led by the parties is all one way. The witnesses for the pursuer are perfectly consistent, while the defender's case depends entirely upon his own evidence, for I am quite satisfied that the witness Miller is speaking of a different occurrence, which took place at a different time of the day, and under different circumstances. On the defender's own evidence there is no call for me to comment, as, on the matter of fact, I have not the slightest doubt.

But the Sheriff has proceeded simply to decern in terms of the prayer of the petition—failing delivery within a certain time, he has ordained the respondent to pay to the petitioner the sum of £50 as the price of said mare, reserving the petitioner's claim for loss or damage, &c. Now, I think he was wrong in decerning for so large a sum. It is as the price and value of the animal, that this sum is sued for, and there is no doubt that this is far above the real price or value. In fact this branch of the Sheriff's judgment looks far too much like the infliction of a fine upon the respondent, or something akin to damages, which it was incompetent for him to give under this petition. Still, I think that the Sheriff would have been entitled to give considerably in excess of the mere market value; he would have been justified in attaching a *pretium affectionis* to the mare, allowing for the feelings with which the petitioner and Colonel M'Call, who was behind him, regarded her. I am of opinion that the Sheriff has gone too far, and that the price decerned for, as an alternative of delivery, should be reduced to £20.

The rest of the Court adhered.

Agents for Appellant—Lindsay & Paterson, W.S.

Tuesday, November 29.

SECOND DIVISION.

MURRAY *v.* ARBUTHNOTT.

Road, Suppression of—43 *Geo, III. c.* 34, § 22. In the year 1824 a petition was presented to the Road Trustees of Mid-Lothian, craving that they should sanction an alteration in a footroad passing through the petitioner's property, whereby a certain portion of it would be shut up, and a new route substituted. The Trustees remitted to a committee to visit the ground, and report; and having received a favourable report from the committee, "granted warrant to the petitioner" to alter the line of road as described, "and to shut up the old road or footpath." *Held*, in an action of declarator at the instance of a member of the public, that the footroad had been illegally shut up in 1824, in respect that the Road Trustees had not complied with the provisions of § 22 of the Act 43 Geo. III. c. 34, in regard to intimation to the public; and that that was the only section which could entitle them to suppress such a road.

In this case, at last Jury Sittings in July, the following issue was sent to a jury:—

"Whether, for forty years and upwards prior to the 14th day of May 1867, or for time immemorial, there existed a public right of way for foot-passengers, leading from the village of Roslin, in the parish of Lasswade, eastwards to a point at or near the top of the north bank of the river Esk, and there entering and running through the property of Mr Trotter of Dryden, and thence through the defender's property, known as the "Swallow Knowe," or "Fir Plantation," along or near the top of said Swallow Knowe, or Fir Plantation, down to and across the public road from Loanhead to Polton Station of the Esk Valley Railway, and thence, onwards and eastwards, along the north bank of the Esk to Lasswade, Dalkeith, and other places in that direction?

The following verdict was returned—"At Edinburgh, the 22d and 23d days of July 1870—In presence of the Right Honourable the Lord Justice-Clerk—Compeared the said pursuers and the said defender, by their respective counsel and agents, and a jury having been empannelled and sworn to try the said issue between the said parties, say upon their oath, That they find for the pursuers, with power to the Court to enter the verdict for the defender, if they shall be of opinion that the road in question was legally shut up by the Road Trustees in 1824."

It appeared from the minutes of the Road Trustees that at a meeting held on 2d April 1824, there was presented a petition from Mr Mercer of Mavisbank to the following effect:—"That there is a footroad from Rosslyn to Laswade Church, which passes thro' that part of the petitioner's property in this parish, called the Swallow Bank, by a steep part in that bank, and which in wet weather is hardly passable. The petitioner proposes to turn that footpath, by making it in future pass along the north side of the bank. In this way, it would be made much easier for the passengers, and the distance will be increased only from about 80 to 100 yards. That, by the Turnpike Acts of the county, the trustees have most ample powers as to altering the roads under their charge, and this right still remains with them, independently of the new General Turnpike Act. But it is more to the present point to observe, that the road which the petitioner desires to turn or alter is not a turnpike road, but merely a kirk or parish road, to which the new general law does not at all extend; while, by the County Act 1803, it is enacted, 'That all the powers contained in the several county Acts which relate to the making, repairing, widening, and altering the turnpike roads in the said county of Edinburgh, or any of them,' 'shall be, and the same are thereby extended to the cross roads, and all other roads in the said county which are not turnpike;' and that the trustees have frequently acted on this authority in altering footpaths, so as to the jurisdiction there is no reasonable doubt."

