1880, if continued at all. Now, to understand these letters we must note the fact that the defender held jointly three different subjects—not inseparable, for they were once held separately—which she came to possess at different times. They were held by different leases, expiring at different times. The first is Westwood, which she holds by a nineteen years' lease expiring at Whitsunday 1881. The second is the orchard, held originally on a seven years' lease, which since its expiry has been renewed by tacit relocation. In familiar though not accurate language, she held the orchard as tenant at will, and she might give it up, or the landlord might resume it, at any Whitsunday. For many years, therefore, the orchard might by either party have been separated from the possession of Westwood Cottage and garden. The third subject was held under a third lease—a lease enduring nineteen years, and with a different ish. It expired at Martinmas 1880.

These leases were originally granted to the defender's husband. She opened a correspondence with the landlord, in which she expressed a desire to continue in possession of Westwood. There is nothing in that correspondence to show that she also desired to continue to have Hay's Cottage and grounds. It might rather, indeed, have been inferred that she wished to be rid of it, for it was used as an inconvenient makeshift rendered necessary by the absence of accommodation for the coachman at the stables, and it is not convenient that the coachman should reside several hundred yards from the stables. And so it is not surprising that the defender says in this correspondence that the stable accommodation is insufficient. One inconvenience to which she refers must be the fact of the coachman living in Hay's Cottage. I should have thought it likely, if her views on that matter had been met, that she would have said she had no more use for Hay's Cottage, but with that exception (which is the reverse of indicating any desire to retain Hay's Cottage) I do not gather anything on the subject from the correspondence. In the first letter we have here—that of 2d January 1880—she asks a renewal of tenure of Westwood—"This makes me somewhat hasten writing to you on the subject of Westwood, tho' in any case I should have done so soon, as the present lease expires at Whitsunday 1881." What lease expired at Whitsunday 1881. That of the orchard? No. It was held from year to year by tacit relocation. That of Hay's Cottage? No. It expired at Martinmas 1880. It is the principal subject she confines herself to in the words she uses. I cannot read her words as having reference either to the orchard or Hay's Cottage. I asked the defender's counsel how language which exactly fits Westwood and nothing else came to be used if the defender meant to refer to the other subjects, and he said she must have forgot the exact period of termination of the lease of Hay's Cottage. I cannot assume that. "It may be convenient," she says, "for both parties to know whether it is to be renewed or not." It is the lease which ends at Whitsunday 1881 she says it would be convenient to know about. Then comes the passage in which she says that in any new lease there must be other stables. From beginning to end of the letter there is not a syllable to indicate that Hay's Cottage was in any way referred to, or any lease which expired at Martinmas 1880. The same may be said of the other letters. All refer to the lease of Westwood Cottage, which expired at Whitsunday 1881. Then comes the decisive letter of the pursuer on 10th June 1880, in which he says—"Referring to our correspondence in the end of last year regarding the renewal of a lease of Westwood Cottage and grounds, I am now in a position to offer to extend the existing lease for one year—say to Whitsunday 1882—the tenure to be in every respect the same as formerly." The proposal of the defender is to read into those words an offer to grant a lease of the orchard from Whitsunday 1881 to Whitsunday 1882, and a lease of Hay's Cottage for one and a-half years from Martinmas 1880 to Whitsunday 1882. Write in these words and you have what the defender says the letters mean. We have no warrant to do that.

I am therefore of opinion that the letter of 10th June refers to the lease it exactly describes, and to the subject therein contained, and that it cannot be understood to refer to a subject not in question in it at all. And I am confirmed in this opinion by the answer of 12th June, for in it also the language applies to Westwood, and has not the remotest application to Hay's Cottage. I agree therefore with the result at which the Sheriff-Substitute arrived.

Lord Craighill concurred with the Lord Justice-Clerk.

The Court affirmed the judgment of the Sheriff.

Counsel for Appellant—Guthrie Smith—J. P. B. Robertson. Agents—Wotherspoon & Mack, S.S.C.

Counsel for Respondent—Kinnear—Murray. Agents—Maconochie & Hare, W.S.

Friday, February 18.

FIRST DIVISION.

[Lord Lee, Ordinary.

BLACK AND ANOTHER *v.* MASON.

