earlier years; but the learned Judge was quite right in his direction, otherwise what an absurdity we are involved in, both in Scotland and in England, when we have to prove, that parties have enjoyed an established right from time immemorial; we never can carry it back to anything like proof of the commencement. The period here which they had to prove was, I think, erroneous in the way in which the issue was framed. The issue was framed as against the pursuers, but not as against the present appellant. The pursuers had to prove that the right had existed either from time immemorial, or for 40 years prior to 1827—that would be the year 1787, and there is evidence which distinctly went beyond that. All that the learned Judge said, was—You may, if the evidence satisfies you, if for any reason it cannot be carried quite back to 1787, go as far as the memory of living witnesses goes; and the law authorizes you in so doing. Upon all these points it seems to me that the learned Judge gave the jury an accurate direction. I confess I must observe upon this occasion, as I have on one or two other occasions, that the learned Judges in Scotland are a little loose in their way of framing issues, and sometimes a little loose in the mode in which they direct the juries; and if I had thought that there was anything really wrong here, I should, perhaps, have felt myself bound to have yielded to these exceptions; but I am happy to say that I see nothing wrong. There is, I may remark, one expression which I think a Judge would not have used in directing a jury in England, namely, "when the evidence was consistent and uncontradicted, the jury ought, in point of law, to presume,"—that is not the happiest way of expressing it; only he goes on to negative what had been contended on the other hand, that it was not competent to them so to find—they could not find the 40 years' enjoyment without distinct evidence of that period of time. He says—That is not so; you may presume it, if the evidence seems to you to be all consistent. The law delights in favouring possession as it has been enjoyed, and authorizes you in one sense, and not only sanctions, but directs you to act upon it.

It appears to me, my Lords, that both these appeals have been brought without any sort of foundation. I shall therefore move your Lordships to dismiss them, and affirm the interlocutors of the Court below.

Interlocutors in each appeal affirmed with costs.

Appellant's Solicitors, Richardson, Loch and Maclaurin.—*Respondents' Solicitors*, Deans and Rogers.

FEBRUARY 27, 1854.

MELROSE and COMPANY, *Appellants*, v. HASTIE and COMPANY, *Respondents*.

Appeal to House of Lords—Competency—Process—Retention—Interlocutor disallowing exceptions.—48 Geo. III., c. 151, § 15—Statute 55 Geo. III., c. 42, § 7—*A question having arisen as to the right to the delivery of a quantity of sugar, an action was brought by the party claiming it, and it went to trial on an issue before a jury. A verdict was returned for the pursuers, but it was set aside by the Court, on a bill of exceptions to the ruling of the Judge, on 7th February* 1850, *and a new trial granted. A second trial took place, in which a verdict was returned for the defenders in March* 1850, *and, on a bill of exceptions presented by the pursuers, the Court, on 7th March* 1851, *disallowed the bill of exceptions; on 9th February* 1852 *the pursuers appealed to the House of Lords.*

HELD *that as the first interlocutor disposed of exceptions, the appeal, not being brought within fourteen days, was too late:* 55 Geo. III., c. 42, § 7.

HELD FURTHER, *that an interlocutor settling an issue is subject to appeal.*[1]

Melrose and Company appealed against the interlocutors of Feb. 1850, and of March and Dec. 1851.

The respondents, in their case, stated the objection to the competency of the appeal—"In respect the statutory period within which the interlocutors complained of could be appealed against had elapsed before the appeal was presented, and therefore the interlocutors are now final, and cannot be reviewed."

The Appeal Committee ordered this objection to be reserved till the hearing of the appeal.

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[1] See previous report 13 D. 881; 22 Sc. Jur. 207; 23 Sc. Jur. 398; 24 Sc. Jur. 120. S. C. 1 Macq. Ap. 698: 26 Sc. Jur. 319.

