pany. As a fact no road was opened there. It is argued that stones and coals were brought by this way, but that was not an opening of a street by Just, who was no longer proprietor, but merely a temporary use permitted of that ground which now belonged to the railway company.

The case may be really decided on this simple question. The superior was only bound to keep those streets open which he had once opened, and he had not opened this one. To make good the respondents' case it would have been necessary to have a much more special obligation in the contract. If the respondents were even in a question with Mr Just to take his obligation as it stands, it would be an injustice to say that he and his successors are bound to make streets for the construction of which they had given no obligation. The respondents may say—"We always thought we should have the benefit of this street;" but the superior's answer would be—"But I could not tie myself down. I did not know what I might want to do in such an event as that, which has occurred, of a railway company coming across my ground." The respondents have no case on which they can maintain their right to compensation in respect of failure to form a road, because they had no right to have it formed.

LORD MURE was absent, but it was stated that he concurred with the Lord President.

The Court adhered.

Counsel for Complainers (Respondents)—Balfour—R. Johnstone. Agent—J. Smith Clark, S.S.C.

Counsel for Respondents (Reclaimers)—Gloag. Agent—George C. Banks, S.S.C.

Wednesday, November 12.

FIRST DIVISION.

[Court of Exchequer.

THE INLAND REVENUE *v.* M'INTOSH BROTHERS.

Process—Appeal—Act 7 and 8 Geo. IV. c. 53 (Excise Act), sec. 84—Where Case Stated by Quarter Sessions after Disposal of Cause.

By section 84 of the above Act it is provided "that it shall be lawful for such Commissioners of Appeal and Justices of the Peace, at such general Quarter Sessions respectively as aforesaid, at their discretion, to state the facts of the case on which such appeal shall be made specially for the opinion and direction of the Court of Exchequer in England, Scotland, or Ireland, as the same shall have arisen therein respectively." Where the Justices at Quarter Sessions acting under this statute had "dismissed the appeal and affirmed the judgment of the Petty Sessions, and decerned"—*held* that it was incompetent for them to state a case for the opinion of the Court of Exchequer under the above-quoted section.

Observed that it was competent for the Justices in Quarter Sessions to pronounce a judgment which should in terms be subject to the opinion of the Court of Exchequer on a case stated, although that procedure was not literally in terms of the statute.

Process—Expenses—Crown—Where Case Incompetently Stated.

Circumstances in which the Court declined to give expenses against the Crown where they had presented an appeal which, though no objection was taken in the Single Bills, was at the discussion on the merits found to have been incompetently stated.

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 William Steele, officer of Excise, against M'Intosh Brothers, spirit merchants, Leith, claiming certain penalties and the forfeiture of certain spirits in respect of alleged contraventions by them of the Statute 23 and 24 Vict. cap. 114, in connection with the process known as grogging—July 19, 1878, 5 Rettie 1097, and December 21, 1878, 16 Scot. Law Rep. 477, and 6 Rettie 443.

The information was first brought before the Justices of the Peace for the county of Edinburgh at a Petty Sessions held at Edinburgh on 26th November 1878. The respondents pleaded not guilty. A proof was led on the 12th December following, and on the 27th December the Justices gave judgment, finding the respondents not guilty of any of the offences charged. An appeal was thereupon taken to the Quarter Sessions, who on the 9th April dismissed the appeal and affirmed the judgment of the Petty Sessions. The minute of the Quarter Sessions of that date bore—"The agent for the appellant and the counsel for the respondents were then heard, and both parties intimated that they would request a case to be stated in the event of the judgment being against them. Thereafter the Justices dismissed the appeal and affirmed the judgment of Petty Sessions, and decerned. The agent for the appellant craved a case to be stated in terms of his previous intimation." And a case was accordingly granted.

Section 84 of the Act 7 and 8 Geo. IV. c. 53, in terms of which the case was stated, after providing for an appeal to the Quarter Sessions, enacted—"That it shall be lawful for such Commissioners of Appeal and Justices of the Peace at such general Quarter Sessions respectively as aforesaid, at their discretion, to state the facts of any case on which such appeal shall be made specially for the opinion and direction of the Court of Exchequer in England, Scotland, or Ireland, as the same shall have arisen therein respectively."

