in the Valleyfield entail (distinguishing it from the entailer's language in the Ardovie entail) the words "which provision immediately above written" meant the matter of the whole preceding clause which embodied all the cardinal prohibitions, and therefore that the entail was good. Having pleaded that case both in this Court and at the bar of the House of Lords, I am in a position to say that such was the nature of the case, and that the judgment of the majority of this Court was affirmed. The principle of that judgment illustrates, I think, the importance of the observation I have made that according to the language of the present entailer the antecedent to the acts and deeds referred to in the irritant clause must be held to be the whole matter of the prohibitory clause embodying the three cardinal prohibitions.

The Court adhered.

Counsel for Pursuer (Respondent)—M'Laren—Mackintosh. Agents—Hope, Mann, & Kirk, W.S.

Counsel for Defenders (Reclaimers)—Kinnear—Keir. Agents—A. & A. Campbell, W.S.

Saturday, June 22.

SECOND DIVISION.

[Circuit Court of Justiciary, Glasgow.

WILSON *v.* GLASGOW TRAMWAYS AND OMNIBUS COMPANY (LIMITED).

Process—Appeal against Small-Debt Court Decision—Incompetency and Want of Jurisdiction—Small Debt Act 1837 (1 *Vict. c.* 41) *sec.* 3.

A party, in accepting employment as conductor of a tramway company, entered into a written agreement with them under which certain persons named were constituted the sole judges of any dispute arising between them, and were further entitled to discharge him without notice or reason assigned, and to declare forfeiture of money deposited by him and wages. The jurisdiction of courts of law is excluded.

He was dismissed by the company, and thereafter brought a small-debt action for payment of wages, &c., in answer to which the agreement above narrated and an award following upon it was pleaded. The Sheriff granted decree, and an appeal under the 31st section of the Small Debt Act having been taken "on the ground of incompetency, including defect of jurisdiction on the part of the Sheriff," the Court (*dub.* Lord Ormidale, who thought there should be inquiry as to the proceedings in the Sheriff Court) *held* that there was nothing in the case to justify appeal on such a ground, and that as they could not inquire into the merits of the cause upon which the Sheriff had proceeded it fell to be refused.

Process—Sheriff Court Act 1877 (40 *and* 41 *Vict. cap.* 50, *sec.* 11)—*Applicability of, to Small-Debt Court, where objection is raised tending to a reduction.*

Opinion (*per* the Lord Justice-Clerk and Lord Gifford) that the 11th section of the Sheriff Cout Act 1877 (40 and 41 Vict. cap. 50) is not restricted in its application to the Sheriff's Ordinary Court, but extends to the Small-Debt Court, which is not technically a separate jurisdiction; and (*per* Lord Gifford) that even apart from that Act, the Sheriff in the Small-Debt Court is not precluded from inquiry into the validity of a formal writing by any rule that such an objection can only be taken by an action of reduction.

Master and Servant—Employers and Workmen Act 1875 (38 *and* 39 *Vict. cap.* 90), *sec.* 3, *sub-sec.* 2, *and sec.* 10—*Does "Workman" include Tramway Conductor.*

Sub-section 2 of section 3 of the Employers and Workmen Act 1875 empowers a Sheriff to "rescind any contract between the employer and the workman upon such terms as to the apportionment of wages," &c., as he shall think fit.

Opinion (*per* the Lord Justice-Clerk and Lord Ormidale) upon a consideration of clause 10, where "workman" is defined, that the conductor was a "workman" in the sense of the statute.

This was an appeal to the Circuit Court of Justiciary, Glasgow, certified by that Court to the Second Division. John Wilson, when he took employment with the Glasgow Tramway and Omnibus Company Limited, as conductor, entered into a written agreement, dated 11th April 1875, with them, which *inter alia* bore that he, the second party, might be discharged "at any time without previous notice or any reason assigned." It was a stipulation that in consideration of his employment he had deposited £2, "which, together with all wages for the week current, or other moneys which may be due to him from time to time, he hereby agrees shall be retained by the said company in security for his good conduct and honesty, and for his obedience to the company's rules and the said bye-laws and regulations, and also for all damages, if any, caused by his neglect." The agreement thereafter proceeded — "Commander Francis Clifford de Lousada, R.N., managing director, and the said John Duncan, secretary, both of the said company, or either of them, shall be the sole judge or judges between the company and the second party; and they or either of them shall be entitled to proceed either upon their or his own personal knowledge or observation, or upon such information or inquiry as they or he shall think proper to obtain or make, and of the competency and sufficiency of which they or he shall be the sole judges or judge; and if the second party violates the said rules and regulations, or the said bye-laws and regulations, or any additional rules and regulations or orders which may be issued and in force from time to time, the said managing director or secretary shall be entitled and is hereby expressly empowered to declare all or any part of the monies due by the said Company to the second party to be absolutely forfeited to the Company, and a certificate under the hand of the managing director or secretary shall be binding and conclusive evidence between the said Company and the second party in all Courts of law in regard to all questions arising under this agreement, or under the rules or regulations in force for the time, or under the said bye-laws and regulations,

it being declared that no formal award or decree-arbitral shall be necessary, and such certificate shall bar the second party of all right under any circumstances to recover the said monies or any part thereof so declared to be forfeited." There was an acknowledgment by Wilson that he had received a copy of the agreement and rules and bye-laws therein referred to.

