Wednesday, February 28.

SECOND DIVISION.

NOTE FOR JAMES ALLAN FOR ADMISSION TO POOR'S ROLL.

Poor's Roll—Status.

Held that it is incompetent to state objections to the *status* of a person claiming the privilege of the Poor's Roll after a remit has been made to the Reporter *probabilis causa litigandi.*

In this case the Reporters made a report to the Court that it had been stated to them that the circumstances of the petitioner were such as not to entitle him to the benefit of the Poor's Roll.

A. J. YOUNG, for the objector, founded upon the terms of the Act of Sederunt of 1842, by which the Reporters are to certify, not only that there is a *probabilis causa*, but that the applicant otherwise merits to be put on the roll; and asked that it be remitted to them to inquire as to his alleged circumstances. The cases of *Hackett*, June 23, and *Oal*, 14 S. 1120, were referred to.

FORDYCE for the petitioner.

The Court refused to remit, and admitted the petitioner.

At advising—

LORD NEAVES—This is too late. Notice is given in the minute-book for the express purpose that objections may be stated when the case appears in the Single Bills. The change in the A. S. of 1842 from that of 1819 was made in order to alter the system formerly pursued.

LORD BENHOLME concurred.

LORD COWAN—I think it very important that the present rule should be adhered to. According to it, an opportunity for objecting is always given when the case is in the Single Bills; objections are frequently stated there, and are perhaps disposed of at once; or perhaps we may then remit to the Auditor to report on the matter of poverty under the certificates, while the *probabilis causa* is remitted to the Reporters. I am very clear, that where the objection to their report comes to this, that there should never have been a remit at all, it cannot be listened to.

Agent for Petitioner—Thomas Veitch, S.S.C.

Thursday, February 29.

GRANT *v.* YUILL.

Parent and Child—Bastard, custody of—Perjury.

The father of an illegitimate female child of ten years of age offered to take the child and aliment her in family, in answer to a demand by the mother for yearly aliment. *Held* that the fact that in a prior action he had denied the paternity on oath did not prevent him from exercising his option either to aliment the child in family or pay a certain sum per annum to the mother.

In this action Grant sued Mr Yuill, farmer, Newlands, for the sum of £12 per annum, as aliment for an illegitimate child of the pursuer and defender, until said child attained the age of fourteen years complete. The nature of the action and of the defence sufficiently appear from the following interlocutor and note of the Lord Ordinary:—

"25*th November* 1871.—The Lord Ordinary having heard parties' procurators, and considered the closed record, proof adduced, and whole process, finds that the defender has made a reasonable offer to take charge of and educate the pursuer's child, who is now ten years of age; therefore sustains the defences, assoilzies the defender from the conclusions of the action, and decerns; finds him entitled to expenses, of which appoints an account to be given in, and remits the same, when lodged, to the Auditor to tax and report.

"*Note.*—The Lord Ordinary, having regard to the position of the leading witnesses examined for the defender, and to the manner in which they gave their evidence, has seen no reason to doubt that the offer made by him to aliment and educate the pursuer's child, under the care of his sister, who is ready to undertake the charge in her own house, was made in *bona fide.*

"But the main difficulty the Lord Ordinary has felt in dealing with the case arises from the fact that the defender for some time denied the paternity of the child; and that appears to have been laid down in the case of *Keay*, Feb. 19, 1825, 3 S., p. 561, that in such a case the defender could not discharge himself of his obligation to aliment a child by offering to take the custody of it. And if that decision is to be held as laying down a general rule, that in all cases where a defender has denied the paternity, and has only paid aliment under force of a decree in a defended action, he is to be precluded from at any time thereafter pleading his readiness to take the custody of the child, as a defence to a claim for continued aliment after the child has arrived at seven or ten years of age, as the case may be,—the present defender is in that position. The Lord Ordinary, however, has been unable so to read that decision. Because the report shows that, at the time the decision was pronounced, the defender was judicially denying the paternity, and the opinion of the Court appears to have proceeded upon that circumstance, as it bears that the defender was not entitled to the custody 'while,' and not because he had at one time denied the paternity.

"In the present case, on the other hand, the defender judicially admits the paternity, and if the offer of the defender had been to take the child into his own house, as in the case of *Kay*, June 14, 1826, 4 Shaw, p. 706; *Corrie*, Feb. 22, 1860; and in the older case of *Ballantine*, Feb. 22, 1803, Hume, p. 424, no objection could, it is thought, have been made to the proposal. The intention, however, of the defender is not to take the child into his own house, but to place her under the care of his sister, a widow, resident on a farm in the country, who has agreed with him to aliment and educate the child, and the question raised is, whether that is a proper fulfilment of the defender's obligation. Now, having regard to the fact that the defender is unmarried, and has no female relative resident in his house, it appears to the Lord Ordinary that this is a fair and reasonable arrangement, for the child in question has never resided with the pursuer, and has for the last six or seven years been placed by her under the charge of her sister, where the pursuer occasionally sees her; and as the period has now arrived when the putative father is entitled to discharge himself of his liability, as explained by

Lord Cowan in his opinion in the case of *Corrie*, by an offer either to take the child into his own house, or to make other arrangements for its aliment, it appears to the Lord Ordinary that the proposed arrangement for the aliment of the pursuer's child is one which, in the circumstances, he would not be warranted in refusing to give effect to."

