Tuesday, January 26.

SECOND DIVISION.

MACKENZIE *v.* CARRICK AND CITY OF GLASGOW UNION RAILWAY CO.

Property—Common or Joint Right—Arching over of Lane—Servitude. Held that one of several proprietors of a lane or passage was not entitled to arch over that part of the lane *ex adverso* of his property, his right in the lane being of the nature of a common right reserved to all the proprietors.

This was an appeal from the Dean of Guild Court of Glasgow, and the question was, whether the appellant, who is a publisher in Howard Street, Glasgow, was entitled to arch over a portion of a lane or passage known as St Enoch's Lane, opposite his own property. He alleged that the said lane or passage was not a public street or public lane, but that the *solum* was the property of the various proprietors of the ground on the west side of the lane so far as *ex adverso* of their properties; that the portion thereof opposite to his ground was his sole and exclusive property, and that the only restriction thereon was that under his titles he (the appellant) was, in common with the other proprietors, bound to leave a lane or passage 12 feet in breadth along the line of the lane in question.

The appellant's petition to the Dean of Guild Court was opposed by the City of Glasgow Union Railway Company, who are proprietors of adjacent lots of ground, and John Carrick, Master of Works in the city of Glasgow. The Dean of Guild, after inquiry, refused to sanction the proposed operation, and dismissed the petition. Before dismissing the petition, the Dean of Guild had pronounced the following interlocutor:—"*Glasgow, 7th August* 1868.—Having resumed consideration of this case, and heard parties' procurators on the closed record, before answer, remit to James Salmon, Esquire, architect, to examine the plans of the buildings proposed to be erected by the petitioner, and, after carefully inspecting the whole subjects, to report specially whether he is of opinion that to cover or arch over the lane in question would, or would not, be injurious or detrimental to the use thereof by the respondents, the City of Glasgow Union Railway, as proprietors of the subjects belonging to them, and, as such, interested in the lane, reserving entire the legal rights of all parties.

"*Note.*—Under the authority of the case of *Allans*, Paton's Appeal Cases, 18th Dec. 1801, it would appear that the proprietor of ground on both sides of a servitude of a footpath is entitled to erect an arch over the footpath, if he can do so without injuring the use of the path; and although the present case is not quite analogous, inasmuch as the question here does not involve so much a mere servitude of a passage or footpath, as the effect of an obligation emanating from a common author on several feuars or purchasers, from that common author to leave a *lane* 'of the breadth of 12 feet all along the back of their respective steadings.' And it is certainly a question not free from doubt, whether any one of these feuars or purchasers is entitled to arch or cover over for a considerable length of space the lane in question without the consent of the whole proprietors interested therein, and by which it appears that the lane would be converted into a covered archway or tunnel instead of an open lane, as at present.

"No doubt a servitude must be used so as to produce the least possible interference with the right of property in the servient tenement; but here the right is something more than a mere servitude, for it would appear to amount almost to a reciprocal or virtual agreement between the common author and the different proprietors, *inter se*, in relation to the property or *solum* of the lane. It will be observed, the subjects on the north, recently acquired by the petitioner, were held under a separate title, and had no interest in the lane now proposed to be tunnelled or arched over, at the date of the original feus or contracts of ground-annual. On the whole, it would appear clear that, in any case, the petitioner is not entitled to injure the right of the respondents to use, in the most ample manner, the lane in question; and, before determining whether the petitioner is or is not entitled to arch or build over the lane, the Court is desirous of being put in possession of the opinion of the neutral architect named, whether the petitioner's proposed operations, if sanctioned by the Court, are likely to prove detrimental or injurious to the use by the respondents of the lane in question.

"The Court, at the request of the parties, reserve, in the meantime, the determination of the points raised by the master of works, until the question as to building over the lane be disposed of."

The petitioner appealed.

SOLICITOR-GENERAL and SHAND, for him, contended that the obligation in his titles to leave open the lane or passage in question was of the nature of a servitude, and that the servitude was not interfered with by arching over the passage.

CLARK and LEE for respondents.

The Court adhered to the judgment of the Dean of Guild, holding that the obligation in question did not constitute a servitude, but constituted a reserved right of property in the lane in favour of the body of proprietors, and that, that being so, the arching over the lane was an interference with property which was not exclusively the appellant's own.

