of the parties, or who may conceive that the case ought to be tried by jury, to remove the process into the Court of Session." . . . .

James Mitchell, farmer, Headyton, in the county of Banff, was owner of the entire horse "Just-in-Time," which he hired to William Urquhart, residing at Longmanhill, also in the county of Banff, for the season of 1883. The hire for the horse was £35, and the season was to last from the beginning of April till the middle of July. Urquhart took possession of the horse about the end of March 1883, and retained the custody till its death on or about the 22d day of May following.

Mitchell raised the present action in the Sheriff Court of Banffshire against Urquhart to recover a sum of £60 as the value of the horse. He averred that the horse had become ill about 16th May, and had not been properly attended to, and that its death was the consequence of the defender's negligent and improper treatment of it, and he further averred that he received no intimation of the illness or death of the horse, and that its carcase was disposed of without his consent.

The defender gave a general denial of these statements, and averred that the horse was never sound, and that it died from natural causes, and not from neglect on his part.

The Sheriff-Substitute (SCOTT-MONCRIEFF) on 12th December 1883 pronounced an interlocutor allowing both parties a proof of their averments.

The defender appealed to the Court of Session for jury trial, and argued — Under section 40 of the Judicature Act 1825 he was entitled to have the case tried by jury. That Act had fixed the amount entitling a party to jury trial as at £40; here the sum at issue was £60. It devolved upon the respondent to show that the case was not suited for jury trial.

Argued for pursuer—There was no rule that in no circumstances could the Court remit the case to the Sheriff, and in an action for a sum comparatively small a jury trial would be far too expensive. The matter was one for the discretion of the Court, and there was nothing in the Judicature Act to bar the Court from exercising that discretion. The Court would take the whole circumstances into account in disposing of the question, and not consider merely whether or not there was issueable matter.

After consultation with the Judges of the Second Division,

LORD PRESIDENT—We are of opinion, after consulting with the other Judges, that the case being in its nature one appropriate for jury trial, and the sum at issue being above the limit fixed by the statute, there is no reason why the party appealing should not have the case so tried.

LORDS MURE and SHAND concurred.

LORD DEAS was absent.

Counsel for Pursuer—Comrie Thomson. Agent—Alexander Morison, S.S.C.

Counsel for Defender—Watt. Agent—Andrew Urquhart, S.S.C.

Saturday, February 2.

FIRST DIVISION.

[Lord Fraser, Ordinary.

BLAIR *v.* MACFIE.

Process — Jury Trial — Proof — Declarator of Right-of-Way.

In an action by a member of the public for declarator that the public had a right-of-way over four roads leading through the defender's lands, the Lord Ordinary ordered issues for a trial of the cause by jury. The Court, on the ground (1) that the action involved difficult legal questions, and (2) that it appeared that there was considerable public feeling with regard to the subject of it, and that the pursuer had, by the publication of a correspondence in newspapers and otherwise, contributed to increase this feeling, *appointed* the cause to be tried by proof before the Lord Ordinary.

In this action of declarator and interdict John Blair, Writer to the Signet, Edinburgh, sought to have it found and declared that there existed three different public rights-of-way by foot and horse, and one right of footpath, through the lands of Dreghorn, the property of the defender Robert Andrew Macfie, and that the defender should be interdicted from molesting or obstructing the pursuer and all others in the peaceable use and enjoyment of the said roads in all time coming.

The rights-of-way in question were alleged to be (1) a road from Hunter's Tryst, on the public road from Fairmilehead to Colinton through the defender's lands westwards, and then southwards by the glen of the Howdean Burn, on to the defender's march, where it formed two branches which passed through the lands of two different proprietors, neither of whom denied the existence of a right-of-way, and so joined a public road from Edinburgh to Biggar. The second alleged right-of-way began at Colinton, and passing through the defender's lands joined the first. The third (the footpath) led from a different point on the public road, and joined the first; and the fourth led through defender's lands from Hunter's Tryst to Colinton.

The pursuer averred that for more than forty years the right-of-way first described had been used by the public as a foot and horse path from Hunter's Tryst through the Pentland Hills to the valley of the Logan Water and to the Biggar Road; that from the time when the pursuer acquired the estate of Dreghorn in 1862 to 1881 no obstruction had been put in the way of the public using this road, but from this latter date various locked gates, it was alleged, had been erected, with intimations to the effect that there was no road that way. Similar averments were made as to the other rights-of-way to which the action related.

The defender denied that the roads in question were public rights-of-way, and averred that the Logan Water valley could be reached by more convenient and direct roads than that from Hunter's Tryst. As to the other roads, they were private estate roads upon which no public money was expended, and as to one of them,

that though there had once (in 1803) been a public road passing in the direction of that claimed by the pursuer, though not in the line he alleged, it had been closed by order of the Justices of the Peace in that year on a new road being substituted by the defender's author. The defender admitted that he had gates at various parts of his property, which he kept locked to prevent trespassing.

