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posal of the deduction in respect to the other period—the claim being all on one side—will not vitiate the award; and I think, therefore, the Court below acted with perfect propriety in sustaining this award, as fixing the rent to be paid from Whitsuntide prospectively, though the arbitrator did not decide what abatement should be made for the anterior period, supposing it appears, on the construction of this voluminous correspondence, that it was intended that point should be submitted to him. And this gentlemen, Mr MacLellan, will not sustain any injury, if the award is sustained without prejudice to any claim he may have in respect of the rent for the anterior period.

My Lords, there was another circumstance involved in this case. Some misconduct was imputed to Mr Brown; but upon reading the letters, and considering the circumstances of the case, I have come to the conclusion, and I believe the Noble Lord entirely agrees with me, that, upon the whole, the facts to which reference has been made were not of such a description as to affect the award. I shall therefore, under these circumstances, humbly submit to your Lordships, that the decision of the Court below ought to be affirmed.

The House of Lords accordingly 'ordered and adjudged, that 'the interlocutors complained of be affirmed.'

J. MACQUEEN—MONCREIFF, WEBSTER, and THOMSON,—Solicitors.

No. 28. JOHN MORRISON and Others, Appellants.—*Spankie—Russell.*

JAMES MITCHELL, Respondent.—*Brougham—Wilson.*

Jurisdiction—Road—Statutes, 33. *Geo. III. c.* 138.; 4. *Geo. IV. c.* 49.—Question remitted for the opinion of all the Judges, Whether, where a party, accused of evading a toll-bar, has been assoilzied by the Justices of Peace from a demand for statutory penalties, the Court of Session has jurisdiction, in an advocation, to find him guilty, and award the penalties.

July 14. 1830.

2D DIVISION.
Lord Cringletie.

BY the statute 8. Geo. III. cap. 63. constituting the Forth and Clyde Canal Company, they were authorized, besides forming the canal, 'to do all other matters and things which they shall think 'necessary and convenient for the making, extending, improving, 'preserving, completing, and using the said navigation, in pur- 'suance and within the true meaning of this Act.' A canal was accordingly made between Port Dundas, near Glasgow, and Grangemouth, on the river Forth; and along the banks a towing-path was formed. The Company carried both goods and passengers between these two places.

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In 1794, a statute (33. Geo. III. c. 138.) was passed, authorizing roads to be made in the county of Stirling, tolls to be levied, and penalties imposed. In particular, it was inter alia enacted, 'That if any person or persons, owning, renting, or occupying any lands or other premises, near to any turnpike 'which shall be erected in pursuance of this Act, shall knowingly 'and willingly permit and suffer any person or persons to pass 'over the same, or through any gate, passage, or way, with any 'coach, chariot, landau, berlin, calash, chaise, chair, litter, waggon, wain, cart, carriage, horse, ass, mule, or any other sort of 'carriage or cattle, or shall open any new road without the consent of the Justices of the said county of Stirling, obtained upon 'an application made to them, convened at their General Quarter 'Sessions, (which application the said Justices are hereby empowered, authorized, and required, to order to lie upon the 'table till their next General Quarter Sessions, and then, and 'not sooner, they are to determine the propriety of opening the 'said road), whereby the payment of the tolls, duties, or pontage, 'by this Act laid on and imposed, is or shall be avoided; every 'such person or persons so offending, and the person or persons 'riding, or driving, or owning such coach, chariot, landau, berlin, 'chaise, calash, chair, waggon, wain, cart, carriage, or cattle, or 'riding, leading, or driving such horse, mule, or ass, and being 'thereof convicted on the oath or other legal testimony of one or 'more credible witness or witnesses, before any one or more Justices of the Peace for the said county of Stirling, shall, for every 'such offence, forfeit and pay to the said trustees, or to their 'treasurer for the time being, the sum of 20s. sterling; which 'sum, in case the same be not forthwith paid, shall be levied 'by distress and sale as aforesaid;' but declaring, 'That no person or persons shall be liable to pay the toll or duty at any 'turnpike or toll-gate, erected or to be erected on the said roads, 'for any carriage, horse, or beast, which shall only cross any of 'the said roads, or shall not pass above one hundred yards thereon.'

In virtue of this statute various roads were formed, and in particular one from Falkirk to Grangemouth, running parallel with the towing-path of the canal; and another from Beancross to Kerse-bridge, which crossed the Falkirk road, and also the towing-path, at a place called Dalgreen, almost at right angles. At the point of junction with the Falkirk road a toll-bar was erected, at which was levied tolls from those travelling between Falkirk and Grangemouth. Of this toll-bar (which was commonly called the Kerse toll) the respondent Mitchell became tacksman in 1821.

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For several years prior to this time the Canal Company had been in the practice of carrying passengers, in coaches and other conveyances, along the towing-path between Grangemouth and one of the locks on the canal called Lock No. 16. situated in the immediate neighbourhood of Falkirk,—there being in the intervening space a great many locks. In proceeding from Lock No. 16. to Grangemouth, the passengers were carried, for a short distance, along a road almost perpendicular to the line of the canal, to Falkirk; whence they were re-conveyed to the banks of the canal to a place called Bainsford, and so brought along the towing-path to Grangemouth. On returning from Grangemouth to Lock No. 16. they travelled along the same line. They thus avoided the turnpike-road between Falkirk and Grangemouth, but necessarily crossed the road between Beancross and Kerse-bridge at Dalgreen. No toll had hitherto been exacted; and several persons, and among others the appellants, had established coaches and carts for transporting the passengers and their luggage along the above line, between Lock No. 16. and Grangemouth. One of the appellants was the driver of a coach belonging to the Company; but the horses were his own property, for which the Company paid him hire, and they received the fares. The others were proprietors of their respective coaches and horses; but they all had the sanction of the Company to travel along the towing-path.

