think that the true meaning of the Act is that a workman cannot proceed to trial under the Act and fail and then proceed by common law action; and also cannot proceed by common law action and having failed in that action then proceed under the Act. The single exception is contained in subsection 4 of section 1, and it strongly confirms that view, and seems to me to negative any wider or inconsistent right." Subject to the "single exception" indicated, it appears to me that the workman, having a statutory "option" to take one or other of two different courses, is, from the very nature and essence of an "option," not entitled to take both; and that where there exist in fact a real option to exercise and a real exercise of that option, the election of one of the alternative courses is final and irrevocable. There have been cases, of which *M'Donald*, 1905, 7 F. 533, and *Rouse*, 1904, 2 K.B. 628, are examples, in which—a claim for compensation under the Act having been rejected by the arbitrator on the ground that the case did not fall within the Act at all—the workman has been held free to make his claim at law, because he truly had in fact no option to exercise. But in the present case the workman elected to proceed under the Act; the matter was fought to a finish, and decided against him upon the merits of the dispute. He cannot, in my judgment, now revert to the discarded alternative of an action at law. I therefore think that the learned Sheriff and Sheriff-Substitute have reached a sound result, though I do not agree with the grounds of judgment expressed in their notes. It is unnecessary for the decision of this case to attempt to lay down any general or exhaustive definition of what might or might not, under varying circumstances and conditions, be held in cases of this sort to amount to a conclusive exercise of the workman's option.

The Court dismissed the appeal.

Counsel for the Pursuer (Appellant)—Crabb Watt, K.C.—J. A. T. Robertson. Agent—Alex. Wylie, S.S.C.

Counsel for the Defenders (Respondents)—Horne—Strain. Agents—W. & J. Burness, W.S.

Friday, February 5.

SECOND DIVISION.

[Lord Salvesen, Ordinary.

THE SUMMERLEE AND MOSSEND IRON AND STEEL COMPANY, LIMITED *v.* THE CALEDONIAN RAILWAY COMPANY.

Railway—Contract—Accommodation Work—Level-Crossing—Obligation to Make Level-Crossing for Proprietor—Accessories and Appliances in alieno solo—Approval of Board of Trade—Railway Regulation Act 1842 (5 and 6 *Vict. cap.* 78), *sec.* 5—*Regulation of Railways Act* 1871 (34 *and* 35 *Vict. cap.* 55), *sec.* 4.

A railway company, under a disposition in 1841 of a strip of ground acquired by agreement for the railway, undertook, and the obligation was declared a real burden, that the disponers "and others having right from them shall be allowed to cross at four level-crossings, either by railroad or cart road as they may choose, the said railway at any period at such points as may be most convenient for them, and which crossings, as now delineated on said plan first above mentioned, shall be made and maintained by my said disponees and at their expense, and my said disponees shall also be bound to place and maintain field gates on said crossings."

Held, in an action in 1904 by the disponer's successors against the railway company, that whether the sanction of the Board of Trade was, under the Railway Regulation Act 1842, sec. 5, and the Regulation of Railways Act 1871, sec. 4, necessary or not to enable the crossings to be used, the obligation of the defenders was to construct such crossings as could be used with reasonable safety, and that they were bound to make and maintain them, together with all such adjuncts or appliances as might be necessary (in the opinion of the Board of Trade or such other expert as the Court might consult) to secure the safety of the public and the traffic on the railway, whether such adjuncts or appliances might require to be constructed on their own or on adjoining land.

