

This was an action at the instance of Mrs M'Gill, with consent of her husband, against Mrs Bell, widow of John Bell, writer in Dundee, and others, trustees under Mr Bell's settlement, for reduction of a disposition by Mrs M'Gill and others in 1854 of certain house property to which Mrs M'Gill had an eventual right of fee, on the ground that the consideration for which the disposition had been granted was inadequate, that the transaction had been carried through when she was in a state of mental weakness and in ignorance of her true rights, and that the signature of her name appearing upon the deed was a forgery.

When the action was in the Procedure Roll before the Lord Ordinary the pursuers applied for admission to the benefit of the poor's roll, and the usual remit was made to the minister and kirk-session, who reported that Mrs M'Gill was fifty-two years of age and her husband fifty, that they had no property, and were entirely dependent upon the earnings of M'Gill, who was an engineer, making on the average £1 a-week, that they had two daughters, one of whom was married, and the other, who was thirteen years old, lived in family with her father and mother, and earned 6s. a-week as a mill-worker.

Upon this report the pursuers moved the Court to remit the cause to the reporters *in probabilis causa litigandi*, and the motion was opposed upon the ground that the poverty of the pursuers was not such as to entitle them to sue *in forma pauperis*. The Court, before answer upon this question, remitted to the reporters, who decided that there was a *probabilis causa*. The pursuers then asked for admission to the poor's roll, and this motion was opposed upon the same ground as the former motion.

The defender argued—There was no precedent for admitting to the benefit of the poor's roll parties in such good circumstances as the pursuers.

The pursuers were not called on.

At advising—

LORD JUSTICE-CLERK—No doubt there have been conflicting decisions on this point, but these cases are always questions of circumstances, and for the consideration and discretion of the Court.

We have here a distinct allegation that this deed was forged, and that the value of the property in question is £2000. We sent the case to the reporters on *probabilis causa*, and they have reported that the pursuer has a *probabilis causa*. Without laying down any general rule, and expressly upon the ground of the gravity of the averments, I am for admitting this pursuer to the benefit of the poor's roll.

LORD NEAVES—I am of the same opinion. The result of not admitting the pursuer to the poor's roll would apparently be that there would be no inquiry into this matter at all. The pursuer of course must be held to have a *probabilis causa*. I do not think that 25s. a-week is enough to enable a pursuer to bear the expense of such a litigation as this is likely to be.

LORD ORMDALE—I am unable, having regard to the precedents, to hold that every individual who has an income of 25s. a-week is entitled to

the benefit of the poor's roll. But, in the special circumstances of this case, I do not dissent from your Lordships. A serious charge of forgery will, I understand, fall to be investigated, and yet having this in view the reporters have found that the pursuer has a *probabilis causa*. That gives a character to the present case which distinguishes it from those which usually occur.

LORD GIFFORD—I agree upon the special ground of the nature of the litigation. I think that this is an element which may often be very material, and which must be kept in view as well as the amount of wages or income which the applicant enjoys.

The Court admitted the pursuers to the benefit of the poor's roll.

Counsel for Pursuers—Low. Agent—David Roberts, S.S.C.

Counsel for Defenders—Pearson. Agents—Webster & Will, S.S.C.

Tuesday, February 15.

SECOND DIVISION.

[Sheriff of Aberdeen.]

GORDON v. M'KERRON AND OTHERS, AND
M'KERRON AND OTHERS v. GORDON.

Road—Possessory Judgment—Proof of Possession.

Counter actions of interdict were brought in the Sheriff-court by a landed proprietor and several members of the public, relating to an alleged public road through the estate of the former. It was proved that such a road had formerly existed, but that in 1815 it was shut up by order of the road trustees, acting under a local statute, some doubt however existing as to the formality of the trustees' proceedings. For at least seven years prior to the raising of these actions the road had been used by the public by climbing over or breaking down fences, and going over cultivated ground, and had also been used by the proprietor by planting, cultivating, and enclosing—*Held*, upon appeal (dissenting Lord Gifford), that before obtaining a possessory judgment the character of the possession founded upon must be ascertained, the inquiry for this purpose not being limited to the seven years prior to the institution of the action, and that, as in this case there was *prima facie* evidence that the road in question had been shut up and the subsequent possession by the public unlawful, the parties claiming it were not entitled to a possessory judgment.

Opinion per Lord Gifford—That the only question before the Court related to the state of possession of the road during the seven years preceding the raising of the actions, and that to go back beyond that period for the purpose of ascertaining whether there actually existed a permanent right or not would be to obliterate the dis-

inction between a possessory question and a question of permanent heritable right.

In June 1872 Mr Alexander Morison Gordon of Newton, in the county of Aberdeen, presented a petition to the Sheriff of that county, in which he set forth that John M'Kerron, mason, residing in Insch, had upon several occasions trespassed upon the farms of Ledikin and Bridge of Shevock, and in the wood of Ledikin, the property of the petitioner. The petition concluded with the usual prayer for interdict. At the same time Mr Gordon presented a similar petition against Robert Slorach, farm servant, and William Fraser, mason.

In December of the same year, and while these actions were still before the Sheriff, a third petition for interdict was brought at the instance of M'Kerron against Mr Gordon, as proprietor, and also against the tenants of the farms of Bridge of Shevock and Ledikin. The petitioner alleged that a public road or pathway, which he as one of the public was entitled to use, ran through these farms, and that fences had been put across it by the respondents. The petition prayed for interdict against these encroachments upon this public road, and for the removal of the fences. The three actions were conjoined upon 27th June 1873.

