[HEARD 27*th March*—JUDGMENT 3*rd August*, 1850.]

JAMES LUMSDEN, Esq., of Auchry, *Appellant*.

RICHARD W. DUFF, Esq., of Orton, and OTHERS, Trustees of the deceased JAMES, EARL OF FIFE, *Respondents*.

Jurisdiction.—It is too late, after a party has concurred in the trial of issues, under an order from a Division of the Court of Session, before which the cause in which the issues were raised did not properly depend, for him to complain of the want of jurisdiction to make the order.

Ibid.—Appeal.—The House of Lords has no jurisdiction to entertain an appeal of an interlocutor refusing a motion for a new trial, upon the ground that the cause in which the order for trial had been made did not properly depend before the Division of the Court by which the order had been made, so as to give it jurisdiction over the cause.

Verdict.—Declarator.—Molestation. Damages, &c.—Where in mutual actions of declarator, molestation and damages, brought for the purpose of ascertaining boundaries, an issue setting out a particular boundary is sent for trial, the verdict returned will be good, although it should not implicitly adopt the boundary set out in the issue, but adopt it with a variation, for the case is not one in which the whole matter is left to the jury, but in which the opinion of the jury is only asked to assist the Court in determining upon the conclusions for declarator.

THE facts of this case are so fully set out in the judgment as to make any other statement of them superfluous, further than to observe that the line of march set out in the issue was *in ipsissimis verbis* the march which was set out in the Respondents' summons of declarator, and according to which the summons asked a declarator of their right.

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Mr. Attorney-General and *Mr. Anderson* for the Appellant.

Mr. Bethell and *Mr. Sandford* for the Respondents.

LORD BROUGHAM.—This case, my Lords, of Lumsden *v.* Duff was heard some time ago by my noble and learned friend, who is not now present, and myself. The case arose under these circumstances:—There was a summons of declarator relating to some matters brought by Mr. Lumsden against the trustees of Lord Fife, who are the present Respondents, and who were the Pursuers below. The trustees of the late Earl of Fife had first brought a summons of declarator against Mr. Lumsden, and then Mr. Lumsden brought a summons of declarator relating to the same matter against Lord Fife's trustees. In neither of these cases did what is called the *partibus* endorsed on the summons specify to which division of the Court the cases respectively were to belong. Two notes of advocation *ob contingentiam* were also brought by Lord Fife's trustees, of processes which had been depending between them and Mr. Lumsden before the Sheriff of Aberdeen. The partibuses on both those notes of advocation were marked "Lord Murray, "Second Division." Afterwards, those two notes of advocation and the summonses of declarator appeared in Lord Murray's Outer House Roll as Second Division Cases, and the whole four cases were then conjoined, and proceeded before Lord Murray in the Second Division, before whom the issues were adjusted. There was afterwards an interlocutor pronounced in the Inner House, by which Lord Fife's trustees, the Pursuers in the first declarator, and the Defenders in the second declarator, were directed to stand as Pursuers of the issues, and Mr. Lumsden was directed to stand as the Defender in those issues. That interlocutor being pronounced in the First Division, was pronounced without Mr. Lumsden having taken any objection whatever that it was not the division of the Court to which the case

belonged. Lord Robertson, who, it was afterwards said, had no jurisdiction, except by force of an order of the First Division, by virtue of the power given to him, tried the cause at Aberdeen, and a verdict was found by the jury for the Pursuers, that is, Lord Fife's trustees, the present Respondents, the Pursuers in the first declarator and the Defenders in the second. It was then enrolled before the First Division, and by that division remitted to the Second Division; and a rule was moved for by Mr. Lumsden, (who had never objected before to the irregularity, or touched upon any question of jurisdiction,) to show cause why the verdict should not be set aside, with a view to a new trial being obtained; and he gave as his ground that the marking of the partibuses on the notes, which was insisted upon here, conclusively fixed the conjoined processes in the Second Division, that the enrolments of the cases in the Rolls of the Outer House had been as Second Division cases; that the order as to which party was to stand Pursuer, and as to which party was to stand Defender, had been pronounced in the First Division, and that the case had been sent to Lord Robertson to be tried at Aberdeen, under an order of the First Division, and therefore it was said that as he had no jurisdiction at all but for the order of the First Division, that order could not apply to the case, because it was, *de jure*, a cause in the Second Division. It was also said that no order which might have been pronounced by the Second Division could have empowered Lord Robertson to try the cause, because, although a Second Division cause, it was then *de facto* in the First Division. This was an objection to the want of jurisdiction; and upon this objection the question here arises. There are three interlocutors brought before the House, upon which I am now to move your Lordships to pronounce final judgment.

My Lords, I have received from my noble and learned friend, the late Lord Chancellor, Lord Cottenham, that which I shall now read to your Lordships in his absence, and in which I entirely coincide. He says:—

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"This appeal is against three interlocutors of the Court of "Session. The first, Because the First Division had directed "that the Respondents should be Pursuers in issues directed "by the Second Division. The second, Because the Second "Division, to which the cause properly belonged, had refused "a motion for a new trial. And the third, Because, having so "refused, they had applied the verdict in disposing of the cause "upon the merits.

"The Appellant and Respondents are owners of contiguous "estates, and the principal contest is as to the boundary between "them. Each, in separate suits, asserted title to the portions "of land within the boundary claimed, and each set out the "boundary claimed. The suits were conjoined and the issues "directed; the first issue being as to the boundary claimed by "the Respondents, and the second as to the boundary claimed "by the Appellant; in each case the description of the boun-"dary being taken from the summons by which it was claimed. "The jury found in favour of the boundary claimed by the "Respondents, but with a variation as to part, which the verdict "specified; not, as to this part, establishing the boundary as "claimed by the Appellant, but correcting an error in the "Respondents' description.

