plete answer to that reasoning is that it has been held even in the stronger case of money lent by one person to another, the obligation for repayment being taken not in favour of the lender, but at the lender's request in favour of a third party, that it would not create an irrevocable transfer of the fund in the hands of the third party, and the reason is that so long as the custody of the document is retained by the lender, it is in his will to destroy or alter it. So here the mere circumstance of taking this policy in the name of trustees for the wife did not create "an irrevocable transfer of funds." If that were true, then in the case of a bond in favour of a third party, or a policy such as we have here, the transfer would be effectual, although the lender or insurer had written a *notandum* on the deed that he held the deed as subject to his own control; even in such a case it would be a good transfer.

Really the case comes to be a question of fact, and that question is, whether this policy can be said to be delivered? and on that question of fact I am rather disposed to take the argument on the view pressed by Mr Gloag, and take it that this destination should be read as a destination in favour of Mrs Jarvie. It has been held on the authorities cited to us that where such a destination is given to the wife in liferent and to the children in fee without taxative terms, the wife is fiar, and this cannot well be disputed. I think a great deal is to be said for the view that the destination in the policy creates a fee in Mrs Jarvie. But even if that be so, when we look at all the circumstances it has not been made out that there was delivery. If the destination in the policy had been simply to the wife, though the husband had held that in his custody, I think it would have been difficult to distinguish the case from *Craig* v. *Galloway*, for if you assume that the husband is the proper custodier of his wife's writs and held it for her, there would in that way have been delivery. But in *Craig* v. *Galloway* the delivery was assumed.

The arguments here against delivery are, first, that this is not a policy simply in favour of the wife. It is a policy taken in favour of trustees named, and the survivors and survivor of them, and I think that if Mr Jarvie intended that that should be regarded as a delivered deed, then it was not to be left in his own custody, but must have been handed to these trustees. Again, in the body of the deed, it appears that the trustees were to hold it as directed by writing under the hand of Nedrick Jarvie. Mr Gloag says that that must refer to a writing already executed, but the parties are agreed that no such writing has been really executed. I think it must refer to a writing intended to be executed. Taking the fact that this is a deed in favour of third parties to hold for the wife, and with reference to which a writing was to be given to those third parties, and that Mr Jarvie never did part with the contract, it appears to me that there was no delivery, and as there was no delivery, then this policy, whether you look at the surrender value or the ultimate proceeds, formed part of his estate, and is carried to his trustee. For these reasons I concur.

Lord Adam—The Lord Ordinary says that in his opinion delivery was not necessary to vest the right in the donee, and the ground of that opinion he states to be that Mr Jarvie was never instituted creditor in the obligation, and the obligation in its inception was in favour of trustees for wife and children. Now, if the Lord Ordinary means that as a correct exposition of the law with reference to all documents, I think it is quite unsound, for he goes against the cases to which your Lordship has adverted, and against the well-known principle of our law that donation is not effectual without proof, and is not to be presumed. The Lord Ordinary does not attempt to draw a distinction between this document, which is an insurance policy, and any other bond or document of debt, and if that be so, I think the decisions are against his view of the case. If this deed required to be held for the donee, then I think that is not proved, because I agree that in this case Mr Jarvie was not the proper custodier. I think the trustees were the proper custodiers, and that is an essential difference between this case and that of *Craig* v. *Galloway*. I also concur with your Lordship that the clause in the policy which points to a future deed shows that he chose to retain it within his entire control. At the same time I do not go on the statements in the assignation, as it is obvious that circumstances might have changed, and that he might have an interest to make statements which are not to be taken like statements made *unico contextu* with the deed. If he had endorsed on the policy that he held it for his wife and children, or if he had put it beyond his control, then the result would have been different, but I prefer not to go into these matters. On these grounds I concur with your Lordship in the chair.

The Court recalled the Lord Ordinary's judgment, and sustained the claim for the claimant Martin.

Counsel for Trustee and Real Raiser (Martin)—Asher, Q.C.—G. W. Burnet. Agents—Fodd, Simpson, & Marwick, W.S.

Counsel for Mrs Jarvie, &c.—Gloag—Fleming. Agents—Macandrew, Wright, Ellis, & Blyth, W.S.

Friday, January 28.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

HOPE VERE AND OTHERS *v.* YOUNG AND OTHERS.

Road — Footpath — Servitude — Statute Labour Road—Act 47 *Geo. III. c. xlv.*

When a road is shut up as a superfluous road by the Trustees entrusted with jurisdiction to do so, it is shut up for every purpose, and cannot continue to exist as a right-of-way for foot-passengers.

A road was closed by order of the Road Trustees in 1869, as being a superfluous road, such as they were authorised by a local Act to close. In a question whether they had jurisdiction to close it, or whether it was a public footpath which they had no right to close, it was proved that it was a public road for all

purposes, and under the administration of the Trustees till within forty years of that date, though the use of it except as a footroad had, in consequence of the opening of a new road, ceased during the latter part of that time. *Held* that the Trustees had jurisdiction to close it, and therefore that the proprietors of the ground through which it ran were entitled, against members of the public claiming a right-of-way over it, to declarator that it had been validly closed, and that there was no servitude or right-of-way over it.

The Lord Justice-Clerk *dissented*, on the ground that the public having in the exercise of their right used the road as a footroad for over forty years, the Trustees had no power to close it as regarded that use.

