minute of alteration, in which the landlord proposed and the tenant rejected a stipulation for caution. But coming to a much later date, after the pursuer's return we find the question as to caution still unsettled. So late as 24th November 1896 Scott-Moncrieff & Trail write to Purdom & Sons, acting for the defender,—"We must ask that payment be made to us at once of at least a year's rent of £290 without prejudice. With regard to the lease, it has not yet been signed. We regret that there should have been any misunderstanding as to the proposed modification of rent." Thus matters were then entirely open, and although the defender was asked to make a payment to account at the reduced rate, this was expressly put on the footing that it was to be "without prejudice."

Now, my view is that all which followed in the correspondence in regard to payment of arrears of rent at the reduced rate of £290 was, as this letter calls it, "without prejudice," although these words are not again used. Thus Scott-Moncrieff & Trail again write on the 15th December 1896—"*With reference to our letter of 24th ultimo*, we shall now be glad to have a remittance on account of the rent due by Mr Bell." Again, on 22nd December 1896 (only a week later, and no communication being made to or by the defender in the meantime) they write to the defender asking a remittance on account of his rent, pointing out that three half-years' rent were in arrears. They then continue—"This is not what was expected *when it was agreed to allow you to remain on the farm at a reduced rent;* and we hope you will be able to pay off these arrears soon after the New Year." No doubt the words which I have italicised (which are strongly founded on by the defender), if taken by themselves might be read as implying that there was an antecedent unconditional agreement that the rent should be reduced. But it is plain that the agreement referred to in the letter of 22nd December was merely the conditional agreement referred to in the letter of 24th November, which must be read along with it; and this is in accordance with the facts, because if it is competent to look at the parole evidence, it appears that no agreement, verbal or other, was come to between the pursuer or Scott-Moncrieff & Trail on the one hand, and the defender or his agents on the other, in the interval between 24th November and 22nd Decmber 1896. The words are "it was agreed," not "we hereby agree." Now, there is no trace of any antecedent unconditional agreement.

It may be that the pursuer was anxious that some of the arrears should be paid up, whether at the original or at the proposed reduced rate; and if the defender had at once paid up the arrears at the reduced rate the pursuer might perhaps have been precluded from thereafter claiming rent at a higher rate for the periods to which such payment applies. But with the exception of £200 the arrears were not paid up during the period covered by this correspondence.

Therefore, on the whole matter, there being admittedly no *rei interventus* in the case, and the defender being still bound under a lease in which the stipulated rent is £400 a-year, I think the pursuer is entitled to decree in terms of the first alternative conclusion of the summons, and decree for the balance of rent at the rate of £400 per annum.

The Court pronounced the following interlocutor:—

"Recal the said interlocutor: Find and declare in terms of the first three declaratory conclusions of the action, and ordain the defender to make payment to the pursuer of the sum of £641, 10s. 11d. sterling, under deduction of the sum of £390 sterling paid on 4th February 1898, and of the sum of £110 sterling paid on 20th May 1898, with interest at the rate of £5 per centum per annum from the date of citation on the sums remaining due until payment, and decern."

Counsel for Pursuer—Young—W. Thomson. Agents—Steele & Johnstone, W.S.

Counsel for Defender—Guthrie, Q.C.—Sym. Agents—Scott-Moncrieff & Trail, W.S.

Friday, January 27.

SECOND DIVISION.

[Sheriff of Lanarkshire.

CAMERON *v.* YEATS.

Proof—Onus—Credibility.

In an action of damages for slander, the slander complained of was contained in a letter signed in the defender's name, and initialed by the writer, who was a female cashier or clerk in the defender's employment. The letter was afterwards entered in the defender's letter-book. It was proved that the defender was, at the date when the letter was written, suffering from inflamation of the lungs and was confined to bed, but it was admitted that he might have seen the writer of the letter at the time as she lived in his house. The defender denied having instructed the letter to be written, and the writer also deponed that she had written it without the knowledge or consent of the defender. She was proved to have taken part in the dispute to which the letter referred and to dislike the pursuer on other grounds. The only other witness called by the pursuer was his brother who deponed that the defender's cashier had admitted in conversation with him that she had been instructed to write the letter.