The respondents objected to the competency of the case, on the ground that it was not in terms of the above provision, having been stated after the Quarter Sessions had pronounced a final judgment.

Argued for the respondents—The true construction of section 84 of the Excise Statute was that the Quarter Sessions might, at their own discretion, state a case for the opinion of the Court of Exchequer—that is to say, when they really were in difficulty as to the law. But this must be done before they had pronounced a final

judgment—*The Quarter Sessions of Perth* v. *Anderson & M'Naughton*, December 18, 1861, 24 D. 221; *The Queen* v. *Beattie*, December 18, 1866, 5 Macph. 191; *Sumner* v. *Middleton*, June 6, 1878, 5 R. 863. Contrast also the present provision with those in 38 and 39 Vict. c. 62, sec. 3, sub-sec. 9.

Argued for the appellant—There were cases in which a contrary practice had been followed—*The Queen* v. *Gilroys*, March 20, 1866, 4 Macph. 656; *The Queen* v. *Caird*, January 18, 1867, 5 Macph. 288; *Wilson* v. *M'Intosh*, July 19, 1878, 5 Rettie 1097; *M'Intosh* v. *Wilson*, December 21, 1878, 6 Rettie 443. But assuming that this practice was wrong, still it was competent for the Justices to pronounce a judgment subject to the issue of an appeal to the Court of Exchequer—*The Queen* v. *Woodrow*, May 1, 1846, 15 Mees and Wel. 404; *The Queen* v. *Gamble*, January 29, 1847, 16 L.J., Mags. Cases, 149. That was substantially what had been done here, as was plain from the minutes of the Quarter Sessions.

At advising—

Lord President—The proceedings which are before us began with a prosecution before the Petty Sessions under the Excise Acts, and the Justices in Petty Sessions acquitted the defenders. The officer of Inland Revenue appealed to the Quarter Sessions, and the Quarter Sessions having heard parties, dismissed the appeal and affirmed the judgment of the Petty Sessions. The officer of Inland Revenue thereupon asked the Justices in Quarter Sessions to state a case for the opinion of this Court as the Court of Exchequer in terms of the Statute 7 and 8 Geo. IV. c. 53, and this case has been stated accordingly and brought before us.

Now, the question which we have to determine is, Whether this case was competently stated by the Quarter Sessions, and is competently before us, and that depends upon the construction of the 84th section of the statute I have just mentioned—[*reads the clause ut supra*]. Now, there is not by this section or by any other section of that statute an appeal given against the judgment of the Quarter Sessions. There is no appeal from the judgment of the Quarter Sessions to this Court, and therefore it is plain that the stating of a case is not, as in some statutes, intended as a mode of appeal. In further illustration of what is plainly intended by this statute, it is left to the discretion of the Quarter Sessions whether they shall state a case for the opinion of this Court or not—a provision entirely at variance with the notion of a right of appeal, because where a right of appeal is given, and the form in which the appeal is to be brought before this Court is a case, then the Court from which the appeal is taken is bound to state a case, and there is no discretion in the matter.

It is instructive to contrast this statute with statutes where the stating of a case is a mode of bringing an appeal to this Court. Take, for example, the Summary Prosecutions Act of 1875 (38 and 39 Vict. c. 62). In the third section of that statute there is this provision—"On an inferior judge hearing and determining any cause, either party to the cause may, if dissatisfied with the judge's determination as erroneous in point of law, appeal thereagainst," and this is to be done by means of "a case setting forth the facts and grounds of such determination." Now, observe the hypothesis there is that the inferior judge has heard and determined the case, and the party has a right by that clause, if dissatisfied with the determination as erroneous in point of law, to appeal to the Superior Court. Then it must be observed further that the Superior Court has by sub-section 9 of the same section its powers and jurisdiction defined as a Court of Appeal under the statute—"The Superior Court shall have power to affirm, reverse, or amend the determination in respect of which the case has been stated, or to remit the matter to the inferior judge, with the opinion of the Court thereon, or to make such other order in relation to the matter and the costs of the appeal as they shall see fit, or to cause the case to be sent back to the inferior judge to be amended in such manner as they shall direct, and thereafter on the case being amended and returned, to deliver judgment in the case as amended." Now, the whole of this provision is applicable to the proper case of an appeal given from an Inferior to a Superior Court, and a jurisdiction in appeal conferred upon the Superior Court—the only resemblance between that case and the present being that the case there is to be one which the Inferior Court is bound to state upon the application of the party, and in which they have no discretion at all in the matter.