This was an action by James Charles Hope Vere, Esq. of Blackwood, in the parish of Lesmahagow and county of Lanark, and John Blackwood Greenshields, Esq. of Kerse and Verehills, and others, trustees of the late William Tod of Logan and Birkwood, in the said parish and county, against Daniel Young, tailor, Kirkmuirhill, and certain other persons living in or near there, to have it declared (1) that there existed no public right-of-way or servitude of road or passage along a road leading from a point on what was formerly the turnpike road from Carlisle to Glasgow, and is now the road from Lesmahagow to Kirkmuirhill, to a point on the new and existing road from Glasgow to Carlisle, and that any public road or right-of-way which formerly existed between these two points was duly and validly shut up by the Statute Labour Road Trustees in terms of the Act 47 Geo. III. c. 45, on or about the 19th January 1869, and that the pursuers, who were proprietors of lands which, they averred, marched each other at the line in dispute, were entitled to erect such walls and fences as would prevent passage along the line in dispute; (2) to have it declared that the pursuers were entitled to prevent the defenders and all others from passing between these two points along the line of the said road; and (3) that the defenders and all others should be interdicted from entering upon the lands of the pursuers for the purpose of going between the said points, or from injuring any fence put up by the pursuers.

Section 36 of 47 Geo. III. c. xlv. [an Act for amending an Act of 12 Geo. III. for repairing and widening roads in the county of Lanark, &c.], provided—"That it shall be lawful for the trustees in any parish, or for any heritor or other person within the said county, conceiving themselves interested therein, to apply by petition to the annual ward meeting of trustees to have the direction of difficult or inconvenient roads altered, and superfluous or useless roads shut up, and the said ward meeting shall thereupon name a committee of at least three trustees, one of whom shall be a justice of the peace for the said county, to inspect such roads, and report their opinion of what is proposed to a subsequent ward meeting, and the committee shall order the said petition to be intimated one calendar month before the meeting," in a manner specified, "and upon report made by the committee to the ward meeting they shall hear all parties interested, and are empowered to order the direction of such roads to be altered and changed, and such superfluous roads to be shut up, providing that nothing herein contained shall be construed to confer on the said trustees a power to alter the course or shut up any turnpike road."

The pursuers averred—"(Cond. 4)—For some time down to the earliest part of the present century there existed a public road or right-of-way along or near the line in question over the pursuers' property, but the same had been for many years prior to 1868 discontinued and abandoned by the public. The said road was a statute labour road, and was under the care and management of the Statute Labour Trustees, who maintained the same as a statute labour road out of the funds under their care. The road in question was a road in the sense of the said 36th section, which had become superfluous and useless for many years prior to 1869, and had remained so down to that date. In these circumstances the late W. E. Hope Vere, Esq., the author of the pursuer J. C. Hope Vere, and the then trustees of the said late William Tod, being heritors in the county of Lanark, on or about 8th October 1868 applied to the Statute Labour Trustees of the Upper Ward of Lanarkshire to have the said former road declared duly shut up in terms of the statute. (Cond. 5) Thereafter the necessary procedure having been gone through, and intimation duly made, the said trustees on 19th January 1869 ordained the said road to be shut up, and discontinued as a public road in all time coming. The said road was accordingly so shut up at that time. An extract from the minute of the said Statute Labour Trustees to this effect is produced and referred to."

The pursuer Mr Hope Vere also averred that as proprietor of the ground he had prepared part of the ground for planting, but that the defenders had on 4th February broken down a wall built along the side of the new Glasgow and Carlisle road, and destroyed the preparations then made.

The defenders stated that "there exists a public footpath or right of passage" along the line in dispute; that for more than forty years prior to 1868, and ever since, the public had had access to and used the public footpath or right of passage; that the footpath, which was of considerable width, never was a turnpike or statute labour road, and that the Road Trustees never exercised any superintendence over it prior to 1869, or expended money or labour on its maintenance. It was admitted that the inhabitants of Kirkmuirhill had broken down the fence erected by the pursuers, but the defenders averred that they did so on the ground that it interfered with the legal use by the public of the footpath.

The pursuers pleaded—"(2) The said road having been under the management of the Road Trustees, and having been duly closed as condescended on, the pursuers are entitled to decree as concluded for."

The defenders pleaded—"(2) The road in question being a public footpath upon which no public money had been expended, and which had not been under the management of the Road Trustees, the said Road Trustees and Justices had no power to shut it up, and the proceedings founded on are *ultra vires* of said bodies."

A proof was allowed. It was proved that the

road was a public road under the administration of the Justices prior to 1820. About that year the new Glasgow and Carlisle Road was opened, and the traffic along the road diminished greatly in consequence. Certain cart and carriage traffic, however, took place over it till about 1835, and the road was used for foot-passengers from 1820 down to the date of the action. It was also shown that the Justices expended small sums in maintaining the road prior to 1820.

The Lord Ordinary pronounced the following interlocutor:—"Finds that there is a public footpath or road for foot-passengers along the line of road described in the conclusions of the summons; that the Road Trustees have no power, under or by virtue of the Act of Parliament libelled, to shut up the said footpath; and that the defenders and all others are entitled to the free use of the said footpath or road for foot-passengers: Therefore assoilzies the defenders from the conclusions of the action, and decerns: Finds the pursuers liable in expenses, &c.

"*Opinion.*—The only difficulty in this case arises from the order of the Road Trustees for shutting up the road in question in 1868. There can be no doubt as to the actual use of the road by the public, either before or since that date. Prior to 1821, although it does not appear for how long a time, it had been used as a public road for carts and carriages. But in that year the new road from Carlisle to Glasgow was opened, and a portion of this new road which passed through the same district served the purposes of a public highway more conveniently than the road in question. Accordingly, since 1821 the public have abandoned all use of the latter road for any purpose except that of a public footpath. But they have continued to use it as a footpath, although for that purpose only, down to the present time. There is no real conflict of evidence as to this point—those of the pursuers' witnesses who had the best opportunities for observation being quite as emphatic in asserting the public use of a footpath as the witnesses for the defenders. If the only question, therefore, were whether the public had established a right-of-way for foot-passengers by continuous use for forty years and upwards, there can be no doubt that the defenders would be entitled to a verdict upon that issue.