On 3d January 1878 Wilson was taken into custody on a charge of being intoxicated while on duty as conductor of one of the tramway cars, and next day pleaded guilty in the Police Court, and was fined accordingly. He thereafter, on 28th February, raised a small-debt summons against the Tramway Company for £11, 10s. per the following account appended to the small-debt summons:—

1878.

Jany. 4.	To amount of deposit made in your hands on my entering your service, . .	£2	0	0
,,	quarter's bonus due to me at this date when I was illegally and unjustifiably dismissed, .	1	6	0
,,	half-yearly do. do. .	2	12	0
,,	yearly do. do. .	5	4	0
,,	two days' pay due to me at date dismissal,	0	8	0
		£11	10	0

The pursuer's agent stated at the bar that he restricted the sum sued for to £10.

The Sheriff (BIRNIE) gave decree for £6.

The Tramway Company appealed to the Circuit Court of Justiciary, and in a note and reasons of appeal lodged for them it was, *inter alia*, stated that their defence before the Small-Debt Court had been that the whole matters which were the subject of the small-debt summons had been dealt with by John Duncan, the arbiter named in the agreement above quoted. He had issued an award dated 11th January, under which, for the reason that Wilson on 3d January 1878, while acting as a conductor of a car, had partaken of intoxicating liquor to such an extent as to render himself incapable of discharging his duties, contrary to the rules and regulations of the company, he declared the wages due to him and the £2 deposit before mentioned, to be absolutely forfeited, no bonus or other money whatever being due to him under the agreement. It was stated that it had been further pleaded on behalf of the appellant that the matters having been referred to an arbiter named, who had adjudicated on the questions, the jurisdiction of the Sheriff was excluded, and that in support of that contention the Sheriff had been referred to the case of the *London Tramways Co. (Limited)* against *Bailey*, 28th November 1877, 47 L.J., Q.B.D. xlvii, 3. The award had been regularly pronounced, and after full hearing and inquiry by the referee.

It was stated that notwithstanding this defence the Sheriff, considering that he was entitled to deal with the matter under the Employers and Workmen Act 1875, allowed a proof, when a further defence had been stated for the appellants, that by the Employers and Workmen Act 1875 (38 and 39 Vict. cap. 90), section 4, subsection 1, the Court of summary jurisdiction, meaning the Small Debt Court of the Sheriff of the county, should not exercise any jurisdiction where the amount claimed exceeded £10, and that the said Act also excluded the jurisdiction of the Sheriff in the cause as the amount claimed was £11, 10s. On this further defence being stated, the agent for the pursuer had restricted the sum sued for to £10, and endorsed a minute to that effect on the back of the account attached to the summons, and the Sheriff-Substitute had allowed the restriction, and had ordered the proof to proceed. Proof was under protest then led, and judgment given. It had been clearly proved that the pursuer had been guilty of drunkenness, in respect of which the arbiter had forfeited his money as before stated.

The note then bore that the appeal against the Sheriff's decree was taken on the ground of incompetency, including defect of jurisdiction on the part of the Sheriff, and that for the following among other reasons:—

1. Because the pursuer, in virtue of the agreement entered into between him and the appellants, having referred all disputes to Commander Francis Clifford de Lousada and the said John Duncan, or either of them, and the said John Duncan having adjudicated on the questions under the reference, the jurisdiction of the said Sheriff was altogether excluded.

2. Because the said Act of Parliament, 38 and 39 Vict. cap. 90, while in certain circumstances empowering the Sheriff to set aside agreements on equitable grounds, confers no power on him to review, quash, or interfere with the effect of an award under a reference. . . . . .

4. Because under the said Act of Parliament, 38 and 39 Vict. cap. 90, the pursuer does not fall under any of the classes of persons to whom the Act applies.

5. The judgment of the Sheriff-Substitute was erroneous, in respect that the same was contrary to evidence, and in any view he was not entitled to disregard the award given by the referee while the same subsisted and was unreduced.

The cause was certified by the Judges at the Circuit Court of Justiciary at Glasgow (Lords Deas and Mure) to the Second Division of the Court of Session.

Argued for the appellants—An appeal against a judgment in the Small Debt Court could only be taken on certain grounds specified in the Small Debt Act 1837, sec. 31. The first question was, Was the appeal competent? It was, on the ground of want of jurisdiction and incompetency on the part of the Sheriff. The respondent, *i.e.*, pursuer in the Small Debt Court, had to found, and did found, on the written contract between him and the appellants as the basis of his claim. But the production of that document showed that the parties had agreed to submit all questions between them arising out of that contract to a tribunal selected by themselves. They had effectually ousted the jurisdiction of the Courts of Law, and consequently the Sheriff had no jurisdiction. Further, when it was made clear after the production of the agreement that the jurisdiction of the Sheriff had been ousted by the pursuer himself, who was invoking the aid of that jurisdiction, it was incompetent for the Sheriff to proceed with the case so as to inquire into the merits. Secondly, The question between the parties having been settled by the decision of the arbiter chosen by them, the Sheriff had no juris-

diction to review that judgment; but in effect he had done so, and this was an incompetent proceeding on his part, and sufficient to set aside his decree. Thirdly, The Sheriff professed to proceed on the Employers' and Workmen's Act (38 and 39 Vict. c. 90), and in respect of the powers there conferred to rescind the contract. But that Act did not apply (1) Because the pursuer was not a workman within the meaning of the Act, sec. 10; and (2) because the contract was at an end before the action was raised—there was no contract to rescind.