Agents for the Appellant—J. & R. D. Ross, W.S.
Agents for the Respondents—Murray, Beith, & Murray, W.S.

Thursday, January 28.

FIRST DIVISION.

ROBERTS *v.* WILSON.

Toll—Road—General Turnpike Act—Seizure. Circumstances in which *held* that a tollman had not "seized," in the sense of the General Turnpike Act, the horse of a man who drove past the toll-bar without paying.

Roberts, a sheriff-officer at Bathgate, presented a petition in the Sheriff-court of Linlithgow, alleging that, as he was driving a horse and gig through West Whitburn toll-bar he was asked to pay toll; that he refused, explaining that his ticket had been taken at another toll-bar, and declining to pay an additional 3d. at West Whitburn; that thereupon Wilson, the tacksman, seized and detained the horse and gig; and praying for restitution of the horse and gig, or otherwise for payment of £100 as their value. After a proof, the Sheriff-Substitute (HOME) pronounced this interlocutor:—"Finds that this is an action brought by the

petitioner against the respondent solely for the recovery of, and delivery up of, his horse, gig, and harness, alleged to have been illegally seized and detained from him by the said respondent: Finds that such an action is peculiarly competent in this Court, and that all questions, even if not originally competent to be raised in the Inferior Court, may be competently inquired into in order to arrive at a decision in the proper matter at issue: Therefore repels the preliminary plea contained in the respondent's additional plea in law, also his third plea in law, that all parties interested have not been called; and, upon the merits, finds it proved that the toll-bar called the West Whitburn Bar was erected in the year 1851 by the Glasgow and Shotts Road Trustees, on their Great Turnpike Road, leading from Glasgow to Edinburgh, and running in a direction from west to east, through the county of Linlithgow: Finds that at the part of said road where said toll-bar was so erected, and for a space on both sides of the same, the road called the Cleuch Road, crossing from north to south through the said county, runs along and coincides with said Glasgow and Edinburgh road: Finds that for many years after the erection of said toll-bar all persons travelling upon said Cleuch Road, and crossing through said bar, were charged for toll-dues, and paid the same without any serious objection being made thereto: Finds that latterly for some years certain parties who had occasion to use said road were exempted from paying at said bar, viz., those who had paid it, and had tickets from the East Whitburn Bar on the north, and Longridge Bar on the south, being both toll-bars on said Cleuch Road, and within the statutory distance of said West Whitburn Bar: Finds that the petitioner is a sheriff-officer, and has been, as such and otherwise, for many years past much in the habit of travelling upon both said turnpike roads, and very frequently, both in his own and hired vehicles, of passing through said bar: Finds that in doing so he, during all said years, like others, paid his toll-dues or produced his ticket, though this last may have sometimes been dispensed with, as he was well known to the people in charge of said toll-bar: Finds that, shortly before the time when this action was raised, some grumbling arose in the neighbouring locality as to said toll-bar, and doubts as to the legality of demanding either money or ticket at the same from parties passing along said Cleuch Road, but that no serious endeavour was made to try the question or to get rid of the same: Finds that upon the 10th of October 1867 the said petitioner was travelling southward upon said Cleuch Road, in his own gig or vehicle, upon business; that he had passed Ballincrieff and East Whitburn Bars on said road, at the former of which he had paid and got a ticket, and which he had delivered up at the latter, not being of any further use according to the regulations of either road: Finds that on coming to the said West Whitburn Bar he was asked by the toll-gatherer's wife for his ticket: Finds that