parish.—See *Blantyre* v. *The Earl of Wemyss*, 22d May 1838, 16 S., 1009.

"(2) The Lord Ordinary also attaches great weight to the admission made by the common agent in his answers to Miss Morison's condescendence, lodged in 1843, in which the common agent expressly admits that Preston's feu (the lands in question) was a 'part of Naughton, and valued in 1637, along with the other parts of that estate.' Great weight has been given to admissions by a common agent, who, without any express authority, can bind all the heritors, as was held by the House of Lords in *Hopetoun* v. *Ramsay*, 22d March 1846, 5 Bell's Appeals, 69. The Lord Ordinary is not satisfied with the objector's answer to this, that the objector is not a mere heritor, but titular of part of the parish, and that as titular the common agent did not represent him. The Lord Ordinary thinks that the common agent represents all who have a common interest in the allocation of the stipend, and, among others, the titular or titulars, who have often a vital interest in the allocation, and who are really the heritors, or the heritable proprietors of the teinds. Of course, there are many cases where the titular's interest is opposed to that of the general heritors, and then he appears for himself. The common agent in the present case was really acting for all concerned. Anciently the titular himself used to prepare the locality, and the practice of electing a common agent superseded this."

Mr Stuart reclaimed.

ROBERTSON for him.

SHAND and WEBSTER for the respondent.

The Court adhered, holding that Lord Ardmillan's judgment had decided these eight acres to have been valued; that the words in that interlocutor, "part of the barony of Naughton" were descriptive and not taxative, and that his Lordship's finding, that "the lands condescended on" were valued, made it necessary to look to the condescendence, where the eight acres were included under the general name Kilburns. They held that, the Lord Advocate having had a title to try that question on behalf of the Crown, it could not again be raised by Mr Stuart, who was a party to the locality.

LORD NEAVES differed, holding that Lord Ardmillan's interlocutor was ambiguous,—that in a question of *res judicata* it must be construed strictly, and without reference to its probable intention, and that its terms were not inconsistent with Mr Stuart's interpretation. His Lordship held, further, that it was necessary that the same *media concludendi* should have existed in the former question, which was not the case here, it having been then erroneously supposed that there was only one Kilburns, whereas here the allegation was that there were two.

Agents for Mr Stuart—W. H. & W. J. Sands, W.S.

Agents for Miss Morison—R. & J. A. Haldane, W.S.

Friday, February 24.

FIRST DIVISION.

SPECIAL CASE—ROBERT MORTON AND JOHN GARDNER.

Process — Jurisdiction — Privative — Competency— Special Case—Public-House Act. A lease of a public-house incorporated *verbatim* as conditions of the lease the whole conditions of the statutory certificate (25 and 26 Vict. c. 35, schedule A, No. 2), so far as they should be binding by public law. The landlord and tenant presented a Special Case, in which a certain sale by the tenant was set forth, on the facts of which parties were agreed, and the Court were asked to decide whether the sale was a breach of the "certificate and lease." The Court (*diss.* Lord Kinloch) *held* the question incompetent, and *dismissed* the Special Case, on the ground that the construction of the Public-House Statute was exclusively appropriated to other Courts, and although in certain cases, in order to determine the civil rights of parties, it was competent and necessary for the Court to decide *incidentally* a point not within their jurisdiction, it was incompetent to decide the point where its decision was the sole exercise of jurisdiction craved, and where parties were under no necessity of resorting to this Court.

The nature of this Special Case will appear from the opinion of the Lord President.

M'LAREN for Morton.

The SOLICITOR-GENERAL and SCOTT for Gardner.

