the field in question. This is expressly sworn to by Mr Andrew Colvin; and although Sir George had no recollection of having given the consent alleged, his memory was evidently on minor points of detail somewhat defective, as indeed might have been expected, looking to his age and the lapse of time which has occurred.

"But Sir George lived within half a mile of the field. He was frequently going about the farm, and he must have seen that the field was broken up from grass, and that it was first in corn and then in turnips. The rent was also taken without exception down to the end; and if there had been miscropping, the penal or pactional rent was due at the first half-year after the miscropping occurred. No complaint was ever made, and no extra or additional pactional rent was ever demanded. It may be that all this would not bar the claim, if there had been a clear case of miscropping, but it conclusively corroborates the view that there was no miscropping, and could be no claim for extra rent.

"(3) The real difficulty, however, arises from the circumstance that the agreement of renunciation of 14th and 21st November 1864 expressly stipulates that the farm shall be left at Whitsunday 1865 'in the same rotation as if the lease had naturally expired, and, in particular, that there shall be left two grass fields along with the Braegrass for pasture to the proprietor or incoming tenant, one of the fields to be so left to be that field in which the houses are situated,' being the steading-field in question. It is then provided that all this is to be done under the conditions specified in the original conditions of let.

"Now it is proved that at the date of the agreement of renunciation the Steading-field was actually in turnips, not eaten off the ground, and that it was absolutely impossible to leave it in the grass for pasture at the Whitsunday following, so that in its literal reading the agreement of November 1864 stipulates for a physical impossibility. The Lord Ordinary thinks that the fact that the steading-field was in the turnips in November 1864 must be held to have been known to both parties, and that in the light of this fact the terms of the agreement must be subject to a reasonable or equitable contruction.

"(4) But whatever be the reading of the agreement of November 1864, the Lord Ordinary thinks that no claim for penal or pactional rent for miscropping can ever arise under it. It is impossible to read the agreement as a bargain by which the tenants consented not only to pay the full rent (which has been paid and discharged), but to pay £140 more as penal or pactional rent, which at the date of the agreement could not be avoided by any act whatever. It is conceivable that damages might be due for breach of agreement, but the damages would require to be proved, and they certainly would not be liquidated or held liquidated by the pactional rent due for miscropping."

The defender reclaimed.

The DEAN OF FACULTY and NEVAY for him.

MARSHALL and REID in answer.

The Court unanimously adhered.

Agents for Reclaimers—Philip & Laing, S.S.C.

Agents for Respondent—Horne, Horne, & Lyell, W.S.

Saturday, November 26.

FIRST DIVISION.

LOCKHART *v.* CUNNINGHAME.

Reparation—Damages—Pretium Affectionis. Where a subject is sought to be recovered as wrongfully retained, and damages are not specifically sued for, but only the price or value, as an alternative of delivery of the subject itself, *held* not competent to decern for a price so much in excess of the market value as to be tantamount to a fine or to an award of damages. *Held*, on the other hand, that where the circumstances justify the owner in attaching a peculiar value to the subject, the Court are entitled to allow somewhat in excess of the market value, as a *pretium affectionis*.

This was an appeal from the Sheriff-court of Ayrshire, brought by Wm. Lockhart, farmer, Stevenston, against the Sheriff's interlocutors pronounced on a petition against him at the instance of his landlord, Mr Cuninghame of Auchenharvie, craving the Court to ordain the respondent to deliver up to the petitioner a certain chestnut mare, and failing which to pay to the petitioner the sum of £50, as the price or value of the said mare, reserving to the petitioner all claim for loss or damage.

It appeared that the mare had belonged to Colonel M'Call, an intimate friend of the petitioner, and by him had been used as a charger in the Crimea, and was accordingly very much valued by them both. She was given by Colonel M'Call to the petitioner to keep, on condition that she was to be well used, and never to leave the property. In 1867 the respondent, who was a tenant of the petitioner, was in want of a horse for his milk-cart, and the petitioner agreed to let him have the mare on loan, on certain conditions, and among others that she was not to leave the farm, and was to be returned when demanded. The respondent took the mare, and after using her for a short time in his milk-cart, put her to other purposes, and ultimately sold her without the petitioner's knowledge to a doctor in Glasgow. On receiving a visit from Colonel M'Call, the petitioner found out that the mare was missing, and required the respondent to recover possession of her, and return her to him. The respondent failed or refused to do so. And Mr Cuninghame had ultimately to bring this petition before the Sheriff.

The respondent pleaded that he had received the mare as a gift, and denied that the transaction was a loan, or that there were any conditions attached to it. He also denied that she was of the value sued for in the petition.

The Sheriff-Substitute (ANDERSON), after proof was led, decerned in terms of the prayer of the petition.

The Sheriff (NEIL CAMPBELL) adhered on appeal.

The respondent appealed to the Court of Session.

SHAND and BRAND for him.

The SOLICITOR-GENERAL and BURNET, for the petitioner and respondent, were not called upon in reply.

