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

acknowledgement with the purpose of contracting a marriage, unless such consent or acknowledgement is to be inferred as a presumption of law from the facts therein stated. (8) There were four children of the said William Ellis Wall and Sarah Ogg, namely, two daughters,—Sarah Wall, born on the 22d August 1862, at Glasgow, in Scotland, and Fanny Catherine Wall, born on the 6th May 1864, at Dalkeith, in Scotland; and two sons, —namely, William Ellis Wall, born on the 30th August 1866, at Dalkeith, in Scotland, and Edward William Wall, born on the 17th March 1868, at Exeter, in England, and the said William Ellis Wall, the father, and Sarah Ogg, then Sarah Wall, understood and believed that the said children were legitimate. (9) The said sons, who have respectively a claim to real estate in England, are the petitioners in this suit, by their guardian assigned, for a declaration of the validity of the marriage of their parents, and of their own legitimacy, under the 'Legitimacy Declaration Act, 1858,'"

The question on these facts is,—"Whether, according to the law of Scotland, which it is to be assumed governs the matter, the said William Ellis Wall and Sarah Ogg, after the removal of the hereinbeforementioned impediment to their marriage, and prior to the births of their said sons, or either and which of them, became married persons."

Argued for the petitioners—In this case habit and repute was proved, and when these facts were proved the law presumed marriage. The only question here was at what date must the marriage be held to have taken place. Clearly, at the date of the removal of the obstacle to the marriage on 19th February 1863. Therefore the question before the Court should be answered in the affirmative.

Argued for the respondents—Habit and repute was not a method of establishing, but of proving, a marriage, and the question was whether the presumption which habit and repute raised was one of law or of fact. It was a presumption of fact, because the contract of marriage was a civil contract, depending on consent, and whether consent was given or not was a question of fact. The presumption then being one of fact, were there any elements in this case to weaken the presumption? There was one element which destroyed the presumption altogether, and that was the fact that the cohabitation was begun and continued in the belief that the ceremony of 1862 was a marriage. That ceremony did not constitute a marriage, but the parties thought it did, and so when the bar to their marrying was removed they would not then interchange any consent to live together as man and wife. So the presumption, being one of fact, that after the removal of the bar consent was interchanged, had no room in this case. There was therefore no marriage by habit and repute, and the question should be answered in the negative.

Authorities—Ersk. i., 6, 6; Stair, i., 4, 6, and 4, 45, 19; I. Fraser, 142 and 203; *Lowrie* v. *Mercer*, May 28, 1840, 2 D. 953; *Campbell* v. *Campbell*, June 26, 1866, 4 Macph. 867, 5 Macph. (H. L.) 115; *Cunningham* v. *Cunningham*, 2 Dow 482; *Lapsly* v. *Grierson*, Nov. 19, 1845, 8 D. 34.

The Court returned the following answer to the question submitted:—

"*Edinburgh*, 16*th June* 1874.—The Lords of the First Division, &c., make answer and say that according to the law of Scotland, William Ellis Wall, in the said case mentioned, and the petitioner Sarah Ogg or Wall, after the removal of the impediment to their marriage, also in the said case mentioned, and before the birth of their eldest son William Ellis Wall, became married persons.

Counsel for the Petitioner—Dean of Faculty (Clark), and Watson. Agents—T. & R. B. Ranken, W.S.

Counsel for Respondents—Scott and Balfour. Agent—D. F. Bridgeford, S.S.C.

Friday, June 19.

FIRST DIVISION.

[Lord Shand, Ordinary.

THE DUKE OF DEVONSHIRE AND OTHERS, *v.* FLETCHER AND OTHERS.

Sale—Implement — Title—Trustee — Marriage-Contract.

By marriage-contract in the English form, the portion of the wife was settled in trust for payment out of interest of an annuity of £200 to her during the subsistence of the marriage, and of the remainder of the interest to the husband. On the death of either of the spouses, it was provided that the whole interest or proceeds of the fund should be paid to the survivor during his or her life. The deed provided that failing children one-half of the fund should be the property of the husband and the other half the property of the wife, to be disposed of by deeds *inter vivos* or *mortis causa* in the case of the husband, and by *mortis causa* deed in the case of the wife. The deed further contained powers to the trustees to change the investments and to purchase heritable property and to dispose of the same from time to time, all with the consent and direction of the husband and wife, subject, however, to the declaration that the lands to be perchased with any part of the trust-fund should, for the purposes of the settlement, be considered as money and personal estate, and should be subject in all respects to the same trust as the money laid out therein would have been subject to if the same had been so laid out and invested. There were no children of the marriage, and the husband disposed of his whole interest in the trust-fund in order to raise money. The trustees in the course of their management had invested the trust-funds in a certain heritable estate, and with the consent of the spouses they entered into a contract for the sale of this estate. In a question with the proposed purchaser as to implement of the contract and payment of the price,—*Held*, 1st, That the husband, notwithstanding that he had conveyed away his whole interest in the trust-estate, was in a position to give his consent to the sale, in terms of the marriage-contract; but, 2d, that as the trustees could not purge the estate of incumbrances, the buyer was not bound to implement the contract of sale.

This was an action of declarator, implement, and payment at the instance of His Grace the Duke of Devonshire and others, trustees under