for conference, and the following minute was adjusted and signed :—

"The parties agree to settle the case in the following terms :—

"1. The defender to pay the pursuer 100 guineas of damages, with expenses to and inclusive of this date, as the same shall be taxed.

"2. Any claim which may now be competent to either party against the other for any assault or defamatory words is discharged.

"3. The pursuer's lease of the farm of Innergeldie to be adjusted at the sight of Donald Mackenzie, Esq., advocate, and all questions now existing between the pursuer and defender, as tenant and landlord respectively of said farm, to be referred to the said Donald Mackenzie.

"4. The interdict case now depending in the Sheriff Court of Perthshire to be referred to the said Donald Mackenzie."

In consequence of the above agreement the jury were discharged.

Counsel for Pursuer—Mr Young and Mr A. Moncrieff. Agents—Hill, Reid, & Drummond, W.S.

Counsel for Defender—Mr A. R. Clark and Mr Gifford. Agent—James Webster, S.S.C.

COURT OF TEINDS.

Wednesday, March 13.

KERR *v.* HERITORS OF YESTER.

Augmentation of Stipend—Decimae Inclusae Right. Circumstances in which held that an heritor had not shown such a *prima facie* case of possession under a *decimae inclusae* title as to justify the refusal of an augmentation.

This was an application by the minister of the parish of Yester for an augmentation of his stipend.

GIFFORD and WEBSTER, for the Marquess of Tweeddale, one of the heritors, objected to any augmentation being granted, on the ground that the only lands in the parish which the minister pretended were unvalued were held by him under a title *cum decimis inclusis*. He founded on (1) a charter dated 9th May 1592, by "Walter Hay, provost of the collegiate church or provostrie of Bothanes, with advice and consent of James Lord Hay of Yester, patron of the said collegiate church, and of the other prebendaries thereof," whereby he gave, granted, &c., to William Hay certain lands "*una cum decimis earundem inclusis que ab invicem nunquam separari solebant;*" (2) a charter or disposition, dated 10th May 1592, whereby the said William Hay sold the said lands to James Lord Yester; and (3) a Crown charter of confirmation, dated 26th September 1592, whereby the before mentioned charters are ratified. The present Marquess is heir-male of Lord Yester, and he founded upon possession of the lands, without payment of minister's stipend, since 1592.

WATSON, for the minister, argued, that the deeds produced did not instruct a good *decimae inclusae* title. The words "*et nunquam antea separatis*" did not occur in the charters. Such a title can only be held when it has flowed from the regular clergy, which is not the case here.

The Acts 1567, c. 12, and 1592, c. 161, were referred to, as also the following authorities :—Ersk., 1, 5, 3; Officers of State *v.* Stewart, 20th July 1858, 20 D. 1331; Locality of Caputh, 3d June 1864, 2 Macp. 1133; Locality of Alyth, 7th Feb. 1810, F. C.; Locality of Carmylie, 23d May 1810, F. C.; and Lord Dundas, 22d June 1823, Shaw's Teind Cases, 41.

At advising,

The LORD PRESIDENT—The only question which we have to determine at present is, whether an augmentation shall be granted, or whether the heritor has shown such a *prima facie* case of the possession of a *decimae inclusae* right as to justify us in refusing the augmentation at once. The Court are all satisfied that the heritor has not shown such a *prima facie* case, and that the augmentation should proceed as if the objection had not been stated.

The stipend was modified at 18 chalders, leaving the question raised to be determined in the locality.

Agents for Minister—W. H. & W. J. Sands, W.S.

Agents for Marquess of Tweeddale—Gibson-Craig, Dalziel, & Brodies, W.S.

COURT OF SESSION.

Thursday, March 14.

FIRST DIVISION.

ALLANS *v.* TEMPLETON.

Restitution—Issue—Criminal Accusation. A pursuer is bound to put in issue the case he avers on record; therefore, in an action for restitution of money said to have been obtained by means of theft and forgery, the pursuer having proposed an issue not containing these accusations, issue disallowed and action dismissed.

