that it was read over and explained to him. Has she proved that he knew what he was signing?

I cannot say that there is no corroboration of her story, but in the circumstances I agree that it is not sufficient. The pursuer's story may be true. But if so, by her secretiveness—keeping this document concealed until her father was dead—she has defeated her own ends. The sum involved, £276 prior to 1896, irrespective of wages earned since 1896, is large for a family in such circumstances, and satisfactory proof was required, and that is not forthcoming.

Apart from the writing, the pursuer's claim for wages is not substantiated.

The Court sustained the appeal, recalled the interlocutor appealed against as well as the interlocutor of the Sheriff-Substitute dated 7th February 1902, found in fact that the pursuer had failed to prove that the writ No. 7 of process was the writ of the deceased Alexander Finlayson, and that she had failed otherwise to prove that the defenders were indebted to the pursuer in any part of the sum sued for; therefore assoilzied the defenders from the conclusions of the action, and decerned.

Counsel for the Pursuer and Appellant—Maclennan. Agent—Alexander Ross, S.S.C.

Counsel for the Defenders and Respondents — M'Clure. Agents — Strathern & Blair, W.S.

Saturday, May 30, 1903.

FIRST DIVISION.

[Lord Low, Ordinary.

LOGIE *v.* REID'S TRUSTEES.

Property — Boundary — Passage — Private Road — Right to Property in Solum of Private Road.

A, the proprietor of a piece of land intersected by a passage, disponed a portion of his land to B, the land conveyed in the disposition being described as bounded by A's property on the north, with free ish and entry by the passage. Subsequently A's successors disponed another part of the land to C, the land conveyed in the disposition being described as bounded by the passage on the south, with free ish and entry by the passage. The successors of C brought an action of declarator that they were proprietors of the *solum* of the passage *ex adverso* of their land, subject to a right in the successors of B to free ish and entry.

Held that under their titles the successors of C had no right of property in the *solum* of the passage, at any rate beyond the *medium filum* thereof.

Averments of possession for over forty years, upon which *held*, that even if the titles had furnished a basis for prescription, the averments of possession were not sufficiently specific to be relevant.

Opinions (*per* the Lord President and Lord Adam) that on their titles the successors of C had no right of property whatever in the passage.

Observed (*per* Lord Adam) that where in a conveyance the subjects are described as being bounded by a private road, there is no presumption that any part of the road is included in the conveyance.

Isabella Logie and Helen Logie, 15 High Street, Montrose, brought an action against John Balfour Alexander, shipowner, Montrose, and others, trustees under the antenuptial contract of marriage of John Reid, chemist, Montrose, concluding, *inter alia*, for declarator that the pursuers were proprietors of a lane or passage measuring 30 feet in length from Market Street, formerly known as East Backsides, Montrose, and lying between property on the north thereof belonging to the pursuers, and the property on the south thereof belonging to the defenders, subject to a right in the defenders, as owners of the property to the south of the lane, to free ish and entry by the lane to the back part of their said property; and that the defenders should be ordained to take up and remove from the *solum* of the said passage a water-pipe laid by them therein, and should be interdicted from inserting pipes therein or executing any other works thereon, or otherwise interfering therewith in time coming. The summons also concluded alternatively for declarator that the pursuers were proprietors of the *solum* of the said lane or passage *usque ad medium filum*.

The defenders did not dispute that the pursuers were proprietors of the *solum* of the passage up to the *medium filum* on the side adjoining their property, but they did dispute that the pursuers were proprietors of the whole *solum* of the passage.

Prior to 1700 the whole block of ground, including the properties of the pursuers and of the defenders, belonged to John Ferrier. In that year Ferrier disponed the subjects which now belonged to the defenders to David Lyell. In that disposition the subjects disponed were described as being bounded by "the other tenement of land lately pertaining to the deceast Patrick Guthrie" [Ferrier's predecessor in title], "and the yaird and tayll thereto belonging at the north," and the subjects were disponed with free ish and entry by the passage in question.