"After the issues had been settled by the Lord Ordinary, "as in causes of the Second Division, application was by mis-"take made to the First Division, as to which party was to be "Pursuer upon the trial of the issues, and it was directed that "the Respondent should be Pursuer, for which an interlocutor "was made, which is the first appealed from, upon the ground "that the First Division had no jurisdiction to make any "interlocutor in a cause belonging to the Second Division. "No such objection appears to have been raised when the "application was made, or until after the verdict upon a motion "for a new trial."

That is to say, the party took his chance of a verdict, and

when he found the verdict against him, discovered an irregularity, and then for the first time stated it, and availed himself of it. Lord Cottenham says: "The Court did not consider "this as any ground for setting aside the verdict, and, in my "opinion, they were right. The error was common to both "parties, and did not, in any respect, affect the merits of the "case." His Lordship means, and I entirely agree with him, that it was an objection which would be very cautiously listened to even in the first instance; it might, in the first instance, be well or ill founded, but when not taken advantage of until after the verdict, and until after the party has taken the chance of a jury trial in order to obtain a verdict in his favour, and when, finding the verdict against him, he for the first time repents of having done that which amounted to a waiver, and endeavours to avail himself of the objection, it cannot be listened to. His Lordship proceeds: "If no such interlocutor had been pro-"nounced, the Respondents would have been the proper Pur-"suers; and after the trial had taken place, and the rights of "the parties had been ascertained, the Court would have greatly "miscarried if it had set aside all the subsequent proceedings, "because such an order had been made by the First Division, "whereas it ought to have been made by the Second. If this "interlocutor were now to be set aside upon appeal, the rights "of the parties would not be affected if the other interlocutors "stood; and if it be used here, as it was below, as a ground "only for a new trial, it will be seen that this House is by the "Acts precluded from interfering with it," having no jurisdiction, as we have frequently had occasion to observe, to review a refusal to grant a motion for a new trial.

His Lordship goes on to say, "The second interlocutor "appealed from is that by which the Second Division refused a "motion for a new trial. I think they were right in so refusing "upon the merits. But what provision has the law made upon "that subject? The 6th section of the 55th George III, "chapter 42, which regulates applications for new trials, declares

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" that such interlocutor granting or refusing a new trial, shall " not be subject to review by reclaiming petition, or by appeal " to the House of Lords; and section 8 provides, that upon " such application being refused, the verdict shall be final and " conclusive as to the fact or facts found by the jury, and shall " be so taken and considered by the Court in pronouncing their " judgment, and shall not be liable to be questioned anywhere.

" The third interlocutor appealed from is that by which the " Court applied the finding of the jury, and upon the facts " thereby found, decided upon the rights of the parties. The " objection made to this interlocutor was, that the jury had " exceeded their powers in finding any variation in the boundary " claimed by the Respondents, and that, as they had not proved " the boundary as laid, the verdict ought to have been for the " Defender. This was one of the grounds upon which a new " trial was applied for; and if the refusal of such application " cannot be reviewed upon appeal, and the verdict must there- " fore stand, what would be the effect of discharging that inter- " locutor upon this appeal?—That the suits would wholly fail, " and the rights of the parties remain as unsettled as before they " were commenced. By virtue of the enactments, the verdict " must stand, and standing, it could not be applied or used in " deciding upon the rights of the parties. The 8th section " appears to me to be conclusive upon this point, by making " the finding of the jury conclusive upon the Court in pro- " nouncing its judgment. If there had been any real objection " to the finding of the jury, it would have been a ground for a " new trial. Of such objection the Court of Session are made " the sole judges; and they having decided against the objec- " tion, it cannot be raised upon appeal. In fact, there is no " ground for the objection. This is not a case in which the " whole matter is left to the jury, but issues are directed to " ascertain facts necessary to enable the Court to dispose of the " matters brought into discussion by the summonses. The dis-

" pute as to the boundary necessarily raised questions as to the " title to those lands affected by the boundary, and each sum- " mons not only insisted upon the boundary as claimed, but " asked for a declaration of title to such lands as each party " claimed as included within his alleged boundary. Upon such " summonses it was competent for the Court to adjudicate in " favour of the title to some of such lands, and against it as to " others. The verdict ascertaining the boundary fixed the title " to the lands, and the interlocutor gives effect to such title, " which it was competent to do.

" As to the claim to the water, the verdict is conclusive. If " there had been any doubt as to the propriety of the finding " upon the evidence, it could only be taken advantage of by " a motion for a new trial. That experiment was made, and " failed, and cannot be brought on again upon appeal.

" I am of opinion that upon all these points the Court of " Session were right, and that all the interlocutors must be " affirmed with costs."

His Lordship therefore considers that the verdict was right; his Lordship considers that the judgment was right, snd he rejects the appeal upon the different grounds stated; and entirely agreeing with his Lordship, I am prepared to move your Lordships that the interlocutors appealed from be affirmed, and the appeal be dismissed with costs.

It is Ordered and Adjudged, That the said petition and appeal be, and is hereby dismissed this House, and that the said interlocutors therein complained of, be, and the same are hereby affirmed: And it is further Ordered, That the Appellant do pay, or cause to be paid, to the said Respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the Clerk-Assistant: And it is also further Ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be and is hereby

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remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the Bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

SPOTTISWOODE and ROBERTSON—LAW, HOLMES, ANTON, and TURNBULL.