ever no case nor authority of any kind to support this position—that an intimated assignation might be defeated by a latent equity, which as being latent *ex necessitate* could not be intimated. June 1, 1813. TRUST AND ASSIGNATION.

Judgment of the Court below reversed.

Agents for the Appellant, SYKES and KNOWLES.
Agents for the Respondents, SPOTTISWOODE and ROBERTSON, Sackville-Street.

ENGLAND.

APPEAL FROM THE COURT OF CHANCERY.

STUART, Esq. and others—*Appellants.*
MARQUIS OF BUTE and others—*Respondents.*

TESTATOR, having devised certain freehold manors, lands, collieries, &c. bequeathes waggon-ways, rails, staiths, and all implements, utensils, *and things*, which, at the time of his death should be used, or employed, for the working and management of the collieries, and might be deemed of the nature of personal estate, to be enjoyed by the persons respectively entitled under the will, to the said manors, lands, collieries, &c. Question, Whether coals resting at the pits and staiths, debts due to the collieries, money (the price of coals sold) lying in the Tyne Bank, and other particulars enumerated, passed by this bequest under the general word THINGS? May 28, 1813. GENERAL WORD THINGS, FOLLOWING PARTICULARS ENUMERATED, CONFINED TO THINGS EJUSDEM GENERIS.

LORD BUTE, by will, dated the 27th May, 1789, devised and bequeathed his freehold and leasehold collieries, lands, tenements, and heredita- Will of Lord Bute.

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ments, and parts and shares of freehold and leasehold collieries, lands, &c. in the counties of Northumberland and Durham, to certain trustees, their heirs, &c. upon trust, to grant a certain rent-charge out of these estates, and subject thereto, to the Countess of Bute for life, and after her decease, for all and every the children of his son James Archibald Stuart, except the eldest for the time being, according to the appointment of their father; and in default of, or until such appointment for all, except the eldest, during the life of their father, equally, share and share alike, as tenants in common, their executors, administrators, and assigns, according to the nature and tenure of the said property.

Terms of the specific bequest.

The testator then proceeded in the following words, "And I give and bequeath all and every the "waggon ways, rails, staiths, and all implements, "utensils, and things, which at the time of my death "shall or may be used, or employed, together with, "or in, or for the working, management, or employ-"ment of any of the said collieries, or shares of col-"lieries, and which are, or shall, or may be deemed "or considered to be as, or of the nature of personal "estate, unto my executors hereinafter named, upon "trust to permit and suffer the same to be from time "to time held, used, or enjoyed by the person or per-"sons respectively entitled by virtue of this my will, "to the use and enjoyment of my said several free-"hold manors, messuages, collieries, lands, and here-"ditaments, or parts or shares of freehold manors, "messuages, collieries, lands, and hereditaments in "the said counties of Northumberland and Durham,

" as far as the nature of the said property and the " rules of law and equity will admit."

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And the testator gave the rest and residue of his personal estate to his son, the Honourable Charles Stuart (the father of the Appellants) for his own use and benefit; and appointed his wife, and his sons, the Marquis of Bute and Charles Stuart, and his brother, James Stuart Mackenzie, executors of his will.

Bill by Lady Bute.

In 1793 Lady Bute exhibited her bill in Chancery, (it was, apparently, a friendly suit,) praying " that her rights, under the specific bequest in the will, might be ascertained and declared; and that an account might be taken of all the stock, utensils, implements, and *things* to which the testator was entitled in respect of the collieries; and that she might be declared entitled to the whole thereof for her life: or, if the Court should be of opinion that the whole did not pass under the specific bequest, then, that such parts as did not pass, might be ascertained; and that the complainant might be indemnified in permitting the same to be applied as part of the general personal estate of the testator."

Answer of residuary legatee. Enumeration of particulars alleged not to have passed.