Yuill appealed.

MACDONALD and HARPER for him.

PATTISON and LANG in answer.

The Court unanimously adhered.

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

Agents for Respondent—Keegan & Welsh, S.S.C.

Saturday, March 2.

FIRST DIVISION.

MACKINTOSH AND OTHERS *v.* MOIR.

(*Vide ante*, vol. viii, pp. 382, 428).

Process — Verdict — Application thereof — Road — Public Right of Way.

In an action of declarator of public right of way in a certain direction between two given terminal points, a verdict was obtained by the pursuers upon the usual issue. *Held* that it was the province of the Court, in the exercise of its equitable functions, to lay down a line of road as convenient as possible for the public consistently with not laying too severe a burden upon the proprietor, and that they were not fettered by the exact terms of the issue and verdict, as an English Court of common law might be; but, having informed their minds by the aid of the jury, were bound to look to the conclusions of the action, and giving due weight to equitable consideration, to give decree accordingly.

Observation as to the misunderstanding which existed in the minds of their Lordships as to the powers of the Court of Session when delivering judgment in *White* v. *Lord Morton's Trustees*, July 13, 1866, 4 Macph., House of Lords, 53.

In this case the jury having pronounced a verdict in the following terms—"that for forty years, or for time immemorial prior to 1844, there existed a public road or right of way for horses, carts, and other conveyances, and also for foot-passengers, leading from Hillfoot Street, Dunoon, through the lands of Milton and Gallowhill, to Argyll Street of Dunoon, in or near the direction shown by the red line on the plan, No. 6 of process." Thereupon their Lordships pronounced the following order:—

"*Edinburgh*, 2*d November* 1871.—The Lords having heard counsel for the parties on the notice of motion for the pursuers, No. 147 of process, apply the verdict found by the jury in this cause; of consent of both parties remit to Mr James Peddie, civil engineer, Edinburgh, to visit the ground, and to report on what line the road ought to be laid down consistently with the verdict, and of what breadth the said road ought to be, and to lay down the said line on a plan to accompany his report; find the pursuers entitled to the expenses hitherto incurred in this process; allows accounts to be given in, and when lodged, remit the same to the auditor to tax and report."

The following was Mr Peddie's report:—

"In obedience to the above interlocutor, the reporter visited the ground along with the parties, and carefully examined the line of road, taking the necessary levels and measurements, and has fully considered the matters involved in the remit, and now begs to submit the following report, with accompanying plan.

"The red line shown on plan No. 6 of process, which is referred to in the verdict, is shown on the plan now submitted by the red line A B C D. The reporter is of opinion that, consistently with the verdict, this line of road may be improved by taking the course from B to C shown by the blue line on the plan. This is in effect merely straightening the red line, by taking out an unnecessary bend on that line. There would, besides, be saved a rise of 5 feet, and the gradients would be improved, as will be seen by the comparative statement of gradients given afterwards.

"At the meeting on the ground the defender proposed another line on which the road might be laid down, as being better and more convenient for the public in respect of gradients, and at the same time more suitable for the defender in the event of his feuing the ground for building purposes. This line, as since modified, is shown on the plan by the brown line from B to C.

"The reporter has examined this proposed line, and finds that, as respects gradients, it would form a better line of road than either the red or the blue line. For about 100 yards this brown line takes the course of a road 12 feet wide already made. Compared with the red line, this line would save a rise of 12 feet; and as compared with the blue line it would save a rise of 7 feet.

"The following is a comparative statement of the lengths and gradients of the three lines:—The distance from B to C along the course of the red line, is 213 yards; along the blue line it is 207 yards; and along the brown line it is 211 yards.

"Laying out a road along these three lines with the same amount of earthwork, the gradients, beginning from B, would be—

On the red line—

For 23 yards, . . .	1 in 25 up.
" 55 do., . . .	1 in 15 do.
" 32 do., . . .	Level.
" 55 do., . . .	1 in 15 down.
" 48 do., . . .	1 in 9 do.
213 yards.	

On the blue line the gradients would be—

For 74 yards, . . .	1 in 25 up.
" 35 do., . . .	Level.
" 40 do., . . .	1 in 25 down.
" 48 do., . . .	1 in 9 do.
207 yards.	

And on the brown line they would be—

For 36 yards, . . .	1 in 50 up.
" 38 do., . . .	Level.
" 100 do., . . .	1 in 60 down.
" 37 do., . . .	1 in 11.
211 yards.	

"An examination of this table will show that the brown line is, in respect of gradient, preferable to the others. But as it is for a considerable part of the length from 20 to 22 yards distant from the red line, the reporter has doubts whether it can be laid down consistently with the verdict. This point he therefore respectfully submits to the consideration of the Court.