Anderson Q.C. (with him *Gray*), for appellants.[1]—We were not bound to come to the House of Lords against an interlocutory judgment, but we had a right to wait till the final interlocutor was pronounced exhausting the merits. The Stat. 48 Geo. III., c. 151, § 15, enacted that final judgments only should be appealed against, but that at the same time the appellant might include all the interlocutors in the cause. This was reasonable, for it might happen that we could not know until the final interlocutor whether we might be injured or not. The 55 Geo. III., c. 42, did not repeal the above clause, but in §§ 4, 6 and 7 merely conferred a privilege of excepting to the ruling of the Judge, and, if such exceptions were not afterwards disallowed by the Court, of appealing to the House of Lords within 14 days against the interlocutor so disallowing them. The consequence of not so appealing within 14 days might no doubt be, that we should thereafter be concluded as to any matter of fact involved in the verdict, but not so as to any matter of law. Where no appeal was taken within the 14 days, then the case went on as usual, and if at the end the whole question turned on a point of law, then by § 9 the interlocutors could all be brought up to the House of Lords, and thus we might get behind the verdict so as to see how it was arrived at. The appeal which was competent prior to the 55 Geo. III., c. 42, was not taken away by that statute, and Lord Campbell said, in *Matheson* v. *Ross*, 6 Bell's Ap. 374, that the *onus* always lay on those who denied the right of appeal, to shew how it was taken away. But even assuming all that the verdict asserts in point of fact, we are not thereby prevented from appealing against all the interlocutors. The verdict merely affirmed that there was no wrongful obstruction, but that did not preclude us from maintaining that we were entitled to the sugars. There may have been no wrongful obstruction, simply because there was no obstruction at all; how then could that entitle the Court to assoilzie the defenders from the other conclusions of the summons? Thus, in *Galbraith* v. *Armour*, 4 Bell's Ap. C. 374, it was held, that the verdict was no answer in law to the action. In *Mackenzie* v. *Ross*, 1 Sh. Ap. C. 109, there was no final interlocutor pronounced at all after the interlocutor disallowing the exceptions.

Lord Advocate Moncreiff (with him *Sol.-Gen. Bethell*), for respondents.—The issue here was directed not to try a special fact merely, but to try the whole case, both the law and fact,—leaving the points of law to arise by way of exceptions to the ruling of the Judge. Such being the case, and since the appellants did not within the 14 days complain of the disallowing of the exceptions, it is now too late. The Stat. 55 Geo. III., c. 42, is clear in its provisions to that effect. *Mackenzie* v. *Ross*, 1 Sh. Ap. C. 109; *Cleland* v. *Weir*, 6 Bell's Ap. C. 402. The verdict having been allowed to become conclusive, and it having exhausted the whole merits, there remained to the Court no alternative but to pronounce an interlocutor assoilzieing the defenders. The facts cannot now, in any shape, be opened up. *Speirs* v. *Dunlop*, 4 S. 92; *Walker* v. *Steel*, *ibid.*, 323.

LORD CHANCELLOR CRANWORTH.—My Lords, so far as it is lawful for any one of your Lordships, when exercising judicial functions, to have wishes as to the result of a case, I confess that the motion which I feel myself called upon to make to your Lordships, is one which is quite contrary to my wishes and inclinations, because I feel that it in all probability shuts out the pursuers from bringing before your Lordship's House something which, if they had taken a different course, they might have brought before your Lordships, and which involves, or might involve, questions of the very deepest importance. From the very cursory glance I have had of these proceedings, I do not intend to express any opinion (indeed I have not formed any), upon the merits of the case. The case is one upon which the Court of Session was divided, and it evidently involves principles of great importance with reference to the mercantile law of Scotland. I say, therefore, so far as it is lawful to have wishes, I wish I could think that this objection to competency was unfounded. I confess my first impression was, that this case might be now brought before your Lordships; but attending to the language of the statutes, I have satisfied myself, that now to hear an appeal from interlocutors overruling these exceptions, would be hearing something which the legislature has not authorized your Lordships to hear, and, I think, more than that, has expressly forbidden you to hear.

This question, my Lords, must depend entirely upon the construction to be put upon two acts of parliament, to which you have been referred, viz., 48 Geo. III., c. 151, and 55 Geo. III., c. 42. I do not find any subsequent statutes which really affect the question in this case. The pursuers, Messrs. Melrose and Company, instituted a proceeding in the Court of Session against the defenders, Hastie and Company, the object of which was to have declarator that they were entitled to 591 bags of sugar that were warehoused at Greenock, which had been imported by Hastie and Company, and which had been, as it is alleged, (and we may assume the fact to be so,) paid for by Melrose and Company, but in respect of which Hastie and Company contended that they had a right of retention, until certain charges which they had upon that sugar were

[1] This being an argument as to the competency of the appeal, the counsel for the objectors ought to have been first heard, as settled in *Geils* v. *Geils*, ante, p. 1: 1 Macq. Ap. 36: 23 Sc. Jur. 438. It was owing to an inadvertence, which was afterwards explained, that that rule was not observed here.

