in all time coming. The respondent is not seeking to sell or feu any of the land in question at the present time, and the restriction has not become operative. A second point was argued, whether the restriction imposed is in sufficiently definite terms to be enforced against a singular successor. Having come to the conclusion that the respondent is not acting in contravention of the restriction imposed upon the defender's author Mr Wakefield in the disposition of 1864, it is not necessary to go further, but I would endorse the opinion of Lord Guthrie that the restriction must be sufficiently specific that the extent of it can be ascertained by a singular successor without travelling beyond the four corners of his titles.

In my opinion the appeal should be dismissed.

Their Lordships dismissed the appeal with expenses.

Counsel for the Pursuer and Appellant—Murray, K.C.—Jolly—MacRobert. Agents—G. H. Robb & Crosbie, Glasgow — Fyfe, Ireland, & Company, W.S., Edinburgh — Elvy, Robb, & Welch, London.

Counsel for the Defender and Respondent—Sir Robert Finlay, K.C. — Christie, K.C. —Burnet. Agents—John Steuart & Gillies, Glasgow—Simpson & Marwick, W.S., Edinburgh—Kenneth Brown, Baker, Baker, & Company, London.

Tuesday, April 27.

(Before Earl Loreburn, Lord Dunedin, Lord Parker, and Lord Sumner.)

M'GREGOR *v.* CRIEFF CO-OPERATIVE SOCIETY LIMITED.

Servitude—Prescription—Evidence—Road—Property—Long Positive Prescription.

In June 1912 interdict was applied for against the erection of certain buildings on the ground that they would interfere with a servitude right of passage for carts from the main street through a close to the back premises of the complainer. The necessary possession of this right of passage was proved for thirty-eight and a-half years, *i.e.*, back to 1873, but with regard to the nature of any use prior to that date, while there was some evidence of use, one witness, accepted as quite reliable, spoke to the period between 1861-5, when as a child he lived with his father, the occupier of the servient tenement, and he stated that there was a locked gate on the passage of which his father had the key, and the occupier of the dominant tenement only used the passage by asking for the key. It was maintained that this established that the use in 1865 was by tolerance, and the use from then to 1873 must be presumed to have retained that character.

Held (*diss.* Lord Sumner) that on a consideration of the whole circumstances the possession required to establish the right of passage had been proved, and that interdict should be *granted*.

Observations as to what may or may not be presumed in regard to the period and the possession of the long positive prescription.

On June 1, 1912, Mrs Christina M'Culloch or M'Gregor, 20 East High Street, Crieff, and her two daughters, *complainers*, presented a note of suspension and interdict against the Crieff Co-operative Society, Limited, East High Street, Crieff, *respondents*. The complainers sought to have the respondents interdicted from "building or otherwise encroaching upon that portion of a steading of ground on the north side of the East High Street, Crieff, . . . which is situated on the east side of said steading, and immediately to the east of the site of the dwelling-house erected on said steading, . . . which said portion forms and has heretofore been used as a cart road, over which the complainers have enjoyed right of access as a part and pertinent of the lands and others belonging to them . . . in such manner as in any way to obstruct the complainers in, or to interfere with, the free use and enjoyment of the said cart road by the complainers as an access to their said lands, in the manner in which the same has heretofore been used and enjoyed by them under their titles to and as part and pertinent of their said lands."

The complainers pleaded—"(2) The complainers being entitled to access to their lands by way of said cart road both by express written grant, *et separatim* as a servitude in favour of their lands established by prescriptive possession, interdict should be granted against the respondents as craved."

The respondents pleaded—"(3) The complainers are unable to instruct any right of access for general traffic by way of cart road over the respondents' property either by their titles or by prescriptive use."

The *facts* and the *nature of the evidence* appear in the opinion (*infra*) of the Lord Ordinary (CULLEN), who on June 14, 1913, refused the prayer of the note.

Opinion.—"The parties to this action are owners respectively of adjoining properties in East High Street, Crieff, the property of the complainers lying to the west of that of the respondents. Each of the properties has a building along the street front, buildings behind, and back ground. To the east of the respondents' property there is an entry from the street known as 'Bell's Entry.'

"The respondents recently proposed to erect new buildings on their back ground, and applied to the Dean of Guild Court for a lining. The complainers objected to the erection of one of the new buildings on the ground that it would have the effect of blocking a cart road to the back of their property to which they allege right. This cart entrance is from the street by way of Bell's Entry, thereafter curving to the west over more or less open ground into their back premises.

"The complainers own no part of the

solum of the said cart entrance. The *solum* of Bell's Entry appears to belong in part to the respondents and in part to the owners of the property to the east of the entry. The *solum* on which the new building in question was proposed to be erected belongs to the respondents. The complainers assert right to the cart entrance by way of servitude.

"As regards the constitution of the alleged servitude the complainers plead (1) written grant, and (2), alternatively, prescriptive possession for forty years.

"The written grant to which the complainers appeal is found in a feu-contract and disposition, dated in 1809, between John M'Currich, shoemaker in Crieff, and Colin Brown, tallow chandler in Crieff. M'Currich had formerly owned both of the properties now belonging to the complainers and respondents respectively. He also owned a piece of unbuilt-on and cultivated land at the back, and lying to the east and discontiguous from the property which is now the complainers'. Prior to the deed of 1809 M'Currich had disponed the complainers' property to Colin Brown. Under the 1809 deed Colin Brown acquired from him also the said cultivated ground lying at the back and to the east. The area of this piece of ground is not stated in the deed nor disclosed by the evidence in this case. In after years it appears to have been parcelled out among the various tenants on the property now the complainers' as garden ground. It does not now belong to the complainers.

"The deed of 1809 in feuing the said cultivated ground towards the east to Colin Brown conferred on him therewith two rights which are thus described:—'With the liberty and privilege of a road of three feet wide on either side of the said John M'Currich's property as he may think most convenient for him till it reaches said ground hereby disponed, and also with the privilege of a cart road to the property of the said Colin Brown upon the west, leading from the street immediately east of the said John M'Currich's dwelling-house, which road is hereby declared only as a privilege to the said Colin Brown for carrying in his crop when ready.'