"But it is said that the road was a statute labour road under the management of the Road Trustees, by whom it was shut up as superfluous in 1868, and that its use by foot-passengers is to be ascribed not to any separate or independent right in the public to a footpath, but to the more extensive public right which was extinguished by the order of the Road Trustees that the road should be shut up. It is true that people have still continued to use the road as a footpath notwithstanding the order of the trustees. But no amount of use since 1868 would either establish a new right in the public or keep alive any right which the trustees had power to determine. On the other hand, it is certain that the trustees had no power to shut up a footpath if the public had no higher right at the date of their order. This was decided in the cases of *Pollock* v. *Thomson* and *Lord Blantyre* v. *Dickson*, and the local Act relied upon by the pursuers gives no higher powers than the Acts which were in question in these cases.

"The question therefore comes to be, whether the road was in 1868 a public road for general purposes under the management of the trustees, and which they had power to close? And I think the pursuers have failed to show that at that date it was a public road in any sense, except that it was a road over which the public had a right of footpath. There is some evidence, although it is very scanty, that before 1820 the trustees treated it as a road under their management. The most material piece of evidence is that on one or two occasions before that year the Statute Labour Trustees expended certain small sums of money upon a road which may probably, although not certainly, be identified with the road in question. But assuming the identification to be complete, it does not follow that it was still a public road in 1868. There is nothing either in the Act of Parliament or in the minutes of trustees to show how it came under their management, or what was the nature of the public right, if any, which justified their spending public money upon it. There is nothing to show that it was made public by the operation of any Act of Parliament, or that the public had any right in it which was not dependent upon continued possession. But whatever may have been the previous use, it is admitted that for more than forty years before 1868 the public had not used the road for any purpose except as a public footpath only. If in that year, therefore, an action had been brought against the pursuers to declare a public right-of-way, they must have obtained a verdict except in so far as regards the footpath. And it appears to me that if the Road Trustees, instead of interposing to shut up the road on the application of the pursuers, had interfered adversely to the pursuers on the allegation of a public right, and endeavoured to sell the ground under their statutory powers, or to have the road repaired or widened so as to afford accomodation for carts or carriages, the pursuers would have had no difficulty in resisting any such interference with their property. It is in vain, therefore, to ascribe the public use and enjoyment of the footpath to any higher right which the trustees had power to determine, because whatever may have been the earlier history of the road,—and as to that we have very imperfect information—there has been no such right for more than forty years."

The pursuers reclaimed, and argued—The road in question was a public road for all purposes under the Statute Labour Road Trustees. They had expended public money upon keeping it up so long as it was necessary to do so, and had never let it go out of their jurisdiction. Carts and carriages had ceased to go on it, and the trustees had therefore full power to shut it up if they thought fit, and took the ordinary procedure as had been done here. Supposing that the road had been only a footpath, then the trustees had still power to shut it up, because the right of footpath came from its being a public road, and the trustees had power to stop the use made of the road if they thought fit—*Lord Blantyre* v. *Dickson*, November 3, 1885, 13 R. 116, 23 S.L.R. 85; *Pollock* v. *Thomson*, December 18, 1858, 21 D. 173; *Murray* v. *Arbuthnot*, November 29, 1870, 9 Macph. 198; *Shearer* v. *Hamilton*, January 24, 1871, 9 Macph. 456.

The defenders argued—The road in question was never a statute labour road; no money had been shown to be spent upon it, which was the

test whether a road was a statute labour road or not. A public right-of-way for carts and carriages might be lost *non utendo*, and yet the right of footpath continue—*Macfarlane* v. *Morrison*, December 19, 1865, 4 Macph. 257. Even if the road was well shut up in 1868 as a public road for carts and carriages, it did not follow that it was well shut up as a footpath, as the rights to the two were separable, and here the public had had the right of footpath for more than forty years before 1868, although part of that time carts and carriages had also used the road—*Davidson* v. *The Earl of Fife*, June 5, 1863, 1 Macph. 874.

At advising—

Lord Craighill—The pursuers of the present action seek to have it found that the road described in the conclusions of the summons is one over which there has been since 1869 no right-of-way either for carriage or for foot-passengers. The Lord Ordinary has found that so far as regards cart or carriage traffic the pursuers are entitled to prevail, but that as regards foot-passengers the decision must be in favour of the defenders, because for more than forty years prior to 1869 the road had been used for foot traffic, and consequently was not affected by the deliverance of the Justices by whom in 1869 the road was closed.

I have come to a different conclusion. I agree with the Lord Ordinary in thinking that the road in question was a public road under the administration of the Justices for an unknown period prior to 1820. The proof by which this is brought out is not very abundant, but it seems to me to be enough to lead to this conclusion. The minutes of 1808 show that the attention of the Justices was directed to roads in the parish, and subsequent entries, as interpreted by the evidence, show that there were sums which were spent by the Justices upon this road, though its identification is less easily made out than might have been expected. There are also the proceedings of 1830, which were originated for the purpose of shutting up the road as one which, even at that time, was superfluous or useless. Putting all things together which are to be found in the proof, I have no hesitation in concurring with the views of the Lord Ordinary on this part of the case.