The residuary legatee (the Appellant's father) by his answer, insisted that corn, hay, horses, coals resting at the pits' mouth, and at the staiths, money due from the several fitters, money in the Tyne Bank, balance of cash in the cashier's hands, balance due from several persons, timber and deals, oil and candles, and also all waggons and waggon materials, waggon ways, and materials belonging thereto; fire-engines, machines, gins not erected or fixed; ropes; iron or materials at the pits; stables,

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20th March, 1793. Cause heard before Lord Loughborough, and reference to Master.

store-houses, horse trappings, &c. &c. not actually employed or used in working the collieries at the time of the testator's death, did not pass; and he therefore claimed them as residuary legatee.

The cause was heard before *Lord Loughborough* who ordered a reference to the Master to inquire and state what were the waggon ways, staiths, rails, implements, utensils, and things, which, at the time of the testator's death were used or employed in working or managing the collieries, and which might be deemed to be of the nature of personal estate: and particularly, whether any, and which of the articles enumerated in the schedule to the bill, (including those stated in the answer,) were used and employed in working and managing the collieries, and in what manner: and the Master was also ordered to state with what funds, and under what contract or partnership the collieries were carried on at the time of the testator's death.

The cause afterwards came on for further directions on the 2d of July 1794, and afterwards on the 27th April 1796, on each of which occasions the Master was ordered to review his report, and to state which of the articles were necessary for carrying on the collieries, and in what respect, and why they were necessary. The Master, by three several reports, dated respectively the 5th March 1794, the 30th Nov. 1795, and 29th April 1796, stated that the collieries were carried on under articles of agreement made in 1726, between Mr. Wortley, of Wortley, in the county of York, (from whom Lord Bute purchased,) and other persons named: that there never was any capital previously formed for

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conducting the partnership concern; but that the partners from time to time advanced what was necessary in equal proportions: that the concern was managed by agents, who made dividends from time to time, retaining funds sufficient to answer probable exigencies: that there was not, at any time, any certain sum left in the hands of the fitters; but that the partnership always drew the money from them as fast as they could get it: that the agents for the partnership issued from time to time to the cashier, by draft on their banker, money for making the necessary payments for the use of the collieries: that the agents deposited all the money received from the fitters in the Tyne Bank, and drew it out as there was occasion, and that they made the dividends at uncertain times according as it appeared to them that there was money sufficient in their banker's hands for that purpose; and that the whole of the monies and articles enumerated were necessary for carrying on the collieries. The material words of the original agreement were set forth, from which it appeared, that the coals might be separated for each partner the moment they were raised, that they might be led to separate staiths, and vended separately.

The money in the Bank, &c. and all the articles, reported to be necessary for carrying on the collieries.

Exception to Master's report.

The residuary legatee excepted to the Master's last report, "for that the said Master had stated that all the particulars, &c. &c. were necessary for carrying on the collieries, whereas he ought to have excepted therefrom (as not being specifically necessary, or falling within the words of the said bequest) the several articles enumerated in the schedule to the answer to the original bill, &c. &c." The Chan-

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cellor on the 1st of June 1796, over-ruled the exception, and by a decretal order of the 18th July, 1796, confirmed the Master's reports of the 30th November 1794, and 29th of April 1796. In the course of these proceedings Lady Bute and the residuary legatee died, and the suit was duly revived against all proper parties.

Judgment of Lord Loughborough affirmed by Lord Eldon.

The cause was afterwards re-heard before *Lord Eldon*, who on the 1st January, 1806, affirmed the decretal order of the 18th July 1796, but with considerable doubt; and the representatives of the residuary legatee therefore appealed to the Lords.

Mr. Richards for the Appellant. This was merely a question of construction; and he argued that, by the word *things*, must be understood things *ejusdem generis* with those previously mentioned. The decision of *Lord Loughborough* had been examined by his successor; and if the latter had heard the cause first, it was probable that it would have been decided the other way: under the circumstances, however, the judgment of *Lord Loughborough* was affirmed, and an appeal recommended, that the opinion of the twelve Judges, if necessary, might be taken on the construction of the will. The testator was speaking of implements, utensils, and things, and he did not see that a sum of money could, consistently with the cases, pass under these words.

