[Heard 27*th June*, Judgment 11*th July*, 1845.]

DAVID STEWART GALBREATH, Esq., *Appellant*.

JAMES ARMOUR, manager of the Campbeltown Gas Company and others, *Respondents*.

Public Highway.—Property.—Servitude.—The soil of a public highway continues in the proprietor of the land over which the way has been made, and that although the highway may for forty years have been under the control and superintendence of the general road trustees; and the proprietor is entitled to prevent the opening of the way for the purpose of laying down gas or water pipes.

Acquiescence.—The proprietor of the soil of a public highway, allowing certain of the conterminous feuars to break up the way for laying down pipes during a period of ten years, is not thereby precluded from questioning similar acts by other feuars.

THE appellant was superior of the town of Dalintober, the houses in which were held of him under feu dispositions, declaring the boundaries to be the streets of the town, and some of them giving the feuars right to perform certain operations on the sides of the streets, such as making barrels, building boats, and storing wood. The feu contract to one of the respondents in particular, gave him power to conduct water along two of the streets to his distillery. But in none of the charters was there any express right of ish and entry.

In the year 1831, the Campbeltown Gas Company, with leave of the road trustees of the district, broke up two of the streets of Dalintober, and laid down pipes for the conveyance of their gas. In the years 1831, 1833, and 1835, the Company repeated these operations, and in each instance without asking any permission of the appellant, who was resident in the immediate neighbourhood during a great part of the period mentioned.

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In September, 1840, the Company were about to repeat these operations. The appellant, desiring to prevent them, presented a Petition to the Sheriff of Argyle, praying for an interdict against the streets being cut up for any purpose whatever without his consent.

The Sheriff, on the 2nd March, 1841, recalled an interim interdict which he had granted, and dismissed the petition. The appellant presented a note of advocation and interdict to the Court of Session, and on the 28th January, 1842, the Lord Ordinary, (*Cockburn*,) pronounced the following interlocutor, and added to it the subjoined note:

"Advocates the cause, recals the interlocutors complained "of, and decerns in terms of the original petition as restricted: "Finds the advocator entitled to expenses, both in this and in "the inferior Court; appoints an account thereof to be given "in, and when lodged, remits the same to the auditor to tax "and report.

"*Note.*—There are many conceivable and reasonable interests "which may induce a superior to refuse to let his vassals do "what the respondents wish to do. One is, that if cutting open "his ground for gas or water pipes be an accommodation to "them, he may think that they ought to pay for it. Another "is, that he may prefer having gas or water brought into his "village on some general system, subject to his control, rather "than according to the caprice of each individual. But whatever his interest may be, *or even supposing he had no interest in the matter*, still the ordinary rights of proprietorship entitle "him to resist such operations on his ground. If the vassals "be likely to have their houses made less comfortable by not "being allowed the means of introducing water or gas, or any "other accommodation, they have themselves to blame for "taking *bounding* charters without any provision for these luxuries. The superior only gave them a right to use the street "or road *for the ordinary purposes of superficial access*; and the

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"Lord Ordinary cannot agree with the Sheriff, that a right to "cut up the road, and to lay it *permanently* with pipes, can be "considered as comprehended under the fair or usual uses of a "road of which the *solum* belongs to another."

The respondents reclaimed, and on the 25th of June, 1842, the Court, before further answer, ordered the following issue to be tried before a Jury, in which the appellant was to be defender, and the respondents pursuers.

"Whether; for forty years or upwards, before the 18th of "December, 1840, the main or High-street and George-street, "in Dalintober, or either of them, were public roads or high-"ways, and under the control and superintendence of the road "trustees, and maintained and repaired by them, and were not "under the control and superintendence of the defender or his "authors, and were not maintained or repaired by the said "defender or his authors; or whether any parts or portions of "the said streets, or of either of them, and if any, what parts and "portions of the said streets, or of either of them, were public "roads or highways, managed and repaired as aforesaid?"

This issue was accordingly tried, and on the 23rd March, 1843, the Jury returned a verdict, finding that, for forty years and upwards, specified parts of the streets of the town, being those in question, "were public or highways, and under the "control and superintendence of the road trustees, and main-"tained and repaired by them, and were not under the control "and superintendence of the defender or his authors, and "were not maintained or repaired by the defender or his "authors."

On the 23rd June, 1843, the Court, in respect of the verdict, altered the interlocutor of the Lord Ordinary, and refused the prayer of the original petition. The appeal was against the interlocutor of the Sheriff, the interlocutors of the Court sending the issue for trial, and the decree of the Court refusing the prayer of the original petition.

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Mr. Kelly and *Mr. Anderson* for the Appellant referred to *Ersk.* II. 5. 1, and II. 6. 9.—Tennent *v.* Muter, 9, *S.* & *D.* 586.—Scouller *v.* Robertson, 7, *S.* & *D.* 344.—*Ersk.* II. 9. 34, and II. 9. 13.—*Stair*, II. 1. 5, and II. 7. 10.—Dovaston *v.* Payne, 2 *Smith's Cases*, 94.—Harvie *v.* Rodgers, 3 *Wil.* & *Sh.* 251.—*Bank*, II. 3. 12.—Act 1661, cap. 41.—Turner *v.* Roxburgh, *Kilk.* 252.—Forbes *v.* Forbes, 7 *S.* & *D.* 441.

The Lord Advocate and *Mr. A. McNeill* for the Respondents referred to *Bank*, I. 3, 4.—*Ersk.* II. 1. 5. and II. 6. 17.—Act 1661, cap. 41.—1 & 2 *Gul.* IV. cap. 43, sect. 71 & 100.—3 & 4 *Gul.* IV. cap. 46, sect. 110.—Forbes *v.* Forbes, 7 *Sh.* & *D.* 441.

