entitled to his first two issues as well as the others.

LORD YOUNG — I am of opinion, as I indicated during the discussion, that this is not a relevant case, and that to call a man an informer is not a slander, even with the addition of the innuendo proposed.

LORD TRAYNER and LORD MONCREIFF concurred with the LORD JUSTICE-CLERK.

The Court approved of the issues proposed by the pursuer to be the issues for the trial of the cause.

Counsel for the Pursuer — Kennedy — Gunn. Agents—J. & L. H. Gow, S.S.C.

Counsel for the Defender—Dundas, Q.C. J. D. Robertson. Agents—Simpson & Marwick, W.S.

Friday, October 27.

SECOND DIVISION.

[Sheriff of Forfarshire.

GOW *v.* HENRY.

Process — Compromise of Action — Extra-judicial Settlement after Action Raised—Whether Pursuer Entitled to Resile.

An action of damages was raised in the Sheriff Court. After defences had been lodged, but before the record was closed, the pursuer, outwith the knowledge of his law-agent, accepted a sum from the defender in settlement of his claim, and granted him a formal receipt discharging it. On the following day the settlement was repudiated by the pursuer. At the adjustment of the record the defender founded on the settlement in his adjusted defences, and pleaded that in respect of the settlement he was entitled to absolvitor, while the pursuer in his adjusted condescendence alleged in answer that the settlement had been obtained under circumstances which made the discharge ineffectual, and pleaded that the discharge should be set aside. The Sheriff closed the record and allowed parties a proof of their conflicting averments regarding the granting of the receipt.

Held that this procedure was regular, Lord Young dissenting on the ground that a settlement of a depending action was inchoate until the Court on a motion assented to by both parties had authorised it, and that therefore the pursuer was entitled to resile.

Parent and Child—Father as Administrator-at-Law—Extra-judicial Settlement of Action of Damages Raised by Father as Tutor for Pupil Child.

Held that a father, who as tutor for his pupil son had raised an action of damages for injury received by his son, was entitled to settle the action extra-judicially without the concurrence of the Court before which the action was depending.

On 20th August 1898 William Gow, labourer, Dundee, as tutor, curator, and administrator-in-law for his pupil son William Thomson Gow, raised an action for £250 damages in the Sheriff Court at Dundee against Andrew Henry, carting contractor, there. The pursuer averred that his son, a boy of two years, had on 15th July 1898 been run over by a horse and cart belonging to the defender, and had suffered injuries necessitating the amputation of the thumb of his left hand.

The defender lodged defences on 27th September.

At adjustment prior to the closing of the record on 30th November, the defender added the following statement to his Answer 7 — "Prior to this action being raised, the pursuer offered to settle for an immediate payment of £2, but the time being on or about the eve of the Dundee holidays, the defender declined at that time to make any payment. The pursuer, however, on 22nd October 1898 offered to accept from the defender the sum of £8 in full settlement of the claims in this action, and the defender on said date paid him that sum in exchange for the receipt granted by the pursuer, which is now produced. The action is accordingly now settled. The pursuer's statements regarding the settlement of the action and the granting of the receipt are denied. The sum paid the pursuer was the sum which he himself named, and the receipt was granted by him in ordinary course of his own free will and motive. The statements regarding the Superintendent of Cleansing are untrue."

The receipt was in the following terms—

"21 *Nelson Street,*
"*Dundee, 22nd October* 1898.

"Received from Mr Andrew Henry, contractor, Dundee, the sum of eight pounds sterling in full of all claims in the action at my instance, and on behalf of my son against him, and I abandon the case.

"£8.

"James Leask, *witness.*
Vanman, 63 Ure Street, Dundee.

"Peter Crerar, *witness.*
District Foreman,
Cleansing Department,
149 Seagate, Dundee.

WILLIAM GOW

22/10/98."

