by the law-agent which the pursuer alleges are grossly excessive. It has been disclosed that the case in substance is one between agent and client. That being so, the pursuer is no more bound by the formal discharge which he has granted than he would have been by a docqueted account. As the trustees will give no facilities, I think the pursuer is entitled to have the law-agent's accounts examined notwithstanding the discharge. In this view the course adopted by the Lord Ordinary is a judicious one, and I am of opinion that his interlocutor should be affirmed.

The Court adhered, and remitted the case to the Lord Ordinary to proceed.

Counsel for the Pursuer and Respondent — Jameson — Graham Stewart. Agents — T. F. Weir & Robertson, S.S.C.

Counsel for the Defenders and Reclaimers —Chisholm. Agent—David Milne, S.S.C.

Tuesday, February 23.

FIRST DIVISION

(COURT OF EXCHEQUER.)

[Lord Stormonth Darling, Ordinary.

LORD ADVOCATE *v.* THOMSON AND ANOTHER.

Stamp—Process—Competency—Stamp Act 1891 (54 *and* 55 *Vict. cap.* 39), *sec.* 53 (2)—*Information Laid against Individual Members of a Firm.*

Held that an information by the Lord Advocate against the individual partners of a firm of stockbrokers for infringement of the Stamp Act 1891, sec. 53 (2), as amended by the Customs and Inland Revenue Act 1893, sec. 7, in respect of the insufficient stamping of certain alleged "contract notes," was well laid.

Process—Jury-Trial—Court of Exchequer (Scotland) Act 1856 (19 *and* 20 *Vict. cap.* 56), *sec.* 6.

Opinion (*per* Lord M'Laren) that under sec. 6 of the Court of Exchequer Act 1856, when a defender denies the truth in fact of an information lodged against him by the Lord Advocate, the case must be sent for trial to a jury.

The Stamp Act 1891 (54 and 55 Vict. cap. 39), sec. 52 (1), defines the expression "contract-note" as "the note sent by a broker or agent to his principal advising him of the sale or purchase of any stock or marketable security."

Sec. 53 (1) enacts that "Any person who effects any sale or purchase of any stock or marketable security of the value of five pounds or upwards, as a broker or agent, shall forthwith make and execute a contract note and transmit the same to his principal, and in default of so doing shall incur a fine of twenty pounds." (2) "Every person who makes or executes any contract-note chargeable with duty, and not being duly stamped, shall incur a fine of twenty pounds."

By Schedule I. of the same Act the stamp-duty on a contract-note of the value of £100 or upwards is sixpence.

Sec. 3 (1) of the Customs and Inland Revenue Act 1893 (56 Vict. cap. 7) substitutes a stamp-duty of one shilling for the duty of sixpence imposed by the Stamp Act of 1891.

The Lord Advocate presented an information against William Thomson and John Hutcheson, stockbrokers, Glasgow, carrying on business under the firm name of Thomson, Hutcheson, & Company, for violation of the above-mentioned statutes.

The information contained eight counts, each of which narrated that William Thomson and John Hutcheson, carrying on business as aforesaid, "did both and each or one or other of them," on a specified date, execute a contract-note in respect of the purchase of certain stock on account of a certain principal, which contract-note was a contract-note within the meaning of sec. 52 of the Stamp Act of 1891, and was not duly stamped, being stamped with a duty of one penny only.

The defender Thomson, *inter alia*, denied the averments in each of the counts, and averred that "the action being one of civil jurisdiction, it should be directed against Thomson, Hutcheson, & Company."

The defender Hutcheson referred to the alleged contract-notes for their terms, and proceeded—"Denied that the advices were contract-notes within the meaning of 54 and 55 Vict. cap. 39, or are contrary to the Statutes 54 and 55 Vict. cap. 39, secs. 1 and 53 (2), and 56 and 57 Vict. cap. 7, sec. 3. Explained that the business was conducted on what is known as the 'cover system.' There was no stock purchased for or on behalf of any such person as" the alleged principal, "and there never was any sale or purchase of any marketable security, as defined in sect. 53 of 54 and 55 Vict. cap. 39. In any event, the action being one of civil jurisdiction, it should be directed against Thomson, Hutcheson, & Company."

