put, and that if he had, the proposed use is altogether unobjectionable. I think, therefore, that the judgment of the Dean of Guild ought to be recalled, and the case remitted to him to grant the prayer of the petition on condition that the petitioner agrees to restrict the height of the proposed building to the limit allowed by his title.

Lord Craighill—I arrive at the same conclusion, and that without any difficulty. It seems to me that the proposed building is an office within the meaning of the petitioner's title. In that view, and knowing what we decided two days ago, I have no hesitation in saying that I think this question is now foreclosed. I am not in the least moved by the argument that the building is to be used as a school. The tenement has been used as a school for twenty-three years, and nothing has hitherto been said against the legality of such use. I think, therefore, we are entitled to say that this new building is to be a conveniency for a use already acquiesced in, and in itself quite proper. Lastly, I think that were we to begin with the question as to whether under the title the houses themselves can lawfully be used as boarding or day-schools, I am of opinion that there is no limitation by which that use could be excluded.

Lord Rutherfurd Clark—I am of opinion that the petitioner is entitled to proceed subject to the proposed restriction as to height. I think it right, however, to guard myself by stating that this alone is the ground of my opinion. The feuars have power to erect such offices as they consider necessary or convenient. I read that as meaning such offices as may be necessary or convenient for the uses to which the buildings may lawfully be applied. Now, I find that these buildings have for twenty-three years been used as a school, and it is admitted on the other side that in respect of acquiescence that must now be considered a legal use. That I understand is not disputed, and if it were so, I should be disposed to regard such an attempt as hopeless. It follows, therefore, in my opinion, that the feuar is entitled to erect any buildings which may fairly be taken to be additional conveniences for the use of the front buildings. I wish to say that I do not desire to express any further or other opinion than that which I have just pronounced.

The Court pronounced this interlocutor:—

"The Lords having heard counsel for the parties on the appeal, sustain the same, Recal the judgment appealed from: Remit the cause to the Dean of Guild with instructions to proceed with the lining in conformity with the dimensions stipulated in the titles of the property: Find the petitioner entitled to expenses in this Court: Remit the same to the Auditor to tax and to report, and decern."

Counsel for Appellant — Mackintosh — Ure. Agents—Macbrair & Keith, S.S.C.

Counsel for Respondents—R. V. Campbell—Lorimer. Agents — Maitland & Lyon, W.S. — Campbell & Smith, S.S.C.

Friday, July 20.

FIRST DIVISION.

[Lord Lee, Ordinary.

AYR ROAD TRUSTEES *v.* W. & T. ADAMS AND BLYTH & CUNNINGHAM.

Process—Reclaiming Note—Extract.

In an action against two sets of defenders, an interlocutor was pronounced decerning against one set but assoilzieing Messrs B. & C., the other defenders, and finding them entitled to expenses. This interlocutor was reclaimed against, but the pursuers intimated that they did not intend to object to the interlocutor in so far as it assoilzied Messrs B. & C. B. & C. accordingly had their account of expenses taxed, and on their motion the Lord Ordinary approved of the Auditor's report on their account, and decerned for the amount of their expenses as taxed. This interlocutor the extractor refused to extract, on the ground that the process was in the Inner House. The Lord Ordinary reported the cause, and the Court *authorised* the extractor to extract the interlocutor.

In an action at the instance of the Ayr Road Trustees against W. & T. Adams, contractors, Callander, and Blyth & Cunningham, civil engineers, Edinburgh, the Lord Ordinary (Adam) on 20th March 1883 pronounced this interlocutor:—"Decerns against the defenders W. & T. Adams, and William Adams and Thomas Adams, the individual partners of the said firm, for the sum of one thousand pounds sterling: Further, assoilzies the defenders Blyth & Cunningham, and George Cunningham and Benjamin Hall Blyth, the individual partners of the said last-mentioned firm, from the whole conclusions of the action, and decerns: Further, finds the said Blyth & Cunningham, and George Cunningham and Benjamin Hall Blyth, entitled to expenses," &c.

The pursuers reclaimed.

On 10th April the pursuers' agents intimated by letter to the agents for Messrs Blyth & Cunningham that they did not intend to object to this interlocutor in so far as it assoilzied their clients.

In the pursuers' reclaiming-note Messrs Adams were titled defenders and respondents, while Messrs Blyth & Cunningham were titled defenders only. Messrs Blyth & Cunningham in consequence of the intimation that the interlocutor was not to be challenged as regarded them, lodged an account of their expenses, which was audited—the pursuers, who were represented at the audit, getting several items struck off.

Thereafter Messrs Blyth & Cunningham enrolled the case for the purpose of getting the account approved of. On 27th June 1883 Lord Lee, for Lord Adam, pronounced an interlocutor approving of the Auditor's report, and decerning for the expenses as taxed. This interlocutor the extractor refused to extract on the ground that the process was in the Inner House.

Messrs Blyth & Cunningham having brought the matter before the Lord Ordinary, his Lordship reported it to the First Division.

