cautioners were the pursuer and a person named Thomson, now bankrupt and dead, who concurred with him in granting certain promissory notes to his creditors for said second instalment. When these notes fell due they were dishonoured and protested for non-payment. But in order to raise money to pay the debt it was agreed between the pursuer and defender and the trustee on the defender's sequestrated estate that the defender, with the trustee's concurrence, should assign to the pursuer, *ex facie* absolutely, certain policies of life insurance forming part of defender's assets. Accordingly, in February 1864, an assignation was executed. Upon the pursuer getting the policies, he reassigned them to a Mr Wilson, obtaining from him a loan of £300 on their security. With this sum, and a further sum of £156, 2s. 2d. paid out of pursuer's own funds, the defender discharged said second instalments. Thereafter the pursuer raised the present action for payment of the full sum of £456, 2s. 2d. sterling, in the Sheriff-Court, Glasgow, and was met with the defence that, by the terms of a back-letter granted by the pursuer to defender on 16th February 1864, the pursuer had bound himself to take no steps towards recovering his debt or selling the policies for six months after its date, and that as the action was raised within the six months, it was premature, and fell to be dismissed. In said back letter it was acknowledged that the assignation had been granted in security only of the pursuer's advances to pay the said second instalment of 2s. 6d. per pound, and then followed the clause of the letter on which the whole case turned, and which is in these terms:—"But as I am about to negotiate a loan on said policies to meet said payments in part, and that therefore the said absolute assignation has been necessary, I agree and bind myself, upon said loan being completed, to reassign to you, at your expense, the said policies, under burden of the sums, principal, interest, and penalties, contained in said bond, and all other further sums paid by me in liquidation of said composition, and of any premium I may be called upon to pay to keep said policies in force, with interest thereon, and I bind myself also that said policies will not be sold under the bond to be granted by me for six months from this date."

The Sheriff-Substitute (Strathern) and the Sheriff (Alison) dismissed the action as premature. On advocation the Lord Ordinary (Mure) adhered. The pursuer reclaimed.

SCOTT and BRAND for him argued—With reference to the balance of £156, 2s. 2d. to which the summons had been restricted in this Court—(1) That it was clear from the letter that only *a part* of the sum necessary could be raised on the security of the policies, and that the back letter did not affect the pursuer's right as cautioner in the promissory notes to operate immediate relief for payment at least of the said balance not obtained on the security of the policies. (2) That the last clause of the letter related entirely to the money to be advanced by the lender (Wilson), and that even he was not to be bound to give a credit of six months, but only not to sell the policies during that interval. (3) That the right of immediate relief was clear, that it was a favourable right, and being founded always on generous motives, should be neither taken from the cautioner nor suspended, except upon clear words to that effect. (4) That the case of the Dundee Marine Insurance Company *v.* Brown, 11th Feb. 1847, 9 D. 607, had no application, as here the sum was due and payable, while in that case the sum sued for was neither due nor payable.

GIFFORD and W. N. M'LAREN, for the defender, answered that, on a fair construction of the back letter and the accompanying facts, it must be inferred that the pursuer had agreed to take no steps for six months, and that therefore, on the authority of the Dundee Marine Insurance Company *v.* Brown, the action was premature, and ought to be dismissed. It was admitted that the back letter showed that only a part of the necessary sum could be raised on the security of the policies, and that the last clause restricted the lender of the £300, and not the pursuer.

The LORD JUSTICE-CLERK—This action was raised for payment of £456, 2s. 2d. advanced by the pursuer to the defender to enable him to pay the second instalment of his composition. We are all of opinion that the Sheriff-Substitute and the Sheriff were wrong in dismissing the action. We are also of opinion that the pursuer originally asked too much. Instead of asking £456, 2s. 2d. he should have deducted the £300, which was plainly not to be made the subject of demand; but as to the balance, we think his claim is good. Therefore we sustain the pursuer's right to sue, but as he asked too much we find no expenses due to or by either side in the Court below, and in the advocation we recall the Lord Ordinary's interlocutor, decern for £156, 2s. 2d., superseding extract till the pursuer has reassigned the policies to the defender, and we find the pursuer entitled to the expenses of the advocation.

Agent for Pursuer—John Walls, S.S.C.
Agent for Defender—William Officer, S.S.C.

CROSBIE *v.* M'MINN.

Public Houses Act—25 and 26 Vict., cap. 35—*Reduction—Relevancy—Jurisdiction—Notice.* (1) Complaint, conviction, and sentence alleged to be under this Act, reduced in respect the complaint did not charge an offence, and the Judge had therefore no jurisdiction to try it; (2) Action of reduction not barred by section 35 of the Act in respect it did not protect proceedings not conducted under the statute.

This was an action of reduction of a complaint, conviction, and sentence against the pursuer, in the Burgh Court of Dumfries, for alleged breach of her hotel certificate, obtained under the 25 and 26 Vict., cap. 35. The certificate, *inter alia*, provides that the pursuer "do not keep open house, or permit or suffer any drinking on any part of the premises belonging thereto, or sell or give out therefrom any liquors before eight of the clock in the morning, or after eleven of the clock at night, of any day, with the exception of refreshment to travellers, or to persons requiring to lodge in the said premises." The 26th section of the statute under which the complaint apparently professed to proceed requires that the particulars of the offence, and the place and time of commission, should be set forth, and also whether it be a first, second, or third offence, as the case may be. And the pursuer was charged by the Procurator-Fiscal of Dumfries with breach of certificate, inasmuch as "she did unlawfully keep her said inn and hotel or public-house open, by permitting or suffering one or more persons to be therein—viz., John Gillespie, a baker, residing in Dumfries, and others, militiamen, whose names are to the complainer unknown, who were neither lodgers nor persons requiring to be accommodated in said house, inn, or hotel."

