deed contained. The effect of either would have been plain, for it would have been expressly provided for; but I think that the mere signature, which is mentioned along with that by her husband in the testing clause, made Mrs Baxter a party to the deed, and must be taken to imply that, there being nothing to the contrary, she approved of all the testamentary arrangements contained in the deed. There is, therefore, no room for the claim urged by her next-of-kin, for they cannot repudiate the consent or acceptance evidenced under her own hand; and that claim has, therefore, as I think, been rightly repelled by the Lord Ordinary.

Lord Rutherfurd Clark—I am of opinion that the judgment of the Lord Ordinary is right. It is plain that if Mrs Baxter was a consenter to her husband's settlement, she must be taken as having accepted the provisions thereby granted to her in lieu of her legal rights. If such consent be not expressed, it is, I think, very clearly implied. Legacies to a very considerable amount are given with her consent and approval to her own relations. These may, I think, be regarded as in substance left by herself or by her husband at her request, or in accordance with her wish. But, as it appears to me, she meant that they were to be paid out of the whole estate, and not out of dead's part. She was thus by necessary implication a consenting party to the disposal of the whole estate in terms of her husband's settlement, and by consequence must be held to have accepted the conventional provisions in lieu of the legal.

Whether she could have withdrawn her consent and claimed her legal provisions it is not necessary to inquire. Such a right was personal to herself, and did not transmit to her next-of-kin.

Lord Young was absent.

The Court adhered, and remitted to the Lord Ordinary for further procedure.

Counsel for Reclaimers — D.-F. Macdonald, Q.C.—Pearson. Agent—A. P. Purves, W.S.

Counsel for Respondents — Mackintosh — H. Johnston. Agents—Mackenzie & Kermack, W.S.

Saturday, May 17.

OUTER HOUSE.

[Lord Kinnear.

COCHRAN, PETITIONER.

Entail—Petition to Uplift Consigned Money—Interest of Pupil Heir—Curator ad litem.

This petition was by an heir of entail in possession to uplift money consigned in bank by a railway company as the price of certain parts of the entailed estate taken by the railway company. The two next heirs entitled to succeed to the entailed estate were in pupillarity, and it was necessary that a *curator ad litem* should be appointed to each of them. At the bar the name of a gentleman suitable for the office was suggested by the petitioner.

The Lord Ordinary said it had been the practice to appoint as *curator ad litem* in such cases the person suggested by the petitioner, but that although this system had worked quite well, it would be better that it should not be continued, as the interests of the petitioner and the pupil to whom the *curator ad litem* is appointed are in such cases antagonistic. He then appointed two other gentlemen on behalf of the next heirs respectively.

Counsel for Petitioner—Wallace. Agent—David Turnbull, W.S.

Friday, June 13.

FIRST DIVISION

[Lord M'Laren, Ordinary.

BRODIE AND ANOTHER *v.* MANN.

Road—Estate Road—Public Right-of-Way—Prescription.

Two public roads running parallel to each other were connected by a road originally made as a farm occupation road. In 1883 two members of the public raised an action against the proprietor of the estate through which this road passed, for declarator that there was a public right-of-way over the road for all purposes. *Held* (1) that the evidence showed that the public had been excluded from the use of the road since 1846, and that there was no proof of the assertion of any right upon their part since that year; but (2) that it had been proved on behalf of the public that for forty years prior to the commencement of 1847 the road had been a public road, and decree of declarator *granted* accordingly.

Observed (1) that the original character of the road as a mere farm occupation road placed a greater *onus* of proof on the party seeking to establish a public right-of-way; (2) that it was not here admissible (as in *Rodgers* v. *Harvie*, 7 Shaw 287) to presume from the use proved during a period less than the full forty years that there had been similar use during the earlier portion of these years, because (1) the presumption would require to be applied to a longer period than had been sanctioned by that case, and (2) there was evidence extending over the whole period, on the import of which the case must be decided.

Prescription—Negative Prescription—Conveyancing (Scotland) Act 1874 (37 *and* 38 *Vict. c.* 94, *sec.* 34).

The Conveyancing (Scotland) Act 1874 has not altered the rule of the common law, that the right of the public to a right-of-way, once established, can only be extinguished by exclusive possession on the part of the proprietor for forty years.

In August 1883 Andrew Brodie and Malcolm Neil, weavers, both residing in Kilbarchan, in the county of Renfrew, raised this action of declarator against Thomas Mann of Glentyan in the parish of Kilbarchan, concluding that the road or way near to the village of Kilbarchan leading from the Bruntshields public road past the farm of Wardhouse on the defender's property of Glentyan, and joining the Lawmarnock public road, was a public right-of-way or road, and that the pursuers as inhabitants of Kilbarchan, and members of the community, and

all others, were entitled to the free use of the road for all purposes without interference by the defender; further, that the defender should be ordained to remove all gates, fences, and other obstructions which excluded the free and open access to the said public road or right-of-way.

The road in question connected the Bruntshields public road and the Lawmarnock public road, and was about 500 yards in length. It led from the Bruntshields Road past the farm-steading of Wardhouse farm, and into the Lawmarnock road.

The defender acquired the estate of Glentyan about 1874, having purchased it at that date from the trustees of the late Captain Stirling.

The pursuers averred that the farm of Wardhouse was acquired by Captain Stirling about 1846, and that at that date, and for time immemorial before that, the road in question consisted of a well formed road with hedges along its whole course on both sides, and that for time immemorial, or at least for forty years prior to 1846, a public right-of-way had existed over this road, and that it had been regularly used by the inhabitants of Kilbarchan for the purpose of carting, riding, driving, and walking. They further alleged that about 1851 a gate was erected by Captain Stirling at the entrance to the road from the Bruntshields public road, but as the gate was not locked it formed no obstacle to the use of the road; that although from and after 1860, when a death by drowning occurred in a dam at the roadside, the gate was kept locked, yet the key was kept at Wardhouse, and was available for such of the public as wished to use the road. The pursuers also alleged that the said road for time immemorial, or at least for forty years before 1874, when the defender acquired the property, had been a public right-of-way, and an established line of communication for carts and other vehicles, and had formed an easy and convenient road between Lochwinnoch and Bridge of Weir.

They then set forth that the defender had endeavoured to impede the access of the public to the road.

The defender averred that the road in question was made about 1820, by the then tenant of Wardhouse farm, from the farm-house to the Bruntshields road, for the use of the said farm, and had been used as an estate road by those occupying Wardhouse and Glentyan, which had belonged to Captain Stirling before he bought Wardhouse; that it was used as an estate road, but was never a public road, or recognised as such, but was used for working a part of the lands of Wardhouse which lay to the south of the Bruntshields road, while the farm-steading lay a considerable distance to the north of that road.

