LORD M'LAREN and LORD KINNEAR were absent.

The Court pronounced this interlocutor—

"(1) Reverse the determination of the Commissioners in so far as it disallows £1732 of the deduction of £2022 claimed by the appellants, and find that in arriving at the amount of profit or loss the Commissioners ought to have allowed the whole sum of £2022 as a deduction; (2) Affirm their determination as regards the other deductions claimed by the appellants; (3) Reverse their determination as regards £866 of the assessment on £2455, 10s.; (4) Affirm their determination as regards the balance of the assessment, viz., £1589, 10s.; and decern: Find the appellants entitled to expenses," &c.

Counsel for the Appellants—Fleming, K.C.—Pitman. Agents—J. & F. Anderson, W.S.

Counsel for the Respondents—Constable, K.C.—Umpherston. Agent—P. J. Hamilton Grierson, Solicitor of Inland Revenue.

Friday, March 18.

FIRST DIVISION.

[Sheriff Court at Glasgow.

M'CORMACK *v.* GLASGOW CORPORATION.

Reparation—Malicious Prosecution—Privilege—Actings in Enforcement of Statutory Bye-laws.

The Corporation of Glasgow, the proprietors of the tramways in Glasgow, are empowered under the Glasgow Corporation Tramways Acts 1870 and 1893 to make bye-laws, and these bye-laws, *inter alia*, make it an offence punishable by a penalty to travel upon any car and attempt to evade payment of the fare, or having paid for a certain distance knowingly to travel beyond that distance with intent to evade payment of the additional fare. They further provide that the conductor of each car shall to the best of his ability enforce the bye-laws and prevent their breach, and make his failure to enforce, itself a breach.

In an action of damages against the Corporation of Glasgow the pursuer averred that he was a passenger in one of their cars, that when the car reached a certain station the conductor requested him to pay the sum of one halfpenny and alleged that he had travelled beyond the station to which he was entitled to travel for a halfpenny, that he refused to pay, that the conductor lost his temper, insulted the pursuer and accused him of trying to defraud the defenders, and wrongfully, maliciously, and without probable cause called a policeman and charged the pursuer with travelling on the car with intent to evade payment, and that in consequence he was cited to appear at the police court, and that after evidence was led the charge was found not proven.

Held, on a proof, that the defenders should be assoilzied—the Lord President and Lord Kinnear on the ground that the occasion was privileged and that the pursuer had failed to prove malice and want of probable cause; Lord Johnston on the ground that though the occasion was not privileged, yet since the conductor was armed with statutory authority the *onus* lay on the pursuer to show that he was not justified in the use of it, and that he had failed to discharge this *onus*.

Buchanan v. *Corporation of Glasgow*, July 19, 1905, 7 F. 1001, 42 S.L.R. 801, *followed*.

Under powers conferred by the Glasgow Corporation Tramways Acts 1870 to 1893, the following bye-laws, *inter alia*, were made:—"4. (*c*) Any person travelling, or having travelled, in any car, who evades or attempts to evade payment of his fare, or any person who, having paid his fare for a certain distance, knowingly proceeds in any such car beyond that distance without paying the additional fare for the additional distance, and with intent to evade payment thereof, shall be liable to the penalty prescribed by these bye-laws. And it shall be lawful for any officer or servant of the Corporation, and all persons called by him to his assistance, to seize and detain any such passenger whose name or residence is unknown to such officer or servant until such passenger can be conveniently taken before a magistrate, or until he be otherwise discharged in due course of law. 23. The conductor of each car shall, to the best of his ability, enforce these bye-laws and regulations, or prevent the breach thereof; and if any such conductor fails to enforce the same as aforesaid, he shall be deemed to have committed a breach thereof."

Joseph M'Cormack, Rose Street, Garnethill, Glasgow, raised an action in the Sheriff Court at Glasgow against the Corporation of the City of Glasgow concluding for £100 damages.