LORD CAMPBELL.—My Lords, this case originates in a petition to the Sheriff of Argyleshire, by the appellant as heritable proprietor of the lands of Ballegrygon. The petition, after stating that the town of Dalintober had been laid out on the said lands, that the feuars had free ish and entry from the streets of the town to their tenements, but that no part of the streets had been granted to any of the feuars, alleged that the respondents, some of whom are feuars under the petitioner, and others represent an unincorporated Gas Company, had resolved to cut into the soil of certain streets in the said town of Dalintober, for the purpose of laying pipes therein for the conveyance of gas and water without his consent, and prayed that they might be interdicted from cutting into or opening any part of the said streets for such a purpose without his consent. The case, therefore, which he made was, that the soil of those streets in the town of Dalintober was his, and that the feuars had no private servitude over them, beyond ish and entry to their tenements, but he allowed that they were highways, over which the public had a right of passage.

The respondents admitted "that at the time when the present "application was presented, they were about to cut open part

" of the street called George-street, in Dalintober, for the pur-
" pose of laying pipes for the conveyance of gas to several
" houses in the said street, without the consent of the peti-
" tioner," but denied that he was entitled to complain of this act.

It will be material for your Lordships to bear in mind the nature of the case which the petitioner at first put forward, and that the interdict prayed for was to be merely prospective, disturbing nothing that actually existed, whether by right or by wrong.

An interdict was granted by the Sheriff-substitute, but was recalled by order of the Sheriff-depute, on the ground that as the respondents had a right to their feus, with free ish and entry thereto from the streets, they were entitled to introduce water or gas into their respective tenements, by means of pipes laid in the streets, and that free ish and entry to a man and his family extended to free ish and entry of water and gas in the customary manner in which such commodities are generally introduced.

Upon a process of advocation, after voluminous statements of facts and pleas in law, Lord Cockburn, as Lord Ordinary, found that the petitioner was entitled to the interdict against the opening of the soil of the streets for the conveyance of water or gas by pipes—he recalled the interdict complained of, and gave expenses to the advocator, both in the Court of Session and in the superior Court—intimating his opinion in a short and pithy note, that the usual rights of proprietorship entitle the proprietor to resist the threatened operations, for that having, as superior, only given the feuars a right to use the street or road for the ordinary purposes of superficial access, a right to cut into the soil and to lay it permanently with pipes, could not be considered as comprehended under the fair or usual uses of a road, of which the *solum* belongs to another.

On a reclaiming note to the Second Division of the Court of Session, for reasons which, (the case not being reported, and

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no note being taken of what fell from the learned Judges,) we have been unable to discover, and I for one find great difficulty to conjecture, the following issue was directed, "whether for "forty years, or upwards, before the 18th of December, 1840, "the main or High street, and George street, in Dalintober, "were public roads or highways, and under the control and "superintendence of the road trustees, and maintained and "repaired by them, and were not under the control and super-"intendence of the petitioner or his authors."

A trial accordingly took place, when the Jury found "that "the streets in question, for forty years and upwards, had been "public or highways, and under the control and superintendence "of the road trustees, and maintained and repaired by them, "and were not under the control and superintendence of the "petitioner or his authors, or maintained by them."

Thereupon, the Second Division, (it is said,) without explaining their reasons, as a necessary consequence of the verdict, reversed Lord Cockburn's interlocutor, recalled the interdict, and dismissed the petition, with costs.

The present appeal to your Lordships is against this last interlocutor of the Court of Session. In my humble opinion, my Lords, this interlocutor ought to be reversed, and that of Lord Cockburn affirmed.

In the first place, it is quite clear that the soil of these streets is in the appellant, and that he has all the rights of proprietor over the soil of them, unless in as far as the soil may be taken from him, or his rights may be impaired, by the consideration that they are and have been above forty years public highways, under the control and superintendence of the road trustees for the county of Argyle. The deeds produced are sufficient evidence of his title; and, in truth, it cannot be contested by the feuars, who claim under grants stating that title, and describing tenements bounded on those streets as the property of the author of the appellant, and giving limited servitude over these very streets.

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The threatened act of opening the soil and laying gas-pipes would no doubt *prima facie* be a sufficient foundation for an application for an interdict by the owner of the soil; I, therefore, now proceed to examine the different pleas on which it is resisted.

The first is that, by the law of Scotland, the soil of all highways is in the Crown. Let us observe to what an extent this proposition goes. Carriage-roads, horse-roads, and footpaths are equally public roads; and whether the use of them has existed further back than can be traced, or they have been established by uninterrupted use for more than forty years immediately before the time when the controversy respecting them arises. It comes to this, then, that if a proprietor for the accommodation of the public suffers a public road for horses, carriages or foot-passengers, to be established over his land, the property of the space which the road traverses is gone from him and his heirs, from the centre to the sky, so that he loses all the herbage there may be upon the surface of it, with all the minerals under it, and he cannot connect the different parts of his intersected property by a tunnel under it, or by a bridge over it. It is curious, in a feudal point of view, likewise, to consider where and how the fee is supposed to be transferred.

But I am happy to think, my Lords, that there is no sufficient authority in the law of Scotland for a proposition so absurd and inconvenient. When the text writers cited upon this point are examined, it will be found that they mean no more than that highways are *res publicæ*—that there is a public servitude over them—that they are called "the king's highways" in Scotland, as they are in England, because the public, represented by the sovereign, have a right to use them, and that any *perprestur*e or nuisance upon them is a public offence, for which the offender may be prosecuted and punished, leaving the soil, subject to the public servitude, to remain in the private proprietor. The highway belongs to the king; but what is the definition of a high-

way?—Not the soil, over which the public have a right of passage. We are told by our books that a highway may be either a footway, a horseway, or a cartway, and is a right of passage in general to all the king's subjects, without distinction, see 1st Institute, 56. This right of passage may well be said to belong to the king, although the soil over which it is exercised belongs to a private individual.

