of obtaining information upon foreign law, but the parties agreed to adopt that course and the Court did not object; and what is the result of that opinion? It amounts to this—that Mrs Brown's deed was not revoked in whole or in part by her subsequent marriage; in the second place, that if there is no destination in the deed beyond the wife, and no will, the husband would take *jure mariti;* and thirdly, that the *jus mariti* will be excluded either by destination in the deed creating the separate estate or in a will subsequently made by the wife. That is a summary of the law given by the learned counsel. What is the effect. It is that the parties who are to take according to the will of the maker, are the heir in heritage or in moveables. The husband is neither the one nor the other. He is not so by the law of Scotland. He is not so by the law of Australia as ascertained in this opinion, and therefore he claims only under his *jus mariti*, on the footing that the object of the deed to create a separate estate in the wife during her lifetime having been accomplished, on her death his *jus mariti* revives, and the estate falls to him accordingly. The result, however, of sustaining such a claim would be to refuse to give any effect to the express words of the deed. I think therefore that the Lord Ordinary has decided rightly. While not determining the question whether the heirs in heritage or moveables are to be sought in this country or in Australia, all that he has done is to repel the husband's claim.

LORD SHAND—I am entirely of the opinion which your Lordship has expressed. When the case came before us first I think there were amendments of the record by both claimants, and the result was that the Court thought it necessary to have some opinion on the law of Australia. One of the points alleged on behalf of Mr Brown was that the trust-disposition, in so far as it could be regarded as a will and not as a contract, was revoked by the truster's marriage; that point is entirely out of the case, because the opinion returned is that the marriage did not act as a revocation. The only question that remained therefore was whether the husband of this lady was entitled to take under the final destination in the deed under which failing issue the property was destined "for behoof of my heirs and assignees in fee."

The first point to be determined in considering these words is, whether this is an appeal to intestacy. I agree with your Lordship in thinking that this is a case of testate succession, that these words are words of destination, and the lady having declared by that destination that her property is to go to her heirs and assignees, that destination must receive effect. It is not alleged that there was any assignation of the property, therefore the destination is to her heirs. That being so, now that we have the opinion of counsel the husband has no right that can be sustained. It may be that if she had died in Scotland the substantial rights would have been the same if she had died intestate, but there then would have been no difficulty. I would be prepared to hold that this is not a case of intestacy. It seems quite plain from the opinion that the expression is one that according to Australian law would not be interpreted as including anyone but an heir, because I find in answer to the question, "According to said law, who would take Mrs Brown's personal estate under the destination 'to her heirs or assignees in fee;' Would the husband be excluded from participation in said estate?"—"This is a very difficult question to answer, because the terms 'heirs or assignees in fee' are terms (I presume) of art in Scotch law, and the Court of New South Wales would seek to know what they meant according to Scotch law." And so the view I take of the case is that whether you appeal to the law of Scotland or to the law of the domicile in this question the lady has destined her property by the deed to her heirs—meaning in Scotland, so far as moveables are concerned, her heirs *in mobilibus*. It is thus quite clear that the husband would not take in any case.

LORD ADAM—I concur in the opinion expressed by your Lordships, but I may add that I would have been quite prepared to adhere on the grounds stated by the Lord Ordinary.

LORD M'LAREN concurred.

The Court adhered.

Counsel for Henry Crawford Brown—Low—Salvesen. Agent—James Philp, S.S.C.

Counsel for Bayne and Others—W. C. Smith—Graham—Stewart. Agents—Cairns, M'Intosh, & Morton, W.S.

Friday, July 18.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

CAMPBELL *v.* HALKETT AND ANOTHER.

Property — Servitude of Road — Implied Grant.

The proprietor of two adjoining estates H and B, who used to drive carts and cattle through B from H to the public road, left H to his brother in liferent and his grandniece in fee and B to his nephew in fee. The titles were silent as to any servitude over B in favour of H, which had another although less convenient access to the public road. *Held* that no grant of servitude was to be implied from these dispositions.

In 1889 William Campbell, Esq., M.D., of Burnsyde, in the parish of Largs and county of Ayr, brought an action of declarator against Mrs Margaret Kerr or Halkett, Great Fosters, Egham, Surrey, proprietrix of the lands of Hangingheugh in the

parish of Largs, and against Matthew Rankin, tenant of said farm of Hangingheugh, and residing at Broomieknowe, Largs, to have it found and declared that there was no servitude right-of-way or access of any description over the pursuer's lands of Burnsyde in favour of the defender Mrs Halkett's lands of Hangingheugh, and to have the defenders interdicted from trespassing on the lands of Burnsyde. Hangingheugh and Burnsyde were adjoining properties in the immediate neighbourhood of Largs. There was a road from Hangingheugh to Largs through a property called Holehouse, as to the use of which no difficulty had ever been raised, but the road was not very good and for reaching places to the north of Largs it was more convenient to go through Burnsyde. The march between the properties was a burn, across which there was a bridge of planks with a gate or slap in the fence on the Hangingheugh side. There was a road to the bridge on the Burnsyde side but not on the other. There was a steep bank between the bridge and the Hangingheugh steading. At the time of this action the steading was in ruins. Carts and cattle had frequently passed across the bridge from the one property to the other, and the tenants of Hangingheugh had used the road through Burnsyde, which had been merely a farm road. The pursuer of this action, however, had turned this road into an avenue, and wished to prevent the further use of the road by Hangingheugh. From 1817 to 1834 both properties belonged to one person, Mr William Lang *primus*. He left a will under which his nephew William Lang *secundus* took Burnsyde, and his brother Dr Hugh Lang became liferenter of Hangingheugh until 1864. No servitude was created in favour of the Hangingheugh over Burnsyde by said will. The titles were silent on the subject. In 1873 William Lang *secundus* sold Burnsyde to David Cousin, architect, Edinburgh, who sold it in 1875 to the pursuer. In 1864 the defender Mrs Halkett, a granddaughter of William Lang *primus*, became proprietrix of Hangingheugh. From 1851 to 1876 the tenants of Burnsyde were John Rankin, his widow, his son Robert, and his son-in-law, and from 1860 to 1877 the tenant of Hangingheugh was the said John Rankin's son Matthew.

The pursuer pleaded—"(1) The pursuer being the proprietor of the lands of Burnsyde, and there being no servitude right-of-way over the said lands in favour of the lands of Hangingheugh, the pursuer is entitled to decree of declarator as concluded for."

The defenders pleaded—"(2) There being a valid servitude right-of-way over the lands of Burnsyde as set forth in the record, the defenders ought to be assoilzied. (3) The said servitude over the lands of Burnsyde being necessary for the convenient occupation and useful enjoyment of the said lands of Hangingheugh, the same must be held to bave been impliedly conveyed to the owner of the said lands of Hangingheugh by the disposition of the common author."

After a proof the Lord Ordinary (KYLLACHY) upon 20th March 1890 found and declared in terms of the conclusions of the summons.

"*Opinion.*—The question in this case is as to an alleged servitude of way claimed by the defender, as owner of the lands of Hangingheugh, over the lands of Burnsyde belonging to the pursuer. The two properties are adjacent, and situated in the immediate neighbourhood of Largs; and the defenders' case is that there is a right-of-way both for foot-passengers and for carts and carriages from the march of his property along a farm road which passes the pursuer's steading, and thence to the public road north of Largs by what was formerly a farm road but is now part of the avenue to the pursuer's house.

"The action is brought by the pursuer for the purpose of negativing the claim thus made, but in the proof which was lately led the defender of course led as being pursuer of the issue.

"Having considered the proof I am of opinion that the defender has failed to prove his case, and that the pursuer therefore is entitled to decree in terms of the summons.

"(1) In the first place, I am satisfied upon the evidence that the proper road to the lands of Hangingheugh (which forms a single farm almost entirely pastoral) is by a road known as the Holehouse road, which does not pass through the pursuer's property at all. That road appears to be in some parts out of repair, and to have been always of a somewhat rough description, but it has all along been a quite definite track from the town of Largs, not only up to the defenders' lands, but through those lands up to the house and steading, which since 1844 have been in ruins. On the other hand, it is clear upon the evidence that while the road claimed affords the defender a slightly shorter access to Greenock and other places to the north of Largs, it is a road which stops short almost at the defenders' march, so that horses and carts have to find their way to the house and steading by zig-zagging up the side of a somewhat steep hill face. While, therefore, in such a case the *a priori* probabilities are by no means conclusive, it must be admitted that those probabilities are somewhat against the existence of the alleged right-of-way.

"(2) In the next place, the evidence of possession appears to me to be plainly insufficient to establish the acquisition of a right-of-way by prescription or implied grant subsequent to the separation of the two properties in 1834. From 1834, when Mr William Lang, the common author of both parties, died and left Burnsyde to one relative and Hangingheugh to another the period which has elapsed is no doubt upwards of forty years, but since 1860 the two properties were until quite lately tenanted by members of the same family, and worked together as one possession. The only period, therefore, of possession which can at all be counted is the period from 1834 to 1860, when William Crawford was tenant

of Hangingheugh, and Burnsyde was occupied successively by Robert Kerr, William Lang, and John Rankin. Now, even assuming—what I think very doubtful—that William Crawford's use and possession of the road claimed had the character of possession as matter of right, and was not merely the result of neighbourly tolerance, it is obvious that, extending only to twenty-six years, it falls considerably short in point of duration of what is required to set up a prescriptive right. Nor is there room in this case for the presumption which applies in some cases, that possession carried back as far as evidence goes may be extended back indefinitely so as to complete the forty years. For between 1817 and 1834 the two properties belonged to the same proprietor, who, for a time at least, himself cultivated both or part of both; and during that period, accordingly, no servitude of way was possible as between the two properties.

"It is a different question, and one which I shall consider immediately, whether the possession between 1834 and 1860 raises any presumption as to the possession prior to 1817, and whether that possession is of any moment in the present dispute. In the meantime I only observe that if the servitude in question was not imposed expressly or by implication by the disposition which William Lang executed in 1834, it has not been imposed or acquired by any use or possession which has occurred subsequent to that date.

"(3) The question really therefore comes to turn upon the construction of the titles of 1834, and here several points are, I think, sufficiently clear—(1) There is certainly no mention of any servitude such as that now claimed either in the title to Hangingheugh or in the title to Burnsyde. It is not suggested that either title contains any clause which by subsequent possession or otherwise could be construed into a grant of the servitude claimed. The titles (and the fact is, I think, significant) are silent on the subject. (2) It is equally certain that there is here no case of a servitude of necessity. In other words, it is impossible to bring the defenders' case within the principle of the case of *Cochrane* v. *Ewart*, 4 Macq. 117, and other cases of that description. The right-of-way in question may be convenient as affording a double access to the defenders' property, but it is certainly not necessary to its convenient use. (3) Further, no inference of presumed intention can, I think, be drawn from the fact that in 1834, the date of the severance, the access in question existed, at all events to this extent, that a gate or gap was left in the defenders' march fence and was connected with a rough bridge of planks across the burn which formed the march between the two properties. It is not, I think, the law that on the severance of two tenements the right to use ways which during the unity of possession have been used and enjoyed in fact passes as matter of course to the owner of the severed tenement—(*Pearson* v. *Spencer*, 1 Best & Smith 571, *per* Lord Blackburn 583). On the contrary, there must I think be something in the conveyance to show an intention to grant the use of the ways *de novo*. But assuming the presumption to be otherwise, the evidence of the older witnesses makes it, I think, plain that the existence in 1834 of the bridge and gateway in question is to be ascribed, or at least may be ascribed, to the circumstance that William Lang between 1817 and 1834 farmed the lower fields of Hangingheugh along with the greater part of Burnsyde and required a communication across what is now the march in order to the convenient working of his farm. This fact, as spoken to amongst others by the witness James Dyer, displaces, in my opinion, any inference favourable to the defender which may be drawn from the existence of an access in the direction claimed at the date of the severance in 1834. (4) Lastly, the same consideration appears to me to exclude the argument, which otherwise might have had force, that the possession from 1834 onward presumes similar possession prior to 1817 when the two properties were separately owned, as it appears they had been from 1699. Had there been nothing known as to the origin or probable origin of the access as existing in 1834, it might not have been unreasonable to conclude that it was the continuance of an access which had existed when the two properties were separate; and that would have raised a perhaps interesting legal question. But any such conclusion appears to me to be displaced by the fact to which I have above referred, that William Lang between 1817 and 1834 possessed the lower fields of Hangingheugh (where alone there is any trace of the road), and worked the same from the Burnsyde steading along with the greater part of the lands of Burnsyde.

"On the whole, and for the above reasons, I have come to the conclusion that the pursuer is entitled to decree."

The defenders reclaimed, and argued—1. There had been immemorial usage. No doubt between 1817 and 1834 the properties belonged to the same person, and between 1860 and 1877 they were tenanted by members of the same family, but all the usage being proved which it was possible to prove, viz., between 1834 and 1860, and between 1877 and 1889, the law implied usage from time immemorial—Bell's Prin. sec. 997; *Carnegie* v. *MacTier*, July 18, 1844, 6 D. 1381; *Brodie, &c.* v. *Mann*, June 13, 1884, 11 R. 925, and May 4, 1885, 12 R. (H.L.) 52. 2. The access to the public road through Burnsyde being necessary, they were entitled to absolvitor. Their right to go by Holehouse might be challenged, but even if it were not absolute, necessity was not demanded if reasonable enjoyment of the property required the access—(Lord Chancellor in *Cochrane* v. *Ewart, infra*). 3. There was an implied grant in consequence of the will of William Lang *primus*. He left the two adjacent properties to members of his own family, and must have intended that Hangingheugh should continue to enjoy the access through Burnsyde —*Pyer* v. *Carter*, January 21, 1857, 1 Hurl.

& Norm. 916; *Cochrane* v. *Ewart*, January 13, 1860, 22 D. 358, *aff.* March 25, 1861, 4 Macq. 117; *Walton Brothers* v. *Magistrates of Glasgow*, July 20, 1876, 3 R. 1130; *Cuthbert* v. *Whitton*, December 20, 1888, 16 R. 259.

Argued for respondent—1. Use had not been proved for the prescriptive period, and such use as there had been was due to the properties being in the same hands or to good neighbourhood. 2. There was no case of necessity. There was a recognised road through Holehouse. 3. There was no case of implied grant. The will of William Lang was absolutely silent on the subject, and there was nothing to indicate any intention on his part to constitute such a servitude. Such grants were not to be lightly inferred —*Gow's Trustees* v. *Mealls*, July 28, 1875, 2 R. 729; *Macnab* v. *Munro Ferguson*, January 24, 1890, 17 R. 397.

At advising—

LORD JUSTICE-CLERK—We have heard an excellent argument in this case on both sides, and certainly Mr Kermack's speech makes it unnecessary to call for another speech on the same side.

This case relates to an alleged right-of-way road running through an estate called Burnsyde, at a place called Hangingheugh, and it appears that in earlier times these two places formed one estate, and belonged to Mr William Lang till the year 1834, when he left Burnsyde to another Mr William Lang, who is called William Lang *secundus*, while Hangingheugh in 1834 was left to a brother of William Lang *primus*. However, it is quite plain that up to 1834 there could not have been any servitude right by the one place over the other. Now, starting from that point, what we are asked to find in this case by the defender is that there was a grant of a right-of-road over Burnsyde in favour of Hangingheugh, which grant is proved by usage. Now, I think there could hardly be a less favourable case for stating such a claim than this, unless it was the fact—and was proved to our satisfaction as the fact—that Hangingheugh without this road would have no access to any public place at all. Therefore I think the first inquiry we have to make here is, whether there is any ground for holding that, and certainly in the present state of this proof, and in view of the fact that no proceedings have been taken in reference to any other road, and in view of the fact that undoubtedly there is another road that has been used during that time from 1834 for reaching Hangingheugh from a public place we must assume there is an access from what is called Holehouse. Therefore it is not a question at all of access or no access.

Now, in a case like this, where this farm of Hangingheugh was close up to the farm of Burnsyde, and Burnsyde itself not very far from the public road, it would be very natural to expect that ordinary good neighbourhood would allow persons occasionally to pass over Burnsyde road, (which for a considerable number of years was not a road that was kept in any style) for the purpose of reaching the public road; and it would require a great deal of such usage to prove such a claim as the present where there was no evidence of grant. It is said that the right-of-way here is to be implied from the fact that on Burnsyde itself there is a piece of road running past the steading and out to a park, which forms practically the march at that point with Hangingheugh. But, I think it is not at all unnatural that close to a farm steading like this a piece of road should be carried along to the junction of several fields which were all at that time one property and that that road should be fenced off from the fields to which it ran. The natural way to fence it would be to fence a short piece of the road, and then the access to all the fields beyond could be made at the point at which the burn was crossed, and that would account also for there being a bridge over the burn reaching not only the side which is now the Burnsyde side of the march, but also over the march on to the Hangingheugh side. Well, it does not require a very strong stretch of imagination to suppose that, there being a rough bridge there and a gate leading to Hangingheugh, which was the proper access to Hangingheugh at the time when Burnsyde and Hangingheugh were the same property, that after these ceased to be the same property, the gate, which was a perfectly good fence for that corner, should be left standing and the bridge should be left, and that nobody would be at the trouble to take them down. Then, when we come to the question of what was the state of matters inside the boundaries of Hangingheugh itself, it appears that if that road was to be used as a road leading up to what was then the farmsteading of Hangingheugh, but which is now in ruins, that road must have been taken by a very difficult and almost dangerous ascent up to then steading, because it required to ascend a steep bank by which I think it is not reasonable to suppose that carts with loads could be taken. Now, so far as I can see from the evidence, whatever evidence there may be of something of the nature of a road running along beyond the bridge and along the march of Hangingheugh for some little distance, there is no evidence whatever of a road having ever been made for the purpose of going up that bank; and accordingly, except as an access to drive cattle or sheep into fields from Burnsyde, I think there is no clear evidence of the place having been used as an access of right for the purpose of taking carts or vehicles into Hangingheugh.