Prescription—Minority—Verus dominus.

An estate was conveyed to a father in liferent and the heirs of his body in fee. He died before either of his two daughters, who succeeded him in that character, attained majority. In an action at their instance to have it declared that a road which passed through the estate had not been a public road for the forty years necessary to found prescription—*held* that in reckoning the prescriptive period the minority of the pursuers could not be deducted except in so far as it was subsequent to their father's death, their position prior to that event not having been that of *verus dominus*.

Miss Jessie Black, Heatheryknowe House, in the parish of Old Monkland and county of Lanark, and her sister Mrs Agnes Black or Scott, heritable proprietors of the lands of Heatheryknowe and others, raised an action of declarator against Alexander Mason, farmer at Commonhead, to have it found and declared that there existed no public road for foot-passengers, carts, carriages,

or cattle leading from the parish road on the north of the farm-steading of Heatheryknowe, and thence eastward to the parish road between Auchinloning and Cuilhill.

Issues were adjusted, the first of which, being the only one which was finally insisted in before the jury, was in the following terms:—"Whether for forty years prior to 16th October 1880, or for time immemorial, there existed a public road for foot-passengers, carts, carriages, and cattle, or any and which of said purposes, leading in" the direction above described? The pursuers of the action were defenders in the issue, and the defender of the action was pursuer in the issue.

The case was tried before Lord Lee and a jury, and in the course of the trial it was proved "that the pursuer Miss Jessie Black was born on 19th May 1844, and that the pursuer Mrs Agnes Black or Scott was born on 13th August 1846; and that the said pursuers are the only children and the heirs of the body of Alexander Black, who died on 16th May 1856. It was also proved that Alexander Waddell of Stonefield, the pursuers' author in their said lands of Heatheryknowe, who died in 1830, by his trust-disposition and deed of settlement dated 13th September, and registered in the Sheriff Court books of Lanarkshire at Glasgow the 19th, both days of August 1830, directed his trustees and trust-disponees therein named to dispone his whole lands and heritable estate in the parish of Old Monkland (being the said lands of Heatheryknowe and others) to the said Alexander Black, father of the pursuers, therein described as son of the deceased Gavin Black of Rawyards, his nephew, in liferent, for his liferent use only, and to the heirs of the body of the said Alexander Black in fee, whom failing to Gavin Black, then of Rawyards, brother of the said Alexander Black, and the heirs and assignees whomsoever of the said Gavin Black. The trustees of the said Alexander Waddell, after being infeft conform to instrument of sasine in their favour dated 23d June and registered in the General Register of Sasines 9th July 1832, by disposition dated 15th, 17th, 18th, and 20th February 1832, in accordance with the directions contained in the said settlement, disponed the said lands of Heatheryknowe and others to the said Alexander Black in liferent, for his liferent use only, and to the heirs of the body of the said Alexander Black in fee, whom failing to the said Gavin Black, and the heirs and assignees whomsoever of the said Gavin Black. The said Alexander Black was, under the precept of sasine contained in the said disposition, infeft in the said lands in liferent, for his liferent use only, by instrument of sasine in his favour dated 23d June, and recorded in the General Register of Sasines 9th July 1832. On the death of their father, the said Alexander Black, the pursuers made up their title to the said lands by general service dated 7th October 1856, and instrument of sasine following upon the open precept of sasine in the said disposition of 1832 in favour of the pursuers, as the fiars in the said lands and others, recorded in the New General Register of Sasines 20th October 1856."

In the course of his charge Lord Lee directed the jury that the minority of the pursuers (defenders in the issue) could not be deducted in considering the said issue, save in so far as it was subsequent to the death of their father in 1856. Counsel for pursuers (defenders in issue) excepted to this direction, and craved his Lordship to direct the jury that the periods of the minority of Miss Jessie Black from 19th May 1844 to 19th May 1865, and of Mrs Agnes Scott or Black from 13th August 1846 to 13th August 1867, were not to be counted in reckoning the forty years' prescription required under the issues. Lord Lee refused so to direct the jury, and a bill of exceptions was thereupon made out and signed.

The jury by a majority found "for the defender that for forty years and upwards prior to 16th October 1880, whether there be discounted the whole period of the pursuers' or either of their minority, or only that subsequent to the death of their father on 16th May 1856, there has existed a public road for foot-passengers, carts, carriages, and cattle leading in" the direction above set forth.

