any way deprived himself of the opportunity of having farther written evidence by what he has done, he will have no other remedy except a reference to oath. I think the practice is just to find that the statute applies, and consequently that the pursuer cannot prove except by writ or oath of party.

Lord Justice-Clerk—I have arrived at the same conclusion, and without any difficulty, but I am anxious to explain in a few words the ground, and the only ground, upon which I proceed. The question raised here is, Whether this debt which is sued for is founded on a written obligation? The pursuers allege that it is, and they offer to prove it. If the pursuers have relevantly alleged a written obligation, they must be allowed to prove it, and we must assume not merely that an agreement was executed, which they say it was, but that it was continued, and even varied as the pursuers allege, as a matter of fact, provided the allegation be relevant. Whether it was so executed, or continued, or varied, I cannot tell, because we have no proof before us on which we can proceed. But this is quite plain, that if that be a relevant statement, the pursuer is in no way restricted as to the mode of establishing it. But I am of opinion that the defender did not come under any obligation at all in regard to the debt sued for, by executing, if he did execute, the agreement in question. The obligation, such as it was, was laid on the creditor solely—I mean the creditor in this debt—who was bound to furnish, if required, and at a reduced rate, the waggons in respect of the hire of which the claim is made. Now, nothing in the shape of a writing will exclude the operation of the statute excepting that which expresses present obligation, although the thing to which the party is bound may be paid or performed in the future, or conditionally.

All the cases referred to consist of present obligations, like the case of *Dickson*, where the obligation was a contingent cautionery obligation, but still the party wss held bound to it in the event of the furnishings being made. And so in the case of *Blackadder*, the party was bound to give out, and the party who employed him was bound to pay him in that event. The only question of difficulty is the effect of the written order; and in regard to that I do not concur in Lord Benholme's view that the limitation of time in regard to the subsistence of the agreement is of much conseqence. I do not know that in this matter, which is *in re mercatoria*, if the question had arisen here, at what rate these waggons was to be charged for? and it had been clearly proved that according to a course of dealing for many years after the five years had expired, the parties had gone on acting on it, but that that would have been quite enough to set up the agreement. I cannot doubt that—and certainly it would be a very narrow view to take if the rights of parties were regulated by an interpretion such as that—that because the prorogation had not been reduced to writing, therefore it was not founded on a written obligation. The question that does arise is, how far this written order, taken along with the obligation of the Company to furnish the wagons, makes out a written obligation; but I am of opinion that it does not make out a written obligation for this debt, because I see nothing that obliged the party ordering the wagons to retain them for the period in question, nor do I see anything to prevent the Company resuming them at any time they thought fit, for whether the agreement was prorogated or not, it is quite clear there was no limit in point of time. On the whole matter therefore, and agreeing entirely that this is one of the claims which properly falls under the statute, I am of opinion that the Lord Ordinary's conclusion is correct, and I agree with Lord Neaves as to the interlocutor which he proposes.

The Court accordingly pronounced the following interlocutor:—

> "The Lords having heard counsel on the reclaiming note for the North British Railway Company against Lord Shand's interlocutor of 13th August 1873: Adhere to the first finding of the said interlocutor: Find the defenders entitled to their expenses since the date of that judgment: *Quoad ultra* continue the cause, and reserve all other questions of expenses: Remit to the Auditor to tax the expenses now found due, and to report."

Counsel for Pursuer—Solicitor-General (Clark) and Jamieson. Agents—Dalmahoy & Cowan, W.S.

Counsel for Defender—Watson and Orr Paterson Agents—Hill, Reid & Drummond, W.S.

Friday, January 16.

SECOND DIVISION.

[Lord Gifford, Ordinary.

SAWERS *v.* J. & H. M'CONNELL.

(*Ante*, vol. x, p. 249.)

Landlord and Tenant—Bona Fides—*Personal Bar.*

A contribution having been annually made for forty years by the landlord of a Bleachwork to upper heritors on a stream in respect of certain dams maintained by them, and this contribution having been continued by the tenant during the last five years of his lease without any express permission or prohibition by the landlord; *held*, (*reversing* Lord Gifford, *diss.* Lord Neaves), that the tenant was entitled to deduct the same from his rent, because the landlord was bound by implication and usage under the lease to make the payment, or had led the tenant to believe in *bona fide* that the contribution was a debt.

Interest.