"The piece of cultivated ground acquired by Colin Brown under this deed was, as I have said, discontiguous from the built-on property (now the complainers') previously acquired by him from M'Currich. It was therefore proper for M'Currich to provide him with means of access. To do this M'Currich granted him, in the first place, the servitude right to a road to the ground of 3 feet wide in the terms above quoted. The route settled on was apparently by way of Bell's Entry. It is not here in question. In addition M'Currich granted to Brown the privilege of a cart road 'for carrying in his crop when ready.' The line of this cart road as it left the street was defined, and was by way of Bell's Entry. The right given was not to a cart road for all purposes or at all times, but was limited to the occasion of carrying in Colin Brown's crop when ready. Looking to the context in which this right was given, I have no difficulty in reading the word 'crop' as referring to the crop or produce of the cultivated ground. The cart road was to lead in from the street. There was no way for a cart at the back. It seems to be implied that Colin Brown had some means of getting the cart with his crop from the cultivated ground to the street further east, so that he might then bring it along the street and up Bell's Entry. The local conditions in 1809 cannot be accurately ascertained.

"If I am right in what I have said as to the meaning of the grant of the cart road to Colin Brown, it is clear that that grant does not establish the servitude right now asserted by the complainers, which is a right of ingress and egress for carts to and from their premises at all times and for all purposes. And as the complainers do not now own the piece of cultivated ground, there can be no claim by them for a cart road to bring by it the crop of the ground when ready. From this point of view it is unnecessary to consider whether the grant to Colin Brown was one personal to himself as the respondents maintain. It was, in any case, intended only to serve the two properties as a connecting route between them for a limited purpose while they were both in the same ownership—a state of matters which has ceased to exist. If it was a proper servitude and not a mere personal privilege, the dominant tenement would appear to me to have been Colin Brown's built-on ground and the cultivated ground viewed as a *unum quid*.

"I turn now to consider the complainers' case as based on forty years' possession. I think the result of the evidence is that from the time when Peter Whyte built his stable on the back ground of the complainers' property the route by Bell's Entry has been freely and openly used as a cart entrance to said back ground as by way of right. There does not seem to be any defined roadway, the reason being that the ground is bare rock or mainly so. The evidence, however, is sufficient in my opinion to show that in Whyte's time and since then carts have been taken over the ground to the complainers' back premises as often as occasion required, and that in the time of some of the tenants, such as Whyte and Donnachie, the carting was regular and frequent. Whyte went to the property at Whitsunday 1873. It is not clear when he built his stable. But taking it that he began carting at the period when he entered on his tenancy, this period is within the forty years' possession required by the complainers. Now there is evidence as to the state of matters during the period which preceded Whyte's tenancy. And it shows, in my opinion, that the use of the cart entrance on the footing of an assumed right to use it began with Whyte, and cannot be carried back before his time.

"The evidence in question as to the period before Whyte's tenancy relates to carting done by one Anderson, a plumber who had a workshop at the back of the complainer's property. Various witnesses speak on this subject. I prefer the evidence given by Mr Thomson, which impressed me as reliable,

and as giving the most definite account of the extent and character of the carting done by Anderson. Mr Thomson's father was at that time the owner of the respondents' property, and he resided on it up till 1865. Mr Thomson was born in 1856, and is therefore speaking to events in his early boyhood, but he professes a clear recollection, and I do not doubt he is speaking the truth. He explains that Anderson came to Crieff to start business as a plumber on the suggestion of an uncle of Mr Thomson in Edinburgh, that he set up his workshop in one of the back buildings on the complainers' property, and that the Thomson family were friendly with him. He further says that at that period there was a fence and locked gate between the back premises of the two properties, that his father kept the key of the gate, that Anderson at times had occasion to bring to his workshop heavy materials such as pipes which could not be conveniently carried by the narrow lane on the west side of the complainers' property, and that on such occasions Anderson asked permission to bring the material in a cart by Bell's Entry to the locked gate, and asked for and got the key of the gate, which he thereafter returned to Thomson senior. Mr Thomson says that the cart never in his experience passed through the gate, as there was a steep slope from the gate to Anderson's workshop which would have been dangerous for the cart, and that the cart was unloaded outside the gate, and the pipes, &c., carried by hand through the gate to the workshop,

"Now whatever may have been the origin of the gate between the properties, the evidence just dealt with does not show Anderson as using the cart route, so far as he did use it, as by way of right, but by way of favour from his neighbour Thomson. The complainers' counsel laid stress on the existence of the gate as involving the recognition of an established access to the back part of the complainers' property. Now I think the existence of the gate may quite well have represented the limited privilege given to Colin Brown in the 1809 feu-contract and disposition of taking in his 'crop' by that route. If M'Currich and his successors fenced their property on the west, as they apparently did, it was necessary to have a gate in the fence. In any case it seems to me clear enough that whatever was the extent of the use made by Anderson of the route by the gate, it was made by way of favour granted to him by Thomson. This view receives corroboration from the evidence relating to Laidlaw, who prior to Anderson's time kept cows in a building on the back ground of complainers' property. It is to the effect that the cows came and went by the lane on the west side of the property, and that when turnips were carted, the cart was emptied at the mouth of this lane and the turnips carried up it to the back ground.

"The Thomsons removed from the property in 1865. Anderson removed from his workship sometime thereafter. The precise date is not proved. It seems to have been towards the end of the sixties. Any use of the route made by Anderson after the Thomsons left must, I think, be held to have been of the same character as Mr Thomson speaks to.

"There was a break of some years between Anderson and Peter Whyte, who commenced his tenancy at Whitsunday 1873, during which period no user of the cart entrance is proved. After the Thomsons left they would appear to have taken no further interest in the matter. The fence became dilapidated and the gate disappeared. Whyte found the entrance unrestricted when he went there, assumed he had right to use it, and did use it openly. And the use thereafter continued, as I have already said.

