the residuary clause in the said trust-disposition of the said William Brodie deceased, with respect to the division to be made of the residuary funds and effects of the said William Brodie, amongst his widow, his two sons, John and George, and his three daughters, Helen, Janet, and Bess, his son Alexander being excluded from a share of such residuary effects, as in the said interlocutors expressed: And find that, according to the true construction of such trust-disposition, such residuary funds and effects (subject to the question after mentioned), ought to be divided between the said widow and the said sons, John and George, and the said daughters, Helen, Janet, and Bess, in proportions following, that is to say, that, for every £10 of such residuary funds and effects which shall be drawn by each of the said sons, John and George, upon distribution of such funds and effects, the widow shall draw £9, and each of the said daughters, Helen, Janet and Bess, shall draw £9, so that when the sons shall take £10 each, the widow and daughters shall take £9 each. But this finding is to be subject, nevertheless, as to the share of the said daughter, Helen, to any question which may arise touching such share upon the true construction of such trust-disposition, with regard to the conditions expressed therein concerning the said Helen, and her husband, the appellant, Walter Fisher. And it is further ordered, that with this finding, the cause be remitted back to the Court of Session, to do therein as shall be just.

For the Appellants, *Sir Saml. Romilly, John Fullerton.*

For the Respondents, *John Leach, John Clerk, James Moncreiff, Fra. Horner.*

NOTE.—Unreported in the Court of Session.

WM. WALKER, Esq. of Coats, . . . *Appellant;*
Major JAS. WEIR of Tolcross, . . . *Respondent.*

House of Lords, 26th March 1817.

ROAD—POWER OF TRUSTEES IN SHUTTING UP ROAD—ACQUIESCENCE.—Three questions occurred in this case, 1st, Whether there was any power in the road trustees to shut up a road at Bell's Mills? 2d, Whether, supposing they had such power,

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this had been duly exercised? 3d, Whether, if this was not duly exercised, there had been any such acquiescence or homologation on the part of the appellant, as to prevent him from challenging the transaction between the road trustees and the respondent in regard to the road. Held in the House of Lords (altering the judgment of the Court of Session), that the road had not been shut up by any competent authority, and that the soil was not legally vested in the respondent. *Quoad ultra* the case remitted to review the interlocutors, regard being had to these findings.

The question at issue in this case regarded a road leading to Bell's Mills, Water of Leith, of which the appellant stated he had been deprived, but which the respondent alleged had been shut up and disposed of to him, some thirty years before the raising of the action.

The appellant's property at Drumseugh was purchased in 1801, from Lord Colville, and consisted of *two* enclosures, both of which are described to *be bounded* on the north by the highroad leading from Edinburgh to Bell's Mills on the Water of Leith; and to both there was a separate entry or access from the road.

Prior to 1785, the chief road from Edinburgh to Queensferry passed through Kirkbraehead, by the back of the Earl of Moray's house, and from thence, down to the Water of Leith Mills, by the bridge there.

Another public road struck off from this, nearly at the back of the Earl of Moray's house, and diverging in a direction almost north-west, passed along by the house of Drumseugh, then the property of Lord Colville, and leading nearly straight downwards to Sunbury, and to Bell's Mills, and the ford upon the Water of Leith.

The road called Bell's Mills Road, was the road in dispute, and, in the appellant's charter, was bounded by his premises on the north. He contended, that it was as much a public road as the other; and the one was called the *road to the Water of Leith*, the other, the *road to Bell's Mills*.

The property which lay betwixt these two highways, with the exception of the angle where they diverged, belonged partly to Mr John Mackenzie and Major Weir jointly, and partly to Major Weir individually.

As the road by the Water of Leith was rather steep and inconvenient, the trustees upon the highways for this district, sometime prior to 1785, thought it advisable to make an alteration upon it. A new bridge was built at Bell's Mills;

and the road, instead of going through the ford, at the bottom of that village, was conducted in a sloping direction, and by an easy access to Bell's Mills Bridge, and so onward till it joined the former road to Queensferry.

