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:

Apply the verdict accordingly; and in respect thereof find that there is a public footpath or road for foot-passengers along the road or way in question, and that the pursuers and all others are entitled to the free use of such footpath or road for foot-passengers, and to that extent and effect decern in favour of the pursuers. *Quoad ultra*, assoilzie the defenders from the conclusions of the action, and decern: Find the pursuers liable to the defenders in expenses of process, subject to modification: Allow an account thereof to be given in, and remit to the auditor to tax the same and to report.

THOMS *v.* THOMS (*ante*, p. 42).

Appeal to House of Lords. Leave to appeal a judgment disallowing two issues *refused.*

Counsel for Pursuer—Mr Patton, Mr Gifford, and Mr Balfour. Agent—Mr A. J. Napier, W.S.

Counsel for Defenders—Mr Gordon, Mr Clark, and Mr Shand. Agents—Messrs, Hill, Reid, & Drummond, W.S.

In this case the Court, on 25th November, allowed the pursuer an issue for the purpose of proving that the deed sought to be reduced was impetrated from the deceased Mr Thoms by fraud; but disallowed two other issues, by which it was proposed to prove that he executed the deed under essential error, and under the belief that he was not conveying by it the entailed estate of Rumgally.

The pursuer now moved for leave to appeal to the House of Lords the refusal of these two issues. He founded upon the fact that the Lord Ordinary thought the issues should have been granted, and also urged that the question involved was one of vital importance in the case. If the Court had not been unanimous in refusing the issues, the pursuer would have been entitled to appeal at this stage as a matter of right. The Act of Parliament prohibiting appeals of interlocutory judgments when the Court are unanimous was only passed to prevent frivolous appeals, and it could not be said that this was a proposal to appeal a frivolous point. There is no use of having a trial just now on the issue of fraud, and another trial possibly afterwards. The expense of one of these trials will be entirely saved by allowing an appeal at present. The defender can suffer no injury, because she is in full possession of the estate. The defender replied that she would suffer great hardship by the case being allowed to go to the House of Lords at this time. She and her agent, Mr Welch, were under a charge of fraud, which they were desirous to meet; and if leave to appeal was granted, this charge would be hanging over their heads untried for at least twelve months.

The Court refused to grant leave to appeal, and found the pursuer liable in the expense of the discussion. The matter was one of discretion; and in dealing with such questions the Court was in the habit of considering the advantages and disadvantages of granting or refusing leave. In this case, looking to the whole circumstances, and especially to the fact that the issue founded on fraud was still insisted in; it was right that the trial should proceed, and it was accordingly fixed for the March sittings.

Wednesday, Dec. 20.

PET.—THOMAS DALL.

Bankruptcy—Acceleration of Dividend. Section 133 of the Bankruptcy Act does not authorise the Lord Ordinary to accelerate payment of a dividend, except during the first six months after sequestration is awarded.

Counsel for Petitioner—Mr John Millar. Agent—Mr John Leishman, W.S.

This petition was presented by the trustee on the sequestrated estate of Robert Knox Wighton, jeweller in Edinburgh, craving authority to accelerate the payment of a dividend to the creditors. The first dividend became payable in terms of the statute on 1st August 1865; but as there were not then funds available for the payment of a dividend the commissioners postponed the declaration of a dividend till the next statutory period, which will not arrive until 1st March 1866. Meanwhile, however, the trustee has realised as much as will pay to the creditors a dividend of 6s. 8d. per pound, and leave a surplus of £434. The creditors, at a meeting held on 5th December 1865, accordingly instructed the trustee to present this petition.

The Lord Ordinary (Mure) reported the petition, being doubtful whether section 133 of the Bankrupt Act, regulating the acceleration of dividends, contemplates the acceleration by the Lord Ordinary of a first dividend, except in the case where it is proposed to make a first dividend at an earlier period than the expiration of the six months from the date of the deliverance awarding sequestration; and whether the power applies to a case where, as here, it is wished to alter the period for payment of a first dividend long after the expiry of six months from the date of the deliverance awarding sequestration.

The Court remitted to the Lord Ordinary to refuse the prayer of the petition.

MACLEAN *v.* DUKE OF ARGYLL.

Bankrupt—Caution for Expenses. A pursuer of an action of damages for patrimonial loss having been sequestrated, and his trustee having refused to sist himself, ordained to find caution for expenses.

Counsel for Pursuer—The Solicitor-General and Mr F. W. Clark. Agents—Messrs Lindsay & Paterson, W.S.

Counsel for Defender—Mr J. G. Smith. Agent—Mr James Dalgleish, W.S.

This was an action of damages for patrimonial loss by a tenant of the Duke of Argyll against his Grace. The estates of the pursuer having been sequestrated during the dependence, intimation of the action was ordered to be made to the trustee, who declined to sist himself. The pursuer then proposed to insist in the action himself, but the Lord Ordinary (Jerviswoode) ordained him to find caution for expenses. The pursuer reclaimed, and urged that as the defender was the main creditor in the sequestration, the general rule as to finding caution for expenses in such cases as this did not apply.

The Court adhered. There was no doubt of the general rule; and although the Duke was the main creditor here, there were also other creditors to a considerable amount who do not instruct the trustee to prosecute the action.

SECOND DIVISION.

DURNO *v.* LEYS.

Reparation—Breach of Promise of Marriage. Circumstances in which held (alt. Sheriff of Aberdeen) that a pursuer of an action for breach of promise of marriage had proved her case, and damages assessed at £25.

Counsel for the Pursuer (Advocator)—Mr Patton and Mr Gifford. Agent—Mr W. Scott Stuart, S.S.C.

Counsel for the Defender (Respondent)—The Solicitor-General and Mr W. M. Thomson. Agents—Messrs Jollie, Strong, & Henry, W.S.

This is an action of damages for breach of promise of marriage at the instance of Susan Durno, residing at Cushieston, in the parish of Rayne, and county of Aberdeen, against John Leys, a farmer in the neighbourhood. The pursuer states that the defender courted her and repeatedly asked her to marry him between May and November 1861; that she gave no definite answer but allowed him to visit her, except during harvest; and that on 8th November they formally pledged themselves to each other in marriage;