The pursuer also made the following addition to his Condescendence 7—"The receipt produced by defender was obtained from pursuer in essential error, and by force, fear, and misrepresentation. Defender induced pursuer to sign the receipt produced by bringing to bear upon him the influence of the Superintendent of the Cleansing Department, Dundee, in which pursuer is employed as a scavenger. Pursuer signed said receipt under pressure from and through fear of said superintendent, who acted in the manner above mentioned at the request of defender, and who charged the pursuer with being always getting into trouble, and told him to settle with the defender on the terms proposed.

The pursuer was in fear of losing his situation in the Cleansing Department unless he obeyed the instructions of said superintendent, and thus signed said receipt. The defender and said superintendent were aware that pursuer had a law-agent acting for him, and they were told so by the pursuer, but notwithstanding they induced him to sign said receipt, and the pursuer's and defender's law-agents respectively were negotiating for a settlement of the action at the time. The pursuer therefore was taken at an undue and improper advantage by defender, and the settlement was, in the circumstances above set forth, effected while the parties were in an unequal position. Repayment of the sum—namely, £8—was tendered immediately to the defender, and pursuer hereby tenders to consign same in Court. Said receipt ought therefore to be set aside, and the action ordered to proceed in ordinary course."

The pursuer pleaded, *inter alia*—"(3) The receipt or discharge founded on should, in the circumstances condescended on, and on consignation of the sum paid by the defender to the pursuer, be set aside, and the action ordered to proceed in ordinary course."

The defender pleaded, *inter alia*—"(4) In respect of the settlement between the pursuer and defender of the action, as condescended on, the defender is entitled to absolvitor."

On 9th January 1899 a proof was allowed to the pursuer of his averments regarding the granting of the receipt, and to the defender a conjunct probation.

The proof showed that the settlement had been made on 22nd October at a meeting of pursuer and defender in the office of Mr Arthur, the city superintendent of scavenging, under whom as a city scavenger the pursuer was employed, that the pursuer had been invited to the meeting by Mr Arthur at the instigation of the defender, that the receipt had been written by Mr Crerar, the foreman of the cleansing department, that the whole proceedings were outwith the knowledge of the pursuer's law-agent, that the settlement had been repudiated the next day on behalf of the pursuer, and that prior to the date of the meeting at which the settlement was arranged the defender had taken pursuer into a public-house and attempted to get the matter compromised by a payment of £5.

On 15th March 1899 the Sheriff-Substitute (CAMPBELL SMITH) pronounced the following interlocutor;—"Finds it to be proved in fact that the pursuer signed the document dated 22nd October 1898, and that the import and *prima facie* legal effect of said document is to show that the pursuer settled the present action for the sum of £8, and received payment of said sum; that the pursuer has failed to prove that the said document should be denied legal effect because of his being induced to grant it through force or fear, or through compulsion or illegal pressure of any kind: Therefore find the action is no longer maintainable: Assoilzies the defender from the conclusions of the action."

The pursuer appealed to the Sheriff (H. JOHNSTON), who on 11th May 1899 pronounced the following interlocutor:—"Sustains the appeal, and recals the interlocutor appealed against: Repels the fourth plea-in-law for the defender, and allows both parties a proof of their averments on record, and to the pursuer a conjunct probation: Finds that, as a condition of proceeding with the cause, the pursuer must consign in court the sum of £8 received by him from the defender on 22nd October 1898, and remits to the Sheriff-Substitute, on such consignation being made, to assign a diet of proof and to proceed with the cause."