Argued for the respondent—The statement of fact though in itself correct was not complete. After the small-debt summons was called on 6th March the Company lodged the agreement and award as a defence, and quoted the case of *Bailey* v. *London Tramways Company*. The respondent then averred *mala fides* on the part of the arbiter, and the Sheriff allowed a proof of this averment, limited to "whether the reference had been properly carried out." This proof was taken on 25th March, and the Sheriff was satisfied that the reference had not been properly carried out. Accordingly he set aside the award and allowed a second proof, this time on the merits. Proof was taken on 10th April, and decree then given for £6. As to the case itself, in the first place it was necessary to ask whether it was competent for the Sheriff to inquire if the reference had been fairly carried out. Before the Sheriff could determine whether he was precluded by the terms of the agreement from entering into the merits of the agreement, he must necessarily have seen and perused it. Then it was that *mala fides* was averred, and the Sheriff had to decide whether he was bound to implement a deed against which an averment of this kind was made. That was settled in the negative by *Brown's Trustees* v. *Fraser*. If he refused to look at the agreement, he was implementing it, so even by the law prior to 1875 the Sheriff could have dealt with such an agreement. Passing over for the moment the Employers and Workmens Act, the Sheriff, under the Sheriff Court Act, section 11, was warranted in dealing with this question. That Act had been held to apply to small-debt cases. Then the Employers and Workmens Act conferred special powers. It was meant to enlarge the Sheriff's jurisdiction, and if he had powers before, much more had he powers now. This was seen specially from section 3, subsection 2, giving power "to rescind any contract between an employer and a workman," and "to apportion the wages due." The Sheriff was therefore entitled to see whether the reference had been fairly carried out. That being so, in the first place the agreement was bad (1) because the arbiter assumed under it powers that no Judge would assume, and asked the Court to sanction his assumption by non-interference. (2) This was an attempt to oust Courts of Law from their jurisdiction. (3) This was an absolute agreement not to sue in case of future claims—Russell on Power of an Arbitrator, *Scott* v. *Corporation of Liverpool*, *Thomson* v. *Channock*, *Horton* v. *Sayer*, and *Lee* v. *Page*. Putting the case, however, even on the alternative view that the agreement was good, the award under it was bad, and was competently set aside after proof by the Sheriff. The reference where one of the submitting parties acted as sole referee without appeal was an improper one.—Bell on Arbitrations —*Dickson* v. *Grant*—*M'Kenzie* v. *Clark*. The powers conferred by the agreement enabled one of the parties to act as arbiter and give an award (1) with or without reason assigned; (2) to the exclusion of any Court of Law. This was an agreement which naturally excited suspicion. [Lord Justice-Clerk—Would it be a good agreement in a contract that one of the parties should be absolute arbiter without appeal?] We do not think so. But there is not a case coming up to that. [Lord Gifford—There is one very near it, where the price of the article sold was to be fixed by the seller.] In *Dempsie's* case Lord Adam held that the Sheriff could go behind the agreement. The only difference there was that the action was raised before the award was given. Finally, the respondent belonged to that class of individuals to whom the Employers and Workmens Act applied.

Authorities—*Brown's Trustees* v *Fraser*, May 31, 1870, 8 Macph. 820; Sheriff Court Act 1877, sec. 11; Employers and Workmens Act (38 and 39 Vict. c. 90), secs. 3 and 10; Russell on the Power of an Arbitrator, 5th ed. 63; *Scott* v. *Corporation of Liverpool*, 28 L.J. (Ch.) 230 (see p. 238); *Thomson* v. *Channoch*, 8 Term Reports 139; *Horton* v. *Sayer*, 29 L.J. (Exch.) 28 (see p. 32); *Lee* v. *Page*, 30 L.J. (Ch.) 857 (see p. 859); Bell on Arbitration, 130, sec. 234, 136, sec. 244; *Dickson* v. *Grant*, February 11, 1870, 8 Macph. 566; *M'Kenzie* v. *Clark*, December 19, 1828, 7 S. 265; Davis on Labour Laws, 110; *Dempsie* v. *Glasgow Tramways Company*, Spring Circuit 1877 (not reported); *Clemson* v. *Hubbard*, 1876, 1 L.R. (Exch.) 179; *Matthews* v. *Scottish North-Eastern Railway Company*, 5 Irvine 237; *Murray* v. *Mackenzie*, April 21, 1869, 1 Couper 247; *London Tramways Company* v. *Bailey*, November 28, 1877, 4 L.R. (Q. B.) 3; *Houldsworth* v. *Brand's Trustees*, May 18, 1875, 2 R. 683; *Somerville* v. *Society of Meters and Weighers of Leith*, May 22, 1868, 6 Macph. 796.

At advising—

Lord Justice-Clerk—The substantial ground on which this appeal is taken is that of "incompetency including defect of jurisdiction," and the allegation on which the plea is supported is, substantially, that the Sheriff did not give effect to the award of the arbiter, and that the contract of submission excluded the jurisdiction of the Sheriff and deprived him of power to judge in the cause.

