granted. The petition ought therefore to be refused.

LORD RUTHERFURD CLARK—I have had very considerable difficulty, but after such consideration as I have been able to give, I am disposed to concur in the opinion of Lord Young.

The Court dismissed the petition with expenses.

Counsel for Petitioners — Pearson — Low. Agent—Mitchell & Baxter, W.S.

Counsel for Respondents—Mackintosh—J. P. B. Robertson — Graham Murray. Agent — J. Smith Clark, S.S.C.

Friday, June 13.*

FIRST DIVISION.

[Lord Kinnear, Ordinary.

HOZIER *v.* HAWTHORNE AND OTHERS.

Road—Public Right-of-Way along River Bank—Substitution and Deviation during Period of Prescription—Prescription.

A public right-of-way along the bank of a navigable river *held* to have been established by evidence of use by the public for 40 years, although during that time there had been operations on the bank throwing back the line thereof, and though the line of road had also been otherwise deviated and another substituted for a portion of it while the period of prescription was running.

Road—Substituted Road—Acquiescence—Prescription.

Where the public acquiesce in a substituted road, and use it in place of one over which there is a public right-of-way, possession for the full prescriptive period, such as would be required to found a new right, is not necessary in order to found a right to the substituted road.

This was an action at the instance of Colonel Hozier, proprietor of the lands of Partick, near Glasgow, in which he sought to have it found and declared that he had the sole and exclusive right of property in that portion of the lands of Partick which extended about 1000 yards along the bank of the river Clyde from the mouth of the Kelvin and Meadowside Ferry to the Ree or Saw Mill Road on the west, and that free of any servitude of passage or right-of-way through the same and any part thereof. The action was brought against Thomas Hawthorne and George Fulton, as representing the public, and the summons also concluded that the defenders should be interdicted from trespassing upon any part of the lands referred to above (and of which a plan was lodged in process), and from pulling down any fences erected thereupon. The Commissioners of Police of the burgh of Partick were also called as defenders. The object of the action was to try the question whether there existed a public right-of-way along the Clyde bank through the lands of the pursuer.

In December 1880 the pursuer feued a portion of the lands through which the right was claimed, to Messrs D. & W. Henderson, shipbuilders, and formed a footpath through his lands along the boundary of this feu to Meadowside Ferry, fencing off this ground and footpath. The fences crossed the line of the public right-of-way claimed along the bank, and were broken down by members of the public, and hence the present action. The pursuer also made another path running westward through his lands. He undertook, if decree were pronounced in his favour, not to shut up the paths he so made.

The defenders Hawthorne and Fulton averred that for more than forty years there had existed a public road or right of public way as a footpath through the lands in which the pursuer claimed an exclusive right of property.—"(Stat. 1) For a period of more than forty years there has existed a public road or right of public way as a footpath from the ferry at the junction of the rivers Kelvin and Clyde, called the Meadowside Ferry, westward along the north bank of the Clyde to the road formerly known as the Ree Road, now as the Sawmill Road, and thence westwards to Whiteinch and Scotstoun. The said public road or right of public way has been for more than forty years, and is largely used by the inhabitants of Partick, Whiteinch, and Govan, and by others, both for purposes of recreation and of business. The said road is a public road, and being on the bank of the Clyde, which for a length of time has been the principal river highway in Scotland, the said footpath formed a much-prized walk for recreation and exercise. It was a favourite resort for the public, who have used and enjoyed the said right of public way from time immemorial without molestation or interruption. Further, for forty years and upwards, or for time immemorial, the said public road, along which the said right of public way exists, has been used by the public as a means of passing between its two termini as above described. This right of public way is of peculiar value to the inhabitants of Partick, Whiteinch, and Govan, as affording a convenient and desirable access between the shipbuilding yards and other public works on both banks of the Clyde and their dwelling-houses, and other places of resort. The said public way was also used as a road to the church. It formed a convenient and desirable access to the inhabitants of Whiteinch and Scotstoun, and others living on the north side of the Clyde, to the Govan parish church. The Meadowside Ferry connects Partick and Whiteinch with the populous town of Govan on the south side of the Clyde, and with the city of Glasgow on the east side of the Kelvin. (Stat. 2) Between Meadowside Ferry and Meadowside Ferry west, the foresaid public right-of-way has always been recognised and left uninterrupted, notwithstanding that a very large shipbuilding yard, owned at one time by Messrs Tod & M'Gregor, and now by Messrs D. & W. Henderson, has been erected close to the ferry, and at different times extended westwards, and also notwithstanding the great practical importance of an immediate water frontage to a shipbuilding yard, subject to the control of the owner or occupant of the yard. The only other buildings on the north bank of the Clyde between Meadowside Ferry and the Ree Road or Sawmill

* Decided March 19.

