what was consented to by the parties was that there should be a proof before the Sheriff. But I do not think that is the case here. In this interlocutor we find that a plea to the relevancy was repelled, the record was closed, and a proof was allowed. Now, as regards the closing of the record no consent of parties was required, and when the plea to the relevancy was repelled no consent was required for the allowance of proof. But as regards the plea to the relevancy it could only be repelled either after hearing what was to be said in support of it (which apparently was not done), or of consent of the party who had stated it. I am therefore of opinion that the words of consent in the interlocutor must be held to refer to that which alone required consent, namely, the repelling of the plea to the relevancy. In the case of *Paterson* it clearly appeared from the terms of the interlocutor that the consent applied to the allowance of proof before answer. Whereas here that is not clear, and is, in my opinion, not to be inferred from the interlocutor, expressed as it is.

I think the allegations as to what actually did take place before the Sheriff are too vague to justify us in sending the case to the Sheriff to ascertain by a report from him what it was that parties consented to, as the Court were prepared to do in the case of *Whyte*. The Sheriff probably could not give us much assistance now. No doubt a great many similar cases have been before him since, and all that he could say would be, in all likelihood, that the interlocutor stated all that he knew as to what was done at the time. I agree that the objection stated to the competency of the appeal should be repelled.

LORD MONCREIFF—I agree. I think the case of *Paterson* is clearly distinguishable on the grounds which your Lordships have stated.

It was suggested from the Bench that the case should be tried upon the record without adjusting an issue, and upon counsel for the parties stating that they had no objection to this course the Court pronounced the following interlocutor:—"Dispense with the adjustment of issues and appoint the cause to be tried upon the record."

Counsel for the Pursuer—Guy. Agents—Clark & Macdonald, S.S.C.

Counsel for the Defenders — Glegg. Agents—Macpherson & Mackay, S.S.C.

Friday, October 15.

SECOND DIVISION.

[Sheriff of Lanarkshire.

CAUGHIE *v.* JOHN ROBERTSON & COMPANY.

Reparation — Independent Wrong - Doers Sued Jointly and Severally — Form of Issue.

In an action of damages for personal injury the pursuer called two defenders and craved decree against them for a certain sum, jointly and severally. He averred that his pupil son had been injured when walking along a public footpath by falling "into a heap of smouldering ashes, placed there by the said defenders, or both or either of them," and that "the defenders had been for some time in the habit of tipping ashes in a live condition" at the place in question. The defenders maintained that the action was irrelevant. *Held* (*dub.* Lord Trayner) that the pursuer was entitled to an issue.

Form of issue *approved.*

This was an action brought in the Sheriff Court of Lanarkshire at Glasgow by James Caughie, 53 Dunn Street, Bridgeton, Glasgow, as tutor and administrator-in-law of his pupil son Robert Caughie, against John Robertson & Company, calico printers, Springfield Print Works, Dalmarnock, and James Orr & Company, bleachers, dyers, and cloth finishers, Summerfield Works, Dalmarnock. The pursuer prayed the Court "to grant a decree against the above-named defenders, ordaining them jointly and severally to pay to the pursuer, as tutor and administrator-in-law to his pupil son Robert Caughie, the sum of £200 with interest and expenses.

The pursuer averred, *inter alia*—"(Cond. 2) On or about 5th August 1896, the said Robert Caughie was walking upon the public footpath along the north or right bank of the river Clyde at Dalmarnock, when he fell into a heap of smouldering ashes, placed there by the said defenders, or both or either of them, and was severely burnt about the feet, legs, and right hand. (Cond. 3) The above-mentioned smouldering ashes are situated immediately alongside of the said public footpath which follows the bank of the Clyde at this point. An embankment has been formed immediately south of the said Summerfield Works by the tipping of ashes across this footpath which now goes over said embankment. Immediately along the edge of said footpath the defenders have been for some time in the habit of tipping ashes in a live condition. Those ashes, though dead to all appearance upon the surface, continue smouldering for some days underneath. Anyone following the line of the path and making a false step off the path would sink into the smouldering ashes and sustain injury. . . . (Cond. 4) In tipping said ashes, without having damped same, immediately alongside said public pathway, the defenders were acting

negligently and wrongfully, and with reckless disregard for the safety of the public."

Both defenders pleaded that the action was irrelevant.