"If I am right in regarding the possession during Whyte's time and since as of the requisite character to make out a servitude right if it had extended over the prescriptive period of forty years, the complainers' case falls short by very little in point of time. But by that little it fails, in my opinion. There is no room for carrying back by presumption the user by way of right earlier than Whyte, because the evidence as I read it shows that any use had before Whyte's time was in fact had by way of favour asked and given, and that the user as by way of right in fact began with Whyte.

"The complainers' counsel, after concluding his speech and after an adjournment to hear the other side, suggested by way of afterthought that he was entitled to interdict in respect of seven years' possession had prior to the action. I think, however, that I must decide the case as it is presented on the record. The case tabled by the complainers in their averments and pleas is based on absolute right, and that is the issue which has been tried.

"On the whole matter I am of opinion that the note falls to be refused."

On a reclaiming note the First Division on 5th June 1914 recalled the Lord Ordinary's interlocutor and granted interdict.

LORD PRESIDENT—In this case the complainers seek interdict against the respondents interfering with a cart access to the complainers' back premises from the East High Street of Crieff. They rest their claim for interdict, first, upon title. They say they have an express grant. And second, they rest their claim for interdict upon possession. They allege that they have acquired by forty years' continuous and uninterrupted possession the right to take carts from the High Street of Crieff in by this entrance and round to the back of their premises for all purposes for which their premises have need.

The Lord Ordinary has found that the title is insufficient to support the claim made, and that the evidence of possession also was lacking.

I say nothing about the title here because the state of possession on the facts proved renders the question of the construction and interpretation of this title purely academic. But I must guard myself from being held to concur in that view which the Lord

Ordinary has taken of the meaning of the title. Titles such as this are never construed in the air but always in relation to the state of possession. And I should not myself have been disposed in the absence of evidence to draw the same inference as the Lord Ordinary with regard to the meaning of the title.

On the question of possession I differ from the conclusion at which his Lordship has arrived, and I do so with less hesitation here, because although the question is one of fact, it does not involve the weighing of contradictory evidence. The main facts are undisputed, and they have been so clearly and accurately set out by the Lord Ordinary that I find it unnecessary to resume them. Where I part company with his Lordship is in the inference which he draws from the undisputed facts.

The possession had of this small cart entrance is undisputed so far as it relates to the past thirty-eight or thirty-nine years. The Lord Ordinary finds—and the respondents have not challenged his finding—that it is adequate in quantity as well as in quality to establish the right claimed. But it is said that there is a fatal gap, that we are not entitled in this case to draw the inference, or rather to draw the presumption, in fact with relation to the possession prior to the thirty-eight or thirty-nine years that we would in ordinary circumstances be entitled to draw because of the disturbing element which occurred in the year 1865.

Now when one turns to the Lord Ordinary's note it will be found that the question between the two parties really narrows itself to this—Are you entitled to presume in fact that the possession anterior to the year 1873, when Peter Whyte became tenant, is of a quality similar to the possession confessedly had since 1873? I think we are entitled to draw that presumption, and for this reason, that when Peter Whyte became tenant, to use his own expressive language, he found this was a made road. It had all the appearance of a road regularly used. There was no grass or anything of that kind even as far back as 1873 when he went there. And as a matter of course Peter Whyte continued the use which he presumably saw had been made of this road from the time when he became tenant. And when one turns to the evidence of six or, it may be, seven witnesses, to whose depositions our attention was drawn, and who are not even mentioned in the Lord Ordinary's opinion, it appears that, from the year 1866, at all events, onwards, first a man named Anderson, a plumber, was tenant in the back premises, and carting had gone on regularly and without any sort of interruption. There was no obstacle in the way. No doubt it is true that Anderson left in the year 1868 or 1869, and that there is a gap between 1869 and 1873, when there is no evidence at all really as to the character of the use, if any, made of this cart entrance. But I think that if we find that from 1866 to 1869 carting went on in the same way as Peter Whyte commenced his carting in 1873, we are entitled to presume that during that time the possession was similar in quality to the possession had subsequently and anterior to that date.

Now the only reason why the Lord Ordinary refuses to draw the presumption is this, that he says it is distinctly proved by a reliable witness, a man named Thomson, that in Anderson's time there had been challenge of the right; that Thomson, who was then proprietor of the property which belongs to the respondents, erected a fence and a gate, locked the gate and kept the key, and only gave the key to Anderson as a matter of favour when he desired to bring lead and other goods into the back premises up by this cart entrance.

Well, be it so. Let us accept as quite reliable the evidence of Mr Thomson when he was a boy of eight or nine. Anderson had received permission, prior to the year 1865, to take his cart through there. He obtained the key from Thomson. What does that mean? It can mean, in the light of the subsequent and uncontradicted evidence, only this, that during that short period—we cannot tell for how long—during that short period Thomson was minded if he could to stop the use of this cart entrance, erected a gate, locked it, kept the key, and only gave it to Anderson when Anderson asked for it; but that, for some reason which we cannot find out or explore, both parties came to see that it was a great nuisance to have an obstacle like this placed in the way of the tenants in the back premises using the road for their carts when they required it, and that from 1865 onwards, if the gate did not disappear, at all events the lock and key vanished.

We find strong confirmation of that conjecture—for I admit it is no more than conjecture—in the evidence of Andrew Cunninghame, an old man who was there in Anderson's time and who was a tenant in the property then. He says—'I remember a wooden fence being erected between Mr Thomson's property and Mrs M'Gregor's, and I remember it being torn down. Mr Thomson erected the fence, which he had no business to do. He said he would leave a wicket on it. The wicket was not locked." Well, Cunninghame may be mistaken. It may have been locked at first. But certainly it was not locked from 1866 onwards, for these seven witnesses to whom I have referred all depone that Anderson used the entrance for his carts, that there was neither let nor hindrance, and that the use made by Anderson was exactly of the same character and quality as the use made by Peter Whyte and the chain of the tenants who succeeded him.