Road are the Partick Saw-mills, occupied by Messrs Robinson, Dunn, & Co. The portion of the site of these saw-mills next to the Clyde was formerly occupied as a foundry or boiler-shed. While it was so occupied the public right-of-way was recognised by the occupants of the foundry and all others, and used and exercised by the public along the north bank of the river. After the erection of the said saw-mills the said public right-of-way continued to be used and exercised along the said bank of the Clyde the whole way to the Ree Road or Sawmill Road, and the fences on the east and west sides of the said saw-mills stopped short at the said path, and so as not to interfere with the said public right-of-way. Many years ago, however, these fences were carried across the said path down to the water's edge, and the road or path was then diverted from the river along the east side, and then along the north side of the said saw-mills into the Ree Road or Sawmill Road. At a later period, when the said saw-mill was extended northwards, the said path was further diverted and carried northwards along the extended eastern boundary, and then westwards along the extended northern boundary into the said Ree Road or Sawmill Road. This deviation and substitution was formed instead of and in recognition of the public right-of-way along the bank, and since the said deviation and substitution the said public right-of-way, including the road along the east and north sides of the premises occupied by the said saw-mills has been in constant use by the public coming west from and going east towards Partick and the Meadowside Ferry, but without abandoning or losing their former rights."

The pursuer denied the existence of the right-of-way for the prescriptive period. He averred that it was only in consequence of the operations of the Clyde Trustees under their Acts of 1851 that passage along the line averred by the defenders had become practicable, and that the river bank as it existed before that date was destroyed by these operations. The pursuer believed that persons were in the habit of passing over his ground to get to the ferry, and he made convenient accesses to the roads mentioned in the condescendence, in order to meet as far as possible the public convenience, but he denied the public right-of-way asserted by the defenders.

With regard to the substitute road formed by the pursuer, and objected to on behalf of the public, it is sufficient to say that the objections were—(1) that it involved a detour; and (2) that it was not on the river bank, and only provided occasional glimpses of the river.

The defenders Hawthorne and Fulton pleaded—"(3) There having existed for a period of more than forty years a public right-of-way between the Meadowside Ferry and the Ree Road or Sawmill Road, and thence onwards to Whiteinch and Scotstoun, the defenders are entitled to *absolvitor*."

A separate question was raised as to another right-of-way which need not be here referred to.

The Lord Ordinary allowed a proof, after taking which, on 31st July 1883 pronounced the following interlocutor:—"Finds that there exists a public road or right-of-way for foot-passengers, leading from the Meadowside Ferry through the portion of the lands of Partick belonging to the pursuer, and described in the conclusions of the summons, to the Ree Road in the line laid down on the plan, and distinguished by the letters A B C D E on the said plan; and also that there exist a public road, &c. [being the other right claimed]: Finds that the defenders Thomas Hawthorne and George Fulton, and the public generally, are entitled in time coming to the free use and possession of the said rights-of-way: Assoilzies the said defenders from the conclusions of the action, and decerns, &c.

"*Note.*—The defenders claim for the public two separate rights-of-way through the ground described in the conclusions of the summons; and in my opinion both rights have been satisfactorily established by evidence of public use for upwards of forty years.

"The first road claimed leads from the Meadowside Ferry at the junction of the river Clyde and Kelvin westwards, along the north bank of the Clyde, to a public road formerly known as the Ree Road, and now as the Sawmill Road, in the line marked A B C D E on the plan. There can be no question that since the year 1854 there has been a well-formed road for foot-passengers in the line indicated, which has been much frequented by the public. So far as it passes along the river bank, the road was formed by the Clyde Trustees, who between 1852 and 1854 embanked the river at the point in question, and formed a road 12 feet in breadth at the top of the pitched slope of the embankment. The Trustees have maintained the road since the completion of their operations, and there can be no question that during the whole period which has since elapsed it has been used as a public road for foot-passengers. It is equally beyond doubt that for more than twenty years before the operations of the Clyde Trustees there existed a defined footpath along the bank of the river between the Meadowside Ferry and the Ree Road; and if the old footpath had been used during that time for the same purposes and to the same extent as the new one has been used since, it is hardly disputed that the defenders would have clearly made out their right-of-way. But it is maintained, that although the use which has prevailed for the last thirty years might have been sufficient if it had subsisted for the requisite period, there is no evidence of use during the previous ten years sufficient either in character or extent to establish a public right.

