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.

LORD PRESIDENT—The Court considers that in the circumstances of this case the Act of Sederunt does not apply and that there should be no certificates for skilled witnesses.

The Court refused the motion for certificates.

Counsel for the Pursuers—The Solicitor-General (Morison, K.C.)—Ingram. Agent—J. George Reid, S.S.C.

Counsel for the Defenders—Watt, K.C.—W. J. Robertson. Agents—Anderson & Chisholm, S.S.C.

Friday, January 16.

SECOND DIVISION.

[Sheriff Court at Glasgow.

JAMES DUNBAR & COMPANY *v.* SCOTTISH COUNTY INVESTMENT COMPANY, LIMITED.

Process—Sheriff—Proving the Tenor—Competency of Action in Sheriff Court—Sheriff Courts (Scotland) Act 1907 (7 *Edw. VII, cap.* 51), *sec.* 5 (1).

Held that an action of proving the tenor is incompetent in the Sheriff Court.

Observed per Lord Salvesen—"A general rule applicable to the construction of statutes is that there is not to be presumed, without express words, an authority to deprive the Supreme Court of a jurisdiction which it had previously exercised, or to extend what was once the privative jurisdiction of the Supreme Court to the inferior courts."

James Dunbar & Company, joiners and building contractors, Glasgow, *pursuers*, brought an action in the Sheriff Court at Glasgow against the Scottish County Investment Company, Limited, Glasgow, *defenders*, in which they craved the Court "to find and declare that the specification and estimate of the carpenter, joiner, and glazier works of four tenements erected by pursuers in Garrioch Road, North Kelvinside, for and on behalf of defenders, was of the following or similar tenor, namely—'. . . [*Here follows the tenor*]. . . .' As also to find and declare that the decree to be pronounced shall be in all respects as valid and effective a document to the pursuers for all purposes as the original specification and estimate if extant would have been, and to find the defenders liable in expenses in the event of their appearing or offering opposition hereto."

The pursuers *pleaded, inter alia*—"1. The said estimate and specification of the carpenter, joiner, and glazier works of four tenements erected in Garrioch Road referred to having been lost or destroyed and being of the tenor before quoted, declarator that an extract of the decree following hereon should be as valid and effectual for all purposes as the original estimate and specification."

The defenders pleaded, *inter alia*—"1. The action is incompetent."

On 8th July 1919 the Sheriff-Substitute (LYELL) found in law that the Sheriff Court had no jurisdiction to entertain the action, sustained the first plea-in-law for the defenders, and dismissed the action.

Note.—"It may be well in the first place to state shortly the genesis of this action of proving the tenor. The pursuers here raised an action in this Court against the defenders concluding for payment of the balance of the price of carpenter work done on certain tenements in Glasgow, founded on a written specification and offer by them and a written acceptance by the defenders. The defenders pleaded that the account was prescribed, to which the pursuers replied that the plea was elided by the fact that the debt sued on was constituted by the written obligation of the defenders. The Sheriff allowed the pursuers to produce the offer and acceptance together with the measurement of the work on which they founded, and granted diligence for the recovery of these documents. On the pursuers proceeding to execute the commission one of the directors of the defenders' company deponed as a haver that the paper containing the specification and offer in question was at one time in the company's hands, but although he had made a search he could not now find it. The pursuers were therefore unable to obtemper the Sheriff's interlocutor to produce the offer on which they founded as the counterpart to the defenders' acceptance which they produced. In these circumstances procedure was sisted in that action that the pursuers might bring an action of proving the tenor of the missing offer, on the ground that the document was not merely an adminicle of evidence but an essential part of the written constitution of the debt founded on, the terms and execution of which must be proved before the pursuers were entitled to say that prescription had been elided.

"Accordingly this action of proving the tenor of the said specification and offer has now been raised, and the defenders' plead that the Sheriff Court has no jurisdiction to entertain it.

"There is no doubt that down to the year 1907 at least such an action would have been incompetent here—'The cognisance of this action from its importance, and from the dangerous consequences which might follow if the tenor of deeds were to be sustained which either never existed or laboured under nullities or have since been extinguished, is appropriated to the Court of Session'—Ersk., iv, 1, 58. The Court held in the case of *Carson* v. *M'Micken & Macintyre*, 14th May 1811, F.C., that a proof taken before a sheriff to prove the tenor of a missing bill of exchange was incompetent and ordered it to be withdrawn from the process, and there seems to be no trace of any further attempt to take such proceedings in the Sheriff Court down to 1907. But the pursuers here found on the 5th section of the Sheriff Court Act of that year as conferring jurisdiction on the sheriff to entertain such cases. The section is entitled 'Extension