something else. His opinion was simply that the exaggerated condition of somnambulism constituted temporary insanity. It was not a known form of insanity in medical science.

By the COURT—He would not certify the prisoner as insane. This was a very rare case. Ordinary sleep-walking was not a rare occurrence, but he would not class that under insanity.

Dr Clouston, Royal Asylum, Morningside, examined for the defence, deponed—He had had interviews with the prisoner, and he had heard the case that day. He could not detect any symptoms of insanity about him. He considered that he was subject while asleep to somnambulism. He found him to be a man of very fair judgment for his education, his memory seemed good, and he seemed particularly affectionate. One thing struck him very much. He asked the prisoner if he felt the death of his child, and he answered he did; but as his wife was much put about he had concealed his own feelings for her sake. He did not think there was any case of somnambulism which could be brought under insanity.

By the SOLICITOR-GENERAL—Witness did not recognise the case as arising from an abnormal condition of the brain producing delusion and violence.

By the COURT—He did not consider that somnambulism might be due to insanity. It was without precedent that a man imagined that it was a beast he was contending with. There was no special way of removing the tendency, except by improving the general health. He did not consider a man in such a condition as responsible. The only difference between an ordinary case of sleep-walking and the present was that the man's actions were of a dangerous character.

The LORD JUSTICE-CLERK, in addressing the jury, said—I suppose, gentlemen, you have not the slightest doubt that the prisoner at the time was totally unconscious of the act that he was doing. There is not the slightest doubt that he was labouring under one of these delusions which occurred in a state of somnambulism—he was under the impression that some animal had got into the bed. I see no reason to doubt, and I do not suppose you, gentlemen, have any doubt, that the account as given is correct. It is a matter of some consequence to the prisoner whether he is found responsible or not, because you are aware that his future must to a great extent depend upon the verdict you shall return. The question whether a state of somnambulism such as this is to be considered a state of insanity or not is a matter with which I think you should not trouble yourselves. It is a question on which medical authority is not agreed. But what I would suggest is, that you should return a verdict such as this—that the jury find the panel killed his child, but that he was in a state in which he was unconscious of the act which he was committing by reason of the condition of somnambulism, and that he was not responsible.

The jury returned a verdict accordingly.

The SOLICITOR-GENERAL then suggested that the case should be adjourned for two days, that there might be an opportunity for consultation as to what arrangements should be made with reference to the accused. He would be very sorry to keep the prisoner for other twenty-four hours, but it was really for his interest that they were doing so.

The LORD JUSTICE-CLERK concurred in the proposal and adjourned the case accordingly.

Upon Fraser's giving an undertaking to the effect that no one but himself should sleep in the room which he might occupy, in which undertaking his father concurred, he was set at liberty.

Counsel for the Crown — Solicitor-General (Macdonald) — Muirhead, A.-D. Agent — The Crown Agent.

Counsel for Fraser—C. S. Dickson. Agent—

COURT OF SESSION.

* *Tuesday, October* 15.

FIRST DIVISION.

M'INTOSH BROTHERS *v.* WILSON.

Process—Exchequer—Special Case under the Act 7 and 8 George IV. cap. 53, sec. 84—Competency of Quarter Sessions judging a Case from Shorthand Writer's Notes taken in the Petty Sessions.

In a complaint before the Petty Sessions claiming penalties in respect of alleged infringements of the Excise Statute 23 and 24 Vict. cap. 114, shorthand writer's notes of the evidence were taken for the convenience of parties. The case was appealed to the Quarter Sessions, where the shorthand notes of the former evidence were used, the witnesses being re-sworn but not re-examined. *Held* that such procedure was incompetent under the provisions of the 84th section of the Act 7 and 8 George IV. cap. 53, and case remitted to the Quarter Sessions for a re-examination of the witnesses.

Expenses.

Held (in compliance with the cases of *The Queen* v. *Beattie*, Dec. 18, 1866, 5 Macph. 191; *The Queen* v. *Gilroy*, March 20, 1866, 4 Macph. 656; and *The Queen* v. *Caird*, Jan. 18, 1867, 5 Macph. 288) that it is incompetent to award expenses against the Crown in a Case submitted by the Quarter Sessions for the opinion and direction of the Court of Exchequer.

This Case was stated for the opinion of the Court of Exchequer by the Quarter Sessions of the county of Edinburgh in an appeal from the Petty Sessions at the instance of M'Intosh Brothers, spirit merchants in Leith, against James R. Wilson, the Excise officer. The witnesses were re-sworn before the Quarter Sessions and the evidence taken before the Justices in the Court below was read by the Clerk of the Peace in the hearing of the Court and of the witnesses, and they were asked upon oath whether that was a correct statement of the evidence, and whether they adhered to it. They were allowed to make any explanations which they desired. The appellants had wished to examine the witnesses entirely of new, but the Quarter Sessions had ruled that as the evidence had been taken in the Court below at the request of the parties by a shorthand writer, this was inexpedient and unnecessary, and that they were confined by the terms of the statute to the same witnesses and the same evidence. The appeal had been dismissed, and M'Intosh Brothers had thereupon asked a Case

* Decided July 19th 1878.

to be stated for the opinion of the Court of Exchequer under the 84th section of the Act 7 and 8 Geo. IV. cap. 53.