"There can be no question that during the ten years before the operations of the Clyde Trustees the path by the river was much less extensively used than it has been since, because there was a very much smaller population to make use of it. The first shipbuilding yard to the west of the Meadowside Ferry was the yard at Whiteinch, which was not established until 1846, and before its establishment the only people living to the west of the ferry who could make use of the path were the inhabitants of farmhouses, labourers' cottages, and colliers' cottages. There was, however, a considerable number of such houses and cottages; and there is evidence that the path existed in a well-defined track by the river side, and that it was frequented both by the farming population to the west, and by the inhabitants of Govan and Partick, for more than twenty years before the operations of the Clyde Trustees. Before these operations the line of the river bank was very irregular, and the path was nearer the water at some places than at others,

but there can be no doubt that, speaking generally, it led along the margin of the river. It was crossed by the Hay Burn (now covered over) and by various fences. But in ordinary weather, and with ordinary tides, the burn could be crossed without difficulty by stepping-stones, so that it presented no serious obstacle in the way of foot-passengers. The fences were crossed by stiles; and it is proved by the witness John Anderson that so far back as 1833 or 1834 the tenant of the field to the west of the Hay Burn tried to put up fences without stiles, but that they were knocked down, and that stiles being then put up the fences were not afterwards interfered with. There is a considerable body of evidence to prove that both before and since that time the path was much frequented. Some of the witnesses speak of it as a regular thoroughfare, upon which they used to meet crowds of people; and in particular, there can be no doubt that it was used to a very considerable extent by people living to the west of Partick in going to, and still more in coming from, Govan Church, at a time when there was no church at Partick, and by children going to and coming from school.

"The pursuer, however, maintains that the only extensive use which can be shown to have been made of the path during the first ten years of the forty was by people who resorted to it for the mere purpose of strolling for pleasure, and not by people using it in their ordinary avocations as a means of transit. It is true that, at least before 1846 or 1847, the evidence of use is very general; and it may be that if no more definite uses could be established during the subsequent period, the custom of resorting to the river-bank for recreation, or even the occasional use of the path as a more agreeable walk to and from church than the high road afforded, could not have been held to indicate a right-of-way. But at least since 1847 it has been used by workmen at Whiteinch and others in the course of their ordinary avocations as a means of transit to and from the ferry. Such use of it has been continuous during that time, and has increased year by year with the growth of the population; and for more than thirty years there can be no question that it has been used for business purposes and as a convenient route between the Ree Road and the ferry —that is, from one public place to another.

"But if the evidence as to the last thirty years is in its nature sufficient to establish a public right-of-way, it does not appear to me very material that the only prior uses of the road which can now be proved may be indefinite or ambiguous. There is no doubt that to establish the defenders' case the public must have used the road as of right for forty years, but that the public use has been continuous and uninterrupted for considerably more than forty years is proved beyond question. The only question is, whether the undoubted use for the earlier years of the forty is attributable to the tolerance of the proprietor or to the exercise of a public right. There is evidence that it was resorted to for other purposes than mere recreation; and the throwing down of the fences until stiles were supplied is a material piece of evidence to show that, for whatever purposes the public may have used it, they claimed to do so as of right. But assuming in favour of the pursuer that the earlier use is consistent with either view, it is explained and confirmed by the subsequent use, which cannot be reconciled with any other hypothesis except the assertion of a right-of-way. It is a very material fact in the same direction, that when the Clyde Trustees destroyed the old path by their operations in 1852 they substituted a new one, which they constructed, and have since maintained, for the use of the public. This was done with the acquiescence of all parties concerned; and the presumption is that it was done because the use which had already prevailed for a length of time had established a right-of-way of which the public could not be deprived.