The meeting remitted to a committee to consider the petition, to visit the ground, and report.

Thereafter, at the meeting held on the 30th April, the committee reported that the proposed alteration would be a great improvement—"And the meeting having resumed consideration of the original petition in connection with the above report, did, in terms thereof, grant warrant to and authorise the said Græme Mercer, at his own expense, to alter the line of the road or footpath as described and explained in these documents. And, when the new line shall have been completed to the satisfaction of the district of Lasswade, and so declared by a quorum of the trustees of that district, this meeting did and hereby do authorise the said Græme Mercer to shut up the old road or footpath, and prohibit and discharge the public from thereafter using the same."

The sections of the Act 43 Geo. III., c. 34, § 21,

and 22, founded on by the parties are as follows:—"(21) And be it enacted, that all the powers contained in the said Acts of the 24th and 28th years of the reign of his late Majesty Geo. II., and of the 4th, 29th, and 38th years of the reign of his present Majesty, and in this Act, which relate to the making, repairing, widening, and altering the turnpike roads in the said county of Edinburgh, or any of them; to digging for, taking, and carrying away of materials for the use of the said roads, and ascertaining damages for the same; to removing nuisances from the said roads, or any of them, and preventing obstructions thereon; and also which relate to the prohibiting and preventing of any injury from being done to the said roads, or any of them, shall be and are hereby extended to the cross roads, and all other roads in the said county which are not turnpike. (22) And be it further enacted, that it shall and may be lawful for any general meeting of trustees to shut up and suppress public roads of every description which may appear useless or of little importance to the public: Provided always that notice of any such intention be previously given for two consecutive Sundays by intimation upon the church doors of the respective parishes through which the said roads pass; and the first, or any stated subsequent general meeting after such intimation has been given and reported, shall hear all persons conceiving themselves to be aggrieved, and may exclusively, in the first instance, determine as to the shutting up or suppressing such roads, as to them shall appear just and reasonable; declaring nevertheless that the ultimate decision of the trustees may be brought under review of the Court of Session by suspension or reduction, in the name of any person interested, at any time within twelve calendar months from the date of the definitive decision; but if the determination of the trustees shall not be complained of within twelve calendar months, then the same shall be final and conclusive in all time hereafter."

SHAND and MACINTOSH, for the defenders, moved the Court to apply the verdict in favour of the defenders. They contended that the Road Trustees had right to shut up the footpath in question, and substitute another footpath for it under both sections; and although, in regard to the 22d section, certain notices required to be given, yet at this distance of time it must be presumed "*omnia rite et solemniter acta*," and relied on Stair, 2, 7, 10, 1553, c. 53, and 1592, c. 159; *Murray*, 2 D. 20; *Pollock*, 21 D. 173.

The SOLICITOR-GENERAL and SCOTT, for the pursuers, opposed the motion, and claimed the verdict as in their favour. They contended that the enactments of the Road Act were wholly inapplicable to footpaths; that, at all events, the power of altering was so; and that in regard to the power of suppression, the facts of the case were inconsistent with any presumption that the necessary notices had been given. They further maintained objections to the form of the verdict, which they held must be read as a verdict for the pursuers, seeing that it contained no findings in fact on which the reserved question of law could be founded.

At advising—

LORD COWAN—At the debate upon the motion for the pursuers to apply the verdict in this case, there was a good deal of discussion with regard to the terms, in which by the verdict the question to be disposed of by the Court is stated, viz., that the jury "find for the pursuers, with power to the Court to enter the verdict for the defender if they shall be of opinion that the road in question was legally shut up by the road trustees in 1824."

On consideration of the state of the pleadings, and of the issue sent to the jury to try the question of right of public way, asserted by the pursuers and denied by the defender, I am satisfied that the verdict embodies everything that was necessary to bring the question of law left to our decision properly before the Court.

