quences, for the mere production of bygone cheques would then enforce on all to whom they were given, the obligation to prove that they did not get the money on loan. I am accordingly of opinion that the judgment appealed from is right, and should be affirmed.

LORD M'LAREN, LORD KINNEAR, and LORD PEARSON concurred.

The Court affirmed the interlocutor of the Sheriff.

Counsel for Pursuer (Appellant)—Constable, K.C.—James Macdonald. Agents—Clark & Macdonald, S.S.C.

Counsel for Defender (Respondent)—Graham Stewart, K.C.—R. S. Horne. Agents—Davidson & Syme, W.S.

Saturday, January 23.

FIRST DIVISION.

[Lord Salvesen, Ordinary.

KERR *v.* THE SCREW COLLIER COMPANY, LIMITED (OWNERS OF THE "PRUDHOE CASTLE").

Ship—Collision at Sea—Merchant Shipping Act 1894 (57 *and* 58 *Vict. cap.* 60), *sec.* 48—*Regulations for Preventing Collisions at Sea, Article* 25—"*Narrow Channel*"—*Firth of Forth.*

The Regulations of 1897 for Preventing Collisions at Sea provide—article 25—"In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel."

Held that the Forth from the Forth Bridge upwards is a narrow channel in the sense of article 25.

The Regulations of 1897 for Preventing Collisions at Sea, article 25, is quoted in the rubric.

Isabella Webster or Kerr, widow of the deceased George Kerr, who was the master of the steamship "Ruby" of Glasgow, for herself and as tutrix and administratrix-in-law for three pupil children of herself and of the said George Kerr, raised an action against the Screw Collier Company, Limited, and others, registered owners of the steamship "Prudhoe Castle" of North Shields, concluding for damages for the loss they had sustained through the death of the said George Kerr. The case is reported only on the question as to the proper navigation for steamships—in view of article 25 of the Regulations for Preventing Collisions at Sea—in the Firth of Forth west of the Forth Bridge.

On or about the 9th day of October 1905 the "Ruby" left Middlesborough with a cargo of pig iron on board, bound for Grangemouth, and on the following morning, while in the vicinity of the Forth Bridge, between the Beamer Light and the Dodds Buoy, she collided with the steamship "Prudhoe Castle" belonging to the defenders. As the result of this collision the "Ruby" sank almost immediately, the master and six of the crew being drowned.

The pursuer, *inter alia*, averred—"(Cond. 5) The death of the said George Kerr was caused through the fault of the defenders, or those for whom they are responsible, owing to their faulty navigation. In particular, the 'Prudhoe Castle,' in breach of the Regulations for the Prevention of Collisions at Sea, and especially article 25 . . and of the rules of good seamanship . . . . the Firth of Forth west of the Forth Bridge, and, in particular, at and near the place of said collision being a narrow channel, failed to keep to that side of the fairway or mid-channel which lay on her starboard side. . . ."

On 28th February 1908 the Lord Ordinary (SALVESEN) pronounced an interlocutor by which he assoilzied the defenders from the conclusions of the summons.

The pursuer reclaimed.

At advising—

LORD PRESIDENT—I am quite satisfied, and I propose that your Lordships should lay it down, so as to leave no doubt upon the subject in future, that the Forth, from the Forth Bridge upwards, is a narrow channel in the sense of article 25 of the Regulations for Preventing Collisions at Sea.

LORD M'LAREN, LORD KINNEAR, and LORD PEARSON concurred.

Counsel for Pursuer (Appellant)—W. T. Watson. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for Defenders (Respondents)—Spens. Agents—Boyd, Jamieson, & Young, W.S.

Thursday, January 28.

FIRST DIVISION.

(SINGLE BILLS.)

COUL *v.* AYRSHIRE NORTHERN DISTRICT COMMITTEE.

Process—Proof—Evidence—Res Noviter—Admissibility of Fresh Evidence after Debate and Judgment.

Circumstances in which, in an appeal from the Sheriff Court, after proof had been concluded and judgment given by both Sheriffs, the Court *allowed* new evidence to be led by the defenders, who were appealing.

The Turnpike Roads (Scotland) Act 1831 (1 and 2 Will. IV, cap. 43), sec. 84, which is incorporated with the Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. cap. 51), by sec. 123 thereof, enacts—"It shall be lawful for the trustees of every turnpike road to make sufficient side drains on any such road, with power to conduct the water therefrom into

any adjoining land, ditch, or watercourse—such land not being the site of any house or garden—in such manner as shall be least injurious to the proprietor or occupier of such land; the said side drains to be maintained at the expense of the trustees."