After hearing parties in the debate roll, the Sheriff-Substitute (ERSKINE MURRAY), by interlocutor dated 18th May 1897, before answer allowed a proof.

Both defenders appealed to the Sheriff (BERRY), who, by interlocutor dated 18th June 1897, adhered to the interlocutor appealed against, and remitted to the Sheriff-Substitute for further procedure.

The pursuer appealed to the Court of Session for jury trial, and proposed the following issue for the trial of the cause:—"Whether on or about the 5th day of August 1896, while upon or near the public footpath along the north or right bank of the river Clyde at Dalmarnock, and near the defenders' works, the pursuer's pupil son Robert Caughie was injured in his person through the fault of the defenders, or one or other and which of them, to the loss, injury, and damage of the pursuer's said son? Damages laid at £200."

The defenders John Robertson & Company objected to the approval of the issue, and argued—Decree was sought against the defenders jointly and severally, whereas their liability was necessarily several. There was no case made here of joint wrong-doing. The defenders were not said to have been associated in any way in making the heap of ashes. The acts complained of were quite independent. The action was therefore irrelevant in respect that the facts averred in the condescendence could not justify the decree craved in the petition. The issue proposed, in which the jury were asked whether the pursuer's son was injured "through the fault of the defenders, or one or other and which of them," was not a proper form of issue to try a case in which decree was craved against two defenders jointly and severally.

Argued for the pursuer and appellant—The pursuer knew and averred that both the defenders deposited ashes at the place in question. The wrongful acts complained of might be separate, but the result of them was a joint wrong towards any member of the public who was injured by the existence and position of this heap, which, as averred, was wrongously placed where it was by both defenders. The pursuer did not and could not be expected to know which of the defenders deposited the ashes which injured the boy on the particular occasion in question.

There was no appearance for the defenders James Orr & Company.

LORD JUSTICE-CLERK—I think this issue must be allowed to go to trial. The allegation is that the defenders tipped live ashes at the side of the path, and that the pursuer in consequence was injured. Two persons or firms may be found both to have committed a wrong at the same place, so that they may both be liable for an injury caused to a member of the public.

LORD YOUNG concurred.

LORD TRAYNER—I have some doubt as to whether this issue should be allowed. I think it is a bad precedent to allow a pursuer to say as this pursuer practically does here—"I don't know which of you did the wrong I complain of, but I know that one or other of you did it." I rather think a pursuer is bound to state specifically who it was that did him the wrong, and doubt whether he is entitled to an issue unless he does so. But if your Lordships all think this issue should be allowed I am not prepared formally to dissent.

LORD MONCREIFF—I quite see that difficulties may arise in determining whether the pursuer has proved the case which he makes upon record. But the averment is that both the defenders were concerned in doing the act of which the pursuer complains and which he says caused him injury. I therefore think that the issue must go to trial as it stands.

The Court approved of the issue and appointed it to be the issue for the trial of the cause, and found the defenders John Robertson & Company liable to the pursuer in the sum of £5, 5s. of modified expenses.

Counsel for the Pursuer—R. Scott Brown. Agent—A. C. D. Vert, S.S.C.

Counsel for the Defenders, John Robertson & Company—M'Clure. Agents—Cumming & Duff, S.S.C.

Saturday, October 16.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

CALLENDER-BRODIE v. ANDERSON & COMPANY.

Process—Reclaiming-Note—Competency—Failure to Present Timeously—Judicature Act 1825 (6 *Geo. IV. cap.* 120), *sec.* 18.

The agent of a party who proposed to reclaim against a judgment of the Lord Ordinary instructed his clerk to lodge the reclaiming-note on the first box-day during vacation. Unknown to his employer, the clerk failed to lodge the note, and absconded. The note was thus not lodged until the second box-day, outwith the statutory period.

Held that the reclaiming-note was incompetent.

Section 18 of the Judicature Act enacts—"That when any interlocutor shall have been pronounced by the Lord Ordinary, either of the parties, if dissatisfied therewith, shall be entitled to apply for a review of it . . . provided that such party shall, within twenty-one days from the date of the interlocutor, print and put into the boxes appointed for receiving the papers to be perused by the Judges a note reciting the Lord Ordinary's interlocutor and praying the Court to alter the same in whole or in part . . . and . . . the party so applying