The following *narrative* is taken from the opinion (*infra*) of Lord Johnston—"The situation is this. The Glasgow Corporation tramway routes are divided in halfpenny stages. If a passenger enters a car at any point within a stage he is due one halfpenny as his fare to the end of that stage. The moment the car enters upon another stage, the passenger, if he is going on with it, is due a second halfpenny for the second stage or any part of it, and so on. The pursuer Joseph M'Cormack wished to travel by one of the Corporation cars on the Maryhill to the city route, along New City Road to the corner of Cambridge Street. If he boarded the car at the corner of Seamore Street and New City Road his fare was a halfpenny. But if he boarded it before Seamore Street his fare was a penny, for the Seamore Street

corner was the beginning of a new halfpenny stage. The conductor believed and maintained, and still maintains, that he got in at the Henderson Street stop, which is 200 yards above Seamore Street. The pursuer maintained, and still maintains, that he got in at the Seamore Street stop. If the conductor was right he was entitled and bound to demand a penny fare, and he did so. It was refused and an altercation ensued, in the course of which the pursuer maintaining his attitude, the conductor hailed a policeman on the St George's Cross beat and gave the pursuer into custody on the charge of evading his legal fare. The pursuer was prosecuted in due course and the charge found not proven. He then raised this action of damages against the Corporation as proprietors of the tramways.

"The ground of damage alleged is, that the conductor acted recklessly, maliciously, and without probable cause, and entirely from temper, in so treating the pursuer, and that the defenders are responsible for his actings; that the pursuer had paid his legal fare to the Cambridge Street stop, to which the defenders were bound to carry him; and that the conductor acted oppressively in handing the pursuer over to the police, 'knowing as he did that pursuer (who supplied his name, occupation, and address) was a respectable and responsible citizen, and was acting in entire *bona fide* in contesting the fare.'"

The pursuer pleaded, *inter alia*—"(1) The defenders' servant," *i.e.*, a tramway conductor, "for whom they are responsible, having wrongfully, maliciously, and without probable cause charged the pursuer with intent to defraud, the defenders are liable to him in reparation therefor."

The defenders pleaded, *inter alia*—"(1) No relevant case. (2) The pursuer's material averments being unfounded on fact, the defenders are entitled to absolvitor with expenses. (3) Privilege. (4) The charge complained of having been made by the said conductor *bona fide* and with probable cause, *et separatim* the said charge being true and well founded, the defenders should be assoilzied."

On 11th June 1907 the Sheriff-Substitute (BOYD) allowed before answer a proof, and his interlocutor was on appeal affirmed on 5th July 1907 by the Sheriff (GUTHRIE), whose note is quoted *infra* in the note of his successor (MILLAR).

On 26th May 1909 the Sheriff-Substitute, after the proof, pronounced this interlocutor—"Finds that on 29th January 1907 the pursuer entered an electric car belonging to the defenders a few yards from the halfpenny car station in Seamore Street, Glasgow, on the line approaching the city; that at or near the station in Great Western Road he tendered the sum of one halfpenny to the conductor; that this was refused and the conductor gave the pursuer in charge of the police, accusing him of attempt to defraud the defenders; that the pursuer was tried on such a charge at the Northern Police Court, Glasgow, on 19th February 1907, and after evidence being heard, the charge was found not proven: Finds that the defenders' servant acted recklessly and without probable cause, and subjected the pursuer to indignity and insult, and that the defenders are liable to the pursuer in damages therefor: Assesses the same at the sum of £10 sterling, and decerns against the defenders for that sum," &c.

Note.—"I regarded this as chiefly a case of credibility, and it seemed to me that the witnesses for the pursuer were very much more to be relied upon than those for the defenders. The only impartial witness on the defenders' side was the lad Whitton, and admittedly he was reading at the time the pursuer boarded the car, and I did not regard him as a safe guide on the point as to the exact locality in which the pursuer entered the car."

On 5th August 1909 the Sheriff (MILLAR) on appeal pronounced this interlocutor—"Recals the interlocutor of 26th May last: Finds on the facts averred that the case is one in which the defenders' servant was privileged: Finds that the pursuer has failed to prove that the defenders' servant acted maliciously and without probable cause; therefore to that effect sustains the third and fourth pleas-in-law for the defenders, and assoilzies them from the conclusions of the action, and decerns: Finds the pursuer liable to them in expenses, including the expenses of the appeal."

