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incapacity." He then alludes to transactions of newly married people, and proceeds to say, "In the present case the opportunities recorded in the evidence were far too numerous to account for it without a distinct defect of virile power." Then he enters into details, such as the defender communicated to him, or he has heard in his evidence. He adds, "And these," that is, the conditions which the defender has himself described, "are just the conditions in which we find the worst cases of impotency in the male." According to that medical evidence the defender had in his statements indicated the worst features of permanent incapacity; and yet we are asked to act upon his own belief founded only upon the possibility that if time and opportunity were given to him, and if the adjuncts which I have already described were supplied to him, he might in the end find means of consummating his marriage.

The inference which I draw is the very opposite. From the defender's history, from his two months of abortive attempts, from his one year and six months of lying beside this desirable young woman without even making an attempt to exercise his rights, I come to the conclusion, clear and plain to my mind, not alone that he was incapable as to her, but that he was impotent at the time of the marriage, and that that impotency was permanent.

It is said that the pursuer ought sooner to have instituted the suit. I ventured to observe in the course of the case, and I repeat it now, that there is not one of us who cannot recall to memory the experience of some case in which a woman submitted to the worst of treatment, treatment degrading and humiliating, and allowed it to continue rather than permit her name to become the subject of a public scandal. And when we add to this that the lady in question had two sisters, young and unmarried, who would necessarily be implicated in any disclosure as to her character, that would greatly strengthen her motives for silence, and probably she would have submitted to much more if she had not been driven to her present course by the institution of the action for divorce.

Upon these grounds, my Lords, I entirely concur in your Lordships' judgment.

INTERLOCUTORS appealed from affirmed, and appeal dismissed, with costs.

ANDREW BEVERIDGE—BEVERIDGE, SUTHERLAND, & SMITH, S.S.C.—STIBBARD, GIBSON, & Co.—BOYD, JAMESON, & KELLY, W.S.

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Brodie, &c.

THOMAS MANN (Defender), Appellant.—*Lord-Adv. Balfour—C. S. Dickson.*

ANDREW BRODIE AND ANOTHER (Pursuers) Respondents.—*R. B. Finlay, Q.C.—James Reid.*

Road—Public right of way—Presumption—Prescription.—In an action brought in 1883 for declarator of public right of way over a road leading from one public road to another public road, it was proved that during the thirty-seven years from 1846 to the date of the action the public had been excluded from the use of the road—that from 1820 to 1846 the public had used the road as of right. The evidence as to the remainder of the forty years prior to 1846 was insufficient *per se* to prove that the public had used the road as of right.

Held (in *rev.* judgment of the First Division) that the presumption arising from the exclusion of the public from the road for thirty-seven years without

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challenge overcame the presumption that the use prior to 1820 had been of the same character as that between 1820 and 1846, and that, therefore, in the absence of any distinct evidence as to that use, the pursuers had failed to instruct a prescriptive right to the road.

(In the Court of Session, June 13, 1884, 11 R. 925.)

The defender appealed.

Lord Blackburn.—In this case the Lord Ordinary (M'Laren) pronounced an interlocutor, in which he "finds it proved that the defender and his predecessors in title have excluded the public from the use of the road in question since the year 1846, and that there is no proof of the assertion of a right on the part of the public since that year: Finds it not proved that the road in question had been a public road during the period of forty years antecedent to the year 1847," and he gave judgment for the defender.

The pursuers reclaimed, and the Judges of the First Division recalled the interlocutor, and found it proved that "the road in question had been a public road during the period of forty years antecedent to the commencement of the year 1847," and gave judgment for the pursuers. The First Division differed from the Lord Ordinary, not as to any question of law, but as to the effect of the evidence.

There was not anything in the nature of the evidence to give the Lord Ordinary, though he heard the witnesses, better means of judging than the Judges of the First Division or your Lordships, who only read the notes; and the Judges, I think, owed it to the respondents to form their own opinion, and to act upon it if it was different from that of the Lord Ordinary. I think now that your Lordships owe it to the appellant to form your own opinion and to act upon it, though it is different from that of the Inner-House. I need not say that I should not lightly differ from them, even though in so doing I agreed with the Lord Ordinary.

The evidence is voluminous, but there is no difference between the Judges below except as to the effect that ought to be given to the evidence relating to the period, I think I may say, between 1805 and 1810, which is directly touched by only a very little of the evidence; and as to the weight to be given to the contrary presumptions arising, one in favour of the pursuers, from the fact, which they all agree is proved by preponderating evidence, that the road was used by the public during a period between 1820 and 1846, affording some reason for acting on slighter evidence during the earlier fourteen years which are required to make up the forty, and one the other way, arising from the fact, which they all agree in finding, that the public have been excluded from 1846, and that there is no proof of the assertion of a right on the part of the public since that year.

