authority to shew, that the owner of one of the rooms in the supposed house to which the passage led, could not alienate that room or any portion of it to another, and that such disponee would not have a right to use the passage.

Reliance was then had upon two cases, in which it was held, that where there are two joint owners of a muir, one of them cannot, without the consent of the other, let to a third party the right of sporting over it. Those cases, however, proceeded upon the special nature of the right attempted to be severed. It certainly was not meant to be decided, that one of two joint owners of a muir may not sell his interest, or any share of it, to as many joint purchasers as he may choose. With respect to the correctness of the decision itself, I am not called upon now to express an opinion.

The same principle must govern the ownership by two or more owners in common of a loch, which is the case here. And I therefore concur with the great majority of the Judges below in the conclusion, that it was competent to Strowan, in 1828, to sell and convey to the respondent a right to the use of the loch, as pertinent to the lands of Kinloch.

With reference to the other question, namely—whether any right to the loch was in fact conveyed to the defender by the terms of the conveyance of 1828, it is to be observed, that the conveyance is, so far as relates to the lands conveyed, in the same language as occurs in the Crown charter of resignation of the 27th June 1636, when Alexander Robertson became the owner of the barony of Strowan. The description in that charter is as follows (I have already referred to it):—"Totas et integras terras, et baroniam de Strowan, comprehendentem omnes et singulas terras, molendina, silvas, piscationes, lacus, (and so on,) cum castris, turribus, fortaliciis, maneriebus, pomariis, hortis, toftis, croftis, molendinis, multuris, silvis, piscariis, lacubus," &c. In the disposition and sasine whereby the lands of Kinloch were conveyed to the defender, the description is substantially exactly the same, except that it is in English, "all and whole the five merk lands of Kinloch or Kinlochie, of old extent, with castles, towers, fishings, lakes, forests, pertinents of the same."

Now, the description in the charter of 1636 of the whole of the lands therein described, as making up the barony of Strowan, coupled with the general words "cum piscariis, lacubus, et omnibus earundem terrarum pertinentibus," was held in 1798 to include a right to the use of the loch for the purposes of fishing, boating, and floating timber, or at least it was held, that with the usage it might be so interpreted. And that being so, I think it follows as a necessary consequence, that a subsequent disposition of a specific part of the lands constituting the barony, together with the same general words added, must be taken to have the same effect, that is, to give to the disponee of part of the lands of the barony as pertinent thereto, the same rights in the lake in respect of the part so conveyed, as he had himself taken on obtaining a conveyance of the whole, subject, of course, to the observation, that, as between Menzies on the one hand, and Strowan and his disponee on the other, no greater or more extended rights could be enjoyed by the latter than if the whole barony had remained entire and unsevered. For these reasons, I entirely concur in the judgment of the Court of Session.

Interlocutors affirmed, with costs.

Appellant's Solicitors, Hope, Oliphant, and Mackay.—*Respondent's Solicitor*, Charles Bruce.

JUNE 12, 1856.

THE MAGISTRATES OF RENFREW, *Appellants*, *v.* JAMES HOBY, and Others, *Respondents.*

Appeal to House of Lords—Competency—Withdrawing case from Jury—Process—*Issues having been sent to a jury to try a question as to a right of free port and harbour, four witnesses were examined by the pursuer, when the parties, on the suggestion of the presiding Judge, agreed that there was no proper question of fact for the jury, and the Judge thereon discharged them, and it was arranged, in order to the disposal of the case by the Court on the notes of the presiding Judge, that each party should be entitled to raise any question of law before the Court, which the notes and record might suggest. The Court of Session having disposed of the case after hearing parties, an appeal was presented against the judgment of the Court.*

HELD—*That the case had, by the consent of parties, been referred to the Court for decision as arbitrators, and that it was therefore no longer subject to the review of the House of Lords by appeal, as an ordinary case.*[1]

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[1] See previous report 16 D. 348; 26 Sc. Jur. 165. S. C. 2 Macq. Ap. 478: 28 Sc. Jur. 470.