The case of Forbes *v.* Forbes, whether rightly or wrongly decided, does not touch this question, as all that was debated there was the extent of the public servitude, not the right to the soil. Lord Glenlee's inaccurate expression, that "the soil occupied "by a public road belongs to the public," he himself immediately corrects and explains by adding, in the same breath, most accurately, "and they may make such use of it as may be neces- "sary for the purposes of the public."

The soil in public harbours, in public navigable rivers, and in the sea-shore, was originally in the Crown, and is now in the Crown, or in the grantees of the Crown; not so the soil of highways, which was originally in the owner of the adjoining land. There may be particular highways in Scotland, the soil of which is in the Crown; but I must express my clear opinion that, by the law of Scotland, as well as by the law of England, the soil of the public highways is presumed to be in the conterminus proprietors, and that if a public highway is established by usage over the land of another, the soil is still his, with all his former rights, subject to the public servitude which he has suffered to be established. The simple fact, therefore, that these streets are public highways, is no answer to the application.

But main stress is laid upon the fact found by the jury, that these streets were not only public highways, but for forty years were under the control and superintendence of the road trustees.

Now it is contended, that at all events the soil of all public roads under the control and superintendence of the road trustees is in the road trustees, and therefore, that the soil of these roads

must be out of the appellant. Upon this reasoning the issue seems to have been directed, and the final judgment pronounced by the second division of the Court. But there is no express enactment to transfer the soil, and surely the transfer of the soil is not necessarily implied by conferring a right of control and superintendence to insure the enjoyment of the servitude. There are expressions in Highway Acts applicable to Scotland, which have been drawn by inferior practitioners of the law imbued with the vulgar notion that the soil of public highways belongs to the king, or the trustees. These being adopted by the legislature would certainly be evidence of the law, if it were doubtful; but the law before, having been clear and explicit, they are wholly insufficient to alter it. There is no dispute that in England the soil of highways is in the conterminous proprietor, who may bring ejectments against any one who takes possession of any part of the highway adjoining his land, and may maintain an action of trespass for any injury done to it beyond what is connected with the public right of passage over it (see the cases collected, 3 *Burn's Justice*, 511). Nor does it make any difference for this purpose, whether the road is under a Turnpike Act or not, for the soil does not vest in the turnpike trustees unless there be a special clause for that purpose. Davison *v.* Gill, 1 *East*, 69; Rex *v.* Mersey Navigation, 9 *Barnwell* and *Cresswell*, 95.

Yet there are Acts of Parliament applicable to England exactly like those relied upon with respect to Scotland, from which it might be inferred that in England the soil of all highways is in the Crown, or in the road trustees. By the General Highway Act, 13 Geo. III., c. 78, s. 17, it is enacted, that "where any "such new highways shall be made as aforesaid, the old highway "shall be stopped up, and the land and soil thereof shall be sold "by the said surveyor to some person or persons whose lands "adjoin thereto, if he, she, or they shall be willing to purchase the "same; if not, to some other person or persons for the full value "thereof." And by the 55 Geo. III., c. 68, which was passed

" to amend 13 Geo. III., respecting the turning or diverting a " public highway," it is enacted by section 4, " that from and " after the enrolment of such order and certificate, such old high- " way, bridleway, or footway shall be stopped up, and the soil of " such old highway or bridleway sold in the manner prescribed " by 13 Geo. III., c. 78, s. 17." My Lords, both those acts are repealed by 5 and 6 Wm. IV., c. 50, and the absurdity being discovered, the new enactments give no power of selling the old highways.

If trustees buy lands, buildings, or other heritable subjects, the property of these will be in the trustees, but such a power to buy will not give them the property in lands, buildings, or heritable subjects, which they have never bought.

It is said, however, that the right of the trustees to control and superintend takes away the right of the appellant to complain of the act of laying the gas-pipes in the soil of the streets, even if the soil is still his.

On the same reasoning, my Lords, if there were minerals under the streets, the property of the appellant, it might equally be contended that he could not apply for an interdict against persons threatening to bore for them, and to carry them away. The power of control and superintendence with a view to the public enjoying the right of way, leaves all the rights of the owner of the soil, subject to the right of way, entirely untouched.

Then, my Lords, reliance is placed on Stat. 3 and 4 Wm. IV., cap. 46, by which authority is given to trustees of roads, and magistrates of royal burghs, to authorize the opening of roads and streets for laying pipes, and conveying water or gas; but the judgment of the Court of Session does not in the remotest degree proceed on the ground that any such power was ever exercised in this case, for the appellant positively denies the fact; and the only use that can be made of the statute is to show that the soil, or the right of complaining of an injury to

it, is taken out of the proprietor. This, my Lords, is, like the power of control and superintendence, to be exercised subject to the paramount rights of the owner of the soil.

If I hold a field, subject to a right to A. to license persons to dig clay from it, I may surely treat as trespassers those who shall dig clay from it without any license.

It seems to me, therefore, my Lords, that the issue was wholly useless, and that the case now stands, as it did before the Sheriff of Argyle, to be determined by a just construction of the feu grants.