The pursuers Miss Black and Mrs Scott moved for a new trial. The Court granted a rule, and counsel were heard thereon and on the bill of exceptions at the same time.

Authorities—Ersk. iii. 7, 45; *Ferguson* v. *Ferguson*, Mar. 19, 1875, 2 R. 627; *Crawfurd* v. *Menzies*, June 12, 1849, 11 D. 1127; *Blair* v. *Shedden*, Dec. 6, 1754, 3 Ross' Leading Cases, Land Rights, 470; *Black* v. *Gordon and Others*, Feb. 5, 1794, 3 Paton App. 317.

At advising—

Lord President—The pursuers of this action are Miss Jessie Black and her sister Mrs Agnes Black or Scott, who are joint-proprietors of the estate of Heatheryknowe and others. The object of the action is to put down a claim of right-of-way through their estate advanced by the defender Mr Mason, and these ladies stand of course as defenders in the issue sent to the jury for the trial of the question. The issue is in the ordinary form—"Whether for forty years prior to 16th October 1880, or for time immemorial, there existed a public road for foot-passengers, carts, carriages, and cattle, or any and which of said purposes, leading in, or nearly in, the direction of the red line on the plan, from the parish road on the north of the farm-steading of Heatheryknowe, in the parish of old Monkland and county of Lanark, and thence eastwards to the parish road between Auchinloning and Cuilhill?" The first question which arises for consideration in this action is this—To what period is it necessary for the pursuer in the issue (the defender in the action) to go back in proving the existence of this right-of-way? It appears that Miss Jessie Black was born in 1844, and consequently she came of age in 1865. Mrs Agnes Black or Scott, again, was born in 1846, and she came of age in 1867. These ladies contended that the whole period of their minority must be deducted from the years of prescription, or, in other words, that the pursuer must go back in his proof, not for forty years only, but for forty years plus the whole period of their minority. On the other hand, it is contended that if the minority is to be deducted, the deduction must be confined to the period since the death of the father of the ladies, Mr Alexander Black. The way in which this question arises depends upon the effect of the deed of settlement under which these ladies inherit this estate. The deed was made by Mr Waddell of Stonefield in 1830. He

conveyed the estate to trustees, and he directed them to convey it to Alexander Black, father of the pursuers, and the nephew of the testator, "in liferent for his liferent use only, and to the heirs of the body of the said Alexander Black in fee." Now, it is contended by the pursuers that as soon as they came into existence they became fiars of the estate, and consequently were in the position contemplated by the statute of prescription, and also by the common law of prescription, in regard to the matter, and consequently that the whole period of their minority must be deducted. But it appears to me that this proceeds on an erroneous construction of the deed of settlement. The two ladies during their father's lifetime could not possibly be fiars of the estate, whether as directly interested in the estate or as holding the fee *qua* beneficiaries under the trust, because during their father's lifetime it was impossible to tell who would be entitled to succeed as the "heirs of his body," or as heirs of his body. No man can have an heir until he is dead, and it can never be ascertained who is to be a man's heir until he dies. That obvious rule was given effect to lately by the Court in the case of *Ferguson*, March 19, 1875, 2 R. 627. Therefore these ladies had no vested interest in this estate until their father's death.

Now, it is quite settled, I think, that the party whose minority is to be deducted in a question of prescription must be the *verus dominus* of the estate, not necessarily feudally vested, but holding the fee of the estate either directly or as a beneficiary under a trust. But these ladies had no vested interest at all. It was not at all certain that they or either of them would succeed to the estate, and it never could be certain until the death of their father. I am therefore of opinion that the direction which the learned judge gave at the trial to the jury as to this matter was sound, and that the period of minority which falls to be deducted must begin only upon the death of Alexander Black, the father. The consequence of that is that the pursuers must go back in their evidence, not for 40 years only, but for 11 years more—that is to say, they must go back to 1829—and show that from that period the road now in question had been possessed by the public. If it had been necessary for the pursuers to go back for the longer period of 63 years—that is, back to a period anterior to 1820—the case would have presented certainly a very different aspect, and I do not propose to give any opinion as to what view I would then have taken of the evidence. But looking at the evidence beginning at 1829 and downwards, I am not able to come to the conclusion that there is no evidence to go to the jury in favour of the pursuers' claim. The case is undoubtedly a very narrow one, and if I had been on the jury I should have been in favour of giving a verdict for the defender in the issue. But I do not feel that I am at liberty to set aside the verdict, there being evidence both on the one side and the other.