The action was one of declarator, that the magistrates of Renfrew had a right of free harbour. The case went to trial on an issue "whether the pursuers have under their charter levied a duty of 2*d.* per ton upon goods loaded or landed, &c., for forty years and upwards." After the examination of some witnesses both parties considered, that there was no proper question of fact which the jury could be called on to decide, and the Lord Justice Clerk, with consent of parties, discharged the jury without a verdict, and in order that the cause might be decided by the Court on the notes, each party being entitled to raise any question of law. The Court ultimately found against the pursuers.

The pursuers having appealed, the respondents appeared and prayed the House of Lords to dismiss the appeal as incompetent, on the ground, that the case having been withdrawn from the jury, it had been submitted to the Court as a referee, and consequently they maintained that it was no longer subject to review. The cases of *Craig* v. *Duffus*, 6 Bell's Ap. 308; 21 Sc. Jur. 205; and *Dudgeon* v. *Thomson*, *ante*, p. 403: 1 Macq. Ap. 714; 26 Sc. Jur. 626; were relied on as settling the point.

The appellants maintained that the appeal was competent—1. Because the judgment was pronounced in the exercise of the ordinary jurisdiction of the Court of Session, and so was open to appeal in the same way as any other judgment. 2. Because no submission to the Court as arbitrators was gone int , either in form or in effect; and any such submission would have been *ultra vires* of the appellants, as provost and magistrates of Renfrew. 3. Because, supposing it could be held, that after the appellants were stopped from concluding their evidence, and the case was taken to the Court as on a pure question of law, the Court proceeded to judge as on a mixed question of fact and law, and to have in itself the functions of a jury, there was in that view of the case a miscarriage in the Court below, and the proceedings taken were irregular, incompetent, and inequitable; and it would be both competent and necessary to obtain the interposition of the House of Lords to redress the irregularities, and to remit the case to be tried anew. *Oswald* v. *M'Whir*, 1 Sh. & M'L. 393, and ii. 399; *Russell* v. *Crichton*, 2 Bell's Ap. 21; and *Matheson* v. *Ross*, 6 Bell's Ap. 379.

Rolt Q.C., for respondents.—This case cannot be distinguished from the two recent cases of *Dudgeon* v. *Thomson*, *ante*, p. 403; 1 Macq. 714; 26 Sc. Jur. 626, and *Craig* v. *Duffus*, 6 Bell's Ap. 308, in which it was held, that, the case having been withdrawn from the jury and submitted to the Court, the latter had decided the matter as arbiters, and not in the ordinary *cursus curiæ*, and therefore that no appeal was competent. In *Dudgeon* v. *Thomson*, there were mixed questions of law and fact, and the Court and the counsel agreed at the trial to substitute the Court for the jury. The Court had no power, but by the consent of the parties, to try such questions of fact, for so long as the interlocutor ordering a trial by jury stood, a verdict of a jury was the only mode of disposing of the question of fact; hence the Court, when substituted for the jury, exercised merely a delegated jurisdiction. The questions in dispute here were questions of fact, viz.—whether certain tolls had been levied within the limits of the charter. The parties, therefore, having elected to take the disposal of the question out of the ordinary course, must abide by the decision of their own tribunal, and cannot complain that no appeal is competent.