Mr Gordon, while not denying that at one time a road such as was claimed by the respondents had passed through his lands, maintained that it had been legally shut up in the year 1815 by the road trustees, acting under a county road statute (39 and 40 Geo. IV. c. 32), when another road was substituted for it. He further pleaded that even although it was not legally shut up at that time, the public had lost all right to pass that way *a non utendo* for forty years and upwards.

It was maintained by Mr M'Kerron and the respondents in the petitions at Gordon's instance, that as the road in question had been used as a public road for at least seven years prior to the proceedings taken against them by Mr Gordon, they were entitled to the benefit of a possessory judgment. They denied that the road had ever been legally shut up, alleging that a minute of the road trustees founded upon by Mr Gordon was vitiated and unauthenticated, and also that the trustees had failed to comply with the provisions of the statute as to notice of their intention to close the road to the public.

A proof was taken, and from the evidence led it appeared that various members of the public had been in the habit of going upon the road, but that they had been challenged and obstacles placed in their way by the proprietor.

The Sheriff-Substitute (DOVE WILSON), on 31st August 1875, issued an interlocutor, in which he found that proceedings of the road trustees were irregular and defective, and that the road in question had remained open as a public footpath, and he accordingly granted the interdict sought by Mr M'Kerron and others.

Against this interlocutor Mr Gordon reclaimed.

On 26th October 1875 the Sheriff pronounced the following judgment—

“*Edinburgh, 26th October 1875.* — The Sheriff having heard parties on the petitioners' appeal against the interlocutor of 31st August last, and having also considered the record, proof, and whole process, recalls the said interlocutor: Finds

it proved that in 1815 the road in question was shut up by the road trustees in virtue of the powers contained in the Statute 39 and 40 Geo. III. c. 32; that it was then enclosed within his grounds by the petitioner, and ceased to be used for carts and horses; that although there is evidence of its continued use as a public footpath, no such possession has been established on the part of the public subsequent to its suppression as would be sufficient to constitute a public right-of-way; therefore, in the petition at the instance of Mr Gordon, repels the defences, grants interdict in terms of the prayer of the petition; dismisses the counter-petition; finds the petitioner Mr Gordon entitled to expenses; allows an account to be given in, and remits the same when lodged to the Auditor for taxation and report, and decerns.

“*Note.*—The proceedings in this case commenced with a petition at the instance of Mr Gordon of Newton against Mr John M'Kerron, mason in Insch, to have him interdicted from trespassing on the lands of Ledikin and others, the property of the petitioner. The defence stated to the action is a right of public way by a line of road which used to run from Insch to Old Rayne; and at the same time a cross petition was lodged at the instance of Mr M'Kerron, craving an order on Mr Gordon for the removal of the fences and other obstructions tending to interfere with the public right.

It is hardly necessary to observe that in a case of this kind the jurisdiction of the Sheriff is of a somewhat limited character. ‘A judgment by the Sheriff (says Lord Deas) in the case of a servitude road may settle the matter of right just as would be done in a declarator, but in the case of a public road the Sheriff can settle only the matter of possession till a declarator is brought in this Court; and, consequently, the proof allowed is different in the two cases, being forty years' possession in the one case and seven years' possession in the other, facts beyond the seven years being no further regarded than as they may indicate the character of the possession (as by tolerance or otherwise) within the possessory period—*Thomson v. Murdoch*, 21st May 1862, 24 D. 975.’ To ascertain the character of the possession which has been proved on the part of the public in this case, it thus becomes necessary to go back to the year 1815, when the road came to be dealt with by the District Road Trustees, under the Act 39 and 40 Geo. III. c. 32.

“Under this Act a new road, called the Gardensmill turnpike, was opened in the year 1803. It is part of the Great North Road from Aberdeen to Huntly and Inverness. The improved line of communication superseded sundry by-roads, which were accordingly shut up by the road trustees under the powers contained in section 71 of the statute.

“By this section it is made lawful for the trustees ‘to shut up and suppress roads of every description which may appear useless or of little importance to the public.’ The statute does not prescribe the manner in which this power is to be exercised. It assumes that it would be the accessory result in many instances of the new and improved means of communication which the statute authorised, and so it leaves the matter in the hands of the trustees without prescribing the formalities to be observed. The

power might thus be exercised on their own motion on the petition of a proprietor, or on the verbal application of any one interested, the only qualification attached being that notice of the resolution to shut up a road should be advertised at the churches of the parishes through which it passed for two consecutive Sundays, one month at least before it was actually shut up. The object of this was to enable persons opposed to the resolution to carry it to the next general meeting of the trustees; and meanwhile, in the event of an appeal being taken, the Sheriff, if he saw cause, was authorised to suspend the execution thereof until the matter was determined by the general meeting. But failing this suspension, the resolution, on the lapse of a month from the date of the notices, took effect.

"The road in question led past the farm of North Ledikin, then through the Ledikin Wood, and so to the existing turnpike. As it approached the eastern end it branched out into two different lines, one going to Lawrence Fair and the other to the Bridgend of Shevock, these two lines forming a triangle, of which the Gardensmill turnpike, when it came to be made, was the base. The first step taken after the formation of the new turnpike was to cut off the limb running down to the Bridge of Shevock. The proceedings in this matter have been recovered. There was first a report from a committee recommending it to be closed, and then the district meeting authorised the notices to be given. No further finding appears to have been deemed necessary. The road was completely obliterated, not a trace of it now remains, and to the regularity of the proceedings no exception has been taken. The town of Insch was also connected with the Gardensmill turnpike by a new road which joined it at the Mill of Newton. This road was opened sometime before the year 1815, and the result was that there were now two roads from Insch to Old Rayne, running nearly in the same direction, at a short distance from each other—the one by the Gardensmill turnpike and the branch from the Mill of Newton just referred to, the other by the road which is now the subject of controversy.

