CASES

DECIDED IN THE HOUSE OF LORDS,

ON APPEAL FROM THE

COURTS OF SCOTLAND,

1837—1838.

[19*th June* 1837.]*

TRUSTEES of JOHN MARSHALL; and TRUSTEES of HUGH Earl of EGLINTON, Appellants.—*Attorney General (Campbell).*

JAMES KERR, Trustee on the sequestrated estate of WILLIAM TAYLOR, Respondent.—*Sir Wm. Follett.*

Process — Appeal. — An appeal is incompetent against an interlocutor of the Court of Session finding that in the cases enumerated in the acts of parliament regarding trial by jury in civil causes, when the conclusion is for damages, the Court has no power to take proof by commission, on remit, or in presentia, but must remit all such cases to be tried by jury.

Observed (obiter), that the judgment of the Court of Session was well founded.

1ST DIVISION.
Ld. Moncreiff.

THE respondent raised an action before the Court of Session against the appellants, alleging that, by their reckless and negligent conduct in working certain coal fields belonging to them, they had caused the water of the river Garnock to descend into and entirely destroy certain coal workings belonging to the respondent,

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* This case was omitted to be reported in the proper order of its date.

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and concluding for damages. The case was remitted from the Court of Session roll to the Jury roll on the 16th of December 1834; but preliminary defences having been stated, as well as defences on the merits, it was retransmitted to the Court of Session roll; and on the 25th of January 1835 the Lord Ordinary repelled the preliminary defences, and of new remitted the cause to the Jury roll. Thereafter a record was prepared, but before it was closed the appellants made a motion before the Lord Ordinary, "That this case " shall be remitted to the Court of Session, to be pro- " ceeded with in such manner as shall appear to be " most expedient for the administration of justice, as " containing matter to which trial by jury is not bene- " ficially applicable." Although, in point of form, the question was, as to whether the case should be sent to the Court of Session roll or not, yet in substance it was, (and it was so argued,) whether the Court could dispense with a trial by jury. The Lord Ordinary verbally reported the motion to the Inner House, who ordered the question to be argued before the whole Judges, which was done accordingly; and their Lordships delivered the following opinions[1]:—

Lord President.—" I have carefully considered the acts " of parliament referred to by the parties, and have " formed a very decided opinion as to the question now " before us. In the first place, it appears to me to be " perfectly plain, that the object and intention of the " legislature in these enactments was, as far as possible, " to put an end to the old procedure of taking proof " on commission. This method of procedure was dis-

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[1] These opinions were revised by their Lordships and laid before the House of Lords.

" agreeable not only to the House of Lords, but also " to ourselves. But the grievance which it occasioned " to the House of Lords was prodigious; and the feel- " ing of that grievance chiefly led to the introduction " of jury trial into this country. In interpreting the " acts, therefore, we ought to endeavour so to construe " them as to give effect, as far as possible, to the inten- " tion of the legislature, and to extend, as far as we " can, the provisions in favour of jury trial.

" I have formed my opinion upon two clauses in the " act of 1819. I do not go further. The first of " these is the 12th section of the act. In this section, " the words 'beneficially applicable' are unfortunate. " It is a loose phrase, and capable of many construc- " tions. It may mean beneficially applicable in regard " to the matter at issue, or in regard to the mode of " proof, or in regard to the time that may be occupied " in ascertaining the facts. These are different senses " in which the phrase may be understood. But I can- " not interpret it as having reference to the mere " question of difficulty, as, if that were its meaning, " you might have an argument raised in every case, " as to whether or not it was one which would be " attended by difficulty if tried by a jury. But, be- " sides, I cannot take this clause by itself; I must " consider it in connexion with the 13th section. By " this section it is provided that the powers of taking " proof on commission shall remain to the Court, " 'save and except in the cases concluding for damages " 'herein-before enumerated.' This is just equivalent " to saying, that in such cases it shall not be compe- " tent to take proof on commission; for wherever a " general power is conferred under an express excep- " tion, this must be held to mean that, in regard to

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" the matter excepted, no such power shall be exer-
" cised. Take, for instance, the case of a trust deed
" in which the trustees are empowered to name a
" factor, and which also contains a power to them to
" allow a competent salary to the factor, provided he
" is not one of themselves. Does this not amount to
" a prohibition, not certainly to their naming a factor
" from their own number, but to their allowing a
" salary to a factor elected from their own number?
" Now, here the case is the same: the prohibition is
" equally express against our powers of taking proof
" on commission in actions of damages. I regret that
" I have been compelled to arrive at this conclusion,
" especially on my own account, as this case will pro-
" bably come to be tried by me. But, at the same
" time, I must say that I never saw a simpler coal case,
" as it is set forth in the summons. The defenders
" are charged with working the coal so close to the
" roof as to leave an imperfect support, thereby occa-
" sioning an inundation, to the injury of an adjoining
" coal pit. I do not know what technical terms may
" be requisite to prove this charge. It is impossible to
" foresee what difficulties of this kind may occur.
" But, in regard to the matter of fact alleged, it is the
" simplest of all the coal cases I ever knew."

Lord Justice Clerk.—" In regard to the question of
" power, and in reference to the acts of parliament,
" which I have carefully considered, I am sorry to say
" that I have been led to form a very decided opinion
" in entire conformity with that now expressed by
" your Lordship. I shall now state the grounds upon
" which I rest that opinion. I agree in the general
" observation made by your Lordship, as to the great
" object which the legislature had in view in framing

" these enactments. The object was to extend the " benefits of jury trial to Scotland, and to get rid, as " far as possible, of the system of taking proofs on " commission in any case. The evils of this system " had been deeply felt, and the House of Lords had " repeatedly complained of it. I sat on the commission " in 1810, and I remember that it was then the " opinion of a number of the commissioners—I do not " say how many—that that system ought to be super- " seded by jury trial, at least in many cases. Nothing " was then done, in consequence of this opinion; but " we know that in 1815 an act was passed for the " purpose of introducing jury trial to Scotland. There " is one section in that act, which I cannot overlook " in considering the present question—that is, the 5th " section, by which, in every case of damages, the jury " are invested with the absolute power of assessing the " amount of damages. By this provision the Court " was for ever relieved of this duty, which thence- " forward was imposed upon juries alone. Then I " cannot entertain any reasonable doubt, that when, " in 1819, the legislature came to enumerate a class " of cases as appropriate to the Jury Court, it meant " to declare that it was proper and expedient that all " these cases should be tried by jury. That I take to " be the meaning of the 1st section of the act. And " when I consider it in connexion with the previous " provision, which rode over the whole of the new act, " viz. that the jury should possess the sole power " of assessing damages, I cannot understand it to " mean any thing but that the whole of this class of " cases was withdrawn from the jurisdiction of the " Court of Session. Then it appears to me that the " whole of the sections which follow the three first

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" apply to the non-enumerated cases only, and have " no reference to that class which, by the first section, " were appropriated to the Jury Court. And it is a " strong circumstance that this interpretation seems to " have been in entire conformity with the understand- " ing of the whole profession; for is there a single " case since the date of that act, with the exception " of the non-enumerated cases, in which the Court has " been called upon, as now, to withdraw it from the " cognizance of a jury? I know of no instance of this; " I have heard no such instance stated; and therefore " I conclude that, until now, it has been the general " understanding of practitioners, of the Court, and of " the country at large, that such a proceeding was " incompetent under the act. Then, with regard to " the 12th section, I am very much of the same " opinion as your Lordship. I think that it embraces " only the cases not enumerated; and the concluding " words of the section, which have been so much re- " lied upon, ought, as I think, in fair construction, to " be applied only to the same class of non-enumerated " cases. It refers to cases turning upon matters of " complicated accounts, which cannot properly be the " subject matter of actions of damages; and then it " goes on to refer to other matter to which trial by " jury is not beneficially applicable. Now, can I, with " any regard to the general meaning of the statute, " interpret these words, which, as your Lordship ob- " served, are rather loose and ambiguous in themselves, " to extend to actions of damages, when I remember " the clause by which it is provided that such actions " shall be determined by a jury, unless so far as they " involve questions of law or relevancy? Then the " 13th section furnishes, I do think, a most important

" addition to the argument. The saving clause in " that section rides over the whole act. The section " appears to me most positively to say, that it shall be " competent to the Court of Session to take proof on " commission in all cases, save and except the cases " enumerated. We are thus thrown back to the " 1st section, in which these cases are enumerated, and " we find that actions of damages, such as the present, " form one branch of them. The 13th section appears " to me, therefore, distinctly to provide, that in such " a case as the present it is incompetent for the Court " to order proof on commission. I agree with the " remark of the Dean of Faculty, that, after the dis- " tinct provision of the 1st section, nothing but express " words, which could leave no doubt that the enu- " merated cases were referred to by the 12th section, " would entitle us to put any construction on that " section at variance with the former. I have looked " into the other acts referred to, and find nothing in " them to warrant such a construction. It would be " a contradiction to the previous enactment, which " nothing but express words would entitle us to give " effect to. I have also attended to that section of the " 6th Geo. IV. in which it is declared that the enu- " merated cases shall be discussed and determined in " the Jury Court.

" There is another section in the same act, which " seems to me to be of considerable importance to the " present question, although it has not been adverted " to by the counsel on either side, — I mean the " 33d section, which contains several important pro- " visions. It relates to the power of the Jury Court " to remit cases to the Court of Session in various " circumstances, and concludes with these words: —

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" 'And if there shall remain matter of fact to be
" 'ascertained between the parties, the said matter
" 'shall be tried by jury.' It seems here clearly con-
" templated by the legislature, that in all those cases
" enumerated as peculiarly appropriate to the Jury
" Court, and in which any question of law or relevancy
" had occurred to justify a remit to the Court of
" Session, that still, in such cases where any matter of
" fact remained disputed by the parties, it should not
" be competent to the Court of Session to allow a
" proof on commission of such matter of fact, or to do
" any thing but to remit the case to the Jury Court,
" there to be disposed of by jury trial. I do think
" that the provisions of this section are quite in con-
" sistency with the construction which I hold to be
" the fair construction of the act 1819.