He also alleged that the gate was put on the road in 1840, and it had been kept locked, and only opened for the use of friends or tenants of the defender or his authors. "(Stat. 3) The defender and his authors have held and possessed the said estate on a valid irredeemable title, free from any such road or right-of-way as is now alleged by the pursuers, for more than forty years or otherwise, and in any event for more than twenty years prior to 1883; and no such road or right-of-way has existed or been claimed or used during said periods. The public never claimed or exercised or possessed any right-of-way in or over the said service or estate road, or over any part of the defender's estate, until the summer of 1883. At that time certain persons, including the pursuers, claimed a right-of-way over said estate from the said gate or door opening into Bruntshields Road, along said service or estate road to Wardhouse steading, and thence to Lawmarnock Road, being the right-of-way now claimed by the pursuers. Certain of them during the said summer repeatedly passed over the line of road now claimed, in large crowds, causing great and wilful damage to the defender's property, and *inter alia* they destroyed the gate or door aforesaid. They also, at or about the same time, destroyed two iron gates belonging to the defender, and situated at or near the Lawmarnock Road end of the road now claimed."

The pursuers pleaded that there having from time immemorial, or at least for forty years prior to 1874, existed a public right-of-way over the said road, they were entitled to decree of declarator as concluded for.

The defender pleaded—"(2) There never having been any public road or right-of-way, as alleged by the pursuers, the defender should be assoilzied. (5) *Separatim*, in respect for more than forty years prior to 1883, or otherwise, and in any event, for more than twenty years prior to 1883, there has been no road or right-of-way as alleged, and no claim to or use of any such road or right-of-way, but the defender and his authors have held and possessed the said estate free from any such road or right-of-way, therefore the defender should be assoilzied."

It was proved that there had been no public use of the road for a considerable period prior to the raising of the action, and the two questions to which the evidence was mainly directed were —(1) Whether the defender and his authors had successfully excluded the public for forty years prior to 1883? (2) Whether, assuming that he had not done so, the pursuers had proved an uninterrupted use of the road as a public road prior to 1847?

The import of the proof fully appears from the judgments of the Lord Ordinary and Lord Mure.

The Lord Ordinary pronounced this interlocutor—"Finds it proved that the defender and his predecessors in title have excluded the public from the use of the road in question since the year 1846, and that there is no proof of the assertion of a right on the part of the public since that year: Finds it not proved that the road in question has been a public road during the period of forty years antecedent to the commencement of the year 1847, and finds that such use as the members of the public have enjoyed during that period has been by tolerance: Therefore assoilzies the defender from the conclusions of the action, and decerns.

"*Opinion.*—This action is brought by certain inhabitants of the village of Kilbarchan to establish a right-of-way on behalf of themselves and the public over a road which has been described as passing from the Lawmarnock Road (which runs east and west past the village of Kilbarchan) to the Bruntshields Road, which also runs in an easterly and westerly direction, but lies to the south of the Lawmarnock Road, and they allege that the road in question connecting the two public highways which I have named is a great convenience to the villagers and their neighbours,

as affording a shorter and more convenient access in certain directions. I daresay as regards the matter of convenience and utility the allegations are true enough, and indeed there is no counter case made on that question. The pursuers seek to establish their right on the usual footing of presumed grant established by evidence of forty years' use of the road on the part of the public. I see that in the condescendence the use claimed is stated alternatively, as is quite competent—first, as a use reckoning back from the year 1874, and alternatively as a use reckoning back from 1846, which is a date denoting a period soon after the commencement of the possession of the late proprietor Captain Stirling.

"The case for the defender is directed to negative both these grounds of action. In the first place, he contends that he has successfully excluded the public, that he and his authors and predecessors have successfully excluded the public for the period of forty years, or alternatively for twenty years, and have thereby acquired a right to the property discharged of this claim on the part of the public. And alternatively he contends, or rather in addition to that plea he contends, that no public right has been proved for a period of the requisite duration antecedent to the commencement of the time when the public were first excluded. So there are two questions of fact to be tried, one relating to the exclusive possession by the proprietors of the road in question during the period of forty years antecedent to the action, and the other, if that shall not be established, relating to the use of the road antecedent to the commencement of the proprietors' exclusive right.

"It will be necessary for me in the first place to consider at what date the proprietors of this property of Glentyan and Wardhouse commenced to close the road against the public, and for two reasons—first, because if I should find that the public, as alleged on record, have been excluded for forty years, it would be unnecessary to inquire into their use of the road antecedent to that period. But secondly, even if exclusive possession is not shown to have extended during the period of forty years, it is still necessary to know how long it has extended in order that we may fix the date from which the use alleged on behalf of the public is to be reckoned backwards. So the logical order of the consideration of the case is different from the chronological order, and I must deal with the latter part of the case, I think, first.

"Now, there is no doubt that Mr Mann, the defender, who acquired this property in 1874, has all along claimed the use of the road as his exclusive property, and has excluded the public, and the real question in this branch of the case relates to the extent to which a similar right was asserted by Captain Stirling, Mr Mann's predecessor. Captain Stirling bought the property of Wardhouse in February 1844. He had for many years—how long is immaterial—been in possession of the adjoining property of Glentyan, on which his residence is built, but it was in 1844 that he acquired the property which includes the *solum* of the road in question. According to the evidence adduced for the defenders, he had put up a gate at the south extremity of the road, where it adjoins the Bruntshields Road in 1846. According to the pursuers' evidence that gate was not erected till 1851, and for a considerable period thereafter the gate was not closed against the public. There is undoubtedly a conflict of evidence as regards the period when the gate was put up. The evidence in support of the date of 1851 I think rests mainly, if not entirely, upon the testimony of Mr Mitchell, who connects it, in the manner which he describes, with the date of the birth of his fourth and youngest son. The most important evidence in support of the date of 1846 is that of a witness who was coachman in the employment of Captain Stirling—Macgregor—and who is now similarly employed by the Sheriff-Substitute at Greenock. Macgregor left the employment of Captain Stirling at Martinmas 1846, and he says the gate was erected before he left. He has occasionally visited at Kilbarchan since that time, but he said that he had no doubt in his own mind that his recollection of the gate did not refer to these intermittent visits but to the time when he was in the service of Captain Stirling, and in answer to a question put at the end of the case he said that although he had been at Kilbarchan he did not believe he had ever been within sight of the gate since he left Captain Stirling's service. Now, if Macgregor is speaking the truth, the circumstance which he mentions seems to preclude all possibility of mistake on his part as regards the date, because, unless he imagined a gate, there is no other way of accounting for his statement that he had seen it there than that it existed while he was in Captain Stirling's employment antecedent to Martinmas 1846. With regard to the evidence of the witness Mitchell, it may be observed that it is matter of common experience that when witnesses are asked how they remember a particular date they will remember it because some family event happened in that year. Now, if there were any direct relation between the birth of Mr Mitchell's youngest son and the erection of the gate in question, that would be testimony of equal value to the testimony of Macgregor. If, for example, Mitchell's evidence had been that he went that way for the doctor and found the gate closed against him, that would be proof of the existence of a gate as at that time. But the mere circumstance that the witness's youngest son was born in the year 1851, coupled with his impression that 1851, and upon the day of the birth of his son, was the beginning of his recollection of the gate, will not in my opinion outweigh the positive testimony of Macgregor, who could not possibly have seen the gate at the later period. On this subject I conclude by saying that it lies with the pursuers to establish their case affirmatively; and in case of doubt I should hold that the exclusive right—a right which belongs to the property—has prevailed since the period to which the evidence of credible witnesses is applied. In short, it has not been proved that the date of the gate being erected was so recent as 1851; and the evidence of Macgregor, with certain corroborations which I need not particularly refer to, satisfies me that the gate was in fact erected in 1846.

