mode of sisting process—but does not state from what time the ten days are to be computed. That time is now defined to be the day on which the latest intimation is given, but it is only by reference to extraneous circumstances that that information is gained. It is not from that interlocutor, however, that the present appeal is brought, but from that of the 6th of July 1864, in which the Court refuses to receive the minute of dissent tendered by the magistrates. That refusal proceeded on the ground that having stated the period during which proceedings were to be sisted, it was unnecessary to specify a time within which dissents should be lodged. In that view I cannot concur, and beg therefore to advise your Lordships to reverse the interlocutor appealed against.

Lord CHELMSFORD—I have the misfortune to differ from both my noble and learned friends, and to think that this interlocutor ought to be affirmed. The sole question is whether the Lords of Council and Session have complied with the provisions of the statute in the intimation they have given to the heritors. (His Lordship then repeated the facts of the case.) It has been objected, first, that the intimation was not of a sufficiently special character; but that is an objection to its form and manner, both of which the statute directs shall be left to the discretion of the Court. Intimation from the precentors' desks, too, is the most usual mode of giving notice to the heritors of a parish. It is next objected that the proceedings were not sisted for a definite time. I think the interlocutor, in directing that the intimations shall be made at least ten days before the process is again moved in Court sufficiently defines the time of the sist; and the time from which it was to be computed would, of course, be the date of the publication of the intimation in the newspapers. It is lastly objected that the intimation specifies no time within which dissents are to be lodged; and it is upon this ground that my two noble and learned friends think it defective. It would have been better had the interlocutor distinctly stated the time; but I think that the heritors, having been informed of the sist, they could not fail to know that it was directed in order to give them an opportunity of stating their dissent. The time for which procedure was sisted appears to me sufficiently identified as the time within which dissents must be lodged; and I therefore think that the interlocutor appealed from ought to be affirmed.

Lord KINGSDOWN—It is not without regret that I feel compelled to yield to the objections which have been raised to this intimation. Much is no doubt left to the discretion of the Court, but the statute positively requires two things to be done—one, that the proceedings should be sisted for a definite time; and the other, that a time should be specified in the intimation within which dissents must be lodged. The times may be the same, or they may be different; but the heritors were entitled to have them clearly defined. The positive requirements of the statute have not been complied with in the present instance, and I therefore concur with my noble and learned friend on the woolsack that this interlocutor must be reversed.

Interlocutor reversed.

March 3, 5, *and April* 26.

LOVAT AND OTHERS *v.* FRASER, *et e contra.*

Entail—Executor—Entailer's Debts—Expenses. A deed of entail having been executed under burden of all the entailer's debts—*Held* (rev., in part, Court of Session, diss. Lord Kingsdown) that an heir of entail, who was also the entailer's executor, was not entitled to charge the entailed estate with expenses incurred by him, after the entailer's death, in resisting payment of unjust demands.

Counsel for Lord Lovat and Others—The Lord Advocate (Moncrieff) and Mr Rolt, Q.C. Agents—Messrs Gibson-Craig, Dalziel, & Brodies, W.S., and Messrs Grahames and Wardlaw, London.

Counsel for Mr Fraser—The Attorney-General (Palmer), Sir Hugh Cairns, Q.C., and Mr J. F. M'Lennan. Agents—Mr Æneas Macbean, W.S., and Messrs Loch & Maclaurin, London.

This is an appeal from an interlocutor of the First Division of the Court of Session.

