committed, it is not the view of the law that the offender should elude punishment for the offence merely because he is also guilty of a common law charge, and here arises the consideration of the distinction between the administration of justice under statute and at common law. In statutory offences the law prescribes an arbitrary punishment up to a certain fixed amount, and under the common law a punishment only limited by the powers given by the law to the particular tribunal trying the case. This being the law our practice is that where a statutory crime has been committed, as well as a common law crime, it is reasonable and proper that the judge trying the offender should have both these offences brought under his notice in passing sentence.

As to the jurisdiction of the Sheriff to try the offences set forth in the third and fourth charges I entertain no doubt. These charges set forth that the one prisoner solicited or indnced the other—a person engaged in the Post Office—to forge certain telegrams, that being a statutory offence quite independent of the crime of fraud previously libelled; and that Wood had similarly committed the statutory offence of forging these telegrams. In this case the question is rather academic than practical. I do not assent to the proposition that the reading of the evidence in regard to the statutory charges was calculated to prejudice the prisoner's defence on the common law charges. Next, it is said that though there might have been jurisdiction in the Sheriff sitting alone and trying the case summarily, there was none in him sitting with a jury and trying the case on indictment. Now, in all cases in which by statute the proper sentence is limited to two years' imprisonment, the Sheriff sitting with a jury has jurisdiction unless excluded by special provision. It is said that section 37 of the Post Office Act reserves such cases to the High Court. I cannot assent to that view. That section I read, not as restricting the common law jurisdiction of the Sheriff, but as securing the more effectual prosecution of such offences, and in Scotland that is arrived at by providiug that in the High Court a man may be tried within the district where such offence shall be committed, or in any county or place within which such offender shall be apprehended or be in custody." The provision is entirely for the convenience of carrying out the prosecution, and is confined to cases which the prosecutor may think fit to bring in the High Court. It does not make it competent to a sheriff to try an offender merely on the ground that he has been apprehended within the sheriffdom, but, on the other hand, it in no way derogates from the right of the Sheriff to try accused persons for any offence committed within the sheriffdom for which the punishment is one which the Sheriff is competent to pronounce.

Next, it is said that the first diet having been deserted *pro loco et tempore* on 13th July 1899, it was incompetent to serve a new indictment until the period prescribed in section 42 of the Criminal Act of 1887 had expired. I cannot agree to that proposition. When a criminal diet has been deserted *pro loco et tempore* for any reason, it is open to the prosecutor at any time to serve a new indictment. That section merely makes it competent to the prosecutor, in place of serving a new indictment, to serve a notice on the accused that he will be tried under the old indictment on a certain date, and after the expiry of the *inducice* prescribed in the section.

Lord Stormonth Darling and Lord Pearson concurred.

Tho Court refused the suspension.

Counsel for the Complainer—Salvesen—A. M. Anderson. Agents—St Clair Swanson & Manson, W.S.

Counsel for the Respondent—Sol.-Gen. Dickson, Q.C. — Fleming, A.-D. Agent—W. J. Dundas, C.S., Crown Agent.

COURT OF SESSION.

Friday, October 20.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

KERR *v.* EMPLOYERS LIABILITY ASSURANCE COMPANY, LIMITED.

Process—Dominus litis—Expenses.

An employer was insured against liability for accidents to his workmen under a policy containing a condition that if proceedings were taken to enforce any claim the insurance company should, if they so desired, "have the absolute conduct and control of the defences, in the name and on behalf of the employer," and that they should indemnify him against the expenses of such proceedings.

A workman raised an action of damages for personal injury against the employer, and obtained decree against him for a sum of damages and for his expenses.

The defence was in fact conducted and controlled by the insurance company in name of the employer.

The employer having become insolvent the workman raised a separate action against the insurance company for the purpose of recovering his expenses in the original action.

Held (1) that the action was competent, and (2) (on a proof) that the company were the true *dominus litis* in the original action, and that they were accordingly liable for the pursuer's expenses therein.