It is certainly not enough, in a case in which the jurisdiction of the Sheriff is impugned, that he was entitled to consider and judge of the plea stated to his jurisdiction. It may often be necessary for a Judge whose jurisdiction is questioned to inquire largely into collateral facts, as in cases of domicile, reconvention, prorogation, and similar questions. But no Judge can create jurisdiction for himself by assuming it, and if his judgment be wrong the finality attached to his decrees within his jurisdiction cannot validate what he does beyond it. But if the plea taken be one not properly to the competency of the Judge, but one which simply excludes the party from invoking his jurisdiction, such as *res judicata*, *lis alibi pendens*, prescription, discharge, title to exclude, and the like, it is not an objection to the jurisdiction but a plea personal to the party, of which the Sheriff must judge, and whether he decide rightly or not, his judgment in the Small

Debt Court is final whether sound or unsound. It is the law of that case. The plea taken here is one of that nature. It is in substance that the pursuer of the action has by contract undertaken to submit to the judgment of another tribunal, that the arbiter chosen by himself has decided against him, and that the Sheriff, although he had jurisdiction over the subject-matter of the cause, and the parties to it, ought to have refused to entertain the action in respect of the pursuer's contract. I do not look on this as a plea to jurisdiction, nor is it a sufficient ground of appeal that the Sheriff did not give effect to the award when laid before him for his consideration. He may or may not have been right in holding the award not conclusive, but I do not think that we can interfere with his decision merely on that ground.

No doubt there are cases to be found in the reports in which the Court has sometimes opened up judgments in the Small Debt Court on a kind of constructive defect of jurisdiction, in respect of the Judge having refused to give effect to some general and well-fixed principles of law. This is a delicate, and for the most part a very exceptional proceeding. Such cases fall rather under the head of oppression than of jurisdiction, and I am not disposed to invalidate the effect of a very salutary provision for finality by fine-drawn distinctions. Unless in a state of circumstances very unusual, the decisions of the Sheriff pronounced in the Small Debt Court, in which the procedure is regular in point of form, and in which his jurisdiction is undoubted, ought to be regarded as final without considering whether he has decided rightly. I have gone over the cases which have been decided on this head, and this is the general result which I think is to be drawn from them. I will not say, however, that if it had been alleged here that the Sheriff had without reason assigned refused to entertain or consider the plea founded on the arbiter's award, some authority might not be found for the interposition of the Appellate Court to remedy a flagrant act of injustice. But this is not the allegation, and it is plainly not the fact. We are told that the Sheriff did consider the award, and came to the conclusion after inquiry that it ought not to receive effect. This of course cannot appear on the face of his decree, nor can the grounds which led to that conclusion, but as there is no allegation that the plea was not fully considered and repelled *causa cognita*, I think we ought not to disturb the judgment.

This appears all the more strongly when the terms of the alleged submission are attended to. I do not say that it was not binding, but it is very stringent. It is, in fact, a contract of service in which the master is absolute judge of the grounds of dismissal, and there are no provisions in the contract either for taking evidence or hearing parties, or even for a formal decision. It is certainly the fact that a similar contract was upheld in England, and I am far from saying that we should not decide in the same way if the question should come directly before us. But it does not follow that the Sheriff was not entitled in the Small Debt Court to consider or decide the point for himself. He has done so, and it is immaterial whether he was right or wrong in doing so.

This is the ground of my opinion, and I consider it unnecessary to go further. It was, however, further alleged that it was incompetent for the Sheriff to examine or inquire into the award, first, because this could not be done without a reduction, which is incompetent in the Sheriff Court; and secondly, because the Sheriff acted under the 2d subsection of the third clause of the Employers and Workmens (1875) Act, which was inapplicable to the case. I shall say a word or two on both these points.

As to the first, it was answered that power is conferred on the Sheriff by the Sheriff Court Act of 1877, sec. 11. It was urged on the other hand that this clause only applies to the Sheriff's Ordinary Court, and does not apply to the Small Debt Court; but I find no restrictive words in the statute. The Sheriff's Small Debt Court is not a separate jurisdiction in any accurate or technical sense. The Sheriff always had jurisdiction in such cases, the provisions in regard to small-debt causes being of the nature of rules of procedure regulating process and review in a special class of cases of which he was always a competent judge. I am therefore not prepared to hold that when this award was produced and founded on before him he was not entitled to consider any objections to it which would have been competent in a reduction.

The second objection raises a question of some novelty and interest. I assume, in dealing with it, that the Sheriff acted, as is alleged, under the 2d sub-section of the 3d section of the Employers and Workmens Act 1875 (38 and 39 Vict., c. 90), which is in the following terms—"If having regard to all the circumstances of the case it thinks it just to do so, it may rescind any contract between the employer and the workman upon such terms as to the apportionment of wages or other sums due thereunder, and as to the payment of wages or damages or other sums due, as it thinks just." "Workman" is thus defined in the Act, sec. 10; "The expression 'workman' does not include a domestic or menial servant, but, save as aforesaid, means any person who being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour . . . . has entered into or works under a contract with an employer, whether the contract be made before or after the passing of this Act, be express or implied, oral or in writing; and be a contract of service or a contract personally to execute any work or labour. . . ."

