among other defences one, of which the substance is that the right upon which this claim is made was not transmitted to the pursuer. The reply to that is, that the right of the pursuer is *res judicata*, being established by a decision of this Court in 1821. To that it is answered, that the proceedings in that litigation are not obligatory on the defender; that they were inept; and at all events irregular in their origin, and never were such as to be the foundation of a valid and effectual judgment. And further, even supposing there was no irregularity, that the pleas now adduced on the part of the defender were good and effectual pleas, and that the failure to state them in the previous action prevented the judgment being founded on as *res judicata* against subsequent heirs of entail. In regard to the procedure, the objections taken were numerous. In the first place, it is said there was no citation of the pupil, or his tutors or curators, if he any had; and it does not appear that there was any execution of service on the pupil, or of service as against his tutors or curators, if he any had, in usual form. It appears that Mr John Ker, W.S., received a copy, which he accepted as service for the defender. It was stated that there was no proper evidence of this fact; that the statement of the messenger to that effect was extrinsic to the execution. If the case here depended on that, I would have great hesitation in giving effect to that view. But it is further said, *esto*, that Mr Ker did receive service, he had no power to accept it; and it is said that all that followed in the case was a nullity, in consequence of the want of citation. The next thing that appears in process is, that defences were given in for the pupil and his tutor *ad litem*, and then it is said that there is no trace of the appointment of a tutor *ad litem*, and that it will not do to suppose that the evidence of their appointment had fallen aside, because, if such an appointment had been made, it would have been made by a regular and formal writing, either on some of the steps of process, or by a separate paper, which would have been a separate step of process; and therefore the inference is, that it is a gratuitous statement of the agent who lodged the defences that they were lodged on behalf of a tutor *ad litem*, there being no such tutor *ad litem*. And further, that even if there had been a tutor *ad litem*, that would not have made the process a competent process, if it was originally incompetent by reason of want of service. To that argument several answers were made. Among others, it was said that such a mode of service was competent; that Mr Ker was competent to accept it, because he was, and acted as, the known agent of the defender. It is further stated as an answer, that the defences lodged in name of the tutor *ad litem* were merely dilatory, complaining that the pursuer had not produced all his documents and calling upon him to produce them, that tutors-dative were thereafter appointed, and that defences having been lodged on the merits for the pupil and them, the litigation proceeded. There was a great deal of argument in the case. Memorials were ordered, and there were full pleadings, and then there was a reclaiming petition and answer, and a judgment on that. And it is said by the pursuer in this case that that interposition of tutors-dative was itself sufficient to support the whole proceedings; that any objections which may have existed to the previous proceedings were objections which might be competently waived by them, and that they did not object. Without going into the merits of the objections taken to the shape of the service, or the efficacy or non-efficacy of Mr Ker's acceptance, I am of opinion that, looking to the stage at which the tutors-dative intervened, their interposition was sufficient, if the interests of the pupil appear to have been fairly taken care of, and that the other objections must be held to be waived. But another objection is that the tutors-dative did not do their duty, inasmuch as they did not plead what might have been a good defence, and that it was not in their power to compromise the interests of the pupil; that the succeeding heirs of entail are not bound, inasmuch as their interests were not fairly defended. Upon that queestion it appears to me that what we have to look to is whether the litigation was conducted fairly and *bona fide*. Looking at the arguments maintained on the part of the pupil heir, I think the proceedings were conducted fairly and *bona fide*. It was a *bona fide* defence, maintained with all the skill the bar at that time afforded. It may be that some arguments were not insisted in, and some arguments considered not to be wholly bad were not maintained. But it does not follow that all litigations with heirs of entail which have taken place in this Court, and where arguments which have since received effect in the House of Lords were not maintained, are bad judgments. I can't doubt that the plea of competent and omitted is pleadable against an heir of entail. Indeed it would be difficult to see what effect a judgment would have against heirs of entail as *res judicata*, unless it were on the same footing as *res judicata* against other parties. On these grounds I think the opinion of the Lord Ordinary well founded.

The other Judges concurred.