If the servitude granted impliedly embraces the right to open the soil, and lay water and gas-pipes, the interlocutor of the Sheriff recalling the interdict, ought to be supported. But, my Lords, I clearly think that the just view of this point is taken by Lord Cockburn. The grants show that the land was to be laid out as a town, and impliedly the feuars have *ish* and *entry* to their tenements from the streets; but how does this *ish* and *entry* infer a right to open the soil of the streets, and to lay down iron pipes, which would become a part of this free-hold. Such a doctrine would entirely destroy all the rules and distinctions respecting servitudes. Breaking the streets to lay pipes is never thought of in England, except under the authority of the legislature. Our different gas companies and water companies are established by act of parliament, with a power, on certain conditions, to open the streets, and lay down pipes.

By a very salutary general statute, the 3rd and 4th Wm. IV., the necessity for such private acts is obviated in Scotland; but the respondents, instead of availing themselves of that statute, have persisted in an expensive and useless litigation.

Another objection made on behalf of the respondents was, that the petitioner had improperly denied that these streets were highways, which had been forty years under the superintendence of the trustees; and that this fact being found against him by the jury, he is not at liberty now to make a case,

consistent with the fact, of their having been such highways. But he could not appeal against the issue; and although he would have done much better to have admitted that they were such highways, which inevitably follows from their having been streets, and the existence of a public Act of Parliament, placing all highways in the county of Argyle under the superintendence of the trustees, he cannot be prejudiced by an immaterial self-evident fact having been found against him. The case originally made by his petition was, that the places, in which the trespasses complained of were committed, were public streets in Dalintober; and "a common street," and a "king's way," though formerly distinguished, are now equally considered public ways. That is so ruled in 1 *Strange*, 44.

I have now, my Lords, to conclude with considering the only question on which I have entertained any doubt, whether the appellant has not by acquiescence precluded himself from resorting to the remedy of an interdict. The result of the statements of the opposite parties upon this part of the case seems to me to be, that in 1831, 1833, and 1835, certain pipes had been laid in the streets of Dalintober without the permission of the appellant being asked, but with his knowledge, and that he made no complaint of them till December, 1840. Such knowledge and acquiescence I think would effectually bar the appellant from seeking to disturb existing enjoyment by interdict; and for what had been done before, if it was wrongful, although all remedy would not be gone, he must proceed by another form of action to try the right, and to obtain compensation. But because A., B., and C., in the town of Dalintober have laid pipes in the streets to bring gas to their houses, may not the appellant seek to prevent entirely different parties, X., Y., and Z., from doing the same? If the Act was unlawful, is it so far sanctioned by custom that a stranger cannot in this form be challenged for doing it? What passed between the appellant and other feuars is *res inter alios acta.*

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However, the case of the gas company is mentioned; and it is said that they being allowed to lay down a main, should not be prevented from laying down service pipes to all the houses in Dalintober. My Lords, the gas company, as such, have here no *locus standi*, there is no privity nor connexion between them and the appellants; they can only be regarded as the servants and agents of the feuars, and they can be in no better situation than their principals. It cannot be said that the respondents, who are feuars, have been put to any expense or any additional inconvenience by the laying of pipes in the streets having been allowed to others, and then suddenly forbidden to themselves.

Although a remainder man had lain by for a time, and allowed timber to be felled by the tenant for life, I apprehend that he might still apply for an injunction against cutting more; and that if the purchaser were included in the application it would not be refused, on the ground that he, expecting a great fall of timber, had provided many horses and carts to carry it away.

The interdict, in my opinion, is entirely prospective, and, therefore, the appellant has done nothing to prevent him from applying for it. In truth, acquiescence was no ingredient in the judgment. The mere right was tried, and if the interlocutor stands the appellant would be without remedy in any shape. After such an interlocutor upon such a verdict, and the *rationes decedendi* expressed in the interlocutor, I rather conceive that the result would not be the same as if the petition had been simply dismissed on the ground of acquiescence; but that upon an affirmance of the interlocutor *res judicata* might be pleaded to any other action. But this point seems to me at presen immaterial, as I am of opinion that there is no sufficient ground for the plea of acquiescence.

As to the conduct of the appellant we have no means of judging, and no right to judge. We can only look to the strict rights of the parties.

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Upon the whole, my Lords, I am of opinion that the appellant was entitled to apply for this interdict; and I, therefore, beg leave to move your Lordships, that the interlocutor appealed against be reversed, and that of Lord Cockburn be affirmed.

LORD BROUGHAM.—My Lords, agreeing, as I entirely do, in the view which my noble and learned friend has just taken of this case, a case of very considerable importance in my opinion, it will be unnecessary for me to trouble your Lordships at great length in stating my opinion, and the grounds upon which it rests.

In the first place, I have to observe that the issue, which was directed in this case, is to me a matter of some astonishment. I do not profess to understand the grounds upon which that issue was directed; I do not profess to comprehend the frame of that issue at all. I hold that, upon every view of the case, the matter of fact directed to be investigated by the trial of that issue is wholly immaterial. No doubt whatever this land was burthened with a servitude; no doubt whatever this land, as far as regards the rights of the public, the right of way over it, had been so used; but whether for forty years, or forty centuries, or for four years, does not signify, because it is admitted on all hands that the public had that right of way.

Then what did the issue direct itself to? It directed itself to trying that which was admitted; namely, whether, in one particular view the title of the public over this land was founded well or not, because it did not even go to try the question, as I understand it, whether the public had that right, but it went to try the question of the foundation of that right, namely, the prescription, the forty years' use of it, which is enough for the servitude of course. But admitting that the public had the right of way, be it owing to long possession, or be it by express abandonment of the owner of the ground to the public, or by any positive grant,

that is quite immaterial; whether the public had that right of way or not was no part of the question in the case; the question was, whether, having that right of way, it followed that the public, by mere possession of an easement, had the ownership of the soil.