By this improvement, it was stated, that the public travelling from Edinburgh by Kirkbraehead to Queensferry, or to Bell's Mills, gained a more commodious access to these places. But it did not follow, that any other road, in which individuals were interested, and by which they had access to their properties, in virtue of their charters, should thereby be superseded and shut up. This, more especially, applied to the highway by Bell's Mills, the road in dispute. The only access to Lord Colville's house and property at Drumseugh, both to the south-east, and to the north-west, was by this road; the new line by Queensferry touched no part of these premises, except at the bottom, where, from its being so much lower than the ground, it could be of no use; and everywhere else, the premises of Mr Mackenzie and Major Weir were situated between these two roads.

In 1801, the appellant purchased Lord Colville's property, as above-mentioned. Previous to doing so, he made careful examination into the state of these roads, examined the public records, and the title-deeds; and in order that he might know the state of the conterminous property belonging to Mr Mackenzie and Major Weir, the records as to these were examined, and the whole completely satisfied him, that there was free access to the *Bell's Mills Road*, all along the north side of Lord Colville's property; and that it was absolutely bounded on that side by a public highway in daily use.

The appellant's subjects were described as follows:—"All "and whole, that lodging or dwelling-house, garden, and "park, with the haill office-houses, parts, pendicles, and per-"tinents of the same, lying near Drumseugh, within the "Barony of Broughton, Parish of St Cuthberts, and Sheriff-"dom of Edinburgh; as also, all and whole, a stable and "hay-loft above the same, *having an entry by the highway*, "leading to the said dwelling-house, together with a stripe "of ground, and trees growing thereon, lying between the "south hedge of the above garden, and the park dyke to the "south thereof; part of the quarry park, as the same were "then possessed by James Keir, Esq., Bughtrigg; the "measure of the ground of which whole premises, *including* "*the thickness of the dykes and hedges of the said* park and "garden, the sweep at the coach-house, and the *great door of*

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" *the park*, extends to 3 acres, 2 roods, 34 falls, and 17 ells, " and bounded as follows :—On the east by the Quarry " Park, sometime belonging to Adam Keir, baker in Edin- " burgh ; *on the north by the highroad, leading from the turn-* " *pike road to Bell's Mills ;* and on the west and south parts, " partly by these 2 acres, 2 roods, and 30 falls of ground, " being part of the lands of Coats, and formerly set in tack " to James Finlay of Wallyford, *in manner after mentioned*, " and partly by that angle of ground disponed to the said " James Keir by Alexander Cunningham."

The other subject referred to above, is thus described and conveyed :—" Also, all and whole the 2 acres, 2 roods, " and 30 falls of ground, being part of the lands of Coats, set " in tack to James Finlay of Wallyford, and bounded as fol- " lows :—on the east by the foresaid lands acquired by the " said James Keir from William and Adam Keir ; and on the " north, west, and south, partly by the foresaid highroad, and " partly by the lands of Coats, belonging to the said Alex- " ander Cunningham, together with the teinds," &c.

From the examination of the public records, it appeared, that the property upon the opposite side of the highway to Bell's Mills, belonging to Mr Mackenzie and Major Weir, was described in their title-deeds as, " all *enclosed by a stone* " *dyke or wall*, bounded as follows, viz., by the dwelling-houses " and garden dyke, possessed by the said Thomas Allan him- " self, on the south and south-east ; the highroad leading from " Edinburgh to Bell's Mills, on the south and south-west " (the road in dispute) ; and the highroad from Edinburgh, " leading to the Water of Leith Mills, on the west, north, " and north-east parts, consisting in whole, the subjects hereby " disponed, of three acres or thereby."

Major Weir had acquired right to Mr Mackenzie's interest in the subject so interjected betwixt the two roads ; and relying, it seems, upon certain latent and private proceedings, which had taken place about or since the year 1785, betwixt an individual, who happened to be one of the trustees upon the highways, and Mr Mackenzie ; he, sometime after the appellant's purchase in 1801, proceeded to make encroachments upon the road in dispute, as if he had been proprietor of it. In particular, he took down his own wall, by which his ground was described, in his title-deeds, as enclosed, and in working a stone quarry upon his own property, not far distant from this road, he so far encroached upon it, that a part of the road, and the wall which enclosed the appellant's

property, were thrown down. He also laid some stones across the lower end of this road, so as to interrupt the passage of carts. This being removed, he afterwards put up a bar gate, at the upper end of the road, close to the appellant's stable, with a view to appropriate the road beyond it to himself.