"In these circumstances, the proprietor of Newton, the grandfather of the present petitioner, brought the question of its suppression before the road trustees at a district meeting which was held at Pitcaple Inn on the 29th May 1815. The minute bears—"Culsalmond. At the request of Mr Gordon of Newton, a committee, to consist of Messrs Horne-Elphinstone of Logie, &c., and Leslie of Warthill, with the heritors of the parish, was appointed for the purpose of inspecting certain roads and the alterations thereof to be pointed by him, Mr Gordon convenor, and for shutting up the old road from Insch to Old Rayne, passing through his and Rothney's lands, now useless. The same was ordered."

"It is proved beyond all doubt that the road here referred to is the road in question, and that the minute is in the handwriting of Dr Beattie, who was clerk to the Garioch Road Trust. The writing appears to have been crowded in after the remainder of the minute was written, but there is no reason for saying that it was not all written at one time, and is not an authentic record of the proceedings of the meeting. The chal-

lenge which has been attempted of the genuineness of the document is not therefore well founded. It is said, however, that the minute does not prove that the trustees ever resolved to shut up the road in dispute. The committee appointed was merely to consider the propriety of its being shut up, and there is nothing to shew what was done upon the report, or indeed that they reported at all. The Sheriff is unable to accept this view. The words, 'The same was ordered,' cannot refer to the appointment of the committee, for that had already been done. They can only mean that it was the suppression of the road which was ordered, and the remit to the committee was, *inter alia*, to take the steps necessary for carrying the order into execution. This construction is supported by the terms of the next entry of the subject, dated the 1st of April 1816, when the clerk reported that the usual notice had been given 'in the parishes of Culsalmond and Insch for shutting the roads which formerly led from Insch to Old Rayne, passing through the lands of Newton and Rothney, as ordered by the district on the application of the proprietor.' This minute bears the initials of Mr Horne-Elphinstone, one of the committee, and it is reasonable to conclude that no further step was considered necessary either by the board or its committee. At all events, such was the opinion of both the clerk and Mr Gordon of Newton. Mr J. F. Beattie says that about the year 1818, being one day in a hurry for the post, he proposed going 'by the old road, but his father told him to go by the new road, as it was a bad example going by this one,' meaning evidently because it had been closed; and Mr Jessiman states that when he entered to North Ledikin in 1823 Mr Gordon told him that the road was shut up and that the people had no right to go there, and he accordingly ploughed it up. The steps subsequently taken for its suppression are proved by the condition in which it now exists, and which is thus described:—"At the western part of the petitioner's lands it is still a cart-road in very bad order, then comes a grass-field, with all trace of the track obliterated. It then enters the wood of Ledikin, into which the passage is barred by a gate. The line of the old road through the wood is shown by the feal dykes, but between these the track has been planted with trees, some of them supposed to be thirty years of age. As it emerges from the wood the passage is barred by a fence and a feal dyke which goes straight across the old road. After leaving the wood there is the track of a cart-road in the same line as the old road which now leads from the farm of East Ledikin, and then there is cultivated land all the way down to the turnpike.' These operations, which are certainly not of yesterday, entirely destroyed the road as a public highway for horses and carriages. That is admitted by even the defenders' witnesses. But if the act of the road trustees was effectual to this extent, there is no resisting the conclusion that it was completely suppressed for every purpose whatever, because the language of the resolution makes no reservation of it as a foot-path, and there is nothing to show that such a thing was ever suggested.

"If then the road was well suppressed in 1815, and the track was obliterated and the passage barred in the manner described, it is

difficult to see how the public could nullify the Act of Parliament by simply refusing to recognise the resolution of the trustees. The evidence indeed shows that many persons on foot continued to use it as a short cut, and attempts were continually made to stop them without apparently much success. This possession might have been sufficient to maintain an existing right but not to create a new one, and in the circumstances it is apprehended that it was incumbent on the defenders to bring up their case to this point. Although people are now willing to say that in scaling the dykes and leaping the fences they believed that they were exercising a legal right, it has been justly observed that in a case of this kind it is not enough that you find witnesses to say so; 'the circumstances must not be inconsistent with that conclusion in point of law'—*Jenkins v. Murray*, 4 Macph. The foundation of the rule of law which gives to the public a right to traverse the lands of a proprietor by a footpath being substantially presumed grant (*Forbes v. Morison*, 13 D. 1404), they were bound to show that all parties, the proprietor included, concurred in treating the Act of 1815 as practically rescinded. But so far from this being the case, the position of the matter all through has been simply this—that as between the public and the proprietor, neither of them would acquiesce in the proceedings of the other. There has been a kind of possession, but it was only a possession of a supposed road—a road which a public statute has declared that the public (in the event which has occurred) shall not possess. Therefore, notwithstanding the long interval which has elapsed, the Sheriff is of opinion that the proprietor is entitled to have the statute enforced."

Against this judgment Messrs M'Kerron, Slorach, and Fraser appealed to the Court of Session.

Argued for them—Whatever might be the result of declarator, were it brought to try the right-of-way, the appellants were entitled to a possessory judgment, as they had established a use of the road by the public for seven years. The road was never legally shut up by the trustees, as the provisions of the statute were not complied with by them.

Argued for the respondent (Mr Gordon)—In order to entitle a person to a possessory judgment something more than mere possession for seven years was necessary. There must be a title of some sort. Here, so far from the public having a title, the presumption was that the road was legally shut up in 1815 by the trustees. The evidence of possession on the part of the public was defective.

Authorities—*Napier's Trustee v. Morrison*, July 19, 1851, 13 D. 1404; *Shearer v. Hamilton*, Jan. 24, 1871, 9 Macph. 456; *Calder v. Adam*, March 2, 1870, 8 Macph. 645; *Wilson v. Henderson*, March 2, 1855, 17 D. 534; *Pollock v. Thomson*, Dec. 18, 1858, 21 D. 173; *Murray and Others v. Arbuthnot*, Nov. 29, 1870, 9 Macph. 198; *Calder v. Learmonth*, Jan. 27, 1851, 9 Sh. 343; *Murray v. Stewart*, Nov. 14, 1859, 2 D. 12; *Wallace v. Police Commissioners of Dumfries*, March 9, 1875, 2 Ret. 505; *Forbes v. Morrison*, Dec. 31, 1851, 14 D. 134; *Carson v. Miller*, March 13, 1863, 1 Macph. 601; *Glasgow v. Carlisle Road Trustees*, Feb. 9, 1854, 16 D. 521.

At advising—

LORD ORMDALE—The question to be determined in this case is one of some nicety, and not unattended with difficulty. It relates to an alleged public right of footpath through the property of Mr Gordon of Newton, in Aberdeenshire, and has been raised in a summary application for interdict presented by Mr Gordon to the Sheriff of that county against the present appellants, to prevent their trespassing on his property. They have resisted Mr Gordon's application, on the ground that in place of trespassing on his property they have merely used as they were entitled to use a public footpath which passes through his estate.

In support of their pleas the appellants presented a counter petition at their own instance, praying the Sheriff to interdict Mr Gordon and two other persons, farmers on his estate, from obstructing or interfering with the road in question, and this petition was conjoined with that at the instance of Mr Gordon, and a record was made up and closed in the conjoined process.

The Sheriff-Principal, reversing the judgment of his Substitute, decided the case in favour of Mr Gordon, by granting the interdict craved by him and dismissing the counter petition. Against that decision the present appeal has been taken.

The plea chiefly relied on by the appellants was to the effect that in respect of their possession of the disputed road or footpath for seven years preceding Mr Gordon's application for interdict against them in the Sheriff Court, they were entitled to the benefit of a possessory judgment, and that beyond the seven years' possession the Sheriff could not competently inquire, it being left to both or either of the parties, if they desired it, to have any larger question tried and determined by instituting the appropriate action for that purpose in the Supreme Court.

As a general proposition, I am not to dispute that, beyond the possessory question, the right to a public way or road cannot be declared and determined in the Sheriff Court. But in dealing with the possessory question I take it to be clear that the Sheriff is entitled and bound to ascertain and consider the character of the possession which the party claiming the benefit of a possessory judgment has had; and that for this purpose the inquiry before him is not necessarily to be limited to the seven years preceding the institution of the action in which the question is raised. It may very well be that the party in possession, and who has had it for seven years, is entitled, in the absence of proof to the contrary, to have it presumed in his favour that his possession was lawful, but it does not follow from this that the contrary may not be proved to the effect of preventing a possessory judgment going out. So, accordingly, in the present, as in any other disputed right-of-way case, it is undoubted, and indeed was not disputed at the debate, that it would be quite competent for the party resisting a possessory judgment to show that the possession relied on in support of it had been the result of violence, intimidation, or other illegal acts; in short, that in place of it having been of a character to indicate that it took place in the exercise of a right, it was truly in persistence of a wrong.

In other words, to entitle a party to the benefit of a possessory judgment his seven years' possession must be lawful and not wrongful. And this

principle can be illustrated and supported by various decided cases, some of them relating to roads, as will be afterwards shown. But, first, let me briefly advert to the more material of the circumstances in which the question has arisen in the present case.

That the seven years' possession on which the appellants rely is of a very meagre and questionable description can scarcely, I think, be disputed. The two last of his witnesses—and they may be taken as a specimen of them all—who speak to the road at all, Mr Patrick Cooper and the appellant M'Kerron, sufficiently show this. The former states that he cannot positively say whether he had been on the road within the last ten years or not, except on one occasion professionally in connection with the present case. And the appellant M'Kerron says, "I know the road in dispute well, and walked it frequently years ago;" and again, "Till three years ago I had no difficulty in getting along the pathway, but obstructions were put three years ago in the wood." It is unnecessary, however, to pursue this matter further, as I am willing it should be assumed that on the appellant's proof, looked at by itself, they might be held in the absence of all counter or rebutting evidence to have made out such a *prima facie* case of possession as to entitle them to the benefit of a possessory judgment. And in regard to the title, in a technical sense they required none, it being enough that they are some of the public having a right to use the public roads. In this respect the case is different from that of a servitude road, where no party can have a right to assert the use of it who is not, *prima facie* at least, in *titulo* of a dominant tenement. But, if to say that a party being one of the public, must have a title to insist on vindicating his right to use a public road, is to use language scarcely appropriate,—certainly not appropriate if by title is understood to be one in the technical meaning of that expression.