Observed that the relation between the nominal party to a suit and the *dominus litis* is not necessarily that of agent and principal—*Fraser* v. *Malloch*, 25 R. 619, *explained*.

An action was raised in the Sheriff Court of Forfar by John Kerr, plater, against the Montrose Shipbuilding and Engineering Company, Limited, craving for decree against the company for £500, in name of damages for injury sustained by him through an accident occurring in the company's yard. The Sheriff-Substitute on 26th February 1895 found that damages to the amount of £150 were due to the pursuer, and that he was entitled to expenses.

An appeal was taken to the Sheriff on behalf of the company, and he on 30th March 1895 dismissed the appeal with additional expenses. The defenders appealed to the First Division, who on 18th July 1895 dismissed the appeal and found the pursuer entitled to expenses in the Court of Session. The company were insured against liability for accidents to their workmen in the Employers Liability Assurance Corporation, Limited, 75 George Street, Glasgow, conform to policy dated 30th January 1892. By the policy it was provided that the Assurance Corporation should "(subject to the endorsed condition No. 2 A) pay to the employers all sums for which such employers shall become liable under or by virtue of the Employers Liability Act 1880, or at common law, as and for compensation for personal injuries caused to any workman in their services while engaged in the employer's work in either of the occupations and at any of the places in the schedule hereto, such payment to be made within one calendar month of the receipt by the directors of the corporation of evidence satisfactory to them of such liability; provided always that this policy and the covenant to indemnify herein contained are subject to the conditions endorsed hereon, which are hereby agreed to be conditions precedent to the right of the employer to sue or recovery hereunder."

Condition No. 2 endorsed on the policy was in the following terms—"A. The corporation shall pay to the employer all sums for which he shall become liable under the Employers Liability Act 1880, or at common law, up to the amount of three years' wages, as defined and expressed in the Employers Liability Act 1880, as well as the costs and expenses hereunder mentioned, if any, and no more in any event. B. On receiving from the employer notice of any claim, the corporation may take upon themselves the settlement of the same, and in that case, the employer shall give them all necessary information and assistance for the purpose. The employer shall not, except at his own cost, pay o. settle any claim without the consent of the corporation, but if any proceedings be taken to enforce any claim in respect of which such notice shall be given, the corporation shall, if and for so long as they shall so desire, have the absolute conduct and control of the defences, in the name and on behalf of the employer, and shall, subject to the terms of the within policy, indemnify the employers against all costs and expenses of and incident upon any such proceedings incurred while they retain such conduct and control thereof, and the employer shall, at the cost of corporation, render them every assistance in his power to enable them to resist any claim, wholly or in part, or to defend any such proceedings."

An action was raised by John Kerr against the Assurance Company for payment of the sums of £55 and £32, being the amount of his expenses in the above-mentioned action in the Sheriff Court and Court of Session, with interest from the dates of the respective decrees.

The pursuer averred that the present defenders had been duly notified by his employers of the claims and of the raising of the action, and that they "thereupon undertook the conduct and control of the defence to the pursuer's action," that the defenders "were the true *domini litis* in the said action, and had the whole control and direction of the whole proceedings therein so far as regards the defence thereto."

The pursuer further averred that he had not been successful in recovering from the Montrose Shipbuilding Company payment of the sums decerned for against them, that the company was insolvent and in liquidation, and that the present action was therefore necessary.

The defenders averred that the pursuer had throughout regarded the Montrose Shipbuilding Company as the real defenders in the action, and had relied upon them as his true debtors, and that he had lodged a claim in the liquidation.

They denied that they had had the absolute control of the defence, and pleaded —"(4) The pursuer having extracted decree against the Montrose Shipbuilding Company for the whole amount of the expenses incurred by him in the original action, the present action is incompetent. (6) The pursuer having no claim on the defenders for expenses incurred by him in establishing a claim against the Montrose Shipbuilding Company, the defenders should be assoilzied, with expenses. (7) The Montrose Shipbuilding Company having retained control of the original action they only are liable for the expenses of that action."