An application was then made to the Sheriff by the appellant, praying him, that the road in question ought to be left open for his and the respondent's use; that the wall was his absolute property; that Major Weir had no right to fill up the road between their properties, more especially, to lay earth and rubbish against the appellant's wall; and to prohibit and discharge him from doing so.

In answer to this petition, Major Weir, founded on the agreement which his author had with George Loch, Esq., convener of the committee of the Cramond Road Trustees, which set forth, "1st, Mr Mackenzie for himself and his own "interest, agreed, that the trustees shall take from his property "at Drumseugh, the ground pointed out by them for widening "the road, beginning at the bank near the red door, on the "road leading to the Dean, and running from the said bank "to the north-west end of his property, and that the trustees "shall have immediate access to the said ground. Dated Oct. 14, 1785.

"2d, That the price to be paid for said ground to Mr "Mackenzie and Mr Weir, shall be at the rate of £250 "sterling per Scots acre, which is to include the value of the "fruit trees on the said ground, which Mr Loch agrees shall "be paid at Martinmas first; and besides the said price, the "old road shall belong to the joint property of Messrs Mac-"kenzie and Weir, so far as it is adjacent, say the old road "lying betwixt said property and Lady Colville's property, "leaving out free all the said road lying to the north of the "corner of Lady Colville's stable. The trustees are to "enclose, on their own expense, the joint property of Messrs "Mackenzie and Weir, with a wall built of stone and lime, "equal in height with what of the new wall is already "finished.

(Signed) "GEORGE LOCH.
" "JOHN MACKENZIE."

Upon production of this agreement, the sheriff pronounced this interlocutor: "Finds, that the defender (respondent) "by this transaction with the trustees for the highroads, in "1785, acquired right to the area of the old road, and the July 1, 1807.

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"same has been occupied by him exclusively since; there-
"fore dismisses the petition and decerns"

An advocation was brought of this judgment to the Court of Session by the appellant, and he also brought an action of declarator to have his right declared and established, and the encroachments put an end to. These two actions having been conjoined, the Lord Ordinary pronounced this interlocutor: "Sustain the defences in both processes, assoilzies "the defender (respondent), and decerns; but, in respect, "the pursuer is a singular successor in the lands, and that "the defender did not produce the documents, on which he "rested his plea, until they were called for by the Lord "Ordinary: Finds no expenses due." On representation, his Lordship adhered. And on two several reclaiming petitions to the Second Division of the Court, their Lordships adhered.

Nov. 14, 1809.

Jan. 10, 1810.

June 22, 1810.
July 10, 1810.

Against these interlocutors, the present appeal was brought by the pursuer to the House of Lords.

Pleaded for the Appellant.—1st, The appellant purchased his property in 1801, from Lord Colville, upon the faith, and after due examination of the public records; and from these it appeared, that the road in dispute was a public highway.

By the title-deeds of his property, standing upon record, it was ascertained, that the first portion of it was bounded "*on the north by the highroad* leading from the turnpike "road to Bell's Mills." The second portion, consisting of 2 acres, 2 roods, and 30 falls, was bounded "on the north-"west and south, *partly by the foresaid highroad.*" And when the restriction in favour of the pleasure walk is mentioned, the road in dispute is again noticed; namely, "for "the space of 32 feet, all the way from the end thereof, to "the road leading to Bell's Mills."

