by sec. 28 of the Summary Procedure Act 1864 (27 and 28 Vict. cap. 53). Under the last-named Act a complaint against a limited company had been sustained as relevant—*Fletcher* v. *Eglinton Chemical Co.*, November 13, 1886, 14 R. (J.) 9; *Lawson* v. *Jopp*, February 16, 1853, 15 D. 392; and *Advocate-General* v. *Grant*, July 20, 1853, 15 D. 980, also referred to. In any event, a proof should be allowed.

The pursuer relied upon the reasoning adopted in the opinion of the Lord Ordinary, and further referred to *Miles* v. *Finlay*, November 16, 1830, 9 S. 18, and to Mackay's Manual, p. 158, and cases there cited.

At advising—

LORD PRESIDENT—The Crown asserts in the information before us that both and each or one or other of the two individuals named have been guilty of an offence against the Stamp Acts. What both and each or one or other are said to have done was, making and executing, in the name of their firm, Thomson, Hutcheson, & Company, and transmitting, a contract-note which was not duly stamped.

Now, to take the simplest case, supposing one of the two partners to have executed the contract-note in the firm's name, and to have issued it without being duly stamped, I suppose it cannot be doubted that the individual who did so is liable in the penalty in that behalf exacted. The matter is not substantially complicated if it be supposed that the two partners acted in concert in having the contract-note so signed and issued unstamped, although the firm signature would necessarily be adhibited by one of the two. In this case, again, both the two individuals have transgressed the law, and each is severally liable to prosecution.

These very plain and obvious considerations make it impossible for me to sustain the plea that this prosecution is incompetent because the firm is not sued for the penalties. I am not here required to consider whether the Crown might not, if it had so chosen, have sued the firm, although I should consider this a much more doubtful question than the present. But if it be legally possible for an individual to contravene the Stamp Act by making and issuing in his firm's name an unstamped contract, then we cannot throw out this proceeding, which asserts that this has been done.

Whether, supposing both partners, or only one partner, to have incurred the penalty, the company funds would be properly chargeable with the amount, is a question with which the Crown has nothing to do. If the Crown succeed in proving a contravention against both or either of the two individual partners, it will be entitled to a judgment against each person convicted for a penalty which can be recovered out of all that belongs to him. How the two may settle their accounts *inter se* the Crown has no need to anticipate or interest to consider.

It was allowed by the learned counsel for the Crown that while there is no real dispute about the facts, yet there is no plea of guilty on the record, and accordingly that the interlocutor is premature, and must be recalled. We can only, in the meantime, repel the 2nd and 3rd pleas for Thomson, and the 1st and 2nd pleas for Hutcheson, and remit to the Lord Ordinary to proceed as shall be just.

LORD ADAM—I concur.

LORD M'LAREN—I concur in the whole of your Lordship's observations. I should like to add, for the consideration of the Lord Ordinary—because we are not called upon to decide the point—whether it is not a part of the proceedings in Exchequer prosecutions that disputes on matters of fact should be referred to a jury. The point was touched upon in debate, and at least deserves to be looked into, for I must say that as at present advised I do not see that any other course can be followed.

LORD KINNEAR—I agree with your Lordship.

The Court recalled the interlocutor of the Lord Ordinary, repelled the 2nd and 3rd pleas-in-law for the defender Thomson, and the 1st and 2nd pleas-in-law for the defender Hutcheson, and remitted to the Lord Ordinary to proceed as should be just.

Counsel for the Pursuer—D.-F. Asher, Q.C.—A. J. Young. Agent—P. J. Hamilton Grierson, Solicitor of Inland Revenue.

Counsel for the Defender Thomson—W. Thomson. Counsel for the Defender Hutcheson—Orr. Agent—W. A. Hyslop, W.S.

Tuesday, February 23.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

NORTH BRITISH RAILWAY COMPANY *v.* LANARKSHIRE AND DUMBARTONSHIRE RAILWAY COMPANY.

