of increment duty, because the price which the proprietor realised was largely in excess of the market value, and the addition which he received to the market value was in the nature of a windfall due to the industry and requirements of the community which surrounded his property. I am not, however, surprised that the referee should have reached the conclusion which he did, because the Finance Act expressly says that increment duty is to be a stamp duty, but I agree with your Lordship's reasoning on this subject, and I cannot overlook the fact that the same Act stated that it was to be a debt due to the Crown. I think it would be very unfortunate indeed if in a transaction such as this, which as I have said falls typically under the operation of the Act, the proprietor should be relieved by any bad draftsmanship of the Finance Act from the duty that would otherwise be clearly exigible from him according to its provisions.

LORD CULLEN—I concur in the conclusion at which your Lordships have arrived. I do not think that section 168 of the Act of 1897 exempting the documents therein mentioned from stamp duties can have the effect of extinguishing the respondents' indebtedness to the Crown created by section 4 (4) of the Finance Act.

The Court found that the first or principal decision of the referee was wrong and recalled the same, as also his finding of expenses, but that the second or alternative decision of the referee was right in finding that the appellants had been properly assessed to increment value duty on the occasion of the transfer in the sum of £303, and in finding no expenses due to or by either party. The Court further found no expenses due to or by either party in respect of the appeal.

Counsel for the Appellants—Solicitor-General (Morison, K.C.)—Candlish Henderson. Agent—Sir Philip Hamilton Grierson, Solicitor to the Commissioners of Inland Revenue.

Counsel for the Respondents—Sandeman, K.C.—M. J. King. Agents—Simpson & Marwick, W.S.

COURT OF SESSION.

Tuesday, March 9.

SECOND DIVISION.

[Sheriff Court at Paisley.

GAIRDNER *v.* MACARTHUR.

Process — Sheriff — Appeal — Additional Proof — Res noviter — Perjury of Witnesses—Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 72.

The Court of Session Act 1868, sec. 72, enacts—"The Court may, if necessary, order proof or additional proof to be taken in any appeal under this Act, such proof to be taken in the same manner as proof may be competently taken in any cause depending before the Inner House, and shall thereafter . . . give judgment on the merits of the cause according to the law truly applicable in the circumstances, although such law is not pleaded on the record. . . ."

In a sheriff court appeal against a judgment of the sheriff finding that the appellant had caused to be removed to a secret place certain property in a liquidation and had subsequently realised it for his benefit, the appellant applied for leave to amend his record and to lead additional proof on the ground that the two witnesses who swore that they had acted as appellant's agents in removing the goods were guilty of perjury, that he had lodged a charge of perjury against them with the Crown, and that as the result of an examination of the place made by experts under the instructions of the Lord Advocate he was prepared to prove that the place could not have been opened within three years, the Court *granted* the application.

Opinion per curiam that the words "if necessary" in section 72 of the Court of Session Act 1868 mean "if necessary for the ends of justice."

The Court of Session Act 1868 (31 and 32 Vict. cap. 100), sec. 72, is quoted *supra in rubric.*

Charles Dalrymple Gairdner, C.A., Glasgow, liquidator of John Scott Engines, Limited, Lonend Motor Works, Paisley, *pursuer*, brought an action in the Sheriff Court at Paisley against Captain A. J. Macarthur, *defender*, for an accounting by the defender of his intromissions with the machinery and tools which the pursuer averred had been removed by the defender or by others acting on his behalf or instructions without the pursuer's knowledge or consent from the premises at Lonend formerly occupied by John Scott Engines, Limited, and for payment of £150 sterling or such other sum as might be found due, or alternatively for the delivery of certain articles which the pursuer averred had been surreptitiously removed by the defender from the premises, or alternatively for the payment of £250, being the value of the articles.

On 23rd January 1914 the Sheriff-Substitute (BLAIR), after a proof, pronounced the following interlocutor:—"Finds *in fact* that the pursuer is the liquidator of John Scott Engines, Limited, which went into liquidation in April 1912; that John Scott Engines, Limited, were, previous to Whitsunday 1912, occupants of the premises known as Lonend Works, Paisley; that up till the end of 1911 the defender was a director of said concern; that the defender resides in Lonend House, which is adjoining the works, separated only by a garden wall; that defender has all along had private access from his said residence into the works without the necessity of going round by the street and thence through the works gate, which is the usual entrance for workmen and material;