Note.—"This is an action at the pursuer's instance, not in his own right, but in his tutorial capacity as administrator-at-law for his pupil child. The accident occurred on 22nd July 1898. After some communication between pursuer and defender personally the pursuer put the matter into the hands of Mr Burke, solicitor, Dundee, who on 5th August made formal demand on the defender, and followed up the same by service of a summons on 20th August. The case was in the roll on 13th September and 5th October, and the defender being apparently anxious for a settlement of the case, there were some negotiations between the agents, which led to nothing. But, not content with this, the defender having tried a public-house settlement with the pursuer, got him to meet him unawares at the office of Mr Arthur, the City Superintendent of Cleansing, under whom, as a city scavenger, the pursuer was employed. I think that the way in which this meeting was arranged and conducted placed the pursuer at some disadvantage, and that he must have felt himself somewhat concussed by the mediation of Mr Arthur, upon whose good graces his livelihood to a great extent depended. At the same time there does not appear to have been any direct influence brought to bear, and had the pursuer been suing in his own right I should have hesitated to reject the settlement then made, even though the pursuer was deprived of the advice of his agent. But I think that the matter presents itself in a different light when it is considered that the claim is not in his own right but on behalf of a pupil. I think that the Court has a duty to protect the interest of the pupil; in fact, it is usual to make some provision for the administration of any fund recovered under similar circumstances, and I do not think that the interest of the pupil received fair consideration in the settlement made in the circumstances referred to. It may be that on the facts there is no good claim, but at present I must assume that there is; and after the matter was in Court and in charge of a recognised law-agent, I do not think it should have been settled behind his back at a meeting into which the tutor had been more or less trapped, and where he had not complete independence. I have therefore declined to allow the so-called settlement, which was immediately repudiated, to stay the action, but I have required the sum

paid to be consigned as a condition of further procedure."

The defender reclaimed, and argued—The Sheriff's judgment was wrong, and that of the Sheriff-Substitute ought to be reverted to. The Sheriff had held on the merits that if the pursuer had been acting in his own right he (the Sheriff) would have hesitated to reject the settlement, but that the fact that the pursuer was suing in a representative capacity as tutor of his pupil child put another light upon the matter. This fact made no difference. The father was the only person who was entitled to raise the action, and, conversely, he alone could settle it and discharge the claim. It was only in the most exceptional cases that the Court would interfere with the father's guardianship. [LORD YOUNG—The alleged settlement took place after defences had been lodged and litis contestation had commenced. Litiscontestation was a judicial quasi-contract (Erskine, i. 4, 69). In such circumstances could a settlement be binding till the judge before whom the cause depended had authorised the settlement.] The authority of the Court was not required to a settlement, even if it took place after defences had been lodged. The case of *Dewar* v. *Ainslie*, Dec. 14, 1892, 20 R. 203, was *a fortiori* of the present. In that case there was no signed agreement, yet the action was held to have been validly compromised. Here there was a formal written receipt expressly discharging all claims.

Argued for pursuer—The proper mode of abandoning an action was by a formal minute. The receipt alone was not sufficient to effect abandonment, it must be corroborated judicially (Dove Wilson, Sheriff Court Practice, 4th edition, p. 252), and until this was done the pursuer was entitled to resile. On the merits, the pursuer was not entitled to settle his child's claim for such an inadequate sum. When a case in which a father sued as representing his pupil child came before the Court, the duty of the Court was to see that the interests of the pupil were protected, and any settlement of the case required the concurrence of the Court. The Court had frequently gone the length of superseding the father if his interest and that of his child conflicted—*Sharp* v. *Pathhead Spinning Company, Limited*, Jan. 30, 1885, 12 R. 574.

LORD JUSTICE-CLERK—The question we have to decide is, whether the pursuer of this action is to be allowed to proceed with it notwithstanding that he gave a receipt and discharge for a sum of money which bore to settle his claim. The receipt is not disputed, but the pursuer takes exception to his being bound by it. When the case was before the Sheriff-Substitute he allowed a proof of the circumstances, in respect the pursuer maintained that there had been improper action on the part of the defenders in obtaining the discharge. The result of that inquiry is, as I think, to show that the pursuer has in fact no ground for having the receipt set aside by way of exception. The evidence proves the opposite of what the pursuer alleged in regard to it. If that be so, then the pursuer has no ground for repudiating the settlement which he made. Standing that receipt, I am of opinion that he cannot proceed with his action, the dispute which forms the basis of the litigation having been competently settled between him and the defender. I can see no ground on which he can repudiate the bargain which he made, which in my opinion he could quite competently make at the time at which he made it. I would add that I do not consider the words at the end of the document, to the effect that the pursuer abandons his action, to be of any consequence one way or the other. It was, of course, the natural sequence of the settlement made, if it was a valid settlement, that the action could not proceed. But this did not require to be expressed, and any words indicating that the pursuer would not proceed with his action were quite superfluous. No formality on his part was required, as the defender holding the written discharge of the claim could effectually resist any attempt to proceed with the suit, unless the discharge was in a competent manner set aside. Holding, as I do, that the pursuer has failed to show ground for doing this, I am of opinion that the Sheriff-Substitute took the right course, and that we should recal the interlocutor of the Sheriff, and revert to the judgment of the Sheriff-Substitute.