On 12th December 1904 the Summerlee and Mossend Iron and Steel Company, Limited, brought an action against the Caledonian Railway Company. In it the pursuers sought, *inter alia*, declarator that the "defenders are bound and obliged to make and maintain at their own expense a level-crossing by railroad or cart road as the pursuers may choose at any period and at such a point as may be most convenient to the pursuers upon and across that part of the defenders' railway where the same passes through the pursuers' lands of Patonswell and Summerlee, in the county of Lanark, under and by virtue, *inter alia*, of a

disposition granted by Alexander Blair, treasurer to and on behalf of the Bank of Scotland and others, with the consent of Wilsons & Company, carrying on business as ironmasters at Summerlee, in favour of Mark Sprot and others, proprietors of the Glasgow and Garnkirk Railway Company, dated 27th and 28th December 1841, and instrument of sasine following thereon, dated 10th, and recorded in the New General Register of Sasines, Reversions, &c., 27th May 1842, and plan docquetted and signed by the parties to the said disposition as relative thereto, the said level-crossing being one of four level-crossings described in said disposition and delineated on said plan, and so as to afford a free access at all reasonable times from the ground belonging to the pursuers on either side of said railway to the other side thereof."

A conclusion followed for decree ordaining the construction of the level-crossing.

The following narrative of the facts and the early stages of the case is taken from the opinion of Lord Dundas—"The pursuers, an iron and steel company, carry on their business in works near Coatbridge, erected about 1853 by their predecessors, Wilsons & Company, upon part of the Summerlee estate, which they had purchased for the purpose. About 1841 the Glasgow and Garnkirk Railway Company—absorbed four years later by the defenders, the Caledonian Railway Company—purchased from Wilsons & Company by private agreement a strip of their said estate, extending to about 2½ acres, which ran right through, and (roughly speaking) bisected it, and upon this they laid down a portion of their railway, which is now used as one of the main passenger lines of the defenders' company. Part of the sellers' consideration consisted of certain stipulated accommodation works, the construction and maintenance of which were created real burdens upon the land conveyed. It is not disputed that the pursuers and defenders are now respectively vested in the rights and obligations arising out of these burdens. By the disposition conveying the strip of ground in 1841, it was, *inter alia*, declared that the sellers "and others having right from them shall be allowed to cross at four level-crossings, either by railroad or cart road as they may choose, the said railway at any period at such points as may be most convenient for them, and which crossings, as now delineated on said plan first above mentioned, shall be made and maintained by my said disponees and at their expense. . . ." The parties are agreed that the pursuers' rights to three of the level-crossings have been satisfied, discharged, or relinquished, and it is with the remaining one alone that this case is concerned. About 1902 the pursuers called upon the defenders to proceed with the construction of this crossing, which they maintained was of great and pressing importance to their business. A mass of correspondence followed, and the present action was raised on 12th December 1904. On 21st June 1905 the Lord Ordinary (Low) found that the defenders were bound to make and maintain a level-crossing for the use of the pursuers upon and across their railway at or near a point marked upon a certain plan, and appointed the defenders to lodge a minute stating what steps they had taken or purposed to take for the construction of said level-crossing, and at or about what date they proposed to commence the work of construction. This interlocutor was apparently acquiesced in, and the defenders lodged their minute, objections to which for the pursuers and answers thereto for the defenders were subsequently put in. The objections and answers disclosed, *inter alia*, a disputed point which lies near the root of this protracted squabble. The pursuers objected that the defenders were bound to make and maintain all adjuncts to the crossing which the Board of Trade might prescribe as necessary for the safety of the public or of the traffic on the defenders' railway, but the defenders declined to construct any such adjuncts in so far as they might fall to be made upon ground belonging not to themselves but to the pursuers. The case thereafter went to sleep, but was awakened in the summer of 1907, when the Lord Ordinary (Salvesen) opened up the record, and allowed a statement of facts for the defenders and answers for the pursuers to be added to it. The new pleadings disclosed what had been going on while the cause slept. The defenders explained that they had constructed a crossing upon their own ground, that the pursuers had made lines or sidings on their property to connect with the crossing on both sides; that the defenders had on 27th October 1906 submitted a plan to the Board of Trade and asked them to approve of the crossing being put into use; that on 7th December 1906 they submitted another plan showing further works, and again asked for the Board's approval; that on 20th February 1907 one of the Board of Trade's inspecting officers, Colonel Yorke, had visited the *locus*, and that by report dated 28th February Colonel Yorke had declined to recommend the Board to sanction the use of the crossing. It is to be observed that the principal grounds upon which Colonel Yorke declined to recommend the Board to sanction use of the crossing were (*a*) the gradient—1 in 40—of the pursuers' mineral line on the west side, and (*b*) the fact that the crossing itself had been laid at right angles to the defenders' railway. As regards the first of these objections, the pursuers have stated on record that they "are quite prepared to reduce their gradient on the west side to 1 in 1000," and again that they are "willing to rearrange their approach lines on the western portion of their own ground in any way that may be necessary in order that they may connect with the level-crossing when completed by the defenders." As regards the second objection, it is important to observe that when the pursuers' agents, so far back as 15th February 1904, submitted to the defenders' agent a plan in conformity with which they requested that

