by the proprietor of the Angel Inn, setting forth that the said William Young had unwarrantably erected an iron gate at the mouth of the said passage, and craving to have it removed, and that the said William Young was assoilzied from the conclusions of that action; (5) that it is not proved that the gate to which these proceedings referred continued to exist for more than a few years after the date of the said proceedings, or that any gate was erected either at the mouth of or within the said archway after the Angel Inn was burned aud rebuilt, which it appears to have been about the year 1826; (6) that on the said Angel Inn being rebuilt, the upper flat thereof was used and sub-let as a dwelling-house; that the only entry thereto was from the court-yard behind the said Inn; and that the tenants of the said houses have, since that date, been in use to use the archway in question as their means of access to their houses; (7) that since the said date the defender and his authors and tenants have had the uninterrupted use of the said passage or archway in question, without any gate or other obstruction, for any purposes that were necessary for the proper occupation of the said Inn and adjoining back-yard and premises: Finds, in these circumstances, in point of law, that the defender has the right to free and uninterrupted access by means of the passage in question to the yard behind for the uses of the said Inn and premises adjoining thereto, and that the pursuer was not warranted in erecting the gate in question within the said passage in the manner complained of: Therefore repels the reasons of reduction, and assoilzies the defender from the conclusions of the action: Finds him entitled to expenses, of which appoints an account to be given in; and when lodged, remits the same to the auditor to tax and report; and decerns.

"*Note.*—As this is a reduction of interlocutors which proceeded upon a proof in the Inferior Court, the Lord Ordinary has pronounced findings as to the leading facts which appear to him to be disclosed in that proof, as required by the Act of Parliament. But as he concurs substantially in the grounds on which the Sheriff has proceeded, both upon the construction of the exception in the title, by which the right of passage was reserved, and upon the fair import of the evidence as explained in the note to the interlocutor, he does not deem it necessary to enter into any detailed examination of the proof, the preponderance of which, though the evidence is in some respects contradictory, is, in the opinion of the Lord Ordinary, with the defender.

"The only point made in the reduction which does not appear to have been raised in the Inferior Court, is that founded on the allegation that the action was there based exclusively upon an alleged right of property in the *solum* of the archway, and that, this having been negatived by the titles, the proceedings should have been dismissed. The Lord Ordinary, however, does not think that the Inferior Court proceedings can be thus strictly dealt with. The petition for interdict is certainly not so laid; and although there is a plea to that effect in the condescendence for the present defender, that appears to have been put by way of answer to the case made out on the part of the present pursuer, and not as the sole and exclusive ground upon which the proceedings were rested."

Oliver reclaimed.

PATTISON and BURNET, for him, argued—(1) The sole ground on which interdict was sought, namely, uninterrupted passage for forty years, was not established by the petitioner on whom the *onus probandi* lay. There was at least as much evidence that up to 1838 there had been a gate as there was that there had not, and the witnesses who never saw the gate might not have observed it, while those who saw it could not be mistaken on the subject. (2) The servitude in the titles was only a right of passage to the middenstead at the end of it, and not to the stables behind the Angel Inn, which could only be reached by crossing over Oliver's back ground, which was not burdened with any servitude, and the south boundary of which was the "stables and middenstead." (3) The servitude must be exercised in the manner least burdensome to the servient tenement, and access to the middenstead would not be interrupted by the erection of a gate, while there were legitimate reasons assigned why a gate should be erected. They referred to *Wood* v. *Robertson*, 9th March 1809, F.C.

GIFFORD and ORR PATERSON, for Robertson, replied—(1) The proof showed that there had been no gate for forty years; (2) the vacant ground behind Oliver's property did not belong to him, as was shown by the fact that in the conveyance by Begbie he bound himself not to build on it, which obligation would not be there if the ground was Oliver's; (3) the gate would be a serious limitation of his right of passage, which was to his stables, the reference to the middenstead in the reservation being introduced only to describe the passage. They referred to *Borthwick* v. *Strong*, 1799, Hume 513.

The LORD JUSTICE-CLERK said that several points had been raised as to which there was room for considerable doubt. There was obscurity about the titles, but his impression was that under them Oliver had right to the back ground behind his tenement, because his boundary was distinctly the stables and middenstead. In regard to the servitude, he thought it was not limited to a passage to the middenstead alone. His impression on the evidence was that there had been a gate up to 1838. But the real question was whether it was a restriction of the servitude to put up a locked gate. He had no hesitation in saying that it was, but the decision in this case would not preclude an application to the Judge-Ordinary to regulate the exercise of the servitude.

LORD COWAN abstained from all opinion about the property of the back court, but he was of opinion that, although a swing gate may be admissible, as was held in the case of *Wood*, a locked gate was not, as was held in the case of *Borthwick*.

The other Judges concurred.

Agent for Oliver—James Somerville, S.S.C.

Agents for Robertson—J. & A. Peddie, W.S.

Wednesday, Nov. 10.

OUTER HOUSE.

(Before LORD ORMIDALE).

M'LEOD *v.* COLLIE.

Reduction — Suspension — Extracted Decree — Charge — Appeal. Held (per LORD ORMIDALE) competent to reduce a Sheriff-Court decree which had been extracted,—a charge having been given on the extract decree,—the said decree remaining unimplemented, and it being admitted that suspension was a competent

means of obtaining the review of the Supreme Court.