(*Ante*, vol. xxxiii. p. 56, and 23 R. 76.)

Res judicata — Plea of "Competent and Omitted"—Lanarkshire and Dumbartonshire Railway Act 1891 (54 *and* 55 *Vict. cap. cci.*), *sec.* 6, *sub-sec.* (4).

The Lanarkshire and Dumbartonshire Railway Act 1891, which authorises a company to construct certain railways, provides by section 6, subsection 4, as follows:—"Railway No. 1 shall be carried under the North British Company's Glasgow City and District Railway, and under the joint sidings and works of that company and the Caledonian Company at Stobcross, in tunnel, and the company shall not, without the previous consent of the companies owning the same, break open the surface of the ground."

In order to ventilate the tunnel the

company constructed a shaft opening on ground belonging to the two companies, and an arbitration was entered into, the question raised by the pleas of the parties being, whether the previous consent of the owning companies had been obtained. The award was in the following terms:—"I am of opinion that the construction of the said shaft falls under the provisions of sec. 6, sub-sec. 4, . . . and required therefore the consent both of the North British and Caledonian Railway Companies. I am further of the opinion that the consent of the North British Railway Company was not duly obtained thereto."

Thereafter the company served a notice upon the North British Company to take the ground upon which the shaft opened under their compulsory powers.

In an action to interdict proceedings under this notice, *held* (*aff.* the judgment of the Lord Ordinary—*diss.* the Lord President) that the terms of the award did not preclude the respondents from pleading that the ground in question was not part of "the joint sidings and works" of the complainers and of the Caledonian Company, and that it accordingly did not fall under section 6, sub-section 4, but might be acquired by the company under their compulsory powers.

Opinion (by Lord Kinnear) that in order to support a plea of *res judicata* it is necessary to show not only that the parties and the subject-matter in two suits are identical, but also that the two suits present one and the same ground of claim.

This is a sequel to the case reported *ante*, November 5, 1895, 33 S.L.R. 56, and 23 R. 76.

On 11th January 1896 the Lord Ordinary, in respect of intimation from the Board of Trade, remitted to Major-General Hutchinson "to determine the question between the parties raised upon record, and to report his determination *quam primum*."

In pursuance of this remit Major-General Hutchinson, under date 6th February 1896, reported as follows:—"In obedience to the foregoing interlocutor, and in virtue of the appointment conferred upon me by the Board of Trade under section 6, sub-section (10), of the Lanarkshire and Dumbartonshire Railway Act 1891, dated 8th January 1896, I have to report that after having carefully inspected the ground in which the shaft in dispute is constructed, and having heard evidence adduced by both parties, and considered the same along with the relative plans and documents produced, I am of opinion that the construction of the said shaft falls under the provisions of section 6, sub-section (4) of the Lanarkshire and Dumbartonshire Railway Act 1891, and required therefore the consent both of the North British and the Caledonian Railway Companies. I am further of the opinion that the consent of the North British Railway Company was not duly obtained thereto. The plan which was submitted to the North British Railway Company's engineer on 24th May 1892 did not sufficiently disclose the existence of the shaft in question. That in effect is an enclosure containing an area of about 644 square feet on ground belonging jointly to the Caledonian and North British Railway Companies, and within a few feet of the rails of the City and Suburban line of the North British Railway Company, the doubling of which at any future period would thereby be seriously interfered with, and there is nothing on the plan which can reasonably be held as directing attention to so serious an operation. Before proceeding with the construction of such a shaft, a proper working plan, showing distinctly what was proposed to be done, should have been submitted, and the Lanarkshire and Dumbartonshire Railway Company having failed to do this, I am of opinion that the shaft should not be allowed to remain."

Thereafter on 19th February 1896 the Lanarkshire and Dumbartonshire Railway Company served a notice upon the North British Company under the provisions of the Lands Clauses Act 1845, incorporated with their Special Act, to purchase and take for the purposes of their line a certain part of the ground of which that company are joint owners, including the part occupied by the ventilating shaft.