that previous to the 28th May 1912, when the pursuer as liquidator was summarily ordered to remove from the premises known as Lonend Works by the defender, who, in addition to being a director of said concern prior to liquidation, was also factor for said premises, acting on behalf of his wife Mrs Eliza Macgregor Thom or Macarthur and others, who are residuary legatees of the late Mr P. C. Macgregor, and in right to let said premises known as Lonend Works; the defender entered the said works by his private access or otherwise in the absence of the workmen, on a date or dates unknown, and collected a large quantity of valuable material, consisting of metal pipes, jigs, bolts, and nuts, parts of machinery, tools, vaporisers, and one if not more carburettors, &c., all material used by and belonging to John Scott Engines in liquidation; that said material which the defender collected was surreptitiously stored by him under a stair in a part of the premises of Lonend Works, not let to John Scott Engines, Limited, and to which John Scott Engines, Limited, or any person in their employ, had not access; that the value of said goods and materials so concealed by the defender amounted to at least the sum of £150; that on or about the beginning of June 1912, after the premises had been vacated by the pursuer as liquidator aforesaid, the defender instructed Thomas M'Millan, engineer's labourer, and Daniel Gibson, a labourer, to remove said material from the place in which it was concealed to the large brick chimney in a part of the premises not let to John Scott Engines, Limited; that the said material was by the defender's instructions and in his presence deposited inside the chimney and bricked up, the bricking up being made on the defender's instructions to look as if it had been done long ago; that after the sale of the assets of John Scott Engines, Limited, which took place on 7th July 1912 in an adjoining store in the Saucel to which they had been removed by the liquidator, the said material, on defender's instructions, was taken out of the chimney and mixed and distributed with material bought at said sale by the defender or by Mr Robert Wilson, subsequently a director of and on behalf of a new company contemplated by them to be called Gleniffer Motors, Limited, and to occupy the same premises as were occupied by John Scott Engines, Limited; that in addition to said material bricked in the chimney the defender further removed and concealed within the outhouses of his private residence a box of brass bolts and a quantity of engine piping, all belonging to John Scott Engines, Limited, or the liquidator; that said additional material was on defender's instructions and in his presence removed by M'Millan and Gibson in the same way as the former and distributed among the stuff purchased at the liquidator's sale and brought back to Lonend Works: Further, that in order not to be observed when removing the material under the stair to the chimney, the defender caused a partition to be cut out so that the men M'Millan and Gibson and the defender himself could remove the stuff to the chimney under cover and free from being overlooked by any adjoining properties; that on or about 28th August 1912 a stock list was prepared by the defender, or on his instructions, of the goods and effects of Gleniffer Motors, Limited, which list included the misappropriated property mentioned above; that the purchases made by defender and his co-director Robert Wilson at the sale aforesaid amounted to £670 or thereby; that the said stock list, which was prepared in order to sell the concern to two gentlemen called M'Millan, amounted in value to over £3000; that a sale based on this stock list was eventually made to the Messrs M'Millan on 9th December 1912; that the Messrs M'Millan paid to the defender and those then having interest in Gleniffer Motors, Limited, a sum of over £3000: *Finds* accordingly that the defender having failed to account for his intromissions and actings with goods and material belonging to the pursuer as liquidator of John Scott Engines, Limited, appropriated by him, the defender, he is liable for the value thereof: Assesses the said value at the sum of £150: Decerns against the defender for the sum of £150, with interest at 5 per cent. from the date of citation: Finds the defender liable in expenses to pursuer," &c.

Note.—". . . . Were these articles appropriated by the defender, as the pursuer alleges? This depends on whether one believes the evidence of the pursuer and his witnesses, principally M'Millan and Gibson. Now their story is circumstantial and definite, and if it is true it ends the matter. There is practically no defence. Captain Macarthur denies it *in toto*, and his wife, whom he called, and his servant-maid can in effect only say that they did not see him do it. I have no reason or ground whatever for doubting M'Millan and Gibson in their evidence about 'Alladin's Cave' and the sequel of the chimney. Both struck me as truthful and reliable witnesses, and I do not see what sort of motive they had to tell a deliberate lie. . . . ."

The defender appealed to the Sheriff (WILSON), and by minute lodged on 23rd February 1914 asked leave to lead the evidence of certain persons who had voluntarily approached him with information as to misappropriation of material belonging to John Scott Engines, Limited. On 13th March 1914 the Sheriff refused the appellant's motion for additional proof, and affirmed the interlocutor of the Sheriff-Substitute.

The defender appealed to the Court o Session, and on 14th January 1915 presented a note to the Lord Justice-Clerk for leave to amend the record and to lead additional proof.

