The child was not making use of the stair as a playground, but had come to do an errand, and was in the same position as an agent who had been sent for to do some business, or a porter who had come to carry something. She had a legitimate reason for being there. There is no room for the distinction which was attempted to be made between guests and others who voluntarily come, and others who come on business. I do not think that in our law any such distinction exists. The case of *Robertson* did not lay down any such rule. What the Judges then decided was that a sufficient allegation of negligence had not been made.

The other Judges concurred.

LORD NEAVES said that if in a common stair there was a defect which caused injury to anyone who had a right to be there, such as a postman or tax gatherer, the landlord would be answerable.

The Court adhered.

Agents for Pursuer—Maitland & Lyon, W.S.
Agents for Defender—J. & R. D. Ross, W.S.

Wednesday, January 24.

MACFIE *v.* SHAW STEWART.

Jury Trial—Public Right of Way—Servitude Road.
Held that an action concluding for a public right of way, or alternatively for a servitude road, was of too complex a nature to be sent to trial by jury.

LORD ORMIDALE reported to the Second Division the question as to procedure raised by the defender in the action of right of way at the instance of Mr R. Macfie of Airds and Langhouse, against Sir M. S. Stewart, Bart. The Lord Ordinary, in reporting the case, mentioned, without approving of, the following as the grounds on which the defender wished that it should be tried without a jury:—(1) It was a special case, as there was an alternative issue that the road was a public road for all purposes, or that it was a servitude road, to which the pursuer, as proprietor of Langhouse, was entitled. (2) It was denied by the defender that one of the termini of the road was a public place; and that question also would require to be settled by the jury. (3) Recent experience had shown that juries were not good judges in cases of right of way, being prejudiced in such questions. His Lordship observed, in conclusion, that this was rather a startling proposition, for, according to the contention of the defender, it came to this, that such cases should not in future be sent for trial by jury. He confessed that, for his part, he would shrink from coming to such a conclusion.

MR SHAND (with him the LORD ADVOCATE and MR H. J. MONCREIFF) for the pursuer, stated that his desire was that the usual course should be adopted in this case—a course which up to the present time had been almost invariably followed in right of way cases. He knew of only one case—the *Loch Katrine* case—in which this course had not been taken, and then it was by consent of parties. And it might be mentioned, by the way, in regard to that case, that their Lordships, on appeal, overturned the decision of the Lord Ordinary. He contended also that there was nothing unusual in the course here taken of sending two issues to the jury—an issue, first, of right of way; and, secondly, of servitude. He was not aware, either, of any recent substantial reason in favour of the course asked by the defender. The *St Andrews* case had been referred to, but the reason why in that case there had been more than one trial was simply that the pursuer had brought forward only part of his evidence on the occasion of the first trial. And in the *Dunoon* case a similar thing had occurred. Unless it was to be held that in future no right of way cases should be sent to a jury, he saw no reason for adopting any but the usual course of jury trial in this case.

THE SOLICITOR-GENERAL (MR ASHER with him) for the defender, cited four cases of right of way in which double trials had been necessary; and in regard to the last of these cases—the *Dunoon* case—he said that many of the Judges had expressed their dissatisfaction with the verdict. Taking these cases as a sort of standard, he was not surprised that the Court had suggested for consideration whether it was proper to try questions of this kind by jury. Juries, he said, had great difficulty in distinguishing between use as of mere toleration, and use as of right; and yet it was upon this very distinction that the whole case must necessarily turn.

Answered by the LORD ADVOCATE for the pursuer—There was no specialty in this case to distinguish it from others of the same class. It was a case of quite common occurrence, and they were quite familiar with the alternative issue which was presented in the present instance. If trial by jury should be abandoned in these cases, he thought the prospect of arguments on the evidence (1) before the Lord Ordinary; (2) before their Lordships; and (3)—a thing which had not hitherto occurred in the experience of anyone—before the House of Lords, was a prospect not very agreeable. He thought that House would be apt to ask—Why has the Court of Session now, in 1872, departed from what has been the inveterate practice of the Court since 1815, when trial by jury was first introduced into Scotland? He hardly thought the Court would venture to pronounce an opinion that trial by jury had become discredited in Scotland. Such an expression of opinion would have the probable effect of a change of the law, so as to make that form of trial less optional. Reference was made by defender to the peculiarity of the road in this case as distinguished from others; but it did not seem to his Lordship that there was any such peculiarity as to call for the adoption of any but the ordinary course of trial by jury in these cases. He concluded by saying that it appeared to him that there was not much matter for argument in the case, but that it was rather matter for judgment by the Court on consideration whether they should now, in 1872, depart from the course adopted in such cases since jury trial was introduced into Scotland.

At advising—

THE LORD JUSTICE-CLERK—We have to consider the way in which the case should be tried. It is an action of declarator which has two alternative objects—1st, to have the road marked on the plan as A to F declared to be a public road; and 2d, to have a part of that road from a point A to D declared to be a servitude road. In order to decide whether the matters raised would be more properly tried by the Court or a jury it is not necessary to consider the general qualifications of juries to try right of way cases. I am not prepared to lay down any general rule or to alter the ordinary

practice, which has undoubtedly been to send such cases to a jury. There have been a good many cases in which the verdicts of juries were held by the Court not to have been well-founded on the evidence. I am afraid that this must be so in cases which depend on evidence of long continued possession.