Though exclusion for less than forty years will not extinguish a public road which is proved to have been created, the fact of no right having been asserted during an exclusion of so long a period as thirty-seven years affords some reason for requiring more evidence to establish that such a right really existed. There must have been many alive in the period between 1846 and, say, 1856, and now dead, who must have known much more as to what really was the state of user of the road between 1805 and 1820 than those now alive, and if they did not assert a right, it affords some ground for surmising that they did not think that right existed, and, therefore, some ground for looking more critically at the evidence produced to prove that it did.

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The case is to be governed by the law of Scotland. Any reference to English law is apt to mislead, unless the difference of the law of the two countries is borne in mind. In both countries a right of public way may be acquired by prescription. In England the common law period of prescription was time immemorial, and any claim by prescription was defeated by proof that the right claimed had originated within the time of legal memory, that is, since A.D. 1189. This was, no doubt, an unreasonably long period. And sometimes, by legal fictions of presumed grants, and in part, by legislation, the period required for prescription as to private rights has, in many cases, been practically cut down to a much shorter definite period—(See *Angus* v. *Dalton.*)[1] But this has never been done in the case of a public right of way. And it has not been required, though in the way in which the evil of the period of prescription being too long has been avoided, an opposite evil of establishing public rights of way on a very short usurpation has sometimes been incurred.

In *Poole* v. *Huskisson*[2] Baron Parke says,—"In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an intention to dedicate—there must be an *animus dedicandi*, of which the user by the public is evidence, and no more; and a single act of interruption by the owner is of much more weight upon a question of intention than many acts of enjoyment."

But it has also been held that where there has been evidence of a user by the public so long and in such a manner that the owner of the fee, whoever he was, must have been aware that the public were acting under the belief that the way had been dedicated, and has taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence on which those who have to find the fact may find that there was a dedication by the owner whoever he was. It is therefore, I may say, in England never practically necessary to rely on prescription to establish a public way.

Now, it is here to be observed that though the length of time during which a road is used as a public highway is an element in determining whether a dedication should be inferred, it is not any definite time, and a very short period of usurpation will often satisfy a jury. But I am far from thinking that the law of England is here at all the perfection of reason, or such as ought to be introduced into the law of Scotland if not so already.

No case is made here as to a right of way created by the owner, either on the titles or by such acts (if any there be) as without any writing might, according to the law of Scotland, preclude the owner and those who claim under him from denying that a right of way had been created. The sole claim is by prescription, and I think there is no dispute that, by the law of Scotland, the period of prescription is forty years. If the public had used the road to such an extent and in such a manner that they may properly be said to be possessed of it, and they have had such possession for forty years, they have acquired the right, and that although it was shewn that the owner in fee was, during that time, not dedicating it; but if less than forty years' possession is proved there is not, as I understand, any principle or authority for saying that a dedication is to be presumed. And again, when the public are excluded for forty years, their right, however clear it may be that they once had one, is gone, by negative prescription. The question, in short, is as to possession by the public or against

[1] 6 App. Cas. 740, at p. 750. [2] 11 M. & W. 827.

the public for a period of forty years, and not, as in England, as to user by the public for such an undefined time, and in such a manner and under such circumstances as to justify the inference that an owner in fee had dedicated.

I think that evidence of possession by the public, such as is proved in this case, between 1820 and 1846, would, in England, justify a jury in finding a dedication before 1846; but it does not justify a finding of prescriptive right, unless it is proved that it continued so long, either at the beginning or end of the period, as to amount to forty years.

I do not propose to enter into the evidence in detail. I agree with the Judges below that the fair result of the proof is that, in 1842, when Captain Stirling, already the owner of Glentyan, purchased the adjoining farm of Wardhouse and began to take steps to throw it into his policies, he did exclude the public from a road which they had possessed for some time. I agree also in thinking that this exclusion was not complete till the gate was set up across the road.

The appellant's counsel shewed that there was some conflict of testimony as to whether the exclusion was complete from the time the gate was set up, and also as to the time when the gate was put up, some putting it in 1846, some in 1851; but I think the preponderance of proof was that the gate was set up in 1846, and that the exclusion of the public was complete from that time, and not before. That puts the defender in possession, as against the public, for thirty-seven years, but not for forty.

The Wardhouse farm lies between two public roads, the northern being called Lawmarnock Road and the southern one the Bruntshields Road. A small stream of water flows across the Wardhouse farm to Glentyan mill, and a dam was made for the mill close by the Bruntshields Road. The farm steading of Wardhouse farm is erected about halfway between the two public roads on the northern or Lawmarnock side of the stream. When all this was done does not appear, but it certainly was some time before the beginning of this century.