he took no notice, but drove on: Finds that the respondent, the real tacksman of the toll there, happening to be at the toll at the time, ran after the petitioner, and stopped his vehicle by seizing the horse by the head: Finds that he demanded either to be paid the toll-dues or to be shown a ticket clearing the same: Finds that the petitioner refused to do either, and that they wrangled about it for some minutes, the respondent still holding the horse by the head: Finds that the petitioner and another person who was with him in the machine at last jumped out, and both, without farther parley, walked off, and left the horse and vehicle in the hands of the astonished respondent: Finds that the respondent upon this almost immediately also quitted his hold of the horse, and returned to the toll-bar, and took no charge whatever of them afterwards: That they stood for some time abandoned on the road, until, at the suggestion of some of the neighbours, they were taken by the toll-gatherer's wife and tied for safety to the side of the toll-gate, and at last, after some hours, were led away by the order of the Whitburn constable as a derelict to Mrs Eddie's stables there: Finds that the petitioner, after so abandoning his horse and machine, proceeded to, and directly hired a vehicle at Whitburn, to go to Crofthead, and that on his return through said East Whitburn toll-bar, some hours after, he saw his said horse and vehicle still standing there, but made no inquiries about them: Finds that he knew their whereabouts in Mrs Eddie's stables from said constable next morning, and that he knew he might have had them again by sending for them, but that he preferred placing the matter in his lawyer's hands, by whom, after a formal demand for their restoration, the present action was raised: Finds that Mrs Eddie, as no one claimed said horse, machine, and harness in her hands, applied to have them judicially sold, and that a warrant was accordingly granted, and the small sum of £5 was realized for the same: Finds that upon the said 10th of October last the names put up upon said toll-house were those of the toll-gatherer and of a former tacksman, not the then tacksman of the same, but finds no necessity in this case to decide whether this was in accordance with or contrary to the requirements of the Road Act: Finds that the provision for the recovery of toll-dues in the 44th section of the said Act, and referred to in the present petition, is intended chiefly for the benefit of the toll-collector, and not so much for the relief of any party who may have refused to pay the toll-dues, although, perhaps, if too long a delay is allowed at any time to intervene, there might be room for complaint on his part also; but finds no ground of complaint for any such delay on the present occasion, for finds that the respondent, upon the said 10th of October, did not seize the petitioner's horse for the purpose of detaining the same and his vehicle from him: Finds that that purpose was, so far as appears, solely to stop the petitioner himself on his way, and to endeavour, by persuasion, to get him to pay the small sum of toll-dues, or to show cause, by ticket, as he had so often formerly done, why he should not be paid, and that no intention was indicated of taking possession of the whole, or of any of said articles, in order to obtain said payment under the powers to that effect granted by the said Road Act, or for any other reason: Finds that the petitioner had no substantial grounds for jumping at such a conclusion, and for so hastily abandoning his property, and leaving it upon the road to be taken care of by others: Finds, that even after he had thus run away so hurriedly from the same, that he might have had it all again in fact by merely putting forth his hands, both that same night and next day, and at any time before said articles were judicially sold,—the respondent never having asserted, or ever having pretended any right of any kind to the same, and the petitioner having been informed of and well knowing the same: Finds, therefore, in the above circum-

