nounced this interlocutor:—"Having considered the draft lease, No. 7 of process, with the objections and answers thereto, Nos. 24 and 25 of process, and the minutes for the parties, Nos. 26 and 27 of process, remits to Mr W. J. Dundas, C.S., to consider the record and productions, to meet with the parties, and to adjust the draft lease, and to report *quam primum*."

Against this interlocutor the defenders lodged a reclaiming-note upon 19th May.

It was argued for the pursuers that the reclaiming-note was incompetent because leave to reclaim had not been obtained, and the interlocutor sought to be brought under review neither exhausted the conclusions of the summons nor settled the mode of proof. Possibly the interlocutor of 4th February might have been reclaimed against within six days without leave, but that had not been done. A course of procedure was then determined upon in which the interlocutor now reclaimed againt was merely a step.

Argued for reclaimers—This interlocutor, by remitting to a man of skill, imported a refusal or postponement of proof, and could be reclaimed against within six days without leave—Court of Session Act 1868, secs. 27, 28, and *A.S.*, March 10, 1870; *Little* v. *North British Railway Company*, July 4, 1877, 4 R. 980; *Quin* v. *Gardner*, June 22, 1888, 15 R. 776.

At advising—

LORD PRESIDENT—I am of opinion that this reclaiming-note is incompetent. There may be ample room for the question whether the interlocutor of 4th February did not, in the words used in *Quin's* case, "virtually settle the mode of proof." It would appear from Mr Guthrie's statement that by implication the Lord Ordinary on that date was asked to allow a proof and refused, because he set in motion another course of procedure which is being carried out, and in which the interlocutor now reclaimed against is only a step. But that interlocutor was not reclaimed against, and Mr Guthrie is thus either too late or too early.

LORD ADAM—I am of the same opinion. There are cases in which a remit is made to a reporter with the view of superseding proof, but it is not so here. This remit is made with the view of carrying out the finding of the Lord Ordinary in a previous interlocutor, and for the purpose of having the terms of a lease adjusted. It will be open to the reclaimers after the report to object to the terms of the lease proposed, and to move for a proof.

LORD M'LAREN—The proper time to have reclaimed was after the interlocutor of 4th February, because it was then determined that in the meantime, at all events, the facts were not to be investigated by means of a proof. It would be inconvenient if after this stage of the case was passed and a remit made to a reporter we were to interrupt proceedings which have begun with the view of reconsidering whether proof was or was not necessary. It will be open to the reclaimer to move for a proof after Mr Dundas's report has been given in.

LORD KINNEAR was absent.

The Court refused the reclaiming-note as incompetent.

Counsel for Pursuers and Respondents—H. Johnston—Wallace. Agents—Russell & Dunlop, W.S.

Counsel for Defenders and Reclaimers—Guthrie—T. B. Morison. Agent—P. Morison, S.S.C.

Tuesday, February 14.

FIRST DIVISION.

[Lord Low, Ordinary.

PATERSON *v.* AIRDRIE AND COATBRIDGE WATER COMPANY.

Process—Proof for Jury Trial—Public Right-of-Way—Servitude Road.

Where it was averred that there was a public right-of-way over a certain road, or alternatively that there was a servitude of way over it—*held* that, as no questions of law were raised on record, the case was appropriate for jury trial under alternative issues.

Process—Issues—Servitude of Way.

Form of issue *approved* for the trial of a question of servitude of way where the pursuer claimed the right to use the servitude road as being the purchaser of a portion of the dominant tenement.

In September 1892 Robert Paterson, proprietor of the estate of Birthwood, Biggar, presented a note of suspension and interdict against the Airdrie and Coatbridge Water Company to have the respondents, their servants, and persons acting with their authority and upon their instructions, interdicted from using a road or path upon the complainer's estate, and leading past his house of Birthwood.

The respondents lodged answers, and the note having been passed, a record was made up.