The earliest evidence given for the pursuers is that of an old man, Matthew Houston, who was born in 1793, and continued at school till he was eleven years old, that is, till 1804, when he went away to learn weaving. As I understand his evidence, it is not so strong in favour of the respondents as Lord Mure thinks it, but is some evidence in favour of the existence of and the user by the public of the road at this early time. He says he used to go "ginneling" trout in the burn whilst he was a schoolboy, but after he became a weaver was kept closer to his work, and did not go again till he was grown up, and he also used to go to curl in winter and to bathe in summer in the dam. In all those ways he would see the place; how far he would observe, or how accurately recollect what he observed, is a question. I see no reason to doubt that the boy who was ginneling trout would observe, and probably remember, as long as he remembered anything, that on the spot where there is now a bridge over the little stream there was then no bridge but a deep pool, now silted up; and as the farmer who occupied the steading must have crossed the stream to get to his fields on the south side, I suppose there probably was at that time some kind of ford across the stream. Whether the boy would so accurately observe or remember that ford there may be a doubt. He says, when he next came after he was grown up (I suppose he would hardly call himself so till he was sixteen or seventeen, that is in 1809 or 1810) the bridge was built, but he does not know by

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whom or when. He says that he saw carts and horses using the road; it is by no means clear whether he means in his school days or in his grown-up days. But he does say, and I think it very likely, that in the early morning when he and the other boys were waiting to get their breakfasts, and the milk carts were late in coming, the hungry boys would walk along the Bruntshields Road to meet them, and he says, "I have seen them on the road in question going past Wardhouse." This is some evidence that light carts, such as milk carts, did come that way before the bridge was built. There is a good deal of evidence that after the bridge was built a number of carts, not very large, but as many as could be reasonably supposed to have an object in going from Lawmarnock Road to Bruntshields Road, did use the road; but this is, I think, the only direct evidence of such a user before the bridge was built.

Mr Stevenson, who was tenant of the Wardhouse farm from 1805 to 1823, when he removed to Auchinames in the neighbourhood, built the bridge. He is dead, but his son, who was born in 1812, and cannot of course speak of his own knowledge as to anything happening before 1817 or 1818, is called. He was born at Wardhouse, and continued there till they flitted to Auchinames, and there continued to live with his father till his death in 1849, when he succeeded his father in that farm. He tells us, what is very probable, that his father talked to him about what he had done; and as his father is dead that is evidence. It is, of course, subject to the observation that the deceased cannot be cross-examined, and the witness does not say (and probably would not be believed if he did say) that he cross-examined the deceased as to what he told him; but his account of what his father told him is, to my mind, worthy of credit; and without reading the details of that evidence, I think it strong to shew that before the bridge was built the public could hardly use this road at all, certainly not conveniently, with any except empty or very light carts.

Lord Mure seems to think that because the witness says what, on reflection, is self-evident, that he cannot tell from his own recollection what was the state of the place before the bridge was built,—that is, before the witness was born,—and cannot tell more from recollection of what his father told him than that he said that until it was made a loaded cart could not cross the ford, this evidence is not so favourable to the appellant's case as I consider it. I do not at all think it conclusive; but when I weigh it against that of Matthew Houston I think it is the more reliable of the two.

I agree with Lord Adam that when you find a number of old persons speaking to a certain state of matters, there is a fair presumption that we should have had others, if they had survived, speaking in the same way. But old Mr Stevenson, if he had survived, would, if his son's recollections are accurate, have spoken very differently from Matthew Houston, who is the only witness who speaks to the state of things before the bridge was built. And Lord Adam lays down very strongly that submission by the public to exclusion for thirty-seven years, though not a bar, throws a heavy onus on those who seek to establish the public use for forty years; yet when the point is brought to be as to what was the state of things in 1807, about the beginning of the forty years (and the evidence is, I think, rather in favour of the defender), Lord Adam seems to give no effect to the onus at all.

I think the Lord Ordinary was right; and as I believe your Lordships are of the same opinion, I move that the appeal be allowed and the interlocutor of the Lord Ordinary restored, the appellant having the expenses in the Court below

from the date of the Lord Ordinary's interlocutor, the respondents paying also the costs of this appeal.

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LORD WATSON.—This action was instituted by the respondents in August 1883 for the purpose of establishing a public right of way for foot-passengers, carts, and carriages, along a road or track leading northwards from a public road known as the Bruntshields Road, through the appellant's lands of Wardhouse, to another public road known as the Lawmarnock Road. The road in dispute, and its termini, are situated in an agricultural district of Renfrewshire, and at no great distance from the village of Kilbarchan.