Held (recalling the judgment of the Sheriff-Substitute—*diss.* Lord Moncreiff) that the onus of proving that the letter was authorised by the defender, lay upon the pursuer, and that accordingly his case failed even on the view

taken by the Sheriff-Substitute, who heard the evidence, that the defender and the writer of the letter were not credible witnesses.

James Cameron, printer and stationer, Glasgow, raised an action for £500 damages for slander in the Sheriff Court of Glasgow against R. H. Yeats, advertising agent, Glasgow. The pursuer averred that the alleged slander was contained in the following letter, which he alleged the defender, on or about 1st February 1898, maliciously and without probable cause, had written or caused to be written and delivered to the pursuer:—

"52 *St. Enoch Square,*
"*Glasgow, Feby.* 1*st* 1898,

"James Cameron, Esq., 59 Bath Street.

"Dear Sir,—Your letter of date to hand. We are not surprised at your low action in trying to hold us up with the programmes, and knowing your religious propensity, we got afraid of your mean actions, and we must say, after the clean way we have treated you in furnishing you with payment beforehand, that your withdrawal of programmes is rascally, and that you are what we term in America a sneak thief. We shall sue you for defrauding us of the paper furnished for the programmes.—Yours truly, R. H. YEATS, *per* A. R."

He further averred that the letter falsely, calumniously, and maliciously represented that the pursuer conducted his business in a fraudulent and dishonest manner.

A proof was led before the Sheriff-Substitute (Guthrie). The pursuer called as a witness the defender. He deponed that he knew nothing of the writing or the sending of the letter, which was in the handwriting of Miss Agnes Robertson, his cashier or book-keeper; that he had met with an accident on 29th January 1898, and had been confined to his bed for about twelve days. Agnes Robertson lived in the defender's house and while he was laid up she sometimes came to the house from the office for lunch. The letter had been entered in his letter-book and never disowned by him. He further deponed —"I think from the way the pursuer has acted the sentiments are such as the letter would have warranted, but probably a little of the phraseology might have been changed. He cheated us out of the programmes and he gave us inferior paper." "I wanted the bills printed by the party who were printing the programmes, because pursuer tried to hold us up in that." The pursuer also called as a witness Miss Agnes Robertson, who deponed that she had taken the responsibility of writing the letter herself, and without having any communication with the defender. The only other witness examined in support of the pursuer's case was his son R. T. Cameron, who deponed that Agnes Robertson had told him that she had written the letter at the dictation of the defender.

The evidence of a doctor was led for the defender, showing that on 2nd February he had been called in to attend to the defender, and found him in bed suffering from fracture, bruises, and inflammation of the lungs, set up as the result of an accident.

On 28th April 1898 the Sheriff-Substitute pronounced the following interlocutor:—"Finds that the letter of February 1st 1898 condescended on was written and signed by the authority of the defender, R. H. Yeats, partner of the firm of Andrew Yeats & Company, and sent to the pursuer, and representing the pursuer as trading unfairly and fraudulently and as a sneak thief: Finds the pursuer entitled to damages: Assesses the same at the sum of Thirty pounds, for which decerns against the defender."

Note.—"The issue was whether the letter was written by the defender or by his authority. He tries to throw the whole liability on a young woman, who is said to live in his family, and who, for indefinite wages—for he and she do not agree as to the terms—is left in charge of his office or shop, with an office-boy, while he is canvassing for advertisements. Miss Robertson takes the burden on herself in the most handsome and unreserved way, but it is impossible to resist the conclusion that she is doing so in order to save the defender (or it may be his brother, a very gay young man) from the penalties of libel. Her manner in the witness-box was embarrassed and diffident, often hesitating and confused, and not at all like that of a young lady accustomed to the sole management of an advertising agency. I think this was due not to the consciousness of having written a letter that might bring her employer and friend into trouble, but rather to her knowledge that she was supporting a concocted defence and her fear of breaking down before Mr Yeats, or failing in some part of her story.