LORD YOUNG—The only question decided by the Sheriff, and now before us, regards an alleged extrajudicial out-of-Court settlement by the parties of the action while in dependence.

The action was raised on 20th August 1898, notice of appearance given on 25th August, and defences lodged on 27th September. The ground of action is fault by the defender in allowing a horse and cart belonging to him to proceed unattended along a public street, in consequence of which a two-year-old son of the pursuer was run over and seriously hurt. The defence is a denial of the averred fault. The parties respectively were represented in Court by professional practitioners who continued throughout unchanged.

On 22nd October the pursuer received £8 from the defender and signed the receipt. This was done in the office of the Superintendent of the Cleansing Department, Dundee, in which the pursuer was employed as a scavenger, and was done without the knowledge of the pursuer's man of business, who represented him in the action. On the following day the proceeding was repudiated by the pursuer and a return of the money tendered. It does not appear that the Court in which the action was depending was informed of this alleged settlement otherwise than by the additions made to the record on adjustment sometime between 22nd October (the date of the receipt) and the 30th of November, when the record was closed. These additions relate exclusively to this receipt, and the

effect of it as an alleged extrajudicial settlement of the pursuer's claims, and consequent abandonment by him of the action, the ground of action and the defence to it remaining unchanged.

In any action in this Court or the Sheriff Court litiscontestation (which has important effects) commences when defences are lodged, and subsists until the action is judicially disposed of so as to be put out of Court. The parties may, of course, at any time agree to settle the *lis* on such terms as they please, their agreement being submitted to and approved of by the Court in which it is *lis pendens*. The ordinary, I think, invariable language of the motion on such occasions is instructive—the Court is moved to "interpone its authority" to the settlement, and I am not aware of any instance of the authority of this Court being so interponed where the parties or their counsel did not in Court state that they were then and there agreed upon the terms of the settlement (no matter when or where they had been arranged), and concurred in the motion for the Court's authority and consequent disposal of the action.

When defences are lodged the dispute between the litigants ought to be and generally is manifest. It certainly was so in the case before us, and the introduction or superinduction of a quite new *lis* on the question whether or not the parties had extrajudicially agreed to terms on which the pursuer should abandon the action, is a novel, and I think *prima facie* objectionable proceeding. This new dispute in the present case arose on 23rd October, when the pursuer intimated to the defender his repudiation of the agreement which he had signed, and tendered return of the £8 which he had received the previous day. The defender maintaining that the receipt was an agreement from which the pursuer was not entitled to be liberated, ought I think to have at once brought the document before the Sheriff in Court, with a motion praying the Court to interpone its authority thereto and dispose of the action accordingly. Had this been done, the parties being represented by the law-agents who had acted for them in the whole proceedings in Court, and the admitted facts stated, how, I ask, ought the motion to have been disposed of? I lay aside any averment or suggestion of deceit, or of such undue influence as might be a ground for reducing a contract, and assume that the following facts only were stated at the bar by the pursuer's agent and assented to by the defender's—1st, that the meeting at which the receipt was written and signed and the money paid was between the defender attended by his law-agent on the one side, and the pursuer on the other without the presence or knowledge of his law agent; 2nd, that the pursuer immediately repented of what he had done, and that on the following day his law-agent with his authority intimated his repentance and tendered return of the money. Had this motion been made, as I think it should have been in ordinary course of practice, I am of opinion that it ought to have been *de plano* refused, and I cannot for my part countenance the notion that the proper course was to order a record on the subject either by way of adjustment or amendment. The dispute here arose before the record was closed, but any dispute regarding an extrajudicial agreement to settle a depending action, whether as to the making of it or the right to resile from it, may arise after as well as before the record is closed, and if it is a competent and the proper course of procedure to have a record regarding it superinduced on that relating to the *lis* in the action, it must be so whensoever it arises.