The respondents sue as members of the public, and the right of road which they ask the Court to declare is based not upon grant or dedication but upon prescriptive user by the public. In the able arguments addressed to us from both sides of the Bar, there was really no serious controversy raised in regard to the legal principles applicable to the constitution of a public right of that kind, and, in my opinion, there is little room for controversy on that point. According to the law of Scotland, the constitution of such a right does not depend upon any legal fiction, but upon the fact of user by the public, as matter of right, continuously and without interruption, for the full period of the long prescription. Lord Stair[1] states prescription to be a rule of "positive law, founded upon utility rather than equity," and he adds,[2] that, in Scotland, the common rule is by the course of forty years, "but there must be continued possession free from interruption." According to Erskine,[3] "positive prescription is generally defined by our lawyers as the Romans did usucapion, the acquisition of property by the continued possession of the acquirer for such a time as is described by the law to be sufficient for that purpose." These learned writers agree that the definition must be qualified in cases where the law requires an antecedent feudal title as the basis of prescription, as in cases falling under the Act 1617, chap. 12. The effect of prescription, in these cases, is not to constitute the right of the possessor, but to fortify it against all future challenge. But, with the exception of one ingenious author, who says that the possession of the public ought to be ascribed to the *jus coronæ*,[4] no one has suggested that any title is required as the foundation of a prescriptive right of public way. I am aware that there are *dicta* to be found, in which the prescriptive acquisition of a right of way by the public is attributed to implied grant, acquiescence by the owner of the soil, and so forth; but these appear to me to be mere speculations as to the origin of the rule, and their tendency is to obscure rather than to elucidate its due application to a case like the present.

Although the principles of law which govern the acquisition of a prescriptive right of way are in themselves simple, yet, in their application to facts, questions of nicety frequently arise. It then becomes necessary to consider whether the user has been that of the public, whether it has been continuous and uninterrupted, and whether it has existed for the full period required by law. These are all questions of fact, and it would not be expedient to lay down any specific rules for their solution. As regards the first of these questions, which has occasioned much more controversy than the others, I think it is safe to say generally, that in order to constitute a public user of the kind of road claimed

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[1] Stair's Inst. ii. 12, 9.
[2] *Ibid.* ii. 12, 11.
[3] Ersk. Inst. iii. 7, 2.
[4] Napier on Prescriptions, p. 370.

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in the present action, the user must be of the whole road, as a means of passage from the one terminus to the other, and must not be such user as can be reasonably ascribed either to private servitude rights or to the license of the proprietor. Then, as regards the amount of user, that must just be such as might have been reasonably expected if the road in dispute had been an undoubted public highway.

Upon the evidence adduced, the Lord Ordinary and the learned Judges of the First Division have come to the unanimous conclusion that from the year 1846 down to the time when this action was raised, the appellant and his predecessors in title have excluded the public from the road in question, and that there is no proof of the assertion of a right on the part of the public during the whole of that period. With that conclusion I entirely agree; and, after the observations which have been made upon this part of the case by the Lord Ordinary, it would be a waste of time to refer to the evidence in detail. There was, no doubt, some use of the road, prior to the year 1874, by persons unconnected with the lands of Wardhouse; but that use did not amount to the assertion of a public right. Counsel for the respondents endeavoured to press upon your Lordships the consideration that the late Captain Stirling, who was proprietor of Wardhouse from 1844 till his death in December 1872, was a very popular person, and that, in deference to his feelings, the inhabitants of the district did not assert their right so vigorously as they would otherwise have done. Such considerations are, in my opinion, utterly irrelevant. Public user is a fact which must be inferred from overt acts of possession, and defective evidence of user cannot be strengthened by proof of the motives which induced individuals to abstain from acts of that kind.

The legal consequence of the exclusion of the public from and after the year 1846, is, that the respondents must establish possession on the part of the public for forty years before that date. The Lord Ordinary was of opinion that the respondents have failed to instruct public user before 1846, extending *retro* for forty years; but the three learned Judges who decided the case in the Inner-House took a different view of the evidence. They were of opinion that the evidence is sufficient to sustain the inference that before their exclusion in 1846 the public had used the road as matter of right for the full prescriptive period.

The evidence of the respondents does, in my opinion, establish that from 1820 to 1846 the public did use the road continuously and as matter of right. That was the view taken by the Lord Ordinary, as well as by the Judges of the First Division, and it was not very seriously disputed by the appellant's counsel. It is certainly not proved that the road was used daily, either by foot-passengers or by carts, but it is in evidence that it was used in both ways by inhabitants of Kilbarchan, and also by a considerable number of farmers in the neighbourhood whenever they had occasion. In arriving at that conclusion, I lay aside altogether the evidence as to the road having been used as an access to the mill dam by bathers and curlers, and I attach little weight to the evidence that people used to stroll along part of the road, although such evidence is not altogether devoid of significance when it is coupled with proof of public use of the road throughout its entire length.

The main controversy between the parties related to the condition and use of the road in question during the period antecedent to the year 1820. The respondents have adduced oral testimony of living witnesses, which reaches back

as far as the year 1803. The appellant has also led proof which goes back to the year 1805, but that proof consists of the hearsay testimony of a single witness, Stevenson, whose information was derived from his deceased father, who was tenant of the lands of Wardhouse from 1805 until 1823. It seems to be fairly deducible from the evidence on both sides that about the year 1806 a bridge was built by the late Mr Stevenson, at that time the new tenant of Wardhouse, in order to carry the road in question over a burn which it crosses, between the steading of Wardhouse and the Bruntshields Road. I think it is also proved that a road existed before the bridge was built, and that it previously crossed the burn by means of a ford, a little way further down the burn than the site of the bridge. The condition of that part of the road before 1806 is a matter of some importance, and upon that point I can see no reason for rejecting the testimony of the witness Stevenson, who says that it could not be used by loaded carts. To my mind, it is extremely improbable that an agricultural tenant would have incurred the expense of erecting a bridge if the ford and its accesses had not been very unsuitable for ordinary farm traffic. It is also, in my opinion, matter for observation that it is neither proved nor suggested that, at the time when the bridge was built, the road at that point had fallen into temporary disrepair, or that its bad condition was due to other than permanent causes.

