liabilities than such as are borne in common by all the partners.

We are therefore of opinion that the Lord Ordinary's judgment is perfectly well founded, and must be adhered to.

The Lord Ordinary's interlocutor was accordingly adhered to.

Counsel for Pursuers—Mr Young and Mr Shand. Agents—Davidson & Syme, W.S.

Counsel for Defender—The Dean of Faculty and Mr Orr Paterson. Agents—J. & A. Peddie, W.S.

Saturday, Nov. 17.

FIRST DIVISION.

JENKINS AND OTHERS *v.* MURRAY

(*ante*, vol. ii. p. 190).

Jury Trial—Special Jury. In a right of way case which had been already tried by a common jury, motion for a special jury for the second trial *granted.*

This case was tried in March last before Lord Ormidale and a common jury, when a verdict was returned for the pursuers. In July last this verdict was set aside as contrary to evidence, and a new trial granted. The second trial is to take place at the Spring sittings.

JOHNSTONE, for the defender, now moved that the second trial should take place before a special jury. In support of his motion he referred to Magistrates of Elgin *v.* Robertson and Others, 12th March 1862, 24 D. 788, where the Lord Justice-Clerk said "that a question as to a right of road case is one which should be tried before a special jury, for in these cases it is sought to impose a burden upon heritable property;" and also to Bell *v.* Reid and Others, 24 D. 1428, a right of way case which was twice tried, and on the second occasion before a special jury.

MILLAR and MACKINTOSH, for the pursuers, objected, and cited Urquhart *v.* Bonnar (vol. ii. p. 178); but in answer to a question from the Lord President stated that they knew of no right of way case in which a motion for a special jury for a second trial was refused.

The Court granted the motion. The case was one of great nicety, and in trying it a common jury had already failed. The pursuers could suffer no hardship by the motion being granted, and the cases cited by the defender were precedents, while none were referred to on the other side.

Agents for Pursuers—G. & W. Donaldson, S.S.C.

Agents for Defender—Russell & Nicolson, C.S.

Tuesday, Nov. 13.

OUTER HOUSE.

(Before Lord Ormidale.)

BREMNER *v.* TAYLOR.

Poor—Derivative Settlement. A woman, who had an illegitimate pupil child, having acquired a new settlement in another parish through her marriage,—Held (per Lord Ormidale) that that settlement enured to the child, although he continued to reside in the parish of his birth with his maternal grand father and did not reside with his mother.

Summons—Revisal—New Ground of Action. Circumstances in which held that the alteration of the date when the pauper first received relief, on revisal, was not the introduction of a new ground of action.

Condictio indebiti—Error in Law. Held that a parish who had repaid advances on behalf of a pauper, believing itself to be the parish of settlement, could not afterwards claim repetition on a different application of the principle in virtue of which it had admitted liability, such error being error of law, not of fact, and not grounding a claim of repetition by the law of Scotland.

Mora—Taciturnity—Acquiescence. Circumstances in which held that the plea of *mora* was not good to exclude a claim of repayment.

Modification of Expenses. Circumstances in which expenses were modified from £125 to £100.

In this action the parish of Rathven concluded against the parish of Huntly for the sum of £115, 5s. 6d.; being the amount of advances made to a pauper, whose settlement was said to be in the parish of Huntly from March 1847, the date of statutory notice, until 1863, and for relief from future advances. The following facts were relied upon, which were not materially in dispute between the parties. The pauper was born in Rathven in 1825, and was an illegitimate child. In 1831 his mother married, and acquired through her husband a derivative settlement in the parish of Huntly. The pauper did not go to Huntly to reside with his mother after her marriage, but remained with his maternal grandfather in the parish of Rathven. In 1835 he obtained relief from the parish of Rathven on his own account, and in addition to this relief he obtained relief as a member of his grandfather's family from 1838 from the *quoad sacra* parish of Enzie, forming part of the parish of Rathven. The sums obtained from Enzie commenced at the rate of 4s. yearly, and were increased until May 1844, when they ceased, to the sum of 14s. The pauper was bedrid from 1838, until 1845, and unable to support himself by his own industry. Soon after the statutory notice in 1847, Huntly admitted liability as the parish of the pauper's settlement, repaid the advances made by Rathven prior to that date, and continued to pay for the pauper up till 14th May 1853, at which date there had been paid to Rathven, for advances made to the pauper, sums amounting to £32, 13s. 11d. After the decision of the Court in Hay against Scott, 23d Nov. 1852, Huntly recalled its former admission of liability, and besides refusing further payment, insisted on being repaid what had been paid to Rathven. After being threatened with legal proceedings, Rathven paid back the said sum of £32, 13s. 11d. It was maintained in argument that this repayment was made under protest of liability, but the Lord Ordinary found that that was not established. In February 1856, the Court decided the case of Hay *v.* Thomson, to the effect that an illegitimate child follows the settlement of the mother in whatsoever way she may have acquired it, which was a return to the law as it had been interpreted prior to the judgment of the Court in the case of Hay *v.* Scott. Accordingly, Rathven again intimated to Huntly that Huntly was the parish of settlement, and claimed repayment of advances from 1847 to the date of the first statutory notice, and further relief. Huntly refused to admit the claim, and after a lengthened correspondence, in which the claim was continuously asserted by Rathven, Rathven raised an action against Huntly, with conclusions as above stated. In the summons it was stated that relief

