A copy of this order having been transmitted to Mrs Ross by Captain Graham, she appeared by counsel, and stated that she had returned to Scotland, and undertook to abide the judgment of the Court in the first petition at her husband's instance; she also craved the Court to dispense with her appearance at the bar on 17th February, which crave the Court granted.

Answers to the petition for custody were lodged for Mrs Ross on 12th February 1885, and the Court allowed a proof, directing Mrs Ross to lead.

As a result of the proof the Court found that Mr Ross was, though much recovered, still unfit to have the custody of the children.

Counsel for Petitioner—H. Johnston. Agents—Hagart & Burn Murdoch, W.S.

Counsel for Trustees—Sol.-Gen. Asher, Q.C.—Pearson—Salvesen. Agents—J. & R. A. Robertson, S.S.C.

Wednesday, August 12.

FIRST DIVISION.

[Exchequer Cause—Lord Fraser.

LORD ADVOCATE *v.* D. J. THOMSON & COMPANY AND OTHERS.

Revenue—Spirits—Spirits Act 1880 (43 *and* 44 *Vict. c.* 24, *secs.* 129, 130)—*Forfeiture.*

Held that in order to forfeiture, under the Spirits Act of 1880, of spirits containing methylated spirit, found in possession of one not entitled to have such in his possession, it is not necessary that there be knowledge by him of the existence of such methylated spirit, it being sufficient that it is, in fact, in his possession.

Evidence—Crime—Evidence of Accused.

Held that in a prosecution for preparing methylated spirit for a beverage, or otherwise for having it in possession contrary to the Revenue laws, the evidence of the accused is incompetent.

The Spirits Act 1880 by section 129 provides that a fine of £100 shall be incurred by one who, not being an authorised methylator, has in his possession any methylated spirits not obtained from a person authorised to supply them.

Section 130 provides that if any person propares or attempts to prepare any methylated spirits as or for a beverage, or as a mixture with a beverage, he shall incur a fine of £100, "and the spirits with respect to which the offence is committed shall be forfeited."

This was an information by the Lord Advocate on behalf of the Crown against D. J. Thomson & Company and James Ford and Richard Dickson, rectifiers of spirits, Leith, stating that the officers of Inland Revenue did, on 11th June 1885, seize in the premises of the defenders James Ford and Richard Dickson 534 gallons methylated spirits, and that (1st count) the said James Ford and Richard Dickson did prepare or attempt to prepare the said methylated spirits for use as or for a beverage contrary to 43 and 44 Vict. c. 24, sec. 130, whereby the said methylated spirits became forfeited; and (2d count) that the said James Ford and Richard Dickson, not being authorised methylators within the meaning of said Act, had the said methylated spirits in their possession, the same not having been obtained from a person authorised to supply the said methylated spirits, contrary to said statute, section 129, whereby the said methylated spirits became forfeited.

D. J. Thomson & Company claimed to be owners of the goods seized.

D. J. Thomson & Company and James Ford and Richard Dickson lodged defences, denying that any methylated spirits were seized as alleged, averring that the goods seized were bought from spirit merchants as free from methylated spirits, that they had been tested for such, and contained none. They denied the first count. They also denied the second count, and averred that they had no knowledge of there being any methylated spirits in their possession, if any was so found. They therefore pleaded not guilty.

A proof was led. It appeared that a firm named Warrick & Sons, who were not authorised to traffic in methylated spirit, had been buying quantities of it from Raimes & Co., authorised dealers in it. They bought it by a gallon at a time, that being the largest amount allowed to be sold at one time. This was mixed with other spirit and sold, as was alleged, to the respondents by Warrick & Sons. The respondents were not aware when buying it that it contained methyl, and bought it in the course of their trade as rectifiers. The defenders tendered themselves as witnesses for the purpose of proving that there was no methyl in the spirits that were seized, and if there were, that they were entirely ignorant of it.

The Solicitor-General objected to the competency of this evidence, on the ground that this was a criminal case, and the evidence of the accused could not be received.

The Dean of Faculty replied that this was not a criminal case, but merely a prosecution for a breach of Excise laws—a civil prosecution—and where therefore a defender, as in an ordinary civil suit, was a competent witness.

Lord Fraser—The point here raised is not new to me. I argued it for the accused in the case of *Alison* v. *Watson*, 1 Macph. 87, unsuccessfully. I would like to see the law otherwise, but I am bound by that decision, and must refuse to receive the evidence of the defenders.