Patrick Coul, farmer, Beith, raised an action in the Sheriff Court at Kilmarnock against the Northern District Committee of the County Council of Ayrshire, in which he prayed the Court to interdict the defenders from running into the pursuer's garden at Cochrane Lodge, Longbar, Beith, the surface water collected on the public road, or otherwise at least to interdict them from running such surface water into the pursuer's property except into any ditch or watercourse thereon, and then only in such manner that no part of such water should be discharged upon any part of the land forming the site of the dwelling-house known as Cochrane Lodge, or of any of the gardens pertaining thereto. The Sheriff-Substitute (LOUTTIT LAING) having refused the prayer of the petition and dismissed the action, and the Sheriff (LORIMER, K.C.) having recalled his Substitute's interlocutor and granted interdict, the defenders appealed to the Court of Session, and on 27th January 1909 presented in Single Bills a note, seeking to have the proof taken in the case opened up, and to be allowed to adduce fresh evidence.

The note stated—"... The present action relates to the right of the defenders and appellants as the local road authority to conduct surface water from the public road on to adjoining land held by the pursuer and respondent under tack for ninety-nine years dated in 1841. It has been held proved both by the Sheriff-Substitute and on appeal by the Sheriff that the surface water from the said road has since 1841 or 1842 been conducted into the said adjoining land, and that the main question in controversy in the case has come to be whether the said adjoining land was or was not prior to 1841 'the site of any house or garden' within the meaning of section 84 of the General Turnpike Act (1 and 2 Will. IV, cap. 43) incorporated with the Roads and Bridges (Scotland) Act (41 and 42 Vict. cap. 51) by section 123 thereof. This question was not specifically raised by the pursuer and respondent in his pleadings, and no evidence with regard thereto was led by him with the exception of the evidence of two aged witnesses who were examined on commission after the proof so far as led before the Sheriff had been concluded, nor did the pursuer and respondent specifically cross-examine the witnesses of the defenders and appellants on this point. The defenders and appellants by the course thus taken by the pursuer and respondent were seriously prejudiced in the preparation of their case, and were precluded from leading evidence on what has come to be the main question in the case.

"The Sheriff, reversing the finding of the Sheriff-Substitute to the contrary effect, has held upon the evidence of the two aged female witnesses for the pursuer and respondent that the said land was prior to 1841 the site of a house or garden within the statutory meaning.

"Since the proof in the case was closed the defenders and appellants have ascertained that there is in the possession of John Mackenzie Stewart, The Bungalow, Irvine, factor for Lady Sophia Montgomerie, proprietrix of the said land which the pursuer and respondent holds under the said tack, a bound volume of estate plans entitled 'The Baronies of Kilmaurs, Dundonald, Symington, Tarbet, Southannan, Beith, Kilbride, and Glassford. The property of the Hon. Lady Sophia Montgomerie, 1822'—and containing a plan showing, *inter alia*, the said land and condition thereof in 1822. On the said plan no house is indicated as existing on the said land.

"The said bound volume of plans which is now available to the defenders and appellants was not in their control or possession at the time of the proof, and its non-production was not due to any negligence on the part of the defenders and appellants. Its existence did not come to their knowledge until it was incidentally referred to by the said John Mackenzie Stewart in the course of a conversation with the agent of the defenders and appellants.

"The said plan contained in the said bound volume is an adminicle of evidence of vital importance to the defenders and appellants in the present case, and if admitted and approved in evidence would be, it is submitted, conclusive of the main question of fact at issue."

The appellants moved the Court to open up the proof, to allow them to put in evidence the said bound volume of plans, and adduce evidence as to the authenticity and reliability of the plans.

The application was opposed by the pursuer and respondent.

The following authorities were referred to—*Reid* v. *Haldane's Trustees*, March 19, 1891, 18 R. 744, 28 S.L.R. 511; *Longworth* v. *Yelverton*, March 10, 1865, 3 Macph. 645.