In 1820 there was opened a new portion of the Glasgow and Carlisle road which had for some time been in the course of formation, and from that time forward the traffic on the road in question, which previously had been a part of the Carlisle road, was very much diminished. But cart and carriage traffic continued to be upon this road, at anyrate till 1835. Carts and carriages may have used this road even later, but that seems to be uncertain. They, however, were certainly there after 1829, and that is enough to prove that the road was an open road—a road in use—and therefore a road which remained under the administration of the Justices within forty years prior to 1869, when it was closed. All are agreed that the road was used by foot-passengers till 1869, but it was a road for carts and carriages as much as it was for foot-passengers, so far as right of use was concerned, and when the Justices in 1869 came to consider the application which was made to them under the local Act 47 Geo. III. c. 45, sec. 36, the only question they had to determine was whether the road in question, as a cart or carriage as well as a road for foot-passengers, was or was not superfluous or useless for the district? A petition by the heritors was presented to them. They appointed a committee; there was a report returned. Advertisements were made as directed by the statute, but none to oppose appeared, and the result was that the Justices being satisfied that the grounds of the application had been established, the road was closed. If the Justices had jurisdiction, then the defenders admit that their deliverance cannot be upset, and the facts being as has just been explained, it must, I think, be held that there was jurisdiction, and therefore that the present pursuers are entitled to prevail in this action.

Three decisions, not referred to at the debate, were brought under my notice by your Lordship in the chair while the case was under our consideration. One is *The Glasgow and Carlisle Road Trustees* v. *Tennant*, February 9, 1854, 16 D. 521. Another is *Murray, &c.*, v. *Arbuthnott*, November 29, 1870, 9 Macph. 198; and the third *M'Gavin* v. *M'Intyre & Company*, June 12, 1874, 1 R. 1016. The question in those cases comes very near that which has to be decided here, but they do not actually touch it, and our judgment here is not to any extent fettered by anything that was said or done by the Court in those cases.

The first of the three cases was one in which a local Act authorised the trustees, when any part of the road was altered, to shut up such part as should be no longer of use, or where a toll might be evaded, but did not prescribe any form of procedure, and directed any parties aggrieved by shutting up the road to apply to the Quarter Sessions. In an application for interdict at the instance of the trustees against certain persons who persisted in using the road which had been shut up under the statute, and removing the obstructions placed by the trustees, the respondents pleaded immemorial possession, and that there was no written minute or resolution of the trustees against which an appeal could be taken; interdict accordingly was granted—the Court holding, upon the construction of the statute, that the road had been duly shut up by the trustees in the exercise of their statutory powers, and that the respondents were not entitled to found on their own illegal acts as constituting possession. This case, so far as it goes, is in favour rather of the pursuers than of the defenders. The road was shut up, but a part of it was subsequently used by the public, and what was decided was, that the trustees having jurisdiction, and the provisions of the statute having been observed, such use as there was could not, and did not, preserve the right of public way which had previously existed. In the present case there was no use taken of the road, which had been shut up after the deliverance of the Justices by which it was closed, but even if there had been, the decision just cited shows that such use would have been without avail. The trustees were within their competency, and as any use behoved to be an illegal use, the decision of the Justices could not thereby be wrought off or nullified.

The second of the decisions was of this nature. In 1824 the proprietor of grounds through which a public footpath ran presented a petition under

the 21st section of the Edinburgh County Road Act to the Road Trustees for permission to alter the course of the path, and on the new path being completed, to shut up the old path. A committee was appointed, and reported that the proposed alteration would be an improvement. The trustees then granted warrant to the proprietor to alter, and authorised him to shut up the old road as soon as the new line was completed. When the new line was made, the proprietor tried to exclude the public from the old road, but with only partial and varying success. In an action of declarator of right-of-way by the public it was held that the footpath had not been legally shut up, because, first, the 21st section of the Act referred to, gives the trustees no power to shut up a footpath, and secondly, assuming that such a power was given, the necessary proceedings had not been followed. That case accordingly related exclusively to a footpath, but the present relates to a road for all manner of traffic. If there had been here a footpath independent of the carriage-way what was done in *Murray's* case might be of some avail, but so far as appears there was no footpath before the road as a whole was used by the public, or before the Justices assumed the administration, and consequently such a use as was taken by foot-passengers was only a use of the public road, and not the use of ground which was used as a footpath exclusively. The Justices, when they closed this road in 1869, closed it in its entirety. The issue upon which they decided was, whether the road as a whole, and taking the use of it by foot-passengers into account, was superfluous or useless? They held that it was, and when the road was so closed, the right of footpath was as much extinguished as was that of all other kinds of traffic.

The last of the three cases comes nearer the present in its circumstances than either of the other two, but still they are far apart. There a conveyance of a mill was granted by feu-contract in 1722, "with free ish and entry, and sufficient ways and passages of 12 foot breadth besouth the lade of the said miln." These words were not repeated in any subsequent title. In 1872 the only road to the south of the mill-lade convenient to the mill was one under the management of the Statute Labour Road Trustees of the county. There was no evidence to show at what period it had become a Statute Labour road. The trustees conveyed the *solum* of the road to the proprietor of the ground through which it passed under their statutory powers, receiving another road in substitution. In a petition for interdict presented by the proprietor of the *solum* of the road against the owner of the mill, it was held that a right of access in the line of the road was included in the grant of 1722 as a necessary adjunct of the mill, and that the Statute Labour Road Trustees had no power to interfere with it. Now, what was the ground of decision there is awanting here. There is no proof that there was at any time any independent right of footway on the line of this road before it was a cart and carriage road, and consequently the use of that road by foot-passengers was only the use of a public road under the administration and subject to the statutory powers of the Justices. When the road was shut up the right of footway as well as to cart and carriage traffic was extinguished.