The proof being concluded, Lord Fraser pronounced judgment as follows:— I do not think it necessary to make avizandum of this case, and am prepared to give judgment at once. I have listened very carefully to the evidence adduced, and which has been so ably commented upon by the two gentlemen who have addressed me. The question which I have to try arises out of the relaxation of the Revenue laws made in recent years for the purposes of trade. Spirits were necessary in very many trades, but these trades could not afford to purchase spirits upon which duty had been paid, and hence it was desirable, in order to encourage trade, that spirits should be allowed to be used without being duty paid. The difficulty was to discover some substance that would prevent these spirits being used as a beverage,

and I believe the only substance that has been discovered that will not destroy the alcohol as a valuable instrument for trade purposes while rendering it disgusting as a beverage is methyl or wood naphtha. The Commissioners are allowed by the statute to warrant the sale of what is called methylated spirits, the spirits being mixed with some "substance"—they do not define what it is—to their satisfaction, their satisfaction being explained, however, by what is set forth in section 3 as, so as to render the mixture unfit for use as a beverage. The statute authorises two or three different classes of people to deal with this article — First, methylators, who are entitled to make methylated spirits; second, retailers of methylated spirits; and third, people who buy from retailers. Raimes & Company are retailers of methylated spirits, and they are entitled to sell a gallon at a time to each person who comes and asks for it. There is a great deal in what was said by the Dean of Faculty as to the neglect by those in authority in not carrying out the provisions of this statute, which were intended for the public protection, namely, in requiring these retailers to keep an account of all the methylated spirits in their possession, and of all they sell. If such an account had been kept, as was contemplated and ordered by the Legislature, it would have been discovered how Raimes & Company and Warrick & Sons were dealing with each other much sooner than it was. I have very little doubt that as a consequence of this trial such a form of an account will be published immediately by the Commissioners of Inland Revenue as will supply that deficiency.

Now, the first count in this indictment has been given up—and I think quite properly—by the Solicitor-General. I do not think it was proved that the defenders were rectifying methylated spirits for the purpose of their being used as a beverage. Indeed, Mr Helm, the first witness for the Crown, stated that the product of the still in the defenders' premises might have been used for trade purposes and not as a beverage.

But the case on the second count stands in a totally different position; and here I may state that I intend to give my judgment upon the footing that these defenders bought from Warrick & Sons those spirits not knowing them to contain methyl—that they were entirely ignorant of the fraud which Warrick & Sons were perpetrating—bought innocently this grog mixed, if it was so mixed—I shall consider that immediately — with methyl, in the ordinary course of trade, with the view of rectifying it and turning it into spirits for trade purposes other than as a potable drink. But I hold that the defence stated on their part — of ignorance of the fraud that was perpetrated upon them—if there was a fraud—and I assume there was—is totally irrelevant in a case of this kind; *scienter* has nothing to do with the question. The whole point is, have these defenders in their possession goods liable to seizure? If they have, these goods must be forfeited, unless, indeed, a case like that stated by the Dean of Faculty could be proved, viz, that some person had feloniously during the night put into their premises a barrel containing spirits mixed with methyl. That is a totally different case. In such circumstances the spirits would not be in their possession though within their premises. The article must be received by the defenders before it can be held to be in their possession within the meaning of the statute. We are here dealing with the case of a trader who did willingly receive the spirits, and who could have discovered, if he had used the means—it is entirely a matter of pounds, shillings, and pence —of ascertaining, whether there was methyl in them. He could have analysed it. No doubt that would be costly and troublesome, but still that is the only way by which he could protect himself. In the application of these Excise laws it is absolutely necessary to put aside *scienter*. Men have been found liable in damages where there was no guilt upon their part, but, on the contrary, where there was the most positive instruction against doing that for which they were found guilty. A servant misuses a permit, and thereby violates the Excise laws; the master is liable. Many other cases come to my recollection of convictions under the Excise laws where there was no intention to do wrong, and no knowledge on the part of the trader of the wrongous act. Malt being found where it ought not to have been, against the orders of the master, the master was notwithstanding found liable. A hole was found in a pipe which conveys whisky away from the still to the receiver—a hole made fraudulently by a workman against his master's knowledge—the master is found liable in the penalties. And so here, although these parties were perfectly ignorant of the methyl being in the goods they got from Warrick & Sons, and knew nothing of the fraud Warrick & Sons were committing, these goods are liable to be forfeited. I am not here dealing with the question of penalty; I say nothing about that, because only forfeiture and not penalty is claimed by the Crown.

Now, then, upon that footing, the only question for me to determine is this, Was there or was there not methyl—wood naphtha, or some substance—in the spirits seized that brought it within the statute? If there was, then the second count is proved, because the defenders received the spirits from a person not entitled to retail methylated spirits, and on the record they admit they received them from Warrick & Sons, who are not licensed retailers. If they did not receive them from Warrick & Sons, they have not proved that they got them from a licensed retailer.

One of the most difficult parts of the judicial office is to estimate the weight due to conflicting testimony,—and especially scientific testimony—given by learned and honourable men, each intending to speak his real opinion. One is driven in the circumstances to proceed on very general rules indeed. And what do I find here? I find, on the one hand, four chemists from the Government establishments in London, whose business it is to inquire into such matters as this—Is there methyl in this spirit? It is their business; they are taken from their fellows and put into conspicuous positions in a Government office to make analyses, and they do it, and have been doing it for years. They bring to bear upon the matter the fruits of study and the lessons of long experience. They have no interest in this case except to discharge their public duty with official and skilful aptitude. They come here and state how they fulfilled that duty. They made inquiry by