Interest at 4 per cent. allowed on balances of rent unpaid by the tenant, although he had termly tendered payment of his rent on receiving certain deductions to which he was ultimately found entitled by the Court.

This was a reclaiming note against the interlocutor of the Lord Ordinary in an action previously reported, and which was an action at the instance of "the Rev. Peter Sawers, now designating himself Peter Russell Sawers, Free Church minister, Gargunnock," as sole surviving trustee of the late Peter Sawers, bleacher, Nether Kirkton, against Messrs John & Hugh M'Connell, bleachers, Nether Kirkton, and Hugh M'Connell, the sole surviving partner of the firm, for payment of a balance of £281, 7s. 1d., with periodical interest amounting to £30, 8s. 7d., and with interest until payment, in name of overdue rents. Payment of £50 of the sum sued for was resisted on the ground—(1) of no title to sue, the pursuer not being entitled to

sue with his co-trustee; (2) that the property taxes and water-rents being proper charges against the landlords, the defenders were entitled to deduction thereof; (3) that the pursuer's claim for interest was unwarranted; and (4) that the defenders not having been *in mora*, but having been always ready and willing punctually to pay their rents on receiving the proper deductions, and having consigned the full sum due (£199, 10s. 8d.), were not chargeable with interest, and were entitled to absolvitor over and above that sum, with expenses.

The Lord Ordinary pronounced the following interlocutor;—

"*Edinburgh*, 18*th November* 1873.—The Lord Ordinary having heard parties' procurators, and having considered the closed record, proof adduced, and whole process, Finds that the balance of rents due and resting-owing by the defenders to the pursuer as at 27th January 1873, after deducting property tax, was £249, 10s. 8d. sterling: Finds that the defenders have failed to instruct that the sum of £50 paid by the defenders to Messrs Cochran & Hay, per receipts produced, was paid either by authority of the pursuer, or that the same was a debt due by the pursuer, and which he is bound to repay to the defenders, or to allow the defenders deduction or credit therefor: Finds that the pursuer has received payment of the consigned sum of £199, 10s. 8d. under warrant of the Lord Ordinary, dated 18th March last: Therefore decerns and ordains the defenders to pay to the pursuer the sum of £50 sterling, in full of the sums concluded for in the present action, reserving entire all questions as to who is ultimately liable for the said sum of £50, and all claims of relief or repayment thereof: Finds in the circumstances no expenses due to or by either party, and decerns.

"*Note.*—The question in this case came ultimately to be a very simple one, namely, whether the defenders were entitled to credit from the pursuer for a sum of £50, being five years' water-rent paid by the defenders to Messrs Cochran & Hay, upper heritors, in respect of certain dams and water-works, of which the bleachfield belonging to the pursuer, and occupied by the defenders, got the benefit.

"There is no doubt whatever that the defenders paid this water-rent, being £10 a-year, in perfect *bona fide*, believing that it was justly due by the pursuer, their landlord, and that they would get deduction for it in settling their rent with him, or his agent or factor; and it seems also to be the case that the defenders believed that if they did not pay this water-rent they would or might be deprived of the benefit of the dams; and as their lease gave them right to the existing water power which the dams were necessary to maintain, they not unnaturally thought they were justified in continuing to pay the water-rent to Messrs Cochran & Hay. The Lord Ordinary, therefore, has felt considerable sympathy for the defenders, and he cannot help thinking that the course taken by the pursuer in repudiating the long usage of his predecessors and authors is, to say the least of it, somewhat illiberal, and that it was not unjustly characterised by the defenders' counsel as narrow and shabby.

"Still, the Lord Ordinary is bound the decide the case on strict legal principles, and he has felt himself compelled to come to the conclusion that the defenders have failed to instruct either—(1) that they paid the so-called water-rent with the pursuer's authority; or (2) that the rent was legally due by and exigible from the pursuer, and that the defenders, as implied assignees of the creditors, are entitled to relief therefrom.