The interlocutor of the Lord Ordinary was accordingly adhered to.

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

Agents for Defender—H. G. & S. Dickson, W.S.

Wednesday, June 20.

FIRST DIVISION.

POLLOCK *v.* MEIKLE.

Res Judicata—Declarator of Right of Property. A plea of *res judicata* stated to an action of declarator of right to heritable property, in respect the question had been incidentally raised in a process of suspension betwixt the parties, in which a final judgment had been pronounced, *repelled*, the process of suspension having been raised to try merely a question of possession, and that of only a portion of the subjects embraced in the declarator.

This was an action in which the pursuer concluded for declarator "that a piece of ground or unbuilt area, consisting of 51½ superficial yards or thereby, bounded on the north by the division wall between said piece of ground and the property known as Bennet's Feu; on the east and south by the tenement of houses belonging to the defender, erected upon the portion of area which was sold and disponed by David Sutherland, builder in Edinburgh, to Robert Dickson, plumber there, as aforesaid; and on the west by a straight line extending from the west gable of the defender's said tenement northwards to the division wall aforesaid, and along which line the defender has recently erected a wooden rail or pailing, and which piece of ground or unbuilt area, bounded as aforesaid, has been taken possession of by the defender, is part and portion of, and comprehended

within, the bounds and marches of the said area or plot of ground belonging heritably to the pursuer, and therefore that the same pertains heritably in property to the pursuer in virtue of his rights and titles."

The defender pleaded *res judicata*, in respect of the final judgment in the process of suspension and interdict, referred to in the following statements made by him :—1. On 16th April 1863 the pursuer presented to the Lords of Council and Session a note of suspension and interdict against the defender, in which he prayed their Lordships "to interdict, prohibit, and discharge the said respondent taking possession of, or using any part of the complainer's (pursuer's) ground at the back of his large double tenement at the south end of Greenside Street, Edinburgh, and forming Nos. 1 to 5 inclusive of that street, and lying to the west of the middle of the mutual gable forming the western boundary of the respondent's (defender's) property, laying down stones or effects thereon, or erecting any building upon the same, or drawing carts or carriages, or going personally by or through the complainer's (pursuer's) gates at the west side of his background; and also not to cover in the site of the respondent's (defender's) own background required by the complainer for erecting an oven thereon." 2. The defender lodged answers to the note of suspension and interdict, and the note having been passed, and the case having thereafter come to depend before Lord Jerviswoode, Ordinary, a record was made up and closed on revised reasons of suspension and revised answers. A debate took place, and parties having been at issue on the facts stated in the record, the Lord Ordinary, on 9th March 1864, pronounced an interlocutor appointing, *inter alia*, the following question to be tried before himself without a jury—viz., "what is the eastern boundary of the property of the suspender?" Both parties acquiesced in this interlocutor, and a trial without a jury having thereafter taken place, and proof having been led, the Lord Ordinary, by interlocutor, dated 22d June 1864, found "that the eastern boundary of the property of the suspender, as possessed by him and his predecessors, extends to the existing western gable of the respondent's tenement in Greenside Place on the east, and northward in a straight line in continuation of the western gable until the said line meets the property named in the titles and record as Bennet's Feu;" and on 13th July 1864 the Lord Ordinary pronounced an interlocutor suspending the proceedings complained of, and interdicting the respondent (defender) from taking possession of or using any part of the ground at the back of the suspender's (pursuer's) large double tenement at the south end of Greenside Street, Edinburgh, and forming Nos. 1 to 5 inclusive of that street, in so far as the said ground lies to the westward of the existing gable of the respondent's (defender's) tenement, and of a line running northward in a straight line in continuation of the said western gable, until the said line meets the property named in the titles as Bennet's Feu, by laying down stones or other effects thereon, drawing carts or other carriages, or going personally by or through the respondent's (pursuer's) gates, and *quoad ultra* refused the interdict as craved. These interlocutors were acquiesced in by the parties, and the same are now final. 3. The object of the question appointed to be tried by the Lord Ordinary in the said action was to ascertain the eastern boundary of the pursuer's property. The eastern boundary was therein declared to extend to the western gable of the defender's tenement on the east, and northwards in a straight line in continuation of the western gable, until the said line meets the property named in the titles as Bennet's Feu. The piece of ground or unbuilt area claimed by the pursuer in the present action is on the east of and beyond the pursuer's eastern boundary, as found by the Lord Ordinary, and consequently formed no part of his property. The object of the present action is therefore to revive the question which was tried and determined against the pursuer in the suspension and interdict process.

