were seized and put in irons. The gravamen of their charge I take from Conds. 6 and 7, which, after the circumstances I have narrated, sum up the thing of which the pursuers complain. The pursuer says he "is a man of good character and reputation, and in consequence of said wrongful, illegal, and oppressive act"—that is to say, the putting in irons—"he has suffered severely in his feelings and reputation. There was a large crowd on the steamer, among whom were several persons known to him, and he felt his position keenly. In arresting and placing the pursuer in irons, it is believed that the ship's officers acted in obedience to the orders of the captain, who was the defenders' servant in charge of said steamer."

I read those two paragraphs particularly because I think that the complaint made might have been of a different character. There might have been a complaint made of a simple assault by the purser himself, which to my mind would have put the case in a different complexion as regards the issue. Here it is perfectly clear, on the pursuer's own showing, that the act complained of, for which he seeks damages, was an act done in pursuance of the orders of the captain.

I need scarcely say that the explanation given by the defenders is very different indeed, and one which, if true, entirely justifies the whole proceeding. But of course I do not take that into account at all upon this question of the form of the issue.

Now, that being so, should "maliciously and without probable cause" be in the issue? I think it should. And I think it should because of the peculiar position of the captain of a ship. The captain of the ship is the person who, for very obvious reasons, has been, according to common law, always considered to be invested with supreme authority over the persons in the ship, not, of course, entirely without being liable to be called to account for the exercise of that authority, but still endowed with the authority for the time being; and if he thinks it necessary for the security of the other persons in the ship to arrest certain members of the crew or passengers upon the ship, he has *prima facie* the right to do so. At any rate he is privileged in doing so, or, in other words, it must be shown that he has exercised his powers in abuse of his privilege—that is to say, as it is expressed in the form of the issue, maliciously and without probable cause.

No doubt there are cases of arrest where there may be no privilege. But I think the matter is really quite well put in a text-book from which I am reading, in which the learned writer, after setting forth the old doctrine that an arrest may be made by a police constable without a warrant or even by a private individual where persons are seen in the act of committing the crime, goes on to say that circumstances may instruct absolute privilege, qualified privilege, or no privilege. I think that is quite right, and that really the only question before us at all is whether malice and want of probable cause should go at once into the issue because privilege was disclosed, or whether it should be left over to the trial, leaving it to the judge to direct the jury that they could not find for the pursuer without finding also malice and want of probable cause upon the circumstances that arose at the trial.

I am clearly of opinion, inasmuch as the action is founded upon those sentences that I have read, and inasmuch as these sentences show that it is the action of the captain that is complained of—the captain being, as I have said, in the position of a person who has a privilege in his actings in regard to the persons upon the ship—that the Lord Ordinary is right and that the issue should be approved as it stands.

LORD KINNEAR—I concur.

LORD SKERRINGTON—I also concur.

LORD M'LAREN and LORD JOHNSTON were absent.

The Court refused the motion.

[A similar judgment was pronounced in *Park's* case.]

Counsel for Pursuer—J. A. T. Robertson. Agents—Inglis, Orr, & Bruce, W.S.

Counsel for Defenders — Watt, K.C. — Macmillan. Agents—Morton, Smart, Macdonald, & Prosser, W.S.

Tuesday, January 25.

FIRST DIVISION.

[Sheriff Court at Glasgow.

BISHOP *v.* BRYCE.

Loan — I O U — Discharge—Proof—Parole Evidence.

An I O U "is an acknowledgment of indebtedness, and that acknowledgment of indebtedness, if you have nothing more, certainly carries with it a legal obligation to repay the sum which is thereby said to be a debt . . . Where you have an obligation to pay money constituted by writ, you cannot ordinarily prove by parole that that obligation has been discharged. But, on the other hand, you can and may prove by parole that facts and circumstances have arisen which really show that the party putting forward the I O U has no proper right to have the document of debt with him."