While, therefore, the appellants might have been entitled in virtue of their seven years' possession to the benefit of a possessory judgment if nothing had been established on the part of the respondent Mr Gordon to show that the possession was wrongful, a different result must follow if the appellants' possession has been shown to have been of that character—to have been in truth and reality more of the nature of trespass than of right. That the road in dispute was prior to 1815-16 a public road, not only for foot passengers, but also for horses and carriages, is unquestionable; but that it was about that time shut up by competent authority appears to me to be equally unquestionable on the facts as they are brought out in the proof, and correctly summarised by the Sheriff-Principal in the note to his judgment. And in addition to what the learned Sheriff says on the subject, I have to refer to the case of *Crawford v. Lennox*, 15th July 1852, 14 D. 1029; and the *Glasgow and Carlyle Road Trustees v. Tennant and Others*, afterwards cited for another purpose, where it was held that the proceedings of road trustees in shutting up a road cannot *ex intervallo* be objected to as informal and irregular, due notice having been given of them, as was done in the present instance, and no appeal against them taken to the quarter sessions, or, as provided for in the present case, to the Sheriff or his Substitute. Even supposing, then, that the proceedings of the road trustees in shutting up the road in

question were exposed to the objections as regards their form and regularity urged against them by the appellants, it is clear, on the authority of the two cases referred to, that that would be no good or available objection in the present dispute.

Assuming, then, that the road in question was ordered and authorised by the road trustees to be shut up in 1815-16, and that in point of fact it was about that time shut up, as is I think very clearly shewn by the proof, it cannot, I think, be held that the attempts on the part of some persons thereafter to continue the use of it, constantly resisted and objected to as they were, have had the effect either of preserving the road as a public one, as it had previously been, or of constituting of new a right-of-way in favour of the public. The resistance and objections on the part of Mr Gordon were of too marked and decided a description to admit of that. Without entering into details, it is enough to remark that the ground over which the road had passed previous to its being shut up was immediately or shortly afterwards in one part planted with trees, and in other parts ploughed up and obliterated, while dykes and fences were also erected, and from time to time renewed and kept up for the purpose of keeping out the public. It cannot therefore, I think, be taken from the appellants that the public had by prescriptive possession subsequent to the road being shut up in 1815-16 by the trustees, acquired a new right-of-way for foot passengers. They certainly had not that peaceable, lawful, and uninterrupted possession which would be necessary to enable them to do so. If, indeed, the respondent had been unable to show that there had been any shutting up of the road at all by competent authority, it might be presumed that the use of it by the public had a legal commencement, and it might in that case have been incumbent on Mr Gordon to have instructed, not merely that he had obstructed, but effectually prevented the use of it. But as the case stands it is to be presumed that any use there has been of the road by the public since it was shut up was illegal in its commencement, and having regard to the respondent's resistance ever since, must be held to have been for the whole period downwards, including the seven years upon which the appellants found as giving them a claim to a possessory judgment, also of an illegal character, and so cannot entitle the appellants to the benefit of a possessory judgment. There is ample authority in support of this view. Thus, in the case of *Maxwell v. Ferguson*, 24th January 1673, Mor. 70,628, it was found in an action for intrusion, in reference to a claim to the benefit of a possessory judgment, that there can be none where the entry to possession, although long anterior to the seven years, was by intrusion. And in the case of the *Countess of Dunfermline v. Lord Pitmedden*, 15 December 1698, Mor. 10,630, it was held that to acquire the benefit of a possessory judgment there must have been *bona fides* in the beginning of the possession.

These cases, it is true, did not relate to a road or right-of-way, but that cannot affect the principle itself. So, accordingly, I find it has been applied in several road cases. Thus, in the *Glasgow and Carlyle Road Trustees v. Tennant and Others*, 9th February 1854, 16 D. 521, where in an application for interdict at the instance of the trustees against certain parties who persisted in using a road

which had been shut up in virtue of statutory powers, and removing obstructions which had been placed on it by the road trustees, the Court held, notwithstanding the respondent's allegation of immemorial possession, that as the road had been shut up by the trustees in the exercise of their statutory powers, the respondents could not found on their illegal acts of subsequent possession to the effect of entitling them to the benefit of a possessory judgment. And so also in *Shearer and Others v. Hamilton*, 24 January 1871, 9 Macph. 456, it was held that a road having been shut up, or declared to be shut up, by road-trustees under their statutory powers, the public were not by subsequent seven years' use of it entitled to a possessory judgment. It is true that in the latter case the road belonged to the road trustees, while here it reverted to the private owner of the *solum* after it had been declared to be shut up, but I cannot see how this can affect the question of possessory judgment. There, as here, it was pleaded by the party claiming the benefit of a possessory judgment that it was enough that as one of the public he had been allowed to use the road uninterruptedly for seven years; but the answer to, this that the road had been declared to be shut up by lawful authority, which rendered any subsequent use of it by the public wrongous and illegal, was held to be good and sufficient.

The important point to be deduced from the cases which have been now referred to is, that it was held in them to be quite competent to look beyond the seven years' possession of the public in order to ascertain the character of the possession, or, in other words, to see whether it was lawful or not; and if competent to do so at all, I do not very well see how anything can depend on the number of years that may have elapsed since the road had been shut up, provided always that the subsequent use of it, from its commencement downwards, had been objected to and resisted. That being so, it cannot be said that the use of the road has been lawful, peaceable, and undisturbed; its character having, on the contrary, been wrongful and contentious from the beginning and throughout.

The case of *Calder v. Adam*, 2 March 1870, 8 Macph. 145, appealed to in the course of the discussion by both parties, brings out I think very well the distinction between cases where there has been seven years' uninterrupted possession without anything to shew that it was wrongful, and cases where the wrongful character of the possession has been shewn or offered to be instructed in answer to a claim to the benefit of a possessory judgment. Thus, in that case Lord Benholme remarked—"It is true that seven years' possession will not always give a possessory title, for the possession may have been precarious or violent, or there may have been some vice in it. Here there is no such peculiarity, and the evidence is conclusive. There can be no doubt that the possession was possession as of a public road." And Lord Neaves concurred, observing that—"It is not every sort of possession that would be enough; and any possession proved might be rebutted or explained away." So I say that in the present case the possession relied upon by the appellants in support of their claim to a possessory judgment has been explained away and rebutted; or, in other words, has been shorn, and

this quite competently without the necessity of resorting to a process of reduction or declarator, which of course could be instituted only in the Supreme Court, to be of an unlawful character, and not such as to entitle the appellants to the benefits of a possessory judgment. For these reasons I am of opinion that the judgment of the Sheriff-Principal is right, and ought to be affirmed.