Lord Young—I agree with the opinion which has just been delivered, but some observations occur to me on the case generally, and also particularly, which I think it my duty to make.

The conclusions of the summons require some attention. They are in my judgment superfluous, and only tend to embarrass the case, with the exception of the first, which comprehends everything necessary to raise the question between the parties. It is a declarator that there is no public right-of-way or servitude of road or passage between the points A and B on the plan which was laid before us. "Servitude" is, of course, superfluous, because no servitude was ever alleged. The purpose of the action is really to negative a right of public way or passage there which is contended for by the defenders, and to interdict them from acting on the footing that there is such. A declarator that any public right or right-of-way which formerly existed was duly and validly shut up by the Statute Labour Trustees is absolutely superfluous as a conclusion, although the circumstances connected with that shutting up are, for the reasons pointed out by Lord Craighill, very material in the consideration of the question whether there is a right-of-way or not. Now, the road in question, as I understand, admittedly, but at all events clearly and certainly, is upon the property of the pursuers. The *solum* is theirs. They have a heritable title to it—a right of property in it. Indeed it cannot be otherwise. No other proprietors are suggested, and the pursuers' title comprehend it. Public property in the *solum* is an impossibility by the law of Scotland. It is not in the Crown, and it cannot by possibility be in the public; it is in the titles of the proprietors. It is their ground, and they are absolutely entitled to a declarator that there is no right of road along their property unless it be established affirmatively to the contrary that there is. Now, as I have pointed out, their conclusion is simply for a declarator that there is no right of public road along this part of their private property. The question is, whether or not the defenders have established that there is? I have expressed my view that the conclusions of the summons are altogether superfluous except the first, and I think I may say the same of the pleas-in-law for the pursuers. They are all superfluous except the last, which is—"The defenders not having right to use the road in question, interdict should be granted as craved." That would have comprehended the declarator, and would have exhausted the case completely.

The case as presented by the pursuers is, that here there was a public road at one time, although there is none now. I shall use that expression "road" in any remarks I have to make as signifying a cart-road, which I need not observe is a road for all purposes. If it is a cart-road it is for that reason a road for horses and cattle and foot-passengers. A cart-road comprehends all the other uses. The other uses do not comprehend it necessarily—indeed they do not. A drove-road, for example, did not extend in the matter of the use of it to carts. If it is a cart-road, however, it is open to cattle, horses, and certainly to foot-passengers. Therefore by the expression "road" I shall always mean a cart-road or a road for all purposes.

The pursuers say there was here, prior to 1868, a public road, but that it was shut up by the pro-

per authority in that year. The case presented by the defenders, on the other hand—and it is the complication from these cross-issues that makes any difficulty in the case—is that there never was a road. They say there was a footpath, but never a road. It is a curious defence *prima facie*, but, when one examines it, it comes to that logically. They undertake to show that there was a public footpath there, and that there is that public footpath now. But then they must prove this by their own evidence, and they cannot in so doing at all avail themselves of the pursuers' averment, which they deny, that there was a public road there which the trustees shut up in 1868. Their case is that there was no such road that the trustees could shut up. There was a footpath, and they undertake to prove that, and to prove the affirmative of that is a necessary condition of their success in the action. I repeat that they cannot there avail themselves of the averment of the pursuers that there was a public road there, for they deny that. They may take it with its qualification that there was a public road there, and that it was shut up in 1868. But if they reject that, they must prove their own case.

I proceed therefore to consider very carefully—because I agree with Lord Craighill's view of the evidence—how it stands on the pursuers' averment that there was a public road. The Lord Ordinary expresses his opinion that prior to 1821, although it does not appear for how long a time, it had been used as a public road for carts and carriages. I think that is proved, and that therefore the pursuers' averment is in accordance with the evidence. I agree with Lord Craighill also that although after 1821 the use by carts was less than previously—the new Glasgow and Carlisle road having been then formed—it nevertheless did not cease, but continued down to 1835, or at the least down to 1829. There was perhaps not very much even before 1821. The nature of the locality accounts for there not being very much traffic there at any time. I do not think there was more than the traffic of the neighbouring farmers. After 1821 the use of it continued, although there was still less use of it after that time than there had been before. Now, in that case, with all that use of it, this road is a statute labour road, with respect to which the Statute Labour Trustees have a duty. I agree with Lord Craighill that there is evidence, although not very much, that in the performance of that duty they not only shut it up after 1868, but that they had expended a good deal of statute labour money upon it. If it was a public road, it was a statute labour road, for by the law of Scotland all public roads which are not turnpike roads are Statute Labour roads. I have already pointed out that they are formed, as all public roads except turnpike roads are formed, upon private property. The *solum* is the property of individuals upon private, personal, absolute titles. Turnpike roads are the only exceptions to that, and not all turnpike roads by any means. By the Turnpike Acts the Turnpike Road Trustees are empowered to purchase land to make roads upon the land, and when they do that they pay for the land, and get a title, and the land is theirs and vested in them, and if the roads should come to be unnecessary by another road being substituted, or otherwise, the trustees may sell that land, as in the case of any other property. The statutes contain some regulations on the subject, but except in these cases where they have bought the ground, and have a heritable title, the roads are mere roadways over *solum* belonging to private individuals. That is so with respect to all statute labour roads. A statute labour road is nothing more nor less than this, that there are trustees appointed to look after the interests of the public in the maintenance of that road. Such roads were formerly maintained by labour—statute labour, because the justices were empowered to call out the labourers and impose the duty on them. When the administration of the roads was entrusted to trustees they were empowered to lay on assessments in lieu of statute labour. Instead of calling out farmers and labourers to repair the roads, they imposed an assessment so far as they thought it necessary for the purpose, and with the produce of the assessment they themselves employed the labourers. Upon some roads they expended very little, and upon some none at all, the public use of them not requiring anything to be expended on them. They were within the "jurisdiction" of the trustees. The use of the word "jurisdiction" is a little inappropriate. What is meant is that it was for them to consider whether they required a road, and if so, what aid was required out of the statute labour money. A corresponding power and a corresponding duty was given to them with respect to the shutting up of such roads by the Statute Labour Acts, or the local Acts applicable to particular districts or counties. They were empowered to shut up superfluous or useless roads, and that upon the application of people who were interested to have them shut up, if such people could satisfy the trustees, who were the guardians of the public interest in the matter, that such roads should be shut up. If they were satisfied that the road referred to was superfluous or useless, those guardians of the public interest, after giving the necessary notices, and hearing any parties who might come forward with opposite views, were empowered to shut them up absolutely. If the road was superfluous or useless, or if another line of road was found to be more convenient, or at least equally convenient, and the public were satisfied to change the one for the other, the trustees were empowered to shut up the one in respect of the opening of the other. If another was not needed, and if the existing one was found to be unnecessary the trustees were still empowered to shut it up absolutely. That would always be the case where the public use in the matter was completely secured by the opening of the turnpike road or a public statutory road, such as the Edinburgh and Glasgow Road, which had special statutes devoted to it, with most minute and special regulations. I forget the name of the office which Mr Hill, father and son in succession, held in maintaining that statutory road, and which used to be, and perhaps is, the best coach road in the south of Scotland.