In an action by the holder of an I O U for payment of the sum contained therein, the defender averred that the document had been granted as a temporary receipt for shares; that the shares had been subsequently allotted to the pursuer; and that as the obligation for which the I O U had been granted had been duly discharged, he was no longer liable thereunder.

Circumstances in which *held* that the defender had proved that the obligation had been discharged.

William Bishop, librarian, St Vincent Place, Glasgow, brought an action against David Bryce, publisher, West Campbell Street, Glasgow, for payment of £358 odd, being (1) the sum of £300 contained in an I O U granted by the defender to the pursuer, and (2) interest thereon under deduction of sums paid to account of interest.

The following *narrative* is taken from the opinion (*infra*) of the Lord President:—"This is an action for payment of a sum of £300, with interest, but under deduction of certain sums said already to have been paid, and the money in the initial writ is described as 'being money advanced by pursuer to defender, conform to statement hereto attached, and I O U dated 11th July 1895 produced.' The pursuer is a gentleman in the book trade who at one time was in the employment of the defender, who was also at that time in the book trade. The action as laid is laid entirely upon the I O U, and upon the averment that the I O U represents money advanced of which repayment is now sought. The defences give an explanation which is tantamount to saying that the pursuer is really not in the circumstances entitled to keep possession of the I O U as representing a living debt.

"Now the story of the defender, as told in the defences, is brought out thus:—The pursuer, as I have already said, was in the service of the defender in the book trade, and it is common ground between them that in the year 1895 the defender had in his hand moneys belonging to the pursuer amounting roughly to about £100, which represented a certain amount of commissions and other payments which by the terms of his service the pursuer had earned but which he had not drawn. It is also common ground between the parties that in that year the defender's business was turned into a limited company, and a proposal was made—I shall say more about that in a moment, but I use a neutral word in the meantime—a proposal was made that the pursuer should take shares in the new company. It is also common ground that the pursuer produced a sum of money, which as a matter of fact he had got by selling some shares in Nobel's Explosives Company, of which he was proprietor, and added that to the sum of money which was already due to him by the defender.

"So far common ground. I now go on with the story as averred by the defender. The defender says that it was arranged that the pursuer should be allotted shares to the value of £300 in this new company. This was while the arrangements about the company were going on, and he says that the I O U was granted as a temporary receipt for the money which he acknowledged he had in his hands, namely, £100 already owing and £200 then advanced—the figures are not strictly accurate, but they are accurate enough for our purpose. He then says that in due time £300 worth of shares were allotted to the pursuer, and that that being done the transaction was closed, but that *per incuriam* the body of the I O U was not got up from the pursuer, and that consequently it is not equitable that he should be called upon to pay the money.

"Now that story is quite distinctly put in the defences, and the first thing I would remark is, that so far as the pursuer's statement is concerned, being met by that story, he does nothing except adhere to his original statement that the £300 was advanced. The only way in which he meets the defender's statement is that he says that it is quite true that £300 worth of shares were allotted to him. But he does not aver any source of payment for these shares. Now that is the way the record stood.

"Well, parties at first debated in the Sheriff Court, there being no question as to whether the I O U was genuine—it bore the defender's signature—as to whether any defence was relevant which did not refer to proof *scripto* or refer to the oath of the party payment of the sums contained in the I O U. Originally the Sheriff-Substitute took the view that that was a good defence. The late Sheriff-Principal recalled that interlocutor, and allowed parties a proof of circumstances which might show that the I O U had really been discharged. That proof was led, and upon that proof the Sheriff-Substitute on 26th March 1909 made a certain set of findings in fact. They are very clearly and very satisfactorily drawn by the Sheriff-Substitute. I do not think that I need read them to your Lordships, because, though really a set of findings in fact, they are nothing more nor less than a substantiation of the story put forward by the defence as I have told it. Perhaps the only finding which I ought to mention, because it is not included in the story as I have told it, is the 13th, which is—'That from the date of said I O U until the beginning of the year 1907 the pursuer made no demand upon the defender for payment of either the principal of the alleged debt therein or of any interest thereon;' and then upon those findings in fact he 'finds in law that the defender's indebtedness under the I O U sued on was discharged by the issue to the pursuer of the thirty first preference shares in Bryce & Murray, Limited, on or about 12th September 1895,' and accordingly of course assoilzies the defender.

