fenders apprehend that houses of a certain class may be built which they do not wish to have in their vicinity. But I do not think this is a legitimate objection. If the proposed or anticipated class of houses is such as the pursuers are entitled to build, the defenders can have no good objection to the pursuers building them or making their ground available therefor. If this class of houses, on the other hand, is such a class as the defenders have any right to exclude, they have their remedy by interdict. But, so far as appears from the record, the defenders by raising the present objection to the diversion of the avenue are merely trying to prevent the pursuer making a legitimate use of his own property, over which the defenders have no right of passage or otherwise, and a use which, while beneficial to the pursuer, does not affect detrimentally any right which the defenders have.

I think, therefore, that the interlocutor of the Lord Ordinary should be recalled.

LORD YOUNG—I concur in that opinion. I put the question to the defenders' counsel whether he desired to argue the case on the view that the alternative access proposed in the summons would be as convenient an access as the present. He answered that he desired no proof but a judgment on the question of the pursuers' right to make any change in the avenue. On that footing I am entirely of the same opinion as Lord Trayner. I think the defender is entitled to access to his feu by this avenue, and is entitled to prevent any interference with the avenue that will affect the convenience of his access. But any alteration that does not affect his convenience I think the pursuer is entitled to make.

LORD MONCREIFF—I am also of opinion that the pursuers Neale Thomson's trustees are entitled to declarator in terms of the second conclusion of the summons, that is, that they are entitled to divert the old avenue which forms an access to the defenders' feu by the proposed diversion coloured green on the plan.

Under their feu-contracts I think that the defenders are entitled to insist that the line or site of the old avenue shall be substantially maintained. For instance, I do not think that the pursuers would be entitled to alter it by means of the proposed diversion (coloured pink on the plan) which forms the subject of the first alternative conclusion. The terms in which the servitude or other right is created are explicit. Access to the defenders' feu is to be by the present avenue or by a lane on the site of the said avenue. Therefore I think that the pursuers could not divert the avenue so that instead of leading to and from Mansionhouse Road it should lead to and from Langside Avenue.

But whether the defenders' right is one of servitude or common interest, the *solum* of the avenue is the property of the pursuers, and I think it would be to construe the deeds too strictly against the pursuers if we were to hold that they are not entitled to make any alteration on the avenue, however slight and harmless to the feuars it may be. It seems to me that by making the proposed diversion coloured green the pursuers will do no more than if they were to alter the position of a lodge at the entrance to the avenue by transposing the positions of the lodge and the avenue.

If altered by the proposed diversion coloured green the avenue will lead into and enter from the Mansionhouse Road, not thirty yards from the present exit. I do not think that the defenders have stated any relevant objection to this on the ground of inconvenience, and, as I have said, I think that the terms of the feu-contracts do not import such a restriction of the pursuers' rights as proprietors of the ground as to prevent them making this use of their property.

I do not think that our decision will conflict with that in *Hill* v. *Maclaren*, mentioned by the Lord Ordinary, when the facts of that case are considered.

LORD JUSTICE-CLERK—I am of the same opinion as all your Lordships, and have nothing to add.

The Court pronounced this judgment:—

"Recal the interlocutor reclaimed against: Find and declare in terms of the second alternative conclusion of the summons, and decern."

Counsel for the Pursuers—Dundas, Q.C. —Craigie. Agents—Forrester & Davidson, W.S.

Counsel for the Defenders—John Wilson. Agents—J. & J. Ross, W.S.

Wednesday, January 12.

SECOND DIVISION.

[Sheriff-Substitute at Glasgow.

M'COLL *v.* J. & A. GARDNER & COMPANY.

Process — Appeal for Jury Trial — Competency—Judicature Act 1825 (6 *Geo. IV. c.* 120), *sec.* 40.

An action was raised in the Sheriff Court by a widow for damages at common law, or alternatively under the Employers Liability Act 1880, for the death of her husband. The pursuer averred, and the defenders denied, that due notice of the death had been given in terms of the Act. The Sheriff-Substitute on 7th June allowed parties a proof of their averments as to whether the notice required by statute had been given, and after proof had been led he, on 24th November, found that notice had been given in terms of the Act, and before answer allowed parties a proof of their averments.

Held that an appeal by the pursuer for jury trial under the provisions of the Judicature Act 1825, sec. 40, was

competent, the interlocutor of 24th November being the first interlocutor allowing a proof as to the merits of the cause.

