had to account to Bisset & Wyllie for the balance. If, on the other hand, the plant had deteriorated and brought less than £79, the defender would still have held Bisset & Wyllie responsible for the full sum with interest. This shows, I think, that there was no true sale; it was a loan, and the defender's receipts for interest bear out this view.

Neither was there a good security or pledge, because there was no delivery.

If so, when Bisset & Company, who succeeded Bisset & Wyllie, granted the trust-deed in favour of the pursuer, the plant in question was their property and not that of the defender. I understand that the plant is still in the premises in St Peter Street, the lease of which is not yet run out. If the pursuer has taken possession of the premises and plant under the trust-deed, he has acquired a real right in the plant. If he has not taken possession of the plant, he has still a personal right to obtain possession of it, although no doubt he has not a right of property as yet. In either case the defender has no right of property in the plant, and no right to resist the pursuer's demand, if in point of fact he is preventing the pursuer from taking possession of the plant.

I am therefore of opinion that the appeal should be dismissed.

The Court pronounced this interlocutor—

"Dismiss the appeal: Find in terms of the findings in fact and in law in the interlocutor appealed against, and find further in fact as follows:—(1) That there was no sale by James Bisset and Alexander Bisset of the machinery and plant in question to the appellant; (2) that the sum of £200 paid by the appellant to the said James and Alexander Bisset was advanced on loan and not paid as the price of said machinery and plant; and (3) that said machinery and plant were in the possession of the said James and Alexander Bisset at the date of the trust-deed granted by them in favour of the respondent, and passed in property to him by virtue of said assignation and delivery following thereon: Therefore of new refuse the prayer of the petition so far as it relates to the gas-engine mentioned in the record, and *quoad ultra* find and declare in terms of the said prayer, and grant interdict as craved, and decern: Find the respondent entitled to expenses in this Court, and remit," &c.

Counsel for the Pursuer and Respondent—Salvesen, K.C.—D. Anderson. Agents—Macpherson & Mackay, S.S.C.

Counsel for the Defender and Appellant—Campbell, K.C.—Gunn. Agents—Mackay & Young, W.S.

Wednesday, March 4.

SECOND DIVISION.

[Sheriff Court at Kirkcaldy.

BRAID *v.* JOHN SWAN & SONS, LIMITED.

Process—Appeal—Appeal under Summary Jurisdiction Acts—Civil Causes—Competency—Court of Session or Court of Justiciary—Jurisdiction—Statute—Construction—Summary Procedure Act 1864 (27 *and* 28 *Vict. c.* 53), *sec.* 28—*Summary Prosecutions Appeals Act* 1875 (38 *and* 39 *Vict. c.* 62), *sec.* 7—*Summary Jurisdiction Act* 1881 (44 *and* 45 *Vict. c.* 33), *sec.* 9 (4)—*Statute Law Revision Act* 1894 (57 *and* 58 *Vict. c.* 56), *sec.* 1.

Held that section 7 of the Summary Prosecutions Appeals Act 1875 is not repealed by section 9, sub-section 4, of the Summary Jurisdiction Act 1881, and that it is still competent to appeal to the Court of Session in causes under the Summary Jurisdiction Acts, where the jurisdiction is of a civil nature.

Public Health—Food—Unsound Meat—Complaint—Relevancy—Public Health (Scotland) Act 1897 (60 *and* 61 *Vict. c.* 38), *sec.* 43.

Held that in prosecutions for contravention of section 43 of the Public Health (Scotland) Act 1897 it is not enough to libel merely that the diseased meat was intended for the food of man, but that it is also necessary to libel either that it was exposed for sale, or that it was deposited in some place, or was in course of transmission, for the purpose of sale, or of preparation for sale.

