among other things, that the conditional substitution in favour of Mr Dunn Pattison comes into operation. It appears to me that this proceeds upon a false construction of the settlement of William Dunn. The event of Alexander's dying intestate, as a condition of the substitution, seems to me to mean dying intestate as regards each of the special subjects respectively destined to the different substitutes. (His Lordship here read the clause in William Dunn's deed in support of this construction). It surely cannot be maintained that if Alexander had availed himself of his right so far as to have sold a separate subject belonging to William Dunn, that that would have evacuated the other substitutions. But, in the second place, it is contended that Alexander Dunn did not die intestate, but left a deed disposing of his whole heritable and moveable estate. If William Dunn intended to confer, and did confer, on his brother Alexander a power of defeating these substitutions by a deed *in lecto*, that is a good argument. But if no such power was conferred, I cannot see any good in the argument, because a deed executed *in lecto* is inoperative against an heir of provision; and it is absurd to say that an unavailing deed shall be a good objection to the pursuer's title to sue. That is just reasoning in a circle. But if William Dunn intended to confer, and did confer, on Alexander a right to defeat these substitutions by a deed executed on deathbed, the defender must prevail. That question must be answered by a reference to William Dunn's deed; and certainly this is clear on the face of William Dunn's deed, that notwithstanding his desire to make a substitution in favour of the persons named, he was most anxious to preserve his settlement from even the appearance of derogating from the full right of *dominium*, vested in Alexander. It was intended that Alexander should have unlimited powers, not special powers, but it was not intended that he should be exempted from any law that was applicable to other fiars. His Lordship proceeded to say that it was unnecessary to consider how far any person could abrogate the public law of deathbed—that if, in addition to the four conditions mentioned in William Dunn's deed, William had given Alexander the power of evacuating the substitutions on deathbed, he might have done so; but there was no evidence that he intended the exercise of any such special powers, and he had certainly not conferred them.

The other Judges concurred.

The Court accordingly repelled the defender's objection to the pursuer's title to sue, and sustained the latter. All the defenders, who maintained the objection to the pursuer's title, were found liable in expenses to the pursuer. At the close of the advising, Mr Shand, for Mr Dunn Pattison, moved the Court, on the ground of the distress that was prevailing in the village of Duntocher, by reason of the subsistence of the litigation, and the consequent continued interruption of the working of the mills, to take up the remainder of the cause without remitting it back to the Lord Ordinary to dispose of the other pleas on the merits; and in the special circumstances the Court assented to the motion, and promised a hearing in May.

Saturday, March 10.

FIRST DIVISION.

ORMOND *v.* BORRIES.

Cautioner—Bond of Presentation—Liberation. A person having been apprehended under a *meditatione fugae* warrant, the petition for which stated that the claim was for the aliment of a natural child which was conceived in *August* 1864, and the cautioner being afterwards sued on the bond under a summons in which the child was said to have been conceived in *July* 1864, held (aff. Lord Kinloch) that this variance did not liberate the cautioner.

Counsel for Pursuer—Mr J. G. Smith and Mr R. V. Campbell. Agent—Mr H. Forsyth, W.S.

Counsel for Defender—Mr William Thomson. Agent—Mr David Milne, S.S.C.

The pursuer gave birth, on 11th March 1865, to an illegitimate child, of which she alleged that one of the defenders, a lad of about sixteen years of age was the father. In November 1864, having been informed that he was about to emigrate to Australia, she presented a petition to the Sheriff of Forfarshire against him as *in meditatione fugæ*. In this petition she expressly averred that the intercourse which afterwards resulted in the birth of a child took place "on various occasions between the 8th and 27th days of August 1864." Under this application he was apprehended, but afterwards liberated on his father, the other defender, granting a bond of presentation for him.

After the birth of the child the pursuer raised this action against the alleged father, and also against his cautioner, founding on the bond of presentation. The intercourse was now alleged to have taken place "on the 11th and subsequent days of July 1864." The cautioner pleaded that in consequence of this variance he was not liable under the bond, the conception of the child, in regard to which he became bound to present his son, having taken place in August 1864. This plea was repelled by the Lord Ordinary (Kinloch), and the cautioner reclaimed. He argued that he had granted the bond in consequence of the statement in the petition that the child was conceived in August, which he knew could not be true if his son was its father. The variance was therefore material. He founded upon Campbell *v.* Hamilton, 20th January 1789 (Hume 82), and M'Neill *v.* Stewart, 18th November 1823 (2 S. 439 N. E.). The Court, without calling for a reply, adhered.

