Until these are paid or provided for the heritable estate cannot be set free in accordance with the intention of the testator. I am therefore for answering the first question in the negative, and to the second question I must decline to return any answer, as it is one which I consider the parties are not entitled to submit to us without producing the consents of the legatees, and without their presence.

LORDS DEAS, ARDMILLAN, and KINLOCH concurred.

The Court accordingly found and declared in terms of the first question:—That the said first party is not, in the circumstances of the case, entitled to require the second parties to execute a conveyance in his favour of the heritable estate of the testator, presently vested in them as trustees: and declined to make any answer to the second question.

Agent for Mr George MacMorine, the first party —Ralph Richardson, W.S.

Agent for Miss MacMorine's Trustees, and for General Maxwell, the second and third parties, Archibald Steuart, W.S.

Friday, June 9.

BAIN *v.* SMITH AND MORRISON.

Servitude — Road — Interdict. Circumstances in which it was *held* that the owner of the servient tenement was not entitled to make certain alterations upon a servitude footroad at his own hand, though they might have been quite proper and legal had he proceeded either by agreement with the owner of the dominant tenement, or, failing that, by judicial warrant.

This was an action of suspension and interdict at the instance of Mr Edwin Sandys Bain of Easter Livilands, against Mr James Morrison of Wester Livilands, and his feuar Mr Smith.

The interdict craved was to prohibit the respondents from shutting up or inclosing a footroad running through their lands, and from interfering with the said road, so as to injure or affect the complainer's use and enjoyment thereof. And farther, to order the said respondent to restore the said footroad to the state in which it was prior to certain illegal operations alleged to have been executed by the respondents.

The respondents pleaded *inter alia* that, "having provided a road equally convenient to the complainer with that which has been closed up, the complainer is not entitled to interdict."

The Lord Ordinary (MURE), pronounced the following interlocutor, from which the circumstances of the case will sufficiently appear:—

"18*th January* 1871.—The Lord Ordinary having heard parties' procurators, and considered the closed record, proof adduced, and whole process, finds it admitted that the complainer and his authors have for time immemorial had the use of a servitude foot-road through the lands of Bizzetland, Wester Livilands, and Braehead, as a means of passage from the complainer's property of Easter Livilands to the town of Stirling: Finds (2) that in the year 1839, disputes having arisen between the complainer and Mr Murray, then proprietor of Wester Livilands, relative to a proposed alteration of the said foot-road, an action of declarator was raised at the instance of the complainer against Mr Murray, to have the complainer's right of foot-road declared, and to have Mr Murray ordained to remove certain obstructions which he had erected thereon at or near the points marked C and D on the plan No. 37 of process: Finds (3) that after various proceedings had been taken in the said action, a joint-minute was entered into between the parties, in respect of which a judgment was pronounced giving effect to the complainer's right of foot-road; and finding and declaring that the said road was to be in the line and direction of that now claimed by the complainer as marked yellow on the said plan, with right to the complainer to take all competent steps in reference to the state and condition of the foot-road, and the walls and stiles thereon: Finds (4) that since the date of that judgment the complainer and his family and dependants have had the full and uninterrupted use of this foot-road down to the date of the proceedings now complained of: Finds (5) that the field marked No. 6 on said plan, through which the said foot-road runs, having been acquired by the respondent Mr Smith, he proceeded in the beginning of June 1870, with the knowledge and approval of the other respondent, to obstruct the complainer's road through the said field, by erecting an iron railing or other fence thereon, at and between the points marked C and D on the plan, and thereby preventing the complainer from making use of that portion of the foot-road: Finds (6) that this was done without judicial authority, or obtaining the consent of the complainer, and without any communication having been made to him relative to the proposed alteration: Finds (7) that upon this proceeding coming to the knowledge of the complainer, he communicated with the respondent Mr Morrison on the subject, when he was informed that the other respondent was acting in terms of the feuing plan of the estate of Livilands, and it was at the same time intimated to the complainer that it was the intention of the respondent, in carrying out the feuing plan, still farther to alter the foot-road as shown upon the plan, and to substitute for it the road to be called Livilands Road, as marked pink and blue upon the plan: Finds (8) that the road so proposed to be substituted for the foot-road in question has no foot-road upon it separate and distinct from the carriage-way, and is not therefore as convenient a road for the complainer as the servitude road; and that the respondents have not come under any obligation to give the complainer the use, in time to come, of the road so proposed to be substituted, or to make a proper foot-path thereon: Therefore grants interdict as craved, and ordains the respondents to restore the foot-road in question, between the points C and D on the plan, to the state in which it was prior to the operations complained of, but without prejudice to the respondents, or either of them, establishing in any competent process their right to have the foot-road in question, or any part thereof, shut up or altered upon their substituting, or undertaking to substitute therefor, an equally safe and convenient foot-path for the use of the complainer; and decerns: Finds the complainer entitled to expenses, of which appoints an account to be given in, and remits the same, when lodged, to the auditor to tax and report.

