adventurers were held entitled to sue one of the co-adventurers who had acted as treasurer. The case is not satisfactorily reported, and it does not show that any of the previous cases were quoted. But their Lordships in the Inner House recalled the judgment of the Lord Ordinary, and repelled the plea of no title to sue, stated in circumstances not distinguishable in principle from those in the present case.

"Their Lordships do not allude to any previous decisions, but must have been satisfied either that the case of *Scotland* v. *Walkinshaw* did not apply, or that it was wrongly decided, and it is not very easy to reconcile some of the dicta with the previous decisions.

"The case is, however, certainly distinguishable from *Scotland* v. *Walkinshaw*, and is, I think, substantially decisive in this case. . . .

"I shall therefore repel the second plea-in-law for the defenders, and appoint them to lodge accounts of the intromissions of the late Thomas Gibb in reference to the building operations referred to in the letter quoted on record."

The defenders reclaimed, and argued—Shaw had no title to sue alone. Raising an action in the name of two persons and calling it in the name of one was changing the instance of the action. If the pursuers had sued for £500 each, something might have been said for the argument that one of the pursuers was entitled to proceed with the action for his own £500, or if there had been separate conclusions for each of the two pursuers the same argument might have applied—*Harkes* v. *Mowat*, March 4, 1862, 24 D. 701. But here the action was raised by two persons for payment of a single sum "to the pursuers," and the instance would be changed altogether if only one-half of the sum was sued for by one of the pursuers—*Gibson* v. *Fraser*, July 10, 1877, 4 R. 100.

Counsel for the pursuer William Shaw were not called on.

At advising—

LORD JUSTICE-CLERK—The position of matters in this case is that Macleod and Shaw were the original pursuers in this action, but that Macleod is no longer one, as he is a bankrupt and his trustee will not proceed with the case. Shaw is therefore now suing alone, but limits his demands to one-half of the sum stated in the summons. I think the Lord Ordinary is right in repelling the plea of no title to sue, and in holding that Shaw is entitled to proceed with the case.

LORD RUTHERFURD CLARK—I am satisfied with the judgment of the Lord Ordinary.

LORD TRAYNER—I agree with the Lord Ordinary.

LORD YOUNG was absent.

The Court adhered.

Counsel for the Pursuer William Shaw—Strachan—Craigie. Agents—A. & A. S. Gordon, W.S.

Counsel for the Defenders—H. Johnston—Deas. Agent—D. Hill Murray, S.S.C.

Saturday, May 20.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

ANSTRUTHER *v.* BURNS AND OTHERS.

Process—Competency of Reclaiming-Note—Imported Refusal or Postponement of Proof—Interlocutor merely Step in Procedure previously Fixed—Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *secs.* 27 *and* 28—*A.S., 10th March* 1870.

Upon 4th February the Lord Ordinary found in an action of declarator that a certain agreement did not supersede the obligation of the defenders to execute a lease, and appointed them to lodge objections to the draft produced, and upon 13th May he remitted to a man of skill to adjust the draft lease and to report. The former interlocutor was not reclaimed against within six days, and leave to reclaim was refused. Against the latter interlocutor the defenders reclaimed within six days.

Held that the reclaiming-note was incompetent, as the interlocutor reclaimed against was merely a step in the procedure previously determined upon.

In July 1892 Sir Windham C. J. C. Anstruther, Bart., brought an action against Straton B. Burns and others to have it found and declared that the defenders were bound by virtue of an agreement dated 15th August 1862 to enter into and execute a lease of certain coalfields in terms of a draft produced.

Upon 4th February 1893 the Lord Ordinary (KYLLACHY) pronounced the following interlocutor:—"Finds that the obligation of the defenders' author contained in the agreement of 1862 to execute a formal and regular lease of the mineral field in question was not superseded by the subsequent and supplementary agreement of 1871; and before further answer appoints the defenders within ten days to state their objections, if any, to the draft lease produced with the summons, and forming No. 7 of process, and the pursuer to answer said objections within ten days thereafter."

Upon 16th February leave to reclaim against this interlocutor was refused *in hoc statu*.

Upon 24th March the Lord Ordinary heard counsel on the objections and answers, and appointed the cause to be enrolled on the second sederunt day for further procedure, and meantime refused leave to reclaim.