The following question of law relating to the mode of procedure was, *inter alia*, submitted to the Court—"Whether in the circumstances the mode adopted at the Quarter Sessions of rehearing the evidence upon which the appellants were convicted was a sufficient compliance with the terms of the statute thereanent?"

Argued for the appellants—The Justices in not re-examining the witnesses had not complied with the provisions of 7 and 8 Geo. IV. cap. 53, sec. 84, which enacted—"That upon every appeal it shall be lawful for the Commissioners of Appeal or the Justices of Peace at the general Quarter Sessions respectively, before whom respectively any such appeal be brought, and they are hereby respectively authorised and required, to proceed to re-hear upon oath and to re-examine the same witness and witnesses, and to reconsider the same evidence and the merits of the case whereon the original judgment appealed against shall have been given, and they shall not examine any evidence or any witness or witnesses other than or different from the evidence and the witness or witnesses which and who shall have been before examined before the Commissioners of Excise or Justices of the Peace respectively," &c. The witnesses should have been re-sworn and re-examined on the whole case. The words "same evidence" alluded to any documentary evidence produced in the Inferior Court.

Argued for the respondents—The provisions of the Act had been carried out as at the examination before the Petty Sessions, the witnesses acknowledged their former evidence, and opportunity was given both to the Justices and to the parties to ask any further questions they might think necessary.

At advising—

Lord President—The point in this case is very short and narrow, and really comes to this, Whether the Justices in the Quarter Sessions were justified under the statute in refusing the appellants' desire to examine all the witnesses anew? It is a point of some importance as a precedent, and as involving a principle, and after the fullest consideration I am of opinion that the Justices were wrong, and did not act according to the provisions of the statute. The statute distinctly decides that they shall proceed to rehear upon oath and to re-examine "the same witnesses," &c., and when we regard those precise words it is not necessary to take into consideration the meaning of the Legislature in so legislating. At common law the evidence in such cases must be taken down *ad longum* in writing in the form of depositions, and if the object of the statute were that precisely the same evidence in the sense of the same statement of the witnesses should be laid before the Quarter Sessions as before the Petty Sessions, it is not easy to see why the common law was not allowed to regulate the matter, for the best way to secure that precisely the same evidence should be put before the two Courts is that the evidence should be taken down in shorthand and transmitted. But when the statute says that that is not to be done, but in place of that that the same witnesses shall be brought and re-sworn and re-examined, it evidently contemplates something entirely different. It probably is contemplated that the witnesses will be better examined on the second occasion and by more experienced persons, and that therefore a more satisfactory account of facts will be given by them. But it is not of much consequence here to inquire the object of the enactment. It is sufficient for the Court to know that in place of securing exactly the same evidence, the Legislature intends that the same witnesses shall be recalled, re-sworn, and re-examined, to entitle it to say that that course must be followed, or the statute is not followed.

I have said that this case is important as a matter of principle, and many cases might be cited upon this point, and I will refer to one—that of *Campbell* v. *Brown*, June 12, 1829, 3 Wilson & Shaw, p. 441. In that case a presbytery who tried a schoolmaster under the Act 43 Geo. III. cap. 54, omitted to have the evidence taken in writing, and argued that it was of no use to do so, for the statute had cut off all review of the case upon the merits. But the Lord Chancellor said that it was no matter whether it was of use to do so or not, for the statute left the rules of common law unaltered, and this was probably done, his Lordship says, because when evidence is taken in writing it is apt to be much more carefully considered; but whether that were so or not the statute made no change, and therefore the evidence must continue to be taken as usual. Now, here the statute does not leave the common law to regulate the matter, but puts something else in its place, and that is the re-examination of the same witnesses. Now, it appears to me that in this proceeding, which is very clearly stated in the Case, the provision of the statute was not complied with. The statute evidently did not contemplate that the evidence should be taken in writing and then sent to the court of appeal. The appeal being incompetent on that point, we cannot, and indeed are not at liberty to, consider the other questions mentioned in the Case.

Lord Deas—There can be no doubt that in this case, according to common law, the evidence might have been taken *ad longum* in writing. There is no express dispensation of that in the statute, and the only dispensation is implied from the terms of sec. 84. But the implication goes inevitably to the conclusion arrived at by your Lordship, that according to the statute the witnesses ought to have been re-sworn and re-examined. If it were not for the words "reconsider the same evidence," which occur in the 84th section, there could be no doubt and no argument suggested against the view taken by your Lordship. If these words are left out, there is an express enactment that the Justices are to "re-hear and re-examine" the same witnesses. The whole argument in favour of what has been done depends on this, that the same evidence is to be reconsidered. That has, however, no reference to the parole testimony. The Quarter Sessions are to reconsider the written evidence, if written evidence there was, and to re-examine the witnesses on the whole cause. That is very clear to me. It is quite plain in the face of the Case stated that they did not do that and did not intend to do that. They reconsidered the evidence taken by the shorthand writer, and the

witnesses were allowed to make any explanations; but that is not a re-examination on the whole cause. On the whole case, I can have no doubt that the proceedings in the Quarter Sessions were quite contrary to statute.