"Appeal was taken to the Sheriff-Principal, and he recalled the Sheriff-Substitute's interlocutor and substituted a new set of findings in fact, of which again I need not read most, but I shall read practically the operative ones upon which he proceeds. Finding 4 is—'That the defender urged the pursuer to take shares in the new firm, and that he agreed to take thirty first preference shares of £10 each on condition that the defender would guarantee him against any loss in connection with said shares;' and then finding 7 is—'That the said I O U was granted by the defender as an acknowledgment of the transaction, and also as a guarantee to the pursuer against any loss which might be incurred by him in respect of his having taken the shares

aforesaid;' and then finding 8 is—'That thereafter, on or about 12th September 1895, thirty fully-paid first preference shares were issued to the pursuer, and that the defender has failed to prove that these were in full satisfaction of the debt of which the I O U was an acknowledgment;' and then his finding in law is—'That under the guarantee given by the defender, constituted by the I O U of 11th July 1895, the defender is liable to repay to the pursuer any loss he may have incurred in investing said sum of £300 in said company, together with 5 per cent. interest from the date of said I O U: Therefore decerns against the defender for the sum of £300 of principal, and for the sum of £58, 6s., being the balance of interest as sued for.' The meaning of that is that as a matter of fact the company of Bryce & Murray, Limited, went on for some time and paid dividends for some years upon the first preference shares. It never paid any dividends upon the second preference shares, and it never paid dividends on the ordinary shares, but it did pay dividends on the first preference. These shares were as originally allotted all first preference shares, but afterwards by a transaction some of those first preference shares were surrendered for second preference shares, but since that, after going for about ten years, the company has gone into liquidation. We are not exactly told, I think, whether the result of the liquidation is to make a certain return to the first preference shareholders or not.

"An appeal has been taken against the interlocutor of the Sheriff-Principal which is now here, and what your Lordships really have got to do is to decide between the views of the Sheriff-Substitute and of the Sheriff."

[*For an examination of the evidence see the Lord President's opinion, infra.*]

Argued for appellant—The I O U admittedly did not vouch what it purported to vouch. The question therefore was this—Was it meant as a guarantee or as a temporary receipt for the shares about to be issued? The question was one of fact, and could therefore be proved by parole—Dickson on Evidence, sec. 1035; *Blackwood* v. *Hay*, February 19, 1858, 20 D. 631; *Grant's Trustees* v. *Morison*, January 26, 1875, 2 R. 377, 12 S.L.R. 292; *Grant* v. *Mackenzie*, June 7, 1899, 1 F. 889, 36 S.L.R. 671. The *onus* of proving that the I O U was guarantee lay on the pursuer and he had failed to discharge it. The Mercantile Law Amendment (Scotland) Act 1856 (19 and 20 Vict. cap. 60), sec. 6. required guarantees to be in writing, and an I O U could not be construed as a guarantee. As to what constituted a valid guarantee, reference was made to *Wallace* v. *Gibson*, March 19, 1895, 22 R. (H.L.) 56, 32 S.L.R. 724. Moreover, the pursuer's evidence was inconsistent with his case on record. The respondent's contention that the shares were merely a collateral security for the loan was inconsistent with the facts, for the holder of such a security would not have drawn dividends (as the respondent had done) but interest on the advance.

Argued for respondent—The I O U was given not as a guarantee but in acknowledgment of a loan. It was so stated on record and clearly proved by the evidence. The shares were merely a collateral security for the loan. The I O U could not be a temporary receipt for the shares, for at the time it was granted the respondent was already on the register as a shareholder.

