opinion. I think the interpretation suggested by your Lordships of the 21st section of the Act is the true one, and that being so, there was hardly any ground for the appeal. Whatever may be said of the close time in this part of Scotland, it would be necessary for the prosecutor to prove that there was no open time in any part of Scotland on the date in question. He could not have proved that, because he could not prove an impossibility. I think therefore that that is enough for the dismissal of the case. I may add that I have no clear and decided opinion on the second question enlarged on by Lord Young.

The Court dismissed the appeal and affirmed the judgment.

Counsel for Appellant — Comrie Thomson. Agent—John Bell, W.S.

Counsel for Respondents—Orr. Agent—

COURT OF SESSION.

Friday, November 14.

SECOND DIVISION.

[Police Commissioners of Dundee.

ROBERT SMALL & COMPANY *v.* POLICE COMMISSIONERS OF DUNDEE.

Burgh—Interference with Police Commissioners acting under Statutory Powers—Chimney—The Dundee Police and Improvement Consolidation Act 1882 (45 *and* 46 *Vict. c. clxxxv.*) *sec.* 126.

The Dundee Police and Improvement Act 1882 (sec. 126) provides that in every new building the chimneys, flues, and hearths shall be constructed of such dimensions as shall be approved of by the Police Commissioners. *Held* that the Court ought not to interfere with the judgment of the Commissioners on the matters committed to them by the Act, in the absence of an averment that they have made proper inquiry or refused to hear parties.

Under sections 121, 122, and 126 of 45 and 46 Vict. c. clxxxv. (The Dundee Police and Improvement Consolidation Act 1882) no new buildings can be erected within the burgh of Dundee "until the plans and sections required by this Act relating thereto have been approved of by the [Police] Commissioners, either with or without modifications." Section 121 provides that the plans and sections shall show and describe the mode of construction and dimensions of all proposed chimneys and flues; while section 126 is as follows:—"In every new building the chimneys and flues and hearths shall be constructed in such mode and of such materials and dimensions as shall be approved of by the Commissioners."

On the 29th September 1884 Robert Small & Company, brick manufacturers, laid before the Commissioners, in terms of the 121st section of the above, the plans and sections of certain brickworks which they proposed to erect on the outskirts of Dundee, which plans showed, *inter alia*, a chimney 80 feet in height. The Works Committee of the Police Commissioners pronounced a deliverance whereby they approved the said plans and sections "subject to and with the declaration that the chimney-stalk be built to a height of not less than 150 feet above the level of the ground adjoining."

Against this deliverance Small & Company appealed, and prayed the Court, "after hearing parties and making such inquiry as to your Lordships shall seem proper, to recal the deliverance complained of, in so far as it requires the chimney-stalk proposed to be erected by the appellants to be built to a height of not less than 150 feet, and to fix such other and lesser height for the said chimney-stalk as your Lordships may approve." They made the following averments—The site of the kiln was on high ground at the back of the town, the elevation being 230 feet above the level of the river Tay, and there were no buildings of any kind between it and the municipal boundary of the burgh. The nearest buildings on the west were 450 feet from the chimney, and on the east 40 feet. In planning the proposed works they had availed themselves of experience gained by them during the last fourteen years at Pitfour, where within 600 yards of the mansion-house they had worked without any complaint either of injury to the crop or the adjoining land, or to the amenity of Pitfour House, brick-works, with kilns roofed in, where the heat from the fires was conducted by flues to a central chimney. They were satisfied that the proposed chimney of 80 feet high was amply sufficient to carry away any smoke without injury to the amenity of the neighbourhood. The requirement of the Commissioners was unnecessary and unreasonable, and it was inconsistent with their action in other cases where they had authorised chimneys in different works specified in the appeal to be erected at a much less height than 150 feet. They stated that the deliverance complained of had been arrived at without notice to and without hearing them.

The complainers pleaded—"The deliverance appealed against being unreasonable and uncalled for, and being inconsistent with the Commissioners' action in other similar cases, ought to be recalled or altered as craved."

The respondents answered as follows—They admitted that the site was on high ground, but explained that the ground to the north was still higher. That ground was a feuing subject, and the proposed chimney might soon be enclosed on the north and west sides by blocks of dwelling-houses, four storeys in height, within 90 feet of the kilns. The plans did not show any provision for consuming smoke. In regard to the averment that the appellants had not been heard, they were not bound to send notice to or hear parties. "The mode or practice followed generally is as follows—The notices of the parties, with the relative plans and sections, constitute the case of the applicants, and the Commissioners' committees and sub-committees, which consist of practical men, aided and assisted by the Burgh Engineer, thereafter consider the plans and sections submitted, and pronounce deliverances." They did not now allow the erection of any such chimneys less than 75 feet in height where there was a single flue, while the appellants' had six kilns with separate flues.

