three years ago, to put down a ferry-station at the foot of the embankment which they made under this conveyance. The question which the complainer has to try is, whether they could do that under the terms of their conveyance and looking to the nature of the rights of parties in that ground? How anybody else but the trustees could be defender in such an action I cannot conceive; nor how it can be imagined for a moment that the Clyde Trustees could enter into a proof to establish a public right-of-way with other parties with whom they had no concern I am unable to understand. In short, I think a false issue has been presented by the respondents here from the very first, and that that question has really nothing to do with the true matter we have to solve. And my solution of it may be given on two grounds. In the first place, I am of opinion that after having this conveyance granted to them, if they had acquired a right of ferry, and had proposed to set a ferry-station down there, it was a direct violation of the provisions of this contract. It is in vain to say it is for the accommodation of the public. They acquired the ground under conditions that they are bound to fulfil. No doubt the stations which the Act of 1858 authorised them to put down were stations along the banks, but that that Act authorised them to violate the conditions on which for the public good they had obtained this piece of ground, is to my mind a position that is wholly untenable. Even as regards stations put down under the authority of the Act of Parliament, they required in the first place to have acquired a private right to the landing-place, and in the second place to connect it with some public road or way.

Therefore the ground on which the Lord Ordinary has gone wrong is this, that this putting down of a station at such a point as that in question is a use of the ground acquired that is prohibited by the very terms of that Act itself.

But observe what the effect of it is. This staircase that was to be made for the benefit of the complainer is now to be handed over to the public. It becomes a public way and nothing else. Those who communicate to this place a right of ferry induce people to come to it, and they acquire a right over it—at all events, if they use it for the prescriptive period; and certainly the proprietor never intended to grant any such right as that. Nor did he ever contemplate that the staircase—a bargain made for his own convenience—was to be altered in such a way by this Act.

But the second view I take—and I hold it very strongly—is, that they were not entitled to put down any station here under their right of ferry unless they could communicate directly with some public way. They admit and cannot deny that the ground upon which they discharge their passengers from their ferry, or right of ferry, is private ground; but they also say that the public are allowed to come here. Well, if the ground had been acquired in the ordinary way without limitation, there might be a question as to how far there was a presumption that the people who came there were entitled to be there; but when I find that the ground was given for a totally different purpose, and that the trustees unquestionably induced the people to come by putting down this ferry-station contrary to their title, that I think raises an entirely different question. I am of opinion that they were not entitled to do that. And I may say further, that I think all illustrations taken from persons unconnected with the proprietor of the ground, who derived no title from him, are wholly apart from and outside of the real merits of this question.

I have said enough to indicate the view I take.

The Court adhered.

Counsel for Complainer—D.-F. Kinnear, Q.C. —Dundas. Agents—Dundas & Wilson, C.S.
Counsel for Respondents—Trayner—Lorimer. Agents—Webster, Will, & Ritchie, S.S.C.

Wednesday, June 22.

FIRST DIVISION.

YEOMAN *v.* M'INTOSH BROTHERS.

Excise—23 *and* 24 *Vict. cap.* 114, *secs.* 170–88—"*Grogging.*"

In balancing the stock books of a spirit dealer under the provisions of the 23d and 24th Vict. c. 114, the Excise officers disregarded certain entries of "grog" and samples of spirits, in respect that these entries did not, as required by the statute, contain any number of permit or certificate, nor the name of any person or firm from whom or of what place the "grog" and samples were received. By disregarding these entries the officers found in possession of the dealer an excess of spirits over the quantity correctly entered in their stock, whereas by taking these entries into account there would have been no excess. *Held* that the entries of "grog" were rightly disregarded, but that those applicable to samples should have been taken into account.

This was a Case arising upon an information prosecuted on behalf of Her Majesty, and by order of the Commissioners of Inland Revenue, at the instance of the appellant against the respondents, claiming certain penalties in respect of alleged contraventions by the respondents of the Statute 23 and 24 Vict. cap. 114.

The information was first brought before a Petty Sessions of the Peace for the County of Edinburgh, held at Edinburgh on 27th April 1880. The respondents pleaded not guilty. Several adjournments were thereafter made. Proof was led on 10th June and 14th October 1880, and on the latter date counsel and agent for the parties were heard. The Court of Petty Sessions made avizandum with the case. They gave judgment on 26th October 1880, finding the respondents not guilty of any of the offences charged.