"The pursuer maintains, on the authority of *Mackintosh* v. *Moir*, March 2, 1872, 10 Macph. 516, that assuming a right-of-way to be established, the Court has a discretion to fix the precise line in which it should be exercised, and that the road which he proposes to substitute for that claimed is sufficient to supply the public right. The decision appears to me to be inapplicable. What was done in that case was merely to define a line of road within the latitude allowed by the verdict of a jury finding that a right-of-way existed generally in a certain direction. In the present case, the right, if it is proved, affects a definite line of road or pathways already in existence and in daily use. The precise line of road over which the right-of-way exists being fixed and defined by prescriptive use, it cannot in my opinion be shut up, nor can a new and different road be substituted for it except by statutory authority.

"The other road claimed is in a somewhat different position. [*His Lordship then stated his opinion that the precise line contended for by the defenders was not established, and referred to the fact that there was no existing road on the line claimed, while that road which did exist fully served the purpose, and proceeded*]—"If a public right-of-way over a defined path in the line G F had been satisfactorily established, the pursuer could not, in my opinion, have insisted in this action on the line G H being accepted as in substitution for that to which the public had right. But there is no ground for subjecting him to the burden of two rights-of-way in the same direction, and if there be any question as to the precise line in which the public right should be used, the existing use of the line G H, and the disuse of the line G F, appear to be conclusive in favour of the former line. So far, therefore, the case appears to me to fall within the rule recognised in *Mackintosh* v *Moir*, and in the previous case of *Macdonald* v. *Farquharson*, 10 S. 236."

The pursuer reclaimed. He argued — The Clyde Trustees by their dredging operations had made a species of dyke, which the public walked upon and trod into a sort of road, but the operations of the Clyde Trustees did not and could not make the road claimed a public road along the river bank. By their bargain with pursuer the ground of the Clyde Trustees ended with the top of the pitched bank, whereas the road in question lay behind the bank and was on pursuer's ground. The road offered was in every way as convenient a road, and was in some parts shorter. There never was any right-of-way over the ground in question, but merely a practice by the public of strolling for pleasure. In any view, the direction of the road had been altered at the time of operations in 1847 and 1857 on the premises of Robin-

son, Dunn, & Company, by being deviated, and the alleged prescription must be dated from these years. So tried it failed. The public might have a sort of right-of-way, but it was never defined, and the use which they alleged was of such a general character that it could never constitute a right-of-way.

Authorities — *Mackintosh* v. *Moir*, March 2, 1872, 10 Macph. 517 ; *Jenkins* v. *Murray*, July 12, 1866, 4 Macph. 1046 ; *Macdonald* v. *Farquharson*, January 24, 1834, 10 S. 236.

Argued for defenders — The right-of-way in question was part of a general right-of-way which the public claimed along the whole north side of the river Clyde. The evidence showed that there had existed during the prescriptive period a river-side road, and that that road was made and was maintained by the Clyde Trustees. The proof also showed that during the prescriptive period this road had been used both for business and for recreation.

Authorities—*Board of Works of Greenwich* v. *Maudsley*, L.R., 5 Q.B. 397; *White* v. *Lord Morton's Trustees* (*Aberdour Case*), July 13, 1866, 4 Macph. 53.

The Case against the Police Commissioners of Partick was sisted in the Inner House until it should appear what was to be the issue of the cause as between the pursuer and the other defender.

At advising—

Lord Shand —This action, which has been raised at the instance of Colonel Hozier, as proprietor of the lands of Partick, is presented in the form of an action of declarator of the exclusive right of property in part of the lands situated on the north bank of the river Clyde, and delineated on a plan lodged with the summons as lying within certain boundaries marked by letters on the plan. The true purpose of the action, however, was to negative a claim asserted by the public to certain rights-of-way for foot-passengers through the ground in question. It appears that before the case was brought into Court the public asserted a claim to two rights-of-way which gave rise to controversy, and to the breaking down by the public of certain fences erected by the pursuer, and it has become necessary to have the rights of parties settled judicially.

Two public rights-of-way for foot-passengers are claimed by the defenders, both starting from the same point, viz., the ferry called the Meadowside Ferry, at the junction of the river Kelvin with the Clyde. The first of these, being that of the greatest length, extends from Meadowside Ferry along the bank of the Clyde westwards a considerable distance till it reaches the south-east boundary of the property of Messrs Robinson, Dunn, & Company, saw-millers, thence northwards along the east side of that property; and again westwards along the north side of Robinson, Dunn, & Company's property to what is known as the Ree Road or Saw-mill Road, the whole line of footpath claimed being substantially upon Colonel Hozier's property.