"It appears that, in order to equalise the flow of water in Kirkton Burn, so as to make it efficient as a water power both in summer and in winter, it has been found necessary to construct at the higher parts of the burn large artificial reservoirs, for the purpose of storing the flood water and the excess available in winter and in wet weather, so as to give a constant supply in summer and in dry weather. It has also been proved that the bleachfield belonging to the pursuer has been benefitted by these operations, and that it was natural and equitable that the pursuer should contribute thereto. It is fully proved that for a period of upwards of forty years the late Mr Sawers and his trustees contributed £5 annually, and that since 1849, when the second dam was formed, they contributed an additional £5 per annum. At the date when the defenders' lease was granted the late Mr Sawers, the truster, was actually paying £10 a-year for the 'existing water power,' and he and his trustees, after letting that existing 'water power' to the defenders, continued to make this annual payment till 1864. About that year, however, Mr Sawers' trustees, with consent of Henry Sawers, the then liferenter, gave the defenders a deduction from their rent of £80 a-year, on condition that the defenders should pay the water-rent, (£10 a-year) which the landlord had hitherto paid. This arrangement was acted upon, and thus the defenders, the tenants of the bleachfield, came to pay the water rent instead of the proprietors or liferenter. The deduction of rent, however, having been only granted during pleasure, the present pursuer, when he succeeded to the liferent, refused to continue the deduction, and it is not disputed that he was entitled so to do, and the defenders have always been ready to pay their rent without the abatement. There never was any settlement of rents, however, till the present action was raised, the defenders merely making payments to account; and the defenders, who, under the arrangement of 1864 had been paying the water-rent direct to Messrs Cochran, continued to do so, supposing that it was a just debt due by the proprietors to the upper heritors.

"But, then, the Lord Ordinary thinks that the defenders took the risk of so doing. In strictness, when the arrangement for abatement of rent was cancelled, matters should have reverted to their former position, and the defenders should have referred Messrs Cochran to the pursuer or his agents for payment of the water rent.

"There are, indeed, strong grounds for holding that the water-rent was justly, or at least equitably, due by the pursuer. As to £5, or one-half of it, it seems to have been paid by the pursuer's authors, by whose acts he is bound, for a period of more than forty years, and as to the remaining £5, this sum has been paid ever since the second dam was constructed. But then it is possible that these payments were of the nature of voluntary contributions. No deed of agreement has been produced, and no obligation under which the payments were made. Indeed, this question as to whether the water rent is a legally exigible debt or not cannot well be tried in the present action, at least it cannot be conclusively tried, because the creditors in the supposed obligation are not parties to the present action, and are not bound

by anything done or found therein; and this is just the misfortune of the defenders, who paid without authority, and without making sure that deduction would be allowed. The Lord Ordinary, however, reserves the question of right entire, for it may very well be that in an action at the instance of the true creditors the pursuer may be found liable for the water rent. As to this the Lord Ordinary can give no opinion. All that he has found in the present action is, that the defenders have failed to instruct a legal right to retain the water rents from the rent of the bleachfield due by them. The Lord Ordinary also leaves untouched any claim of repayment which the defenders may have against anybody other than the present pursuer.

"In the whole circumstances, the Lord Ordinary thinks justice is done by awarding expenses to neither party. To a very large extent the pursuer himself is to blame for the dispute which has arisen, and for the present litigation. He seems to have appointed a factor, Mr Matthew Anderson, but he did not give this factor authority to settle questions with the present defenders, and Mr Anderson very naively depones that he is not sure whether he is the pursuer's agent or not. In Mr Anderson's cross-examination it appears that he got no instructions or information from the pursuer at all, and it is proved that it was at his request that the defenders went on simply making payments to account, without coming to half-yearly or termly settlements. Then, neither the pursuer nor Mr Anderson ever intimated, either in writing or verbally, to the defenders, that there was no water rent due to the upper heritors, or undertook that the 'existing water power' should be maintained, though the water rent for the dams was not paid. The pursuer himself knew the long usage of payment, and never intimated either to the defenders or to the creditors that the usage was to be inverted. This may not prevent the pursuer from now maintaining his strict legal rights, whatever these are, but it seems an equitable and sufficient ground for refusing him the expenses of an action of which he has himself been the cause."

The defenders reclaimed.