Lord CURRIEHILL—The objection stated comes to this—the debt sued for is not the debt in respect of which the cautioner became bound. I think that cannot be maintained. The debt was a claim for the aliment of a natural child of which the pursuer was at the time pregnant. That is just what is now sued for. I think therefore the identification is sufficient. If it should turn out that the other defender is not the father of the child, then the cautioner will be free. But that is all reserved.

Lord DEAS—The question is whether the bond applies to the debt in dispute. I think it does. The mention in the petition of the date of the intercourse was a superfluity. The two cases founded on were quite distinguishable from the present.

Lord ARDMILLAN concurred. He thought the defence was an attempt to take advantage of what was a manifest error.

The Lord PRESIDENT was absent.

SECOND DIVISION.

SCEALES *v.* SCEALES AND OTHERS

(*ante, p.* 109).

Proof—Declarator of Marriage—Judicial Examination of Party. Circumstances in which a motion for the judicial examination of a pursuer of a declarator of marriage (aff. Lord Ormidale) *refused.*

Counsel for Pursuer—Mr Scott. Agent—Mr A. P. Scotland, S.S.C.

Counsel for Defenders—Mr Monro. Agents—Messrs Melville & Lindesay, W.S.

In this action of declarator of marriage, the defenders, who are the representatives of Stewart Sceales, to whom the pursuer says she was married by habit and repute, made a motion to the Lord Ordinary (Ormidale) to ordain the pursuer to be judicially examined before fixing any diet for proof. The Lord Ordinary refused the motion,

holding that the circumstances of the case were not such as to justify a departure from the ordinary practice, and appointed the proof in the cause to be led before him on the 13th of March. To-day the Court, after hearing Mr Munro in support of a reclaiming note for the defenders, unanimously adhered, the LORD JUSTICE-CLERK observing that the judicial examination of a party, in all cases a proceeding of extreme delicacy, was particularly so in consistorial causes, and should not be adopted except in circumstances of a very special nature. No such circumstances had been stated in the present case; and, moreover, he was not aware that that proceeding had ever been followed in a proof of marriage by habit and repute.

JURY TRIAL.

(Before Lord Ormidale.)

JENKINS AND OTHERS *v.* MURRAY.

Road—Right of Way. Verdict for the pursuers in a right of way case.

Counsel for Pursuers—Mr Millar, Mr Balfour, and Mr Mackintosh. Agent—Mr George Donaldson, S.S.C.

Counsel for Defender—The Solicitor-General, Mr Gifford, and Mr Johnstone. Agents—Messrs Russell & Nicolson, C.S.

In this case—in which William Jenkins, junior, salesman, residing in the town of Stirling; and Edward Banks, smith, also residing in the said town of Stirling; John Stewart, tailor, residing in the village of Torbrex, near Stirling; George Finlayson, weaver, also residing in the said village; and William Gillies, pattern-maker, also residing in the said village; Robert Marshall, nailer, residing in the village of St Ninians, near Stirling; George Paterson, nailer, also residing in the said village; Robert Corsair, nailer, also residing in the said village; Robert Andrew, nailer, also residing in the said village; John Dick, nailer, also residing in the said village; and William Wright, nailer, also residing in the said village; Alexander Gordon, gardener, residing in the village of Cambusbarron, near Stirling; John Ure, weaver, also residing in the said village; and John Lamond, flesher, also residing in the said village, are pursuers; and Lieutenant-Colonel John Murray of Touchadam and Polmaise, in the county of Stirling, is defender—the issue was as follows:—

"Whether for forty years and upwards, or for time immemorial prior to 1864, there existed a public right of way for foot passengers from a point on the public turnpike or statute-labour road leading from Stirling to Glasgow, marked C on the copy Ordnance Survey map, No. 4 of process, through the defender's lands, as delineated by a line coloured green on the said map, to another point marked D on the said map, also situated on the said public turnpike or statute-labour road, and near to the Murrayshall Limeworks?"