It is, I think, desirable for obvious reasons to refuse countenance to litigation regarding such agreements. The parties to an action in Court are themselves in Court, and any agreement for a settlement is an agreement in Court, and inoperative until the Court on motion, assented to by both parties, has authorised it, thereby signifying this, and only this, that it was made in presence of the Court which saw no reason for withholding its authority. Of course the parties may, and usually do, confer and arrange out of Court the terms of an agreement to be submitted to the Court, but this, as I have said, is not enough. Nor would it in my opinion signify that the terms so arranged were written in a formal minute and signed by the parties or their legal representatives, agents, or counsel, if both parties did not in Court adhere to it and concur in the motion for the Court's authority and judgment accordingly.

In the present case nothing followed on the receipt which imports the agreement except the payment of £8, of which there not only can be, but has been, restoration. Matters were quite entire when the pursuer intimated his change of mind and offered the restoration.

I am disposed to go the length of stating it as a generally, if not universally, true proposition with respect to an extrajudicial agreement for the settlement of a pending action, that even when written and signed there is *locus pœnitentiæ* until the authority of the Court is interponed. When something has followed whereby one of the parties will or may be seriously prejudiced if the other is allowed to resile, difficulties may arise. But I should not even in such a case (the occurrence of which I have difficulty in conceiving) be prepared, so far as I can now judge, to disregard the consideration that such an agreement ought not to be acted on while only inchoate, which in my opinion it is till judicially approved of and authorised, and that a party so acting must take the risk. But where the only action was payment of a sum of money which was returned without delay, and while matters otherwise were quite entire, there is in my opinion no difficulty.

On these grounds I am of opinion that the Sheriff ought to have disallowed the proposed additions on adjustment, closed the record on the petition and defences, and allowed a proof. Further, if the defen-

der thought proper to move the Court to interpone authority to the document of 22nd October as an abandonment by the pursuer of the action, I am of opinion that the Sheriff ought to have refused the motion. It is, I think, immaterial that the expression of abandonment is preceded by an acknowledgment of receipt of £8. The proper mode of abandoning a pending action is well settled and known, and no reason or explanation for not taking it here is suggested. There could be none if the proceedings were fair and above-board. If such a document, with or without a receipt attached, were produced at the bar of this Court, need I ask whether we should interpone authority to it? Looking only to what is written on the face of it, I think we should decline to recognise it or admit it into the process.

LORD TRAYNER—I think the interlocutor of the Sheriff appealed from should be recalled, and the interlocutor of the Sheriff-Substitute of 15th March last reverted to. The facts are very simple. The pursuer sued for damages, and his claim was disputed by the defender. After defences had been lodged but before the record was closed the pursuer accepted a sum of money (whether it was great or small is not material) in full of his claim under the action. The defender set forth this fact in his adjusted defence, and pleaded that in respect of the settlement of the action he was entitled to absolvitor. The pursuer, however (or his agent), on adjustment of the condescendence, alleged that the settlement and discharge of the action had been obtained from him under circumstances which made the discharge ineffectual. He pleaded, accordingly, that the discharge on which the defender founded should be set aside.

A proof was allowed to the parties of their several and conflicting averments in regard to the settlement and granting of the discharge, after considering which the Sheriff-Substitute held that the pursuer had failed to establish the grounds on which he maintained that the discharge should be set aside, and (giving effect to the discharge) assoilzied the defender. I see no room for any doubt as to the soundness of the decision thus pronounced by the Sheriff-Substitute. It is doubtful (to say the least) whether the pursuer's averments, if proved, would have been relevant to infer the reduction of the discharge. But his averments, such as they were, were clearly disproved by his own testimony and that of his witness Mr James Arthur.

