my province to deal with matters of fact, but the province of the constitutional tribunal.

EARL OF HALSBURY—I am entirely of the same opinion. I abstain from expressing any opinion of my own on the point, which is simply a question that the jury will have to determine. It is enough for me to say that in my view there was a case to be properly submitted to a jury, and it was for them to determine it.

LORD ASHBOURNE—I agree.

LORD ROBERTSON—My opinion is that this appeal must be allowed. I differ with the greatest reluctance from a tribunal so able and experienced in administering this particular jurisdiction, but I think in this instance they have gone too fast.

I must not, however, be supposed in the least degree to hold that because the parties are not agreed as to the facts therefore a case must go to trial. That is a much cruder view than has ever been accepted by the Scotch Courts or by your Lordships in Scotch Appeals. Much time and money have been saved by a more critical view of the case presented by the claimant. When a case comes, as this one did, from the Sheriff Court for trial by jury the duty of the Court of Session is to see before a jury is summoned that there is a case to try. This means an ascertainment of the gist or gravamen of the action. The mere fact that in what is probably an unnecessarily detailed averment of circumstances there is a dispute about facts is in no way decisive of the right to go to trial. If the defender can demonstrate that, assuming all the pursuer says, he has no case, then the Court has habitually, and most rightly, ended the litigation. This, however, is a delicate jurisdiction, because it depends in dubious cases on the language very often obscure applied to facts very often equivocal.

As I think this case must go to trial I do not enter into any analysis of the points in the case, for that would merely prejudice the trial. My interposition at all is merely because in my humble judgment it has got to be remembered that the Scotch system obliges the pursuer to show his hand and state his case before he is allowed to go to trial, and thus compels the Court, when invited, to ascertain the value of the case thus stated. In the present instance I think the Court have criticised the statements too severely and nicely.

LORD COLLINS—I am of the same opinion.

Their Lordships reversed the judgment appealed from with costs on pauper scale.

Counsel for the Appellant—Munro—J. A. Christie. Agents—Thomas Scanlan & Company, Glasgow — St Clair Swanson & Manson, W.S., Edinburgh — Warlow & Patey, London.

Counsel for the Respondents—Solicitor-General (Ure, K.C., M.P.)—Forbes Lankester, K.C. Agents — James Watson, S.S.C., Edinburgh—John Kennedy, W.S., Westminster.

COURT OF SESSION.

Wednesday, May 20.

FIRST DIVISION.

[Sheriff Court at Aberdeen.

PARISH COUNCIL OF STRICHEN *v.* GOODWILLIE.

Sheriff — Jurisdiction — Appeal — Competency — Burial Grounds (Scotland) Act 1855 (18 *and* 19 *Vict. cap.* 68), *secs.* 10 *and* 32.

The Burial Grounds (Scotland) Act 1855, section 10, allows in certain events "an appeal to any of the Lords Ordinary of the Court of Session, whose decision shall be final, such appeal always being presented within fourteen days of the date of the sheriff's judgment." Section 32 enacts—"No interlocutor or deliverance of a sheriff under this Act, excepting as herein provided, shall be in any way subject to review, or to be set aside by reason of any defect of form therein, or in the procedure on which it followed."

Held that the only appeal allowed by the Act was the appeal to the Lord Ordinary provided for in section 10, and that there was no appeal from the Sheriff-Substitute to the Sheriff.

Sections 10 and 32 of the Burial Grounds (Scotland) Act 1855 are sufficiently quoted in the rubric.

The Parish Council of the parish of Strichen, in the County of Aberdeen, presented a petition in the Sheriff Court at Aberdeen, in which they prayed the Court "to appoint a time from and after which" a certain piece of ground "shall be deemed part of the burial ground of the said parish of Strichen; to grant sanction to the petitioners under such restrictions and conditions as they think proper to sell the exclusive right of burial, either in perpetuity or for a limited period in said ground, which the petitioners have resolved, subject to such sanction, to wholly appropriate for that purpose and for the other exclusive rights mentioned in section 18 of the Burial Grounds (Scotland) Act 1855; and to approve of the fees and payments in respect of interments in said burial ground fixed by the petitioners; and to find any party opposing the prayer of this petition liable in expenses."

The petition was opposed by the Reverend Richard Goodwillie, the minister of the parish of Strichen, on the ground of certain alleged irregularities on the part of the petitioners. On 15th November the Sheriff-Substitute (A. J. YOUNG) pronounced an interlocutor granting the prayer of the petition and fixing the 1st December 1907 as the date from which the ground in question was to be deemed part of the burial ground of the parish.

On 16th November the respondent appealed to the Sheriff.