I shall now refer to the evidence of possession anterior to 1820. There are six aged witnesses for the respondents, whose combined testimony covers the period from 1803 to 1820, and I begin with those whose recollections are the most recent. William Orr, who was born in 1805, speaks to the use of the road from 1815 by carts from his father's farms of Law and Lawmarnock, and also from two other farms in the vicinity, Pannell and Monkland. He also speaks to the use of the road by persons on foot, but it is by no means clear that his evidence on that point applies to the earlier years between 1815 and 1820. John Gilmour, born in 1802, first saw the road in 1814. When he was a boy he used the road almost daily in the summer time, when he went to bathe in the dam; and he likewise states that he has seen horses and carts using the road, but cannot say whose horses and carts they were. He does not speak to the use of the road by foot-passengers at that early period. James Clark, born in 1802, who recollects the road since 1811 or 1812, says that "in these early days the road in question was very much used by the Kilbarchan people for walking. I went from end to end of the road." He seems to have used the road at that time as an access to the dam, when he went with other boys to bathe, and he says that he has seen carts upon the road, but cannot say whose they were. Archibald Hunter, born in 1803, was first taken to the road about 1808 or 1809, when he was a mere child, by his father, who, on that occasion, went from the Bruntshields Road, a little way up the road in dispute, and then "turned and came away back again." I think it is the import of his evidence that he did not renew his acquaintance with the road until he was a "young lad," whatever that may signify; probably not before 1814 or 1815. He too went at that time for the purpose of bathing in the dam, but he says that the road was a great resort of the Kilbarchan people, and that he has seen horses and carts going along the road, but cannot say whose they were, as he "did not pay any attention."

The two remaining witnesses for the respondents who had the earliest acquaintance with the road, and upon whose evidence great reliance was placed by Lords Mure and Adam, are Matthew Houston and John Houston. Matthew

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Houston was born in 1793, and his first knowledge of the road was acquired in 1803 and 1804, when he went to "ginnel" trout in the burn over which the bridge was subsequently built. He left school and began to weave when he was eleven years old, and it plainly appears from his evidence that from that time until he was a "young man" his knowledge of the road was very limited, if indeed he was ever upon it, which is by no means clear. Accordingly he knows nothing about the building of the bridge, save that he saw it after it was built, and he was not even aware that Mr Stevenson was the tenant of Wardhouse. It is very difficult to ascertain the date at which he first saw the bridge, but, in all probability, it cannot have been before 1809 or 1810. The only occasion of his using the road in his younger days was in going to catch trout, with his hands at first, and afterwards with rod and line, and going to see the curlers on the dam. He does give evidence to the effect that the Kilbarchan people were in the habit of walking along the road; but I do not think that evidence, when closely examined, can be held to refer to the years 1803 and 1804. Then he speaks to the existence of the road and ford in these years, and he adds that the road was "always passable for carts." I believe that statement to be true, subject to the qualification (which it does not exclude) that the ford and its accesses did not afford a convenient passage for carts, and were not passable by a loaded cart. But I doubt very much whether his evidence as to the use of the road by carts is in reality applicable to the years 1803 and 1804. One thing is plain, that even if it be held to apply to these two years, his evidence at that time is limited to milk carts, which supplied a dealer in Kilbarchan.

Then John Houston, who was born in 1799, first went on the road in 1807, and frequently used it afterwards, on his way to the dam for the purpose of bathing or sliding. He says nothing whatever about the use of the road by other persons on foot, except for these purposes, and he says expressly, "I don't remember seeing carts on the road." This witness, on cross-examination, made a volunteer statement to the effect that "the carts went through the burn until the bridge was built." The statement is not evidence at all. The witness never saw the road before the bridge was built, and he cannot recollect his having seen a single cart upon it after the bridge was built. He does not say at what time, or from whom, he obtained his information, and in the absence of any evidence on these points his hearsay statement is inadmissible.