11 Vesey. [illegible].

5 Brown, P. C. 534. Case of Mr. Wortley's will.

Mr. Courtney. The Judge appeared to be influenced by another cause, with which this had nothing to do, when he decided that the testator be-

queathed the whole of that, of which he had become the purchaser. That was not a safe ground unless their Lordships were satisfied from what appeared upon the face of the will itself, that the testator really intended to give all he had bought. But the present bequest did not at all refer to what he had bought.

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The general mode of construing the word *things* was, to consider it as referring to things *ejusdem generis* with the particulars mentioned before it. It could not be larger than the words *goods* and *chattels,* and *stock* in trade, and yet it had been decided that debts were not included in these words, and debts formed a great article in the present account. The debts and the coals to any extent could not be employed in working the colliery. The testator was speaking prospectively with a view to the future profits, and then, in giving what was necessary to secure these, such as the engine, &c. &c. he had a definite idea of what he was bequeathing. But if he meant any thing more large, he could not have the least idea of what he was giving: he could not, for instance, form any definite idea of the debts due to the concern; and this was another reason why the meaning should not be extended further than the words strictly imported.

Debts did not pass by the words stock in trade; debts were not included in the words goods and chattels generally; and therefore debts due to the concern could hardly be included in the words "in or for the working of the collieries." There was evidence indeed, that the amount of debts was not greater at the time of the testator's death than usual.

Seymour v. Rapier *et al.* Bunbury, 28. Latimer's Case, 2 Dyer, 59. B.

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It would be dangerous on such grounds to give so large a construction to the word *things*.

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Sir S. Romilly (for the Respondents). Their Lordships would consider whether the testator did not mean to pass the whole of his interest in these collieries. They were carried on for the joint benefit of Lord Bute and his associates in the concern: he had not the money itself, but an interest in the money, and the question was, whether he did not mean to pass the whole of that interest. As to the horses, hay, &c. he did not understand these to be now disputed; but they said that the debts due to the concern and the coals remaining unsold on the estate did not pass. The balances, however, and the coals, were inseparable from the interest in the collieries until a dividend was declared, and Lord Bute could not touch a shilling, but the whole was as much at the disposal of the managers as the engine, or any of the utensils employed in the work. They said that it was incumbent on the Respondents to show that this sum was necessary to carry on the work; but they admitted that some money was necessary, and therefore it was incumbent on them to show what less sum would suffice for that purpose. The cases which they cited were different from the present; here the debts were inseparably connected with the concern, and in a late case the debts were considered as so inseparable from a colliery, that they were both sold together. Brewers' leases of public-houses were also considered as part of the stock in trade on the same principle, and would be sold with the brewery, as these things

Wren v. Kirton, 8 Ves. 502.

were necessary to carry on the trade. Lord Roslyn did not decide merely on the ground that the testator meant to pass all that he had bought, but he considered the money here, not as separate and distinct property, as money usually was, but as a part of the machinery necessary for carrying on the work.

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Mr. Wetherel. This, to use an expression of Lord Kenyon, was a case by itself. It did not come within those relating to stock in trade. It was a bequest of a noble Lord, disposing of personal property, so that it might accompany the real property. He devised the colliery, not to be put an end to, but to be carried on, along with the enjoyment of the other property, and how could it be carried on without the money and debts, material to its continuation. This, therefore, was not the case of an ordinary bequest; and the observation, as to his having no definite idea of what he gave, did not apply: the intent was that the Respondent should stand in respect of the colliery, in the same situation as Lord Bute was at the time of his death; and it did not depend on him what the balances should be, but on the mode of carrying on the trade. They said that the debts were not necessary to carry on the trade; but suppose 10,000*l.* worth of coals had been sold on a credit not run out, then the debt might be essential to the carrying on of the work, and must go along with the colliery. No trade in which it was necessary to give credit could be carried on without debts, which were therefore essential to the

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conduct and management of the works. Latimer's case cited by them was not law now. In the other case it was true that debts were held not to be included in the stock in trade; but there it did not appear to be intended that the trade should be continued.