the crossing should be constructed, the crossing was shown not at right angles to the passenger lines but on a skew. After protracted delay the defenders' agent replied, on 13th September 1904, that 'the plan shows a level-crossing on the skew instead of on the square, and as the company cannot agree to form the crossing on the skew I shall be obliged by your letting me have an amended plan showing the position of the crossing on the square.' I do not know by what warrant the defenders considered themselves entitled to refuse a crossing on the skew and insist for one on the square; I understood their counsel to say it was because the square was shorter and therefore cheaper than the skew; but the important point is that the crossing has been laid on the square upon the demand of the defenders and against the original desire of the pursuers. It is true that on 4th October 1904 the latter furnished the defenders, in accordance with their demand, with a plan of the level-crossing on the square, but I do not think this could be held as a deliberate acquiescence in the proposed change, or as excusing the defenders from having to lay the crossing on the skew if that should be found necessary to the execution of their contractual obligation. The defenders have thus in point of fact constructed a crossing upon their own ground, except that a single rail has purposely been left unlaid to prevent its actual use, but this rail could as matter of practical work be laid in half-an-hour."

On 4th March 1908 the Lord Ordinary pronounced the following interlocutor—"Decerns the defenders to complete the level-crossing at or near the point marked 'A B' on the plan, so as to make it available as a connection between the lines of railway or railway sidings constructed by the pursuers on their own land at each side of the defenders' railway, and that within the next fourteen days, but subject always to the pursuers' undertaking not to use the said level-crossing until they have reduced the gradient on their railway on the west side of the defenders' railway to one in a thousand; and grants leave to reclaim."

Opinion.—"On 21st June 1905 Lord Low, before whom this action then depended, pronounced a finding that the defenders 'are bound to make and maintain a level-crossing for the use of the pursuers upon and across that part of the defenders' railway which passes over the pursuers' lands of Patonswell and Summerlee, and at or near the point marked A B on the plan.' By the same interlocutor he appointed the defenders to lodge in process a minute stating what steps they proposed to take for the construction of said level-crossing.

"The defenders took no steps to have this interlocutor submitted to review; but in obedience to it they lodged a minute in which they stated that they had instructed their engineer to proceed with the work of constructing the level-crossing in question so far as situated on their own ground, and that the work of construction would be commenced not later than 15th August 1905, subject to the regulations of the Board of Trade, and subject further to the pursuers executing the necessary work in connection with the extension of said level crossing into their own land as might be required and approved of by the Board of Trade. The pursuers lodged objections to this minute, in which they took exception to the qualification with regard to the regulation of the Board of Trade, maintaining that it was for the defenders to make all adjuncts to said level-crossing which might be prescribed by the Board of Trade as necessary adjuncts for the purpose of securing the safety of the public and of the traffic on the defenders' line of railway. The defenders admit this, subject to the important limitation that they do not propose to construct any such adjuncts in so far as they fall to be made on property belonging to the pursuers.

"The defenders thereupon proceeded to construct the level-crossing; and they have laid rails across the public line and have erected a gate at each side of the level-crossing. They have, however, left one rail of the crossing on the east side of the railway unlaid; so that in its present condition the crossing cannot be used. It was at first proposed to put the level-crossing on the skew, but the defenders ultimately elected to make it at right angles to the existing railway; and this is how it has been constructed.