This was a case for appeal to the Court of Session stated by the Sheriff-Substitute (Gillespie) in the Sheriff Court at Kirkcaldy, in terms of section 3 of the Summary Prosecutions Appeals (Scotland) Act 1875, in a complaint under the Summary Jurisdiction Acts at the instance of Francis Braid, sanitary inspector, acting under the Provost, Magistrates, and Town Council of the burgh of Kirkcaldy, and as such the local authority of the burgh, complainer and appellant, against John Swan & Sons, Limited, live stock agents, The Fife Central Mart, Thornton, respondents.

The case stated was as follows—"This is a cause originating in a complaint under the Summary Jurisdiction (Scotland) Acts of 1864 and 1881, and the Criminal Procedure (Scotland) Act of 1887, brought by the appellant against the respondents, charging them with having contravened section 43 of the Public Health (Scotland) Act 1897, in so far as on the 30th day of October 1902 years they had in their possession in the slaughter-house situated in Cowan Street, Kirkcaldy, the carcase of a bullock which was intended for the food of man, and which was diseased, unsound, and unfit for the food of man, and was seized on said date by the complainer, and by order of

John Tait, one of the Magistrates of the burgh of Kirkcaldy, dated 31st October 1902, condemned and ordered to be destroyed or so disposed of as to prevent it from being exposed for sale or used for the food of man, whereby the said John Swan & Sons, Limited, are in terms of the said section 43 of said Act liable to a penalty not exceeding £50. The complaint was called in Court on the 3rd day of December 1902, when the respondents, who are a limited company, appeared by their secretary, who, after the complaint was read over to him, and before tendering a plea, stated the following objection to the relevancy of the complaint, viz., that it was not enough to libel that the animal was intended for the food of man, but that it was necessary also to libel one or other of the alternatives contained in section 43 (1*a*) of the said Public Health (Scotland) Act of 1897, viz., 'that it was exposed for sale or deposited in any place, or was in course of transmission for the purpose of sale, or of preparation for sale.' After hearing parties' procurators, I was of opinion that the objection was a good one, and I therefore sustained the same, and dismissed the complaint.

"The question of law for the opinion of the Court is as follows—Is the complaint, as laid, relevant to warrant a conviction under section 43 of the Public Health (Scotland) Act 1897?"

The respondents objected to the competency of the appeal on the ground that such an appeal could only be taken to the High Court of Justiciary, and founded on section 9, sub-section (4), of the Summary Jurisdiction (Scotland) Act 1881.

By section 28 of the Summary Procedure (Scotland) Act 1864 it is enacted—"In all proceedings by way of complaint instituted in Scotland in virtue of any such statutes as are hereinbefore mentioned the jurisdiction shall be deemed and taken to be of a criminal nature where, in pursuance of a conviction or judgment upon such complaint or as part of such conviction or judgment, the Court shall be required or shall be authorised to pronounce sentence of imprisonment against the respondent, or shall be authorised or required in case of default of payment or recovery of a penalty or expenses, or in case of disobedience to their order, to grant warrant for the imprisonment of the respondent for a period limited to a certain time, at the expiration of which he shall be entitled to liberation: and in all other proceedings instituted by way of complaint under the authority of any Act of Parliament the jurisdiction shall be held to be civil."

By section 7 of the Summary Prosecutions Appeals (Scotland) Act 1875 it is enacted:—"The superior court to which a case, stated and signed by an inferior judge as hereinbefore provided, shall be sent for opinion shall be the High Court of Justiciary at Edinburgh when the jurisdiction in the cause is of a criminal nature, according to the provisions contained in the 28th section of the Summary Procedure Act 1864, and either division of the Court of Session when the jurisdiction in the cause is of a civil nature according to the said provisions."

By section 9, sub-section 4, of the Summary Jurisdiction Act 1881 it is enacted:—"All appeals from proceedings under the Summary Jurisdiction Acts shall be taken to the High Court of Justiciary at Edinburgh or on circuit."

By section 1 of the Statute Law Revision Act 1894 the words "at Edinburgh or on circuit" in section 9, sub-section 4, of the Summary Jurisdiction Act 1881 are repealed.