Solicitor-General (Bethell), and *Anderson* Q.C., for the appellants.—The two decisions of *Craig* v. *Duffus* and *Dudgeon* v. *Thomson*, were unjust, mischievous, and opposed to all authority. They were unjust and mischievous, because the House chose of its own mere motion to start this objection of incompetency, as a surprise on the parties, neither of whom, nor even the Judge, ever contemplated such a result, as that they would be depriving themselves of the right of appeal, when the Judge suggested that the Court should try the question instead of the jury. In such cases, where both parties clearly mistook their way, it was the duty of the House to direct a new trial, and such was the course sanctioned by the previous authorities. Yet the House treated the parties as if they had submitted to the Court as mere arbiters. But nobody ever heard of an arbitration, where neither of the parties signified his consent to arbitrate. In *Craig* v. *Duffus* the Court had ordered a jury trial, and because the parties before going to trial agreed to take the proof by commission, Lord Cottenham said that was a departure from the regular course; but it was not so, it being quite competent for the Court to direct a proof either by commission or by jury trial.—59 Geo. III. c. 35, § 13. In *Dudgeon* v. *Thomson*, 1st August 1854, in House of Lords, the parties, at the suggestion of the Judge in the middle of the jury trial, that the matters in dispute depended on the construction of written documents, agreed, that the Court was a better tribunal for disposing of them, and withdrew the case from the jury. The present case, however, differs materially from both these cases, for while, in those cases, the matters of fact in dispute were submitted to the Court, here the matters of fact were all disposed of, and the issues exhausted, and nothing but a bare question of law was reserved for the Court. There was no dispute here that the tolls had been in fact levied, but the question was—what was, in point of law, the effect of such tolls being collected at particular places. The Court accordingly treat it as a simple question of law, and call it a question of law in their interlocutor. There is therefore no reason for holding, that the decision of the Court on a question of law is exempted from review, for what was done was in fact

recalling the interlocutor ordering a trial by jury, which had the effect of remitting the parties to their original rights. But if the present case is not distinguishable from those cases, then those cases ought to be overruled. *Dudgeon* v. *Thomson* was a mere corollary of *Craig* v. *Duffus;* and in the latter case Lord Cottenham acted without due consideration of the previous authorities, and his decision should be treated as having passed *per incuriam.* In *Oswald* v. *M'Whir,* 1 Sh. & M'L. 393, the question as to the competency of the appeal was distinctly raised and persisted in, and yet the House overruled it. So the appeal was competent in *Magistrates of Lanark* v. *Hutchison,* 2 Sh. Ap. 386; *Russell* v. *Crichton,* 2 Bell's Ap. 81; *Matheson* v. *Ross,* 6 Bell's Ap. 374; *Marquis of Breadalbane* v. *Macgregor,* 7 Bell's Ap. 43. The present case is, in fact, in the same position as if a special verdict had been found, and the question of law reserved for the Court.

Rolt, in reply.—The House is bound by the two recent decisions of *Dudgeon* v. *Thomson,* and *Craig* v. *Duffus,* even if they had not laid down a wholesome rule, viz., that of preventing appeals on mere questions of fact. The question in dispute was nothing but a question of fact, though the interlocutor, by mistake, describes it as one of law. This case cannot, therefore, be distinguished from the cases referred to—at least there is no substantial distinction. This cannot be treated as a special verdict, for the simple reason that there was no verdict at all. The cases cited on the other side do not bear out the appellant's contention; besides, they were duly considered in the cases of *Dudgeon* v. *Thomson* and *Craig* v. *Duffus,* and it is too late to set them up in opposition to these authorities.

LORD CHANCELLOR CRANWORTH.—I don't think it necessary to take any further time before I propose to your Lordships the course which I recommend the House to take in this case, which is to declare this appeal incompetent. I do not think it necessary to take any further time to consider the matter, because the question was very fully considered by me the year before last, in the case of *Dudgeon* v. *Thomson,* which, I confess, appears to me to be quite undistinguishable from this case, and which, I think, therefore, ought to govern it, even if I entertained, as I do not at all entertain, any doubts as to the propriety or expediency of that decision. I will say a word or two about the other case of *Craig* v. *Duffus;* but this is so exactly like the case of *Dudgeon* v. *Thomson,* that, unless I were to hold that case to have been wrongly decided, I could not, with propriety, express any doubt about the present case.

In the case of *Dudgeon* v. *Thomson,* there was an action, the particulars of which I do not recollect in detail, but I recollect sufficient to enable me to state the substance, which was this:—That the pursuers in that case sought to make the respondent liable for the purchase of an estate, because, having purchased it as agent for another, or being alleged to have purchased it as agent for another, either it ought to be considered that he really was purchasing it for himself, or that, if that were not so, he was purchasing it as agent for a man whom he knew to be insolvent, and ought to have so disclosed to the vendors; or, *thirdly,* that he purchased in circumstances which necessarily made him in the nature of a guarantee or surety for the solvency of the purchaser. In order to decide those questions of fact, whether that view of the case was correct or not, three issues were directed, raising these distinct points:—*First,* whether he purchased for his own benefit, because then, of course, he would be responsible for the purchase money. *Secondly,* if he did not purchase for his own benefit, but purchased as agent for another, whether that other person was known to him as an insolvent person. And, *thirdly,* whether, in the course of the transactions connected with that purchase, he did make himself liable as guarantee or surety for the purchaser. Those three issues were directed, and when they came on to be tried, a great deal of documentary evidence was offered, consisting of letters and other papers that had passed between the parties, tending, as the pursuer alleged, to prove the affirmative of those issues, but not leading to that conclusion, as the defender contended. It was not a case in which there was any conflict of credibility of witnesses, because it was all dependent upon the construction fairly to be put, or the inferences fairly to be deduced from those letters and documents. And, therefore, after the evidence had all been given, either by the suggestion of the parties or of the Judge, I am not sure which, but by the consent of both the Judge and the parties, it was agreed, that the whole matter should be withdrawn from the jury, and submitted to the Court, and that the Court should find that which it would have been the duty of the jury to find but for that agreement. It was then remitted back to the Court, and the Court found on these issues, I think, if I remember rightly, for the defender upon the first of those issues, and for the pursuer upon both the others; however, certainly they found for the pursuer upon the last issue, namely, that the defender had made himself liable to guarantee the solvency of the purchaser. Of course, no other question then arose, because, as he had done so, he was bound to pay the money, and that was the result. This matter having been brought before your Lordships' House by way of appeal, what was attempted was this, to shew that the Court had arrived at an erroneous conclusion in point of fact—that they ought not to have found the issues as they did find them. In advising the House as to the decision to be come to in that case, I certainly stated with very great confidence, that that was a course that could not be taken. If it had been left to the jury to decide, there would have been no means of calling their decision in question before

this House. There might have been a motion before the Court for a new trial, upon the ground of the verdict being unsatisfactory, or contrary to evidence. That, of course, is excluded, when you find that the verdict is one found by the Court. But the question of fact never could have been brought by way of appeal before the House of Lords. It was, in truth, an agreement by the parties to substitute the Court for the jury, and when the Court, in pursuance of that delegated authority, found the issues, they were *functi officio*. The finding upon the issues was considered just as if it had been given by a jury, and no appeal was competent.

On the propriety of the course which your Lordships took upon that occasion, I confess that, whether I look at the matter upon technical views, or upon views of substantial justice, I do not entertain one particle of doubt. That, technically, it was right, no person can doubt. That it was in consistency with principles of substantial justice, appears to me to be equally clear, because nothing is less conducive to substantial justice than encouraging litigation and appeals upon questions of fact which have been submitted to a jury, who have heard the witnesses, and who, therefore, had the best means of forming a judgment. I think, therefore, that the recommendation which I ventured to give to your Lordships, and which your Lordships followed upon that occasion, was perfectly correct.

Now, I must own further, that, looking at this case, it appears to me that it is exactly the same case. In this case the town authorities of Renfrew claim that they were entitled, under an old charter of the year 1703, to certain dues to be levied upon goods imported into that town. That was denied by the defenders, who were shipbuilders, and other persons residing at Renfrew. And the question turning entirely upon how far there had been a levying of tolls in conformity to this admitted charter, an issue was directed for the purpose of having that question properly tried.