I am therefore for disallowing the bill of exceptions and discharging the rule.

Lord Mure and Lord Shand concurred.

Lord Lee—Of the two issues laid before the jury the defenders ultimately gave up the claim of servitude and elected to stand upon the allegation of a public right.

Against this allegation evidence was adduced to show that the road in question was made by the proprietor of the lands through which it runs after the two properties came into the same hands, about the years 1819-20; and it was contended that any use which had been taken of the road was either ascribable to tolerance or was interrupted. It was further contended that the pursuers (defenders in the issue), being one or other of them in minority from the birth of the elder in 1844 (19th May) to the date when the younger attained the age of twenty-one (13th August 1867), it was incumbent on the defender to prove public use for forty years irrespective of that period, viz., to show use of the road as a public road from 16th October 1817. Being of opinion that the minority of the pursuers ought not to be deducted save in so far as it was subsequent to the date when the succession opened to them by the death of their father in 1856, I so directed the jury. But at the same time I asked them, if they should find the issue established in that view, to answer it also on the assumption that the whole minority ought to be discounted, so that in the event of my direction being found erroneous, and of a different verdict being returnable upon a deduction of the whole period, the Court might have the means of applying the verdict according to the legal rights of parties.

The jury by their verdict have affirmed the existence of the road as a public road in either view of the forty years. But if my direction was right, it was only necessary in disposing of this rule to consider whether the verdict is contrary to evidence with reference to the period from 16th May 1828 to 16th October 1880.

Had it been necessary for the defender to prove the existence of the road from 16th October 1817, I should have thought it very difficult to support the verdict, for in my opinion the pursuers have shown weighty grounds for holding that they have established the history of the road. . .

I think that it ought to be determined first of all what is the period to which the issue properly applies. And upon that point I remain of opinion that the forty years ought to be counted without deduction of the period during which the pursuers' father held the estate as proprietor in liferent. During that period I think that the pursuers had no right to the estate. Until their father's death it could not be known who would succeed as heir of his body. The pursuers, had they been of full age, could not have granted the right of road; nor could they, in my opinion, have prevented the acquisition of a prescriptive right. If adverse possession upon an infeftment had been pleadable, I do not see how upon the authorities they would have excluded the operation of the Statute 1617 by deducting their minority while not in right of the estate. The cases of prescription running against substitute heirs of entail upon whom the right of succession has not devolved—such as *Gordon* v. *Gordon*, M. 10,968, and 3 Ross' L. C. 474—appear to me to be against such a claim. In the present case the prescription is not upon an infeftment, but upon the exercise of a public right. And I am of opinion that the private interests of the estate, as against the public, were fully represented by the pursuers' father. He was infeft as liferent proprietor. The case of *Hardie* v. *The Magistrates of Port-Glasgow*, 2 Macph. 746, was founded on

as showing that the father had no title to resist encroachment. But the title in that case was not that of a proprietor in liferent. It was a mere personal right of occupancy, and was rejected on that ground, and not on the general ground that a liferent proprietor has no title to defend the estate against encroachments by the public. And with regard to the cases of prescription where the estate is held in trust, I think that it is only where the trust is for behoof of a particular person that the prescription is interrupted by the minority of the person for whose behoof the trust exists. This was the ground of decision in the case of *Bailie* v. *Menzies*, 1756, 5 Br. Sup. 847, and I am not aware that it has ever been gone back upon. . . . .

[*After dealing with the evidence his Lordship concluded*]—On the whole, therefore, while I cannot help thinking that the present claim is not so much in vindication of the public right as in pursuance of a private dispute, I am of opinion that the question was fairly before the jury, and that while the evidence would have supported, perhaps more satisfactorily to my mind, a different verdict, there is no sufficient ground for setting aside the verdict as contrary to evidence.

Lord Deas was absent.