"Then the next question on this branch of the case is the character of the possession since the gate was erected. Now, if there was in fact, a public way along the road in question prior to

that period, *prima facie* the erection of the gate is an assertion on the part of the proprietor that he intends to dispute the right-of-way, and that he, so far as within his power, intends to prevent it being reared up into that legal right which after a certain time it would be no longer in his power to put an end to. But, of course, the mere putting on of a gate would not run against the acquisition of the road by the public if it was left open, if it formed no substantial impediment to the use of the road by the public, and if in point of fact the public continued to use the road as they had used it before. In this case I think there is a preponderance of evidence to the effect that the gate was generally closed against the public. The gardeners who were successively in the employment of Captain Stirling stated that they were instructed to keep it closed against the public, and they endeavoured, as far as they could, to carry out their instructions. No doubt the gate was sometimes open—it was necessary for the convenience of the property that it should be so. Unless it had been intended to be opened sometimes, there would probably have been no gate put there. The best mode in which Captain Stirling could assert his claim against the public would have been to build a wall across the road, but he needed an access from the Bruntshields Road, and no doubt when the gate was open it was used by others than Captain Stirling and his tenants and servants. Several witnesses cited by the pursuers stated that they found the gate open and passed through. And one witness, Mr Craig, who was a farmer on the north side of Wardhouse, says that his father and uncle had, down to the year 1860, once a-year brought carts of hay to their respective farm-steadings from Lochwinnoch. On one occasion, when the witness came with the carts, it was found that a loaded cart would not pass under the gateway; and the person who resided in Wardhouse—the ploughman and sub-manager of Captain Stirling's farm—brought a key or wrench with which to unscrew the top bar of the gateway, and thereby allowed their carts to pass through. The mode of admission rather suggests that this was an exceptional case, and I do not think there is any evidence of carts having used the road after the gate was put up, except the evidence of Mr Craig, which I accept as perfectly honest and reliable.

"The question is—Would the use of the road once a-year, between 1846 and 1860, by one family, with evidence of occasional use by foot-passengers, amount to a continued assertion of a public right-of-way? In considering this I must take into view that, if I can rely upon the evidence applicable to the previous part of the case—the previous period—there must have been a great many other persons, both foot-passengers and owners of carts and vehicles, who would have found it convenient to pass by the road in dispute, and that none of them, from the time the gate was erected, seems to have actually used the road. Not only so, but it is not proved that any single individual ever remonstrated with Captain Stirling in regard to the erection of the gate, or, having been refused admittance, claimed admittance as a matter of right. It therefore appears to me that from the erection of the gate in 1846 down to the present time the public have been in fact excluded, with occasional exceptions, which may be explained as tolerance or favour, and there has been no assertion of the right. I am not speaking of actions raised, but of an assertion by word or letter, until a period approximate to the date of the action. In these circumstances I think it has not been established that the defender and his authors have had the exclusive occupation of the road for forty years, so as to shut out further inquiry; but that it has been established as matter of fact that these gentlemen have had exclusive use of the road since 1846.

"Next in order comes the question, whether by the operation of the statute of 1874 the period necessary for the acquisition of an exclusive right on the part of the proprietor has been reduced from forty years to twenty? On this subject I shall content myself with stating my opinion, which is, that the statute has made no alteration on this branch of the law. The statute has reduced the period of the positive prescription to twenty years, and therefore it is quite sufficient for the proprietor to show that he has exclusively possessed some pertinent of his property for twenty years in order to establish a right to it—I mean in the general case. But there is no doubt that this road was a pertinent of Captain Stirling's property, and his successor Mr Mann. They have had all the right to it which any proprietor could have. The question is as to the discharge of a collateral right burdening the property; and in the absence of any reference in the statute to the negative prescription, or to the common law rule in regard to the discharge of such claims, I must hold that if the public ever had a right to this road, their right could not be extinguished by exclusive use on the part of the proprietor for a period short of forty years, the consuetudinary period of prescription.

"Now, I come to the second and more critical branch of the case—whether antecedent to the year 1846, when the gate was erected, the public had used the road for forty years in such a manner as to presume an antecedent grant on the part of the proprietor. Of course, as was pointed out by pursuers' counsel, if there be no parole evidence reaching as far back as forty years from the last date—from the date of reckoning—then the evidence for the whole period of human memory short of forty years will be sufficient to establish the right, the issue always being whether there has been that use for forty years or for time immemorial. But I do not think that any question of this kind arises here, because there is evidence reaching back to the full period of prescription. In considering the effect of that evidence it is very necessary to attend to the description of the road, and to the purposes for which it was formed. In the present case it is obvious, I think, by inspection of the plans, aided by evidence, that the primary and most important use of this road, in both its parts, was as an access to the farm and farm-steading of Wardhouse—I mean, that the occupiers of that farm would more frequently have occasion to use the road as an access than any other person whatever. Being a road entirely on the lands of the farm of Wardhouse, I think it was to all appearance intended primarily for the accommodation of the farm. This opinion—presumption at all events—which I should have arrived at independently of the evidence, is strongly confirmed by the evidence of Mr Stevenson of Auchinames, whose father was tenant of Wardhouse from, I