The present action was brought by the North British Company to obtain interdict against the respondents following up or proceeding under that notice.

The complainers pleaded—"(4) The engineer appointed by the Board of Trade having disallowed the shaft in question, notwithstanding the plea urged by the respondents before him and repeated in this action, that said shaft is not situated on the joint sidings and works of the complainers and the Caledonian Railway Company at Stobcross, and his decision being final, interdict should be granted as craved."

The respondents pleaded—"(4) In respect that the operations of the respondents do not affect the complainers' Glasgow City and District Railway, or the joint sidings and works of the complainers and the Caledonian Railway Company at Stobcross, the complainers are not entitled to interdict."

On 15th July 1896 the Lord Ordinary pronounced this interlocutor:—"Repels the fourth plea-in-law for the complainers: Finds that the question between the parties falls to be determined by an arbiter appointed by the Board of Trade in terms of section 6, sub-section 10 of the respondents' Act: Therefore sists process to enable either of the parties to make application to the Board of Trade for the appointment of an arbiter, with a view to the cause being remitted to such arbiter after his appointment, meantime reserving all questions of expenses: Grants leave to reclaim."

Note.— . . . "The complainers' objection is that the ground in question is part of their and the Caledonian Railway Company's joint sidings and works, and that under the provisions of section 6, sub-section 4, of the respondents' Special Act the

latter are prohibited from taking compulsorily any land occupied by the joint sidings and works of the two companies. By the section in question it is directed that under those joint sidings and works the respondents' line shall be constructed in tunnel, and that without the consent of the joint owners the surface of the ground shall not be broken. The complainers say—and it is not disputed—that the object of the respondents' notice is to acquire full rights over the surface of the ground to which the notice applies.

"The answer of the respondents is that the ground in question does not in fact form part of the joint sidings and works of the two companies, and that therefore section 4 of the Special Act does not apply.

"The complainers reply, *inter alia*, that it is *res judicata* in a former action between the parties that the ground in question is within the area of the joint sidings and works. They say (1) that the contrary allegation was a defence proponed and repelled in the former action; and (2) that if not proponed and repelled it was a defence competent and omitted.

"Now, the conclusion of the former action was for removal of a certain ventilating shaft constructed by the respondents and projecting above the surface within the area now in dispute. And I shall assume, in the meantime, that the complainers have obtained, or are entitled to obtain, decree in the former action. In other words, that that action is now in such a position that no new or further defence can now be stated by way of amendment.

"But so assuming, I am, in the first place, not able to hold that the question, whether or not the ground in dispute is within the sidings and works of the complainers, was a question raised and determined in the former action. The demand in that action was, as I have said, that the respondents should remove a certain ventilating shaft, and the only defence stated to that demand was that the shaft in question had been constructed with the consent of the two companies. No other defence was stated, or, as I shall point out presently, could have been stated as matters then stood. At any rate, no other defence was stated, and the issue being simply consent or no consent (an issue depending on the construction of certain plans and correspondence), the same was remitted under an arbitration clause in the Special Act to Major-General Hutchinson, who some time ago reported negativing the alleged consent. His report is produced. I need not recite its terms, but its substance was to negative the alleged consent. He may have expressed opinions on other points, but the point mentioned was the only point remitted to him and the only point which he did or could decide. I cannot therefore hold that the defence in question was in the former action proponed and repelled.

"That, however, leaves it quite open to argue that the point now raised, viz., the point whether the ground in question is within the joint sidings and works, so as to make the consent of the two companies requisite, was a defence competent and omitted. Here again I am unable to accept the complainers' argument. The defence was certainly omitted, but, as matters stood at the time, I do not at present see how it was competent. In other words, I fail to see that, if stated, it would have been a good defence. The respondents had neither acquired the surface, nor had they then taken any proceedings towards acquiring it. Whether, therefore, it was within the restricted area, or as they now say beyond it, they had no right to interfere with the surface without the consent of the complainers. They believed they had such consent, and so believing thought it, I suppose, unnecessary to raise any question as to the precise limits of the restricted area. As their rights then stood, they had no title or interest to do so. In these circumstances, if the ground in question be in fact outside the restricted area, and if under their present notice the respondents acquire it in property, I do not see how the proceedings in the former action can form an obstacle to the exercise of the new rights which they (the respondents) thus acquire.