" If a door is to be opened for the consideration of
" the applicability of trial by jury to each of those
" cases so familiarly known as jury cases, if parties
" are to be allowed in every case of this description
" to enter upon a discussion as to whether, in its
" peculiar circumstances, it is one to which jury trial
" is or is not beneficially applicable, it is obvious that
" the course of justice would be constantly embar-
" rassed by needless discussions. We know that there
" are many cases in which trial by jury is attended
" with great trouble, not only to the parties, but also
" to the counsel, judges, and jury; and, if a door is
" to be again opened to the admission of the question
" in each of these, whether it will be most beneficially
" disposed of by jury trial, or by taking proof on com-
" mission, it may be seen very clearly what will be
" the result—the matter will just be thrown as loose
" as ever it was, and in every instance it will fall for

" the Court to decide whether the parties are to be " admitted to or excluded from jury trial."

Lord Gillies.—" I am sorry to say that I have arrived " at a totally different conclusion; and I will state " the grounds upon which I have formed my opinion. " Ever since jury trial was introduced into Scotland, " or at least almost ever since, certain cases have been " enumerated as peculiarly fitted for that mode of " trial. They are well known by the name of the " enumerated cases, and the others go by the name " of the non-enumerated cases. The question before " us is, whether we have the power, in any of the " enumerated cases, and under any circumstances, of " sending them back from the Jury Court to the " Court of Session as a Court more fitted for their " disposal. I differ totally from the assertion, that to " all the cases of this class trial by jury is beneficially " applicable. During the short period in which the " Jury Court has existed in Scotland many cases have " occured belonging to this class, and which were so " ill adapted for trial by jury, that we have found it " expedient to urge the parties to settle them other- " wise. But I need not say any thing to prove the " frequent occurrence of such cases; for the Dean of " Faculty himself informed us, that in England such " cases frequently occur, and that there the evil is so " severely felt, of being compelled to try them by " jury, that the Judges have endeavoured to obtain " an act of parliament to invest them with that very " power which it is now questioned whether we possess. " But the point we are now to settle is not whether a " bill ought to be prepared to give us such a power, " but whether the acts which are passed do not confer " upon us the very power which the Judges of England

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" so deeply feel the want of. It has been said, that " no cases of complicated accounting can be expected " to occur in actions of damages. I totally differ from " this position. All actions in regard to moveables " may give rise to such questions. Take the case of " an action of damages for wrongous imprisonment " upon a meditatione fugæ warrant, where the party " denies that he owes any thing to the defender, and " asserts that the balance of their transactions shows " a result in his favour. This at once raises a question " of accounting which may be the most complicated " that ever came before the Court. Many such " actions may be figured; and it must be admitted, " that many of the enumerated cases do occur, involv- " ing inquiries as to which jury trial cannot be said " to be beneficially applicable.

" The question then is, whether in such cases we are " excluded by the statutes from trying them otherwise " than by a jury. It has been said that the power of " assessing damages shows that they are exclusively " appropriate to trial by jury. It is true that the jury " by these enactments possesses the powers of assessing " damages; but that is only if they find for the pur- " suer. But it does not follow that if they do not find " for the pursuer, but remit the case to the Court of " Session, to be disposed of by them, that in that " event the case must go back to the jury for ultimate " disposal. By the 59th Geo. III. the Court of " Session are bound at once to send all actions of " damages to the Jury Court. This was an early en- " actment, and has never been departed from. The " moment defences are lodged in such cases, the Court " of Session ceases to have further jurisdiction in re- " gard to them. They are immediately sent to the

" Jury Court, and that Court is required to settle an " issue for trial. By this act then there are two classes " of cases provided for—the enumerated and the non- " enumerated. In the latter the Lord Ordinary is " empowered to prepare issues; but in the enumerated " he has no power but to remit to the Jury Court, to " have an issue prepared there. Then we come to " section 12th of the act, and there we find it enacted, " 'That it shall be competent and lawful for the Jury " 'Court, when it appears to the said Court, in the " 'course of settling an issue or issues,' &c. This shows " that the section alludes to that class of cases in which " the issues are prepared in the Jury Court, not in the " Court of Session. The section provides, in regard to " them, that when there is a question or questions of " law or relevancy involved, it shall be competent to " the Court to remit back the whole process to the " Court of Session, in order 'that the question or ques- " 'tions of law or relevancy may be considered and " 'determined there.' I read this portion of the clause " with reference to another section to which I shall " presently refer. Then comes the important clause, " in which it is farther provided, 'That it shall be " 'competent for the Jury Court, when it appears to the " 'said Court, in the course of settling an issue or issues, " 'that a case turns upon matter of complicated accounts " 'or other matter to which trial by jury is not benefi- " 'cially applicable, to remit back the whole process " 'and productions as aforesaid.' It is said that this " relates only to the non-enumerated cases. I think " that it refers to both classes; but if it is applicable " only to one class, I would say that it is applicable " only to the enumerated cases, because in the non- " enumerated cases the issues are settled by the Court

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" of Session generally, and in the enumerated cases " that duty is imposed solely upon the Jury Court. " Now, the section says, that it shall be competent for " the Jury Court to remit, when it appears to them, in " the 'course of settling an issue or issues,' that the " case is one to which trial by jury is not beneficially " applicable. This section, therefore, appears to me " to be unambiguous, and to refer clearly to the enu- " merated as well as the non-enumerated cases.

" Reference is made to section 13, as inconsistent " with this view. But, with great deference, I would " say, that this conclusion is founded on a great mis- " take as to the meaning of that section. It provides, " 'that nothing in this act contained shall extend or be " 'construed to extend to prevent the Court of Session, " 'in either of its Divisions, or the Lords Ordinary " '(save and except in the cases concluding for " 'damages herein-before enumerated), or the Judge " 'Admiral, &c., to take proof on commission.' Now, " it is said, why save and except the cases concluding " for damages? For this plain reason, that such cases " were not before the Court of Session. The Court of " Session had nothing to do with them, and had no " jurisdiction in regard to them. They belonged ex- " clusively to the Jury Court, and therefore in them " the Court of Session had no power to order proof on " commission. But it is perfectly plain that no infer- " ence can be drawn to limit the powers of the Jury " Court from this saving clause, introduced, perhaps " unnecessarily, as to cases in which the Court of Ses- " sion could not allow proof on commission, simply " because they were not before them. If the section " had not contained this exception, it might have been " contended that the Court of Session might have

" ordered proof on commission, in the enumerated " cases, before remitting them to the Jury Court.

" I have very little more to say; but there is a clause " in the act of 6 Geo. IV. which appears to me to be " of great importance, and on which sufficient stress " has not been laid. The 28th section of that statute " enacts, ' That the provisions of the said act of the " ' 59 Geo. III., by which it is directed that certain " ' actions be remitted to the Jury Court, but that, " ' previous to their being so remitted to the Jury " ' Court, questions of law or relevancy may be raised, " ' pleaded, and decided in the Court of Session, shall " ' be and the same are hereby repealed.' Now I beg " you to observe, that this repealing clause refers to " the 12th section of the act of 1819, and to the first " part of that section. By this latter statute the first " part of that section is expressly repealed, but the " second part is not repealed. The repeal is confined " to that part of the section which refers to remitting " cases on questions of law or relevancy alone. Now, " when one part of a section is expressly repealed, and " the part immediately following is not repealed, it " follows that the intention of the legislature was not " to repeal that second part. I have not considered " that part of the 6th Geo. IV. referred to by the Lord " Justice Clerk, as it is not in the printed papers, and " I was led to believe that all the sections which bore " any reference to the question were contained in these " printed papers. But I am of opinion, for the reasons " already stated, that the Jury Court has the power of " retransmitting such of the enumerated cases to the " Court of Session as they think unfitted for jury trial. " And there must be very few cases in which we would

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" be called upon to exercise that power which the " English judges are so anxious to possess."

Lord Cockburn.—" This case is of vital importance to " the future condition of jury trial in civil causes in this " country. This mode of investigating facts was origi- " nally introduced with such caution, that no entire " cause was allowed to be sent for trial, but only such de- " tached issues as the Court of Session thought ' expe- " ' dient.' If this had been deemed safe as an ultimate " system, there was no reason for altering this pro- " vision of the original act. But it was altered very " materially, and by a very marked step, in the very " next statute, which declares certain causes to be " proper for trial by jury; and, accordingly, enacts " that these shall be sent to the Jury Court for trial, " except in the single event (as I think) of there being " legal questions which, in the opinion of the Court of " Session, ought to be determined first. The third act " not only enlarged the description of these cases, but " took away the power, formerly given to this Court, " of abstaining from remitting, in order that supposed " questions of law or relevancy might be discussed here. " The fourth and last act confirms these cases, as ap- " propriate to trial, and makes it competent to fix the " facts, even of consistorial cases, by verdicts.

" These statutes all demonstrate a steady and pro- " gressive confidence in the system of trial by jury, and " an increased tendency to have the character of the " cases that are to be so disposed of fixed by parlia- " ment. Accordingly, so far as I can discover, no " attempt has ever been made till now to get the Court " to exercise any discretion as to the fit application of " this system to any of those enumerated cases. When-

" ever a case has been brought within the statutory " description, it has always been understood that its " course, in so far as the facts were concerned, was " determined.