In 1774, after various transmissions, the remainder of the ground which had been retained by Ferrier became the property of William Burness, who in that year disponed to one Barclay that portion of the ground [marked No. 6 on the plan produced in process] *ex adverso* of which the part of the passage in dispute was situated. In the disposition by Burness to Barclay the subjects disponed were described as "All and whole that tenement of land . . . bounded with . . . the common passage from the said High Street to the

East Racksides [now Market Street] on the south, with free ish and entry thereto by the said passage from the said street to the East Backsides." Burness subsequently disponed other portions of the ground belonging to him in separate lots to different disponees, and after various transmissions the whole of the ground north of the passage as formerly possessed by Burness became the property of the pursuers. In the pursuers' title that portion of the ground marked No. 6 on the plan was described as bounded on the south by the passage from the East Backsides to the High Street.

The pursuers averred — "(Cond. 3) The said lane or passage was formed entirely on the pursuers' lands, and the *solum* thereof belongs to the pursuers and is included in their titles, and the defenders have only a right of ish and entry thereover to and from the rear part of their property. The right of the pursuers and their authors to the *solum* of the said lane or passage has been repeatedly recognised by the defenders and their authors, and until recently it has never been disputed that the right of property in the said lane or passage was and is in the pursuers and their authors, who have possessed the same from time immemorial, or at least for over forty years, in virtue of their titles, and have exclusively carried out works thereon, and laid drain and water-pipes therein at their own expense, and exercised all proprietorial rights thereover, subject only to the right of ish and entry in the owners of the defenders' property."

These averments were denied by the defenders.

It was admitted by the defenders that they had opened up the southern side of the passage adjoining their property for the purpose of laying a water-pipe. The pursuers averred that this constituted an encroachment on their rights as proprietors of the whole *solum* of the passage.

The pursuers pleaded, *inter alia*, as follows:—"(2) The pursuers being proprietors of the said lane or passage in virtue of their titles and possession had thereon, decree should be granted in terms of the first declaratory conclusion of the summons."

"The defenders pleaded, *inter alia*, as follows:—"(1) No title to sue. (2) The titles of the parties being the exclusive measure of their rights cannot be qualified by extraneous evidence other than writ. (3) The action is irrelevant."

On July 3rd 1902 the Lord Ordinary (Low) pronounced the following interlocutor:—"In regard to the first declaratory conclusions of the summons, and the conclusion to have the defenders ordained to remove a water-pipe, Sustains the first plea-in-law for the defenders, and dismisses the said conclusions: Of consent of the defenders, finds, decerns, and declares in terms of the alternative declaratory conclusion of the summons," &c.

The pursuers reclaimed.