"That being so it is unnecessary to consider whether it is still open to amend the record in the former action so as to introduce a new defence founded upon the averment that the ventilating shaft is outside the joint sidings and works, and that the ground which it occupies is in course of being acquired by the respondents under their notice to treat.

"I am not, I confess, as at present advised, prepared to hold such an amendment incompetent. No decree has been pronounced in the former action, nor has anything been done under it since the date of General Hutchinson's report. It would therefore I think be difficult to hold the introduction of a new and emerging defence to be outside the Court of Session Act of 1868. As I have said, however, I do not think it necessary to deal further with the former action at the present stage. It may, I think, conveniently stand over until the present case is finally decided.

"It remains, however, to consider by what procedure the facts at issue between the parties with respect to the locality of the ground embraced in the respondents' notice shall be determined. The respondents ask a proof. The complainers ask that the question shall be remitted to General Hutchinson under the arbitration clause, which is sub-sec. 10 of sec. 6 of the Special Act. On this matter I am of opinion with the complainers, and generally for the reasons expressed in my former judgment. I propose, therefore, to pronounce an interlocutor repelling the fourth plea-in-law for the complainers, finding that the question between the parties falls to be determined by an arbiter appointed by the Board of Trade in terms of sec. 6, sub-sec. 10, of the respondents' Act, and therefore sisting process to enable either of the parties to make application to the Board of Trade for the appointment of an arbiter with a view to the cause being re-

mitted to such arbiter upon his appointment. I shall meantime reserve all questions of expenses."

The complainers reclaimed, and argued—This question must have been decided by the arbiter before he settled whether consent had been obtained. Moreover, the respondents had an averment in the previous action as to the local situation of the shaft. Accordingly the arbiter's decision on the point had been given, and was final, and the question could not be again raised. But alternatively, if it were held not to have been so decided, the respondents were shut out from the plea now proposed on the ground that it was a defence competent and omitted.

Argued for respondents—There was no specific denial in the first action that the shaft was in the sidings and works, and no plea to that effect was stated; accordingly there was no *res judicata*. The arbiter's decision was based on the assumption that the ground was within the prohibited area, and he was not called upon judicially to apply his mind to the question. Even if the reclaimers were right in holding that the question had been raised in the former action, their proper plea, since it had not been concluded but only sisted for decision by the arbiter, would have been, not *res judicata*, but *lis alibi pendens*. Nor could it be said that this was a defence competent and omitted, for the respondents could not have maintained it in the former action, because at that time they had given no notice to treat, and their only possible defence was that they had obtained the consent of the reclaimers.

At advising—

LORD ADAM—The complainers, the North British Railway Company, are joint-owners with the Caledonian Railway Company of a large area of ground known as the Stobcross Station or Depot. The respondents are the Lanarkshire and Dumbartonshire Railway Company, and are authorised to construct a railway from Glasgow to Dumbarton.

On the 19th February 1896 the respondents served upon the complainers a notice to treat for the purchase of a portion of that area of ground, and the present suspension is brought for the purpose of interdicting the respondents from taking any further proceedings under that notice to treat.

The question at issue between the parties arises in this way. The Lanarkshire and Dumbartonshire Railway Act 1891, under which the respondents claim to have right to purchase the land embraced in the notice, contains a clause (section 6, subsection 4) to the effect that Railway No. 1, thereby authorised, should be carried under the North British Company's Glasgow City and District Railway, and under the joint sidings and works of that company and the Caledonian Railway Company at Stobcross, in tunnel, and that the company should not, without the previous consent of the companies owning the same, in the construction of such tunnel, break open the surface of the ground, or in any way raise or interfere with the rails of the North British Company, or of the joint property of that company and the Caledonian Railway Company, but that the company might open the surface where necessary for the purpose of temporarily supporting or protecting the railways and sidings of those companies from injury during the construction of the railway.