"The pursuers, in order to connect their railway with the level-crossing, also constructed lines on their own ground on either side. On the west side the gradient of the line was 1 in 40, and on the east side 1 in 971.

"The defenders thereupon approached the Board of Trade to send an inspecting officer to inspect the level-crossing and sanction its use, with the result that a report was prepared by Colonel Yorke. He took exception to the inclination of the mineral line being 1 in 40, and also to the crossing having been formed at right angles so as to make it impossible to insert catch-points in the mineral railway sufficiently near the public lines to adequately protect them. He accordingly stated his inability to recommend the Board of Trade to sanction the use of this crossing. Matters have since remained at a deadlock, parties having differed as to their legal obligations in the matter—the pursuers apparently declining to approach the Board of Trade on the footing that they possess no jurisdiction over a crossing of this kind. They have, however, on record expressed their willingness to reduce the gradient on the west side to 1 in 1000, which will certainly obviate one of the objections of the Board of Trade inspector to the use of the level-crossing. I think they are well advised in making this offer, because as the mineral line on each side of the level-crossing falls to be constructed by them, I think there is an implied obligation upon them so to construct the line as not to make the level-crossing unnecessarily dangerous.

"The defenders boldly maintain that they

have fulfilled the obligation which was incumbent upon them under the interlocutor of Lord Low, and that they are now entitled to be assoilzied. If I were prepared to adopt the defenders' view, I should have thought the more appropriate course would have been to dismiss the action on the ground that it had served its purpose; but it is quite plain that so long as the rails do not extend from one side to the other of the level-crossing, the defenders' obligation can in no sense be held to have been implemented. The real question, however, in the case seems to be, upon whom the burden falls of satisfying the Board of Trade, for that department undoubtedly possesses jurisdiction over the defenders with regard to the conduct of their traffic on their public lines.

"The argument for the defenders on this head may be briefly summarised as follows. In 1841, when the obligation which it is sought to enforce in this action was undertaken, railways in this country were still in their infancy. Supervening legislation, however, has conferred large powers on the Board of Trade with regard to the regulation of railways. In 1842, by the Act 5 and 6 Vict. cap. 55, sec. 4, it was enacted that no railway or portion of a railway should be opened for the conveyance of passengers until notice of the intention to open it should have been given to the Board of Trade, and until the Board of Trade should be satisfied that such opening might take place without danger to the public; and by the Act 34 and 35 Vict. (1871) cap. 78, sec. 5, the provisions of the earlier Act were extended to the opening, *inter alia*, 'of any crossing on the level which forms a portion of or is directly connected with a railway on which passengers are conveyed, and has been constructed subsequently to the inspection of such railway on behalf of the Board of Trade previous to the original opening of such railway.' The defenders say that the crossing in question comes under this section; and that, just as supervening legislation might have discharged them of the obligation to construct a level-crossing at the place in question by prohibiting its construction, so it falls upon the pursuers, so far as any works require to be made on their ground, to satisfy the Board of Trade inspector by constructing such works at their own expense.

"In the absence of the Board of Trade I cannot, of course, decide what jurisdiction they possess in the matter so as in any way to bind them, but as between the parties to the present case I think I am bound to express my opinion of the effect of section 5 of the 1871 Act, and I have come to the conclusion that it has no application to the crossing in question. It is plain that this level-crossing does not form a portion of a railway on which passengers are conveyed, any more than a cart road on the level could be held to form a portion of such a railway. Is it then directly connected with such a railway? Mr Cooper argued that it was in physical contact with a passenger line, and therefore must be treated as being directly connected to it within the meaning of the section. I cannot so read it, because this may be predicated of every level-crossing over passenger railways, and yet I think it is plain that the Act does not apply to the construction of every level-crossing. At all events, the pursuers are willing to take all risks of the Board of Trade interfering with their operations; and if the Board of Trade have jurisdiction over them they can, of course, enforce it whenever the pursuers propose to use the level-crossing. I do not think, therefore, that the sections quoted afford any obstacle as between the parties to this case to the pursuers obtaining the decree which they seek.