The note stated, *inter alia*—"Of this date (March 26, 1914) the appellant appealed to your Lordship's Division of the Court, and of this other date (May 12, 1914) the case was sent to the short roll. As the result of further information obtained by

him, the appellant of this date (July 1, 1914) reported the whole circumstances to the Lord Advocate with the request that he would give them his consideration with the view, if so advised, of instituting criminal proceedings. Of this date (November 24, 1914) the said chimney-stalk was on the instructions of the Lord Advocate opened by a man of skill in the presence of, *inter alios*, men of skill representing the appellant, and a thorough examination from the inside as well as from the outside was made possible. As a result of the examination it appears, and the appellant believes and avers, that the chimney was neither opened nor bricked up at or about the dates alleged by the said Thomas M'Millan and Daniel Gibson, nor for many years before, and that the account given by the said Thomas M'Millan and Daniel Gibson of the placing of the said articles in the chimney and the subsequent removal of them therefrom is not true. The case against the appellant depends in this respect entirely upon the evidence of these two witnesses, as appears from the notes of the evidence taken at the proof and the note appended to the Sheriff-Substitute's interlocutor of 23rd January 1914, and it is on their evidence alone that the aforesaid findings that articles were removed by them to the chimney-stalk, built in, and afterwards removed therefrom, all by the appellant's instructions, are based. The appellant has been informed that the Lord Advocate has decided to suspend further inquiries until after final judgment in this appeal. In these circumstances the appellant desires to amend the record in terms of the proposed amendment hereto appended and to lead proof in support of the averments contained therein, and he accordingly humbly submits this note to your Lordship."

The proposed amendment was as follows:—"Explained that the chimney-stalk referred to is about 200 feet high, is built of common brick, and was erected about fifty years ago; the base is about 20 feet square outside, and inside it is circular, with the result that the structure is very much thicker at the corners than elsewhere. There are portholes at the bottom of this structure on all four sides—all of which were bricked up except that on the south, into which a large flue about 9 feet long and about 5½ feet high was led; this flue was bricked up at its outer or southern end (which is 9 feet from the chimney-stalk) many, and at least more than three, years ago. Within said rectangular stalk there is an inner lining, circular in form, built of fire-brick about 14 inches thick, and about 30 feet high. There is an air space of 2 or 3 inches all round this lining between it and the stalk. No opening has ever been made in the west or north sides of the said rectangular brick structure since it was erected, except one in the porthole on the west side made on 24th November 1914 by instructions of the Lord Advocate. No opening has been made on the east side for many, and at least more than three, years, nor has any opening been made in the south side since the chimney was built. The built-up entrance into the said flue has never been opened since it was originally built up. No opening into the said square chimney-stalk was made or rebuilt in 1912, and particularly no such opening was made or rebuilt in May, June, or July 1912. A plan and model of the said chimney and adjacent buildings are produced herewith and referred to."

Answers were lodged for the pursuer and respondent objecting to the amendment being allowed, but, if allowed, proposing an amendment to the effect that he had had no notice of the opening of the chimney, and did not know on whose instructions it had been opened.

Argued for the respondent—The wide powers conferred on the Court by recent legislation might entitle the appellant to ask leave to amend his record, but he was not entitled to lead additional proof except on a sufficient averment of *res noviter*, which did not exist in the present case. The facts on which the appellant desired to lead further evidence were fully before him on record, and his sole reason for the present application was that he did not attach sufficient importance to them. The reasons which ruled the Court in dealing strictly with such applications were (1) the unfairness to the opposite party which would ensue if a case once decided could be opened up on these grounds, and (2) the fact that public policy demanded that there should be an end of litigation. In this respect there was no difference between a proof in the Sheriff Court and in the Court of Session, except that in the one case the power of the Court was statutory and in the other discretionary. The principles which regulated the admission of fresh evidence in such cases were the same as ruled in cases of reduction and *res judicata*. The authorities supported these contentions—*Lockyer* v. *Ferryman*, March 6, 1877, 4 R. (H.L.), 32; *Glengarnock Iron and Steel Company, Limited*, v. *Cooper & Company*, June 12, 1895, 22 R. 672, 32 S.L.R. 546; *Brown* v. *Hastie & Company*, July 16, 1904, 6 F. 1001, 41 S.L.R. 838; *Mackintosh's Trustees* v. *Stewart's Trustees*, February 6, 1906, 8 F. 467, 43 S.L.R. 363; *Campbell* v. *Campbell* (*Breadalbane*), February 10, 1865, 3 Macph. 501; *Gelot* v. *Stewart*, March 4, 1870, 8 Macph. 649, 7 S.L.R. 372, July 19, 1871, 9 Macph. 1057, 8 S.L.R. 688. There must be a new issue different from the one that had been already tried, and a mere averment of perjury was not enough—*Snodgrass* v. *Hunter*, November 8, 1899, 2 F. 76, 37 S.L.R. 60. There was a difference between *res noviter* and a mere adminicle of evidence such as the proposed amendment disclosed—*Longworth* v. *Yelverton*, March 10, 1865, 3 Macph. 645; *Allan* v. *Stott*, June 14, 1893, 20 R. 804, 30 S.L.R. 728; *Coul* v. *Ayr County Council*, 1909 S.C. 422, 46 S.L.R. 338. The appellant could competently have led evidence on the matter of the amendment at the proof, and *sibi imputet* that he had neglected to do so—*Edinburgh and District Water Trustees* v. *Clippens Oil Company, Limited*, July 7, 1899, 1 F. 899, 36 S.L.R. 710.