Argued for the respondents—The appeal was incompetent. This was the first time the point had been considered. Section 9, sub-section 4, of the Act of 1881 had evidently escaped observation both in *North British Railway Company* v. *Dumbarton Harbour Board*, January 13, 1900, 2 F. (J.C.) 20, 37 S.L.R. 294; and *Simpson* v. *Corporation of Glasgow*, February 28, 1902, 4 F. 611, 39 S.L.R. 371. The point had been brought up but had not been determined in *Lindsay* v. *Low & Company*, February 20, 1902, 4 F. (J.C.) 45, 39 S.L.R. 489, as that case had been decided on relevancy. The words of the section were all-embracing, and did not admit of a construction excluding appeals in cases like the present.

Argued for the appellant—The appeal was competent. Section 9 (4) of the Act of 1881 did not repeal section 7 of the Act of 1875. It only amended it so as to permit appeals, which formerly could only be taken to the High Court of Justiciary, being taken to either the High Court or the Circuit Court. Section 7 of the 1875 Act had never been repealed, and if section 9 (4) of the 1881 Act could be read consistently with it, that should be done.

LORD JUSTICE-CLERK—The position of matters is extremely puzzling. Under the Acts of 1864 and 1875 a distinction is expressly drawn between criminal and civil procedure. This distinction is very plain in terms of the 1864 Act, viz.—where imprisonment can be inflicted as a punishment the jurisdiction is criminal; where only money penalties can be inflicted the jurisdiction is civil. Now, if we look at section 9, sub-section 4, of the Act of 1881 we find it enacted that "all appeals from proceedings under the Summary Jurisdiction Acts shall be taken to the High Court of Justiciary at Edinburgh or on circuit." This no doubt appears *prima facie* to refer to all proceedings and to repeal the provisions of the older statutes. But when considering the matter more carefully I am of opinion that the words are open to construction. The meaning I attach to them is that the section was intended to deal with criminal appeals which could previously only be taken to the High Court of Justiciary at Edinburgh, and to enlarge the jurisdiction by providing that such appeals could thereafter be taken either to the High Court of Justiciary at Edinburgh or to the Circuit Court. This gives the section a reasonable meaning consistent wtih the provisions of the Acts of 1864 and 1875. I think this is the proper reading of the section, although I confess it

at first appears difficult to read it in this manner. I am therefore of opinion that the respondents' objections to the competency of the appeal should be repelled.

LORD YOUNG—If section 9, sub-section 4, which was referred to as the foundation of this objection, was capable of no other construction than that put upon it by the respondents, then we could not do otherwise than give effect to their contention, although the result of doing so might be undesirable. But I think that the section is capable of the construction which your Lordship has mentioned, and that being so, I am disposed to adopt the construction which is desirable and avoid that which is undesirable.

LORD TRAYNER—The words of section 9, sub-section 4, of the Act of 1881, on which the appellants base their argument, are certainly very broad, and I quite see the difficulty which these words as expressed give rise to. If they are to be read as "appeals of every description under the Summary Jurisdiction Acts," then this appeal is not competent to the Court of Session. But this involves the idea that section 9, sub-section 4, of the Act of 1881 repeals section 7 of the Act of 1875. I am slow to adopt the view that this latter section has been repealed by implication, and I see no reason to think that this was intended.

But further, I think the two sections can be read consistently with one another. When the Act of 1875 was passed the High Court of Justiciary sat only at Edinburgh. Section 7 provided that in cases in which the jurisdiction "is of a criminal nature" the appeal should be to the High Court of Justiciary at Edinburgh. Section 9, subsection 4, of the Act of 1881 authorised such appeals to the High Court at Edinburgh or on circuit, the latter words being added because at that time the sittings on circuit were not regarded as sittings of the High Court. Since 1887, however, Circuit Courts are regarded as sittings of the High Court, and thus the words "or on circuit" have become superfluous and have been struck out by the Statute Revision Act. It appears to me, therefore, that the deletion of these words (introduced for the convenience of litigants and now unnecessary) leaves the Act of 1875 as it stood, and I am of opinion that all appeals which were appropriate at its date to the High Court of Justiciary at Edinburgh may now be taken at any sitting of that Court, but that appeals in cases where the jurisdiction is not "of a criminal nature" are competent to the Court of Session.