It is needless to multiply examples of this kind of appeal. Precisely equivalent directions are to be found in a statute with which we are familiar connected with the administration of the revenue—I mean the Customs and Inland Revenue Act (37 Vict. c. 16)—in which the provisions for appeal and stating a case are substantially just the same as in the Summary Prosecutions Act.

Therefore upon the face of the statute it appears to me very clear that there lies no appeal from the Quarter Sessions to this Court of Exchequer under the Statute 7 and 8 Geo. IV. c. 53, and that all that the Court of Quarter Sessions is there empowered to do is to obtain by means of a case stated the opinion and direction of this Court for their guidance in the administration of the jurisdiction conferred upon them.

The cases which have occurred in this Court since the jurisdiction in Exchequer causes was transferred to it by the Act 19 and 20 Vict. c. 56 (Court of Exchequer (Scotland) Act) are not very numerous, and unfortunately the practice has been somewhat varied. It is therefore all the more necessary that we should now determine what the proper practice under this statute is. The first case which occurred was a case from the Perth Quarter Sessions (December 18, 1861, 24 D. 221), and in that case the view of the statute which I have just explained was taken by the Justices in Quarter Sessions. They refrained from pronouncing their judgment, but they stated a case and sent it up for the opinion of this Court. They obtained the opinion and direction of this Court, and then they pronounced judgment in accordance with the opinion and direction they had so obtained. But unfortunately some years afterwards a case occurred in the Second Division—*The Queen* v. *Gilroys*, March 20, 1866, 4 Macph. 656—where a case was stated and brought up to this Court after the Quarter Sessions had given their judgment. No objection was taken to the competency of the case. It seemed to be assumed on both sides of the bar that an appeal was

allowed under this statute, and the case was brought as of the nature of an appeal, and the Court undoubtedly proceeded without sufficiently studying the statute to give judgment upon that case as if it had been competently brought up in the way of appeal. But that case was certainly the first in which such a course was taken, and in the immediately following year there was another case—*The Queen* v. *Beattie*, 5 Macph. 191—in which again the proper course was adopted. There, there was no judgment of the Quarter Sessions. The Quarter Sessions were in the position of being equally divided in opinion, and that being so, they stated a case for the opinion and direction of this Court, and the opinion of this Court was obtained in the proper form under the statute, and their judgment was given in terms of that opinion. That case also occurred in the Second Division of the Court. But then there follow two cases in which what appears to me to be the error of the Court was repeated—*The Queen* v. *Caird*, 5 Macph. 288, and *Wilson* v. *M'Intosh*, 5 Rettie 1097; but in the same year in which the case of *Wilson* was before this Division of the Court there occurred in the other Division the case of *Sumner* v. *Middleton*, 5 Rettie 863, in which the question was raised whether a case could be stated by Quarter Sessions after they pronounced judgment, and the Second Division thought such a proceeding incompetent.

In that state of the authorities, therefore, it is quite necessary to refer back to the statute and make up our minds what is the true construction of the Act and what is the form of procedure under it; and I must say I have no doubt there is no appeal by the 84th section of the 7 and 8 Geo. IV. c. 53, and that the only competent proceeding under that section is for the Justices in Quarter Sessions, or the Commissioners of Appeal in the case of some other offences, to state a case for their guidance before they pronounce judgment, and then when they have received the opinion of this Court to pronounce judgment accordingly.