It is also very material to consider that, in putting this question to the jury, there was not a word said of acquiescence. I could much more easily have understood sending an issue to try the point of fact of acquiescence or no acquiescence, because if there had been acquiescence proved in a clear and legitimate manner, a great deal of light would have been thrown upon that right in this case conjoined with the other right. The possession of the easement was really no matter of dispute between the parties.

It is not immaterial to consider that their Lordships did not direct any issue to the point of acquiescence on this ground, that it tends most demonstratively to show what my noble and learned friend has already pointed out, that acquiescence formed no part whatsoever of the ground for the judgment below, for if it had formed any part of the ground of that judgment, they most undeniably ought to have sent it to be tried as a matter of fact upon the issue, instead of having a fruitless matter of fact tried upon one ground, and one ground only, and that one which was not disputed, namely, the public right to the highway.

Then we get this point whereupon to rest our foot in the outset, that the public highway is admitted. Now it seems clearly, as my noble and learned friend has stated, to have been only upon the ground of the finding of the verdict on that issue that the judgment was pronounced. What was it? Why, that their Lordships thought that the only issue was the right of way, and that if the public had a highway right they had the soil; because, instantly that the issue was found in one direction, namely, on behalf of the public, the judgment was pronounced. It was supposed to be a necessary consequence, as it were the consequence in law of the finding upon the issue.

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Let us then see whether that is the legitimate consequence of that admission, which I take to be an admission proved by the verdict upon an issue unnecessarily tried, namely, that the public had a right of way. A highway must, according to the law of Scotland, be totally different from a highway according to the law of England. But, it must be clearly admitted, to follow from the right of a highway being vested in the public, that the soil thereby is vested in the public, else this judgment cannot stand. Is it so? Is there that wide difference, or rather contrast, between the laws of the two countries in this respect, namely, that in England it is barely an easement, and that in Scotland it is not merely a servitude or easement, but it is a right to the soil? My Lords, I see no authority whatever for holding that that is the law of Scotland. The cases clearly do not prove it. The reference made to the statutes does not prove it; and I can see no difference whatever, upon looking into either the text writers or the cases, and nothing to impeach the inference drawn from both in the statutes, (of which a word presently,) to show that there is a different view taken of the conflicting rights of the public and of the owner of the soil in Scotland, from that which is taken in England.

When it is said, as it is in the books, and in some of the cases, that a highway is in the public, or in the trustees on behalf of the public, or in the Crown for the benefit of the public, what is it that really is so? *Ex vi termini:* we are not to take "highway" to mean that, which it is often used to mean, by the ordinary confusion of language in common parlance, where, in this case, as in many others, you confound the thing with the use of the thing. You talk of a "reading," and sometimes confound it with a book. You talk of a "drawing," and sometimes confound it with the paper upon which the drawing has been made. We have here to consider it in the legal, strict, and technical sense of the word. Then "highway"

what is it? It is known to the law of Scotland; and it is known to the Civil law, from which it was borrowed into the law of Scotland, that there are three kinds of way:—there is the *iter*, there is the *actus*, and there is the *via*. What is the *iter?* The road from London to York is very often called *iter*. *Iter* would be very often used by an historian; but when a jurist makes use of the word *iter* it means an easement, a right of passing along another man's close on foot, and no more. There is the *iter* without having the right of driving a horse. The *actus* gave you the right to drive a horse or a cart without cattle; and the *via*, the highway, is a general phrase for the whole: it included *iter* and *actus*, and the right also to take wains or carts drawn by cattle. It was the *nomen generis*, the most general term of the whole, and included the other minor ones. Every one of those is an easement, and only describes the right to use the surface in respect of that right of easement; but in common parlance you talk of an *iter* as meaning the high road, the body of the road. You talk of *actus* not so much as meaning the body of the road as the right of going over it, and you talk of *via* very commonly as meaning the body of the road; yet when a lawyer comes to consider them, whatever a common person might do, he considers them to be merely words expressive of the various forms of that servitude or easement. This, therefore, shows distinctly, (and I have entered into it for the purpose of explaining it more clearly,) that you are to take the word *highway*, when you speak as a lawyer, in a different sense from that in which you take it when you use it as in common parlance.

Then it is said that there is an expression of Lord Glenlee, and that has been relied upon, I see, in quoting it in another case. But I think a great step has been taken towards the explanation of it, and to show that his Lordship really had the right sense of the word when he came to unfold it more clearly. My noble and learned friend referred very justly, in fairness to

that most able and learned judge, to what follows almost immediately afterwards; for, if you take those words by themselves, they certainly do seem to import that he considered the soil to be in the party having the easement.

Then, my Lords, it is said, that various Acts of Parliament have dealt in Scotland with the subject as if they assumed that the soil was in those of the public who have the easement. A complete answer to that has been given, a more complete one cannot be given, than to show that if that proves anything it will prove a great deal too much; for it will prove that in England, where no man doubts this point, the soil belongs to those having the easement, namely, the king or the public; because in the first General Highway Act of the year 1773, and in the second General Highway Act of the year 1805, the road, not only the right of way but the public road, the *corpus ipsum* of the road, was dealt with as if it belonged to the public, *a centro usque ad cœlum*, and as if the public had the right and not the conterminus proprietor or proprietors. That was discovered and set right in the year 1835 or 1836 in the existing Highway Act, which omits, and most properly omits, that erroneous clause.

