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out; and from 1817 to 1819 he appears to have done nothing. Was this acting like a prudent man? But if you think there was not culpable negligence, you must find for the defender.

Verdict—"For the defender on all the issues."

*Hope, Sol.-Gen.* and *Buchanan*, for the Pursuers.
*Jeffrey* and *Hunter*, for the Defender.
(Agents, *Hugh Macqueen*, W. S., *Gibson* and *Hector*, W. S.)

## GLASGOW.

PRESENT,

LORD CHIEF COMMISSIONER.

1828. Nov. 5 and 6.

## OSWALD, &c. *v.* LAWRIE, &c.

Finding that a public road existed for time immemorial, and that it had been obstructed by a gate erected by the defenders.

THIS was a declarator by a committee of road trustees under a Statute Labour Act, to have it found that a public road had existed for more than forty years,—that it had been obstructed by certain buildings and a gate,—and that the gate should be removed.

DEFENCE.—There are other open streets parallel to the one in question. The ground

was enclosed for more than forty years, except as to foot-passengers, and they and horses are still allowed to pass.

ISSUE.

" Whether, for time immemorial, or for forty " years and upwards, there has existed a public " road or highway for carriages and horses " along the south bank of the river Clyde, " from the south end of the Old Bridge lead- " ing from Glasgow to Gorbals to the south " end of the New or Broomielaw Bridge, be- " tween the houses in Carlton Place and the " said river, or nearly so? And whether the " defenders have wrongfully and unwarrantably " shut up or obstructed the said road by placing " a gate across the same, at or near the south " end of the said New Bridge?"

*Jeffrey* opened the case for the pursuers.—It is now admitted that prior to 1754, a road did exist; but it is said it was shut up, and that the one which now exists along Carlton Place is a private road, on which the defenders are entitled to prevent carts and heavy carriages from travelling. The defenders are bound to prove this singular sort of right, though the issue seems to lay on the pursuers the burden

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of making out the right to a road. The defenders can only show their right by proving that they purchased it from the trustees, or that they have had peaceable and uninterrupted possession for forty years.

Books delivered to the clerk of an hospital by his predecessor, as containing the minutes of the managers, received in evidence, though not signed.

Certain books of an hospital being produced by the clerk or treasurer of the hospital, an objection was taken, that the minutes were not signed, and that certain of the books were amissing.

LORD CHIEF COMMISSIONER.—The objection taken is not that these books are not sufficient to prove the fact, but that they are not signed. I know no law requiring that they should be signed. The only question is, Whether they are the minutes of the managers of the hospital? and as they were given to this witness as such at the time he came into office, I am of opinion that we must receive them.

A witness may refresh his memory by looking at notes made by him at the time a fact occurred.

A witness having stated that he made a scroll at the time the plan of Carlton Place was made, his Lordship observed, That it was clear a person could not speak from notes made by him at a distance of time, but that it was equally clear, that, if they were made at the time, the witness might look at them to refresh his memory.

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*Moncreiff, D. F.* opened for the defenders.—The question is, Whether a road has existed during the last forty years, and not whether it formerly existed? If the pursuers succeed, they must indemnify the defenders, who paid for every inch of the ground. The road which formerly existed was changed under the authority of a statute, and was in fact shut up, though we cannot show any written order for it, as the pursuers have not produced their books. But it is said the road was revived, and that the feuar was bound to make a street; but the question here is not on the contracts of parties, but whether there was in fact a road? The question is peaceable possession of a road down to 1805, when it is clear that they were stopped.

When a plan was produced,

A copy of a plan referred to in a writing, received as *prima facie* evidence in explanation of the writing.

*Cockburn* objects, No plan ought to be received without evidence of its authenticity; and though the haver is of opinion that this is an original plan, it clearly is not, but a copy, as the docquets are all written by one hand, and there is no evidence of its accuracy.

*Murray.*—There were three proprietors of the ground; and we say this is the copy given to one of these proprietors; and we have done

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what we could to produce the signed copy, but failed.

LORD CHIEF COMMISSIONER.—The person who produces this is the custodier, not the maker of the plan. I consider plans as a species of evidence to be received with great caution, and when received, we must have them in such a state that they may be compared with the thing, and be capable of being confirmed as correct. But where a document refers to a plan, it is in a different situation, and this is given in, not as an accurate plan of the ground, but as explaining the document. The question is not whether this plan agrees with the direction of the road, but whether it agrees with the document, and as in this case there were three proprietors, each entitled to a plan, and as the original cannot be found, I hold this *prima facie* evidence as a means of explaining the document.

A feuar of ground on the side of a street, rejected as a witness in a question as to an obstruction in the street.

One of the feuars of the defender was called as a witness, but rejected on the ground of interest.

Depositions taken many years before in a question between the same parties, received in evidence.

Evidence had been taken in 1804 in a question between the parties. When the depositions taken in that question were tendered,

*Hope, Sol.-Gen.*—The case of Knowles at Aberdeen is the only one in which this has been done, and there the depositions were admitted with great difficulty.

Smith *v.* Knowles, 3 Mur. Rep. 430.

LORD CHIEF COMMISSIONER.—I do not say that it may be right in all cases to admit evidence taken in this manner, but when I find that after much consideration Lord Pitmilly received it in the only case in which the question occurred, I hold myself bound by that decision.