The Court disallowed the bill of exceptions and discharged the rule.

Counsel for Pursuers — Asher — Campbell. Agent—Alexander Wylie, W.S.

Counsel for Defender — Macdonald, Q.C.— Mackintosh. Agent—Alexander Morison, S.S.C.

Tuesday, February 22.

SECOND DIVISION.

[Sheriff Court of Dumfries and Galloway.

GRAHAM *v.* M'WILLIAM.

Poor—Circumstances Entitling to Relief in respect of Lunatic Daughter.

Held that an ablebodied man living with his wife and a lunatic daughter in a house rent free, and earning £27 a-year and 65 stones of meal as wages, was not a proper object of parochial relief in respect of his lunatic daughter.

Poor — Industrial Settlement — Settlement of a Lunatic living with her Father.

A labourer born in parish of C., three months before acquiring an industrial settlement in parish of H., applied for and received parochial relief from the latter in respect of his lunatic daughter. *Observed*, that in accordance with *Milne* v. *Henderson* (7 R. 317), this relief did not interfere with the acquisition of an industrial settlement in H., and that that parish must be liable for any advances made so long as it continued to be the parish of the father's settlement.

This action was raised at the instance of William Graham, Inspector of Poor of the Parish of Hoddam, against Alexander M'William, Inspector of Poor of the Parish of Carlaverock. The summons concluded for repayment of the sum of £8, 14s. 6d. sterling, as well as for all future advances paid or disbursed by the pursuer for the relief of James Hunter, or Agnes Hunter, his daughter. The following facts were admitted or proved:—James Hunter, who was born in the parish of Carlaverock, at Whitsunday 1874, went to live at Newpark, in the parish of Hoddam, as a shepherd or farm-servant. His family consisted of his wife, aged fifty-nine, and one child Agnes Hunter, twenty four years of age, a helpless lunatic. Besides occupying his house rent free, he was earning £27 per annum and 65 stones of meal. On the 10th of January, and when he was on the eve of acquiring an industrial residential settlement at Hoddam, Mrs Hunter, his wife, applied to the pursuer for relief on account of the daughter Agnes, alleging her helpless state and the inability of the parents to support her. The pursuer accordingly gave the relief craved, sent to the defender the statutory notice that the said Agnes Hunter had become chargeable on the parish of Hoddam, and next day sent an amended statutory notice that the father had become chargeable on the said parish. The defender denied liability, averring that James Hunter was an ablebodied man, and in circumstances which made it incumbent on him to support his imbecile daughter. The father alleged that the pursuer had made the advances prematurely and without proper inquiry into the circumstances of the case, and with a view to prevent the pauper acquiring a residential settlement in Hoddam.

He pleaded—"(1) That neither the said James Hunter nor the said Agnes Hunter being proper objects of parochial relief, the defender is neither liable to relieve the pursuer of advances, which must have been improperly made, nor to maintain the alleged pauper or paupers in time coming, and the defender should be assoilzied from the whole conclusions of the petition, and expenses found due to him. (2) *Separatim*, Even if the said Agnes Hunter should be found to be a proper object of parochial relief, and the said advances be found to have been properly made, such advances have not pauperised the said James Hunter, nor prevented his acquiring a residential settlement in the parish of Hoddam."

The Sheriff-Substitute (Hope), after findings in fact, pronounced this judgment:—"Finds in law—(1) That the said James Hunter not being in circumstances properly to support his lunatic daughter, although he is an ablebodied man, therefore his said daughter is a proper object for parochial relief; (2) That her settlement is that of her father; and (3) That the parish of Carlaverock, as the parish of the pauper's settlement, is bound to repay to the parish of Hoddam all advances made on behalf of said pauper to this date, and to relieve it of all further maintenance or relief: Therefore repels the defences, and decerns."

The defender appealed, and argued — (1) In point of fact James Hunter was not a proper object of parochial relief; (2) In point of law, on the authority of the case of *Milne*, Hoddam must bear the burden of the relief given.

Authorities—*Wallace* v. *Turnbull*, March 20, 1872, 10 Macph. 675; *Anderson* v. *Patterson*, June 12, 1878, 5 R. 904; *Milne* v. *Henderson and Smith*, Dec. 3, 1879, 7 R. 317.

At advising—