addressed four letters to the reclaimer's agent inquiring what he proposed to print without getting an answer. He argued that the case was ruled by *Little Orme's Head Limestone Company, Limited* v. *Hendry & Company*, November 25, 1897, 25 R. 124, where expenses were allowed.

The reclaimer explained that he had produced a similar plan, which it would have been his duty to print had he gone on with the case, and argued that it was the duty of the respondent to wait to see what the reclaimer printed, and as the note had been timeously presented, the usual award of £2, 2s. was enough—*Robertson* v. *Robertson's Executors*, November 8, 1899, *ante*, p. 58.

The Court awarded £2, 2s. of modified expenses.

Counsel for the Reclaimer—Cook. Agents—Simpson & Marwick, W.S.

Counsel for the Respondent — Cullen. Agent—J. F. Mackay, W.S.

Friday, November 24.

SECOND DIVISION.

[Lord Stormonth Darling, Ordinary.

MERCER HENDERSON'S TRUSTEES *v.* DUNFERMLINE DISTRICT COMMITTEE.

Road—Repair of Road—Taking Materials from Enclosed Land—General Turnpike Act 1831 (1 *and* 2 *Will. IV. c.* 43), *sec.* 80.

By section 80 of the General Turnpike Act 1831 (incorporated with the Roads and Bridges Act 1878, by section 123 thereof) it is enacted, *inter alia*, that it shall be lawful for the road trustees to search for, dig, and carry away materials for making and repairing the road out of enclosed land and through the ground of any person "(such land or ground not being an orchard, garden, lawn, policy, nursery for trees, planted walk or avenue to any house, nor enclosed ground planted as an ornament or shelter to a house, unless where materials have been previously in use to be taken by the said trustees)."

Prior to 1831 the road authorities had quarried stone for the repair of a road from certain craigs within an enclosed policy with the consent of the proprietor, and thereafter they continued to do so. In course of time these workings approached within thirty yards of a planted walk which ran from the avenue to the mansion-house and passed to the east of the quarry along the top of the craigs through a plantation of trees.

The proprietor brought an action of declarator and interdict to prevent the road authorities from continuing to work the quarry, or at all events from extending the superficial area of their workings. The defenders maintained that under the Act they were entitled to continue quarrying stone out of any part of the craigs.

Held (*rev.* judgment of Lord Ordinary) that the defenders were not entitled to quarry or remove materials from the craigs to the east of the present face, as further operations in that direction would endanger the amenity and security of the planted walk, which was one of the excepted subjects in the statute. Interdict *granted* accordingly.

Opinion (*by* Lord Young) that if the quarry was originally opened without statutory sanction, use *de facto* could confer no right as against the proprietors.

Opinion (by Lord Trayner) *contra*.

Opinion (by the Lord Justice-Clerk and Lord Young) that the words "previously in use" mean previously to the ground having been brought within the excepted subjects, and not previously to the passing of the statute.

Opinion (by Lord Trayner) *contra*.

By section 60 of 49 Geo. III. cap. 31, a local Act for more effectually making and repairing the Great North Road leading from North Queensferry to Perth and Dunfermline, dated 1809, it is enacted "that it shall and may be lawful for the surveyor or surveyors appointed by the said trustees, or for such persons as he or they shall appoint, by an order of any two or more of the trustees, to dig, gather, take, and carry away any gravel, sand, stones, furze, heath, or other materials for making or repairing the said roads out of any waste or common in the said counties, without paying any consideration on that account, and also out of the property or lands of any person or persons where such materials are and may be found (paying for the same), not within 200 yards of the mansion-house or ordinary residence of the proprietor of the ground qualified as aforesaid, nor out of any garden, orchard, park, or ground set apart and used as a nursery or plantation for trees before the passing of this Act; but it shall not be in the power of any proprietor or occupier of such lands, by any operations he may carry on, to deprive the trustees of the right of resorting to such quarries and gravel pits as they have been in use to work for that purpose, and have actually worked at any time within three years preceding, but the said trustees shall pay to the owners and occupiers of the said grounds respectively from whence stones, gravel, or other materials have been taken away, or over which the same shall have been carried, such damage as they shall sustain thereby, the amount of which shall be settled by any two or more justices of the peace living in the neighbourhood from whence the same materials are taken: And in case of any difference between such owners and occupiers and the said trustees touching such damages as aforesaid, the said justices shall and may judge and finally determine the same, but such disputes or differences shall

not in the meantime hinder the using or carrying off the said materials and applying the same towards the repairing the roads."

50 Geo. III. cap. 72, a local Act for more effectually making and repairing certain roads in the counties of Fife, Kinross, Perth, and Clackmannan, including the Great North Road, dated 1810, contains a provision in exactly the same terms.