think, 1805 to 1819, before he succeeded to the property of Auchinames, which he afterwards farmed as proprietor. Mr Stevenson, the son, was only born in 1812, and therefore his recollection does not go back nearly to that period. But he was informed by his father that Mr Stevenson, the father, had completed, or greatly improved, the road in question when he came to the farm, or soon after he came to the farm in 1805. Prior to that time the only access to Wardhouse for a loaded cart was by that part of the road in question which connects Wardhouse with the Lawmarnock Road; and therefore at that time we have a road, being merely an access to a farm-steading, and not leading from one public place to another. I think the fair import of Mr Stevenson's evidence is, that there was a track of some kind leading to the Bruntshields Road, and that horses, passengers, and perhaps empty carts could pass that way, but there was no access for a loaded cart in that direction; and Mr Stevenson senior had to cart his manure round by the village. Mr Stevenson senior made a bridge across the little stream that passes to the south of the steading, improved the road, and fenced it, or completed the fencing, so as to make it a good practicable road for farm purposes. Therefore the history of the road, at least as regards its character from 1806, is this, that it was made not in one continuous track leading from one public place to another, but in two separate sections designed as accesses from different public roads to a common point. That point was of course the farm-steading to which the road was intended to give access. I have been referred to a case in which the view was expressed that if it is shown that the road was originally an avenue leading to a private house no length of possession on the part of the public will suffice to constitute a right-of-way by that road, and along another road leading in a different direction to a public place. That doctrine, if stated without qualification, seems to me to be somewhat inconsistent with the practice which has prevailed in subsequent cases of allowing an issue as to a road across the estate of one proprietor, although the public place to which it leads is separated from that proprietor's grounds by an intervening estate. I think that the later law has somewhat modified the views expressed by the Lord Justice-Clerk Hope in the case referred to. While not professing to give a positive opinion upon a point on which high legal authorities have differed, I should not, if acting upon my own opinion, be disposed to say, that in no circumstances could a right-of-way be constituted by piecing together two separate roads intended as accesses to a mansion-house, or farm, or other country place. But certainly the circumstance that the road was originally designed as an access or accesses to a private house is a material circumstance to be considered in weighing the evidence, and it strongly suggests that there was no original purpose of dedication to the use of the public. Such a road is in a very different position as regards the use of the public from a road made by a proprietor right through his property for the general convenience of the tenants on the estate. In such a case, if the public have been allowed to use it along with the tenants without discrimination, that is the ordinary case in which a right of public way is established; because I suppose no proprietor ever made a road merely for the use of the lieges. He makes it generally for the convenience of his estate; but if the lieges use it for forty years he is held to have included them in the original destination. Here, however, the origin of the road is not very favourable to the plea which lies at the foundation of the pursuers' case, and it would be necessary, I think, to prove continuous and unequivocal use on the part of the public for the whole period from the foundation of the road, which I am inclined to put about forty years before the period of 1846, in order to establish affirmatively the case which is raised under this branch of the condescendence. Well, then, has such a use been proved? As regards the earlier period, from 1806 to, I think, 1808, we have no evidence but that of Matthew Houston, and from 1808 to 1810 we have the evidence of Matthew Houston and John Houston, witnesses who are not related to each other I believe. From that period downwards there are various witnesses, the number increasing as we come nearer to the present time. Now, what does Matthew Houston's evidence amount to? He was a boy of ten years, I think, in 1803, when his recollection begins, and he only noticed the road because he was in the habit of going there guddling for trout. He was there in the pursuit of his amusement as a boy, and no doubt looked about him, and as far as I can judge he seems to have retained a pretty clear and accurate recollection of what he saw. He speaks of there being a road of some kind when he first knew the place, but he remembers the erection of the bridge; and before that time the only means of getting from the Bruntshields Road to the farm was by going down into the stream and crossing a ford. Now, Matthew Houston undoubtedly says that as far back as he can remember the road was used by milk carts bringing milk to the village. But he does not speak of any other use by carts except the carts that brought milk to the village two or three times a-week in the morning, but he does not know where those carts came from. His evidence is quite consistent with the supposition that they may have been carts coming from the Wardhouse estate, or coming by that road with the permission of the proprietor or tenant. John Houston's evidence does not seem to me to amount to anything more; and it is really only when we come down to near the year 1820 that there is evidence of anything like general use of the road by farmers in the neighbourhood and owners of vehicles. Mr Johnstone pointed out that that evidence applied to all the farms bordering the two roads both to the north and south; and if there had been evidence of that character extending over the whole period of forty years—as much as applies to the period from 1820 to 1840—I do not doubt that the present claim might have been established. But the difficulty that occurs to me in considering the pursuers' case, is that when you go back to the earlier portion of the prescriptive period to which the evidence must apply, the use spoken of was merely occasional, and falls very far short of what would be necessary to establish a public right-of-way. It is notorious that all over the country there are farm roads—roads made and maintained by the proprietor for the convenience of his tenants—which are occasionally used by

other persons as short cuts, and from a feeling of good neighbourhood that is allowed to a moderate extent, and unless it amounts to such use as is inconvenient or seems to point to assertion of public right, it is not likely that it will be stopped. I see, up to about the period of 1820, no evidence of any use, except such as may be predicated of any of the ordinary farm roads made and maintained by proprietors throughout the country. Therefore in my opinion the pursuer has failed to establish the prescriptive use antecedent to 1846, which is a necessary part of his case. That failure does not arise from the absence of living witnesses applicable to the earlier period of forty years, because there are living witnesses, but because their evidence, whether from want of means of knowledge or from defective recollection, or from the facts being against the case, does not seem to me to amount to use as matter of right, and in the assertion of a right.

"My opinion, therefore, on the whole case is that the defenders have had the exclusive use of the road from 1846 downwards through their predecessors in title, and that the pursuers have failed to prove the necessary use on the part of the public for forty years, or time immemorial antecedent to that date, and accordingly the defenders are entitled to be assoilzied from the conclusions of the action."

The pursuers reclaimed, and argued—There was direct evidence of public use from 1806 onwards, and besides, from the year 1820 to 1846 there was a use of this road clearly proved, if not admitted, of such a kind as would not have been tolerated unless there had been previously an existing right of way. No interruption took place prior to 1874, when defender acquired the property, the gates having been proved to have been kept unlocked. For forty years prior to 1846 this road had been proved to have been a public right-of-way; the road might have been improved by the tenant, but that did not take away the right of the public to the use of it, that right having once been established.

Argued for the respondent—There had not been proved for forty years prior to 1846 a use by the public of this road. Their non-possession of it for the thirty-seven years subsequent to 1846 was much against the probability of such use. The road was essentially in its situation and formation an estate road, and any use of it which the public might enjoy was only by the tolerance of the proprietor. The thirty-seven years' disuse must be held to have sopited any right of use by the public.

Authorities—*Forbes* v. *Morrison*, July 19, 1851, 13 D. 1404; *Wallace* v. *Police Commissioners of Dundee*, March 9, 1875, 2 R. 565; *Magistrates of Elgin* v. *Robertson*, January 17, 1862, 24 D. 301; *Campbell Douglas* v. *Hozier*, October 19, 1878, 16 Scot. Law Rep. 14; *Hill* v. *Ramsay*, 5 Pat. App. 299; *Waddell* v. *Earl of Buchan*, March 26, 1868, 6 Macph. 690; *Sutherland* v. *Thomson*, February 29, 1876, 3 R. 485; *Rodgers Harvie*, Jan. 17, 1829, 7 S. 287, *aff.* 3 W. & S. 251.