The complainers maintain that the land embraced in the notice to treat is land occupied by the joint sidings and works of the North British and Caledonian Railways. The respondents deny that this is so. I understand that if the land is occupied as the complainers say that it is, that the respondents do not maintain that they have a right to acquire it compulsorily—on the other hand, I understand that if the land is not so occupied the complainers do not dispute the respondents' right to acquire it.

The question at issue between the parties is therefore one of fact—whether the land proposed to be taken forms part of the joint sidings and works of the North British and Caledonian Railway Companies in the sense of the 4th sub-section of the 6th section of the Lanarkshire and Dumbartonshire Railway Act 1891.

The complainers maintain that this fact has already been conclusively determined in their favour in a previous action between the parties—the proceedings in which I shall presently have to consider — but assuming for the present that the complainers are wrong in this, the question arises as to the further proceedings in this case.

Now, sub-section 10 of section 6 of the respondents' Act enacts that if any difference should at any time arise between the company and the North British Company or their respective engineers with respect to any of the matters above referred to in the section, such difference should be determined by an engineer to be appointed by the Board of Trade on the application of either company.

I think that the difference which has arisen between the parties, viz., whether the ground proposed to be taken is occupied by the joint sidings and works of the railway companies—or in other words, whether the respondents' railway is being carried in tunnel under these sidings and works as required by sub-section 4 of section 6, is a difference to which the arbitration clause contained in sub-section 10 applies.

If, therefore, the Lord Ordinary is right in repelling the complainers' fourth plea-in-law, which I shall now consider, I agree with him that this case should be sisted to enable either party to apply to the Board of Trade for the appointment of an arbiter.

The complainers' fourth plea is to the effect that in certain previous proceedings between the parties the question now at issue between them was determined in their favour by an arbiter appointed under sub-section 10, and that his determination is final.

It appears that the respondents had constructed a ventilating shaft through the

surface of the depot into their tunnel beneath. In February 1895 the complainers raised an action against them to have this ventilating shaft removed. It is not disputed that this shaft is upon the ground sought to be compulsorily acquired by the respondents.

In that action the complainers quoted section 6, sub-section 4, of the respondents' Act, and they averred that the shaft was not authorised by their Act of Parliament, and had been placed on the ground in direct violation of the provisions of the Act.

In defence the respondents did not deny that the shaft fell within the provisions of sub-section 4 of section 6, but they averred that the shaft was constructed with the consent, express or implied, of the complainers, and they further pleaded that the question should be referred to arbitration in terms of sub-section 10 of that section. The Lord Ordinary sustained that plea by interlocutor of 11th July 1895, which was subsequently adhered to by the Court. He subsequently remitted the case to General Hutchinson (who had been named as arbiter by the Board of Trade) "to determine the question between the parties raised upon record, and to report his determination *quam primum*."

On the 6th February 1896 General Hutchinson issued a report, in which he states that he is of opinion that the construction of the said shaft falls under the provisions of section 6, sub-section 4, of the Act, and therefore required the consent of the complainers and the Caledonian Railway Company, and that the consent of the complainers had not been duly obtained thereto, and then he states his reasons for coming to that conclusion.

It is, as I understand, upon that opinion or determination of the arbiter, viz., that the construction of the shaft falls under the provisions of section 6, sub-section 4, of the Act, that the complainers maintain that the present question has been finally determined in their favour, because if the construction of the shaft falls under that sub-section, it is because it is upon ground occupied by the joint sidings and works of the railway companies, which they say is the question at issue in the present case,

But, as I have already pointed out, this question was not raised in the former case. It was assumed, nay pleaded, by both parties that sub-section 4 did apply to the case. The only question at issue was whether the respondents had obtained the consent of the railway companies to the construction of the shaft, and that was the only question remitted to the arbiter to determine, and the only question as to which his determination is final.