The Lord Ordinary (KYLLACHY) allowed the parties a proof, the import of which sufficiently appears in his Lordship's note, *infra.*

On 24th December 1898 the Lord Ordinary pronounced an interlocutor by which he decerned against the defenders in terms of the conclusions of the summons, and found the pursuer entitled to expenses.

Opinion.—"This is an action for expenses as against an alleged *dominus litis.* The original *lis* was an action brought by the pursuer claiming damages for personal injuries against his employers the Montrose Shipbuilding Company, now in liquidation. The action was defended (nominally by the company), but after litigation in the Sheriff Court and Court of Session the pursuer obtained decree for a sum of damages, and also for his taxed expenses. His decree for damages is, unfortunately for him, worthless, owing to the hopeless insolvency of the company; but he claims to have now discovered that the action was

truly defended by the present defenders, an Insurance Corporation, and accordingly he brings this action against them, claiming that, as regards the expenses incurred by him, he has right to recover against them as the true *domini litis* in the litigation.

"Upon the matter of fact, it does not appear to me that there is any doubt. It seems to be established beyond dispute that, in terms of a right expressly enforced on them by the contract of assurance, the defenders' corporation claimed and obtained from the assured company the absolute conduct and control of the defence to the suit; and also that they did in the company's name conduct and control the suit to its termination.

"It seems also established, and is indeed not disputed, that they so conducted and controlled the suit in respect of having under their contract of assurance a direct interest in its subject-matter—an interest partial or total according to the result, but yet an interest quite direct and immediate.

"Nor does it seem to detract from the importance of those facts that—the Sheriff-Substitute and the Sheriff having decided for the pursuer, and the corporation's advisers having appealed to the Court of Session — the assured company became bankrupt and went into liquidation, and its liquidators refused to allow their names to be used in prosecuting the appeal. It may be that, as between the company and the corporation, this liberated the latter from their obligations under the policy; but I fail to see what effect that can have on the present question, which relates exclusively to the expenses incurred by the pursuer during the period while the corporation were still in control and were litigating for their own interest in the company's name. It would of course have been different if the liquidators had intervened and carried on the liquidation on the company's account. But that did not happen. Neither they nor the company in fact intervened at all. The whole expenses now sued for were due to the opposition of the present defenders.

"The question therefore is, whether, the defenders' relation to the suit being what I have stated, the case comes within the doctrine of *dominus litis*. Now, I do not propose to resume the authorities upon that doctrine. I had occasion to do so in the comparatively recent case of *Fraser* v. *Malloch*, 23 R. 619, to which I refer. But it seems to me that whatever difficulties may sometimes arise in applying that doctrine, the present case stands clear of most of those difficulties. Indeed, I should be disposed to say that the present is a typical case for the application of the doctrine. In particular it seems to me to satisfy to the full the conditions figured by Lord Rutherfurd in the case of *Mathieson* v. *Thomson*, 16 D. 19, where, reviewing the whole authorities, his Lordship puts the matter thus—'That a *dominus litis* is a party who has an interest in the subject-matter of the suit, and through that interest a proper control over the proceedings in the action.'

"Accordingly I should, I confess, have disposed of the case at once had it not been for an able and ingenious argument originally presented by Mr Moncrieff and afterwards by Mr Dewar—an argument founded on some observations of my own in the case of *Fraser* v. *Malloch*. That argument, as I understood it, was of this nature. Assuming, it was said, that the law of *dominus litis* is just a chapter of the law of principal and agent, and that the ground of liability is that the *dominus* is just an unknown principal, litigating in the name of another person who is *ad hoc* his agent,—so assuming, the result, it was said, is that the alleged *dominus litis* is in the same position as any other undisclosed principal, and being so, cannot be sued, after his agent who has appeared as principal, has been sued to judgment. This, it was at first said, followed from principles established in England and recognised in Scotland under the doctrine of election. But as ultimately presented, the case was put, not as one of election, but of absolute bar—the unknown principal, whether discovered before judgment or not, being always entitled to plead that judgment having gone out against the agent, no further action could lie on the same cause of action against him (the principal), or indeed against anybody else. This was said to be the result of the decision, and particularly of Lord Cairns' judgment in the case of *Kendall* v. *Hamilton*, 4 App. Cas. 504.