In my opinion the evidence of these old men, taken by itself, and apart from any presumption which might be derived from other facts proved in the case, would be quite insufficient to establish that the road in question was used as matter of right by the public from 1806 down to 1820. I agree with the Lord Ordinary that the oral evidence applicable to that period "falls very far short of what would be necessary to establish a public right of way," and that it does not prove any use of the road, by members of the public, "except such as may be predicated of any of the ordinary farm roads made and maintained by proprietors throughout the country." If I understand his judgment aright, Lord Mure, though he does refer at some length to the case of *Harvie* v. *Rodgers*[1] was of opinion that the direct oral evidence was sufficient, without the aid of any presumption, to establish public user during that earlier period. Lord Adam does not appear to me to have taken the same view, because he says, "I

[1] 3 Wil. & S. 251.

ask myself what is the presumption which we must draw when all the survivors speak in one direction. I think there is this presumption, that if we had had more survivors they would all have spoken in the same direction." His Lordship then refers to a direction of the Lord Justice-Clerk (Hope), which was upheld by this House in *Cuthbertson* v. *Young*,[1] and goes on to say, "That charge of the Lord Justice-Clerk (Hope) is an authority in the direction I have already indicated, and if there is evidence, uncontradicted and undisputed, going back to an early period, I think we are entitled to have recourse to the presumption that there was an antecedent grant."

In *Harvie* v. *Rodgers*[2] and *Cuthbertson* v. *Young*,[1] both of which came to this House upon a bill of exceptions to the charge of the presiding Judge, there is no reference made by the noble Lords who decided these cases to any presumption of an antecedent grant. In *Harvie* v. *Rodgers*[2] there was evidence before the jury to the effect that, for at least thirty-four years prior to 1789, the public had enjoyed the free and uninterrupted use of the footpath in question; and that from 1789 to 1822, when the action was brought, the public continued to use it, notwithstanding repeated but unsuccessful attempts to bar their passage. Lord Lyndhurst thus states the import of the direction excepted to. "The learned Judge in substance told the jury, there is evidence from which you may assume that for a particular period, namely, forty years, this way had been exercised without interruption. If you are of that opinion, then that is, according to the law of Scotland, sufficient to establish a prescriptive right of way; and if that right of way be once established in the manner I have stated, then I tell you that in point of law subsequent interruptions not acquiesced in cannot defeat the right so acquired." In expressing his approval of that direction, the noble and learned Lord said that, if thirty-four years of uninterrupted exercise of the right of way were established, "it was then competent for the jury to presume, and they ought in point of law to be directed to presume, a previous enjoyment of the same kind."

In *Cuthbertson* v. *Young*[3] there was evidence to shew that between 1827 and the raising of the action in 1849, a period of twenty-two years, the public had been excluded from the footpath claimed. The Lord Justice-Clerk (Hope) refused to tell the jury that such evidence of interruption was "sufficient in law to exclude such right of way on the part of the public," and he directed the jury that, "if evidence was given satisfactory to their minds of the existence of a public footpath as far back as the memory of living witnesses could be expected to extend, although such testimony did not either in any instance, or only in a few cases, go distinctly as far back as forty years prior to 1827, still it was competent for the jury to presume, and (the evidence being consistent and uncontradicted) the jury ought in point of law to presume, a previous enjoyment corresponding with the manner in which it had been enjoyed during the period embraced by the evidence." In affirming that direction the Lord Chancellor (Cranworth) added,—"I understand the learned Judge, when he used the expression 'the jury ought to presume,' not to be stating a proposition in law on which the jury were bound to act, but merely to be pointing out what was an almost irresistible inference in point of fact." The expression was borrowed verbatim by the Lord Justice-Clerk from the judgment of Lord Lyndhurst in

[1] 1 Macq. 455, 26 Scot. Jur. 310, Pat. App. 309.
[2] 3 Wil. & S. 251, at p. 260.
[3] 14 D. 306, 307, 24 Scot. Jur. 145.

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Harvie v. *Rodgers*;[1] yet it elicited from Lord Cranworth the observation that Scotch Judges are "sometimes perhaps a little loose in their mode of directing juries."

There can, I apprehend, be little doubt that Lord Cranworth was right in pointing out that any presumption which the jury were entitled or ought to draw was matter not of law but of fact. The decisions of the House in these two cases go no further than this, that when there is no evidence, or it may be scant evidence, applicable to the commencement of the forty years requisite, the Court or a jury may nevertheless infer, if the evidence is sufficient to sustain the inference, that the public user which is proved to have existed during the later portion of that period must have existed throughout. But these decisions afford no indication whatever of the quantum of evidence which will be sufficient to support such an inference. The House assumed, and was bound to assume, that there was ample evidence to support the inferences drawn by the jury, for in *Harvie* v. *Rodgers*[1] the Court had refused a motion made for a new trial on the ground that the verdict was against the weight of evidence, and in *Cuthbertson* v. *Young*[2] the verdict had never been impeached on that ground.

In the present case there is evidence applicable to the first fourteen years of the prescriptive period during which the respondents must establish public user. To my mind the evidence which applies to these earlier years is deficient not only in amount but in quality. If twenty witnesses had merely repeated the statements made by the six old men who gave evidence for the respondents, that would not, in my opinion, have strengthened the respondents' case. On the other hand, the testimony of a smaller number of witnesses, each speaking to persons using and occasions of user other than those observed by these six witnesses, might have been a very material addition to the evidence for the respondents. It is, however, a just observation that it would not be reasonable to expect that many witnesses could be found capable of speaking to the condition of the road in question and its use during the period of fourteen years ending in 1820, a period ranging from sixty-three to seventy-seven years before proof was taken in this case. The evidence suggests, and it is doubtless the fact, that before this case went to proof the vast majority of those who were qualified to speak to that period of fourteen years had paid the last debt of nature. And I freely concede that in ordinary circumstances that fact might afford reasonable grounds for presuming that the testimony of those witnesses whom death has silenced would have amply supplemented the evidence of the survivors.