The defender Thomson pleaded, *inter alia*—"(2) The action is incompetent, *et separatim*, it is irrelevant. (2) All parties not called."

The defender Hutcheson also proponed these pleas, numbering them 1 and 2.

On 5th January 1897 the Lord Ordinary (STORMONTH DARLING) found for the pursuer upon each of the eight counts of information, subject to the declaration that the pursuer should not be entitled to recover more than one fine of £20 sterling under each count; and therefore adjudged the defenders, jointly and severally, to forfeit and pay to the pursuer a sum of £160.

Opinion.—"The defence to this suit for penalties under the Stamp Act is twofold —(1) That the information is badly laid as being directed against the individual partners of a firm without calling the firm itself; and (2) that the documents said to have been insufficiently stamped are not contract-notes within the meaning of the

Stamp Act at all. There is a separate defence by one of the partners that he took no part individually in executing or transmitting the alleged contract-notes.

"The first of these defences goes to the competency of the action, and must be considered at the outset.

"Ever since the case of *Reid & M'Call* v. *Douglas*, 11th June 1814, Fac. Coll., it has been settled practice that the creditor of a firm in a civil debt cannot sue any of the partners without constituting his debt against the firm. This rule, as explained by Lord Justice-Clerk Inglis in *Muir* v. *Collett*, 24 D. 1119, rests on considerations of equity, and especially on these,—that the firm is a separate *persona*, whose funds are not at the disposal of an individual partner, and that the firm, or the partners not called, may possibly have a good defence against the claim, or be in possession of a discharge. It is obvious that these considerations do not apply with anything like the same force where all the individual partners are called (though the firm is not), and I am not aware that the rule has ever been enforced except when a selection was made from the partners. It may be well, however, to begin by assuming, as counsel did, that in the case of a civil debt the rule holds even when (as here) all the partners are called as individuals. But the Crown maintains that this is not a civil debt, and on that point I heard an elaborate argument.

"If all cases could be sharply divided into the two categories of civil and criminal, with different kinds of liability attaching to each, there would be a good deal to say for the view that this is simply a civil claim. The Crown demands money, and nothing but money. It demands it in a proceeding which, though peculiar to the Court of Exchequer, follows the course of a civil action. The defenders do not require, as in a proper criminal case, to be personally present at the hearing. The nature of the imprisonment for which, under Schedule G of the Exchequer Act, a warrant must be given in the case of failure to pay the sum sued for, is not imprisonment for a definite period, but imprisonment until the money is paid, and this distinction, in the case of summary complaints, is made the test of whether jurisdiction is civil or criminal, by by the 28th sec. of the Summary Procedure Act. Lastly, the theory on which this claim is made against two individuals is, not that each is liable only for his own default, which is the ordinary rule of criminal liability, but that each is liable also for the default of the other, or of a clerk or servant of both acting within the scope of his employment, which is the ordinary rule of civil liability.