satisfied. That is a very important question. And for the purpose of asserting their right they instituted this action, in which they sought these several findings :—that it should be found and declared that the pursuers had been wrongfully obstructed, and that they might lawfully remove the sugar from the warehouse ; whether they had been wrongfully obstructed or not, that the parties having the control over the sugar should be restrained from removing it for the future ; and further, that the defenders should be made responsible in damages for the injury which had resulted from the pursuers having been wrongfully obstructed. The Court of Session, in order to have this question investigated, directed an issue, whether the defenders had wrongfully obstructed the pursuers in removing this sugar?

Undoubtedly, looking logically at that issue, it does raise every question both of fact and of law ; but with all deference to the learned Judges, I must say, that I think that is a most inconvenient mode of having doubtful points of law investigated. It would surely have been more satisfactory to have submitted to the jury the pure facts, or as nearly the pure facts as the nature of things permitted, and then for the Court afterwards to have applied the law, as they understood it, to the facts. In directing a jury upon any trial, we are always involved in the necessity of mixing some law with the facts, because, in truth, if you direct a jury upon the issue, whether A B is the son of C D, that involves the question of what constitutes a lawful marriage. You cannot direct any question of fact, that will not necessarily have mixed up with it some question of law; but the object of the Courts in this country always is, to separate, as far as the nature of things permit, the one from the other. Now, I cannot help thinking, that the inconvenience of that course is so obvious, that it would have been infinitely better if the issues directed in this case had been simply issues as to what the facts were. The knowledge of the facts one way or the other, would have enabled the Court to apply the law, and say what the result was. However, no objection seems to have been taken by either party to the form of the issue, which was directed in the Court below. But now the parties come by way of appeal to your Lordships' House ; and, upon referring to their appeal, I observe that they do not complain of that issue having been directed. The issue was evidently directed for the purpose of raising, and, logically, it did raise, all the three questions ; for if it is true, as the pursuers said, that this was their sugar, and that Hastie and Company had no right to prevent them from taking it from the warehouse, then the jury must have determined that Hastie and Company did wrongfully obstruct. So with the second question—whether they ought to be prevented for the future from removing, the same result would follow, and so also as to the question of damages. That issue was directed, and, upon the trial of that issue, it seems that certain facts were admitted or proved as to payments, which shew that the pursuers were right in saying that they had paid, but then the party whom they had paid was a middleman in the transactions; and then arose this question—whether, these payments having been so made, the right contended for by the pursuers did or did not result?

Now, the learned Judge who tried the case, supposing the jury to review these facts, eventually directed them "that there was in this case no delivery, actual or constructive, of the 591 bags of sugar, and nothing proved in evidence to bar Hastie and Company from retaining these sugars for the balance due by Bowie and Company—that the circumstance of Melrose and Company having placed the delivery note, with the indorsation in their favour, in the hands of Duncan Ferguson and Company, and its having been acted upon by partial removal of the sugars, did not affect the right of retention on the part of Hastie and Company." That, in fact, involved the whole of the question in dispute ; and the learned Judge having laid down that as the law upon it, the jury found that there had been no wrongful obstruction. That was followed by a bill of exceptions to that ruling, and those exceptions were brought before the Court of Session, and the decision of the Court of Session is in the interlocutors which were made upon those exceptions.

In order to see whether it is competent or not to the parties who are aggrieved, or who think themselves aggrieved, to appeal to your Lordships' House, we must look to the statute, and to that alone, because that must guide us. The statute which introduced or reintroduced jury trials into Scotland, is the 55 Geo. III., c. 42, and the sections which have been referred to and are material, are the 7th, 8th, and 9th. The previous sections shew how parties may apply for a new trial, and other matters of that sort. In order to enable the parties, who are aggrieved by any decision of the Judges at the trial, not to be bound by the Court of Session, if they think fit to bring the case to the House of Lords, this provision is made by the 7th section. After the directions for bringing the case before the Court of Session, the section proceeds thus:—"Provided always, that it shall be competent to the party against whom any interlocutor shall be pronounced on the matter of the exception, to appeal from such interlocutor to the House of Lords, attaching a copy of the exception to the petition of appeal, certified by one of the clerks of Session, so as such appeal shall be presented to the House of Lords within 14 days after the interlocutor shall have been pronounced, if Parliament shall be then sitting ; or if Parliament shall not be sitting, then within 8 days after the commencement of the next Session of Parliament, but not afterwards, and so as the proceedings on such appeal do conform in all respects to the rules and

