incorporated in the barony of Murthly by the charter of 1615, the right of superiority having been in the Crown from 1580 by virtue of the Act of Annexation till that time. It is true that in 1617 the Act of Restoration was passed, and that in 1623 a Crown charter in favour of Sir William Stewart had been obtained which omitted Over and Nether Obney from the lands described as held under the barony title. But it is equally true that at the time of the valuation between 1629 and 1635 these lands were still held by Sir William Stewart under the charter of 1615, which described them as lying in the barony. It was only in 1635 that another title was taken from the Sub-dean of Dunkeld. It is not, I think, at all remarkable therefore that the lands should be described as lying within the barony of Murthly. They were so described in the last title to Over and Nether Obneys which had been obtained, and though, strictly speaking, the effect of this had been undone by the Act of Restoration, this does not, in my opinion, make the statement so obviously inaccurate as to lead to the limitation of the word Obneyes to Meikle and Easter Obneyes only.

As to the clause referring to the claim to a *decimæ inclusæ* right, as I have already observed, the Commissioners treated this as a claim only. They were quite aware that it did not exempt the lands from valuation. The fair reading of this part of the report is, I think, merely as a note that such a claim was put forward, leaving it to the heritor to take what benefit he could before the High Commissioner, if any, when the report came before them for approval. From other reports of Sub-commissioners, and indeed from other parts of the general report of these very Sub-commissioners, the Court has repeatedly had occasion to notice alternative views, suggested or stated evidently with the view of leaving questions open for the High Commissioner, and cases have previously occurred of reports in which a note is given of claims put forward in regard to lands the teinds of which were nevertheless valued.

This view of the second paragraph of the report appears to me also to afford an answer to the Lord Ordinary's reasoning, founded on the narrative of the charter of 1550, by the Sub-dean of Dunkeld, to which charter it appears to me the Sub-commissioners gave no effect.

On the whole, on the question of construction of the Sub-commissioner's report, I think the lands of Over and Nether Obneys are included under the general term of Obneys used by the Commissioners. At the best for the objectors, the case made out appears to me only to throw doubt on that construction, and I think such doubts, even though much stronger than they are, are quite insufficient to disturb and overturn the immemorial usage which has existed.

I do not think the question is *res judicata* against the objectors. But it is an important element in the case that in former teind processes Nether and Over Obneys were, as it appears to me, admitted to be included in the valuation, and an express admission to that effect was made by the titular. I am also disposed to attach much weight to the case of the *Officers of State* v. *Stewart*, 20 D. 1331. Sir W. Stewart in that case maintained, in order to support his claim to a *decimæ inclusæ* right, that the only lands valued were Meikle and Easter Obneys, but that contention was negatived, for this reason among others, that the lands of Nether and Over Obneys were valued by this valuation. I may refer to the opinion of the Lord President on page 1343 of the report, and to that of Lord Curriehill on page 1347. It is evident that one of the grounds on which Sir W. Stewart lost his case was that the Court were of opinion that the Commissioners had disregarded the charter and valued the lands. The point is not *res judicata*. But I know nothing to which I would attach more weight on the construction of this decree than the opinion of those Judges, and by their concurrence in the construction which I have put upon it I am much fortified in my opinion.

The Court adhered.

Counsel for Objectors (Respondents)—Asher—Murray. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Respondent (Reclaimer)—Kinnear—Keir. Agents—Dundas & Wilson, W.S.

Wednesday, February 4.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

DENT AND OTHERS *v.* NORTH BRITISH RAILWAY COMPANY.

*Process—Proof—Jury Trial—*6 *Geo. IV. cap.* 120 (*Judicature Act* 1825), *sec.* 28—29 *and* 30 *Vict. cap.* 112 (*Evidence (Scotland) Act* 1866), *sec.* 4—*Mode of Trial of Case of Collision at Sea.*

In an action for damages for collision at sea both parties desired trial by proof before a judge, and not by jury. The Lord Ordinary having ordered issues to be adjusted, parties reclaimed. *Held* that under sec. 4 of the Evidence (Scotland) Act 1866 the question of the mode of trial must be left entirely to the discretion of the Lord Ordinary.

John Dent junior, shipbroker, Blyth, and others, owners of the steam-tug or trawler "Integrity," sued the North British Railway Company for £1000 damages, on the ground that on 7th October 1879 the "Integrity" had been run down and sunk in the Firth of Forth by the steamship "John Stirling" belonging to the Railway Company.

Both parties desired to have the case tried by proof before the Lord Ordinary, and not by jury.

The Evidence (Scotland) Act 1866 (29 and 30 Vict. cap. 112) enacted (section 4) that—"If both parties consent thereto, or if special cause be shown, it shall be competent to the Lord Ordinary to take proof in the manner above provided in section first hereof, in any cause which may be in dependence before him, notwithstanding of the provisions contained in the Act passed in the sixth year of the reign of His Majesty King George the Fourth, chapter one hundred and twenty, section twenty-eight, and the pro-

visions contained in the Act passed in the thirteenth and fourteenth year of Her present Majesty, chapter thirty-six, section forty-nine; and the judgment to be pronounced by him upon such proof shall be subject to review in the like manner as other judgments pronounced by him."

