of section 29 of the Court of Session Act of 1868 (31 and 32 Vict. c. 100). That clause enacts that "all such amendments as may be necessary for the purpose of determining in the existing action or proceeding the real question in controversy between the parties shall be so made." I cannot doubt that the amendment proposed by the learned Judge would have been unwarranted by the terms of the statute, which contemplate alterations on the record with the view of facilitating the determination of the real question at issue between the original parties, but not the importation of new parties into the litigation.

On these grounds I am of opinion that the interlocutors under appeal ought to be reversed, and a remit made in the terms proposed by your Lordships.

Interlocutors appealed from reversed, with costs, and the cause "remitted back to the Court of Session in Scotland, with directions to sustain the third plea-in-law for the appellant, and to refuse the reasons of suspension, and find the respondents liable in expenses, and to ordain the respondents to repay to the appellant the expenses in the Court of Session.

Counsel for Complainers — Solicitor-General (Balfour, Q.C.) Agents—F. W. Reynolds—L. Mackersy, W.S.

Counsel for Respondents—D.-F. Kinnear, Q.C. —Davey, Q.C. Agents—William Robertson—Macandrew & Wright, W.S.

Thursday, December 1, 1881.

(Before Lords Penzance, Blackburn, and Watson.)

SHEPHERD *v.* HENDERSON.

(*Ante*, vol. xviii. p. 349.)

*Appeal—Competency—*6 *Geo. IV. c.* 120, *sec.* 40 *—Findings in Fact.*

Terms of an interlocutor which were *held* to import a judgment upon a matter of fact, and consequently under the Judicature Act not to be capable of being carried by appeal to the House of Lords.

Opinion (*per* Lord Watson) that parties are not entitled to ask the House of Lords as a matter of right to send a case back to be heard again in the Court of Session on the ground that they did not at the former hearing there insist on facts on which it was then open to them to have insisted.

This case was reported in the Court of Session of date February 25, 1881, *ante*, vol. xviii. p. 349, 8 R. 518.

The Lords of the Second Division, in affirming the judgment of the Sheriff, pronounced this interlocutor:—"Find that on 23d May 1879 the pursuer's steamship 'Krishna,' being then insured in terms of the policy founded on, and the defender (respondent) being an insurer to the extent of £50, was stranded during a violent storm on the coast of Hindostan, between Panjim and Bombay: Find that on or about the 7th day of June following the pursuer (appellant) intimated to the underwriters in said policy that he abandoned the 'Krishna,' and claimed as for a total loss: Find that the underwriters did not accept the abandonment: Find that the pursuer brought this action for indemnification of his loss upon the 1st day of October 1879: Find that shortly after the stranding of the 'Krishna' the south-west monsoon began upon the coast of India, and continued till the end of September or beginning of October, and that during its continuance it was impossible to get the 'Krishna' afloat; but find that there was on the 7th of June and continued thereafter to be a reasonable prospect of her being got off the sandy shore on which she lay without greater expense than a prudent uninsured owner would reasonably incur: Find, therefore, that there was not at that date a constructive total loss of the ship: Therefore dismiss the appeal, affirm the judgment of the Sheriff appealed against, and decern."

The pursuer appealed to the House of Lords, but the defender maintained that in terms of the 4th section of the Judicature Act the interlocutor, since it contained a judgment on a matter of fact only, was not subject to appeal.

The appellant, in support of the competency of the appeal, argued, first, that this was a mixed question of law and fact; and second, that the findings in fact were incomplete, and should be rectified. He cited *Hudson* v. *Harrison*, 3 B. & B. 97; *Provincial Insurance Company of Canada* v. *Ledne*, L.R., 6 P.C. 224; *Peck* v. *Merchants Insurance Company*, 3 Mason 27; Phillips on Insurance, vol. ii., 5th ed., 375; *Moss* v. *Smith*, 9 C.B. 94; *Irving* v. *Manning*, 6 C.B. 392; *Mackay* v. *Dick & Stevenson*, 18 S.L.R. 387; 8 R. (H. of L.) 37.

The respondent was not called upon.

At delivering judgment—

Lord Penzance said—It seems to me that the question whether the underwriters accepted the abandonment or not is a question of fact to begin with, but the circumstances of the case may be such that a jury may be told as a matter of law, and properly told, that if they think the underwriters have done certain acts which are consistent only with their having accepted the abandonment, then they ought to find that the abandonment has been accepted. And further, I think it may well be that although they have not really accepted the abandonment, they may have so acted that a Judge may very properly tell a jury that, having acted in a certain way, and having thereby altered the rights, the condition, and the interest of the owner, although they have not accepted the abandonment, and the jury ought to find accordingly in point of fact, yet in point of law they ought to be dealt with as if they had accepted it. I think that those are the propositions which belong to a case of this kind. But subject to those exceptions, I think that from first to last the question whether the underwriters have accepted the abandonment or not is a question of fact. The Judges of the Court below found as a matter of fact that the underwriters did not accept the abandonment. I can hardly understand how your Lordships can be asked, without going into the facts of the case, but confining yourselves to what appears on the record—which according to the case of *Mackay* v. *Dick & Stevenson* is that alone which your Lordships have to look to—how your Lordships can be asked to send this case back to the Court of Session to tell that Court to discriminate whether they meant this finding as to the aban-

donment as a pure matter of fact, or whether they intended it to be a mixed matter of law and fact; the findings are, I think, reasonably distinct, and reasonably clear and precise. I think your Lordships can have very little doubt as to the real intention of the Court in the conclusion which it came to, and to refer it back to the Court would only be to ask the Court to put in more precise language those matters which they intended to put, and may, I think, be reasonably understood to have put, in the interlocutor as it stands.