regulations established respecting appeals." The 8th section says—"That if a new trial shall not be applied for, or shall be refused, or if the exception taken to the opinion and direction of the Judge or Judges shall be disallowed, the verdict shall be final and conclusive as to the fact or facts found by the jury." Then the 9th sect. says,—"That in all cases wherein the Court shall pronounce a judgment in point of law as applicable to, or arising out of, the finding by the verdict, it shall be lawful and competent for the party dissatisfied with the judgment in point of law, to bring the same under review, either by representation or reclaiming petition, or by appeal to the House of Lords." Now, if it depends entirely upon that, there having been an appeal against interlocutors overruling exceptions, and an appeal more than 14 days afterwards, the question is —Is such an appeal competent? Obviously, *primâ facie*, it is not competent; but then what was argued by the learned counsel for the pursuers, the appellants in this case, is, that we must look back to the 48 Geo. III., c. 151, which was an act for regulating the course of proceedings in Scotland before the establishment of jury trials; and here we find this proviso to the 15th sect.: —"Provided, that when a judgment or decree is appealed from, it shall be competent to either party to appeal to the House of Lords from all or any of the interlocutors that may have been pronounced in the cause, so that the whole, as far as is necessary, may be brought under the review of the House of Lords."

Now, my Lords, in the first place, I think that the subsequent statute, making express provisions as to the course of appealing in this particular kind of interlocutory applications, must be understood as superseding all that had been previously directed about interlocutory applications, so far as relates to that particular sort of interlocutory application. I think that would be so, if there were nothing peculiar in the nature of such an interlocutory application as this is. Ordinarily speaking, the issue was meant to be an issue merely to find some particular fact or facts; but when we consider how important it is to have that conclusively established, before any further proceedings are taken upon it, and to have it conclusively established for all purposes whatsoever, there does appear a very obvious reason why the legislature meant to limit the time within which complaints were to be made upon that subject to a very short period. You may apply immediately for a new trial, or take a bill of exceptions if you choose, and you may come to the House of Lords, but you must do that within 14 days. The statute gives peculiar facility to have priority given to your appeal over all others, in order that the matter may be at once and for ever conclusively established. It appears that the legislature has laboriously contrived that there shall be no delay in appeals of this nature; but that these matters, decided by issue, shall be established at once and for ever without any appeal, except so far as that appeal is granted; and that was meant to be something which should conclude or stop all further inquiry or any fact or facts which were found by the jury. Ordinarily speaking, that would be most convenient. If, in this case, for instance, the issue had been directed to try whether the sugar had been paid for to Hastie and Company by Bowie and Company, and whether the second portion of sugar which was bought by Melrose and Company had been paid for by Bowie and Company, and any other matters of fact that it would have been important to have decided, one sees the great convenience of having that established conclusively before anything further is done. It seems to me, attending to the nature of the subject matter, and the language of the act of parliament, it is quite clear that we cannot carry back, as it were, the proceedings upon a jury process to the 15th sect. of 48 Geo. III., c. 151, where the whole matter came before the Court upon the final judgment, and was not merely capable of being taken at the end of 14 days. I think that is very much confirmed by the 9th sect. of the Jury Act, which expressly says:—"That in all cases wherein the Court shall pronounce a judgment in point of law, as applicable to, or arising out of, the finding by the verdict, it shall be lawful and competent for the party dissatisfied with the said judgment in point of law, to bring the same under review, either by representation or reclaiming petition, or by appeal to the House of Lords." In the ordinary way, that means a case that comes within the doctrine—*expressio unius est exclusio alterius*. When the legislature says a verdict has been found and established, you may come to this House if you think the verdict does not warrant what the Court is doing upon it. That seems to me to exclude the notion that you might also say—the verdict was improperly obtained by wrong direction or any other mode.