At advising—

LORD PRESIDENT—The first party to this case, Mr Robert Morton, is a wholesale wine and spirit merchant in Glasgow, and also proprietor of a house in Broomielaw Street, which is let as a public-house to the second party, Mr John Gardner, on a lease for four years from Whitsunday 1870. The peculiarity of the lease is that it incorporates the whole provisions of the statutory certificate which requires to be obtained by a public-house keeper, being No. 2 of schedule A annexed to the Act 25 and 26 Vict. c. 35. The conditions of the certificate are specially made conditions of the lease, but only in so far as they are at the time binding as public law. The lease goes on to stipulate—"And this lease is entered into on the express condition that if the said John Gardner do any thing contrary to or in violation of the said conditions either specially or generally before set forth, according to the true intent and meaning which the same have in the Acts of Parliament relative to the respective matters contained in the said general or special conditions before written or referred to or in his certificate, then, whether there shall have been or be any complaint by the Procurator-Fiscal or any other person or not, this lease shall, at the end of one month from the date of a written notice by the said Robert Morton or his foresaids to the said John Gardner or his foresaids, of his intention to avail himself of the consequence of any contravention of any one or more of the conditions of this lease, *ipso facto* become null and void, without the necessity of a declarator or other process of law, and the said John Gardner may be instantly thereafter ejected from the said shop or premises, and he binds himself and his heirs to remove accordingly; but it shall be in the option of the said Robert Morton and his foresaids, instead of enforcing the said *ipso facto* forfeiture of the lease as a direct consequence of any such contravention, to interdict the said John Gardner and his foresaids from continuing such contravention either as a violation of this lease or as a violation of the statutes or laws of the land." It is stated in the Special Case that on the 10th September 1870 (the lease having been signed ten days before), a sale

of spirits was made by Gardner, which Morton says is a breach of the certificate, and Gardner says is not. One of the conditions of the certificate is "that the said John Gordon do not sell or supply exciseable liquor to boys or girls apparently under fourteen years of age." The Special Case sets forth—"On the 10th day of September last (1870), a young girl, apparently under the age of fourteen years, and who stated her age to be thirteen past in answer to inquiry made of her, came into the said shop with a bottle and sevenpence, and asked for a gill of whisky, stating, in answer to an inquiry, that she had been sent for it by and for her father, giving his name and address. In point of fact, the girl had been so sent by her father. The whisky was delivered to her in the bottle for her father, and was taken home to her father's house and delivered to him. The said Robert Morton has intimated to the said John Gardner that he regards the sale or supply of whisky under the foresaid circumstances as a breach of the said condition of his certificate and of his lease, and requires the said John Gardner to desist in future from selling or supplying exciseable liquor to customers through the intervention of messengers apparently under fourteen years of age, sent and known to be sent by such customers for said liquor."

The Court are asked to give judgment on the following question—"The question for the opinion and judgment of the Court is, whether said act of selling or supplying exciseable liquors in manner before mentioned is a breach of the conditions of said certificate and lease?" The case then goes on to suggest—"In the event of the Court answering the said question in the affirmative, the judgment sought is a decree declaring that the said prohibition in the said certificate against selling or supplying exciseable liquors to girls or boys apparently under fourteen years of age, prohibits the sale or supply of such liquors in manner before mentioned, and that the said John Gardner has, by selling or supplying as aforesaid, contravened the conditions of his lease, and also interdicting the said John Gardner from selling or supplying exciseable liquors in manner before mentioned. In the event of the Court answering said question in the negative, the judgment sought is a decree declaring that the said prohibition in the said certificate against selling or supplying exciseable liquors to girls or boys apparently under fourteen years of age, does not prohibit the sale or supply of such liquors in manner before mentioned." It is hardly necessary to say that in so far as this question proposes that we should give a decree of declarator of contravention, or an interdict, these things are utterly incompetent in a Special Case.

There remains the question of law—in other words, whether Gardner has committed an offence under the Public-House Act. This raises an important question, Whether we are at liberty to answer such a question under a Special Case? I think that the Court are not at liberty to answer any such question, and that they have no jurisdiction to do so. The Act 25 and 26 Vict. c. 35, which is the existing statute regulating public-houses, enacts that certain things shall be held statutory offences to be tried in certain specified Courts. It then provides (section 33) that where a person has been convicted for breach of his certificate he shall have a right of appeal to the Court of Justiciary, but only on certain limited grounds. The 34th section excludes all other review of sentences under the Act. The jurisdiction thus conferred is privative and exclusive of the Court of Session. We could take no cognisance of an offence against the statute as such. The question then arises, whether parties, who might have stood in the relation of prosecutor and accused in a criminal Court, are entitled to come to us as parties to a Special Case. I have said that I think they are not. It would be practically to set aside the statutes which exclude our jurisdiction. Cases may arise where this Court may consider incidentally questions not naturally within its jurisdiction. This is in virtue of the maxim of the civil law incorporated into the law of Scotland, "*Cui jurisdictio data est, ea quoque concessa esse videntue, sine quibus jurisdictio explicari non potest.*" This maxim has been applied, for instance, in a suit for a civil debt, if it is necessary, as a step to determine a question in its own nature criminal. There the Court is under necessity, and is entitled to decide the criminal question as a step towards ascertaining the legal remedy that one party is seeking against the other. We must not extend the principle to cases where it has no application. The determination asked for is not a step to a legal remedy, but the Court, having answered the question, is to stop and go no further. There is no necessity for the Court to determine the question in order to explicate its own jurisdiction. The answer of the question is the sole exercise of jurisdiction, and that is precisely the jurisdiction which the law has given to another Court. I am therefore of opinion that this is an incompetent question to lay before the Court, and that we are not entitled to answer it.