"It appears to me, however, that the rigid classification of every case as either wholly civil or wholly criminal—a classification appropriate enough in a primitive state of things—has long since been superseded by the complicated course of legislation. The modern statute-book bristles with penalties or fines attached to offences which are typical examples of the *malum prohibitum*, as opposed to the *malum in se*. Some of these can only be incurred by personal delinquency; others are incurred through the fault of agents. When incurred, the money is, in one sense, a debt due to the Crown, but none the less does it retain its inherent character as a pecuniary fine imposed by way of punishment for an offence. The proceeding brought for the recovery of the fine may be brought in a court which is ordinarily a civil court, and may be conducted according to the rules which govern civil actions, yet the proceeding itself is held to be neither wholly civil nor wholly criminal, but partly the one and partly the other. Thus in *Lawson* v. *Jopp*, 15 D. 392, a penalty and expenses awarded under the Salmon Fisheries Act of 9 Geo. IV., which together did not amount to £8, 6s. 8d., were held not to be a 'civil debt' in the sense of the Small Debt Act of 5 and 6 Will. IV., so as to exempt the defenders from imprisonment. It is true that the imprisonment in that case was for a limited period, but that circumstance cannot have been the *ratio decidendi*, for Lord Colonsay expressed the opinion (at p. 396) that the Small Debt Act, in mentioning 'civil debts,' was not intended to apply to 'pecuniary mulcts or fines imposed by way of punishment for crimes or offences, though these may in a sense be called debts, and although the party may be entitled to be relieved from imprisonment on payment.' Similarly in *White* v. *Simpson*, 1 Macph. 72, it was held that a prosecution in the Justice of Peace Court at the instance of an officer of Excise for contravention of the Spirits Act of 1860 was not 'a cause depending before any civil court in Scotland,' in the sense of section 24 of the Exchequer Act, so as to make the Crown liable in expenses, although in that case there was no limitation of the period of imprisonment that was to follow non-payment of the penalties. I do not know that a different decision would have been pronounced after the passing of the Summary Procedure Act of 1864, because sec. 28 of that Act was not intended to alter the character of the offences charged, but only to indicate the proper Court of review. At all events, that Act cannot be held to apply to the present proceeding. Again, in *Lord Advocate* v. *Thomson*, 20 S.L.R. 3, an information by the Crown, brought in the Court of Exchequer for forfeiture of methylated spirits, under the Spirits Act of 1880, sec. 129, was held (by Lord Fraser) to partake of the nature of a criminal case to the effect of making the evidence of the accused incompetent.

"The specimen informations appended to the Exchequer Act show that some conclude for sums forfeited or penalties incurred, and others merely for sums in which the person proceeded against 'is indebted to Her Majesty.' The latter class may fall under the description of civil debts, not so the former. The Stamp Act of 1891, on which this proceeding is founded, declares, sec. 53 (2), that 'every person who makes or executes any contract-note chargeable with duty, and not being duly stamped,

shall incur a fine of £20.' That is the appropriate language for creating an offence and imposing a penalty. Consequently it seems to me that the proceeding for recovery of the fine is sufficiently penal in its character to disentitle the defenders from pleading a rule of practice which is confined to civil debts.

"I asked their counsel what interest they had to plead that the firm should be called. The answer was that they had a double interest—(1) To prevent the full penalty being exacted from each partner; and (2) to take care that the right of one partner paying the fine to obtain relief to the extent of one-half against the other should not be prejudiced.

"With regard to the first of these points, the position of the Crown is not in my view satisfactory. Its advisers declined to admit that their right was limited to recovering one fine for each offence. They seemed to go the length of maintaining that if a firm consisted of six partners, and if a contract-note issued by or on behalf of the firm was insufficiently stamped, the Crown would be entitled to exact £120. This is quite extravagant. The plain meaning of the Act of 1891 as amended by the Act of 1893 is, that when any stock or marketable security of the value of £5 or upwards is sold or bought by a broker or agent, a contract-note must be executed by the agent and transmitted to the principal, and it must bear a penny stamp if the value is below £100, and a shilling stamp if the value is £100 or upwards, and that if either no contract-note is made, or if it is insufficiently stamped a fine of £20 shall be incurred. Obviously the stamping of the document is clerk's work, and if the prohibited thing is done in the ordinary course of the broker's business, the fine is incurred whether it is done by or for the broker. There is no valid distinction between this case and such cases as *Advocate-General* v. *Grant*, 15 D. 980, which related to a penalty under the Excise Act of 1832, and *Lord Advocate* v. *Thomson* already cited. If the rule were otherwise, the door would be opened to unlimited evasion of the law. But it is equally plain that a fine which may be incurred thus vicariously must be a single fine, and has nothing to do with the number of persons in whose interest the thing is done. The Crown cannot have it both ways. I shall take care in the judgment I am to pronounce that the right to recover is limited to one fine for each offence. Accordingly, the defenders' interest to state their plea on that ground disappears.