Note.—"This is an action of damages on the ground that the defenders' servant, a tramway car conductor, charged the pursuer with failing to pay his fare and handed him over to the police, and that he did so recklessly and maliciously and without probable cause and entirely out of bad temper and spite against pursuer. The pursuer avers that he got in at the tramway car station at Seamore Street and that the fare to the station at Cambridge Street is one halfpenny, which he tendered to the conductor; that the conductor believing that he had come in at the station previous to Seamore Street, when a penny would be due as fare, refused to accept a halfpenny. The pursuer refused to give a penny, whereupon the car conductor called the police. I think there is no doubt that as the conductor was acting in the scope of his employment and in the interest of the Corporation he was in a privileged position, and that the pursuer must prove malice and want of probable cause before he can succeed in his action. His case was before the late Sheriff Guthrie on the relevancy, and he says in his note—'This case differs from *Buchanan* v. *Glasgow*, 7 F. 1001, in respect that the conductor of the car is said to have lost his temper and become insulting and abusive to the pursuer. It is possible that malice may be inferred by a jury from such bearing of the defenders' servant.' Now it is enough to say that the pursuer in his own evidence says—'The conductor was insulting and abusive to me. (Q) Explain how?—(A) He said that I was trying to get out of paying my fare and I would see, and he

would give me in charge, and he got into an excited state. (Q) Was he abusive in any other shape or form?—(A) He would not be in any other form except trying to strike me, and he did not do that. He used words to the effect, as far as I can recollect, that I was trying to get out of paying my fare. That was practically the only language he was using.' Now it is clear from that, that all that was said by the conductor was that the pursuer was not paying the fare that was due, and that was the question at issue. Apart from that the pursuer does not say the conductor was either insulting or abusive to him. Accordingly, so far as the conductor's language was concerned, the pursuer fails to prove malice. But it is further said that the conductor handed over the pursuer to the police after he had given his name and address, but it appears from the evidence of the only independent witness Whitton that the pursuer did not tender his card to the conductor but only to the police after they arrived. Accordingly I think that point also fails. As to the question whether there was probable cause, there is no doubt that the conductor believed that the pursuer had come on previous to the Seamore Street station, and the lad Whitton is also of the same belief. Moreover, the pursuer's friends, whom he left at the west side of Seamore Street station, saw him hurry forward to the car, and he seems to have got on a few steps before the car actually arrived at the station. In these circumstances I think it is difficult to hold that the conductor had not probable cause for what he did. The pursuer therefore has failed to prove that the defenders' servant acted maliciously and without probable cause. If that be so the defenders are entitled to be assoilzied."

The pursuer appealed, and argued—(1) A tramway company was not in the same position as a railway company, in that a passenger in the former case was entitled to enter on the journey without a ticket—*Apthorpe* v. *Edinburgh Street Tramways Company*, December 13, 1882, 10 R. 344, L. P. Inglis at 351, 20 S.L.R. 256. The occasion here was not privileged, and there was no need to prove malice and want of probable cause. Bye-law 4 (*c*) merely gave a power or privilege of enforcing a civil remedy. It was not in the same position as a *quasi*-police regulation, as that of preventing spitting, under consideration in the case of *Buchanan* v. *Corporation of Glasgow*, July 19, 1905, 7 F. 1001, 42 S.L.R. 801. Its provisions were rather of the nature of those in sections 35 and 37 of the Merchant Shipping Act Amendment Act 1862 (25 and 26 Vict. cap. 63), under consideration in *Lundie* v. *M'Brayne*, July 20, 1894, 21 R. 1085 (esp. Lord Kinnear at 1088-9), 31 S.L.R. 872. Accordingly they maintained that when the right to give in charge depended on statute, the giving in charge was wrongful and illegal unless the exact provisions of the statute were complied with, and it did not in any way give rise to an occasion of privilege. [LORD KINNEAR referred to *Pringle* v. *Bremner & Stirling*, May 6, 1867, 5 Macph. (H.L.) 55, 4 S.L.R. 233.] (2) In any case the evidence established malice and want of probable cause. The conductor had no reasonable ground for belief that the pursuer was trying to evade paying his fare. The want of probable cause and the recklessness of the conductor in charging the pursuer were in themselves evidence of malice—*Arbuckle* v. *Taylor*, 1815, 3 Dow 160; *Martin & Stark* v. *Cruickshanks*, June 26, 1896, 23 R. 874, 33 S.L.R. 683; *Clark* v. *Molyneux*, 1877, 3 Q.B.D. 237. Reference was also made to *Munro* v. *Taylor*, February 25, 1845, 7 D. 500.

