of the contract is by each party choosing an arbiter, with power to them to appoint an oversman.

LORD M'LAREN—This is a narrow case, but on a balance of opposing considerations I concur in Lord Adam's opinion. May I add that this question could hardly have arisen if the contract had been made in England, because in the relative English Arbitration Act there is a section to the effect that where no particular mode of arbitration is provided the reference shall be understood to be to arbitrators nominated by the respective parties, with power to appoint an umpire. Why this useful provision of the English Arbitration Act has not extended to Scotland I have difficulty in understanding, but we must take the Act as we find it. The result of this discrepancy is that we have had two hearings in this Division of the Court and a proof, all on the question how that arbitration clause is to be explicated, I can hardly doubt that with less expenditure of time and at less cost to the parties the Court would have determined the merits of the case if the parties had not chosen to raise this preliminary question. It is to be hoped that contracting parties when they mean to refer their disputes to arbitration will be a little more clear in their statements—which only require a few words—as to how the court of arbitration is to be constituted.

LORD KINNEAR concurred.

The Court pronounced this interlocutor:—

"Find that the customary manner of settling disputes by arbitration in the timber trade in the sense of the contract mentioned in the record, is by each party choosing an arbiter, with power to the arbiter to appoint an oversman: Sist the action till the matters in dispute between the parties, so far as falling under the contract, shall have been determined by arbitration in terms of the said contract."

Counsel for the Reclaimers — Clyde — Aitken. Agents—Webster, Will, & Company, W.S.

Counsel for the Respondent—Salvesen, Q.C.—Hunter, Agents—White & Nicholson, S.S.C.

Saturday, February 3.

SECOND DIVISION.

[Lord Low, Ordinary.

THORBURN *v.* DEMPSTER.

Process — Record—Defences—Court of Session Act 1850 (13 *and* 14 *Vict. c.* 36), *sec.* 1 *—Act of Sederunt 7th February* 1810—*Act of Sederunt 1st February* 1715, *sec.* 6.

The defender in an action lodged defences, in which he neither admitted nor denied the pursuer's averments on the merits, but merely stated that he was a domiciled Englishman and not subject to the jurisdiction of the Scottish courts. He declined to state his position on the merits until it was shown that he was so subject, and his only plea-in-law was "No jurisdiction."

Held that these defences were not competent defences to an action, and case *remitted* to the Lord Ordinary to allow the defender to lodge defences if so advised.

Jurisdiction—Action on Contract Relating to Heritage—Foreign.

Held by Lord Low (Ordinary) that an Englishman who has concluded an *ex facie* formal and effectual contract for the purchase of heritage in Scotland, is subject to the jurisdiction of the Scottish courts in an action for the enforcement of that contract.

This was an action at the instance of John Hay Thorburn, Leith, against Alexander Dempster, Eaton Hall, Penmaenmawr, North Wales, against whom arrestments were said to have been used to found jurisdiction, in which the pursuer concluded for decree ordaining the defender to implement a contract for the sale of a distillery in Aberdeenshire.

The pursuer averred that on 18th May 1898 he entered into a minute of sale with the defender, whereby the pursuer agreed to purchase the distillery in question from the defender, and to fulfil various other stipulations relative to the sale, which were specified in the minute of agreement. The minute of sale upon which the pursuer founded was produced. It was a probative deed executed in the Scots style, and according to the solemnities of the law of Scotland.

In defence to this action the defender lodged defences, which are here given in full, and which ran as follows:—

"Answers to pursuer's condescendence—Ans. 1 to 8. With reference to the alleged contract of sale, the defender declines to make any admission until it is shown that he is subject to the jurisdiction of the Scotch courts.

"Statement of facts for defender—Explained that the defender is not subject to the jurisdiction of the Scottish courts, as he is a domiciled Englishman and does not possess property, either heritable or moveable, in Scotland. In order to found jurisdiction against defender the pursuer arrested in the hands of Harvey's Yoker Distillery Company, Limited, having their registered office at No. 43 Renfield Street, Glasgow, the sum of £30,000 sterling more or less, alleged to be due and addebted by the said arrestees to defender. The defender neither possesses any shares in the said Harvey's Yoker Distillery Company, Limited, nor are the said arrestees debtors of defender.

"Plea-in-law for defender—No jurisdiction."

The Court of Session Act 1850 (13 and 14 Vict. c. 36), sec. 1, enacts as follows:— . . . "The allegations in fact which form the grounds of action shall be set forth in an articulate condescendence, together with a note of the pursuer's pleas-in-law, which condescendence and pleas-in-law shall be annexed to such summons, and shall be held to

constitute part thereof; and the defences to such summons shall be in the form of articulate answers to such condescendence, and where necessary appended thereto a statement of the allegations in fact on which the defender founds in defence, and also a note of the defender's pleas-in-law."

