and now the question comes to be, whether it is illegal at common law or by statute? I think under the statute we have to ascertain nothing but whether this company by a three-fourths majority at a meeting convened for the purpose of making the bargain are bound and acted regularly under the statute. I think they are, for I think it is clearly proved that there was a special meeting called by advertisement to consider the resolution with a view to adopt it, and that being done the commissioners are entitled to go forward and complete the sale, and no further question can arise on the matter. That is my general view of the clause, and indeed it would be impossible to work it if an objection by individual shareholders as to the regularity of the meeting by which three-fourths of the members adopted the resolution were to be given effect to. In point of fact the meeting of 18th April 1884 was unanimous, and I think it is only right to say that if the parties now appearing had intended to object, they should have done so earlier, and I cannot comprehend why they did not. Mr Brown senior was indeed a prominent person at the meeting, but took no division and made no protest. Therefore looking to the terms of the statute, and clause 20, which applies, no further question remains in the case. I will only say generally that I agree with the Lord Ordinary on the other questions which have been raised. This is a copartnership which outlived its term of twenty-one years, and it was thereafter simply one at the will of the partners. Now, that may give rise to a variety of questions as to the rights of the partners, and I do not dispute that the old rules will regulate their relations in so far as they are in their nature applicable. That is the reason and common sense of the matter, but except in so far as the period of the copartnership has been extended or prorogated, I think clause 30 is manifestly inapplicable.

Lord Young—I concur. The pursuers are shareholders of the Kilsyth Gas-Light Company, and bring a reduction of a contract dated September 1884, between the company and the commissioners on the ground of illegality. The Kilsyth Gas Light Company is one at common law, and I can find nothing in the terms of the contract of copartnery rendering the contract with the Police Commissioners illegal or in any way irregular. It was subsisting as a copartnership at the will of the partners and was dissolved at the time when the agreement was entered into with the consent of all the shareholders except two pursuers. I agree in thinking that there is nothing in clause 30 which at all interferes with a contract of this description being made at common law. But then it was not made at common law, but under the Burghs Gas Supply (Scotland) Act 1876. It is true that Act had not then been adopted, but the commissioners had its adoption in contemplation, and the contract was made on the assumption of its adoption. Now, on a familiar rule of our law and practice necessary for the convenience of business, where we have a contract made, whether on the passing of a statute or the adoption of an Act which it was in contemplation to adopt, it shall operate on the passing of that statute or the adoption of that Act, just as if it had been made after the passing or adoption of the Act. Now, clauses 20 and 21 taken together authorise the Police Commissioners of any such community as this to buy up the whole works of just such a company as this with this condition, that the company shall agree by at least three-fourths of the shareholders. The objection of more than one-fourth must end the matter; if three-fourths in value consent to the sale it may lawfully take place at a price agreed on, or to be fixed failing such agreement by arbitration. Well, the purchase was made, and more than three-fourths agreed, and what is the objection? Clause 30; but I have already said that even at common law clause 30 is not applicable to such a matter, but if it were, it could not prevail over the Act of Parliament, and if the Act of Parliament says it may be made if three-fourths consent, it is immaterial what clause 30 says. Therefore in every view I am able to take I agree in thinking the Lord Ordinary is right.

Lord Craighill—I am of the same opinion. There is one view which I think perfectly sufficient for the judgment though it does not appear to have been presented to the Lord Ordinary, for he does not put his judgment at all on the ground of the terms of the Burghs (Scotland) Gas Supply Act of 1876. But these terms seem to me perfectly conclusive of the question which we have here to determine. Suppose this question had occurred when the period of the company's original endurance was still running, or during a period for which its existence had been extended, would that have ousted the Act of Parliament? Not in the least. True, it may be that without the Act of Parliament the wishes of three-fourths of the members might not have prevailed, but the Act of Parliament in effect provides that whatever the rules of the company may say, if three-fourths agree, that is to be taken as sufficient just as if the whole members of the company had assented to what it was proposed to do. That consideration obviates truly the necessity of dealing with those intricate questions of company law which have been discussed so fully, I have no doubt to the entire benefit of all concerned.

The Court adhered.

Counsel for Reclaimers—Pearson—G. Wardlaw Burnet. Agent—George Andrew, S.S.C.

Counsel for Commissioners of Police—Mackintosh — Maconochie. Agents — Maconochie & Hare, W.S.

Counsel for Kilsyth Gas-Light Company—Lang. Agents—Yeaman, Fodd, & Simpson, S.S.C.

Thursday, February 4.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

MALCOLM *v.* LLOYD.

(*Ante*, vol. xxii. p. 554, 17th March 1885).

Road — Servitude — Cart Road—Declarator of Servitude.

In an action raised in 1885 for declarator of right to a servitude road the jury found that the pursuer, his predecessors and authors, had

possessed the road in question for forty years and upwards for the use of foot-passengers and horses, and that they had also possessed it for the use of cars or sleds for upwards of ten years prior to 1854, and for the use of carts from and after that year. *Held* that the verdict imported a right to a servitude road for carts, horses, and foot-passengers.