The Sheriff does not take a very different view of the result of the proof. He says he would have hesitated to "reject the settlement"—that is, he would have hesitated to refuse it effect—had it not been that the pursuer is here suing a claim "not in his own right but on behalf of a pupil." I confess I do not appreciate this as a reason for refusing effect to the proof which the Sheriff himself allowed. The pursuer, in the circumstances of this case, was the only person entitled to bring the action. His title to bring it was not and could not be disputed. But he who has the right to make and insist in a claim has a title to discharge it.

I cannot say that I can find fault with anything done in this case by the Sheriff or Sheriff-Substitute as matter of procedure. They have violated no form of process. On the contrary they appear to me to have done only what statutory provision permits if not requires. The defender was entitled in adjusting his defence to plead the settlement he had made; the pursuer was just as much entitled to meet that in adjusting his condescendence. And when the question was thus raised, whether the discharge founded on was or was not effectual, that, depending on disputed fact, could only be determined after proof. I attach no importance whatever to the words in the discharge "and I abandon the case." The words were superfluous and inappropriate; they were superfluous because all claim under the action having been discharged the action could no longer be insisted in, and they were inappropriate because the pursuer was not availing himself of the statutory privilege of abandoning an action or anything like it.

Nor do I concur in the view that the parties having once appeared in Court are thereby disabled—either before or after litiscontestation—from settling their difference just as and when they please, without the leave or approval of the Court. The leave of the Court to settle any ordinary litigation is never asked—it is a matter with which the Court is not concerned.

LORD MONCREIFF—This action, in which the pursuer sues for damages in respect of personal injury sustained by his pupil son, was raised in September 1898. Defences were lodged on 27th September 1898, and on 5th October the Sheriff-Substitute continued the case for adjustment. On 22nd October the pursuer settled or professed to settle the action for the sum of £8, of which he received payment, and granted to the defender a receipt and discharge, in which he states that the sum of £8 was received "in full of all claims in the action at my instance, and on behalf of my son against him (the defender), and I abandon the case."

The defender on adjustment added a statement in his seventh answer to the condescendence stating that the settlement had taken place, and the pursuer in answer disputed the fairness of the transaction, and tendered payment of the £8 received. The Sheriff-Substitute closed the record, and allowed parties a proof of their respective averments as to the alleged settlement, and to each a conjunct probation. The Sheriff ordered the pursuer to lead in the proof; and a proof having been led, the Sheriff-Substitute found it proved that the discharge was binding and the action no longer maintainable, and accordingly assoilzied the defender with expenses. The Sheriff recalled this interlocutor, holding that the alleged discharge did not form a bar to the prosecution of the action provided that the pursuer consigned in Court the sum of £8 which he had received from the defender.

The only question which at the outset I understood to be submitted to us by the appeal on both sides was simply whether on the evidence it was or was not proved that the discharge was obtained from the pursuer in such circumstances of unfairness or inequality that the defender was not entitled to stand upon it as a bar to the pursuer proceeding with his action of damages.

But a view was suggested, I think from the bench, which if well founded would make it unnecessary to consider whether the discharge was or was not unfairly obtained. The proposition is that although the pursuer has actually accepted payment of a sum in full of all his claims the settlement is not binding upon him, because litiscontestation having taken place, and the authority of the Court not having been interponed to the settlement, the pursuer is entitled to resile.

I apprehend that as a general rule any contract may be altered or terminated by agreement of parties; and if, it being relevantly averred that the contract has been so terminated, there is a dispute as to whether such agreement was fairly and properly effected, that question must be decided on competent proof.

But it is maintained that the contract of litiscontestation stands in an exceptional position, and that if parties have once joined issue the contract cannot be terminated without the sanction of the Court.

I know of no authority for this proposition; I understand the practice to be to the contrary effect, and such cases as are reported establish this. The cases with which we are perhaps most familiar are those in which the alleged discharge was granted before the action was raised, of which examples are the recent case in this Division of *Mackie* v. *Strachan, Kinmont, & Company*, 23 R. 1031, and also the earlier case of *Wood v. North British Railway Co.*, 18 R. (H. L.) 27.