Section 80 of the General Turnpike Act 1831 (1 and 2 Will. IV. cap. 43) (incorporated with the Roads and Bridges Act 1878, by section 123 thereof) enacts—"That it shall be lawful for the trustees of any turnpike road, or any person authorised by them, to search for, dig, and carry away materials for making or repairing such road and the footpaths thereof, or building, making, or repairing any toll-house, bridge, or any other work connected with such road, from any common land, open uncultivated land, or waste, or to deposit mud or rubbish thereon, without paying any surface damages or anything for such materials, except for stone to be used for building, and to carry the same through the ground of any person, such trustees or other persons authorised by them filling up the pits or quarries, levelling the ground wherefrom such materials shall be taken, or fencing off such pits or quarries so that the same shall not be dangerous to any person or cattle, and paying for or tendering the damage done by going through and over any enclosed or arable lands for or with such materials, mud, or rubbish, such damages to be ascertained as hereinafter mentioned; and also that it shall be lawful for such trustees, and other persons authorised by them as aforesaid, to search for, dig, and carry away any such materials in or out of the enclosed land of any person where the same may be found, and to land or carry the same through or over the ground of any person (such materials not being required for the private use of the owner or occupier of such land, and such land or ground not being an orchard, garden, lawn, policy, nursery for trees, planted walk, or avenue to any house, nor enclosed ground planted as an ornament or shelter to a house, unless where materials have been previously in use to be taken by the said trustees), making or tendering such satisfaction for stones to be used for building, and for the surface damage done to the lands from whence such materials shall be dug and carried away, or over or on which the same shall be carried or landed, as such trustees shall judge reasonable; and in case such trustees and the proprietor or occupier of such lands shall differ as to the amount of such payments." . . . This section is in general a re-enactment of section 75 of the Turnpike Roads Act of 1823 (4 Geo. IV. cap. 49). The two sections, however, are different in some small particulars, amongst others, section 80 of the 1831 Act substitutes "unless where materials have been previously in use to be taken by the said trustees" for "unless where materials have been taken by the said trustees previous to the passing of this Act" in section 75 of the 1823 Act.

On 4th March 1898 the trustees of the late George William Mercer Henderson of Fordel, in the county of Fife, as proprietors of the estate of Fordel, raised an action against the Dunfermline District Committee of the County Council of the county of Fife to have it declared "that the defenders have no right or title, by themselves, their contractors, servants, or others deriving right from them, to search for, dig, or carry away materials for making or repairing roads or footpaths or building or repairing bridges, or any other work connected with roads, or for any other purpose whatsoever without the consent of the pursuers, in or out of the enclosed ground known as the Pitadro Craigs, or the Craigs Plantation, situated on the pursuers' estate of Fordel, in the county of Fife, near to the public road known as the Great North Road, and on the east side thereof," or at all events that the defenders had no right or title by themselves or their foresaids "to search for, dig, or carry away such materials as aforesaid, without the consent of the pursuers, in or out of the said enclosed ground, or in or out of the said quarry, in such a manner as to extend the superficial area of the workings in said Pitadro Quarry."

The summons contained corresponding conclusions of interdict.

The defenders pleaded—"(1) The defenders are entitled under the Road Acts to search for, dig, and carry away materials for making or repairing the roads under their charge in or out of any part of the Pitadro Craigs, and they ought to be assoilzied, with expenses. (2) The defenders and their predecessors having been uninterruptedly in use for a period of over forty years to remove stones from the Pitadro Craigs for the purpose of making and repairing the roads under their charge, have acquired a prescriptive right to do so, and are entitled to decree of absolvitor, with expenses."

A proof was led, the import of which is set forth in the opinions of the Lord Ordinary (STORMONTH DARLING) and the Inner House Judges.

On 17th February 1899 the Lord Ordinary assoilzied the defenders from the conclusions of the summons.

Note.—"The pursuers, as proprietors of the estate of Fordel, ask for declarator that the defenders, as road authority for the district, have no right or title to continue working the quarry at Pitadro Craigs on Fordel estate, or at all events, that they have no right to do so in such a manner as to extend the superficial area of their workings. There are also relative conclusions for interdict.

"The question mainly turns on the proper construction to be put on the involved and obscure language of section 80 of the General Turnpike Act, which was incorporated with the Roads and Bridges Act of 1878. But I shall first state in a few sentences what I conceive to be the import of the proof that has been led.

"The quarry in question is situated beside the Great North Road, and is approached through a gate in the wall which bounds

the policies of Fordel House. The working face of the quarry is towards the road. On the other side, and within an average distance of about thirty yards from the working face, there runs an ornamental walk through the trees which surround the quarry, and by this walk, which leaves the avenue near the Perth Lodge and winds through woods, it is possible to find one's way right round to the mansion-house. The plantation in which the quarry is situated has existed from a period beyond living memory, and the walk has been a gravelled one for about fifty years, previous to which it was a grass walk; and Moyes, a man of ninety, says he remembers it as such since his boyhood. Taking the word 'policy' to mean the pleasure ground surrounding a gentleman's seat, I have no doubt that this quarry is within the policy of Fordel House. I do not think the defenders have succeeded in showing that it was ever anything else. I have also no doubt that Pitadro Craigs form a natural feature enhancing the beauty of the policy.

"As to the time during which the quarry has been in operation, there may be some doubt whether it was used for the construction of this part of the Great North Road between the years 1815 and 1818, but I think there is no doubt that it was in operation for road purposes as early as 1827, or at all events for some years before the passing of the General Turnpike Act on 15th October 1831. Indeed, the pursuers practically admit as much when they say (Condescendence 5) that 'after 1818 and shortly before 1832 some materials for the repair of the road were for the first time obtained by the defenders from Pitadro Craigs.' There is nothing to suggest that the possession of the quarry originally obtained was otherwise than with the proprietor's entire consent. Sir John Henderson was a trustee of the Great North Road, and there is documentary evidence to show that both he and his successors, Sir Philip and Lady Durham, were anxious for the improvement of the line of the road where it passed through their property. The possession thus legally acquired has been continued by the defenders and their predecessors ever since, subject to occasional complaints by successive proprietors of the estate, but without any active attempt to dislodge the road authorities. The quarry is a valuable one for road metal, and for the last six years the average quantity of stone removed has been about six hundred cubic yards per annum.