" But the doubt that has now been raised is, " whether the statutes fix any cases whatever as " cases of which the facts, if they are to be inves- " tigated at all, must be investigated by juries. The " doubt is, whether it be not competent for this Court " to withdraw even the enumerated causes from trial, " whenever it may happen to think trial inexpedient.

" The plain result of this is, that it places the extent " to which trial by jury is to be practised entirely in " the discretion of the Court. It entitles every party " to contest the fitness of his particular case for trial; " and justifies, and therefore tempts, a vexatious pre- " liminary discussion on this subject, even in the clearest " case of damages, such as that arising from injury " to land where the title is not in question. Lords " Ordinary, instead of being guided by general rules, " which quiet the parties by their inflexibility, may " order trials, or they may order unfathomable proofs " by commission, according as their habits make them " view the examination of given subjects familiarly or " with dismay. And if a majority of the Judges in " either Division should recur to the opinion which was " held, at no great distance of time, by many most " eminent lawyers, that trial by jury is beneficially " applicable to no case whatever, the whole system " might silently disappear.

" I can find no ground for such a result in the " statutes. Not that the 12th section of the act of " 1819 is so clearly expressed as it might have been, " if this doubt had been anticipated; but that the

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" pursuer's construction, which tends to promote the " undoubted object of the legislature, and is therefore " the one to be favoured, is, to say the least, as satis- " factory as that of the defenders, which tends directly " to obstruct it.

" The 59 Geo. III. cap. 35. sec. 1. not only specifies " what are to be held proper jury causes, but enacts, " that being so, they shall be sent at once to the " Jury Court for trial; and the Jury Court is not " merely authorized, but is imperatively required, 'to " 'settle an issue or issues, and to try the same by a " 'jury.' The two next sections seem to me to intro- " duce all the provisions that were thought necessary " for the disposal of questions of preliminary law or " relevancy in relation to these enumerated causes. " The import of them is, that such questions are to " be settled by this Court before the remit. But if " the case should pass this stage, and the remit be " made, I am inclined (though I admit that there has " been some practice against this) to think that these " questions could not afterwards be revived, but that " the province of the Jury Court consisted in merely " trying the case.

" And when the first part of the 12th section em- " powers the Jury Court still to send the case back " for the discussion of such legal matter as should be " discovered in trying to settle an issue, it rather " appears to me that there is some ground for main- " taining that this only relates to the non-enumerated " cases. It relates to 'the cases remitted to them as " 'aforesaid;' which words may, without any violence, " be applied so as to include, not the causes finally " disposed of by the three first sections, but those " immediately preceding the 12th clause; being all

" those which, though not enumerated, it was compe-
" tent for this Court or for the Admiralty to remit.
" It was not unreasonable to give more opportunities
" of discussing legal questions in these cases than in
" the enumerated ones, because they might be more
" complicated; which was the reason why they were
" put on the roll of the proper jury causes. However,
" this view is certainly not without difficulties.

" But, assuming that this first part of the 12th sec-
" tion embraces all cases whatever, the second part,
" which expressly relates only to causes to which jury
" trial is not 'beneficially applicable,' stands in a very
" different situation. The gates may be left very open
" for points of preliminary law, and yet shut very close
" against speculations as to the expediency of proofs
" by commission. It is said that the words, 'in the
" 'course of settling an issue or issues,' must be held
" to comprehend judicially the very same things in
" every part of the same clause. I am not aware of
" any necessity for such construction, where there are
" relative words which give the same expressions differ-
" ent meanings in different places even of the same
" section. We must give the statute the greatest
" amount of consistency that we can upon the whole.

" Now, the attempt to extend this second part of
" the clause to the enumerated cases is met by two
" obstacles, both of which, to my mind, are unsur-
" mountable:—1st, I cannot reconcile this construc-
" tion with the previous positive enactment, that these
" enumerated cases are proper for trial by jury. To
" say that a case is 'appropriate for jury trial,' seems
" to me exactly to say, that it is a case to which jury
" trial is 'beneficially applicable.' Therefore the de-
" fender's construction makes the two parts of the act

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" contradict each other. What the statute should have " enacted, according to them, is, that trial by jury was " beneficially applicable to no case whatever, unless " the Court of Session should think so. Their con- " struction makes the 12th section repeal the 1st. " 2dly, I cannot reconcile this construction with the " 13th section, which enacts, in express terms, (though " it be printed parenthetically,) that the Court has no " power to take proof by commission, by remit, or in " presentia, in the enumerated cases. I cannot believe " that the statute meant to exclude these modes of " proof from the enumerated cases, except on the " supposition that it meant that these cases should " positively have their facts investigated by jury; be- " cause, otherwise, it virtually debars them from being " investigated at all.

" If the case, therefore, had depended on this sta- " tute alone, I should have held that, the cause being " on the catalogue of proper jury cases, and there " being no question of law, and the facts being dis- " puted, it was not in the power of the Court to pre- " vent a trial. But the matter is made clear by the " subsequent acts.

" The 6 Geo. IV. cap. 120. enlarges the description " of appropriate jury causes, and compels this Court to " send them forward for trial without waiting to dis- " cuss any legal question. But due provision is made " for the disposal of such matter, by a clause which " was not noticed at the bar, but seems to me to be " decisive. It is the 33d, which introduces a totally " new set of regulations upon this subject. Its sub- " stance is, that when any legal question, proper to be " settled before trial, shall occur in the Jury Court, " that Court may either send back to the Court of

" Session or not, as it shall think proper; and that, if " sent back, the case shall proceed, quoad the law, as a " Court of Session process. But this is only as to the " law; it is as to 'such question of law or relevancy.' " There is no indication, but the reverse, of any inten- " tion on the part of the legislature to retract its " previous description of causes to which trial was " beneficially applicable, and leave it to this Court to " say to what causes it was appropriate. For the result " in reference to the facts, as stated in the close of the " section, is, that if, 'after the determination of such " 'question, there shall remain matter of fact to be " 'ascertained between the parties, the said matter " 'shall be tried by jury, and the parties shall forth- " 'with proceed before the said Jury Court, or one of " 'the Judges thereof, to prepare an issue or issues " 'for trial.' So that the case is taken from the Court " of Session in the first instance, because it is held " appropriate for trial; and when it is restored to this " Court on account of emerging law, the authority of " the Court is exhausted as soon as this law is cleared " away, and the necessity for trial, if there be facts to " be settled, revives.

" The act of 1830, which abolished the Jury Court, " declares, that all causes which formerly behoved to " be tried in that Court shall thenceforth be tried in " the Court of Session. It does not enlarge the cata- " logue of jury causes; but neither does it abridge it, " or warrant any new mode of ascertaining their facts. " It keeps up whatever necessity there was under the " previous statute for trying facts by juries.

" I do not consider the case of Leslie[1] as any autho-

[1] Leslie v. Blackwood, 3 Murray, 157.

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" rity on the point now at issue. This precise point—
" viz. of the competency of withholding a trial, on the
" ground that a commission or a remit were more ex-
" pedient—was not mooted there at all. Lord Gifford's
" speech, however, in Lady Mary Crawford's case [1]
" satisfies me, that if that had been purely a claim for
" damages he would have held a trial unavoidable.

" Something has been said, and a good deal more
" insinuated, with respect to the policy of the system
" of compelling a court to try any cause by jury, to
" which that court may think that trial by jury is not
" beneficially applicable. This is plainly not a judicial
" consideration. I shall only say, therefore, that if
" this problem shall ever come before us, I anticipate
" no difficulty in making up my own mind upon it.
" Meanwhile, I feel no uneasiness in relying on the
" experience of England, where there is no other way,
" except by jury, in which the common law courts can
" examine the facts, and where, nevertheless, there are
" sufficient practical means for avoiding the trial of
" really untriable cases."

Lord Meadowbank.—" Deeming it unnecessary, after
" the judgments which have been delivered at so great
" length, to occupy the time of the Court by going
" over views of this question which have already been
" fully explained, I shall only say that I have more
" than once changed my mind in reference to the
" question before us; but I am now decidedly of the
" same opinion as the Lord President and Lord Justice
" Clerk."

Lord Mackenzie.—" I have arrived at an opposite
" conclusion. The question depends upon the mean-

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[1] Lady Mary L. Crawford v. Dixon, 2 W. & S., 354.