The case has been tried by the Lord Ordinary without a jury, as one really involving questions of right-of-way, and the defenders who maintained these rights were made pursuers in the issues raised by their defences.

The real controversy on the reclaiming-note has related to the larger footpath which runs a considerable distance along the river bank. It was explained, on the one hand, that the pursuer Colonel Hozier has a material interest to have it found that no such right-of-way exists, because he will then be enabled to make considerable use of the river frontage for shipbuilding and other works for which it is well adapted. The defenders, on the other hand, have stated that although the right-of-way along this line be established, the use of the path will not be so serious an obstruction as is represented by the pursuer, because it has been found quite possible at other places along the river bank where similar public rights-of-way exist, to erect building yards and other works with the means of direct access to the river wherever this is required, and there is evidence in the proof to this effect. However this may be, the rights of the parties cannot be affected by such considerations. The question of the existence of the alleged right-of-way must be determined with reference to the use and possession which the public has had for the last forty years.

Now, in regard to the use, a proof has been led, there has been an anxious discussion of the case, and I think the facts have been fully and very clearly stated by the Lord Ordinary in the note appended to his judgment. It appears to be quite clear that between 1852 and 1854—that is to say, about thirty years before this action was raised—the Clyde Trustees embanked the river at that part of it which is here in question, and that in doing so they formed a road of about twelve feet in breadth at the top of the slope of the embankment, and I do not think it has been seriously disputed that for the thirty years that have elapsed since these operations took place the footpath has been extensively used by the public in the same way as a footpath is used in the exercise of a public right, that is, without interruption or objection of any kind. The question raised is rather, whether the usage for ten years previously had been of an extent and character sufficient to sustain a public right-of-way? I agree with the Lord Ordinary in thinking that the defenders have made out their case to this public right-of-way, and the evidence of public use for the full period of forty years is sufficient to support that claim.

As the Lord Ordinary has observed, it is of considerable importance in looking at the evidence prior to 1852 to see that at and from that date there has been an extensive and uninterrupted exercise of the public right of use of the pathway, and it is by no means an unimportant circumstance that the Clyde Trustees, when carrying on their operations, made provision for a footpath at this place—for it is a matter of fair inference that this was done in recognition of a right that had previously existed. It is no doubt true that during the later years to which I have referred, with an increasing population in this district, and works growing up in the neighbourhood, there has been a greater extent of use than had been or could possibly be the case previously, but I think the evidence shows that in the earlier years, and so far back as the memory of the witnesses goes, the river bank, from Meadowside Ferry on the one side to the Ree Road on the other, has been regularly used, not merely as an agreeable walk, although it was frequently

used for the purposes of recreation, but by persons having occasion to go that way in the course of their ordinary avocations. Since 1847, when the Whiteinch Shipbuilding Works were erected, the workmen connected with these works have used this road constantly, and before and since that date I think there is a body of evidence to the effect that those persons to whom it was a convenience—I mean farmers in the neighbourhood, cottars, field labourers, and others—used the road whenever they had reason to do so, and used it, not as a matter of tolerance only, but as a matter of right, and just as it has been used subsequently. And in addition to the ordinary use just mentioned, I think it is clear from the evidence that the path was extensively and regularly used by persons frequenting the church of Govan on the other side of the river. There is a good deal of evidence that persons going to and from that church coming from the north side of the river used this road regularly, in addition to those who used it for recreation and in the course of their ordinary business avocations.

It has been maintained that prior to 1852 there was no regular made path along the river bank, and to some extent that is true, because it appears that the Hay Burn, which ran down through the ground towards the river, was sometimes in such a condition that it was difficult to get over. But although the Hay Burn caused an obstacle on some occasions when in flood, and after the flood had receded, by leaving the banks soft and muddy, yet this did not seriously affect or interrupt the use of the road, for all that was necessary was to go back a short distance from the river, and cross the burn higher up, still using the right of passage through the pursuer's ground, and this the public did.

Then it is further to be observed that there is evidence in the proof to show that an attempt made on more than one occasion by the proprietor to put fences across this road down to the river side which impeded the footpath was resisted, for the fences were broken down, so that stiles had to be provided, over which persons using the road passed. This again shows that a right-of-way was recognised as being in existence then.

These points are all fully described by the Lord Ordinary in the judgment he has given, and I do not think that I need say more than that I agree with his Lordship's view of the evidence.