But it has been suggested that an escape from this difficulty may be found in the present case by holding that the judgment of the Quarter Sessions here was pronounced subject to the effect of this case. The record of the proceedings bears that before the judgment was pronounced the agent for the appellant and the counsel for the respondents were heard, and both parties intimated that they would request a case to be stated in the event of the judgment being against them. Then the Justices pronounced their sentence, dismissing the appeal and affirming the judgment of the Petty Sessions, and the agent for the appellant craved a case to be stated in terms of his previous intimation. Now, I do not at all dispute that a judgment might be pronounced by the Quarter Sessions subject to the opinion of this Court on the case stated. That is no doubt not literally in terms of the statute, but still I can quite understand that that might be competently done. For example, if the Justices in Quarter Sessions were of opinion that the defendants ought to be convicted and a penalty imposed upon them, they might have pronounced a judgment to that effect convicting and imposing a penalty, but subject to the condition that upon a case stated a certain point of law should afterwards be determined by this Court, as the Quarter Sessions were of opinion that it should, and that otherwise the conviction should be void. In that case there would be no necessity to come here by appeal, and neither would this Court have any jurisdiction or power to reserve or affirm the judgment of the Quarter Sessions, but the effect of the opinion of this Court being adverse to the law held by the Quarter Sessions would just be that the conviction would fail and would be of no effect. If the opinion of this Court were otherwise the conviction would stand.

This practice is supported, I see, by two cases in England which were cited to us, and in which that course was followed. But then it must be observed that in these cases there is provision made in the way I have just suggested for the conviction either standing or falling according as the opinion of this Court shall be one way or the other upon the questions of law. For example, in the *The Queen* v. *Wodrow*, 15 Mees & Welsby, 404, which was the first of these two cases, the Court of Quarter Sessions dismissed the appeal subject to a case for the opinion of the Court of Exchequer upon two points—(1) whether the notices of appeal and trial were sufficient, and (2) whether the respondent had been guilty of the offence charged in the information? The judgment of the Quarter Sessions was to be quashed or affirmed as the Court might decide upon the above questions. If the order of Quarter Sessions were to be quashed, then the respondent was to be convicted in the mitigated penalty of £50, and the tobacco seized was to be forfeited. Now, there there was a complete sentence, and provision was made for the event of the Court of Exchequer being of the one opinion or of the other. But in the present case there is no such provision at all; and supposing we should be of opinion that the defendants ought to have been convicted, how can a penalty be imposed? There is no penalty imposed by the Quarter Sessions or by the Petty Sessions, and most assuredly this Court has no power to impose a penalty under the statute. And just as little has this Court any right to send this case back to the Quarter Sessions, for the Quarter Sessions are *functi officio*. They have pronounced a judgment, and the case is at an end. The other case I referred to is that of *The Queen* v. *Gamble*, 1847, 16 L.J., Mags. Cas. 149, and there the appeal was from the Justices to the Recorder. The Recorder pronounced a judgment finding the party guilty of a particular offence, but such finding was conditional only, and was not to be of any force or validity unless the Court of Exchequer should be of opinion that he ought to have given judgment upon the second count. The point for the opinion and direction of the Court of Exchequer on these facts therefore was, whether the recorder was entitled to give judgment and conviction upon the second count of the information or not?

It seems to me, therefore, that while such a mode of stating a case under the statute was perfectly competent, that has not been done in the present case, but something quite different has been done; and on the whole I am of opinion that this case is incompetently before the Court.

Lord Deas concurred.

Lord Mure—I am of the same opinion. It appears to me that the construction which your Lordship has given of the 84th section of the

statute is a sound one. The decision in the case of *Sumner* was pronounced merely to enable the Judges to dispose of the question of expenses, and not with the view of disposing of the merits of the question of competency; but it appears to me that the judgment of the Second Division in that case contained a correct exposition of the meaning of the 84th section of the statute, and that the meaning of that section is that it shall be in the power or discretion of the Quarter Sessions, either if the matter is one of difficulty to themselves or if they agree to a suggestion from one or other of the parties, to state a case for the consideration of the Court of Exchequer. That is, of course, with a view to enable the Quarter Sessions to decide the question. That is plainly the intention of the statute. It never was intended that after a decision was pronounced by the Quarter Sessions either of the parties before them should get a case in order to come here for the direction of the Court of Exchequer.