Mr. Richards in reply. The construction which they put on the word *things* was too large, and not warranted by the cases. In answer to a question from Lord Eldon, he stated that debts, balances in the hands of the fitters and others, money in the Tyne Bank, coals resting at the pit's mouth, and staiths, and whatever articles were not actually employed in the collieries at the time of the testator's death did not pass, as the bequest was confined to what was in use at the time of his death. Leases of public-houses would pass with a brewery, he admitted, but that was because such leases were a part of the trade. Possibly Lord Bute intended that all should pass in this instance, but *quod voluit non dixit*, and all the articles could not pass without giving an unusual construction to the word *things*.

Judicial observations.

Lord Redesdale. The difficulty was whether the money, and the subject to be converted into money, which was to form the matter of dividend, passed by this bequest. Suppose Lord Bute had been seized in fee of the collieries, and died intestate, so that the real property should go to the heir, and the personal property to the personal representative—would not the personal representative have the coals and cash? The question was, Whether he meant to give

what, if he had lived, he would have taken as bygone profits; and thus, to take all the bygone profits from the residuary legatee? That was a view of the subject, which had not before been taken. Was it not his meaning that Lady Bute should have the profits of all the coals raised from the time of his own death to that of the Lady? Yet according to this decision, as the coals might go on accumulating for years, she might have nothing. Was this money intended to go as a capital sum to be laid out at interest, or how was it to be applied?

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Upon the principle of this decision, as the coals might go on accumulating for years, the tenant for life might have nothing.

Lord Eldon (Chancellor). The opinion of Lord Loughborough appeared to have been partly founded on this ground, that as the testator had purchased the whole together, he intended to pass the whole in the same manner; but that was begging the question, for the conclusion did not necessarily follow. His opinion was, that the stock got together for the purpose of being used did pass. As to the rest he had very great doubt. If these sums were bequeathed to be enjoyed along with the collieries according to the limitations in the will, *quo modo* were they to pass? Were they to remain in the Bank, or what was to be done with them?

When he considered the latitude to which this would lead in the construction of the word *things*, he certainly felt great doubts as to the correctness of this decision, even though it rather appeared to him that the testator intended to pass the money, coals, &c.

Lord Redesdale. The difficulty arose upon the construction of the words. A testator when he was

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desirous of passing the whole of his personal property, would naturally do so by the general expression. When he enumerated several particulars, the presumption was that he intended to exclude something: and it was settled on decided cases, that the word *things* must be understood as applying to things *ejusdem generis*, with particulars previously specified.

Another circumstance which had been much overlooked was the purpose for which the bequest was made. It was made to be used, or enjoyed, by the persons to be respectively entitled to the collieries. Several persons who were to take the freehold were to take these things along with it. Now, how could they take the debts, balance of cash, &c.? It could only be by laying out the money at interest, which was not expressed in the will.

But then it was said that he had an undivided third, which he had no right to separate. But he had a right to separate the coals which were raised, and the partners might have carried them to different staiths; otherwise the coals might be retained for a great number of years, and some of the persons in the limitation might have no benefit from them whatever. He thought therefore, that the testator did not intend to dispose of his whole interest in the colliery; if he had so intended, he might have done it by the simple words "the whole of my interest in the collieries." But the words used were not applicable to the whole of his interest.

According to the latitude of other cases; for if the words were to have the ope-

ration contended for, a man's whole property might go where he never meant it should. Suppose, Lord Bute had no property but the colliery, the whole of his personal estate would pass under that latitude of construction. And so in the case of a bequest of this kind by a manufacturer, all the money due for manufactured goods and the whole of his personal estate might pass.

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construction given by this decision to the word *things*, the whole of a man's property might pass contrary to his intention.

Lord Redesdale (after stating the case and proceedings.) The question was, Whether the decretal order of the 18th of July, 1796, was right or not? With respect to some of the articles, there was no doubt but they must pass; as to others, it was contended they were not meant to pass. The question then was, what was the intention of the testator as it was to be collected from the will. The directions in the will were, that the things which the testator meant to pass should be held in trust for those who should be entitled to the manors, messuages, collieries, &c., mentioned in the will. And the decision appeared to have been founded on the supposition that among the articles and things in question, were to be included the by-gone profits not received by him before his death. After the best consideration, however, that he had been able to give the subject, he could not go the length of that decision. If such had been the intention of the testator, it was natural for him to have said so in a few comprehensive words. But as there was an anxious enumeration of the particulars to be passed, it was rather to be presumed that he did not intend to pass the whole. Some of the articles too were incapable of being

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He could not go the length of the decision of the Court below.