Argued for the pursuers and reclaimers—When the subjects now belonging to the defenders lying on the south of the lane were given off by Ferrier in 1700, they were described as bounded on the north by the property which at that date remained in Ferrier. The property so remaining in Ferrier, consisting of the ground now belonging to the pursuers, included the *solum* of the lane. As the defenders' title did not include the lane, the lane remained the property of Ferrier, and the onus was on the defenders to show that the right of the pursuers, as Ferrier's successors, was excluded. In this view the description of the subjects *ex adverso* of the part of the lane in dispute contained in the disposition by Burness to Barclay in 1774, in which these subjects were described as being bounded on the south by the lane, could not be read as excluding the lane. On the contrary, this disposition conveyed the full rights in the property conveyed which had belonged to Burness, and before him to Ferrier, who was Burness' predecessor in title, and therefore included the lane. The observations of the Judges in *Louttit's Trustees* v. *Highland Railway Co.*, May 18, 1892, 19 R. 971, 29 S.L.R. 670, that a conveyance of land described as bounded by a road is *prima facie* a grant exclusive of the road, did not apply to the circumstances of this case. Further, such a rule was contrary to the decision in *Magistrates of Ayr* v. *Dobbie*, July 15, 1898, 25 R. 1184, 35 S.L.R. 887. The authorities were reviewed by Lord Moncreiff in the latter case, who came to the conclusion that the balance of authority was in favour of the view that *prima facie* such a grant was not exclusive of the road (*per* Lord Moncreiff in *Magistrates of Ayr* v. *Dobbie*, *supra*, at p. 1196; also *per* Lord Rutherfurd Clark in *Currie* v. *Campbell's Trustees*, December 18, 1888, 16 R. 237, at 241, 26 S.L.R. 170). The presumption rather was, as stated by Lord Cranworth in *Wishart* v. *Wyllie*, April 14, 1853, 1 Macq. 389, that the ground extended to the *medium filum* of the road. But this presumption could be rebutted by evidence (*per* Lord Cranworth in *Wishart* v. *Wyllie*, *supra;* also *per* Cotton, L.J., in *Micklethwaite* v. *Newlay Bridge Co.*, 33 Ch. Div. 133, at 145). They averred that the pursuers' right had never been disputed, and had been repeatedly recognised by the defenders, and they also made sufficient averments of prescriptive possession — *Ferrier* v. *Walker*, February 16, 10 S. 317. The titles might competently be explained by the prescriptive possession following on them — *Cooper's Trustees* v. *Stark's Trustees*, July 14, 1898, 25 R. 1160, 35 S.L.R. 897. They moved for a proof of their averments.

Argued for the defenders and respondents—The question turned on the description given of that portion of the ground *ex adverso* of which the part of the passage in dispute was situated in the conveyance by Burness to Barclay in 1774. In that conveyance the ground now belonging to the pursuers was described as bounded on the north by the passage. This description *prima facie* excluded the passage from the land conveyed—*Louttit's Trustees* v. *Highland Railway Co.*, *supra*. The case of

Magistrates of Ayr v. *Dobbie, supra*, was in no respect contrary to that decision, as the road in the *Ayr* case was a public road. The lane in this case was admittedly a private road. There was reason, too, why the property in the lane should not have been conveyed to the purchaser of lot No. 6 in the conveyance of 1774, for that lot was one of three lots, and if the property in the lane had been conveyed to the purchaser of lot No. 6 the granter could not have given a right of using the lane to the purchasers of the other lots, which right was necessary to the beneficial enjoyment of the other two lots. Again, if the *solum* of the lane had been conveyed by the disposition of 1774 it was quite unnecessary to give the disponees (as was given in the disposition) a right of free ish and entry by the passage. The pursuers on their title accordingly had not a right to any part of the *solum* of the lane, but the defenders had no interest, and did not desire, to dispute the right of the pursuers to the property in the lane up to the *medium filum*. Having regard to the pursuers' titles, the pursuers' averments of possession were irrelevant. These averments were also insufficient from lack of specification. There was nothing in the titles—such as a conveyance of parts and pertinents—which could be expiscated by proof of possession. No proof of possession would enable the pursuers to establish a right of property outside of and contrary to their titles, and therefore the motion for proof should be refused.