"These being the facts, I turn to the 80th section, and find that a 'policy' is one of the protected kinds of 'enclosed land' from which, in the ordinary case, road authorities are prohibited from searching for and taking away materials. But then the parenthesis which confers this protection closes with the words 'unless where materials have been previously in use to be taken by the said trustees.' Now, what do these words qualify? Mr Campbell for the pursuers maintained that they applied only to the clause immediately preceding about 'enclosed ground planted as an ornament or shelter to a house.' I cannot assent to that argument. If ordinary rules of construction are to hold, I think the words must be held to qualify the whole parenthesis except (as suggested in the case of *Lyell's Trustees*, 9 R. 792) the introductory words about materials not required for the private use of the owner or occupier.

"The result would seem at first sight to be that, wherever a road authority has once got lawful possession of a quarry, even though it be within the enclosure surrounding a man's dwelling-house—his 'orchard,' his 'garden,' his 'lawn,' or his 'policy,'—they are entitled to go on working within the enclosure so long as there is stone to be got. That would certainly be a very strong interference with private right. This particular case is perhaps not so strong as some that might be figured, because the quarry, though within the policy, is not visible from the house, and is three-quarters of a mile away from it. But in this case the defenders maintain their right to quarry out the whole rock within the enclosure, even though it should have the effect of destroying the Craigs altogether, and they admit that at their present rate of progress they will bring down the ornamental walk in about thirty years.

"Now, nothing that I am deciding at present will affirm their right to do either of these things. In the case of *Yeats* v. *Taylor*, 1 Macph. 221, Lord President Colonsay said—'That statute must receive a reasonable interpretation. On the one hand it must be interpreted in such a way as not to be unreasonably oppressive; and if road trustees inflict injury, by the exercise of their rights in a nimious manner, there are undoubted powers in the Court to restrain them. On the other hand, where the powers of the road trustees are fairly exercised, they are not to be interfered with.' I do not doubt that there might be cases of injury to a private owner's amenity so disproportionate to the public end in view that the Supreme Court might fairly be asked to intervene. Be it observed that an application to the Sheriff would not be competent (except as regards mere surface damage), because the proviso at the end of section 80, giving wide powers of regulation to the Sheriff, are all controlled by the words 'before taking such materials from any enclosed land from which the same shall not previously have been in use to be taken.' Therefore if a proprietor were (let us say) to erect a house within the enclosure, and the road authorities were to carry their operations too near it either for safety or amenity, I do not see what remedy the proprietor would have except by resorting to the Supreme Court. But an application of that kind would require very special averments. No such question, as it seems to me, can properly be tried in this process, which baldly presents for decision the question of legal right. Now, I cannot deny the right of the defenders under the statute to be where they are, and to do what they are doing.

"With regard to the alternative conclu-

sion, I should have been glad if I could have limited in any reasonable manner what I cannot but regard as the rather arbitrary powers with which the statute has vested the defenders. But in the absence of some such special averments as those I have indicated, I do not find any warrant in the statute or in the decided cases (every one of which I think I have examined) for confining the defenders to the part of the quarry in which they have already been working. As to the case made on present and prospective injury to trees, that of course falls under surface damage, and may in case of difference be assessed by the Sheriff.

"It is perhaps to be regretted that the Legislature, when it had an opportunity in 1878 of revising the language of section 80, contented itself with the mild modification contained in section 123 of the Roads and Bridges Act, of prohibiting the road authorities from using the materials at a greater distance than three miles from the place where the materials were obtained. That the powers so left to road authorities were somewhat absolute in their character is pretty well attested by the fact that in the Roads and Bridges Amendment Act of 1892 a clause was inserted (section 5) giving the Secretary for Scotland power, on the application of the proprietor, to prohibit the destruction of land or ground which it might seem to him desirable to preserve intact, 'on the ground of national or public interest or historical association.' And if I mistake not, the inducing cause of that enactment was nothing less than an apprehension that the Castle Rock of Stirling might be quarried away."

The pursuers reclaimed, and argued—The Lord Ordinary was right in holding that the quarry was within the policy of Fordel House. That being so, the first question to be decided was, Had the defenders any right to quarry there at all? The words "unless those materials had been previously in use to be taken" only qualified the immediately preceding sentence "nor inclosed ground planted as an ornament or shelter to a house." This was shown by the use of the word "nor" in place of "or," and meant that the enclosed ground lying outside a policy was to be excepted if planted as an ornament or shelter to a mansion-house, unless materials had been previously in use to be taken from it by the trustees. The defenders were also put out of Court if the word "previously" was held to mean previously to the ground being made into a policy, &c., because there was no doubt that the policy and planted walk had existed long before the quarry. Even if it were held that the words "unless where" &c., qualified the whole clause, and that "previously" meant previously to the passing of the Act, the case referred to in the statute must be held to mean legal use under a title. In *Graham* v. *Renfrewshire Road Trustees*, May 29, 1851, 13 D. 1012, it was plain from Lord Justice Clerk Hope's opinion, p. 1014, that the decision proceeded on the assumption that the Road Trustees had a legal title. The defenders had only quarried here by permission of the proprietors, and there was no evidence of use strong enough to show that it had been preceded by such a grant or agreement as put it out of the power of the proprietor to withdraw his permission. The defenders contended that the words "unless where" meant "except in enclosed ground from which." If such an unusual construction were given to the words, then there would be no restriction on the defenders quarrying under avenues and through gardens, and totally destroying the amenity of the house. The defenders would in that case be in a position vastly stronger than if they had to obtain the authority of the sheriff or justice of the peace in terms of the latter portion of section 80. The sheriff or justice were entitled to impose restrictions—*Whitson* v. *Blairgowrie District Committee*, February 6, 1897, 24 R. 519; *Earl Manvers* v. *Bartholomew*, 1878, L.R., 4 Q.B.D. 5—but if the defenders' contention was sound no restriction could be imposed upon them. It was fair to assume that the two modes of getting into enclosed ground, provided for in section 80, were not intended to have such different results. This section must be strictly construed. "Unless where" should be held to mean "except in the place in which," and the use, if allowed at all, should be restricted to the spot where it had been exercised. In any event the defenders must not be allowed to quarry any nearer the planted walk, as its amenity, and indeed its existence, would be endangered by operations being carried on in closer proximity.