The summons concludes for declarator of a public right of footpath, in the direction and through the grounds specified and described in the issue. For forty years and upwards prior to May 1867, or for time immemorial, the pursuers aver that there had existed such public right of way for foot passengers; and to obtain a verdict in their favour it was necessary that the jury should be satisfied that this averment had been established by the proof; and accordingly, in finding for the pursuers, subject to the reserved point, the jury must be held to have affirmed this on the evidence as matter of fact. But in the record, and on the written evidence which was before the jury, a special defence was stated, to the effect that in 1824 the public footpath in question had been shut up by the road trustees of the county, or by their authority under the proceedings set forth and referred to, and the warrant and authority by the meeting of 30th April 1824 and certificate of 17th June. Hence it was pleaded that the alleged right of way had been interrupted and the footpath legally shut up; and for this reason it was that the jury gave power to the Court to enter the verdict for the defender, should they be of opinion that this legal defence was established. In that event, notwithstanding the use of the footpath by the public during the intermediate period between 1824 and 1867, it is the clear finding of the jury that the pursuers were not entitled to prevail, and that the defender ought to have the verdict entered for him.

Had it been necessary to have recourse to the notes of evidence preserved by the presiding Judge to the effect of ascertaining, not whether disputed matters of fact should be held proved or not by the evidence—for that was the exclusive province of the jury—but for the purpose of ascertaining the facts with regard to the shutting up of the footpath—as to which there could be no dispute, and with reference to which the legality of the proceedings founded on by the defender fell to be, in the view of the jury, to be decided by the Court—I could not have hesitated in holding that the Court were entitled to have recourse to the notes of the presiding Judge for that purpose. A special verdict might no doubt have been adjusted, embodying such matters of fact as were necessary to enable the Court to answer the legal question left to their decision. But no more than in the case of exception to the law stated, or to be stated by the presiding Judge, can I doubt of the competency of this Court, when necessary, to have the notes of refused evidence before them to the limited effect I have stated. In the view which I take of this case, however, a verdict in the general terms which has been here returned was the more appropriate form. The legality of the procedure in 1824 essentially depends upon the view to be taken by the Court of the proceedings adopted by the trustees, as embodied in their minutes and referred to in the record, and their power to act as they did, and to grant authority for shutting up the footpath under the Acts of Parliament, in virtue of which the proceedings are

alleged to have been legitimately taken. For the consideration of the reserved question, it is only necessary to consider the statutory powers conferred on the trustees, and the proceedings which were actually adopted by them, as set forth in their minutes, and in the record. The legality of shutting up the footpath is exclusively to be determined upon these elements for judgment; and if the decision is adverse to the defender's views, the pursuers must be entitled under the finding of the jury to have the verdict entered for them.

The proceedings adopted by the trustees may be thus summarised. The petition to turn the footpath in a different direction, and to authorise the petitioner to shut up the footpath in question, and prohibit the public from using the same, was presented to the trustees at their meeting of 2d April 1824. At that meeting a committee was appointed to visit the ground and report their opinion; and their report, to the effect that the proposed alteration would be a great improvement, and that the old footpath should be stopped, was presented to a general meeting of trustees held upon 30th April 1824. Of that date a resolution was passed, authorising the petitioner to alter the line of footpath; and, on the same being completed to the satisfaction of a quorum of the district trustees, further authorising him "to shut up the old road or footpath;" and also by the same resolution prohibiting the public "from thereafter using the same." No farther procedure was adopted by the trustees; but it is alleged by the defender, and a writing to that effect has been produced by him, that on 17th June 1824 two of the district trustees had inspected the new footpath, and found it in every respect done in a substantial manner and to their satisfaction.

It was maintained by the counsel for the pursuers that this last document was not entitled to any regard, as evidence of the fact which it embodies; and whether it be so may be attended with doubt; but having been received without objection, and pleaded on throughout as part of the proceedings, I am not disposed to throw it out of view in the disposal of the legal question, whether the footpath was lawfully shut up. I think it would be unfortunate if our decision were made to turn on any such narrow ground.