For these reasons, my Lords, I reluctantly feel myself compelled to say, that this case, so far as the appeal against the interlocutors overruling the exceptions goes, is not in a state in which it is competent to your Lordships to hear it. Consequently, we can only hear the appellants, so far as they may have any case for your Lordships to hear, upon the assumption that these interlocutors overruling the exceptions were proper—that the exceptions ought not to be allowed—that the ruling of the learned Judge was correct, and that there was nothing to complain of in the ruling. Then, all that the appellants can do is to shew, that, upon this record, the Court of Session has given an erroneous judgment, there being nothing but the summons, the proceedings before the direction of the issue, and the finding, which is, we know not upon what grounds, a correct finding, that the defenders never wrongfully obstructed the pursuers in the removal of the

sugar. I therefore have to move your Lordships, that, so far as that part of the case is concerned, the appeal must be dismissed.

LORD BROUGHAM.—My Lords, I entirely agree with my noble and learned friend in the view which he takes of this case. I also entirely agree with him in the regret which he has expressed, and in which I largely share, that we are obliged to exclude the arguments upon the important points which are raised by the decision come to in the Court below, and which stood for our hearing upon the present occasion. I regret it the more, because I see that there was a considerable difference of opinion amongst the learned Judges in the Court below upon one or two matters of the greatest possible importance to the mercantile law of Scotland. It is not even agreed by all those learned Judges that that law differed from the law of England; that there is a material difference in one respect, namely, in that which constitutes an agreement of sale, or in respect of delivery, I think they are pretty well agreed generally as to the doctrine of retention, lien, and stoppage *in transitu*. After reading the opinion of those learned Judges, it is impossible to say that we have a distinct statement as to whether the law of Scotland is the same with our English law upon this important matter, or whether it is materially different; whether it is different in a greater or less degree; and also whether it is different in substance, (which is the only possible conclusion), or only different in language.

For these reasons, my Lords, I share entirely in the regret which has been expressed by my noble and learned friend that we are precluded from going into these questions upon the present occasion. I agree with him in the conclusion at which he has arrived, and for the reasons which he has given, and indeed for one or two others with which I will not trouble your Lordships; but he has given quite enough to justify the proposition to your Lordships of excluding the arguments upon this part of the case.

I shall only, therefore, add, that the appellants have the right still to go upon the other point —the application of the verdict by the learned Judges; but I would fain hope that the learned counsel for the appellants will think twice before they make any attempt, in going into this matter, to bring us back to that which we have excluded, or are about to exclude, namely, all arguments upon the bill of exceptions, and upon the conclusions which were come to in the interlocutors upon the exceptions in the Court below. My Lords, there being a sitting of the Appeal Committee to-day, we cannot continue the discussion upon the hearing at present: but it would be very vexatious if the parties were to be put to the expense of coming down another day with the expectation that the ingenuity and zeal of the learned counsel could somehow or other get on one side of the decision to which we have now come, and, notwithstanding that decision, open the question again which is raised by these exceptions. I hope and trust that the learned counsel, in the exercise of a sound discretion, will not make any such attempt; that they will consider whether it is possible, in any usual form of proceeding, to go beyond the simple question, right or wrong, in applying the verdict; and that they will save the parties the expense, and your Lordships the trouble, of again going into this question.

LORD CHANCELLOR.—Is it the intention of the learned counsel to argue the rest of the appeal?

Mr. Anderson.—After the expression of opinion of the two noble and learned Lords present, I should certainly not attempt to re-argue in another form the questions which are raised by the bill of exceptions. What I would venture to submit to your Lordships would be very shortly this; that in dealing with the three conclusions at the same time, it is competent to the Court below, and they ought—if they could not look behind the verdict, with a view of ascertaining the facts—to have directed a further investigation as to the payment of the price of these two parcels of sugar, and then they would have come to the true question, namely, the right to the property. I feel, from the expressions of your Lordships' judgment, that it would be useless for me to attempt to go behind the verdict to satisfy your Lordships that the argument was wrong. I submit that there is a very important question to be tried, and the Court of Session may think that their opinion given on this issue would bind them to repeat the same judgment; still I think that what I would suggest would bring it properly before their Lordships, viz., that there should be a remit upon this other part of the case, in order, if the respondents still persist in denying the payment of the prices of these two parcels of sugar, that evidence should be taken, with the view of enabling the Court to deal with the two first conclusions.

LORD BROUGHAM.—That is for a new trial, or a further trial upon a new issue?

Mr. Anderson.—Yes, my Lord, I think that a much more economical course can be arrived at by another trial. There are only two short dry points of fact, viz., the payment of these two sums of money.