Well, if the trustees come to be of opinion that the road was useless, in the exercise of their jurisdiction they shut it up as far as their authority extended. If they took proper proceedings in the formal way their authority was unquestionable. I think I have heard the suggestion that the trustees might shut up a public road with respect to all its uses except that of a footpath. I can find no trace of

that in the statute. I think when a public road is shut up, whether it is in respect of a more convenient or in respect of an equally convenient road substituted for it, it is shut up for every purpose.

Now, with regard to the history of this road—and it is necessary to consider that in considering the case made by the defenders here—we do not know its origin, except in so far as we can deduce that by inference from the evidence before us. It is not direct, but we are entitled in such a matter—indeed we are bound—to draw inferences, without any limitation except reason. Now, it appears that the road was just constructed between two estates, the one half upon the land of the one estate, the property of Mr Tod, and the other half upon the land of the adjoining estate, belonging to Mr Hope Vere. It was constructed of a width varying from 24 to 26 feet—to be exact to a foot or two is really no matter. It was fenced on either side by a feal-dyke, and at some parts by a hedge. It is impossible to resist the conclusion that that road was made by those proprietors on their own property for their own purposes. I think that is an inference with reason and likelihood to support it—that a road between two estates, one half upon the *solum* of the one, and the other half upon the *solum* of the other, 25 feet wide and duly fenced, was made by the proprietors on their own ground for their own use. I cannot resist that conclusion. It is, besides, a thing of very frequent occurrence—I mean roads so made. You can find instances of them by the hundred in every county in Scotland. I cannot doubt that the origin of this road was a desire on the part of these proprietors to make a road at their own expense upon their own land for their own purposes—not a footpath. There is no suggestion, and no evidence that they took the line of a footpath in making this road and fencing it in in this way. You might make a similar surmise with reference to any other road in the kingdom. Taking their statement of it then, they allowed the public to have the use of it as a road for all purposes. Well, that was a matter of goodwill. They were perfectly entitled to do that. I take it from their averment that it became a public road—that they consented to the public use of it as such. They consented to its acquiring that character. They got sums, however small, from the statute labour trustees to help to keep it up—that is, to recompense them for the tear and wear the public made upon it. It would become perfectly clear that it was a public road in that way. But then the defenders say—Oh, that is quite a mistake. It was not a public road at all. It was just a footpath. They may say that, of course, but then they will have to prove it, and that without taking any aid from the averment about public road by the pursuer, which they must take as it stands, and with its qualifications, if they take it at all. But how is the evidence? The evidence is to the effect that it was used by carts as well as by foot-passengers—so much so that the Lord Ordinary says it was a public road for carts. The defenders, who are really pursuers in regard to the issue, rely upon usage. What is the law of Scotland in regard to usage? It is very difficult to administer it, and I think that proprietors have perhaps suffered considerable hardship from the difficulties attending the administration of the law as it stands. A footpath, or any kind of a road, may be acquired by use; but then the use for 40 years, or for time immemorial, must be proved to be such that the jury weighing the evidence shall impute to the proprietor that the use showed an acknowledgment by him of the public right. Otherwise, use for any period you like is a matter of tolerance. If that should be the conclusion of the jury or the Court that will not make a public right. If any proprietor in Scotland, by grace or favour, or kindly disposition, tolerates the public passing along his private road or avenue, or otherwise, it would never become a public road by use for any length of time. You must take the evidence and see whether the use proved is to be attributed to the assertion of a right or to tolerance. That must, of course, depend on the circumstances of the particular case. The defenders' case is that the use by carts is to be imputed to tolerance, and the use by foot-passengers is to be imputed to right. Now, I could not assent to that for a moment. It reminds me in the argument of a case I remember very well. I was counsel for the defender. I think it was a case of issues—a case of footpath tried on issues—the pursuers contending that it was a public footpath, or at least that they were proprietors, or tenants or occupants, of an adjoining estate, which had a right of servitude over it. At the trial there was a great deal of evidence of use by the proprietor and tenants and occupants of the neighbouring estate, and also a great deal of use by strangers—members of the public as they are sometimes quaintly called—although the evidence of strangers was much less, probably owing to the fact that it was a footpath over a moor where there were not many strangers passing. Counsel for the pursuer, at the end of the evidence, and in addressing the jury, abandoned the claim for a verdict of public right, and insisted only for a verdict on the issue of servitude. That immediately provoked the answer—you have led evidence that members of the public used this, endeavouring to support your contention that they did it as matter of right. But you are now constrained to abandon that, and to impute the use you have proved to tolerance and the goodwill of the proprietor, but much more likely is the use by his neighbours and friends upon the adjoining estate to be imputed to friendship. It would be more or less churlish to turn a stranger crossing a moor, but doubly so to turn those residing on the adjoining property. Therefore, if you impute the use by strangers to tolerance and good will, much more must you impute use by neighbours to tolerance. That was my argument, and it was assented to by Lord Justice-Clerk Hope and the jury. We had a verdict on both issues accordingly. And so here I could not see my way to impute the use of this road by carts to tolerance, and the use of it by foot-passengers to a right. What was the use by foot-passengers after all. They were chiefly children or poachers. There were no doubt neighbours passing along the road occasionally—people on the neighbouring farms. It was a shorter cut for some of the farms. I should say that any proprietor would act churlishly indeed, and in a way that would excite something like indignation at his conduct, if he turned off any stranger who set his foot on a road of this kind. There

is some danger if you set up proprietors by telling them that the only way to secure their own safety is to be stern and turn back people, even the neighbouring farmers who may occasionally use the road—by telling them that they can only allow the road to be so used upon pain of its being converted into a road. But be that as it may, the use proved must always be such as to satisfy the tribunal judging of the evidence that it was in the exercise of a right, and that the proprietor was recognising it as a right, and that it was not mere civility and good feeling towards people who were really serving themselves upon occasion and doing no harm to anybody.

There are some general words used in the evidence that there were people constantly travelling upon it. One of the witnesses who gives evidence to that effect says he has only been once upon it for the last twenty-two years. When you come to the details one finds the use to be of the most inconsiderable description. When the planting was put down in 1835, there was really no use for the road except by trespassers. When the case was being argued I noted some passages about what these people did. For instance, James Brown says—"(Q) What became of them? [that is, of the trees]—(A) Well, you cut one, and I cut one, and some other body cut one, just when they needed a thing of the kind. They were never quarrelled. We had no leave from anybody to do it." Is presence on such occasions to be imputed to the right of the defenders? And in the same way he speaks of the road. "(Q) Did you use to go along that road to your work frequently from Boghead?—(A) Yes, I have travelled it to my work from Boghead. I was going to and coming from Lochanbank. No man ever quarelled me for going that road." Then Janet Brown speaks to using the road almost every week. "The people whom I saw using it were going all airts, both ways." John Brown says—"There were trees upon the road when I was young. I cannot tell what became of them. (Q) Did you ever cut any of them?—(A) Well, I have; I have seen other people cutting them." Then James Brown says—"There were trees that had been planted on the old peat road, I cut some of these because I was requiring them, and it was considered it was always a public place that belonged to no person, and when I saw any person take one I thought I would do it too. There was no restriction, and they were not of much use." The people wanted firewood, and the proprietor did not object. Some of them went there for that purpose, some of them to take advantage of a near cut, and some of them were in pursuit of rabbits, and the proprietor did not turn them away. I could not on that evidence sustain the contention that a public road or a footpath existed here. I should have imputed it to goodwill and neighbourhood; and indeed but for the case presented by the pursuer that this was a public road I should have thought there was a real difficulty in proving publicity. I think it is proved that the use in respect of which he makes that admission was continued down to the year 1835, when the trees were planted, although the use was greatly diminished towards the end of that period. I am of opinion that in the exercise of their jurisdiction the trustees did well shut up the road.

There was a point that crossed my mind more than once, namely, whether, if this was a public road, and the use of it by foot-passengers continued, the road could be held to have ceased to exist or be held to be withdrawn from the jurisdiction of the road trustees because no carts went along it. After it was shut up and became impassable for carts, which I agree with Lord Craighill was not until after 1830, that would not arise. But so long as it was used for carts, and used in any of the ways in which a public road is useable, I should think it was not withdrawn from the jurisdiction of the trustees, for it did not cease to be a public road. But it is not necessary to consider that question or to decide it. Illustrations occur to one. There are many public roads in the country upon which a cart was never seen—upon which they do not go. You may see foot-passengers upon them occasionally, but carts do not go, simply because they have no occasion to go. I should not say a road had ceased to be a public road because you have proved that it has ceased to be used by carts, one or more of the uses, short of carts, to which a public road is subjected continuing, and it being open to carts to go upon if they had occasion to do so. That would not apply to the period after it was mechanically closed by the putting of obstructions upon it which could not be overcome.

Upon these grounds, and upon those stated by Lord Craighill, I am of opinion that this judgment ought to be recalled, and decree pronounced in terms of that which I think is the only material conclusion of the action, that there is no public right-of-way over this road.

Lord Rutherfurd Clark—I am of the same opinion.

Lord Justice-Clerk—I am sorry I have come to a different conclusion on the evidence in this case, and although I shall not detain your Lordships long by explaining the grounds on which I reach the result, yet I think it only respectful and right to say in a few sentences what my view on the proof and the law is.

