holding that this was not possession by Sir James himself. They reserved their opinion on the question whether a right of salmon fishing could have been reared up by the taking of salmon with nets, not of the ordinary kind, but of the only kind suitable for the purpose in the locality, if by tenants of Sir James who paid him a rent for the privilege.

Agents for Pursuer—Tods, Murray, & Jameson, W.S.

Agent for the Crown—Solicitor of H. M. Woods, &c.

Wednesday, November 10.

SECOND DIVISION.

OLIVER *v* ROBERTSON.

Servitude—Passage—Gate. Held that the owner of a passage, over which there was a servitude of way, was not entitled to erect a locked gate in the passage, even although he gave the owner of the servitude a key.

This was an action of reduction of certain interlocutors pronounced in the Sheriff-court of Ayrshire. The parties are proprietors of conterminous subjects in Market Lane, (formerly High Street) Kilmarnock. Both subjects at one time belonged to a person named Begbie. In 1811 Begbie conveyed the subjects now belonging to Oliver, and occupied by James Orr, and in the disposition they were described as "bounded on the east by the said John Begbie's dwelling-house, on the west by the house of the said Robert Johnstone and Archibald Finnie, on the south by the stables and middenstead then occupied by the said John Begbie, and on the north by the High Street." The disposition contained the following reservation and declaration, viz., "reserving always a passage of ten feet in breadth, running from the High Street along the gable of the said Robert Johnstone and Archibald Finnie to the middenstead then occupied by the said John Begbie, and declaring that the said John Begbie and his successors were not to erect any building on the south of the subjects so disponed nearer than the stables then occupied by him, so as to injure the lights of the house that might be erected on said subjects." It was farther declared that the disponee "was to be entitled not only to half gable in the dwelling-house then occupied by the said John Begbie, free of charge, but also to the property of the ten feet excepted as aforesaid, the said John Begbie and the neighbouring heritor having only a privilege therein." Robertson's subjects are those described in the above disposition as "John Begbie's dwelling-house, and some ground and stables behind it." They afterwards became and are now occupied as the "Angel Inn."

When Oliver's subjects were conveyed in 1811 the ground was unbuilt on, but shortly thereafter a tenement was erected and an arched passage of ten feet in width was then formed in terms of the reservation in the disposition.

In 1866, for the purpose, as was alleged by Oliver, of preventing the access of persons of loose and disreputable character to the ground at the back of his house, he proposed to erect a locked gate in the said passage, of which Robertson was to get a key. Robertson thereupon presented a petition to the Sheriff against Oliver and his tenant Orr, to have them interdicted "from putting up an iron gate, or any other obstruction in the passage or archway therein mentioned, and from interfering in any way with the petitioner's rights and free use of said passage or archway for taking his horses and carriages, and those of his tenants and others, through the same to the courtyard and stables at the back thereof." He alleged that "from time immemorial he and his predecessors in said property had had the free and uninterrupted right of passage for themselves, for their horses and carriages, and for those of their tenants and others in said inn, through the passage, now a covered archway, leading from said Market Lane to their courtyard and stables at the back of said Inn; that the upper flat of said Angel Inn had from time immemorial been sublet as a dwelling-house, and the invariable mode of access for the tenants therein had been through said archway to the courtyard, and up a back stair." He also alleged that he and not Oliver was the proprietor of the *solum* of the passage, but this contention he subsequently abandoned. He did not found on record on the reservation in Oliver's titles, and there was nothing in his own titles at all about the passage. Oliver, on the other hand, maintained that he was proprietor of the *solum* of the passage, subject only to a servitude over it of access to the middenstead at the end of it.

A proof was led before the Sheriff. A great many witnesses were examined as to the use which had been made of the passage. The evidence was very conflicting. Robertson's witnesses all swore that, except for a short time more than 50 years ago, there never had been a gate on the passage, while those adduced on the other side were equally positive that up to 1838 there had been one at the entrance to it. It was clear that there had been no gate since 1838 or 1840. It was also proved that in 1814 a predecessor of Robertson had applied to the magistrates of Kilmarnock to have a predecessor of Oliver interdicted from erecting a gate, and that decree of *absolvitor* had been pronounced in the action.

The Sheriff granted interdict, and in this action of reduction the Lord Ordinary (MURE) pronounced the following interlocutor:—"The Lord Ordinary having heard parties' procurators, and considered the closed record, proof adduced, and whole process—Finds, as matter of fact, (1) that in the year 1811 the late John Begbie, innkeeper in Kilmarnock, was proprietor of the property now belonging to the pursuer and defender respectively, and that he then occupied the property belonging to the defender under the name of the Angel Inn; (2) that by disposition dated in the year 1811, the said John Begbie conveyed to the pursuer's author, William Young, a portion of the said property, extending to 18 feet of frontage, then unbuilt on, and immediately adjoining the Angel Inn; (3) that the said disposition contained the following exception:—'But excepting and reserving always from the subjects above disponed a passage of 10 feet in breadth' (the archway in question), running from the High Street along the gable of Robert Johnston and Archibald Finnie to the middenstead occupied by me;' and that in the testing clause of the disposition it is declared that the said William Young was entitled to the property of the said 10 feet, and that the said John Begbie and the neighbouring heritor had only a privilege therein; (4) that after the property now belonging to the pursuer was acquired by the said William Young, and a house built thereon, an application was presented to the magistrates of Kilmarnock, in the year 1814,

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