was first administered in 1838, but this date was changed in the revised paper to 1835.

Before closing, a proof was allowed by the Lord Ordinary, the import of which, according to his judgment, in which parties acquiesced, was to establish the foregoing facts. The case was argued on the merits last session, and was to-day finally disposed of on the reserved question of expenses.

On the merits,

W. A. BROWN (with him Solicitor-General YOUNG) argued—By her marriage the pauper's mother acquired a settlement in the parish of Huntly, which enured to her illegitimate son, and the pauper being bedrid from a period when he had that settlement, and was in pupilarity, was unable to acquire any other settlement for himself. The parish of Huntly is therefore liable as the parish of settlement from 1847, the date of the first statutory notice. The repayment made to Rathven of the sum of £32, 13s. 11d. was made under protest, and cannot be founded on as an admission of liability. The alteration in the revised paper does not introduce a new ground of action. Hay *v.* Thomson, 6th Feb. 1856, 18 D. 510; Greig *v.* Adamson & Craig, 2d March 1865, 3. Macp., 575.

BALFOUR (with him A. R. CLARK) for the defender, answered—The pauper never having lived with his mother in the parish of Huntly, and never having been a member of her husband's family, did not acquire a settlement through her in the parish of Huntly. Even if the pauper acquired a derivative settlement in the parish of Huntly at the date of his mother's marriage, that settlement was lost by his having resided out of that parish, after he became *sui juris*, and before he became a pauper. The pauper's derivative settlement in Huntly being lost, his birth settlement in Rathven revived. It is incompetent in a revised paper to make such a material change as has been made here. The advances made to the pauper's grandfather from the *quoad sacra* parish of Enzie, in which he participated, did not pauperise the pauper in respect—(1) the advances were not made to him specially; (2) they were not made out of the parochial funds; and (3) they were insufficient to pauperise him by reason of their smallness. In no view can the pursuer recover the sum of £32, 13s. 11d. repaid to Huntly, that sum having been paid back in error not of fact but of law; and there being, by the law of Scotland, no action of *condictio indebiti* under such erroneous payment. Further, the action is excluded by *mora*. Wilson *v.* Sinclair, 7th Dec. 1830, 4 W. & S. 398; Dixon *v.* the Monkland Canal Company, 17th Dec. 1831, W. & S. 445.