The issue was this:—It being admitted that a royal charter was granted in the year 1703, conferring certain rights, powers, and privileges upon the magistrates and burgh of Renfrew; and in particular, conferring on said magistrates and burgh a right of harbour within the limits or boundaries expressed in the charter, the question was—"whether the magistrates and town council of Renfrew, by themselves or their tacksmen, have, under the said charter, levied a duty of twopence per ton upon goods loaded or landed within the bounds of the said grant of harbour, excepting coals, dung, or lime for manure, to or for the use of residing burgesses, and as to these articles, to the extent of one half of the said dues, and that for upwards of 40 years prior to June 1851." That issue came on to be tried. Some documentary evidence was put in, and then four witnesses were examined, who were inhabitants of Renfrew; one, I think, was merely a gentleman who had made a plan of the harbour, and the three other witnesses were residents in Renfrew, who gave evidence tending to shew, as the pursuers contended, that these dues had been levied, and that they had been levied in conformity with the charter. There was no dispute that the dues had been levied, but the real question was—whether the evidence did not shew, that they had been levied *alio intuitu*, not by reason of a right conferred by that charter, but from some other cause which would not entitle the pursuers to that for which they were contending.

The evidence having all been gone into, that was done which is substantially exactly the same as what was done in the case of *Dudgeon* v. *Thomson*. The note says—"At this stage of the trial, both parties concurred in the view, that there was no proper question of fact which the jury could be called upon to decide"—not, I must observe, a very accurate way of putting the matter. It ought to have been said that it was not a question upon which the jury could have to decide the facts, properly so called; but that they would have to decide what was the rational inference from the facts that were proved. But, however, putting it so, "the Lord Justice Clerk, with the consent, and at the desire of the parties, discharged the jury without a verdict, and in order that the case might be decided by the Court upon the notes, each party being entitled to raise any question of law which the notes and record suggest." It comes back, and is argued before the Court upon that evidence, and then the Court being, as I have no hesitation in saying, by the consent of the parties, put by them to find that which, but for what they were so doing, the jury would have been bound to find, the Court comes to this conclusion—"Having heard parties' procurators on the questions of law" (as they call them, though truly they are questions of fact) "raised by them on the notes of the evidence taken at the trial, and reserved for the Court, find that the levy proved of twopence per ton on goods loaded or landed in the course of the canal of Renfrew, being goods exported from or brought into the said burgh by means of the said canal, or thereby sent into or brought from the river Clyde, was not in law a levy of proper harbour dues by the burgh of Renfrew, in virtue of the charter of 1703, giving them a grant of free harbour and seaport on the Clyde, and authorizing them to levy them, and therefore that such levy cannot form any warrant for the execution."

Now the only distinction that is attempted to be made between this case and that of *Dudgeon* v. *Thomson* is, that the learned Judges in their finding say, that they find that "in point of law." If the jury had said "we find, in point of law, that it was not a levy in pursuance of the charter," that would not have made it less in truth a finding in point of fact and not of law. It is not a question of law at all. The question to be decided was one of fact—whether, in pursuance of the

charter, the dues had been levied. That being the matter to be decided by the jury, the parties agreed that it should be submitted to the Judges. The Judges found that the dues were not levied in pursuance of the charter, and then, no doubt, all matter of law is reserved. What would be the consequence of those tolls having been levied, if not in pursuance of the charter, is an open question; but the question, whether the Judges properly came to that conclusion, is a question which is not open, but which must be taken to have been found by the jury, although not found by the jury but the Judges. It was only so found by the Judges, because the parties agreed to substitute them for the jury. I am therefore decidedly of opinion, that this case comes clearly within the decision in *Dudgeon* v. *Thomson*, and that it would be most mischievous to admit appeals of such a character.