An appeal was thereupon taken, at the instance of the complainer, to the Court of General Quarter Sessions of the Peace, to be holden next after the expiration of twenty days from the date of the judgment. The said Court of Quarter Sessions was held on 1st March 1881. On the appeal being called, the appellant asked leave to withdraw all the counts of the information save the first, which was granted. The Court, after hearing the appeal on the 1st count of the information, resolved, before pronouncing judgment, to state the facts of the case

for the opinion and direction of the Court of Exchequer in Scotland, in terms of section 84 of 7 and 8 Geo. IV., cap. 53.

The Quarter Sessions stated the following facts, as having upon the hearing of the appeal been either admitted or proved:—

1. The respondents before and at the date of the offence alleged in the 1st count of the information were licensed dealers in and retailers of spirits, and traded in both capacities on the same premises, all the spirits in their possession, whether as dealers or retailers, forming one stock.

2. On 8th and 9th December 1879 certain officers of Excise took an account of all the spirits in the stock and possession of the respondents, and balanced their stock-book. By disregarding the entries of "grog" and of samples of spirits after mentioned, the officers found an excess in the stock or possession of the respondents of 680·8 gallons of proof spirits.

3. The total number of entries of "grog" and samples made by the respondents, and disregarded by the officers in balancing the stock-book was 2220; and if these entries had been taken into account by the officers, no excess, but a deficiency, would have been found in the stock or possession of the respondents. These entries, as made by the respondents in the stock-book, did not contain the number of any permit or certificate, nor the christian name and surname of the person, or the name of the firm, from whom and of what place the "grog" and samples were received. The respondents did not deliver to the officers any permit or certificate received by them along with the "grog" and samples appearing under such entries. In the calculation of the stock on hand, and in the balancing of the stock-book, all spirits were computed at proof strength. In calculating the stock on hand the officers took into account all spirits, including grog, found in the stock or possession, and within the entered premises of the respondents. In balancing the stock-book the officers gave effect to all entries therein containing the particulars required by the statute of spirits received with permit or certificate, and of spirits sent out accompanied by certificate, including spirits denominated P.S. (plain spirits), while, on the other hand, they disregarded the 2220 entries aforesaid.

The entries of "grog" relate to spirits derived by a process known under the name of "grogging."

"Grogging" is the process by which spirits absorbed by the wood of casks are extracted. When a cask is filled with spirits part of the spirits is absorbed by the wood. After the cask has been emptied water is put into it, and is allowed to remain for a month or thereby, the cask being rolled about at intervals. By these means the absorbed spirits are extracted, there being a chemical affinity between the water and the alcohol by which the extraction of the latter from the wood is effected, and the spirits so extracted are called "grog."

4. Four of the witnesses stated that in their opinion, if a dealer in or retailer of spirits grogs only casks which he receives with spirits brought into his stock with permit or certificate, and adds the grog so obtained to his stock, no excess will be found in the stock arising from such grogging, and that the addition of such grog to the stock would be more than counterbalanced by the loss arising from waste, absorption, or evaporation. The respondents have been in the habit of buying from cask-dealers old spirit casks which they grogged, and added the grog so recovered to their stock, as well as the grog recovered from casks received by them with spirits brought in with permit or certificate; but it did not appear from which set of casks or in what proportions the alleged excess had been derived.

The Revenue regulation for charging duty on spirits warehoused is, that on delivery from any Customs or Excise warehouse of a cask of spirits warehoused therein without payment of duty, duty is charged and paid on the liquid quantity of spirits contained in the cask at the time of delivery. It was proved that it is the practice of the Revenue in charging duty on spirits to make an allowance varying from 6 to 12 per cent. for leakage, evaporation, and absorption, according to the time during which the spirits have been in warehouse. It was also proved that the Revenue have statutory power to charge duty on the contents as ascertained by weighing the casks, but that it is not their practice to do so.

As regards samples, the Revenue practice is to allow traders to take from every cask of spirits they have in bonded warehouse two duty-free samples of spirits of three gills each. Duty is charged and paid on any samples drawn in excess of that number. Samples, whether duty-free or duty-paid, are allowed to traders to enable them to dispose of the spirits in bulk. No permit or certificate is given with samples.