In these circumstances I think the Lord Ordinary was unwarranted entirely by the state of the evidence when he came to the conclusion that he could not apply the familiar presumption, and when he says—"There is no room for carrying back by presumption the user by way of right earlier than Whyte, because the evidence as I read it shows that any use had before Whyte's time was in fact had by way of favour asked and given, and that the user as by way of right in fact began with Whyte." When Whyte came the road

was a made road without a single obstacle on it; and several witnesses, against whose candour and honesty nobody has anything to say, depone that from 1866 to 1869 this cart entrance was used by Anderson without saying anything to anybody.

In these circumstances it seems to me that the complainers here have made out the averments of fact which they set out in their third statement, that we ought to recal the Lord Ordinary's interlocutor, sustain the second part of the second plea-in-law for the complainers, and grant interdict in terms of the prayer in the note.

LORD MACKENZIE—The complainers in this case say they are entitled to interdict upon two grounds. In the first place they say they have a written grant, and in the second place they say that they have established a prescriptive right by possession for forty years of the road in question.

In regard to the first point it is not necessary to express an opinion in order to arrive at a conclusion in the case. I will therefore only say that for my part I should not, as at present advised, be prepared to differ from the view taken by the Lord Ordinary. But I pass from that branch of the case, only saying this, that the titles instruct that so far back as the year 1809 there was a cart access along the line A B and across C, which is the march between the complainers' and the respondents' property.

Upon the second branch of the case I agree with the conclusion reached by your Lordship. It is, no doubt, a jury question, and one would have been slow to differ from the conclusion reached by the Lord Ordinary if the determination of the question depended upon the credibility of witnesses. But in the view I take I regard Mr Thomson as an entirely credible witness. I accept the Lord Ordinary's view of the weight to be attached to his entire honesty in giving his evidence in the case, but I draw a different conclusion from that which the Lord Ordinary has reached. The way in which I think the case should be put is this—It being admitted that for thirty-eight and a-half years there was possession, freely and openly, of this cart entrance to the back ground as by way of right, are we entitled to draw back between the period when that possession as a right commenced, in the year 1873 to the year 1865, or for forty years—we do not require to go back so far as even to 1865—or are we obliged to do as the Lord Ordinary says he has done, to start at 1865 and say it has been proved that in certain cases anterior to that permission was asked, and that therefore you must carry forward only possession which depends upon tolerance, and therefore that possession of that nature wont avail the complainers to make out the prescriptive period.

Now the passages in the Lord Ordinary's opinion with which I find myself unable to agree are these—"In any case," his Lordship says, "it seems to me clear enough that whatever was the extent of the use made by Anderson of the route by the gate, it was made by way of favour granted to him by Thomson." And again—"Any use of the route made by Anderson after the Thomsons left must, I think, be held to have been of the same character as Mr Thomson speaks to."

Now Mr Blackburn put very ably before us, as did also his junior, the whole facts upon which they found. But one admission was made which I think was of necessity. Mr Blackburn said that when the Thomsons left there was a complete change. That is exactly what Thomson himself says, because although he was a boy when he left in 1865 he speaks to what had been done before he left. But he says—"I cannot say who kept the key after we left in 1865. I could not tell you whether it was kept locked after that or not;" and therefore I am unable to take the view that we must hold the possession by Anderson subsequent to 1865 to have been of the same quality as that before 1865, and therefore I do not think the evidence given by the witnesses upon whom the Lord Ordinary depends for his ground of judgment really counters the case that is made by the complainers, because it goes back to a period anterior to the commencing of the forty years.

I think that if the large body of evidence to which we were referred by the counsel for the complainers is read, even giving weight to the criticisms that in many cases were with justice made upon it, that the witnesses were a little apt not to keep their attention closely fixed on the line A B C and on to D, but were a little apt to wander away by the north and not pay enough attention to the left-handed turn. I think there is sufficient in the case, taking the question as a jury question, to entitle one to arrive at the conclusion that the possession which Whyte commenced in 1873—the date when he found a road in existence—was really of the same character as the use for the years immediately before, and that, treating the case in that way, the complainers have succeeded in establishing the prescriptive right by possession for forty years, and accordingly I agree in the judgment which your Lordship proposes.

LORD SKERRINGTON—I concur. The only observation which I wish to make is that in cases of this kind and in the argument which we heard there is very frequently used a phrase which seems to me to be inaccurate and misleading. The question is put whether the use of a certain access was had by tolerance or whether it was as of right. I think the true question must always be whether the use was by tolerance, that is, by permission, or whether it was without permission.

In the present case I think it is quite clear that the use which was made of this access subsequent to the year 1865 was not made by permission but that it was made without permission, and that therefore it is habile, coupled with the use during the subsequent years, to constitute a servitude right-of-way.

The respondents the Crieff Co-operative Society, Limited, appealed to the House of Lords.

At delivering judgment—

EARL LOREBURN — In this case I have come to the conclusion that the order appealed from ought to be affirmed, though it is not a very easy question.

The issue is whether or not the complainer, the now respondent, has proved a right of ingress and egress for carts up and down a passage called Bell's Entry in the High Street at Crieff. I have no difficulty in saying that no such right exists by express grant. That was the opinion of the Lord Ordinary, and I am content to accept his reasoning. In the Inner House it was held unnecessary to decide the point. The Inner House found that the alleged right had been constituted by prescriptive possession, therein reversing the decision of the Lord Ordinary, and this point must depend on the evidence.

Now it is necessary to prove forty years' possession. In such a proof manifestly the further back you go the less evidence you are likely to obtain. It is not necessary to furnish proof of the user for every year. As the time becomes more remote there will be more frequent and longer intervals between the acts of possession that can now be established in evidence, and human memory will be less precise as regards dates. All said, it remains for the Court to say if it is satisfied that there has been continuous possession for the required period, not by stealth, nor by violence, nor by leave asked and given, but of right, which is to be inferred from simple user *nec clam nec vi nec precario*.