That being so, I might feel myself absolved from saying anything more upon the subject, but I quite admit with the learned Solicitor-General, that the question is one of considerable importance, and I do not at all regret that it has been fully canvassed at the bar. The learned Solicitor-General has very much questioned the propriety of a decision which occurred seven or eight years ago, in the year 1849, in the case of *Craig* v. *Duffus*. That case differed from the present case and the case of *Dudgeon* v. *Thomson* in this respect, that the parties did not leave the Judges, as it were, to be put in the place of the jury, to find upon evidence that had been submitted to the jury what the verdict ought to be. But before the matter came on for trial, they agreed that, instead of its being tried by a jury, the jury should be discharged, and that the whole question should be gone into in the ordinary mode of investigating matters of fact before the Court of Session, where jury trial is not resorted to. A most laborious and protracted investigation took place accordingly, and the Court came to a decision. And what this House determined was, that although, if there had been no question about a jury at all, if from the first that investigation had been made, as eventually it was made, by a commission, and other modes of trial, a finding in that case which would have been a finding that was capable of being brought by review, yet that, in truth, the course, in which the matter had been conducted, had constituted the Court, not a Court deciding *secundum cursum curiæ*, but deciding in the character of arbitrators. If this House was right in that conclusion, it followed as a matter of course that that, which the arbiters had found as fact, could not be subject to be canvassed by any Court of appeal afterwards. The parties had made their own tribunal, and by the decision of that tribunal they must be bound.

Now I think that decision was perfectly right, except that upon one point I confess a doubt occurs to my mind, and that arises from something that fell from Lord Campbell in his judgment, in adverting to the rule arising from the statutes, that there can be no appeal from an order directing a matter to be tried by a jury, that being not a matter capable of being appealed. In that case there was an order directing a trial by jury, and consequently, that order standing, the trial must be taken to have been a trial by jury, and any divergence from it merely a divergence in which the parties had agreed to constitute some other tribunal their judges, in the nature of arbitrators. Lord Campbell says—"An order was made that the case should be sent to a jury. Under those circumstances the case stands precisely in the same position as if it had been one of the enumerated cases that must be referred to a jury. The parties might, by consent, have set aside that interlocutor, and have restored things to the same situation that they were in before the interlocutor was pronounced." Now I confess, that in the course of this argument a doubt has occurred to my mind, whether it might not have been successfully contended, that what took place at the trial, or before the trial at the opening of the intended trial in *Craig* v. *Duffus*, might, by fair implication, have been held to amount to a consent by the Court and the parties, that the order for the trial by jury should be discharged. And if Lord Campbell be correct, as I have no doubt he is, that the Court, with the consent of the parties, might discharge any prior interlocutor, then it would have laid the matter open, and it would have been a matter instigated by the Court, according to its ordinary course of investigation, not embarrassed by any reference to a jury. But unless that suggestion can be adopted, I confess that not only I do not see any ground for questioning the propriety of that decision, but I think it is a decision which the House was necessarily bound to arrive at. Standing the order of reference to a jury for trial, it was impossible to take the decision of any other body as anything else than the decision of a conventional tribunal incapable of being made a subject of appeal.

Several cases prior to this of *Craig* v. *Duffus* have been referred to in the course of the argument, as being calculated to throw doubt upon that case and upon those which have followed it, viz., *Dudgeon* v. *Thomson*, and the present case. With regard to *Dudgeon* v. *Thomson*, I do not think that that case, any more than the present, is at all necessarily dependent upon *Craig* v. *Duffus*, because in *Dudgeon* v. *Thomson* (and I think exactly the same argument applies in this case) there was evidently no intention whatever to discharge the order for a trial by jury. On the contrary, that order was meant to stand; and it was only meant to substitute the finding of the Court as probably being likely to be a more rational finding than that of the jury.

Then the other cases that were referred to, I do not think, ought to have any influence on your Lordships' minds, even if they were at variance with the subsequent cases, because if they are at