" ing of the 12th clause of the act 59 Geo. III: The
" first question is, whether that section applies to the
" enumerated cases? It is said that it is wholly inap-
" plicable to the enumerated cases. Now, I have no
" difficulty upon this head. It is obvious that it refers
" to the enumerated cases, and it must have been in-
" tended to refer to them; for it is the only section
" which provides for the disposal of questions of law
" or relevancy after the case has been remitted to the
" Jury Court. Now, if a case came before the Jury
" Court, and if they found the summons grossly irre-
" gular, or the defences totally irrelevant, is it possible
" to hold that the Jury Court had no power to provide
" for the disposal of the question of relevancy, but that
" they must, in the face of these irregularities, go on
" to try the question of fact? Was there any such
" necessity imposed upon them? Can there be any
" doubt that the Jury Court have, over and over again,
" sent such cases back to the Court of Session, to have
" such questions disposed of? I can have no doubt that
" in so far the section applies to the enumerated cases.
" But look at the words of the section. It provides
" for the disposal of questions of law arising 'in the
" 'course of settling an issue or issues in the cases
" 'remitted to them as aforesaid.' Now, are these
" enumerated cases not just those remitted as aforesaid
" for the preparation of an issue or issues in the Jury
" Court? I have, therefore, no doubt as to the ap-
" plication of that part of the section. Then the
" same section goes on to provide other powers to the
" Jury Court, and in the very same words, without the
" slightest hint of change in reference to the subject of
" the enactment. It provides, 'That it shall be com-
" 'petent for the Jury Court, when it appears to the

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" ' said Court, in the course of settling an issue or
" ' issues, that a case turns upon matter of complicated
" ' accounts, or other matter to which trial by jury is
" ' not beneficially applicable, to remit the whole pro-
" ' cess and productions as aforesaid.' Are not these
" words applicable generally to all classes of cases?
" May it not appear, in some of the enumerated cases,
" that the question turns upon a matter of complicated
" accounting? It is well known that actions of damages
" may involve the most complex questions of account-
" ing, and questions as to which trial by jury cannot
" be held to be beneficially applicable. I am willing
" to take the words ' beneficially applicable' in their
" strictest sense. They ought to be taken so. It was
" never meant to contend that the Court should have
" the power of sending back every case to which they
" thought another form of trial would be more benefi-
" cially applicable than trial by jury. Whenever they
" exercised the power of remitting, they were bound to
" say, before sending back the process, that this is a case
" consisting entirely of complicated accounting, or that
" this is a case in which trial by jury would be abor-
" tive, utterly unavailing, and inconsistent with the
" ends of justice. Now, where is the absurdity of con-
" ferring such a power as this on the Jury Court? At
" the date of the enactment it was a separate Court.
" There was then no room for such extreme jealousy
" as to the feeling of the Court of Session against jury
" trial; but certainly there was no room for such jea-
" lousy towards the Jury Court, which would naturally
" be inclined to extend, rather than abridge, its own
" jurisdiction. I therefore see no difficulty in holding
" that the section confers the power upon the Jury
" Court contended for.

" Then, with regard to section 13th, I think that it " has no application to the present question. If it had " not contained the saving clause, would it not have " been inconsistent with the previous provisions of the " act? Would it not have been said that the section " contained nothing to prevent the Court of Session " from disposing of the enumerated cases, whenever " they pleased, by proof on commission? But what " does the clause save? Just the regulations of the act, " by which it is provided that such cases shall go to " the Jury Court, there to be disposed of. It never " can be interpreted as taking away the powers of the " Jury Court. It never could be interpreted as taking " away their power of remitting such cases to the " Court of Session, when they thought them unfitted " for jury trial.

" If, then, this power existed in the Jury Court in " 1819, was it taken away by the subsequent act of " 6 Geo. IV.? I cannot see that it was so taken away. " By that act it is provided, that the enumerated " cases 'shall be held as causes appropriate to the Jury " 'Court, and shall, for the purpose of being discussed " 'and determined in that Court, be remitted at once " 'to that Court.' It is said that these expressions " import that such cases must remain in the Jury " Court, and must be in every point disposed of there. " But that interpretation must be wrong; for the " 33d section refers to half a dozen ways in which such " cases may be remitted to the Court of Session. " Therefore the expressions I have quoted must be " taken exceptis excipiendis, and under these excep- " tions amongst others which are contained in the " previous act, and unrepealed. This 33d section " provides, that when the parties shall agree as to the

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" question of fact, then the case shall be remitted to " the Court of Session. It then provides, that even " when they do not agree as to the question of fact, " if any question of law or relevancy occur, then the " case shall be remitted to the Court of Session. Now, " it follows, that if this question of law or relevancy is " to be decisive of the cause, then the whole case must " be concluded in the Court of Session. Suppose such " a question of relevancy to arise as, whether the sum- " mons was irregular and inconclusive, or whether the " defences were irrelevant, would it not be competent " to the Court of Session to dismiss the action, or to " find the defence alleged insufficient, and thus to " ' discuss and determine,' in the Court of Session, one " of those very cases as to which it is declared that " they shall be discussed and determined in the Jury " Court? It is therefore quite plain, from this sec- " tion, that the other clause which I have quoted " admits of exceptions; and if it does, why should it " not admit of the exception of powers previously con- " ferred and unrepealed? This 33d section has been " referred to by Lord Cockburn as containing an " exhaustive statement of all the powers conferred " upon the Jury Court as to the disposal of these enu- " merated cases. But I cannot hold this to be the " case, when I look to the terms of section 28th, in " which it is declared to be expedient ' to repeal, vary, " ' and amend the previous enactments as to trial by " ' jury in civil causes;' and to make other provisions " for the further improvement of that mode of trial. " So that it is not the object of the act to repeal all " the powers previously vested in the Jury Court by " the earlier statutes; it is an act passed to ' vary and " ' amend' some of them, and of course to leave some

" of them untouched. Accordingly, it has just done " so. It has left some of the powers unrepealed, among " which, I think, are the powers conferred by this " 12th section of the previous act. In the first place, let " us consider, what does this 6 Geo. IV. repeal ? I do not " think it repeals any of the powers of the Jury Court. " The powers it repeals are those of the Court of " Session, as to the disposal of questions of law and " relevancy occurring in the enumerated cases, before " remitting them to the Jury Court. These are the " only powers it repeals. It then proceeds to vary and " amend the powers of the Jury Court in section 33d ; " but it takes no notice of the provision of this sec- " tion 12th, just because it intended these provisions " to remain as they were. Therefore, I think that at " this time the power still remained to the Jury Court " of remitting such cases as appeared unfit for trial by " jury to the Court of Session ; and if it then re- " mained, it must still remain after the union of the " Courts. Whether it was wise or not to unite the " Courts, I do not know. But have we heard any thing " to lead us to doubt that the same powers remain " since the union of the Courts as the Courts sepa- " rately possessed before ?

" This power has never yet been exercised, not be- " cause it was thought by the Court or by practitioners " not to exist, but because no cases have occurred in " which the necessity has arisen for exercising it ; and " I have no doubt, that if we find in favour of the " abstract question of power, we may never see a case " again, for many years, in which the power would " require to be exercised."

Lord Corehouse.—" The question under considera- " tion is of great consequence to the due administration

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" of justice by the method of jury trial. After all the " consideration which it has received, I retain the " opinion which I always held, that it is competent to " remit a cause, though one of the enumerated actions, " from the jury roll to the common roll of other causes " depending in the Court of Session. I shall shortly " state the grounds of that opinion, but not without " diffidence, when I see that they are opposed to the " views of your Lordship and others of my brethren, " to whom so much deference is due.

" The question is not, whether the form of jury trial " is beneficially applicable to tbe individual case before " us; it is the abstract question, whether it is compe- " tent for us in any action, and under any circum- " stances, to retransmit one of the enumerated actions " from the jury roll, on the ground that trial by jury " is not beneficially applicable to such action?

" In judicial procedure, causes may occur, and per- " haps not rarely, which are not fitted for this mode " of trial. An action may be raised which may either " involve complicated accounts, or a great and intricate " mass of documentary evidence, or questions of " abstruse science. The merits of such an action may " be altogether unsusceptible of adequate explanation " to a judge and a jury during the period of a jury " trial. And if it were necessary to confirm the " position that there are such causes, I would refer to " the terms of the statute 59 Geo. III. cap. 35. itself, " as a declaration by the legislature that there are " causes to which jury trial is not beneficially appli- " cable, as it has expressly recognised their existence, " and given directions for disposing of them.

" But if there be such causes it must next be " examined whether they may occur among the enume-

" rated actions as well as among the non-enumerated.
" And I have no doubt that they may; and not only
" so, but that actions to which jury trial is not bene-
" ficially applicable will sometimes be so shaped as to
" fall within the enumerated class, for the express
" purpose of perplexing a jury, if this Court shall
" determine that it has no power to interpose in any
" circumstances, and prevent an action, if of the enu-
" merated class, from being tried by jury, There is
" no difficulty in figuring actions, among the enumerated
" class, to which jury trial may not be beneficially
" applicable. Suppose, for example, that a merchant
" has dismissed a clerk, alleging that he kept irregular
" books, and embezzled money; that the clerk raised
" an action of damages for defamation; and that the
" merchant pleaded the veritas convicii. It may be
" necessary, in trying the action, to go into the ac-
" counts of the mercantile concern for ten or twenty
" years back; and must all this be done before a
" jury? Or suppose that trustees are accused of
" embezzling trust funds, that they deny the allegation,
" and plead that their accounts exhibit a full and fair
" state of their whole intromissions, and prove that
" there has been no embezzlement. It is evident that
" a mass of accounts may be requisite for such an
" action, which might be very ill suited for the arbitra-
" tion of a jury. And there are other actions, such as
" those relating to the alleged infringement of patents,
" and many more which might be mentioned. Among
" all which, though there might be some, and even a
" majority, which were well fitted for trial by jury,
" there might evidently be others which were not
" fitted for being so tried. I am satisfied that among
" the enumerated actions there may be some of which

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" it would be found, in terms of 59 Geo. III. cap. 35, " sec. 12., that they ' turn upon matter of complicated " ' accounts, or other matter to which trial by jury is " ' not beneficially applicable.' And if there may be " any such causes, that is enough to support my " present argument; because it must not be forgotten, " that to subject any one cause whatever to a form of " trial which is not beneficially applicable to it is to " inflict a grievous injury upon the parties concerned " in such action, and is nearly tantamount to a denial " of justice to them. It is not lightly to be presumed, " that the legislature has passed an enactment leading " to this result, which, however, I fear it has done, if it " has taken away all discretionary power from this " Court, and made it imperative on us to try every one " of the enumerated actions before a jury, whether such " a mode of trial be beneficially applicable to it or not. " But if the statute be imperative and unambiguous in " so enacting, we, of course, are bound to give effect to " it. I shall immediately state the grounds on which " I think the statute is not to be so construed; but I " may notice, in passing, a suggestion which has been " thrown out, that if this Court sustained the com- " petency of its jurisdiction to withdraw any of the " enumerated actions from the jury trial, there would " result a practical evil from the risk of a too frequent " retransmission of causes from the jury roll, and a " consequent narrowing of the beneficial operation of " jury trial. I believe this apprehension, even if it could " have any weight in determining the construction of " a statute, to be altogether without foundation. Any " prejudices which may formerly have existed against " jury trial are now removed so completely, that I " believe there is as little hazard that any of the Lords

" Ordinary, or either of the Divisions of this Court,
" should unwarrantably exclude causes from jury trial,
" if fit to be so tried, as there formerly was that such
" a course should have been taken by the Lord Chief
" Commissioner whilst he presided in the Jury Court
" when it was a separate Court. I am satisfied that if
" any attempt should be made improperly to withdraw
" a cause from trial by jury, which was fitted for that
" mode of trial, such attempt would at once be put
" down by any Lord Ordinary before whom it was
" made.