"In the view that I have taken it is unnecessary to consider the question whether, if catch-points or stop-blocks should ultimately require to be made on the pursuers' line so as to guard against the risk of accident to the public traffic, the expense of constructing such would fall upon the pursuers or the defenders. For all I know the Board of Trade may not in the end insist on any such works, now that the pursuers have agreed to reduce the gradient. Something will also depend upon how far such precautions may be necessary because of the largely increased traffic upon the line. The pursuers' view would seem to be, that whatever requires to be done to enable the defenders to implement their obligation to the pursuers, in so far at least as that has been occasioned by a change in the character and amount of the traffic on their lines, must be done at their expense; but as there has been no inquiry into the facts I refrain from saying anything further.

"I was informed by Mr Cooper that the single rail which is still unlaid on the east side of the railway can without difficulty be put down within half-an-hour. I propose to give the defenders a fortnight within which to do this work; and to make the use of the crossing subject to the pursuers first reducing the gradient of their mineral line on the west side of the public road to 1 in 1000."

The defenders reclaimed, and argued—The Regulation of Railways Act 1871 (34 and 35 Vict. cap. 78), sec. 5, applied the provisions of the Railway Regulation Act 1842 (5 and 6 Vict. cap. 55) to the level-crossing here, and made the sanction of the Board of Trade necessary to its use. The Board of Trade had refused their sanction. Their decision could not be reviewed by the Court—*Attorney-General* v. *Great Western Railway Company*, 1876, L.R., 4 Ch. Div. 735. The Board of Trade's refusal was based chiefly on the inadequacy of works on the pursuers' lands, with which the defenders had nothing to do. The defenders had neither right nor duty to enter on lands not belonging to them for the purpose of making adjuncts to the level-crossing. The level-crossing had been made, and nothing more could be or had to be done by the defenders. There was, for example, no obligation on the party bound to make a bridge over a railway line to make the approaches thereto, apart from special statutory provision. The defenders

therefore had fulfilled their obligation. Alternatively, if the actual making of the crossing was not fulfilment, anything more had become impossible by reason of the refusal of the Board of Trade to sanction the crossing. The sanction of the Board of Trade was necessitated by legislation subsequent to the constitution of the obligation, and it had therefore become impossible of performance, and the defenders were discharged—*Baily* v. *De Crespigny*, 1869, L.R., 4 Q.B. 180; *Caledonian Insurance Company* v. *Matheson's Trustees*, June 4, 1901, 3 F. 865, 38 S.L.R. 691; *Newington Local Board* v. *Cottingham Local Board*, 1879, L.R., 12 Ch. Div. 725. The Railway Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 33), secs. 41 and 58, were referred to.

Argued for the pursuers (respondents)—The Railway Regulation Act 1842, and the Regulation of Railways Act 1871, did not apply to the present level-crossing, which was not a portion of nor directly connected with a passenger railway. "Directly connected with" implied that it would be possible for trains to pass from the one line to the other—*Attorney-General* v. *Great Western Railway Company*, 1872, L.R., 7 Ch. App. 767. But whether these Acts applied or not, the defenders' obligation was to give the pursuers a level-crossing which could be used, and that obligation they certainly had not fulfilled. If it were necessary for the defenders in fulfilling that obligation to enter on the pursuers' lands, they were both entitled and bound to do so. They were bound to make all the adjuncts and appliances, whether on their own land or on the pursuers'—*Addie's Trustees* v. *Caledonian Railway Company*, July 7, 1906, 8 F. 1047, 43 S.L.R. 769; *Wishaw and Coltness Railway Company, &c.* v. *Dixon*, February 9, 1849, 11 D. 557; *Todd* v. *Midland Great Western Railway Company*, 1881, L.R., Ir., 9 Ch. Div. 85. There was nothing in the necessity for the sanction of the Board of Trade which excused performance of the obligation, and there was no question of impossibility of performance by reason of supervenient legislation. It might be that the effect of subsequent legislation was to make the defenders' obligation more onerous, but that did not excuse non-performance—*Dunbar's Trustees* v. *British Fisheries Society*, July 12, 1878, 5 R. (H.L.) 221, 15 S.L.R. 772. Counsel also referred to *Mackay* v. *Dick and Stevenson*, March 7, 1881, L.R., 6 A.C. 251, 8 R. (H.L.) 37, 18 S.L.R. 387.