[The Court informed counsel for the defenders that they need not argue the question of privilege.]

Argued for the defenders—The pursuer had failed to prove malice and want of probable cause. Both must be proved, but he had proved neither.

At advising—

LORD KINNEAR—This is an appeal from a judgment of the Sheriff of Lanarkshire in an action at the instance of Joseph M'Cormack against the Corporation of the City of Glasgow, which concludes for damages in respect of a wrong done to the pursuer by a conductor on the Glasgow Corporation Electric tramways, for which the Corporation is said to be responsible. The averment is that the pursuer was a passenger in an electric car, that when the car reached a certain station the conductor, Goodrick, requested him to pay the sum of one halfpenny, and that Goodrick alleged that he travelled beyond the station to which he was entitled to travel for a halfpenny, but the pursuer refusing to pay, the said Edward Goodrick lost his temper and became insulting and abusive to the pursuer and accused the pursuer of trying to defraud the defenders by travelling without paying for his ticket, and thereupon called a policeman and charged the pursuer with travelling on the car with intent to evade payment. In consequence of that charge the pursuer was cited to appear at the Police Court, and after evidence was led the magistrate found the charge not proven. Now the averment that the conductor lost his temper and used abusive language is not an averment in itself of any actionable wrong, but it is a perfectly good cause of action to allege that the defender made a charge against the pursuer of defrauding the defenders by travelling without paying for his ticket, and with intent to evade payment, and that that charge was false. But then the defence is that the conductor was acting in the exercise of his duty, that the occasion was a privileged one, and that the defenders cannot be made responsible in damages unless the charge was made maliciously and without probable cause. I think the learned Sheriff was right in holding, on the authority he has cited, that the occasion was privileged. The bye-laws, which are drawn up in the execution of an Act of Parliament, make it an offence punishable by a penalty to travel upon any car and

attempt to evade payment of the fare, or having travelled for a certain distance to proceed beyond that distance without paying the additional fare and with intent to evade payment thereof; and the bye-laws also provide that the conductor of each car shall to the best of his ability enforce these bye-laws and regulations and prevent the breach thereof, and if any conductor fails to enforce the same as aforesaid he shall be held to commit a breach thereof himself. There is a further provision by which an officer of the company is authorised to seize and detain passengers in certain circumstances. But it is not necessary to consider this part of the bye-law, because it is not alleged that the conductor attempted to put it in force; and the evidence shows that he did nothing of the kind. The only thing complained of is that he made a charge to the police; and on the face of the bye-laws regulating this man's duty, he was acting in accordance with his duty in making the charge if he had reasonable ground for making it, and if he was not acting maliciously. Now the meaning and effect of that last proposition is perfectly well settled in law. It must be proved in order to meet the defence of privilege that a privileged person acted maliciously in this sense that he was not acting in the honest discharge of his duty, but was acting from some illegitimate motive; and secondly, it must be proved against him that he had no reasonable ground for the action which he took. The position of the conductor is very analogous to that of a person who has become aware that a crime has been committed, and in the performance of the ordinary duty which falls upon a citizen gives information to the authorities. It is true that this would only serve to show that he was acting in the due course of his employment, and so to render the defenders responsible for his wrong if they had themselves no right or duty to give people in charge for defrauding them of their fares. But then the bye-laws are passed in the exercise of statutory powers, and *Buchanan* v. *Glasgow Corporation* is an authority for holding that the Corporation is privileged to enforce them if they are honestly enforced. It makes no difference to my mind whether the public may be more or less interested in a bye-law which is intended to prevent annoyance to passengers, than in one which is intended to prevent a fraud upon the Corporation.