A question was raised upon record as to whether certain years of minority fell to be deducted in reckoning whether the public had possessed the alleged right-of-way during the prescriptive period.

Upon 16th January 1884 the Lord Ordinary (FRASER) pronounced an interlocutor appointing issues to be lodged for the trial of the cause.

The defender reclaimed, and argued — This was a case which should be tried before the Lord Ordinary without a jury. It was a very complex case, involving not only a right-of-way over four roads, each of which would require a separate issue, but also delicate questions of law as to minority, title-deeds, and the effect of the alleged right-of-way passing through the lands of defenders not called in the present action. (2) It would also be impossible to get an unprejudiced jury, for the question had been so discussed in the public prints and at public meetings that a fair trial of the question could not be obtained. The question as to the mode of trial was one entirely in the discretion of the Court.

Authority—*Macfie* v. *Shaw Stewart*, January 24, 1872, 10 Macph. 408.

Argued for respondent—As a matter of practice, cases such as this invariably go to a jury, for the question at issue was really one of the credibility of witnesses. The mode of trial was a matter for the discretion of the Lord Ordinary, and the Court would be slow to interfere with that discretion when once it has been exercised. In order to take this case out of the ordinary rule there must be either consent of parties or a much more exceptional state of circumstances than had been disclosed.

Authority—*Crawford* v. *Menzies*, June 12, 1849, 11 D. 1127.

At advising—

LORD PRESIDENT—This is a question for the discretion of the Court, and I must say that I sympathise very much with the observation which has been made that that discretion has been already exercised by the Lord Ordinary, and that the Court are not likely to interfere with that discretion. As a general rule I am quite prepared to concede to that, but the present case is one of great delicacy, and if I had been the Lord Ordinary I think I should have sent this case to be tried without a jury, and that is the course which I propose should be adopted still. In the first place, the case is attended with a good deal of difficulty and complication. There are four different roads, which if the case goes to a jury must form the subject of four separate issues. These roads, so far as they concern the lands of the defender, do not terminate at any public place. They start from a public place, but there is no public place at the other end of them so far as the lands of the defender are concerned. Therefore, in order to make out his case the pursuer must establish forty years' possession of a right-of-way, not only through the lands of the defender, but through the lands of other adjoining proprietors. I think it may be a question of very great delicacy how far, if the pursuer establishes a clear case of use of the roads through the lands of the defender, he is bound to go in addition in the way of proving the same amount of use of the roads through the lands of the parties who are not called as defenders. I do not wish to indicate any opinion on the subject, or to say that the burden on the pursuer is greater or less in the one case than in the other, but I can quite understand its being maintained by the pursuer that having proved forty years' use of these roads through the lands of the defender to his march, it will be sufficient for him to show generally that there is undoubtedly in existence, and has been for some time, corresponding right of passage through the lands on the other side of that march.

But I am still more moved by another consideration, and that is the prejudice which has been created in the minds of the public, and particularly of that part of the public from which juries are drawn, in regard to the merits of this case by discussions in and letters addressed to newspapers. That would not go so far if the pursuer was entirely blameless in the matter, but when the pursuer in an action, or a person who intends to become a pursuer, commits himself to publishing letters in newspapers bearing on the subject-matter of the action, he cannot hold himself blameless. On the contrary, he has incurred a very heavy responsibility, and has placed himself in a position deserving of no favour. Upon that ground especially I am for sending the case back to the Lord Ordinary to be tried without a jury.

LORD DEAS and LORD MURE concurred.

LORD SHAND—If it had not been for the public discussion of this question which has already taken place both in the newspapers and otherwise, and the effect which that might have in prejudicing or biassing the minds of a jury, I should not have been disposed to have interfered with the discretion which the Lord Ordinary has exercised in determining the mode of trying this case. In a question of this kind tried before the Lord Ordinary, where there are no less than four roads involved, there must necessarily be a great mass of evidence, and a proof extending over several days, to be followed by a long discussion, not only here, but possibly also in the House of Lords, all which necessarily involves a vast amount of expense some portion of which might, no doubt, be avoided if we appointed this case to be tried by jury. I cannot say that I attach the same importance which your Lordship does to the delicacy of the inquiry as to the right-of-way extending over the lands of defenders who are not called in the present process, and accordingly I should not on that ground have been prepared to have interfered with the Lord Ordinary's discretion in a case of this kind. But we are appealed to by the defender to say that it would be impossible, owing to the state of public feeling on this question, for him to obtain a fair trial by jury, and he shows us, in support of this contention, a large mass of letters, newspaper editorials, and other documents and prints, all bearing upon this case. As the defender has put forward this objection to

having the case tried by a jury, I think we are bound to give effect to it. There can be no doubt that if a question of this kind was set down to be tried on Circuit with reference to a local right-of-way, and it was objected that owing to local feeling upon the matter it was impossible to have the question fairly tried, the Court would in these circumstances appoint the case to be tried at Edinburgh, and upon that principle I think with your Lordships that we ought to remit this case to the Lord Ordinary to be tried without a jury.