Upon 13th May the Lord Ordinary pro-

nounced this interlocutor:—"Having considered the draft lease, No. 7 of process, with the objections and answers thereto, Nos. 24 and 25 of process, and the minutes for the parties, Nos. 26 and 27 of process, remits to Mr W. J. Dundas, C.S., to consider the record and productions, to meet with the parties, and to adjust the draft lease, and to report *quam primum*."

Against this interlocutor the defenders lodged a reclaiming-note upon 19th May.

It was argued for the pursuers that the reclaiming-note was incompetent because leave to reclaim had not been obtained, and the interlocutor sought to be brought under review neither exhausted the conclusions of the summons nor settled the mode of proof. Possibly the interlocutor of 4th February might have been reclaimed against within six days without leave, but that had not been done. A course of procedure was then determined upon in which the interlocutor now reclaimed againt was merely a step.

Argued for reclaimers—This interlocutor, by remitting to a man of skill, imported a refusal or postponement of proof, and could be reclaimed against within six days without leave—Court of Session Act 1868, secs. 27, 28, and *A.S.*, March 10, 1870; *Little* v. *North British Railway Company*, July 4, 1877, 4 R. 980; *Quin* v. *Gardner*, June 22, 1888, 15 R. 776.

At advising—

LORD PRESIDENT—I am of opinion that this reclaiming-note is incompetent. There may be ample room for the question whether the interlocutor of 4th February did not, in the words used in *Quin's* case, "virtually settle the mode of proof." It would appear from Mr Guthrie's statement that by implication the Lord Ordinary on that date was asked to allow a proof and refused, because he set in motion another course of procedure which is being carried out, and in which the interlocutor now reclaimed against is only a step. But that interlocutor was not reclaimed against, and Mr Guthrie is thus either too late or too early.

LORD ADAM—I am of the same opinion. There are cases in which a remit is made to a reporter with the view of superseding proof, but it is not so here. This remit is made with the view of carrying out the finding of the Lord Ordinary in a previous interlocutor, and for the purpose of having the terms of a lease adjusted. It will be open to the reclaimers after the report to object to the terms of the lease proposed, and to move for a proof.

LORD M'LAREN—The proper time to have reclaimed was after the interlocutor of 4th February, because it was then determined that in the meantime, at all events, the facts were not to be investigated by means of a proof. It would be inconvenient if after this stage of the case was passed and a remit made to a reporter we were to interrupt proceedings which have begun with the view of reconsidering whether proof was or was not necessary. It will be open to the reclaimer to move for a proof after Mr Dundas's report has been given in.

LORD KINNEAR was absent.

The Court refused the reclaiming-note as incompetent.

Counsel for Pursuers and Respondents—H. Johnston—Wallace. Agents—Russell & Dunlop, W.S.

Counsel for Defenders and Reclaimers—Guthrie—T. B. Morison. Agent—P. Morison, S.S.C.

Tuesday, February 14.

FIRST DIVISION.

[Lord Low, Ordinary.

PATERSON *v.* AIRDRIE AND COATBRIDGE WATER COMPANY.

Process — Proof for Jury Trial — Public Right-of-Way—Servitude Road.

Where it was averred that there was a public right-of-way over a certain road, or alternatively that there was a servitude of way over it—*held* that, as no questions of law were raised on record, the case was appropriate for jury trial under alternative issues.

Process—Issues—Servitude of Way.

Form of issue *approved* for the trial of a question of servitude of way where the pursuer claimed the right to use the servitude road as being the purchaser of a portion of the dominant tenement.

In September 1892 Robert Paterson, proprietor of the estate of Birthwood, Biggar, presented a note of suspension and interdict against the Airdrie and Coatbridge Water Company to have the respondents, their servants, and persons acting with their authority and upon their instructions, interdicted from using a road or path upon the complainer's estate, and leading past his house of Birthwood.

The respondents lodged answers, and the note having been passed, a record was made up.

The complainer averred—"(Stat. 2) The dwelling-house of the estate of Birthwood is situated at the north-east verge thereof, about 2 miles from the village of Culter. The public road comes to an end at the boundary of the estate, and the house is approached from the public road by a bridge over the Culter Water (which forms the north-east boundary), and a planted avenue of about 120 yards in length. The said bridge was built by the father of the complainer, and is the exclusive property of the complainer. From beyond the said house the said avenue is continued to the office buildings, about 150 yards to the south-west, and is thence continued as a farm road to the west or south-west boundary of the said estate. The said