At advising—

Lord Mure—The two leading questions which are raised under the present action, as explained in the opinion of the Lord Ordinary, are (1) Whether the public have been excluded from the use of the road or right-of-way in question for such a period prior to the year 1883 as entitles the defender to maintain that the pursuers have now no right to use the road? and (2) Whether, if the public have not been so excluded, the pursuers have proved that for forty years prior to 1847, or for time immemorial, the road has been used as a public road, or right-of-way?

With reference to the first of these questions, the Lord Ordinary has found as matter of fact "that the defender and his predecessors in the title have excluded the public from the use of the road since the year 1846, and that there is no proof of the assertion of any right on the part of the public since that year." But he has held, as explained in his opinion, that as this exclusion has not been continued for forty years, it is not sufficient to shut out further inquiry as to the existence of the road as a public road or right-of-way. And with reference to the second question, his Lordship has found "it not proved that the road has been a public road during the period of forty years antecedent to the commencement of the year 1847."

As regards the first question, I have no difficulty in coming to the same conclusion as the Lord Ordinary. I think it is proved that since the date of the erection of the gate at the junction with the Bruntshields Road, which took place about the year 1846, the public have been substantially excluded from using the road; but as that exclusion has not existed for forty years, which is still the period of prescription applicable to a question of this description, I am of opinion that the exclusion has not been of sufficient duration to enable the defender to maintain a defence upon that ground. The Lord Ordinary has fully explained his views of the evidence and of the law applicable to this branch of the case, and as I concur substantially in the views he has expressed, I do not think it necessary to detain your Lordships by any examination of the evidence bearing upon it.

In dealing with the other branch of the case, the origin or history of the road is a matter of considerable importance, as was pressed upon us during the discussion. Having regard to the situation of the farm-steading of Wardhouse, which is about midway between the two public roads, and to the fact that until the building of the bridge between it and the Bruntshields Road the principal access to the farm was from the Lawmarnock Road, while the access from the Bruntshields Road, or the greater part of it, was little more than a cart-track, along which a cart could with difficulty be taken, I am disposed to think that the road was originally made, not for the public, but in all probability with a view simply to the occupation of the farm. But if the proprietor of the farm on which such a road exists, and which is evidently a very convenient one for parties requiring to pass from the one public road to the other, allows the public to make use of it for years without any serious objection, the circumstance that the road was made originally for the use of the farm alone cannot, I conceive, be held to prevent the public from continuing that use if it has been allowed to go on for the requisite period of forty years. The fact, however, on the other hand, that the road was originally a farm occupation road appears to me to throw a greater burden of proof on the party who is seeking to establish a public right-of-way; and the question now to be disposed of is, whether the pursuers

have discharged themselves of that burden?

In considering the proof on this part of the case, it may be convenient to separate it, as the Lord Ordinary has done, into that applicable mainly to the period from 1846 back to 1820, and that applicable to the earlier period, viz., *retro* from 1820 to 1806, or so far back as the evidence may be fairly said to extend. For there is admittedly a much stronger body of evidence relative to the use of the road between 1820 and 1846 than there is in relation to the earlier period.

During the period from 1820 to 1846 there are, as I read the evidence, nearly a dozen of the witnesses for the pursuers who give clear and consistent evidence to the effect that the road during all that period was used by themselves and by members of the public as foot-passengers, on horseback, and with carts, without objection, as occasion required, as a better and nearer means of access to the places to which they might be travelling than the ordinary turnpike or parish road.

The witnesses seem all to be people with an accurate knowledge of the district, and the first in order are two farmers of the name of John and William Erskine, whose father owned a property in the neighbourhood, and who speak to the period between 1830 and 1842, and say that the road was used by children going to school, and by farmers from different parts of the country, as the most convenient way of passing between the two public roads; and they speak generally to the same effect over that period of time. A witness, John Inglis, gives evidence for the same period, and to the same effect; and there are John Hunter and Thomas Fraser, who speak to the road from 1825 to 1846, and the latter of whom says that in his "earlier days the road was open from end to end." Then there are Mrs Fulton and Mrs Inglis, whose parents appear to have been in Captain Stirling's service, who speak of the road, the one in 1821 and the other in 1839, and the latter of whom says that "Prior to the putting up of the gate every person was at liberty to use the road; and I have seen farmers and riders of both sexes, and walkers, using it repeatedly I have seen flittings going along the road, and carts of hay and straw. It was used, indeed, for whatever was required." Alexander Mather, whose knowledge of the road was from 1830 or 1834, speaks to the use of it by himself with horses, and by others with carts loaded with hay and lime going to and coming from farms in the neighbourhood. And there is also the witness Robert Wilson, whose father was factor on the estate, who says that he had known the road from his earliest recollection, "and that it was used as a public road all the time he had known it" till the gate was put on. That is the evidence of the leading witnesses for the pursuers on that branch of the case, and I see that there are several witnesses for the defender, who, while they are on other matters favourable to the defender's view of the case, admit frankly in cross-examination that they used the road themselves, and saw others doing so till the gates were put on in 1846. The witnesses examined for the defender who speak of that are A. Walker, M. Weir, John Ramsay, and two or three others.

In this state of the evidence the result seems to me to be that for twenty-six years the road was used regularly during that time by the public—particularly by the farmers in the neighbourhood, and their servants—for all the ordinary purposes of country traffic, and that as regards that period of time the use of the road by the public has been established; and this seems also to be the view which the Lord Ordinary was disposed to take of this part of the evidence.

Before proceeding to deal with the evidence as regards the earlier period, it may be right that I should refer to the law as laid down in the cases of *Elgin* and of *Rodgers* v. *Harvie*, quoted to us in the course of the argument, and more particularly to the latter of those cases, which in some of its features is not dissimilar to the present. That case was disposed of here, and afterwards went to the House of Lords on appeal as to the precise way in which the issue for forty years, or from time immemorial, was to be dealt with, and as to how the jury were to be directed to dispose of a question of that sort when dealing with the evidence. The Judge here, the Lord Chief-Commissioner, had directed the jury substantially to the effect that if they believed the evidence adduced, they were entitled to presume, although that evidence did not go back for the full period of forty years, that there had been anterior use of the road or right-of-way for the full period, provided the evidence was sufficient in their opinion fairly to raise that presumption. Upon that point the case was taken to the House of Lords, and Lord Lyndhurst, who was then Lord Chancellor, stated his views very fully upon the question.

