self. Now, that is quite a different matter, and therefore any agreement on the assumption of the appointer having power does not apply. A deed which failed from want of power in regard to an essential particular presents a different problem from the ordinary case of a lapsed legacy. At the same time the two run so close together that I am not prepared to dissent from Lord Young's views, and the question will be answered in that sense.

The Court pronounced this interlocutor:—

"The Lords . . . are of opinion and find that the deed of appointment executed by Mrs Best on 30th August 1880 constitutes a valid, subsisting, and the regulating appointment of the whole funds and estate held by the first parties under her marriage-contract, and answer the first question accordingly; answer the first alternative of the second question in the affirmative, and the second alternative thereof in the negative: Find it unnecessary to answer the remaining questions," &c.

Counsel for First, Second, and Fourth Parties—Pearson. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Third Parties—Mackay—H. Johnston. Agents—Henderson & Clark, W.S.

Tuesday, November 3.

FIRST DIVISION.

[Lord Trayner, Ordinary.

LORD BLANTYRE AND ANOTHER *v.* DICKSON AND OTHERS.

Road – General Turnpike Act 1831 (*1 and 2 Will. IV. cap.* 43), *sec.* 70—*Haddingtonshire Roads Act* 1863—*Public Footpath – Justices—Jurisdiction.*

Held that the Justices of Peace of Haddingtonshire had no jurisdiction either under section 70 of the General Turnpike Act 1831, or under the powers contained in the Haddingtonshire Roads Act 1863, to shut up a public footpath upon which no public money had been expended, and which had not been under the management of the road trustees.

Proof—Minutes of Meeting—Subscription.

Quære—Whether unsigned minutes of a meeting of justices ordering that a public footpath should be shut up were valid?

By the 70th section of the General Turnpike Act 1831 (1 and 2 Will. IV. cap. 43), it is provided "that where any new turnpike road shall be made in lieu of an old road, or where any bye road shall be used for the purpose of evading the toll duties imposed by any local Act, or where any old road or any bye road shall have become useless or of no importance to the public, it shall be lawful for the justices at any stated meeting, on the application of the trustees of such road, to give orders for shutting up such old road or bye road." . . .

By the Haddingtonshire Roads Act 1863 it was enacted by sec. 3 that "the words 'the roads' shall mean and include all turnpike and labour roads, highways, and bridges within the county of Haddington, and generally all public roads and bridges within the said county whereon the public have at the passing of this Act a right of passage, or whereon any public traffic is carried on, and which are not herein specially excepted."

By section 4 of the said Act the provisions of the General Turnpike Act, "in so far as the same are not inconsistent herewith, shall be, and the same are hereby incorporated with this Act, and the same shall extend and apply not only to the turnpike roads but also to all the roads hereinafter described." . . .

On 13th July 1880 a petition was presented by Lord Blantyre, the proprietor of the lands of Lennoxlove, and J. D. Lawrie, proprietor of the lands of Monkrigg, both in the county of Haddington, to the Road Board of Haddingtonshire, praying that the board should take measures for shutting up an old public road lying between the public road leading from Haddington to Coalston on the west, and the public road leading from Haddington to Gifford on the east, running through a portion of the pursuer's respective properties of Lennoxlove and Monkrigg, and for assigning the ground of the road to the petitioners for their respective rights and interests as the owners of properties adjoining the road, all in terms of the General Turnpike Act 1831.

Upon this application the board on 3d August 1880 pronounced an order directing an application to be prepared by their clerk and presented to a stated meeting of Justices of the Peace for an order to shut up the said road.

At a meeting of Justices for the county of Haddington, held on 26th October 1880, the application of the Road Board to shut up the said road was entertained, and a resolution passed that it should be shut up.

At a meeting of the said Road Board on 17th March 1882, the road was ordered to be shut up, and was thereafter closed as a public highway. Immediately after this last-mentioned order was pronounced by the board, the petitioners entered into an arrangment for settling their respective interests in the *solum* of the road.

This was an action at the instance of Lord Blantyre and J. D. Lawrie against Alexander Dickson and others, inhabitants of Haddington, who claimed a right to use the ground as a road, to have it found and declared that the pursuers had a good and undoubted right and title to the exclusive possession and occupation of the ground occupied by the said road, and for interdict against the defenders entering upon or using the ground, and from destroying or interfering with the fences on the ground.

The pursuers narrated the proceedings above set forth, and founded on the resolution of the Justices of date 26th October 1880.

The defenders pleaded—"(4) The road in question not having been within the jurisdiction or under the administration of said Road Trustees, Road Board, and Justices, the proceedings founded on were *ultra vires* of said bodies."

They further stated that the resolution of 26th October 1880 was unsigned, and therefore pleaded that it was inept and invalid.

From the record as amended in the Inner House, together with a minute of admissions lodged by the pursuers, the following appeared to be the nature of the road in question:—The

road, which was about twenty feet in width, never was a turnpike, statute-labour or parish road, and no public money was at any time expended upon its maintenance. For many years it was used by the proprietors of Lennoxlove and Monkrigg, their tenants and the public, for cart and carriage traffic, as well as by foot-passengers. It had been used by the public generally as a right-of-way for foot-passengers for upwards of forty years prior to 26th October 1880. The road was never included in any of the lists of roads as falling within the management and administration of the road board of the county, and had not *de facto* either before or after 1863 been managed by them.