LORD CHANCELLOR.—I will postpone the motion I was about to make, and simply move, that the further consideration of this case be adjourned till to-morrow morning.

LORD BROUGHAM.—And you will understand, Mr. Anderson, that you are excluded from all arguments upon the bill of exceptions.

Adjourned till to-morrow.

Anderson still contended that, even admitting the verdict to be conclusive of the facts it

involved, the Court was not entitled to assoilzie the defenders from the whole conclusions of the summons. (The argument turned entirely on the purport of the language used in the summons and the issue respectively.)[1]

Sol.-Gen. Bethell contra contended, that the issue and verdict thereon exhausted the whole merits of the cause; and it having been decided already that the verdict was conclusive, the interlocutor of the Court below, assoilzieing the defenders from the whole conclusions of the summons, followed as a matter of course, and could not now be impeached.

LORD CHANCELLOR CRANWORTH.—My Lords, this case, when it was in the Court of Session, involved a question as important as any that can well be conceived—the question as to the right of retention on the part of owners of goods in a bonded warehouse as against other persons who have purchased the goods from them, but have not received them. Hastie and Company, in this case, had purchased a large quantity of sugar from the Mauritius, which was lodged in a bonded warehouse at Greenock; and they sold to Bowie and Company the sugar which they had so purchased, or a large part of it. Bowie and Company afterwards made an under sale of about 700 or 800 bags of sugar to the pursuers, Melrose and Company. Melrose and Company removed about 170 bags, but left the other 591 bags still in the warehouse, and still in the name of Hastie and Company—I should rather say in the name of Duncan Ferguson and Company, who were the agents of Hastie and Company—it is just the same thing—they stood in the name of the seller. Bowie and Company, to whom Hastie and Company had sold, afterwards became bankrupt, while the 591 bags of sugar remained unremoved; and so becoming bankrupt, they became bankrupt being largely indebted to Hastie and Company; not, however, indebted in respect of the 591 bags of sugar, for which it was contended, at least on the part of the plaintiffs, that Hastie and Company had been paid—at least I will assume that to be so. Then the right set up by Hastie and Company was this:—They said, subsequently to the sale of this sugar, Bowie and Company became largely our debtors, and by the law of Scotland we have, as against Bowie and Company, a right of retention of these sugars, although they have been paid for, in order to have a sort of security for the subsequent debt which accrued afterwards. That was the defence set up by Hastie and Company. Melrose and Company, who had purchased from Bowie and Company, said—That is most unjust. We have paid Bowie and Company for the whole of these sugars. Though we have not removed them, we might have removed them, as we have a warrant from Hastie and Company to remove them. It is hard that we should lose, and that Hastie and Company should be saved harmless. Melrose and Company therefore instituted proceedings in the Court of Session, having for their object this substantial declaration—*firstly*, that the obstruction of their removal of these sugars was wrongful; *secondly*, that the parties who were obstructing should no longer be allowed to obstruct them; and, *lastly*, that they might recover damages in respect of the obstruction which had arisen.

In order to settle what the rights of the parties were, the Court of Session directed an issue, which I agree with the learned Solicitor-General may be viewed very much in the same category as an action for trover would have been in this country, upon which the whole question of right might be raised, because, although the conclusions of the pursuers, Melrose and Company, are divided into three heads, in truth the case all depends upon the one question—whether there does exist, by the law of Scotland, the right of retention which is contended for by Hastie and Company.

The Court directed an issue, and the terms of the same were—"Whether the defenders wrongfully prevented or obstructed the pursuers in removing 591 bags of sugar, or any part thereof, from the bonded warehouse in which they were deposited?" The case was tried. I need not allude to the first trial, at which there was a miscarriage, but the case was tried again, and the learned Judge who tried it the second time substantially directed the jury that they ought to find for the defenders, because there existed the right for which the defenders contended. I do not mean to say that he put it in that language, but that was substantially the direction which he gave. Against that direction the counsel for the pursuers excepted; and undoubtedly the propriety of that direction involved the whole question in the cause. Therefore the learned counsel for the pursuers at the trial put the matter exactly upon the proper footing. The learned Judge stated to the jury what he conceived the law to be. The pursuers objected to that statement of the law, and took the proper course for bringing the matter into course of judicial investigation by excepting to the direction of the learned Judge. The learned Judge persisted in that direction, and the jury consequently found for the defenders. A bill of exceptions was brought before the Court of Session, and there the question of the propriety of that direction, or, in other words, the question—Whether there does or does not exist, by the law of Scotland, the right of retention contended for, was elaborately argued. In the original Court the learned

[1] He also was allowed to go into the merits of the case, viz., as to whether the defenders had a right of retention of the sugars in the circumstances. It was, however, afterwards decided, on hearing the Solicitor-General, that this part of the argument had been allowed *per incuriam.* As only one side, therefore, was heard on that point, it is unnecessary to report the argument.