At advising—

Lord President— . . . [*After narrative ut supra*] . . . The case was exceedingly well argued on both sides, and various topics were discussed, through all of which I do not think it necessary to go. But I should like to say, in general, that I do not think that there is any doubt at all as to the general law to be applied to a case of this sort in connection with an I O U. I quite accept the law as laid down by the majority of the Court in *Thiem's Trustees*. An I O U is an acknowledgment of indebtedness. The precise way in which that indebtedness may have arisen may vary. It may be an advance then and there made, which is quite a common thing, or it may represent a state of accounts between parties as at a certain date; but it is an acknowledgment of indebtedness, and that acknowledgment of indebtedness, if you know nothing more, certainly carries with it a legal obligation to repay the sum which is thereby said to be a debt. That is the first proposition. The second proposition is that where you have an obligation to pay money constituted by writ you cannot ordinarily prove by parole that that obligation has been discharged. But, on the other hand, you can and may prove by parole that facts and circumstances have arisen which really show that the party putting forward the I O U has no proper right to have the document of debt with him. Of course, that must be clearly shown, otherwise the somewhat strict rule would be of no use.

Now when I come to this case, of course what at once strikes one upon the face of it is this, that the Sheriff-Principal has given decree upon a ground of action that is not in the record at all. Nobody can read that record and really find out anything about this question of guarantee. And that has really very much coloured the whole case. It has, first of all, coloured it in this way, that the Sheriff who originally allowed the proof having, quite rightly I think, made the defender lead in the proof (because the *onus*, of course, was upon him to show the facts and circumstances which really had got rid of the I O U), the defender goes into the box and tells his own story, and not a word is put to him, in the proper sense, in the questions that are put to him, of this other view of the case, namely, that although the money was paid to get shares, and shares were given, yet the acknowledgment of indebtedness was also to be kept as a guarantee. Well, then, the defender having ended his

case, the pursuer goes into the box, and then for the first time—almost, one might say, more by accident, as far as one can see, than anything else—this other view, this other story, comes out. Well, in the first place, I think, if this proof had been properly conducted, the questions ought not to have been allowed to be put to the pursuer, not having been put to the defender; and if that meant really a breakdown in justice, then, subject to such *amende* as might have been necessary in the way of expenses, I think the defender ought to have been recalled and the questions put to him before they were allowed to be put to the pursuer. Secondly, not only are the rules—the very necessary rules—of evidence broken in that, but the questions as put are put in such a way as to really denude the evidence of much of its force. For instance, he is asked—"Did Mr Bryce make any proposal to you in connection with your taking shares in the new company?—(A) Yes, he expected me to put money into it. I believe he asked me to put £300 into the concern. (Q) Did you agree or refuse?—(A) I agreed on certain conditions only. (Q) What were these conditions?—(A) That he would make himself responsible for the whole amount. I flatly refused to have anything to do with the company except on these conditions." Now so far, of course, the examination is right enough; but then, instead of going on as it should, it goes on thus—"(Q) Did Mr Bryce urge you to take £300 worth of shares?—(A) He more than urged; he gave me a broad hint that they could easily get another librarian. I utterly and absolutely refused to put the money in unless he became responsible for it." And then, instead of being asked "What did Mr Bryce say to you?"—which, of course, was a proper question—he was asked "Did Mr Bryce say to you that if you took £300 worth of shares he would be responsible?" That is, of course, absolutely putting the words into the man's mouth, and the result of that is that the answer, as he made it, is a worthless answer.

It is not, of course, that the pursuer himself did not quite plainly state that there were certain conditions, but those questions ought never to have been suggested; they ought to have allowed the man to tell his own story. I do not think probably there would have been much difference if he had been allowed to tell his own story; it would probably have come to the same thing. But then you are in this difficulty, that this view ought never to have been put to the pursuer without there having been put to the defender his own words, which were going to be testified to by the pursuer.

Now, as far as direct testimony goes, the matter really practically ends there. As I have said, this not being put to the defender, you do not have the defender's account of this so-called condition. But you have what may be called an indirect account, not, of course, directly meeting it—it could not, because the matter was not put to him—but you have an indirect account where he is asked this—"Did you propose to Mr Bishop that he should put £300 into the limited concern?—(A) I cannot say whether I proposed it or he proposed it. It was generally talked over. He was an old servant of the firm, and these things were all talked over. He calculated what he could spare, and made up his mind. He went into it very calculatingly."