The road statute in force in 1824, when these proceedings were adopted by the trustees, was that of 43 Geo. III., c. 34 (1803), entitled an Act for enlarging and altering the powers of and rendering more effectual the preceding Acts thereinmentioned "for repairing the turnpike and other highroads in the county of Edinburgh." The argument for the defender was mainly directed to establish that under the 21st, or at all events the 22d, section of the Act 1803, the Road Trustees had power to act as they did in shutting up this footpath. The 21st section enacts that all the powers contained in the preceding Acts mentioned in this Act, which relate to the making, repairing, widening, and altering the turnpike roads; to digging for and carrying away materials for the use of the said roads; to removing nuisance sfrom the same, and preventing obstructions thereon; and also which relate to the prevention of any injury to said roads, "shall be and are hereby extended to the cross and all other roads in the said county, which are [notturnpike." By the statute 1789 power was given to the trustees, after the principal roads were thoroughly repaired, to apply the tolls collected upon them "towards repairing the cross and bye roads" leading to and connected with such principal roads, provided always it was made to appear that the parochial funds arising from statute labour were insufficient for the reparation and maintenance of these roads. And it is farther enacted that a list should be kept by the clerk of the great roads and cross roads, to which this statutory provision should be applicable; and the trustees were discharged from laying out any of the money arising from tolls upon any roads "unless upon such great and cross roads contained in said recorded list, or upon such other roads a list or description of which shall be presented to a general meeting, and approved of by them." These roads are obviously the same as those described in the 21st section of the Act 1803 as "the cross roads and all other roads which are not turnpike," to which the powers specified in this section of the statute are declared applicable. I cannot hold this description to include and be applicable to a public footpath, so as to permit of the trustees widening and altering, at their pleasure, such paths passing through private estates, or expending the money arising from tolls in making and repairing such footpaths. The power of "altering" the line of road in cases falling within the statute was specially founded on, as justifying what was done by the trustees in 1824. But (1) that power of alteration had reference to roads which it was in the power of the trustees to make, repair, and widen; and in the formation and repair of which the money arising from the tolls might in certain events be expended; and (2) the application, which was before the trustees in 1824, was not in any just sense for an alteration merely of the line of footpath. It was for the shutting up of the footpath altogether from a certain part of its course to its terminus; and it is the power to shut up a public road or path, that must be shown to have been conferred by the terms of this statutory provision. To me it seems quite impossible to refer to this section of the Act 1803 to justify what was done by the trustees as *intra vires.*

But section 22 was alleged to be more comprehensive in its terms, and to embrace public footpaths. The words are that it shall be lawful for the trustees "to shut up and suppress public roads of every description which may appear useless or of little importance to the public." It is not necessary to consider the correctness of the defender's contention that these words embrace footpaths,—for, assuming that this effect is to be ascribed to them, the statutory provision very carefully prescribes the mode in which any public way or road is to be shut up and suppressed. The public, whose rights are to be interfered with in any such case were parties materially interested, and were entitled to notice, that they might appear for their interest. Accordingly, it is provided, *first*, that notice of the intention to shut up or suppress a public road, shall be previously given for two consecutive Sundays by intimation upon the doors of the parish church; and *second*, that after such intimation had been made and reported, the trustees should hear all persons conceiving themselves aggrieved; and *third*, only then were they exclusively, in the first instance, to determine what was just and reasonable; and this is followed by a declaration, that the ultimate decision of the trustees might be brought under review of the Court of Session, within twelve months after its date. A very definite procedure is here pointed out, the ob-

servance of which was a condition precedent to the exercise of the statutory power. But from the minutes founded on by the defender, it is made certain (1) that no previous notice on the door of the parish church whatever was made, and consequently no intimation of that having been done was or could have been made at a meeting of the trustees; and (2) that no ultimate decision which could have been appealable was actually pronounced—the *ex parte* resolution of the trustees being prospective only, and made dependent on the altered line of footpath being found satisfactorily completed, by a committee of district trustees. The proceedings were thus at variance with the express words of the Act, and the trustees, in giving authority to shut up the footpath, did so without notice of any kind to the public, as prescribed by the very words of the enactment. This being so, it cannot be held that this footpath was legally shut up in 1824.