"Again, the defender said that the letter was not such as he could have written or dictated. There is, I think, far more difficulty in believing it to be the unassisted production of Miss Robertson. Judging by internal evidence, I have no hesitation in holding that either the defender or his brother was the author; but as no one has hinted that the latter did it, and as the letter stood for more than a fortnight in the defender's letter-book, and he did not even to the last repudiate its contents except by a form of denial in his pleadings, I am content to ascribe it to his dictation. There are other surmises arising out of the letter and the defender's conduct which are not favourable to him, but which not being capable of direct proof need not be considered.

"But it is important to notice that the defender's proof is defective in several material points. He asserts himself, and he brings a doctor to prove, along with the rather unsteady evidence of Miss Robertson, that in consequence of an accident which befel him on the 29th January he was confined to bed on Monday 31st January, Tuesday 1st February, and longer, and was not at business till the Thursday week. We are told that he was able, with a great effort, to write on Monday a letter to the banker stopping the cheque which he had drawn in favour of the pursuer on Friday,

and which had been delivered to the pursuer by Miss Robertson. But there is no evidence, not even mere assertions, to show that anything had been done on Saturday by Mr Cameron to obstruct the theatre people in getting the extra programmes, and there is nothing to explain what kind of misconduct is meant by 'withdrawal of programmes.' It is more important still that no independent evidence—no evidence at all except what I must regard as the doctored evidence of Miss Robertson—is brought forward to contradict what she is stated to have said about the letter in question to Robert Cameron on Tuesday night. It is said that the office-boy was present and must have heard it all, but he is not a witness, as he would have been if he could be got to support the defender's case. Further, we hear that Miss Robertson lives in the defender's 'family,' and probably he was attended to when ill by a wife or some other of that 'family,' but no one is brought to confirm the statement that neither to his brother nor to Miss Robertson did he give any authority to write this letter, or such a letter, to the pursuer.

"I humbly but confidently think that a careful consideration of the whole case as told by the witnesses, could lead an intelligent jury to no other result than that the letter was not written by Miss Robertson in her eager desire to protect her employer's interest, but that in one way or other her hand was directed by the defender or someone authorised by him. It is to be noticed that Charles Yeats was entrusted by him on Monday with dealing with the pursuer, and that no very intelligible account of Charles Yeats' instructions or mandate is given. It might also be said that no very intelligible or business-like account is given of the relation of R. H. Yeats and the firm of Andrew Yeats & Company with Charles Yeats of Edinburgh (or of Glasgow)."

The defender appealed to the Sherriff (BERRY), who on 6th October 1898 adhered.

Note.—"In judging of a question which depends upon the credibility of the witnesses, I am always slow to differ from the Sheriff-Substitute—more especially am I reluctant to do so in a case where pointed observations reflecting on the evidence of a material witness are made by the Sheriff-Substitute, as has been done here in regard to the witness Miss Robertson. I may observe also that the evidence of the defender himself is open to observation as inconsistent on certain points, and I am unable to regard him as a trustworthy witness.

"The contention that his illness was such as to prevent the defender dictating the letter founded on in the action is not borne out by the evidence. Apart from my hesitation to differ from the Sheriff-Substitute on a question of fact in such circumstances, the consideration I have given to the proof leads me to the same conclusion with him, that the letter founded upon was written under the immediate direction of the defender, and not by Miss Robertson of her own accord. It was written in answer to a letter addressed to him, it was signed in his name, and was copied in his letter-book. These are facts which tell strongly in favour of the defender being responsible for it.

"With regard to the amount of damages, the sum awarded cannot be regarded as excessive, and the amount being properly a jury question I do not think I should be justified in interfering with it."