Judges were equally divided; and then, pursuant to the statute in such case made, they called in the assistance of three learned Judges from the other Division. Then of the seven Judges five were in favour of the ruling of the learned Judge who tried the case—that is, in favour of the defenders; and the two other Judges adhered to their opinion; so that there was a large majority for the defenders, and the result was, that the verdict went for the defenders.

Now, my Lords, what was the course for the pursuers to take, if they were dissatisfied with this decision? There was no doubt about it, because the statute expressly points out that, within a certain limited time, they are entitled to come, by way of appeal, to your Lordships' House. They have advantages which no other appellants have, because their cause is to be advanced by reason of the nature of the appeal being against a trial, and therefore of a sort not to brook delay. They have advantages given to them, not by the rules of your Lordships' House, but actually by the statute; and it is in consequence of that provision that these appellants now have a *locus standi* at the present moment. They presented a petition of appeal against these interlocutors which overruled the exceptions, and confirmed the learned Judge's ruling; and also against the final decree of the Court, which was a decree applying the verdict—that is, saying what ought to be done upon that verdict; on which application of the verdict they assoilzied the defenders.

Now this House intimated to the learned counsel yesterday, and, indeed, finally decided, that, so far as this was an appeal against the exceptions, or rather against the interlocutors overruling the exceptions, the pursuers had not a *locus standi* here, because they had not come within the time which was limited by the statute. It was argued that that did not signify; that when there was an appeal against a final decision, the parties might, under the 48 Geo. III., c. 151, hook on to that all the previous interlocutors. So it was endeavoured to hook on to the appeal against this final decree the interlocutors overruling the exceptions. Your Lordships expressed a clear opinion that that could not be done, and that the interlocutors overruling the exceptions were not in the category of ordinary interlocutors, but that there was an express provision made as to the time, and that a party coming too late could not be heard. Then the House felt it was possible that it might be open to the pursuers, the appellants, to contend that, although they must take the verdict of the jury as correct, still the final decree, applying that verdict, and applying that verdict by assoilzieing the defenders, might be wrong.

Mr. Anderson, on the part of the pursuers, has argued the case at great length to-day; and I confess at one time I had a doubt whether he was not right to this extent, that we ought to send this matter back to have that cleared up, which seemed at the first blush to be an obscurity in the verdict; but I have now come to the conclusion that that impression was erroneous. Mr. Anderson's clients, the pursuers, are in the character of *actores*, and the defenders Hastie and Company are the *rei*. The *actor* and the *reus* are always in this position:—If the *actor* does not make out his case, the *reus* has nothing to make out, and he is entitled to have an absolvitor. The question is not, I think, whether the verdict sustains the case of the *reus* here, who are the defenders. If it did, I should be strongly of opinion that it does not at all necessarily make out the case of the defenders; but the defenders have a right to say—We do not want to make out any case at all; unless the pursuers make out their case, we are entitled to our absolvitor; and we are entitled to an absolvitor, not because we have established anything, but because the pursuers have established nothing. What is the result of the verdict? The pursuers say—We are entitled first of all to have a declarator, that the defenders have been wrong in obstructing us heretofore; secondly, we are entitled to an interdict to prevent our being restrained for the future; and, thirdly, we are entitled to damages for what you have done. The jury found that the pursuers had never been wrongfully obstructed at all. How does that establish the affirmative of either of your propositions? Mr. Anderson felt the force of that observation, and said—"No, I admit it does not; but I think the case ought to be remitted to the Court of Session to have further inquiry." Why? The issue was an issue settled by the Court, against which there was no appeal. I must beg leave to say, that a somewhat loose note in a case, which has been handed to us just this minute, leads to this conclusion—that you cannot have an appeal from an interlocutor settling an issue. That is a complete mistake. This House never could have meant to lay down any such proposition as that. What the grounds were, upon which the appeal was rejected in that case I know not, but it is quite impossible that this House can have laid down a rule which is not insisted upon by the statute. With reference to an interlocutor directing that a matter shall be tried by issue, the statute says there shall be no appeal; but with regard to an interlocutor settling what the issue shall be, there is no statutable objection to an appeal; and of course this House cannot lay down any rule so preposterous as that it should not be the subject of appeal, when, in truth, the whole merits of the case may be involved in such an interlocutor.

