient authority for his view that he was entitled to sue on the I O U—*per* the Lord President in *Haldane* v. *Spiers*, March 7, 1872, 11 Macph. 541. Besides, the defender did not plead that the action was irrelevant.

At advising—

LORD JUSTICE-CLERK—The pursuer does not propose to amend his record. The defender does propose to make an amendment, and the question is, what share of the expense previously incurred he is to pay to the pursuer as a condition of making that amendment? I do not think it quite clear that some part of the previous expense may not be made available for future use. I therefore think that the amendment may be allowed on condition that the defender pays the pursuer fifteen guineas.

LORD YOUNG—In my opinion an I O U is not a bond; it is not a document of debt constituting a debt *per se*. I think it is settled in England (and we borrowed them from England) that an I O U is not a document of debt, but serves only as evidence of the amount of the debt agreed on between the parties on an antecedent contract. But if the money is not paid, then the debt must be sued on and proved. The I O U is a most important and, it may be, a very conclusive piece of evidence, but the debt itself must be sued on. That is the way in which the law is put by Mr Justice Byles in his work, and if the law is otherwise, then an I O U would be tantamount to a bond which would stand by itself as a document of debt without reference to any antecedent contract, and one consideration in support of these views is that otherwise

there would be no means of knowing what debt had been paid when the money in the I O U was handed over. Now, I was struck on reading this record that no debt is alleged by the pursuer, and I doubt if he has proved any distinct debt. I think that the nature of the debt should be stated, and the pursuer should be in a position to say that a distinct debt is proved. I think that both parties have misapprehended their case, and I repeat that I think the pursuer ought to amend his record, and the defender if necessary may state his new defence, although it may not be necessary. I should be for reserving the expenses altogether, and the whole question can come up for discussion in the end.

LORD RUTHERFURD CLARK—The only question before us at present is, whether the defender is to be allowed to amend his record, and on what conditions he should be allowed to do so. The pursuer does not propose to amend his record. It may be a defective record, and we may have to decide that at another time. In my opinion we cannot do so at present. If the defender had chosen to maintain that the action was irrelevant in respect that the debt was not sufficiently specified, we might have decided that plea, but he does not do so; he only wishes to amend. That being so, the amendment must be allowed; the only question is, on what conditions. No doubt some expense has been occasioned to the pursuer by the course of procedure taken, and he is entitled to be indemnified. I should not have been averse to reserve the whole expense, but that may be equally hard upon the pursuer. I think the amendment may be allowed on condition of the defender paying fifteen guineas.

LORD TRAYNER—I agree with Lord Rutherfurd Clark. With reference to what Lord Young said as to an I O U being taken as a ground of debt, it was very fully recognised as such by the Lord President in *Haldane* v. *Spiers*, March 7, 1872, 11 Macph. 537. Whether that view is sound or not, we cannot ask the pursuer to amend his record unless he wishes to do so, and the defender has not stated any objection to the relevancy of the record. If the defender wishes to amend, I think that fifteen guineas is not too heavy a penalty to pay for the expense to which he has put the pursuer.

The Court allowed the defender to put the amendment craved, and stated in a minute, to be put upon record upon payment by him to the pursuer of fifteen guineas.

Counsel for the Appellant—Watt. Agents—J. & A. Hastie, Solicitors.

Counsel for the Respondent—M'Kechnie—Boyd. Agents—T. & W. A. M'Laren, W.S

Wednesday, June 10.

FIRST DIVISION.

[Sheriff-Substitute of Argyllshire.

M'LEAN *v.* M'LEAN.

Crofter's Power of Bequeathing his Right to his Holding — Limitations on that Power—Crofters Holdings (Scotland) Act 1886 (49 *and* 50 *Vict. c.* 29), *sec.* 16.

Under the 16th section of the Crofters Holdings Act 1886 a crofter may . . . bequeath his right to his holding to one person, being a member of the same family; that is to say, his wife or any person who failing nearer heirs would succeed to him in case of intestacy. . . .

A crofter who had sons and daughters living, bequeathed his right to his holding to a brother's daughter. His eldest son as heir-at-law maintained that the bequest was null and void on the ground that the legatee did not possess the necessary statutory qualifications.

Held that the bequest was a valid exercise of the power conferred by said Act.

The Crofters Holdings (Scotland) Act 1886 (49 and 50 Vict. c. 29) by section 16 provides that "A crofter may, by will or other testamentary writing, bequeath his right to his holding to one person, being a member of the same family; that is to say, his wife or any person who, failing nearer heirs, would succeed to him in case of intestacy (hereinafter called the 'legatee'), subject to the following provisions—(*d*) If the landlord or his known agent intimates that he objects to receive the legatee as crofter in the holding, the legatee may present a petition to the Sheriff praying for decree declaring that he is the crofter therein . . . and if any reasonable ground of objection is established to the satisfaction of the Sheriff he shall declare the bequest to be null and void; but otherwise he shall decern and declare in terms of the prayer of the petition . . . (*g*) If the legatee shall accept the bequest, and the bequest is not declared to be null and void as aforesaid, the legatee shall be entitled to possess the holding on the same terms and conditions as if he had been the nearest heir of the crofter. . . . (*h*) If the legatee does not accept the bequest, or if the bequest is declared to be null and void as aforesaid, the right to the holding shall descend to the heir of the crofter, in the same manner as if the bequest had not been made. Provided always that in the case of any legatee or heir-at-law more distant than wife, son, grandson, daughter, granddaughter, brother or son-in-law it shall be competent to the landlord . . . to represent that for the purpose of enlarging their holding or holdings the holding ought to be added to them; . . ."

By deed of settlement dated 1st October 1890 the late Niel M'Lean, crofter, Cornaigbeg, Tiree, who died 14th November 1890, bequeathed his right to his holding to his