and denied.' This is a bad and incorrect form of pleading, and ought not to be allowed. Irrelevancy is a matter of law, not an answer in point of fact, and it ought to have no place in the answer to statements in point of fact. It is at the same time illogical to deny a statement which is characterised as irrelevant. If it is irrelevant it is no matter whether it be true or not. One of the best tests of relevancy is to inquire whether the respondent is prepared to admit the statement objected to in point of fact. If he is not, it may safely be assumed that it is relevant."

The respondents appealed by virtue of Act 6 Geo. IV., c. 120, § 40, and Court of Session Act 1868, § 73, to the Second Division.

The respondents (appellants) wished issues adjusted to try the cause by jury, but the petitioners respondents) wished the case to go to a proof, and stated that they would be perfectly satisfied to have the evidence taken either before one of the Judges of the Division or before the Lord Ordinary.

At advising—

LORD ORMIDALE—My Lords, I have felt some difficulty in this case and I should like to state from what it arises. It does so from a consideration of the case of *Dennistoun* v. *Knox*, 1871, 9 Macph. 739. There is no doubt that it is competent for either party to appeal for the purpose of getting the cause tried by jury, and then for the Court itself *proprio motu*, or at the instance of either party, to order a proof and quash the whole proceedings. This is quite settled. In this case neither party has maintained that the question is one of such a character as will enable it to be determined without some further investigation. I am entirely of opinion that there should be such investigation, and, what is more, that the investigation should take place without adjusting issues to go to a jury, because I think from the peculiar circumstances it would be very difficult to frame appropriate issues. I therefore would be inclined to think that a proof before answer would be the proper course.

But then, although coming to this conclusion, on the other hand, if we look at the case of *Dennistoun*, to which I have alluded, it seems to me to be doubtful whether it is competent that the proof be taken before any Judge here—it should rather go back to the Sheriff. If a proof is allowed before a Judge here, the case may be taken on appeal to the House of Lords—on an appeal, moreover, which would include fact as well as law, and the Act 6 Geo. IV., § 120, was intended to obviate such a result.

LORD JUSTICE-CLERK—I should be very reluctant to think that where parties have come here asking for an investigation into the facts we must send them back again to the Sheriff. In *Dennistoun's* case the party who advocated for a jury trial turned round when he got into this Court and asked for a proof, and the Court very properly sent him back to the Sheriff-court. Here it would be very difficult to make any issue or issues that would bring out the point of the case, and I think your Lordships should order a proof before answer—to be taken before one of the Judges of this Division.

LORD NEAVES—I quite agree. If I can satisfy my mind that a case, wherever it began, should be ried by a proof, I can see no impediment to that proof being taken before one of your Lordships, if, in the opinion of the Court, justice in the case can be well satisfied by such a course. Section 40 of the Judicature Act, no doubt, was intended to relieve the House of Lords of appeals on matters of fact; but since that day there has grown up a great deal less repugnance to proofs taken here.

LORD GIFFORD—I am of the same opinion as your Lordship in the chair, and I do not think that there is anywhere anything to exclude the proposed course.

The Court ordered a proof before answer of the facts averred by either party, and appointed the same to be taken before Lord Gifford.

Counsel for Appellants (Respondents)—Solicitor-General (Watson), Q.C., and Smith. Agent—Adam Shiell, S.S.C.

Counsel for Respondents (Petitioners)—Dean of Faculty (Clark), Q.C., and Trayner. Agent—David Dove, S.S.C.

I., Clerk.

Tuesday, November 24.

SECOND DIVISION.

[Sheriff of Clackmannan.

ADAM SPOWART *v.* MOIR.

General Police and Improvement (Scotland) Act, 1862, *sec.* 135—*Nuisance.*

Where the Commissioners of Police of Alloa erected a public urinal in a street of the burgh without notice, and a petition for its removal was presented to the Sheriff by the proprietor and the tenants of two shops in front of which the urinal had been erected, on the allegation "that it will be and become a nuisance."—*Held* that the petitioners were entitled to proof of their allegation.