Now in that state of the evidence I am bound to say that I do not think the Sheriff has any justification for holding the fourth finding proved—that the defender urged the pursuer to take the shares in the new firm, and that he agreed to take thirty first preference shares of £10 each on condition that the defender would guarantee him against any loss in connection with the shares. It is only the evidence of the one against the evidence of the other, and the Sheriff was not in the position that the Sheriff-Substitute was of seeing the witnesses. If that finding had been written by a judge who saw the witnesses, I should have said that a reason for his coming to that conclusion is that he disbelieves the one witness and believes the other. But the Sheriff is, of course, in no better position than we are; and upon the statement of the pursuer alone, which statement the defender was not given a proper opportunity to contradict, I say unhesitatingly the Sheriff has no right to come to that finding as upon the evidence.

Now, of course, when you come to a conflict of testimony between two people directly like that, one generally tries to help oneself out by considering what you may call the antecedent probabilities of the one story and of the other. I do not think that, so far as the antecedent probabilities are concerned, one is much helped here, because I think that the story on the one side and on the other are both antecedently probable—not improbable but probable. I can perfectly well see that it was in one sense to the interest—in a very plain sense to the interest—of the defender here to try to get this man to take shares. The defender was the vendor. The conditions of the sale to the company were, as is so often the case, so much in cash and so much in shares. The public did not come forward, and the result was that the shares were not subscribed for; and of course it meant that if he could get these shares taken up by somebody there would be some cash to pay him; and there is no question that this £300 found its way into the pocket of the defender as part, of course, of the price of the business with which he had parted. So that the idea of his pressing his employee to take some shares is, to my mind, quite a probable idea.

But then, while I say that, the other side is perfectly probable too. It was a perfectly natural thing that an employee should go into the business. He says, after the event, that he did not like it. But one does not know at all if he did not have perfectly different views at the time, and it is a perfectly common thing when a business is turned into a limited company that shares in that limited company should

be taken by the employees. And therefore the story as told by the defender, that the pursuer himself went into the matter nicely and calculatingly and then asked for the shares, is also upon the face of it not at all an improbable story.

Now in that state of matters, what is the result to which one is bound to come? I think that that fourth finding, for which I have already said I do not think the Sheriff has any justification, is really at the root of his view of the law in the case, and with it his view of the law goes. And I think it must go, and must go for this reason—So long as you are upon the original case as laid—advance of money—you are on safe ground upon the I O U, and unless you can show that the money has been paid, and unless you can show that by writ, then discharge of the I O U is not to be presumed. But as soon as you find that although the money has not been repaid, money's worth has been given, then you oust the idea of the I O U being still, as an I O U, a standing document of debt. Now it seems to me that that has been done, and that it has been done by the pursuer's own evidence as well as by that of the defender. The pursuer admits that he got these shares that were nominally worth £300. They were allotted to him, the company's books show it, and the company's books show that he was paid dividend upon them. The position which was taken up upon record, and from which Mr Murray in the stress of circumstances, if he will pardon the expression, tried to wriggle out, was that the payments shown in the company's books were payments of interest. They were nothing of the sort; they were payments of the dividends to the pursuer by the company.

