the charter before Whitsunday. See what followed. The Presenter says that his clerk having gone over the new productions, and make the necessary corrections upon the drafts, the whole titles, along with the drafts, were, on Friday 3d May, sent to the Presenter for revisal. On the 7th of May they were returned from the Presenter revised, and his clerk proceeded to make out notes of the duties. This required considerable calculation, and on 9th May notes of the duties were sent to the Auditor in Exchequer for revisal and authentication. These are the notes we have printed before us, and in which the non-entry duties are clearly brought out. In the 4th set, applicable to the lands of Craighall in Fifeshire, the mines and minerals are entered as of no value,—no duties being due in consequence of the mines and minerals not having been worked. That was sent on 9th May to the Auditor in Exchequer, and on 14th May it is authenticated by him as a correct note of the non-entry duties, the total non-entry duties being brought out by addition, on the footing of charging nothing for the mines and minerals. It must have been therefore after he had actually authenticated this note as a correct statement, that it occurred to him that it might be as well to inquire if the mines had been wrought. I don't ascribe to him any blame for instituting such an inquiry But if such a thing occurs to him just one day before the term, when it has all along up to that day been held by all parties, including himself, that nothing is chargeable, it will not do for him to say on the eve of the term, I shall direct inquiry, though the result will be to throw the charter past the term day. I think that is practically unjust. We must remember that we here represent the Crown, coming in place of the Barons of Exchequer, and administering the affairs of the Crown, and we must do what is necessary to control the servants of the Crown. Here it is necessary to interfere for that purpose.

Lord Deas and Lord Ardmillan concurred.

Reclaiming note refused, with expenses to objector since the date of the Lord Ordinary's interlocutor.

Agents for Objector—Hope and Mackay, W.S.

Agent for Crown—A. Murray, W.S., Solicitor H. M. W. & F.

Wednesday, November 20.

LYELL *v.* GARDYNE.

(*Ante*, vol. iii, 299; vol. iv, 14, 237.)

Expenses—New Trial. In an action of right of way raised by one of two conterminous proprietors against the other, the jury found for the pursuer. The verdict was set aside, and in a new trial the jury found for the defender. *Held*, in the special circumstances of the case, that the defender was entitled to expenses of the first as well as of the second trial.

This action was raised by Mr Lyell of Gardyne, in Forfarshire, against Mr Bruce Gardyne of Middleton, for the purpose of establishing a public right of way through the defender's lands leading from Gardyne Den northwards to the Forfar turnpike road. The case was twice tried. On the first occasion the jury returned a verdict for the pursuer. That verdict was set aside as contrary to evidence, and a new trial granted. The case was then sent to a special jury, who found for the defender.

The defender now moved the Court to apply the verdict, and for expenses. The pursuer moved for his expenses of the first trial, in which he had been successful, and for the expenses of discussing the rule obtained by the defender.

Clark and Watson, for the pursuer, supported the motion chiefly on the ground that the defender had failed in the first trial to adduce certain witnesses whose evidence was, in the second trial, held to be very material for the defender's case. The defender had thus simply made use of the first trial as a rehearsal. They opposed the defender's motion for expenses on the authority of *Lindsay* v. *Shield*, 31st January 1863.

Solicitor-General (Millar), and Æ. J. G. Mackay for defender.—In none of the cases have the expenses of the first been given to the party losing the second trial where the expenses of the first have been reserved; the most he can ask is that these expenses should be given to neither party. The present is an exceptional case, of the nature alluded to by the Lord President and Lord Deas in *Lindsay* v. *Shield* —the pursuer having shown bad faith in bringing the action when his predecessors had acknowledged by letter that the road was private. The defender therefore should have the expenses of the first trial: his evidence at both trials had been substantially the same.

The following cases were cited:—*Lindsay* v. *Shield*, 31st January 1863, 1 Macph., 380; *Barns* v. *Allan & Co.*, 20th December 1864, 3 Macph., 269; *Millar* v. *Hunter*, 24th November 1864, 4 Macph., 78; *Magistrates of Elgin* v. *Robertson*, 12th March 1862, 24 D., 780.

Lord President—The only anxiety I have in disposing of this case is, that we should not seem to throw any discredit on the general principle that is enounced by Lord President M'Neill in the case of *Lindsay*. I agree with the principle which that judgment contained, and particularly with the way in which the Lord President enounced it. If there arise a pure case of a verdict in a first trial for a pursuer, and then, that being set aside as against evidence, a verdict in a second trial for the defender—there being no appearance or allegation of mispleading or misconduct of the case on either side—the proper course would be to find neither party entitled to the expenses of the first trial. The only question is, Is this a case for the application of that rule? For, as to the pursuer's claim for expenses, that is out of the question; and the only difficulty is, Has the defender a right to the expenses of the first trial? Now, I cannot see that it was through any fault of the defender that he did not gain a verdict in the first trial. It was against him, but the jury ought to have found for him, and therefore there was no misconduct attributable to the defender. That, however, is not enough to lead the Court to the conclusion that he ought to have the expenses of the first trial. But looking to the nature of this case, there are some things weighing unfavourably on the pursuer. This is a case of one or two conterminous proprietors claiming a road through a neighbour's policy, and he is not content with a servitude, but he insists on making the road public. Now, I cannot help supposing that in claiming on that ground he speculated on the inclination of a jury as to public roads, and he probably got his first verdict by shaping his claim in that way. If so, that would

be a reason for awarding expenses against him. But it must be added that the whole history of this road does not read well for the pursuer. On the contrary, one cannot help feeling that there was rather a breach of fair understanding between the parties. It was not such an arrangement as could afford any legal obstacle to the present claim, but it is an unfavourable aspect of the case for the pursuer. I am therefore disposed, on the whole matter, to give the defender the expenses of the first as well as of the second trial.