The late Hon. Archibald Fraser was heir of entail of the estate of Lovat, and proprietor in fee-simple of the lands of Abertarff and others, in the parish of Inverness, in the purchase of which a grant to him under the Privy Seal, vested in trustees, had been applied. He was also possessed of a considerable amount of personal property. In the year 1805 he executed a deed conveying those fee-simple lands to himself and his heirs-male, and to any subsequent series of heirs which he might name by writing under his hand. His eldest son, Colonel Simon Fraser, being then dead, the respondent, his grandson, was the sole descendant of the family. On the 25th June 1808, Archd. Fraser executed in favour of the respondent a general disposition of various subjects lying in the burgh of Inverness and the village of Campbeltown, and of all his property, heritable and moveable, which he might leave undisposed of at the time of his death; the deed also contained a declaration that *its revocation should not be inferred from implication or construction, but only from an express writing.* Thereafter, on the 15th of August in the same year, he executed a strict entail of the lands of Abertarff and the lands of Auld Castlehill, of which he was owner in fee-simple in favour of Thomas Alexander Fraser of Strichen, now Lord Lovat, and a certain series of substitutes, amongst whom the respondent was not included, under burden, however, of all his just and lawful debts due and addebted, or which might be due and addebted by him at his death; which said debts he declared *should in noway affect or diminish his executry*, or other funds, property, or effects, *unless* such executry should be *given* and conveyed by him *to the said Thomas Alexander Fraser of Strichen* and the other substitutes mentioned in the deed. This deed contained a reservation of power to revoke or alter. On the 2d July 1812, Archibald Fraser executed another deed, which proceeded upon the narrative that he had some years ago executed an entail of the lands of Abertarff and others, and that he intended in the exercise of the power therein reserved to alter and revoke that deed to a certain extent. He accordingly disponed the lands to the heirs of his body, whom failing to the respondent and the heirs-male of his body, whom failing to the other heirs and substitutes mentioned in the deed of entail, but always with and under the several provisions, conditions, burdens, &c., contained in that deed, and under certain other additional provisions—viz., that the respondent and his heirs-male succeeding to him should take the name of Archibald, and that he should disencumber the lands in the parish of Inverness of the debts affecting them out of the executry, or by burdening the other lands, In April 1813, Archibald Fraser executed an entail of the lands of Castlehill in favour of the respondent; and on the 2d of August in the same year he executed a general conveyance by which he disponed to certain persons as trustees, tutors and curators, of the respondent, all the lands, houses, heritages, and heritable subjects (that is to say, all the lands not included in the deed of entail), and all the goods, gear, effects, and moveable subjects of every description, which he had destined, given, disponed, and conveyed to his grandson, the respondent. Archibald Fraser died in December 1815, and the respondent succeeded to the estate of Abertarff, and also as general disponee and residuary legatee to the whole fee-simple estates and executry which belonged to the deceased.

Various litigations arose between the appellant,

Lord Lovat, and the respondent, as to the import of the deeds above mentioned, and in particular as to whether the respondent was bound to execute an entail of the lands of Abertarff and others specified in the deeds of entail of 1808 and of 1812. This question was raised by Lord Lovat in 1818, and the Court of Session, on the 24th of June 1823, assoilzied the curators of the respondent, who defended the action, from the conclusions of the summons. In 1824, however, the Court altered this decision, and found that the respondent was bound to execute an entail, and that finding was affirmed on appeal to the House of Lords in 1842. Previous to 1828 the respondent had made up his title as proprietor in fee-simple of all the lands disponed to him, whether under the deed of nomination of 1812, or the general disposition of June 1808. In that capacity, and while the question whether he was heir of entail or owner in fee-simple was pending, he constituted various burdens upon those lands. He also paid the debts of Archibald Fraser, amounting to £6186, os. 7¼d., and incurred £2791, 1s. 9d. in law expenses in ascertaining and adjusting the claims brought against him.

On the 31st of December 1851 (after the decision that he was only heir of entail of the lands), Abertarff (the respondent) raised this action of declarator against Lord Lovat, and the other substitute heirs of entail, concluding to have it found and declared that all the lands included in the deed of entail of 1851 were held under the burden of the just and lawful debts of the Hon. Archibald Fraser, due and addebted by him at the time of his death, and in particular of certain specified debts, amounting to £6186, os. 7¼d. ; and that the said lands and estates were liable in payment of the said debts, and might be attached and sold therefor ; and further, that the pursuer was entitled to be relieved out of the lands so entailed of the sum of £2791, 1s. 9d., as the expenses of litigation incurred by him *bona fide* and beneficially for the defenders as heir of entail. On the 17th of June 1853, Lord Anderson (Ordinary) found that by the deed of entail of 1851, prepared under the directions of the Court of Session, which directions were confirmed on appeal to the House of Lords, the lands libelled were held under the burden of payment of all the just and lawful debts of the late Archibald Fraser, and this judgment was affirmed by the First Division. On the 20th November 1855, Lord Handyside (Ordinary) found that the debts specified in the summons, and amounting to £6186, os. 7¼d., were just and lawful debts due by the said Archibald Fraser ; but that the pursuer was not entitled to relief out of the entailed lands of the sum of £2791, 1s. 9d. of expenses incurred by him in litigation. Upon reclaiming notes, the Lords of the First Division recalled the latter finding of the Lord Ordinary, and remitted to him to allow parties an opportunity of substantiating their respective averments as regarded the claim for £2791, 1s. 9d. On the 8th of June 1858, Lord Kinloch (Ordinary) found that the entailed lands were subject to certain of the expenses claimed for litigation ; and the pursuer having produced discharges of the encumbrances he had created over the entailed lands during the time he supposed himself to be proprietor in fee-simple, the Lord Ordinary, on the 17th June 1858 found that the entailed lands were liable in payment of the sum of £6186, os. 7¼d. The Lords of the First Division found that the reclaiming note for Lord Lovat was not insisted in as regarded Lord Kinloch's interlocutor of 17th June 1858, and therefore refused the desire of the reclaiming note, in so far as it prayed for the recall of that interlocutor ; recalled the interlocutor of the 8th of June 1858, and in place thereof found the pursuer entitled to expenses of litigation to the extent of £331, 4s. (21 D. 1154.