Argued for defenders—The view of the Lord Ordinary was sound. The qualification "unless where" applied to the whole of the exceptions immediately preceding; there was no reason for limiting it to one of the categories mentioned rather than to another. The word "where" did not apply to locality, but meant "in cases in which." Having been in use before 1831 to take material from this quarry, they were now entitled under section 80 to continue to do so. That use made by them of the quarry before 1831 had been with the knowledge and sanction of the proprietor, and the case of *Graham, supra*, was an authority in their favour. Having legally used the quarry prior to 1831, they were not bound by the exceptions in section 80, but were entitled to continue to quarry at any place within the enclosed land.

At advising—

LORD JUSTICE-CLERK—The question in this case is practically whether the road authority having been for many years in use to take road materials from a certain place in the lands of Fordell, are entitled to continue to advance their workings so as to destroy a planted walk within the policies of the mansion-house. They have already approached near the walk, and it is not disputed that if they approach nearer not only the amenity of the walk must cease but the walk itself must be destroyed. The question turns upon the interpretation to be given to the 80th section of the

General Turnpike Act of 1831, which is incorporated with the Roads and Bridges Act of 1878. By that clause the Road Trustees got power to take materials from enclosed land except in certain specified cases, viz., "such materials not being required for the private use of the owner or occupier of such land, and such land or ground not being an orchard, garden, lawn, policy, nursery for trees, planted walk or avenue to any house, nor enclosed ground planted as an ornament or shelter to a house, unless where materials have been previously in use to be taken by the said trustees." But for these last words the case would be quite clear. A planted walk would be absolutely excluded. But it is contended by the road authority that as materials had been in use to be taken within the enclosed ground of Fordel, they can continue to do so although in the course of their proceedings they come upon and destroy any of the excepted places mentioned in the clause. They maintain this, even upon the footing that this place is policy ground, but they further deny that it is so. It is contended for the proprietors that such is not a fair or reasonable reading of the excepting clause, and that it only refers to such ground as is immediately described after the word "nor," viz., ground which, though not part of the policies, is "ground planted as an ornament or shelter to a house."

I have no doubt in holding that this place constitutes part of the policies of Fordel, and that the walk in question is a "planted walk" within the statute. It remains, therefore, only to consider whether the fact being that the road authority was in use to win road metal inside the enclosed land at this place before the passing of the Act they are now entitled to go on in a particular direction to the effect of destroying this planted walk. Now, this statute is one which gives unusual powers to a public body. It is undoubtedly a statute empowering encroachment upon private property without compensation. It compels proprietors in whose property certain material is found to submit to have it removed without payment and without their having claim to compensation for injury to the property caused by its removal. Such a statute must, I think, be very strictly interpreted so as to keep its operations within the narrowest limits that can be given to it consistently with reasonable interpretation of its language. To me it appears that the construction which we are asked to put upon it by the defenders is not a reasonable or fair construction. To read it as meaning that if within any part of large policies surrounding a mansion-house the road trustees have been in use to take material at any place, they have a right to go on with their workings anywhere they please so as to destroy not only planted walks but the whole of the pleasure ground, including gardens, nurseries, lawns, and even the avenue by which the house is approached, would, I think, be unreasonable, unless no other reading were possible. And I think it may reasonably be read in the restricted sense of applying to the last-mentioned subject, viz., to ground, not of the nature of any of those specified, but only ground which for purposes of ornament or shelter to a house have been planted other than the policies. In short, that although there may be plantations which are ornamental or give shelter, these, if not part of the policies, are not to be absolutely protected like gardens, avenues, &c., but are only to be exempted from the road trustees' powers if they have not been used as places for obtaining road material prior to the passing of the Act.

I notice, as consistent with this view, that the statute disjoins the part relating to "enclosed ground planted as an ornament or shelter" from the previous part. After specifying several subjects it concludes the enumeration of these with a statement of the last, thus, "or avenue" to any house, and then uses the word "nor" before the words "enclosed ground," &c. Even if the Act could be reasonably read otherwise in the sense that the "previously in use" did include all the subjects referred to in the parenthesis, then I think the clause may be, and indeed must be, read as meaning that the previous use must have been before the ground in question was made into a "planted walk," or whatever the particular application of the ground was for purposes of the dwellers in a house surrounded by pleasure ground.

I am therefore of opinion that when the road authority now proposes to carry out the work of winning stone, so as to approach and injure a planted walk within the grounds of Fordel, that they are proposing to do what is in excess of their powers, and that the pursuers are entitled to have them restrained from doing so. I would move your Lordships to recal the interlocutor of the Lord Ordinary. If your Lordships agree that interdict should be granted, the terms of it will require to be somewhat modified from those given in the summons. My view is that the defenders should be interdicted from carrying their works any nearer to the planted walk, thus practically restricting them to the line of the existing face.