I believe two sources may be pointed out as having been the origin of that erroneous law. The one is, that in many cases there is a property in a highway just as there is in a railroad. A railway company buys the road, buys the soil, buys it out and out, and they are the owners of the soil—they have done a great deal more than merely buy the easement. So, in many cases it may have happened that highways have been bought, and have not been the property of the owner of the co-terminus lands. But I believe a more likely source than this was oversight. I think, generally speaking, it was an oversight in those who framed those Acts. In private Acts and in local Acts we have frequently seen it existing, and in those cases it very often is owing partly to the first of those

causes, namely, there having been a purchase, and partly to the second of those causes, there having been an oversight. And I am inclined to think, upon the whole, that that unintelligible clause, (for so to a lawyer it must appear to be, the English law not being doubted upon the subject,) crept into the 13th of George the Third, and the 55th of George the Third, the two General Highway Acts passed in 1773 and 1805, owing more to an error than to the few instances, (for they are comparatively few,) of purchase of the soil.

My Lords, I observe a very great slowness in those who maintain the other side of the question, to follow it to its consequences. If the consequences are legitimate, then there cannot be a clearer matter than this, that he who will have the proposition, cannot repudiate its consequences—if the consequence is absurd, he gets rid of a great argument against himself, by a capricious and arbitrary use of the proposition; but he shall not be allowed so to use it. If so, the most evident truths in mathematics would cease to be true, because a man might say, "I only say so and so, I do not go the length of saying so and "so."—Aye, but you must go the length, because if you say so and so, you must say so and so, too. But he would be very well pleased if he could get rid of the consequence.—And so I have often observed with respect to the old demonstration *ad absurdum,* upon which some of the most certain propositions in Euclid rest; among others, one of the most evident of all, which the geometricians used to laugh at, because they said it was plain to asses—I mean that two sides of a triangle are greater than the third side. They said, "An ass knows that, he would "rather go across than go round." "Oh no," said Euclid, "I "must lay it down; it is part of my general system."—And that proposition is proved *ad absurdum*—and so are many others of the most certain propositions. According to the mode of reasoning with which I am dealing, people would very easily assert the most absurd propositions—things evident even to asses they

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would deny, because they would say, "Oh! I only say so and "so, but I do not say so and so." No, no,—you must take the consequence of your proposition—*Qui vult antecedentem, non debet nolle id quod consequitur*.—And so I say here.

Now, observe how that applies. I find the greatest slowness in those learned persons who maintain the other side, to follow it out to its consequences, namely, that if the soil of a highway belongs *ad centrum* to the public, a man having a highway running through his ground, could not mine under it below the surface. In Northumberland, for instance, Lord Londonderry or Mr. Lambton could not mine under the surface, but he must sink another pit on the other side of the road, because if he had sunk a pit on the east side of the road he could not drive his gallery from east to west under the road. It is perfectly self-evident that that is the inevitable consequence of this doctrine that a man who has driven a pit in his close upon the east side of the road, both sides of the road belonging to him, if he has not the property of the road is bound to sink another pit on the west side, and he is a trespasser if he touches an atom of the coal, or of the sub-soil perpendicularly under the road.—That is evident, and those who maintain the one proposition, must clearly buckle to the consequences and maintain the other.

My Lords, it is not necessary for me to detain your Lordships further. I have dwelt a little longer upon this than I should otherwise have done, on account of the unfortunate circumstance of our not all quite agreeing upon the subject. That being the case, I have thought it necessary to give my opinion at greater length than I otherwise should have done. And so viewing the case, I most cordially agree with my noble and learned friend, and give my concurrence and support to his proposition.

LORD COTTENHAM.—My Lords, I am of opinion that the interlocutor appealed from ought to be affirmed. I consider

this a case of great importance as it involves questions affecting public highways throughout Scotland, and the principles upon which the equitable jurisdiction in matters of interdict is in future to be administered in that country.

If the judgment of the Court be reversed and the interdict be restored, this House will establish that by the law of Scotland any owner of land, adjoining a street or public highway in towns, may prevent the opening of the street for the purpose of laying down pipes for the conveyance of water or gas, or for any other purpose required by the inhabitants, without his consent —that is, without paying to him such a consideration as he may think proper to require as the price of his permission; and consequently, that the trustees of the roads have no power to give permission, or themselves to open the roads or streets for such purposes, except as such rights and powers may be affected or given by some recent Acts.

The great distinction between private rights of way or roads by servitude and the public highways, is strongly marked by all the authorities from the earliest time down to the present, and is most essential to be kept in view in considering the claim raised by the appellant. If duly considered, it will reconcile the apparently discordant opinion of the Sheriff Substitute and Lord Cockburn on the one side, and of the Sheriff Depute, Lord Gillies, and the Inner House on the other.

The appellant, indeed, was well aware of this distinction, for he, throughout, maintained, that in the street in question the feuars had only a right of way by servitude. His petition so states his title; and this seems to have been assumed by the Sheriff Substitute and by Lord Cockburn, and the real state of the case was only ascertained by the verdict upon the issue.

If the state of the case had been as the appellant stated it the interdict would have been matter of course; because any party, entitled to a mere right of way by servitude, could only have such right of passage as the enjoyment proved, and no

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question could arise as to the powers of road trustees or other functionaries, in whom the jurisdiction over the public highways is by the law of Scotland vested. The interdict assumes that there is no such right in the road trustees, for the fact of their consent having been obtained is a fact controverted between the parties; and if the right of the plaintiff had depended upon the absence of consent by the road trustees, no interdict could be granted until the fact had been ascertained. The interdict assumes that the fact is immaterial, and that whether they consented or not the plaintiff has a right to restrain the future progress of the works.

The Inner House, seeing the importance of the distinction, directed an issue to try this fact controverted between the parties, and the result has been to ascertain that the street in question is a public highway and under the jurisdiction of the road trustees. Upon that being so ascertained, the Court of Session seems to have considered it as conclusive against the claim of the appellant.

