Wednesday, Dec. 20.

ANDERSON *v.* GLASGOW AND SOUTH-WESTERN RAILWAY CO.

Process—Issue—Court of Session Act—Act of Sederunt. Held that an issue is not a paper in the sense of Section 4 of the Court of Session Act; and that Section 12 of the Act of Sederunt of 12th July 1865 is therefore not inconsistent with said statute.

This case was advised to-day. The Court, while approving of the course taken by the Lord Ordinary in refusing to prorogate the period for lodging the pursuer's issue, allowed the issue now to be received, in respect this was the first case in which the recent Act of Sederunt had been enforced.

The LORD PRESIDENT said—The ground upon which this reclaiming note is supported is, that under section 4 of the Court of Session Act (13 and 14 Vic. c. 36) parties to a cause have power to prorogate the time for lodging papers, and that this provision applies not only to pleadings but also to issues. The system of prorogating by consent is a matter of recent introduction. It did not exist before the Judicature Act. There was then no limit to the power of the Lord Ordinary to prorogate, but it was always done by the authority of the Lord Ordinary. When a consent was given, the Lord Ordinary usually gave effect to it. The usual practice was—and my experience at the bar and behind it goes back for about half a century—to move for a renewal of the last order; and this was done as a matter of course, generally under an amand of forty shillings. But that system proved so pernicious that it became desirable to limit the Lord Ordinary's power. Accordingly, by section 12 of the Judicature Act of 1825 it was provided "that the Lord Ordinary shall, in every instance, on due consideration of the circumstances, fix the time within which such condescendences and answers shall be lodged, and such time shall not be prorogated except on payment of the expenses previously incurred, unless before the time so fixed special application shall be made for such prorogation; nor shall the prorogation in any instance be granted except on cause shown, nor oftener than once." This provision was intended to limit parties in regard to their averments, which previously had been of two kinds. There were articulate condescendences and argumentative condescendences, which were very different from each other. Matters went on under this provision for two or three years, when it was found that the Court was sometimes embarrassed and prevented from doing justice betwixt the parties in consequence of the record being closed on imperfect pleadings. To remedy this the Court, on 11th July 1828, passed an Act of Sederunt, by section 111 of which it was enacted "that the time limited for giving in papers other than reclaiming notes may at any stage be prorogated without the necessity of any application to the Court or Lord Ordinary, if both parties consent, provided that such consent be given in writing under the signature of the respective agents; and a copy of such prorogation by consent shall be prefixed to the paper when given in, as well as of the interlocutor ordering or allowing the same to be given in." That was the first introduction of the power given to parties to prorogate. It is repeated in substance in section 4 of the Court of Session Act. But the Act of Sederunt of 1828 had nothing to do with the giving in of issues, which were adjusted in what was then a separate Court. Therefore, as we read section 4 of the Court of Session Act, it has no reference to issues. Section 38 of that Act has reference to them. And there is a plain reason why prorogations should be allowed in the one case and not in the other. In the course of preparing a record information is required, and may have to be collected from various quarters; therefore facilities are given for this purpose. But when the facts are all collected and the record is closed, there is no reason for delay in preparing the issue. The issue is extracted from the record and nothing else. There is no more information to be collected; and it is not for the interests of the parties or the credit of the Court that there should be delay. An issue, moreover, is not a pleading. It is not signed by counsel, and is not treated by the clerks as a paper. It is merely a memorandum of what the party proposes to undertake to prove. A party cannot frame his record without having in his mind all the time the issue which he expects to be able to extract from it. For a counsel to be able to do justice to his client this is necessary; and if he has had the issue in his mind there is no occasion for delay in framing it. We are therefore of opinion that the Lord Ordinary was right; that his duty was, not to be controlled in this matter by the wishes of the parties. The view we take is that section 4 of the Court of Session Act does not apply to issues, and that section 12 of the recent Act of Sederunt is not therefore inconsistent with it. But as this is the first case in which the rule of the Act of Sederunt has been applied, we have resolved in this case to allow the issue now to be received, and to remit the case back to the Lord Ordinary.

Tuesday Dec. 19.

MACFARLANE AND OTHERS *v.* MORRISON AND OTHERS.

Road—Right of Way. Application of a special verdict returned by a Jury in a right of way case.

Counsel for Pursuers—The Lord Advocate and Mr Deas. Agents—Messrs Duncan & Dewar, W.S.

Counsel for Defenders—Mr Gifford and Mr J. G. Smith. Agents—Messrs Wotherspoon & Mack, W.S.

This case was tried before Lord Barcaple and a jury in July last. The issue sent to the jury was whether for forty years the road called the "Broad or Braid Lone," near the village of Causewayhead, in the parish of Logie, extending from one point of the Ochil turnpike road to another, has been used as a public road. The jury returned a special verdict. They found (1) that the road described in the issue was, for time immemorial prior to the year 1806, used as a public road for all purposes; (2) that since the year 1806 the said road has not been used for horses, carts, or cattle; and (3) that since 1806 it has continued to be used as a public road for foot passengers only.

The pursuers moved the Court to apply this verdict, and to decern in terms thereof; and the defenders moved the Court to enter up the verdict as a verdict for them, subject to a footpath or right of road for foot passengers only. Both parties asked to be found entitled to expenses.

The Court held that the verdict was an answer to the issue, but that under it the pursuers had only established their case to a limited extent. The verdict was therefore applied by finding and declaring that the road has been for forty years used as a public road for foot passengers only, and *quoad ultra* the defenders were assoilzied; and in respect they had, both in correspondence and throughout the litigation, admitted the pursuers' right to a foot road, they were found entitled to expenses, subject to slight modification.

The following interlocutor was pronounced—

"*Edinburgh, 19th December* 1865.—The Lords having heard counsel for the parties on their respective motions set forth in Nos. 104 and 105 of process: Find that the verdict returned by the jury at the trial of the cause on the 28th and 29th July 1865 is to be held as a verdict for the pursuers, in so far as regards a public footpath or road for foot-passengers; and is to be held as a verdict for the defenders in so far as regards a road for horses, carts, or cattle: