to move your Lordships to mention in your judgment in respect of costs, it does appear to me that it will be a very wholesome proceeding, in both these cases, to dismiss the appeals, with such costs as your Lordships may think proper to give. Feb. 15. 1822

FRASER,—J. CAMPBELL,—Solicitors.

(*Ap. Ca. No.* 1.)

MURDO M'KENZIE, Appellant.—*Moncreiff—Skene.*
DAVID Ross and his CURATORS, Respondents.—*Adam—Cockburn—Maitland.*

No. 23.

Proof—Jury Court—55. *Geo. III. c.* 42.—An action of damages for trespass having been remitted to the Jury Court, and a view ordered—Held,—1.—That the viewers are to be selected from the first twelve jurors in the list returned for the county where the property is situated, and where the view is to be taken, although lists of other counties belonging to the same circuit have been delivered.—2.—That a bill of exceptions is an incompetent mode of objecting to these viewers acting as jurors on the trial.—3.—That a motion for a new trial, founded on that objection, being refused, all review quoad hoc is incompetent.—4.—That, in particular circumstances, parole evidence, explanatory of the situation of marches, is admissible, although there be a written contract in relation to them; and,—5.—That a bill of exceptions against such evidence being disallowed, and no appeal taken within fourteen days thereafter, review is incompetent.

Hill. I. 539.

M'KENZIE, proprietor of Ardross in the county of Ross, brought an action against Ross, an adjoining proprietor, stating, 'That the said David Ross has taken it upon him, most illegally 'and unwarrantably, to build a house upon a part of the hill or 'muir of Tolly, which is the absolute and undoubted property of 'the pursuer: That part of the said hill or muir having been adjudged to belong to the estate of Ardross by a contract entered 'into, in the year 1757, between the pursuer's grandfather and 'the now deceased Captain Cuthbert of Milncraig, and exclusively possessed by the pursuer and his predecessors ever since 'that time; and although the pursuer has uniformly claimed 'right to the exclusive possession of the part of the said hill or 'muir of Tolly so found to belong to the said estate of Ardross, 'yet the said defender, by his tenant Donald Munro M'Finlay, 'most illegally and improperly keeps possession of the house so 'built by him upon the pursuer's said exclusive property.' He therefore concluded that Ross should be ordained to demolish and remove the house,—to cease from molesting him in future,—and to pay £1000 of damages. These allegations being denied, the following issues were prepared, approved of by the First Divi-

Feb. 15. 1822.

1ST DIVISION. Lord Alloway.

Feb. 15. 1822. sion, and thereafter transmitted to the Jury Court: 'I. Whether 'the defender, by himself or his tenant Donald Munro M'Fin- 'lay, has, without the pursuer's consent, and to the loss and da- 'mage of the said pursuer, erected a house in the neighbour- 'hood of the village of Tolly, upon a part of the muir of Tolly 'formerly belonging in common property to the predecessors of 'the pursuer and defender in their respective lands, but which, 'by a contract of division of said muir, entered into betwixt the 'pursuer's grandfather and the defender's predecessor in the lands 'of Milncraig, in the year 1757, became the exclusive property 'of the pursuer? 2. Whether the defender, by himself or his 'foresaids, have committed other encroachments on the part of 'the said muir, his the pursuer's exclusive property as aforesaid, 'by cutting and baring the surface thereof, and carrying off the 'same for fuel, to the loss and damage of the pursuer?' The trial was appointed to take place at Inverness at the same time as that in the preceding case, and the same objection occurred relative to the appointment of viewers. In the course of the trial, Ross having proposed to adduce witnesses to prove the state of possession, M'Kenzie objected that parole evidence was incompetent, seeing that the respective marches of the parties were established by the contract of 1757. Lord Pitmilly repelled the objection, on the grounds subsequently stated by his Lordship in a report to the Court. * A bill of exceptions was tendered; and the jury having found for Ross, M'Kenzie moved the Court of Session for a new trial, on the ground, 1. That the viewers had been irregularly appointed; and, 2. That incompetent evidence

* These grounds were thus explained by his Lordship:—"I repelled the objection for this reason, that although the evidence of the present state of the marches could not invalidate the contract 1757, on the ground of the marches fixed in that contract having been altered by subsequent usage and prescription, (no such question having been put in the issues); yet, in a nice and narrow question of fact, as the present turns out to be, whether the disputed spot where the hut is built (which is very near the march) was included in Ardross or in Milncraig's share of the muir, as settled by the contract 1757, the evidence of the marches since the date of the contract might serve as an article of evidence in a doubtful case as to the precise line allotted by the contract 1757, and on which side of the line the hut in dispute was situated. I distinctly stated that it was only in this view, and as the witnesses could scarcely be examined at all without hearing their account of the present state of the marches, that I would allow the investigation to proceed; and accordingly I explained very fully to the jury, in summing up, that no question having been put to them in the issues, whether the march agreed upon in 1757 was departed from by subsequent usage, they must not allow the evidence of usage per se to bring about a verdict in favour of the defender, but must hold it merely as an article of evidence, the weight due to which they would consider in determining as to the import of a nice and narrow proof as to whether the hut was built on Ardross or Milncraig's side of the march, as agreed on in the contract 1757."

had been received. The Court, on the 19th of January 1819, 'Having heard counsel, in terms of their former interlocutor, 'as well upon the bill of exceptions as upon the motion for a 'new trial, they disallow the exceptions for a new trial, and de- 'clare the verdict conclusive.' * No appeal was entered against this interlocutor in relation to the disallowance of the bill of exceptions within fourteen days, in terms of the statute; and the case then returned to the Lord Ordinary, who, in respect of the verdict, assoilzied Ross, and found him entitled to expenses. Against this interlocutor M'Kenzie did not present a petition to the Inner House, but entered an appeal to the House of Lords, on the same grounds on which he had moved for a new trial. To this it was answered, that the appeal was incompetent—1. Because, so far as regarded the disallowance of the bill of exceptions, it ought to have been entered within fourteen days, which had not been done; and that, so far as regarded the motion for a new trial, as it had been refused, the verdict was final, and not liable to be questioned any where. 2. That as the interlocutor of the Lord Ordinary had not been reviewed, the appeal was further incompetent in terms of the 48. Geo. III. c. 157, § 15; and, 3. That the objections were unfounded on the merits. The House of Lords 'Ordered and adjudged that the interlocutors complain- 'ed of be affirmed, with £100 costs.' †

Feb. 15. 1822.

Appellant's Authority.—2. Dict. p. 218, 219.

FRASER,—J. CAMPBELL,—Solicitors.

(*Ap. Ca. No. 2.*)

JEAN HUMPHRY, Appellant.—*Jeffrey—Brownlee.* No. 24.
JAMES AITKEN, Respondent.—

Proof—Semiplena Probatio—Bastard.—1.—Circumstances in which a criminal intercourse between the mother and alleged father of a bastard, prior to the time when the child must have been begot, held not to amount to a semiplena probatio;—and, 2.—A stepmother held not an admissible witness for her stepdaughter, although the husband had been dead for upwards of sixteen years.

JEAN HUMPHRY presented a petition to the Justices of Peace for Ayrshire, stating that in the end of January 1813 she was delivered of an illegitimate male child, of which James Aitken, a married man, was the father,—and praying that he should be

Feb. 18. 1822.

2D DIVISION. Lord Craigie.

---

* Not reported. † See the Lord Chancellor's speech in the preceding case.