At advising—

The opinion of the Court was delivered by

LORD DUNDAS—[*After narrative given supra*]—It is in these circumstances that the interlocutor reclaimed against has been pronounced. I do not think it is one which the Court can adhere to, because in substance and effect it ordains the defenders to complete and make available for the pursuers' mineral traffic a level-crossing over the defenders' main passenger line, the use of which the Board of Trade has, upon the report of an experienced officer, declined to sanction upon grounds relating to public safety. The Lord Ordinary was doubtless anxious to bring this unduly protracted litigation to as speedy a close as might be, but I think that this result should be attempted by a less daring and drastic method than that which he has resorted to. The defenders' counsel stoutly argued that his clients should be assoilzied. He urged that when they had laid down a crossing from side to side of their own ground, they had done all they could do in satisfaction of their contractual obligation; that the refusal by the Board of Trade to grant sanction—which he contended must be obtained as a necessary condition-precedent to the use of the crossing—arose out of matters beyond the defenders' control, because they were neither bound nor indeed entitled to perform any operation *in alieno solo;* that supervening legislation, viz., the Regulation of Railways Act 1871, sec. 5, extending secs. 4 to 6 of the Railway Regulation Act 1842, had thus rendered it impossible for the defenders to fulfil their bargain further or otherwise than they had done; and that they must therefore be absolved from doing anything more upon the principle expressed in the maxim *lex non cogit ad impossibilia.* The arguments thus summarised appear to me upon examination of them to be untenable. It is not, I think, established that it is impossible for the defenders to implement their obligation fully and satisfactorily, though it may cost more money to do this than is agreeable to them to spend upon it. The pursuers' counsel denied that the Board of Trade have any direct statutory jurisdiction over a crossing of this kind in virtue of the statutes referred to. I am rather disposed, for my own part, to think that section 5 of the Act of 1871 is here in point. But it seems to me to be quite unnecessary to decide the question one way or other, because I think it clear that the Court is entitled to see that a crossing of this sort is not put in use in a manner inconsistent with the safety of the public; and may to that end order (as a condition-precedent to its use) the construction of such works or appliances as they may find upon the advice of the Board of Trade, or of any other persons of skill whom they consult, are necessary to secure the public safety, and that at the cost of the obligees under the contract, provided that the construction of such works falls fairly within the purview of the obligation, reading it in the light of the conditions existing when the question comes before the Court. The case of *Wishaw and Coltness Railway Company*, 1849, 11 D. 557, is an authority in support of these propositions, if authority be needed. Now I think the defenders contend for a much too narrow construction of their obligation under the disposition of 1841. That instrument does not provide for any special mode or kind of level-crossing. Its words are quite indefinite. The defenders are not in my opinion warranted by its terms, or by

the ordinary use of language, in saying that their obligation is entirely implemented by laying down cross rails upon their own ground. A "level-crossing" must, I think, be held to mean one so constructed as to be capable of being used, and used with reasonable safety, and to include such accessory works or appliances as may be necessary to effect this purpose. It has been decided that a company bound by agreement to make an over-bridge were obliged to construct not only a bridge across their rails but the necessary approaches for affording a complete connection between the lands on either side of the line, though this of course involved operations *in alieno solo* —*Addie's Trustees*, 1906, 8 F. 1047. Still less, as already observed, are the defenders, in my judgment, entitled to insist that the crossing shall be on the square and not on the skew, if the latter mode would materially contribute to the safe and efficient construction of the crossing. It may be that if the crossing were skewed it would not be necessary to erect any adjuncts or appliances upon ground not belonging to the defenders. But whether this be so or not, I think that the defenders' obligation includes the construction, at their expense, not only of the actual cross rails, but of such adjuncts and appliances, *e.g.*, catch-points, signals, stop-blocks, &c., as the Board of Trade may consider necessary to secure the public safety, whether such adjuncts or others require to be constructed upon land belonging to the defenders or to the pursuers.