LORD BLACKBURN concurred.

LORD WATSON said—Upon the general scope and purpose of the Scottish Judicature Act I desire to say nothing, because these have been commented upon in a judgment of this House within a very recent date—in the case of *Mackay* v. *Dick & Stevenson*. I shall only add this, that the contention seems to me to be entirely unwarrantable that the Court in framing their findings of fact under that 40th section are bound to observe the very strict rules which are applicable to the special verdict of a jury in England. I think that all the Court are bound to do is to find, either negatively or affirmatively, upon those propositions in point of fact which are to be found in the record, and upon which the parties rely in their contention at the bar. I say so advisedly, because I am not prepared to hold that if the parties do not insist upon facts material to their case in the Court below, they shall as a matter of right be entitled to come here and insist that the case shall go back to the Court of Session to be tried upon grounds which might have been competently urged at the bar of that Court when the case first came before it, but which were not then urged.

The House affirmed the interlocutor appealed from, and dismissed the appeal with costs.

Counsel for Appellant—Butt, Q.C.—Pollard—Guthrie. Agents—Sym & Holman—Maconochie & Hare, W.S.

Counsel for Respondent — Cohen, Q.C. — Hollams. Agents—Hollams, Son, & Coward—J. & J. Ross, W.S.

Tuesday, November 8, 1881.

(Before Lords Penzance, Blackburn, and Watson.)

SCOTT & BEST *v.* SMITH.

(*Ante*, vol. xviii. p. 355.)

Implied Contract —Sub-Contract—Conduct which induces Third Parties to believe that there is an Implied Authority to Pledge another's Credit

This case was decided by the Second Division of the Court of Session (*diss.* Lord Young) on January 26, 1881, and is reported *ante*, vol. xviii. p. 355. The action was raised by Smith, and concluded for the "sum of £43, 12s. 9d., being the amount of an account for stones supplied by the pursuer to the defenders, or for which they are responsible." The defence was that the stones had been supplied to a man Cameron, who in point of fact held a sub-contract from the defenders, and for whom they were not responsible. The Lord Ordinary (LEE) decerned in favour of the pursuer, on the ground that even assuming the sub-contract to be proved, which his Lordship thought doubtful, the defenders had put Cameron in such a position that he was ostensibly possessed of authority from them, and must therefore be answerable to the pursuer for his loss. The Second Division (*diss.* Lord Young) substantially adhered to this judgment, on the ground that the sub-contract had not been proved.

The defenders appealed to the House of Lords. The Lords having heard counsel, ordered and adjudged that the interlocutor appealed against should be reversed, on the ground that the fact of the sub-contract was clearly proved, and that the defenders had in no way rendered themselves liable for the acts of Cameron, and were therefore not answerable to the pursuer for his loss.

Interlocutor reversed with costs.

Counsel for Appellants—Webster, Q.C.—Rolland. Agents—William Robertson—T. J. Gordon, W.S.

Counsel for Respondent—Dundas. Agents—W. A. Loch—Mackenzie & Black, W.S.

Wednesday, March 29, 1882.

(Before Lord Chancellor Selborne, Lords O'Hagan, Blackburn, and Watson.)

CALEDONIAN RAILWAY COMPANY *v.* WALKER'S TRUSTEES.

(*Ante*, vol. xviii. p. 253.)

Railway — Compensation — Lands "Injuriously Affected"—Access—Railway Clauses Consolidation (Scotland) Act 1845, *sec.* 6—*Lands Clauses Consolidation (Scotland) Act* 1845.

The following are the principles for determining right to compensation under the 6th section of the Railway Clauses Consolidation Scotland Act, in respect of lands "injuriously affected," viz:—(1) when a right of action which would have existed if the work in respect of which compensation is claimed had not been authorised by Parliament, would have been merely personal, without reference to land or its incidents, compensation is not due under the Acts; (2) when damage arises, not out of the execution but only out of the subsequent use of the work, then also no compensation is due; (3) loss of trade or custom by reason of a work not otherwise directly affecting the house or land in or upon which a trade has been carried on, or any right properly incident thereto, is not by itself a proper subject for compensation; (4) the obstruction, by the execution of the work, of a man's direct access to his house or land, whether such access be by a public road or by a private way, is a proper subject for compensation.

A railway company that had, in the exercise of its statutory power, closed certain public streets, and had thereby deprived a property, situated in the neighbourhood of these operations, of a level access to a great public thoroughfare, was held liable upon these principles (*aff.* judgment of the Court of Session) in damages therefor under the 6th section of