But the circumstances of the present case appear to me to be exceptional. For thirty-seven years before the respondents brought their action the public were excluded from the road, and never asserted their right to use it. Whatever might have been the case before that date, the proprietors of Wardhouse, by the lapse of seven years from 1846, became entitled in 1853 to a possessory judgment, and thereafter they had no occasion to establish their exclusive right to the road by declarator. It lay with the public to establish their right by judicial decree before they could legally use the road. But that is not the only effect which must be attributed to the exclusion of the public for so long a period as thirty-seven years. The fact of exclusion will not, *per se*, destroy a pre-existent right of public way unless it is maintained for the prescriptive

[1] 3 Wil. & S. 251. [2] *Supra.*

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period of forty years; but it is, as stated by Lord Cranworth in *Cuthbertson* v. *Young*,[1] evidence that no public right ever existed, which may, of course, be met and overcome by counter evidence. Lord Adam was of opinion that the exclusive possession of the proprietor for thirty-seven years threw a very heavy onus on the respondents; and he adds that "if, in spite of that onus, the pursuers have been able to make out, by proof of use over the whole period of forty years, or upon a presumption arising from proof of use over a lengthened part of that period, that the road was used or enjoyed as a public road for that period, that will be sufficient." So far as it goes, I see no reason to differ from that statement; but it appears to me to omit all notice of the most important question which arises in the circumstances of this case, namely, to what extent the presumption to which his Lordship refers is ousted by the fact that there was no assertion of any right by the public for a period only three years short of what was necessary to place the appellant's right to the road beyond question. And I do not find that, in dealing with the evidence, his Lordship entertains that question, or considers the weight which that fact of exclusion ought to have against the presumption which he draws in favour of the respondents.

The Lord Ordinary, in his opinion,[2] speaks of "the origin of the road"; and it appears to me that the meaning which his Lordship intended to convey by that phrase has been misapprehended in the Inner-House. The Lord Ordinary did not, in my opinion, mean to suggest that there was no road or track along the line now claimed before 1806, but that before the erection of the bridge in that year there was merely a bad farm road, quite unsuitable for the purposes for which the public used the road with carts between 1820 and 1846. And it is a significant fact that those members of the public who used the road with carts between 1820 and 1846 did so mainly because its gradients were more suitable for a loaded cart than those of the neighbouring highways, whereas, prior to the erection of the bridge in 1806, the road was unavailable for such traffic. I also venture to think that Lord Mure has misapprehended the evidence of Mr Stevenson as to his father's complaints that the public used the road. His Lordship seems to infer from that evidence that, throughout the term of his father's tenancy, the public used the road as matter of right. What the witness Stevenson does say is,—"My father complained of people who took advantage of the road that he had made. It was done in some cases, but very rarely." The statements of the witness obviously refer to a use which did not begin until after the bridge was erected, and moreover, on any fair construction of them, they relate to actual complaints made at the time in the hearing of a witness who was born in 1812.

The impression made upon my mind by the evidence applicable to the period between 1806 and 1820 is that it is quite possible, if not probable, that the appellant has, by the lapse of time, been deprived of as much evidence as the respondents. It is nowhere suggested that a single person who lived upon the farm of Wardhouse between 1805 and 1820, and who must have known, better than any of the aged worthies who have been examined for the respondents, the condition of the road and its uses before and after the erection of the bridge, was alive at the time the proof was taken in this case. That loss of testimony is plainly not imputable to the appellant, and I know of no principle, and can see no good reason for holding, that the public ought, any more

[1] *Supra.*

[2] 11 R. 925.

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than a private litigant, to be exempted from the consequences of their own laches in delaying the judicial assertion of their rights.

In these circumstances, I am very clearly of opinion that the exclusive and undisturbed possession, enjoyed for thirty-seven years by the appellant and his predecessors in title, is absolutely fatal to any presumption of public user prior to the year 1820; and, seeing that the evidence of possession before that date is insufficient of itself, and without the aid of presumption, to instruct user by the public, I have come to the conclusion that the interlocutor appealed from ought to be reversed, and the judgment of the Lord Ordinary restored.

LORD FITZGERALD.—The statement of the law made by my noble and learned friends has been so very clear and satisfactory that I shall not attempt to add one word to it. By "the law" I mean the law of Scotland as applicable to the particular case now before us. It differs very much from the English law upon the same subject, but still more from the law of Ireland, which is so clear and simple that a question such as is now before your Lordships could not possibly have arisen.