The particular offence with which we are concerned here falls short of any criminal gravity; it is a petty fraud, but still a fraud; and it is a statutory offence, to be visited by the infliction of a penalty, and a specific duty is laid upon this particular officer to see that it is not committed. The learned Sheriff-Substitute on consideration of the evidence thought that it had been proved that the conductor acted recklessly and without probable cause, and then he goes on to find "And that he subjected the pursuer to indignity and insult." I disregard the last part of the finding because it is too vague to import actionable wrong; but the material finding is, that the defender acted without probable cause. The learned Sheriff-Substitute does not find—which I think was necessary to an exhaustive judgment—that he also acted with malice. The learned Sheriff on appeal took a different view, and held that the pursuer has failed to prove that the defender acted maliciously and without probable cause, and therefore he sustains the defenders' pleas-in-law.

I am of the same opinion as the Sheriff. I do not think it is necessary on a mere question of fact to examine the evidence in detail, and therefore all that I do think it necessary to say upon the second of the two branches of the learned Sheriff's judgment is that I think there is evidence that although the conductor was mistaken he nevertheless had a reasonable ground for thinking that the pursuer was travelling without paying his fare. So far, therefore, as the want of probable cause is concerned, I do not think it is proved, but I am quite clearly of opinion, and that is enough to dispose of the case, that there is no evidence that the defender acted maliciously, or that he was acting otherwise than in what he believed to be the discharge of his duty to his employers. It is said that he used insulting language; and it may be that any excessive violence in his action or even in language would be evidence tending to prove malice. But I entirely concur with the observation of the learned Sheriff, who points out that when the pursuer is asked what the insult was he says that it consisted of saying that "I was trying to get out of paying my fare." But that is a statement which *ex hypothesi* does not of itself imply malice; and it follows that evidence of malice must be found elsewhere than in the words of the statement itself.

I therefore agree with the learned Sheriff, and think that the case is not proved, and that the appeal must be dismissed.

LORD KINNEAR intimated that the LORD PRESIDENT, who was absent at advising, concurred with him.

LORD JOHNSTON—While I agree with him that the pursuer has failed to establish his claim, I cannot approve the Sheriff's interlocutor. I think that the true issue in the case was confused by the initial reference by the late Sheriff Guthrie to the case of *Buchanan*, 7 F. 1001, and has since been lost sight of. The case has been treated as one of privilege, for which I think that there is no proper ground.

[*After narrating the facts ut supra.*]—Now it was quite right and in accordance with practice that the pursuer should libel malice and want of probable cause, as a case of privilege might have emerged at the trial, which otherwise he would not have been in a position to meet. But it does not follow that malice and want of probable cause would have been put in issue had the case gone to a jury, or that they must be proved to the satisfaction of the judge, as the case went to proof before the Sheriff.

The idea that the case turns on the question of privilege has, as I think, arisen from misapprehension and misapplication of the precedent of *Buchanan* v. *Corporation of Glasgow*, *supra*. The Corporation have a statutory right to make bye-laws which have the force of statute, and we have been furnished with a copy. Some of these bye-laws are purely in defence of the Corporation's interests, as, for instance, head 4 (*c*), under which the conductor acted, and which provides that any person—I read it short—travelling by the Corporation cars, who evades or attempts to evade payment of his fare shall be liable to the prescribed penalty, "and it shall be lawful for any officer or servant of the Corporation, and all persons called by him to his assistance, to seize and detain any such passenger whose name or residence is unknown to such officer or servant, until such passenger can be conveniently taken before a magistrate, or until he be otherwise discharged in due course of law."