Argued for the appellant—It was true that the Court would only allow additional

proof in exceptional circumstances, but such circumstances existed in the present case. The appellant made a precise and specific charge of perjury, and had reported the case to the Crown. In this respect the case differed from a mere general averment of perjury, such as had been refused effect to as a ground for opening up a proof—*Begg* v. *Begg*, February 27, 1889, 16 R. 550, 26 S.L.R. 402. Further, the present case was not one of reduction, but a living process, and under the Court of Session Act 1868 (31 and 32 Vict, cap. 100), sec. 72, the Court had wide powers to allow the motion. That statute gave the Court greater liberty in a question of this kind in a Sheriff Court case than in a Court of Session case where the Court's powers did not depend on statute—*Taylor* v. *Provan*, June 16, 1864, 2 Macph. 1226; *Mitchell and Others* v. *Sellar*, January 22, 1915, 52 S.L.R. 300; *Snodgrass* v. *Hunter*, *cit. sup.*

At advising—

LORD SALVESEN—This is an unusual application with which we have to deal. It is a note by the unsuccessful defender in an action which was raised against him for leave to make an amendment upon his record and to lead additional proof in order to substantiate the amendment so made.

The case altogether is a very unusual one. In effect the defender is being sued for the value of certain articles which were the property of John Scott Engines, Limited, of which company the pursuer is now the liquidator, and he is sued on the ground that he surreptitiously instructed certain workmen to remove these articles until the removal of John Scott Engines, Limited, from the works had been completed; that he had them brought back, and obtained a money consideration for them from another company, which took over the business of the limited company in liquidation. These averments amount to a charge of theft or of fraudulent appropriation of goods, the property of another person, for the benefit of the appropriator.

There was a very long proof taken in the case, and the Sheriff-Substitute, in finding the charge proved, obviously proceeded on the evidence mainly of two workmen, who gave a detailed story as to their being shown the goods in a secret place pointed out by the defender, then transferring them to another place on his instructions, and finally opening the last-named repository and bringing them back into the works, where they were realised for the defender's benefit. A part of the story is that in order to carry out this scheme which the defender had planned they made an opening in the bottom of a large chimney, and built it up after they had conveyed the articles, many of which were fairly heavy, into this secret chamber, and then afterwards broke into the chimney again and took out the articles. They also say in evidence that they had built up the parts of the chimney opened so skilfully as to make it appear that there had been no entry into the chimney at all.

The defender says that since the judgment was pronounced against him he has reason to believe that the chimney had never been opened at all, and having obtained this information he communicated with the Crown, and preferred a charge of perjury against the two workmen on whose evidence he was convicted. He further avers that the Lord Advocate directed an inspection of the chimney to be made by experts, and that as the result of the inspection he is prepared to prove that this chimney, with regard to which such a detailed story has been given, cannot have been opened within the period of the last three years. If he is able to substantiate these averments (which are contained in the minute of the proposed amendment of the record) we should probably place very little reliance upon the story of the two workmen, on whose evidence the Sheriff-Substitute entirely, or almost entirely, proceeded.

The pursuer contends that it is incompetent for us to allow the amendment, because it is an amendment not directed to any new issue, but is an amendment giving notice of an attack upon the evidence already led; and further, because it was quite open to the defender to have made this investigation before the proof was closed, and he cannot now be allowed to make good an omission of so serious a nature on the part of himself or of those responsible for the conduct of the case.

There are three kinds of circumstances in which a proposal to lead proof that perjured evidence had been adduced has come before the notice of the Court. There is in the first place the case where there is a final decree, and it is sought to reduce the decree upon the ground of the perjury of a party or a witness in the case. We were referred to the case of *Begg*, 16 R. 550, upon that subject. I think it lays down what has always been regarded as an established rule, that unless there is an allegation of subornation of perjury, an averment of perjury by a witness, even if he be one of the parties to the case, is not a ground for reducing a decree. Subornation of perjury stands upon a different footing, because it involves an attempt on the part of the suborner to deceive the Court by means of concocted evidence, and accordingly in *Begg's* case a statement that certain evidence had been suborned was regarded as relevant on the question of the reduction of the decree, and was remitted to proof.