" I should therefore consider it a subject of much
" regret if the discretionary power of this Court did
" not extend to the enumerated as well as the non-
" enumerated actions. And I shall now state shortly
" what I consider to be the true construction of the
" statutes affecting the question.

" The pursuer appears chiefly to argue, that the
" three first sections of 59 Geo. III. cap. 35. refer
" exclusively to the enumerated causes; that the next
" eight sections refer exclusively to non-enumerated
" causes; and that the 12th section is merely a part
" of this last series of clauses, and is limited to non-
" enumerated actions only. I own that I see no
" ground whatever for holding that opinion. The
" words of the section afford no warrant for it. With
" regard to the first clause of the section, the words
" are, ' That it shall be competent for the Jury Court,
" ' when it appears to the said Court, in the course of
" ' settling an issue or issues, or at any time before
" ' trial, in the cases remitted to them as aforesaid,
" ' that there is a question or questions of law or
" ' relevancy which ought to be previously decided, to
" ' remit back the whole process,' &c. I am at a loss

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" to find any thing in these words which restrict the " application of the power of retransmission to one " class of causes more than another. They apply to " all the cases remitted to the Jury Court as aforesaid, " and therefore to the enumerated as well as the non- " enumerated actions, both of which are so remitted. " I conceive that there are several decisions which " support this construction of the clause. In Leslie v. " Blackwood [1], one of the enumerated cases, a motion " was made to remit a cause from the Jury Court to " the Court of Session, because a question of law " occurred which ought to be settled previously to " trial by jury. That motion was indeed refused, but " it was not refused on the competency; it was " entertained as competent, and was refused because " ill-founded on the merits.

" Again, in the case of Allan, 1822 [2], which also was " one of the enumerated actions, a motion was made in " the Jury Court to retransmit it to the Court of Session " for the determination of a question of law. The motion " failed; but the Lord Chief Commissioner, in disposing " of it, laid it down explicitly, that it would have been " competent to grant the motion had it been well-founded " on the merits. And in another case in 1823, which " was an action for damages only, indisputably one of the " enumerated actions, a motion was made to retrans- " mit the action to the Court of Session, in order to " have a question of law determined. I was of counsel " in that cause, and the motion was granted, and the " cause was retransmitted; after which, the Lord " Ordinary sustained the defences, and assoilized from " the action. The Inner House adhered to this judg-

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[1] 3 Murray, 157.

[2] Allan v. Thomson, 3 Murray, 1.

" ment, so that the cause thus retransmitted was finally
" disposed of in the Court of Session.[1]

" I consider, therefore, both on principle and
" authority, that the words of the first clause in section
" 12th apply to enumerated as well as non-enumerated
" causes. And where is the distinction between these
" words and the words of the last clause in that section ?
" The last clause is in these terms:—' That it shall be
" ' competent for the Jury Court, when it appears to the
" ' said Court, in the course of settling an issue or issues;
" ' that a case turns upon matter of complicated accounts,
" ' or other matter to which trial by jury is not benefi-
" ' cially applicable, to remit back the whole process,' &c.

" On perusing these words, I can discover no dis-
" tinction, either express or implied, between them and
" those in the first clause of the section. If the first
" clause extends both to enumerated and non-enume-
" rated actions, I think the last clause must necessarily
" apply to both of these classes of actions also.

" But it is said, that even if this would otherwise
" have been the just construction of section 12, it is no
" longer so when reference is had to section 13. I do
" not feel moved by this argument. That latter
" section had a different and perfectly legitimate
" object in view without producing any alteration on
" the import of section 12. It was necessary, in regard
" to the disposal of non-enumerated causes, and it affects
" them only. But I shall not go more fully into this
" point, as it has been well explained in some of the
" opinions already delivered.

" But the pursuer has farther pleaded, that by
" 6 Geo. IV. cap. 120. sec. 28. a new enumeration of

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[1] Supposed—Forbes v. Alison, 2 S. & D., p. 169. (new ed. 152.)

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" causes was made; and it was declared, that 'all these " 'shall be held as causes appropriate to the Jury " 'Court; and shall, for the purpose of being discussed " 'and determined in that Court, be remitted at once " 'to that Court,' in manner therein mentioned. It is " said that this is an imperative enactment,—that all " such causes, when transmitted to the Jury Court, " must be discussed and finally determined in that " Court before a jury. But it will be observed, that " the statute thus founded upon does not repeal or " alter the statute 59 Geo. III. cap. 35., excepting to " a partial extent, which in itself is, by implication, a " confirmation of those parts of the statute which are " not repealed or altered. And, in deciding on the " question, whether the general words which I have " just quoted have the effect of abolishing the particular " power expressly conferred by 59 Geo. III. cap. 35. " sec. 12. of retransmitting both enumerated and non- " enumerated actions from the Jury Court to the Court " of Session, there is one fundamental rule of construc- " tion which must be carefully kept in view. If, in the " same statute, a particular thing is expressly given in " one part of it, it is not held to be taken away by sub- " sequent general words; and, in like manner, in par- " tially repealing the prior statute, 59 Geo. III. cap. 35., " general words are not to be extended to take away " what was particularly granted in that statute, and is " not particularly repealed. Both in reference to this " rule of construction, and from a consideration of the " respective sections, I am of opinion that the power of " retransmitting enumerated causes, as given by " 59 Geo. III. cap. 35. sec. 12., was not abolished by " 6 Geo. IV. cap. 120. sec. 28.

" It has however been farther pleaded by the

" pursuer, that by 11 Geo. IV. and 1 Will. IV. cap. 69. section 2. a provision is made, which is decisive of this question in his favour. It is there enacted, undoubtedly, that 'all causes and issues which, if they had occurred before the passing of this act, must by law have been tried by jury in the Jury Court, shall be tried by jury in the Court of Session.' But this provision just leaves the matter where it stood before. The question remains, what were the causes which, prior to this act, must 'have been tried by jury in the Jury Court?' These were the enumerated actions, but under such limitations as were applicable to that class of actions. These limitations were neither enlarged nor narrowed by the act in question; and the point now at issue must be decided exactly in the same manner, and as if these acts had never passed.

" On considering these various statutes, I am of opinion that it is not imperative on this Court, in each and every one of the enumerated actions, to send it to trial before a jury, if it appears to be one to which trial by jury is not beneficially applicable. It is true that there may be few instances among the enumerated actions in which jury trial should not be resorted to; and I hope that every year the facility of trying causes by jury will increase, so as to extend the beneficial application of that mode of trial more and more. The institution of jury trial is one for which I, and I am sure all of us, feel much admiration; and I consider it to be of advantage to that institution, as well as to the general administration of justice, if the construction of the statutes, which appears to me to be the true one, shall receive the

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" sanction of the Court. If the opposite construction " be adopted, I apprehend it will have the unfortunate " tendency to bring jury trial into some disrepute, by " rendering it occasionally the instrument of injustice, " in consequence of its being resorted to in causes to " which it is not beneficially applicable."

Lord Jeffrey.—" The Court being so unfortunately " divided upon this question, it is important that all " the views by which any of the judges are led to form " an opinion should be brought before the Court. I " shall therefore state shortly what has occurred to me " in reference to the question. I have wavered a good " deal in forming my opinion; but at last I agree " pretty clearly with those who hold that the Court " has no power of retransmission. I do not mean to " repeat the arguments which have already been so " ably urged, but merely to throw out a remark or two " as to the phraselogy of these enactments.

" I fully adopt the canon of Lord Corehouse, " although I draw a different inference from it,—that " when a provision is distinctly made in one portion of " a statute it cannot be held repealed by general words " occurring afterwards. But it appears to me that the " leading provision in the act of 1819 is contained in " the first section, by which the Court is authorized " and required to try the enumerated cases by a jury. " This is the general rule. According to the modern " phraseology of statutes, if it had been intended that " this rule should be subject to exception, the section " would have contained some such words as 'except as " 'herein-after excepted.' I do not mean to say that " such words were absolutely requisite to render valid " any subsequent express exceptions contained in the

" act; but, considering the unqualified statement of
" the general rule in the first section, I think that, if
" section 12 has been rightly interpreted by the defen-
" ders, these words should either have been in the first,
" or there should have been added to the provisions of
" section 12, some such words as 'any thing herein-
" 'before contained to the contrary notwithstanding.'

" In this statute no doubt some sections contain the
" restrictive words, 'other than the actions for damages
" 'herein-before enumerated;' but they do not do so
" always, even when such restriction is confessedly in-
" tended. In the 6th section, for instance, which quite
" plainly refers to the non-enumerated cases only, the
" words are perfectly general. It therefore follows,
" that the omission of these restrictive words in the
" 12th section by no means furnishes a conclusive ground
" for holding that that section refers to all cases with-
" out restriction.