But it not unfrequently happens that after an action has been raised a settlement or alleged settlement takes place, and a question arises as to whether the settlement is binding or not. Now, in all cases in which this has occurred so far as I know the Court has ordered inquiry; if after proof they held the discharge binding they dismissed the action; and if, on the other hand, they held that it was improperly obtained they allowed the action to proceed. We had recently a case before us also from the Sheriff Court at Dundee—*Stewart Brothers* v. *Keddie*, decided 30th June 1899. The action was raised on 19th August 1898, and after the action was raised and issue joined the pursuer agreed to accept £5 in full of all her claims, and received payment of that sum on 1st October 1898, for which she granted a discharge, adding—"And I hereby withdraw the action in the Sheriff Court here at my instance against them" (that is, the defenders). Proof having been allowed as to the circumstances in which the discharge was obtained, the Sheriff-Substitute held the discharge effectual and assoilzied the defenders. The Sheriff recalled this interlocutor and allowed parties a proof of their averments on the merits of the case, but this Division of the Court recalled that interlocutor and assoilzied the defenders. According to my recollection the point with which I am at present dealing was not suggested in that case.

To cite an older decision—in the case (also in this Division) of *Dewar* v. *Ainslie*, 20 R. 203, it was held by the Court that a settlement effected after action was raised and issue joined was binding, and that one of the parties was not entitled to resile. In that case, which originated in the Sheriff Court, the defenders alleged that a compromise had been effected after litiscontestation, and lodged a minute and condescendence of *res noviter*, which was answered by the pursuer. On proof led the Sheriff Substitute held the settlement proved; the Sheriff recalled this interlocutor, but on appeal the Court reverted to the judgment of the Sheriff-Substitute and dismissed the action, holding the settlement proved.

The only other case to which I shall refer is the earlier case of *Love* v. *Marshall*, 10 Macph. 795, which was founded on and followed in *Dewar* v. *Ainslie*. In that case the compromise was said to have been effected in the course of an action of reduction raised at the instance of George Love and Others against James Marshall and Others. Some of the defenders authorised their agent to compromise the action, and the terms of compromise proposed by them were agreed to on the part of the pursuers, but no formal minute of agreement was entered into by the parties and the case was not taken out of Court. Instead of asking to have effect given to the compromise in the action already raised, the pursuers, for reasons which do not appear in the report, but probably because the complicated terms of compromise could not have been carried into effect in that action, raised another action to enforce implement of the compromise. Among the defences to that action the defenders pleaded what is maintained here—"Even although the letter of Messrs Gifford & Simpson and Mr Sinclair had been written by the authority of all the defenders, it was competent for them to resile from the conditions contained therein so long as they had not been embodied in a probative deed or in a minute to which authority of the Court had been interponed." The Lord Ordinary repelled these defences, and held the compromise to be binding, and the First Division adhered.

I see no reason either on principle or authority for deciding differently in the present case. On the merits I agree with the Sheriff-Substitute, and am therefore of opinion that the appeal should be sustained, the interlocutor of the Sheriff recalled, and that of the Sheriff-Substitute affirmed.

The Court sustained the appeal, and recalled the interlocutor of the Sheriff, affirmed the interlocutor of the Sheriff-Substitute, and assoilzied the defender from the conclusions of the action and decerned, and granted warrant to the defender to up-

lift the sum of £8 sterling consigned in the hands of the Clerk of the Sheriff Court.

Counsel for Pursuer — Gunn — Adam. Agents—Mackay & Young, W.S.

Counsel for Defender—Salvesen—Craigie. Agent—J. Pearson Walker, S.S.C.

Friday, October 27.

FIRST DIVISION.

WISHAW BURGH COMMISSIONERS *v.* CLELAND CO-OPERATIVE SOCIETY.

Burgh — Slaughterhouse — Slaughterhouse within Two Miles of Burgh — Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 284—*Public Health (Scotland) Act* 1897 (60 *and* 61 *Vict. cap.* 38), *sec.* 32.

