Court to ordain the pursuer to sist a mandatory. The pursuer objected, and argued that this was really a motion to oblige him to find caution for expenses. He was compelled by his position as trustee to raise the action. The Judgments Extension Act, 1868, 31 and 32 Vict., cap. 54, sec. 3, makes a decerniture for expenses by the Court of Session effectual in England.

Authorities—*Simla Bank* v. *Home*, 21st May 1874, 8 Macph. 781; *Raeburn* v. *Andrews*, 27th Jan. 1870, 9 L.R., Q. B. 118.

At advising—

LORD PRESIDENT—In this case the defenders move that the pursuer should be bound to sist a mandatory in respect that he is not at present within the jurisdiction of the Court, and to that demand two answers are made. In the first place, it is said that the pursuers are owners of heritable property in Scotland as trustees, but that is not a good answer under the circumstances, because the object of the action is to reduce a security held by the defenders over that property. But there is a second answer, which is of much more importance. It is contended that as by sec. 3 of the Judgments Extension Act decree for expenses given by this Court may be enforced against parties resident in England, the defenders are in no worse position than they would have been if the pursuer had been resident in Scotland. It seems to me that there is a great deal of force in that argument in so far as sisting a mandatory is intended to secure the payment of expenses in the event of their being found due. That, however, is not the only purpose of such a sist; there is the further object that there may be always some one here who is responsible for the proper conduct of the cause. That, however, is a matter which is rather the interest of the Court, and no doubt the great interest of the party is that he may have some one against whom he may enforce his decree for expenses, and so in determining this case the circumstance that the decree for expenses will be enforceable must have great weight. The question is one entirely within the discretion of the Court, and we considered the matter so important that we consulted our brethren, and the result of that consultation is, that we shall always consider it very important that the pursuer or defender who is asked to sist a mandatory is not resident in a foreign country, but is in some part of the United Kingdom, and unless there are other circumstances which have to be considered, the Court would refuse the motion. In consideration that in the present case the security for the expenses is quite good, we have no doubt that the motion must be refused.

The other Judges concurred.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the note for the British Linen Company, craving that the pursuers should be ordained to sist a mandatory (No. 31 of process), and having conferred with the other Judges, Refuse the said note."

Counsel for Lawson—Kinnear. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for British Linen Co.—Adam. Agents—A. & A. Campbell, W.S.

Friday, June 12.

SECOND DIVISION.

[Sheriff of Forfar

M'GAVIN *v.* M'INTYRE.

Road—Servitude—50 *Geo. III. c.* 120.

Where a road was originally a private servitude road, trustees *held* not entitled to shut it up.

This was an appeal from a decision of the Sheriff of Forfar on a petition at the instance of Robert M'Gavin of Ballumbie, against Messrs W. A. partners of the company, to the effect that— M'Intyre & Co., bleachers, Douglasfield, and the "The petitioner is proprietor of the lands of Mid-Craigie and others, situated near Dundee, including therein a piece of land originally feued from the estate of Fintry, bounded on the north partly by the Pitkerro turnpike-road, formerly known as the post-road leading from Dundee to Aberbrothock, and partly by mill-lead, formerly the mill-lead of the town of Dundee's mills, conform to infeftment produced. That parallel with, and near to the said mill lead, there until lately existed a statute-labour road running eastward from the said Pitkerro road to a road leading north and south near Craigie Mill; but the site of this road was recently given up to the petitioner by the statute-labour road trustees of the district, in consequence of the substitution therefor, at their instance, of a new road, situated to the southward, made upon the petitioner's lands; which substitution was carried through and notified in terms of the statute 50 George III., chap. 120. That the petitioner, and his authors and predecessors, have been in the uninterrupted possession of the land lying betwixt said new road and the said mill-lead from time immemorial, and the same is at present under lease. That the petitioner, on the 21st February current, proceeded to erect a fence at the eastern extremity of this land, and running between the eastern termination of said new road and the said mill-lead—a distance of about 25 yards, for the enclosure of the land from the public road; but on the following day the petitioner's land was entered upon, and the said fence interfered with and partly taken down by workpeople or others in the employment of the said W. A. M'Intyre & Co., acting under instructions from the said firm, or one or other of the individual respondents, and that without warning to or authority from the petitioner, and without any right or title whatsoever. Farther, that this day the petitioner's servants, who were engaged in removing from one spot to another of said ground a large boulder, were, by personal violence on the part of the said James M'Intyre and others, servants of the said firm, stopped in the execution of their work." The petition finally prayed the Sheriff to interdict the respondent from entering the petitioner's property situated between the mill-lead and the said new road, and from molesting the petitioner in the erection of the proposed fence.

After a proof the Sheriff-Substitute (CHEYNE,) pronounced the following interlocutor:—

"*Dundee*, 31*st January* 1874.—The Sheriff-Substitute having advised the process as regards the road mentioned in the petition, Finds *in fact* that the same has for upwards of forty years been a statute labour road, and as such has been under the

control and management of the statute labour road trustees of the Dundee district, and upheld by them; Finds that in the years 1871 and 1872 certain procedure took place before the road trustees, resulting in said road being shut up by their order, and in its sight being handed over by them to the petitioner, at whose expense a new and better road, substituted for it, had been made; Finds that in all essential points the trustees' procedure was regular, and in conformity with the Local Statute Labour Road Act, 50 Geo. III., cap. 120; Finds it pleaded by the respondents that, even assuming the public have been legally and effectually excluded from said road, the exclusion does not extend to them, in respect the road was originally a private road over which the proprietors of Craigie Mill, now belonging to them, had, in virtue of an express grant in their titles, a right of servitude; Finds, however, that there is no evidence that the road has ever been other than a public highway; Finds that shortly before the raising of this action the petitioner, acting with the consent and concurrence of the road trustees, whose resolution to shut up the road had previously become final, erected a fence across the east end of the road; Finds that the respondents commenced to pull down said fence, whereupon this petition for interdict was presented: Finds *in law* that the respondents' right to use the road in question has been legally determined, and that they were not justified in interfereing with the foresaid fence: As regards the narrow strip of brae land intervening between the foresaid road on the south and the mill-lade on the north, Finds it sufficiently proved that the petitioner, through his tenants, has had for the last seven years exclusive possession of the same as far east as a road which passes Craigie Mill—or, in other words, to a point farther east than the fence which the petitioner was in course of drawing across it when interfered with by the respondents; Finds *in law* that the petitioner is entitled to the benefit of a possessory judgment in so far as said strip of brae land is concerned; and having regard to the whole of the foregoing findings in fact and law, Repels the defences; declares the interdict already granted perpetual, and decerns; Finds the petitioner entitled to expenses; allows him to give in an account; and remits the same, when lodged, to the Auditor of Court for taxation.

"*Note.*—As explained by the Sheriff-Substitute in the note to his interlocutor of 7th May last, the case divides itself into two branches. With these he shall deal in the order of their importance; and though the process is a somewhat bulky one, and the points raised by the respondents not few in number, his observations may, he thinks, be compressed within a very narrow compass.

"1. With regard to the road, there can be no question whatever that it has for a very long time back—as far back as we can have any evidence in regard to it—been a public highway under the management of the statute-labour road trustees of the district. This the respondents did not at the recent discussion attempt to dispute, and the Sheriff-Substitute shall therefore assume that the first finding in the foregoing interlocutor is correct.

"As little, he thinks, can it be doubted that the proceedings in the shutting up of the road are open to no serious objection. It is quite true that they were not commenced by a survey, made by the directions of a district meeting, as section 37 of the statute seems to contemplate they should be, but the Sheriff-Substitute, for one, is not prepared to hold that such a trifling deviation from the statute, which cannot possibly have prejudiced a human being, renders the whole after proceedings abortive. The fact that no one is prejudiced distinguishes the case from those cited, in which an omission to give the notices to the public required by the special statute has been held fatal. Here all the statutory notices were given. The respondents, indeed, maintained that the notices (which were only published at the church of Mains parish), should have been published also at the church of Dundee parish, but as the piece of road shut up is proved to lie wholly in Mains parish the objection falls.

"The difficulty—if difficulty there be in the case—arises in connection with the respondents' plea founded upon the allegation that the road was originally a private servitude road for the proprietors of Craigie Mill. Where, however, it may be asked, is the evidence that the road was ever used as a servitude road at all? So far back as we are permitted to see the road has been used as a public highway, and, for all that can be said to the contrary, it may have been such long before the creation of the servitude upon which the respondents found as giving them right to keep it open for their own use. The facts are therefore not sufficient to raise the plea under examination; but even if they were—that is to say, if it were certain that the road was originally the respondents' private servitude road,—the Sheriff-Substitute would still feel compelled to hold, upon the authority of *Smith* v. *Knowles*, March 11, 1825, 3 S. 652, that the respondents' right to use the road had been determined by the action of the road trustees. No doubt there were some specialties in the case referred to, which do not occur here; but so far as the Sheriff-Substitute can judge, the decision was not affected by these, and the case is, as it seems to him, a direct authority, which he would be bound to apply here. Were the point open, he confesses that he would hesitate somewhat before coming to the conclusion that an established right of servitude was extinguished by the mere fact that the possession of the road had not been confined to the grantees of the servitude, but had been enjoyed also by the public.

"2. The Sheriff-Substitute must be permitted to express his deep regret that there should have been so much expense incurred in reference to the strip of land between the road and the mill-lead. It became evident at an early stage of the proof that the respondents did not dispute the petitioner's possession of the greater portion of this strip, and that all they claimed was a small bit, of the most trifling value, at the east end of it. The Sheriff-Substitute, on discovering this, did all he possibly could to effect a settlement, but his efforts were unsuccessful; and the result is, that probably more than the fee-simple value of the bit of ground in dispute has been expended in determining the question as to the state of possession for the last seven years. On the proof, the Sheriff-Substitute thinks that the petitioner has been successful. If one fact in the case is proved it is that the Christies' cows (the Christies being petitioner's tenants) have for more than seven years been herded over the whole extent of the braes from west to east. But conceding this, the respondents maintain that they have proved that the possession *quoad* the east end has been divided. They found

their contention (1) upon the alleged fact that rubbish from the mill has been in use to be put down there; and (2) upon the fact that a large mangle-stone, taken out of the mill about 20 years ago, in the time of a former occupant, has been lying on this disputed bit of ground ever since its removal from the mill. But no witness speaks to any rubbish having been put down within the last seven years; and as for the stone, it is very doubtful whether it belongs to the respondents, and even if it does, the simple fact of its having lain where it has been lying, can hardly, it is thought, constitute possession by the respondents under their titles."

On appeal, the Sheriff (MAITLAND HERIOT) pronounced the following interlocutor:—

"*March* 14*th*, 1874.—The Sheriff having heard parties' procurators on the respondents' appeal against the interlocutor of 31st January last, and made avizandum, and having considered the record, proof, and whole process, adheres to the interlocutor appealed against, and dismisses the said appeal, and decerns.

"*Note*.—The Sherift is of opinion that the petitioner is entitled to the interdict he prays for.

"Had the case depended on the regularity of the procedure under the 37th section of the Statute-Labour Road Act, the Sheriff has grave doubts whether the requisites of that section were sufficiently complied with. But after carefully considering the matter, the Sheriff considers that, under the 34th of the Act the statute-labour road trustees were entitled to do as they did. The 37th section has reference to a case where the district road trustees see fit 'to order and direct the several roads within their respective districts to be surveyed, in order the better to ascertain, with the concurrence of two Justices of the Peace for the said county, whether any, and which, of such roads may be shut up and suppressed as being useless or of little importance to the public,' and in that case certain statutory notices must be given, &c. That clause seems to the Sheriff to have reference to a general revision of the whole roads of a district, and gives power to the trustees, with the concurrence of the two Justices of the Peace, to shut up and suppress useless roads. That section provides means for a simple *shutting* up of a road, *without any substitution being made therefor*. What the trustees did in the present case, however, was not to shut up a road, but was merely to alter the course of a part of a road, leaving *the road still open*.

"Now, by the 34th section of the Act the trustees are authorised and empowered to do a variety of things, and *inter alia* 'to cause the course of such part or parts of the said roads as they shall think proper, *to be changed or altered*, for shortening the same, or for making them more accessible,'—and for this purpose large powers are conferred on the road trustees. They were entitled, acting under this section, to do what the respondents complain of. They merely caused the course of a part of this road to be 'changed or altered.' The statute-labour road in question (and it is proved to be a statute-labour road) which runs from the Arbroath turnpike-road to the Pitkerro turnpike-road, *is not shut up*. It is still open for all and sundry, but the course of a part of it has been to a certain limited extent merely changed or altered. The Sheriff visited the locality and examined and inspected the alteration. He did so, as suggested at the debate by the petitioner's agent, and which suggestion the Sheriff understood was approved of by the agent of the respondents. The part to be disused is narrow, and runs along the top of 'a brae,' at the bottom of which is a running water. It is, as described by Mr Callen, the district road surveyor, in his evidence (page 5), 'a very dangerous road, and would have required a fence, which it never got, to make it safe.' The part to be substituted is a good, safe, wide road; and is, as Mr Callen describes it, 'a far better as well as a more convenient road than the old one.' To a person living at Craigie Mill and proceeding in one direction, the part substituted is not shorter but longer, but proceeding in another, viz., towards Dundee, it is shorter; but in any case it is more accessible, and altogether a safer road for the public.

"It is true that the road trustees carried through, or endeavoured to carry through their proceedings, as a "shutting up" under the 37th section of the Act. They may have done so, or endeavoured to do so *ob majorem cautelem*, but it appears to the Sheriff that they were entitled to make the alteration of the road in question under the 34th section. The respondents contend that their predecessors or authors have used the disused part of road as a servitude road before it became a statute-labour road, and that as soon as it ceased to be a statute-labour road their right of servitude revived. Whether they ever exercised any such right of servitude is very doubtful. In fact, the proof contains little or no evidence as to how long it has been a statute-labour road, and how long, if ever, it was a servitude-road. It is admitted by the petitioner's procurator to have been used as a church road for time immemorial. The meaning of this is somewhat doubtful. It may mean that it has been used, before it was a statute labour road for time immemorial, as a church road, or that the parties have gone to church by the statute labour road for time immemorial. But, however this may be, *they can still go to church by the substituted road.* Admitting that it had been a servitude or church road before it became a statute labour road, the Sheriff is of opinion that on its becoming a statute labour road and coming under the operation of the statute labour road Acts, the road trustees were entitled to deal with it as specially authorised by Act of Parliament. Accordingly, it was held in the case of *Smith*, 11th March 1825, 3 S. 652, that, 'it having been found by verdict of a jury that a road was a public as well as a servitude road, the trustees were held entitled to shut it up.'

"The respondents raise the question as to whether the road trustees were entitled to give up the old piece of road to the petitioner in return for the new piece made by him on his own ground without the intervention of a jury. So far as the respondents are concerned this seems to the Sheriff to be *res inter alios acta*; but, at any rate, the procedure which the respondents contend the trustees should have observed is to be followed only 'in case no agreement shall have been made with the owner or owners, occupier or occupiers, of the land where the roads are to be so altered or widened.' In the present case there has been such an agreement.

"As to 'braes' in question, the Sheriff agrees with the Sheriff-Substitute that the petitioner is entitled to a possessory judgment."

The respondent appealed.

Authorities cited—Ersk. ii. 11, 12; *Smith*, 3 S., 652, 456, 4 Bell's App. 74.