The practice of the respondents was to add to their stock all samples of spirits received by them so far as not required by them for sampling purposes. To what extent, beyond what is aftermentioned, the samples appearing under the entries thereof disregarded by the officers in balancing the stock-book were added to stock did not appear. The respondents, with consent of the revenue officials, received from Messrs Ogg & Co., Aberdeen, on 30th October 1879, one gallon and 4-32 parts of a gallon of spirits, or 12 duty-free samples of spirits of three gills each. It appeared that some part of these samples was used by the respondents for sampling purposes, and that they added the remainder to stock. The entry of these samples in the stock-book as made by the respondents is contained in the extract from the stock-book set forth in the case.

The Quarter Sessions asked the opinion and direction of the Court of Exchequer on the following question:—"Whether the aforesaid 2220 entries were rightly disregarded by the Excise officers in balancing the respondents' stock-book on 8th and 9th December 1879?"

Argued for the appellant—The object of the provisions in the statute relative to permits and certificates is to prevent fraud, and they ought therefore to be strictly construed—*MacIntosh* v. *Wilson*, 21st Dec. 1878, 6 R. 443, 16 Scot. Law Rep. 477.

Argued for the respondents—The stock of the respondents did not show an excess over what was in their books, as the "grogging" entries were not rightly disregarded. The statute does not distinctly require the number of the permit to be inserted in the stock-book, and if it did the respondent should have been prosecuted

under the 171st section of the Act for not making proper entries in their books.

At advising—

LORD PRESIDENT—The decision of the question submitted to us by the Quarter Sessions of Edinburgh depends upon a consideration of the facts stated in this case in connection with certain clauses of the Spirits Act (23 and 24 Vict. c. 114). We had occasion in a previous case to construe some of those clauses—in the case of *MacIntosh Brothers* v. *The Inland Revenue*, on the 20th of March 1879—and we there held, upon the construction of sec. 170, that a failure to enter in the book provided by the dealer all spirits received into his stock or sent out constituted an offence against that section and subjected him to a penalty, and that that offence might be committed more than once in course of the same day. Upon the construction of the 176th section we held that he was liable in the penalty imposed by that section, if there was, in point of fact, an excess of spirits in his stock beyond that which was entered in the book, no matter from what source that excess of spirits came. In point of fact, we were informed there, in the case before us at that time, that the excess was brought about by the operation of grogging.

Now, we have the same question in a somewhat different form and upon different conditions presented in the case before us. There is a quantity of spirits in the stock of these dealers which is confessedly produced by the operation of grogging. It is in evidence—and I understand the Quarter Sessions to represent to us that the only evidence in the case is to the effect—that if grogging is carried no further than to extract from the wood of the casks which belong to the dealer himself, and which have come into his stock as full casks, what remains in the wood after the cask has been emptied, that will not raise any practical question, because it would not produce such an excess of stock as to create any offence under the 176th section of the statute. But the parties before us are in the habit of performing this operation of grogging upon a much more extensive scale. They buy casks—empty casks which had contained spirits—and they extract from the wood of those casks, by the operation which is explained in this case and in the former one, a quantity of spirits, which is added to their stock, and increases their stock beyond what there ought to be if spirits were not obtained by them except in the ordinary way from a distillery or a dealer in spirits.

The precise state of the facts in the present case is this, that on the 8th and 9th of December 1879 the officers of Excise took an account of the spirits in the stock or possession of the respondents, and balanced their stock-books, but in doing so they disregarded certain entries of spirits received in the stock-book, and the question before us is, whether they were right in disregarding those entries? Those entries are 2220 in number, and if they are disregarded, then there is an excess over what is properly entered in the stock-book to the extent of 680 gallons. If, on the other hand, those entries are taken into account, then there is no excess of stock, and there can be no penalty.