"Now, I am not, I own, satisfied that the judgment in the case of *Kendall* lays down any doctrine of general law. It seems to me to depend largely, if not entirely, upon the application of certain rules of procedure established in the Common Law Courts in England, and not (according at least to the majority of their Lordships) affected by the Judicature Act of 1883. And if that be so, I am not aware that we are in this Court embarrassed by any such rule. It certainly does not occur to me that we should be much embarrassed by some of the practical difficulties which are figured by Lord Cairns, and which helped to determine his judgment.

"Neither am I at all satisfied that, assuming all they say, the defenders could or can take any benefit from the doctrine of election. To an election it is at least necessary that the party supposed to elect has known that he had a choice. But here the pursuer is not proved to have known, before the dismissal of the appeal, or even before the final interlocutor approving of the Auditor's report, that the present defenders had been all along his true antagonists in the action. He, or rather his agent, may have suspected something of the kind. The latter seems certainly to have known or to have heard that the Shipbuilding Company were insured. But there is no evidence as to how much they knew, and the Court cannot in such a matter assume knowledge in the absence of proof.

"Even, however, if all this was otherwise, there is, in my opinion, a defect in the defenders' argument which goes a good deal deeper. It may be true that the principle underlying—what I have called for

shortness—the doctrine of *dominus litis* is the same as that which determines the liability of an undisclosed principal, with respect to contracts made by his agent in the latter's name. But it does not thence follow that the whole law of principal and agent, with all its incidents, is necessarily imported into the very special form of agency with which we have here to deal. There is at least one circumstance which makes it very difficult to hold that the *dominus litis* is freed whenever the nominal litigant is sued to judgment. For with us it is at least I think a rule of practice that the expenses of a cause, if they are to be recovered by the successful party, must be ascertained and decerned for in the suit in which they are incurred. If therefore the defenders' argument were to be held as sound, the right to sue the *dominus* by a separate action — a right which is well established—would be a dead letter. This of itself seems to show that the doctrine of *dominus litis* has rules of its own, and also that it is possible to state legal principles too broadly, and to apply them too literally.

"Altogether, I see no reason why the pursuer should be now barred from his remedy against the defenders, and accordingly I propose to decern in terms of the summons, with expenses."

The defenders reclaimed, and argued—They were not the true *dominus litis*, but even if they had been so, the pursuer was barred from proceeding against them by having accepted the Montrose Company as his debtor. It had not been established that the defenders were truly the principals in the action, and that the company was merely their agent. That was the criterion of liability laid down by Lord Kyllachy in *Fraser* v. *Malloch*, March 12, 1896, 23 R. 619. This was not the case of a man of straw put forward as a litigant for the purpose of prejudicing an opponent. Nor was a mere obligation in relief to the Montrose Company enough to found this action—*Carrick* v. *Rodger, Watt, & Paul*, Dec. 3, 1881, 9 R. 242. But even if the defenders had been in the position of an undischarged principal, they were entitled to plead that the pursuer having obtained judgment against the agent, no further action would lie against them — *Kendall* v. *Hamilton*, 1879, L.R., 4 App. Cas. 504.