The trial commenced on Wednesday morning and lasted till Saturday, when the jury, after an absence of about half an hour, returned a verdict for the pursuers.

HOUSE OF LORDS.

Thursday, March 8, and Monday March 12.

LEITH DOCK COMMISSIONERS *v.* MILES.

Poor—Assessment—Harbour. Held (aff. Court of Session) that the Leith docks and harbour are liable to be assessed for the support of the poor.

Res judicata. Held (aff. Court of Session) that a plea of *res judicata* was not well founded, the question at issue not having been before the Court in the previous action.

Counsel for Appellants—The Attorney-General (Palmer), the Lord Advocate (Moncreiff), and Mr Anderson, Q.C. Agents—Mr John Phin, S.S.C., and Messrs Maitland & Graham, London.

Counsel for Respondent—Sir Hugh Cairns, Q.C. and Mr Rolt, Q.C. Agents—Mr Alexander Duncan S.S.C., and Messrs Simson & Wakeford, London.

This is an appeal from the First Division of the Court of Session deciding that the harbour and docks of Leith are equally liable to be assessed for the support of the poor with any other heritable property within the parish (2 Macph. 1234).

The LORD CHANCELLOR—Is not this case identical with the English Case of the Mersey Docks and the Scotch case of Adamson *v.* The Clyde Navigation Trustees, both decided last session?

The ATTORNEY-GENERAL said it was to a certain extent identical, and he would therefore beg their Lordships to trust him that he would argue only those points which he submitted distinguished the present case from those his Lordship had referred to, and exempted it from the rule applied to them. He begged to submit three propositions to the House—1st, That the non-liability of the commissioners was already *res judicata*; 2d, That these docks were not public property in the sense in which the Mersey Docks were; and, 3d, That assuming they were assessable, the assessment ought not to be levied upon the harbour dues.

LORD CHELMSFORD—It was decided in the Mersey Dock case that though the trustees were bound to lay out every sixpence in their maintenance, the docks were nevertheless liable to assessment.

The LORD CHANCELLOR—Did not the Court of Session hold that Adamson *v.* The Clyde Navigation Trustees governed the present case?

The ATTORNEY-GENERAL admitted they did, but said he hoped to show that the two cases were not analogous. With respect to his first proposition, that this matter was already *res judicata*, it would be necessary to show the position of the appellants. The right to the harbour and port of Leith, with right to levy dues, was conferred on the city of Edinburgh—or was sanctioned—by the Golden Charter granted by James VI. in 1603. These dues were expended in the maintenance and improvement of the port and harbour, which had since, and under authority of the statutes to be presently mentioned, been still more enlarged by the construction of works within high-water mark and otherwise. By the Act 28 George III., c. 58, the magistrates were empowered to borrow £30,000 to purchase certain lands, to execute certain works, and to levy additional duties. Additional borrowing powers were conferred by 38 George III., c. 19, and 39 George III., c. 44; and the latter Act authorised the imposition of additional duties, the construction of further works, and provided that the duties should be applied solely in keeping the works in repair, in paying the interest of the money borrowed, and that any surplus which should remain should be kept as a sinking fund to meet emergencies from accidents. Additional borrowing powers were conferred by various subsequent Acts to the extent of £160,000. The Act 6 Geo. IV., c. 103, authorised the advance of £240,000 by the Treasury to be applied in payment of the sums borrowed by the magistrates, to be secured to the Treasury by a conveyance of the harbour rates, and of all the property purchased for the purposes of the harbour. By 1 and 2 Vic., c. 55, the management of the harbour was entrusted to eleven commissioners, of whom five should be appointed by the Commissioners of the Treasury, three by the magistrates of Edinburgh, and three by the magistrates of Leith, and to these commissioners all the rights and powers of the magistrates were transferred. That Act also provided that the debt to the Treasury should be postponed to an annual sum of £7680, to be paid into bank in name of the Remembrancer and Auditor of the Court of Exchequer, to be applied in payment of—(1) £2000 to the ministers of Edin-