The complainer averred—"(Stat. 2) The dwelling-house of the estate of Birthwood is situated at the north-east verge thereof, about 2 miles from the village of Culter. The public road comes to an end at the boundary of the estate, and the house is approached from the public road by a bridge over the Culter Water (which forms the north-east boundary), and a planted avenue of about 120 yards in length. The said bridge was built by the father of the complainer, and is the exclusive property of the complainer. From beyond the said house the said avenue is continued to the office buildings, about 150 yards to the south-west, and is thence continued as a farm road to the west or south-west boundary of the said estate. The said

avenue or road is formed entirely upon the property of the complainer, and was so formed, and has from time immemorial been used exclusively for the purposes of the proprietor of the said estate of Birthwood, and his tenants and servants. (Stat. 3) The respondents . . . have statutory powers to make and maintain certain works, consisting of reservoirs, conduits, &c., situated partly upon the property of the complainer and partly upon other property lying to the west or south-west thereof, and in particular certain reservoirs upon the estate of Lamington, which bounds the complainer's property on the west or south-west. (Stat. 4) The respondents have recently commenced operations for the construction of said reservoirs, and in connection therewith they, or their servants, or other persons acting with their authority and upon their instructions, have entered upon and passed over the said avenue or road or path on foot and with vehicles, and have also used the said road for the conveyance of material to be used in connection with said works. The complainer has called upon the respondents to desist from said use, but they have refused to do so."

The respondents answered that they were entitled to use the road in question, either as members of the public or as part proprietors of the lands of Lamington; and they further averred in their statement of facts—"(Stat. 5) There is a public road or highway from the town of Biggar to Dumfries, passing through the villages of Culter, Lamington, Abington, and Elvanfoot. At the village of Culter a public road diverges from the said Biggar and Dumfries road, and proceeds in a southerly direction, following the course of the Culter Water, and passing between the complainer's house and offices at Birthwood. At Birthwood this road divides into two branches, one still following the course of the Culter Water, proceeding to Tweedshaws and Moffat; and the other striking off in a westerly direction, proceeding through the lands of Birthwood and the lands of Lamington, by way of Windgill, Cowgill, and Baitlaws, to Lamington village, where it rejoins the said public road from Biggar to Dumfries. It is averred that the said road from the village of Lamington, passing Baitlaws, Cowgill, Windgill, and Birthwood House, to the village of Culter, as shown on the plan No. 36 of process, and marked thereon with the letters G, F, E, D, C, B, A, is a public right-of-way for carts and cattle and for foot-passengers, or for one or more of these purposes, and (except as regards the substituted portion thereof after mentioned) has been used as such for more than forty years, or for time immemorial. . . . The road claimed by the complainer is the portion between the march dividing the lands of Lamington from the lands of Birthwood at the one extremity and the gate entering to Birthwood House at the other extremity, as marked with the letters A, B, C on said plan, and on the plan No. 37 of process. (Stat. 6) The respondents have in virtue of their statutory powers acquired, and are heritable proprietors of, part of the estate of Lamington as shown on the plans herewith produced, and they are entitled to enjoy and exercise all rights of servitude effeiring to the subjects so acquired by them. If the road specified in article 5 of the respondents' statement of facts is not a public road, at all events the said respondents and their predecessors, as proprietors of said portion of the estate of Lamington, or their tenants as occupants thereof, have possessed a right of servitude over that portion of the said road between the points A to C, shown on the plans Nos. 36 and 37 of process, from time immemorial, or at least for upwards of forty years, for the passage of carts and cattle and for foot-passengers, or for one or more of these purposes, and the respondents, the said company, as proprietors of said subjects, are now entitled to exercise the right of servitude which has been constituted as aforesaid."

The complainer pleaded—"(1) The road in question being the property of the complainer, and the respondents having no right thereto, interdict should be granted, as craved. (2) There being no right-of-way by the road in question, the complainer is entitled to interdict as craved, with expenses."

The respondents pleaded—"(1) The complainer has no title or interest to insist in the present note. (2) The note ought to be refused, in respect—(*a*) That the road referred to is a public road, and that the use of it by the respondents is reasonable and lawful; (*b*) *separatim*, that in virtue of the right of servitude acquired by the respondents, the said company, and their predecessors, the said company are entitled to use the said road; (*c*) that the complainer's statements, so far as material, are unfounded in fact."

On 23rd December 1892 the Lord Ordinary (Low) appointed the respondents to lodge the issue or issues which they proposed for the trial of the cause.

The respondents (pursuers in the issues) proposed the following issues—"(1) Whether for forty years and upwards, or for time immemorial prior to 1892, there has been a public road or right-of-way for carts, horses, cattle, and foot-passengers, or any and which of them, leading from Culter, in the county of Lanark, in a south-westerly direction past Birthwood to Lamington, in said county, as shown and coloured red on the plan No. 36 of process, herewith produced, and marked thereon with the letters A, B, C, D, E, F? Or (2) Whether for forty years prior to the year 1892, or from time immemorial, the pursuers in the issues, and their predecessors and authors, as proprietors of part of the lands and estate of Lamington, have by themselves, and their tenants, servants, and occupants, possessed and enjoyed a right of servitude for carting, driving cattle and horses, and walking, or any and which of these purposes, over the road shown as coloured red on the plan No. 37 of process, herewith produced, and marked thereon with the letters A, B, C?"