In terms of the interlocutor of the First Division, dated 17th March 1885, as previously reported, the trial in this action of declarator of right-of-way took place before the Lord Ordinary (KINNEAR) and a jury on 18th June 1885. The following issues were sent to the jury:—"(1) Whether for forty years prior to 7th January 1885, or for time immemorial, the pursuer and his predecessors and authors have possessed for all purposes a road leading in a south-easterly direction from said farm [of Achaleck, belonging to him] through the lands of Minard, belonging to the defender, to the public road leading along Loch Fyne side, and which road prior to the year 1854 ran in or near the line A, B, C, K, L, M, G, H on the plan, and thereafter in or near the line A, B, C, D, E, F, G on the said plan? (2) Whether for forty years prior to 7th January 1885, or for time immemorial, the pursuer and his predecessors and authors have possessed a road leading as aforesaid for the passage of horses and cattle? Or (3) Whether for forty years prior to 7th January 1885, or for time immemorial, the pursuer and his predecessors and authors have possessed a road as aforesaid for the passage of foot-passengers?" The jury returned the following verdict:— "That in respect of the matters proved before them, they find on the first issue that the pursuer and his predecessors and authors have possessed the road therein described for forty years and upwards for the use of foot-passengers and horses, and that they have also possessed the said road for the use of cars or sleds for upwards of ten years prior to the year 1854, and for the use of carts from and after the said year; and on the second issue find that the pursuer and his predecessors and authors have possessed the said road for forty years and upwards for the use of horses, but not for the use of cattle; and on the third issue they find for the pursuer."

On a motion to apply the verdict, the Lord Ordinary on 17th July 1885 pronounced the following interlocutor:—"The Lord Ordinary having heard counsel on the effect of the verdict of the jury, applies the same, and in respect thereof finds and declares that the pursuer, as heritable proprietor of the farm of Achaleck, has good and undoubted right to a servitude road for the passage of carts, horses, and foot-passengers leading from the said farm of Achaleck over the estate of Minard to the public road by the side of Loch Fyne, and that by the line marked on the plan, and lettered A, B, C, D, E, F, G, H; and that the pursuer and his tenants and others in the occupation of the farm of Achaleck have good and undoubted right to the use of the said road, and that the defender is not entitled to molest them in their use thereof, and decerns: Finds the defender liable in expenses," &c.

Against this interlocutor the defender reclaimed, and argued—The Lord Ordinary was wrong in his interpretation of the verdict. All that the jury intended to say was, that there was here a road suitable for horses and sleds, not a cart road, which would be a servitude more burdensome on the servient tenement. The two kinds of roads were quite distinct, and the import of the proof was that only horses and sleds or cars had used this road during the prescriptive period.

Authorities—*M'Kenzie* v. *Banks*, June 19, 1866, 6 Macph. 936; *Forbes* v. *Forbes*, February 20, 1829, 7 S. 441; Bell's Prin. secs. 1010 and 985.

Replied for pursuer—This was not a case of making a servitude more burdensome. The distinction attempted to be introduced by the defender was truly a fanciful one, as there was no practical difference between a sled and a cart, the latter of which was only a sled on wheels. The Lord Ordinary had given the only intelligible interpretation to the verdict of the jury.

Authorities—Ersk. Inst. ii. 9, 4; *Hozier* v. *Hawthorne*, March 19, 1884, 11 R. 766; *Dingwall* v. *Farquharson*, 3 Pat. App. 564.

At advising—

LORD PRESIDENT—The Lord Ordinary in the interlocutor which is now under review has applied the verdict of the jury pronounced in this case on 18th June 1885. The verdict is a special one, and the question comes to be, whether his Lordship has given true and just effect to that verdict?

There were three issues sent to the jury, but it is only with reference to the first of these that any question has been raised. That issue is in these terms—[*His Lordship here read the first issue*]. The finding of the jury on that issue is in these terms—[*His Lordship here read the verdict on the first issue as above quoted*].

Parties, I think, are now agreed that cars and sleds are synonymous expressions. Now, sleds are just carriages without wheels, a class of vehicle which was at one time very common in Scotland, and though they are now to a large extent superseded by the wheeled cart, yet they are still to be found in certain parts of the Highlands.

The mode in which the Lord Ordinary has applied the verdict of the jury is by finding and declaring that the pursuer, as heritable proprietor of Achaleck, has good and undoubted right to a servitude road for the passage of carts, horses, and foot-passengers from Achaleck to the public road by the side of Loch Fyne—in short, he considers that he can give declarator that this is a cart-road, because it is found that though the use of carts on this road was only commenced in 1854, yet it was undoubtedly used for cars or sleds prior to 1854 for the necessary period of ten years. He is further of opinion that carriages and sleds are one and the same thing.

I think that the Lord Ordinary is right in the view which he has taken of this verdict, and am for adhering to his interlocutor.

