of £19, 10s. 11d. ; and they prayed the Court to find that the respondents had been guilty of contempt of Court and breach of arrestment, and in respect thereof, "to fine and amerciate the said Norval Smith and Thomson Aikman, both and each or one or other of them, in the sum of £100, or such other sum as your Lordships may determine ; or to inflict such other censure or punishment as in the discretion of your Lordships shall seem just ; as also, to find the said Norval Smith and Thomson Aikman, jointly, or one or other of them, liable to pay to the petitioners the amount of expenses to which the petitioners have been put by and through the act complained of, in order to deter the said Norval Smith and Thomson Aikman, and others, from committing the like offence in time coming; and further to find the said Norval Smith and Thomson Aikman liable in the expenses of this petition and complaint, and of all the proceedings to follow hereon."

The respondents lodged answers to the petition, in which, after narrating certain negotiations and correspondence which they had had with the petitioners' agents with the view of loosing the arrestments, they stated that no breach of the arrestment had been committed ; that the ship had been taken to Greenock solely for convenient loading ; and that there was no attempt or intention to take her out of the jurisdiction of the Court until the arrestments were loosed. They also stated that they believed they had the petitioners' consent to take the vessel down the river as they did.

YOUNG and M'LENNAN were heard for the petitioners.

SOLICITOR-GENERAL and GIFFORD for the respondents.

In the course of the discussion a question arose as to whether it was competent in such an application as the present to pray for decree for the expenses to which the petitioners had been put in consequence of the breach of arrestment alleged.

The respondents argued that this was a civil debt which could not be recovered by means of a petition and complaint ; and, besides, the proceeding may turn out to have been unjustifiable, in which case the petitioners, instead of recovering this sum, will be liable in damages. The case of Bell *v.* Jamieson, 24th June 1848, 10 D. 1413, was referred to.

The Court took time to consider their judgment, which was to-day delivered by

The LORD PRESIDENT—This application is not of a usual kind. I don't recollect an application praying the Court to inflict punishment for breach of arrestment on the ground of its being a contempt of Court. Such applications founded on breach of interdict are common enough. I don't mean to say that a person is entitled to violate an arrestment—far from it. There is a statute about breach of arrestment, but it does not make it a contempt of Court. Breach of arrestment is not quite parallel with breach of interdict. A party obtains a warrant to arrest on his own application and as a matter of course. However, I am very far from saying that breach of an arrestment should not be punished, and I am very far from giving any countenance to the argument of the respondents that they were entitled to remove the ship from Glasgow notwithstanding the arrestment, provided they did not remove it beyond the jurisdiction of the Court, or more than three miles from the coast. The warrant and arrestments were regular and in the usual form ; and to say that a person is entitled to remove an arrested ship as he pleases, notwithstanding an arrestment, is altogether out of the question. That contention is quite new to me, and I think it was new to the respondents themselves ; for I don't think it was on that ground that they proceeded. If they had proceeded on that ground, they would have been in a much worse position than I think they are. But an arrestment is farther distinguishable from an interdict in this respect, that it is a matter which is every day made the subject of arrangement as to how far it is to be insisted in or relaxed ; and when we come to deal with an application for punishment for breach of it, it is material to inquire whether anything has been done by the parties with this view. I think in this case it is clear that there had been a communing betwixt the parties, and if it does appear that there was even a misunderstanding on this subject, it would be very difficult to discover any criminality. I think the import of the communings was that there was reason for the respondents believing that they had right to do what they did. Security had been offered for the debt said to be due, and there was correspondence with a view to getting the arrestment loosed. I don't think, therefore, that there was here any criminality which calls for punishment, or that we can treat these parties as criminals. On the other hand, I think there is a demand made here which is incompetent. It may be the case that the vessel having been taken to Greenock may have caused expense to the petitioners, but that is a part of the expense which, if they gain their cause, they will get. If they don't gain it, it is an expense which they are not entitled to recover. The opinion of the Court on the whole is, that we should dismiss this complaint, and find neither party entitled to expenses.

Agents for Petitioners—Morton, Whitehead, & Greig, W.S.

Agent for Respondents—John Ross, S.S.C.

PET.—HAMILTON.

Entail—Excambion—11 *and* 12 *Vict., c.* 36. Held that, in order to warrant an excambion of entailed lands under 11 and 12 Vict., c. 36, it was essential, under section 5 of that Act, that there should be produced the consents of the three next heirs of entail at the date of presenting the petition, as well as at the date of the consents being executed.

In this application by Captain Hamilton of Dalzell for leave to excamb, a preliminary point was raised as to the sufficiency of the consents, which, as it was of some general importance, and not free from difficulty, the Lord Ordinary (Mure) reported for decision. The point was thus explained in the Lord Ordinary's note :—

"It is raised under the 5th section of the statute 11th and 12th Victoria, cap. 36, which seems to require that the heirs, on whose consents an excambion may be made in such a case as the present, must be those who are the three nearest heirs, both at the date of the consents, and at the date of presenting the application. In the present case the consents were not produced with the petition, as the statute does not require this to be done ; and it was probably omitted in consequence of one of the nearest heirs, Mr George Hamilton Lawson, being then on foreign service. A considerable time having, however, elapsed between the date when the application was presented and the remit to the reporter, it appears

that in the meantime Mr Hamilton Lawson died, without having executed any deed of consent, and that a nearer heir had also been born. So that if the statute is to be read as requiring that the heirs who consent must be those who are the nearest in existence at the date both of the application and of the consents, it will be impossible for the petitioner to carry through the excambion under the present petition.