LORD MURE—From the first time I read the 84th section I had no difficulty in coming to a conclusion, for the words there could not be more imperative. The Justices are specially required to proceed by rehearing upon oath, and to reconsider the same evidence. Now, what was done here? They did not rehear upon oath, but came to the conclusion that the Clerk of Court should read a deposition taken for the convenience of the Petty Session, and then they ask whether they were not right according to statute. Nothing can be more different. A witness is re-examined and reheard in order that the Quarter Sessions may form an opinion of what a witness says, and on his credibility or incredibility, according to the way he says it. If an agreement had been made by the parties that the evidence should be laid in writing before the Quarter Sessions, the question must have been different, but this course is certainly not allowable by statute, and seems to me to be a course which if adopted would defeat the ends of justice. I can conceive no worse way to consider evidence than that a clerk should read it over to the Justices in a monotonous tone. One-half of it I am sure would convey no meaning to their minds at all.

LORD SHAND—I confess that throughout much of the discussion I was rather of opinion that the objection was too narrow, and that there had been a substantial compliance with the Act—and when I say a substantial compliance I do not mean that something equivalent had been done, but that the respondent was in a position to say that the statute had been complied with. For one cannot fail to see that the witnesses were fully examined in the whole case. The parties could put any questions they chose; but the peculiarity in this case is that a record taken by a shorthand writer was read over to the Justices, and taking that fact into consideration I have come to the same conclusion as your Lordships, and therefore I am of opinion that the appellants are entitled to have the proceedings set aside.

I concur with Lord Deas that the words "same evidence" in the statute means documentary evidence laid before the Petty Court; but it must be kept in view in construing the Act that there is nowhere in previous parts of the statute a provision authorising a record to be made up in the lower court. The parties must decide on purely *viva voce* evidence. That being so, unless with consent of the parties,—even if that would have been enough,—the justices in the Quarter Sessions were not entitled to take cognisance of the fact that a record was made up in the lower court. The appellants were perfectly entitled to claim that this record should be set aside and the evidence taken entirely anew. It may be that the objection that evidence when read over will not tell so strongly upon the judicial mind as it would have if heard in question and answer is somewhat critical, but I cannot say that I do not think some weight should be given to it, and if any weight should be so given, then it should be given to the appellants, as according to statute they were entitled to have it so taken. If the appellants had not objected at the time, I will not say that it would be sufficient to state it now, but the objection was taken, and I think that the Justices were not entitled to take the course they did in face of that objection.

Counsel for the respondent then moved that the case should be remitted back to the Quarter Sessions in order that it might be tried over again in proper form.

Counsel for the appellants argued that the whole conviction should be quashed in respect of the illegal proceedings of the Quarter Sessions.

The Court issued the following interlocutor:—

> "The Lords having heard counsel on the case as amended, Find that the mode adopted by the Justices in Quarter Sessions of rehearing the evidence was not a sufficient compliance with the provision of section 84 of the Act 7 and 8 Geo. IV. cap. 53, but was in violation of the said provision: Therefore set aside the deliverance of the Quarter Sessions, by which they dismissed the appeal and confirmed the conviction of the Petty Sessions; and decern and direct the Justices in Quarter Sessions to rehear the cause in terms of the statute; and find no expenses due."

On the question of expenses, counsel for the appellants moved for the expenses of the Special Case, and founded on the Act 19 and 20 Vict. c. 56, sec. 24, and *Somner* v. *Middleton*, June 6, 1878, 15 Scot. Law Rep. 594.

Counsel for the respondents argued that the Court had no power to give expenses, and founded on these cases—*The Queen* v. *Beattie*, Dec. 18, 1866, 5 Macph. 191; *The Queen* v. *Gilroys*, March 20, 1866, 4 Macph. 656; *The Queen* v. *Caird*, Jan. 18, 1867, 5 Macph. 288; *White* v. *Simpson*, Nov. 28, 1862, 1 Macph. 72.

The Court refused expenses, holding the point ruled by the cases last quoted above.

Counsel for Appellants — Dean of Faculty (Fraser) — M'Kechnie. Agent — W. G. Roy, S.S.C.

Counsel for Respondent — Solicitor-General (Macdonald)—Rutherfurd. Agent—David Crole, Solicitor of Inland Revenue.

Thursday, October 17.

SECOND DIVISION.

[Sheriff of Berwickshire.

STOTT *v.* FENDER AND CROMBIE.

(*Ante*, vol. xv. p. 734.)

Expenses—Double Appearance by Two Defenders having Similar Interests.

Where there are two defenders to an action with the same or similar defences, the Court will not allow the whole expense of a double defence.

Circumstances in which the Court *allowed* the expenses of one defender, with a watching fee added for counsel and agent of the other