The defender contended that he was entitled to the presumption, especially after so long a lapse of time, that *Omnia rite et solemniter acta fuisse.* But the presumption to this effect, even were it applicable to so great an omission as here occurred, must yield to the fact; and, as already said, there is demonstrative evidence afforded by the minutes of the trustees themselves, that no publication of the intention to shut up this footpath was made, and that no ultimate decision to shut up the road, after the public had been certiorated of the intention to do so, was ever adopted by the trustees. This also affords a conclusive answer to the plea of finality of the decision to shut up the road after the lapse of twelve months. There was no ultimate decision in terms of the statute to admit of it.

On the whole, keeping in view that the jury have affirmed the use of this public footpath for time immemorial prior to the institution of this action, and have found for the pursuers, conditional only upon the decision of the Court upon this reserved point being in their favour,—I am of opinion that the verdict must be entered for them, and that their motion to have decerniture in terms of the conclusions of the summons should be granted.

Lord Benholme said that it was plain that there was an obvious distinction between the powers given to the trustees to alter or suppress roads. If they proceed under section 21 they could do no more than alter; if they shut up a road, they must proceed under the 22d section. It was plain that this was a shutting up, and not an alteration of the road, and it was also plain that the intimations required by the 22d section had not been made. It appeared from the minutes and petition that the trustees had proceeded under the 21st section.

Lord Neaves concurred.

The Lord Justice-Clerk said that it appeared to him to be an open question whether Road Trustees were entitled by these statutes to exercise any right of altering or suppressing a road like the present, upon which they had never expended any funds in its construction or maintenance.

The Court accordingly applied the verdict as in favour of the pursuer, and decerned and declared in terms of the conclusions of the summons, with expenses.

Agents for Pursuer—Wotherspoon & Mack, S.S.C.

Agents for Defenders—Mackenzies & Fraser, W.S.

Tuesday, November 29.

HUNTER FINLAY *v.* BLAIR.

Mineral Lease—Mining—Water—Injury. Premises which had been let as print-works for forty years were supplied with water from neighbouring springs. The proprietor granted a lease of minerals in adjacent land, and in working the pits the springs were dried up, and the water pumped to the surface. The lessee of the minerals having sold the water to the tenant of another print-work,—*interdict granted* against the removal of the pipes which the latter laid down for carrying away the water to his own works.

Opinion, that in subterranean operations a mineral tenant was not responsible for depriving a neighbouring tenant of water which he had used for forty years, so long as the workings were fair and ordinary.

This was an appeal from the Sheriff-court of Lanarkshire, in a question between Blair & Co., calico printers, Maryhill, and Hunter Finlay & Co. calico printers, Dawsholm. Blair & Co. presented a petition to the Sheriff, to the effect that they had leased from the tenants of a pit which was being sunk near to their print-works, the water which should be pumped up from said pit, for the sum of £20 per annum. They alleged that they had received permission of the North British Railway Company to put down pipes upon their property to carry the water to their print-works, and that the respondents had forcibly broken these pipes for the purpose of abstracting the water for their own use, and they asked for interdict.

The respondents replied, that they held their printworks under a lease from Sir George Campbell, and that the subjects let to them included certain subterranean springs which were necessary for the supply of the water for carrying on calico-works. That two years ago Sir George let the minerals of his lands adjacent to those print-works, and that the tenants Messrs M'Nair, Stokes, & Co. sunk a pit close to the springs, and that the water supplied by the springs to the petitioners was thus pumped to the surface. The Messrs M'Nair and Stokes continued to allow the water thus pumped up to flow in its natural direction, whereby it was available for the print-works of the respondents, until recently, when they granted a lease of it to the petitioners Blair & Co., and the pipes in question were put down. They pleaded "(1) The mineral tenants having no proprietary right in the water pumped out of their pit, they could not legally sell the same to the petitioners, or any one else. (2) The water in question being in most part drained from one or more of the sources from which the respondents obtained the supply necessary for their works, the mineral tenants were bound to discharge the same in such a way as to allow it to flow in the direction which (but for their operations) it would naturally have done."

The Sheriff-substitute (Steele) pronounced this interlocutor and note:—*Dumbarton, 22d August* 1870.—The Sheriff-substitute having heard parties' procurators *viva voce*, and resumed consideration