The Lord Ordinary (Ormidale) repelled the plea of *res judicata*, and in his note he observed :—"The present is an action of declarator of property, while the former was merely a possessory action—a suspension and interdict. Independently of that very material distinction, the present action is more comprehensive in its conclusions than the former suspension and interdict was in its prayer. The summons in the present action contains a specific and express conclusion to the effect that the disputed piece of vacant ground, situated at the north-east corner of his own, and at the north-west corner of the defender's admitted property, belongs to the pursuer, and not to the defender. But in regard to that piece of vacant ground, it appears to have been assumed or admitted by the pursuer in the former process that it belonged to the defender, and all the pursuer then asked was an interdict against the defender's covering in the site of it, as it was required by the pursuer for erecting an oven. Clear it is therefore, that there neither was, nor indeed could have been, any dispute in the former process, as to the party to whom the piece of ground now in dispute belonged; for, as now explained, and as the record in the former process shows, it was then assumed, or rather admitted, to belong to the defender, and all that was asked by the pursuer was, that the site of it should not be covered in, to the prejudice of his right of oven therein. It turned out, however, in the course of the proceedings in the former process, that the pursuer's right of oven related to another part of the defender's property altogether, being westward from the piece of ground in dispute; and the pursuer now says that it was his mistake regarding this matter, which led to the admission he then made, to the effect that the piece of ground in dispute was not his, but the property of the defender. Be that as it may, the Lord Ordinary cannot hold that an admission made in the course of the proceedings in the former process, is sufficient to support the plea of *res judicata* as stated in the present, the *medium concludendi*, as well as the object or conclusion of the two actions, being essentially different. But then it was argued for the defender, that as the Lord Ordinary in the former action had, with a view to the determination of the question of possession, which alone was then raised, found that the eastern boundary of the pursuer's property was such as necessarily to exclude the piece of ground now in dispute, the question raised in the present action must be held to have been formerly tried and settled, and consequently that the plea of *res judicata* is well founded. It appears to be true that the question of boundary of the pursuer's property was incidentally tried and answered in the former process, but still the Lord Ordinary cannot hold that circumstance to be sufficient to support the defence of *res judicata* taken to the present action, seeing that in no proper sense did the question of property now raised for determination form the ground of action in the former process,

and that it was not necessary that it should be so for the solution of the only question which it was the object of the former process to get settled."

The defender reclaimed.

MAIR (with him GORDON) was heard for the defender in support of the reclaiming-note. He cited Huntly *v.* Nicoll, 9th Jan. 1858, 20 D. 374; Anderson *v.* Gill, 22d Dec. 1860, 23 D. 250; and National Exchange Company *v.* Drew, 12th July 1861, 23 D. 1278.

GIFFORD and WATSON, for the pursuer, were not called upon.

The LORD PRESIDENT—The right of property was not in question in the former action. It was a case of interdict, and only embraced a portion of the ground, which is the subject of contention in this action. There was no question of property raised, and the Lord Ordinary did not find anything in regard to a right of property. His Lordship said that all he was dealing with was a question of possession, and so he proceeded to deny to the suspender a portion of the remedy which he was asking. But why should that prevent a declarator being raised for which there were no *termini habiles* in the suspension? I therefore think there is no case of *res judicata* here.

Lord CURRIEHILL—I concur.