LORD NEAVES concurred.

LORD GIFFORD—After the fullest and most careful consideration, I am sorry to find myself obliged to differ from the views and result now expressed by your Lordships, and although at one time I felt the case to be attended with a good deal of difficulty, I have ultimately come to be clearly of opinion that the respondents, M'Kerron and Others, are entitled to a possessory judgment and to the continued use of the road in question until the rights of parties therein are finally determined in an action of declarator or otherwise. I therefore concur in the result reached by the Sheriff-Substitute, although not quite upon the same grounds as those upon which he has proceeded.

The question raised in these three separate processes of interdict is a purely possessory question. The Sheriff Court only decided what is to be the interim state of possession of the footpath in question until the question of right be finally settled elsewhere. The Sheriff could not decide the question of permanent right—he could not determine whether there is or is not a right of foot-path as claimed by the respondents, but he could only fix whether the foot-path is in the interim to be shut up or not—that is, whether the petitioner is to exclude the respondents from using the path till they make good their right in a declarator.

In like manner this Court, in an appeal from the Sheriff, has no greater power or no greater jurisdiction than the Sheriff had. We cannot now decide the question of right, however desirable it might be to do so. Even if we had jurisdiction to determine whether or not there is a right of way (which in this process we have not, for we are merely reviewing the Sheriff's judgment) we have not the materials to decide any such question, for the only proof which has been allowed, or which could have been allowed by the Sheriff, was a proof of possession, and of the possessory question alone we are in a position to judge.

In my view, therefore, the only question to be determined is—What has been the state of possession of the footpath in question for the last seven years—that is, for the seven years preceding the present actions, or preceding the dispute which led thereto? Whatever that possession was, it must be maintained and continued until the question of right be finally determined. For this is the very meaning of a possessory judgment. It means that the *status quo* shall be maintained *ad interim* until it be finally settled which party is in the permanent right, and hence the question for the Sheriff always is, not whether there exists right-of-way, but whether there has been a possession of way for the last seven years or not. If there has been possession—uninterrupted possession for the last seven years—then

that possession must be continued until the proprietor, by means of a declarator, shows that there is no right-of-way, and by this means stops further possession.

It is true that in determining as to the proof of possession it is competent for the parties and competent for the Court to go further back than seven years—indeed, to go back as far as is necessary. But the object of so going back is not to ascertain the question of right, but merely to ascertain the character of the possession—that is, to ascertain whether the possessors claimed to possess as matter of right, or whether they did so by special permission or sufferance. If the possession was claimed and enjoyed as of right—that is, if the possessors asserted a right and enjoyed it for seven years—then that possession must be continued whether they had really a right or not. It is enough that the public claimed the right and enjoyed it. The Sheriff cannot ask and cannot decide whether they were right or wrong in making the claim. To go back beyond the seven years in order to ascertain whether there actually existed a permanent right or not, would be to obliterate the distinction between a possessory question and a question of permanent heritable right. It would be to make the question of *interim* possession incidental to the larger question of permanent right, and it would practically give the Sheriff the right, and impose upon him the duty, of deciding the heritable question of right, in order that he might settle the mere question of *interim* possession. But this would be just inverting the law, and practically denying a possessory judgment unless the party could establish at the same time a permanent right.

The only question therefore is—What has been the state of possession of the footpath in question for seven years preceding the present dispute? Whatever the state of possession has been, that state must be continued till other measures are taken, and in another Court than that of the Sheriff. All that the Sheriff has to do is to preserve the *status quo*, to keep matters in their present condition—that is, in the condition in which they have been for seven years, until the matter of right be finally ascertained.

I at first felt with some of your Lordships that the proof of possession for the last seven years was somewhat narrow, but on a more careful perusal of the proof I am satisfied that it is quite sufficient to entitle the respondents to a possessory judgment. Indeed, upon this point both the Sheriffs are at one. The Sheriff-Substitute expressly finds, and I think he is borne out by the evidence, that the road has remained open and been used as a public footpath, and the Sheriff-Principal, while admitting the possession, rests his judgment on the ground that it was “only a possession of a supposed road, a road which a public statute has declared closed” by virtue of proceedings taken sixty years ago. But in my humble opinion this is just to decide the question of right, and not to limit himself to a question of possession.

Turning to the evidence, I really can have no doubt that, actual possession has been fully proved. Even the witnesses for the pursuer Mr Gordon fully establish the possession. The tenants of the farms tell us that they could not stop the public though they tried to do so. They

were obliged to leave the path unploughed, otherwise the public would have trodden down the crop. It was in vain to put up fences, for the public always tore them down and passed freely through, and so on—the evidence embracing almost every incident which is available in establishing a right-of-way. John Jessiman, the existing tenant of North Ledikin, whose steading is close to the path in question, and who has been on the farm since 1823, says that “some people have used the road since 1823, and some have not. It has been in daily use all the time,” and he explains that though he and his father tried to stop the people, they never were able to do so. This evidence is abundantly confirmed by the respondent's witnesses, and although it may be true that the number of persons using or requiring to use the road was limited, it seems perfectly clear that at least by a considerable number of persons it was claimed and enjoyed as a public footpath. Going back beyond the seven years, the evidence of the possession, and its character, at least as a claimed public right, becomes all the clearer—indeed, it appears that for more than forty years the right has been both asserted and enjoyed.