By Act of Sederunt 7th February 1810 the Lords enacted and declared "That where a fact is averred by one party, and not explicitly denied by the other party, he shall be held as confessed in terms of the Act of Sederunt One thousand seven hundred and fifteen, section 6, and the fact as definitely proved against him."

The Act of Sederunt 1st February 1715 enacts as follows:—"Section 6 . . . Any party against whom any matter of fact shall be alledged which might be admitted to probation, the said party or his advocate shall be obliged to confess or deny that fact before pronouncing of the interlocutor, which confession or denial respectively shall be expressly marked in the minutes, and if he do refuse to confess or deny, his refusing shall in like manner be marked in the minutes, whereupon he shall be held as confessed." . . .

On 13th July 1899 the Lord Ordinary (Low) pronounced the following interlocutor:—"Repels the defender's plea-in-law; and in respect that the defender's counsel has this day at the bar intimated that he did not propose to amend the record to the effect of stating a case upon the merits—in the first place, finds, declares, and decerns in terms of the conclusions for declarator and implement; in the second place, finds, decerns, and ordains in terms of the first, second, third, and fourth heads of the second conclusions of the summons: *Quoad ultra* continues the cause: Finds the pursuer entitled to expenses," &c.

Opinion.—[*After stating the nature of the case*]—"The only plea stated by the defender is 'No jurisdiction.'

"I am of opinion that if an Englishman has concluded a formal and effectual contract for the purchase of heritage in Scotland, that is sufficient to give the Scottish courts jurisdiction.

"The precise question has never, so far as I am aware, been settled by decision, but it is well established that a complete feudal title to land is not required. Thus a personal right under a disposition, a mere title of apparency without any possession, a beneficial interest in lands held in trust, and a lease of heritable subjects, have been held sufficient to give jurisdiction. That being so, I see no reason why, if an Englishman has actually bought an estate in Scotland, there should not be jurisdiction although he has not yet obtained the feudal title which it is in his right to demand.

"The defender argued that in this case there could not be jurisdiction in respect of the contract, seeing that the *de quo queritur* was whether there was or was not a binding contract. But I am not aware that there is any dispute in regard to the contract. It is true that the defender does not admit the contract, but he does not deny it, and the pursuer has produced a probative deed which is sufficient to establish his case unless the deed is set aside, or circumstances are averred and proved which entitle the defender to refuse to implement the contract.

"If the defender had stated a relevant defence upon the merits I should have allowed a proof, and in that case it would have been immaterial whether the plea of no jurisdiction was repelled or not, because the facts upon the question of jurisdiction and upon the merits are necessarily the same.

"But as the pleadings stand there are no disputed facts in regard to which a proof could be allowed.

"The plea is stated and was argued as a strictly preliminary plea, which falls to be given effect to at once, and which excludes all inquiry. In that sense I think that the plea is bad, and must be repelled. If, however, the plea is repelled, nothing remains, because the defender has stated no defence upon the merits. Therefore unless he moves for leave to amend his pleadings I must give decree."

The defender reclaimed, and argued—The defender was not bound to state his defence upon the merits until it had been determined that he was subject to the jurisdiction of the Court. [Lord Young referred to the Court of Session Act 1850, sec. 1, and to the Acts of Sederunt, 7th February 1810, and 1st February 1715, sec. 6]. The defender's failure to admit or deny the pursuer's allegations on the merits could not have any further effect than to put him in the same position as if he had admitted them. Assuming all the pursuer's averments on the merits to be true, it was submitted that the Court had no jurisdiction here. A foreigner was not subject to the jurisdiction of the Court because he had become a party to a contract relating to heritage in Scotland. The Lord Ordinary's interlocutor was therefore unfounded. Before any other question could be considered there must be a proof as to the validity of the arrestments used to found jurisdiction.

Lord Justice-Clerk—I think the proper course will be to recal *in hoc statu* the interlocutor of 8th November 1898 closing the record, and the interlocutor of 13th July 1899, which is the interlocutor reclaimed against, and to remit to the Lord Ordinary to give the reclaimer an opportunity of lodging defences if so advised.

Lord Young—I think that is the proper course. No such defences as these were ever seen before. They are in violation of the Act of Parliament and the Acts of Sederunt and the unbroken practice of the Court. They ought not to have been given in, and they ought not to have been received any more than a paper with a cross on it and a plea of no jurisdiction. I think that it is quite proper that the summons should go back to the Lord Ordinary, and that the defender should be allowed to lodge defences if so advised.