This petition, at the instance of John Adam, proprietor of two shops and a dwelling house in Candle Street, Alloa, and John Spowart, the tenant thereof, against James Moir, clerk to the Commissioners of Police of the burgh of Alloa, set forth that the Commissioners had erected a public urinal in Candle Street in front of the petitioners' premises, without notice to the petitioners, and contrary to the provision of the General Police and Improvement (Scotland) Act, 1862; that it will be and become a nuisance to the public, and more especially to the petitioners, and an obstruction to the street; and concluded with a prayer for the removal of said urinal. The facts of the case and the contentions of parties are fully set forth in the interlocutor of the Sheriff-Depute, affirming the judgment of the Sheriff-Substitute.

"*Edinburgh*, 19*th October* 1874.—The Sheriff having heard parties' procurators orally, and made avizandum, and considered the cause, dismisses the defender's appeal against the Sheriff-Substitute's interlocutor of 28th September last, and adheres to the said interlocutor, and decerns.

"*Note.*—The question here raised is an example of the looseness of expression complained of in that otherwise valuable statute, the General Police Act of 1862.

"The complaint of the petitioners, the proprietor and tenant respectively of a shop and dwelling-house in Candle Street, Alloa, is that the

urinal in question is an obstruction to the street, and specially to the access to their own premises, and is and will be, in other respects, a nuisance; and the prayer is that it shall be removed. It is not maintained by the defenders, the Magistrates of Alloa, that at common law this petition is incompetent or irrelevant. The defence is, that the act of the Magistrates in placing the urinal there is within their powers under section 135 of the statute, and cannot be called in question unless by appeal under the statute; and that no appeal having been taken, there is now no remedy open to the petitioners except a claim for compensation. On the other hand, the petitioners deny that the present application is excluded by the statute.

"Section 135 of the Act is as follows:—'The Commissioners may erect such public water closets, privies, and urinals within the burgh, and in such situations as they think fit, and may defray the expense thereof, and of keeping the same in good order, and may make compensation for any injury occasioned to any person by the erection thereof out of the police assessment, but so that such erection shall not become a nuisance, and any householder who thinks himself aggrieved thereby may appeal to the Sheriff in manner after provided.'

"Upon this section sundry observations occur:—(1) It does not apply to the petitioner Mr Adam, who is only the proprietor, and resides in Leith, and does not fall within the definition of a householder in sect. 3. (2) The provision that any aggrieved householder may appeal to the Sheriff 'in manner after provided,' is of difficult application, for the mode of appeal 'after provided' cannot be literally followed in this case. The only section providing an appeal, which can be in the view of said sect. 135, is sect. 396 (sect. 397 being limited to cases of private improvement assessment). Now sect. 396 enacts, that 'any person liable to pay or to contribute towards the expense of any of the works aforesaid, or otherwise aggrieved by any order of the Commissioners relating thereto, may at any time, *within seven days next after the making of any such order*, give notice in writing to the Commissioners that he *intends to appeal* against *such order* to the Sheriff, *and, along with such notice*, he shall give a statement in writing of the grounds of the appeal; and if *within four days* next after giving such notice, the party grant bond to the Sheriff, with two sufficient cautioners, to the satisfaction of the Sheriff, *to abide the order of the Sheriff*, and pay such costs as shall be awarded by the Sheriff thereupon, *the work so appealed against shall not be begun* until after the judgment of the Sheriff upon such appeal,' &c. Upon this section it may be observed, 1st, That the allowance to any person aggrieved by *any order* of the Commissioners relative to works, cannot override the marked omission of the owner in the 135th section, especially where he is, as here, not aggrieved by *any order*, but by an act done without either definite order or previous notice. 2*d*, That neither the owner nor the householder can be bound to give notice of an intention to appeal against an order where no order has been made (the resolution of the Commissioners being merely to erect urinals in certain streets, and requesting a committee to fix the precise sites), and no notice of the intended work given and 3*d*, That the provision that the work, appealed against shall not be begun until the Sheriff gives judgment, is inapplicable to a case where the work is already done, and without notice. If, therefore, the provision for an appeal in the 135th section is to be carried out, that must be either, on the one hand, by holding that such appeal need not comply with the various conditions precedent prescribed in the 396th section, or it must be held that a previous order and notice are by implication requisite before the erection of any privy or urinal; and that where such order and notice are neglected, the Commissioners lose the special protection of the appeal clauses, and become subject to the ordinary administration of justice. In the former view, the present petition may be held as an appeal under the statute, and, if necessary, a slight alteration on its title, so as to make it 'Petition of Appeal,' might make it sufficient. In the second view it is open to no objection; and in either view it admits of being maintained that this petition is protected by section 438, which provides, that 'no jurisdiction conferred by this Act shall be held to exclude the jurisdiction of any Sheriff or Court of Guild, where the case shall, in the first instance, have been brought before or taken up by such Sheriff or Court of Guild.'