In this case no dispute arises that for thirty-eight or thirty-eight and a-half years there has been such possession going back to 1873. It is, however, said that no sufficient evidence has been given to carry it back beyond that date. Thirty-eight years is not forty years, and we are not at liberty to draw an inference that the possession lasted for forty years simply from the fact that it lasted thirty-eight. But I do think that when so long a period of possession has been established the fact may fairly be taken into account. It may predispose us to think that the possession has been continuous, though the gaps in the evidence as to what happened more than thirty-eight years ago are at longer intervals, subject of course to any proof suggesting a change of conditions thirty-eight years ago, which is not to be found here.

I go now to the evidence. Possession being established so far back as thirty-eight years, what was proved for the antecedent period? I will begin by the evidence of one Anderson. He was a tenant on what is alleged to have been the dominant tenement, the property now of the complainer, from 1861 to 1868. His use of Bell's Entry during those seven years was admitted, and if it had not been for the testimony of a witness named Thomson the case would have been at an end. But Mr Thomson, who was fifty-six years old when he gave his evidence, stated that he was the son of the man who then occupied the servient tenement, and that from between 1861 and 1865 he lived there with his father, being then a child, aged five years in 1861 and nine years n 1865. He says that there was a gate across the passage of Bell's Entry at that time and a key to it, which his father kept, and that it was kept locked. He says that he recollects Anderson several times asking permission to cart his stuff and being given the key and returning it when it was done, and that he has no recollection of anyone else taking a cart through without asking leave. That is the substance of what this gentleman, admittedly a perfectly honest witness, tells us about the gate and the lock and key and about Mr Anderson's possession. Mr Thomson's evidence ceases to be available after 1865, for in that year he and his father went to live elsewhere, and though he was occasionally at this spot afterwards, and describes how after 1865 the gate became dilapidated notwithstanding his father's repairs, he does not say either yes or no whether Bell's Entry was used after 1865 without permission by tenants of the dominant tenement with carts.

Obviously if Mr Thomson's evidence is to be accepted, then Anderson's user up to 1865 cannot help the complainer, because it was *precario*, and the facts about the locked gate show that there was no right in anyone prior to that date. Anderson, however, admittedly remained a tenant of the dominant tenement or a part of it down to 1868, and continued to use Bell's Entry between 1865 and 1868 after the departure of Mr Thomson and his father, and the key disappeared after 1865, so that there is no question of Anderson having asked or received permission after that date. But we were told that as his user began *precario*, so it must be held to continue on a like permissive footing between 1865 and 1868. I am by no means sure of that, but I need not pursue the subject, because it is not necessary in my view of this case. For the same reason I will assume that the user by Anderson is altogether to be disregarded, though it is a very strong thing to disregard it on the evidence of Mr Thomson of what he saw and heard between the age of 5 and 9 on so trivial a matter. He must have been a child with quite exceptional gifts of observation and memory to be so impressed that he can speak to it with confidence nearly half-a-century later. Immense importance attaches in such matters to the opinion of the Judge who saw him, but this seems an extreme case.

However, I lay aside Anderson's user. But there is other evidence of which the Lord Ordinary says very little. Cunninghame used Bell's Entry from 1861 to 1863 as tenant of the dominant tenement. Crerar, a witness of 53, remembers it being used by another tenant when he was just a boy. Mrs M'Gregor remembers that road since Anderson's time, and that in his time there was carting over the passage by the tenants. Mrs Morison remembers its use for carts frequently some fifty years ago, and says that all the different people that she knew in the dominant tenement who had horses and carts used that road, and they had no other road. Mr Cuthbert, aged 60, remembers the use of this road for carting all his time, and says that all the tenants used it so. He used it himself as a boy to do repairs

for his grandfather, who owned the dominant tenement. Mr Cramb, aged 63, remembers the road or passage being used by these tenants all his life. This evidence fills in the period between 1868 and 1873.

The Lord Ordinary does not deal with this evidence at all, but the Inner House considered it and found in respondent's favour. I share their opinion. There is a body of evidence which, taken together, suffices to satisfiy me that this possession has been enjoyed by the tenants of the dominant tenement for more than forty years, openly, peaceably, and without leave asked or given. In my opinion the order appealed from should be affirmed.

LORD DUNEDIN—The appellants and respondents are conterminous proprietors of two houses with back ground situated in the East High Street of Crieff, the respondents' property being to the west of that of the appellants. The East High Street of Crieff is an old street, and the houses are built in the way common in old Scottish towns, with entrances or "closes" between them which give access to the back ground. Anyone familiar with the High Street or the Canongate of Edinburgh will recognise the description. These closes are of varying width. At the west of the respondents' property, between it and the next adjoining property still further to the west, there is a close of 3-foot width. This serves as an access to the respondents' property for foot-passengers, but from its size does not admit of the passage of a cart. On the east of the appellants' property, between it and the next adjoining property to the east, is another close 7 feet 9 inches in width at the entrance and tapering down to 6 feet 6 inches. This is wide enough for a cart, and is continually used for the purposes of the appellants themselves and the next adjoining property to the east, which is an inn, and has its stableyard behind. The respondents—that is to say, they themselves and their predecessors in occupation—have also for many years used this access by coming out of their own property and crossing the appellants' property behind the houses and then going out through the entry.

In 1912 the appellants proposed to erect buildings on this back ground, and with that view presented a petition for lining to the Dean of Guild. This petition disclosed the fact that the buildings if erected would prevent the passage of carts from the respondents' property as they had been in use to go in order to go out of the wide close. The respondents then presented the present note of suspension and interdict to have the appellants interdicted from interfering with their right of passage through the back ground and out of the said close.

The respondents based their alleged right of servitude alternatively on title and on prescriptive possession.

The note was passed and record made up in the Court of Session. The Lord Ordinary refused the prayer of the note. On reclaiming note to the Inner House the First Division recalled the Lord Ordinary's interlocutor and granted interdict as craved.

All the learned Judges are agreed that the appellants have no case on title, and as I think they are clearly right but little need be said. The supposed right on title was based on the fact that early in the last century the predecessors in title of the respondents obtained from the predecessors in title of the appellants a conveyance of some back ground situated away to the east. The only access to this from the west was by a foot road, and accordingly there was added in the disposition the following clause—"Also with the privilege of a cart road to the property of the said Colin Brown upon the west (*i.e.* the respondents') leading from the street immediately east of the said John M'Currich's dwelling-house (*i.e.* the wide close in question), which road is hereby declared only as a privilege to the said Colin Brown for carrying in his crop when ready."

The respondents are not, however, proprietors of the ground to the east which is dealt with in this title. Accordingly in seeking to invoke the aid of this clause they doubly fail—first, because the servitude is on the face of it limited to the use of carrying the crop, and cannot be extended to all purposes, and second, because the properties being separated the respondents are no longer entitled to claim a servitude which was only constituted for the state of affairs when the properties were held together.

The case of the respondents therefore rests on prescription and prescription alone.

Before I examine the evidence it may be as well to say a few words on the law of the subject.

First as to the period of prescription. The period all are agreed is forty years. The possession or use must be continuous during that period. But though that is so it is obvious that it is impossible to prove use of such a thing as a right of passage during every moment of the forty years. But if the use is regular and uninterrupted a jury or a judge sitting as a jury may presume that the possession has been continuous.

Now this question of what may be presumed has raised, I think, a little misconception, based on some of the remarks made in the cases of *Harvie* v. *Rogers*, *Cuthbertson* v. *Young*, and *Mann* v. *Brodie*—all cases which came to your Lordships' House. In each of these cases there had been interruption down to date, in the last case for the very long period of thirty-seven years. In each case the interruption, not extending to forty years, was not sufficient to destroy by the negative prescription a right hypothesised previously to exist. In each case therefore the inquiry as to the period before the interruption extended, if forty years were reckoned back from the beginning of the interruption, to a time as to which no living witness could speak.

In these circumstances it was laid down that if a long period of use—yet short of 40 years—were proved before the interruption it was competent for the jury to presume that the use had extended still further back. In the first two cases cited that was done. In the last one, *Mann* v. *Brodie*, the House

of Lords, sitting really as a jury, held that the long period of 37 years' exclusion prevented them from coming to the conclusion that the earlier use proved had really been a use as of right.

I agree, however, with Mr Blackburn's argument that when you are dealing, as here, with a use down to date, then, except the presumption as to continuity *de momento in momentum*, as to which I have already alluded, there is no room for presuming back if a period of less than 40 years is proved. For to do so would just be to declare the period necessary a shorter period than 40 years. On the other hand, if use is proved anterior to the commencement of the 40 years, it is allowable to presume continuity between that use and the earliest use within the period of 40 years, just as you presume continuity in the gaps within the 40 years—provided always that the gap, if any, is not so formidable, either from length of time or from conspicuousness of successful interruption, as to affect your judgment of the quality of the earlier evidence, as was done in *Mann* v. *Brodie*.

So much for the period. Now as to the character of the use. The expression hitherto used has invariably been that it must be "as of right." Sometimes it is put negatively, that it must not be *clam aut vi aut precario*. And here I really do deprecate the observation made by Lord Skerrington that the expression "as of right" is misleading, and that the true question is whether the use "was of tolerance, that is, with permission or without permission." With great deference I think his substituted phrase is apt to be misleading—so apt that if a jury were charged in those words alone, without further explanation, that "with permission" includes tacit permission, and "without permission" means in assertion of right, I would not hesitate, on exception taken, to grant a new trial. Take the countless cases where persons are allowed by a proprietor to use his avenue or his paths. These persons go there knowing full well that they are tolerated, but probably not one out of twenty has had an interview with the proprietor or received a letter from him in which permission to go was accorded. I do not say that, strictly considered, Lord Skerrington's proposition is wrong, but I do say it is couched in language very apt to mislead.

The expression "as of right," on the other hand, has, as he observes, been widely used in cases of this kind. It will be found used by several learned Judges in the cases already cited. It is true these were cases of public rights-of-way, not of servitude. In the question of the character of the use I do not think that makes any difference except that in the one case it is the public, in the other it is the owner of the dominant tenement that asserts his right. But if further authority is needed it will be found in the case of *M'Inroy* v. *Duke of Atholl* in your Lordships' House, 18 R. (H.L.) 46. That was a case of servitude right of passage, and Lord Watson, speaking of the use by certain shepherds, says "that was by permission and not as of right;" and in a subsequent sentence of his judgment dealing with the general question he expresses himself thus—"I do not doubt that in order to found a prescriptive right of servitude according to Scots law, acts of possession must be overt, in the sense that they must in themselves be of such a character or done in such circumstances as to indicate unequivocally to the proprietor of the servient tenement the fact that a right is asserted, and the nature of the right."

I now turn to the facts of the case. We begin with the very striking one that it is admitted that there has been uninterrupted use for a period of thirty-eight and a-half years back from the date when issue is joined. The whole controversy turns on whether the gap necessary to fill the complete forty years can be filled up. Now that there was use *de facto* during the one and a-half years is undoubted, for Anderson used it; but then Anderson's use was, if we accept Thomson's evidence—and I think we must accept it—a use which began by permission. Notwithstanding the consideration which affected Lord Mackenzie's mind, viz., that the permission was given at an antecedent period, viz., before 1865, and that the use from 1865 to 1873 was under different circumstances—the Thomsons gone, and nothing known as to the key of the gate—a consideration of which I feel the weight—yet if the matter rested on this alone I should find it hard to suppose that Anderson's use, begun by permission, changed into a use as of right.

But then the matter does not rest on this alone. We did have some evidence—slight, no doubt—of use at a period anterior to 1865. There is Cunninghame, who says he carted coals by that way prior to 1873 during Anderson's time. There is Crerar, who says that when he was a boy carting was done for M'Crorie, who was there before 1871, and a mutual wall was built for which the carting was done, the wall being mutual with a property still further to the west. There is Cuthbert, who deposes to use when he was a boy, which would be fifty years ago. Then there is the fact that as soon as the Thomsons left there is no trace of a locked gate, the gate itself having disappeared, and that when Whyte comes on the scene in 1873 he commences to use the access as a well-understood right.

Seeing that there has been undoubted use for thirty-eight and a-half years, I think very little more will do, and I think we have here that additional proof which enables one as a juryman to presume that the use has been continuous for forty years.

I do not mistrust Thomson's evidence, but treating it as it is I think it only points to a brief attempt to stop the acquiral of a prescriptive use—an attempt abandoned at least as early as 1866, when the Thomsons left the place.

I am accordingly of opinion that the judgment of the First Division should be affirmed.

I do not think, however, that the decree as it stands is quite right, because the interdict given would give the respondents a right to the exact access which they now

possess. Now it is well-settled law that the owner of the servient tenement has a right to arrange the road in the manner least burdensome to him, provided always that the servitude is not made less beneficial to the dominant tenement.

I would therefore suggest that the interdict should be varied by deleting the words in the page of the complaint now embodied in the decree after "belonged to John M'Currich," and inserting "in such manner as to obstruct the complainers in the free use of an access for carts as convenient as hitherto enjoyed by them from their property to the close or entrance situate between the respondents' property and the property to the east and known as Bell's or M'Laren's Entry and through the said close to the High Street," and with that variation that your Lordships should affirm the judgment and dismiss the appeal with costs.

LORD PARKER—I confess that I have no very strong opinion on this case, but I have on the whole come to the conclusion that the evidence bearing on the enjoyment of the right claimed for the first one and a half years of the forty years' period is sufficient, and that the appeal therefore fails.

I should like to add that I cordially agree with what has fallen from my noble and learned friend Lord Dunedin as to the meaning of "enjoyment as of right," and also with the passages on the same subject contained in the opinion of my noble and learned friend Lord Sumner which I have had the advantage of reading and considering.

LORD SUMNER—The complainers found in the first place upon an alleged written grant of a servitude right of ingress and egress for carts up Bell's Entry in the High Street of Crieff, bearing to be expressed in a feu-contract and disposition of the subjects, of which the complainers are now proprietors, dated in 1809, from one M'Currich, who was the common author both of the complainers and of the now appellants, the original respondents. In spite of ingenious argument from the language used and from maps, which though old are not contemporaneous, I think it clear that the only grant touching the *locus in quo* was one for limited purposes only, made in favour of the complainers' property and another and discontiguous property as a *unum quid*, and that, as the complainers have absolutely disponed the said discontiguous property to a stranger and have determined those purposes for ever, their right to such servitude as was granted in 1809 has now come to an end.

Alternatively the complainers assert right to this cart entrance by way of prescriptive possession for forty years. The *solum* of Bell's Entry belongs *ad medium filum* to the original respondents. The other or eastern half belongs to owners of property on the other side of the entry, but as the action is one only of suspension and interdict against the Crieff Co-operative Society their position need not further be considered. The interference with their alleged right on the part of the Crieff Co-operative Society, on which the complainers found, is an application on their behalf to the Dean of Guild Court for a lining in respect of intended new buildings, the execution of which would block the alleged cart access. Forty years from the application take us back to May of 1872. The complainers led proof at the trial, which established to the satisfaction of the Lord Ordinary a continuous possession of the alleged servitude right by themselves or their authors and their tenants back to a time about Whitsuntide 1873, or rather later. This is now not contested. The questions are (*a*) whether they can carry back their proof for a further continuous residence of about two years, so as to complete forty years' possession, and (*b*) whether, that failing, they can still show an earlier though discontinuous possession by their authors and their tenants which will serve to complete the period aforesaid either *per se* or by the legal presumptions thereout arising.

The opinion of the Lord Ordinary was adverse to the complainers on both heads. In the Inner House it was otherwise decided, their Lordships of the First Division apparently thinking that the position of one Anderson, then tenant of the subjects under the complainers' authors for the time being, was such as to raise a presumption that from 1865 to 1868 or 1869 he was in due possession of the servitude right in question so as to complete the statutory period of forty years in favour of the complainers. If this be so, there can be no doubt that, even if the proof left the years 1868 to 1873 a blank, nothing appears to defeat the complete establishment of the complainers' right.

As to the state of things existing from say 1861 or thereby to 1865 there was proof which, though contradictory, was on the complainers' side vague and on the respondents' precise. It rested in the latter case on the recollections of Mr W. D. Thomson of incidents in his boyhood nearly fifty years before, and it is true that the matters to which he deponed were not such as would much concern most lads of eight or nine. Still he convinced the Lord Ordinary, who says of him, contrasting him with "various witnesses," those of the complainers, to wit, who also speak to Anderson's time—'I prefer the evidence given by Mr Thomson, which impressed me as reliable and as giving the most definite account of the extent and character of the carting done by Anderson." I think that your Lordships should accept the Lord Ordinary's view in this regard, and should attach to Mr Thomson's proof the credence and the appreciation of the Lord Ordinary, and I think further that such acceptance implies the rejection of the proof of other deponents (without, be it said, any reflection on their personal character), whose proofs cannot be reconciled with that of Mr Thomson.

If so we start with this, that in 1865 and for two or three years before then the deponent's father, being then proprietor of the *solum* in which the complainers claim the servitude right of cart access pertinent to their subjects, was minded to permit no

carting as of right up or down Bell's Entry (then M'Laren's) in connection with the complainers' subjects, and took steps to prevent the commencement of possession of any servitude right, for he maintained a fence with a locked gate in it, cutting off his property from the other, and Anderson always carted through the gate as occasion arose only in virtue of permission asked and given. Before Anderson's time there is no suggestion of any act of possession of such right on the part of anyone.

Mr Thomson senior ceased to reside on the property now belonging to the Crieff Co-operative Society in 1865, though he continued to be the owner of it. After his departure, though by what stages and in what precise time we do not know, the fence either fell into decay or was broken through, or both, and ceased to be an effectual barrier to access. There is evidence that for three or four years Anderson still continued to use that access. What was the quality of his user? The Lord Ordinary says of it—"Any use made of the route by Anderson after the Thomsons left must, I think, be held of the same character as Mr Thomson speaks to." From this Lord Mackenzie dissents and says—"When the Thomsons left there was a complete change, . . and therefore I am unable to take the view that we must hold the possession by Anderson subsequent to 1865 to have been of the same quality as that before 1865. I think there is sufficient in the case, taking this question as a jury question, to entitle one to arrive at the conclusion that the possession, which though commenced in 1873 . . . was really of the same character as the use for the years immediately before."