"With regard to the other ground, there can be no apprehension, I should think, since the case of the *Wick & Pulteneytown Shipping Company*, 20 R. 275, affd. 21 R. (H.L.) 39, that there is any bar to a co-delinquent's right of relief where his acts are not tainted by fraud or moral delinquency.

"Accordingly, it seems to me that the defenders have no appreciable interest to state their preliminary plea. It is an equitable plea, and if there be no equity to support it, it ought to fail. That is, I rather think, a short but sufficient answer to it, for even if the defenders' argument that the proceeding is a purely civil one were sound, the want of interest would seem to deprive the plea of all validity. But in my view the proceeding is not a purely civil one. It is civil only in some respects, its main quality being criminal, or, as I should prefer to call it, penal.

"If the proceeding be a competent one, the only remaining question is whether the defenders, or either of them, have stated any good answer on the merits. I am of opinion that they have not.

"The defence that the business was conducted on the 'cover' system, and that there was no real purchase or sale of stock on behalf of the client, seems to me quite irrelevant. The defenders do not deny that contract-notes bearing a penny stamp, were executed and transmitted as alleged. They cannot be heard to say that this was an idle formality. A contract-note is defined by the Act of 1891 (sec. 52) as 'the note sent by a broker or agent to his principal . . . advising him of the sale or purchase of any stock or marketable security.' These notes answer that description. They were used by the defenders, I imagine, because they knew that they could not legally carry on their business under the 'cover' or any other system without them. A man who issues a contract-note in the course of his business must put the proper stamp upon it, whether it represents a real transaction or not.

"It follows from what I have said, that the separate defence stated by the defender Thomson, to the effect that he did not know of the contract-notes being sent out, is also irrelevant. He does not deny that they were sent out by or on behalf of his firm, and that is enough.

"I shall therefore repel the answers and give judgment for the Crown, but subject to the declaration that the Crown shall not be entitled to recover more than one fine under each count. As this was disputed, I shall modify expenses."

The defenders reclaimed, and argued—The information was incompetent, being badly laid against the individual partners instead of against the firm. *Reid & M'Call* v. *Douglas*, June 11, 1814, F.C., had once for all settled the point that the creditor of a firm in a civil debt must constitute his debt against the firm, and could not sue any of the partners, although, no doubt, diligence could be done against individual partners for the firm's debt—Partnership Act 1890 (53 and 54 Vict. cap. 39), sec. 4 (2). This was essentially a civil and not a criminal proceeding. By sec. 47 of the Court of Exchequer Act 1856 (19 and 20 Vict. cap. 56), the word "person" comprehended public and private company, as well as the individual members thereof—see also the Interpretation Act 1889 (52 and 53 Vict. cap. 63), sec. 19—and under Schedule G of the Act of 1856 an offender was liable to be imprisoned until he had paid the sum required of him. That was the very test of a civil as opposed to a criminal action established

by sec. 28 of the Summary Procedure Act 1864 (27 and 28 Vict. cap. 53). Under the last-named Act a complaint against a limited company had been sustained as relevant—*Fletcher* v. *Eglinton Chemical Co.*, November 13, 1886, 14 R. (J.) 9; *Lawson* v. *Jopp*, February 16, 1853, 15 D. 392; and *Advocate-General* v. *Grant*, July 20, 1853, 15 D. 980, also referred to. In any event, a proof should be allowed.

The pursuer relied upon the reasoning adopted in the opinion of the Lord Ordinary, and further referred to *Miles* v. *Finlay*, November 16, 1830, 9 S. 18, and to Mackay's Manual, p. 158, and cases there cited.