On 10th December 1907 the Parish Council as then constituted passed a resolution not to proceed further with the petition, and a joint minute was lodged for them and the respondent craving the Sheriff to sustain the appeal, recal the Sheriff-Substitute's interlocutor, and dismiss the petition. Minutes were also lodged for John Sleigh and another, two of the minority of the Parish Council, and for certain ratepayers, protesting against the first-mentioned minute as an agreement *ultra vires* and incompetent, and claiming to be heard on the competency of the appeal.

On 26th December the Sheriff (CRAWFORD) pronounced an interlocutor allowing these minutes to be received, and sisting the protesting minuters as parties to the case.

On 22nd February 1908 the Sheriff dismissed the appeal as incompetent.

Note.—"This is an appeal against a decree of the Sheriff-Substitute, pronounced in a petition by the Parish Council of Strichen, presented under section 9 of the Burial Grounds (Scotland) Act 1855. I am of opinion that the appeal is not competent, and that I have no jurisdiction to entertain it. By the statute a certain jurisdiction is conferred, and a corresponding duty laid upon the Sheriff. It was conceded and could not successfully have been disputed that the word 'Sheriff,' as used in the statute, includes Sheriff-Substitute, as it always does, unless the contrary is expressed, and that the petition was competently presented to the Sheriff-Substitute and dealt with by him. Now, clause 32 of the Act is in these terms—'No interlocutor or deliverance of a sheriff under this Act, excepting as herein provided, shall be in any way subject to review or to be set aside by reason of any defect of form therein or in the procedure on which it followed.' The words of that section, according to their plain meaning, appear to me to exclude an appeal from the Sheriff-Substitute to the Sheriff. The words 'excepting as herein provided' make that all the more evident. The exception refers to an appeal which is allowed in certain cases under section 10 to a Lord Ordinary of the Court of Session. That appeal must be presented within 14 days of the date of the Sheriff's judgment. That would not leave time for an appeal from the Sheriff-Substitute to the Sheriff, and I do not think it possible to interpret the words 'Sheriff's judgment' as meaning a judgment on appeal from the Sheriff-Substitute.

"The statutes are now numerous in which a new jurisdiction and duty are conferred and laid upon the Sheriff for the purposes of the statute different from his jurisdiction as judge ordinary. The procedure prescribed in these statutes varies very much in detail, and each must be interpreted by its own terms. Where there is room for holding that Sheriff means the Sheriff Court with its ordinary procedure, then the appeal from the Sheriff-Substitute to the Sheriff will remain, and any different intention must be clearly and unmistakably expressed. Such a case was *The Magistrates of Portobello* v. *The Magistrates of Edinburgh*, 9th November 1882, 10 R. 130, 20 S.L.R. 92, in which the language of the Rivers Pollution Prevention Act made it clear that the ordinary procedure of the Sheriff Court was to be followed, and the subject-matter of the petition to the Sheriff was similar to that of an ordinary Sheriff Court action. There is, however, a series of statutes which differ from each other in detail, some of them, though not all, imposing upon the Sheriff a duty which is rather ministerial than judicial, but agreeing in this, that the purpose of the statute is to be worked out under a procedure marked by more speedy finality and greater dispatch than an ordinary litigation would afford. One feature common to such Acts is that they provide for a single decision in the Sheriff Court which in some cases is final, while in others there is a single limited appeal. In some statutes, especially of late years, that object is attained by limiting the jurisdiction to the Sheriff-Principal. But a single decision may be contemplated without such limitation. An early case of that kind was *Balderston* v. *Richardson*, 20th February 1841, 3 D. 597, arising under the Bankrupt Act, 2 and 3 Vict. cap. 41. Lord Gillies observed, 'The Sheriff in the statute means either the Substitute or the Principal, but not both,' and that observation is equally applicable to the present case. The case of *Fulton* v. *Duplop*, 31st May 1832, 24 D. 1027, arising under the same statute as the present, is very nearly a direct precedent. It was there stated by the Sheriff-Substitute and assumed throughout that there was no appeal from him to the Sheriff. It also appears from the report that a year or two previously another application had been made under the Act by the Parochial Board, and that the Sheriff had dismissed an appeal to him from the Sheriff-Substitute as incompetent. The same point has been raised in other cases, such as *Fleming* v. *Dickson*, December 19, 1862, 1 Macph. 188; *Leitch* v. *The Scottish Legal Burial Society*, October 21, 1870, 9 Macph. 40, 8 S.L.R. 8; and *Bone* v. *The Sorn School Board*, March 16, 1886, 13 R. 768. Those cases decided that the Sheriff-Principal may take up the case though the petition has been presented to the Sheriff-Substitute, and he has dealt with preliminary pleas, and that even when the Sheriff has done so under the mistaken impression that an appeal to him was competent. He can intervene so long as no final decision has been pronounced. But all these cases agree in this, that only one decision in the Sheriff Court is contemplated. A recent case was decided by the First Division under section 57 of the Roads and Bridges Act 1878 affirming a judgment by which I held that an appeal to the Sheriff was incompetent. The clause of finality was in similar terms to those of section 32 above quoted, and I cannot distinguish between the two cases. The case which was mentioned during the debate (and Mr Duncan, the agent of one of the parties in this case, was engaged in it) is

not reported. The name was, I think, *Aberdeen District Council* v. *Milne*, and the year 1901.