Lord Lovat appeals against the whole of this judgment, while Mr Fraser of Abertarff, in a cross appeal, complains of so much of it as limits his right to recover the expenses of litigation to the sum of £331, 4s.

The LORD ADVOCATE submitted, first, that Abertarff was bound to pay all the personal debts of the late Archibald Fraser out of the executry to which he had succeeded, and was not entitled to burden the entailed lands with them. He proceeded to comment upon the different deeds.

The ATTORNEY-GENERAL said that matter was already *res judicata* between the parties and could not be made the subject of appeal. Lord Kinloch's interlocutor of the 17th of June 1858 had declared that the entailed lands were liable for the payment of debts amounting to £6186, os. 7¼d. ; and, in so far as that interlocutor was concerned, the Lords of the First Division had found that the reclaiming-note had not been insisted in, and therefore refused it. The appellant having included that interlocutor in his appeal, the respondent had presented a petition to their Lordships praying that it should be declared incompetent for the appellant to do so, and that he might be ordered to amend his appeal accordingly. Upon report from the Appeal Committee, their Lordships had ordered that to be done.

The LORD ADVOCATE urged that it was as a matter of form they had reclaimed against Lord Kinloch's interlocutor.

The LORD CHANCELLOR—The judgment of the Appeal Committee seems to exclude you. It must be taken that those lands are liable for the payment of debts to the extent of £6186, os. 7¼d. You not only did not reclaim against Lord Kinloch's interlocutor, but the Appeal Committee has found that you are not allowed to appeal.

The LORD ADVOCATE said he would not press the matter further, but bow to the decision of the House. The only point remaining was as to the sum of £331, 4s. having been allowed as expenses of litigation with Mr Hugh Fraser, W.S. That litigation arose in this way:—The forfeited estate of Lovat had been restored in 1744 to Lieutenant-General Simon Fraser, under burden of heavy debts to Government. He entailed the estate under burden of a trust-deed, whereby he disponed the lands to certain persons in trust for the purpose, *inter alia*, of applying an annual sinking fund to the amount of £400 towards payment of the debts with which the estate was burdened. When the General died, the amount of the debt was £74,000. The Hon. Archibald Fraser succeeded, and upon his death, Mr Hugh Fraser, as judicial factor appointed to see the payments made to the sinking fund, brought an action against the respondent for the payment of fifteen years' arrears due by Archibald Fraser. The respondent resisted the claim, and it was reduced to a certain extent, but only upon his agreeing to pay his own expenses. The respondent could not be held entitled to redress as having litigated for the benefit of the heirs in entail. The case of Fraser *v.* Vans Agnew (5 Wilson & Shaw, App. Cas., p. 249) showed that an heir of entail was not bound to pay costs incurred by a preceding heir, though a large part of the estate would otherwise have been lost. This was a debt, not due by Archibald Fraser, but incurred by the respondent, who was therefore alone liable for its payment.

Mr ROLT, Q.C., then followed on the same side.