LORD DEAS—This lease contains a great variety of conditions, a breach of any ono of which is to create an irritancy of the lease, with an option to the landlord to interdict the tenant. The conditions are exceedingly numerous, some of them important, and some of them very trifling; and they are all said to have the same meaning as they have in the Statute 25 and 26 Vict. c. 35, so that it is impossible under this lease to decide that anything is a contravention of the lease without deciding that it is a contravention of the statute. If this alleged contravention of selling to a girl apparently under fourteen might be the subject of decision in a Special Case, so might the contravention of any or all of the other things mentioned. I regard this as contrary to common sense. When we turn to the statute we find the penalties therein enacted and the consequences that are to follow. Appeal is allowed in certain cases to the Court of Justiciary, and all other review is excluded. I quite agree with your Lordship that we may often be called upon to decide questions incidentally which we could not decide directly. We decide them only so far as is necessary. I cannot hold that parties, by the particular mode in which they frame a contract, can extend one jurisdiction *ad infinitum*, so as to make crimes triable by the civil court instead of the criminal. There is no necessity for such a course. The statute has provided the appropriate forms and remedies, and committed the jurisdiction to certain other tribunals. We cannot decide that this thing said to have been done was illegal without deciding that the public-house keeper committed a crime, the jurisdiction in which is committed to another Court. The decision could have no effect on any procedure taken there. And what effect is our decision to have on

the civil rights of parties, except that one may be able to say to the other, "I told you I was right, and you were wrong." How it might have stood if the conditions had been expressed without reference to the statute is a different question. It is not the question here, for it is explicitly stated that the conditions are only to be binding in the lease so long as they are binding by statute. But I am not prepared to say that, even if there had been no reference to the statute, we could have been called upon to decide the question. It is not every irritancy in a lease that will be effectual. I certainly hold that, if it were clear that parties were creating a pretended case simply to get some abstract point decided, we could not be compelled to determine it. But that is not the ground I go upon, though this case looks very like a pretended case. Ten days after the lease is signed, a little girl comes in and asks for the whisky, and about a month after this Special Case is presented. I think that both parties want a judgment one way; and, if so, one of the consequences of allowing such cases would be that on one side we should have no *bona fide* argument.

LORD ARDMILLAN—The construction of the Public-House Act is matter for the Court of Justiciary. It is so in its nature, and by express enactment. We have no jurisdiction to decide directly the question of breach of the statute. But in deciding another question, fairly and properly raised, we might solve for our own satisfaction a question in which we have not jurisdiction, because it may be necessary to explicate our jurisdiction in a question in which we have. The parties here, by the ingenious device of throwing the provisions of the statute into a lease, think that they will get a judgment from this Court. To give such a judgment would, I think, be contrary to the spirit of the Court of Session Act, 1868. We should have Special Cases presented where there was no real dispute. I cannot see any dispute here. The lease is satisfactorily and amicably adjusted. The landlord has apparently no interest in the decision which he asks, unless, indeed, his moral convictions are extraordinarily sensitive. Within ten days of signing the lease this friendly tenant breaks the lease openly; the facts are all known to the landlord. I must think that this Special Case is framed so as to get a judgment in favour of the tenant. In any view, we should decline giving any opinion.

LORD KINLOCH—I am unable to concur in the view now expressed.