At advising—

Lord Benholme—The parties in this case are the petitioner, Mr Robert M'Gavin, of Ballumbrie, and Mr McIntyre, on behalf of himself and his partners, who are bleachers at Douglasfield. Mr McIntyre resists an application which was made by Mr M'Gavin to the Sheriff of Forfarshire for an interdict, the object of which was to prevent Mr McIntyre from interfering with a fence which the petitioner had erected by having posts stuck into the ground at such a distance as entirely to obstruct the entrance from the mill belonging to Mr M'Intyre, to a piece of road which has been called the road in dispute, and which is so marked upon the plan taken from the Ordnance Survey. The Craigie mill, which is the property of the respondents, is situated close to where these posts obstructing the access to this road have been driven into the ground; and there seems no doubt that it was the intention of the petitioner, which for a time he successfully carried out, entirely to prevent any passage along that road,—to prevent the people of the mill from coming upon the road at all. Consequently, there can be no doubt that the question between these two parties,—the proprietor of the mill on the one hand, and Mr M'Gavin, of Ballumbie, on the other,—is whether Mr M'Gavin is entitled to obstruct this road. The localities of the mill and the surrounding ground your Lordships have very clearly set out on the plan copied from the Ordnance Survey; and in order to develop my views of the case it is necessary that I should call your Lordships' attention somewhat in detail to these localities. Craigie Mill is marked at the extremity of the road as the old road, and at the left hand it abuts upon a public road—a turnpike road I think, which is called the Pitkerro turnpike road. It is a piece of road about 1200 yards in length, as we learn from some of the witnesses. Following it until it crosses the Pitkerro road, we find it is continued of a smaller breadth for a very considerable way to the westward, close to the mill-lade of the Craigie Mill. It is continued as far as what is called the Honey Green Mill, where it is in evidence that the in-takes of the mill-lade are to be found. That mill-lade is derived from the water of the Dichty, and between the in-takes of the Craigie Mill at Honey Green Mill and the mill itself there are various sluices, which of course are of some use and have some importance in the success of the Craigie Mill; and the road the whole way, except, perhaps, this disputed piece of road, is close to the mill-lade. I suppose the reason why there intervenes a strip of ground between the old road and the mill-lade at the place that is now in dispute, arises from this, that the ground there is somewhat precipitous, and is not altogether free from danger. Consequently, I suppose, the original road, which seems to me to be at least a century and a-half old, had not been led so close along the south side of the mill-lade as it certainly is more to the westward. Now the question first occurs, as this disputed piece of ground is the sole subject now in question, what is alleged by the respondent?—who resists the obstruction,—what is alleged as to its origin and character? That is an enquiry which does not appear to me to have very much attracted the attention of the Sheriff in the court below, but upon the evidence I think there can be no doubt that this road is the same as appears in a grant dated in 1772 by the magistrates of Dundee to the predecessor of the respondent in the Craigie Mill. I think the circumstances of the case irresistibly prove that the passage that I have now to read applied not only to the small footpath near the mill-lade to the westward of the Pitkerro road, but also applied to the continuation of it over the disputed piece of ground which communicated with the mill. The grant is to be found at page 34; and I certainly wish that the Sheriffs in the Court below had paid more attention than they seem to have done to it, because, so far as I can read their views in the interlocutors and notes which we have before us, they seem to be very much in doubt as to the respective origin of this private road on the one hand, and the duration of the public statute labour character of the road on the other. On page 33 it is stated that the subjects are described in the feu-contract as follows:—"All and haill that east miln of those three corn milns on the water Dightie, disponed to them"—the said magistrates and council—"by the now deceased David Graham, of Fintrey." That refers to the Craigie Mill, which is the eastmost mill. There are two other mills mentioned as being to the westward. Then on page 34 there is this important privilege, which I am inclined to think was a most essential part of the grant—a part of the grant without which the grant of the mill and the feu of the ground upon which it stands, would really have been comparatively useless, inasmuch as it was, and has been, I think for a century and a half, the only access to that mill—the only way by which the grist to the mill could be procured from the westward. Now the words are these:—"With free ish and entry and sufficient ways and passages of twelve foot bredth besouth the lead of the said miln, for carrying horse-loads upon horse-backs to and from the said milns, as contained on the town's rights aftermentioned: as also with power of casting, winning, and leading away stones, feal, and divot, from the places accustomed for repairing, sustaining, and upholding the foresaid milnhouses, kilne, dams, intacks, and others foresaids, in all time hereafter." Now it is a matter of extreme consequence in this case that your Lordships should be perfectly satisfied whether there is an identity between this express clause such as to cover the road in dispute. I will fairly confess that my view of this case entirely depends upon being satisfied that what is here alleged in the shape of a grant, and is described in a very graphic way as besouth the mill-lade, is exactly the piece of ground about which this dispute has taken place. It has been matter of question in this case, and I don't wonder at it, whether there is any sufficient identification of this grant with the road in dispute. It has been said that it is too vague in its description—a road besouth the mill-lade. It is said that might apply to various other roads, or some other road or roads, besides this; and an attempt was certainly made in the course of the evidence to render that plausible at least, if not evident. But I confess it appears to me that this matter of identification has turned out to be entirely unimpeachable; for the surveyor of the district gives evidence which to my mind is very important. Mr James Callen, a witness examined on the part of the petitioner, and who is surveyor of the roads in this district, says, "I never heard or knew of any road besouth the mill-lade running from the Pitkerro turnpike to Craigie Mill, except

the road now in dispute." He is pressed still further, and at length he says, "There is an old horse track about half a mile or rather more south of the mill-lade." I suppose it was held that this might turn out capable of being identified with the road in the grant, and it would have thrown great difficulty on the idea that this was meant to be the particular road of 12 feet which is mentioned in the grant; but Mr Callen, who seems to speak of this road about half a mile south of the mill-lade, being pressed to mark it on the plan, does mark the line of it upon the plan No. 57 of process by the letters A B C D. I have examined the plan, and I can tell your Lordships exactly where these letters are placed, and what is the foot road—no doubt besouth the mill-lade instead of south of it, but it is at the distance of a mile and a half. If your Lordships will look at the Ordnance Survey I will state where these letters are marked by Mr Callen as indicating this other, and the only other, road which could be mistaken for it. The letter A is at the right hand side of the plan, near where you will find "103" marked on the margin a little to the right of Happyhillock. B follows down to the south; C is away to the west, and D is near what is called the old mill. So that this, which seems to be the only other road which could be mistaken as a road 12 feet south of the mill-lade, is at a very considerable distance from it. It is at the distance of about a mile and a-half or rather more from the mill-lade. From this I deduce and state to your Lordships my conviction, that it is impossible to refuse to identify the grant in 1722, which was made the subject of registration fifty years afterwards in the town books, and therefore shows that it must have continued to be an object of interest to the parties—that this is just that road which is so graphically described as besouth of the mill-lade. The plural number has been suggested as a source of difficulty. It is said that there must have been more than one access of this kind. I confess that does not give me much trouble. Your Lordships see there are two parts of this road, one to the east and another to the west of the Pitkerro turnpike; but what is of more importance, it appears to me that one great use of this privilege—for I think it is more than a mere servitude,—it is a privilege of access by this road all along the south margin of the mill-lade, and the importance of it was an access to the lade itself for the purpose of mending it, and to the intakes for the purpose of regulating them, and also the sluices between. The ground close to the mill-lade here is precipitous. It is a brae with a scanty herbage upon it, which seems to form the subject of a lease, or at all events of some right, to some poor people in the neighbourhood; but it is rather a dangerous bank, and in all probability there would not be a free access from the mill close to the mill-lade all the way up; and therefore to have a privileged access by this road, approaching in all probability to several points where access might be had to the mill-lade, appears to me to be of the highest importance, and evidently to show that the use of this track was not only to afford access to the mill for the grist that was coming to it, but also to enable the parties to get access and approach the mill-lade at various points, and especially here, where the banks were a little rough and precipitous —to have access *to it* at various points where they might repair the mill-lade or put to rights anything that had gone wrong. As to the necessity of having this access, I will not detain your Lordships by detailing the evidence, by which it is as clear as can be conceived that this was the only access on the west to the mill before the new road was made. That is spoken to by numbers of witnesses. Your Lordships have the testimony of James Hood, a man of seventy years of age, at page 54 C, the evidence of Thomas Drummond, sixty-seven years of age, and the evidence of Mrs Robertson, at page 58 B, who all coincide in stating that it was the only access to the mill from the west. I shall take the liberty of reading a passage from page 58, from the evidence of Alexander Robertson, who had been the occupant of the mill. He says at D E, "I cannot say when the Messrs M'Intyre bought the mill, but we were, for some time before we left, their tenants. The road in dispute was the only access we had to the mill from the north," —he means the west or north-west probably. "It was also our only road to our intake, which was at Honeygreen. It was also our only road to Main's Church, which was our parish church. We cleaned the mill lead occasionally. We generally threw the stuff that we took out of it upon the dam (*i.e.*, the north) side; but I have seen us throw it out on the other side too. We had frequent occasion to go to the intake. We only cleaned the lade up as far as our own dam." I may also refer to the evidence of Mr M'Gavin himself, at page 71 F. He speaks of the origin of his having wished to make, this change on the statute labour road arising out of some sort of arrangement with Messrs Cargill; and he says, "After I had come to a sort of arrangement with the Messrs Cargill, I asked Mr Callen, the road surveyor, to make me a sketch of the new road which I was to propose to the trustees to substitute for the old road. But for the arrangement with the Messrs Cargill I would not have interfered with the road at all. I knew, of course, that the old road was the only access the Craigie Mill people had from the west." He knew that, and he adds, "But I was to give them, as I considered, an equally convenient, and indeed a better road in lieu of it." I am very willing to accept this statement of the petitioner. He may not have observed or not have adverted to the fact that whilst his change of road was an advantage to the public, and no doubt may have formed the reason why it was acceded to by the trustees, if it shortened the distance between the two public roads in so far as the people of Dundee were concerned,— exactly to the same extent, but in an inverse ratio, it lengthened the communication from the mill to the Pitkerro turnpike road. From the Craigie Mill to the Pitkerro turnpike along this disputed road is 1200 feet. That is stated by James Salmond at page 53. Now if the Craigie Mill people were obliged to abandon that comparatively straight line to get at the Pitkerro turnpike, and to get at the continuation of the servitude road up to their intakes, and were obliged to take what the petitioner says was a better road for him, they would need to take the new road, and then a portion of the Pitkerro turnpike in order to arrive at the same point, and that involves a circumbendibus of 3,035 feet, or more than twice the length. Now this is a very important matter. It was not only a circumbendibus, but observe what effect it might have had upon the welfare of the mill. They had to struggle against rivals upon this water of Dichtie. There are two mills to the westward ready to intercept their grist, if there be any ob-