The ATTORNEY-GENERAL, on the part of the respondent, said the only matter for discussion was whether the entailed estates were liable for the expenses incurred in ascertaining what debts could properly be charged against it. The Court below was wrong in disposing of the question whether the litigations were properly or improperly conducted on a mere presumption founded upon the result of these litigations, and without consideration of the nature of the claims resisted, and of the defences pleaded. It was a matter of everyday occurrence that trustees were found liable in expenses to an opposing litigant, and it had never been held that such a finding of itself rendered the trustees personally liable for the expenses of the litigation, or was equivalent to a finding that the litigation was

unwarrantable and improper; secondly, the litigations were necessary for the examination and constitution of the debts, and were conducted *bona fide* and on the whole properly by Mr Fraser. At the time he litigated he believed that he was proprietor of the lands in fee-simple, and therefore the only person concerned in their reduction. He had put himself in the hands of responsible and skilful advisers, and all the Judges agreed his good faith was unimpeachable. The litigations, too, were upon the whole successful, a clear gain of £1315 resulting to the entailed lands after setting off the costs of that policy against its fruits. Mr Attorney then proceeded to examine the different cases which had been litigated, and contended they were most properly conducted. He submitted that the interlocutor of the Court below ought to be affirmed, except in so far as it limited the respondent's right to recover the expenses of litigation to the sum of £331, 4s.

Sir HUGH CAIRNS, Q.C., then followed on the same side.

The LORD ADVOCATE having replied, Mr Rolt, Q.C., claimed right to address the House on the cross appeal opened by the Attorney-General and Sir Hugh Cairns. Their Lordships said they certainly understood both appeals had been heard together.

Mr ROLT said he could not have addressed himself to the cross appeal until it had been opened.

The LORD CHANCELLOR—It is better to err in hearing than in not hearing you.

Mr ROLT then submitted that Mr Fraser ought to be allowed to burden the lands with expenses of litigation to the amount of £331, 4s. as sanctioned by the Court below, but had not proceeded far when he was interrupted by the Attorney-General, who said his learned friend was discussing the general principle which had been already discussed in the original appeal.

Mr ROLT said if their lordships would not allow him to argue the general question he would sit down.

Lord CHELMSFORD—The only question arising on the cross appeal is whether there is any distinction between the debts appealed against there and those in the original appeal.

The LORD CHANCELLOR—It seems to me personally that you are not precluded from using any argument which is germane to the cross appeal simply because it has been made use of in arguing the original appeal.

Mr ROLT then proceeded to argue principally that the fact of Abertarff believing himself to be proprietor in fee-simple, and therefore personally liable for the debts, would induce him to act very much more recklessly and obstinately than he would have done had he known he was only a trustee for others.

The ATTORNEY-GENERAL having replied,

The LORD CHANCELLOR said the House would reserve its judgment.

Thursday, April 26.

Judgment was delivered to-day.