Now, that being so, the pursuer does not hint any source of payment for the shares which he got except these moneys which were represented by the transaction covered by the I O U. Accordingly by his own evidence he has displaced the ordinary position of an acknowledgment of indebtedness still extant in the I O U. Well now, no doubt he has done it, although at the same time (not in his record but in his evidence) he has said that this I O U was really meant also to be held as a guarantee. It seems to me that when you say that you really offer to prove another contract, because an I O U is not the way to constitute a guarantee. Nobody can spell a guarantee against loss upon shares out of an I O U. The truth is it is not quite easy to say what precisely a guarantee against loss upon shares means. I do not mean that the idea is a difficult one; but what I mean is that if you want to know all about it, you need to know a little more than we are told here. How long is it to last? For a man's lifetime, or for how many years? And what does loss mean? Suppose that the shares go to an enormous premium at one time, and that if he had cleared out he could have made a good thing, but he sticks to them and the shares go down, is the guarantee still to subsist? An I O U shows anything else in the world rather than a guarantee against loss on shares. Well then, if a man has a contract of an unusual nature I think he must prove it. Now here the pursuer has not proved it. He has got only his own testimony contradicted by the testimony of the other man.

Accordingly I think the Sheriff-Substitute's view here was really the right view. It may be that the truth, after all, is upon the other side. Whenever one has this conflict of the direct testimony of one man against that of another, the Court can only feel that it is mortal. But if the truth is on the other side, then at least the pursuer has himself to thank for the view I take of the law, because he ought to have had that bargain reduced to writing in such a way that it could have been proved. I think that upon the materials the Sheriff-Substitute was clearly right, and I shall advise your Lordships to allow the appeal and revert to the Sheriff-Substitute's findings.

LORD KINNEAR—I agree. I have no doubt that the proof which was allowed by the Sheriff in this case was perfectly competent, and that he allowed it in the proper form. It is said that an I O U is a written document establishing a debt which can only be discharged by payment, and that payment can only be proved by writ or oath; and in support of that view the pursuer cited the case of *Thiem*, which is referred to by the Sheriff-Substitute. But an I O U is nothing but an acknowledgment of debt. As long as it stands it is good as against the granter to prove that he acknowledges a debt to the grantee. But it does not express the ground of debt or give any indication whatever of the kind of contract out of which the debt has arisen. It does not, therefore, follow that when an I O U is granted, it is granted for a loan, or in respect of any particular contract, and it does not follow that in order to get rid of it the granter of the I O U must prove payment of money. The simple way of getting rid of an I O U is to have it given up to the granter by the person to whom it was granted, and the granter has always the right to have it given up to him upon satisfaction of the obligation, whatever it may have been, in respect of which it was granted.

The case of *Thiem* establishes that according to a rule of our law, which the Judges who were constrained to follow it in that case refused to applaud, payment can only be proved by writ or oath. But when the question arises whether it is necessary to prove payment it cannot be solved by anything that appears upon the face of the I O U. It depends upon the circumstances under which it was granted, and the intention with which it was given by the one party to the other. It is the result of some transaction or other. It does not on its face disclose the kind of transaction; and therefore in order to determine the rights of parties, if there be a difference between them on the facts, it is indispensable that the facts should be proved. I take it, therefore, that the proof, as I have said, was perfectly com-

petent, and that the question between these two parties comes to be one of fact. I agree with the observation which was made by your Lordship, that when a question of fact comes to depend upon the conflicting testimony of two witnesses only, each of whom positively asserts his own story and positively denies the other, the Court has an extremely difficult and unpleasant duty to discharge, because, as your Lordship has said, we are not infallible, and we may go wrong as between two people when we have nothing to guide our decision except the assertion of one to one effect and the counter-assertion of the other to the opposite effect. In these circumstances, when there is no extrinsic evidence which is conclusive one way or the other, I should for myself feel extremely reluctant ever to dissent from the judge who heard the witnesses. After all, in a case of that kind, the question comes to depend upon the credibility of one witness and of the other, and the judge who heard the testimony is in a very much better position for deciding that question than any judge of appeal can possibly be. And at the outset, therefore, I should say that as a rule I do not think the Court should interfere with the decision of the Sheriff-Substitute.

But then I think there is a very material consideration tending in the same direction to which your Lordship has called attention. The defender's story is perfectly clear, perfectly intelligible, and is set out in plain words on record. The pursuer's original story is equally clear, and is equally clearly set out. The defender is put into the witness-box to prove his story and gives his evidence. After his proof is closed, the pursuer, in his turn, is put into the box, and there is obtained from him an entirely new story which is not upon record, which he has withheld until the defender's evidence is over and done, and which is not in any reasonable shape put to the defender at all when he is in the box.