"I have thought it desirable to refer to some of the cases in which a similar question has been mooted, and which seemed to me valuable as illustrating the present case. But, as I have said, each statute must be interpreted by its own terms. In the case of *Fulton* we have what almost amounts to a direct precedent, and even without the help of that case I should have come to a clear conclusion that I have no jurisdiction to entertain this appeal."

The petitioners and the respondent Goodwillie appealed to the Court of Session.

Counsel for the appellants argued that an appeal to the Sheriff was competent, and referred to *Leitch* v. *Scottish Legal Burial Society*, October 21, 1870, 9 Macph. 40, especially Lord Cowan at p. 42, 8 S.L.R. 8.

Counsel for the respondents were not called upon.

LORD PRESIDENT—I do not see any difficulty in this case, and I think the judgment of the Sheriff is right. It is impossible to read the provisions of the Burial Grounds (Scotland) Act 1855 without seeing that the only appeal allowed is an appeal to the Lord Ordinary under certain limited conditions, and that there is no appeal from the Sheriff-Substitute to the Sheriff. The Sheriff and the Sheriff-Substitute here are not acting in their ordinary capacity, and are both equally available as a court of first instance.

LORD M'LAREN—I concur.

LORD KINNEAR—I entirely agree with your Lordship. I think the Sheriff has refused the appeal on perfectly right grounds; and that he has stated correctly the distinction between Acts of Parliament conferring an exclusive jurisdiction on the Sheriff, to be exercised either by the Sheriff-Depute or the Sheriff-Substitute, and those which give a new jurisdiction to the Sheriff Court to be explicated according to the ordinary course of procedure.

LORD PEARSON was absent.

The Court dismissed the appeal.

Counsel for the Reverend Richard Goodwillie (Respondent and Appellant), and for the Parish Council of Strichen (Petitioners and Appellants)—Chree. Agents—Henry & Scott, W.S.

Counsel for John Sleigh and Others (Respondents) — Hunter, K.C. — Macmillan. Agents—Alex. Morison & Company, W.S.

Wednesday, May 27.

FIRST DIVISION.

[Sheriff Court at Airdrie.

GEORGE *v.* THE GLASGOW COAL COMPANY, LIMITED.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, c.* 58), *sec.* 1 (2) (*c*)—*Serious and Wilful Misconduct—Coal Mines Regulation Act* 1887 (50 *and* 51 *Vict. c.* 58), *sec.* 51—*Contravention of Special Rule.*

By the additional special rules in force in a coal mine, under the provisions of the Coal Mines Regulation Act 1887, it was provided (Rule 3)—"The bottomer at a mid-working in a vertical shaft not provided with an appliance which constantly fences the shaft, being a mid-working in use for the regular passage of workers or the drawing of minerals from the mine, shall not open the gate fencing the shaft until the cage is stopped at such mid-working. . . . . "

A bottomer employed at a mid-working, requiring the cage, called down the shaft to the bottomer at the foot, who signalled to the engineman to raise the cage. By the system of signalling in use in the pit, the engineman on receiving a signal to raise the cage, though in use to stop at the mid-working, was entitled, unless stopped by a further signal, to raise the cage to the pit-head, and on this occasion did so. The bottomer at the mid-working, without ascertaining whether the cage had stopped or not, opened the gate fencing the shaft, pushed his hutch forward into the shaft, and fell with it to the bottom, receiving injuries.

In a stated case under the Workmen's Compensation Act 1906, *held* that there was evidence upon which the arbiter in a claim for compensation could find that the workman's injuries were due to his serious and wilful misconduct.

Opinion per curiam that the workman's breach of the additional special rule was serious and wilful misconduct in the sense of the Act.

The Workmen's Compensation Act 1906 (6 Edw. VII, cap. 58), sec. 1 (2) (*c*) enacts—"If it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall; unless the injury results in death or serious and permanent disablement, be disallowed."

John George, bottomer, Shieldmuir, Wishaw, claimed compensation under the Workmen's Compensation Act 1906 from the Glasgow Coal Company, Limited, Kenmuirhill Colliery, Carmyle, in respect of injuries sustained by him while employed in one of the defenders' pits.

The matter was referred to the arbitration of the Sheriff-Substitute at Airdrie