The LORD CHANCELLOR said this was an appeal from several interlocutors pronounced in an action in which the respondent was pursuer and the appellant defender. The dispute between the parties arose originally upon the construction of two deeds. By the first of these, dated the 15th August 1808, the late Hon. Archibald Fraser executed a strict entail of the lands of Abertarff and the lands of Auld Castlehill, of which he was owner in fee-simple, in favour of Thomas Alexander Fraser of Strichen, now Lord Lovat, and a certain series of substitutes, amongst whom the respondent was not included, under burden, however, of all his just and lawful debts due and addebted, or which might be due and addebted by him at his death; which said debts he declared *should in noway affect or diminish his executry*, or other funds, property, or effects, *unless* such executry should be *given* and conveyed by him *to the said Thomas Alexander Fraser of Strichen* and the other substitutes mentioned in the deed. This deed contained a reservation of power to revoke or alter. By the second of the deeds, which proceeded upon the narrative that he had some years ago executed an entail of the lands of Abertarff and others, and that he intended in the exercise of the power therein reserved to alter and revoke that deed to a certain extent, he disponed the lands to the heirs of his body, whom failing, to the respondent and the heirs-male of his body, whom failing to the other heirs and substitutes mentioned in the deed of entail, but always with and under the several provisions, conditions, burdens, &c., contained in that deed, and under certain other additional provisions — viz., that the respondent and his heirs-male succeeding to him should take the name of Archibald, and that he should disencumber the lands in the parish of Inverness of the debts affecting them out of the executry, or by burdening the other lands. Archibald Fraser died in 1815, and did not bequeath his executry to Lord Lovat, so that his just and lawful debts due and addebted to him at the time of his death became charges upon the entailed lands. The respondent was then a minor, and his trustees disputed his obligation to execute an entail of the lands, contending that they belonged to him in fee-simple. A protracted litigation ensued, the result of which was that the respondent was declared to be under the obligation to which I have referred, and a deed of entail was executed under the direction of the Court. That deed contained the declaration of the deed of 15th August 1808, that the lands were to be held under burden of all the just and lawful debts of Archibald Fraser. On the 31st of December 1851 (after the decision that he was only tenant-in-tail of the lands), Abertarff (the respondent) raised an action of declarator against Lord Lovat, concluding to have it found and declared that all the lands included in the deed of entail of 1851 were held under the burden of the just and lawful debts of the Hon. Archibald Fraser due and addebted by him at the time of his death, and in particular of certain specified debts, amounting to £6186, os. 7¼d.; and that the said lands and estates were liable in payment of the said debts, and might be attached and sold therefor; and further, that the pursuer was entitled to be relieved out of the lands so entailed of the sum of £2791, 1s. 9d., as the expenses of litigation incurred by him *bona fide* and beneficially for the defenders as heirs of entail. On the 17th of June 1853, Lord Anderson (Ordinary) found that by the deed of entail of 1851, prepared under the directions of the Court of Session, which directions were confirmed on appeal to the House of Lords, the lands libelled were held under the burden of payment of all the just and lawful debts of the late Archibald Fraser, and this judgment was affirmed by the First Division. On the 20th November 1855, Lord Handyside (Ordinary) found that the debts specified in the summons, and amounting to £6186, os. 7¼d., were just and lawful debts due by the said Archibald Fraser; but that the pursuer was not entitled to relief out of the entailed lands of the sum of £2791, 1s. 9d. of expenses incurred by him in litigation. Upon reclaiming notes, the Lords of the First Division recalled the latter finding of the Lord Ordinary, and remitted to him to allow parties an opportunity of substantiating their respective averments as regarded the claim for £2791, 1s. 9d. On the 8th of June 1858, Lord Kinloch (Ordinary) found that the entailed lands were subject to certain of the expenses claimed for litigation; and the pursuer having produced discharges of the encumbrances he had effected over the entailed lands during the time he supposed himself to be proprietor in fee-simple, the Lord Ordinary found that the entailed lands were liable in payment of the sum of £6186, os. 7¼d. The Lords of the First Division found that the reclaiming note for Lord Lovat was not insisted in as regarded Lord

Kinloch's interlocutor of 17th June 1858, and therefore refused the desire of the reclaiming note, in so far as it prayed for the recall of that interlocutor; recalled the interlocutor of the 8th of June 1858, and in place thereof found the pursuer entitled to expenses of litigation to the extent of £331, 4s. Lord Lovat appeals against the whole of this judgment, while Mr Fraser of Abertarff in a cross appeal complains of so much of it as limits his right to recover the expenses of litigation, to the sum of £331, 4s. As to the sum of £6186, os. 7½., your Lordships intimated that the appeal could not be insisted in, and in that opinion Lord Lovat acquiesced. The question is therefore confined to the sum of £331, 4s., costs of litigation, to which the Court below has found the pursuer entitled. In both cases the question turns upon the construction to be placed on the clause in the deed of August 1808, "under burden of all my just and lawful debts due and addebted to me at the time of my death." Under that description of liability I think costs incurred subsequent to the settler's death in resisting unjust demands cannot be included. My advice to your Lordships is that Archibald Fraser did not constitute the costs of litigation a burden on the entailed lands. When a testator charges his executry with the payment of debts, his executor, suing or having sued, is entitled to indemnify himself out of the funds in his possession, but there is no principle by which he can saddle the real estate. This is the opinion of Lord Curriehill, and with it I entirely concur. According to my view of the case, it thus becomes immaterial to inquire whether the respondent litigated *bona fide* or not. I think, however, there should be no costs on either side.

Lord CHELMSFORD concurred, observing that there was nothing in the deed of entail to exonerate the executry from primary liability.

Lord KINGSDOWN said he regretted that the difference of opinion which had existed in the Court below upon this matter extended also to their Lordships' House. All the Judges in the Court below, with exception of Lord Curriehill, had held the respondent entitled to burden the lands with the costs of certain of the litigations, and the reason they had not empowered him to do so in every case was that in the former he had been successful, and in the latter unsuccessful. In that ground for distinction he could not concur. In cases where an executor was entitled to idemnify no such test was applied. Abertarff was in the position of a trustee for others, and incurred these costs from no sinister motives, and was entitled to be reimbursed.

Certain interlocutors affirmed; one interlocutor in part affirmed and in part reversed; other interlocutors reversed.

March 12–15, *and April* 26.