" But the construction of the 12th section, con-
" sidered as a whole, is what has puzzled me most. My
" interpretation of it would be much facilitated if I
" could think that no portion of it referred to the enu-
" merated cases; but I cannot doubt that the first
" portion of it does contain a provision applicable to
" these cases as well as others. The difficulty, then,
" with the importance of which I am much impressed,
" is, how are you to make a distinction between the
" two branches of this one section, and hold them ap-
" plicable to two distinct classes of cases? But you
" will observe, that although it is one section it is not
" one sentence. In the substance and object of the
" several provisions, the two branches are perfectly dis-
" tinct. The one provides for the disposal of questions

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" of law or relevancy; and the other provides for the " disposal of questions of complicated accounting, and " others to which jury trial may not be thought benefi- " cially applicable. It appears to me that this last " clause hangs entirely by itself, and may be considered " as if it had been introduced under a separate number, " and with a separate title. If it imports a power to " try the enumerated cases otherwise than by jury, " it really amounts to an abrogation of the provisions " of the first section, and that by implication only; " while it certainly does not contain the words requisite " to show that it was intended to qualify that section, " such as 'any thing herein-before contained to the " 'contrary notwithstanding.'

" Then the 13th section renders the interpretation " of the defenders still more difficult to be adopted. " To crush it to their meaning many more words would " require to be interpolated than the opposite construc- " tion requires to be understood in section 12; it being " manifest that, in order to restrain the total exception " of the enumerated cases which now stands in section " 13, it would have been necessary to introduce such " words as these—'where such have not been retrans- " 'mitted, as not beneficially fitted for trial by jury.' I " do think, therefore, that the expressions contained in " the first section after the enumeration, viz. that the " Court is authorized and required to try all such cases " by a jury, amounts to a statutory declaration that to " all such cases jury trial is beneficially applicable. And " therefore I hold that nothing except a clear retracta- " tion of that declaration would allow us to qualify it.

" With regard to the 33d section of 6 Geo. IV., from " which Lords Corehouse and Mackenzie have argued

" that that act does not repeal the provisions of the " previous one, I would make a single remark. No " doubt, that act does not entirely repeal the previous " one; several provisions in it are only varied and " amended. I think the only part directly repealed is " that contained in the 2d and 3d sections. But does " not section 33d vary and amend the provisions con- " tained in the 12th section of the previous act? It " provides, in the first place, a totally new set of regu- " lations with reference to the disposal of questions of " law or relevancy occurring in the Jury Court. It " provides, farther, that where parties, by mutual ad- " missions, come to one upon the facts of the case, it " shall be remitted to the Court of Session. It then " provides, that if parties agree that a question of law " or relevancy should be disposed of before going to " trial, then the case shall be remitted to the Court of " Session for that purpose: and it farther provides, " that if one of the parties moves to have such a ques- " tion of law or relevancy remitted to the Court of " Session, and is opposed in his motion, it shall be " competent to the Jury Court to grant or refuse it as " they see fit. All these are variations of the powers " previously conferred by the first part of the 12th sec- " tion of 6 Geo. IV. But what is the close of the whole " of this new form of process? At the end of the 33d " section it is provided, that after all these questions " of law or relevancy are disposed of, ' if there shall " ' remain matter of fact to be ascertained between the " ' parties, the said matter shall be tried by jury.' " These expressions correspond with the leading words " of the previous enactment. I think, therefore, that " the new act repeals the powers conferred upon the

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" Court of Session by the old act of deciding questions
" of law or relevancy in the enumerated cases, before
" remitting them to the Jury Court; and it improves,
" extends, and renders more complete the former code
" of regulations as to the powers of the Jury Court to
" remit such questions of law or relevancy to be tried
" by the Court of Session; and it then adds, that in
" all those cases any matters of fact which may remain
" shall be tried by a jury. Now, is it to be said that
" you are, without absolute necessity, to control these
" strong expressions, so similar to the leading enact-
" ment in the previous statute, and in such striking
" conformity with the whole scheme and object of the
" legislature, which obviously was to do away with
" proofs on commission in the enumerated cases? And
" can you do so without endangering, I mean theoreti-
" cally, the whole system of jury trial as established in
" Scotland?

" With regard to the argument of Lord Gillies,
" founded upon the deficiency of powers said to have
" been felt in the courts of England, I would just say
" that I think we have already got the very powers
" which they wished to get. In England all cases in-
" volving matter of fact, arising in the Courts of com-
" mon law, must be tried by jury; and the Judges
" there, therefore, were anxious to possess the power
" of disposing otherwise of such cases as were in their
" nature unfitted for jury trial. Now, we already have
" such a power; we may try all cases, except the
" enumerated cases, in the Court of Session; and all
" that can be said with reference to this argument is,
" that we already have all the powers which the Eng-
" lish Courts wanted to have, which they were not

" allowed to have, and yet without which the system in " England works well. As to having a class of cases " subjected in this respect to a discretionary power, I " would say that it is better for all parties to have the " line chalked out by parliament within which that " discretionary power is to be exercised. The restric- " tion thus imposed is not unwholesome. It is not a " great evil that, in a very few cases, after an attempt " has been made to try them by jury, that method of " trial may be found inexpedient. And the remedy is " not very desperate. Few parties would be inclined " to insist on having questions tried by jury, contrary " to the persuasion of the Judge, and with the good " sense of their own counsel to guide them."

Lord Moncreiff.—" I concur entirely in the opinion " of Lord Gillies; and the grounds upon which I have " formed my opinion have been so clearly and fully " explained by Lord Corehouse that I do not intend " to trouble you with many remarks. I was prepared " to state fully the views which I entertain of the " question; but that is now unnecessary. In con- " sidering the question, we have to keep two points " steadily in view: 1st, that we are called upon to give " our judicial opinions upon a pure question of compe- " tency; as to whether it would be better that the law " should have stood the one way or the other, we have " no right to inquire; and, 2dly, that in construing a " statute judicially it is not to be assumed that the " legislature proceeded on the idea that any Judge in- " any Court would not do his duty faithfully.

" If the question were, whether any great number of " these enumerated cases ought to be remitted to the " Court of Session, I should say that very few indeed

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" would require to be so disposed of. Nay, if even in " this very case the question were, whether, the point " of competency being decided, it ought to be remitted " to the Court of Session, I should have very great " doubts of the propriety of doing so without the con- " sent of all parties. But the only question before us " is that of competency; it is simply, whether, when " a Lord Ordinary in such a cause, acting as the Jury " Court formerly did, doubts whether or not a particu- " lar case is fitted for jury trial, he may remit it to the " Court of Session to decide the question whether it is " so or not. I am most decidedly of opinion, that the " 12th section of the act 1819 applies to both classes of " actions; and the only cause for hesitation which I " have in forming that opinion is the respect which I " feel for the opinions of so many of your Lordships " who think differently. If the first clause of that " section refers to both classes, I do not think that, by " any rule of construction, it is possible to hold that the " second does not also refer to both. Then, as to section " 13, it was necessary to continue the former powers " for the disposal of the non-enumerated cases, but it " was not intended to affect any of the provisions with " reference to the disposal of the enumerated cases, " and therefore they were excepted. Neither do I " think that by any of the subsequent acts the powers " conferred upon the Jury Court by this 12th section " have been taken away. The general expressions con- " tained in the 28th section of 6 Geo. IV. are only to " be understood sub modo, and in conformity with the " other provisions established or left unrepealed by " that act. Then, with regard to the 33d section, it " only gives powers as to the disposal of questions of

" law or relevancy; and then it provides, that when " such questions are transmitted to the Court of Session " that Court is bound, after having disposed of them, " to remit the whole process back to the Jury Court " as one of the enumerated cases. And therefore " the last words of this section import no more than " the former general provision, that all such cases " shall be sent to the Jury Court, there to be disposed " of. Then it is said, that in the 1 Will. IV. the " legislature assumes that these cases must be tried by " jury. No doubt of it; that remains the general " rule for all such cases. But the question still " remains, whether there is any thing in either of these " acts which repeals the 12th section of the former " act? I find nothing in them that can be held to have " such an effect; and therefore, holding that that " section clearly confers upon the Jury Court the power " of retransmitting to the Court of Session such of the " enumerated cases as may appear to them unfit for " jury trial, I think we still possess these powers. The " cases in which these powers will come to be exercised " must, in my opinion, be very few; but the legislature " clearly supposed that they might exist."

Lord Fullerton.—" In regard to the 12th section of " the 59 Geo. III. I agree with Lord Jeffrey. I do " not think that the first provision of that section can " be held to be confined to what are termed the non- " enumerated cases. There were obvious reasons for " conferring a general power to retransmit emerging " questions of law or relevancy, because, as in the " great proportion of the enumerated cases the con- " descendences and answers were given in in the Jury " Court, such questions were not likely to be raised

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" until after the case had been remitted from the " Court of Session.

" But I do not think it necessarily follows that the " concluding part of the section, which is in expres- " sion a substantive enactment, must receive an equally " comprehensive construction; that will depend on " the true meaning of the terms employed in it. And, " on considering those terms with reference to those of " the first and leading enactment of the statute, it " would require some clearer and more unequivocal " declaration to satisfy me that by this section the " Jury Court were empowered to exercise a discretion " as to the beneficial application of jury trial in that " class of cases to which, by the clearest implication, the " leading enactment had declared it to be beneficially " applicable, and which it had expressly directed that " Court to try by a jury.