"*Note.*—It appears to the Lord Ordinary that the respondents are under some misapprehension as to the position in which the owner of a servient

tenement stands towards the owner of the dominant tenement as regards the right of the former to alter a servitude road of the description here in question. They are no doubt correct in supposing that the owner of the servient tenement is not to be restricted in the use of his property beyond what the purposes of the servitude may require, and that he is entitled to have one road substituted for another, provided it is equally sufficient and convenient for the dominant owner. And it may be that, where no material alteration is proposed, or where all that is intended is to regulate the use of the road by the erection of gates or stiles, the servient owner is entitled to do that at his own hand, leaving the propriety of the alteration, if challenged, for after determination; *Wood*, 9th March 1809. But when the alterations begun and contemplated are of the material and extensive nature here in question, involving a complete inversion of the use and possession of the road as it has existed for years, the Lord Ordinary is not aware of any authority for holding that this may be done by a servient owner, except under judicial authority first applied for and obtained, or under an arrangement with the dominant owner.

"Such questions are generally disposed of under a declarator in this Court—*Bruce*, January 25, 1745, M. 14,525; *Ross*, February 19, 1751, M. 14,531; *Magistrates of Renfrew*, July 5, 1823; *Macdonald*, January 24, 1832; and if that is the course usually followed the circumstances of the present case are such as seem to render it the more necessary that some such course should have been here adopted, because the complainer's right to the line of road in question has been authoritatively fixed in a process of declarator in this Court, where the question raised related to an alteration substantially the same as the one here objected to. At the same time, as the complainer's claim to a right of servitude road is not here actually disputed, and the questions raised relate mainly to the manner in which that right is to be exercised, the Lord Ordinary would not, as at present advised, be prepared to hold that, as contended for by the complainer, the present is an incompetent process in which to try such a question; and if the respondents had undertaken to give the complainer in all time coming a sufficient substitute road at sight of a surveyor, with a properly laid out foot-path thereupon, and not to alter the existing foot-road till that matter had been adjusted, the Lord Ordinary would have been disposed to deal with that question in this process.

"But no such obligation has been undertaken or proposed by the respondents, and as no proper foot-path has been formed alongside of the carriage-way already made, it appears to the Lord Ordinary that the complainer was warranted, in the special circumstances of this case, in applying to this Court for redress against the shutting up of the foot-path by the respondent Mr Smith, and against the further projected alterations as shown on the feuing-plan of the other respondent; and that he is entitled to be protected in the use of the foot-road as fixed by the judgment of this Court in 1839, until the terms and conditions on which the respondents are to be entitled to have that line of road altered are authoritatively settled."

The respondents reclaimed.

SOLICITOR-GENERAL and LANCASTER for them.

WATSON and BURNET for the complainer.

At advising—

LORD PRESIDENT—I cannot allow that there has been any case made out for delay of proceedings with a view to the respondents making a tender. The time is gone by for that. My opinion is, that the Lord Ordinary has taken a perfectly sound and correct view of the case. It is quite true that in the exercise of a right of servitude the holder of the right is bound to use it in such a way as to be as little burdensome to the servient tenement as possible. But then the rights of the dominant tenement are not to be abridged or deteriorated. These rights are entitled to as much consideration as those of the servient tenement. What the law looks to is the reconciling of these conflicting rights so as neither to impair the servitude of the dominant tenement, nor injure the servient tenement unnecessarily. Now, following out this general rule, it was quite a usual and natural thing that the respondent here should have proposed to substitute for the footpath in use another more convenient to himself. But when a servitude road has once been established by usage, and still more, when it has been declared by a judgment of the Court, it is quite out of the question for the owner of the servient tenement to take the matter into his own hands and proceed to make alterations without either the consent of the proprietor of the dominant tenement or judicial authority. Now, that is just the position in which the respondents find themselves here. They have proceeded of their own hands to alter an established footpath to which the complainer has right. He comes to us with the objection that whereas his right is one of footway, they are proceeding not only to divert it, but to substitute a carriage way instead, and that one which in all reasonable expectation will be much frequented by vehicles of every description. Along this carriage road there is no provision of any sort for a footpath. In fact the right proposed to be substituted is quite a different thing from that originally existing. It appears to me that this is quite a good ground of objection, and I am therefore for adhering.

Of course the granting of the interdict, and the order to restore the footpath contained in the interlocutor reclaimed against, does not in the least degree prevent the respondents proceeding now as they ought to have done before, either by entering into an agreement with the complainer, or by applying for a judicial warrant. All that is kept quite open by the Lord Ordinary's interlocutor, and would have been so at any rate at common law. I have only to add that I do not understand by the Lord Ordinary's order to restore the foot-road between C and D, that he means the carriage road already formed between those two points to be obliterated, but only the footpath restored in the old line.

LORD DEAS—I have no doubt that this interdict was rightly granted. As regards what has been done here, there is no doubt that there are some alterations which a proprietor is entitled to make at his own hand in the subject of such a servitude as this; but the alterations made here, whether legal or no, are not such as any party was entitled to make in such a manner. There were two courses open to the respondent. Either by arrangement with the complainer, or by applying to the Sheriff for a warrant. It is not at all necessary for them to come here with a declarator; a summary application to the Sheriff is all that is required.