The Burgh Police (Scotland) Act 1892 provides, section 284 — "That where before the passing of this Act, or within one year thereafter, any burgh shall have erected slaughterhouses, no other slaughterhouse shall be erected within the distance of two miles from the existing boundaries of such burgh, unless either it is erected with the consent of the commissioners of such burgh, or is situated within the area of another burgh."

The Public Health (Scotland) Act 1897, sec. 32, gives power to the local authority to grant a licence to carry on the business of a slaughterhouse in specified premises.

Held that burgh commissioners who had erected a slaughterhouse under the provisions of the Burgh Police Act were entitled to interdict the use of premises within two miles for that purpose, although these premises had been licensed by the local authority.

The Commissioners of the burgh of Wishaw brought this action in the Sheriff Court at Hamilton against the Cleland Co-operative Society, the prayer being "To interdict the defenders from erecting within two miles from the boundaries of the burgh of Wishaw, the same not being within the boundaries of any other burgh, a slaughterhouse, and from using any building within the said distance from the boundaries of the burgh of Wishaw, such building not being within the boundaries of any other burgh, any premises for the slaughter of cattle and sheep and other animals, without the consent of the pursuers."

The Burgh Commissioners averred that they had erected a slaughterhouse for Wishaw, which fell under the provision of section 284 of the Burgh Police (Scotland) Act 1892 (quoted in rubric), and that the Co-operative Society were engaged in erecting a slaughterhouse on a site within two miles of the boundaries of Wishaw.

The Co-operative Society admitted that they were erecting a slaughterhouse on the site mentioned, but denied that it was within two miles of Wishaw. They averred that they had obtained the sanction of the District Committee of the County Council of Lanarkshire, acting as the local authority under section 32 of the Public Health (Scotland) Act 1897.

Section 32 of that Act, after prohibiting the establishment of certain businesses, including slaughterhouses, without sanction, provides (sub-section 2)—"The local authority shall give their sanction by order" . . . "and where the local authority grants or withholds such sanction, any person aggrieved may appeal to the Board, whose decision shall be final."

The defenders pleaded, *inter alia*—"(1) No jurisdiction. (2) Action incompetent. (3) The defenders having received the sanction of the local authority to establish the said business, they ought to be assoilzied, with expenses."

The Sheriff-Substitute (MARK DAVIDSON) on 31st October 1898 repelled the first and second pleas-in-law for the defenders and allowed a proof.

Note.—"The defenders take objection to the competency of the action on the ground that they have a right to erect a slaughterhouse from the district committee of the county council, which is by the Act of 1897 constituted a Court; and that the pursuer's proper course is to appeal against their decision in the manner provided by the Act. I do not decide on the question whether a Court is constituted by an Act or not, though I think such a proposition would be difficult to establish. But whether the local authority be a Court or not, I am quite clear that the jurisdiction of this Court, in a matter of the kind under discussion, is not excluded. The Act of 1892 distinctly prohibits the erection of a slaughterhouse within two miles of a burgh which has a slaughterhouse of its own, and no one has any more right to erect a slaughterhouse in such a position than he has to build a cottage on another man's ground, or to carry on business in another man's shop, without his consent. The magistrates of a burgh are a properly constituted Court for licensing the sale of intoxicating drink, but if they happened to grant a licence to a person to sell drink in premises to which he had no right, that would not be a bar to his ejection at the instance of the true owner, nor would the latter require to appeal to a bench of justices in the Confirmation Court. The case of *Kennedy* v. *Wyse*, 17 R. 1036, on which the defenders rely, does not seem to me to be in point. There were two grounds for the decision in that case—that the defender was asked to deliver articles of which he could not have possession, and that the matter was *res judicata*. These are not pleas in any way applicable to this case."

The Co-operative Society appealed to the Sheriff (BERRY) who on 23rd December 1898 adhered.

A remit was made to Mr Gavin Paterson, architect, Hamilton, to report on the distance of the defenders' slaughterhouse from the boundaries of the burgh of Wishaw.