With the greatest respect for the opinion of Lord Mackenzie, I am unable to see that there can be any presumption of law that Anderson's enjoyment, which must now be taken to have been purely permissive so long as old Mr Thomson resided on his property, became thereafter an enjoyment in the assertion of a servitude right and operated as the commencement of the acquisition of such a right in favour of the dominant tenement which he occupied. The facts, whatever they were, all fell within the period of living memory, yet proof upon the matter is lacking. The question is, I think, a jury question, and if so regarded, as perhaps Lord Mackenzie himself meant to regard it, I think it should be answered in favour of the now appellants. So long as Anderson got his carting done when he wanted it he had no concern in an access by right in preference to an access by leave. He was but a sojourner. He did not occupy, and was not likely to occupy, this alleged dominant tenement for forty years, or perhaps as many months. He was a man with a future. It was through Mr Thomson's family that he came to Crieff and started business there. He was on friendly terms with them while they were neighbours; their friendship might continue to be enjoyed by him afterwards. When they left they were neighbours still though not so close as before, for they still lived in Crieff. He could see for himself that his friend Mr Thomson did not want any right of access for carts to be acquired over his property, for he maintained this fence and kept the key. Why should he run counter to Mr Thomson's desire for somebody else's benefit the moment his friend's back was turned? I daresay when unfriendly hands assailed and pulled down the fence he turned a blind eye, but it was equally no business of his to uphold the fence for Mr Thomson or to assert a right of carting for Mrs M'Gregor's authors. He got his carting done. I take it that contented him. I think he went on as he had begun—that is, under a continuing permission, none the less that he no longer had to go and ask for it every time—and not under a newly begun assertion of an inchoate independent right.

There is an observation of Lord Skerrington on which I wish to say a word. He says—"The question is put whether the use of a certain access was had by tolerance or whether it was as of right? I think the true question must always be whether the use was by tolerance—that is, by permission—or whether it was without permission."

I think that this proposition must be received with caution. If "without permission," used in antithesis to "by permission," means in disregard or defiance of the want of permission, it may be right, but I do not see in that case why "as of right" is wrong. If the party entering virtually says to the owner of the property entered, "Here I am and here I stay, I do not care whether you permit me or not," and he is neither ejected nor proceeded against, I think his user may be said to be "as of right." But it would bear hardly on good relations between proprietors and their neighbours if Lord Skerrington's proposition held good as it stands. There is much enjoyment of access without leave ever asked or given, which on both sides is truly tolerance. He who uses knows and accepts that his enjoyment is none the less permission though no one ever says him nay. He who permits means, and is known to mean, no more than the good-natured extension of his own amenities to his friends, but always on the common understanding that it is to cost him nothing. It would be strange if long afterwards, in a question of the acquisition of a prescriptive servitude right, this friendly commerce should be treated as an assertion and inchoate establishment of a right merely because to the question where was the permission? the only possible answer must be that no proof of any is forthcoming. Open unqualified user in ordinary course may well be deemed to be in fact adverse user as of right when no more appears; but if the evidence suggests that it was after all due to tacit permission, the question must be then whether the user does upon the whole case establish the growing acquisition of a servitude right.

The complainers also sought to establish such possession of the servitude right claimed as would, independently of Anderson's enjoyment, complete the requisite forty years. Obviously testimony which might have sufficed to carry thirty-eight

years of proved possession back for two years more, even though in itself somewhat vague and indeterminate, becomes an insecure foundation as soon as it is found that at or shortly before the relevant period there was obstruction of any possession *ex adverso* by the proprietor of the alleged servient property, and recognition of his rights, through tolerance asked and granted, on the part of the tenants of the alleged dominant property. Such was the case here.

The proof led may be classed under two heads—(*a*) Deponents who say that they remember such possession generally without being able to affirm precisely either its date or the persons who had it; and (*b*) deponents who affirm possession precisely enough but say that it was enjoyed by persons whose businesses required the carting of materials up Bell's Entry. Cunninghame and Crerar belong to the first class. Cunninghame deposes to events which happened apparently before 1865, to which Mr Thomson's evidence is sufficient answer; for if the recollection of the latter be accepted, as it must be, then what Cunninghame speaks of either took place privily or by old Mr Thomson's tolerance. Crerar speaks of building a mutual wall when a boy, the materials for which were carted up Bell's Entry without leave, but he does not say how old he was. If he was over fourteen, he only speaks to events in or after 1873, and does not advance matters. It is only if he was then under fourteen that his evidence is relevant, and this was left in doubt. Of the second class, Cuthbert, Cramb, and Wyllie are the chief. They say that tenants of the complainers' subjects had the use of Bell's Entry for all carting they required, or that all the people in the premises carrying on business had such use for whatever carting they required. There is a complete absence of any evidence that in the five years in question, viz., 1868 to 1873, there were any such tenants who and whose business required any such carting. The evidence of Mrs Margaret Miller, very clearly given, goes far to negative the existence of any such tenant, while further it is not till 1873 that any stable was erected on the property in question—a fact which, so far as it goes, confirms the view that no prior tenant had occasion (as certainly Anderson had none) to employ a horse or do any carting of his own. Finally, something is founded on the allegation that this track was bottomed throughout, but the complainers' expert who alleges this, is cancelled by the respondents' expert, who could find no bottomed work, and even the former could not say how long the track had been bottomed, and whether the bottoming went back to or beyond or fell short of 1873. Thus the complainers' proof of possession by their authors or their tenants before 1873 came to nothing and their case failed.

With all due diffidence I think that the appeal should be allowed, the interdict granted by the First Division should be discharged, and the judgment of the Lord Ordinary should be restored.

Their Lordships dismissed the appeal with expenses, varying the interdict granted as proposed by Lord Dunedin.

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