Tuesday, January 24.

SECOND DIVISION.

SHEARER AND OTHERS *v.* HAMILTON.

Right of Way—Statutory Powers of Road Trustees—Prescription—Possessory Judgment—Notice to the Public. The Act 56 Geo. III., c. 83, gave to the trustees of the Glasgow and Carlisle Turnpike Road power to shut up and sell to the adjacent proprietors the *solum* of such portions of the roads under their charge as should be superseded by the construction of new roads, and thereby rendered superfluous and unnecessary to the public. *Held* that their right so to do was *meræ facultatis*, and could not be lost by the operation of the negative prescription. Further, that the public, though using and possessing the superseded portion for forty years dating from the construction of the new road, did not thereby acquire a separate right on a new title—their title being merely that of the trustees in whom the roads were vested, and that the circumstances alleged did not entitle to a possessory judgment.

Held that where an Act of Parliament required that intimation of a meeting of statute labour road trustees should be given by advertisement on the door of a parish church "on a Sunday, at least ten days before such meeting," that such advertisement made on two consecutive Sundays, intimating a meeting to be held on the Tuesday following the second Sunday, was insufficient, and the proceedings of the trustees thereby invalidated.

This was an application to the Sheriff of Lanarkshire at the instance of Gavin Shearer and other residents in or near Larkhall, in the county of Lanark, against W. H. M'Niell Hamilton, Esq., of Raploch, for the purpose of having him interdicted from carrying out certain building operations, and others, which were alleged to amount to an obstruction of certain roads on the respondent's property of Raploch, and to an illegal interference with the rights of the petitioners as members of the public to their use and enjoyment. This application was supported by an allegation of possession and use of the roads in question by the petitioners and the public from time immemorial, or for upwards of forty years. The roads although continuous consisted of two portions—one (marked B C on the plan produced with the petition) being a portion of what was formerly the turnpike road between Glasgow and Carlisle until superseded, about the year 1820, by the construction of the present road; and the other (marked E D B A on the said plan) being a statute labour road. With regard to the portion of the old turnpike road B C, it was alleged for the respondent that the road, having been superseded by the construction of the new portion in 1870, had ceased to be of any use to the trustees or the public, and that in consequence thereof the trustees, acting under the authority of the 38th and 39th sections of their statute (56 Geo. III., c. 83), had, on the application of the respondent or his predecessor in the estate of Raploch, and for a pecuniary consideration, conveyed to him the solum of the portion in question, and that by a disposition dated 21st March 1860. Upon this disposition infeftment had been taken in 1865, and in 1869 or 1870 the respondent had proceeded to take the steps complained of by the petitioners to have the road shut up, and its *solum* converted to other purposes. With regard to the statute labour road, it was stated that in October 1869 the respondent had presented a petition to the Statute Labour Road Trustees for the middle ward of the county, representing that this road had by the construction of new roads been rendered unnecessary, and craving the trustees to exercise the powers conferred on them by the Act 47 Geo. III. c. 45, and shut up the said portion of road. The trustees having ordered the statutory intimation to proprietors, occupiers and the public, and having duly inspected the road, and the portions of new road proposed to be substituted therefor in a minute of meeting, dated 10th January 1870, found "that the substitution of the new road for the portion of the old parish road mentioned in the petition would be of great public benefit, and approve thereof accordingly; and further, that the portion of the old parish road mentioned in the petition is superseded by the new road; is superfluous and unnecessary, and ought to be shut up; and appoint the same to be shut up accordingly; for all which authority is hereby granted in terms of the prayer of the petition."

For the petitioners it was contended that, with regard to the portion of road B C, the trustees, not having excercised the power given by their statute to sell and shut up disused portions of the roads, under their charge during forty years, had lost it by the negative prescription; and also that by their forty years' possession the public had acquired a separate right on a title different from that of the road trustees, dating from the substitution of the new road for the old. With regard to the statute labour road, it was urged that the proceedings of the statute labour road trustees, following on the petition of the respondent, had not been in conformity with the statute 47 Geo. III, cap. 45, no sufficient notice, in terms of the 36th section of that statute, of the proceedings having been given to the public. In that section it is provided that notice be given "by advertisement upon the church doors of the parishes in which the said grounds lie, upon a Sunday ten days at least before such meeting." In this case a certificate of intimation on the door of the parish church of Dalserf on two successive Sundays, of a meeting to be held on the Tuesday following the latter Sunday, had been produced, and it was contended for the petitioners that the notice was insufficient, neither of the Sundays on which the intimation had been made having been "ten days at least before such meeting." The proceedings were thereby vitiated, and were *ab initio* null and inept. On the whole cause, it was contended that the petitioners were entitled to be protected in their possession of the various roads.

