therein provided. Now, the purpose of this enactment is, that as the cost of the alterations ordered by the commissioners is to be thrown on conterminous proprietors, they may have an opportunity of appealing to the Sheriff in the manner provided by the 396th section. The respondent seeks to take the case out of the 146th section and bring it within the 394th. But the only condition on which he can do this is by showing that the street "has not been theretofore levelled." On that matter there is a controversy between the parties, and yet the Sheriff has granted interdict on the assumption of the correctness of the complainer's assertion without any proof. But the respondent has no case unless he can show that the circumstances are not covered by the 146th section but by the 394th, and that has not been done. I therefore agree in the judgment which your Lordship has proposed.

Lord Rutherfurd Clark—I am disposed to take a different view of the case, though probably the result may not be very, if at all, different from that of your Lordships' proposed judgment. The commissioners of police have under the statute a power of raising, lowering, and altering streets. That is an extensive power entrusted to them for the good of the burgh, but which if exercised may very materially affect the interests of the inhabitants—adjoining proprietors and others; and therefore in so far as those powers are proposed to be exercised under the 146th section of the Act, any person aggrieved is entitled to appeal. Now, the complainer here alleges that the commissioners had resolved to alter the level of an existing street so as to affect the value of his property situated on either side of the street. He complains to the Sheriff that they had no power to do so unless they had given him previous notice of their intention in terms of section 394. On the other hand, the commissioners say that as the street was previously levelled they were not bound to give any notice, but were entitled at once to proceed, however much their work might affect existing levels or be prejudicial to the complainer's property, and that his only remedy was to appeal to the Sheriff, as provided under the 396th and 397th sections. Now, I confess I have great difficulty in reading the statute in such a way as to place such a power in the hands of the commissioners that they can proceed to alterations of so extensive a character without any previous notice to the proprietors, and I am rather disposed to read the 394th section as applying to the present case if the allegation of the complainer is in point of fact true—that is to say, that the commissioners were bound to give notice of their operations in so far as they might affect existing levels. No doubt the words of the statute are not well expressed to that end, and it is contended in a literal reading of them, that if a street has been already levelled the commissioners may make that street twenty feet higher or lower just at their pleasure without notice. Such a construction of the statute appears to me to be so injurious to the public interest that I cannot accept it when another reasonable construction is possible. I am disposed to construe the clause to the effect that whenever the commissioners' operations have the effect of altering the existing levels of a street they must give the statutory notice. If they are to leave the levels as they were before they may proceed without notice. As the levels of a street are all-important to the adjoining proprietors as well as to the public, the commissioners are not to be allowed to alter them without giving to any inhabitant who may consider himself aggrieved an opportunity of appealing to the Sheriff. If that be so, the complainer is quite entitled to apply to the Sheriff, for the commissioners were bound to give him notice, and did not do so. Now, that would tend to this result—if the complainer's statements are substantiated by evidence he would be entitled to the remedy he asks. But the Sheriff has proceeded without any inquiry, because he thought it appeared from the record, and probably from his own knowledge of the *locus*, that the commissioners had been too hasty. I cannot altogether think that the Sheriff has gone too fast, as your Lordships seem to think, for I cannot doubt that the commissioners really intended to alter existing levels. I am therefore inclined to think they were bound to give notice so that anyone affected by their operations might have an opportunity of applying to the Sheriff. But the operations have, in spite of this process of interdict, been carried on to completion, and the practical matter is not what we are now to do in this process, but what we are to do with the commissioners' works. It is quite out of the question to order them to be undone if they are just to be done over again, and therefore the only possible question is, whether or not the Sheriff thinks the work as executed should or should not stand as if he had been applied to before it was commenced. If, therefore, we remit the case to him, the only thing the Sheriff can do is to ascertain now whether the work is such as he would have sanctioned had it been regularly gone about. I would therefore recal the Sheriff's judgment, and remit the case back to him on that footing.

The Lord Justice-Clerk was absent.

The Court sustained the appeal, recalled the judgment of the Sheriff-Substitute, and remitted the cause back to the Sheriff Court.

Counsel for Pursuer (Respondent) — Mackintosh. Agents—Henry & Scott, S.S.C.

Counsel for Defender (Appellant)—J. P. B. Robertson. Agents—Skene, Edwards, & Bilton, W.S.

Friday, November 21.*

SECOND DIVISION.

[Sheriff of Lanarkshire.

BRANNAN *v.* THE NORTH BRITISH RAILWAY COMPANY.

Process—Jury Trial—Trial without Issues—Court of Session Act 1868 (31 *and* 32 *Vict. c.* 100), *sec.* 27, *sub-sec.* 3.

This was an appeal for jury trial in an action for damages on account of the death of the pursuer's husband by an accident on the defenders' line. Parties were not agreed upon an issue for the trial of the cause, and in the course of the discus-

*Decided November 4.

sion on the issue proposed by the pursuer the Court suggested that the cause should be tried on the record without issues. The pursuer's counsel consented, but the defenders' counsel stated that before consenting he desired the opinion of the Court on the question whether, if the case were tried on the record, copies of the record ought to be laid before the jury. If so, he could not consent.