Apart altogether from the additional consideration to which your Lordship has adverted—that the mode in which the pursuer's story is obtained from him is altogether irregular and tends to displace entirely the confidence which we ought to put in the deposition of the witness—I think that method of treating the case is altogether unfair to the defender. I do not think that when a question comes to depend, as this does, entirely upon the evidence of two people who alone were present at the transaction, it is reasonable that one of them should be allowed to withhold his account of what he alleges to be the transaction until the mouth of the other is closed. And on that ground, therefore, agreeing with your Lordship, I am the less indisposed to accept the decision of the Sheriff-Substitute as final.

LORD JOHNSTON—I concur in the judgment which your Lordship proposes. It is true that Mr Bishop, the pursuer, holds the I O U of Mr Bryce, the defender, for £300, and an I O U necessarily implies an obligation to pay the sum acknowledged to be due, otherwise it would appear to me to have no meaning. There has been much controversy whether an I O U is a document constituting a debt or merely an adminicle of evidence of debt. I am unable to give to the words represented by the letters I O U any other meaning than an acknowledgment of debt, and therefore a constitution of debt. An I O U is not a formal document, but it has an acceptance by usage which gives it the force of one, and a formal document which acknowledges indebtedness necessarily imports an obligation to repay. But as it is one which cannot be the foundation of diligence, but must be sued on, there is little appreciable difference between it and an adminicle of evidence of debt, for it is one which is of such nature that on its authenticity being proved, it constitutes the debt, and can only be met by avoidance. Accordingly I am inclined to think that the question whether an I O U is a document constituting a debt, or only an adminicle of evidence, draws a distinction without a difference. Now it is recognised in our law that satisfaction of an obligation constituted in writing can only be proved in the general case by the writ or oath of the creditor in the obligation. But to this rule there are exceptions. Circumstances may be referred to as establishing that the document of debt did not come into, or does not remain, in the hands of the holder as a living document of debt. Such circumstances exist here in the application by Mr Bishop for shares to the amount contained in the I O U in the company of Bryce & Murray, Ltd., and the application by Mr Bryce of the amount which he was due upon the I O U in payment of the sum due upon the shares, coupled with the actings of Mr Bishop in connection with the company for a series of years, and in particular his receipt of dividends and his failure to make any claim against Mr Bryce upon the I O U. If the matter ended there, there could, I think, be no doubt as to the result. But Mr Bishop now alleges that the I O U was not, as explained by Mr Bryce, a mere interim acknowledgment for the money which was to be put into the shares, and which interim acknowledgment ought to have been handed back when the shares were issued, but that its delivery to him was in respect of an undertaking by Mr Bryce to guarantee the sufficiency of the security, and that it was to be retained by him as vouching that undertaking. The circumstances give a certain colour to the statement. But it is impossible to hold it proved on the evidence of Mr Bishop alone, and it is still more impossible to do so when no notice of his present contention is given on record, and when Mr Bryce, who was appointed to lead in the proof, was allowed to leave the box without the point being directly put to him or even foreshadowed in his cross-examination.

Injustice may be done to Mr Bishop in fact. But on the case as presented to the

Court it is impossible to hold otherwise than that the I O U, though still remaining in Mr Bishop's hands, was no longer a document upon which he could sue.

LORD M'LAREN was absent.

The Court sustained the appeal, recalled the interlocutor of the Sheriff dated 23rd July 1909, reverted to and affirmed the interlocutor of the Sheriff-Substitute dated 26th March 1909, repeated the findings in fact and in law therein, and of new decerned and ordained in terms thereof.