I think, however, it is not unimportant to notice that we have a series of titles connected with this ground by which Colonel Hozier and his predecessors have given off portions of it along the river side, in the warrandice clauses of which there are exceptions of rights of walking along the banks of the river Clyde, and of rights of footway or passage through the ground, thus showing that the parties had in view that the public had claimed a right-of-way at the date of these titles. Accordingly, taking the case as it was presented to the Lord Ordinary, I am of opinion with his Lordship that the defenders have made out their claim to this right-of-way.

There was a new point stated in the argument in the concluding speech of senior counsel for the pursuer, by which a formidable difficulty was presented which it is right I should notice. The road as it originally existed went right along from Meadowside Ferry on the east, in a straight line along the river side to the Ree Road on the west. In 1834 a piece of ground to the west, and adjoining the Ree Road, was given off to the predecessors of Robinson, Dunn, & Company, who are saw-millers now occupying that ground. The path continued to be used from 1834 during the occupancy of the feuars as formerly down to 1847 or 1848, when it appears that Messrs Robinson, Dunn, & Company, who had erected a saw-mill on the ground previously occupied by a foundry, erected a wall at the west end of the river path, thus cutting off access to the Ree Road, and from that time onwards the public, after breaking down the wall which had been so put up, and so far resisting the encroachment on their right, acquiesced in and accepted a deviation from the old line of road. But while they discontinued the use of part of the old path, it is clear that this was on the footing that they had an alternative road provided or allowed which enabled them to reach the Ree Road with little detour by turning off when they reached Robinson, Dunn, & Company's feu and striking northwards, and thereafter westwards, round the boundaries of Robinson, Dunn, & Company's property to the Ree Road.

The position which the defenders maintain in reference to this change of part of the path is explained in their second statement of facts in the following passage:—[Quotes the defender's statement as above, "The only other buildings"—"public right-of-way."] Now, I pause here to say that I think the proof substantiates that statement. And then the defenders go on to say,—[Quotes "Many years ago"—"Saw-mill Road."] This last passage refers to a feu which was given off as an addition to the Saw-mill Company's feu in 1857. The statement then proceeds,—[Quotes "This deviation"—"former rights."] And again I have to say that, so far as this statement of the defenders is a statement of fact, I think it has been made out, and that I think it has been established, and is clear, that from the time when the interference was made at the river side with the use of the path past the front of the saw-mills, the public have had uninterruptedly the use of the said road round these saw-mills, first northwards and then westwards to the Ree Road.

The argument of the pursuers has been, however, to this effect, that as in the year 1847 or 1848 the public ceased to use the direct road along the river bank to the Ree Road, and as there has been only thirty-four years' use of the deviated part of the road, taking 1847 as the starting point, and indeed only twenty-five years' use of the deviated part, if you take the deed of 1857 as the starting point, there is too short a period to enable the public to acquire a right of way over that ground. It has been maintained that nothing short of forty years' possession of the whole right of way will enable the public to constitute their right, whereas here there has only been twenty-five years, and thirty-four years' use of material parts of the road which have been used only since the deviation occurred. Now, if it had appeared that the ground which had been used by the public as the deviation or substitution of the original road at the parts of it I have mentioned had been Colonel Hozier's ground, without any facts shewing his knowledge of and acquiescence in that use, all I shall say now is that a very formidable argument might have been maintained on his behalf. It might have been

said that the public could only establish a right of way upon an entirely new piece of Colonel Hozier's property by forty years' use and possession. Even in that state of the facts, however, there are considerations to support an argument to the contrary, on the ground that Colonel Hozier was not entitled to have the great extent of this footpath along the river bank, which had been for so many years in the possession of the public, shut up in consequence of a deviation of a short part of it which he had not resisted, and which the public had enjoyed for some years. But it is unnecessary to deal with the case on that footing, for I think that there are materials which shew clearly that the case is one in which Colonel Hozier must be held to have acquiesced in the use by the public of the deviation or substitution of that part of the road; and so acquiesced that he is no longer entitled to say that no right has been acquired.

In the first place, it is clear that when Robinson, Dunn, & Company built the wall across the part of the road at the river side, their proceedings attracted a good deal of public notice. Colonel Hozier's factor lived in the neighbourhood, and it is quite clear that when the difficulty occurred it must have been brought under the notice of all parties interested, because not only was the wall broken down more than once, by reason of the public insisting on their right-of-way, but the matter formed the subject of proceedings in one of the local Courts. It is therefore impossible to doubt that the parties interested must have been quite aware that the public were asserting a right-of-way there, and they must also have been quite aware that the public did not assent to the road being shut up, and that they submitted only on obtaining a substitute or deviated path.

