that in point of fact he possesses no title to defend this action. If he or others interested have been wronged by the proceedings in the *cessio*, or by the sale of his heritable property, they have their remedy, but these questions cannot be disposed of in this action."

The defenders appealed to the Court of Session, and argued—The objection to the pursuer's title could be raised by way of exception—Sheriff Court Act 1887 (40 and 41 Vict. cap. 50), sec. 11. Unless the trustee in a *cessio* had more extensive powers of sale than either the trustee in a sequestration or the trustee under a voluntary trust-deed, the sale to the pursuer was *ultra vires* and illegal—Murdoch on Bankruptcy, (5th ed.) p. 288; *Crichton* v. *Bell*, June 25, 1833, 11 S. 781; Trusts Act 1867 (30 and 31 Vict. cap. 97,) sec. 3. The only competent mode in which a trustee in a *cessio* could sell heritable estate was by making application to the Sheriff under sec. 15 of the Act of Sederunt anent Processes of Cessio (22nd December 1882).

At advising—

LORD PRESIDENT—The only objection taken to the judgment of the Sheriff is that the pursuer has no title, and that is founded on the allegation that the trustee in the *cessio* has no power to sell heritable estate without applying to the Sheriff to call a meeting of creditors, and that the meeting of creditors must give instructions to the trustee to sell. That is, I think, a new proposition in law. I have always believed that the effect of a disposition *omnium bonorum* for behoof of creditors was to vest the trustee with the estate of the granter for the express purpose of distributing it. There must be a power of sale in order that such distribution may be made. Nothing is said in the Cessio Act about a power of sale just because the very object of the procedure under the Act is to bring the estate to sale. It is, therefore, clear that the Act of Sederunt has no sort of application, and the challenge of the pursuer's title to sue is worth nothing. The pursuer being the disponee of the trustee in the *cessio* is quite entitled to remove the defenders.

LORD ADAM and LORD M'LAREN concurred.

LORD SHAND was absent.

The Court adhered.

Counsel for the Pursuer and Respondent —W. Campbell. Agents—Boyd, Jamieson, & Kelly, W.S.

Counsel for the Defenders and Appellants R. Johnstone—G. Millar. Agents—Robert D. Ker, W.S.

Saturday, June 28.

FIRST DIVISION.

Lord Kinnear, Ordinary.

BURNS *v.* HARVIE AND OTHERS.

Landlord and Tenant—Mineral Tenant—Compromise of Action—Res Judicata.

In an action by a mineral tenant, holding under a lease dated in 1862, against the proprietor and mineral tenants of a neighbouring estate for payment of damages for loss of coal alleged to have been illegally worked out by the latter, the defenders pleaded *res judicata* in respect of a decree pronounced in 1888 in an action at their instance against the proprietor from whom the pursuer derived right, which decree had been pronounced in terms of a compromise arrived at between the parties.

Held that the pursuer was not bound by terms of the decree, as he had not been a party to the compromise, and plea of *res judicata repelled.*

In 1887 William Harvie, heir of entail in possession of the estate of Brownlee, and John Wilson and others, his mineral tenants, brought an action against Sir Windham Anstruther, the proprietor of the neighbouring estate of Mauldslie, and the trustees of the deceased James Thornton, sub-tenant of minerals on the estate, for payment of damages for loss of minerals alleged to have been illegally worked out by the defenders under a road which the pursuer alleged to be part of the estate of Brownlee. Decree having been pronounced in favour of the defenders in the Outer House, the pursuer reclaimed, and before the case was heard in the Inner House a compromise was arrived at, and decree was thereafter pronounced by the Second Division in terms of a joint-minute by which the boundary between the two estates was fixed so as to include the road in question in the estate of Brownlee. The dependence of this action was intimated to Michael Burns, to whom the coal and other minerals within the entailed lands and barony of Mauldslie had been let for thirty-one years by lease dated 15th August 1862. Mr Burns however did not become a party to the action or to the compromise, but assumed the position shown in the following letter addressed by him on 20th December 1887 to the agents of Sir Windham Anstruther—"I beg to remind you that any arrangement Sir Windham Anstruther may make with Mr Harvie about withdrawing from the present action can have no effect whatever upon my claims, either against him or Mr Harvie, with regard to the road coal."

The present action was raised by Mr Burns against Mr Harvie and the Messrs Wilson, his tenants, for payment of damages for loss of coal alleged to have been illegally excavated by the defenders under the road in question.