LORD MONCREIFF—I regret that I am unable to read section 9, sub-section 4, of the Summary Jurisdiction Act of 1881 in the restricted sense which your Lordships have adopted, or to put the gloss on the words of the statute which your Lordships have put on them. I am unable to agree with your Lordships, and shall only add that as the effect of the Act of 1881 is to make almost all proceedings under the Summary Jurisdiction Acts criminal or *quasi* criminal *quoad* review, there is no antecedent improbability that that statute should limit review to the Court of Justiciary. I quite recognise the expediency of your Lordships' construction of the statute, because it would be a misfortune if, after the two solemn decisions which were cited to us giving effect to the distinction between causes of a civil nature and causes of a criminal nature according to the test laid down in section 28 of the Summary Procedure Act of 1864 as determining whether an appeal under the Summary Prosecutions Appeals Act of 1875 should be taken to this Court or to the High Court of Justiciary, it were now to be held for the first time that the 9th section of the Act of 1881 repealed section 7 of the Act of 1875 and section 28 of the Act of 1864 in so far as appeals are concerned. At the same time I have not been able to read section 9 of the Act of 1881 except in an absolute sense, and as directing all appeals to be taken to the High Court of Justiciary.

Parties were then heard on the question of the relevancy of the complaint.

Argued for the appellant—The charge was a relevant charge under section 43 of the Act, and it was not necessary to libel that the meat was exposed for sale, or deposited or in course of transmission for sale, or being prepared for sale. If it was held that it was necessary to libel exposure, &c., for sale, endless loopholes would be afforded for escape from conviction. The section came in place of section 26 in the Public Health Act of 1867, and in construing that section a conviction without libelling exposure, &c., for sale had been held good—*Phillips* v. *Auld*, January 9, 1892, 19 R. (J.C.) 29, 29 S.L.R. 299.

Counsel for the respondents were not called upon.

LORD JUSTICE-CLERK—I have no doubt whatever in this case. Section 43 of the Act deals with two different matters—(1) the seizure of unsound or diseased food for the protection of the public, and (2) the prosecution of any person exposing such food for sale. If an inspector discovers a carcase or other article intended for the food of man which is unfit for human food, he is entitled to have it condemned whether it is for sale or not. But it is different in the case of a prosecution. In order to justify a charge under the section the animal or other article must not only be unfit for human food, but must be "exposed for sale or deposited in any place or in course of transmission for the purpose of sale or of preparation for sale." What this section of the Act is intended to strike at and to prevent is the selling of diseased meat to the community. In order to make the complaint relevant it is therefore necessary to libel that the unsound meat was exposed for sale or deposited or in course of transmission for the purpose of sale or of preparation for sale.

LORD YOUNG, LORD TRAYNER, and LORD MONCREIFF concurred.

The Court repelled the respondent's objection to the competency of the appeal, answered the question of law therein stated in the negative, and decerned.

Counsel for the Appellant—Younger—J. B. Young. Agents—Dundas & Wilson, C.S.

Counsel for the Respondents—M'Lennan. Agents—Dalgleish & Dobbie, W.S.

Friday, March 6.

SEVEN JUDGES.

[Sheriff Court at Airdrie.

MOTHERWELL *v.* MANWELL.

Superior and Vassal—Casualty—Discharge—Satisfaction—Superiority and Dominium Utile held by Same Person—Confusio—Composition—Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. cap.* 94), *sec.* 4, *sub-secs.* 3 *and* 4.