The defender appealed, and argued that the evidence led by the pursuer was insufficient to bring home to the defender the averment that the letter had been written with his authority.

The pursuer argued that the question was a jury one, and the judgments which had been arrived at by both Sheriffs should not be disturbed.

At advising—

LORD JUSTICE-CLERK—This case turns upon the question whether it is proved by the pursuer that the letter alleged to be slanderous was the defender's letter, and was sent to him by the defender. The Sheriff-Substitute held that this was proved before him, and the Sheriff has adhered to the Sheriff-Substitute's judgment. When the case was heard I felt very strongly that the decision ought not to be interfered with if the question was one turning upon credibility of witnesses, which at first sight seemed to be the real matter decided in the case. The Sheriff-Substitute who decided the case has had so much experience in considering evidence that his conclusion upon a proper balancing of evidence would necessarily be received as very weighty. I certainly would distrust my own judgment upon a consideration of a proof without seeing the witnesses, if it tended to lead me in the opposite direction, and I was disposed at first to think that the judgment might be adhered to. But after it was taken to avizandum and more than once considered, I felt that there was great difficulty in holding that it was an ordinary case of sufficiency of evidence, and I have ultimately come to the decision that it cannot properly be so dealt with, but must be dealt with on a consideration of the question whether there is evidence to prove the pursuer's case. The pursuer undertakes to prove, and must prove, that the letter was written by the defender, or caused to be written by him, and delivered to the pursuer. That is his own averment which he must prove. The pursuer brought forward as his evidence of the defender being the author of the letter in question no other evidence than that of the defender himself and of the female clerk, who it is certain wrote the letter and initialed it as for the defender. Now, their evidence is absolutely negative of the pursuer's case. Therefore if that evidence is to be accepted the defender must be assoilzied. But if the conclusion be reached that the evidence of these witnesses is not to be believed, then the pursuer is unable to point to any evidence at all to prove his case. I am unable to come to the conclusion that the rejection of the evidence led by the pursuer as being untrustworthy—as to the propriety of which I express no opinion—can supply

the place of evidence. The falsity of that evidence cannot prove a fact, the burden of proving which rests on him. If evidence negativing the pursuer's case is not believed, then the pursuer cannot say that because denials of his case are not believed, therefore it must be held that he has proved his case. That would be to hold that although no witness had deponed affirmative of his case, he could nevertheless maintain that it was proved by saying that it was certain that witnesses called by him, who negatived his case in their depositions, had proved it because they were not credible, and therefore the opposite of what they had said was proved to be the truth by what they said being rejected as untrue. I am unable to hold that such a conclusion is permissible. Where the proof in a case is narrow, and for that reason to be critically looked at, the question of credibility or non-credibility of other evidence may have an important bearing upon the safety or non-safety of accepting a proof, which, though sufficient if believed, is yet somewhat narrow. But a pursuer to succeed must have some affirmative evidence of his case legally sufficient if believed. In this case he has none. Even the alleged conversation between the pursuer's son and Miss Robertson does not, on the assumption that he is believed or she is disbelieved, constitute any evidence against the defender. For if he were believed it would come to nothing more than that one witness said something to another, outwith the presence of the defender, and what one person said to another cannot be taken as evidence to prove the fact to which what is spoken has relation. And even if it could be so taken, it requires a very strong case to make what is alleged to have been said in conversation to subvert sworn testimony. It is always dangerous to take the evidence of one witness as to what was said by another as against that other witness' denial as a witness. To take one person's recollection of conversation as sufficient to prove that the other party to that conversation is to be disbelieved when speaking upon oath and not in conversation, would often be most unfair to a witness who presumably may, when under sanction of an oath, speak truthfully, although not having spoken carefully or even truthfully in conversation, possibly under strain or excitement. Here one witness speaks to a conversation, and the other witness denies having used the expressions alleged. I am unable to hold that any substantive fact can be proved by such evidence of a conversation between witnesses, so as to prove against the defender the authorship of this letter.

