liabilities than such as are borne in common by all the partners.

We are therefore of opinion that the Lord Ordinary's judgment is perfectly well founded, and must be adhered to.

The Lord Ordinary's interlocutor was accordingly adhered to.

Counsel for Pursuers—Mr Young and Mr Shand. Agents—Davidson & Syme, W.S.

Counsel for Defender—The Dean of Faculty and Mr Orr Paterson. Agents—J. & A. Peddie, W.S.

Saturday, Nov. 17.

FIRST DIVISION.

JENKINS AND OTHERS *v.* MURRAY

(*ante*, vol. ii. p. 190).

Jury Trial—Special Jury. In a right of way case which had been already tried by a common jury, motion for a special jury for the second trial *granted.*

This case was tried in March last before Lord Ormidale and a common jury, when a verdict was returned for the pursuers. In July last this verdict was set aside as contrary to evidence, and a new trial granted. The second trial is to take place at the Spring sittings.

JOHNSTONE, for the defender, now moved that the second trial should take place before a special jury. In support of his motion he referred to Magistrates of Elgin *v.* Robertson and Others, 12th March 1862, 24 D. 788, where the Lord Justice-Clerk said "that a question as to a right of road case is one which should be tried before a special jury, for in these cases it is sought to impose a burden upon heritable property;" and also to Bell *v.* Reid and Others, 24 D. 1428, a right of way case which was twice tried, and on the second occasion before a special jury.

MILLAR and MACKINTOSH, for the pursuers, objected, and cited Urquhart *v.* Bonnar (vol. ii. p. 178); but in answer to a question from the Lord President stated that they knew of no right of way case in which a motion for a special jury for a second trial was refused.

The Court granted the motion. The case was one of great nicety, and in trying it a common jury had already failed. The pursuers could suffer no hardship by the motion being granted, and the cases cited by the defender were precedents, while none were referred to on the other side.

Agents for Pursuers—G. & W. Donaldson, S.S.C.

Agents for Defender—Russell & Nicolson, C.S.

Tuesday, Nov. 13.

OUTER HOUSE.

(Before Lord Ormidale.)

BREMNER *v.* TAYLOR.

Poor—Derivative Settlement. A woman, who had an illegitimate pupil child, having acquired a new settlement in another parish through her marriage,—Held (per Lord Ormidale) that that settlement enured to the child, although he continued to reside in the parish of his birth with his maternal grand father and did not reside with his mother.

Summons—Revisal—New Ground of Action. Circumstances in which held that the alteration of the date when the pauper first received relief, on revisal, was not the introduction of a new ground of action.

Condictio indebiti—Error in Law. Held that a parish who had repaid advances on behalf of a pauper, believing itself to be the parish of settlement, could not afterwards claim repetition on a different application of the principle in virtue of which it had admitted liability, such error being error of law, not of fact, and not grounding a claim of repetition by the law of Scotland.

Mora—Taciturnity—Acquiescence. Circumstances in which held that the plea of *mora* was not good to exclude a claim of repayment.

Modification of Expenses. Circumstances in which expenses were modified from £125 to £100.

In this action the parish of Rathven concluded against the parish of Huntly for the sum of £115, 5s. 6d.; being the amount of advances made to a pauper, whose settlement was said to be in the parish of Huntly from March 1847, the date of statutory notice, until 1863, and for relief from future advances. The following facts were relied upon, which were not materially in dispute between the parties. The pauper was born in Rathven in 1825, and was an illegitimate child. In 1831 his mother married, and acquired through her husband a derivative settlement in the parish of Huntly. The pauper did not go to Huntly to reside with his mother after her marriage, but remained with his maternal grandfather in the parish of Rathven. In 1835 he obtained relief from the parish of Rathven on his own account, and in addition to this relief he obtained relief as a member of his grandfather's family from 1838 from the *quoad sacra* parish of Enzie, forming part of the parish of Rathven. The sums obtained from Enzie commenced at the rate of 4s. yearly, and were increased until May 1844, when they ceased, to the sum of 14s. The pauper was bedrid from 1838, until 1845, and unable to support himself by his own industry. Soon after the statutory notice in 1847, Huntly admitted liability as the parish of the pauper's settlement, repaid the advances made by Rathven prior to that date, and continued to pay for the pauper up till 14th May 1853, at which date there had been paid to Rathven, for advances made to the pauper, sums amounting to £32, 13s. 11d. After the decision of the Court in Hay against Scott, 23d Nov. 1852, Huntly recalled its former admission of liability, and besides refusing further payment, insisted on being repaid what had been paid to Rathven. After being threatened with legal proceedings, Rathven paid back the said sum of £32, 13s. 11d. It was maintained in argument that this repayment was made under protest of liability, but the Lord Ordinary found that that was not established. In February 1856, the Court decided the case of Hay *v.* Thomson, to the effect that an illegitimate child follows the settlement of the mother in whatsoever way she may have acquired it, which was a return to the law as it had been interpreted prior to the judgment of the Court in the case of Hay *v.* Scott. Accordingly, Rathven again intimated to Huntly that Huntly was the parish of settlement, and claimed repayment of advances from 1847 to the date of the first statutory notice, and further relief. Huntly refused to admit the claim, and after a lengthened correspondence, in which the claim was continuously asserted by Rathven, Rathven raised an action against Huntly, with conclusions as above stated. In the summons it was stated that relief