Now, the way in which the entries are made as regards the spirits obtained by grogging—apart from the question as to samples, which I shall deal with separately—is this:—The dates when the spirits are received are entered in one column. The second column, which ought to contain the number of the permit or certificate accompanying the spirits received, is blank, for a very obvious reason, because there could be neither permit nor certificate accompanying spirits which are obtained by grogging on the premises of the dealer himself. Under the head of "Christian and surname of the person, or name of the firm, from whom the spirits are received," there is no name, either christian or surname, but there is a reference to a cask by its number, from which it is represented of course that the spirits have been obtained by the grogging process. In the column of "What place," there is a blank. The quantity in gallons, or fractions of gallons, is stated rightly enough in the next column; and in the column for "kind or quality of the spirits," the entry is "grog;" in the next column the "strength of the spirits" is quite rightly given; and in the next the "gallons at proof" are given. Now, it is contended upon the part of the Inland Revenue that the officers of Excise very properly disregarded these entries because they are not made in terms of the statute. The statute describes what particulars shall enter this book, and if these particulars are not entered, then they contend that the book is not kept in terms of the Act of Parliament, and the entries so made, being disconform to the Act of Parliament, must be disregarded. The question which the Quarter Sessions have put to us in order to enable them to decide this case is, Whether these entries were rightly disregarded by the Excise officers in balancing the respondent's stock-book on the 8th and 9th of December 1879?

Now, the clauses of the Act of Parliament with which we are concerned are those which come under the general title as to certificates and permits for the removal of spirits, which begin with section 170 and end with section 188. That is the division of the statute in which all the sections occur that we require to construe. The 170th section provides that "Every rectifier, dealer, and retailer respectively shall provide himself with a book prepared according to a pattern to be given to him, on his application to the proper officer, and shall, on the same day on which he receives any spirits into his stock, custody, or possession, and at such time on that day as he may be requested to do so by any officer, and if not so requested, then at latest before the expiration of that day, write and enter in such book, and in the proper columns respectively prepared for the purpose, the date when, and the christian and surname of the person, or the name of the firm from whom and of what place the spirits were received, the number of gallons, and the kind or quality of the spirits, and the strength thereof." And then there is a provision for entering also the spirits sent out of stock in a corresponding part of the book. Now, here it will be observed that there are certain entries imperatively required to be made—the date of receiving the spirits, the christian and surname of the person from whom they are received, the place from which they come, the number of gallons, the kind or quality of the spirits, and the strength—and if any of these particulars are disregarded it is quite ob-

vious that some one or more of the securities provided by the law for the collection of the revenue will be lost to the Excise officers. Now, in the present case, as I have already mentioned, there is no entry of the christian and surname of the person, or name of the firm, from whom the spirits were received, nor of the place from which the spirits came. To that extent, therefore, the entries are disconform to the statute. It was contended also that there was a defect in respect that the number of the permit or certificate was not entered in the proper column. That is not expressly required by the 170th section of the statute, but it is also a very important particular of defect in the register kept in this case by the dealer, as will be seen when I proceed a little further with the clauses of the statute.

The next section which requires to be specially noticed is the 174th, which provides that "No rectifier, dealer, or retailer shall receive any spirits not accompanied by a true and lawful permit or certificate, as the same are respectively required by law,"—that is, a permit in the case of spirits coming from a distiller, or a certificate in the case of spirits coming from a dealer—"and every rectifier, dealer, and retailer respectively shall immediately on receiving a permit or certificate cancel the same by writing in large letters in ink across such permit or certificate, or in the space prepared for that purpose, the word 'RECEIVED,' and the day and hour when received, or shall otherwise permanently cancel such permit or certificate by lines drawn in ink across the same, so as to prevent it from being again used for the removal of spirits, and every rectifier, dealer, or retailer who shall receive any spirits without the same being accompanied by a true and lawful permit or certificate as by law required, shall forfeit the sum of One hundred pounds; and all such spirits, or an equal quantity of spirits of a like kind, to be taken out of any part of his stock, shall also be forfeited; and every rectifier, dealer, or retailer receiving any permit or certificate, who shall not cancel the same as aforesaid, shall forfeit the sum of Fifty pounds." Then section 175 provides that "all permits and certificates received with spirits by a rectifier, dealer, or retailer, shall be preserved after being cancelled as aforesaid, and shall be delivered by him to the officer of Excise who shall first inspect his premises after the receipt thereof; and for any neglect or default in this respect the rectifier, dealer, or retailer shall forfeit the sum of Fifty pounds for every such permit or certificate: but the penalty shall not be incurred if the permit or certificate has been lost or destroyed after the expiry of three months from the date thereof." Now, in connection with this, I read section 183, or at least a part of it, which provides that "no rectifier or compounder or dealer shall have (except as after-mentioned) credit in stock for any greater quantity of spirits received or found therein, than for the quantity computed at proof brought in with such permit or certificate as aforesaid delivered to the officer." The words within parentheses—"except as after-mentioned"—have not been shown to introduce any exception which can apply to the present case; and therefore we have here a distinct provision that a dealer is not to have credit in stock for any greater quantity of spirits received or found therein than for the quantity brought in with the permit or certificate which has been delivered to the officer in terms of section 175, which I have just read. This brings into the present case the want of a permit or certificate as a very important part of the consideration upon which we are to determine whether the entries in question were properly disregarded by the Excise officers. According to section 183, the Excise officers are expressly debarred from giving credit in computing the stock for any spirits that are not brought in with the permit or certificate which has been received along with them and duly cancelled, and thereafter handed to the officers of Excise. Then, by section 176 (to go back again), which is the one that more especially refers to the prosecution in this case, it is provided —"Any officer may at any time take an account of the quantity of all spirits in the stock or possession of a dealer or retailer, and if it be found that the quantity of spirits remaining in the stock or possession of such dealer or retailer exceeds the quantity which ought to be therein, as appears on balancing the book by this Act directed to be kept by him of spirits received into and sent out of his stock or possession (all spirits being for that purpose computed at proof), the excess shall be deemed to be spirits illegally received; and a quantity of spirits equal to such excess shall be forfeited, and may be seized by any officer out of any part of the stock of such dealer or retailer, who shall also forfeit the sum of Twenty shillings for every gallon of such excess; and it shall also be lawful for any officer to enter into the premises of a dealer or retailer, and to examine and take samples of any spirits in his stock or possession, paying for such samples the usual price thereof." Now, the officers of Excise in this case found entries of spirits in this book with no particulars as to the party from whom they were received or the place from which they came, and without any permit or certificate applicable to those spirits, and it appears to me therefore that under the provisions of these various clauses they had no alternative but to disregard the entries of those spirits in the stock book, and that being so, of course the excess is brought out as stated in the Case.