Then there is the case where an action has been tried in the Court of Session and, on a reclaiming note being presented, an application is made for additional proof. The Court have generally looked upon such applications with great disfavour, and we have been referred to various cases where they have refused to allow additional proof. The only one where there was an allegation of perjury was the case of *Snodgrass* v. *Hunter*, (1899) 2 F. 76, and I am not surprised that the allegation there was treated with very scant courtesy, because, it being a case where there had been the verdict of a jury and a motion for a new trial on the ground that the verdict was contrary to the evidence, not a word was said on the motion for a new trial about the non-

reliability of any of the witnesses in the case, and it was only when the motion had been refused, and as a last resort, that the party came forward with the statement that one of the witnesses on whose evidence the jury had proceeded had confessed to some other person that he had been guilty of perjury. In that case the Court refused the note and applied the verdict, and I think we should certainly have done the same in similar circumstances.

But then this is not an action that originated in the Court of Session; it is one that originated in the Sheriff Court; and I think there is a good deal of force in what Lord Neaves said in the case of *Taylor* v. *Provan*, 2 Macph. 1226—a case which was decided before the Court of Session Act 1868, was passed. Lord Neaves said this—"I was anxious to hear all that could be said in support of this motion for further proof, because I think it is the duty of this Court to give redress wherever there has been a miscarriage in an inferior court, though that may have been the result of fault. The supposition that there may be an *inopia peritorum* in the inferior court may not have the same basis in fact as it used to have, but I think the law still presumes, in the general case, that there may be a want of mature advice in the inferior court against which a party may be restored in this Court."

It is obvious that these observations do not apply to the second class of circumstances to which I have referred, where the action has been originated in the Court of Session and where the party litigant has had the advantage not merely of the advice of an agent but of one or more counsel learned in the law; and it is not to be presumed that a man will be ill-advised in such circumstances. Cases may, however, still occur—although I should be far from suggesting that there is *inopia peritorum* in the Sheriff Court at Paisley—of there being such *inopia* in remote parts of Scotland where it would be against the ends of justice if one took the same strict view which prevails with regard to actions which originated in the Court of Session, and assumed that the person has been well advised in every step of procedure.

But since that judgment was pronounced a statutory discretion has been conferred upon the Court which is limited, as I understand, to Sheriff Court cases. It is still competent for us to grant additional proof in a case originating in the Court of Session, but there is no express statutory sanction for it, and the circumstances in which such applications will be granted require to be exceptional. The only limitation of the power of the Court of Session, where the action has originated in the Sheriff Court, is that the Court shall think it necessary that there should be additional proof, which I interpret as meaning, necessary for the ends of justice, necessary for the proper and due disposal of the case.

Here we have, as I pointed out at first, very pointed allegations, which, if they can be substantiated, go to show that there has been a complete miscarriage of justice in regard to a matter which is vital to this defender's character. He has in this civil proceeding been convicted of what is a serious crime by the law of Scotland, and he now alleges that he has complete and real proof to the effect that the evidence upon which he was convicted was perjured. I do not myself think that you could have a stronger case for allowance of additional proof, whether the case originated in the Court of Session or in the Sheriff Court, because my own view is that if before the case has got the length of a final judgment there are pointed allegations supported by *prima facie* evidence of gross and deliberate perjury having been committed it would be most unfortunate if this Court could not investigate these allegations with a view to do justice in a civil suit that is pending before them. The alternative would be that decree should be granted for a pecuniary payment, and after the decree had become final, that there should be an investigation into the criminal charge, the result of which, however conclusive, would not affect the liability under the civil decree. At all events, I think that in the case of a Sheriff Court proceeding, even although there has been fault on the part of the agent, there may be, as Lord Neaves explained, reasons why we should open up the case and allow additional evidence.

In this particular case I am not so sure that the degree of fault was very serious. I do not doubt that the agent might have directed his attention to the question whether in fact the chimney had ever been opened, but it was assumed apparently by everybody that it had been so. The defender, who was put in as the first witness for the pursuer, was asked very pointedly if he was aware that it had been opened, and his answer was that he did not know, but he had heard about it and supposed it was so, and accordingly the whole attention of his advisers was directed to the question whether the defender could be connected with the opening of the chimney and with the abstraction and concealment of the goods which formed the subject of the charge.

At all events it is plain that he made no such investigation, and it was only after the judgment of the Sheriff-Substitute that he apparently woke up to the possibility that there might be a mode of testing the evidence, which he believed to be perjured, in this direct way; and he did so, I think most properly, by putting the case into the hands of the Crown for their investigation. The Crown have now taken up the attitude that they will not proceed until they see the result of this civil action. In these circumstances I think it is desirable that we should have all the evidence before us that will enable us to say whether there has been a concocted case of perjured evidence against this defender, with which of course the pursuer is in no way connected, because he is the liquidator of the company and has, no doubt, been acting entirely upon information which he believed to be credible.