The conclusion I have arrived at is that the pursuer has failed to prove his case.

Lord Young—I cannot avoid saying that I think that this is a most regretful action, and one which might have been avoided if the parties had kept their tempers or recovered them after the incident that caused the disturbance. It is regretful because it has brought before us not only the question of interfering with the judgment of the two Sheriffs, but also the question whether two witnesses are guilty of wilful perjury and one of subornation of perjury. The relation of the parties and what led to the disturbance was simply this. The defender had for some time employed the pursuer as a printer for things which he required in his capacity of advertising agent. The defender was dissatisfied with the paper used for printing, and sent an intimation to the pursuer in January that he was not going to continue his employment after the end of that month. This very naturally caused some irritation. On 31st January there was a meeting between the pursuer's son and the defender's brother and a Miss Robertson, in the defender's employment. The defender was not present at this interview, he having met with a serious accident. The irritation I have mentioned led to some strong language between the parties, especially on the matter of "holding up" the programmes. A cheque had been left to pay the pursuer's account, and because of what had passed, payment of this cheque was stopped and this fact was communicated to the pursuer. I think that what I have said is important, because it shows that Miss Robertson was a party to the matter. The letter in question was written on the 1st February, and was sent to the pursuer by the hands of his son. That letter I should have called an uncivil impertinence rather than a defamation. I do not think that the pursuer is entitled to bring an action against the writer of it and innuendo it as he has done. I confess that any ordinarily intelligent man would, before raising an action, have inquired of the defender what he meant by it. Or he might have written to his man of business, and I can hardly think that any man of business would have taken proceedings before writing to the defender asking an explanation. If the pursuer had been told that the defender was in bed, and that the letter had been written by Miss Robertson without his consent or approval, I think he would have been satisfied with that, and that he would not have brought an action against the defender for £500 because the words "sneak thief" were used in a letter written by a shop girl. But this action has been raised without any opportunity for explanation having been given to the defender.

The first question is, What has the pursuer to prove? I think that he must prove what he avers, that the pursuer wrote this letter or caused it to be written. I think that he has not proved that. If this letter was written by the shopgirl without the defender's authority or sanction the defender is not responsible. What is complained of is defamation. Any man of business is liable for what his shopman or shopgirl does within the sphere of his or her employment without his giving any special instructions to the shopman or shopgirl. If the shopgirl had sent an order for goods in her master's line of business, he would have been responsible whether the order was in writing or verbal, and even if she had acted without his know-

ledge and approbation. But he is no more responsible for her written slander than he would be for her verbal slander. If the pursuer had come to the shop and Miss Robertson had called him a "sneak thief," or used any other defamatory language, the defender would have been no more responsible than if she had slapped the pursuer's face. To slander anyone is not within the sphere or region of an ordinary business, and a master is not responsible for his servant's written or spoken slander any more than he is responsible for an assault committed at his door. The pursuer avers that the defender himself caused it to be written, and the case went to proof on that footing. Is there any evidence that the letter was written by the defender or by his authority? There is absolutely none. Not a single witness says that the letter was written by the defender or by his authority, and two witnesses say that it was not written by him or by his authority.

I have frequently expressed my unwillingness to interfere on a matter of evidence with the judgment of a Lord Ordinary or a Sheriff who has heard the witnesses. If there had been a conflict of evidence, and the Sheriff, exercising his judgment as to the credibility or veracity or intelligibility or powers of observation of the witnesses, had come to a certain decision, I would not interfere with his judgment without strong grounds for doing so. But where there is no conflict of evidence—where all the evidence is against the conclusion to which the Sheriff-Substitute has come—I must look to the reasons assigned by the Judge for rejecting that evidence, and I must examine the terms of his note. The note, I must confess, does not impress me favourably. The Sheriff-Substitute comments upon the evidence of Miss Robertson, but I think that the long and in great part irrelevant and improper examination to which she was subjected may account for the "unsteady" evidence on her part on which the Sheriff-Substitute comments. The Sheriff-Substitute further says, as regards the letter—"Judging by internal evidence, I have no hesitation in holding that either the defender or his brother was the author, but as no one has hinted that the latter did it, and as the letter stood for more than a fortnight in the defender's letter-book, and he did not, even to the last, repudiate its contents except by a form of denial in his pleadings, I am content to ascribe it to his dictation." So it would appear that if the action had been brought against the defender's brother the Sheriff-Substitute would have held that he did it!