LORD PRESIDENT—The question in this case relates to the right of property in a lane or passage which runs between High Street of Montrose on the west and Market Street on the east. The pursuers' property is situated on the north of this passage and the defenders' property is on the south. The question in controversy is whether the lane or passage for about 30 feet westwards from Market Street belongs in property exclusively to the pursuers, or whether they have only made out a good title to one half of it, their right to which the defenders do not dispute. The titles of both parties flow from a common author—Ferrier—in whom the whole property was vested prior to 1700. In that year he disponed the ground on the south of the passage, which now belongs to the defenders, to Lyell. In that disposition the land conveyed is described as bounded by Ferrier's property on the north, and it was disponed with free ish and entry by the passage in question. This description is substantially the same as that occurring in the defenders' titles down to the present time. In 1712 Ferrier was succeeded by his sister in the northern portion of the lands, and she made up a title in which they are described as bounded on the south by the tenements disponed to Lyell. After various transmissions Burness acquired the whole of the northern portion of the ground, and in 1774 he disponed to Barclay the lot marked No. 6 on the plan which is *ex adverso* of the lane throughout the 30 feet westwards from Market Street which is in dispute, and which is described as bounded by "the common passage from the High Street to the said East Backsides (*i.e.*, Market Street) on the south." Burness disponed another portion of the lands to the north of the passage with a similar description as regards the south boundary, and conveyed the remainder of the property as bounded by the property belonging to the defenders on the south. The pursuers eventually acquired the whole of the ground north of the passage as possessed by Burness, and in their titles lot No. 6 was described as bounded on the south by the passage, as in the disposition by Burness, while the rest of the lands were described as bounded by the defenders' property. The pursuers contend that no right to any part of the *solum* of the passage was conferred upon Lyell by his conveyance, but merely a right of ish and entry. The Lord Ordinary has carefully considered the descriptions in the titles, and I agree with him in thinking that with the exception of lot 6 the conclusion from them is that the properties meet in the central line of the passage, and that nothing has occurred in the actings of the parties to displace that conclusion. In regard to the 30 feet of the lane *ex adverso* of lot 6, I agree that the pursuers have shown no title to it, but as the defenders are willing to concede that the pursuers have a right of property in this portion of the lane up to the *medium filum*, the question does not arise. An attempt was made by the pursuers to explain the titles by allegations as to possession of which a proof was asked, but I concur with the Lord Ordinary in thinking that the allegations are not sufficient, even if proved, to displace the natural construction of the titles. I am therefore of opinion that we should refuse the motion for proof, and adhere to the Lord Ordinary's interlocutor.

LORD ADAM—The real question at issue between the parties is, whether or not the pursuers have proved that they are the proprietors of the whole of the *solum* of the passage described in the summons, over which the defenders have free ish and entry.

The defenders do not dispute the pursuers' right to the *solum* of the passage up to the *medium filum*, and in view of the defenders' admission it is unnecessary to decide whether the pursuers have established this right up to the *medium filum*. From a practical point of view the matter in dispute is a very small one, and indeed it is difficult to see what is the interest of the pursuers to contest the question of the property in the remaining half of the passage.

In 1700 the properties of the pursuers and of the defenders both belonged to John Ferrier, and in that year he disponed what is now the whole of the defenders' subjects to David Lyell, the northern boundary being described as "the other tenement of Land lately pertaining to the deceast Patrick Guthrie and the yaird and tayll thereto belonging," that is, the pursuers' lands, and this description is substantially repeated in the modern titles of the subjects. This disposition left the remainder of his property in possession of Ferrier. In 1774

Ferrier's successor disponed that portion of the ground *ex adverso* of which the part of the passage in dispute is situated, and which is called lot 6, to Barclay, the ground being described as "bounded with . . . the common passage from the High Street to the said East Backsides on the south," and that description remains the description in the present titles, except that East Backsides is now Market Street.

The question is whether under that title the right of property is given in the common passage from High Street to Market Street. I adhere to what I said in the case of *Louttit's Trustees* v. *Highland Railway Company* (19 R. 791), and I do not think that anything I said in that case is inconsistent with the later case of the *Magistrates of Ayr* v. *Dobbie* (25 R. 1184). I said nothing about a public road. This is a private road, and I am of opinion that the case of *Dobbie* does not apply. Where the boundary is a private road it is in the same position as if the boundary was a field or house, and there is no presumption that any part of it is included. The proposition maintained to us is that the true boundary of the ground is not as described in the title, but is the defenders' property on the south side. If certain property is described as bounded by a passage, how can it be said that that is a title which incorporates the passage which it declares to be the boundary? On the construction of the title I am of opinion that it is exclusive of the passage and not inclusive. If we were to speculate about it we can see good reason why in disponing lot 6 the disponer should not give a right of property in the passage, for if he had given to the purchaser of lot 6 a right of property in this passage, he could not have given (as he did give) subsequently a right of free ish and entry in this passage to disponees of other portions of his ground. Again, if he had disponed the property of the *solum* of the passage in the disposition of 1774, it is curious that he should in that very disposition have expressly granted to the disponee "free ish and entry thereto by the said passage." If the property in the *solum* of the passage had been conveyed, the grant of free ish and entry was surely unnecessary. If, then, the question depends on the titles, it is clear that no right to this passage *ex adverso* of lot No. 6 was given to the pursuers' authors.