Accordingly I am in favour of allowing this amendment and of allowing the additional proof with regard to it.

There remains the question of the amendment that was originally proposed in the Sheriff Court. As I understand that amendment it is directed to the same subject-matter as the second amendment—namely, the question whether the two particular witnesses who were singled out as having sworn to a false story had spoken the truth in any part of it. If that be the true meaning of the amendment, which to my mind is a little obscure, then I think we ought to allow inquiry into that also. If the meaning of the amendment is that whereas these two witnesses in the proof deponed to their having been shown a chamber or place of concealment where the defender had accumulated all these goods, the truth was that they themselves had had them conveyed to that place of concealment, then it is really just part of the same detailed story which the defender now challenges as a tissue of falsehood from beginning to end.

Of course we are not in any way prejudging the question as to whether these averments are well founded or not. It may be that he or his advisers have discovered a mare's nest; but as they stand they point to a serious case of perjury, and I think it would be most unfortunate if we should be precluded from an investigation at this stage when the judgment of the Sheriff-Substitute is still under review.

LORD GUTHRIE—I agree. It seems to me that this is a very exceptional case. It is not ruled by any of the cases quoted to us, and it can scarcely be a precedent in any other case. We must be guided by the words of section 72 of the Act of 1868. I agree with Lord Salvesen in his interpretation of the words "if necessary," namely, if necessary for the ends of justice. It was suggested that the proper gloss to put upon them was to be found in a reference to section 29 dealing with amendments of records, where it is said that such amendments should be allowed as may be necessary to determine the real question in controversy between the parties. I do not think there is any substantial difference between those two views.

In a case of this kind, if it is proposed to lead evidence on a new line of defence, one must first ask, Was notice fairly given by the pursuer which ought to have induced the defender at once to table the evidence on the line of defence now proposed? I am bound to say that I think on record notice was fairly given, but both in the answers to the condescendence and in Captain Macarthur's answers in the witness-box it is clear that he did not appreciate in either the one case or in the other that he had an alternative line of defence—(1) that the thing was not done at all, (2) that in any case "I did not do it."

The next question is—Was the party in fault in not maintaining at once the new line of defence? I think he was in fault. It may have been natural for him to take the line he did, but I think his agent, for whom he must accept responsibility, was bound to have exhausted all possible lines of defence, and among others to have inquired whether the chimney had ever been opened at all.

The third question as I read the case is this—Had the party while in fault any reasonable excuse satisfactory to the Court for not leading evidence on the new line? A number of the cases quoted to us do not assist us—for instance, the case of *Mitchell* v. *Sellar*, (1915) 1 S.L.T. 128, and the case of *Brown* v. *Hastie & Company*, (1904) 6 F. 1001. In these cases the Court held there was no blame whatever either to the party or to his agent. On the other hand, in the case of *Allan*, 20 R. 804, the Court held that there was no excuse whatever either for the party or for the agent. The case which is most in point is the case of *Coul* v. *Ayr County Council*, 1909 S.C. 422, where an extremely important plan was discovered after the proof was closed, but its importance only became apparent on the evidence being led of two old ladies who were examined on commission after the proof taken in the Court had been concluded. In that case the Court distinctly indicated that they thought there was fault on the part of the agent in not producing the plan sooner, and yet the plan was allowed to be produced and evidence led about it. Lord Dunedin in giving judgment said—"When proof has been concluded and judgment has been given both by the Sheriff-Substitute and by the Sheriff, it is not on light grounds that your Lordships will go back upon what has been done and open up the proof, and in particular when a party has by his own negligence failed to bring forward evidence which might have been available to him. Your Lordships could not countenance the idea that, after debate and after judgment has been given, a party who has discovered what is a weak point in his case should be able to come here and to obtain leave to introduce new evidence to strengthen that weak point. But the application is certainly competent, and in the particular circumstances of this case I think it should be granted. I have come to be of this opinion because I am satisfied from the pleadings that the parties had not their ideas focussed upon the point on which this new evidence is desired, and, in particular, that the position taken up by the pursuer in his pleadings was not such as to put the defenders in negligence in not having made such inquiries as should have brought to light the book in question."

I do not say that the reference to the conduct of the pursuer in that case applies directly here, but it is quite plain that the parties here as in the case of *Coul* had their mind focussed on one line of defence, and did not advert to the fact that they had another which might equally have availed them.