At advising—

Lord President—This is a point of some delicacy, but at the same time I think we should grant the relief asked by Messrs Blyth & Cunningham.

The reclaiming-note against Lord Adam's interlocutor was sent to the roll on 12th May, and that interlocutor of Lord Adam was a final judgment of which extract could of course be obtained. But that reclaiming-note brought the process here, and nothing could be done till that reclaiming-note was disposed of if the effect of the reclaiming-note was to bring here as respondents both sets of defenders. But it rather appears to me that, taking the title of the reclaiming-note, it is one in which the reclaimers represent the Messrs Adams as respondents and Messrs Blyth & Cunningham as defenders and not respondents. Now, taking that along with the letter written by the pursuers' agents to the agents for Blyth & Cunningham, we must hold that the reclaiming-note is one in which the pursuers do not seek to object to that part of the interlocutor which assoilzies Blyth & Cunningham with expenses. I do not see why Blyth & Cunningham should not be entitled to proceed under that part of the interlocutor which is not to be challenged, and which allows them to give in an account of expenses, and remits to the Auditor to tax and report. That is just what Blyth & Cunningham did, for they lodged an account and then asked the Auditor to fix a diet for taxation. That was done, and the pursuers in accordance with what appears to be their intention from the reclaiming-note and from the title to which I have alluded, attended the audit, and with effect, for they got £50 struck off the account. Then the Auditor reports to the Lord Ordinary, and quite rightly, for it was by the Lord Ordinary that the remit was made, and the Lord Ordinary, on Blyth & Cunningham's motion, approves of the account and decerns for the amount as taxed.

The difficulty of the extractor is that the process is here and not in the Outer House; but that is only a technicality, and does not avail in the circumstances of the case. The real question is, whether in the position of the process on 27th June the Lord Ordinary had jurisdiction to pronounce this interlocutor. I think that he had, and that the course we should follow is, on Mr Murray's motion to authorise the extractor to extract this decree.

Lords Deas and Mure concurred.

Lord Shand—I think it right to say that although I concur with your Lordships, in order to remove the practical difficulty which has arisen, I am not prepared to say that such an order as we are now to pronounce is necessary.

I think that the Lord Ordinary is the person to say whether a cause is properly before him or not; and if, as frequently happens, having the cause before him as regards one set of defenders he gives decree, it rather seems to me that it is the extractor's duty to respect that decree, and that the mere circumstance of the process being in the Inner House for one purpose should not affect the extractor in the discharge of his duty.

I concur with your Lordships, as the difficulty has arisen, that relief should be granted in the circumstances. I only wish to guard against saying anything that might indicate that I considered such an order necessary.

The Court pronounced this interlocutor:—

"The Lords on the motion of the defenders Messrs Blyth & Cunningham, upon the report of Lord Lee, authorise the extractor to proceed with extracting the interlocutor of Lord Lee for Lord Adam, of date 27th June 1883.

Counsel for Messrs Blyth & Cunningham—Graham Murray. Agents—Tods, Murray, & Jamieson, W.S.

Friday, July 20.

FIRST DIVISION.

(Before the Whole Court.)

[Sheriff of Lanarkshire.

EWING *v.* COCHRANE.

Process—Appeal—Appeal for Jury Trial—Proof—Judicature Act (6 *Geo. IV. cap.* 120), *sec.* 40.

When an action is brought up from a Sheriff Court by appeal under sec. 40 of the Judicature Act, and the Court is satisfied that questions of fact involved in it ought to be determined by proof rather than by jury trial, the proof can competently be taken in the Court of Session, the effect of the appeal being altogether to remove the cause from the Sheriff Court.

This action was raised in the Sheriff Court of Lanarkshire. The pursuer William Cochrane, a stockbroker in Glasgow, claimed £2500 as damages said to have been caused to him by the actings of the defender Archibald Hunter Ewing, who was also a stockbroker in Glasgow, and was a member of the Stock Exchange there. It appeared from the averments and admissions of the parties that between the years 1876 and 1879 the pursuer had been employed by the defender as a clerk, and that their connection was continued under a new arrangement for three years from 1st January 1879. The pursuer alleged that the reason of their arrangements taking the form which they did was that the rule of the Glasgow Stock Exchange forbade the defender to have as a partner a person not himself a member of that Stock Exchange (which the pursuer was not), and also averred that one of the conditions of the arrangement was that after he had received a certain sum as salary he should be remunerated by a share in the defender's business profits.

In 1878 a person named Robertson was engaged by the defender to act as "accredited" or Stock Exchange clerk. It was admitted that Robertson while so engaged entered into considerable speculations on his own account. The pursuer alleged that this conduct of Robertson was unknown to him, and that when the transactions turned out well he got no benefit from them, but that when they turned out ill they were carried into the defender's suspense account, with the effect that the proportion of profits falling to him under his own engagement was much diminished. He also averred that the defender showed gross negligence in not putting a stop to these operations by Robertson when he discovered them; that he refused to dismiss him, but,