In the course of the argument, in which the appellants' counsel had asked for a remit to a man of skill, in respect they had not been heard by the Commissioners, the respondents' counsel stated that if the appellants thought they had not had a proper opportunity of being heard by the Commissioners, he did not object to the case being remitted back to them for the purpose. The appellants' counsel refused the proposal.

At advising—

Lord Justice-Clerk — Section 126 of the Dundee Police and Improvement Consolidation Act 1882 provides that "in every new building the chimneys and flues and hearths shall be constructed in such mode and of such materials and dimensions as shall be approved of by the Commissioners." The question here is in regard to a chimney in certain works to be erected by the complainers which has been delineated on the plans as a certain height. The Commissioners, under the powers of the clause quoted, decline to approve of the plans, and specially object that the height of the chimney is too low and ought to be 150 feet high. This appeal has been taken against the Commissioners' non-approval of the plans as they stand, and the question is whether we can, on the statements made in the appeal case, interpose our approval and authorise the works to be erected as proposed. Now, if a case had been made out to us that the Commissioners were wrong in the mode of inquiry which they take, or that injury had been done through not hearing parties properly, or that some advice of importance had been neglected, then I think we might have interposed. But I have a strong impression we cannot substitute our approval for that of the Commissioners, who have special powers given them by the Legislature, and act on special information in the absence of such a case. Nothing had been stated to us here except that they take a different view from the complainers as to the height of the chimney, and as to its effect on the surrounding neighbourhood. In that matter I should be inclined to trust their judgment, and therefore in the absence of a special statement of the kind I have pointed out I am of opinion that we should refuse this appeal.

Lord Young—I am of the same opinion. It was put to Mr Murray whether if the complainers thought they had not had an opportunity of stating their case to the Commissioners there would be any objection to their having such. He said none; but Mr Johnston said frankly that looking to the answers and mode of procedure of the Commissioners, it looked hopeless that it should be done and that he did not care to take the course. That is different from making a remit. With that explanation I entirely concur in your Lordship's judgment. No case has been stated here to induce our interference, and we should require such special cause to induce us to take the initial step towards substituting our judgment for the judgment pronounced by the Commissioners under powers given them by Act of Parliament. Anything extraordinarily wrong, or ascertained to be so, on a statement of it on remit, we should attend to, or any irregularity on the part of the Commissioners, but we cannot interpose in absence of statement of such in a matter involving as it does exercise of judgment.

Lord Craighill—I am of the same opinion. No cause has been shown to warrant our interference. A strong case would be required to do so.

Lord Rutherfurd Clark—I also think no case has been stated in respect of which we may make a remit to displace the deliverance of the Commissioners. But it is said the Commissioners did not hear the complainers, and I should have been disposed to remit to them to reconsider their judgment if the appellants had desired it. They do not desire it, and I daresay there would have been very little use in the remit.

The Court refused the appeal.

Counsel for Appellants—H. Johnston. Agent—Robert Menzies, S.S.C.

Counsel for Respondents—Graham Murray. Agent—J. Smith Clark, S.S.C.

Saturday, November 15.

SECOND DIVISION.

NORTH BERWICK GAS COMPANY *v.* JOHN B. ROBERTSON & COMPANY.

Process—Sheriff—Appeal—Amendment of Record—Sheriff Courts (Scotland) Act 1876 (39 *and* 40 *Vict. c.* 70), *sec.* 24.

In an action in a Sheriff Court for the price of goods sold and delivered, the defenders, while admitting the debt, pleaded compensation by reason of loss caused by alleged breach of contract on the part of the seller, consisting in a premature termination of a contract said to have been entered into first for one year, and renewed by tacit relocation. The Sheriff-Substitute having decerned against the defenders, they, in a reclaiming petition, alleged that there had been a new verbal contract, but did not formally propose any amendment. The Sheriff having adhered to the Sheriff-Substitute's judgment, the defenders appealed to the Court of Session and moved for leave to amend to the effect of making a specific averment of a new verbal contract for the year to which the dispute applied. *Held* (*diss.* Lord Craighill) that the defenders not having made the motion to amend at the proper time before the Sheriff, and having taken a judgment on the record as it stood, leave to amend should be refused.

This action was raised in the Sheriff Court at Haddington by the North Berwick Gas Company against John B. Robertson & Company, chemical manufacturers, Dunbar, for payment of £68, 18s. 6d. as the amount of an account from April 1882 to August 1883 alleged to be due to them for gas tar and ammoniacal liquor supplied to the defenders. The debt was admitted, "but under deduction always therefrom of the defenders' counter claim of damages."

The defenders averred—"(Statement 2) For several years prior to the 31st day of July 1883 the defenders had an annual contract with the pursuers for the supply to the former of the gas tar and ammoniacal