I am of opinion that the pursuer has not proved his case. Indeed, I am of opinion that his case is unfounded, as I see no reason for doubting the uncontradicted testimony of the defender and Miss Robertson that the letter was not written with the defender's authority. I therefore think that the judgment of the Sheriffs ought to be reversed, and that we should assoilzie the defender.

Lord Trayner—The ground of action here is that the defender wrote and sent, or caused to be written and sent, a libellous letter to the pursuer. The letter is produced, and it is admitted that it is not written by the defender but by one of his servants, Agnes Robertson. The pursuer must therefore prove, in order to succeed in his action, that the letter founded on was written with the defender's knowledge and on his authority. The defender's authority would probably be readily inferred if knowledge of the writing and sending was brought home to him.

To prove that the defender knew of the writing and sending of the letter, and that he authorised it to be written and sent, the pursuer adduces as witnesses the defender and Agnes Robertson. I do not go over their evidence (which contains much that should never have been there) in detail, but it comes to this—they deny that the defender knew of or authorised the letter in question, the defender saying in addition that he never saw the letter until after this action was raised, and Agnes Robertson saying that she wrote the letter without instructions from anyone, and on her own responsibility. This evidence does not support but negatives the pursuer's case; and there is no other evidence bearing directly on the main issue—the only issue indeed—to be tried.

The Sheriff-Substitute before whom the defender and Agnes Robertson were examined does not believe them, and makes some strong observations on the demeanour of Agnes Robertson in the witness-box. From a perusal of the evidence I should not have come to the conclusion that it was false. There is nothing in it which appears to me to be inconsistent with reasonable probability. The defender was not in a condition to attend to business at the time. He was suffering from serious bodily injuries, which I should readily have believed incapacitated him from giving attention to any matter of business, the more especially as his business was being looked after by his brother and Agnes Robertson, and did not require any personal attention from him. It does not appear to me unreasonable to suppose that if the defender had wished to write an angry or abusive letter to the pursuer he would have waited until he was better in health. On the other hand, Agnes Robertson, who was taking charge of the business at the time, and who felt very much annoyed with the pursuer's proceedings (and on other grounds disliked the pursuer) might have given way to her feelings and written what she thought was a sharp and stinging letter without troubling the defender on the subject. All this appears to me quite probable. The Sheriff-Substitute, however, takes a different view. Now, if it had been a question here of weighing or determining upon conflicting evidence, I should attach great importance to the opinion of the judge who saw the witnesses. But that is not so. There is no evidence to consider except the evidence of the defender and

Agnes Robertson. If they are believed, the pursuer's case fails. If they are not believed, then the case of the pursuer also fails, because he has not proved by credible or reliable testimony the fact which he must establish before he can get a verdict. The Sheriff-Substitute apparently proceeds upon the principle that if a witness depones negative, and is not believed, that that is the same thing as if the witness had deponed affirmative. To such a principle I can give no assent. A party's negative, if not believed, may in some circumstances affect the view to be taken or weight attached to contrary evidence. But if there is no contrary evidence to be so affected, the case stands where I put it. The evidence not believed must be set aside.