struction to the passage or any difficulty in getting access to the Craigie Mill; and they have to encounter this rivalship, which would have been rendered infinitely more formidable if this long circumbendibus was involved in arriving at the mill. But going this road which led away from the mill-lade was by no means giving them an equivalent for that which gave them access to the mill. The very circumstance that this disputed road was the means of facilitating their access to the mill-lade for the purpose of repairing, rendered it essential to the mill, and the other road deprived them of all that access. But had the respondent submitted to this change in respect of a change to be made upon the statute labour road, he was in fact admitting that this important access which he took under the clauses in the grant of 1772 might have been again changed at the bidding of the petitioner and by the authority of the trustees. And it appears from a passage in his own evidence that he knew the strength of his own right as a private right attached to the mill. He seemed to be quite aware of that; and consequently he does not seem ever to have contemplated to fight the petitioner in regard to the trustees' deliberations. He was aware that Mr M'Gavin was one of these trustees. *Quorum pars magna fuit.* He takes a very large share in the deliberations, and very properly; and, so far as I can see, Mr M'Gavin had a very plausible and a very commendable view in shortening the road to the public, and in giving a safe road instead of a dangerous one. That was a very proper view. In short, the respondent does not seem ever to have hoped to compete with him in point of influence in changing that as a public road. But he stood, and I think stood safely, upon his private right, with which he seemed to think he was able to defy his antagonist, although he might not be able to prevent him from changing the road as a public road. At page 64 E your Lordships will find Mr M'Intyre's statement, which I read, to show that I am giving a correct account of his views in regard to this matter. He says he was applied to by the petitioner about the closing of the old road. I must say that the petitioner did not in the least conceal what he was going to do, but he applied to the respondent for leave to do it. "When petitioner first spoke to me about the closing of the road I said I must consult my partners. At our next meeting I told him we could not agree to what he wanted, and he said he would get it closed in spite of me. He did not tell me why he wanted the road closed. My chief reason for objecting was that it was our road to our intake and sluices, and traffic to the mill came by it. I also looked upon it as the servitude road mentioned in my title." Now here the parties were plainly in antagonism. The petitioner had conceived that by his influence with the trustees, and pointing out that the new road which he proposed to give was as to the public a better and a safer road, he could carry them along with him in so far as they had jurisdiction, and he would be backed in his object, which was to exclude the millers from this road altogether. Mr M'Intyre, on the other hand, having consulted with his partners, refused to give up that which he conceived was so important, and he says, "I told him we could not agree to what he wanted, and he said he would get it closed in spite of me." Now what is the true character of this grant? Is it a mere ordinary servitude? I don't look upon it as such. I think it is an essential part of the grant of the mill. It is an adjunct of the mill, without which the mill could not subsist; and certainly without it the proprietor would be subjected to a very large abandonment of the western custom that he was entitled to have, and also those facilities of arriving at points on the mill-lade which this road enables him to get to, as also of going directly to the westward up to the intakes and the sluices. Now, was it within the jurisdiction of the Statute Labour Trustees to put an end to this important right? Was that properly within their jurisdiction? I apprehend it was not. They might sanction a change or alteration in the statute labour road, substituting one statute labour road, or piece of road, for another; and they might withdraw whatever expenditure had been laid out upon the one in favour of the other. But this did not at all amount to their having any right to block up the road, or to extinguish so important a private right which had existed for a century and a-half, and had been warranted by an express and most graphic title. The Sheriff-Substitute, I must do him the justice to say, felt the difficulty of this. I am not quite aware whether that gentleman did advert to the terms of the grant in 1722. It is very strange that there is nothing said of that grant in either of the interlocutors or notes. Nay, he seems to be uncertain whether the duration of the statute labour character of the road or that of the private servitude was the more ancient. I can only say that I think it is very difficult to carry back the evidence of this being a statute labour road so far as the Sheriff-Substitute seemed to think. viz., forty years. I doubt very much whether there is any sufficient evidence of that. But I have no doubt whatever that for a century and a-half the private right subsisted; and therefore the speculation which of the two was the more ancient is one which I think the Sheriff-Substitute ought to have had no difficulty in solving in his own mind had he only attended to the date of that original grant. But see what he says. Upon page 14 your Lordships have a statement of his doubts, and in these doubts I concur, only swelling the doubts into absolute certainty one way. At page 14 he says, "The difficulty, if difficulty there be, in the case, arises in connection with the respondents' plea founded upon the allegation that the road was originally a private servitude road for the proprietors of Craigie Mill. Where, however, it may be asked, is the evidence that the road was ever used as a servitude road at all?" Why, there was no other access for 150 years excepting this road. "So far back as we are permitted to see the road has been used as a public highway, and for all that can be said to the contrary it may have been such long before the creation of the servitude upon which the respondents found as giving them right to keep it open for their own use." That would have been carrying back the public road very far indeed. "The facts are therefore not sufficient to raise the plea under examination; but even if they were,—that is to say if it were certain that the road was originally the respondents' private servitude road—the Sheriff-Substitute would still feel compelled to hold, upon the authority of *Smith v. Knowles*, 11th March, 1825, 3 S. 652, that the respondents' right to use the road had been determined by the action of the road trustees. No doubt there were some specialties in the case referred to which do not occur here; but so far as the Sheriff-Substitute can judge, the decision was not affected by these,