There is considerable want of precision in both these clauses. But I am of opinion, first, that the respondent was a workman in the sense of the statute. He was not a domestic servant. He was not other than a labourer employed to attend on the tramway cars, as much as a miner employed to work a windlass or the gearing of a pit, or a man employed to guide the horses of a track-boat on a canal. I am unable to draw any distinction which would not neutralise the Act altogether.

In regard to the second sub-section of clause 3, the power given is certainly a wide one, and I should have been disposed to think contemplated a termination or voiding of the class of contracts in question for the future. But it is not so limited, and I cannot find that in reading the statute as he did the Sheriff went beyond the terms of the provision.

On the whole matter I am disposed to dismiss the appeal.

Lord Ormidale—The question for decision in

this case is, Whether the small-debt decree complained of can be opened up and set aside for any of the reasons stated by the appellants?

Of the five reasons stated, the two first, as it appears to me, are alone attended with difficulty. The third, to the effect that the claim before the Sheriff exceeded £10, was given up at the debate in respect that the pursuer (respondent in the appeal) had duly and timeously restricted his claim to £10. The fourth reason is to the effect that the pursuer, who is a tramway car or omnibus guard, does not fall under any of the classes of persons to whom the Employers and Workmens Act applies. But having regard to the terms of the 10th section of that Act, [quoted in the Lord Justice Clerk's opinion, *supra*] I can entertain little doubt that the pursuer is comprehended by it. He may not belong to any of the classes specially enumerated, but I can see no sufficient reason for holding that he does not fall under the general description of persons being servants engaged in manual labour; and I feel myself confirmed in this view by the circumstance that domestic or menial servants are expressly saved or excluded from the operation of the Act, the inference being thereby rendered irresistible, as it appears to me, that all other servants engaged in manual labour are comprehended. And it cannot be disputed that the pursuer being occupied or employed as a guard to an omnibus or tramway car is acting as a servant engaged in manual labour. The fifth reason, so far as it does not relate to the merits of the dispute, which cannot be the subject of appeal, falls under the first and second reasons, which I have now to consider.

These reasons of appeal are much to the same effect, viz., that the jurisdiction of the Sheriff was excluded by the agreement of parties to leave their disputes to be settled by submission or reference. Now, for my own part, I cannot doubt that this is a sufficient ground and aptly expressed, if established, for quashing the Sheriff Court proceedings. The first reason of appeal is, not that the Sheriff was without jurisdiction to try and determine the case supposing there had been no agreement by the parties to leave it to be settled under a reference, but that his jurisdiction was excluded by such an agreement, and that accordingly it was incompetent for him to entertain the case and pronounce the decree complained of. And if this be so, the present appeal does not necessarily fall to be dismissed, for by section 31 of the Small Debt Act (1 Vict. cap. 41) it is provided that an appeal may be taken on the ground of incompetency, including defect of jurisdiction.

But then it was maintained by the pursuer, as I understood the argument, that the reference or submission and relative award in the present instance must be held to have been rescinded so far as they could be founded on as standing in the way of the Sheriff taking up the case and deciding it as he did, and consequently that his decree cannot now be reviewed. It is here that I have felt the present case to be attended with difficulty. It is true that by the second subdivision of the third section of the Workmen and Employers Act 1875 the Sheriff is empowered "if, having regard to all the circumstances of the case, he thinks it just to do so, to rescind any contract between the employer and the workmen upon such terms as to the apportionment of wages or other sums due thereunder, and as to the payment of wages or damages or other sums due, as he thinks just." But what was done in regard to rescinding the contract in the Sheriff Court, and whether its power in that respect was duly exercised, does not well appear. I doubt therefore if we are in a position to determine satisfactorily whether the decree complained of is reviewable or not without inquiry, and till it should be ascertained what was actually done in the Sheriff Court, and especially how far and to what effect the submission or reference and relative award were rescinded and set aside. I am inclined to think therefore that before disposing of the appeal it would be desirable, if not indispensable, to ascertain whether the submission or reference with the relative award, or only the contract of service, or all of these proceedings, were rescinded. That the contract of service, dealing with it separately and apart from the agreement by the parties to leave their disputes to be determined under a reference or submission, could be competently rescinded I cannot doubt; and that so far the decision of the Sheriff Court could not be reviewed I can entertain as little doubt. But I doubt whether the agreement of parties to leave their disputes to be settled under a reference or submission and the award which was pronounced are in any correct sense parts of the contract of service, and could as such be rescinded or disregarded by the Sheriff. Such a reference or submission I must take to be legal and unobjectionable, and this indeed I did not understand to be disputed. And the recent decision of the Court of Queen's Bench to that effect, although not conclusively binding on this Court, is entitled to great respect, and removes from my mind any hesitation I might otherwise have felt on the subject. But if so, the right or competency of the Sheriff to rescind or disregard the reference or submission and relative award is rendered all the more doubtful. And, assuming that the reference or submission and relative award stand untouched, it cannot, I think, be questioned that they must be held to have excluded the Sheriff's jurisdiction; or, to put it differently, or perhaps more correctly, have rendered it incompetent for him to entertain and judge of the pursuers' claim, just as it would be incompetent for this Court to entertain and give effect to a reduction of a regular and unobjectionable decree-arbitral.

In regard to the Sheriff Court Act of last year, all I think it necessary to say is, that as at present advised I am not prepared to say that it applies to the Small Debt Court at all; but whether the Sheriff proceeded upon that Act does not appear, and this just renders it all the more necessary that inquiry should be made before we dispose of this appeal.