*Hope, Sol.-Gen.* in reply.—The question here is not whether the pursuers have established a right to a road, or whether this was a statute labour road, but whether the whole public have acquiesced in the interruption of what is admitted to have been a road? This admission throws on the defenders the burden of proving that it was shut up, and in this they have completely failed. The use of this as a footpath by the public was sufficient to prevent the acquisition of it as private property, and there is no authority given by the statute to shut it up, and no evidence that it was shut up.

LORD CHIEF COMMISSIONER.—I am in great

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hopes that the ends of justice may be attained in this important case by stating within reasonable compass the grounds on which you are to decide it. Indeed, after attending to it for nearly twenty-eight hours, I am not able to go much into detail, and my judgment is satisfied that it is unnecessary.

This is an anxious case for any jury, and particularly so for one in this city; but I shall not, and you ought not to, go out of the issue, but to draw your conclusions from the evidence for the pursuer or defender.

The question is, Whether immemorially (and forty years is equivalent to this) there has been a high-way along the south bank of the River Clyde? In a high-way there must be a point from which it commences, and one at which it ends; and though the new bridge did not exist at the time to which part of the evidence relates, we may take the margin of the river at the end of this bridge as the point meant in the issue; and the margin of a river is a point in which a high-way may legally end. It is, however, of importance in considering the evidence, that the renewal of the use of this road arose from a work of art, which fixed the point on the margin of the river.

It is clear that down to 1756 there was a

road by a coal quay and windmill on the margin of the river to the bridge of Renfrew; and the question is, Whether this road was legally put an end to in whole or in part?—Whether it was lost by some operation of law, or such want of use or continued acts of interruption as cuts off the right of the public?

There is power given by the acts of Parliament to widen or change the situation of certain roads, but there is no specific evidence that this road was so altered, or that another was substituted for it. The question then comes, Whether there is evidence of continued interruption? The minutes of the trustees at the period being lost, evidence was laid before you of the pulling down a bridge and other acts of interruption, proving that the road to Renfrew could not exist throughout its whole length; and the inference drawn from this is, that, had the minutes been produced, they would have proved that the whole road was legally shut up. I cannot take this as evidence of the contents of the minutes; but it proves shutting up in point of fact, by persons looking after the roads; and this being acquiesced in, the road cannot now be maintained as a road from end to end; but that evidence does not apply to the part now in question, as these interruptions

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did not obstruct the road between the old bridge and the coal quay or windmill, which are below the new bridge; and if the road below the new bridge was taken away, it was only for eleven years, as it was again used when the new bridge was opened. This is not the sort of interruption which will take away the right to a road.

There are thirty-three years from the opening of the new bridge to the putting up of the gate between the two bridges; and this is a singular species of interruption, as it was only carts and heavy carriages which were stopped; and there is no evidence of their being stopped before six o'clock in the morning. This is an interruption of the road *via facti* to a certain extent; but it is proved that all carriages, except loaded carts, were allowed to pass.

Much was said of the burden of proof, and, in my opinion, it lies on both parties, and that the defender is bound to defeat the evidence for the pursuer, as he has not proved a legal shutting up of the road The witnesses for the pursuers spoke to acts done by themselves in using the road, and it is not necessary that it should have the appearance of a made road. Unless they are perjured, they speak to facts

showing the use of this as a road, and you will judge whether there was a want of honesty in them.

The witnesses for the defenders speak to observation on the state of this road, and they had means of observing it, but they do not speak to acts done by themselves, and I am unwilling to impute perjury to them. The evidence of many of them goes to prove that there was not any thing like a cart road at that place, but some of them state most material evidence for the pursuers, particularly that singularly distinct witness, who, at the age of ninety-two, gave such proof of being in possession of all his faculties. He proved on his cross-examination, the occupation of this road by carts passing from both ends, and going to certain points, being beyond each other, which shows that they must have crossed each other. The statement by the other witnesses for the defenders, that they did not see carts, is negative evidence, but part of it, as to the breadth of the road, is positive, and, on the whole, the case is a singular one. It rests with you; for it depends on your opinion of the witnesses, as I am not aware of any thing in the law of Scotland requiring you to find specially that carriages of luxury were allowed to pass, while

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carts were prevented. The passing of the former is evidence of the use of the road.

Verdict—"For the pursuers."

*Hope, Sol.-Gen. Jeffrey* and *Cockburn*, for the pursuers.
*Moncreiff, D. F. J. A. Murray*, and *Ivory*, for the defenders.
(Agents, *D. Fisher*, and *Gibson-Craigs*, and *Wardlaw*.)

PRESENT,

LORD CHIEF COMMISSIONER.

1828. Nov. 7.

## DUNLOP *v.* BUCHANAN, &c.

Damages against a party, his mandatory, and agent, for arresting the person, and poinding the property, of a protected and discharged bankrupt.

AN action of damages by a discharged bankrupt against one of his creditors and the agent and mandatory, for arresting his person, while he had a protection from the Court of Session; and for again arresting him and poinding his property after he obtained his discharge.

DEFENCE.—The defender, Buchanan, was not aware of the existence of the protection, and the pursuer refused to show it. He gave no authority for the second arrest, but both it and the poinding were justified by the illegal manner in which the discharge was obtained.