At advising—

LORD PRESIDENT—Except in one particular, I quite agree with the Sheriff's judgment. I only differ from him as to the amount decerned for. I do not think he should have given the full sum for which the petitioner concluded. The evidence

led by the parties is all one way. The witnesses for the pursuer are perfectly consistent, while the defender's case depends entirely upon his own evidence, for I am quite satisfied that the witness Miller is speaking of a different occurrence, which took place at a different time of the day, and under different circumstances. On the defender's own evidence there is no call for me to comment, as, on the matter of fact, I have not the slightest doubt.

But the Sheriff has proceeded simply to decern in terms of the prayer of the petition—failing delivery within a certain time, he has ordained the respondent to pay to the petitioner the sum of £50 as the price of said mare, reserving the petitioner's claim for loss or damage, &c. Now, I think he was wrong in decerning for so large a sum. It is as the price and value of the animal, that this sum is sued for, and there is no doubt that this is far above the real price or value. In fact this branch of the Sheriff's judgment looks far too much like the infliction of a fine upon the respondent, or something akin to damages, which it was incompetent for him to give under this petition. Still, I think that the Sheriff would have been entitled to give considerably in excess of the mere market value; he would have been justified in attaching a *pretium affectionis* to the mare, allowing for the feelings with which the petitioner and Colonel M'Call, who was behind him, regarded her. I am of opinion that the Sheriff has gone too far, and that the price decerned for, as an alternative of delivery, should be reduced to £20.

The rest of the Court adhered.

Agents for Appellant—Lindsay & Paterson, W.S.

Tuesday, November 29.

SECOND DIVISION.

MURRAY *v.* ARBUTHNOTT.

Road, Suppression of—43 *Geo, III. c.* 34, § 22. In the year 1824 a petition was presented to the Road Trustees of Mid-Lothian, craving that they should sanction an alteration in a footroad passing through the petitioner's property, whereby a certain portion of it would be shut up, and a new route substituted. The Trustees remitted to a committee to visit the ground, and report; and having received a favourable report from the committee, "granted warrant to the petitioner" to alter the line of road as described, "and to shut up the old road or footpath." *Held*, in an action of declarator at the instance of a member of the public, that the footroad had been illegally shut up in 1824, in respect that the Road Trustees had not complied with the provisions of § 22 of the Act 43 Geo. III. c. 34, in regard to intimation to the public; and that that was the only section which could entitle them to suppress such a road.

In this case, at last Jury Sittings in July, the following issue was sent to a jury:—

"Whether, for forty years and upwards prior to the 14th day of May 1867, or for time immemorial, there existed a public right of way for foot-passengers, leading from the village of Roslin, in the parish of Lasswade, eastwards to a point at or near the top of the north bank of the river Esk, and there entering and running through the property of Mr Trotter of Dryden, and thence through the defender's property, known as the "Swallow Knowe," or "Fir Plantation," along or near the top of said Swallow Knowe, or Fir Plantation, down to and across the public road from Loanhead to Polton Station of the Esk Valley Railway, and thence, onwards and eastwards, along the north bank of the Esk to Lasswade, Dalkeith, and other places in that direction?

The following verdict was returned—"At Edinburgh, the 22d and 23d days of July 1870—In presence of the Right Honourable the Lord Justice-Clerk—Compeared the said pursuers and the said defender, by their respective counsel and agents, and a jury having been empannelled and sworn to try the said issue between the said parties, say upon their oath, That they find for the pursuers, with power to the Court to enter the verdict for the defender, if they shall be of opinion that the road in question was legally shut up by the Road Trustees in 1824."

It appeared from the minutes of the Road Trustees that at a meeting held on 2d April 1824, there was presented a petition from Mr Mercer of Mavisbank to the following effect:—"That there is a footroad from Rosslyn to Laswade Church, which passes thro' that part of the petitioner's property in this parish, called the Swallow Bank, by a steep part in that bank, and which in wet weather is hardly passable. The petitioner proposes to turn that footpath, by making it in future pass along the north side of the bank. In this way, it would be made much easier for the passengers, and the distance will be increased only from about 80 to 100 yards. That, by the Turnpike Acts of the county, the trustees have most ample powers as to altering the roads under their charge, and this right still remains with them, independently of the new General Turnpike Act. But it is more to the present point to observe, that the road which the petitioner desires to turn or alter is not a turnpike road, but merely a kirk or parish road, to which the new general law does not at all extend; while, by the County Act 1803, it is enacted, 'That all the powers contained in the several county Acts which relate to the making, repairing, widening, and altering the turnpike roads in the said county of Edinburgh, or any of them,' 'shall be, and the same are thereby extended to the cross roads, and all other roads in the said county which are not turnpike;' and that the trustees have frequently acted on this authority in altering footpaths, so as to the jurisdiction there is no reasonable doubt."

The meeting remitted to a committee to consider the petition, to visit the ground, and report.

Thereafter, at the meeting held on the 30th April, the committee reported that the proposed alteration would be a great improvement—"And the meeting having resumed consideration of the original petition in connection with the above report, did, in terms thereof, grant warrant to and authorise the said Græme Mercer, at his own expense, to alter the line of the road or footpath as described and explained in these documents. And, when the new line shall have been completed to the satisfaction of the district of Lasswade, and so declared by a quorum of the trustees of that district, this meeting did and hereby do authorise the said Græme Mercer to shut up the old road or footpath, and prohibit and discharge the public from thereafter using the same."

The sections of the Act 43 Geo. III., c. 34, § 21,