These being my views on the matters of fact brought before us in the proof we have, I would be for adhering to the Lord Ordinary's interlocutor.

I must say for my own part, I think we have gone quite far enough even in implying grants of this kind; and in circumstances where it is quite evident that the grant if it ever was made must be a grant of comparatively recent date, I think it would require very strong evidence indeed to set up an implied grant, and we

would also require to have nothing that could be attributed to tolerance.

On these grounds I have come to the opinion that the Lord Ordinary's interlocutor should be adhered to.

LORD YOUNG concurred.

LORD RUTHERFURD CLARK—The defender has led proof of the servitude which she alleges, and considering first that the two properties belonged to the same person between 1817 and 1834, and (second) that they were in the same occupation from 1860 to 1877, I think she necessarily had a very difficult task. In my opinion the evidence is not nearly enough to prove servitude, and I am quite satisfied with the grounds on which the Lord Ordinary has placed his judgment.

LORD LEE—I concur with what has fallen from your Lordship in the chair, and from Lord Rutherfurd Clark, and I do not know that I have anything to add. But I am clearly of opinion that no case of necessity or constructive necessity has been made out. I think the evidence, so far as it goes, leads to this—that the preponderance of the testimony shows that the road in use was the Holehouse road, and it struck me very forcibly that two witnesses referred to by Mr Kermack spoke to the fact about that which has not been got over—and cannot be got over—and that is the removal of old William Crawford from the farm of Kilburn to Hangingheugh, Kilburn being to the north. It is proved, both by William Crawford, who is aged eighty, and by Mrs Janet Crawford or Thom, that at the time of his removal from Kilburn to Hangingheugh his stock and carts with his goods went round by Holehouse. With regard to the *prima facie* evidence afforded by the existence of a road upon the Burnsyde side of the burn up to the burn, I think the Ordnance Survey map is sufficient to explain and account for the existence of a road there so far, for it shows that the road after reaching the burn rather turned to the south so as to reach other fields on Burnsyde.

On the whole, therefore, without going over the evidence, I am entirely satisfied with the judgment of the Lord Ordinary, and the grounds which he has stated in support of it.

The Court adhered.

Counsel for the Pursuer and Respondent—H. Johnston—Kermack. Agents—Mylne & Campbell, W.S.

Counsel for the Defenders and Reclaimers—Low—Dundas. Agents—Mackenzie & Black, W.S.

Thursday, June 19.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

THE ABERDEEN JOINT PASSENGER STATION COMMITTEE AND THE GREAT NORTH OF SCOTLAND RAILWAY COMPANY *v.* THE NORTH BRITISH RAILWAY COMPANY.

Railway—Station—Use of Joint Station—Management—Title to Sue.

The Great North of Scotland Railway Company and the Caledonian Railway Company (the successors of the Scottish North-Eastern Railway Company) possessed jointly and equally the new joint passenger station at Aberdeen, and it was provided by statute that "the maintenance, management, regulation, and control of the station, and the appropriation thereof, and of the sidings, sheds, offices, and buildings therein, and all other matters incident to the said station, including the power to appoint, suspend, and dismiss the superintendents and other officers and servants, &c.," should be vested in a joint committee representative of the two companies. The North British Railway Company were secured by statute in certain "conveniences and privileges" over the lines now possessed by the Caledonian Railway Company, including "the joint or separate use of the offices, stations, sidings, and other accommodation at the several stations . . . of the Scottish North-Eastern lines, including in so far as the (Caledonian) Company lawfully may" the station referred to. Since 1878 the North British Railway Company had exercised running powers for passenger and goods trains over a portion of the North-Eastern lines from the neighbourhood of Montrose to Aberdeen; they had been provided with accommodation in the joint station, into which they had been allowed to run their passenger trains. The joint committee and the Great North of Scotland Railway Company sought declarator that the North British Railway Company were not entitled without the consent of the Great North of Scotland Railway Company to use the joint station and the railway through the same, and that the joint committee were not bound to admit the defenders' traffic into the station.

Held (*rev.* Lord Kinnear, *diss.* Lord M'Laren) that the pursuers had a title to sue without the concurrence of the Caledonian Railway Company, or calling this Company as defenders.

This was an action by the "Joint Committee" vested by Act of Parliament with the maintenance and management of the Aberdeen Joint Passenger Station, and the "Great North of Scotland Railway Com-