variance they have been overruled. Unless those other cases can be shewn to have passed hastily or *per incuriam*, or by oversight, (which I think they certainly did not,) the later cases must prevail. But I do not think that when those cases are looked at, it is at all difficult to reconcile them with those that have been subsequently decided. There was a case which came before Lord Gifford during the time that he presided at the hearing of Scotch appeals, which was, I think, in the year 1824—*Magistrates of Lanark* v. *Hutchison*, 2 Sh. App. 386. That was a case before the Jury Court was abolished. Now we know that the Jury Court is united with the Court of Session. In that case there had been a remit to the Jury Court to settle the issues, and eventually to try them. But the Jury Court, pursuant to the authority which is given to it by the statute, sent it back to the Court of Session to have certain preliminary inquiries made by the Court. The Court made those inquiries, and came to the conclusion that the case had better not go to an issue at all, and then they made an interlocutor—"Recall remit to the Jury Court, and direct another course of trial." The question arose—whether they could do that, and the Court below held, and this House affirmed that decision, that they certainly might, and not only that they might do it, but they held, according to what was stated by Lord Glenlee in the Court below, that it was unnecessary to say "recall remit to the Jury Court," when the Jury Court had sent the matter back to the Court—that they were then in just the same position as if there had been no sending of the case to the Jury Court, and that the Court had full power to deal with the case. That was the decision of the Court below in that case, which was affirmed in this House.

Then the next case was one which was argued at very great length, and also with great care, and attended to very much by my noble and learned friend (LORD BROUGHAM). That was the case of *Oswald* v. *M'Whir*, 1 Sh. & M'L. 398. In that case certain issues were directed, and at the trial the parties agreed to a statement of facts from which the Court might decide what ought to be done. They decided, in truth, what were the facts that they thought exhausted the subject. The Court of Session came to a certain conclusion upon these facts so found, and what they decided in conformity with those facts was brought by way of appeal to this House. There is no doubt this House can deal with an appeal from an application (as it is called) of the verdict. And the House in looking at the finding in that case, came to the conclusion that, in truth, the facts that had been agreed upon were not facts which exhausted the subject — that it was impossible to treat what had been found as a satisfactory finding—that there had been, in truth, a mis-trial, for that what had been found was not a sufficient finding—that it was not a finding upon which they could decide satisfactorily, either for the pursuer or for the defender, for that there were certain necessary ingredients to enable justice to be done, as to which there was no finding at all. Consequently this House remitted the case back with the direction that there should be a new trial. It appears to me that that has no bearing whatever upon the present case.

Then there was the case of *Lord Breadalbane* v. *Macgregor*, as to which I own I am puzzled—not that I think it bears upon the present case, but I am puzzled, because, in spite of what has been said, I do not see by what authority an appeal was entertained from an interlocutor which directed an issue. It is said that it was not an issue directed by the Lord Ordinary. That is not material, for I observe, in looking at 59 Geo. III. c. 35, § 15, it is enacted, "that it shall not be competent by representation, reclaiming petition, bill of advocation, appeal to the House of Lords, or otherwise, to bring under review any interlocutor by the said Divisions, Lords Ordinary, or Judge of the Admiralty, ordering a trial by jury." It is quite clear that the appeal in that case was an appeal (at least as I read it) against an interlocutor directing a trial by jury. I cannot therefore reconcile that with the statute. At the same time I must own, that, on looking hastily at a case just handed to me during the argument, it is very probable that I have overlooked some circumstance that might have given jurisdiction in that case; at all events it is sufficient for the present purpose to say, that it has no bearing upon the case now under discussion.

With regard to the case of *Russell* v. *Crichton*, 2 Bell's Ap. C. 81, upon examining it, it is admitted that it has no bearing upon the point; and *Matheson* v. *Ross* also, I think, is a case which I should particularly refer to as illustrating the true principle that ought to guide the House in questions of this sort. In that case there was a verdict by a jury; but the question was reserved to the Court of Session, to say whether certain evidence ought or ought not to have been received. If it ought, the verdict was to be one way. If it ought not, the verdict was to be the other way. And the question was raised—whether it was competent to the parties to appeal against such a decision, because it was said that it was not a matter upon which there was any authority given by any statute to appeal. But Lord Campbell, I think, put it upon a perfectly satisfactory ground. He says—"It is strenuously contended on the part of the respondent, that this appeal is incompetent, and that the interlocutor is final, precluding any further proceeding. Now it is quite clear," he says, "that in the general case there is an appeal from the Court of Session to your Lordships' House. The *onus* therefore lies upon the respondent to shew how the appeal is taken away in this case." And then he goes on to shew, that the only question is, whether that appeal is taken away. And he shews, by canvassing the clauses of the statute, that it is not taken away, and therefore the decision of the Court in point of law, as to what ought in

the result to be done upon certain ascertained facts, was a matter competent to your Lordships to adjudicate upon by appeal. Lord Campbell says—"My Lords, clearly the scope of legislation upon this subject was, that the determination of facts should be final; but that still there should be the right for the protection of the parties, and for the uniformity of the law, to take the opinion of your Lordships upon any point of this sort (that is, any point of law) that might arise."