This is an action at the instance of Margaret Linn Hope or Allan, wife of John Allan, residing at Livingston, near Mid-Calder, the said John Allan, and Margaret Linn, residing with him, against Marian Templeton, Over-Dalserf, near Carluke. It concludes for payment of £134, 7s. 1d., and for £100 "as the loss and damage which the pursuers have sustained through the defender having fraudulently and illegally abstracted or stolen a deposit-receipt for £133 sterling, granted by the Bank of Scotland to the pursuer, Margaret Linn Hope or Allan, dated 13th May 1862, uplifted the contents thereof, and retained or applied the same to her own purposes."

The following averments set forth the pursuers' grounds of action :—

"Cond. 4. The pursuer, Margaret Linn, lives in family with the other pursuers, John Allan and Margaret Linn Hope or Allan, and has a chest in their house in which she keeps her articles of wearing apparel, &c. The said deposit-receipt was always kept in the said chest. In November 1862 the defender paid a visit to the pursuers. During that visit the defender had access to Margaret Linn's chest, in which she (the defender) had been allowed to place several articles of her own, and she took the opportunity of abstracting or stealing the said deposit-receipt therefrom."

"Cond. 6. Thereafter the defender forged the signature of the pursuer, Margaret Linn Hope or Allan, by writing the name 'Margaret Linn Hope' across the back of the said deposit-receipt. She did so without the sanction, authority, or knowledge of the pursuers, or any of them. The defender thereupon presented the said deposit-receipt, with the said forged indorsation thereon, for payment at the office of the City of Glasgow

Bank at Glasgow, or at Hamilton, or at some other of the offices or branch offices of the City of Glasgow Bank, and obtained payment of the sum therein contained, with bank interest thereon from 13th May 1862, the date of the said deposit-receipt, until 15th November 1862, the date when said payment was made. The said deposit-receipt was handed over by the City of Glasgow Bank to the Bank of Scotland on 15th November 1862, on payment being made by the latter to the former of the sums contained therein. The theft of the said deposit-receipt was not discovered by the pursuers till 16th March 1863, when its absence was noticed by Margaret Linn. The pursuer, John Allan, immediately thereupon proceeded to Edinburgh, and made inquiries at the bank, when he ascertained that the same had been cashed by the defender as above set forth."

"Cond. 8. By the illegal, fraudulent, and criminal conduct of the defender as above set forth, the pursuers have been defrauded of the sums contained in the said deposit-receipt, and they have suffered great inconvenience in consequence of the want of the money fraudulently uplifted by the defender."

The defender denied these averments.

The pursuers proposed the following issue:—

"Whether in or about the month of November 1862, the defender wrongfully wrote, or caused to be written, the subscription or name 'Margaret Linn Hope' on the back of the deposit-receipt, No. 17 of Process, for £133, by the Bank of Scotland at Edinburgh, in favour of the pursuer, Margaret Linn Hope, and dated 13th May 1862; and whether the said sum of £133 and £1, 7s. 1d., or thereby, of interest thereon were wrongfully obtained by the defender, or by some one on her behalf, from the City of Glasgow Bank, who received payment from the Bank of Scotland of said sums on or about 15th November 1862, and are, or any part thereof, resting-owing to the pursuers by the defender, with interest from 15th November 1862?"

The Lord Ordinary (Ormidale) reported the case with the following

"*Note.*—The defender objected to the issue as proposed by the pursuers, on the ground that it was not in conformity with the case as averred on record.

"The Lord Ordinary is of opinion that this objection is substantially well founded, and that the issue ought to be remodelled, so as to make it more in accordance with the pursuer's case as averred by them, more particularly in articles 4 and 6 of their condescendence. This view is supported by the decision of the Court in Moffat *v.* Underwood, 23d November 1860, 23 D. 48.

"The Lord Ordinary was strongly urged, on the part of the pursuers, to allow the parties a proof before answer, under and in terms of the recent statute. That course, however, was opposed by the defender, and the Lord Ordinary has been unable to see any sufficient reason for adopting it. On the contrary, he thinks the case should be sent to a jury, just as that of Moffat *v.* Underwood was.