"Reverting to section 135, it is difficult to suppose that the Legislature, in authorising Commissioners to put down privies and urinals 'in such situations as they think fit,' meant that they might do so free from any check or control, or any respect for the rights of others. A substantial power is given, although no such startling construction be adopted; for they are authorised to make such erections out of the public funds in their charge, and thus, if no objection arises *ab extra*, they are protected against any question as to want of power. The clause surely does not empower them to put down such conveniences within a gentleman's garden or parterre, or in the courtyard of his house against his will. They have no power to appropriate private property, even on compensation, except under the Land Clauses Act (see section 390). If, then, the clause does not give unlimited and despotic power, there must be a limit, and that limit is naturally furnished by the rights of others as protected by law. The withdrawal of that protection of the rights of the lieges which is afforded by the ordinary courts of law is not to be readily implied, and not to be established except by unambiguous legislation. See *Colt* v. *Caledonion Railway Company*, 2d July 1859, 21 D. p. 1118, per Lord Justice-Clerk Inglis. It is to be observed that while in this Act the decision of the Sheriff on appeals is declared final and unrenewable (see close of section 397), there is not, except in the case of private improvement assessments under section 397, where careful previous notice is provided, any declaration of finality of an act of the Commissioners in the case where no appeal is taken. An appeal is an appropriate remedy where there is an order or judgment, but not where there is merely a fact or misfeasance of a party complained of; but it may be doubted whether this obvious distinction has been always kept in view by the framers of the statute."

The respondent appealed.

Cases cited—*Colt*, 21 D. 1118; *Scott*, 8 S. 845 *Young*, 13 S. 646.

At advising—

LORD NEAVES—On the whole, I am not disposed to disturb the judgment of the Sheriff-Depute. The power conferred on the commissioners by the 135th section is one which no doubt may be used in a manner very beneficial to the company, but also may be used in an irritating manner to individuals. It is guarded by the qualification which it is impossible to overlook in the words "so that such erection shall not become a nuisance," and an appeal to the Sheriff is provided. Now, unfortunately the Act is very loosely framed, and here, where there was no notice and no order, it is difficult to find a terminus for the *inducice*. The only person entitled to complain is the householder. Still the restriction does exist, and here we have an allegation made that this erection will become a nuisance, not by a householder, but by one having an undoubted interest; he offers to prove that, and goes to the Sheriff under the common law and seeks to be allowed to establish that. Now, I do not say what is the precise construction to be put on the clause. I do not concur with the Sheriff that this petition may be used to make the statutory right of appeal available, but I think that before answer the Sheriff has rightly allowed a proof.

LORD ORMIDALE—As I was not present at the discussion, I give no opinion.

LORD GIFFORD—I concur. I think this petition is founded on common law, and is not excluded by the statute.