The Lord Ordinary (Trayner) on 20th May 1885 sustained the fourth plea-in-law for the defenders, and assoilzied the defenders from the conclusions of the summons.

"*Opinion.*—This case, as now presented in argument by the pursuers, differs materially from the case as stated in the record. The pursuers now admit that the Clovery Road is to be regarded as a public road only in the sense that it is a road over which the public have by long usage acquired a right of passage. It is further admitted that such a road could not be shut up by order of the Justices of the Peace on the application of the road authorities in the county of Haddington, unless they are authorised so to do by the provisions of the Haddingtonshire Roads Act 1863. The argument addressed to me was therefore confined to the question whether, under the Act of 1863 the Justices of the Peace had power to shut up the road in question?

"The Local Act of 1863 contains no direct provision in regard to the shutting up of old disused or superfluous roads; but by section 4 it incorporates the Turnpike Act 1 and 2 Wm. IV. cap. 43. By section 70 of the latter Act power is given to Justices of the Peace to shut up old roads or bye-roads which have become useless, &c.; and the procedure under which such power is to be exercised is prescribed. The Local Act of 1863 (sec. 4), as I have said, incorporates the General Turnpike Act, and provides that 'the same shall extend and apply not only to the turnpike roads, but also to all the roads hereinafter described.' The interpretation clause of the Act of 1863 contains, *inter alia*, the following provision: 'The words "the Roads" shall mean and include all turnpike and statute-labour roads, highways, and bridges, within the county of Haddington, and generally all public roads and bridges within the said county whereon the public have at the passing of this Act a right of passage, or whereon any public traffic is carried on.'

"The pursuers contend that these words are broad enough to cover, and on a fair construction do cover, the road in question. I am of opinion that this contention is unsound. The words 'and generally all public roads,' &c., on which the pursuers rely, appear to me to be limited to roads of the same kind as those mentioned in the specific enumeration which goes before, and these undoubtedly were roads in reference to which the road authorities were charged with the maintenance and supervision, and with the right of property in which the road authorities were vested. A road over which the public had acquired a right of passage, but which otherwise was private property, over which the road authorities had exercised no supervision, and on the maintenance of which they had never expended any money or labour (and such as the road in question is now admitted to be), does not appear to me to fall within the provisions of the Act of 1863. This view of the meaning of the Act is strengthened in my opinion by a consideration of the purpose and scope of the Act, as gathered from its preamble, from which it appears that the better maintenance and improvement of the public roads and bridges in the county of Haddington, formerly under the charge of certain Road Trusts, which were discontinued, was the purpose and the only purpose which the Act of 1863 was intended to serve. The case of *Pollock* v. *Thomson*, 18th December 1858, 21 D. 173, seems an authority in favour of the view I have adopted.

"I am therefore of opinion that the shutting up of the road in question was *ultra vires* of the Justices of the Peace; and I do not, consequently, express any opinion as to the regularity or sufficiency of the procedure before them, which however appears open to grave objection."

The pursuers reclaimed, and argued—Even admitting that under the General Turnpike Act the Justices had not jurisdiction to shut up this road, the interpretation clause of the Local Act was broad enough to cover a road of this description. But further the expression "bye-road" in sec. 70 of the General Turnpike Act would apply to a road like this. The fact that the Road Board had not maintained the road in question was not enough to exclude their jurisdiction, because there were many "bye-roads" on which no public money had been spent, and yet the Road Board would be entitled to shut up these under section 70. The objection that the order of the Justices was unsigned was obviated by the admission on record that such an order had been pronounced—Stair, ii. 7, 10; *Smith* v. *Knowles*, March 11, 1825, 3 S. 456; *Murray* v. *Stewart*, November 14, 1839, 2 D. 12.

The defenders argued—The construction to be applied to the statutes in this case should be that which was applied in the case of *Pollock* v. *Thomson*, December 18, 1858, 21 D. 172. This was merely a public footpath, and was therefore neither a public road nor a bye-road in the sense of the statutes. The order in question being an *actus legitimus* could not receive effect because it was unsigned—*Dickson* v. *Heritors of Newlands*, M. 7464; *Ferguson* v. *Heritors of Kirkpatrick-Durham*, July 2, 1856, 12 D. 1146, aff. 1 Macq. 232.

At advising—

Lord President—It appears to me that the greatest difficulty in this case arose from the fact that the parties were not able to tell what the precise nature of this road is which the Justices attempted to shut up by their resolution or order of 26th October 1880. Counsel have now explained that there is no public right in connection with this road except a public right of footpath which was constituted by possession or use for forty years. The road no doubt was used by carts and carriages, but it is not alleged that the public used the road for carts and carriages for forty years, or for any number of years; nor is it said that there is any dedication of the road to public uses either by grant or statute. That being the state of the facts we must deal with this

as a public footpath, and not as a public road in any other sense whatever.