Two questions arise upon this state of circumstances. First, In whom is the soil of a public highway in Scotland? And secondly, Does a proprietor, dedicating a portion of his land to the public as a highway, merely grant a right of passage to all persons, which would be only giving to all the same right which individuals have in rights of way by servitude? Or have the road trustees and other public functionaries such a power and jurisdiction over the soil as entitles them to open it when the interest of the public requires it? For if they have such a power, the appellant cannot be entitled to an interdict.

That road trustees have a larger power than persons entitled to a right of way by servitude cannot be disputed. It is not denied that they may break the soil for purposes of improving the road by raising or lowering the level, making drains, &c. But it is answered that these are objects connected with the right of passage. The existence of the power, however, marks

the distinction between public and private ways, and shows that in dedicating a portion of land as a highway to the public, more is granted than the mere right of passage; and this being so, the question will be as to the extent of the grant, and whether it does not devote to the public and submit to the jurisdiction of the public functionaries all such power over, and interest in, the highway, as the public interests including the objects in dispute may require. A question quite independent of the title to the soil and the minerals which may be under it, as to which there are no doubt great difficulties, arising from the principles which regulate the titles to landed property in Scotland, and from the authorities which are to be found upon this subject, but it appears to me quite immaterial to attempt to solve these difficulties. If the soil be in the Crown, there would indeed be a short end of the appellant's case; but if it be in him, it appears to me that his title to interfere with the use of the soil for the purposes contemplated will not be advanced by his establishing a title to the soil, it appearing to me evident, from the authorities, that the Crown, and through the Crown the road trustees, have right and power over public highways sufficient to enable them to permit the surface to be opened for such purposes as those in question; and consequently, that the original proprietor of the soil has no right to the interposition of the Court by interdict to prevent such works being carried into effect.

This will, I think, clearly appear from text writers, decided cases, and the recognition of various acts of parliament.

Craig says, I. 16. 10., "*Via publica solum est publicum.*"

Stair says, I. 4. 7., "Highways belong to the King."

Bankton says, in I. 3. 4., "Things public are those which "belong as property to the Sovereign, as rivers, harbours, and "highways; but of the banks of a river the use is public, but the "property belongs to the owner of the adjoining ground." And again, he says, in II. 1. 5., "Highways are the King's, and *inter*

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"*Regalia*, as encroachments upon them, as likewise upon the "streets of Royal burghs and public rivers, is purprision."

Erskine, II. 6. 17., says, "Since the introduction of feus, "rivers, free-ports, and highways are *inter Regalia* and *in* "*patrimonio principis*."

Bell, in his Principles, sect. 638 and 659, says, "Highways "are vested in the Crown; a public road is capable of extension "with a change in the mode of travelling, but a road by servi- "tude is strictly limited to the extent of the possession."

This was the point decided in Forbes *v.* Forbes, in 7 Shaw and Dunlop, 441, where Lord Glenlee says, "I cannot help thinking "that there is a difference between a public road and that of "one claimed as a right of servitude by the proprietor of "a dominant tenement. The soil occupied by a public road "belongs to the public, not to the proprietor of the ground "over which it passes, and they may make such use of it as "may be necessary for the purposes of the public." All the other Judges concurred.

In Miller *v.* Swinton, in *Morrison* 13, 527, it was found that the public streets in a burgh belong to the Crown.

In the road acts in Scotland no enactment is found giving power over the soil, but there are various provisions which assume it. In two modern Acts, particularly the 1st and 2d of Will. IV., cap. 43, sec. 32, the trustees are authorized to erect toll-bars, houses, and gardens, and the property is declared to be in them. By sec. 61 the trustees are authorized to widen roads to 20 feet without any payment, and to 40 feet making compensation. In sec. 67, lands taken for the purpose of the roads are declared to be the property of the trustees. By sec. 71, roads and toll-houses becoming useless are to be sold. Sec. 86 assumes the power of the trustees to widen and lower the roads. Sec. 100 assumes power in the trustees to give leave to lay water and gas pipes; and provides that if the road shall be opened with the leave of the trustees or others

having authority so to do, for the laying of pipes for water, gas, tunnels, or railroads, or for any other purposes, the soil shall be replaced.

Again, in the 3d and 4th Will. IV., cap. 46, sec. 110, the Commissioners of Police are authorized to apply by petition to the road trustees for leave to open the streets "for laying pipes "for water or gas, or making sewers or drains, or for any other "purposes which road trustees shall grant the necessary "warrant for that purpose." The right and power is assumed to reside in the trustees alone, for no application is required to the supposed owner of the soil.

We find then these authorities stating that the soil of a public road belongs to the public, to the Crown,—not as the banks of a river, the *use* of which is for the public, but the *soil* of which belongs to the owner of the adjoining land; that highways, but not private ways, may be extended as to extent and use as occasion may require, and that such uses may be made of highways as may be necessary for the purposes of the public; and we find public acts, and particularly the 1st and 2d Will. IV., cap. 43, sec. 100; and 3d and 4th Will. IV., cap. 110, recognising the rights of road trustees over the soil so much as to treat it as vested in them, enabling them to convey it when no longer wanted for the public, and above all referring to the particular acts sought by the appellant to be restrained, and making the consent of the road trustees alone, without any reference to the supposed owner of the soil, sufficient for the purpose of opening streets for the purpose of laying pipes for water and gas.

How far these authorities may be sufficient to show the nature and extent of the powers of road trustees over public highways it is not necessary for the present purpose to consider. The question is, do they leave it quite clear that they have no power to permit the opening of the soil for the purpose of laying pipes for the public service of water or gas; and do they leave it

quite clear that the owner of the adjoining soil has a right to prevent that being done? for if the right so claimed by them be even doubtful, he cannot, in the present state of the question, be entitled to the interdict he asks.