But there remains for consideration the point regarding the samples, which stands in a different position from the spirits recovered by grogging. There is nothing in the Excise Statutes about samples at all so far as I can see. There are no statutory provisions or regulations as to samples. But the Commissioners of Excise authorise the giving to dealers of samples of spirits in bond, and they give samples of certain amounts, generally samples of three gills, which certainly is not a very great amount, but apparently a dealer is entitled to have two samples of such amount from each cask of spirits which he has in bond. These samples do not pay duty, and they go into the dealer's possession without a permit or certificate. Now, there is no authority for that in the statute, and the Commissioners of Excise, therefore, in dealing with this matter, are going beyond the statute. They are giving to dealers spirits which do not pay duty—taking spirits out of bond and delivering them to him without exacting duty—and they are also allowing him to obtain possession of those spirits without permit or certificate. I do not see how in these circumstances the Commissioners of Excise can

fall back upon the statutes and say in regard to these quantities of spirits—"You shall not take these into your stock." The dealer is just following the example of the Commissioners in violating or disregarding the statute. The Commissioners of Excise say—"These spirits are delivered to you as a matter of indulgence and for a special purpose, and you have no right to put them into your stock." Well, if that is so, they certainly ought to have made some very express or special provision in the regulations about giving out samples,—how the samples are to be disposed of if they are not used or consumed as samples. But they do not appear to have done that; and certainly one would suppose that the most natural course for a dealer, if he has got samples to a greater extent than he finds he has use for in dealing with his customers, is just to put them into his general stock. I cannot say I think it possible to allow the Commissioners of Inland Revenue to recover penalties, or in any way to prosecute in respect of these spirits being found in the possession, or, in other words, in the stock, of the dealer in excess of what is brought there under a lawful permit or certificate, and in compliance with all the regulations of the statute, when the fact that they are there under these conditions is attributable to the action of the Commissioners of Inland Revenue themselves; and therefore, while I am for answering the question put to us in the affirmative as regards the spirits obtained by means of grogging, I think we must answer the other part of it as regards the samples in the negative.