There may, however, be grounds upon which the respondents may not be able to get behind this alleged determination of the arbiter, and accordingly the complainers maintain that the plea now insisted in by the respondents, viz., that the shaft is not within the area of ground embraced by sub-section 4, was a plea which was competent and omitted, and cannot now be insisted in.

It will be observed, however, that whether the shaft was within the area embraced by sub-section 4 or not, it was certainly within the area of the Stobcross Depot, which was the property of the railway companies. If the respondents had the requisite consent to its construction, it was entirely immaterial whether it was within the larger or the more limited area, and equally so if theyhad not the requisite consent. I do not see therefore that it was a plea which they could have competently or effectually pleaded in the former action as matters then stood. But the situation of matters is now changed by the subsequent proceedings of the respondents. They have given notice to treat for the purchase of the ground on which the shaft is situated. That raises the question whether that ground is within the area of ground embraced in sub-section 4. I think it is a question raised for the first time, and which, for the reasons I have stated, I think has never been determined. I think the respondents are entitled to have that question tried, and I agree with the Lord Ordinary that it should be determined in this action. If the respondents are right they will be entitled to maintain the shaft on what will, in that case, be their own ground. If they are wrong, the shaft will then be removed under the former action.

I am of opinion that the interlocutor of the Lord Ordinary should be adhered to.

LORD KINNEAR — I agree with Lord Adam. The purpose of this action is to interdict the respondents from following up or proceeding under a notice which they have given under the provisions of the Lands Clauses Act, to take for the purposes of their line a piece of ground of which the complainers are joint owners. The complainers object that the ground in question forms part of the joint sidings and works of their company and the Caledonian Railway Company, which the respondents are prohibited from taking compulsorily by the provisions of section 6, sub-section 4, of their Special Act. The respondents answer that the ground in question does not in fact form part of the joint sidings and works of the complainers and the Caledonian Railway Company, and that it is part of the lands which the respondents are empowered by their Act to acquire compulsorily. The main question therefore between the parties is whether the ground in question is or is not in point of fact a part of the joint sidings and works of the North British and Caledonian Railway Companies. I think that this question has not been determined by the judgment of the arbiter in the former action, and therefore that there is nothing in his decision to exclude inquiry in the present process.

I agree that the decision of General Hutchinson assumes that the ground is within the protected area, but the question which he had to decide was submitted to him upon that assumption. He was not called upon to apply his mind judicially to the question of fact, because for the pur-

poses of the arbitration it was assumed on both sides that no such question arose. The case maintained by the respondents was, not that the ground in question was beyond the area of the joint sidings and works, but that the ventilating shaft to which the complainers objected had been constructed with their own consent. Now, I take it to be clear that in order to support a plea of *res judicata* it is necessary to show not only that the parties and the subject-matter in two suits are identical, but also that the two suits present one and the same ground of claim, so that the specific point raised in the second has been as directly raised in the pleadings and concluded by the judgment in the first. Now, we do not know what evidence was in fact led before the arbiter, but we must look to the pleadings in the former action in order to see what the question was that was submitted to him, and it seems to me clear enough that the question whether the ground in dispute could have been acquired by the exercise of compulsory powers was neither raised upon the pleadings nor apposite to the case. On the other hand, the evidence of consent which may have been adduced in the former case would in no way support the case now made by the respondents. I think therefore that there has been no decision of the question raised by the present record.

If this be so, the next question is whether the plea which the respondents now put forward was competent and omitted in the former suit, and as to this I agree with the Lord Ordinary. It would not have been consistent with the respondents' case in the former action to maintain that the ground which they proposed to occupy by their shaft was land which they might acquire in the exercise of their compulsory powers, because they had not acquired the land and had given no notice to treat. Their case was that they were entitled to use the ground for the construction of their tunnel without taking it under the statutes, because the complainers had consented to their doing so. That being decided against them, it appears to me that they raise an entirely different question when they claim right to acquire the ground in the exercise of their statutory powers.

