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,

without specifying the time and place of seduction, or two issues specifying different occasions, one in 1860 and the other in 1863.

SCOTT for pursuer.

SOLICITOR-GENERAL and THOMS for defender.

The Court observed that the time at which a woman is seduced is a definite point, and must be well known to her, and so with regard to the place. There cannot be two different occasions. It is an essential part of the pursuer's case, though it is no longer the practice to put it in issue, that up to the time of seduction she was a virtuous woman. If she was seduced in 1860 it is impossible that she could have been seduced in 1863. The occasion in 1860 is well and relevantly stated in her condescendence. She must take a single issue, and that occasion must be embodied in it.

Agent for Pursuer—D. F. Bridgeford, S.S.C.

Agents for Defender—Lindsay & Paterson, W.S.

Saturday, February 4.

FORBES *v.* THE MINISTERS OF OLD MACHAR.

(*Ante*, Vol. V, p. 335, and Vol. VI, p. 726.)

House of Lords—Petition to apply Judgment—Expenses. Where the House of Lords has pronounced a judgment exhausting a cause, and not containing any finding as to expenses before appeal, the Court will not dispose of the question of expenses.

In the process of augmentation and locality of Old Machar a question arose between the ministers and certain heritors, of whom Mr Forbes was one, as to the validity of certain decrees of valuation of teinds. The Court of Session held the valuations bad, and found the heritors liable to the ministers in expenses. On appeal, the House of Lords reversed and ordered the expenses paid by the appellants to the respondents to be repaid, but made no order as to the appellants' expenses in the Court of Session. In a petition for applying the judgment of the House of Lords, Mr Forbes now moved for his expenses previous to the appeal.

FRASER for him.

ASHER in answer.

The cases of *Stewart* v. *Scott*, 11 March 1836, 14 S. 692, and *Railton*, 12 June 1846, 8 D. 812, were referred to.

LORD PRESIDENT—This is a question on a closed record. It arose in a process of locality, but every question on which a record is made up and judgment pronounced is for all practical purposes a separate cause. The House of Lords exhausts the case, and while it orders the expenses paid by the appellants to the respondents to be repaid, it says nothing farther as to expenses. The rule laid down in *Stewart* v. *Scott* is directly applicable, that where a judgment of the House of Lords exhausts a cause and contains no finding as to expenses, it is not intended that we should dispose of them.

The other Judges concurred.

The Court applied the judgment, but refused the prayer so far as it prayed for expenses in this Court previous to the appeal.

Agents for Petitioner—Henry & Shiress, S.S.C.

Agents for the Ministers—H. & A. Inglis, W.S.

Wednesday, February 8.

GOWANS *v.* BRATHWAITE CHRISTIE AND ANOTHER.

Landlord and Tenant—Lease—Sterility—Clause—Process — Reduction — Competency. Circumstances in which a tenant, under a lease of freestone and other minerals, was held not entitled to insist in an action of reduction of his lease upon the ground of "sterility" or "non-workableness to profit," there being in the contract of lease a special machinery devised which was manifestly intended by the parties to obviate all such questions.

Observed by the Lord President, that the question of sterility in mineral leases was quite different from what it was in agricultural ones, for the former were now-a-days viewed much more in the light of contracts of hazard than the latter.

This was an action of reduction at the instance of James Gowans, railway contractor, against Mr Brathwaite Christie of Baberton and Mrs Agnes Mossman or Christie, widow and sole executrix and heir *in mobilibus* of the late Alexander Christie of Baberton. There was sought to be reduced a certain lease of the whole freestone and minerals, and all materials and substances lying under the lands and estate of Baberton, entered into in February 1866 between the said Alexander Christie of Baberton, as heir of entail then in possession of the said estate, and the said James Gowans, the pursuer.

The more important clauses of the said lease were as follows:—"The said Alexander Christie has set, and by these presents, in consideration of the rents or tack duties, and other prestations after-mentioned, lets to the said James Gowans and his heirs and assignees, all and whole the freestone and minerals, and all materials and substances, of what nature soever, lying in and under the lands and estate of Baberton, which are in the parishes of Currie and Colinton, and sheriffdom of Edinburgh, and that for the space of twenty-one years from and after the term of Candlemas Eighteen hundred and sixty-six, which is hereby declared to be the commencement of this lease, and the entry of the said James Gowans to the premises, in virtue hereof; with full power to the said James Gowans and his foresaids, at their own expense, to search for, work, win, raise, and carry away the freestone, and all minerals, materials, and substances of what nature soever, lying in and under said lands, as fully and freely as the said Alexander Christie could do himself. (then follow clauses regulating the working). Which tack, under the conditions and reservations above-written, the said Alexander Christie binds and obliges himself, and his heirs and successors, to warrant at all hands, and against all mortals, as law will: For which causes, and on the other part, the said James Gowans binds and obliges himself and his heirs, executors, and successors whomsoever, to pay to the said Alexander Christie, and his heirs and successors, for the said freestone, minerals, and substances, and materials hereby let, the sum of two hundred pounds sterling of fixed money rent per annum, and that half-yearly, at the terms of Lammas and Candlemas; and it is hereby agreed that the said fixed rent shall not be exacted for the year or period