But there are other bye-laws which concern the public interest, such as head 16, which prohibits any passenger, *inter alia*, spitting or committing any nuisance in or upon any car. In *Buchanan's* case the Corporation's inspector had charged the pursuer with a contravention of this bye-law. In respect that they were acting not merely in the defenders' interest, but were performing a public duty, the inspector's action was held to be privileged, though the privilege might not be of a high degree, and accordingly malice was required to be relevantly averred and proved. But *Buchanan's* case is no authority for holding that the Corporation officials are privileged in the enforcement of all their bye-laws, and I think that they were not so privileged in the case in question, which is much more akin to, if not identical with, *M'Brayne's* case (21 R. 1085) than *Buchanan's* (*supra*). The Corporation are entitled to receive their legal fares. Their conductors are responsible to them for recovering the fares due, and if an inspector happened to come aboard and found that the fare had not been exacted, the conductor would at least be surcharged. I do not think that the conductor is concerned with the motive for withholding the proper fare, as, for instance, a *bona fide* belief that more than is legal is being asked. It is enough for him that in fact there is evasion of payment. I note one exception, which strengthens my view of the real meaning of the rule, viz., the inadvertent travelling an additional distance without paying the additional fare. Now power is conferred on the conductor to seize and detain the evading passenger until he can be conveniently taken before a magistrate. But though he is armed with this exceptional power to interfere without warrant of a magistrate with the liberty of the subject, his exercise of it can only be justified by the fact that the due fare has not been paid or is refused; and it is subject to this further condition, that the name or residence of the passenger is unknown to him. If he is mistaken, or if the passenger's name and address are known to him, he has no warrant for the detention, and as he is the servant of the Corporation, and acting within the scope of his duty, the Corporation is responsible in damages (*Moore* v. *Metropolitan Railway Company*, L.R. 8 Q.B. 36, and cases there cited by Blackburn, J.).

The sole question therefore in the case is, Was the Corporation's conductor right or wrong in exacting a penny or two stage fare, and did he know the name or residence of the passenger?

The evidence is conflicting. But I think that at any rate this is clearly proved, viz., that the conductor did not know the name or address of the pursuer. Had the latter offered him his card, I think in such a small matter he was bound to accept that as credible evidence. But the pursuer did not tender it until the police were called in, and I note that though the police accepted it and did not detain him in custody, they thought it proper to verify its authenticity by following him to his door. But it is not so easy to determine satisfactorily the precise point at which the pursuer entered the car upon which the proper fare depended. The pursuer admits that he jumped on the car while still in motion a little before it reached the Seamore Street stop. But the conductor is emphatic that he was the last of three passengers who got on at Henderson Street, and in fact was waited for there. And each is supported by two witnesses. I should have been inclined to give preponderating weight to the statement of the Sheriff-Substitute as to the comparative reliability of the witnesses, were it not that he finds that the conductor acted without probable cause, and subjected the pursuer to indignity and insult, a finding which I think is disproved out of the pursuer's own mouth, though alleged by him on record. On the other hand, against the Sheriff-Substitute's opinion I cannot act on my own preference for the defenders' witnesses. The question therefore resolves itself into a question of *onus* of proof, and I think that as the defenders' conductor is armed with authority the equivalent of statutory, the *onus* lies on the pursuer to show that he was not justified in his use of it. I think, therefore, that though the Sheriff's judgment should be affirmed in so far as it assoilzies the defenders, it should be on different findings in fact and law.

LORD M'LAREN was absent.

The Court pronounced this interlocutor—

"Dismiss the appeal, affirm the interlocutor of the Sheriff of 5th August 1909, repeat the findings therein, of new assoilzie the defenders from the conclusions of the action, and decern: Find the pursuer liable in the expenses of the appeal as between agent and client, and remit the account thereof, along with that of the expenses found due in said interlocutor of the Sheriff, to the auditor to tax and to report."

Counsel for the Pursuer and Appellant—Hamilton. Agents—Gardiner & Macfie, S.S.C.

Counsel for the Defenders and Respondents—M. P. Fraser—Crawford. Agents—Simpson & Marwick, W.S.

Tuesday, March 15.

SECOND DIVISION.

[Lord Mackenzie, Ordinary.

MILLAR *v.* MARQUESS OF LANSDOWNE.