Then in regard to the substituted line of road along the east of Robinson, Dunn, & Company's property to the north, and then to the west through the property of Colonel Hozier and Robinson, Dunn, & Company, upon turning to the titles we find that provision is made for the use of the ground for the purpose of a road. The title of 1834, which contains the boundaries of what is now Robinson, Dunn, & Company's feu, is to this effect—[*His Lordship thereupon quoted the titles*].

Now, in that state of matters, what occurred was this, that Robinson, Dunn, & Company shut up this footpath, and having the ground given off by Messrs Hozier for the purpose of making a road, they, with the authority of the pursuer's predecessors, allowed the new road to be appropriated and used as a substitute for the old one so shut up. It seems to be too clear for argument that if the substituted line had been entirely on Robinson, Dunn, & Company's ground, and the public had submitted to the shutting up of one line in consequence of their being permitted to use another, there could really be no question that the use of the substituted line for even a short time would give the public a right over it. The case would be simply one of the proprietor shutting up the road at one point by which access to the Ree Road was cut off, and providing or laying out through his ground a deviation which would enable the public to reach the Ree Road by a slight detour. In such a case I think the ordinary rule as to forty years' possession has no application, and that if the facts were sufficient to show that there was such use by the public of the new road—it might be for a year or less—as would amount to acquiescence on their part in the shutting up of the old road, and acceptance of the new one allowed in lieu of it by the proprietor, this would create a right to the substituted line of road.

But having regard to the terms of the titles, and to what occurred, it appears to me to be made out that Colonel Hozier or his predecessors authorised the course that was followed. They could not challenge what Robinson, Dunn, & Company did, because that company had got the ground for the purpose of a road, and had paid for it, while the superiors gave an equal quantity of ground for the same purpose. And so, I think, we have the pursuer's predecessors made substantially parties to the proceedings by which the road was in part deviated, or, at all events, that what took place was done with their authority and sanction.

It was ingeniously argued by counsel for the pursuer that the public had no *jus quæsitum* under the contract between the pursuer's predecessors and Robinson, Dunn, & Company or their predecessors—that the terms of that contract were unknown to the public, who had no rights under it. I quite concede that this is sound. The public had no right and no *jus quæsitum* under that contract until it came to be acted upon. But Robinson, Dunn, & Company having stipulated for the making of the road, their acting on that stipulation placed the public in quite a different position as regards the Messrs Hozier, because Messrs Robinson, Dunn, & Company were entitled to say that the deviation had not only been made but had been made under the authority of the deeds granted to them, and the public could thereafter successfully maintain that they had acquired a right against both parties. And so taking this as a deviation made and accepted in 1847, of what was undoubtedly a public road then, it appears to me that this brings matters down to 1857 in this position, that by that time, and indeed long before that, the public had acquired a right-of-way by the deviated path to the Ree Road in respect of the actings of Robinson, Dunn, & Company, and the actings and acquiescence of the Messrs Hozier.

In 1857 a second deed was granted by which the feu of Robinson, Dunn, & Company was extended northwards, and the result was that the public were again shut off from the road which they had used on the north side of the first feu, and had to make a somewhat further detour, going northwards along the line of the additional ground—that is, along the eastern boundary of the additional feu, and along its north boundary to the Ree Road or Sawmill Road. In that deed there is a stipulation to this effect—"Declaring also, as it is hereby mutually agreed to between the said James Hozier and the said Samuel Wilson" (Samuel Wilson was the name of the person who took the feu) "in so far as they and their foresaids are concerned, that the street of forty-five feet wide which was formerly intended to be made on the north side of the said piece of ground originally feued to the said John Berry and others, and now belonging to the said Samuel Wilson, and also the former intended street of forty feet wide on the east side of the

said last-mentioned piece of ground, are now to be, and the same are accordingly hereby mutually abandoned and given up by the parties hereto for their respective interests." And in this feu-contract there is a provision for a new road being formed to the north of the feu of no less than sixty feet wide. It was maintained that as these parties had agreed between themselves to shut up the road, Colonel Hozier was entitled to do so now. But against that there are two facts which taken together are quite conclusive. In the first place, I think in 1857, when this deed was entered into, the public were entitled to keep the road they had got for the reason I have stated—I mean the road along the north and west sides of Robinson, Dunn, & Company's feu to the Ree Road—and so they were entitled to have a deviated road provided as a substitute if they gave up that right, although not bound to submit to a deviation. But in the next place it appears from the evidence that the new road round the extended feu has been used by the public since 1857 down to the present time as a substitute, just as they used the former road, and taking these two things together I think it is not possible to maintain successfully that from 1857 down to the present time the public have been in such a position that they have had to acquire a new right entirely by forty years' possession.