It is to be kept in view that this is a servitude road, and not a public road. The distinction is often a most important one, although it does not enter into the decision of the present question.

Now, there are three kinds of servitude roads in the law of Scotland, the difference between which is well stated by Erskine in the passage to which we have been referred (Inst. ii. 9, 12), where, after narrating the kinds of servitude roads known to the Roman law, and describing the difference which existed between them, he proceeds to ex-

plain what are the different kinds of servitude of road known to the law of Scotland. He says—"There are servitudes by the usage of Scotland analogous to these; of a foot road, an horse road, a cart or coach road, and ways or loanings by which cattle may be driven from one field to another; but an horse road is not by our practice included in a foot road as it was by the Roman law." Keeping out of view then the loaning, the three kinds of servitude roads known to the law are a foot road, a horse road, and a cart road, and the question comes to be, to which of these classes does the road in question by the verdict of the jury belong? It clearly does not belong to the first, nor does it, I think, belong to the second, because that is evidently confined to roads along which a horse may be led or ridden, but there is evidence that this road has for long been used for cars or sleds, and latterly for carts, so I think there can be no doubt that it falls to be classed in the category of cart roads.

No doubt for a considerable period the only use to which this road was put was for sleds drawn by horses. Now, a sled is just a carriage for the conveyance of peats or other produce—it is a carriage just as much as a cart is. The wheels may no doubt facilitate the cart's progress, but in point of use it is just the same as the sled. Whatever conveys farm or other produce is just a carriage. In taking the view which he has done I think the Lord Ordinary was right, and that his application of this verdict is sound. The substance of that interlocutor is just this, that the pursuer is to be allowed to use carts on a road on which sleds were used till 1854, and carts since then, and he is not to be confined to using this road for horses merely. If he were to be so limited he could not even use sleds, as in so doing he would be going beyond his rights. But it is clear that when sleds have been used the road cannot be merely a horse track.

The Lord Ordinary might have gone even further than he has gone, and granted decree in terms of the declaratory conclusions of the summons [see *ante*, vol. xxii. p. 555], but taking the interlocutor as it stands I think it is well founded, and I am for adhering to it.

Lords Mure and Shand concurred.

Lord Adam—I am of the same opinion. The use of sleds and afterwards of carts stamps the right as being of the highest kind of servitude roads known to the law of Scotland.

The Court adhered.

Counsel for Pursuer—Sol.-Gen. Robertson—Comrie Thomson—Murray. Agents—Mitchell & Baxter, W.S.

Counsel for Defender—Mackintosh—Darling. Agents—Pearson, Robertson, & Finlay, W.S.

Friday, February 5.

FIRST DIVISION.

[Lord Fraser, Ordinary.

STOBBS PATTISSON AND ANOTHER *v.* M'VICAR.

Foreign—Decree-Conform—Res judicata—*Jurisdiction—Payment by Order of English Court—Order Reversed—Implied Condition to Repay.*

In an administration suit in the Chancery Division of the High Court of Justice in England an order was on 24th January 1878 pronounced declaring that certain parties were entitled to participate in the distribution of the estate. On 9th August 1878 an order was pronounced directing that payment should be made to these parties, one of whom was "the legal personal representative of" A "when constituted." P., the agent for the plaintiffs in the suit, then intimated to M., with whom he had been in communication, that his (M.'s) wife was entitled to take out letters of administration to the estates of A. M. and his wife were domiciled in Scotland, and were not parties to the proceedings in England. P. was instructed by M. to take out letters of administration of the estate of A. in favour of M.'s wife. M. and his wife then granted a power of attorney in favour of P. to receive the sum directed to be paid by order of the Court. P. uplifted the money and remitted to Scotland the balance, after deducting costs, by cheque in favour of M. and his wife. M.'s wife, acting as A.'s executrix, distributed the money among the various beneficiaries entitled to take through A., retaining her own share. When M. and his wife received the money they knew that the order of 24th January 1878, which gave them their title to the money, was appealable for two years. The order was reversed on appeal, and it was declared that the legal personal representative of A. had been overpaid to the extent of £1523, 12s. 6d. Thereafter the plaintiffs obtained in the English Court an order under which they were at "liberty to take such proceedings as they may be advised" against certain persons who had received overpayments, and, *inter alia*, against M. The plaintiffs then raised this action in the Court of Session against M. for payment of £1523, 12s. 6d. *Held* (1) that the proceedings in England did not warrant the Court in pronouncing a decree-conform; but (2) that M.'s wife had received payment upon the implied condition that if the order which conferred upon her a title to receive the money were reversed she would make repayment; and (3) that M. having consented to his wife's acting as executrix was liable for her obligations, as she had no separate estate. The Court *granted* decree.

Husband and Wife—Husband's Liability for Wife's Obligations as Executrix.

Held that where a husband has consented to his wife acting as executrix, and she has no separate estate, he is liable for her obligations incurred in that capacity.

Andrew Carrick, doctor of medicine in the county