Lord Deas — This question of grogging arose before us on a previous occasion in a somewhat different form. I was then disposed to think that the officers of Excise were bound to recognise the entries which were made of such spirits; but the very lucid statement made by the counsel for the Commissioners of Inland Revenue upon this case satisfied me that if that were the sound construction of the statute the Revenue would be exposed to dangers of not getting proper duty—so very great that it makes it very difficult to think that that is the right construction of the statute. And I am now satisfied —while I retain my opinion that grogging is a perfectly lawful process—that the regulations as to the entries in the books are all necessary for the fair protection of the Government in recovering the duties; and that being so, it is very difficult to suppose that they are not imperative upon the dealer. I now think that they are imperative upon the dealer, and when they are not observed, that the officers of the Revenue are entitled to disregard those entries. On that point, therefore, I agree with the explanation of the rule and of the law given by your Lordship. Upon the matter of samples I have no hesitation in agreeing with your Lordship.

Lord Mure—The question as put to us here is as to the competency of the officers of Excise disregarding certain entries which they found in the stock-book when they were checking that book in terms of the 176th section of the statute, and whether they were at their own hand entitled to refuse to give effect to the entries of certain spirits that were there entered. Now, these entries related to different things, and are entered under different names. Your Lordship has pointed out that the permit column is blank, and that in the column for the name of the person or firm from whom the spirits were received there are entries of a certain number of casks by number, and a certain number of samples of spirits are entered; and there is brought out in another column what the quantity is in each of the casks. Now, it is not necessary, in my view of the case, to enter into any question as to the legality of this alleged grogging. It is conceded on the part of the Excise that if the trader simply puts water into a cask for a certain time in his own premises and extracts by that process a quantity of spirit from the wood—and there is a letter from Mr Young, the secretary, to this effect —they would not challenge such a proceeding. But with reference to a cask purchased by a trader —and for anything we can see, all the casks here entered may have been so obtained—the Excise say that the trader is not entitled to make use of this process of grogging so as to get spirit out of the wood of those casks. I do not think it is absolutely necessary to express any opinion on that matter. The case we are called upon to deal with under the 176th section is a case where certain things called casks are entered which are said to contain grog, but where there is no name or surname entered of the person or firm from whom the cask has been obtained, and where that express enactment of the Act of Parliament is not complied with. So finding matters, the officers of Excise disregarded all those entries, and the question is whether that was within their power. Now, in regard to the fact (which is admitted) that there was no permit or certificate with these casks, I am of opinion that the officers were entitled to deal with those casks as cases where the statute had been violated with reference to having spirits in possession without a permit or certificate, and that it was the duty of the officers to disregard the entries. On that ground I agree with your Lordships, and I also agree with your Lordships in regard to the samples, which I think are not struck at by the statute, as it makes no provision with regard to them.

Lord Shand—In the former case that came before this Court the question arose in these circumstances, that although there had been a quantity of spirits received in the wood of casks and extracted from the wood of casks, no entries had been made in the book of the retailer or dealer, and, in consequence of the absence of all entries, on balancing the stock there was clearly an excess found on the premises beyond what the book showed. I was of opinion with your Lordship that that was clearly stock which might have been forfeited, and in respect of each gallon of which the Crown was entitled to penalties, and upon the simple reason that there was no record of that stock in the book as required by the Act of Parliament. The question in this case arises in a somewhat different way, as your Lordship has pointed out. The dealer has made certain entries in his book of stock which was received by him in casks and taken out of these casks, and the question is, whether, having entered them in the way in which he has thought fit to do it, he is now in a position to maintain successfully that he is not liable in any penalties?

I have come to the conclusion with your Lordships that the case is one in which the Crown is entitled to the penalty. In the first place, I think it is clear upon section 170 that the retailer or dealer is bound, in compliance with the provisions of this section, to record in the book which is given to him for the purpose under section 171 by the officers of Excise, the christian and surname of the person or firm from whom he receives the spirits, and the place from which such spirits are received. In regard to all of the spirits with which we have here to do we find that these are entirely omitted, and in these circumstances it appears to me that as one of the statutory requisites provided as a safeguard and a means of checking the transit of spirits from one dealer to another has been omitted in this book, the officers were entitled to disregard the entries. The case is not one in which we have an accidental omission here and there of a date or of a particular sale of spirits, or at a time an isolated case of that class. It is a case in regard to which this provision of the statute is systematically disregarded, and intentionally so; and if that be so, it appears to me that the officers were entitled to say—"We cannot take those entries as entries in compliance with the statute, and we disregard them, and we balance your book without them." There is another point which has been adverted to by your Lordship, and which I am of opinion leads to the same result—I mean the provision in regard to the necessity for permits or certificates. The statute does not prescribe that in this book a record of each permit or certificate shall be kept, but it certainly provides, taking section 174 with sections 183 and 184, that no dealer or retailer shall receive spirits into his premises, at least exceeding one gallon at a time in quantity, without a permit or certificate with such spirits. Now, on turning to the entries which are here recorded under 31st October and 17th November, it appears that upon each of those dates casks containing much more than one gallon of spirits were received into stock at one and at the same time. That being so, it appears to me that the concluding words of the 183d section apply to this case, which are these, that no rectifier, compounder, or dealer, &c.—[*reads*]—in short, that a permit or certificate is absolutely essential, where the quantity of spirits received exceeds one gallon, before the dealer can obtain credit for it in his stock.