Lord DEAS—A suspension and interdict is in its own nature a possessory action, and the result of it is generally regulated by the state of possession for the last seven years. I cannot see that this suspension was treated by the parties on any other footing. I should not wish to be understood as laying it down that a question of property can never be decided in an action of suspension and interdict. It is not necessary to decide that here; for apart from that, the great bulk of the ground embraced in this action was not embraced in the other action. All that was there referred to was 18 inches along the line of the mutual gable. Here there are 56½ square yards. The plea is not put that as to these 18 inches there is *res judicata*, but it is stated in regard to the whole ground. It is totally out of the question to maintain that. I don't wish to suggest that had the plea been so limited, it would have been good, because I rather think that even to that extent it is ill-founded.

Lord ARDMILLAN concurred with the Lord President.

The reclaiming-note for the defender was therefore refused.

The Lord Ordinary also reported the case on the motion of the pursuer that the evidence in the cause should be taken on commission, in terms of sec. 49 of the Court of Session Act, which motion the defender objected to on the ground that the case should be sent to a jury.

The Court, in respect the question was chiefly one of law, depending on the construction of titles, explained, it might be, by the possession which had followed, remitted to the Lord Ordinary to allow the parties before answer a proof of their averments, and to appoint the evidence to be taken on commission.

Agents for Pursuer—Morton, Whitehead, & Greig, W.S.

Agents for Defender—Scott, Moncreiff, & Dalgety, W.S.

SECOND DIVISION

GARDNER *v.* KEDDIE OR M'GAGHAN.

(*Ante* p. 6.)

New Trial. Held that a cause in which a trial had taken place before the Lord Ordinary and a jury, and in which the Court had afterwards upset the verdict as contrary to evidence, and granted a new trial, was in dependence before the Lord Ordinary, and not the Inner House, and therefore that a motion to have a day fixed for the new trial could be competently made only in the Outer House.

This case was tried last session before Lord Jerviswoode and a jury, and resulted in a verdict for the pursuer. Thereafter the defender moved for a new trial, and obtained a rule on the pursuer to show cause why it should not take place. The rule was at the commencement of this session made absolute. The case was then enrolled before the Lord Ordinary to have a day for trial fixed. His Lordship, however, expressed doubts whether he could entertain such a motion, as, in the interlocutor of the Inner House granting a new trial, there was no remit of the case to the Lord Ordinary. A note was accordingly boxed to the Second Division, praying the Court to remit the case that a day for trial might be fixed.

W. A. BROWN, in support of the note, argued—Under the Court of Session Act of 1850 the practice of the Court was divided in regard to reports from the Lord Ordinary on cases upon issues. In the one Division a remit was made to the Lord Ordinary after issues were adjusted, and in the other the cause was retained in the Inner House. In consequence of this unequal practice the Distribution of Business Act of 1857 provided, in sec. 8, that a remit should be made. That Act was declaratory of the law. The present case falls under the same principle that determined the provision of the Act of 1857. When a case is before the Inner House on a motion for a new trial it is there for a temporary purpose, just as a case is before the Court for a temporary purpose when issues are adjusted. This is *casus improvisus*, under the 8th section of the Act of 1857, and therefore the remit should be made.

No appearance for the pursuer.

The Court were unanimously of opinion that the case was in dependence before the Lord Ordinary, and not the Inner House. The Lord Justice-Clerk remarked that although he had no difficulty on the point, he was glad the question had been raised, as it was desirable that it should be authoritatively ruled. In considering a motion for a new trial, nothing was before the Court but what took place at the trial, the Judge's notes and the verdict of the jury, just as in dealing with a Bill of Exceptions, nothing but these and the exceptions were before the Court. The Court could not, in that case, look to the process, and he did not see that in a motion for a new trial the case was different. There was no foundation for the argument that the analogy of the practice of the Court, in reports from the Lord Ordinary upon issues, applied under the Act of 1857, or for the notion that the case was *casus improvisus* under that Act. The motion for a new trial was made under the Act of William of 1830.

The other Judges concurred.

Agent for Defender—James Bell, S.S.C.

JURY TRIAL.

(Before Lord Kinloch.)

CAIRD *v.* INNES.

Proof—Admissibility of Evidence—Judicial Confession in a Criminal Trial. In the trial of an action of damages for assault, held (per Lord Kinloch) that a judicial confession by the de-