Mrs Catherine M'Coll, a widow, raised in the Sheriff Court at Glasgow against J. & A. Gardner & Company, quarrymasters, Glasgow, an action for £500 as damages at common law, or alternatively £175, 10s. as damages under the Employers Liability Act 1880, on account of the death of her son John M'Coll while in the employment of the defenders on 14th February 1896.

The pursuer averred, *inter alia*—"(Cond. 9) The pursuer caused notice of the death of the said John M'Coll to be given on the 17th of March 1896 in terms of the Employers Liability Act 1880."

The defenders denied liability, and pleaded, *inter alia*—"(1) The action is irrelevant. (3) The pursuer not having given notice to the defenders as required by statute, the action so far as laid under the statute should be dismissed."

On 7th June 1897 the Sheriff-Substitute (BALFOUR) pronounced the following interlocutor:—"*Ante omnia* allows the parties a proof of their averments as to whether the notice required by the statute was sent to and received by the defenders, and assigns Monday 26th July next at 10 a.m. as the diet."

Proof was led as to the notice, and on 24th November the Sheriff-Substitute pronounced the following interlocutor:—"Finds that notice of the accident was received by the defenders within the time prescribed by the statute: Therefore repels the third plea-in-law for the defenders: Further, having heard parties' procurators on the defenders' plea of irrelevancy, before answer allows the parties a proof of their averments."

On 8th December 1897 the pursuer appealed to the Court of Session for jury trial, and lodged an issue for the trial of the cause.

The defenders pleaded, *inter alia*, "that the appeal was incompetent," and argued—The appeal was too late, as it was made more than fifteen days after 7th June 1897, the date on which a proof was first allowed. The Judicature Act 1825 provided (sec. 40) that the appeal for jury trial must be taken "as soon as an order or interlocutor allowing a proof has been pronounced in the inferior court." An appeal was competent where proof was allowed of part of the pursuer's averments—*Stewart* v. *Rutherfurd*, July 19, 1862, 24 D. 1442, but when a proof of certain points had been taken, it was incompetent to appeal for jury trial when further proof was allowed *Gill* v. *M'Ra*, May 19, 1832, 10 S. 552.

Counsel for the pursuer was not called on.

LORD JUSTICE-CLERK—It may be quite a common thing that such a question as has been raised and disposed of in this case is disposed of with the merits of the case. Certainly it is convenient to get rid of it before, because if a jury is summoned, and the question turns on whether due notice was given that the inquiry was to proceed, the whole expense and trouble of a jury trial are practically wasted. It is plainly a purely preliminary question if parties choose to raise it, and I think it is quite certain that certain preliminary questions may arise in every court, and require to be expiscated by some kind of proof. We have such proofs in the Justiciary Court—a proof in which witnesses may be produced who are not in the lists giving notice what witnesses are to be called in the case—in order to see whether the case can duly go to trial. I do not think there is any ground for the contention raised by Mr Constable on this matter. I think the case must be dealt with just as an ordinary case coming up on appeal for jury trial.

LORD YOUNG—I am of the same opinion. I think the objection to the competency of this appeal is absolutely without any foundation and is absurd on the very statement of it. The action is upon the Employers Liability Act and also at common law. The question of notice only relates to the action as laid on the Employers Liability Act, and it might have been laid on that exclusively. Upon the objection that notice had not been given, the Sheriff had to inquire into its truth, and he could only do that on inquiry as to the facts, if the parties disputed the fact whether notice had been given. But that is not an issue on the merits of the case at all; it is an issue on fact antecedent to the determination of whether there is a case at all before the Court. If the Sheriff had come to the conclusion, either upon the admission of the parties or upon inquiry, that there had been no notice as required by the statute, then there was no action before him and he would have been bound to dismiss it. There would have been nothing to inquire into if statutory notice had not been given. If he had taken that view and dismissed the action it would have been quite competent to bring the case here on appeal. But that would have been a question whether there was an action under the Employers Liability Act in Court, and if this Court had determined that notice had been given, contrary to the opinion of the Sheriff, the case would have been sent back to him to proceed with, as being an action under the Employers Liability Act, and to try the issue in that action on fact and on law. If thereafter he had allowed a proof, it would just be the ordinary case of the Sheriff having allowed a proof in an action determined to have been well brought into Court, and with the proper statutory notice—just as in any other case where an action must be brought within a given specified time (there are many such cases), and where the summons must be served within the statutory time. Therefore I think, as I have already said, that this objection is entirely without foundation.