He has no suit to establish his right, but merely a petition asking for an interdict founded upon an assumed title. He is, therefore, applying solely to the equitable jurisdiction of the Court, and although the same Courts in Scotland administer the equitable and the legal jurisdiction, they must, when exercising the one, be regulated by the principles applicable to that particular province. Neither from the papers, nor from the argument, have we been furnished with authorities showing how far the equitable jurisdiction of the Scotch Courts is regulated by the principles which have long been established in this country. But as the principles of equity are of universal application, I cannot suppose that such rules would be considered as inapplicable where not opposed to any contrary practice or decision in Scotland.

The granting the interdict under the circumstances of this case would be contrary to many of the best established rules which regulate Courts of Equity in this country.

First, when a party applies for an injunction founded upon an alleged legal title, though the Court will sometimes, to secure the property in the mean time, grant an interim injunction, it always makes the ultimate decision depend upon the establishment of the legal title, as in the case of Roberts' copyright, &c., Kinder *v.* Jones, 17 *Vesey*, 110, Norway *v.* Rowe, 19 *Vesey*, 147; and in those cases we have Lord Eldon's authority for saying, that if the legal title be denied, the Court will not grant an injunction. In this case, the plaintiff, by his petition, rests his case upon the alleged right of the owner of the soil in the ground under a road by servitude: a title not only denied, but disproved by the verdict of the jury, by which it is proved that if he have any right it is one of a totally different character, namely, the right

of the owner of adjoining land to the soil of a public highway. And this opens another objection to the interdict; for it is a rule, in this country at least—

Secondly, that a party who seeks an injunction *ex-parte*, as was the case here, upon one title or state of circumstances, shall not be permitted to maintain it upon another title, or under different circumstances.

Thirdly, in this country formerly courts of equity refused to grant injunctions in cases of trespass. This rule has been relaxed, but it is seldom done except in cases of irreparable mischief, and never in cases in which the injury from the injunction might be greater than that from the act sought to be restrained. Upon which principle I acted in the case of the Attorney General *v.* the Mayor of Liverpool, reported in 1st *Mylne* and *Craig*, 171. In the present case, the injury to the plaintiff from laying the service-pipes would be nothing, the power of the Court over the use of them continuing, and being capable of execution if the right of the appellant should be established.

But, Fourthly, no court of equity ought to restrain the further progress of works of the commencement and progress of which the party applying was cognizant, and of which he made no complaint. In such cases, the party carrying on the works obtains an equity against the equity of the party complaining. For it would be manifestly unjust for any one to permit others to proceed under a supposed right, and incur expenditure on works founded upon such supposed right, and then to assert a title opposed to it, and seek by injunction to restrain the further progress of the works, which without completion would be useless. Upon this principle I refused an injunction in the case of Greenhalgh *v.* the Manchester Railway Company, in 3rd *Mylne* and *Craig*, 788.

In the present case the appellant attempts to deny knowledge of the progress of the works which commenced many years ago, but the most important part of which was laying the main

pipes through the very streets in which the houses of the respondent are situate, and from which main pipes it is now sought to lay service pipes to such houses. I think he has totally failed in negativing the case of knowledge and acquiescence charged; but that is not essential, because if the title to the interdict rested upon that, the Court would have adopted some course of ascertaining the fact, before they would have granted an interdict, which would not be proper if such knowledge and acquiescence existed, there being in fact no evidence but assertion against assertion, although the situation of the property, and the residence of the appellant, throws every degree of probability upon the side of the respondent's statement.

If the interdict of Lord Cockburn be restored under the present state of circumstances, it will be negativing the right of the public functionaries in towns to open the soil of the street for the purpose of laying pipes for water and gas, and will establish in the supposed owner of the soil the right of refusing or of extorting the purchase of such benefit,—a right of, at all events, great doubt. And it will be an interdict asked for upon an alleged title proved by the verdict to be false, and ultimately resting upon a title different from that originally made. It will be an interdict to restrain a trespass from which no indirect injury can arise, without any means taken to try an important legal right, upon which the title to the interdict depends; and after an acquiescence in the progress of the works the completion of which is interdicted, either proved or shown to be very probable, without any means taken to ascertain the fact. The works are said to be the works of the Gas Company, and not of the feuars. That is quite immaterial. If the company were permitted to complete the works, the interdict against the feuars will be useless.

The interdict sought to be now obtained, is sought under circumstances very different from those which existed when the case was before Lord Cockburn, and would I think be subver-

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sive of many of the best established rules of equity, by which courts are regulated in such cases.

LORD CAMPBELL.—Of course, my Lords, I do not intend to make a single observation on what has fallen from my noble and learned friend who has last addressed you, but by way of explanation I merely beg, that it may not be supposed that I am of opinion that the trustees or the magistrates of Royal burghs have not the power, under the 3rd and 4th of William the 4th, if proper application is made to them, to grant a license to open streets, or highways, for the purpose of laying gas-pipes, or water-pipes. I think that they have that power, and I think that their exercise of that power is perfectly consistent with the interlocutor in question being reversed.

LORD COTTENHAM.—My Lords, of course, I am not going to argue this question, but, in answer to the last observation of my noble and learned friend, I would observe, that I referred to that Act, because that Act does not profess to give the power, but assumes the power to exist.

Ordered and adjudged, that the Interlocutors, so far as complained of in the Appeal, be reversed with costs in the Court below. And it is further ordered and adjudged, that the cause be remitted back to the Court of Session in Scotland, with directions to that Court to adhere to the interlocutor of the Lord Ordinary in the said cause, dated the 28th January 1842, recited in the Appeal, and further to do therein as shall be just and consistent with this direction and judgment.

GRAHAME, MONCRIEFF, and WEEMS—D. CALDWELL, Agents.