Argued for the respondents — The reclaimers' argument depended on their being able to show that the law of *dominus litis* was identical with that of principal and agent, and also that the Montrose Company had been in the position of agents. It was quite evident that they were not, for they had done nothing at all in the case except allow their name to be used, having by the conditions of their policy assigned to the present defenders the entire right to conduct the action. Moreover, the pursuer would have had no right of action against the present defenders in the first instance, there having been no privity of contract between them, so the law of election had no application. After getting a decree against the nominal defender, it was quite competent to sue the *dominus litis* in a separate action for expenses—*Stevens* v. *Burden*, Nov. 21, 1823, 2 S. 507; *Corson* v. *M'Lauchlan*, Feb. 8, 1828, 6 S. 505; *Hepburn* v. *Tait*, May 12, 1874, 1 R. 875.

LORD PRESIDENT—I cannot but think this a very clear case, and I agree in the ground stated by what, for shortness, I shall call the first part of the Lord Ordinary's judgment. The action is brought on the theory that this Assurance Company was the true *dominus litis* in the previous action. Now, if anybody other than the person whose name is printed as party in the record can be the *dominus litis*, I think this Assurance Company was. To begin with, to the person whose name was used it was immaterial whether the result of the action was success or failure; he was completely covered by his policy of assurance, and accordingly the Assurance Company very naturally stipulated in their contract that they, and not he, should have the control of the action, and should, of course, incur all liabilities resulting from that position. There are valuable illustrations in the cases of the relations which might constitute a man a *dominus litis*, but I do not cite any of them, for this reason that I think that not one of them is clearer, or indeed so clear, as the present case, of an Assurance Company who begin by stipulating that the insured shall give his name to them, in order that they may conduct the action, and where, from that point onwards, he has nothing whatever to do with the conduct of the case. Therefore, that the Assurance Company were the *dominus litis* in this matter seems to me to be beyond all doubt. It is true that it was, or at least they thought it, essential to their prosecuting the action to final judgment in this Court, that they should have the concurrence of the liquidators of this company and they failed to obtain that, but that is merely one of the risks they ran; and it does not bring anybody into the field to oust them or supersede them in the position of conducting the case.

The next point is this — what is the ground upon which a *dominus litis* is made liable in expenses? As I take it, it is simply the ground upon which everybody is made liable in expenses, and it is stated thus by Lord Jeffrey in *Irvine* v. *Kilpatrick*, 10 D. 367:—"If any party is put to expense in vindicating his rights, he is entitled to recover it from the person by whom it was created"—that is to say, by whom the expense was created. The person who ultimately holds a judgment in his favour is held to be the person who has the right, and if that right is challenged by anybody and expense caused by the challenge, against the person causing the expense is the right to recover expenses. And that, therefore, is the basis for the rule and practice by which expenses follow the result. The only other point is this—how stands the practice on this, which is a pure point of practice? Must the expenses be

recovered against the true *dominus litis* in the original action? or, can they be recovered by a subsequent action? The law on that point seems to be settled by practice. It is competent to recover expenses by a subsequent action, and that being so, it seems to me that the way of the pursuer is perfectly plain to the decree which the Lord Ordinary has granted, except for a rather fanciful argument about principal and agent. All this about principal and agent arises merely from the Lord Ordinary being careful to ensure the complete accuracy of the very elaborate judgment which he gave in *Fraser* v. *Malloch*, 23 R. 619, and which seems to be a very useful discussion of the law upon this question of *dominus litis*. Incidentally, he had said that the one man was said to be the agent of the other, that is to say, that the nominal party was merely the agent of the one who was pulling the strings behind his back. And in that case there was not the complete control which in a true case of *dominus litis* like the present case the *dominus litis* has, but, on the contrary, he remained in the background, and only exercised a sort of veto on the person who was the nominal party. But in the present case the nominal party was not in Court at all. His name was, but he had nothing to do with the case, having long ago assigned to the Assurance Company the right to conduct this action. And accordingly, as an agent is one who acts and not one who does not act, all this fine-spun argument about principal and agent falls to the ground. But I think it right to say that the application of this principle of election seems to me to be completely excluded by the two considerations which were adverted to in the course of the debate. First, it is well established that you can sist a man as *dominus litis* side by side with the person whose action he is controlling, and in the end take decree against them, conjunctly and severally, in the same process. Secondly, it is proved to be the practice, as I have already pointed out, that, after having got against the nominal party decree for expenses in the original action, you can go and recover the expenses, and get them out of him by diligence; and if you do not get the whole, then you can recover what you have lost out of the *dominus litis* in a separate action, which, in itself, is a conclusive negative test of the soundness of this doctrine, upon which we have heard this argument. Therefore I am of opinion that the Lord Ordinary's judgment is right.