On 19th January 1893 his Lordship discharged the order for issues, dispensed with the adjustment thereof, and allowed both parties a proof before answer of their respective averments.

"*Opinion.*—I am of opinion that the question of servitude which the respondents now raise is not one appropriate for trial by jury; and further, I do not think that the true question at issue between the parties could be properly determined upon the issue proposed by the respondents.

"The respondents have acquired some 70 acres of land for the purpose of the works which they are authorised to execute. These 70 acres are, I understand, a portion of a stretch of moorland pasture belonging to the Lamington estate. The respondents' case is that there is a servitude of way over the road in question in favour of the moorland pasture, and that, as they have acquired a portion of that pasture, they have also acquired right to use the servitude road.

"I think that the purpose for which the respondents have acquired the land, and the use which they propose to make of the road, cannot be left out of view in considering whether or not the case should be sent to a jury. They have acquired the land for the purpose of constructing a reservoir, and the proposed use of the road which has led to the present proceedings is to cart the materials for the construction of this reservoir over it.

"The use, therefore, to which the land is to be put is different from any former use, and the proposed use of the road is probably different in kind from, and more burdensome than that to which it has hitherto been put.

"Assuming, therefore, that a servitude of way exists over the road to the Lamington moorland pastures, it may well be that the purchaser of a portion of the pastures would be entitled to a use of the road for his part of the pasture, of the same nature as that formerly exercised in favour of the pasture as a whole; but it does not follow that if he puts his portion of the land to an entirely new use he will have a servitude right-of-way over the road for any kind of traffic which the new use of the land may require. If the traffic is different in kind and more burdensome than the former use of the road, I am inclined to think that the purchaser would not be entitled to make such use of the road.

"That, however, is a question which would not be raised under the issue proposed, and it is a question the solution of which is, I think, necessary for the determination of the rights of the parties. No doubt the interdict asked in the prayer is absolute, and if the respondents could establish that they had any right to the road, the complainer would not be entitled to the absolute interdict which he asks. The main question, however, is whether the respondents are entitled to use the road for carting the materials necessary for the reservoir, and it is obviously desirable that that question should be settled in the present process.

"The question whether the road is a public road is of course a proper jury question, and it occurred to me that that part of the case might at once be sent to a jury, leaving the question of servitude to be dealt with in the event of the respondents failing to obtain a verdict that the road was a public road. Both parties, however, were averse to the case being split up, and as I am of opinion that the question of servitude is one which ought not to go to a jury, I must allow a proof in regard to the whole case."

The respondents reclaimed, and argued—It was now the settled practice to send questions of public rights-of-way to be tried by a jury, unless there was some specialty which made that mode of trial unsuitable — *Fraser - Tytler's Trustees* v. *Milton*, March 15, 1890, 17 R. 670. The same practice prevailed with regard to servitudes of way if the question raised were one of pure fact—*Black* v. *Mason*, February 18, 1881, 8 R. 497; *Malcolm* v. *Lloyd*, March 17, 1885, 12 R. 844. The issue in this case was as simple as possible. If, however, the Court thought that the question of servitude right raised by the second issue was unsuited for jury trial, the respondents were willing that the first issue only as to the public right-of-way should go to the jury, the other question, which was quite separate, being reserved for subsequent inquiry. The Lord Ordinary's difficulty as to the competency of the proprietor of an estate communicating a servitude right to the purchaser of a portion of the estate was met by the case of *Carstairs* v. *Brown*, 7 S. 607, and the other authorities cited in Bell's Prin., sec. 986; and the question whether the respondents were likely to make the servitude too burdensome should not be raised *ab ante*.

The complainer argued—It was in the discretion of the Court to send questions as to rights-of-way and servitudes of way either to proof or for jury trial. There was no case in which alternative issues such as were here proposed had been sent to a jury; on the contrary, *Macfie* v. *Stewart*, January 24, 1872, 10 Macph. 408, was a conclusive authority for the Lord Ordinary's view, that the Court was the proper tribunal to try an action where a right and a servitude of way was claimed alternatively.

The complainer stated that if the case was sent to a jury he preferred that both questions should go to the jury.

