and that it was not necessary that it should be so for the solution of the only question which it was the object of the former process to get settled."

The defender reclaimed.

MAIR (with him GORDON) was heard for the defender in support of the reclaiming-note. He cited Huntly *v.* Nicoll, 9th Jan. 1858, 20 D. 374; Anderson *v.* Gill, 22d Dec. 1860, 23 D. 250; and National Exchange Company *v.* Drew, 12th July 1861, 23 D. 1278.

GIFFORD and WATSON, for the pursuer, were not called upon.

The LORD PRESIDENT—The right of property was not in question in the former action. It was a case of interdict, and only embraced a portion of the ground, which is the subject of contention in this action. There was no question of property raised, and the Lord Ordinary did not find anything in regard to a right of property. His Lordship said that all he was dealing with was a question of possession, and so he proceeded to deny to the suspender a portion of the remedy which he was asking. But why should that prevent a declarator being raised for which there were no *termini habiles* in the suspension? I therefore think there is no case of *res judicata* here.

Lord CURRIEHILL—I concur.

Lord DEAS—A suspension and interdict is in its own nature a possessory action, and the result of it is generally regulated by the state of possession for the last seven years. I cannot see that this suspension was treated by the parties on any other footing. I should not wish to be understood as laying it down that a question of property can never be decided in an action of suspension and interdict. It is not necessary to decide that here; for apart from that, the great bulk of the ground embraced in this action was not embraced in the other action. All that was there referred to was 18 inches along the line of the mutual gable. Here there are 56½ square yards. The plea is not put that as to these 18 inches there is *res judicata*, but it is stated in regard to the whole ground. It is totally out of the question to maintain that. I don't wish to suggest that had the plea been so limited, it would have been good, because I rather think that even to that extent it is ill-founded.

Lord ARDMILLAN concurred with the Lord President.

The reclaiming-note for the defender was therefore refused.

The Lord Ordinary also reported the case on the motion of the pursuer that the evidence in the cause should be taken on commission, in terms of sec. 49 of the Court of Session Act, which motion the defender objected to on the ground that the case should be sent to a jury.

The Court, in respect the question was chiefly one of law, depending on the construction of titles, explained, it might be, by the possession which had followed, remitted to the Lord Ordinary to allow the parties before answer a proof of their averments, and to appoint the evidence to be taken on commission.

Agents for Pursuer—Morton, Whitehead, & Greig, W.S.

Agents for Defender—Scott, Moncreiff, & Dalgety, W.S.

SECOND DIVISION

GARDNER *v.* KEDDIE OR M'GAGHAN.

(*Ante* p. 6.)

New Trial. Held that a cause in which a trial had taken place before the Lord Ordinary and a jury, and in which the Court had afterwards upset the verdict as contrary to evidence, and granted a new trial, was in dependence before the Lord Ordinary, and not the Inner House, and therefore that a motion to have a day fixed for the new trial could be competently made only in the Outer House.

This case was tried last session before Lord Jerviswoode and a jury, and resulted in a verdict for the pursuer. Thereafter the defender moved for a new trial, and obtained a rule on the pursuer to show cause why it should not take place. The rule was at the commencement of this session made absolute. The case was then enrolled before the Lord Ordinary to have a day for trial fixed. His Lordship, however, expressed doubts whether he could entertain such a motion, as, in the interlocutor of the Inner House granting a new trial, there was no remit of the case to the Lord Ordinary. A note was accordingly boxed to the Second Division, praying the Court to remit the case that a day for trial might be fixed.

W. A. BROWN, in support of the note, argued—Under the Court of Session Act of 1850 the practice of the Court was divided in regard to reports from the Lord Ordinary on cases upon issues. In the one Division a remit was made to the Lord Ordinary after issues were adjusted, and in the other the cause was retained in the Inner House. In consequence of this unequal practice the Distribution of Business Act of 1857 provided, in sec. 8, that a remit should be made. That Act was declaratory of the law. The present case falls under the same principle that determined the provision of the Act of 1857. When a case is before the Inner House on a motion for a new trial it is there for a temporary purpose, just as a case is before the Court for a temporary purpose when issues are adjusted. This is *casus improvisus*, under the 8th section of the Act of 1857, and therefore the remit should be made.

No appearance for the pursuer.

The Court were unanimously of opinion that the case was in dependence before the Lord Ordinary, and not the Inner House. The Lord Justice-Clerk remarked that although he had no difficulty on the point, he was glad the question had been raised, as it was desirable that it should be authoritatively ruled. In considering a motion for a new trial, nothing was before the Court but what took place at the trial, the Judge's notes and the verdict of the jury, just as in dealing with a Bill of Exceptions, nothing but these and the exceptions were before the Court. The Court could not, in that case, look to the process, and he did not see that in a motion for a new trial the case was different. There was no foundation for the argument that the analogy of the practice of the Court, in reports from the Lord Ordinary upon issues, applied under the Act of 1857, or for the notion that the case was *casus improvisus* under that Act. The motion for a new trial was made under the Act of William of 1830.

The other Judges concurred.

Agent for Defender—James Bell, S.S.C.

JURY TRIAL.

(Before Lord Kinloch.)

CAIRD *v.* INNES.

Proof—Admissibility of Evidence—Judicial Confession in a Criminal Trial. In the trial of an action of damages for assault, held (per Lord Kinloch) that a judicial confession by the de-