FARQUHARSON *v.* BYRES.

Servitude—Road—Decree-Arbitral. A proprietor of a farm having been found by an arbiter, in 1763, entitled to the use of a road, and his successor having thereafter become proprietor of an adjoining farm—*Held* (aff. C. of S., diss. Lord Chelmsford) that the latter was, under the decree-arbitral, entitled to use the road for the purposes of both farms.

Counsel for Appellant—Sir Hugh Cairns, Q.C., and Mr Forbes. Agents—Mr John Robertson, S.S.C., and Messrs Clark, Woodcock, & Ryland, London.

Counsel for Respondent — The Attorney-General (Palmer), Mr Anderson, Q.C., and Mr J. Badenach Nicolson. Agents—Mr Walter Duthie, W.S., and Messrs Martin & Leslie, London.

This is an appeal from an interlocutor of the First Division of the Court of Session.

In 1763 the lands of Whitehouse, now belonging to the appellant, were in possession of John Durno, the elder, and John Durno, younger of Catie, and were then called Meikle Catie, while at the same period the estate of Tonley, belonging to the respondent, and then called Kincraigie, was in the possession of Alexander Achyndachy. In September of that year the Durnos and Achyndachy entered into a submission to John Gordon of Craig, advocate in Aberdeen, whereby they agreed to refer, and did refer, to him, all claims, questions, controversies, and disputes betwixt them, and, *inter alia*, the right, whether of property or servitude, which each of the said Alexander Achyndachy or John Durnos, elder and younger, or either of the said parties, have or pretended to have to the disputable ground betwixt the towns of Holes, Upper and Nether Edindurno, belonging to the said Alexander Achyndachy, and the town of Meikle Catie, the property of the said John Durnos, elder and younger, with full power to the arbiter to ascertain and determine the marches, &c. Mr Gordon accepted the office, and pronounced a decreet-arbitral by which he found, *inter alia*, that Alexander Achyndachy and his tenants of Upper Edindurno had right and title to a road or cawloan upon the north side of the burn of Catie, from the town of Upper Edindurno westward to the low ground on King's highway; and he ordained the said road or cawloan to be lined out as near to the burn as conveniently might be to the extent of 20 feet wide down the side of the said burn, reserving liberty to the proprietors and tenants of Meikle Catie to water their cattle at the burn of Catie, notwithstanding the road which was declared to be common to both. The road was accordingly formed, and the respondent and his predecessors, as proprietors of the lands of Upper Edindurno, and his tenants on their lands, have ever since enjoyed its use. The appellant has also used it, and it is available to him principally as a private road leading to his mansion-house, and a small part of the arable lands of Whitehouse. It is wholly upon his lands, and is kept in repair solely at his expense. In 1836 the predecessor of the respondent joined to the farm of Upper Edindurno the farm of Holes, and let both to one tenant, and the road referred to has been since used for the purposes of both these farms. The appellant having on one occasion complained to the predecessor of the respondent, the latter disclaimed all right to use the road in question except for the purposes of the farm of Upper Edindurno, and stated that if his tenant used the road he did so without permission from him. The respondent's tenants, however, having still continued to use the road, the appellant at last raised the action, in which the interlocutor was pronounced now the subject of this appeal. The summons concluded that it should be found and declared that the respondent and his tenants had no right of commonty, pasturage, or other servitude over any part of the appellant's property, with exception only of the said road in respect of the respondent's ownership of Upper Edindurno; and had no right to use the said road except in respect of the latter farm. The respondent pleaded that under the decreet-arbitral he had a right of common property in the road, and might use it for any purpose he pleased; that the said road had been used, not only in respect of Upper Edindurno, but also in respect of Holes for upwards of forty years, and that the appellant and his authors had acquiesced in such use. A proof was taken, and on the 16th of June 1864 the Lords of the First Division found that the first declaratory conclusion of the summons had not been insisted in, and assoilzied the respondent from the other conclusions.

Sir HUGH CAIRNS, Q.C., on the part of the appellant, submitted—first, that upon a proper construction of the decreet-arbitral the road in question was wholly within the boundaries of the appellant's lands, and that the respondent's right to use the road was merely a servitude constituted in his favour, not as proprietor of Holes, but solely as proprietor of Upper Edindurno, to the purposes of which farm it was limited. It had been decided n Scott *v.* Bogie (6th July 1809, Fac. Coll. 397) that