The Lord Ordinary pronounced the following interlocutor :—

"*Edinburgh, 22d February*, 1866.—The Lord Ordinary, having heard counsel for the parties, and considered the argument, the proof, and whole proceedings, Finds, as matters of fact, that the pauper, John Thomson, was born in the parish of Rathven in December 1825; that he is an illegitimate son of Ann Copeland, who was married on the 17th day of April 1831 to John Cruickshank, then residing in the parish of Huntly; that Ann Copeland and her husband have ever since their marriage resided in the parish of Huntly; that the pauper, John Thomson, has always resided in the parish of Rathven, first with his mother till her marriage, and afterwards in family with her father John Copeland (his grandfather); that John Thomson has never been able-bodied, or able to earn his livelihood, and has since in or about 1838 been bedrid; that since or about 1835, when John Thomson was still in pupillarity, he has, as a proper object of parochial relief, received such relief to some extent from the parish of Rathven, partly directly and in his own name, and partly through and in the name of his grandfather, John Copeland, with whom he lived in family as aforesaid: Finds also, as matter of fact, that written notice was in March 1847 given in terms of the statute for the parish of Rathven to the parish of Huntly, that John Thomson was chargeable and in receipt of relief as a pauper, and that the parish of Huntly was held liable in relief to the parish of Rathven, for the advances made or to be made towards the maintenance of John Thomson: Finds also, as matter of fact, that the parish of Huntly admitted its liability in such relief, and accordingly paid to Rathven the sum of £32, 13s. 11d., being the amount of the advances which had been made to the pauper by the latter parish prior to 14th May 1853: Finds it also established that the parish of Rathven thereafter, in or about September 1854, repaid to the parish of Huntly, on the demand of and threat of legal proceedings on the part of the latter parish, the said sum, or what was considered the true amount—viz., £31, 19s. 11d., as never having been legally due, and that the parish of Rathven has ever since continued to support the pauper John Thomson: Finds also, as matter of fact, that thereafter, on 26th February, 1856, notice in terms of the statute was again made on the part of the parish of Rathven to the parish of Huntly of the chargeability of John Thomson as a pauper, and that the latter parish was held liable in relief to the former, in respect of all advances made or to be made to him, and that such notice was several times renewed and repeated during the period from said 26th February 1856 to 6th May 1861: Finds that in the circumstances the pauper, John Thomson, has never had or acquired a parochial settlement for himself independently of his mother; and that his settlement is that of his mother in the parish of Huntly: Further finds and declares that, in the circumstances foresaid, the defender, William Taylor, as Inspector of Poor for the parish of Huntly, and his successors in office, are liable to relieve the parish of Rathven of the sums of money already advanced or incurred, or that may be advanced or incurred on account of the said pauper, John Thomson, since the 26th of February 1856, so long as he may remain a pauper, and require parochial relief: also Finds the said William Taylor, as Inspector foresaid, and his successors in office, liable in payment to the pursuer and his successors in office, for behoof of the parish of Rathven, of the sum of Sixty three pounds seven shillings and fivepence, being the amount of the advances to or on account of the said John Thomson for the period since said 26th February 1856 till the 14th of October 1863, as per the account libelled on, with the legal interest at the rate of five pounds per centum per annum of said advances from the respective dates on which the same were made, as per said account, till paid, and decerns accordingly: Finds it unnecessary to dispose of the conclusions of the summons otherwise, except the conclusion for expenses, in regard to which finds the pursuer entitled to expenses, subject to modification; allows him to lodge an account thereof, and remits it when lodged to the auditor to tax and report.

(Signed) "R. MACFARLANE."

"*Note.*—The Lord Ordinary having regard to the prior decisions of this Court, is unable to see

any room for serious doubt (1) that the pauper, Thomson, is not only now, but has always been, since at least 1835, a proper object of parochial relief; and (2) that he has never acquired a settlement for himself, but that his settlement must be held to be that of his mother. Hay *v.* Thomson, 6th February 1856, 18 D., 510; and Greig *v.* Adamson & Craig, 2d March 1865, 3 Macp., 575.

"The Lord Ordinary cannot give any effect to the defender's criticism on the terms of the formal part of the summons, which he thinks must be read in connection with the condescendence, and so reading it the defender's suggestion to the effect that John Thomson must be held to have been, previous to 1845, not a pauper but able to support and acquire a settlement for himself, is inadmissible. Nor does the Lord Ordinary see any sufficient reason for holding that there has been an unwarrantable change in the revised condescendence, as compared with the condescendence before revisal.

"Neither can the Lord Ordinary hold that the defender's plea of *mora* is supported by the facts applicable to the period for which his liability has been sustained.

"On the other hand, the Lord Ordinary is of opinion that the pursuer is precluded by the payment to Huntly parish of the £31, 19s. 11d. in September 1854 from now going back to the period prior to that date, and claiming repetition of that sum. Supposing it was paid in error, as it appears to have been, the error was one avowedly of law and not of fact, but an error in law is not a good or sufficient foundation for an action of *condictio indebiti*. Wilson *v.* Sinclair, 7th Dec. 1830, 4 W. & S., 398; and Dixon *v.* the Monkland Canal Company, 17th Dec. 1831, 5 W. & S., 445.