The defenders founded on the decree pronounced in the previous action and pleaded —"(1) No title to sue. (2) *Res judicata.*

(3) The defender Mr Harvie having been found entitled to the coal in question in a litigation with the pursuer's author, the defenders are entitled to absolvitor."

On 12th March 1889 the Lord Ordinary (KINNEAR) repelled the first, second, and third pleas in law for the defenders, and allowed the parties a proof of certain averments made in record.

On 12th April the Lord Ordinary allowed the parties a proof of their respective averments on record with reference to the property of the minerals alleged by the pursuer to have been wrongously excavated and removed by the defenders.

The defenders reclaimed, and argued—The question between the parties had been settled by the decree pronounced in the previous action. Having settled the question with the proprietor, the defenders were not bound to go into the question with a mineral tenant whose lease did not define the boundaries of the minerals thereby let. The pursuer's proper remedy was an action of damages against his author.

At advising—

LORD PRESIDENT—As regards the first and second pleas founded on the compromise agreed to by Sir Windham Anstruther, the pursuer's landlord, and certain other parties, in the action by the present defender against them, that action was an action for payment of money as the damages sustained by Mr Harvie by reason of the coal under his lands being worked out, but Mr Burns was not a party to it. The action was intimated to him, and the position he took up was that whatever might happen between the parties to the action it could not affect him, because he had got a lease from Sir Windham Anstruther, so he declined to take a part in the proceedings. It is not of any importance to inquire what would have been the effect of a judgment of the Court without a compromise having been arrived at, because what happened was that the parties compromised the action and made an agreement, as if the action had been an action of declarator that the boundaries between their lands were so and so. Of course that agreement is binding on the parties who made it, but it is not *res judicata* in a question with the present pursuer, who brings this action to recover damages for loss sustained by him owing to the working out of minerals, which he alleges to be his under his lease. The first and second pleas for the defenders are therefore I think, plainly untenable, and not to be listened to.

LORD ADAM and LORD M'LAREN concurred.

LORD SHAND was absent.

The Court adhered.

Counsel for the Defenders and Reclaimers — R. Johnstone—J. A. Reid. Agents — Buchan & Buchan, S.S.C.

Counsel for the Pursuers and Respondents—Guthrie—Low. Agent—P. Morison, S.S.C.

Tuesday, July 1.

FIRST DIVISION.

[Lord M'Laren Ordinary.

NORTH BRITISH RAILWAY COMPANY *v.* MACKINTOSH,

*Ferry—Right to Exclude Public from Use of Piers—*11 *Geo. IV. and* 1 *Will. IV. c.* 115—*Edinburgh and Glasgow Railway (Queensferry) Act* 1863, (26 *and* 27 *Vict. c.* 237).

Under the Act 11 Geo. IV. and 1 Will. IV. c. 115, the ferry at Queensferry, with all the piers connected therewith, was vested in a body of trustees, and it was declared that such piers should be used exclusively for the purpose of the ferry, and for no other purpose whatever except with the permission of the trustees in writing. By section 31 of the Edinburgh and Glasgow Railway (Queensferry) Act 1863 power was given to that company, on a certain event, to acquire from the trustees the ferry, the piers connected therewith, and all the rights and interest belonging to the trustees. Section 33 of the Act empowered the company to make byelaws for the regulation and control of the ferry and the piers connected therewith, and this was the only section which gave the company power to make byelaws, and by sec. 34 it was enacted that it should not be lawful for any person to make use of any of the piers to be acquired or constructed by the company under the Act, nor to land thereat or ship therefrom any passengers or goods except in such manner and under such conditions and regulations as should be prescribed by the company by the byelaws to be made by them; and it was declared that any person so using any of the piers without a written authority from the company, or under such regulations as should be prescribed by them, should be subject to a certain penalty.

In 1869 the trustees disponed to the North British Railway Company, who were then vested in the rights of the Edinburgh and Glasgow Railway Company, the ferry and piers connected therewith and all the rights and interest belonging to them.

In a note of suspension and interdict at the instance of the company, *held* that the company had a right to exclude the public from using the piers for any but proper ferry purposes, except under written authority from them, and interdict granted against a steamboat proprietor who persisted in using one of the piers without their written authority.

By the Act 11 Geo. IV. and 1 Will IV. c. 115, entituled an Act for the further improvement and support of the passage across the Firth of Forth, called the Queensferry, the property of the ferry of Queensferry, its piers and landing places were