At advising—

Lord President—We have to determine this question solely by reference to the record, and the record appears to me to raise pure questions of fact only, these questions being whether the public have had possession of this road for carts, horses, cattle, and foot-passengers for forty years and upwards; and secondly, whether for the same period the respondents and their authors, as proprietors of a part of the estate of Lamington, have had possession of the road for such traffic. The record

might have raised questions of law, and had such questions been raised, we might have considered them to be so interwoven with the questions of fact as to make the case unsuitable for jury trial, or we might have determined the questions of law before allowing issues. But I do not think that the complainer, without raising any question of law on record, is entitled to say that because questions of law may arise in the course of the trial the case ought not to be sent to a jury. As I have said, I can discover no question of law in this record, and I think that it is quite likely that no such question may arise at the trial. I think, therefore, that we should recal the Lord Ordinary's interlocutor, and appoint the case to be tried by jury. But I agree with the Lord Ordinary in thinking that the second issue proposed by the respondents requires some amendment.

LORD ADAM concurred.

LORD M'LAREN—For myself I should have been quite content with the order of the Lord Ordinary, both because I think the judge of first instance has a certain discretion in this matter, and because my own personal opinion is in accordance with that of Lord Low, that cases of this kind are better tried by a judge sitting alone. I recognise, however, that the practice, especially of late years, has been to send such cases to a jury; I therefore do not dissent from the course which your Lordships propose.

LORD KINNEAR was absent.

The respondents then proposed the following amended issues:—"(1) Whether," &c., as in the original issues. "(2) Whether for forty years prior to the year 1892, or from time immemorial, the pursuers in the issues, as proprietors of part of the lands and estate of Lamington, and their predecessors and authors in the said lands, have, by themselves, and their tenants, servants, and occupants, possessed a road for carting, driving cattle and horses, and walking, or any and which of these purposes, in or near the line coloured red on the plan No. 37 of process, herewith produced, and marked with the letters A, B, C?"

The Court thereafter recalled the Lord Ordinary's interlocutor, appointed the case to be tried by a jury, approved of the issues proposed by the respondents as amended, and appointed them to be the issues for the trial of the cause.

Counsel for Complainer and Respondent—C. J. Guthrie—Ure. Agent—W. Kinniburgh Morton, S.S.C.

Counsel for Respondents and Reclaimers—Comrie Thomson—John Wilson. Agents—Wylie, Robertson, & Rankin, W.S.

HIGH COURT OF JUSTICIARY.

Wednesday, May 17.

(Before the Lord Justice-Clerk.)

HOBBS, APPELLANT.

Justiciary Cases—Bail—Scuttling Ships.

David Mustard Hobbs was charged with three charges of purchasing ships and having them scuttled with the object of obtaining insurance money, and was committed for further examination. Having applied for liberation on bail the Sheriff-Substitute at Dundee (CAMPBELL SMITH) fixed the amount of bail at £400. Hobbs appealed to the High Court of Justiciary, on the ground that as his estates had been sequestrated, the amount was prohibitive, and that looking to the nature of the case he would be unable properly to prepare his defence if in prison. He suggested £100. The Court refused to interfere with the discretion of the Sheriff.

Counsel for the Appellant—A. S. D. Thomson. Agents—Hutton & Jack, Solicitors.

Counsel for the Lord Advocate—Adv.-Dep. Lorimer. Agent—Crown Agent.

Monday, May 22.

(Before the Lord Justice-Clerk, Lord Adam, and Lord Low.)

YOUNG *v.* NEILSON.

Justiciary Cases—Glasgow Police (Further Powers) Act 1892 (55 *and* 56 *Vict. cap. clxv.*) *secs.* 3 *and* 20—"*Common or Open Area or Space to which the Public have Access and any other Public Place.*"

The Glasgow Police (Further Powers) Act 1892 prohibits betting in the street, and "street" is defined to mean "any road, street, footway, lane, close, or court, common stair, the quays of any harbour, any railway station, canal depôt, wharf, towing-path, public path, common, or open area or space to which the public have access, and any other public place."

Held that recreation grounds enclosed within a high paling, with gates to which the public were admitted on days when races were being run, at a charge of 6d. for each person, was not a "street" within the meaning of the Act.

This was a case on appeal by Robert Young, No. 142 Great Hamilton Street, Glasgow, against George Neilson, Procurator-Fiscal of Court, against a conviction in the Police Court of Glasgow upon a complaint charging him as "a person who conducts business as a bookmaker or betting agent in the making of bets on horseraces and the