That being so, the only question we have to consider is, whether the intimation that was made by the agent and counsel for the appellant and respondents respectively, that they intended to ask for a case in the event of the judgment being against them, was sufficient to keep the matter open, and is sufficient to entitle us to decide whether the proceeding of the Quarter Sessions—by which, I think, the appeal from the Petty Sessions to them was dismissed—was a right act on their part or not? It appears to me that that was not sufficient within the decisions in the cases of *Wodrow* and *Gamble*, for there the judgment pronounced was subjected to a qualification, and was made subject to the opinion that might be pronounced in the Court of Exchequer in England. Here, on the other hand, the decision is absolute and unqualified. The case is dismissed; and the Quarter Sessions having dismissed it, I know of no means given by the statute by which they can recal that dismissal of the case and pronounce a different judgment from the first in the event of its being the opinion of this Court that the course they had taken was wrong. I do not see anything in the Act to entitle us to pronounce a judgment recommending a course to be pursued which may have the effect of finding these parties guilty, or to give an opinion about the meaning of the statute, where no such power to reverse their judgment is given to the Quarter Sessions themselves.

Upon these grounds I think your Lordship has taken the right view of the statute, and it appears to me also that the view which we thus take is not unknown, because in one of the cases referred to the proper course was taken of getting a case stated before the judgment was pronounced by the Quarter Sessions. In the circumstances I think that is the right course, and the one that we should give effect to.

Lord Shand—I entirely concur with your Lordship in holding that it was not intended by the 84th section of the Act 7 and 8 Geo. IV. cap. 53, to give either the Crown or the party against whom a complaint is presented a right of appeal against the judgment of the Quarter Sessions; and I concur in the views which were expressed by the Judges of the Second Division in the case of *Sumner* to that effect.

The power given to the Quarter Sessions is at their discretion to state a case, and that negatives the idea that there is anything of the nature of a right of appeal by either of the parties. The opinion and direction of the Court can only be obtained if the Justices at Quarter Sessions desire it. On the other hand, however, it is to be observed that the clause enables the Justices at Quarter Sessions to obtain not merely the opinion but the direction of this Court in reference to the proceedings before them. I think that word "direction" must have this force, that the Justices may, if they think fit, without themselves giving any judgment, apply to this Court for its opinion on any legal question arising on the facts stated, and for its direction thereupon as to how they shall act. But I think, further, that in accordance with what we see has been the practice in England, it is equally competent for the Quarter Sessions to give judgment—it may be dismissing the complaint, it may be convicting the party—subject to a case stated; and I ám of opinion that in such a case—if it should appear that the Quarter Sessions have gone wrong in their judgment on the question of law raised—the Court is entitled to recal that judgment, and to remit the case back with directions for such further procedure as in their opinion ought to follow. It would be reading the words "for the opinion and direction of the Court," in my opinion, in too limited a sense to hold that such a direction can only be given in the course of proceedings with reference to a matter which the Justices have not themselves decided. My view is, that even upon judgment given, if the Court shall be of opinion that the judgment is ill-founded as regards the legal effect of the facts stated, they are entitled to remit the cause back to the Quarter Sessions with such directions for further procedure as they may think it right to give.

I have felt the decision of the question of competency in this case to be attended with very considerable difficulty. As I have already said, I think the Quarter Sessions were entitled to pronounce a judgment subject to a case stated, and I confess it is not without great difficulty that I concur in your Lordships' judgment in holding that the present is not a case of that kind. The Justices at Petty Sessions had dismissed the complaint. The case raised a question evidently of considerable nicety in point of law, and both parties, after the proof was closed at Quarter Sessions, and before any judgment was pronounced, as appears from the minutes—for the decision in this case is really embodied in the minute of the Quarter Sessions,—both parties stated they would desire a case for the opinion of this Court. It is thus expressed in the minute—"The agent for the appellant and the counsel for the respondents were then heard, and both parties intimated that they would request a case to be stated in the event of the decision being against them." Now, suppose that passage had gone on to say, "And the Justices being of opinion that this request was reasonable, as the case was attended with considerable difficulty, resolved to grant a case," it would surely be very difficult to maintain that this was anything but a judgment subject to a case stated. Observe what follows—"Thereafter the Justices dismissed the appeal and affirmed the judgment of the Petty Sessions, and decerned. The agent for the

appellant craved a case to be stated, in terms of his previous intimation, and such a case was granted." I think that in such circumstances the case before us would be substantially that of judgment given subject to a case stated, and the difficulty I have in concurring with your Lordships' judgment is that I am not sure it is not too strict a reading of this minute to hold that that was not in substance what was here done. It is difficult to see why the Justices before giving judgment recorded the fact that each party had requested a case to be stated, unless the purpose was that this having been agreed to, it was desired to keep everything open. If the Justices had resolved not to give a case, or treat this as a matter on which the unsuccessful party might attempt an appeal if he thought fit, it occurs to me that no such passage would have been in this minute, or the minute would have contained a statement that the request had been refused. But at the same time, as your Lordships have unanimously held that the minute as expressed is not sufficient to make this a judgment subject to a case stated, and as I cannot dispute that the matter has not been made so clear as it certainly might have been, I am not disposed to say that I differ from the result at which your Lordships have arrived, although I confess I should more willingly have concurred if the judgment had been the other way.