Mitchell, the tacksman of the Kerse toll-bar, having insisted on payment of toll, and the appellants having refused payment, he presented a petition to the Justices of the Peace of the Falkirk district, founding on the above statute, and another in 1810 prolonging it, and praying that they should be found liable in the statutory penalties for evasion of the toll-bar. This petition was dismissed, on the ground that Mitchell had no right in his own name to sue for the penalties. He then, with concurrence of the treasurer of the road-trustees, presented another petition, from which the Justices assoilzied the appellants, with expenses,—'in respect that the Turnpike Act specially exempts from 'payment of toll, and from all claim for penalty on the ground 'of evasion, all those who merely cross the turnpike-road, and 'do not travel more than one hundred yards thereon; and 'that the pursuers themselves plead that the defenders travelled 'altogether on the canal bank, and not on the turnpike-road; 'and therefore that the defenders have been guilty of no evasion 'subjecting them to the penalties of the statute.' To this judgment the Quarter Sessions adhered, in respect that it was 'ad-

'mitted by the parties, in presence of the Court, that the coaches 'in question, in travelling from Lock No. 16. to Grangemouth, 'travelled on the canal bank from Bainsford to the latter place, 'but did not travel on the Kerse turnpike, except in crossing the 'same where it crosses the canal bank at Dalgreen.' Of these judgments Mitchell presented a bill of advocation, on advising which Lord Eldin remitted to the Justices, 'with instructions to 'recall their interlocutors against the complainers; to find that 'all persons who use coaches or other carriages for the purpose of 'travelling upon the tracking-paths or roads upon the banks of 'the canal, must be considered as evading the tolls in the true 'meaning of the statute, and liable to the penalties therein con-'tained; to allow the complainers a proof of their allegations, and 'thereafter to decide according to the rules of justice;' and found the appellants liable in expenses. The Court afterwards recalled this interlocutor, and passed the bill.*

After some intermediate procedure in regard to the sisting and withdrawing of the Canal Company and the road-trustees as parties, Lord Cringletie reported the cause to the Court on Cases; and their Lordships, on the 7th of July 1827, found the appellants 'guilty of evading the Kerse toll-bar, by driving their 'coaches and carts along the banks of the canal, and therefore 'liable to the advocator in the forfeitures and penalties by the 'statute libelled on;' and remitted to the Lord Ordinary to ascertain the amount thereof, and decern for the same, and found expenses due.†

Morrison and others appealed.

When the cause came to be heard at the bar, an objection was stated to the jurisdiction of the Court of Session to pronounce the above interlocutor, it being maintained, that the statute conferred no power on the Court of Session to convict, but only on the Justices; and reference was made to § 108–112. of the General Turnpike Act, 4. Geo. IV. c. 49.

As this point had not been stated in the Court below, the House pronounced this judgment:—'Inasmuch as a question 'has been raised at the bar of this House respecting the juris-'diction exercised by the Court of Session in this matter, which 'does not appear to have been discussed or considered by that

* Mitchell then brought a separate advocation of the original process.

† 5. Shaw and Dunlop, p. 909.

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'Court, it is ordered and adjudged, that the cause be remitted 'back to the Second Division of the Court of Session, to con- 'sider and state their opinion whether that Court had, by the law 'of Scotland, any jurisdiction, upon a bill of advocation, to find a 'defender liable in penalties under the Acts in the pleadings in the 'said cause mentioned, or either of them, such defender not being 'convicted before a Justice of the Peace; and the said Second 'Division of the Court is hereby required to take the opinion of 'the Judges of the other Division of the Court, and of the perma- 'nent Lords Ordinary, upon this question.'

D. CALDWELL—J. FRASER,—Solicitors.

No. 29.

PAGE KEBLE, Appellant.—*Lushington—Crowder.*

TRUSTEES of the late THOMAS GRAHAM, Respondents.
Pemberton—Dundas.

Et e contra.

Appeal—Debtor and Creditor.—1. The House of Lords having found a debtor entitled to 'deduction of the charge of remittance' of money from India;—Held, (reversing the judgment of the Court of Session), that under the above finding the debtor was not entitled to deduction of one year's Indian interest from the debt; and, 2. (affirming the judgment), That although the Court of Session had of consent found the debtor entitled to deduction of property-tax from 1808 till 1813; and the creditor did not appeal, but the debtor appealed the whole cause; and the House of Lords found it deducible only from and after 1813; the debtor could not claim deduction from an earlier period than 1813.

July 14. 1830.

2d DIVISION.
Lord Cringletie.

IN the year 1785 the late Page Keble of Calcutta, the father of the appellant, deposited in the hands of Graham, Crommeline, and Moubray, merchants there, certain bonds due to him by the East India Company, for a considerable sum in current rupees. The leading partner of the house was the late Thomas Graham, Esq. who resided in Calcutta, but was possessed of the estate of Kinross in Scotland. Mr Keble died, having appointed Mr Graham to be his executor. In 1803 the appellant (who was the son of Mr Keble) raised an action against Mr Graham, then resident in Calcutta, concluding against him for payment of L.4768. 8s. 6d., being the amount of the bonds in sterling money, converted at the rate of two shillings the rupee; and for interest at eight per cent, being that stipulated in the bonds, till 1791, (when he alleged the amount should have been paid to him), and