No. 27.

But, from these premises, the Lords formed a very different conclusion; for, being generally of opinion, that by *highways* in the act of Parliament, are only meant the *King's highways*, which are no man's property, they considered the consequence to be, that the Judge Ordinary, who has no power to cast about roads at all other than the statute gives him, cannot turn about any private foot or horse-road to kirk or mill, which is a man's property, even for one ell.

However, no judgment was given upon this point, in respect of a concession made by the pursuer, with which the defender was satisfied. But so much were the Lords of opinion that the act of Parliament gave no power to alter private roads, that, notwithstanding the party's concession, they refused to give judgment *in jure* for casting about the road in question, and would have left it to the parties to make their agreement as they thought fit;

But the pursuer having restricted his declarator, which the Court had no concern to oppose, the Lords, without giving any judgment *in jure*, " decerned in the declarator as restricted."

Compare the immediate following case, June 25, 1748, Bruce of New Grange *contra* Wardlaw of Abden, No. 28.

*N. B.*—May it not be doubted what is meant by the provision in this act of Parliament, that the " highways be not removed above 200 ells upon their whole ground," whether it is that the new road be not above 200 ells longer from the point where the alteration begins, to the point where the new and old road again join, as the heritor who proposes to turn the road upon his neighbour's ground is sometimes inclined to explain it? or is it, That the new road is no where even upon his own ground to be above 200 ells distant from the old road?

And it is thought that this last is the meaning; for the words are general, " that it be not removed," that is from the old road, above 200 ells. But it is easy to figure how the new road may be even shorter than the old, and yet be removed from it more than 200 ells. Suppose the old road to form two sides of a triangle, each 300 ells in length, and the new road to be so cast about as to form the base, the new road would be much shorter than the old, and yet removed at one point 300 ells from it, which the act does not permit.

*Kilkerran*, (SERVITUDE), *No.* 1. *p.* 515.

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1748. *June* 25. BRUCE *against* WARDLAW.

No. 28.
A kirk-road allowed to be altered for one equally commodious.

UPON advising the prepared state in the process, at the instance of Bruce of New Grange and others, for declaring their right to a road to the kirk of Kinghorn, through Wardlaw of Abden's close, it being argued for the defender, that where a kirk-road is ever so much established by possession, yet still it is no high-way; it is but a predial servitude; and as other predial servitudes may be

No. 28. restricted, provided the *prædium dominans* be equally well accommodated, so a kirk-road may, by the heritor of the servient tenement, be changed to another place, equally commodious for the heritor of the dominant tenement;

The Lords found, "That Bruce of New Grange, his family, and tenants, and the heritor of Innerteil, his family, and tenants, and the parishioners residing in the north and east parts of the parish of Kinghorn, have been in use of a foot-way and passage, to the kirk of Kinghorn, through the defender's close of Easter Abden, on Sundays and other days of divine service; but nevertheless found, That, upon the defender's making a foot-road to the pursuer's, as commodious as that through the defender's close, at the sight of the deputy-sheriff, or any two justices of the peace of the district of Kinghorn, the defender is entitled to, and may shut up the foot-road through the said close."

And this, notwithstanding it was argued for the pursuer, That although, where an indefinite servitude is constituted upon a man's ground, such indefinite servitude may be restricted to a particular part of the ground, sufficient to answer the end of the servitude; yet, where a servitude is not indefinite, but constituted upon a particular spot, no such restriction can take place; here the road in question is fixed to a particular line, and the pursuer has right to that individual road, or to no road at all.

Whether or not this decision shall be held as laying down a general rule with respect to all private roads, one cannot positively say, as this case had some specialties in it; for, not to mention the particular hardship on a gentleman in having a road go through his court, between his house and his stable, which may have had some involuntary influence; in fact, this road had been in a course of being varied; for at one time, it appeared by the proof to have been set about a little, by Abden's building his gardener's house upon the spot through which it had been in use to run, at another time, by building a garden wall: True, notwithstanding these changes, the road still went through the close, which was the ground of the present dispute. But these circumstances may have been thought to bring it a little nearer to the case of an indefinite servitude; and in the preceding case, June 25, 1747, Urie *contra* Stewart, No. 28. p. 14524. though there was no judgment given, the Lords argued very differently from the general principles upon which the present judgment would appear to stand.

*Fol. Dic. v.* 4. *p.* 280. *Kilkerran*, (SERVITUDE), *No.* 2. *p.* 516.

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1752. *June* 11.

WALTER STIRLING, Doctor of Medicine, *against* JOHN FINLAYSON, Commissary of Dumblane.

No. 29.
Servitude of stillicide.

DR. STIRLING is proprietor of a tenement on the north side of the high-street of Stirling; and Commissary Finlayson is proprietor of a tenement adjoining to the gavel of the Doctor's tenement.