I think it right to say that a question attended with very considerable difficulty remains behind, viz., as to whether a dealer is entitled to receive spirits in quantities of less than a gallon without a permit or certificate? I confess my impression is that he is entitled to receive that quantity, and that point perhaps bears on the question of samples in this case, because, in the first place, I see that section 174 deals with the question of receiving spirits without a permit or certificate in these terms:—[*reads* sec. 174.] Now, that indicates that there are circumstances in which by law they are not required. Again, when we turn to section 183, there is a provision that no rectifier, compounder, or dealer shall have, except as after mentioned, credit in stock for any greater quantity of spirits received than the quantity computed, and so on. Both of these expressions—the expression "as the same are respectively required by law" in section 174, and the expression "except as after mentioned" in section 183—seem to indicate that there are circumstances in which dealers or retailers may receive spirits without a permit or certificate. And accordingly when I turn to section 184 I find this is the provision:—[*reads*]. It appears to me that the whole of that provision in sec. 184 is qualified by the words "exceeding the quantity of one gallon of spirits at a time." Accordingly, if it had appeared on the face of this book that we had the name of the place from which those spirits were received, and that on each occasion there was less than one gallon of spirits so received, I think a different question would have been raised from that which we have in this case. But I think that in this particular case we have the absence of the christian name and surname, and the absence of a permit or certificate, for it appears that in a great many instances certainly there was more than two gallons. What the decision of the Court might be in the case I have supposed of those smaller quantities being received from time to time I shall not say. It appears to me—indeed it is clear, looking at this statute as a whole—that the Legislature have not had in view this process of grogging at all, and it may probably be very difficult for any dealer or retailer, even in regard to those small quantities, to carry on such a process as MacIntosh Brothers are shown to do here without bringing himself within the penalties of this statute. I can only say, if that be so, it is to be regretted, because it is unfortunate that a very large quantity of spirits existing in casks, in the hands of others than the people who are dealing with casks of their own, should be thrown away and rendered useless. But that is a matter for the Legislature and not for this Court.

In regard to the matter of samples, I agree in the result at which your Lordship has arrived, but I do not concur in the reasons that have been stated. It does not appear to me that the Commissioners of Excise or the officers of Excise do go beyond what they are entitled to do in giving out these samples; I rather think that sec. 184 leaves it open to them to give out quantities of spirits less than one gallon, because it expressly deals with the case of taking spirits out of bond and removing them from place to place. But then, if quantities of less than that amount are received, that is no reason why they should not be entered in this book. The trader, if he gets a number of samples, is bound to enter the spirits he receives. I see no exception in the matter of samples or anything else. They go into his premises, and therefore into his stock, and he is bound to put them into his book, and if they are in his book he is entitled to get credit for them. I am therefore of opinion that the officers of Excise were bound to credit those samples, which were fairly received, and upon that ground I think they were entitled to disregard the entries of samples in the books of the Messrs MacIntosh.

The Lords "were of opinion that of the 2220 entries disregarded by the Excise officers in balancing the respondents' books on 8th and 9th December 1879, those which apply to spirits obtained by the operation of grogging were rightly disregarded, but that those entries which apply to spirits delivered by the Excise officers to the respondents as samples were not rightly

disregarded, and direct the said Justices in Quarter Sessions accordingly."

Counsel for Appellant—Rutherfurd. Agent—David Crole, Solicitor of Inland Revenue.

Counsel for Respondents — Mackintosh — M'Kechnie. Agent—W. G. Roy, S.S.C.

Thursday, June 23.

SECOND DIVISION.

[Lord Adam, Ordinary.

STEVENS *v.* STEVENS.