and the case is, as it seems to him, a direct authority, which he would be bound to apply here. Were the point open, he confesses that he would hesitate somewhat before coming to the conclusion that an established right of servitude was extinguished by the mere fact that the possession of the road had not been confined to the grantees of the servitude, but had been enjoyed also by the public." Truly there are some specialties in the case of *Smith*, here referred to, for the case was this: "The road trustees of Aberdeenshire, on the application of Knowles, ordered a road to be shut up, passing through his lands, and leading from the neighbouring lands of Ords to the parish church. Of this order a reduction was brought by Smiths, the proprietors of Ords, who alleged that the road in question was a private servitude kirk road for behoof of the tenants of the lands of Ords and other parishioners, and contended that although the trustees were authorised by a local statute to shut up 'kirk roads or footpaths,' they had no power to interfere with a private right of servitude. On a remit to the Jury Court to determine the facts as to the character of the road, a verdict was returned, finding, 1, That the road in question had not been used as a private road or servitude kirk road only, but also as a public road or highway by the public at large; and, 2, That there was no sufficient evidence that the road had been maintained either by the individuals claiming the use of it, or by statute labour, or out of the public or parochial funds. On a motion to apply this verdict, Smiths contended that a right of servitude was established by it, and that the circumstance of the public having also been admitted to the use of the road could not warrant the trustees to deprive individuals of their right of servitude." Now this was a kirk road. That was the character of it, though it was sometimes called a servitude kirk road. But the Act of Parliament under which this case was to be decided gives trustees power to shut up kirk roads, and that is rather an important speciality in the case. The main feature of the road now in question is that it is an absolutely necessary adjunct to the mill. The mill cannot go on without it. It is granted as an important adjunct to the mill. It has been used for 150 years as the only access to the west, and constantly used for the purpose of access to the mill-lade, and to the intakes above, and to the sluices. I do not think the Sheriff-Principal seems to have adverted very much to this plea, which troubled the mind of the Sheriff-Substitute; and it seems that his Lordship in all probability would have arrived at the same conclusion at which I have arrived had he not conceived that he was bound by the authority of this case. I fairly confess that when I find that this was the cause why he acceeded to the motion for an interdict, I am very much inclined to say that his ground of decision does not satisfy me. How long this statute labour character had been impressed on the road I cannot pretend to say, but it seems very evident that the trustees had not done much in the way of keeping it up, and from anything that appears they seem to have left it very much to the exertions of those that were principally interested in it, viz., the occupants of the mill. If your Lordships will turn to page 61 C, you will find one of a very few and scanty evidences about the improvement and mending of the road, and the expenses upon it. James Donaldson, at page 61 C, says, "I am 57 years old. I was born at Fountainbleau, which is quite close to Craigie mill. I have known the road in dispute all my life. I have seen Mr Sandeman" (a former tenant of the mill) "occasionally repairing it, but I cannot say I ever knew of the road trustees doing anything to it." Now, he was just the man that had an interest in it, and you find him repairing the road. The road trustees do not seem of late years to have had anything to lay out upon it. Now, we have here not only the use of the road as an indispensable part of the grant, but we have also the expenditure of money upon it. The idea that this grant could be lost by negative prescription or non-use by the tenants of the mill, who must have made use of it every day of the year on which there was anything coming to the mill, seems to me a very desperate attempt. I am therefore humbly of opinion, and that upon grounds which appear to me to be very clear, that the privilege, important and essential to the mill of Craigie, was constituted in 1722, the grant was recorded in the burgh books 50 years afterwards, and during the remaining time we have the evidence of half a dozen witnesses that it was constantly used and was the only access to the mill from the west. Having this conviction, I fairly confess that I have considered it of less consequence to wade through the very subtle arguments that were suggested in the Court below, and also very ably indeed here, as to whether the proceedings of these trustees were perfectly regular and in consistency with their Act of Parliament. I look on that as a matter of very little consequence, and I cannot say that I have bestowed so much pains upon it as to have arrived at a distinct result whether the irregularities or deficiencies of notice under the 37th section were sufficient to render it an irregular proceeding, or whether under the 34th section they were entitled to give their orders with less formality in respect that this was a road for which there was a recompense in the shape of a new road to be given. I cannot say that I have made up my mind on these points, because I thought it was unnecessary, holding the view that I do, that this did not fall under the jurisdiction of these trustees,—that although they might sanction the alteration of the road as a public and statute labour road, and so far as that was concerned entitle Mr M'Gavin no longer to consider this as a statute labour road passing through his ground,—still I could not imagine it to be within their power under the jurisdiction that they had to stop up and prevent such a right as this on the part of the mill. The advantage to the public was to shorten the access by the statute labour road to people coming from the one public road to the other, going to Dundee. It had the effect of substituting a straight line for an angle, but so far as the mill's interest was concerned, it was substituting an angle, and a very acute one, for a straight line. So that the advantage to the public in regard to length or circumbendibus was just the inverse of the prejudice to the mill. I look upon that as a matter of perhaps minor consequence, because the mere distance is one thing, though it might have affected the popularity of the Craigie mill and the success of it, seeing that it had competitors and rivals—no less than two of them within a short distance of the Dichtie water; I do not look upon that as of such importance, but I think the access to the mill-lade secured by this piece of road was of essential importance to the success of the mill; and therefore

I come to the conclusion that we should alter the interlocutors here submitted to review. I think we should refuse the interdict which was asked by the petitioner, and find that they had no right to block up this road as a private road.

Lord Neaves—I have carefully considered this case, the proof and the proceedings, and I have arrived at the same conclusion which your Lordship has reached, and upon the same grounds. The full and distinct manner in which your Lordship has stated the evidence will save me a great deal of statement; but I shall direct attention to some of the principles that I think applicable to a case of this kind, and which I think have been very much overlooked in the Court below. The questions that sometimes arise in consequence of the severance of property into different parts, are questions of considerable delicacy. Suppose a property exists of a complex kind, containing a mill and a farm occupied for different purposes, it may be necessary constantly to have communication between all the different parts of that complex property; but so long as it is in possession of one proprietor, there can be no such thing as a servitude constituted. Though the lands and mill were possessed separately by tenants, there might be leave to pass over the other's ground for the convenience of each, but that would not be a servitude so long as the proprietor was the same, because there is no rule better fixed than *Res suam servit nemini.* But when a property of that complex kind is to be divided so that it comes to be owned by several proprietors, very nice questions may sometimes arise, although there be no express writing on the subject. The proprietor of a complex subject feuing a part of it will not be allowed to say afterwards that those accesses and uses which were essential to the enjoyment of the one subject that he has parted with shall cease merely because he has conveyed it away. There are cases where roads of convenience and accommodation that have all along subsisted between one part of the property and another remain without any express constitution of servitude, upon the footing that they are necessary for the enjoyment of the subject conveyed, and that it must be held that they were so conveyed to the new proprietor with those benefits that were previously essential to the full enjoyment of it. That may often arise, I think, without express stipulation, but if there is an express stipulation in the original sale or feu-contract, then it becomes a most solemn contract. It is upon this, even in a general way, that the right of ish and entry depends, but still more when that is guaranteed and derived by express writing in the deed of alienation, it becomes as solemn and sacred an obligation, and as perpetual an obligation (unless it is lost in some way) as is known to the law. Now I cannot conceive a clearer grant of a right to use the road to this mill than that which we have in the year 1722. Free ish and entry is granted,—the right to use the road both to bring grist to the mill and to carry away the corn which has been ground, and also to get access for the purpose of repairing a vital and essential part of the mill,—its mill-lade and the various sluices. Nothing can be more clearly given by the deed of 1722, and although I do not think that an essential part of the case, I think the very peculiarity of that grant is an indication that at that time there was no public road there, because if there had been a public road, it might not have been thought so necessary to constitute expressly this grant of servitude which is there made a part of the grant. The lands are given with this adjunct for the enjoyment of access to the mill in this direction, and communication with the mill-lade and sluices, and this is given for an onerous consideration. It might have been for a price; it is all the same whether the onerous consideration is paid down at once in a slump sum, or whether it continues to be payable periodically in the shape of a feu-duty, that feu-duty is payable for the benefit and for the whole benefit of the subject contained in that grant, and it seems to be out of the question that any act of the granter, who is still going to draw his feu-duty, should be permitted, that destroys the benefit that was stipulated for, and which must be regarded as part of the cause and the moving consideration of the arrangement. It is said that this grant is not repeated in the subsequent writs. I don't think that is of the least consequence. The feu-duty would not be repeated, but it would go to the superior for all that; and the servitude need not be repeated, for servitudes do not technically or strictly require a written constitution. It is of very great importance in a case like this that there does exist a written constitution, because it gives us evidence of how it came into existence, and the reason for its doing so. But a servitude may arise without a written constitution, and this being in the original grant, gives us the origin and the reason for it; and the question just is, whether it has been lost? It is certainly not lost by the mere omission to repeat it in the writs by progress which the superior may grant. It may be lost otherwise; it may be lost *non utendo*, but that is not said here. It was lost *utendo*, that is to say, it was lost by the public being allowed by the servient tenement to come in and participate in the use of the road. The party could not stop the public; the servient tenement could, but did not choose to do so, and the road in that way is said to have become a statute-labour road. I think it must have become so a considerable time after the original grant, but whether it did or not, it is a separate thing. It was not granted simultaneously, but was constituted by a special right originally in favour of the mill; and is it to be said that if the public afterwards got a right to it, and it becomes a statute-labour road, that extinguishes the original contract between these parties, and the person who feued it out can then say—"I will come in place of the trustees, and deprive you of it?" I know of no authority for that; and it seems to be admitted that there is no authority, if the case of *Knowles* is not an authority. To my mind that case has no bearing on this at all. There apparently there arose simultaneously some right which could be traced to no origin of a private nature. And then this question might arise, that if a private party who only gets the same sort of interest in the road that the public get, shall he impute it to the constitution of a servitude when all the rest of the world are imputing it to the publicity of the road? He shall not say it is a servitude to him when he is just one of the public. That is a totally different case from the case where he has a separate title and separate interest, and where it is not as one of the public that he has it, but expressly as the owner of a dominant tenement, getting for value a servitude