Jurisdiction is a very important question. The defender if he had chosen might not

have appeared; but if he appears and pleads no jurisdiction he must observe the rules of this Court, and this Court has jurisdiction to determine the question of jurisdiction, but it cannot determine any question except upon a record properly made up in accordance with the statute and the Acts of Sederunt.

LORD TRAYNER—I concur in what your Lordship has suggested.

LORD MONCREIFF—I am of that opinion also.

The Court pronounced this interlocutor:—

"Recal *in hoc statu* the interlocutors of 8th November 1898 and 13th July 1899, and remit the same to the said Lord Ordinary to allow the defenders, if so advised, to lodge defences: Find the pursuer entitled to expenses to this date," &c.

Counsel for Pursuer—Salvesen, Q.C.—Cook. Agents—Simpson & Marwick, W.S.

Counsel for Defender—Lorimer—Laing. Agents—Philip, Laing, & Harley, W.S.

Thursday, February 14.

FIRST DIVISION.

[Sheriff Court of Ayrshire.

MAGISTRATES OF KILMARNOCK *v.* DONALD & MORTON.

Burgh—Customs—Toll upon Cattle Brought within Burgh for Sale—Method of Levying—Liability of Auctioneer—Process—Action of Exhibition Relative to Claim Against Third Parties.

The magistrates of a burgh were empowered to levy customs upon all cattle, &c., brought for sale within the burgh, and in particular had right to levy or collect customs at specified rates upon all cattle, &c., "brought for sale within or sold within" an auction mart situated within the burgh.

An action was raised by the magistrates against the proprietor of the mart claiming the amount of customs which they alleged to be due in respect of the cattle, &c., which during the period of a year "have been consigned to the defenders within the said burgh . . . or brought within and sold by the defenders within said auction mart belonging to the defenders." There was a further conclusion for production by the defenders of a list of the owners or consignors of the cattle, &c., or for exhibition of the defenders' books to enable the pursuers to ascertain this. The Court *dismissed* the action, holding that there was no ground of personal liability for the dues against the defenders, and that there was no obligation on them to exhibit their books or furnish information relative to a claim upon third parties against whom no action had been brought.

Observations by Court as to the method in which it was competent for the burgh authorities to exercise their right to levy customs.

Opinion that they could primarily only be exacted from those in charge of the animals at the time they entered the burgh.

An action was raised in the Sheriff Court of Kilmarnock at the instance of the Provost, Magistrates, and Town Council of the Burgh of Kilmarnock, against Donald & Morton, auctioneers, carrying on business in an auction mart at West Langlands Street within the burgh of Kilmarnock. The pursuers craved the Court "to grant a decree against the above-named defenders, ordaining them to pay to the pursuers the sum of £56, 15s. 7d, or otherwise to appoint, ordain, and decern the defenders to produce or deliver to the pursuers a list containing or showing the names and addresses of the owners or consignors, and the numbers of each kind of bestial, of all cattle, sheep, horses, pigs, or other bestial consigned to or brought within or sold within their auction mart at West Langlands Street, Kilmarnock, between the 7th day of October 1898 and the 30th day of September 1899; and further, to ordain and decern the defenders to produce and exhibit to the pursuers their books or other documents in order that the pursuers may verify or check said list, and discover the names and addresses of the owners or consignors, and the number of each kind of bestial, of said cattle, sheep, horses, pigs, or other bestial consigned to or brought within or sold within said auction mart belonging to defenders within the periods above mentioned."

It was averred by the pursuers on record, and was not disputed by the defenders, that "(Cond. 2) The pursuers have right to levy petty customs or dues, *inter alia*, on all cattle, sheep, horses, pigs, and other bestial brought for sale within the burgh of Kilmarnock, conform to schedule of rates herewith produced dated 23rd October 1854. . . . By judgment of the Sheriff-Substitute of Kilmarnock, dated 16th February 1899, it was decided that the pursuers have right to levy or collect the customs at the rates mentioned in said schedule upon all cattle, sheep, horses, or pigs brought for sale within or sold within the said auction mart of the defenders. A copy of said judgment is herewith produced and referred to."

The pursuer further averred—"(Cond. 3) Between the 7th day of October 1898 and the 30th day of September 1899 there has been consigned to the defenders within said burgh, or brought for sale within said burgh by the defenders, or brought within and sold by the defenders within said auction mart belonging to the defenders, and on the respective dates therein mentioned, the number of cattle, horses, sheep, pigs, or other bestial mentioned in the list herewith produced by the pursuers. The customs or dues payable to the pursuers upon said cattle, &c., amount to £56, 15s. 7d., all as detailed in said account."