At advising—

Lord Benholme—In the present case I find myself in this position, that, while I agree with the greater part of the Lord Ordinary's view of the case, I yet cannot agree in the conclusion to which he has come. I cannot do better in introducing my own view then say that I concur in the following part of the note to his interlocutor:—"The question in this case came ultimately to be a very simple one, namely whether the defenders were entitled to credit from the pursuer for a sum of £50, being five years' water rent paid by the defenders to Messrs Cochran & Hay, upper heritors, in respect of certain dams and water works of which the bleachfield belonging to the pursuer, and occupied by the defenders, got the benefit." I quite concur that the payment of £10 a year was made by the defenders without any express authority from the pursuer. He seems always to have run away and refused to come personally in contact with the question, how and by whom the payment was to be made. The second thing said by the Lord Ordinary to be made out, is, that the payment was not legally due by and exigible from the pursuer, and therefore that the defenders, as implied assignees of the creditors were not entitled to relief. Now I quite agree that there was no legal obligation on the pursuer, as in a question between him and the upper heritors, to continue this payment, but it is in the words that follow as to the defenders, "as implied assignees of the creditors, having no right of relief," that I discern the fallacy in which I think the Lord Ordinary's judgment has proceeded.

Had the question been whether the pursuer, as landlord, had become bound by the series of payments made to the upper heritors to continue their payment in all time coming, I should not have differed from the Lord Ordinary. I think he was not so bound. If he was prepared to sacrifice the benefit which his works were receiving in return for this annual contribution, he was, I think, entitled to withdraw it. Therefore it is clear that, as one of the upper heritors, the defenders could have no claim.

But there is another ground of judgment, which compels me to come to a different conclusion from the Lord Ordinary. I look on the missives of lease of these subjects, and not on the obligation of the pursuers to the upper heritors, as the foundation of the defenders' case, and hold that under the warrandice of the lease the pursuer is bound to relieve the defenders of this payment.

The water power was given as it then existed. It was essential to the full enjoyment of the existing water power that the water rent which had been paid to the upper heritors for forty years and more should continue to be paid. And as the landlord was bound to give the water, he was bound to make the payment.

Having made these observations, I next notice that the Lord Ordinary, toward the end of his note, "reserves the question of right entire, for it may very well be that in an action at the instance of the true creditors the pursuer may be found liable for the water rent." Now, if we look at the state of matters existing when the action was raised, we shall see that for four years the defenders, as tenants, had been making this payment, and that it was utterly impossible that the upper heritors should ever raise action against any one for these years' payment. The reservation of the Lord Ordinary is therefore unmeaning and ineffectual. But it shows also most clearly that the ground of the Lord Ordinary's judgment altogether overlooks the obligation that the pursuer was under, not to the upper heritors, but to the defenders. So far as the upper heritors were concerned the pursuer might do as he liked. But he was not entitled to say to his own tenants—I did not during all these years choose to expose myself to any discussion on the subject with you, but I now say you took on yourselves a risk for which you are answerable, and if you cannot make out that I am liable to the upper heritors you will get nothing from me.

Let us now look at the lease.—[*Reads lease.*] Now it appears to me that it was impossible for the landlord to maintain the high rent of his bleachfield unless he maintained at the same time the supply of water. It is clear that that has been the opinion of the proprietors for the last forty years. It was the opinion of old Mr Sawers, who worked the bleachfield himself. It was the opinion of Henry Sawers, the first liferenter. He continued for some years the payment previously made by his predecessor to the upper heritors, and then, when a short time before his death an arrangement was made between him and his tenants to the effect

that the rent which was £300 a-year should be reduced, he stipulated that for his convenience the payment of £10, which was a burden incumbent on himself under the warrandice of the lease, should be for the future made by the tenants, and held as a payment towards rent. Accordingly, from that time we find, from the receipts in process, the tenants making this payment as for the landlord, on the footing that they were thereby paying part of their rent. On the death of Henry Sawers the present pursuer became liferenter, and it was quite in his power to say—I will no longer allow the abatement of rent given by the late Henry Sawers. And he cannot be accused of any shuffling or indecision in taking this course. But though he withdrew the abatement of rent, it was not in his power to alter the nature of the warrandice under which he, as well as his predecessors, was bound to keep up the water power, and therefore to make the payment to the upper heritors which was essential to that end. It is not therefore in any sense as assignees of the upper heritors, but on their own right to enforce the warrandice of their lease, that the defenders are entitled to insist upon the deduction of these payments from each year's rent.