I rest my difference of opinion on the terms of the Court of Session Act, 1868. It is provided by the 63d section of that Act—"Where any persons interested, whether personally or in some fiduciary or official character, in the decision of a question of law, shall be agreed upon the facts, and shall dispute only on the law applicable thereto, it shall be competent for them, without raising any action or proceeding, or at any stage of an action or proceeding, to present to one of the Divisions of the Court a Special Case, signed by their counsel, setting forth the facts upon which they are so agreed, and the question of law thence arising upon which they desire to obtain the opinion of the Court; and which Case may set forth alternatively the terms in which the parties agree that judgment shall be pronounced, according to the opinion of the Court upon the question of law aforesaid." In such a case it is declared the Court shall "give their opinion or pronounce judgment as the case may be."

It is clearly not necessary that the parties presenting such a Case should ask from the Court any judicial remedy, still less that they should state that a judicial remedy either has been or is to be entered on. They do not even require to ask from the Court a judgment. They are entitled simply to ask an opinion. Undoubtedly they must be *bona fide* in dispute about the law applicable to the facts agreed on. The point in dispute must touch civil rights and obligations; this is clearly implied. It must further be fairly said to be a point which, independently of the statutory provision, could have been brought into discussion, and been made the subject of a judgment, by using one or other of the ordinary forms of process known to the Court. But if these requisites concur, I conceive the Act lays on the Court the duty of giving their opinion on the Case presented.

In the case now before the Court, the parties present themselves as landlord and tenant respectively, in a lease of a public-house for four years from Whitsunday 1870. If I had it proved to me that this lease was not a *bona fide* contract, but got up merely for the purpose of stealing an opinion from the Court, on a point of general importance, I would decline to answer the questions. But there is no evidence of this; and I must assume the reality of the lease. It is provided by one of its clauses, that if the tenant shall contravene any of the conditions of his certificate, which are conditions statutorily imposed, the lease shall, in the landlord's option, become null and void; a reasonable and not uncommon stipulation. The object of the Special Case is to obtain the opinion of the Court whether a state of facts, admitted to have taken place, formed such a contravention, and whether, therefore, the lease had or had not become null. I consider this to be a dispute about a matter of civil right, such as the statute contemplates when authorising Special Cases. It is a dispute which might be brought to issue, and the judgment of the Court obtained on it, by the form of a declarator of irritancy. I think the same opinion as might be given in such a declarator is obtainable as a matter of right under the Court of Session Act 1868, "without raising any action or proceeding," by means of a Special Case.

It appears to me that in this we should not in any sense be travelling beyond our proper jurisdiction, directly or indirectly. It is within our jurisdiction, and I think within our duty, to construe any Act of Parliament where the construction bears on a matter of civil right. The Act may have mainly in view the imposition of penalties to be sued for in a court of criminal jurisdiction. But with this, its main object, the regulations which it lays down, on considerations of public policy, may be such as may fitly be adopted in civil contracts, and the breach of these declared to be a forfeiture of the civil rights created by the contract. Where such has been the case, I think the Court is strictly exercising its proper civil jurisdiction, when construing the Act of Parliament, with reference to the bearing of its provisions on the point of civil right brought in issue.

On these grounds I feel compelled to dissent from the refusal to entertain and pronounce judgment on this Special Case. But your Lordships being all of an opposite view, I, of course, intimate no opinion on the questions presented in the Case.

The Court dismissed the Special Case.

A similar Special Case for the same parties, in regard to the condition in the certificate which prohibits sale by other than the imperial standard weights and measures, was also presented, and dismissed on the same grounds.

Agent for Robert Morton—A. Kelly Morison, S.S.C.

Agent for John Gardner—John Galletly, S.S.C.

Friday, February 24.

SECOND DIVISION.

HENDERSON AND OTHERS *v.* ANDREW.

Superior and Vassal—Minerals—Property. A superior bound his vassal by a feu-contract to build and maintain in all time thereafter a house of a particular description, and also reserved the minerals to himself, with full power to work, &c., "and that free of all or any damage which may be thereby occasioned to the said second party or his foresaids." *Held* (affirming Lord Ormidale's interlocutor, *diss.* Lord Justice-Clerk) that the superior was not entitled to conduct the workings in such a way as to destroy a house built in accordance with the stipulation in the feu-contract.