stances, that the petitioner has no competent grounds for demanding from the respondent the restoration or delivery to him of his said horse, gig, and harness, or for their value, whatever claim on the part of the petitioner said respondent may have made himself liable to otherwise for having illegally, if it so turn out, molested the lieges, and stopped him on his road, as above mentioned, and demanded toll-dues from him contrary to law: Assoilzies the respondent accordingly, and refuses the prayer of the petition: Finds him entitled to his expenses," &c.

The Sheriff (MONRO) adhered.

Roberts advocated.

STRACHAN (CLARK with him) for advocator.

LANCASTER and DEAS, for respondent, were not called on.

At advising—

LORD PRESIDENT—We have read this proof, and we think it unnecessary to call for a reply, or to enter upon the other questions in this case.

This is an application at the instance of Roberts, the advocator, "to decern and ordain the respondent instantly to deliver up to the petitioner the said horse and machine and harness illegally, wrongously, and unwarrantably seized and detained as aforesaid, the property of the petitioner, and failing the respondent doing so within such period as your Lordship shall appoint, to decern and ordain the respondent to pay to the petitioner the sum of £100 sterling, as the price and value of said horse, machine, and harness, or such other sum as shall be ascertained to be the price or value thereof, reserving the petitioner's claim for loss and damages already sustained by him, or which he may sustain in consequence of the respondent wrongously and unwarrantably withholding and refusing delivery of the said horse and machine and harness." The question is, whether, in the circumstances of the case, as disclosed in evidence, this application can be entertained? I am decidedly of opinion that it cannot. The Road Act, 1 and 2 Will. IV. c. 43, (sec. 44), provides 'That if any person subject to the payment of any toll by any local Turnpike Act shall, after demand thereof made, wilfully neglect or refuse to pay the same, it shall be lawful for the person authorised to collect such tolls at the time when the same shall be due and payable, or within twelve hours thereafter, taking such assistance as shall be necessary, to seize and detain (1) any horse, beast, cattle, carriage, or (2) other thing upon or in respect of which any such toll is imposed, or (3) any carriage in respect of the horses or other beasts of draught drawing the carriage on which such toll is imposed, or (4) any of the goods or effects of the person so neglecting or refusing to pay (except the bridle or reins of any horse or other beast separate from the horse or beast.)" Now, the allegation of the petitioner is, that he was asked for toll at West Whitburn toll-bar, that he declined to pay, and that thereupon his horse and gig were seized by the respondent. The question is, whether he is well founded in that allegation? I think he is not. The whole history of the affair comes out very clearly on the proof. Roberts, the petitioner, had made up his mind to have a controversy with the toll-keeper. He says, "I had resolved not to pay the toll at West Whitburn toll-bar, before the 10th October last." Mrs Melvin, the women who keeps the toll-bar, says she had occasion before this to threaten to shut the bar in his face, and he answered, "You can do it." So that both parties were prepared for the controversy, and there is really no difference in the evidence as to what occurred. Roberts drove right through the toll without stopping. Mrs Melvin asked him to show his ticket, but he refused. After he was through Wilson ran up to him and took hold of the reins and stopped the horse, and required Roberts either to pay or to show a ticket. Whether the controversy lasted for only a few seconds or for ten minutes is of no consequence. Probably it lasted for some time, for in such controversies people say the same thing so often, over and over again, that they must take some considerable time to say it. Roberts thought he saw his way to put the tacksman in a false position, so he jumped out of the gig, Rankin having preceded him, left the horse and gig in the hands of Wilson, and declared that Wilson had made a seizure. I don't think that was making a seizure, or anything like making a seizure within the meaning of the Act. All that Wilson did was to stop this man on the road when endeavouring to evade payment of toll, and undoubtedly he was quite entitled to do so. Roberts did quite wrong in driving through the toll-bar, knowing that a demand for toll would be made, without stopping and coming to an understanding with the toll-keeper. The important thing in the case is, that, instead of a seizure on the part of Wilson, the attempt was all on the part of Roberts to suffer seizure. The petitioner must have known that no such thing was intended. He knew in a very short time that the horse and gig were entirely at his disposal, for he passed along the road in a cart and saw them, but declined to take them, being desirous of having the present litigation instead. In these circumstances there is no ground for the present application, and therefore I am of opinion that the Sheriff has rightly decided.

The other Judges concurred.

Agent for Advocator—T. M'Laren, S.S.C.

Agents for Respondent—Duncan, Dewar, & Black, W.S.

Thursday, January 28.

INGLIS *v.* INGLIS AND OTHERS.

Succession—Heir—Widow. A widow cannot take benefit from a bequest to the lawful heirs of her husband, she not being one of his heirs.

Inglis, who died in 1860, provided by his settlement as follows:—"Thirdly, whereas it is my purpose in my own lifetime, and as soon as I can accomplish it, to invest in heritable or other security, in the name of certain trustees, a sum of £1600, in trust, for behoof of my grandson and heir-at-law James Inglis, son of my said deceased son George Inglis, in liferent, for his liferent use only, and of the parties after-mentioned in fee: And whereas it may happen that I shall fail to accomplish the said investment during my lifetime, then, and in that case only, I direct my trustees to lay out and invest on such heritable or other security as they shall consider good and sufficient a sum of £1600 sterling, for behoof of the said James Inglis, my grandson, in liferent, for his liferent use allenarly, and after his death, the fee of the said sum of £1600, to be divided into two equal parts or shares, one whereof shall be payable to or amongst the lawful heirs of the said James Inglis, the liferenter," &c.

James Inglis, the liferenter, died in 1867, leaving no issue. His widow claimed a part of the fund as