The Court recalled the Lord Ordinary's interlocutor, and remitted the case to him to be tried without a jury, reserving all questions of expenses.

Counsel for Pursuer—Sol.-Gen. Asher, Q.C.—Mackintosh—W. C. Smith. Agent — Andrew Newlands, S.S.C.

Counsel for Defender—Trayner—Thorburn—Graham Murray. Agents—Macandrew, Wright, Ellis, & Blyth, W.S.

Saturday, February 2.

SECOND DIVISION.

[Sheriff of Fife.

SCOTT *v.* DAWSON.

Parent and Child—Filiation—Proof—Evidence—Admissibility of Proof of Intercourse subsequent to Birth of Child—Notice on Record.

In an action of filiation of a child born in 1879, which action was raised in 1883, the pursuer, in order to show her relation with the defender and to contradict his evidence, led evidence, without notice on record, of familiarity and of acts of intercourse in 1882. *Held* that the evidence was *admissible*, but observed that there ought to have been notice of it on record.

In this action of filiation and aliment the pursuer averred on record that in January and February 1879, when she was in the service of a Mrs Harrow, at Wemyss, the defender, who was a carter in Wemyss, had sexual intercourse with her in the kitchen and in a court belonging to her mistress, the result of which was that she gave birth to a male child on the 5th October 1879, that after the birth of the child the defender frequently called at the pursuer's house, and in December 1882 called and paid a sum of 3s. to account of her inlying expenses, but had made no further payments. The defender denied these averments. The action was raised in August 1883.

A proof was led, in which the pursuer deponed to the truth of her averment of connection in January and February 1879. This the defender denied. There was some slight evidence to corroborate the pursuer, which is not material to be here narrated.

The pursuer also led evidence of a visit to the house in which she lived in 1881, and of familiarities and several acts of sexual intercourse with the defender in 1882, of none of which was there notice on record. She herself deponed to them, and was corroborated in her deposition on this point by several witnesses. The defender denied them.

The Sheriff-Substitute (Gillespie) found in fact that the pursuer gave birth to an illegitimate male child on 5th October 1879, and that the defender was the father thereof; found in law that he was liable in inlying expenses and aliment as craved.

"*Note.* — This is in some respects a narrow case. The delay in bringing the action is a circumstance unfavourable to the pursuer, and while, on the whole, her statements, when they can be tested by neutral evidence, are fairly supported, there are some discrepancies.

[*After examining the evidence, and referring to that part of it on which he held that the defender's denial of any familiarity in* 1882 *was disproved*]—

"Reference may be made to the often-cited case of *M'Bayne* v. *Davidson*, February 10, 1860, 22 D. 739, not as a precedent, because every filiation case is so eminently one of circumstances that it is hardly possible that one case should be on all fours with another, but as an illustration that when the defender is discredited no great amount of corroboration may be required to establish the pursuer's case. The opinions of the Judges are instructive, as showing the radical changes which the Evidence Act made in the way in which filiation cases must be dealt with, and some of their Lordships' observations are very applicable to the present case.

"The Sheriff-Substitute wishes to observe that it would have been more in accordance with correct and fair pleading if the pursuer had given notice in the record that she was to prove acts of connection in 1882. The correct rule humbly appears to him to be, that while evidence may be given of familiarities as part of the proof without notice on record, the pursuer ought to set forth concisely in her condescendence the place, and, as near as possible, the date of each act of connection on which she is to lead specific evidence, even though some of these acts of connection may have taken place long before or long after the time that the child must have been conceived. Where this is not done the defender may justly object to the evidence being led of such acts of connection on the ground of surprise. In the present case, however, it would not affect the Sheriff-Substitute's opinion on the case if the passages in the evidence to the effect that the defender had connection with the pursuer in 1882 were thrown out of consideration."

On appeal the Sheriff (Crichton) (after allowing an additional witness to be examined, who gave evidence tending to corroborate the pursuer as to her relations with defender in 1879) adhered.

"*Note.* — This is very narrow case, but on consideration of the evidence the Sheriff has come to agree with the Sheriff-Substitute that it is sufficient to entitle the pursuer to decree."

The defender appealed, and argued—There was no sufficient evidence of familiarities and intercourse during the period of conception to prove that he was the father of the pursuer's child. The only other evidence adduced was evidence of such acts of intercourse from October 1882 and onwards, which was a period long after the date of the conception of the child. Now, this evidence was incompetent, as no notice of it had been given on record. Such notice should have been given, according to the rules of pleading.