Again, I may notice here what I think is worthy of observation, that while, on the one hand, the declaration to which I have referred provides that streets might be shut up so far as the superior's and feuar's rights were concerned, there is in the clause of warrandice in the contract an exception of "any servitude rights of walking along the banks of the river Clyde, or the said ground, or otherwise, which may affect the same," showing that the parties were quite conscious of the rights-of-way which the public have vindicated by the present action.

If there had been no such deviations as I have mentioned, I think it is clear that the public had a right-of-way along the river bank from the Meadowside Ferry to the Ree Road. But I regard what occurred in 1847 or 1848 and 1857 as a mere deviation of that existing road, and I am of opinion that something a great deal short of forty years' possession would in the circumstances be sufficient to give the public the right-of-way along the deviated line of road. Having regard to the terms of the titles and the uninterrupted possession, I hold that the pursuer or his predecessors authorised, or at all events acquiesced in the deviations, and cannot now successfully challenge the use by the public of the deviated lines.

Upon the whole, I am of opinion that the judgment of the Lord Ordinary should be adhered to.

Lord Mure and the Lord President concurred.

The Court adhered.

Counsel for Pursuer—J. P. B. Robertson—Graham Murray. Agents—A. & A. Campbell, W.S.

Counsel for Defenders—Brand—Lang. Agents—Macbrair & Keith, S.S.C.

Tuesday, June 17.

FIRST DIVISION.

[Sheriff of Renfrew and Bute.

NIXON (INSPECTOR OF PORT-GLASGOW) *v.* DEAS (INSPECTOR OF GREENOCK).

Poor—Settlement—Residential Settlement—Constructive Residence—Poor Law Act 1845 (8 *and* 9 *Vict. c.* 83), *sec.* 76.

Where a settlement has been once acquired, residence in the parish in the sense of section 76 of the Poor Law Act 1845, may be merely constructive during the whole five years.

A man who had a residential settlement in the parish of P. went abroad in December 1876, leaving his wife and family in a house in P. He intended to remain abroad for two years, and then, if successful, to bring his wife and family out to him, if unsuccessful to return home. During his absence he regularly remitted money to his wife, which she used to pay the rent of the house and maintain the family. He died abroad in 1882 without having ever returned to this country, and his wife and family became chargeable in G, to which parish they had removed in September 1879. *Held* that the residence which he had acquired for himself and his family at P. had not been lost by absence at the date of the chargeability, and that G. had a good claim of relief against P. for the aliment afforded.

This was an action at the instance of the Inspector of Poor of the parish of Greenock against the Inspector of Poor of the parish of Port-Glasgow, for relief outlay made by him on the widow and children of James Beattie. They became chargeable in Greenock on 19th October 1882. James Beattie, and his wife Mary Wharton or Beattie, were both born in Ireland, and were married there in 1866. In 1869 Beattie came to Port-Glasgow, and was followed by his wife in 1870. They continued to reside there together along with their children, four in number, all of whom were born in Port-Glasgow, till 1876. In that year, having at the time a settlement in Port-Glasgow, Beattie, who was a joiner in a shipbuilding yard, resolved to go abroad, and embarked on board the "Emu," a vessel bound for Adelaide, South Australia, leaving his wife and family in Port-Glasgow.

Beattie obtained work in Australia, and never returned to this country, but died there on 11th July 1882. From the time of his arrival in Australia in the spring of 1877 he made regular remittances of money to his wife, averaging £4 a-month, which remittances enabled her to pay the rent of the premises she occupied, and to keep her family in comfort. He also sent numerous letters to her, and in his last, which was dated the 9th November 1880, besides enclosing a little money, he spoke of trying to get a passage home in the course of that season. He had not been successful in the colony.

In a joint minute of admissions for the parties it was admitted that Beattie's object in going to Australia, as expressed to his wife and family,