I see no reason for holding that a jury is a better tribunal than the Court for trying questions of servitude roads. In such cases there are always peculiarities and questions of mixed law and fact, which are more fitted to be tried by the Court.

It may be doubted if the two rights claimed should properly be included in the same action. The difficulty is that you have a double set of claims referable to the same possession. If the pursuer will abandon his conclusions for the servitude road there is no reason why the question of a public right of way should not be tried by jury. But if the action is to be tried as it stands I think it should be tried before the Court.

An observation on the allegation of the right is that it is doubtful how far the termini is sufficiently distinct. It might, perhaps, be amended so as to make it similar to the Burntisland case (*Cuthbertson* v. *Young*, 13 D. 1308).

LORD COWAN—If the case had simply contained an allegation of a public right of way, I would have had no hesitation in saying that it was a case to be tried, as such cases have up to this time been tried, by a jury. Whether the allegations on record are sufficient to enable the Court to frame an issue to send to a jury may be doubtful. The two *termini* must be alleged to be public places; and I doubt if there be any sufficient statement to that effect in the record. But assuming the pursuer to limit his case to the assertion of a right of public way, it will be for the Lord Ordinary to consider whether there is room for an alteration such as will allow the case to go to a jury. There is, however, conjoined with that primary assertion of public right, a claim personal to the pursuer and the tenants of his lands and estate to a servitude road, now the property of the defender. I agree with your Lordship that there may be much nicety in questions of servitude between the owner of the dominant tenement and the owner of the servient tenement. This makes it at least questionable whether this alternative action can, with safety to the just interests of the defender, be tried under alternative issues by the same jury in one trial. And on the whole, it seems to me, now that the Court have power to try such cases, we should exercise it, and let the proof be taken before the Lord Ordinary.

LORD BENHOLME—The general question, Whether cases of public right of way ought to be tried by jury, does not appear to me to be governed by any inflexible rule of law. Right of way is not one of the enumerated cases. It is within the discretion of the Court in each particular case, although I am free to admit that the practice has been to send such cases to be tried by jury. Without seeing our way more clearly, I should not be inclined to send this case to be tried by a jury. What determines me against doing so is the complex nature of the pursuer's demand.

LORD NEAVES concurred.

Agents for Pursuer—Finlay & Wilson, S.S.C.
Agents for Defender—M'Ewen & Carment, W.S.

Friday, January 19.

HOPE *v.* WEBSTER.

*Superior and Vassal—Feu-duty—*16 *and* 17 *Vict. c.* 80.

A vassal was bound by his charter to pay as feu-duty "two pounds Scots money, twelve capons, or twelve shillings Scots for each capon, and four shear dargs, or 6s. 8d. for each darg not performed, all in our (the superior's) option." Circumstances in which *held* that the superior had sufficiently intimated his option of taking capons, and not their money conversion, and that the shear dargs could not be demanded after the year in which they were exigible was past.

This was an appeal from the Sheriff-court of Fife. Mr Hope of Craighall sought to remove his vassals, Mr Webster and others, from a feu in Ceres, for which, as he alleged, they had failed to pay the feu-duty. The case was brought under the Act 16 and 17 Vict. c. 80, which gives jurisdiction to the Sheriff in cases where the feu-duty is under £25 yearly. The feu-duty stipulated to be paid was "two pounds Scots money, twelve capons, or twelve shillings Scots for each capon, and four shear dargs, or six shillings and eight pennies for each darg not performed, all in our (the superior's) option." The vassal maintained that, having tendered the money he had done all that was required of him.

After various procedure, a proof was led in the Sheriff-court, and thereafter the Sheriff-Substitute (BEATSON BELL) found that the superior had not intimated his option to take the capons, and that if he wished to do so he was bound so to intimate to the vassal, and not having done so, the remedy of the statute did not apply. Upon appeal the Sheriff (CRICHTON) adhered.

The superior appealed.

MARSHALL for him.

SOLICITOR-GENERAL and ADAM in answer.

The Court recalled these judgments, holding that the vassal was bound to pay or tender his feu-duty to the superior, and that it was not the duty of the superior to go and ask for it. The superior had sufficiently indicated his option by taking capons for a number of years. With regard to the shear dargs, the Court held that such services could only be demanded within the year, and that if the superior did not demand them, and kept the vassal waiting to do his work, he was not entitled to ask for their money value after the time was past. They remitted the case to the Sheriff to pronounce decree of irritancy, but reserved the vassal's right under the statute to purge the irritancy by paying the feu-duty.

THE LORD JUSTICE-CLERK—I am of opinion that the judgment of the Sheriff is wrong and ought to be altered. It is conceded that the option of taking capons or the money conversion rested with the superior. I think it is proved that the superior sufficiently intimated his option to take the capons, and not their money conversion. For a series of years the feu-duty had been paid by delivery of capons or by payment of what was held to be their value in money. It is the duty of the vassal to pay or tender the feu-duty, not of the superior to go to him and demand it. The vassal appears to have thought that he has been paying too much, and a misunderstanding arose, the result of which was that the feu-duty fell into