At advising—

LORD PRESIDENT—This is an application by the appellants in a case which is before us on appeal from the Sheriff to open up the proof in order that they may be allowed to prove certain facts relating to a document or book which they have learned exists, and which they conceive will shed light upon what has proved to be an important point in the case. No doubt, when proof has been concluded and judgment has been given both by the Sheriff-Substitute and by the Sheriff, it is not on light grounds that your Lordships will go back upon what has been done and open up the proof, and in particular when a party has by his own negligence failed to bring forward evidence which might have been available to him. Your Lordships could not countenance the idea that after debate and after judgment has been given, a party who has discovered what is a weak point in his case should be able to come here and to obtain leave to introduce new evidence to strengthen that weak point. But the application is certainly competent, and in

the particular circumstances of this case I think it should be granted. I have come to be of this opinion, because I am satisfied from the pleadings that the parties had not their ideas focussed upon the point on which this new evidence is desired, and in particular that the position taken up by the pursuer in his pleadings was not such as to put the defenders in negligence in not having made such inquiries as should have brought to light the book in question. The action is one of interdict directed against road trustees, and founded on an alleged interference with the lands occupied by the pursuer by discharging on to them the surface water from a public road. It is answered that the trustees have a statutory right to do so, and that they have always done so. Mr Christie has argued that inasmuch as when you look at the statute tabled in answer you there find an exception to the right in favour of lands being the site of a house or garden, it is necessary for the party pleading the statute to exclude the exception. I do not think that is so. Where a party tables a right under a statute, and the provision in that statute is qualified by an exception, it is for the other party to show that he comes within the exception. I am dealing here only in popular language with the effect of these pleadings. The parties here went to proof, the proof was concluded, but was not technically closed, because a commission was granted to examine two aged witnesses. It was at this commission that for the first time questions were asked which raised this point as to the land in question having been the site of a house or garden, and upon the answers given by these witnesses the Sheriff has practically decided the case. It was at this point that the new document was discovered. I think that in the circumstances a fair case has been made out for allowing the document to be put in. Upon what terms this is to be allowed is another matter; I think that should be left over until we hear the case. I am therefore for allowing the admission of the document in question along with the necessary evidence as to its authenticity and reliability, reserving the question of the expenses of this note.

LORD M'LAREN—When this application was made, I suggested that it came within the scope of the principle of *res noviter*, and though my suggestion was not accepted by counsel, I think the principle is wide enough to apply not only to the admission of new facts, but to the admission of evidence to meet a new point of contention not previously raised in the case. Be that as it may, this is a matter for the discretion of the Court, and must be decided upon the principles which are applicable to *res noviter*. No doubt it would be easier to admit new evidence after proof was closed but before argument. Here not only has the proof been closed but debate and judgment have followed, and it is a difficult case for the exercise of that discretion, and one which I should not like to be looked upon as a precedent. But still all that is asked is that a document very pertinent to the case should be admitted, and I think the document should be admitted with of course that amount of evidence which is necessary to prove the document.

LORD KINNEAR—I agree with your Lordship in the chair. I think the reasons which your Lordship has given are sufficient for the decision of this case. I therefore think that we may admit this document, but I wish to reserve my opinion as to any other question which has been raised.

LORD PEARSON concurred.

The Court pronounced this interlocutor—

"The Lords having considered the note for the appellants and heard counsel for the parties, open up the proof: Allow the defenders and appellants to put in evidence the bound volume of estate plans mentioned in the note, and allow the defenders and appellants a proof as to the authenticity and reliability thereof, and to the pursuer a conjunct probation: Grant diligence at the instance of both parties for citing witnesses and havers: Appoint the proof to proceed before Lord Pearson at such time and place as his Lordship shall fix, reserving the question of expenses."

Counsel for the Pursuer (Respondent)—J. R. Christie. Agents—Carment, Wedderburn, & Watson, W.S.

Counsel for the Defenders (Appellants)—Macmillan. Agents—Bryson & Smart, S.S.C.

Tuesday, February 2.

SECOND DIVISION.

THE EDINBURGH AMERICAN LAND MORTGAGE COMPANY, LIMITED *v.* CLELAND AND OTHERS.

Company — Scheme of Arrangement — Debenture Holders — Company not in Liquidation, and Able to Pay Creditors—Alteration of Security for Debentures—Opposition by a Minority—Joint Stock Companies Arrangement Act 1870 (33 *and* 34 *Vict. cap.* 104), *sec.* 2—*Companies Act* 1900 (63 *and* 64 *Vict. cap.* 48), *sec.* 24—*Companies Act* 1907 (7 *Edw. VII, cap.* 50), *sec.* 38.

The Companies Act 1907, sec. 38, makes applicable to companies not in course of being wound up the Joint Stock Companies Arrangement Act 1870, which, by sec. 2, provides that where any compromise or arrangement is proposed between a company in course of being wound up and its creditors (or, under the Companies Act 1900, sec. 24, its members), the Court may order a meeting of such creditors or class of