This was a process of interdict, and was commenced in the Sheriff-Court of Lanark by a petition at the instance of William Jackson Andrew, solicitor in Coatbridge, against Robert Henderson and Richard Dimmack, carrying on business at Drumpeller, Coatbridge, as coalmasters, under the firm or style of The Drumpeller Coal Company; and also against David Carrick Robert Carrick Buchanan, Esq., of Drumpeller, for any interest he may have.

After a proof, the Lord Ordinary (ORMIDALE) granted the interdict craved, and the following passage from the note to his interlocutor will explain the important question of law raised by the case:—"There remains the important question whether, in the special circumstances of the present case, and in particular having regard to the conditions of the respondent's feu-right, he is entitled to complain of the operations in question, and to an interdict against their continuance, whatever may be the injurious consequences to his property, even although the result may be, if these operations are continued, the total destruction of his dwelling-house. The advocators maintain that the respondent is not entitled to any interdict, and in support of this contention they chiefly founded on the reservation in the feu-contract of the minerals to the superior, Mr Buchanan, and of his right to work and remove the same without being liable to the feuar for any damage that might thereby happen to the piece of ground in question or the buildings thereon. On the other hand, the respondent maintained that he was entitled to interdict against the continuation of operations which it was proved would destroy his dwelling-house, and in support of this contention, besides appealing to the common law principle that the owner of minerals was only entitled to work and remove them in such a manner and to such an extent as not to deprive the owner of the surface of its natural and necessary support, he founded on the stipulation in the feu-contract whereby he was taken expressly bound 'to erect, in so far as not already done, a single or double dwelling-house or villa of one storey with attics, or a dwelling-house of one and a-half or two storeys in height, which house or villa shall be for the occupancy of one family only, and shall yield a yearly rent equal to triple of the foresaid feu-duty, and to maintain and uphold the foresaid building in a sufficient and proper state of repair, so as always to yield such a yearly rent, and of an equally good style of architecture, in all time thereafter.' It is certainly not very easy to reconcile these stipulations of the feu-contract with the alleged right of the superior so to work the minerals as to destroy the feuar's dwelling-house—to reconcile the right, on the one hand, of the superior, by himself or his tenant, to work out and remove all the minerals below the respondent's feu, even although that should have the effect of destroying his property, with the very stringent obligation which has, on the other hand, been laid upon the feuar not only to erect, but to keep in good repair a dwelling-house of a particular description on the ground of his feu. The Lord Ordinary is of opinion that the stipulations of the feu-contract must be considered and dealt with in subordination to its main object, viz., the erection and keeping up of a dwelling-house. That was the main object of the feu-grant, and it would be altogether unreasonable and absurd to suppose that while the feuar was to be bound not only to erect, but always to uphold in good repair, a dwelling-house of a certain description, the superior should be at liberty to destroy that house whenever he pleased, and that, too, without being answerable in the loss or damage thereby occasioned to the feuar. It is possible to conceive that there may be damage done to the feuar's property short of actual injury to or destruction of his house, for which he may have no claim, and in that way the stipulations in the lease may be reconcileable, but the Lord Ordinary entirely fails to understand how it is possible to reconcile these stipulations on the footing of the feuar being bound to erect and uphold in good repair a dwelling-house on his grounds, while the superior is at the same time to be entitled to carry on operations which must have the effect of seriously injuring, if not entirely destroying, such dwelling-house. Various decided cases, both English and Scotch, were cited in argument by the parties, but as in none of them did the same *species facti* occur as those which characterise the present case, the Lord Ordinary cannot say that any of them is of the nature of a precedent precisely in point. The general principles, however, which appear to have influenced the Court in deciding the cases of *Bald* v. *The Alloa Coal Company and Lord Mar*, 30th May 1854, 16 D. 870; *The Caledonian Railway Company* v. *Sprot*, 1856, 2 Macqueen, 449; and *Hamilton* v. *Turner and Others*, 19th July 1867, 5 Macph. 1086, go far, the Lord Ordinary thinks, to support the contention maintained in the present case by the respondent, and the judgment which has been pronounced."

Messrs Henderson & Dimmack reclaimed.

The SOLICITOR-GENERAL and BALFOUR for them.

SHAND, TRAYNER, and MACLEAN for the respondent.

At advising—

LORD COWAN—The discussion under the reclaiming note was confined to two questions, which are the subject of the third and fourth heads of the note attached by the Lord Ordinary to his in-