LORD YOUNG—The question in this case is one of statutory power given to a public body in the public interest in the matter of public roads and rights-of-way. There is no question of property or of servitude raised in the case. No question of servitude is capable of being presented; there is no dominant tenement. Neither is there any question of grant or contract. Indeed, no grant or contract of any kind is alleged. Therefore the question is, as I have said, entirely one of statutory power given to a public body. There are two pleas-in-law for the defenders. I think that upon one of them we had no argument at all, and so far as I can see there is no room for any. The first is, "The defenders are entitled under the Roads Act to search for, dig, and carry away materials for making or repairing the roads under their charge in or out of any part of the "Pitadro Craigs;" and the second plea-in-law is, "The defenders and their prede-

cessors having been uninterruptedly in use for a period of over forty years to remove stones from the Pitadro Craigs for the purpose of making and repairing the roads under their charge, have acquired a prescriptive right to do so." It is upon this second plea that there was no argument, nor was there a possibility of any argument, for we have no such thing as a prescriptive right acquired by mere use in the law of Scotland, and there is here no suggestion of a right in regard to which usage may be the evidence of a fact requiring to be proved. With respect to known servitudes usage is evidence of a grant — the grant of a right of servitude. I know of no case in which usage will confer a right of property in land or in quarries or in anything else. The question therefore is, whether by statute the defenders here have power conferred upon them to do those things which the pursuers ask to have them interdicted from continuing. When I say by statute I refer to the Statute of 1831, for we are not concerned with any other (except upon an incidental question which I shall refer to by-and-by). Does or does not that Act give the defenders power to do what the pursuer asks that they shall be interdicted from continuing to do? Their contention is stated by the Lord Ordinary quite accurately (as indeed it was stated to us by the counsel for the defenders here)—"In this case the defenders maintain their right to quarry out the whole rock within the enclosure, even though it should have the effect of destroying the craigs altogether, and they admit that at their present rate of progress they will bring down the ornamental walk in about thirty years." It may be remembered—it is in my own memory—that I put the question to counsel, handing him one of the photographs which showed the wood upon the craigs and the ornamental walk through the wood within the park or policy of Fordel—Do you maintain right to quarry away the whole craig so as to destroy all the wood and the walk upon it? The answer I got was distinctly, and with proper candour, in the affirmative, that that was maintained.

The Lord Ordinary in his note refers to a case in which the late Lord President, (Lord Colonsay) indicated his opinion (in which I should think we will all concur) that in the exercise of their statutory powers, a public body, such as the defenders here, may be restrained from nimious exercise of their powers. Though they have the power generally to do the thing, they may be restrained from exercising that power in an excessive, that is, a nimious manner, and from doing injury to the proprietor in a way which might be and reasonably ought to be avoided. Assuming the power to exist here, I should think the Court generally would assent to that view that there might be restraint put by this Court upon the exercise of it. But the Lord Ordinary's view with respect to that is that there is no such question raised here. He says—"No such question, as it seems to me, can properly be tried in this process which baldly presents for decision the question of legal right. Now, I cannot deny the right of the defenders under the statute to be where they are, and to do what they are doing." His Lordship decides it therefore as a question of legal right, and does not enter upon any suggestion that there is a nimious exercise of the right or a reprehensible manner of exercising it, or that they are doing injury to the proprietor, which in good sense and good reason ought to be avoided.

The primary question is certainly that which has been decided by the Lord Ordinary, Is there such a right at all at this place? Upon the question of what is the nature and character of the place, I take the facts to be as stated by the Lord Ordinary. He says—"I shall first state in a few sentences what I conceive to be the import of the proof that has been led." "The quarry in question is situated beside the Great North Road, and is approached through a gate in the wall which bounds the policies of Fordel House. The working-face of the quarry is towards the road. On the other side, and within an average distance of about thirty yards from the working-face, there runs an ornamental walk through the trees which surround the quarry, and by this walk, which leaves the avenue near the Perth Lodge and winds through woods, it is possible to find one's way right round to the mansion-house." I should use a little different language in speaking of that. It is not only possible to find one's way round the policies and to the mansion-house; it is an ornamental walk within the policy for the purpose of people resident in the house or properly admitted there, enjoying themselves within the policy, and going from and returning to the mansion-house. The Lord Ordinary goes on to say—"The plantation in which the quarry is situated has existed from a period beyond living memory, and the walk has been a gravelled one for about 50 years, previous to which it was a grass walk; and Moyes, a man of ninety, says he remembers it as such since his boyhood. Taking the word 'policy' to mean the pleasure-ground surrounding a gentleman's seat, I have no doubt that this quarry is within the policy of Fordel House. I do not think the defenders have succeeded in showing that it was ever anything else." That is perhaps too strong, but the ground has not been anything else during the present century, or probably a great part of last century. The Lord Ordinary further says—"I have also no doubt that Pitadro Craigs form a natural feature, enhancing the beauty of the policy."

Now, the question which I put here is, Is there any statutory power given to road trustees, or to the defenders, a public body coming in place of the road trustees, to quarry in such a place? I ought perhaps to have noticed that the character of the wall between the public road and the policy in a certain sense has been altered, in that it has been made a more substantial and a more ornamental wall; but I think with the Lord Ordinary that it is proved that the ground was always, as far as memory can go, enclosed with a wall. I should not