It is not necessary to go on that ground alone, because here we have a strong case of alleged perjury with very specific averments, accompanied by a list of witnesses in reference to the Sheriff Court amendment, and an offer by Mr Macphail to put in a similar list in reference to the Court of Session amendment. The case is distinguishable from all the cases quoted to us. There

is no question of public policy here, because this is not the case of a final judgment. With a final judgment people are entitled to adjust their whole arrangements on the ground that the matter is finally at an end. Nor is there any question here of long interval as in *Lockyer* v. *Ferryman*, (1877) 4 R. (H.L.) 32, where a proposal was made to open up a matter after thirty years had elapsed. Nor can *Snodgrass* v. *Hunter*, (1899) 2 F. 76—a case of alleged perjury—be said to be decisive on this point, because the averments there were of the most vague and general kind.

I think this case, with its double element of excusable mistake and alleged perjury, is not ruled by any of the cases quoted. I think that to refuse the motion would amount to a denial of justice. There are cases in which that result must follow, but that occurs in cases where on grounds of public policy individuals must suffer. This is not a case of that kind. I am not prepared to say that if the Sheriff Court amendment had stood alone we should have granted it. But I am clear we should allow the Court of Session amendment, and I agree in thinking it desirable that in these circumstances the whole matter specified in these minutes should be gone into.

LORD JUSTICE-CLERK—I am of the same opinion. Section 72 of the Court of Session Act was specially framed to deal with cases coming up from the Sheriff Court before they were finally disposed of by judgment in this Court, and it gives the Court power to allow additional proof if necessary. I agree with your Lordships as to the interpretation of the words "if necessary." I take them to mean that justice may not be done, indeed cannot be done, without allowing that additional proof. As the present case stands, great injustice may be done by affirming the judgment of the Sheriff without having the inquiry asked for.

I do not think there was any blame attached to the defender's advisers in the mode in which the case was conducted by the defender in the Court below, because there the case was dealt with as it was put by the pursuer. In the pursuer's allegations the question of the opening up of this chimney and the question whether the defender was the party who caused it to be opened up are inextricably mixed up together, and when the matter came to proof the case was treated by the pursuer on the assumption that there was no doubt whatever that this place had been opened. It was so distinctly brought forward that the defender well might shrug his shoulders and say—"I do not know whether it was done or not, I am ready to believe it, but if so I have had nothing whatever to do with it."

It is said that he or his agent should have gone and ascertained whether this place had ever been opened up or not. I cannot hold that that was a course which was necessarily called for in the circumstances at the time of taking the proof. The question was not whether this place had been opened or not. The question was whether the defender had caused it to be opened for a purpose which was necessarily fraudulent, and whether in consequence of his action it was opened. So far as I can see there was no duty on the part of the defender to make any examination of the place at all, because when the statement was made—which we are told was a perjured statement—that he had given orders for it to be opened, it would probably be considered that the witnesses would hardly make such an allegation unless it had in fact been opened. Therefore I do not hold that there was any omission at all on the part of the agent.

If it could be held to be an omission, it was one of those omissions which might take place in the Sheriff Court owing, as Lord Neaves said in the case quoted to us, to the want of skilful advice in the Court below, and that being the case, I take it that clause 72 of the Act was practically intended to meet such a case. I do not for a moment say that if in the Court below the defender had omitted a material part of his own case we should allow additional proof. But this was not a necessary part of his case at all. It was not necessary for his case at the time to decide whether this chimney had ever been opened or not. His case was that he had not done it. He was beaten on that upon the proof, because there were witnesses to prove, at least to the satisfaction of the Sheriffs, that he had done what was alleged against him. He now says that he has ascertained that that was perjured evidence. He says he is prepared to prove this, and he has taken the best means of doing so by making an accusation to the Lord Advocate and asking him to investigate the matter. We are told that the Lord Advocate has investigated the matter but is not prepared to act until this case has been finally decided.

It is difficult to see what action can be taken if it be ultimately held in this case—that is, proved in fact and finally decided in this Court—that the defender had caused that place to be opened. But the position of matters being as I have stated, and the defender having done everything that he could to get the matter cleared up by the ascertainment of the facts, I think he is not to be precluded because the Lord Advocate is not prepared to proceed on the evidence before him with regard to the examination of this chimney. I cannot understand the Lord Advocate having had any difficulty in dealing with the case by taking no proceedings if he had found that the place had really been opened. I am of opinion that in the circumstances of this case this inquiry should be made, and we should allow the proposed amendment and the additional proof with reference to it. I suggest that the proper course is to reserve the question of expenses.

LORD DUNDAS was sitting in the Extra Division.