The main facts were these—The dispute arose in 1822; there had been interruption in 1789; and there were witnesses whose memories went back to the year 1755, in regard to the existence and use of the right-of-way—thus proving its existence for the period between 1755 and 1789, viz., for thirty-four years. There was, however, no proof that went farther back than 1755, and that was how the question came to be raised as to what the jury were entitled in such a case to presume in regard to the use of the right for a longer period, and upon that Lord Lyndhurst said,—"I shall assume, for the purpose of this argument, that the interruption in 1789 was established to be an interruption without any contradictory evidence. I do not mean interruption that was finally successful, for the interruption was resisted, but for thirty-four years previous to that time this way had been used without any interruption at all by the acquiescence of the proprietors of the land over which the way ran. That carries back the evidence as far as seventy years,—as far back as the memory of any witness could extend who was examined upon the trial,—as far as it is probable the recollection of any witness could apply to a case of this description; and if thirty-four years of uninterrupted exercise of the right of way were established, it was then competent for the jury to presume, and they ought in point of law to be directed by the learned Judge to presume, from thirty-four years' exercise of a right-of-way uninterrupted, a previous enjoyment corresponding with the manner in which it had been enjoyed during the thirty-four years. They therefore were entitled from the evidence to presume that for forty years previous to the year 1789, the date of the first interruption, this right-of-way had been exercised without any interruption, more particularly from those circumstances stated in the evid-

ence that there were actually openings made by the proprietors of the land for the purpose of allowing the free use and enjoyment of that right-of-way."

It was laid down in that case, therefore, that where the evidence did not reach back to the full period of forty years, it was competent for the jury to presume, and for the Judge to direct that they might presume, that the same use of the road had existed *retro* for some years before; and it was contended that the same rule should be applied here. I am, however, not prepared to adopt that course in the present case, because (1) there is a much longer period of time for which that presumption would require to be applied, and (2) there is here evidence of witnesses who can speak *retro* for the whole forty years. I agree, therefore, with the Lord Ordinary that this portion of the time must be dealt with upon the import of the evidence adduced.

Now, from 1820 *retro* there are six or seven witnesses who speak to periods prior to that date. The first of these witnesses is Robert Verd, a retired custom-house officer, who was born in Kilbarchan, but who seems to have spent a good deal of his life in Greenock, where he now lives, and is not therefore necessarily mixed up with the feeling which is said to exist in the district on the subject. After explaining that he was often at Glentyan with his father when a boy, he states,—"I recollect the road in question since about 1819 or 1820. I knew it from that time until I left the village in 1833. I have often been in the village since 1833. Before 1833 I was often along the road in question. I have been there many times when Captain Stirling was there. I have seen other people there many a time also. I have seen people passing and giving Captain Stirling his time of day and him returning it, the same as on any other public road. Captain Stirling never made any objection when he met people on the road. I have not only seen people passing along the road, but loaded carts with all sorts of crops belonging to farms going and coming. I have seen Captain Stirling meeting them, and I never saw any objection taken, and never heard of any. I never heard of anyone being turned back or refused leave to go upon the road." This witness speaks, therefore, of a date—1819—which is rather earlier than any of the other witnesses I have referred to; and his evidence goes back to the state of matters which existed before Captain Stirling had acquired the property. He was probably on the road, therefore, not as proprietor but as tenant of the farm, but whether he was proprietor or tenant he certainly does not seem to have taken any steps at that time to warn people against going on a road where it is said they had no right to be.

Tracing the matter back from 1829, the next witness is a man of the name of Gilmour, who is eighty-one, and can speak of the road as far back as the year 1813. He was the son of one of the workers at Glentyan, and says he knew the Wardhouse Road when he was a boy of about twelve years of age, and had been "on it every day in the summer time at a meal hour when I was a boy. I went up to bathe in the dam on these occasions. I did so nearly every day, and nobody challenged me. It was a cart-road at that time. (Q) Just like any other country road?—(A) Just any other cart-road . . . I have often walked through the road in dispute from the Bruntshields Road to the Lawmarnock Road. I have also walked on the road in the opposite direction within twenty years. I did it regularly when I was younger. I was out walking, and went by that road and came over a dyke. I used the road in question often each year. I have seen horses and carts using the road, but I cannot say whose horses and carts they were. They went right through the road. I have seen them going along the road both ways. There was no gate at either end of the road when I first knew it." There is then a witness of the name of Clark who can speak to the road from the year 1810. He says—"I have seen carts going along that road in my early days, and I have passed them myself. I have seen them so long ago as 1809 or 1810, when I was running about the road. Since ever I recollect they were carting upon the road, and there was no obstruction. I cannot exactly say whose carts they were, but they came from the farms to the north-west of the Glentyan estate down from the country. They would be going south from Auchinsale and other farms to Howwood by the road in dispute. Carts with hay from Lochwinnoch Loch or with other things went to the farms on the north by the road in dispute. (Q) Was it a common thing to see carts on that road?—(A) Yes. I have seen them often. The cart tracks shewed that there was a good deal of traffic on the road. I have seen ruts four inches deep in it. (Q) Although it had tracks in it was it metalled?—(A) I think it would be sorted up. I never could say that I saw any man sorting the the road. It was a hard road with stones on it; it was just a common country road."

That is the state of matters as seen in 1810; and the next witness is a man Hunter, who speaks of the road as far back as 1808. He describes having been taken to the road by his father when he was a boy, and of having gathered haws from the hedge, and his evidence is substantially of the same import as that of the other witnesses I have read. He speaks of having gone from the Lawmarnock Road through by the Wardhouse Road to the Bruntshields Road, and *vice versa*, and also of having "often seen horses and carts going along the road in question. I cannot say whose horses and carts they were, as I did not pay any attention. I have seen such horses and carts often going right through the Wardhouse Road from one end to the other. The Kilbarchan people went a great deal by that road. It was a great resort for them. I was never prevented from walking on the road in question, and I never heard of any other body having been prevented. I have been on the road in question three or four times a-week on some occasions, but after I grew up I was not so often on it. I have been many a time along the road since I grew up."

The next witness is William Orr, who speaks to the time from about 1815 to 1831. He says—"I was born at Lawmarnock, and lived there till I was about twenty-six years of age—from 1805 until 1831. When I was a boy I went along the Wardhouse Road with my father often. We went to the mill that way, and several other places, with carts. It was the Glentyan Mill that we went to, which was near Kilbarchan. I got a ride in my father's cart on these occasions. When I grew older I very often took carts along

that road myself. I have carted lime, coal, corn, and other things required for the farm along the road in dispute. I generally carted the lime from Howwood. We put the lime upon the land. We used a good deal of lime in that way. I have also carted dung along that road. That dung was got in the town of Kilbarchan. We went along the road in dispute, because in coming from Kilbarchan there was a causewayed road. That road went from Kilbarchan up the Lawmarnock Road. We had a better road going by the Bruntshields way and along the Wardhouse Road. The carts were taken along that road both from the farm of Law and also for Lawmarnock." He explains that they used the road for carting things to the farm as occasion required, sometimes every day and sometimes not for a good while, using it just as occasion required. And he gives evidence to the same effect as the other witnesses as to his having seen people driving carts along the road from other farms, and carting lime and hay from Lochwinnoch and other places, in accordance with the evidence of other witnesses, although at somewhat later period of time.