LORDS ARDMILLAN and KINLOCH concurred.

The Court adhered.

Agent for the Complainer—Wm. Mason, S.S.C.
Agents for the Respondents—H. & A. Inglis, W.S.

Friday, June 9.

LEEMING (DOUGLAS' TRUSTEES) *v.* CARSON AND OTHERS.

Trust—Antenuptial Settlement—Agent—Creditor—Infeftment—Agreement—Security—Fraud. D, by antenuptial settlement, conveyed certain heritable subjects (his whole estate) in trust for behoof of his intended spouse and their issue. L, the party who was acting for the lady with full powers, and who subsequently was the acting trustee under the trust, transmitted the settlement to C, D's agent, to take infeftment in favour of the trustees. C, who was a personal creditor of D, delayed to take infeftment till he had got from D a bond and disposition in security over a part of the subjects. *Held*, in an action of reduction and damages at the instance of the trustees against C, that the terms of the correspondence which passed between C and L showed that it had been agreed that C should either be paid his debt, or get a security over the property preferable to the trustees' infeftment, and consequently that it was no fraud on the part of C to secure his own debt before infefting the trustees.

In 1847 the late George Agnew Douglas contemplated marriage with Miss Catherine Hoghton of Liverpool. The present pursuer, Mr Leeming, who is a solicitor in Manchester, was an uncle of Miss Hoghton, and acted for her in the negotiations previous to the marriage. Mr Douglas was possessed of certain heritable subjects in the burgh of Wigtown, which appear to have constituted his whole estate. Miss Hoghton was not possessed of any fortune. The defender Mr Carson was Mr Douglas' factor and agent in Wigtown. He was also a creditor of Mr Douglas for £200, for which he held his bill. In the spring of 1847 an antenuptial settlement was prepared, by which Mr Douglas conveyed the subjects in Wigtown to Mr Leeming, and Mr Rankin, now deceased, as trustees. The trustees were directed to pay the rents of the estate to his intended spouse during her life, and after her death to the issue of the marriage. By the trust-deed Mr Douglas renounced his *jus mariti* and right of administration over the rents of the trust-estate. On the 29th April 1847 Mr Leeming forwarded the trust-settlement to Mr Carson to take infeftment in favour of the trustees. Mr Carson in reply drew attention to his debt, and pointed out that infeftment in favour of the trustees would prevent the property being made available to meet his debt. The understanding of the parties, and the position taken up by them, on which the present action mainly turned, will be seen from the following correspondence:—

William Carson to Thomas Leeming, dated 25th March 1847.

". . . There is a debt of £200 due by Mr Douglas to me by bills for which he wished to grant security over the houses, with interest. The security is not made out; in the meantime the titles stand hypothecated therefor."

William Carson to George Agnew Douglas, dated 1st April 1847.

". . . Will I send you a bond for the £200 for signature."

George Agnew Douglas to William Carson, dated 7th April 1847.

". . . You ask me if you will send me a bond for the £200 for my signature. Had I not been getting the above-mentioned deed of settlement drawn out, I should have answered—Send it by all means—but as my property will now be quite safe, I leave it entirely in your option. It would save me the expense of a bond were you to rest satisfied with my bill."

Thomas Leeming to William Carson, dated 29th April 1847.

"I beg to forward this settlement. . . . You will be kind enough to get the instrument of seisin registered within the proper period, and return the deed to me."

William Carson to Thomas Leeming, dated 4th May 1847.

". . . On looking over the deed of settlement, I observe there is no provision made for the payment of the £200, and interest due by Mr Douglas upon bills, which I explained to you when here. I have not yet taken any bond upon the property for the money, and I do not observe that Miss Hoghton or her trustees would be bound to pay this debt. I have the utmost confidence in the integrity of the parties, still I wish the matter put upon such a footing as to prevent the least chance of a misunderstanding about it. Please say what Mr Douglas proposes about this debt."

William Carson to George Agnew Douglas, dated 6th May 1847.

". . . On looking over the deed, I observe that there is no provision made for the payment of the £200 bill and interest. I have been unwilling to put you to the expense of an heritable bond and infeftment, but as your wife's marriage-settlement might cut out any claim upon the property for that money, I think it is but right that something should be done about that before passing the infeftment, and I have written Mr Leeming to that effect."

Thomas Leeming to George Agnew Douglas, dated 11th May 1847.

". . . I have by this night's post written to Mr Carson to desire him to withhold the registering of the deed for the present, in order to enable me to carry out the course I have under the circumstances suggested."

Thomas Leeming to William Carson, dated 11th May 1847.

"As Mr Douglas is anxious to discharge the debt of £200 which he owes to you, and at the same time raise a little ready money for his own purposes, he is desirous of mortgaging or hypothecating the property at Wigtown. I think I can find him the money for this purpose, but the settlement unfortunately does not contain any