The Court granted the prayer of the note and the crave of the motion and minute; opened up the record and allowed the defender to amend the same as proposed in

the note and motion and minute, and the pursuer to amend the record as proposed in his answers and minute, and the amendments having been made, of new closed the record; allowed the proof to be opened up in order that the defender might lead additional evidence on the averments contained in his note and motion and minute; allowed the pursuer a proof in replication, and appointed the proof to be taken by Lord Salvesen on a date to be afterwards fixed.

Counsel for the Pursuer and Respondent—MacRobert—D. M. Wilson. Agents—Fyfe, Ireland, & Dangerfield, W.S.

Counsel for the Defender and Appellant—D.-F. Dickson, K.C.—Macphail, K.C.—Burnet. Agent—James Scott, S.S.C.

Saturday, February 27.

FIRST DIVISION.

[Lord Dewar, Ordinary.

GLASGOW CORPORATION *v.* JOHNSTON.

Jurisdiction—Domicile—Delict—Scotsman Absent from Country at Date of Raising of Action, with no Fixed Residence, Edictally Cited in Action Based on his Delict.

An action of relief from the compensation payable to an injured workman was brought against a defender in respect of delict committed in Scotland. The defender was by birth and origin a domiciled Scotsman and had never lost that domicile nor acquired another; but some years before the alleged delict he had left his usual residence, and about a month before the raising of the action had left Scotland and had not returned, nor had he acquired a fixed residence anywhere. He used his former Scotch address as his address for letters, which were forwarded to him, and for the purpose of registration of his motor car. He was cited edictally and by registered letter at the said address. *Held* that, in the circumstances, the Court had jurisdiction to try the action.

Observed per Lord Dundas—"I do not think that it . . . would be advisable to lay down as an absolute or general rule that Scots domicile combined with *locus delicti* in Scotland will in all cases lead to a similar result."

The Corporation of the City of Glasgow, *pursuers*, brought an action of relief against Harold Bruce Johnston of The Pass, Callander, then furth of Scotland, *defender*, calling upon him to indemnify them for the payment of compensation at the rate of 15s. per week from the 14th day of February 1913 until the further orders of the Court, and expenses amounting to £20, 5s. 9d., "being the principal and expenses contained in the award of Sheriff-Substitute A. S. D. Thomson at Glasgow, dated the 3rd day of November 1913, and interlocutor following thereon of the 24th day of November 1913, in the proceedings in the Sheriff Court at Glasgow at the instance of Duncan Mitchell, carter, 14 Robert Street, Govan, against the said pursuers for payment of compensation under the Workmen's Compensation Act 1906."

The defender pleaded, *inter alia*—"No jurisdiction."

The *facts* are given in the opinion (*infra*) of the Lord Ordinary (DEWAR), who on 17th November 1914 repelled this plea.

Opinion.—"In this action the Corporation of the City of Glasgow claim relief against the defender Harold Bruce Johnston for certain sums for which they have been found liable to one of their servants in name of compensation under the Workmen's Compensation Act.

"The pursuers aver on record that on 7th February 1913 while their said servant in the course of his employment was driving a horse and cart along Paisley Road, Glasgow, he was run into and injured by a motor car which the defender was driving. They plead that as the said injuries were caused by the fault and negligence of the defender, he is under liability to pay damages in respect thereof, and that the pursuers having been found liable to the said servant for compensation and the expenses of the action, are entitled under the provisions of the Workmen's Compensation Act 1906 to be indemnified by the defender.

"In addition to a defence on the merits the defender pleads that the Scotch Courts have no jurisdiction. Proof on this preliminary plea was allowed, and I have now heard the evidence. The material facts proved are as follows:—The defender, who is thirty-two years of age, is a domiciled Scotsman, and at the time of the accident [February 7, 1913] resided in Glasgow. He is a son of the late Henry Buist Johnston, stockbroker, Glasgow, who died in 1907. The late Mr Johnston was proprietor of, and resided at, The Pass, Callander, and the defender and his mother continued to reside there until 1910, when the place was let to a yearly tenant. From 1910 till May 1913 the defender was employed in Glasgow and resided there. He then went to London. He returned to Scotland in September, and remained in a hotel at Callander till November. This action was raised in December—the summons being signeted on 6th December 1913—but by that time the defender was on his way to Canada. He remained in Canada till January 1914, when he returned to London. He again visited Canada and came back to London in June 1914. He is there still. Since he left Scotland he has lived in various hotels and boarding houses, but had never any fixed residence. He used The Pass, Callander, as his permanent address. His letters are sent there and forwarded by the Callander postmaster. He gave this address for the registration of his motor car. He is entered on the valuation roll as joint owner and occupier. He explains in evidence that this was a mistake, but he admits that he has exercised the franchise in respect of it. He is in receipt of an income of £80 a-year from his