Going back in the order of time, the remaining witnesses for the pursuer are John and Matthew Houstoun, the former of whom was born in 1799, and the latter in 1793. John Houstoun speaks of the road generally from about 1807 to 1836, and to his having gone along it himself with horses to the smith's shop when he was young, and to the carts having to go through the burn before the bridge was built by Mr Stevenson, who became tenant of the farm.

Matthew Houstoun goes more into detail, and seems to have known the road well from 1803. He is distinct in his recollection, according to his own view, of the state of the road from the time he was about ten years old, so that his evidence carries us back beyond 1806; and he says that "there was no bridge across the burn on the Wardhouse Road when I knew it first. There was an open ford there. It was not a very big burn, but there are some deep pools in it. It was shallow where the ford was, and you could could go across the burn there quite easily dry shod. There was a road in those days before the bridge was built, right up past Wardhouse from the Bruntshields Road. That road passed Wardhouse, and ended at the Lawmarnock Road. The Wardhouse Road went between the two roads I have mentioned. I was often on the Wardhouse Road when I was a boy. (Q) What kind of road was it then?—(A) It was just similar to any other country road. It was metalled. I have seen milk carts and other carts taken along that road since ever I knew it, in my young days. It was quite a common thing to see carts going along the road when I was there. I have seen that going on long after the bridge was built. I continued to be often on that road, but I cannot say for how long. (Q) From the time you were ten years old till when?—(A) Long before the late Captain Stirling purchased the estate."

After explaining who were the former proprietors of the property he goes on to say—"When I first knew the road it was in a separate property from Glentyan altogether. The carts which I saw using the road in question in my young days came from the farms above the village, because it was a nearer road into the village to the woman who kept the dairy. They supplied her with milk which she sold in the village. That woman lived at the foot of the village in Stirling Street. At that time they went by the road from the end of the Wardhouse Road, which is now thrown into the policy; the public road there has been diverted a little to the south. I cannot say that I have ever seen people on horseback go by the road in question. I have seen carts and horses going along it with grain and hay. I never heard of that road being disputed by anybody in my younger days. I may say that the late Captain Stirling was well beloved, and there was never a word with him about this road till this matter took place, which I am sorry for. (Q) Till the present dispute arose?—(A) Yes. When I was a young man I was often walking on the road in dispute. I never thought that I was trespassing. I could not think so, because it was a common open road for passengers. (Q) The same as other turnpike roads as regards the public use of it?—(A) The very same. There were no gates upon the road in dispute at that time. Portions of the road were hedged on each side. The road was not metalled from end to end. There were portions of it metalled while there was mud and dirt on other parts. It was always passable for carts."

On cross-examination he gives the same account of the matter. "When I left school I went to be a weaver, but I cannot say how old I would be then. I was always living in Kilbarchan. I was inspector of poor for twenty-eight years. I suppose I would be eleven years of age when I began the weaving trade, but I cannot swear to that. I went along the whole burn when I was "ginneling" trout. I was very fond of doing so. I cannot say how far from the Wardhouse steading the burn was. It was where the bridge is now. I don't remember when the bridge was built, or who built it. I did not see the bridge being erected. The burn ran in a deep hole where the bridge is when I first knew it but it is now filled up. The ford was a little way off. It was William Connell, horse-dealer, who was tenant of Wardhouse farm when I first remember it. I don't recollect Mr Stevenson being in the farm. The dairy of which I have spoken was further down the village than where the old school was. The people who used the road in question in going to the milk shop with their carts came from the farms of Law, Lawmarnock, and others which I cannot name just now." He is thus quite distinct about the places being beyond the Wardhouse property, and in answer to the question how often he had seen the milk carts go through this road, he says—"I never counted. If I was up early in the morning waiting for my milk, and the carts were not in, I went along with other boys and met the carts coming down the Bruntshields Road. I have seen them on the road in question going past Wardhouse. It was after I became inspector of poor that I saw the gate on the road in question. I became inspector of poor in 1833." He then speaks to the gates being put on, and he seems after that never to have used the road himself except when he got leave from Captain Stirling."

The evidence of this witness appears to me to be of great importance in the case. He is quite distinct in those portions I have read as to the fact that from his earliest recollection there was

a cart track used by the public between Wardhouse and the Bruntshields Road, and that the way the carts went before the bridge was built was by crossing this burn at a ford. This evidence, therefore, taken in connection with the other evidence adduced by the pursuers, seems to me to make out a pretty distinct and decided public use of the track prior, at all events, to the date when Mr Stevenson became tenant of the farm of Wardhouse in 1806, as explained by his son. I see no reason to doubt the credibility of these witnesses, more particularly that of Matthew Houston, who for many years held a responsible position in the parish, and was well acquainted with the district. Unless, therefore, his evidence and that of the other witnesses can be held to have been displaced, or materially contradicted by the evidence adduced by the defender, it appears to me that the pursuers' claim must be held to have been established.

Now, the witness who is mainly relied on to contradict these witnesses is Mr Stevenson, the son of the tenant of 1806, who now resides in England. He was born in the year 1812, and lived with his father at Wardhouse till his father's removal to a neighbouring farm about the year 1822. He gives a pretty distinct account of what he heard from his father on the subject, and there can be no doubt that it was his father who built the bridge. He says that his father must have become tenant of Wardhouse about 1805, not earlier, and that he lived with his "father at Wardhouse until 1823, when he removed to Auchinames, which marches with Wardhouse. I remember when flitting, the furniture and things were just carried through the fields direct. I lived at Auchinames with my father till 1849, when he died. I succeeded him in the farm, and continued to live there until five years ago. (Q) You know the road in question in this case?—(A) I know the track very well. My father told me he made the road. He told me he could not get access to the Bruntshields Road from Wardhouse until there was a bridge made across the burn, and a kind of road metalled in a sort of way. He said he had been at the expense of making the road. He had the road made for the convenient working of the farm. I do not remember of him telling me when he made it, but it was after he went to the farm. The first manure he brought to Wardhouse came from the farm of Crossford, near Howwood, which he had previously occupied. In driving from Crossford to Wardhouse my father preferred to go through Milliken Park Bridge, by the village of Kilbarchan, and up through the village to the Lawmarnock Road. He told me he took that road because the other one was not passable at that time. The track in question was not made at that time. If the track in question had been made that would have been the nearest road from Crossford to Wardhouse. My father did not tell me particularly what he had done in the way of making the bridge, but until the bridge was made the road was useless, because the burn formed a kind of gully, which could not be passed with a loaded cart, or perhaps even with an empty one. I never saw the place before the bridge was put up, but I know what the ground was like. Suppose the bridge were away, I think very few would try to cross the burn at that place with a loaded cart. The burn there runs in a bed fifteen or sixteen feet below the level of the adjoining ground. I never heard my father say what the bridge cost him for building. My father complained of people who took advantage of the road that he had made. It was done in some cases, but very rarely. After leaving Wardhouse and going to Auchinames, I occasionally saw the road in question as a boy when I was going to school, and I was sometimes on the road when I went to the dam to bathe, or when I went to the ice in winter. During all the time that I was at Auchinames I never heard of this road being claimed as a public road. I have seen an occasional member of the public upon it, but very rarely."