which he is maintaining, and which the public may come to participate in if they are allowed by the other party, but whose right is neither dependent in its origin on the public right, nor is it to cease because the public cease to use it. Suppose the public had ceased to use it for a time, that would not affect the private party's right in the slightest degree. He would not keep it up for the public when using it under his servitude, nor would he cease to use it because the public had ceased to exercise their public right. As regards the case of *Knowles* v. *Smith*, there are two things in respect of which it appears to me to differ entirely from the present case, and which shew, I think, that it has no application. In the first place, there never was anything that fixed it as a proper servitude right. The party said it was a kirk road. I demur to the idea that a kirk road is a servitude road. It is not a predial servitude. The statement by the party was, that it is available as a kirk road—on Sundays, I suppose—to the tenant and the other parishioners. That is not a servitude. That is a public right of a limited kind. It is a public road, and the Act of Parliament gave power to shut up kirk roads on the footing that they were public roads capable of regulation. So that what between the only servitude claimed being as a kirk road, and the express right given by Act of Parliament to shut up kirk roads, it appears to me that no other judgment could have been pronounced than was pronounced in that case. It was not only used as a servitude or kirk road,—that does not make it a legal servitude,—but it was used as a servitude road might have been used at different times, though not separately or as by an independent right; but there was a promiscuous use of it by the parishioners in going to church, and by the public. It would need to be a very strong case indeed that would entitle those who are enjoying a kirk road under that Act of Parliament to plead its exemption from regulation, or adjustment, or shutting up, or anything else in terms of the Act of Parliament, merely because they have enjoyed that very thing which brings it under the Act of Parliament. Making it a kirk road brings the road under the terms of the Act of Parliament, and so in that way there could be no other judgment pronounced than the one that was pronounced. But here there is no power to shut up servitude roads or any roads coming under the denomination as originally constituted; and when we have here an original constitution proved in the manner which your Lordship has pointed out, it gives it a category of its own. It was a road by original contract of a predial kind, and feu-duty is paid in consideration of it. The trustees never acquired right to the *solum* of this road. It is not very clearly made out what Mr M'Gavin did about it,—whether he kept the road originally and did not need to get it back, or whether he got it back again. But that would not signify. He is now the proprietor again, or has always been the proprietor; but does that exempt him from representing the party whose successor he is in that which is transmissible to singular successors, viz., a right of servitude paid for, and paid for periodically in the feu-duty granted for it. I think the road trustees have no interest to shut up this road. All the interest they have is to save the expenditure of their money. That they can stop as much as they like. They can withhold their funds, and Mr M'Gavin, after the declaration by the trustees of its ceasing to be a statute-labour road, has it in his power to exclude the public from it, and to limit the right to those that have the predial servitude constituted by a valid and binding contract. These are the general principles applicable to this case, and I think they have been overlooked. It is plain that if the Sheriff-Substitute had taken the view we are now taking of *Knowles'* case he probably would not have pronounced the judgment he did. I think the case of *Knowles* is broadly and markedly distinguished from the present; and without going into the evidence, which shews that for a century and a-half this road must have been used as a means of getting to the mill and taking away the grist from the mill, I think that what is now attempted to be done is a violation of the rights of the defenders by the party who granted the right, for I regard him as the universal successor of the original party. He cannot keep the superiority and refuse to allow the beneficial enjoyment connected with the mill: all the more as, I think, it is not an ordinary servitude, but an appurtenance of the mill as it were. It is a right of ish and entry; and that ought to be secured to him. If it were proposed to shut him up altogether, that never could be permitted. In these circumstances, I think we are called upon to recal the interlocutor, and find that the petition must be refused.

Lord Ormidale—As I have the misfortune to differ from your Lordships in many of the views which you have taken of this case, and in the conclusion at which you have arrived, it is necessary that I should state the grounds on which I think the judgment ought to proceed. I wish to remark at the outset that it would appear (and this is important with reference to a view which I shall afterwards suggest may be fairly taken of this case), that the appellant (the respondent in the Court below) knew of the proceedings of Mr M'Gavin and the Road Trustees before they were commenced, and during the whole of their progress. He states that candidly and fairly enough when he was examined as a witness; and yet down to the last moment, till after the conclusion of these proceedings, from anything we observe he makes no remonstrance, and does not attempt any interference. But after the proceedings have been carried to a conclusion, when that conclusion was to the effect that this was a public road which the trustees had under their charge, and were entitled to shut up, and which they did shut up by giving a new one in its place; and then when the fence or barrier was put up by Mr M'Gavin to prevent parties from going by that road, and requiring them to go by the new or substituted road, Mr M'Intyre, at his own hand, proceeds to break down that fence; and then a petition on the part of Mr M'Gavin is presented to the sheriff for interdic against that unwarrantable proceeding, in his view. I don't mean to say that Mr M'Intyre was actuated by any improper motive in taking that course of action. I daresay he thought he was entitled to do exactly what he did, and I am bound to suppose that all the more after the opinions which have now been delivered by your Lordships. But I think it is very unfortunate and much to be regretted that he did not go before the Road Trustees at an early period and remonstrate against their interference with this right of way, if it was a valuable one for him; because, for anything we

know, if he had taken that course, it is possible the trustees would then, in the discharge of their duty, giving effect to all due complaints or remonstrances or representations made to them by everybody interested in the matter, have held their hand and said, "We won't alter this road; it is useful for the mill, and the proposed substitute road will not be so available to Mr M'Intyre." It is quite possible that the trustees would have come to that conclusion, and so the whole of this litigation would have been saved. But Mr M'Intyre did not adopt that course. He stood by silent and apparently acquiescent till the whole thing was done, and then, *brevi manu*, broke down the fence which had been set up. Now, I impute no motives here, and I don't think I am entitled to do so, for I daresay Mr M'Intyre took the course which he was advised or thought he was entitled to take; but I think it unfortunate that that course should have been taken, for it is not one that recommends itself to my mind, or that could recommend itself to any court of law. Be that as it may, the question which we have now to decide is, whether or not the trustees were entitled to shift about this road, so far as Mr M'Intyre, the appellant, is concerned; and the first question we have to deal with in the consideration of that matter is the right of servitude which he claims. It is called a servitude throughout the pleadings. It is laid upon that, and upon that alone. I quite concede that the Road Trustees had under the statute right to interfere with a private servitude road, and they had no power except what the statute gives them. That is perfectly clear; but the road was undoubtedly a public road, and as such it fell under their power and jurisdiction; and if it had been a public road, and that alone, they were entitled to deal with it as they did. They were entitled, if they thought it was not a convenient road for the public, including Mr M'Intyre as one of the public, to shift it about to the extent which they did, and to make it, in the language of their own surveyor, a more convenient and a better road, only a little longer. That is what Mr Callen, their own surveyor, says. He says, "The substituted road is, in my opinion, a far better as well as a more convenient road than the old one. Of course, to parties going north it gives a little longer journey." Now, that is the whole matter, for I see no contradiction of that anywhere. It has been brought out—and I believe with perfect accuracy by your Lordship, from your examination of the plan—that the distance that the mill people would require to go to the west, or to the north, as Mr Callen calls it, would be somewhat greater—I rather think about a quarter of a mile. [Lord Benholme—3000 feet instead of 1200.] Well, my calculation was that it would come to about a quarter of a mile. But it rather appears to me, from my inspection of the plan, that there was access to the intake and to other portions of the lade, independent altogether either of the old or the new road. There was access to the mill by the north, and then by a road going in that direction towards the intakes. From my examination of the plan, I think that is so; but even supposing I were mistaken in that, it is not very material to the legal questions which we have here to dispose of. A good deal was ably and ingeniously suggested as to the want of a proper constitution of a servitude. Now, I am disposed, although I must own that I am not so perfectly clear upon the subject, to concur with your Lordship in the chair that there was here a sufficient constitution, if a constitution in writing was necessary at all, supposing we had all the other requisites to show that there had been a servitude road. It is certainly an odd kind of constitution, for it is, in the first place, with free ish and entry, and that is independent altogether apparently of what follows. It would be an odd kind of conveyance to a mill if there was not free ish and entry to it. It would be very extraordinary indeed if a party who took a feu of a mill could not enforce free ish and entry, independent of any special conveyance of any particular ground. But the constitution in the deed of 1772 goes on to say, "and with sufficient ways and passages of 12 feet broad besouth the lade." Now, that is a very singular mode of referring to an existing road. It rather looks to me as if there were no properly defined road or passage at all at the date of that deed in 1722, and that it had very likely been land or ground which had been of little or no value, where the road has been since established, and that what was intended was this—'it may be one or it may be two or more roads or passages which will be given to you, but it is a matter for the future.' That is not settled upon, but the miller was to get that from the granter of the deed; and if there had been clear evidence of possession of the old road in dispute, following such a constitution as that, I would be disposed to say that there was ample constitution, not only of the grant itself, but of the establishment of it by possession. Upon the whole, I am inclined to think that if there was nothing else in the case, there was to begin with here a right which might have been of the nature of a servitude established in favour of the miller. But this cannot be dealt with merely upon that footing. We must look at something more than merely the right so established in favour of the miller; and the next point that I think is deserving of consideration—and more consideration, with humble deference, than your Lordships have been disposed to give to it—is the fact that after 1722 there is no notice whatever taken of this constitution in the subsequent transmissions. That strikes my mind as being somewhat peculiar. The next transmission that takes place is in 1728, and there are several transmissions following, and in not one of them is there any reference whatever to these passages or roads or to any servitude road whatever. Now, how did that omission arise? The fact of the deed being recorded in the Burgh Court Books at Dundee does not appear to me to bear much on the matter. I think the deed was probably recorded, not with reference to the constitution of a servitude, or having any regard to a servitude at all, but with reference to the other matters embraced by the deed. I think that is much more likely than that it was recorded for the purpose of keeping up a record of the servitude. Therefore I cannot think that has much bearing upon the matter. But may it not very well be suggested that, in the meantime, if not before the date of the deed in 1722, the passage in dispute had been established as a public road. Unfortunately we have not got evidence, and I am a little surprised at that, as to the origin of this line of road being made a statute labour public road. I should have supposed that the books or documents of the Road Trustees might have thrown some light on the subject; but as the case stands we have no evidence whatever on that subject, though it is quite a supposable case that