The Court of Session Act 1868, section 27, provides, with regard to jury trials in causes originating in the Court of Session, that "if the parties consent, and the Lord Ordinary approves, it shall be competent to direct the cause to be tried by jury without adjusting any . . . issue, and such cause shall be tried, as nearly as may be, in the same manner in which causes are tried in which issues have been adjusted according to the present law and practice."

The Act of Sederunt, 10th March 1870, provides (section 1, sub-section 5) that "it shall be competent to try any cause by jury on the record without issues if it shall appear to the Lord Ordinary expedient that such cause shall be so tried."

The Court *were of opinion* that copies of the record should not be laid before the jury, the Lord Justice-Clerk *observing* that "the proper course is for the Judge to put before the jury the points that arise on the record. It is quite improper that the jury should have the record itself in their hands."

The defenders' counsel then agreed that the cause should be tried on the record.

Counsel for Pursuer—Rhind—Gunn. Agent—Robert Stewart, S.S.C.

Counsel for Defenders — Comrie Thomson. Agents—Millar, Robson, & Innes, S.S.C.

Tuesday, November 18.

OUTER HOUSE.

[Lord Kinnear.

BAIN *v.* GRANT.

*Glebe—Prescription—*Ultra vires.

In 1756 a presbytery resolved to convey to a heritor, at a stipulated rent or feu-duty, the ground forming a glebe which lay in a situation inconvenient for the minister of the parish. No deed of conveyance was ever executed. In 1884 the minister of the parish and the presbytery sought to vindicate the glebe from the heir of the heritor, who pleaded prescriptive right. *Held* (assuming the validity of the plea if there had been a deed of conveyance) that a mere resolution of the presbytery to grant a title was not a good ground on which to found prescription.

The parishes of Duthil and Rothiemurchus were about the year 1630 united into one parish.

At a meeting of the Presbytery of Abernethy, held at Rothiemurchus on the 6th July 1756, a joint petition was presented by Captain Patrick Grant, younger of Rothiemurchus, and Mr Patrick Grant, minister at Duthil. The petition stated that there was a glebe belonging to the minister of Duthil, situated so as to be "in the bosom of the Mains of Rothiemurchus," and that the situation was distant from the manse, and very inconvenient for both parties. They prayed the presbytery to make over and dispone the said glebe to Captain Grant, his heirs and successors in perpetuity, he being willing to pay the minister of Duthil and his successors in office a yearly rent or feu-duty of twenty pounds Scots.

The presbytery thereafter appointed two persons to inspect the glebe, and to present a report to the next meeting of presbytery, giving an estimate of the value and yearly rent of the same. At the next meeting of presbytery, held at Aviemore on 3rd August 1756, the report was presented, which after describing the glebe as to the south of Gualin Claoigh, to the west of the kirk-yard, to the north of Lochan Coinich, to the east of the Crasks of Liandell and Polnageddis, to the north betwixt it and the Spey, and stating that the reporters "having perambulated amid the said glebe, commonly known by the name of Croft-na-h'eglaish or Church Croft, did seriously consider of the extent and boundaries thereof, and we judge and compute it to be about an 'acker and and an half acker' of arable ground, which conform to the best of our skill we esteem worth six pounds Scots per acker, amounting in whole value to sum of nine pounds money aforesaid."

The presbytery thereafter having considered the report and petition, and for various reasons stated in the minute, such as the fact that the glebe was "a small spot of ground situate in the very bosom of Rothiemurchus, his mains," the inconvenience both to the owner of Rothiemurchus and to the minister of Duthil caused by the position of the glebe, the support which the Rothiemurchus family had given to religion and the minister, and the rent which the laird of Rothiemurchus promised to pay, which was greater than the minister of Duthil had before secured, unanimously agreed that the moderator should sign a deed in name of the presbytery, "disponing, transferring, and making over the said glebe to Captain Patrick Grant of Rothiemurchus, his heirs and successors or assignees in perpetuity;" and they also agreed "that writs be at this day extracted to the above effect." No such deed was executed, or at all events, at the date of the action now reported, none was known to have been ever executed, as no deed transferring the glebe to the proprietor of Rothiemurchus was at the date of this action to be found.

Captain Grant, however, entered into possession of the glebe, and he and his successors in the lands of Rothiemurchus continued to pay the annual feu-duty or rent of twenty pounds Scots to the minister of Duthil.

On 19th October 1883 the Rev. James Bain, the present minister of the parish of Duthil and Rothiemurchus, with consent of the Presbytery of Abernethy, raised an action against Sir John Peter Grant of Rothiemurchus. In this action the pursuer sought declarator "that All and Whole the lands and others sometime called by the name of and known as Croft-na-h'eglaish or Church Croft, extending to 12 acres or thereby, and which is bounded and extends and lies as follows,—viz., to the south of Gualin Claoigh, or ridge of land forming the south side of the churchyard to the west of