I have made these observations with the fact fully in view that the pursuer's son Robert Cameron depones that Agnes Robertson told him that the letter had been dictated to her by the defender. Agnes Robertson denies that she ever said so. If the latter were believed, that would dispose of Robert Cameron's evidence. But not being believed, how does Cameron's evidence affect the case. The statement said to have been made by Agnes Robertson was made outwith the defender's presence, and therefore does not bind him. He denies the statement. But if Agnes Robertson is not to be believed when giving evidence on oath, is she more deserving of credit, in reference to what she said when she spoke without any such sanction? *Falsum in uno falsum in omnibus.* I feel bound to add that it appears to me improbable that Agnes Robertson should have made the statement to Cameron to which he speaks.

I come therefore to the conclusion (even on the Sheriff-Substitute's view of the credibility of the witnesses) that the pursuer has failed to prove his case.

But it is said that the letter in question must or may be presumed to be the letter of the defender, and that if his evidence and Agnes Robertson's is not believed, then the presumption has not been redargued. I think it may be admitted that if a letter is written by a clerk or servant in name of his master, in reference to his master's business, and especially that part of his business with which the clerk or servant writing the letter is more immediately connected, such a presumption would not be unreasonable. But I cannot admit that any such presumption arises here. The letter in question is not about business at all; and it was written under circumstances proved to exist by evidence of an independent character, which takes away the idea that the defender knew of its being written and despatched. The defender was not attending his place of business at the time; he had been absent from it for days before and days after the date of the letter. The whole circumstances of the case seem to me rather to exclude than suggest the presumption on which the pursuer founds.

Lord Moncreiff—This case peculiarly depends upon the credibility of the defender and his cashier and bookkeeper Agnes Robertson. Now, the Sheriff-Substitute not only disbelieved the evidence of these witnesses, but in his note has recorded, in language more emphatic than we usually meet with in a judge's opinion, the unfavourable impression which was produced on his mind by the manner in which Miss Robertson gave her evidence. From the terms of his opinion I infer that something exceptional must have occurred during the examination of that witness. It satisfied him, he says, that her evidence was "doctered," and the defence "concocted." The Sheriff who heard the case on appeal, having in view the Sheriff-Substitute's expression of opinion, came to the same conclusion, and so do I.

The burden of proving that the letter complained of was not written by the authority of the defender lies on the defender. The letter was written professedly for the defender by the defender's assistant, on office paper, in answer to a letter written by the pursuer to the defender, and it was duly entered in the defender's letter-book. The defender endeavours to prove his defence by himself denying that he knew of or authorised the letter. He says that at the time he was ill and unfit for business and did not return to his office for several days. He also adduces as a witness his assistant Miss Robertson, who says that she wrote the letter without consultation with the defender, and on her own responsibility. If Miss Robertson wrote it without consultation with the defender, the latter is not responsible. If, on the other hand, it is not proved that Miss Robertson wrote it on her own responsibility, the only alternative presented is that the defender instructed it to be written.

The Sheriff-Substitute utterly disbelieved Miss Robertson's evidence, and he believed the evidence of the pursuer's son Robert Cameron, who says that Miss Robertson told him that the letter was written to the defender's dictation.

Comments by a judge on the manner and demeanour of a witness should be and usually are used sparingly. But when they are deliberately made by a judge of experience, they are entitled to weight, and it is the practice of the Court to give them weight, unless it clearly appears from the rest of the evidence that they were unwarranted.

I do not say that I should have come to the same conclusion as the Sheriff-Substitute on the evidence as recorded, apart from the strong indication of his opinion. I can only say that if I had tried the case and the witnesses had produced the same impression on my own mind, my verdict would have been the same as the Sheriff-Substitute's. But there are several circumstances which go to support his judgment. It is not necessary—indeed it is not to be expected—that there should be direct evidence in such a case, where the amanuensis will not give evidence against her employer. It