Lord Adam—I am of the same opinion. I have always understood the definition given by Lord Rutherford in the case of *Mathieson* v. *Thomson*, 16 D. 19, to be the sound definition of what a *dominus litis* was, and I understood Mr Campbell to approve of that definition. In that case it is laid down that a *dominus litis* is "a party who has an interest in the subject-matter of the suit, and through that interest a proper control over the proceedings in the action." That the Assurance Company had an interest in the subject-matter of this suit is beyond doubt. They were ultimately liable to the employers for the damages, and a greater interest in this suit they could not have. And having that direct interest in the suit they had entire control of it. It is not disputed that the defenders claimed and obtained as the insuring company the absolute conduct and control of the suit. Therefore it appears to me that if ever there was a case where a party fell within the definition of Lord Rutherford, it is this Assurance Company. They had a direct interest in the suit, and they had the entire control of it. Therefore I agree with your Lordship that they were the true *dominus litis*. That being so, the question arises solely about expenses. How are parties made liable for expenses in such a case? The one party, the nominal pursuer, is liable throughout, because he is a party in the case, and being a party in the case, pursuing or defending, he is liable in expenses. But it may be that the other party may discover in the course of the proceedings that there is some person behind him who has in truth an interest in the case, and who is taking the entire control of the case. And having discovered that, if he be successful in the end he may move that that party may also be found liable to him in the expenses of the case. If the fact is admitted, or if on making a motion for expenses he can incidentally prove by the production of an assignation or by some such mode, that this other party is the *dominus litis*, he may and would get decree against him also in this action. But if the fact is disputed, I doubt whether the Court would allow an inquiry in the original case. It would say you must raise another action, and accordingly it appears to me that decree may be given against the *dominus litis* either in the original action, or, as it was in Thomson's case, a separate action may be raised, in which it may be pleaded that the party against whom he seeks decree for expenses was the *dominus litis* in the case. That is my view of the law of this case. I have never been able to see what we have to do with election, or agent and principal, or anything of that sort. The principle, I think, is that you are the party who has occasioned the expenses in the proceedings, and you must refund these expenses. In short, I agree with the Lord Ordinary.

Lord M'Laren—I concur in the opinion of your Lordship in the chair, and I shall confine my observations to two points. The Lord Ordinary has said that but for the argument founded on the law of principal and agent he would have had no difficulty in dealing with the facts of the case. But as that argument rested upon some observations by Lord Kyllachy himself in a previous case, he felt bound to give the point careful consideration. Now, I do not know enough of the case there referred to —*Fraser* v. *Malloch*, 23 R. 619—to be able to say how far it is a case in which the analogy of principal and agent might be applicable, but I assume that in that case his Lordship rightly treated it as a case