At advising—

LORD PRESIDENT—The Crown asserts in the information before us that both and each or one or other of the two individuals named have been guilty of an offence against the Stamp Acts. What both and each or one or other are said to have done was, making and executing, in the name of their firm, Thomson, Hutcheson, & Company, and transmitting, a contract-note which was not duly stamped.

Now, to take the simplest case, supposing one of the two partners to have executed the contract-note in the firm's name, and to have issued it without being duly stamped, I suppose it cannot be doubted that the individual who did so is liable in the penalty in that behalf exacted. The matter is not substantially complicated if it be supposed that the two partners acted in concert in having the contract-note so signed and issued unstamped, although the firm signature would necessarily be adhibited by one of the two. In this case, again, both the two individuals have transgressed the law, and each is severally liable to prosecution.

These very plain and obvious considerations make it impossible for me to sustain the plea that this prosecution is incompetent because the firm is not sued for the penalties. I am not here required to consider whether the Crown might not, if it had so chosen, have sued the firm, although I should consider this a much more doubtful question than the present. But if it be legally possible for an individual to contravene the Stamp Act by making and issuing in his firm's name an unstamped contract, then we cannot throw out this proceeding, which asserts that this has been done.

Whether, supposing both partners, or only one partner, to have incurred the penalty, the company funds would be properly chargeable with the amount, is a question with which the Crown has nothing to do. If the Crown succeed in proving a contravention against both or either of the two individual partners, it will be entitled to a judgment against each person convicted for a penalty which can be recovered out of all that belongs to him. How the two may settle their accounts *inter se* the Crown has no need to anticipate or interest to consider.

It was allowed by the learned counsel for the Crown that while there is no real dispute about the facts, yet there is no plea of guilty on the record, and accordingly that the interlocutor is premature, and must be recalled. We can only, in the meantime, repel the 2nd and 3rd pleas for Thomson, and the 1st and 2nd pleas for Hutcheson, and remit to the Lord Ordinary to proceed as shall be just.

LORD ADAM—I concur.

LORD M'LAREN—I concur in the whole of your Lordship's observations. I should like to add, for the consideration of the Lord Ordinary—because we are not called upon to decide the point—whether it is not a part of the proceedings in Exchequer prosecutions that disputes on matters of fact should be referred to a jury. The point was touched upon in debate, and at least deserves to be looked into, for I must say that as at present advised I do not see that any other course can be followed.

LORD KINNEAR—I agree with your Lordship.

The Court recalled the interlocutor of the Lord Ordinary, repelled the 2nd and 3rd pleas-in-law for the defender Thomson, and the 1st and 2nd pleas-in-law for the defender Hutcheson, and remitted to the Lord Ordinary to proceed as should be just.

Counsel for the Pursuer—D.-F. Asher, Q.C.—A. J. Young. Agent—P. J. Hamilton Grierson, Solicitor of Inland Revenue.

Counsel for the Defender Thomson—W. Thomson. Counsel for the Defender Hutcheson—Orr. Agent—W. A. Hyslop, W.S.

Tuesday, February 23.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

NORTH BRITISH RAILWAY COMPANY *v.* LANARKSHIRE AND DUMBARTONSHIRE RAILWAY COMPANY.

(*Ante*, vol. xxxiii. p. 56, and 23 R. 76.)

Res judicata — Plea of "Competent and Omitted"—Lanarkshire and Dumbartonshire Railway Act 1891 (54 *and* 55 *Vict. cap. cci.*), *sec.* 6, *sub-sec.* (4).

The Lanarkshire and Dumbartonshire Railway Act 1891, which authorises a company to construct certain railways, provides by section 6, subsection 4, as follows:—"Railway No. 1 shall be carried under the North British Company's Glasgow City and District Railway, and under the joint sidings and works of that company and the Caledonian Company at Stobcross, in tunnel, and the company shall not, without the previous consent of the companies owning the same, break open the surface of the ground."

In order to ventilate the tunnel the