"The Lord Ordinary doubts very much whether anything more was contemplated by the recent statute than that the proof should be taken by the Lord Ordinary himself in place of by a commissioner, in those cases in which, before the passing of the statute, a proof in commission would have been allowed. Were any extension to occur of the number of cases which depend upon an investigation and determination of disputed facts, not before a jury, whose verdict is conclusive (subject of course to new trial, when that is allowed on due cause shown), but by proof under the recent statute, the Lord Ordinary fears the consequences would soon be found to be very inconvenient and objectionable, for it is not to be overlooked that the findings of fact by the Lord Ordinary on such proof are not final, but may be reviewed by the Inner House under a reclaiming note, whose judgment, again, is subject to review by the House of Lords on appeal by either or both of the parties.

"It is right to add that the pursuers in this case stated that they were not to insist in their conclusion for damages. They ought, however, to lodge a minute passing from that conclusion."

MACKENZIE and TOD for the pursuers.

FRASER and BURNET for the defender.

After discussion, the case was continued that the pursuers might consider whether they should abandon the action or withdraw the charges made on record if they were not to be put in issue. The Judges were all of opinion that a pursuer was not entitled to state such charges unless he intended to put them distinctly in issue.

The pursuers thereafter proposed the following amended issue:

"Whether, in or about the month of November 1862, the defender forged, or caused to be forged, the name of the pursuer, Margaret Linn Hope or Allan, by writing the subscription or name 'Margaret Linn Hope' on the back of the deposit-receipt, No. 17 of Process, for £133, dated 13th May 1862, and granted by the Bank of Scotland at Edinburgh, in favour of the pursuer, Margaret Linn Hope; and whether the said sum of £133 and £1, 7s. 1d., or thereby, of interest thereon, were obtained by the defender, or by some one on her behalf, from the City of Glasgow Bank, who received payment from the Bank of Scotland of said sums on or about 15th November 1862, and are, or any part thereof, resting-owing to the pursuers by the defender, with interest from 15th November 1862?"

The defender objected that the charge of theft was not put in issue, but notwithstanding retained on record. In regard to the issue putting the question of forgery, there were not materials for it on record. The time when the forgery was committed was not specified on record, and it was not said either there or in the issue that the money was obtained by means of the forgery.

The Court disallowed both issues proposed, and dismissed the action with expenses.

Lord DEAS said—This case was very fully debated formerly, and, according to my note, we came to this conclusion—that it should be delayed for the pursuers either to abandon their action or amend their record. They now propose to do neither, and that perhaps is sufficient to prevent us going back on what we have done already. But suppose we are to do so, I am very clear that on the allegations on record the pursuers are not entitled to the issue originally proposed by them. Wrongfully writing another's name on a deposit-receipt either means forgery or nothing, and I have no idea of allowing this party so to disguise his meaning in the issue presented to the jury as to lead them to believe that he is alleging something less than forgery. The objection to that issue is that it does not put in issue the case on record. Then it is not made to appear from the issue now proposed that the money was obtained by means of the forgery, and ac-

cordingly when I look at the record I find that it was not so much by means of the forgery, as by means of having stolen the document that it is said to have been obtained. The theft therefore is the *gravamen* of the charge; the rest is rather introduced as part of the narrative; and besides this, the whole is coupled with a statement by the pursuers themselves, that it was the habit of the parties to go to the bank together and uplift and redeposit the money, and on all these occasions the defender signed of consent the pursuer's name; so that the question is narrowed to this, that if the defender cannot prove that on this last occasion she had the pursuer's authority she must be convicted of forgery. I think, therefore, the amended issue should also be disallowed.

It would be altogether contrary to the ends of justice to allow either issue.

Lords CURRIEHILL and ARDMILLAN concurred.

LORD PRESIDENT—This case is somewhat new to me, but I concur in what has been said by Lord Deas. This is a civil action for recovery of a sum of money said to be in possession of the defender, and how is it alleged that it came into her possession? It is quite impossible that it can have come into her hands by forgery alone. Accordingly both theft and forgery are alleged in combination with uttering of the forged indorsation. Without the combination of these things the possession of the money is unaccounted for. The action would therefore, without these allegations, be quite irrelevant, and I think they must all be put in issue.

Agents for Pursuers—Hagart & Burn-Murdoch, W.S.

Agent for Defender—John Thomson, S.S.C.