This is an action by Mr Hope Vere against Tod's Trustees for the purpose of having it declared that the public have no right of passage along the line of the road in question. I do not wonder that they found it necessary to have recourse to a declarator to that effect, because the reply which is made in the first instance is that the public have had the use of this road as a public right-of-way for foot-passengers at least from the beginning of the century, and probably a great deal longer. That is the defence. The first question is—How stands the fact? Of course we are driven to inference in regard to the earlier period of the history of the road. But this is certain, that from the time when carts and horses went along the road, which goes back to the beginning of the century, the public have had the use of this line of road when they required it for foot-passengers. The proof, I must own for myself, I should have thought absolutely conclusive upon that matter. I do not think it necessary to go into that proof in detail, because sitting as one of a jury to decide this matter of use or no use, I find the Lord Ordinary's view is as clear and distinct as it can be, and he had the great advantage of hearing

the evidence. He says—"Accordingly, since 1821, the public have abandoned all use of the latter road for any purpose except that of a public footpath. But they have continued to use it as a footpath, although for that purpose only, down to the present time. There is no real conflict of evidence as to this point—those of the pursuer's witnesses who had the best opportunities for observation being quite as emphatic in asserting the public use of a footpath as the witnesses for the defenders. If the only question, therefore, were whether the public had established a right-of-way for foot-passengers by continuous use for forty years and upwards, there can be no doubt that the defenders would be entitled to a verdict upon that issue." Therefore I assume as a matter of fact from which the argument starts, that for that period, far exceeding the prescriptive period, the public have used that right-of-way. They did not use it by tolerance, at least I find no indication that such was the fact. And it would have been very singular if it had been, for the very simple reason that before the new Glasgow and Carlisle Road was made there was a considerable district of country that had no direct communication with the old Glasgow and Carlisle Road excepting by means of the road in question. For carts and carriages it was useful as well as for a footpath. When the new Glasgow and Carlisle Road was made, and communication made more direct with the places to the south, the use of this road for wheeled vehicles and horses was of course to a large extent lessened, although its use for foot-passengers continued. There were many places of importance in that neighbourhood. There was the mill, for instance, for access to which they used the road in question.

Now, the next question, and indeed the only question, is, whether the Road Trustees had a right to shut up the footpath? I say nothing about the road for carriages and horses. I should not think it necessary to dispute that they might have a right to shut up the carriage-way. But, as I have said, the question really is, whether the undisturbed and undisputed right which the public had exercised for eighty years was rightly or wrongly interfered with in 1868 by the shutting up of the road? And that is a question of some difficulty even if the Road Trustees had professed to shut up the road or footpath. In the ordinary case Statute Labour Trustees have no jurisdiction to do anything of that kind. A public footpath is not a statute labour road. Nor is it supported in any way whatever by these trustees. And it is not the least impossible that a right-of-way may exist for foot-passengers although the *solum* over which the footpath goes was once a public road for wheeled vehicles. There is a singular illustration of that in a case reported in 16 D. 521, the case, namely, of *The Glasgow and Carlisle Road Trustees* v. *Tennant*. The case is only important in this view. There was a road with a footpath there, and the road must have been in the immediate vicinity of that which is here in question. The Road Trustees shut up the public road, but left the footpath, and accordingly the footpath was used from that time to the time when the case I have mentioned arose. Now, there is nothing inconsistent in the fact that there may be a right of footpath where a road also happens to be. I rather suspect that a great many statute labour roads were originally nothing but footways, coming gradually from their convenience to be used by cattle and horses, and ultimately coming to be adopted by the Statute Labour Road Trustees. Be that as it may, I imagine that, after eighty years' use of this as a public footpath, it is out of the question to say, there being nothing else to shut up, that the trustees can interpose and deprive the public of that footpath.

These are the views I entertain. I think the Lord Ordinary has dealt with the case very satisfactorily and I certainly should have been better pleased to have adhered to his judgment.

Your Lordships recal the interlocutor, and decern in terms of the summons.

The Court recalled the interlocutor of the Lord Ordinary, and gave decree in terms of the conclusions of the summons.

Counsel for Pursuers—D.-F. Mackintosh, Q.C, --Dickson—Horn. Agents—Melville & Lindesay, W.S.

Counsel for Defenders — Jameson — Craigie. Agent—R. D. Ker, W.S.

Saturday, January 29.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

GOW *v.* GOW.

Husband and Wife—Divorce—Desertion.

A wife having justifiably left her husband's house during bad health caused by his ill-usage of her, and gone to her father's house, he broke up his home, sold his furniture, and went away from the district in which they lived, and never afterwards had any communication with her. *Held*, in an action raised more than four years after his disappearance, that he was in malicious desertion, and decree of divorce pronounced.

This was an action of divorce for desertion. It was undefended. Personal service of the summons was made, and the diet of proof intimated to the defender.

The pursuer Isabella Peden or Gow was married to the defender John Gow in 1875. They lived together till the spring of 1877 at Macbiehill, near Peebles. At the date of this action there was one surviving child of the marriage. The evidence was to the effect that the defender treated the pursuer so cruelly during their cohabitation that her health suffered. During a period of illness from which the pursuer suffered, and which was, at least to some extent, the result of the defender's ill-treatment, the defender at her request allowed her to go to her father's in Peebles for a week or two until she should be stronger. A few days after he demanded her return by letter, but she was then ill and in bed, and replied that she could not do so. She afterwards went to their house, saw him, and got away a few clothes. She only got away a few articles for immediate use, as she intended to return. Several letters passed, which, however, had been destroyed, in the earlier of which, according to the evidence of the pursuer's sister,