These gave to the appellant a clear right to the road. But the titles of the respondent are equally explicit. They are described, as *all enclosed with a stone dyke or wall*, bounded by "*the highroad leading from Edinburgh to Bell's Mills on "the south and south-west.*"

2d. The step, or secret transaction entered into in 1785, betwixt Mr Loch and Mr Mackenzie, cannot be set up to contradict, or alter, the rights of parties. Mr Loch was never empowered to enter into this agreement by the other trustees, and he could not legally enter into it alone. There was not the slightest evidence adduced that he had been so authorized. The respondent was repeatedly called on to

show Mr Loch's authority, but he could produce none; and it must, consequently, be held that Mr Loch took the matter entirely upon himself, and had no authority from any one. Even the sanction of the trustees themselves would have been no authority to Mr Loch to proceed in a transaction, the object of which was to deprive both the public and a private individual of his property, unconsenting thereto. It is a servitude for the public that the trustees hold, while the feudal title and right to the minerals is vested in the conterminous heritors, whose right to the surface has been taken from them for a public purpose; and when that purpose ceases, it is *ultra vires* of the trustees to do any act by which a preference, as in this case, is given to one adjoining proprietor over another. The authority, therefore, of the trustees could not have mended the matter. But when it is found that, even if they had such authority, they did not delegate it to Mr Loch, the measure was still more destitute of legal authority.

Pleaded for the Respondent.—The road in question was condemned and shut up by the Trustees for the Public Roads in the year 1785, and was then transferred by the authority of the same trustees to the respondent and Mr Mackenzie, and annexed to their property, in exchange *pro tanto* of the ground given by them for making the new road to Queensferry by Bell's Mills. And the transaction being of a public nature, and entered into for the benefit of the public, who have acquiesced therein ever since the year 1785, the powers of the trustees to shut up and transfer the road cannot now be questioned. And, in particular, the appellant is not entitled to question the same, as he only claims the use of this road in right of the property of Drumseugh, which he purchased from Lord Colville, by whom the powers of the trustees were directly acknowledged, and who also acquiesced in the respondent's possession and enjoyment of the said road, under circumstances amounting to a confirmation of the respondent's title thereto, and a waver of all right which the said Lord Colville, or any subsequent proprietor of the appellant's property could have, or pretend to the said road.

After hearing counsel,

THE LORD CHANCELLOR (ELDON) said,*

"My Lords,

"There appears to be two questions in this cause:—

* Taken by Mr Richardson.

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"1st. Whether there was really any power in the trustees to shut up the road; and,

"2d. Whether, supposing there was power, it had been duly exercised; and if it was not duly exercised, Was there any such *acquiescence*, or, according to the Scottish law, *homologation*, on the part of the appellant, as to prevent him from challenging the transaction between the Road Trustees and the respondent?

"There is no case in which it is more absolutely required of courts of law, to see that the interest of the subject is not taken away, than under such Acts of Parliament relating to navigations, roads, &c., &c. Upon the best consideration, therefore, which I have been able to give to the papers in this cause, and the Acts of Parliament, I cannot see that the road was shut up by competent authority. It does not appear that such authority was given by the Acts which I have looked into; but supposing that authority was given by the Act, any subject has a right to insist that the trustees shall exercise that authority in precise terms of the Act. If the trustees had the authority, and it was not duly exercised, then the question of acquiescence might arise; but it appears to me that the Court have decided the case on the notion that all was to be ruled with respect to the opinion that they entertained, that the road had been legally shut up.

"I would propose to your Lordships, not to reverse but to find, that the road was not shut up by any competent authority, and that the soil thereof was therefore not legally vested in the respondent, and to remit to the Court of Session, to review their interlocutors, regard being had to these findings.

"This finds that the road was not shut up by any competent authority, and therefore not duly vested in the respondent.

"It would be difficult to say that any right could be obtained by acquiescence, and it seems to me that the judgment on the ground of acquiescence, was affected by the opinion which the Court had formed, that the road was legally shut up.

Journals of the House of Lords.

Accordingly, it was ordered and adjudged as follows:—

The Lords Finds that the road in question was not duly shut up by any competent authority, or the soil thereof duly vested in the respondent, or those under whom he claims; it is therefore ordered, that the cause be remitted back to the Court of Session in Scotland, to review the several interlocutors complained in the said appeal, having regard to this finding, and thereupon to do what shall be just.

For the Appellant, *John Dickson, R. Hamilton, Pat. Walker.*

For the Respondent, *Jno. Tawse.*