At the date of the death of the last expressly entered vassal in 1885, the estates of superiority and *dominium utile* in certain lands were vested in the same person, but the estates, which had been acquired on separate titles, were not consolidated, and continued to be held on separate titles. Thereafter, the superiority and *dominium utile* having passed to separate singular successors, the superior claimed payment of a casualty of composition, upon the ground that no casualty had been paid since the death of the last expressly entered vassal. The vassal maintained that the claim for a casualty had been extinguished *confusione* when the two estates belonged to the same person. *Held*, by a majority of a Court of Seven Judges (Lord Justice-Clerk, Lords Adam Kinnear, Trayner, and Moncreiff—*diss.* Lords Young and M'Laren), that the claim for a casualty could not be held to have been extinguished in respect of the superior and the vassal being the same person, and that the present superior was now entitled to claim payment of the casualty from the present vassal.

Sheriff—Jurisdiction—Action of Declarator and for Payment of Casualty—Competency.

Question whether an action of declarator and for payment of a casualty, under section 4, sub-section 4 of the Conveyancing (Scotland) Act 1874, was competent in the Sheriff Court when the value of the lands was less than £1000.

Gavin Black Motherwell, writer, Airdrie, the superior of certain subjects, raised an action in the Sheriff Court at Airdrie against Mrs Margaret M'Phee or Manwell, Gourlay's Lane, Airdrie, as his vassal, for declarator that a casualty of composition was due by her in consequence of the death of the last expressly entered vassal, and for payment of £22, 19s. 9d., being the amount of a year's rent less deductions.

The pursuer averred that the value of the subjects was less than £1000.

The Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94), section 4, sub-section 2, provides that every proprietor duly infeft shall be deemed to be duly entered with his superiors as at the date of the registration of his infeftment. Sub-section 3 of section 4 enacts—"Such implied entry shall not prejudice or affect the right or title of any superior to any casualties . . . which may be due or exigible in respect of the lands at or prior to the date of such entry; and all rights and remedies competent to a superior under the existing law and practice, or under the conditions of any feu-right, for recovering, securing, and making effectual such casualties . . . and all the obligations and conditions in the feu-rights prestable to or exigible by the superior, in so far as the same may not have ceased to be operative in consequence of the provisions of this Act or otherwise, shall continue to be available to such superior in time coming; but provided always that such implied entry shall not entitle any superior to demand any casualty sooner than he could by the law prior to this Act or by the conditions of the feu-right, have required the vassal to enter or to pay such casualty irrespective of his entering." Sub-section 4 enacts—"No lands shall after the commencement of this Act be deemed to be in non-entry, but a superior who would but for this Act be entitled to sue an action of declarator of non-entry against the successor of the vassal in the lands, whether by succession, bequest, gift, or conveyance, may raise in the Court of Session against such successor, whether he shall be infeft or not, an action of declarator and for payment of any casualty exigible at the date of such action, and no implied entry shall be pleadable in defence against such action; and any decree for payment in such action shall have the effect of, and operate as, a decree of declarator of non-entry, according to the now existing law, but shall cease to have such effect upon the payment of such casualty, and of the expenses (if any) contained in said decree; . . . and the summons in such action may be in, or as nearly as may be in, the form of Schedule B hereto annexed.

The superiority of the subjects in question was acquired by William Motherwell in December 1866, and he acquired the *dominium utile* in November 1876. He was duly infeft in both estates, under separate titles, and continued in possession of them until he died in 1892. The estates were not consolidated and continued to be held on separate titles.

In November 1892, Motherwell's testamentary trustees, acting under his trust-disposition and settlement, dated 4th March 1890, and registered in the Books of Council and Session 12th March 1892, made up a title to the *dominium utile*, and in December 1897 disponed it to the defender's husband, from whom it passed on his death to the defender, who in turn was duly infeft.