The Sheriff-Substitute at Hamilton (W. C. SPENS) dismissed the petition, without closing the record, on the preliminary plea of the petitioners' want of title to sue. The Sheriff (GLASSFORD BELL) adhered in the following interlocutor:—"*Glasgow, 10th October* 1870.—Having heard parties' procurators on the pursuer's appeal, and thereafter made avizandum with the whole process, finds that a declarator of a public right of way is incompetent in this Court: Finds that it is only such a public right of way that is sought to be vindicated in the present action, and this notwithstanding that as regards the public high road first and chiefly referred to in the petition, another road was in the

year 1860 substituted for that portion of the old road by the road trustees in whom it was vested, and who, in conformity with their statutory powers, then disponed the piece of old road to the defender, who has been ever since the feudal proprietor thereof as instructed by the titles produced, and has exercised his rights of ownership thereon, the challenge of which raises an heritable question likewise incompetent in this Court: Finds as regards the statute-labour roads second and third referred to, that the petition does not set forth that the pursuers have used the same for seven years, or for any other period; and, as regards the second of said roads, the pursuers do not deny in the record the authenticity of the certified extracts, No. 73, from the minutes of the statute-labour trustees who had the management of the road, from which it appears that they resolved it should be shut up, and another more convenient piece of road substituted for it, which was done accordingly, and if the pursuers or any others interested were aggrieved with the actings of the trustees in the matter, their remedy was by appeal in the manner permitted by section 51 of the act 47 Geo. III, cap. 45; Finds therefore that there are no *termini habiles* in the petition to warrant a possessory judgment in virtue of which the conclusions *ad factum præstandum* and for interdict could be granted. The action, on the contrary, being substantially one of a declaratory character, competent only in the Supreme Court, therefore dismisses the appeal; Sustains the preliminary pleas, and adheres to the interlocutor appealed against, in as far as it dismisses the action; Adheres also as regards expenses, and decerns."

The petitioners having appealed to the Second Division of the Court of Session, their Lordships allowed certain amendments; and on 22d December 1870 closed the record, and heard parties.

SOLICITOR-GENERAL and LANG for the appellants.

SHAND and H. J. MONCRIEFF in answer.

At advising—

LORD JUSTICE-CLERK (after stating the facts relative to the turnpike road and the statute-labour road) said—This proceeding commenced by an application to have Mr Hamilton prohibited from shutting up a certain road, consisting of two portions, the one a part of the old Glasgow and Carlisle road, the other a statute-labour road.

As to the first piece of road, which was formerly part of the Glasgow and Carlisle road, I am of opinion that the defence must prevail. It appears to me that from the time when the new road was substituted for the old, the old remained vested in the trustees, subject to their right, as confined by the Act of Parliament, to sell or alienate the *solum*, and so destroy its character as a road.

Two views were urged on us to support the right of the public. One that the trustees, not having exercised their right of sale within forty years, had lost their right to sell by the negative prescription; the other that the public had acquired a separate right on a new title, dating from the time when the new road was substituted for the old. Both these pleas proceed on the footing that forty years had elapsed before the disponee took infeftment on the conveyance from the trustees. I think neither plea well founded. The right to alienate was a power *mercæ facultatis* in the trustees, and while the old road remained vested in them the public had no other title than that of the trustees. If, after the sale to Mr Hamilton, the public had used the road for forty years, they might have acquired a new right, but nothing of that sort exists here. There is therefore no room for the operation either of the negative or the positive prescription.

The question is one of nicety, whether the possession of the public for seven years after the sale does not entitle them to a possessory judgment. How that would have stood if the application had been founded on an allegation of forty years' possession on a title separate from that of the trustees, and seven years' possession, it is not necessary to decide. In *Carson* v. *Miller*, 13th March 1863, 1 Macph. 663, we held that possession for seven years without a title was not sufficient to found a possessory judgment, We had the same point raised lately in *Calder* v. *Adam*. There, however, the question arose with a tenant, and as he was only a possessor himself, it was held that the point did not really arise. It is equally unnecessary to express any opinion here, as the possession for seven years in the circumstances which appear on the face of this application is clearly insufficient.

The question as to the statute-labour road is different; and I am of opinion that the trustees have not proceeded in terms of the statute, and that the road has not been properly shut up. The necessary notices were not properly given. That is admitted; for while, by the Act, ten days' notice is required, the ten days can only be made up by including the day on which the notice was given, and the day on which the meeting was held.

The only difficulty was the case of *Crawford* v. *Lennox*, 15 July 1852, 24 Jur. 629, 1 Stuart, 1065, where the Court held that there was no jurisdiction, because a remedy had been provided by the Act of Parliament; but there, at the distance of thirty years, the objection was taken by the public, that the notices to the proprietors were imperfect. It was held that they had nothing to do with these notices, if those to themselves were sufficient. Here the notices to the public are insufficient; and, without further entering into the question, I think the objection is fatal. Such notices would be of no value if, although they have been omitted, the public should be still barred from objecting. In the *Hawthornden* case we acted on the same principle.

On the whole matter, as to the piece of road B to C, I think the defence must prevail; but as to the statute-labour road, that the proceedings have been irregular.

Both parties moved for expenses. The Court, however, holding that the success obtained had been about equal, allowed no expenses to either, with the exception of the expense of the amending the record, to which the respondent was entitled.

Agents for Appellants (Petitioners)—D. Crawford and J. Y. Guthrie, S.S.C.

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

Saturday, February 4.

FIRST DIVISION.

HILL *v.* WILSON.

Seduction—Issue. An issue of seduction must be single, and specify the occasion.

This was an action of damages for breach of promise of marriage and seduction. The pursuer proposed to take either an issue in general terms,