Having disposed of the legal question, the remaining question is, what is the correct view to take of the evidence in this case, or what legitimate inference is to be drawn from the facts unquestioned and in proof in the case? When, from reading the judgment of the Lord Ordinary and the judgments of the Appellate Court in Scotland, I had learned that there was no real controversy upon the fact that for thirty-seven years before the bringing of this action the public had been excluded from this road, and excluded in a clear and unequivocal manner, and that such exclusion had been continuous, it did appear to me that there was an inference to be drawn so overwhelming against the claim of the pursuers that it would be difficult indeed to rebut that inference.

Now, let us go back to the year 1846, when Captain Stirling, the owner of Glentyan, had acquired the Wardhouse estate. He himself, we may take it, knowing a great deal of the local circumstances connected with the enjoyment of this road before that time, whatever enjoyment there was, proceeds to deal with this road for the purpose of enlarging and completing his policies, and he does it in a most expressive and decided manner, namely, by closing up this road, putting across it a gate which is constantly kept locked or secured, and absolutely excluding the public. He was dealing with the community of Kilbarchan. The act which he was doing was one which was against the interest of every member of that community; it was one to which they would all be adverse; and he was dealing with a community that was quite capable of asserting and defending its own rights. I should come to the conclusion that they would then have asserted the right if a public right of way had existed.

There is another view also to be taken. That was in 1846. At that time a large portion of the community could have spoken to the enjoyment for forty years previously, if enjoyment there had been. If there had been continuous and exclusive possession by the public, there were then a number of people who could have spoken to it in positive terms and in the most satisfactory manner; and it seems to me incredible that a community who saw its right, if the right existed, violently invaded, would have long submitted to that invasion and have acquiesced in it for thirty-seven years. The inference to be drawn from that is very strong that a public right did not exist, and that the people then living knew that it did not exist, and that it was because of that know-

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ledge that the community acquiesced in the forcible act of Captain Stirling in excluding them. Well, if that is the true view to take of it, it only remains to consider whether in this case there is sufficient evidence of facts in proof to rebut that legitimate and, as I have called it, overwhelming inference.

I do not intend to advert to any of the details. They have been so well criticised by my noble and learned friends who have preceded me that I should only be wasting time by entering upon them. I will only state what occurs to my own mind regarding them, and that is that at an early period, from 1805 to 1820, the evidence is of that character that it cannot be said to be such full, complete, and satisfactory evidence as would rebut the inference deducible from a thirty-seven years' acquiescence, which can only be rebutted by proving that for forty years anterior to 1846 the public had a clear and continuous possession as of right and with no interruption.

My Lords, I entirely agree with the judgment of the Lord Ordinary, and I think that the interlocutor under appeal should be reversed, and that the interlocutor of the Lord Ordinary should be restored.

INTERLOCUTOR under appeal reversed: Interlocutor of the Lord Ordinary restored: The appellant to receive the expenses in the Court below from the date of the Lord Ordinary's interlocutor, and the respondents to pay the costs of this appeal.

GRAHAMES, CURREY, & SPENS—WEBSTER, WILL, & RITCHIE, S.S.C.—J. B. ALLAN—JOHN MACPHERSON, W.S.

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May 13, 1885.
Duke of Hamilton v. Dunlop, &c.

DUKE OF HAMILTON, Defender (Appellant).—*Davey, Q.C.—Murray.*
JAMES DUNLOP AND ANOTHER.—*Lord-Adv. Balfour—Sol.-Gen. Herschell.*

Property—Minerals—Reserved right.—A conveyance of lands reserving to the disponer right to work the minerals will be construed as a conveyance of the lands reserving the right of property in the minerals.

Where a proprietor conveyed the lands of A in excambion for the lands of B, reserving "the liberty of working" coal and other minerals in the lands of A to himself and his heirs and successors in the lands of B, "if conveyed with that privilege," *held* (aff. judgment of the Second Division) that the reserved right was a right of property in the minerals, which was not lost when the lands of B were disponed by him without the privilege.

(IN the Court of Session, June 20, 1884, 11 R. 963.)
The defender, the Duke of Hamilton, appealed.

Ld. Chancellor (Selborne).
Lord Blackburn.
Lord Watson.
Ld. Fitzgerald.

LORD CHANCELLOR.—It appears to me that the unanimous decision of the Second Division of the Court of Session agreeing with that of the Lord Ordinary in this case is right.

I will first make some observations which occur to me, which shall be but few, upon what I regard as the good sense and reasonable view of such a deed as the present, even if there were not authority apparent on the matter. You have words of reservation, and you have a prior title to the whole property in the coals and minerals in the person who is making this reservation in his favour. What is the thing reserved? If there be no limit of time—if it be to Dunlop and his heirs for ever—then it is a perpetual reservation. What is the subject of the reservation? The right to take away the whole of those coals and minerals. A perpetual right to the whole possible profits and the benefit of property is *prima facie* very much like the whole beneficial interest in that