LORD PRESIDENT—The purpose for which the respondents propose to take the ground specified in the notice in question is the construction of a ventilating shaft, which has in fact been already completed. This same ventilating shaft had, indeed, been finished before it became the subject of the former action—the summons in which concluded for a decree ordering the respondents to remove it, and to restore the ground to the *status quo ante*. The ground of this complaint was that the shaft was constructed in ground which was expressly protected against such interference by the 6th section of the respondents' Act of Parliament. The respondents refused to remove the shaft. It was perfectly plain that the question whether the shaft was to come down, as being a contravention of the Act or not, was a difference between the parties in the sense of the section, and must go to arbitration. It went to arbitration, and General Hutchinson, the arbiter appointed by the Board of Trade, has, in so many words, decided that the 6th section applies to this shaft, and that it cannot be allowed to remain.

Now, it seems to me to be perfectly immaterial that the arbiter was reached through the portal of the Court of Session, and I treat his award exactly as I should do if the parties had gone to him direct, as they ought to have done under the Act. The disputed claim is embodied in the summons, and the difference between the parties was whether the shaft was illegal by reason of the 6th section, and must be removed.

Now, in the first place, I cannot think that, even if their present contention were quite new, it will do for a party to go before an arbiter to defend a work attacked on the ground that it is prohibited by a certain enactment, allow the arbiter to find that the prohibition applies and that the work is illegal, and then turn round and get the case tried over again on the ground that, locally, the shaft is not within the area protected by the section. Even if (as I do not think) the ground of defence had been solely that the shaft had been consented to, I should hold that the respondents had waived other grounds of defence and were bound by the result. The plea of "competent and omitted" has certain technical limitations which render the term inappropriate to proceedings outside the Scotch courts of law. But even in a court of law, if a defender, having two pleas available against an action to have him ordained to pull down a building, viz., first, that the section alleged to be contravened does not apply, and second, that he has complied with its provisions, states only the second plea and not the first, and judgment is given against him, I cannot see how he could afterwards seek to have the building held to be legal on the first and omitted plea.

Nor does it, in my judgment, make the matter at all different that the question now arises under a notice to treat. The complainers' contention is that, notice or no notice, the shaft is struck at by the 6th section, and he produces General Hutchinson's decision, which, as I have already said, in so many words determines, first, that the section applies to the shaft, and second, that the terms of the section have not been complied with.

But then I must say further that I think that the present contention of the respondents as to the local situation of the shaft was stated in the former action, viz., in the last sentence of the fourth article of the respondents' statement of facts. It is true that there is no corresponding plea-in-law, but then I am not aware that a Board of Trade arbiter is bound by the rules of pleading which obtain in our courts, and General Hutchinson inspected the ground, heard evidence, and explicitly pronounces on the local situation of the shaft. I may

add that there is an averment on the present record that the present contention of the respondents was urged by them before General Hutchinson, and rejected by him. Had your Lordships thought fit to remit this averment to probation, I should have had no objection, although I think that the summons, record, and the award furnish adequate evidence that the question in dispute has been already decided.

My opinion is that the award of General Hutchinson is final and conclusive of the question whether this shaft is a contravention of the 6th section, and, accordingly, that the purpose for which the land in dispute is sought to be taken is illegal, and that the prayer of the note should be granted.

LORD M'LAREN was absent.

The Court adhered.

Counsel for the Complainers—D.-F. Asher, Q.C. — Cooper. Agent — James Watson, S.S.C.

Counsel for the Respondents—Sol.-Gen. Dickson, Q.C.—Malcolm. Agents — Clark & Macdonald, S.S.C.

HIGH COURT OF JUSTICIARY.

Tuesday, January 26.