Where there is an anxious enumeration of particulars in a bequest,

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the presumption is that it was not intended to pass the whole.

enjoyed according to the limitations in the will, for the testator directed that they should be enjoyed by the persons who held the freehold manors, &c. in succession; and these, it would be remembered, were devised to the Countess of Bute for life, then to the children of J. A. Stuart, according to the appointment of their father, and in default of, or until such appointment, equally during his life; so that as long as the father did not exercise his power of appointment, and he might not choose to exercise it at all, the absolute property would be in suspense, and that suspense might last till his death. How then could these coals and sums of money be held and enjoyed with the freehold manors, &c., according to the course of succession directed by the will?

An impression appeared to have been made on the mind of the judge, who originally decided this cause, that the question had been previously determined in another cause which arose on Mr. Wortley's will. There, however, the words were different, and no complete decision upon the point took place at all. As the words here were so very different, they might have been expected to have led to a different, rather than a similar determination. That case might therefore be laid entirely out of view.

5th Brown P. C. 534.

Suppose the testator had been tenant for life of the collieries, and that upon his death, the interest in them had of course gone to another, the coals raised before his decease, and resting at the pit's mouth, would not go along with the collieries, but remain as part of the personal estate of the tenant for life. This would also be the case with his share of the balances due from various persons, and

money in the Bank, which were still nearer the state in which the produce was usually divided. The wages of the workmen, it was said, must be paid out of this fund. But, so the case would be, if the testator had been tenant for life only, or tenant in fee and had died intestate, though, under these circumstances the money would have gone to his executors. It appeared to him that this formed no ground for including the money in the Bank, coals at the pits, and staiths, and balances due to the concern, among those things which passed by this bequest. The reference to the Master to inquire what was necessary for carrying on the collieries went beyond the words of the will; for the testator did not say that every thing which was necessary should pass, but only such things as might be used or employed in the working and management of the collieries at the time of his death.

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The reference to the Master to inquire what was *necessary* to carry on the collieries went beyond the words of the will.

It seemed to him therefore clear upon the whole, that the intention was to give those articles only which might be enjoyed with the colliery as long as they lasted; and that the enumeration ought not to be extended beyond the usual construction of the word things, that is, things *ejusdem generis*. Horses, hay, corn, &c., were not properly bygone profits, but to be used and employed in working the collieries, and therefore passed. They were in their nature capable of enjoyment in succession as long as they lasted, and might be included among those things which passed, notwithstanding the argument to the contrary. But the coals raised, the debts due to the concern, and money in the Bank, did not pass, as they were not in their nature within the

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meaning of the word *things* as used in the will, but rather bygone profits.

If these things were taken as having passed, they could not belong to Lady Bute absolutely. They must be used in succession, and the money and value of the coals must be secured for that purpose, and how were they to be secured? Were they to be laid out in the funds, or in what other way? As to this, the will gave no directions. He could not conceive how these articles could be applied to the uses to which the property really meant by the testator to pass was destined. It was the intention of the testator that the collieries should be going on; but a bequest of the money and coals already raised, was not necessary for the purpose. That object was secured by the conditions of the partnership. The only question here was, To whom the dividends out of these bygone profits were to be made? When the coals raised at the time of the testator's death were sold, and the debts or balances due to the concern were paid, and the money lodged in the Bank, the whole formed an aggregate fund to be applied, first, to the payment of the debts due from the colliery, to the payment of the wages of the workmen, and the purchase of the necessary new implements; and even these new implements were not given by the will, but only such as were used and employed at the time of the testator's death. Those purchased after his death could not answer that description.