Husband and Wife—Divorce for Desertion—Wilful and Malicious Desertion—Reasonable Excuse for Absence of Deserting Spouse—Bodily Fear such an Excuse.

Held (*rev.* Lord Adam) that a wife having left her husband's house and remained absent for more than four years with reasonable excuse, through fear caused by the threats and violent treatment of her husband, was therefore not in that wilful and malicious desertion which warrants decree of divorce.

Opinion (*per* Lord Young) that conduct on the part of a husband not sufficient to ground an action of separation and aliment at his wife's instance, may be sufficient excuse for his wife's absence to constitute a defence to an action for divorce on the ground of desertion.

William Stevens, West Calder, brought this action of divorce on the ground of desertion against his wife Catherine Duncan or Stevens. Mrs Stevens defended the action, admitting that she had been absent from her husband's house for eight years, and making no offer of return to him, but alleging that she had left her husband's house in consequence of violence and threats on his part which put her in bodily fear.

She pleaded—"The defender having never deserted the pursuer, but having been driven out of the conjugal residence under threats and in danger of her life, was entitled to absent herself from the pursuer's society and fellowship."

At the proof the pursuer adduced his own evidence and that of two servants who had been in his employment before his wife left him, and also that of two neighbours, to prove that the defender had not been treated with the cruelty which she alleged as an excuse to justify her absence from him. The pursuer also suggested that the real reason for the defender's departure was that she had so mismanaged a grocery business belonging to him of which she had sole charge that very heavy liabilities were becoming due, and that she was unwilling to await the inquiry into the reasons for which these obligations had been incurred.

The defender, besides her own evidence, adduced in support of her averments the evidence of her daughter and son-in-law, the nature of whose evidence will be found summarised in the opinion of the Lord Justice-Clerk. There was a conflict of evidence as to an occasion in March 1873 (two months before defender left her husband) when she was proved to have spent at least part of a night in the storehouse belonging to the shop, the question being whether or not she had been obliged to take refuge there because her husband had assaulted her and put her out of the house.

The Lord Ordinary on 19th May 1881 found that the defender "wilfully deserted the pursuer, his society and fellowship, on 15th May 1873, and has continued in wilful desertion of the pursuer since that date, being upwards of four years," and pronounced decree of divorce.

The defender reclaimed.

Authority—*Winchcombe*, May 26, 1881, *supra*, p. 517.

At advising—

Lord Justice-Clerk—It is very truly said by the counsel for the pursuer and respondent that in a question of this kind it is well to lean to the view of the Lord Ordinary who saw the witnesses. But at the same time the pursuer here is suing an action of divorce and asking us to cancel the matrimonial bond which has subsisted for so many years, and he must satisfy us on the facts proved that his wife has maliciously deserted him. In a question of that kind it is relevant to inquire whether the husband so behaved as to found a reasonable excuse for the absence of his wife. I am far from saying that mere hard words, or cold looks, or annoyance, or even threats not deliberate, would suffice to form such an excuse; but the allegation here is that the wife was in fear of her life owing to her husband's conduct, and such, I think, must be taken to be the issue really before the Lord Ordinary. I think it is clear on the evidence that the wife had a hard life of it with this man, that he left her the hard work of the business, and took out of it what he wanted and used it in horse-racing, intemperance, and intemperate living, while she had only sufficient for her own subsistence and clothing, and was subjected to constant threats and violent language. If a man in that position comes here to say that he has done his duty by his wife, and has not treated her with violence, he has something to prove. I say nothing of the evidence of the defender herself, though her testimony seems credible, but the son-in-law Kay, and also his wife, the pursuer's daughter, if they are to be believed, prove the defender's case, for both of them came to the conclusion that the defender was in reasonable fear of her life. Kay, who lived fifteen months in the pursuer's house and had good opportunities of knowing the relations between the parties, says—"They were always contending about something. He was always blackguarding her about something in connection with the business. I heard him say several times he would blow up the house about her ears. . . . . He was very violent in his language and conduct towards her. She seemed frightened for him. From what I saw I think she was at times afraid of her life from his violence. He appeared always to be getting more violent until she went away." That is corroborated by Mrs Kay, who says—"My mother seemed to be afraid of him. He never threatened me, but I have been afraid that he would do something during the night. I have heard him say he would shoot the whole lot of us. I have several times heard him say that if he knew where she was he would go and rip her up. I have heard him say so when he had a knife in his