"On examining the documents in process, and more especially the letters which passed at the time, the Lord Ordinary has satisfied himself that the pursuer is in error in alleging that the payment to Huntly in 1854 of the £31, 19s. 11d. can be held to have been made under protest. If the Lord Ordinary be right thus far, it follows, if not necessarily, on fair reasoning, that any statutory notice which may have been given by the parish of Rathven to the parish of Huntly prior to the payment by the former to the latter of the £31, 19s. 11d. must be disregarded, and if so, the first available statutory notice is that which was given on 26th February 1856.

"Notwithstanding the number of pleas in law for the parties, being no less than nine for the pursuer and twelve for the defender, the Lord Ordinary believes he has noticed all the points of any importance in the case.

"The parties will, of course, have an opportunity of being heard on the subject of the modification of the pursuer's account of expenses when the auditor has made his report; and all the Lord Ordinary has to say regarding that matter at present is, that according to the impression he now entertains, it ought not to be slight, but considerable. (Initd) "R. M."

Neither party reclaimed.

On the reserved question of modification of expenses,

W. A. Brown, for the pursuer, argued—The pursuer has been substantially successful in the action, and therefore the modification should be slight. As to past advances, he has got a judgment for a sum greatly in excess of that of which the defender has been relieved, and he has been relieved of liability in all time to come. The plea of *condictio indebiti*, in which the defender was found successful, was merely incidental to the case. The real issue between the parties was the parish of the pauper's settlement.

Balfour, for the defender, answered—The pursuer has only obtained judgment as to past advances for about one-half of what he concluded for. The argument did not turn on the consideration of the evidence to any material extent, and the greater part of that was admitted in a minute adjusted between the parties. The discussion was mainly upon the pleas in law, and in an important one of these the pursuer was defeated. There should be a modification to the extent of at least a third, and there are circumstances in the case determining that the modification should be even greater.

The taxed amount of the pursuer's expenses amounted to £125. The Lord Ordinary modified the account to £100, and decerned for that amount.

Agent for Pursuer—J. C. Baxter, S.S.C., and James Gordon, Solicitor, Keith.

Agents for Defender—Gibson-Craig, Dalziel, & Brodies, W.S.

OUTER HOUSE.

(Before Lord Barcaple.)

HARVEY, BRAND, AND CO. *v.* ANDERSON.

Bankruptcy—Trustee—Bill of Exchange—Pleas of Compensation by Creditors of Bankrupt. A firm accepted bills to bankrupts the day before they stopped payment. Sequestration was afterwards awarded. The acceptors of the bills claimed right to plead compensation in respect of other debts due to them by the bankrupts, and applied for interdict against the trustee indorsing or negotiating the bills. Held by Lord Barcaple (and acquiesced in) that the trustee was not entitled, by indorsing the bills to a third party, to defeat the acceptors' plea of compensation, and interdict accordingly granted.

This is a suspension and interdict at the instance of Harvey, Brand, & Co., of London, against William Anderson, accountant in Glasgow, trustee on the sequestrated estate of Buchanan, Hamilton, & Co., merchants in Glasgow.

For several years prior to their bankruptcy, Buchanan, Hamilton, & Company had very extensive business transactions with the complainers, Harvey, Brand, & Company. In the course of these transactions a very large amount of foreign produce imported into this country was intrusted by Buchanan, Hamilton, & Company to Harvey, Brand, & Company, for realisation in London. The complainers were bound to account to Buchanan, Hamilton, & Company for the proceeds realised by the sale of the said produce, and they charged and were allowed a commission on the proceeds so realised.

When the shipping documents for each successive shipment of produce were placed in the hands of Harvey, Brand, & Company, it was generally arranged between Buchanan, Hamilton, & Company and them, that, in anticipation of the realisation of the produce, they should grant their acceptances to Buchanan, Hamilton & Company for a stipulated proportion of the invoice value of that particular shipment. These bills were generally drawn payable at six months' date, and during the interval between the dates of the bills and their maturity the shipment was realised, and the complainers from that source were placed in funds to meet their acceptance against it.