SWAN *v.* MACKINTOSH AND OTHERS.

Limitation of Action—Road Act—Signeting—Execution. An Act of Parliament limited the right of action to six months. A summons was signeted and served on some of the defenders within the time, but was not served on the others till a day after it had expired. The defenders were all concluded against conjunctly and severally. *Held* that the action was "commenced" against all the defenders within six months.

J. R. Swan, accountant in Glasgow, raised this action against fifteen gentlemen who were trustees for the management of the statute-labour roads within the Dunoon district of Argyllshire, appointed under the Act 27 and 28 Vict., cap. 206. The action was one of damages for injury sustained by the pursuer on 12th Sept. 1865, in consequence, as he alleged, of the unfenced state of the road from Blairmore to Strone, which was due to the culpable neglect of the defenders.

The defenders pleaded in defence that the action was excluded by section 46 of the General Statute Labour Road Act, in respect it was not "commenced" within six months from the date of the occurrence libelled. The summons was signeted on 10th March 1866, and served on nine of the defenders on 12th March 1866, but not on the other six until 13th March 1866, being six months and one day after the occurrence.

The Lord Ordinary (Ormidale) sustained this plea as to the six defenders, and repelled it as to the others. The following is his

"*Note.*—The wrong and injury of which the pursuer complains, having been done to, and suffered by him on the 12th of September 1865, while the present action was not commenced against the defenders named in the interlocutor, till the 13th of March 1866, it is, in the Lord Ordinary's opinion, barred and excluded *quoad* those defenders by the statutory provision referred to in the defenders' first plea in law. On the other hand, the action having been executed against all the other defenders, on the 12th March, the Lord Ordinary thinks it must be held to have been commenced as regards them, within the statutory period, and therefore he has repelled the plea in question, in so far as the action is directed against them. The argument of the pursuer, founded on the assumption that the signeting of the summons on the 10th of March 1866, although it was not served on the defenders mentioned in the interlocutor till the 13th of that month, must be held to be the commencement of the action in the sense of the statute, appears to the Lord Ordinary to be unsound. The signeting of the summons was merely an act necessary to complete it, and render it a competent writ wherewith to commence the action; but the Lord Ordinary cannot hold that act to have been itself the commencement of the action against the defenders any more than the writing of the summons, or its subscription by a writer to the signet. The defenders were not parties to any of these acts, and of all of them they were necessarily ignorant, till served with the summons. It was only on the summons being served, that, in the words of Mr Erskine (3. 6. 3.) the proceeding could be said to be 'a begun action.'

"On the other hand, as the Lord Ordinary cannot doubt that the citation of the remaining defenders on the 12th of March was a commencement of the action, so far as they are concerned, within six months after the date of the wrong or injury complained of, he has repelled the plea in question, *quoad* these defenders.

"Although some discussion also took place in relation to the defenders' second plea in law, the Lord Ordinary does not think it would be right to dispose of it till parties have had an opportunity of being further heard—the more especially as that plea will now present itself under a somewhat different aspect than heretofore, in consequence of the action having been dismissed as to some of the defenders. It will now fall to be considered, whether with reference to the circumstance of the summons concluding against all the defenders as being conjunctly and severally liable, for one and the same fault, committed by them jointly, the action, seeing that it has been dismissed against some of the defenders, is relevant or maintainable against the others; and in regard to this point the Lord Ordinary has to direct the attention of the parties to the cases of Leslie's Representatives *v.* Lumsden and Others, 19th June 1856, 18 D. 1046; the Western Bank of Scotland *v.* Bairds, 20th March 1862, 24 D. 859; and the North British Railway Company *v.* the Leadburn Railway Company, &c., 12th January 1865, 3 M'P. 340.

"The Lord Ordinary has only further to suggest that it might be well, before farther answer, that an order were taken for issues, as the question how far the action is now relevant or maintainable against any of the defenders could be best and most conveniently discussed, when it is seen in the form of an issue, how, and in what terms, the action is still to be insisted in."

The pursuer reclaimed.

RUTHERFURD CLARK and F. W. CLARK for him.

YOUNG and GIFFORD for the six defenders, who had been assoilzied.

At advising,