In the evidence of the defender Hugh M'Connell it is clear how anxious he and his partner were to come to an understanding with Mr Sawers on the subject of the payment of this £10—foreseeing that difficulties might be afterwards raised. It is also clear how anxious Mr Sawers was to avoid any personal communication with them on the subject. In these circumstances, no doubt the tenants in making this payment of £10 a year for the last five years of the lease took on them a certain risk. But what was that risk? Not the risk that Mr Sawers might be found under no obligation to make this payment to the upper heritors, but the risk that Mr Sawers might be found under no obligation to them under the warrandice in their lease to make this payment in order to secure the water supply, which was essential to the carrying on of their works. That was a risk they were quite entitled to run. It was evident that the bleach work could not be carried on without the supply of water. If they did not pay it was evident they would not get the water; and as prudent men, and acting *in bona fide*, they were entitled to say, Our landlord is not dealing openly in this matter, and will not come to a settlement of any one year's rent which would bring the thing to a point; we cannot carry on without the water, and rather than run the risk of ruining our trade we will pay this water rent and recover it from him. Had they both done so it would have been much worse for the pursuer, for their claims against him could then have taken a very different form. I am therefore of opinion that the deduction of £50 claimed by the defenders should be allowed.

Lord Neaves—The case is a nice one, but it is narrowed by the view taken by the Lord Ordinary, and still further by that just adopted by Lord Benholme. I concur in the terms of the Lord Ordinary's interlocutor, and in the expressions of his note as to the hardship of the case as regards the position of the Messrs M'Connell. In the second clause of the Lord Ordinary's interlocutor the finding is thus expressed: "Finds that the defenders have failed to instruct that the sum of £50 paid by the defenders to Messrs Cochran & Hay, per receipts produced, was paid either by authority of the pursuer, or that the same was a debt due by the pursuer and which he is bound to pay to the defenders, or to allow the defenders deduction or credit therefor:" . . I think that it is plain that these five payments of water-rent were not made by Peter Sawers' authority, and that payment never was made by the tenants at all until an abatement of the rent was allowed by Henry Sawers, which for a time shifted the burden on to the tenants. It would appear that Henry Sawers, or the pursuer, his successor, could at any time on due notice have brought the arrangement as to abatement to an end. When the pursuer succeeded he did so, and this act it seems to me completely rescinded matters and placed everything in its original position; consequently, this payment for water-rent, *whatever its character*, reverted again to the landlord and become due by him: if it were optional still it was his, if there were a legal obligation, that was binding on him. This has been settled, and the tenants have been decerned against for the full amount of the rent.

In the next place, the finding holds that the defenders have failed to instruct "that the same was a debt due by the pursuer." It has not been proved that this was a legal debt due by Peter Sawers, that Messrs Cochran and Hay could have had any ground of action upon it, and I agree in this with the view taken by the Lord Ordinary. The view taken by Lord Benholme is to this effect—You are liable to me under the obligation of warrandice under the lease, and therefore I was entitled to make these payments for you, and to deduct the amount from the rent which I had to pay you. I confess I cannot coincide with the law as laid down by Lord Benholme on this point. Certainly there was an obligation, but I am unable to see that any breach of warrandice ever actually took place. All that the defenders, in such a view, could maintain would be, that as the warrandice would have been broken we paid this money to avoid your failure to implement your obligations under the lease. Now, this is a serious matter. I do not think it is a tenant's business to implement his landlord's obligations. Let him wait, let the landlord break the warrandice and fail to fulfil his obligation, and *then* there would be a measure of damage incurred thereby. To have acted in the way in which the Messrs M'Connell have done appears to me to be unjustifiable in so far as regards a claim for reimbursement. Putting the question entirely on the legal ground, I am not able to say that I think a tenant entitled to go and fulfil his landlord's warrandice in this way.

In all these transactions no one can approve of Mr Sawers' conduct in shuffling and avoiding any settlement of the question, and I must concur in what the Lord Ordinary has said of this in his note. Were I called upon to pronounce an eulogium on Mr Sawers' conduct I could not do it.

Lord Justice-Clerk—My Lords, I am not surprised at the difference of opinion in the Court as to this case; my views incline to those expressed by Lord Benholme, and I shall only add a few observations:—

(1.) This payment was made in respect of, and as the counter part of, certain rights and privileges which the landlord was bound by his lease to communicate to the tenant, and form part of the consideration for which the rent stipulated in the lease was paid. I think we must hold that this annual contribution represented a corresponding annual

benefit. These rights and privileges were enjoyed by the tenant and paid for in the shape of rent by him to the landlord during the five years in question, and the latter has consequently received value for the payment.