It has been suggested by your Lordship in the chair that even if this had been a judgment given subject to a case stated, the case would still be incompetent, and there would have been no remedy, because by the judgment the appeal was dismissed, while no alternative statement is given of the judgment to be pronounced if in the opinion of the Court the Justices have taken a wrong view of the law. In that opinion I cannot concur. The point decided by the Justices is one of law arising on the facts stated. In respect of their view upon the legal question the complaint has been dismissed. But if it had been dismissed subject to a case stated—as I think was intended—and this Court were of opinion that in point of law the justices were wrong, it appears to me that our course then would have been, under the statute, to remit the case with our opinion, and with a direction to recal the judgment, dismissing the complaint, and to proceed with the cause. The complaint having been dismissed upon a wrong view of the law, the Justices did not proceed to fulfil their duty, which would have been to take up the case upon the merits, and to dispose of it by imposing the penalties, modified or otherwise, which they should think right. I see no reason to doubt, so far as my opinion is concerned, that under the statute we could competently so have dealt with it—that the terms of the statute which enables this Court to give a direction would have entitled the Crown to obtain a remit of that kind. But as your Lordships are of opinion that this is really not a judgment subject to a case stated, but a judgment against which one of the parties is practically attempting an appeal, of course the observation I have now made can in this case have no practical effect.

The Court dismissed the appeal as incompetent.

The Dean of Faculty for the respondents moved for expenses on the ground that the Revenue authorities had brought an incompetent case before the Court—*Sumner* v. *Middleton, supra.*

The Lord Advocate for the Inland Revenue—The respondents should have taken the objection to competency in the Single Bills. They had, on the contrary, given no notice of their objection either before the Justices or anywhere else until the case came up for discussion on the merits.

The Court refused the respondents' motion.

Counsel for Appellant—The Lord Advocate (Watson)—The Solicitor-General (Macdonald)—Rutherfurd. Agent—The Solicitor of Inland Revenue.

Counsel for Respondent—The Dean of Faculty (Fraser)—Mackintosh. Agent—W. G. Roy, S.S.C.

Thursday, November 13.

SECOND DIVISION.

[Lord Adam, Ordinary.

CALEDONIAN AND GLASGOW AND SOUTH-WESTERN RAILWAY COMPANIES *v.* WM. DIXON (LIMITED) AND OTHERS.

Railway—Mines and Minerals—Notice to Purchase—Railway Clauses Consolidation Act 1845 (8 *and* 9 *Vict. cap.* 33), *sec.* 71.

The 71st section of the Railway Clauses Consolidation Act 1845 provides that if the owner or lessee of minerals under a railway is desirous of working them, he shall give the railway company before he begins working thirty days' notice of his intention to do so. The 72d section provides that if before the termination of thirty days from the notice the railway company do not give a counter notice of their desire that the minerals should remain unworked, the mine-owner may begin to work them as he thinks fit. *Held* that the effect of the latter section was to prevent the mine-owner from beginning to work within that time, and that the railway company were not thereby precluded from giving the counter notice at any future time that they considered their safety required it, they making compensation to the mine-owner for his loss thereby.

The Caledonian and the Glasgow and South-Western Railway Companies brought this note of suspension and interdict against William Dixon (Limited), and the managing director and secretary of that company, for the purpose of preventing them working out the minerals under a certain portion of the Beith Branch Railway, of which the complainers were proprietors. That railway passed through the estate of Caldwell, belonging to Colonel Mure. The railway companies had purchased from him the land occupied by the railway so far as passing through that estate, their term of entry being 12th October 1866. The mines and minerals under the land were not expressly purchased along with it, and therefore under the Acts of Parliament they fell to be excepted out of the conveyance.

The respondents were lessees of the minerals,