soon after the constitution, as it has been called, of this servitude in 1722, seeing that all reference to it was dropped in the subsequent transmissions, the road had become an established statute labour or public road, and that then all parties concerned —the parties in right of the mill as well as Mr M'Gavin, the proprietor, through whose grounds the road passed—came to be satisfied that there was to be an end of that private right, it having been absorbed in the public right. I think it is not unreasonable to suppose that that may have been the case. It may have been thought by the miller of the day that it was better for him to have a public road there than a mere right of servitude. As the dominant tenement—the party enjoying the servitude—he had no right whatever to call on the servient proprietor to keep that road in order for him. He could prevent the servient proprietor from destroying it, but he had no right to get it repaired and kept available for his purposes connected with the mill. But if it was established as a public road under the jurisdiction and power of the road trustees, it necessarily then became part of the duty of the road trustees to keep up the road for him and for all the public, just as they were bound to keep up in a state of repair and usefulness all the other roads under their charge. He would therefore, by its becoming a public road have enjoyed very considerable advantages. Further—and here again, unfortunately, we cannot speak with any certainty—at the time this road was absorbed or taken under the charge of the road trustees, the party in right of the mill at the time may have got an equivalent for any right that was lost to him, if he thought there was anything lost to him at all. The road trustees had no right to take this ground from Mr M'Gavin, or from any other party, to make this road on it, without paying compensation. Private parties might, for the sake of getting a public road there, give their ground to the road trustees for the equivalent of getting a road established there, and for the consideration that it would be henceforth kept up at the expense of the ratepayers generally. That might be so. How it was in this case I don't know; but it appears to me that if road trustees take private ground for the purpose of making a public road, they are bound to compensate all parties who may be thereby affected. They were bound to compensate Mr M'Gavin, and I have no doubt they did compensate him or his partners when the ground was taken to make it into a public road. They were bound to compensate any party having a private servitude over that ground if he could shew he was entitled to compensation; and for anything we see or know the party in right of this servitude at the time either did get compensation or said he did not want any, thinking that the public road would be more beneficial to him than any private road which he then had. I think it is not unreasonable to suppose that the party in right of this alleged servitude road might have found it his best course to give up any right he had to the road trustees, or to parties coming in place of the road trustees at the time, for the purpose of having a public road established. We are not to assume that merely because a private party having a private right over a piece of ground gives it up to the public, he is in that way to run the risk of having everything extinguished and lost at some time or other by the road trustees shutting up the ground and destroying his private right, or rather the convenience which that private right gives him; because under the statute he had a right to appear as a party having interest, and to say, Don't shift round this road; it may be very beneficial for some parties, but it will be highly detrimental to me. It must be assumed that road trustees in the discharge of their duties will always give effect to a just and well-founded remonstrance of that kind; so that Mr M'Intyre, or those in his right when the road trustees first established this road, might have thought that they were quite safe in regard to any future encroachments by the road trustees. Now, these are the circumstances in which we have to determine this right of private servitude. Is it to be held after such a lapse of time that this right was not completely put an end to by the public and superior right? There is not much authority, if any, to aid as in the solution of that question; but I cannot concur with my learned brothers in thinking that the case of *Smith* v. *Knowles* is to be treated as having no bearing upon this point. I have read the case again and again in both editions of Mr Shaw's Reports, though I think both reports are very much to the same effect; and I cannot help thinking that it has a material bearing in support of this proposition, that public right absorbs and annihilates the private right of way. In that case, by the Aberdeen Road Act, the trustees were entitled to deal with kirk roads. We are not dealing with a kirk road here, but I think it must be held that the kirk road they had a right to deal with was a public kirk road. I cannot concur with my learned brother who last delivered his opinion that there is no such thing as a kirk servitude, for any one turning up the cases in the Dictionary under the word servitude will find kirk servitude roads so classed and so dealt with. The dominant tenement in the case of *Smith* v. *Knowles* was a particular farm and the occupants and inhabitants of that farm going to the kirk. No doubt it was in favour of the parishioners also,—the parishioners going from that particular district probably being very few. But it must have been dealt with by the Court as a servitude or private right independently of the public altogether, or how it is possible to understand that they should have sent the case to a jury? There were two trials on the subject, the jury having in the first instance returned a verdict entirely in favour of the private party, but there was a motion for a new trial and a remit again. But why remit at all, if the kirk road which admittedly was comprehended by the Aberdeen Statute which was there in operation,—if a kirk road must be dealt with as a public road, then *cadit quæstio?* There can be no dispute. But what the party alleged, and what the Court held to be a perfectly relevant allegation, was, "it is a private servitude kirk road?" Now, the verdict at the second trial was that the road in question had not been used as a private or servitude kirk road only, but also as a public road or highway by the public at large. Is not that the very verdict according to the evidence we have here, in any view of the case that could be taken, that would be returned if an enquiry had been necessary in regard to the road in dispute? It was used, in the most favourable view that can be taken of the evidence for M'Intyre, as a servitude road to his mill, but it was also used by the public at large. Well, on such a verdict as that, the Lord Ordinary in the first instance, and the Court afterwards, on the application of the

verdict, assoilzied Knowles, and the Court refused the petition without answers; that is to say, they held that the public road prevailed over the servitude road, and put an end to it; for that is the only way I can read that judgment. It is most unfortunate for the present discussion that the case is so meagerly reported that we have not one word given as to the views of any of the Judges; but I think that case has a bearing on the present, and I think it tends, to say the least of it, to support the conclusion at which I have arrived, that a public road established and in existence for such a length of time as the present must be held to have put an end to and annihilated the private road. I have the less reluctance in coming to that conclusion, because, looking at the statute, I find that Messrs M'Intyre are not without a remedy, supposing that it is a serious grievance being obliged to go a quarter of a mile round, although by a much more convenient and a better road; but they are not without a remedy, for by section 35 of the statute it is enacted "that in case by altering the course of any of the said roads, it shall become necessary to have roads of communication for persons residing on or near the old roads to the new roads, it shall and may be lawful to and for the said trustees, or any seven or more of them, to make such roads of communication in like manner through and over such grounds and fences, as to them may appear most proper for the purpose." Now, it rather appears to me that under that section of the statute Messrs M'Intyre might, and they still may, make an application to the road trustees to continue a communication or to make a new communication from their mill direct to the point where the new road abuts on the public road on the west. They may make that application, and I must assume that the road trustees will do them justice in that matter. I have therefore less hesitation in saying that that is the true remedy, and that it is not to be held that this right having been in abeyance, and as a separate and independent right entirely non-existent for 150 years, is now all at once to be revived. On the contrary, I think that servitude road must be held to be dead and buried under the public road long ago.