" This opinion is confirmed by the section imme- " diately following, viz. the 13th. For though, from " its form of expression, it is not absolutely conclusive, " it is hardly possible that, if the 12th section had " contemplated the retransmission of any of the enume- " rated cases, for the purposes of a proof by commission, " or otherwise, the 13th would have contained such a " saving and excepting clause, without some expla- " nation or qualification.

" Even if the question, then, had turned entirely on " the act of the 59 Geo. III. I should have been " inclined, though with great difficulty, to think that " the Jury Court had no power, in any of the enume- " rated cases, to retransmit on the particular ground " now under consideration.

" But it does not appear to me to depend entirely on

" that statute. We must look to the next, the " 6 Geo. 1V., and that, in my opinion, removes the " difficulty.

" The purpose of it was to enact a body of regula- " tions for the preparation of causes in the Court of " Session, and for the ascertainment of facts in those " cases in which the facts were disputed.

" Even in that department of this last class of cases, " which was not specially appropriated to the Jury " Court, the provisions contained in it went far to " supersede the 12th section of the 59 Geo. III.; for " the 14th and 15th sections provide, first, for the case " of the parties differing as to facts which do not " require to be ascertained by jury trial, and, secondly, " for that of the parties differing as to facts which do " require to be ascertained by jury trial. The adoption " of the different course of procedure respectively " applicable to those cases is left by those clauses to " the Lord Ordinary and the Court; and after that " power had been exercised, by sending a case to the " Jury Court, it is not easy to see how the Jury Court " could have had the power to retransmit it, on the " ground that they did not consider it one to which " jury trial was beneficially applicable.

" But the matter is still clearer in regard to the " other or enumerated class of cases, which is by this " statute extended much farther than by that of the " 59 Geo. III. In the first place, it repeals expressly " the whole provisions authorizing the remits of cer- " tain cases from the Court of Session; and, secondly, " it introduces a remit of a totally different kind, and " founded on a different principle. After repealing the " provisions of the 59 Geo. III. as to remits of the " specified class of cases, it enacts that 'the following

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" ' actions, whether originating in the Court of Session
" ' or the Court of Admiralty, shall be held as causes
" ' appropriate to the Jury Court, and shall, for the
" ' purpose of being discussed and determined in that
" ' Court, be remitted at once to that Court, in manner
" ' herein-after to be directed;' and the 29th section
" points out the form in which this is to be done.

" By these enactments an essential change was made
" on the former system. The Jury Court being
" declared to be the 'appropriate Court' for the class
" of enumerated actions, in which these actions were to
" be 'discussed and determined,' and the Court of
" Session being called on at once, and without any
" discretion, to remit these actions, it appears to me
" that those actions were as completely fixed in the
" Jury Court as if they had been brought into it by a
" special writ for that purpose. In truth, in the enu-
" merated cases the remit of the Court of Session
" ceased, after that statute, to be any thing but the
" formal instrument for passing the case to the ' appro-
" ' priate Court.'

" Now, if the enactments had stopped here, I do not
" see how the Jury Court could have had the power to
" retransmit on any ground whatever. Having been
" declared the 'appropriate Court' in which certain
" actions were to be ' discussed and determined,' they
" must have retained those cases till they were so
" discussed and determined; and I do not see how
" such cases could have found their way back to the
" Court of Session, unless by the authorized proceedings
" in error, by bills of exceptions, or otherwise, after
" they were determined in the Jury Court.

" But the enactments did not stop there. For the
" 33d section points out the special circumstances in

" which the Jury Court shall retransmit to the Court " of Session; and, in particular, the manner in which " questions of law or relevancy, emerging in the dis- " cussion of the enumerated cases, shall be dealt with " by the Jury Court; and it concludes with the " positive direction, that if, after all the sifting of the " case, ' there shall remain matter of fact to be ascer- " ' tained between the parties, the said matter shall be " ' tried by jury.'

" Combining this clause with the 28th, I think they " necessarily constitute a repeal of all grounds of re- " transmission by the Jury Court to the Court of " Session, except those specified in the 33d section; " and, at all events, they constitute a repeal of any " powers, if they ever existed, to retransmit any of the " enumerated cases to the Court of Session, in order " that disputed facts in these cases might be ascertained " in any form but by that of trial by jury. Upon this " last matter the statute seems to me to be clear. In the " first place, it declares that the enumerated cases shall " be discussed and determined in the Jury Court, as " the appropriate Court; secondly, it points out the " special circumstances under which that appropriate " Court shall retransmit to the Court of Session, in " regard to questions of law or relevancy; and, thirdly, " it directs that in all cases in which there ' remains " ' matters of fact to be ascertained, they shall be tried " ' by a jury.' The consequence I draw is, that these " enactments are absolutely exclusive of the power to " retransmit any of the enumerated cases ' in which " ' there remains matter of fact to be ascertained,' in " order that such matter of fact shall be determined, " not by the appropriate Court, in the statutory form

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" of trial by jury, but by the Court of Session, on a " proof by commission.

" Holding, then, that there was no power in the " Jury Court, while it subsisted, to withhold any of the " enumerated cases, in which there remained matter of " fact to be ascertained, from trial by jury, and it " being unquestionable that no different or higher " powers on the matter are now vested in the Court of " Session, I think the application incompetent."

Lord Cuninghame.—" Although I had formed an " opinion in favour of the competency of the motion, " yet now, after hearing the opinions which have been " delivered, I have come to entertain considerable " doubt on the question; and on the whole, consider- " ing that the Court is so nearly divided, and that I " have had the least experience among your Lordships, " as a Judge, I think myself justified in withdrawing, " and in declining to vote, on the ground of non " liquet."

The Lord President.—" It may be satisfactory to the " Court to learn, that the opinion of the Lord Chief " Commissioner is with the majority."

The Court then pronounced this interlocutor :—

(10th March 1837.)—" The Lords having heard " counsel in presence of the whole Court, and having " considered the different acts of parliament regarding " trial by jury in civil causes, and having particular " regard to the 12th and 13th sections of the act " 59 Geo. III. c. 35., are of opinion, and find and de- " clare accordingly, that in the cases enumerated in " the said acts as appropriated for trial by jury, where " the conclusion is for damages, they have no power " to take proofs by commission, on remit, or in pre-

"sentia, but must remit all such cases to be tried by "jury."[1]

Marshall's Trustees and Lord Eglinton's Trustees presented petitions of appeal, which were objected to as incompetent; and the appeal committee having reported the matter to the House, their Lordships directed the question to be argued by one counsel on each side.[2]

Respondent (*objecting to the appeal*).—This is an action concluding for damages to lands where the title is not in question, and is thus one of those enumerated in the statute 59 Geo. III. cap. 35., and which are ordered to be tried by a jury. A power is reserved to the Court of Session, where any question of law arises to decide such a question; but where no such question arises (and here there is none), it is enacted by section 3d, that "the interlocutor of the Lord Ordinary "ordering the cause to be remitted to the Jury Court, "whether with or without a reservation of the alleged "question of law, shall not be subject to review by "representation, petition, appeal to the House of Lords, "or otherwise;" and by section 15 it is expressly enacted, that all interlocutors "ordering a trial by "jury" shall not be subject to appeal. The same class of actions are enumerated in the statute 6 Geo. IV. cap. 120. sec. 28. And in uniting the Jury Court with the Court of Session, the statute 1 Will. IV. cap. 69. sec. 16. enacts, that all the provisions of the therein recited acts (including the act of the 59 Geo. III.) shall remain

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1 15 D., B., M., 784.

2 The argument took place under the petition for Marshall's Trustees, it being arranged that the judgment on it should regulate the judgment on the petition of the Trustees of the Earl of Eglinton.

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in force in so far as not inconsistent with it; and the rule prohibiting appeals is not so.

Appellant (*in answer*).—The right of appeal cannot be taken away by implication. The rule as to the incompetency of appeal under section 3d of the 59 Geo. III. applies to the act of remitting a case to the Jury Court, not to the question whether a trial by jury shall actually take place. That question can arise only at the time of settling the issues. Then the statute 6 Geo. IV. cap. 120. in part repeals that of the 59th of Geo. III., and no provision is made against an appeal. In this situation of matters the statute 1 Will. IV. abolished the original Jury Court, without making any explicit enactment on the subject. The question here is, whether the case shall be sent from one roll in the Court of Session to the other; and there is no prohibition against an appeal in such a case.

LORD CHANCELLOR.—My Lords, this is an application to dismiss an appeal, as not being competent from an order. The application was made (according to the petition) in these terms,—it being in a motion stated to have been made before the Lord Ordinary as in the Jury Court:—" That the cause should be remitted back " from the jury roll to the roll of the Court of Session, " in terms of the 12th section of the act 59 Geo. III. " cap. 35., on the ground that it was one to which, " from the nature of the case, and the technical and " scientific investigation on which it would depend, " jury trial would not be beneficially applicable." The petition states, that the Lord Ordinary required the assistance of all the Judges; and it ended in the following order:—" The Lords having heard counsel " in presence of the whole Court, and having con-

" sidered the different acts of parliament regarding " trial by jury in civil causes, and having particular " regard to the 12th and 13th sections of the act " 59 Geo. III. cap. 35., are of opinion, and find and " declare accordingly, that in the cases enumerated in " the said acts as appropriated for trial by jury, where " the conclusion is for damages, they have no power to " take proof by commission, on remit, or in presentia " but must remit all such cases to be tried by a jury."