The proper course, therefore, in my judgment, will be to recall the Lord Ordinary's interlocutor . . . [*His Lordship gave the form of the interlocutor to be pronounced, v. infra*] . . .

The Court pronounced this interlocutor—

"Recal the interlocutor reclaimed against: Find that the defenders are bound, in order to carry out the interlocutor of Lord Low, dated 21st June 1905, to make and maintain at their own expense the level-crossing upon and across their said line of railway, together with all such catch-points, signals, stop-blocks, or other adjuncts or appliances as the Board of Trade may prescribe as necessary to secure the safety of the public and of the traffic on the railway, whether such adjuncts or others may require to be constructed upon the defenders' own land or upon land belonging to the pursuers, who are bound, if so required by the Board of Trade, to fulfil at their own expense their undertakings upon record to reduce the gradient of their mineral line on the west side to 1 in 1000, or to otherwise rearrange their approach lines: With the above finding, continue the cause in order that the matter may be laid by the parties or either of them before the Board of Trade, and the approval of that Board obtained, with all reasonable despatch, to the construction by the defenders, with a view to its use, of a level-crossing with adjuncts or others as aforesaid; and give leave to either party to apply to the Court, if so advised, at any time, for any such orders as may be competent or proper," &c.

Counsel for the Pursuers (Respondents)—Dean of Faculty (Dickson, K.C.)—Ramsay. Agents—Webster, Will, & Company, S.S.C.

Counsel for the Defenders (Reclaimers)—Cooper, K.C.—King. Agents—Hope, Todd, & Kirk, W.S.

Wednesday, January 27.

SECOND DIVISION.

(With Lord M'Laren, Lord Kinnear, and Lord Pearson.)

[Dean of Guild Court, Dunblane.

ANGUS *v.* JEFFRAY.

Dean of Guild—Procedure—Jurisdiction—Civil or Criminal—Penalty—Appeal—Act of Sederunt, 12th November, 1825, *Part III, cap.* 1, *sec.* 1—*Burgh Police (Scotland) Act* 1892 (55 *and* 56 *Vict. cap.* 55,) *sec.* 209—*Burgh Police (Scotland) Act* 1903 (3 *Edw. VII, cap.* 33), *secs.* 37 *and* 41 (1) (*c*).

On a complaint purporting to proceed under the Burgh Police (Scotland) Acts 1892 to 1903, a builder was charged before a Dean of Guild with a contravention of section 41 (1) (*c*) of the Burgh Police (Scotland) Act 1903 by deviating in the construction of a road from the plan authorised by the Dean of Guild Court. No record was made up, nor was any note of the evidence recorded. The builder was convicted and sentenced to pay a penalty. He appealed to the Court of Session. In a Court of Seven Judges (*dub.* Lord Pearson) *held* that the appeal was competent, and that the conviction should be set aside on the ground that the complaint and proceedings following thereon being in the form appropriate to criminal procedure were incompetent in the Dean of Guild Court, the jurisdiction of that Court being of a civil character.

The Act of Sederunt of 12th November 1825, relative to the forms of process in civil causes in Royal Burghs, enacts—Part III, Chap. 1, sec. 1—"Actions in the Dean of Guild Courts of Royal Burghs may proceed in the ordinary form of petition or complaint, answers, and replies. . . ."

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), sec. 209, enacts—"Every proceeding before the Dean of Guild Court shall be subject to the following rules and regulations. It shall commence by an application in writing or in print, or partly in writing and partly in print; and, except where otherwise specially directed, the subsequent steps may be in writing or *viva voce*, as shall be ordered by the Court. In all other respects the proceedings before