where the person sought to be made the *dominus litis* stood in the true relation of principal towards the party who was the nominal pursuer or the defender as the case may be. Now, if that is so, if the person who is behind, and who is sought to be made liable for expenses, is really in the position of principal—where that is the true relation between him and the party who is conducting the case in his interest, it may very well be that a question of election might arise affecting the disposal of the case and the expenses. I give no opinion upon that point, because I do not think it arises in this case; but it is at least maintainable that if the other contracting party has elected to treat the agent as the principal, in conformity with well-known principles of mercantile law, that he could no more recover costs from the principal than he could recover the principal sum in the action. I do not wish to give an opinion one way or the other on that point, but it plainly does not arise here, and for this reason, that the relation of the Employers Assurance Corporation and the Montrose Shipbuilding Company is not that of principal and agent at all. That appears very conclusively from this consideration, that the injured workman who brought the action against his employers had no election, and could not possibly have maintained an action against the Assurance Company as guarantors. There was no relation of contract whatever between him and them so as to give rise to election in regard to a suit for the principal sum; and that being so, I fail to see how any such questions can arise with regard to expenses. The other point to which I merely advert is, that it seems desirable in general that when it is sought to make someone responsible for expenses who is not a party to the suit, but who is known to be promoting the suit, the claim for expenses should be made in the action in which the expenses were incurred. And I should have thought with the Lord Ordinary that it was a maintainable point in this case that, as the Assurance Company were quite well known to be promoting the action, and no claim was made in the action to make them conjunctly and severally liable along with the liquidators or the representatives of the Shipbuilding Company, it is now too late to bring it forward. There are cases where an alleged *dominus litis* has been made responsible in a separate action, but in those cases which were cited to us it does not appear from the reports, so far as I have been able to gather, whether the party sued was known to be the *dominus litis* at the time when the original action was brought to a conclusion. I should like to reserve my opinion on this point also, because although the attention of counsel was called to the point, no argument was offered upon it, and I therefore assume that it does not arise in the present case.

LORD KINNEAR — I concur with your Lordship in the chair.

The Court pronounced this interlocutor—

"The Lords having considered the reclaiming-note for the defendant Corporation against the interlocutor of Lord Kyllachy, dated 24th December 1898, and heard counsel for the parties, Adhere to the said interlocutor: Refuse the reclaiming-note, and decern," &c.

Counsel for the Pursuer—W. Campbell, Q.C.—Findlay. Agents—J. & J. Galletly, S.S.C.

Counsel for the Defenders—Vary Campbell — Moncrieff. Agents — Drummond & Reid, S.S.C.

Tuesday, October 24.

FIRST DIVISION.

GUNN, PETITIONER.

(Sequel of *Gunn* v. *Muirhead*, June 30, 1899, 36 S.L.R. 798.)

Company—Issue of Shares—Consideration other than Cash—Filing of Memorandum—Companies Act 1898 (61 *and* 62 *Vict. cap.* 26), *sec.* 1.

Form of memorandum authorised to be filed, under sec. 1 of the Companies Act 1898, in regard to shares in a company which had been issued as fully paid-up, and with respect to which no contract had been filed with the Registrar of Joint-Stock Companies, in compliance with sec. 25 of the Companies Act 1867.

The facts of this case, which were fully stated in the previous report, may be summarised as follows:—John Gunn, who was a shareholder in the West End Cafe Company, entered into an agreement with James Muirhead, whereby he agreed to accept certain shares in a company called Aitchison & Sons, which was being formed to take over the assets of the West End Cafe Company, in lieu of shares belonging to him in the West End Cafe Company, while Muirhead, on the other hand, undertook to relieve Gunn of the shares allotted to him in Aitchison & Sons.

No payment in cash was made by Gunn for the shares allotted to him in Aitchison & Company, and no contract was filed with the Registrar of Joint-Stock Companies, in terms of sec. 25 of the Companies Act 1867.

Gunn raised an action against Muirhead to have him ordained to take over the shares in implement of his agreement. Muirhead defended the action, on the ground that the shares allotted to Gunn were not free from liability, as no cash had been paid for them, and no contract under sec. 25 had been filed. In the action Muirhead was assoilzied (see 36 S.L.R. 798).

Gunn now brought a petition for authority to file a contract with reference to these shares, under the provisions of the Companies Act 1898. By section 1 of said Act it is provided as follows—"(1) Whenever, before or after the commencement of this Act, any shares in the capital of any com-