have thought that material had these crags advanced as far as the road. Probably they did at one time, because I know of no better enclosure for a policy than such elevated crags as these; but there was, so far back as the evidence goes, or the memory of anybody who has been examined goes, always the wall, enclosing the policy. Taking that as proved, I venture to put the question, Is it maintainable that the defenders were entitled under their statute to enter the place and quarry stone? I am supposing they had not done it at an earlier period. It seems quite impossible to maintain that. They could not do it. It is a park or policy, and over these very crags there is an ornamental and a protective plantation. There is an ornamental walk and an avenue. Well, they could not enter that. I do not need to repeat the words of the Act in order to exclude that. I do not think it was contended that they could. Is there any period within the evidence in this case, which goes back to the beginning of the century, at which they were entitled? Prior to the Act of 1831 there were two Acts, one in 1809, and the other in 1810, authorising road trustees to quarry and open in waste ground, and upon certain conditions even in enclosed ground — that is, such enclosures as we are familiar with in farms where there is enclosed ground for cultivation or for feeding. But under these Acts they were not entitled to go within such ground except upon certain conditions, giving notice, and making certain payments. But was there any period at which they were entitled to enter upon this ground? The Lord Ordinary says in the next paragraph, immediately following that which I read, that there is no doubt that their operations for road purposes were going on as early as 1827, or at all events for some years before the passing of the General Turnpike Act of 1831. It is suggested that there may have been and probably were some occasions of taking materials for road purposes as early as 1818. That could only be under the Acts of 1809 or 1810, and these exclude parks or policies and ground set apart as ornamental plantations. I do not think that it is material that in these statutes there is a special qualification that such policies or ornamental ground must have existed as such before the passing of the Act. I think it is in accordance with the whole evidence here that the park and the policy round Fordel House existed before 1809 and before 1810. Human memory does not go back to its beginning, and in all probability it existed during not only the whole of this century but during a great portion of the eighteenth. Had they any power to enter such a policy as it is now? I take the view of the Lord Ordinary that it is now what it has not always been, but has been from before the commencement of any operations by the Road Trustees. They had no power by statute to enter it and to quarry there. The proprietor might not complain or might not interfere to prevent them, but they had no statutory right. His non-interference in not stopping them (not being unwilling that they should have the stones at that time, or so long as he or his successors did not choose to stop them) would confer no right. I asked if any legal principle could be stated within which the case could come as a right conferred upon such a statutory body by the non-interference of the proprietor to stop their doing what they did within this policy or anywhere else. I can conceive of none, and I think they could tell me none. If they had no statutory right to go there, they had no other. I suppose the County Council, or a public body like the Road Trustees, might acquire rights by purchase and grant. Road Trustees frequently acquired a right of property. They bought land, and then they became proprietors by the ordinary law of the land. Or they could purchase a servitude—that is to say, a right to take the surface of the ground, paying the proprietor for it, in order to make their roads. But there is no room for an allegation that these trustees acquired anything which statute did not give them. Their case upon the record is contained in Ans. 5, in which they quote the statute. The second sentence of Ans. 5 is, "They have done so" (that is, removed material from the Pitadro Craigs for making or repairing the roads under their charge) "strictly in the exercise of rights conferred on them by statute" (section 80 of the General Turnpike Act 1831). They quote the statute. That is the right which they allege. Does that give it to them? They say that it does give it to them where they have been previously in use to exercise the right—that is to say, taking material.

That brings me to the consideration of the meaning of the word "previously" here—"previously in use." There have been two constructions put upon the word "previously," or rather two meanings imputed to the use of it here. The one is "previously to the ground being put into that state which prevents the use which the statute gave before it was put into that state," that is, if before the ground has been converted into a policy, garden, lawn, nursery for trees, planted walk or avenue to any house, or enclosed ground planted as an ornament, or shelter to any house, the road trustees or a public body have been in use to take the stones, the subsequent putting of it into that condition will not according to this meaning exclude the use which has been previously taken under the statute. The other meaning (and I think the only other meaning of the use of the words) is "previously to the passing of the Act." No other is suggested except one or other of these two. Now, which is the true meaning? The first which I have stated is certainly very intelligible, and seems to me to recommend itself to one's acceptance from its reasonableness—that if the trustees had been in use (I read that as meaning in the use of the exercise of their statutory right) to take stones from the place before it was put into this exceptional condition, which

excludes them from their use, that use may be continued. Now, as to the other, viz., previously to the passing of the Act. The Act was passed in 1831. Take the year 1831—that is nearly seventy years ago now—and take the case of a policy or enclosed planted pleasure-ground and walk made ten or twenty or forty years ago, and that there has been use up to the time of its being made, but no use prior to 1831, when the Act passed. Take it that there has been ten, twenty, or forty years' use subsequent to the passing of the Act, but before it was turned into a policy or planted ground. Then if the argument is sound that "previously" means "previously to the passing of the Act," that use is of no significance, for it was not prior to 1831, not prior to the passing of the Act.

I must express my own opinion distinctly against that as the view which ought to be taken. I think the true view is that "previously in use" means previously in use in the exercise of their statutory powers prior to the change in the character of the property which would exclude that use. Now, in that view there is little or nothing to serve the defenders by referring to any use prior to the Act of 1831. But suppose it ever so much, was it in the exercise of any statutory powers? No, for before their use commenced the ground was in the same condition as it is now. The Lord Ordinary says that is his opinion upon the evidence, and I say that it is my opinion upon the evidence, and the case was argued before us upon the assumption that it was in the same condition as now. The proprietor might allow them to do it if he pleased, but it was a gratuitous allowing unless the statute authorised it, which, according to the view I have expressed, it did not. Well, then, it was tolerated use, in that sense not illegal, but not in the sense which the Lord Ordinary uses of right, for a party may have done many things without acting illegally, although he had no right and although he might have been stopped. If the view which I have expressed is sound, they had no right under the statute There is nothing in the evidence in this case, as it appears to me, to indicate anything except that the proprietor was for a season not unwilling, and did not interfere to prevent them. But I should even venture to put the case thus, if the view I have stated of the statute is unsound, then they have statutory right; but if it be sound, then they have not; and my proposition here is that the erroneous view that they had a statutory right when they had not, although that was shared by the proprietor, although he was under a mistake as well as the Road Trustees, would not make a right, or would not enlarge the statutory right and extend it to a place to which it did not apply. Now, upon this ground I am of opinion that the pursuers are entitled to have the most comprehensive interdict against this use being continued. There was no illegality in what has been done hitherto, because it was committed and tolerated, but committed and tolerated without conferring or creating a right, therefore no illegality; but there was nothing done by the proprietor which, according to any rule of law with which I am acquainted, or to which we were referred, would exclude him from interposing and saying, "Now, this is to be continued no longer. I permitted it, indeed tolerated it hitherto. I may have been under a delusion as to the application of the Act or not. My motive, or the motives of my predecessors, may have been what you please to suggest by way of illustration." There was nothing to bind him or his successors as proprietors of the estate, or to enlarge the statutory powers of this public body.