The Lord Ordinary (RUTHERFURD CLARK) however pronounced an interlocutor assigning a day for adjustment of issues, and granting leave to either party to reclaim.

The North British Railway Company reclaimed.

Authorities—*Nicol* v. *Britten & Owden*, Jan 19, 1872, 10 Macph. 351; *Hume & Others* v. *Young, Trotter, & Co.*, Jan. 19, 1875, 2 R. 338.

At advising—

LORD PRESIDENT—This is one of those causes which were well known in former times as the "enumerated causes" under the Judicature Act (6 Geo. IV. cap. 120, sec. 28), and with reference to these it is provided by section 4 of the Evidence (Scotland) Act 1866 that—[*reads the section*]. This is a case in which both parties consent to that course being adopted, or rather they apply to the Lord Ordinary to have the cause tried without a jury. That being the state of matters, it is competent to the Lord Ordinary to order the case to be so tried, but it is not compulsory, and the statute leaves it in the discretion of the Lord Ordinary to do what he thinks right in the circumstances. I am of opinion (and I believe your Lordships are so also) that in these circumstances it is not desirable to interfere with the discretion of the Lord Ordinary. He ought to be left to determine in which way the cause shall be tried, under the power given to him under the 4th section of the Evidence Act 1866.

LORD DEAS and LORD MURE concurred.

LORD SHAND—I am of the same opinion, but I must add, that so far as I am concerned, I think that if as Lord Ordinary in the cause I had to exercise the discretion, I should have yielded to the desire of the parties. The parties and their advisers are, I think, quite capable of judging for themselves as to the comparative advantage of a trial before a judge alone and a trial before a judge with a jury, and if both parties say that they desire to have a case of this kind tried before a judge alone, it appears to me there should be strong reasons against it to induce the judge or the Court to refuse their joint request. As to this particular class of cases, we know that for some years they have been almost invariably tried by a judge sitting alone, and as the parties desire it in this case, I should have thought it a proper exercise of discretion to have yielded to their desire. It is said sometimes that a judge alone is not a suitable tribunal for such questions. In that view I do not agree, and I can only say that if it were sound it would appear to strike very deeply at the whole system of the administration of justice in Sheriff Courts in Scotland, in which questions, sometimes of large importance, and questions of this very class, are tried invariably by a judge sitting alone. But while that is my view as to the course which I think should have been adopted in this case, I quite agree with your Lordships that it was entirely in the discretion of the Lord Ordinary, and I am not prepared to interfere with that discretion or to undo what he has done.

LORD PRESIDENT—I ought to mention that we have taken this course after conferring with the Judges of the Second Division, who are of the same opinion, that the discretion is in the Lord Ordinary. But I may say that I do not think the circumstance of the Lord Ordinary having by this interlocutor assigned a day for the adjustment of issues would preclude the parties from making their motion to his Lordship again.

The Court adhered.

On the motion being renewed before the Lord Ordinary, his Lordship pronounced an interlocutor dispensing with the adjustment of issues and allowing the parties a proof of their respective averments. He added this note—

"*Note.*—When this case came before the Lord Ordinary both parties moved for a proof. The Lord Ordinary was not unwilling to accede to the motion. But the Court have on more than one occasion very strongly disapproved of mere questions of fact being tried by a judge, and therefore the Lord Ordinary conceived that he was bound to order issues.

"The parties reclaimed, and the interlocutor of the Lord Ordinary has been affirmed, on the ground that the form of the trial was a matter within his discretion, with which the Court would not interfere. But while the Court affirmed the interlocutor, one of the Judges plainly said that the Lord Ordinary had exercised his discretion wrongly, and the Lord President intimated that notwithstanding of the judgment the parties were not precluded from moving for a proof—an intimation which the Lord Ordinary can only construe to mean that he should accede to the wishes of the parties. None of the Judges said that the Lord Ordinary was right, and in abstaining from any expressions of approval they must have desired to indicate that the Lord Ordinary was wrong.

"The Lord Ordinary regrets that the Court have not more explicitly decided that questions of fact shall be tried in the form which the parties desire when no exceptional reason exists to the contrary. The discretion of the Lord Ordinary is subject to the discretion of the Court, and the Lord Ordinary finds it difficult to understand why the Court have not explicitly told him whether he was right or wrong. But in the absence of any approval, and in the presence of expressions or intimations of disapproval, he can draw no other inference than that though his interlocutor was affirmed it really was wrong. He conceives, therefore, that he obeys the wishes of the Court in dispensing with issues and ordering a proof."

Counsel for Pursuers — Trayner — C. S. Dickson. Agents — Beveridge, Sutherland & Smith, S.S.C.

Counsel for Defenders (Reclaimers)—Lord Advocate (Watson)—Balfour—Pearson. Agent —Adam Johnstone, Solicitor.