The interlocutor of the Sheriff-Substitute (WELSH) was—"Finds in fact (1) that in the year 1895 the pursuer was in the employment of the defender's then firm of David Bryce & Son, booksellers, Glasgow; (2) that in or about the month of May of said year, said firm was amalgamated with the firm of Thomas Murray & Son, Limited, and was converted into a limited company under the name of Bryce & Murray, Limited; (3) that at or about the time of the flotation of said company, the pursuer arranged with the defender that he would take shares in said limited company; (4) that at that time the defender had in his hands a sum of £100 or thereby belonging to the pursuer, which represented salary or commission which the pursuer by arrangement had left in the defender's hands; (5) that the pursuer handed to the defender a sum of £200 or thereby in order to make up the sum of £300 to obtain thirty first preference shares in said company; (6) that the defender then granted to the pursuer an I O U dated 11th July 1895, for the sum of £300; (7) that said I O U was granted by the defender merely as an acknowledgment of the transaction, or as a temporary receipt until such time as the shares should be issued to the pursuer, and was not granted as an acknowledgment of a loan or advance to him; (8) that thirty fully paid first preference shares were issued to the pursuer in said company on or about 12th September 1895; (9) that on or about 12th December 1895 the pursuer's holding was changed, he having given up his original thirty first preference shares, and obtained in lieu thereof twenty-two first preference shares and eight second preference shares; (10) that said charge was made at the request of the defender in order to provide an applicant for first preference shares with the number required by her, and that the pursuer at said request transferred eight of his first preference shares to the applicant; (11) that the pursuer acted as a director, and for some time as secretary, of said company, and regularly received dividends from said company on the shares held by him; (12) that the said company went into voluntary liquidation in the year 1905; (13) that from the date of said I O U until the beginning of the year 1907 the pursuer made no demand upon the defender for payment of either the principal of the alleged debt therein, or of any interest thereon, and that the defender has paid no sum to the pursuer in respect thereof; (14) that the defender, when said thirty first preference shares were issued to the pursuer, omitted to obtain return of the I O U: Finds in law that the defender's indebtedness under the I O U sued on was discharged by the issue to the pursuer of the thirty first preference shares in Bryce & Murray, Limited, on or about 12th September 1895: Finds that the defender is entitled to have said I O U delivered up to him, and to be assoilzied: Therefore ordains the pursuer, as craved, to deliver up to the defender the I O U granted by the defender in favour of the pursuer for the sum of £300 dated 11th July 1895, and assoilzies the defender from the conclusions of the action: Finds him entitled to expenses," &c.

Counsel for Pursuer (Respondent) — Murray, K.C.—W. T. Watson. Agents—Duncan Smith & M'Laren, S.S.C.

Counsel for Defender (Appellant) — M'Lennan, K.C.—D. P. Fleming. Agents—Laing & Motherwell, W.S.

Thursday, January 20.

FIRST DIVISION.

[Lord Skerrington, Ordinary.

GORDON'S TRUSTEES *v.* YOUNG AND OTHERS.

Cautioner—Relief—Primary or Secondary Cautioners—Cash-Credit Bond—Relations of Sureties inter se—Evidence—Parole—Competency.

A bank agreed to make advances to A. The security given to the bank was a cash-credit bond, which was signed by A and two others, B and C. Further security was provided by A's brothers and sisters conveying to the bank "in security of the personal obligation" in the bond their interest in a certain trust estate. In the bond A, B, and C were all personally bound as principals, though B and C were admittedly only cautioners. A's brothers and sisters were not personally bound in the bond at all. A and B having failed to repay the advance, the bank sued C, who paid the sum due, obtaining from the bank an assignation of its rights not only against A and B but also against the trust estate.

In a claim at the instance of C's trustee for relief from the trust estate conveyed to the bank in security, *held* (1) that while it was competent to prove by parole the relation of the signatories to the bond, the position of the brothers and sisters had not been proved different from what it appeared on the bond, and (2) that on a sound construction of the bond the brothers and sisters were in the position of secondary cautioners, *i.e.*, cautioners for the cautioners, and that as the obligation for the implement of which the security had been granted had been validly discharged, C's trustee had no right to any part of the trust estate, and claim *repelled.*