But the pursuers urge that they have prescribed property in the passage. On this point it does not appear to me that the title in question would afford sufficient basis for prescription. It is a bounding description. It has reference to a visible thing which is described as the boundary of the land. To prescribe beyond that boundary would be to prescribe against their title. The title makes no reference to parts and pertinents on which prescription could run. The averments of possession set forth are as follows:—[*His Lordship read the averments of possession in Cond.* (3) *quoted supra*]. These are slight and vague averments, quite wanting in specification. In my view they are irrelevant, but in any view I should not consider it proper to allow a proof on averments of possession of this character.

LORD KINNEAR—I agree, and after what has been said it is enough for me to say that, on the titles as they stand the pursuers have shown no right to the exclusive property in this passage. Whether they could show a right of property up to the *medium filum* it is unnecessary to determine since the defenders do not dispute it, and the Lord Ordinary's judgment on that point proceeds on the defenders' consent.

If the pursuers have shown no title to the ground in dispute, I agree, for the reasons stated by Lord Adam, that they are not entitled to a proof of prescriptive possession. Even if they had produced a title which would provide a basis for prescription, they have not made averments of possession sufficiently specific to be relevant. On this question of proof I must say that the value of the interest in dispute, which could have no bearing on the construction of the titles, ought not to be left out of account. The pursuers have at present every beneficial use and enjoyment of this passage which they could possibly have if their property extended over the whole, subject to the right which they admit to be vested in the defenders. They may use it as an access to their property, they may lay their pipes and dig drains on their own side, and they concede that they cannot prevent the defenders walking over it to and from their own back yard. All they want in addition to this is to prevent the defenders laying a pipe under the surface in the part of the passage which the pursuers themselves do not occupy in that way. This would obviously be a convenience if not a necessity for the defenders, and it can do no harm to the pursuers. Even if the pursuers' right of property was clear, an action by the pursuers to prevent such a use of the lane by the defenders would be a very unneighbourly proceeding. In the circumstances I think it is proper for the Court, out of mercy to the parties, to consider whether the proof which is asked is likely to have any other result but that of protracting litigation and heaping up expenses, and therefore to scrutinise the averments even more strictly than might otherwise have been necessary. So viewing the averments, I think the statements as to the prescriptive possession of the lane by the pursuers are too vague to be sent to proof.

I would venture to suggest that instead of adhering to the Lord Ordinary's interlocutor as it stands we should recal it in so far as it sustains the plea of no title to sue and dismisses the action, and that we should assoilzie the defenders. While I think that the pursuers' titles do not give them a right of property in the passage, I do not think it can be denied that they have a title to sue, or in other words, to come into Court to have their title construed.

LORD M'LAREN was absent.

The Court pronounced this interlocutor—

"The Lords having considered the reclaiming note for the pursuers against the interlocutor of Lord Low, dated 3rd July 1902, and heard counsel for the parties, Recal said interlocutor so far as regards the first declaratory conclusion of the summons, and assoilzie the defenders therefrom: *Quoad ultra* adhere to said interlocutor, and decern."

Counsel for the Pursuers and Reclaimers —Cooper — Welsh. Agent — R. Ainslie Brown, S.S.C.

Counsel for the Defenders and Respondents—Guthrie, K.C.—W. Harvey. Agents W. & J. Burness, W.S.