is a jury question. Here the language used in the letter precisely expresses the feelings which the defender entertained at the time as to the pursuer's conduct. The defender says in his evidence—"I think from the way the pursuer has acted the sentiments are such as the letter would have warranted, but probably a little of the phraseology might have been changed. He cheated us out of the programmes and he gave us inferior paper." Again—"I wanted the bills printed by the party who were printing the programmes, because the pursuer tried to hold us up in that." In the letter we find these expressions—"We are not surprised at your low action in trying to hold us up with the programmes;" and again—"We shall sue you for defrauding us of the paper furnished for the programmes." Again (besides the Americanisms which it contains) the letter does not strike me as one which a woman like Miss Robertson would have written uninstructed, and it does seem to me just such a letter as an exasperated man would be likely to write under the irritation produced by the pursuer's conduct and the illness under which at the time the defender was suffering.

It is said that at the time he was unfit to do business. I think it is proved that he was very ill, but the doctor did not see and warn him till the next day (2nd February) after the letter was written, and I cannot believe that Miss Robertson, who lived with the defender, did not inform him of what was going on. It would take a very short time and not much exercise of mind to dictate the short though angry letter that was sent to the pursuer. Lastly, neither in the record nor in the evidence is there any trace of regret or apology on the defender's part for the insulting letter which emanated from his office.

If, then, Miss Robertson's evidence is unworthy of credit, the defender has failed to discharge the burden of proof; further, on the same assumption, even supposing that the burden were on the pursuer, there is, in my opinion, sufficient evidence to justify the Sheriff-Substitute's judgment.

I need only observe, in reference to observations which were made by some of your Lordships, that in my opinion the evidence of Miss Robertson and the defender, if disbelieved, cannot merely be struck out and ignored as if it had never been given. The credibility of these witnesses is a material, a vital question in the case, because the truth of the defence is known to them alone. If they are clearly not to be believed, it requires little additional evidence from circumstances to entitle a judge or jury to hold that the defence has failed.

The Court pronounced the following interlocutor:—

"Recal the interlocutors of the Sheriff-Substitute and the Sheriff of Lanark, dated respectively 28th April and 6th October 1898: Find that the pursuer has failed to prove that the defender defamed the character of the pursuer, to the hurt and injury of his feelings: Therefore assoilzie the defender from the conclusions of the action, and decern."

Counsel for the Pursuer—Shaw, Q.C.—Graham Stewart. Agents—Curror, Cowper, & Buchanan, W.S.

Counsel for the Defender—Salvesen—Anderson. Agent—John Veitch, Solicitor.

Friday, January 27.

SECOND DIVISION.

[Sheriff of Lothians and Peebles.

MATHIESON *v.* HAWTHORNS & COMPANY, LIMITED.

Discharge—Reparation—Master and Servant—Essential Error Induced by Defenders.

In defence to an action of damages for the death of a husband, the defenders, in whose employment the deceased had been working when he sustained the injuries which were the cause of his death, pleaded discharge of all claims, and produced a document bearing that the granter had received £25, 4s. in full satisfaction and discharge of all claims "accrued or to accrue." This document was executed notarially on behalf of the deceased while he was lying in the hospital to which he had been taken after the accident, and where he remained till his death. It had previously been signed by the pursuer. The docquet bore, and it was admitted to be the fact, that he had authorised the notary to subscribe for him, having declared that he could not write owing to sickness and bodily weakness, and that the document had previously been read over to him. With regard to this discharge the pursuer averred that a claim had been made by a law-agent on behalf of the pursuer, and that the defenders went behind the law-agent's back and got the pursuer and the deceased to sign a paper which he and she believed to be a receipt; that the discharge was executed by the deceased "under essential error induced by the defenders;" that one of the partners of the defenders' firm, acting on their behalf, had offered, on the representation that there was no claim against them, to pay £25, 4s., being seven months' wages, out of sympathy, but said that the pursuer and her husband would have to sign a receipt; that she communicated this to her husband, and that he authorised the execution of the discharge in the belief so induced that it was a simple receipt, and that when the discharge was executed he was "in a weak condition in body and mind and much depressed, and took no interest in what was being done."