Now, my Lords, how does this matter stand, after getting rid of so much of the appeal as relates to the bill of exceptions? The only remaining complaint is, (not that the matter was not put into proper train at the trial—I doubt whether such an appeal could have been sustained—I rather think that the issue would have raised every question which was necessary to be raised,) after disposing of so much of the appeal as relates to the interlocutors overruling the exceptions,

that the Court came to a wrong conclusion in applying the verdict; that is to say, looking to the verdict, they ought not to have said,—"The defenders are to be assoilzied." How could they do anything else? I quite agree with the observations of the learned Judges on the motion to apply the verdict. Even the learned Judges who dissented from the view, which was taken by the learned Judge at the trial, and by the majority of the Court, were of opinion that no other course could be taken. Certainly not, because the pursuers, who were to make out the case, have simply put the Court in the position of saying—What is to be done when the jury give a verdict saying, that the pursuers were never wrongfully obstructed? What right does that entitle them to? Evidently nothing.

In my opinion the Court of Session came to the only conclusion they could arrive at, and consequently this appeal is altogether unfounded. I shall therefore move your Lordships that the appeal be dismissed, and the judgment of the Court of Session be affirmed. I wish it to be distinctly understood, that, in coming to that conclusion, the House does not mean to express any sort of opinion, one way or another, upon this very important question—whether, by the law of Scotland, there does or does not exist the right of retention which is contended for in this case?

LORD BROUGHAM.—My Lords, I take the same view of the question as that which is taken by my noble and learned friend, and for the reasons which he has given, in which I entirely concur. I agree with the learned Solicitor-General's reference to the case of trover. It seems to me that this is precisely as if an action of trover had been brought to recover these sugars, and then the question for the jury would have been twofold—Was there a conversion (*i. e.*, appropriation) or not? In point of fact, if there was no conversion, *cadit quæstio*, verdict for the defendant. But if there was a conversion, was it a wrongful or a rightful conversion? In the very words of this issue—that is to say, had the party converting, which in this case would be by retention, a right to it from a lien, or from an unpaid share, or whatever the other grounds were upon which he set up his right to retain?

Was not this verdict upon a special issue? In a case of trover the plea would have been "not guilty," which would have covered the whole of the special matter—both the denial of fact and the conversion, which is the gist, as your Lordships know, of the action of trover—conversion in this case being retention. The plea would have covered the rightful or wrongful nature of that retention. Denying the wrongfulness of it and affirming the right would have been in sum and substance a plea of "not guilty." If the verdict had been for the defendant setting up the plea of "not guilty," then the Court would have had to apply that verdict—that is to say, whether the *postea* should be given to the plaintiff or to the defendant. It is just the position in which the Court of Session stood in applying a mere special verdict here. The Court would have said—"Verdict for the defendant, *postea* for the defendant;" that would have been applying the verdict, and that would have made an end of the cause, as this makes an end of the cause.

My Lords, I entirely agree with what my noble and learned friend has said respecting the exclusion of any conclusion touching the opinion of this House upon the very important question of Scotch law which is raised by these exceptions. I lamented yesterday that we had not an opportunity of going into it, and having the case argued. We have had it to-day argued more or less regularly. I do not complain, because I have derived great benefit, and I am sure my noble and learned friend has also, from the very able arguments of Mr. Anderson upon the matter. But in this case we labour under the misfortune that one side has been paralysed upon this point. We have had only the benefit of one side, Mr. Anderson being perfectly alive, whereas the learned Solicitor-General has suffered under the impediment to which I have adverted; we have not therefore had the benefit of his active interference in the argument, a portion of which we have only heard in fact *ex parte*. Even if we had heard both parties, our judgment in this case would not have touched upon the subject upon which they differ, and the grounds upon which the judgment proceeds would not have decided those points of difference.

Appeal dismissed, and interlocutors affirmed with costs.

Appellants' Solicitors, Clark, Grey and Woodcock.—*Respondents' Solicitors*, Richardson, Loch and Maclaurin.