But while I have thought it right to state the grounds upon which I have some doubt of the propriety of dismissing the present appeal without at least an inquiry as to what actually was done in the Sheriff Court, that doubt is not felt by me so strongly as to induce me to differ from the conclusion at which I understand both your Lordships have arrived in such a case as the present—a small-debt case.

Lord Gifford—This is an appeal against a decree pronounced in the Sheriff Small-Debt Court of Glasgow. The appeal was taken under the

statute to the Circuit Court of Justiciary and by them certified to this Division of the Court of Session, but in disposing of the appeal this Division is bound by the rules and subject to the limitations which would have governed the Circuit Court of Justiciary at Glasgow in the same way as if the case had been disposed of at the Glasgow Circuit.

Now, the first observation I wish to make is that there is no review of a small-debt decree pronounced under the statute upon the merits of the small-debt action. The Sheriff's judgment is final, however erroneous it may be either in point of law or in point of fact. The appeal to the Circuit Court is in no case whatever and under no circumstances to involve any review of the merits or any correction of the Sheriff's views, whether in fact or in law. It is of no use therefore saying that the Sheriff has gone wrong. That is not the question. The Legislature has said he shall not be put right on the merits. It is better that occasional errors should remain unredressed in causes of so small pecuniary value than that the door should be opened to the expense and delay of reviews, and the benefits of a summary finality be lost or diminished.

Appeals to the Circuit Court against Sheriff small-debt decrees are limited to certain special and specified grounds mentioned in sec. 31, thus—"Such appeal shall be competent only 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 from having been done, or on incompetency, including defect of jurisdiction of the Sheriff."

In the present appeal the appellants rest their case exclusively upon the last of the statutory grounds here mentioned—"incompetency, including defect of jurisdiction." It is not pretended—there was not the remotest suggestion—that there was corruption or malice or oppression on the part of the Sheriff; it is not said that there is any deviation whatever from the statutory form or any irregularity in the proceedings; and therefore the sole question for us is, Is the Sheriff's decree void or voidable on the ground of incompetency or defect of jurisdiction?

I am of opinion that there was no incompetency in what the Sheriff did, and that there was no defect in the Sheriff's jurisdiction, and therefore I think that this appeal should be dismissed. When the appellants' grounds of complaint are narrowly examined I am satisfied that they are really complaints on the merits of the cause. They all resolve into allegations that the Sheriff has erred in point of law or in point of fact. It is said that he has grossly or grievously erred—that he has refused to give effect to the appellants' pleas, said to be founded on a written deed and on a written decree-arbitral, and that he has wrongly and unjustifiably decided the case in favour of the pursuer, the tramway conductor, whereas he ought to have decided it in favour of the Tramway Company, and so on. It appears to me that all these pleas really involve the merits of the case, and on these merits I decline to say anything, because the merits are not and cannot be before me. I have not the materials which the Sheriff had, and the statute precludes me from entering upon or inquiring into the merits of the various questions decided by the Sheriff, and that equally whether these merits consist of questions of fact or of questions of law.

But it is urged that the Sheriff was incompetent to pronounce the decree he did, and that he exceeded his jurisdiction, and it seems to me that these two questions are the only questions which can be decided in this appeal.

The words of the statute are "incompetency, including defect of jurisdiction," and thus want of jurisdiction is classed as a kind of incompetency, and undoubtedly it is so in one sense. It is incompetency in respect of the limitation—territorial or otherwise—of the judge's office. Still it is important to distinguish want of jurisdiction from other kinds of incompetency in order to see precisely where it is that the appellants' objection lies.

Now, first, I am of opinion that the Sheriff in pronouncing the decree in question had jurisdiction, and was acting within his jurisdiction. The parties were domiciled, resident, carrying on business, and cited within the Sheriff's territory. The account sued for consisted of wages alleged to be due by the Tramway Company to one of their conductors, and the amount sued for was restricted to the small-debt statutory limit. Such cases arise by hundreds every week, and *prima facie* it is difficult to conceive how any objection could be taken *in limine* to the Sheriff's jurisdiction. The parties were regularly there subject to the Sheriff's power. The subject-matter was precisely one to decide which the Small Debt Court was created, and the Sheriff was there to decide between the parties. On entering Court therefore there could be no objection to the jurisdiction of the Sheriff. But then the appellants say that when contracting with their servant they entered into a written agreement, by one article of which it was covenanted that the managing director or the secretary of the Company should be the sole judge in any dispute between the Tramway Company and their servant, and the appellants' plea is that this written contract, especially when followed by a certificate or award by the secretary, excluded the Sheriff's jurisdiction—that is, prevented the Sheriff from judging at all in the case. In one sense this is true. In common language, where no attempt is made at logical accuracy, it is sometimes said that a contract of submission or arbitration ousts the common law jurisdiction of all judges. The parties have chosen a private judge for themselves. But this is not strictly or logically accurate language, and what is more important, it is not the sense in which the small-debt statute uses the words "incompetency" and "defect of jurisdiction." In strict language a contract of arbitration does not destroy the jurisdiction of the common law judge. It only introduces a new plea into the cause on which the common law judge must decide by virtue of his inherent jurisdiction. If he decides that there has been a valid contract of arbitration he may take several courses. He may dismiss the action, leaving the parties to go to their arbitration and come back again if necessary for execution or for powers, or he may remit to the arbitrator, or suspend proceedings or give effect to the award. If the common law judge decides that there has been no valid arbitration or that the award is bad or *ultra vires compromissi*, he will proceed accordingly, but in dealing with arbitrations