My Lords, it is not disputed that the right of action in this case was one coming under the cases enumerated by the 59th of Geo. III. Those cases are also enumerated in the 6th of Geo. IV. cap. 120. sec. 28.; and it is admitted on all hands that the case in question was among those enumerated cases. The 1st section of the 59 Geo. III. provides, that in those cases the Lord Ordinary, without any discretion, shall send the case to the Jury Court. The application in question is made under the 12th section of that act. Then there is a series of sections, commencing with the 4th, providing, that in all cases not enumerated, as to which provision is made, the Lord Ordinary or the Court of Session may, if the case appears a fit case for the purpose, send it to be tried by the Jury Court. Then the 12th section provides, " that it shall be competent to the Jury Court, " when it appears to the said Court, in the course of " settling an issue, or at any time before trial, in the " cases remitted to them, that there is a question or " questions of law or relevancy which ought to be pre- " viously decided, to remit back the whole process and " productions to the Division of the Court of Session, " Lord Ordinary, or Judge Admiral, who remitted the " same to the Jury Court, that the question or ques-

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" tions of law or relevancy may be considered and
" determined there: Provided always, that it shall be
" lawful to the said Division, Lord Ordinary, or Judge
" Admiral, when matters of fact shall, after such con-
" sideration or determination, remain to be proved,
" again to remit the whole process and all the pro-
" ductions to the Jury Court, that an issue or issues
" may be prepared and tried as aforesaid."

Now, it would be rather a singular provision, if, in the first instance, it were imperative on the Lord Ordinary to send one of the enumerated cases to be tried, against which order there can be no appeal; and yet, when it got to the Jury Court, and measures were being taken to send it before the Jury, it could be sent back to the Lord Ordinary or the Court of Session,—that there should be discretion in the Court whether to send it to the Jury or not. That, however, is an objection which would lie more to the order to which the appeal applies, than to the particular case now under your Lordships consideration.

The next section, however, the 13th, provides, " that
" nothing in this act contained shall extend or be
" construed to extend to prevent the Court of Session,
" in either of its Divisions, or the Lord Ordinary, (save
" and except in the cases concluding for damages,
" herein-before enumerated,) or the Judge Admiral,
" unless otherwise instructed as aforesaid by the
" Court of Session, to take proof on commission, by
" remit, or in presentia, and thereafter disposing of the
" cause in the manner now practised in such cases."

Then the 15th section provides, " 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 Judges of the " Admiralty, ordering a trial by jury." So that the Lord Ordinary's order, in the first instance, in the enumerated cases is final, unless arrangements are made for taking the opinion of the Court of Session in the cases not enumerated. The 15th section provides, that in all cases there shall be no appeal against an order directing the case to be tried by a jury, embracing the two classes of enumerated and non-enumerated cases. It is quite obvious that if this appeal be competent, means might have been found by which the provision of the statute would be evaded, inasmuch as parties might indirectly call upon your Lordships to decide whether or not the Court of Session or the Lord Ordinary had power to send the case to be tried by the Jury Court.

The only part of the statute on which it is attempted to be shown that the present appeal is founded is the 12th section, which provides, that in certain cases applications may be made to the Jury Court to send a case back from the Jury Court to the Court of Session. That affords a strong reason for believing that if that case were now before your Lordships for decision that would apply, not to the enumerated, but to the non-enumerated cases; but it is quite clear, that under the provision in that section only the question now before your Lordships arises. It is a statutory provision, under which the application is to be made; and it is clear that the act of parliament which gives that power does not give a power of appeal. It is against the refusal of the application that the present appeal is presented.

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I shall observe presently on the terms of the order, to see whether there is any thing in the argument, that all those provisions are gone by the union of the two Courts,—a power of appeal being given by the statute, and no appeal given by the statute,—whether that would be a sufficient answer to the competency of this appeal.

Then it is said, however that might be before the statute of the 1st of William IV., the statute of 1st William IV. has altered the case, inasmuch as the Jury Court is merged in the Court of Session. That statute certainly has provided, that all those powers which had before that time been executed by the Jury Court should be in future executed by the Judges of the Court of Session; but it never could be supposed that the true construction of that act was to destroy all the machinery which the previous acts of parliament had established as the means by which it was to be ascertained what cases were to be tried by that Court, and what cases were to be tried by the Jury Court, and regulating the cases in which the one or the other course was to be adopted. There can be no doubt of that being the intention of the act, from the general nature of it; but the 16th section of that act appears to put an end to all discussion, for it enacts, "that all "the provisions of the foresaid recited acts now in "force, in so far as not inconsistent with this act, shall "be construed and remain in force until altered or "revoked by parliament; and that all rules and regu-"lations in observance in the Jury Court at the time "of the union of jury trial in civil cases with the "administration of justice in the Court of Session, "established and enforced by act of sederunt, shall

" continue and be observed as rules and regulations " applicable to the Court of Session after such union, " until altered by competent authority, namely, the " Court of Session in Scotland." Then, if all the provisions of the former act are to remain in force, one of those provisions having left it in the discretion of the learned Judges whether a case should be tried by the Jury Court jurisdiction, or whether it might be disposed of by the Judges exercising their ancient jurisdiction, that provision applies as much to the proceedings subsequent to that act as it had done to the proceedings antecedent to it. The terms of the clause are explicit:—" That all the provisions of the " foresaid recited acts now in force, in so far as not " inconsistent with this act, shall be continued and " remain in force until altered or revoked by par- " liament; and that all rules and regulations in " observance in the Jury Court at the time of the " union of jury trial in civil causes with the admini- " stration of justice in the Court of Session, estab- " lished and enforced by acts of sederunt, shall " continue and be observed as rules and regulations " applicable to the Court of Session after such union, " until the same shall be altered by acts of sederunt." My Lords, it is quite obvious, I apprehend, that that act did not at all intend to alter the provisions with respect to the means by which the powers of the Court were to be put in operation; but that it was for the purpose of providing, that the jurisdiction exercised by the Jury Court should be exercised in future by the Court of Session, they discharging the duties of the jurisdiction separately, so as to carry into effect all the provisions of the prior acts. It appears to me, that, on

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a consideration of all the acts, there is in this case no power of appeal, and that the petition of appeal must be dismissed.

LORD BROUGHAM. — My Lords, I entirely agree in the conclusion to which my noble and learned friend has come to upon this subject. If the act of the first of the present King had been drawn with greater precision, and the manner of the transfer of the Jury Court to the Court of Session had been more distinct, it would have left no question at all in the present case. It is alone because that is not done with sufficient distinctness that the present question has arisen. If it had been said in that act (and we must take it as if it had been said), the Jury Court is to cease and determine from and after a certain day, as now constituted, —that is to say, as a separate Court, but that, nevertheless, the functions of the Jury Court shall hereafter —that is to say, after that shall have ceased and determined as a separate Court — continue to be performed by the Court of Session, then we should have the Court of Session acting in the separate capacities clearly laid down in the act, both as a Jury Court, and as the Court of Session. Then, if it acted in two separate capacities, both as a Jury Court and a Court of Session, the 12th section of the 59th of Geo. III., upon which, and upon which alone, the present application could be made, would have applied to it in both these capacities; and we should have read it:—It shall be competent to the Jury Court, when it shall appear to the said Court, in settling an issue or issues, that the matter turns on complicated accounts, to which trial by jury is not applicable, to remit both the whole process and productions, with their report thereon, in order that the

cause may be proceeded with in such manner as shall appear most expedient for the administration of justice. We should then have been enabled, more distinctly than we at present are, to read:—that it shall be competent for the Court of Session sitting as a Jury Court, to remit to the Court of Session sitting as a Court of Session, and to the Judge Admiral, in order that such Court may proceed in such way as may be requisite for the administration of justice. But I apprehend that must be taken to be the meaning of the 12th section, when coupled with the 1st, and particularly with the 16th section of the first of the present King. If that be so, it appears to me to put an end to all doubt, for this is, in that case, an appeal from an order of the Jury Court. The Jury Court, I take to be a mere creature of the statute; and unless an appeal is given by the act constituting that Court, no such appeal will lie. If the Court of Session, acting as a Court of Session, has, quasi Court of Session, any such jurisdiction, it is not necessary, for the present purpose, to argue that the appeal will not lie unless given by the statute. The separate existence of that Court is determined by the statute in the first of the present King. I therefore think that this appeal does not lie. And I have the less anxiety respecting the decision to which your Lordships are about to come upon this matter, because, after having attended to the arguments which the learned Judges advanced on both sides, after having attended to the arguments in the Court below, speaking with the greatest deference possible of all the learned Judges, I have come to a very strong opinion, I may say I have come to an unhesitating conviction, in favour of the opinion of the majority, that the jurisdiction

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in question does not apply to the enumerated, but only to the non-enumerated cases. At the same time it must be admitted it is very clear that among the enumerated cases may possibly arise, and not even possibly, but very probably, from time to time, cases where a jury trial would not be the most expedient and the most desirable mode of proceeding for the administration of justice; but the great bulk of the cases, the very great majority, almost all those cases, are such as are better adapted for trial by jury than the other cases which fall within the description of the 1st section of the one act, and the 28th section of the other. Those cases are much more likely to furnish instances of actions where it may be more advisable not to proceed by jury trial than to proceed by that mode of trial. The legislature appears to have drawn that distinction in the two clauses. A case may, by remote possibility, arise—and the present case may, by possibility, be one—in which the trial by jury would not be so advisable. I have formed my opinion upon the merits of the case, so far as I have been able to attend to it, and on a careful perusal of the opinions of the learned Judges below, and have no hesitation in joining in the opinion of my noble and learned friend advising your Lordships to dismiss this appeal.

The House of Lords ordered and adjudged, That the said appeal be dismissed this House, as incompetent, without costs.

DEANS and DUNLOP—ANDREW M'CRAE—RICHARDSON and CONNELL, Solicitors.