The only contradictory proof is a proof of complaint and protest on the part of the proprietors of the ground. It seems to be true that they always complained and protested that there was no public right of pathway; but so far from this being in favour of the pursuer, I think it is very strong evidence against him, for it proves beyond the possibility of dispute the character of the possession—that the possession by the public was possession not by permission but as a right, that is, the public claimed the right and took it as their right—took it in spite of the proprietor's complaints, and in defiance of his objections—and this is just the kind of possession which makes a public right, and that of the strongest kind. It is a mistake to say that the possession was interrupted. It was not interrupted, it was never stopped, it was merely challenged, and a challenge which is defied and disregarded is so far from being an interruption that it is the best proof of uninterrupted possession as of right. The proprietor, when he found that his objections were unheeded and his fences broken and his fields trampled, should have resorted to interdict forty or fifty or sixty years ago. Having never done so till now, he cannot complain that in a mere possessory question the possession which the public have hitherto, and for so long a period, vindicated, or at least actually enjoyed, shall be continued till the matter of right be decided against them.

This is the ground upon which I am of opinion that the Sheriff-Substitute's judgment is right, and that the possession of the public such, as it is proved to have been in time past, should be continued until the right to invert it shall be competently established. But one or two questions have been raised and very ably discussed in argument on which I should like to say a single word.

It was keenly and ably maintained that the road was duly and formally shut up in 1815 in virtue of the Act 39 and 40 Geo. III. cap. 32, being the Road Act applicable to the district. Now, I am not satisfied that this was so, or at least that the actual shutting up—I mean the

shutting up *via facti*—ever went farther than its shutting up as a road for carriages or carts, and as to this the present respondents raise no question. So far as tolls were concerned, the Road Trustees had no interest except to secure the carriage traffic upon the new road, and if the proprietor did not take steps effectually to prevent foot passengers, resorting to interdict if necessary to prevent trespass and breaking of fences, he has himself to blame. But then, as already explained, I think the question as to the shutting up in 1815 and its legal effect, is not a question for the Sheriff or for this Court in actions to regulate interim possession in 1876.

But still farther, I am very clearly of opinion, that even although it were absolutely and completely established that the road was well and effectually shut up in 1815, so as to make the *solum* of the road the unburdened property of Mr Gordon and his authors, this would not prevent the public from acquiring a right of way over it or over any other portion of his estate by possession claimed as of right and actually enjoyed for any period of forty years subsequent to 1815.

Sixty years have elapsed since 1815, and possession as of right for forty years constitutes a right of way. Such possession is alleged, and if in a proper action such possession is proved, it seems to me to be quite in vain to allege a shutting up by Road Trustees at any time previous to the commencement of such possession. As well might the proprietor go back 100 years or 500 years—it would be useless to do so if a right has been acquired during the last forty years. The shut-up road cannot be in a better position than any other part of the estate over which there never was a road at all. The statute cannot do more than give the *solum* to the proprietor unburdened. The proprietor may then do what he likes with it. He might undoubtedly make a grant of public road, and the law declares that forty years' possession as of right is equivalent to a grant. On this ground alone it seems to me unnecessary to inquire whether there was an effectual shutting up or not so far back as 1815.

As to whether there has been possession as of right for forty years or not, of course I give no opinion. That point has not been remitted to probation, and neither in form nor in substance have we any proof on the subject. That question would be the issue in the action of declarator, and it would be for a jury to answer it. But I am free to add, in point of law that the kind of possession which, if continued for seven years, will warrant a possessory judgment, will in such cases as the present, if continued for forty years, warrant a judgment affirming the permanent right.

LORD JUSTICE-CLERK—I agree with Lord Ormisdale.

This is a possessory question, and depends on whether, if the possession proved for the last seven years had existed for forty years, it would have been sufficient in character and amount to establish the right claimed for the public. I do not agree with Lord Gifford that the only question for inquiry in such a case, where the benefit of a possessory judgment is claimed, is what was the state of possession, or that the Sheriff can only maintain the *status quo*, however violent or

clandestine the possession may be. The possession must be of the character I have stated.

The possession proved in this case has been divided and contested during the seven years in question. The appellant has proved on the part of the public a certain amount of continuous use of this line of footpath, but a use opposed, resisted, and obstructed by the proprietor. The respondent, on the other hand, has proved possession of the *solum* of the road as private property by planting, enclosing, and cultivating it, and by acts of direct obstruction, attempted but not successful.

We have not to consider in this case how far such possession, continued for forty years, would have been sufficient to prove the public character of this footpath without further light in regard to the nature of the mutual possession, for it is certain that in 1815 the road was not only public but was under the management of the road trustees as a cart-road as well as a foot-road. The question is, whether it was shut up in that year? If it was not, then the respondent could only acquire an immunity from the public right by excluding the public for forty years, and proof by the public of such possession as has been proved in this case would be amply sufficient to maintain the right. If, on the other hand, it was shut up in that year, then the public could only acquire the right claimed by the consent, expressed or implied, of the proprietor; and such resistance on his part to the public use of the road, and assertion of his own private right, would be clearly sufficient to exclude any presumption of acquiescence or consent.

Holding, therefore, the question to be whether in the circumstances of this case the possession proved for the possessory period was of such an amount and character as would, if continued for forty years, have established the public right, I am of opinion that this question entirely depends on whether the road was or was not shut up by statutory authority in 1815.