and awards the judge is exercising his inherent jurisdiction and is noway divested thereof, and that whether he sustains the arbitration and award or whether he refuses to do so in whole or in part. In short, the plea of arbitration is a plea on the merits of the case, which if well founded will indeed prevent the judge from himself entering on the merits or going into proof, but which will not and cannot deprive him of his jurisdiction. If the award is good he will give effect to it either by ordering it to be put in execution or otherwise. If it is bad he will disregard it, repel the plea of arbitration, and proceed with the suit in common form, but in all cases he has jurisdiction to take either course, and if his jurisdiction is not subject to review his decision will be final.

The case is precisely the same with other defences besides the defence of arbitration and award. Suppose that instead of producing the alleged arbitration and award the defenders, the Tramway Company, had produced a formal and regular deed of discharge and acquittance by the pursuer in their favour. Such a deed would not have ousted or destroyed the Sheriff's jurisdiction. It would only have raised an ordinary and competent plea in the cause, of which the Sheriff would most certainly have had jurisdiction to judge. If the discharge was valid and unexceptionable the Sheriff would give effect to it,—if the discharge was void or inapplicable he would repel the plea and proceed; but in both cases he would be exercising his jurisdiction and would not be divested thereof. Indeed, an arbitration with an award of acquittance is just a discharge granted by the party indirectly—that is, through the arbiter—and is to be treated in precisely the same way as if granted directly by the party himself—that is, its validity must be judged of and decided by the Sheriff. I am of opinion, therefore, that the alleged arbitration and award did not exclude the jurisdiction of the Sheriff, but simply raised a plea which the Sheriff was entitled and bound to dispose of. So with a plea of compromise, which really is very like a plea of arbitration. If either party say that the case has been validly and effectually compromised or settled, that will not deprive the Sheriff of jurisdiction, although if well founded it may exclude him from entering upon the proper merits of the case. But he must decide, and decide finally, in the Small-Debt Court whether the case has been compromised or not.

The appellants' contention that the Sheriff's judgment was incompetent is also I think sufficiently answered. Incompetency, in the strict technical meaning of the word, signifies that the judge has no power to deal with the matter either way—that he cannot decide it at all either in favour of the pursuer or the defender—he cannot look at it at all or come to any conclusion regarding it. But the appellants' own plea is inconsistent with this, for what they say is this, that the Sheriff ought to have sustained the plea of arbitration and award instead of having repelled it. They say it was incompetent in the Sheriff to disregard the award, but they do not say it was incompetent in him to have sustained it. On the contrary, they say he ought to have sustained the award and assoilzied them from the action. Now, I do not understand an incompetency of this kind—an incompetency which makes it incumbent on the Sheriff to decide in a particular manner and in that manner only. It would be a most lopsided incompetency—an incompetency to assoilzie but a competency to give decree, or *vice versa*. Incompetency, if it have place at all, must incapacitate the judge from doing anything whatever, and must not compel him to decide the question only in one way. And so upon this part of the case I think the argument of the appellants rests upon a fallacy. In short, I am of opinion that the Sheriff, a competent judge with competent jurisdiction, rightly took cognisance of the plea of arbitration, and competently decided it, whether rightly or wrongly is a totally different question with which I have nothing whatever to do. I am excluded by the statute from entering upon that matter.

Now, without going further, I think I have here enough to lead to the dismissal of the appeal. I think the plea upon the arbitration was really a plea upon the merits of the case, although no doubt if sustained it would prevent the going into other merits which necessarily lay behind. It was just like a plea of discharge or of compromise, or of prescription or statutory limitation, or any other plea which if sustained would supersede the inquiry how much was due? Surely the Sheriff's judgment in the Small-Debt Court upon a plea of prescription or the application of the different rules of prescription is not subject to review either by the Circuit Court or by this Court, although no doubt now and then the Sheriff may decide such questions erroneously. I see no difference in kind between a plea founded upon an alleged award from a plea founded upon an alleged discharge or alleged compromise or upon an alleged statutory prescription.

But the appellants attempted to ask the legal review of this Court on the pleas in fact and in law on the ground that the Sheriff could not disregard or get behind the award, which they say is a regular deed duly tested, without a formal action of reduction in the Court of Session, and there having been no such action, his going behind the award was incompetent, though he might quite competently have sustained it. I cannot assent to this proposition. It would be rendering the Small Debt Acts nugatory if every time formal writing is founded on in these Courts the Sheriff's hands were tied, and he were precluded from all inquiry unless actions of reduction or similar actions were first brought in the Court of Session. The formality of the alleged writing makes no difference. A bill or receipt *in re mercatoria* is as privileged as a tested deed, and I should be very slow to hold that the Sheriff cannot get behind receipts or bills when the justice of the case requires it without an action in the Court of Session. I think the Small Debt Court has all the powers necessary to extricate its jurisdiction, provided only the sums in dispute—and it is practically limited to money claims—do not exceed the statutory limit of small-debt jurisdiction. I also incline to be of opinion that the recent statute, which gave Sheriffs power to deal with writings by way of exception, is applicable to Sheriffs sitting in Small Debt Courts. But it is not necessary to decide this point.