(Before the Lord Justice-General, Lord Adam, and Lord Kinnear.)

GOW & SONS *v.* M'EWAN.

Justiciary Cases—Small Debt Appeal—Small Debt (Scotland) Act 1837 (1 *Vict. cap.* 41), *sec.* 31.

A Sheriff-Substitute dismissed a small debt action on the following ground as stated by himself in a report made to the High Court—"After hearing the parties I came to the conclusion that there should be an end of strife, and it was not desirable to re-open the case for the third time." *Held* that a decision on such grounds entitled the party aggrieved thereby to an appeal, in terms of section 31 of the Small Debt Act 1837.

This was an appeal by J. Gow & Sons, furniture dealers, Trongate, Glasgow, against a decree pronounced in the Small Debt Court at Dumbarton on 19th May 1896, in an action at their instance against William M'Ewan, 1 Union Street, Clydebank, under the following circumstances:—The appellants in 1892 executed an order for goods from William M'Ewan, who paid instalments on the price. Finding that only a small balance remained, Gow & Sons sent in June 1895 a lithographed form stating that the account had been marked off. In July 1895 M'Ewan ordered further goods from Gow & Sons, for which he incurred an account of £6, 7s. In March 1896, when only £1, 12s. of this account had been paid off, Gow & Sons, through a mistake of their clerk, sent to M'Ewan a lithographed form stating that as the balance due by him was only a small one it had been marked off. In April 1896 they raised a small-debt action for £4, 15s., being the balance of their account. This action was dismissed on M'Ewan producing the receipt in June 1895. A second action was raised in the same month, in answer to which M'Ewan produced the letter sent to him by mistake in March, and the action was in consequence dismissed. A third action was raised in May, and the Sheriff (GEBBIE) dismissed the case and refused Gow & Sons a proof.

Gow & Sons appealed to the High Court and pleaded:—"(Firstly) Incompetency or malice and oppression on the part of the Sheriff-Substitute. (Secondly) That the procedure in said cases, and particularly in the case dismissed on said 19th May, was radically incompetent and contrary to the provisions of section 13 of the Small Debts Court (Scotland) Act 1837. (Lastly) Generally under section 31 of the said Small Debts Court (Scotland) Act 1837, the Sheriff-Substitute has deviated from the statutory enactments wilfully or so as to prevent substantial justice from being done."

By section 31 of the Small Debt (Scotland) Act 1837 (1 Vict. cap. 41), it is provided, *inter alia*, as follows:—"That it shall be competent to any person considering himself aggrieved by any decree given by any sheriff in any cause or prosecution raised under the authority of this Act, to bring the case by appeal before the next Circuit Court of Justiciary, or when there are no Circuit Courts, before the High Court at Edinburgh . . . Provided always that such appeal shall be competent when founded on the ground of corruption or malice and oppression on the part of the sheriff, or on such deviations in point of form from the statutory enactments as the Court shall think took place wilfully, or have prevented substantial justice having been done, or on incompetency, including defect of jurisdiction of the sheriff."

The case was heard on 6th November 1896 and remitted to the Sheriff to report on the circumstances. The Sheriff lodged a report, stating the facts given above, explaining that in the second action he had intended to have given decree of absolvitor instead of dismissing the action, and giving, with regard to the third action, the explanation quoted in the rubric and in the opinion of Lord Kinnear.

Argued for the appellants—The Sheriff here had refused to apply his mind to the case. That was sufficient to give a right to appeal. It was not necessary to state whether corruption, malice, or oppression, or incompetency was the ground of appeal—*Murray* v. *Mackenzie*, April 21, 1869, 1 Coup. 247; *Gordon* v. *Mulholland*, January 26, 1891, 18 R. (J.C.) 18; *Reid* v. *Sinclair*, November 22, 1894, 22 R. (J.C.) 12.

Argued for the respondent—The Sheriff had applied his mind to the case. He may have been wrong, but that was not a ground of appeal from a decision in a Small Debt Court.