The question then is, whether the Haddingtonshire Road Trustees have under their Local Act, and under section 70 of the General Turnpike Act, jurisdiction to shut up a public footpath? Now, in order to answer that question I do not think it is necessary to go over the provisions of the Acts, for the question is a very general one, and would arise under all local Acts framed in the usual way, where section 70 of the Turnpike Act is incorporated.

On that question I am very clearly of opinion that trustees in this and every other case have charge of public roads which are used by the public for horses, carriages, carts, sheep, cattle, &c., and have nothing to do with footpaths except in virtue of special powers, and it is not alleged that there is any special power here, unless such is conferred by the general words that are common to all local Acts and to the general Act.

In the view I take it is not necessary to go further into the case. This is a footpath, and therefore the Justices have not jurisdiction to shut it up. In coming to that conclusion I think we are following the case of *Pollock* v. *Thomson*, 21 D. 173, in which though the clauses were not quite the same they were substantially the same.

It is right to add that if this ground of judgment had not been quite so clear I should have had the greatest doubts as to the regularity of the procedure. But the first ground is quite clear.

Lord Mure—I come to the same conclusion on the case as now brought out. This was a public footpath and nothing more, and I see that in the case of *Pollock* it was held that road trustees had not power to shut up footpaths. The power then given to the trustees was "to shut up superfluous or useless roads." And under that provision the Court in 1858 held that the trustees had not jurisdiction to deal with a public footpath. I do not think there is any distinction between section 4 of this Act and the similar section in the Dumbartonshire Act. I think this footpath is not under the jurisdiction of the trustees.

Lord Shand—If it had appeared upon record or had been admitted by both parties that this was a public road in every sense of the word, except that it was not under the management of the Road Trustees, I should have thought it a question of great difficulty. It is impossible to read these statements without seeing that they were framed loosely, but from the statement as now amended it is clear that the only public right-of-way along this road was one for foot-passengers. I am therefore of opinion that the trustees had no right to shut it up. I may further say that I should have had the greatest difficulty in supporting the order by the Justices, it being in effect a decree which was not properly authenticated.

Lord Adam concurred.

The Court adhered.

Counsel for Pursuers (Reclaimers)—Goudy—Dundas. Agents—Gillespie & Paterson, W.S.

Counsel for Defenders (Respondents)—Strachan—A. S. D. Thomson. Agents—Andrew Newands, S.S.C.

Wednesday, November 4.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

GOLDIE *v.* SHEDDEN AND OTHERS.

Succession—Testament—Writ—Holograph—Subscription—Parole Evidence.

Two deposit-receipts with the following words, holograph of a person deceased, "Mr Lewis Shedden i leave this to my sister Janet Shedden," were produced by his sister after his death. *Held* in an action in which these documents were founded on as valid testamentary writings, that being unsubscribed they could not receive effect, and that parole evidence to prove that the deceased intended them to be testamentary writings was incompetent.

Remarks on *Russell*, Dec. 11, 1883, 11 R. 283.

Lewis Shedden, gardener, Kilmarnock, died on 18th March 1883. This was an action at the instance of Mrs Janet Shedden or Goldie, sister of the deceased, with consent of her husband, against John Shedden and others, next-of-kin of the deceased, to have it found and declared "that the writings following, namely, the words 'Mr Lewis Shedden, i leave this to my sister Janet Shedden,' written upon the back of a deposit-receipt of date 11th October 1880, granted by the Clydesdale Banking Company at their office in Stewarton, in favour of the deceased Lewis Shedden, Kilmaurs, for the sum of one hundred and seventy-two pounds sterling, and the like words written upon the back of a deposit-receipt, of date 9th December 1882, granted by the Royal Bank of Scotland at their office in Kilmarnock, in favour of the said Lewis Shedden, for the sum of sixty pounds sterling, are both holograph of the said deceased Lewis Shedden, gardener, Regent Street, Kilmarnock, and are valid and effectual testamentary bequests in favour of the pursuer Mrs Janet Shedden or Goldie of the said deposit-receipts respectively, and of the sums—principal and interest—therein contained."

The deceased left no other testamentary writing, and these deposit-receipts constituted nearly the whole of his estate. The receipts were produced after the death of Lewis Shedden by the pursuer, with whom he lived the latter part of his life and down to the date of his death.

The defenders pleaded that the writings on the deposit-receipts were not valid or effectual testamentary dispositions by Lewis Shedden, in respect they were not subscribed by him.

A proof was allowed and led in order to show that the deposit-receipts had been delivered by the deceased to the pursuer, and that he had intended the documents to be testamentary writings. There was no question of donation in the case.

On 13th January 1885 the Lord Ordinary (M'Laren) sustained the defences for the compearing defenders, and assoilzied them from the conclusions of the libel.

"*Opinion.*—I took time to consider this case, that I might examine the authorities regarding the possibility of supplying the want of a subscription to a testamentary writing. There is no question of donation raised on the record, and the only question I have to consider is, Whether