2*d*, That the road which runs on the east side of the shop of the pursuer is not fitted for use as a road for the passage of carts, and has not, in fact, been used for such passage, in so far as the same lies between the subjects of the pursuer and those of the defender, for forty years, or otherwise, as alleged on the record on behalf of the pursuer: 3*d*, That the said road is not the common road referred to as such in the titles of the property belonging to the defender, but finds that the road so referred to is that which, in fact, is situated to the west of the said shop of the pursuer: 4*th*, That the middenstead referred to in the fourth head of the condescendence, and which had previously been in the occupation and use of the pursuer, was filled up by the defender at or about the time at which the latter filled up a middenstead adjoining thereto, which he himself had occupied, and which he filled up in consequence of the interference of the inspector of the parishes of Falkland and Auchtermuchty therewith as a nuisance: And 5*thly*, That the pursuer has failed to prove that the defender has built a shed or sheds and a byre on the site of the pursuer's said middenstead, so as to prevent free ish and entry to the same, or to the pursuer's shop and yard,"—and assoilzied the defender.

The pursuer reclaimed.

J. C. SMITH for him.

GEBBIE, for respondent, was not called on.

The Court (Lord President absent) adhered, holding that although the defender's building had rested partly on the pursuer's, the pursuer had been a party to the building being erected in that way; and besides, the defender had not only offered to discontinue the use of the pursuer's wall as a support, but had actually discontinued it; that the alleged obstructions were clearly not erected on the pursuer's property, and that his right of footpath, which was all the right he had, was not interfered with; and that the pursuer's allegations of encroachment by the defender on the commonty had not been substantiated.

Agent for Pursuer—W. Milne, S.S.C.

Agents for Defender—Adamson & Gulland, W.S.

Saturday, March 7.

CAMPBELL'S TRUSTEES *v.* CAMPBELL AND OTHERS.

Reclaiming Note — Judicature Act — Intimation to Opposite Party—Competency. The reclaiming days expired on 6th March. The case appeared in the Single Bills of 7th March. Objection to competency, on the ground that the six copies required by the Judicature Act, 6 Geo. IV., c. 120, sec. 18, had not been timeously sent to the respondent, *repelled*, in respect it appeared that the copies had been sent and received previous to the calling of the case in the Single Bills.

This case was in the Single Bills of Saturday 7th March.

CRICHTON, for respondent, objected to the competency. The interlocutor reclaimed against had been pronounced on 25th February. The reclaiming days expired on Friday 6th March, and the reclaimer had not complied with the requirement of the Statute by timeously sending six copies of the reclaiming note to the opposite party.

CLARK, for reclaimer, stated that the required number of copies had been sent to the respondent on the morning of Saturday 7th March, by ten o'clock.

The following cases were cited:—Shands Pr. 2, 959; *Lothian* v. *Tod*, 7 Sh. 525, 3d March 1829; *Bell* v. *Warden*, 8 Sh. 1007, July 2 1830; *Taylor* v. *Macdonald*, 6 D. 637, 10th February 1844.

LORD CURRIEHILL—If such a case had never previously been under the consideration of the Court, I should have thought this to be attended with some difficulty, for the words "delivery at the same time" might lead to the reading that the intimation must be made at the same time as the boxing. But fortunately the Court has had occasion to consider the matter, and it has been held that that is not the meaning of the Act, and if once we get rid of that reading, I see nothing to make it incompetent to give intimation any time before the calling of the cause in the Single Bills. In this case it is admitted that that intimation was made. Consistently with the construction put on this Act in former cases, I think we must hold that the competency of this reclaiming note has been saved, though in the narrowest possible way.

LORD DEAS.—I am of the same opinion. There are some things in that Statute that are imperative, and there are other things that are merely directed. The judgment in *Lothian* and *Warden* implied that this particular thing is not imperative, but merely directed, because if it was imperative it certainly was not done, and therefore the Court could not have sustained the competency of the reclaiming note. Whenever that is settled the case is pretty clear. It was held in another case that if the copies are not furnished before the case is moved in the Single Bills the reclaiming note falls. That cannot, consistently with the previous cases, be on the ground of the imperative nature of the enactment, but on the ground that it would not be proper to relax the enactment to the extent of allowing copies to be furnished after the case comes to be moved in the Single Bills, and there is good reason for this, for there may be an objection to the competency of a reclaiming note which may require to be stated when the case is in the Single Bills, and it would be a strong thing to hold that parties who had not seen the note were to be precluded from taking the objection by the case being sent to the roll, without their ever having had an opportunity of seeing the note. It is plain that if the contention of the respondent is sound, it would be the same thing whether the reclaiming note was lodged on the first of the reclaiming days or on the last. If it were lodged in the first of the reclaiming days, it would come into the Single Bills long before the reclaiming days were over. I have the strongest possible recollection that we decided a case of this nature not long ago in this Division. It may have been, as was suggested, a case of the boxing of copies, but it is obvious that that would not be a weaker case than the present. It would be a great deal stronger. But whatever was the nature of the case, the authority founded on by the respondent was quoted, and the Court held, notwithstanding, that the Act was not imperative.

LORD ARDMILLAN concurred.

LORD PRESIDENT absent.

Agents for Reclaimers—A & A. Campbell, W.S.

Agents for Respondents—Weddell & M'Intosh, W.S.