every test known to science—the three chemical tests they have described in such detail to us. They also used that other test which is common to us all, the sense of smell—a test very valuable no doubt, but depending on the acuteness of the perceptions of each individual. But they used every means of arriving at the truth, and the three chemical tests that they used all led to the same result. The whole four chemists—there were two independent inquiries—came to the same conclusion, corroborated, as they were, by Mr Falconer King, the analyst for the city of Edinburgh. Now, what have I opposed to that? Two gentlemen—one of them very well-known in this Court, a most admirable scientific man, Dr Stevenson Macadam. There is no man upon whose scientific knowledge I would sooner rely, or whose scientific opinion I would sooner take than his. But with the candour which belongs to him he said, "This is the first time I ever had to do with analysing for methyl." And so with Dr Dittmar. He gave descriptions of experiments which he himself made in order to obtain other tests than the three recognised by scientific chemists, experiments which convinced him there was no methyl. That may be. I cannot adopt his conclusions. I am here to deliver a verdict as if I was a jury, and I must give a verdict in favour of the great weight of scientific opinion, and the verdict I pronounce is, that it is proved that the spirits seized by the Crown upon 11th June 1885 contained methyl. I pronounce judgment for the Crown upon the second count forfeiting the goods, with expenses, and finding the first count not proved.

Counsel for Lord Advocate—Sol.-Gen. Robertson, Q.C.—Lorimer. Agent—D. Crole, Solicitor of Inland Revenue.

Counsel for Defenders—D.-F. Balfour, Q.C.—Dickson. Agents—Boyd, Jameson, & Kelly, W.S.

COURT OF JUSTICIARY.

Saturday, August 29.

GLASGOW CIRCUIT COURT.

(Before Lord Mure.)

WORRALL, HALLAM, & COMPANY *v.* M'DOWALL.

Sheriff—Process—Small Debt Court—Litis contestatio—*Decree* in foro—*Sist—Small Debt Act* 1837 (1 *Vict. c.* 41), *sec.* 16.

Where both parties have appeared in the Small Debt Court at the calling of a cause, decree therein can never thereafter be in absence though pronounced at a subsequent diet which one party does not attend. Where, therefore, both parties were present at the first calling, but the pursuer did not appear at the second calling, and decree of absolvitor was pronounced—*held* that this was a decree by default, and that a warrant to have the cause heard under section 16 of the Small Debt Act 1837 was *incompetent.*

This was an appeal to the Circuit Court against a decision of the Sheriff-Substitute (COWAN) of Renfrewshire at Paisley. The appellants sued the respondent in the Small Debt Court at Paisley for £9, 17s. 3d. alleged to be due for goods sold to him. At the calling of the case in Court on 9th July both parties appeared, and at the request of the appellants (pursuers) the case was continued for a week. At the calling on 16th July the defender appeared, but the pursuer's agent was not in Court when the case was called (having been late in arriving), and decree of absolvitor by default was pronounced.

The pursuers obtained from the Sheriff-Clerk a warrant for the purpose of having the cause heard, which warrant was duly served in manner provided by section 16 of the Small Debt Act 1837. That section provides that "where absolvitor has passed in absence of the pursuer . . . it shall be competent for him . . . to obtain a warrant, signed by the clerk, for citing the defender and witnesses for both parties, which warrant . . . shall be an authority for hearing the cause." . . .

On the case being again called in Court on 23rd July the respondent submitted that the warrant for hearing was incompetent and should not have been granted, and the Sheriff-Substitute sustained this contention.

This appeal was then taken.

Argued for pursuers and appellants—This appeal was taken under section 31 of the Small Debt Act, there having been here such deviation in point of form from the statutory enactments as had prevented substantial justice being done. There had been here no *litis contestatio*, and consequently the decree of absolvitor was one in absence, and being in absence the warrant sisting execution which had been issued by the Sheriff-Clerk under section 16 was properly issued and should have been sustained by the Sheriff. At all events, the decree, if not a decree in absence in the ordinary sense, was one which had passed "in absence of the pursuer," in the sense of section 16. To hold otherwise would be to narrow unduly the 16th section, which ought to be liberally construed, inasmuch as it provided against the hardship of a pursuer being left without a remedy if he happened through no fault of his own to be absent when the case was called. The Sheriff in refusing the remedy provided by the 16th section had deviated from the statutory enactment, and had prevented substantial justice being done. The appeal should therefore be sustained.

Answered for defender and respondent—The Sheriff had taken the proper course in refusing to sustain the warrant sisting execution of the decree of absolvitor. The question really was whether the decree was one *in foro* or one in absence, for section 16 applied only to decrees in absence and not to decrees *in foro*. This was not a decree in absence in any sense whatever. There had clearly in the circumstances of this case been *litis contestatio*, and a decree after *litis contestatio* cannot be a decree in absence. This was a decree by default, and therefore a decree *in foro*. *Lumsdaine* v. *Australian Co.*, 13 Shaw 215; see *dictum* of Lord Deas in *Rowan* v. *Mercer*, 12th May 1863, 4 Irv. 377. The remedy provided by section 16 did not therefore apply to the present case. The tendency of