The local magistrate found the alleged offence proven, and inflicted a fine, with the alternative of imprisonment, The pursuer appealed to the Circuit Court at Dumfries, on the ground that there was no relevant offence charged against her, and that therefore the Magistrate had no jurisdiction to entertain the complaint. The appeal was certified to the High Court by Lord Deas; but after a hearing there, dismissed, on the ground that that Court could not entertain the appeal for the reasons set forth. The pursuer then raised the present action of reduction in the Court of Session. There was also a conclusion for damages, but this was given up.

The Lord Ordinary decided in favour of the pursuer, reducing the complaint, conviction, and sentence, on the ground that no statutory offence whatever had been charged.

The defender reclaimed, and

For him the SOLICITOR-GENERAL and MAIR argued—(1) That the complaint sought to be reduced charged a relevant offence. (2) That even though not sufficiently relevant in its details, that was a matter which could be remedied by an appeal to the Circuit Court, as provided in the statute; and (3) That in any view the Act of Parliament provided, sec. 35, "that every action or prosecution against any Procurator-Fiscal, Superintendent, or other officer of police or constable, or other person, on account of anything done in execution of the recited Acts, and this Act, or any of them, shall be commenced within two months after a cause of action or prosecution shall have arisen, and not afterwards." That the complaint in question was something done in execution of the Act; and therefore that as the present action was not raised till after the expiry of the statutory period, it was now incompetent. The reclaimer relied on the authority of Russell *v.* Laing, 25th June 1845, 7 D. 919.

THOMS and BRAND, for the pursuer, were not called on to reply. Their contention on record was—(1) That no relevant offence having been charged, the Magistrate had no right or jurisdiction to entertain the complaint, or to pronounce the sentence therein complained of. (2) That the pursuer not having violated any of the terms or conditions of her certificate, the complaint, conviction, and sentence were bad in law, and therefore subject to reduction; and (3) That the alleged offence being no offence, either against the statute set forth in the complaint or against common law, the complaint, conviction, and sentence were illegal and groundless. Pursuer's authorities were Ferguson *v.* Malcolm, 14th Feb. 1850, 12 D. 732; M'Donald *v.* Dobie, 14th Jan. 1864, 2 M'Pherson, 437.

The Court were of opinion that the only jurisdiction which the Magistrate had was under the Public Houses Act, because the offence intended to be charged was a breach of that Act. The clause required three things—(1) That open house be not kept; (2) that no drinking be permitted between eleven P.M. and eight A.M.; and (3) that no liquor be sold within the same hours. The object here plainly was to prevent trade being carried on between these hours. The prohibition against keeping open house was simply a prohibition against carrying on business, and the other two enactments were plainly added with a view to prevent any evasion of this the leading prohibition; but the complaint merely said that the alleged offender kept her house open, which was a very different thing from "keeping open house;" and if the complaint had stopped there they would have no difficulty in holding it irrelevant but it did not; for, confounding together the second and third prohibitions, which were quite distinct, it went on to say that the specific way in which the offence was committed was "by permitting," &c. (as above). The mere suffering persons to be in the house did not surely imply either that drinking was permitted or that liquor was sold. There was here such a plain disconformity with the terms of the certificate as could not be got over. The objection to the complaint was therefore good, and that being so, it followed as a matter of course that there was no jurisdiction; and that being so, it would be monstrous to hold that the pursuer, against whom no offence had been proved, had no means of wiping out the stain thus inflicted on her character. It was quite true that under the statute all review was excluded, but here the proceedings had not been conducted under the statute, and were therefore not protected by it. The same observation applied to the objection that the action had not been brought within the statutory period.

The interlocutor of the Lord Ordinary was therefore adhered to, with additional expenses.

Agent for Pursuer—W. Officer, S.S.C.

Agent for Defender—W. Kennedy, W.S.

Saturday, June 9.

FIRST DIVISION.

MACKENZIE *v.* INVERNESS AND ABERDEEN JUNCTION RAILWAY COMPANY.

Arbitration—Reduction of Decree-Arbitral—Lapse of Submission—Ultra Fines Submissi. A decree-arbitral in a submission under the Lands Clauses Act reduced, because—(1) the submission had expired, and (2) the arbiter had decided a matter not submitted to him, which was not separable from what was.

The Inverness and Ross-shire Railway Company, now represented by the defenders, required for the formation of their line of railway to intersect the lands of Brahan and others, part of the entailed estate of Seaforth, of which the late Honourable Mrs Mackenzie was, in 1861, heir of entail in possession, and also the lands of Kildun, a portion of which formed part of the said entailed estate, and another portion of which belonged to the pursuer, Mr Keith William Stewart Mackenzie, as fee-simple proprietor thereof.

In January 1861 the said railway company entered into a minute of agreement with Mrs Mackenzie and Mr Mansfield, C.A., her trustee, and the pursuer, whereby the parties thereto, *inter alia*, agreed "that all claims, except as hereinbefore reserved, of compensation to be paid by the said first party (the company) to the *proprietrix* of said lands, for the lands to be taken, &c., shall be fixed and determined by the said Peter Brown, Esq., as sole arbiter."

On 22d October 1862 the said arbiter issued his decree-arbitral, in which he found that the value of the land taken belonging to the said second parties (Mrs Mackenzie and the pursuer), or in which they are respectively interested, and the damage to the remainder of their lands, was £706, 11s. 6d., for which sum he decerned against the railway company.

The pursuer sought to reduce the minute of agreement, and also the decree-arbitral. The former, he contended, was invalid, because Mrs Mackenzie, being an heiress of entail under a strict