This was a reduction of a judgment of the Sheriff of Morayshire, decerning the pursuer to pay the defender certain sums of money pursued for in an action by her. The judgment having been extracted, and appeal being no longer competent, the pursuer brought a reduction of the decree. A charge had been given on the extracted decree, but it had not been implemented, and no further steps of diligence were taken by the defender. The defender now pleaded against satisfying the production that the action was incompetent in respect suspension was the proper remedy to stay the execution of diligence, and that reduction was not competent until every other competent remedy had been exhausted. After hearing parties, the Lord Ordinary (ORMIDALE) pronounced the following interlocutor:—"The Lord Ordinary having heard counsel for the parties, and considered the argument, repels the preliminary defences, and, under reservation in the meantime of all questions of expenses, appoints the case to be enrolled with a view to further procedure.

"*Note.*—It was maintained in support of this defence that reduction, even of an extracted decree, is incompetent wherever suspension would be competent. On the other hand, it was maintained by the pursuer that the decree complained of in the case being extracted, reduction was competent as well as suspension. Both parties cited and relied on the case of *Scoular* v. *M'Lachlan*, 20th March 1864, 2 Macph. 995.

"In the case there referred to all that was actually decided was that reduction was an incompetent mode of reviewing an Inferior Court process, the decree in which has not been extracted. But in the opinion of the Court a great deal of valuable matter is to be found bearing on the present question.

"According to the Lord Ordinary's reading of the Lord President's opinion in *Scoular's* case, his Lordship would appear, although he had no occasion to state so in so many words, and is careful to avoid laying down any general rule on the subject, to have held and assumed that reduction would have been a competent mode of review if the decree complained of had been extracted. Lord Deas is quite distinct in the expression of his opinion to this effect, while Lord Ardmillan would seem, on the strength of a dictum of Lord Moncreiff in the case of *Martin* v. *Barclay*, 12th June 1844, 6 D. 1136, to have entertained a different opinion. But with great deference, the case of *Martin* v. *Barclay* is very special, and so very different from the present as to render it impossible to hold that the solitary and somewhat vague observations, as reported, which appear to have fallen from Lord Moncreiff, can have any weight in the present discussion, even supposing it was of the nature which Lord Ardmillan thought it was, although that is far from being clear.

"The Lord Ordinary thinks, therefore, that the authority of the case of *Scoular* was in favour of the interlocutor pronounced by him in the present case, and that being so, and having regard to the precedents cited in 'Shand's Practice' pp. 613–14, and particularly to the cases of *Jack* v. *Umpherston*, 15 S. 1833, and *Brown* v. *Anderson and Stair*, 15 S. 977, in which the Court appears to have assumed that reduction of an extracted decree is clearly competent, the Lord Ordinary has not had much difficulty in repelling the preliminary defences in this case. In doing so he has not only acted on the precedents, but also on what he himself has always understood to be the practice of the Clerks of Court in the Outer House. Nor is there much in the observation that reduction has been resorted to in order to avoid the necessity of finding caution, for as reduction does not stop the execution of diligence, the defender may proceed against the pursuer so as to compel him to suspend and find caution."

This interlocutor has become final.

Counsel for the Pursuer—Mr Asher. Agents—Murdoch, Boyd, & Co., S.S.C.

Counsel for the Defender—Mr W. A. Brown. Agent—David Cook, S.S.C.

Tuesday, November 9.

SECOND DIVISION.

PRESBYTERY OF SELKIRK *v.* DUKE OF BUCCLEUCH AND OTHERS.

Teind—Parochial Glebe—Designation—Prescription. Circumstances in which *held* to be proved (1) that there had been at a certain period a valid and effectual designation of a parochial glebe; (2) that the benefit of it had not been lost to the minister by the operation of prescription.

This was an action brought by the Presbytery of Selkirk and the Rev. James Russell, minister of the parish of Yarrow, against the Duke of Buccleuch and others, heritors of the latter parish, concluding for declarator—(1) that a certain portion of the lands of Kirkstead, lying adjacent to St Mary's Loch, and bounded as described in the summons, formed the *parochial* glebe of the parish of Yarrow; and (2) that a certain other portion of land, in the neighbourhood of that first mentioned, formed the *grass* glebe of the said parish. The Duke of Buccleuch having put in defences, and having produced a decree of the Court of Session, dated 1728, negativing the claim of the minister of Yarrow to a *grass* glebe, that part of the pursuer's demand was given up, and the question came to be confined to the parochial glebe claimed as above. Besides disputing that there had ever been any designation, the Duke of Buccleuch maintained the following plea:—"Even assuming that a proper parochial glebe and minister's grass were designed by the Presbytery of the dates alleged in the condescendence, the decrees cannot now be enforced or given effect to, and the action is excluded by the operation both of the positive and of the negative prescription, in respect—(1) That the whole lands alleged to have been so designed have ever since the dates of said alleged decrees, or at least for upwards of forty years before the date of this action, been possessed exclusively, and without interruption, by the defender and his predecessors, as proprietors thereof, under their titles to Kirkstead; and (2) That neither of said alleged decrees has been acted upon at any time, at least for upwards of forty years before the date of this action."

The Lord Ordinary (BARCAPLE) pronounced the following interlocutor and note:—

"*Edinburgh, 14th April* 1869.—The Lord Ordinary having heard counsel for the parties, and considered the closed record and proof—Finds that the pursuers do not now insist in the conclusions of the