LORD TRAYNER—I am of the same opinion. On the question of competency I think that the objection must be repelled. The

Judicature Act by section 40 provides that in certain cases, as soon as an order or interlocutor allowing a proof has been pronounced in an inferior court, it shall be competent to either party to advocate that case in order that it may be tried before a jury instead of before the inferior judge who allowed the proof. But it is obvious that the meaning of that section is that when the inferior judge has ordered inquiry into the merits of a case which he is asked to determine, the parties, or either of them, if they think proper, may have the same question—the merits of the case—determined before a jury instead of before a judge. It would not have occurred to me that that covered the case of any inquiry which was antecedent—necessarily and properly antecedent—to the inquiry into the merits. The provision of the statute seems to me to apply only to the allowance of proof on the merits of the case.

LORD MONCREIFF—I am of the same opinion. I had some slight doubts as to the competency of the appeal, but these have been entirely removed by what your Lordships have said. I think it would be very much to be regretted if we were obliged to hold this appeal to be incompetent. In the first place, the first interlocutor dealing with the claim at common law is that of 24th November 1897; and it would be anomalous if we held that the appeal was bad when that was the first interlocutor dealing with the main ground of action. In the second place, Mr Constable admitted that he did not dispute on the merits that the notice was well given.

The Court approved of the pursuer's issue as the issue for the trial of the cause.

Counsel for the Pursuer — M'Clure. Agents—R. C. Bell & J. Scott, W.S.

Counsel for the Defender — Constable. Agents—Simpson & Marwick, W.S.

Friday, January 14.

FIRST DIVISION.

[Lord Pearson—Bill Chamber.

EBBW VALE STEEL, IRON, AND COAL COMPANY, LIMITED *v.* MURRAY (WOODS' TRUSTEE) AND OTHERS.

Lease—Termination of Lease—Clause Providing a Break in Favour of the Tenant on Certain Conditions—Bankruptcy of the Tenant—Breach of Contract—Measure of Damages.

The lessees of a mineral field sub-let the subjects held by them under their lease. The sub-lease provided that the sub-tenants should pay an annual dead rent, and should be bound to keep the mines drained—an obligation which the principal lessees were bound to fulfil by their lease. The agreement also provided that "if the sub-lessees shall at any time sink two pits (one winding and one ventilating) on the property down to the Old Coal, they shall have power to surrender the sub-lease at any time thereafter by giving six months' previous notice in writing." The sub-tenants were sequestrated, and the trustee on the sequestrated estate declined to take up the sub-lease. The principal lessees re-entered the subjects for the purpose of fulfilling the obligations of their own lease, and lodged a claim in the sequestration of their sub-tenants for the capitalised value of the dead rent for the whole unexpired period of the sub-lease, and for the expense incurred and to be incurred in pumping operations which were necessary for the fulfilment of their obligation to keep the mines drained. The trustee rejected the claim, and on appeal the Court, after a proof, *held* (*aff.* judgment of Lord Pearson) that as there was no likelihood of the appellants being able to make a profitable use of the subjects, they had gained nothing by obtaining re-access to them which could be set against the loss of the stipulated dead rent; but that the chance that the conditions of the clause providing for a surrender of the lease might have been implemented was appreciable and must be allowed for in assessing the damages; and that, subject to that allowance, with regard to future expenses, as the appellants were bound to their landlord for the pumping of the mines, the claim for the expenses of pumping must also be allowed.

Observations on the above surrender clause as supplying a measure of damages.

The Ebbw Vale Steel, Iron, and Coal Company, Limited, were lessees of mineral property near Pontypool, Monmouthshire. They were also sub-lessees of certain seams of coal under a sub-lease from the Blaendare Coal Company, Limited, which seams were worked through the property comprised in their Pontypool lease. In March 1891 the company entered into an agreement with Messrs James & William Wood, coal-masters, Glasgow, for a sub-lease to them of substantially the whole of the minerals from April 1st, 1891, for a term of twenty-three years from 24th June 1889, except in the case of the Blaendare minerals, the lease of which expired in eleven and a half years from that date. Under the agreement James & William Wood bound themselves to pay a minimum rent per annum of £3600 for the Pontypool estate, and £400 for the Blaendare estate. One of their obligations with regard to the Pontypool estate was "to keep the mines ventilated and drained,' an obligation which the Ebbw Vale Company were bound to fulfil under the lease between them and their own landlord. The agreement also provided that "if the sub-lessees shall at any time sink two pits (one winding and one ventilating) on the