The view I take of this case also supersedes the questions raised upon the construction of the Workmen's Acts. On these questions I would rather avoid giving any decided opinion. They are attended with much difficulty. Whether a

tramway car conductor is a workman—how far the Sheriff's power to rescind a contract entitles him to intermeddle with arbitration clauses or awards under the contracts which he is entitled to rescind—I would rather not absolutely say. These are all difficult questions of law, but they are parts of the legal merits of the case between the parties which the Sheriff has dealt with and decided, and his decision in law, even upon the construction of a difficult statute, is not subject to review. It has been said that the Sheriffs in Small Debt Courts have often to decide without appeal questions of law which might be the subject of different and alternating decisions through all the Courts of the kingdom. It is just to avoid such a result that the Sheriff's judgment is made final.

To the same category I refer other questions raised in argument. For example, How far could the Sheriff modify the penal forfeiture of wages and restrict it to any loss which the Tramway Company actually sustained? How far could he correct an obvious error in the award by which the secretary forfeited only 1s. 9d. of wages, which, being the current wages, he thought was all that was due, whereas the conductor had deposited or left in the company's hands nearly £10 of wages, of which it is said the alleged arbitrator did not know at all, and so on. All these were questions for the Sheriff, and not for me. These questions are all nice and difficult, and very possibly the Sheriff may have erred, but his decision is final, and all review is excluded; and, being of opinion that the Sheriff acted competently and within his jurisdiction, I think the appeal should be dismissed. Strong cases were put of Sheriffs obstinately refusing to give effect to decrees of this Court or of the House of Lords. Or it was figured that the Sheriff on views of his own might refuse to sustain prescription at all as an unjust plea, and contrary to justice, and so other extreme cases were urged in argument. I think all such cases if they could be substantiated would fall under the head of oppression or perhaps of legal corruption, but nothing of that kind—not even a shadow of it—arises in the case before us.

The Court therefore refused the appeal.

Counsel for Pursuer (Respondent)—Brand—Martin. Agents—Wright & Johnston, Solicitors.

Counsel for Defenders (Appellants)—Mackintosh. Agent—John Gill, S.S.C.

Friday, June 28.

SECOND DIVISION.

M'DOUGALL *v.* CALEDONIAN RAILWAY COMPANY.

Jury Trial—Expenses—Fees of Skilled Witnesses and to Counsel to Consider Tender where Case Settled.

In an action of damages for personal injury, where a tender of £200 and expenses was made and accepted, the Court *allowed* the pursuer (1) the expense of consulting a surgeon before the raising of the action, with the view of his ultimately giving evidence, on the ground that that was a necessary preliminary for the purpose of getting up the case previously to the stage at which it was settled, and (2) fees to counsel to consider the tenders, more than one of which had been made.

Observations (*per* the Lord Justice-Clerk and Lord Ormidale) upon the extent to which the practice of obtaining skilled medical testimony in cases of damages for personal injury is carried.

This action was at the instance of the Rev. J. R. M'Dougall against the Caledonian Railway Company, for damages for personal injury sustained through the upsetting of a coach on Lochawe-side on 27th August 1877, while travelling in virtue of a ticket issued by the defenders.

The pursuer after the accident proceeded to Bridge of Allan, where he was seen by several surgeons both from Bridge of Allan and from Edinburgh and Glasgow, including Mr Annandale from Edinburgh.

The action was raised in the end of September 1877, and issues were adjusted on 22d November.

The next day the pursuer received notice of a tender of £150, which, after a consultation with counsel, he agreed not to accept. On 28th November the defenders lodged a tender of £200 and expenses, which at the time was not accepted.

Notice of trial was given by the defenders for the Christmas sittings, but the trial was postponed on the motion of the pursuer. The defenders in February 1878 gave notice of trial for Inveraray Circuit (8th May), but on 18th April the pursuer accepted the tender lodged on 28th November before. The Court then gave decree for that amount, with expenses to the date of the tender, and expenses to the defenders after that date.

The Auditor allowed the pursuer the expense of consulting Mr Annandale, £15, 15s., and also fees to counsel for considering the first and second tenders, to both of which findings the defenders lodged objections.

Argued for them—The fee to Mr Annandale ought not to be allowed, because if the trial had taken place he would have been examined as a skilled witness, and the Judge would have required to certify before the fee would have been allowed. The fee could not be certified, because the trial never took place; a tender was accepted, and the expense of consulting surgeons should be included in the amount of damages—A. of S. 10th July, 1844, secs. 4 and 6.

At advising—

Lord Justice-Clerk—In regard to the more serious matter—the question whether the fee of £15, 15s. to Mr Annandale is to be allowed—I must say I sympathise with a good deal of what was said by Mr Trayner, especially in regard to the amount. It is a great misfortune that in cases of this sort the expense of medical testimony should be run to the extent it is, because the parties must have the most famous doctors.

I should have been very glad of an opportunity of revising the whole of this practice, but I am not disposed to do so in this case. This is an action of damages for personal injury, where we find that a tender has been made and accepted; the advice, therefore, of surgeons of eminence was absolutely necessary. The Railway Company had the pur-