I am therefore of opinion that the interlocutor of the Lord Ordinary ought to be recalled, and that the pursuers ought to have interdict in the most full terms which are prayed for in this summons.

LORD TRAYNER—The section of the General Turnpike Act of 1831 (section 80) on which the defenders base their right to work and quarry the stone in question is not only open to construction, but also somewhat difficult to construe. The words in that section to which I particularly refer are these, "unless where materials have been previously in use to be taken." The pursuers contended that the word "where" was a word indicating place or locality, restricting the defenders to work stone only in the area where they had previously worked. I do not agree with this view; there are obvious reasons I think against its adoption. I think the word "where" refers to circumstance, not locality, and that it is equivalent to the expression "in the case in which," which would entitle the defenders to work stone in any enclosed land in which they had been "previously in use" to work the same. The word "previously" may have either of two meanings; it may mean previously to the land being enclosed as policy, or may mean previously to the passing of the Act. A good deal might be said in support of either meaning, but after some hesitation I incline to the opinion that the latter of the two meanings is the correct one, namely, previously to the passing of the Act. This view seems to get some support from the terms of the Acts of 1809 and 1810. Then the words "in use" are said to be ambiguous, and may mean merely where the road trustees have been *de facto* in the habit or custom of taking stone; or, on the other hand, may mean only where they have taken stone in respect of some legal right or title to take it. I adopt the former of these two meanings. I read the clause in question, therefore, as providing that the road authorities may continue to work or quarry stone in enclosed lands in all cases in which they had *de facto* been in the custom or habit of doing so previously to the passing of the Act. That construction arrived at does not, however, of itself suffice to determine the rights of parties, for I think the clause protects, and was intended to protect, cer-

tain parts of enclosed lands found within the enclosure from invasion on the part of the road authorities. And unless the road authorities have actually quarried or worked stone in or under those protected places previously to the passing of the Act, they are not now entitled to do so. The protected parts of the property referred to are orchard, garden, lawn, planted walk, and nursery for trees. In the present case we have only to do with a planted walk.

It appears to me to be well established by proof that the planted walk in question was formed and planted very many years ago—indeed, at a period beyond the memory of any living person—and that the defenders have never quarried or worked stone in or under that walk. Their workings have continued to approach it for some years, and have already resulted in the destruction of some trees, and the undermining of others which border the walk, and were planted there for its protection and amenity. If these workings are continued, the walk will be altogether destroyed within (as the defenders say) thirty years, but it would, of course, be rendered not only unsafe, but very undesirable as a walk or promenade long before then. The question is, whether the defenders are to be restrained from such workings as would bring about this result. I think they are, because in my view such workings are in excess of the right conferred on the defenders by the Turnpike Act.

I am not prepared, any more than the Lord Ordinary, to grant the pursuers a decree in the terms concluded for, but I think the conclusions are sufficient to cover a limited interdict. I would therefore grant interdict prohibiting the defenders from working or removing material from the Pitadro Craigs to the east of the present line or face of the Craigs, and *quoad ultra* dismiss the action.

LORD MONCREIFF—The contentions of both parties appear to be extreme. The pursuers maintain that notwithstanding that the defenders have been in use to take stones from Pitadro Quarry for at least 70 years they have no right or title to do so, and are bound immediately to desist.

The defenders, on the other hand, maintain that having obtained a foothold in a corner of the enclosed policies belonging to the pursuers they are entitled to search for and remove stones not merely from Pitadro Quarry as at present worked, but from any part of the enclosure that they may think fit, and that in doing so they are entitled if necessary to excavate the whole of the Pitadro Craigs, thus destroying the existing plantation walk.

I am not prepared to adopt either of these views. I think that it must be held that the use had by the Road Trustees of Pitadro Quarry from a time anterior to the passing of the General Turnpike Act of 1831 was a use as of right. The origin of that use is obscure, but that is not much to be wondered at considering the length of time during which the use has continued and the fact that it did not necessarily depend on any written title or formal authority. I think we must infer that the trustees acted in virtue of a statutory power, and that they did so with the full acquiescence of the proprietors of Fordel. If the proprietors recognised and acquiesced in the right of the trustees to use the quarry (which there seems to be no reason to doubt they did) it was not necessary to prove that the use by the trustees was preceded by notice or other procedure prescribed by the existing statutes. I think, therefore, that we must assume that when the trustees began first to use the quarry they had a statutory right to do so. That being so, it is not necessary to consider whether the words "previously in use" in the 80th section of the Road Act of 1831 mean in use previously to the passing of the Act; but I may observe that in the corresponding clause of the Road Act of 1823 (section 75) the words used are "unless where materials have been taken by the said trustees previous to the passing of this Act," which give support to that construction of the words. The terms of the Acts of 1809 and 1810 are the same.