The only case to which the Lord Ordinary was referred, as bearing upon the question, is that of Burton, noted in Mr Duncan's "Manual," p. 347, and reported in 13 D. p. 40, but not upon the point now raised. In that case a nearer heir was born between the date of the remit to the reporters and the date when the tutor *ad litem* to one of the nearest heirs in existence at the date of the application executed a deed of consent as tutor of that heir. In that state of matters, the Court, before disposing of the case, granted warrant for serving the petition on the second son of the petitioner; and a tutor *ad litem* having been appointed to him, who executed a deed of consent on his behalf, the prayer of the petition was granted.

Had the circumstances of this case been substantially the same as those in that of Burton, the Lord Ordinary would not have taken it to report. But it is to be observed, that although in that case a nearer heir was born, after the petition was presented, for whom a consent was given, the heirs who were the nearest at the date of the application were all of them still in life, and had all executed consents to the excambion. So that the Court had, in that case, the consents of the heirs who were the nearest heirs at both of the dates mentioned in the 5th section of the statute, as well as of the heir subsequently born; whereas, in the present case, the consent of one of the three nearest heirs at the date of the application cannot now be obtained.

There is a subsidiary point raised as to the form of the deeds of consent—viz., whether it is necessary, under the provisions of the Act of Sederunt, to set forth the terms of the destination *ad longum* in the consents. The Lord Ordinary is disposed to think that this is not imperative, and that it is sufficient if enough of the destination is inserted distinctly to identify the entail, and this, he understands, has been done in the present case."

After hearing counsel for the petitioner, the Court held that they could not get over the difficulty, and remitted to the Lord Ordinary to give effect to the objection under section 5 of the Act.

It was mentioned that the subsidiary difficulty referred to at the close of the Lord Ordinary's note might have been overcome, but it was recommended that, in the event of a new petition being presented, it should be avoided.

Counsel for Petitioner—The Lord Advocate and Mr Pyper. Agents—Hamilton & Kinnear, W.S.

STEVENSON AND OTHERS *v.* BIGGART.

Property — Servitude — Road — Boundary Wall — Hedge. Held (1) that a person had a right of servitude over a road; (2) that he was entitled to perform operations on the road for the purpose of repairing it, but not so as substantially to alter its nature or level to the prejudice of his neighbour; (3) that he was not entitled at his own hand to dig trenches in the road for gaspipes, but that this having been done, he could not be ordained at the instance of an adjoining proprietor to remove the pipes; (4) that he was entitled to make openings in a wall running along the side of the road for the purposes of access to his own property, with or without gates, but that he was not entitled to make such openings in a part of the wall separating his property from that of his neighbour, so as to give access to his neighbour's property; (5) that he was entitled to take down any portion of the said wall for the purpose of enabling him to erect offices on his own ground; (6) that he was entitled to insist that a hedge on the side of the road should not be allowed to protrude so as to interfere with his full use of the road, but was not entitled at his own hand to cut down the hedge to any greater extent; and (7) that a party having a servitude over a road was not entitled without consent to erect a gate on the road at its junction with a parish road.

This is an action of declarator and interdict at the instance of Mr Stevenson, the minister of Dalry, and Captain Blair of Blair, with consent of Mr M'Cosh of Merksworth, writer in Dalry, against Mr Thomas Biggart, woollen manufacturer, Dalry. The questions betwixt the parties were of a very trifling nature, although they had given rise to considerable litigation. They had reference to an alleged interference on the part of the defender with a road, a wall, a hedge, and a ditch in the neighbourhood of the glebe of Dalry parish, and of the property of the defender. The Lord Ordinary (Kinloch) pronounced, after a long proof, an interlocutor in which he "Finds and declares that the defender, Thomas Biggart, has a right of servitude over the road libelled for its whole extent, from the parish road from Dalry to Blair westward to the point A on the plan referred to in the summons, to the effect of obtaining access thereby to his property, lying to the southward of the same: Finds and declares that the said defender was and is entitled to make openings in the wall running along the said road on the northward of his said property, for the purpose of obtaining access to his said property, with or without gates: Further, finds and declares that the said defender was and is entitled to take down the said wall to such an extent as to enable him to erect offices or other buildings on his own property, on the line of the said wall: Finds and declares that the wall to the southward of the defender's property, so far as it does not run along the said road, being that part of it running from the point A westward to the point B on the foresaid plan, is a march fence between the defender's property and the manse ground to the northward, and that the defender is not entitled, at his own hand, to make an opening in or otherwise affect this portion of the said wall: Finds and declares that the defender was not and is not entitled, without consent of the road trustees, to open any part of the parish road from Dalry to Blair, for the purpose of laying pipes or otherwise; but finds no sufficient ground on which to ordain him, at the instance of the present pursuers, to take up and remove any gaspipe laid by him: Finds and declares that the defender was not and is not entitled to lay slag or other materials on the said servitude road, to the effect of substantially altering the nature or level of the road; but finds no sufficient ground for ordaining him, at the instance of the present pursuers, to take up and remove the materials laid by him on the road: Finds and declares that the defender was not and is not entitled, at his own hand, and without the consent of the pursuer, the Reverend Robert Stevenson, to cut the hedge lying on the northward of the said servitude road: Finds and