Thursday, June 4.

SECOND DIVISION.

WARREN'S JUDICIAL FACTOR *v.* WARREN'S EXECUTRIX.

Trust—Administration of Trust—Investment of Trust Funds—Personal Liability of Trustees.

Where a trustee had made a certain investment in the *bona fide* belief that such an investment was authorised by the power conferred upon him in the trust-deed, *held* that as the terms of the power were such as to make it reasonable for him to interpret them as he did, he was not liable for loss on the investment, even if the Court were of opinion that his interpretation of the power was erroneous, such an error not being one which should involve him in personal liability.

Mrs Agnes Rutherford or Warren died on 26th March 1879, leaving a trust-disposition and settlement dated 21st August 1878, by which she conveyed her whole means and estate, heritable and moveable, to trustees for the purposes therein specified. The trust deed contained the following clause:—"And I hereby confer on my said trustees all the powers and privileges conferred or to be conferred by statute or at common law on gratuitous trustees in Scotland, and over and above these powers, power to sell the trust estate, either by public roup or private bargain, to allow the trust estate, or any part thereof, to remain on the obligations and securities upon which the same may stand at the time of my death, and to lend out the trust funds to persons or corporations on any form of obligation or kind of security they deem fit, or to invest the same in the purchase of preference or debenture stocks of any established railways in the United Kingdom, or in the stocks or shares of any Scotch banks or gas or water companies in Scotland, or place the same on deposit with bankers in Great Britain or with established Indian or Colonial banks, and to alter or vary the loans and investments from time to time; declaring that my said trustees shall not be liable for the sufficiency of the investments or the securities upon which the trust funds may be lent or laid out."

In June 1899 Andrew Rutherford Warren, who was then the sole surviving trustee foresaid, invested £3000 of the trust funds in £3000 4½ per cent. first mortgage debenture stock of the Credit Foncier of Mauritius, Limited. The said company was a limited company registered under the Companies Acts, and carrying on business in London. Among the objects specified by the memorandum of association of the said company there was, *inter alia*, "the raising of money by share capital and by the issue or sale of bonds, debentures, or other obligations." By its articles of association the following regulations applied to the borrowing of money:—"*Borrowing Powers.* — 42. The company may issue debenture stock, bonds, debentures, or other obligations at any time and in any form or manner and for any amount which the board may from time to time determine, subject to the following condition:—The total amount of such debenture stock, bonds, debentures, or obligations for the time being shall not exceed the amount of the subscribed nominal capital of the company for the time being. 42*a*. The borrowing powers of the company shall be subject to the restrictions imposed by the trust-deed executed or intended to be executed in or about April 1899 upon the creation of £400,000 debenture stock, so long as any of that debenture stock remains outstanding, and the company shall not meanwhile, save as therein appears, issue any debentures or debenture stock ranking in priority thereto or *pari passu* therewith." In June 1899 the company made an issue to the public of £300,000 first mortgage debenture stock bearing interest at 4½ per cent., part of a total amount limited to £400,000. The said debenture stock was, together with the debentures of the company, secured by a trust-deed, whereby the company charged, in favour of trustees for behoof of its debenture and debenture stockholders, its whole undertaking, capital, assets, and rights, both present and future, other than its uncalled capital for the time being. Article 3 of the said trust-deed was in the following terms:—"The debenture stock shall be represented by certificates in the form already prepared and set out in the second schedule hereto, and shall be subject to the conditions and provisions already prepared and set out in the third and fourth schedules hereto, which conditions and provisions shall be endorsed on each certificate, and shall be binding on the company and on the trustees and on the holders of debenture stock, and on all persons claiming through them respectively." The said fourth schedule contained the following provision:—"12. Upon due notice given a general meeting of the debenture stockholders shall have the following powers exerciseable by extraordinary resolution, namely:— . . . (2) To release any property charged to the trustees, and to accept any other securities or shares in