It is plain, however, that although this witness very rarely saw members of the public upon the road, there must have been some considerable use of it by the public, because he says at the beginning of the passage I have just read that his father complained of the road he had made being used by the public. He again speaks of the complaint—"In my father's time there were sometimes horses and carts on the road, and he complained of that. He complained that he had made the road and if the public got liberty to use it it would need upkeep. It was a rare thing for any horse or cart to be upon the road. He was not much troubled on that account." This evidence of Mr Stevenson is, I think, pretty clear upon the main point he was brought to speak to, viz., the building of the bridge, and consequent improvement of the roadway. But when a question is put to him by the Lord Ordinary as to the existence of the track before the bridge was built, his answer is—"I cannot tell what it would be like then. I have no means of knowing; but I never heard anyone speak upon that point. My father told me he had made the bridge, and that until it was made a loaded cart could not cross the burn. (Q) Would that not rather suggest that there was a road of some kind, but not so good a road?—(A) I cannot tell from my own recollection or from what my father told me."

That is the full import of the evidence of Mr Stevenson; and as I read it, it does not amount to a statement that his father said there was no road for foot-passengers or carts, but merely that before the bridge was built he could not take "loaded carts" along the road to Wardhouse farm. It is not inconsistent, therefore, with the account Houston gives of the road or track as he describes it; because he says that the carts went through the burn at the ford; and although the change caused by the building of the bridge was an important improvement of the road, it does not necessarily follow that there was no public road there because there was at one time no bridge across the burn. Houston is quite distinct as to there being a track there which the public used as far back as he can recollect, and continued to use after the bridge was built. And that, again, is quite consistent with the statement and complaint of old Mr Stevenson, that the track was used by the public, which appears to me to confirm what Houston and the other witnesses say of the public use of the road. I have no doubt as to its having been made matter of complaint by old Mr Stevenson that the public used the road; but while he made that complaint it does not appear that he or his landlord ever took any steps to prevent the public using the

road, which it is proved they did, and continued to do after the bridge was built, and after he left the farm in 1822. In this state of the evidence I have been unable to resist the conclusion that there was a public road or right-of-way at the time Matthew Houston speaks of it. It was then a rough track very likely, not very useful to anyone except those who had occasion to walk over it, or to take horses and light carts along it, as spoken to by Houston, who evidently regrets that this dispute has arisen. As I have already remarked, I see no reason to doubt the credibility of this witness; and assuming his account of what he saw to be correct, it appears to me to be proved by his evidence, taken in connection with that of the other witnesses adduced, that for forty years prior to 1846 this road was a public right-of-way; and the fact that the road was improved by the putting up of the bridge, so as to make it more useful than it was before for cart traffic, cannot, in my opinion, be founded on as showing that there was no public right-of-way there at the time the bridge was built. The decision of this Court in the case of *Forbes*, Feb. 20, 1829, 7 S. 441, appears to me to support the view that a change in the character or condition of a public right-of-way, or in the uses to which it may be put, cannot be held to affect the right of the public to use the road.

I am on these grounds, therefore, of opinion that the pursuers have established their case, and are entitled to decree in terms of the conclusions of the summons.

The Lord President and Lord Adam concurred.

Lord Deas and Lord Shand were absent.

This interlocutor was pronounced:—

"Recal the interlocutor: Find it proved that the defender and his predecessors in title have excluded the public from the use of the road in question since the year 1846 and that there is no proof of the assertion of a right on the part of the public since that year: Find it proved that the road in question has been a public road during the period of 40 years antecedent to the commencement of the year 1847: Therefore find and declare in terms of the declaratory conclusions of the summons; ordain the defender immediately to remove the walls, locked gates, fences, and all other obstructions erected on the road in question as concluded for, and decern."

Counsel for Pursuers—R. Johnstone—James Reid. Agent—John Macpherson, W.S.

Counsel for Defender—Mackintosh—Dickson. Agents—Webster, Will & Ritchie, S.S.C.

Tuesday, June 17.

OUTER HOUSE.

[Lord Fraser.

KINLOCH *v.* IRVINE.

Proof — Evidence — Confidentiality — Medical Reports furnished to Third Party.

In an action for reduction of a disposition by a person deceased at the date of the action, which involved a question as to the effect on the health of the deceased of a railway accident happening prior to the date of the disposition, and from which he had suffered injuries—*held* that the pursuer was entitled to recover by diligence, from the railway company on whose line the deceased was injured, medical reports supplied to the company at the time of the accident for the instruction of their own agents in connection with a claim made by him.

This action was raised by Mrs Isabella Kennedy Kinloch or Irvine (widow and executrix-dative of the deceased Alexander Irvine, gardener) a daughter of the late James Kinloch, dairyman in Edinburgh, who died in 1882, against Jessie Kinloch, another of his daughters. The object of the action was the reduction of a disposition, assignation, and conveyance executed by James Kinloch, and dated 30th October 1879, and conveying to the defender, *inter alia*, the furniture and plenishing of his house and shop, and the goodwill of his business. One of the grounds of reduction was that at the time of his granting the said disposition he was not of sound disposing mind, or at least was weak and facile and easily imposed upon, and was imposed upon by the defender. It was admitted that in 1873 the deceased had suffered injuries in a railway accident on the North British Railway, for which, after he had raised an action in respect of them, the company had paid him compensation. The pursuer of the present action stated that after the accident the deceased was incapacitated for any kind of work, and suffered from paralysis and loss of memory. The record having been closed, and issues ordered to be lodged, the pursuer obtained a diligence for recovery of, *inter alia*, all medical reports and certificates obtained for or on behalf of the deceased, or for or on behalf of the North British Railway, in connection with the injuries sustained by him in the accident above mentioned, or with the action raised by him in respect of his injuries.

At a diet held before the commissioner, the agent for the railway company declined to produce under the call the following documents falling thereunder—(1) A medical report by a doctor in Penicuik, since deceased; (2) and (3) Two reports by Dr Dunsmure; (4) A joint report by Drs Dunsmure and Heron Watson and the late Professor Spence. The ground of refusal to produce these documents was that they were confidential, having been furnished to the railway company at their own expense for the instruction of their own officers or agents in connection with the claim for compensation.

The commissioner, in respect of the case of *M'Donald*, January 7, 1881, 8 R. 357, and 19 S.L.R. 196, repelled the objection, and ordained