LORD JUSTICE-CLERK—Holding this to be an application at common law only, I concur.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the appeal, Dismiss the same, and affirm the interlocutors appealed against; remit the cause to the Sheriff to proceed with the same, and find the respondents entitled to expenses, and remit to the Auditor to tax the same and to report."

Counsel for Appellant—Asher and Moncreiff. Agents—M'Ewen & Carment, W.S.

Counsel for Respondent—Balfour. Agents—Keegan & Welsh, S.S.C.

HIGH COURT OF JUSTICIARY.

Tuesday, November 26.

(Before Lords Justice-Clerk, Neaves, and Young.)

T. & W. SANDYS *v.* LOWDEN.

Process—Appeal—Merchant's Account—30 & 31 *Vic., c.* 96—*Act* 1579, *c.* 83.

Held that an account for goods supplied by manufacturers in England to wholesale dealers in Scotland was a "merchant's account," in terms of the Debts Recovery Act, 1868.

This was an action at the instance of T. & W. Sandys, trimming manufacturers, London, and W. Scott Douglas, Edinburgh, their mandatory, against Lowden & Rowe, 18 Hill Place, Edinburgh. It appeared that on the 20th day of July 1874 the appellants raised a summons under the Debts Recovery (Scotland) Act, 1867, before the Sheriff of Mid-Lothian and Haddington at Edinburgh, against the respondents for payment of the sum of £22, 13s. for goods furnished by the appellants to the respondents. The respondents entered appearance to the said action, and pleaded, *inter alia*, that the action being one to recover an account for goods supplied by manufacturers in England to wholesale dealers in Scotland, it was not a merchant's account in the sense of the Debts Recovery Act, and that the action was incompetent under that Act, and fell to be dismissed.

The Sheriff, without any inquiry, pronounced the following interlocutor:—

"*Edinburgh, 9th October* 1874.—The Sheriff having heard parties' procurators on the competency of this action under the 30 and 31 Vict., sec. 96, sustains the first plea of the defenders, and finds the action incompetent; therefore dismisses the same."

The pursuers appealed to the High Court of Justiciary, submitting, as one of their reasons for so doing, "that the said summons was competent, and ought to have been sustained; and that, therefore, the Sheriff had jurisdiction to entertain the same under the Debts Recovery (Scotland) Act, 1867."

It appeared that the respondents had received all the goods ordered, but they averred that a portion of the goods were disconform to order, and having returned that portion ten or twelve days after delivery, they contended that the account should be reduced from £22, 13s. to £8, 10s. The question upon the merits was thus, whether the respondents were entitled to reject the goods (which were buttons) delivered.

The appellant argued that a modern statute must be construed according to the meaning of the words used at the time of the passing of the Act, and not according to the meaning which the words bore when used in an Act passed centuries before.

The respondent argued that the words used being not now in general use, and being the exact words used in the Act of 1579, c. 83, establishing the triennial prescription in regard to certain classes of debts, it was evident that the provisions of the modern statute were intended to be limited to the same class of debts, and the words must be construed according to the meaning which they bore in 1579.

At advising—

LORD NEAVES—In this case we have heard an able argument from Mr M'Kechnie, but I think that it is the safer course to construe a modern Act, like the Debts Recovery Act, according to the present universally accepted meaning of the language used therein, unless there is a direction to the contrary in the Act. The Debts Recovery Act commences by narrating two other Acts, the Small Debt Act, and the Act for regulating the establishment of Circuit Courts for the trial of Small Debt cases by the Sheriffs. Then having referred to these two statutes as indicating the aim in view, the Act proceeds to make "further provisions to facilitate the recovery of certain debts in the Sheriff Court. If it had been meant to restrict the provisions of the Act to a particular kind of debts already defined, it would have been very easy to do so.

No doubt the same language is used as in the Act of 1697, and is language of a somewhat provincial character, and it might have been safer for the Legislature to have used terms more universally used and understood. But we are bound to construe the language used according to its pre-