That question we can only consider in its bearing on the possessory right. It is a question on the title, and I regard it only in its *prima facie* aspect, leaving the absolute right to be tried in any appropriate process. But, *prima facie*, I think we must hold that the road was shut up. The original resolution of the trustees was no doubt ambiguously expressed and irregularly entered in the minutes. But it was clearly adopted afterwards. We must give faith to the minutes when they bear that the clerk reported that due advertisement had been made; and as no appeal was taken, and the road was in point of fact shut, as far as it reasonably could be so, I think the burden of establishing the contrary in a declarator is thrown on those who maintain the public right, and that the possessory right must remain with the respondent.

The Court pronounced the following interlocutor:—

“The Lords having heard counsel for the parties on the appeal, Find, in point of fact, that in and prior to the year 1815 there existed on the line in question a public road for carts and foot passengers, under the charge of the District Road Trustees: Find that it appears from the minutes of the trustees that in the year 1815 they resolved

to substitute, and did substitute, a new road for that which had previously existed, and that thereupon the trustees resolved that the old road should be shut up, and this, after due advertisement, was done: Find that since that time, and during the last seven years, the respondent has used the *solum* of the road claimed by planting, enclosing, and cultivating the same: Find that during the same period of seven years the public have used the line in question as a public road, obtaining access thereto by climbing over the fences, or forcing a passage through them, and by walking over the cultivated ground: Find that the possession so proved by the appellants is not sufficient to entitle them to the benefit of a possessory judgment: Therefore dismiss the appeal, affirm the judgment of the Sheriff appealed against, and decern: Find the respondent entitled to expenses, and remit to the Auditor to tax the same and to report."

Counsel for Gordon—Dean of Faculty (Watson)—Asher. Agents—Auld & Macdonald, W.S.

Counsel for M'Kerron and Others—Balfour—Keir. Agents—Webster & Will, S.S.C.

Wednesday, February 16.

SECOND DIVISION.

[Lord Young.

CRAIG v. PEEBLES.

Process—Damages—Malice—Want of Probable Cause—Relevancy.

A conviction under the Public Houses Act having been quashed on the merits by the High Court of Justiciary, the party accused brought an action of damages against the Procurator-fiscal, on the ground of malice and want of probable cause. The Court *assolzie'd* the defender, in respect that, although malice was sufficiently averred, there was not set forth on record a relevant case of want of probable cause in regard to the facts and circumstances on which the criminal complaint was based, and that so far as the law involved in that complaint was concerned there was a probable cause.

This was an action of damages at the instance of James Craig, spirit-dealer, West Merryston, against John Kidd Peebles, Procurator-fiscal at Airdrie. The pursuer held a license for a public-house at West Merryston, which during the currency of this license was almost entirely destroyed by fire. Soon thereafter the pursuer was served with a complaint at the instance of the defender, charging him with "an offence within the meaning of the 'Public Houses Acts Amendment (Scotland) Act, 1862,' section 17th; in so far as on or about the 8th day of May 1875 the said James Craig, defender, did within the broken walls of an old public-house which was burnt down, situated in West Merryston, in the parish of Old Monkland and county of Lanark, unlawfully traffic in whisky or

other exciseable liquors, without having obtained a certificate in that behalf in terms of said Act; and such offence is the first offence, whereby the said James Craig is liable to forfeit and pay the sum of £7, with the expenses of prosecution and conviction, to be ascertained upon conviction, and in default of immediate payments thereof to be imprisoned on his own charges and expenses for a period of six weeks."

On this complaint the pursuer was tried on 20th May 1875 at Airdrie before two Justices. He pleaded his license in bar of the complaint, and the Justices took time to consider the case, and adjourned it until the 27th, on which date, having in the interval consulted the Sheriff-Substitute, they convicted the defender, finding him liable in a penalty of £7, with £2 of expenses, or in default six weeks' imprisonment.

On 16th June 1875 the pursuer brought the proceedings before the High Court of Justiciary by suspension, and the conviction was quashed.

Craig accordingly brought this action against Peebles for £500 damages, on the ground that the complaint had been brought maliciously and without probable cause.

The pursuer, while admitting that the house had to a considerable extent been destroyed by the fire, denied that it was destroyed to such an extent as to warrant the defender's proceedings. The pursuer further made full averments of malice, and his averment of want of probable cause, in a condescence of *res noviter* lodged by him, was as follows:—"The said conviction was procured by the defender when he well knew that there was no just, reasonable, or probable cause therefor, and solely to gratify his malicious feelings against the pursuer, and when he farther well knew, or ought to have known, that, owing to the equal division of opinion which had occurred at first diet, it was his duty as prosecutor not to ask for a conviction of the pursuer, in terms of section 21 of the Summary Procedure Act, under which the proceedings had been taken and carried out."

The defender's first plea in law was that the statements on record were not relevant to support the conclusions of the summons.

The Lord Ordinary pronounced the following interlocutor:—

"26th November 1875.—The Lord Ordinary having heard counsel, and considered the record and whole process, sustains the first plea in law for the defender: Assolzie's him from the conclusions of the action, and decerns: Finds the pursuer liable in expenses," &c.

The following opinion was delivered by Lord Young in pronouncing judgment:—

"This case, although the facts are novel, presents a question of general interest and importance.

"The defender prosecuted the pursuer before the Justices on the Public Houses Act, 1861, for selling spirits without a license, and obtained a conviction, which was subsequently set aside by the Court of Justiciary. Neither before the Justices nor in the Court of Justiciary was there any dispute about the facts, and the only controversy regarded the legal question on which the Court of Justiciary, differing from the Justices, set aside the conviction. The accused party (the pursuer) acknowledged the sale within the speci-