Property—Title—Competition of Titles—Crown Grant of Lands with Coals—Subsequent Crown Grant of Coals—Defect in Title—Prior Title—Prescription.

X in 1908 brought an action against Y for declarator that he had right to the coals under the lands of B. He founded on a Crown charter, dated 1647, to the lands of B with coals. Y founded on a Crown charter, dated 1663, to the coals within the lands of B. From 1647 onwards X and his authors had continuously possessed the estate. One of the links in X's title was a disposition, dated 13th November 1719, whereby the lands of B with coals were disponed to "W. D. and E. E., spouses, and to the longest liver of them two in conjunct fee and liferent for the liferent use of the said E. E., and to R. D. their eldest son, and the heirs-male to be lawfully procreat of his body, whom failzieing," to certain substitutes "in fee." In 1720 infeftment was taken upon that disposition by instrument of sasine in favour of W. D. and his wife and the longest liver of them two in conjunct fee and liferent for the wife's liferent use, and the said R. D., their eldest son, in fee. In 1789 R. D. resigned the lands for new infeftment, and obtained a Crown charter in favour of himself in liferent and his son in fee, upon which infeftment was duly taken.

Held (1) that the instrument of sasine of 1720 was defective in respect that R. D. was a substitute under the destination, and was not institute, but (2) that the said instrument of sasine and the writs between it and the Crown charter of 1789, although open to challenge at the time at the instance of anyone who had a title to raise the question, were sufficient to form a connecting link between the charter of 1789 and that of 1647, and that X's title, which was founded on the said Crown charter of 1647, was unchallengeable at the instance of Y, who founded on the Crown charter of 1663.

Property—Title—Crown Grant of Lands with Coals—Subsequent Crown Grant of Coals—Separata Tenementa—Grant a non domino—Possession.

X founded on a Crown charter, dated 1647, to the lands of B with coals. He and his authors had continuously possessed the estate since that date. Y founded on a Crown charter, dated 1663, to the coals within the lands of B. Neither Y nor his authors had ever possessed the coals.

Held that the Crown charter of 1663 was a charter *a non domino*, that the coals were not thereby created a *separatum tenementum*, and that accordingly it was not necessary for X to prove possession of the coals as a separate estate.

Dictum of the Lord President in *Cadell* v. *Allan*, March 17, 1905, 7 F. 606 (at 624), 42 S.L.R. 514, *explained.*

Property—Title—Competition of Titles—Conveyance of Lands Reserving Coal—Subsequent Conveyance without Reservation—Prescriptive Possession—Crown Grant of Coals subsequent thereto.

X's progress of title commenced with a charter granted in 1546 of the lands of L. with the coals. One of his authors obtained a charter in 1615 in which there was a reservation of coal. In 1621 a title was made up to the lands in which the reservation was omitted. Possession of the lands for the prescriptive period followed on that title. In 1663 Y's author obtained a Crown charter of resignation and novodamus to the coal in the lands of L.

Held that as forty years' possession on the title of 1621 was completed in 1661 X's author had acquired a right to the lands of L. *a cœlo usque ad centrum* before the charter was granted to Y's author in 1663.

Property—Title—Competition of Titles—Foreshore—Coal under Foreshore—Separata Tenementa—Averments of Prescriptive Possession—Proof.

X claimed the coal under the foreshore of B. He founded on a charter of 1647 to the lands of B with pertinents. The lands in fact abutted on the sea. Y founded on a charter of 1663 to the foreshore of B, and on a disposition of 1772 and instrument of sasine thereon to the coals within the foreshore of B. Both parties made averments of possession, but Y maintained that under his titles the coal belonged to him, there being no room for inquiry in respect that X's averments of possession were irrelevant, because he did not aver prescriptive possession of the foreshore prior to 1772, when there was separation of the coals and foreshore, nor possession of the coals for the past twenty years.

The Court *allowed* both parties proof of their respective averments of possession.

On 13th November 1908 R. H. Millar of Blaircastle, in the County of Fife, brought an action against the Marquess of Lansdowne for declarator "that the pursuer has the sole and exclusive right to the coals in and under the following lands of