Now it does not matter whether the jury or the parties, or, I will even go the length of saying, the learned Judges, have chosen to call anything a matter of law. Their calling it by that name cannot make it matter of law. What was decided in this case was strictly matter of fact. It was matter of fact found by the Judges, in pursuance of a delegated authority given to them by the parties putting them in the place of the jury. And against that finding there can be no more jurisdiction in this House to entertain an appeal than there would have been, if, instead of having been decided by the Judges, it had been decided by a jury. Therefore I move your Lordships, that this appeal be dismissed as incompetent, and with costs.

Solicitor-General.—Your Lordships will not give any costs of this hearing. This hearing was directed at the request of the Appeal Committee, for the purpose of enabling the Appeal Committee to make the proper order. If you dismiss the appeal, therefore, you will dismiss it with costs as from the time when the matter came before the Appeal Committee, not including the costs of this hearing.

LORD CHANCELLOR.—I think we must dismiss it with costs. This was the opinion of the committee:—"Matter of respondents' petition as to incompetency, to be argued at the bar by one counsel of a side on an early day in next session. Appellants and respondents at liberty to lodge a printed case confined to matter of competency of appeal, if they shall be so advised."

Solicitor-General.—That is about lodging the case, but the Appeal Committee could not have dismissed it with costs.

Mr. Richardson (agent for respondents).—The petition prays that the appeal may be dismissed with costs.

Solicitor-General.—What the petition prays is an immaterial thing. The House here has been acting, as it were, merely for the purpose of assisting the Appeal Committee. You have not yet the appeal brought to be heard by the House. You will make the order now which would have been made by the Appeal Committee.

Mr. Richardson.—It would be very hard upon the parties to be deprived of the costs.

Solicitor-General.—Another reason for not giving the costs of this hearing is, that it is a matter of public concern.

LORD CHANCELLOR.—As a matter of form, the appeal is dismissed by the House as incompetent, and the matter of costs is referred to the Appeal Committee.

Appeal dismissed as incompetent, and the question of costs referred to the Appeal Committee.

Appellants' Agent, James Moore, S.S.C.—*Respondents' Agents*, Gibson-Craig, Dalziel and Brodie, W.S.

JUNE 16, 1856.

THE CALEDONIAN RAILWAY Co., and THE GLASGOW, GARNKIRK, AND COATBRIDGE RAILWAY CO., *Appellants*, *v.* MARK SPROT, *Respondent.*

Railway—Disposition—Sale—Reservation of Minerals—Support of Surface—Construction—*S., a proprietor, sold to a railway company a portion of his land contiguous to the line, reserving right to work the minerals, but the conveyance was made subject to the conditions of an act of parliament previously obtained by the company, which provided, that it should not be in the power of any proprietor reserving right to minerals to work them, without previous notice and security for damage to the line. It turned out, that the minerals could not be worked without danger to the line.*

HELD (reversing judgment), *That in his disposition S. by implication conveyed to the Co. the right to all necessary support of their line of railway, and he could not derogate from that conveyance by working the mines and removing that support.*[1]

An action of declarator and damages was raised at the instance of Mark Sprot, Esq. of Garnkirk, against the railway companies, in respect to certain minerals belonging to him under and adjacent to the Caledonian Railway.

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[1] See previous report 16 D. 559, 955: 26 Sc. Jur. 255. S.C. 2 Macq. Ap. 449; 28 Sc. Jur. 486.