But the next question is—*esto* that this is not an operative private servitude in favour of Mr M'Intyre, did the Road trustees proceed so regularly that we are entitled to sustain their judgment in shifting it about, and giving a new road, as they did. We have had a vast deal of discussion on a great many points, made on the footing that the 37th clause of the statute was alone applicable. I am very clearly of opinion that the 34th is the clause that is applicable; and assuming that to be so, the 34th clause makes no reference to forms whatever, so that that question is entirely laid aside. I can quite understand a reason for that, because the things which are referred to in the 34th clause are comparatively unimportant matters that the trustees are to deal with—as to repairing and altering roads, and where it is more convenient for a shorter or a longer distance to shift a road about they are entitled to do that in the words of the statute "as they think proper." The words of the 34th clause are very important,—"as they shall think proper, be changed or altered." But we were referred to subsequent clauses in the Act, which are a little perplexing there is no doubt, especially the 48th and 49th, as denoting that there must be a shutting up of the road after regular forms and advertisements; but it rather appears to me that the explanation given by the counsel for the road trustees is sufficient, and that we have in section 50, following up section 34, quite ample grounds upon which to hold that the forms are inapplicable altogether to section 34, and that that is quite sufficient to support everything the trustees did. I would only say that if we are to go into the matter of form at all,—like your Lordship in the chair, I don't say it is necessary because I don't it is necessary to give any conclusive opinion on the matter, but my impression rather is that these alleged irregularities were not sufficiently well founded to entitle us here to review and set aside the whole of the proceedings, if there was nothing else in the case. I am the more inclined to take that view, having regard to the case of *Crawford* v. *Lennox and Another*, decided in this Division on 15th of July 1852, and which is to this effect, as indicated in the rubric, "In an action of reduction of the proceedings of road trustees in shutting up a road under the provisions of a local Road Act, which had been brought by certain parties interested in the use of the road at a distance of ten years after the proceedings complained of were carried through, on the ground that the intimation required by the statute to be made to the owners of the lands through which the road passed had not been duly given; the Court sustained the defence that the pursuers not having availed themselves of a power of appeal to the Quarter Sessions and to the Court of Session, conferred by the statute, were barred from insisting in the action, and that the proceedings of the road trustees were final and conclusive." Now I see by the Road Act which we are dealing with that there are clauses which are almost identical with the clauses founded on in that case. They have not been printed, but I find them in the process copy, No 143, and they are to this effect, "Provided always, and be it further enacted, That if any person shall think him or herself aggrieved by any of the proceedings in the execution of this Act, for which no particular method of relief has been hereby provided, such person or persons may, within six months after the matter complained of shall be done (but not afterwards) appeal to the trustees of the peace at their Quarter Sessions for the said county,—the person or persons appealing first giving fifteen days' previous notice of such appeal to the clerk of the said trustees, and also to the clerk of the said Justices of the Peace, and lodging with him at the time of entering the said appeal, a recognizance to prosecute the same; also giving legal notice thereof to the defender or defenders; and the said Justices of the Peace are hereby authorised and required to take cognizance of such complaints and appeals, and to make such determination therein as they shall think proper, and such determination shall be final." And the last clause but one is to the effect that even such appeals to the Justices are not to be competent at all except within six months after the alleged wrong has been done. There is great propriety in these limitations; for why should a case of this description about the shifting of a road round for a certain distance, and substituting a new one for the old one, be brought into the Sheriff Court, and then appealed to this Court, and from here I suppose to the House of Lords. I think we are hardly entitled to suppose that that could be contemplated by the statute; most un-

doubtedly the case of *Crawford* goes to the contrary, for it goes to shew that there should be a finality where there is such ample power of review given. No doubt it may be said, and that is the only answer to this view that could well be made, that the proceedings of the road trustees here were entirely out of the statute, and that therefore the finality clauses do not apply. That answer was made in the case of *Lennox* v. *Crawford*, and although the Court proceeded on the assumption that a very important form, viz., advertisement or notice to the parties through whose grounds the new road was to pass, had not been given, still they said that was a wrong which did not entitle the Court to say that the proceedings were irregular, and therefore not protected by these clauses. It humbly appears to me, therefore, upon all the grounds to which I have now adverted, that the conclusion to which both the learned Sheriffs in the Court below have come is the correct conclusion, and on that view I would suggest that the appeal here should be dismissed, and the judgment of the Sheriff affirmed.

LORD BENHOLME—Then your Lordships alter.

Counsel for Appellants — Watson and Asher. Agent—W. Archibald, S.S.C.

Counsel for Respondent—Dean of Faculty and Balfour. Agents—Morton, Neilson, & Smart, W.S.

Tuesday, June 16.

FIRST DIVISION.

PETITION—MRS SARAH OGG OR WALL.

Husband and Wife—Habit and Repute—Legitimacy.

A and B were lawfully married in England, and on 1st July 1862 the marriage was dissolved by decree absolute of the Court for Divorce and Matrimonial Causes, on the ground of B's adultery. The said decree was subject to appeal to the House of Lords till 19th February 1863, before which date, even although no appeal was taken, neither party was free to marry again. On 16th July 1862 A married C, in Glasgow, after due proclamation of banns, in an Episcopalian church, and according to the rites of the Church of England, both parties believing that A was free to marry, and that the marriage was valid accordingly. From the time of the said ceremony till the death of A, which occurred in July 1871, he and C constantly, continuously, and openly lived and cohabited together as man and wife, and were holden and reputed to be so by their relations and friends, and by all who knew them. *Held* that A and C became married persons after the removal of the impediment to their marriage, and prior to the birth of a son in 1864.

The following Case was stated by the Judge Ordinary of her Majesty's Court of Divorce and Matrimonial Causes in England (upon evidence heard before him at the hearing of a petition brought by Mrs Sarah Ogg or Wall as guardian of her sons William Ellis Wall and Edward William Wall, to have it declared that they were legitimate), for the opinion of the First Division of the Court of Session, in pursuance of the provisions of 22 and 23 Vict., cap. 63:—

"(1) William Ellis Wall and Hannah, otherwise Anne, Jones were lawfully married in England on 11th June 1857. (2) The said marriage was dissolved, on the ground of the wife's adultery, by decree absolute of Her Majesty's Court for Divorce and Matrimonial Causes, dated 1st July 1862. (3) The said decree was subject to appeal to the House of Lords till 19th February 1863, from and after which date, no appeal having in fact been presented, each of the parties was at liberty to marry again; but until the period for appealing expired, neither party was free to marry again, as the Act which governs the matter has been interpreted by the said Court. And for the purposes of this case any marriage contracted by either of the parties before the expiration of such time must be deemed to be void. (4) On the 16th July 1862, while the period for appealing against the said decree was still current, the said William Ellis Wall, whose domicile of origin was English, and Sarah Ogg, were, after due proclamation of banns, married in Glasgow, in an Episcopalian church, according to the rites of the Church of England, both parties believing that the said William Ellis Wall was then free to marry, and that the marriage was valid accordingly. The same would have been valid except only for the impediment, unknown to the parties, that the said William Ellis Wall was not then free to marry by reason of the period allowed for appealing against the aforesaid decree of divorce not being then expired. This marriage ceremony was, contrary to the intention and belief of the parties, and for the reason assigned above, and no other, ineffectual by itself to constitute the relation of man and wife between them. It was proved by the said Sarah Wall at the hearing of the petition that the deceased had waited for the decree absolute to be pronounced on the 1st July 1862, in order, as they believed, that before it took place all legal impediment to their marriage should be removed. (5) From the time of the said marriage ceremony of the 16th July 1862 to the death of the said William Ellis Wall, which occurred at Sidmouth, in England, on 23d July 1871, he and the said Sarah Ogg, constantly, continuously, and openly lived and cohabited together as man and wife, and were holden and reputed to be so by their relations and friends, and by all who knew them. They so lived and cohabited together in Scotland from 16th July 1862 till May 1863; in Ireland from May 1863 till March 1864; in Scotland again from March 1864 till November 1867; and in England from November 1867 till the death of the said William Ellis Wall on the date aforesaid. The habit and repute which attended their cohabitation from the first and throughout was undivided. (6) The said William Ellis Wall and Sarah Ogg intended to contract marriage together: the marriage ceremony of 16th July 1872 took place in pursuance of that intention. They believed, and never, prior to the death of the said William Ellis Wall, ceased to believe, that the marriage ceremony was lawful and valid, and throughout their cohabitation they intended to stand to each other in the relation of husband and wife, and believed that they did so, and their said treatment of each other as husband and wife, and of their children as legitimate offspring, was due to this belief. (7) The said William Ellis Wall and the said Sarah Wall did not, at any time after the said 16th July 1862, interchange or express to each other any consent to marry, or to make any