The other Judges concurred, in consideration of the special state of facts, and the Court accordingly applied the verdict, and found the defender entitled to expenses, including the expenses of the first trial.

Agent for Pursuer—James Webster, S.S.C.
Agent for Defender—Alex. Howe, W.S.

Thursday, November 21.

SUTHERLAND AND MACKAY *v.* MACKAY.

This was the first appeal to the Court under the Debts Recovery (Scotland) Act 1867, 30 and 31 Vict., c. 96.

The appellants having, in terms of the 14th section of the Act, presented to the Lord President of the First Division (to which Division the appeal had been taken) a note craving his Lordship to move the Court to send the appeal to the Summar Roll, were ordered to print the Sheriff-court process, and the appeal was sent to the Summar Roll.

The Lord President intimated that, although the case was sent to the Summar Roll, it was not to be taken for granted that the same course would be followed with regard to all cases under the "Debts Recovery Act"; for although the Act required that parties should move the Court to send the appeal to the Summar Roll, it did not bear that the Court were bound to send it there.

Counsel for Appellants—Mr Black.
Agent—D. Forsyth, S.S.C.

Thursday, November 21.

WALDIE *v.* GORDON'S TRUSTEES AND ANOTHER.

Landlord and Tenant—Lease—Concluded Contract—Offer and Acceptance—Conditional Acceptance—Issue. A party made a written offer for a farm. The landlord sent a written acceptance, under certain conditions and stipulations. In an action by the offerer, founding on the offer and letter of acceptance as forming a contract of lease—*Held* that there was no concluded agreement. Opinions, that if such letters had been followed by possession, the offerer might have been held to have acquiesced in the stipulations contained in the landlord's acceptance, so as to make a concluded contract.

Dismissal of Action—Remit to Lord Ordinary—Issue—Consent. A case being reported on adjustment of issues, the Court holding that the pursuer had not stated a case entitling him to go to a jury, of consent of pursuer, the case was not sent back to the Lord Ordinary, but was finally disposed of by the Court.

This was an action of declarator and damages at the instance of George Waldie, stabler in Montrose, against the trustees of the late Mr Gordon of Charleton and Kinnaber, and another, founded on alleged failure to implement a contract of lease.

In March 1866 the farm of Kinnaber was advertised to be let. The pursuer, on 27th June, sent in an offer for the farm in the following letter:—"I here offer for the farm of Mains of Kinnaber as advertised, say £140 per annum, payable in two instalments, the first half at Candlemas after shearing, and the other half of above sum at Lammas, the term of lease for nineteen years and crops, and £16 per annum for the wood, except the first year, which will be £8, and entry at Whitsunday 1867. The propritor, if wanted, to git possession of the wood for a rabbit warren, and the land on the east side at valuation, by giving one year's notice previous. The propritor gits the wood at £16, and no valuation, except what fencing may be at time of exchange of such, he (the propritor) will have to take at valuation. £170 to be spent in repairs of house and steading, and to leave them in fair and habitable condition. Should any damage buy rabbits to amount of £5 of valuation per annum, the propritor to pay for same, and the propritor to give say £10 per annum for the first five years to me, to be expended on town's manure.

(Signed) "George Waldie."

The sum of £140 was explained by the pursuer to be a clerical error for £240. On 8th July Mr G. M. Gordon, one of the defenders, and who acted for the other defenders in the management of the lands, transmitted the following letter to the pursuer:—"Sir,—I accept your offer of 27th ultimo on the following understanding, viz.:—That it is for a lease of the farm of Kinnaber, as at present occupied by Mr Milne, and as to the extent of which you must satisfy yourself, for nineteen years from Martinmas next, at an annual rent for the first five years of £230, and for the remainder of £240; and for a lease of the grazing in the Kinnaber wood, lying between the Kinnaber farm-steading and the dwelling-house of the gardener at Charleton, and on the east side of the high road which passes near that house, for eighteen and one-half years from Whitsunday next, at an annual rent of £16." The letter contained several reservations and stipulations, *inter alia*,—"Proprietor not to put up fences or renew existing ones. Tenant to fence where necessary to prevent sheep or cattle from entering on lands not let to him. Proprietor to pay damage which may be caused by rabbits to the arable ground, if such damage in any year exceeds £5, according to valuation. But, to avoid vexatious questions, proprietor to have power to intimate to tenant that the latter may keep down rabbits on arable land, in which event latter to have no claim for damages. Lease to be under conditions similar to those in current lease to Mr Milne, of which a copy is herewith sent, except that wood rent should be payable at expiry of each six months for the preceding six. . . . . That if tenant die, proprietor may declare lease at an end as at date of death or first term of Whitsunday and Martinmas thereafter, and that tenant insure stock. Lease to be under the conditions in favour of Mr Milne specified in his lease, and in favour of Mr Burgess as to access to a field through corner of Kinnaber wood, in terms of his lease.—I am," &c.

Various correspondence passed between the parties. The pursuer alleged that he agreed to the con-