The money not to be di-

The ground upon which it was imagined that these things passed was, that the collieries could not be carried on without the money. This was true; and the executors could not divert it from that appli-

cation; but it did not follow that it therefore passed by this bequest, though they could not divert it, nor get possession of any part of it until a dividend was declared. With respect to the property given by the word *things*, as applicable to waggon ways, &c., its destination was the working of the collieries, and it might be used and enjoyed in succession for that purpose as long as it lasted; but the destination of the other things, such as money, &c. was profit. They were not of a nature to be used in working the collieries, but of the nature of dividends.

Such being the impression on his mind, he differed to that extent from the order over-ruling the exception. The decree of the 18th July, 1796, therefore went beyond the proper limits, and he should propose to find, that the coals resting at the pits and staiths at the time of the testator's death, valued at 2899*l.* 12*s.* 8*d.*; money due from the several fitters, amounting to 10,371*l.* 13*s.* 8*d.*; money in the Tyne Bank, amounting to 5512*l.* 19*s.* 6½*d.*; balance of cash in the cashier's hands, 656*l.* 17*s.* 4*d.*; and the balances due from several other persons, amounting to 5632*l.* 10*s.* 10*d.*, did not pass; but that the testator's share of these particulars formed part of the general residue of his personal estate, applicable first, to the payment of the debts of the collieries; then to the payment of his general debts and legacies, and that the remainder went to the residuary legatee; and thus far to reverse the decree of the Court below, and affirm it as to the rest.

This fund was certainly applicable in the first place, to the payment of the debts of the collieries, as the partnership had a specific lien upon it for this

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verted from the purposes of the collieries, but to be applied to the payment of the debts due from the collieries, workmen's wages, &c., up to the time of the testator's death. The executors could only get the amount of the dividend made after these deductions.

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purpose, in preference to other creditors. Particular directions would be necessary, as Lady Bute had received the dividends, though, as tenant for life, she ought to have received only the produce of the collieries from the time of the testator's death; and therefore the enjoyment had not been according to what he conceived to be the proper effect of the testator's will. But the Court below would make the proper order in this respect.

If the decree of the Court below were suffered to stand, the principle would lead to monstrous consequences.

This was a case of considerable importance; for it was difficult to say to what extent the principle of the decree, if suffered to stand as it was in the Court below, would lead in other cases. For instance, if a person gave a manufactory, there too it might be argued that it could not be carried on without goods and money; and thus all a man's goods and money, and the whole of his property might pass under the words "manufactory, and things employed in it," though it might be his intention to give only the manufactury, with the things actually employed in it, to one child, and to suffer the rest of his property to go to his other children. This would be monstrous, and yet the decree, if allowed to remain as it stood, would be a decisive authority in favour of such a construction.

Lord Eldon (Chancellor.) He thought himself highly fortunate in having the assistance of his noble and learned friend, in whose view of the question he completely concurred. As this judgment would affect another cause now depending in the Court of Chancery, it was expedient that the terms of it should be settled with the utmost possible accuracy.

and he proposed that the matter should stand over for that purpose. June 28, 1813.

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This day the judgment was read, and was in substance and effect conformable to the suggestion of *Lord Redesdale.* July 7th,

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SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

EARL OF MORTON—*Appellant.*
STUART, ESQ.—*Respondent.*

DECLARATOR of immunity from an alleged right of way as far as respected a person or persons claiming in virtue of a particular tenement, and prayer that (if the right existed) the uses to which the ways were to be applied should be ascertained and defined. Defence, claiming the right by prescription to two ways; one to a harbour, the other to a bay of the sea, in favour of the proprietors of grounds and houses in and about a certain village, in which description the defender was included. Question, Whether on the ground of the sea shore being *publici juris*, or for any other reason assigned, this is sufficiently explicit, or whether it is not necessary in pleading to state the precise and particular uses or purposes for which the right of way is claimed, before the parties can be permitted to go to proof. June 16, 1813.

PLEADING RIGHT OF WAY.

THE Appellant, in 1806, brought an action of declarator of immunity from an alleged servitude, stating, "That his barony of Aberdour was nowise burthened with any servitude or privilege in favour of the lands of *Hillside*; and that the proprietors or inhabitants of these lands had

Action of declarator of immunity by the Appellant.