(2.) It is to my mind quite immaterial that the obligation to furnish and pay for these privileges was not permanently binding on either Sawers or Cochran in a question between them, and might have been terminated by either. They were binding on the landlord in a question with his tenant whatever might be the rights of Sawers or Cochran in the matter. But it must be remembered that this was an annual payment for an annual benefit, paid after the benefit had been supplied, and, yet further, one which had continued for many years. Although it was not a permanent payment it could not be terminated without notice; and each year which was allowed to terminate without notice might vest a right to the payment for that year, seeing the consideration was furnished and accepted for that year. In this case no notice that he means to discontinue this payment has ever yet been given to Cochran by Sawers, and in this view the prior arrangement between them did continue to subsist for each of the five years as each year expired, and therefore it may be reasonably maintained that for each of these five years the payment became due and was a debt between Cochran and Sawers. But that is not the question here. The rights and powers of Cochran against Sawers cannot come into question, for Cochran received all he could claim, and Sawers obtained all the advantage paid for. The real question is whether Sawers can retain the advantage and leave the burden on the shoulders of the tenant.

(3.) Mr Sawers maintained that it was enough for this action that, whether the sum was due by him or not, this payment was made without and against authority, and therefore that the tenant was not entitled to credit for it or to retain his rent in respect of it. Now, even if the pursuer had taken his ground plainly and openly, had told his tenant that he was going to terminate this agreement, and to discontinue the payment to Cochran, and had warned the tenant not to pay, this would not absolutely have settled the question, as the tenant might still contend that the landlord could not withhold the payment so far as necessary to secure the stipulated privileges under the lease. But the element in this case which has chiefly weighed with me, (admitting Lord Neaves' observation on the law as to payment made by a tenant of his own hand), is that the pursuer has never made any such intimation—he has evaded all opportunity of settling the question—as to intimation he does not say anything either on the record or in his evidence. All he did was to intimate that he would not allow the abatement given by Henry Sawers; he would recognise no deduction, and would demand his full rent. His full rent has been paid as far as the former deductions were concerned; but this was not a deduction. It was no favour or advantage to the tenant; it was a burden on him. From the evidence it is quite clear that the pursuer evaded all attempts to extract from him a statement of what ground he took. He never liberated the tenant in express terms, at least from his customary payment; he knew of these payments year by year, but he never told Cochran they were not paid on his account. It was an arrangement for the landlord's convenience in Henry Sawers' time that the tenant should pay the water-rent—certainly it was not made to suit the tenants. Mr Sawers knew, and his agent knew, that the receipts were taken in the name of the landlord, but he did nothing. He never faced the question whether he could under the lease stop this contribution, and he took care to prevent such a question arising. He never spoke of this rent to his agent, and would not speak of it to his tenant, but left him in uncertainty whether that part of his arrangement with Henry Sawers remained, although the deduction were disallowed; and, now, waiting till all the payments have been safely made, and no question can now arise to his prejudice, he tries to avoid payment. This I think he cannot successfully do.

The Court pronounced the following interlocutor:—

> "Recal the interlocutor complained of; assoilzie the defenders from the whole conclusions of the summons, and decern, except as regards the periodical interest arising on the rents due by the defenders while unpaid: find that the said interest amounts to £22, 19s. 8d., and decern against the defenders therefor; find the defenders entitled to expenses, and remit to the Auditor to tax the same and to report."

Counsel for Pursuer—Lord-Advocate (Young) Q.C., and Scott. Agent—D. Milne, S.S.C.

Counsel for Defender—Solicitor-General (Clark), Q.C., and R. V. Campbell. Agent—A. K. Mackie, S.S.C.

Saturday, January 10.

FIRST DIVISION.

CHISHOLM *v.* MARSHALL.

Court of Session Act 1868, § 70.

On this case being called no appearance was made for the respondent—

Asher, for the appellant, referred to the case of *Stuart* v. *Stuart*, 16th May 1871, 9 Macph. 740.

There being some doubt as to whether the appeal had been intimated to the respondent.—

Lord President—It is the practice of the Sheriff-Clerk of Lanarkshire to mark on the record not only that an appeal has been lodged, but also that it has been intimated in accordance with the Act, and I take this opportunity of saying, what I am sure your Lordships will concur with me in thinking, that it would be very advisable if all Sheriff-clerks would adopt the same course.

The Court appointed the appellant's agent to communicate with the Sheriff-clerk, and ascertain if appeal had been intimated; and continued the case for a week.