But, on the other hand, I think that the right of the trustees is not of the unrestricted nature which the defenders maintain. They are entitled under the 80th section to search for and carry away materials in or out of "enclosed land," but they are not entitled to do so in the case of the subjects enumerated, "orchard, garden, lawn, policy, nursery for trees, planted walk," &c., which may all be enclosed within a park wall such as we have here, but may or may not themselves be separately fenced off. The fallacy as it seems to me of the defenders' argument lies in this, that they assume that because they have right to take materials from a spot within the outer enclosure that gives them right to take materials from any spot within the outer enclosure, although that spot may be within one of the excepted subjects.

Now, the planted walk along the top of the Pitadro Craigs is an excepted subject, the security and amenity of which are threatened by the defenders' operations. I think, therefore, that the pursuers are entitled to be protected against this by declarator and interdict. A declarator to that effect would be within the first conclusion of the summons.

The Court pronounced the following interlocutor:—

> "Recal the said interlocutor reclaimed against: Find that the defenders are not entitled to quarry or remove materials from the Pitadro Craigs mentioned on record to the east of the present face or line of the said Craigs: Interdict, prohibit, and discharge the defenders, and all persons acting upon their authority and instructions, from quarrying or removing materials from the said Craigs to the east of the foresaid face or line thereof: *Quoad ultra* dismiss the action and decern," &c.

Counsel for the Pursuers—W. Campbell, Q.C.—Clyde. Agents—Davidson & Syme, W.S.

Counsel for the Defenders—Guthrie, Q.C. —Chisholm. Agents—Wallace & Begg, W.S.

Friday, November 24.

SECOND DIVISION.

[Sheriff of Lanarkshire.

SOMERVILLE *v.* SUTHERLAND.

Reparation — Wrongous Apprehension — Arrest in Court—Perjury — Arrest without Warrant.

Pursuer averred that at the close of a prosecution in a Police Court in which he gave evidence as a witness, he was apprehended on a charge of perjury by instructions of the defender, who was a police superintendent and acting procurator-fiscal in the Police Court; that the perjury with which he was charged was said to have been committed during his cross-examination in the said prosecution by the defender; but that the defender in causing his apprehension acted without a legal warrant or the instructions of the presiding magistrate *Held* that such apprehension was illegal.

Opinion (*per* Lord Young) that apprehension on the charge of perjury without a legal warrant is illegal.

On 18th November 1898 John Somerville was tried at the Northern Police Court, Glasgow, on a charge of assault and was acquitted. He afterwards raised this action in the Sheriff Court at Glasgow against the acting procurator-fiscal in the Northern Police Court, Donald Sutherland by name, in which he claimed £250 damages, in respect that the defender had at the conclusion of the trial in the Police Court illegally caused the pursuer's apprehension on a charge of perjury. The circumstances in which the alleged apprehension took place were stated by the pursuer to be as follows:—At the close of the prosecution Somerville tendered himself as a witness, and was examined by his own law-agent, and cross-examined by the acting procurator-fiscal. In the course of his cross-examination, and whilst the pursuer was still in the witness-box, the defender falsely and calumniously charged the pursuer with swearing falsely and committing perjury, and ordered two of his subordinate officers to apprehend the pursuer there and then.

He was not, however, at once apprehended; but when his evidence was finished and the magistrate had intimated that he found the charge not proven, the pursuer was thereupon, on the instructions of the defender, who had no warrant or other authority, apprehended by the said officers, removed from the Court, and lodged by them in the police office. The pursuer was detained in custody for about half-an-hour, when the defender, being unable to formulate any charge against him, ordered the pursuer's liberation and he was liberated accordingly.

The pursuer further averred that the arrest was absolutely unjustified, and the defender in arresting him acted recklessly, maliciously, and without probable cause. The pursuer is a law-abiding subject, and holds a licence from the Magistrates of Glasgow as a 'bus driver. As such his residence was well known to the defender. Further, he was at the time before the Court under citation upon a complaint which fully set forth his name and place of abode, and there was not the remotest probability of his fleeing from justice.

The pursuer pleaded—"(2) The defender having illegally, unwarrantably, maliciously, and without probable cause apprehended the pursuer, or caused him to be apprehended, on a charge of perjury, is liable to the pursuer in reparation for the loss, injury, and damage thereby sustained by the pursuer."

The defender pleaded—(2) "The actings of the defender having been *in bona fide* and in discharge of his public duty as procurator-fiscal, those actings were privileged. (3) The pursuer having, as matter of fact, committed perjury when being examined before a competent court as a witness in his own behalf, has no claim against the defender."

The Sheriff-Substitute pronounced the following interlocutor—Finds that the defender, in ordering the pursuer's apprehension on the 18th November 1898, after the police charge against him had on that day been dismissed by the magistrate, was privileged, and being privileged, that there are no relevant averments of malice and want of probable cause libelled against the defender: Therefore sustains the first plea-in-law stated for the defender, dismisses the action, and decerns: Finds pursuer liable in expenses," &c.

Note.—"At the outset of the debate pursuer's agent stated that what may be described as a charge of slander in the fifth article of the condescendence he did not press, but confined himself entirely to a claim of damages for illegal apprehension. Defender, it appears from the statements and admissions of parties, was the acting fiscal in the Northern Police Court in Glasgow on 18th November last, when pursuer was charged with assault on a tramway conductor. The case was found not proven and dismissed, but the defender thereafter ordered pursuer's apprehension on a charge of perjury, and he was taken into custody for a few minutes—defender says five, and pursuer says twenty. It may be doubted whether defender acted with discretion and common sense in ordering pursuer's immediate apprehension, but that is one question, and the question which has to be determined here is another. The pursuer contends that the apprehension was made without warrant. The defender unquestionably was acting as fiscal, and he says—and there is no reason to disbelieve him—that he heard pursuer swearing that he had not a shilling in his possession, and