they did obtain a title in regular form, but they seek to add to that a bit which the proprietor will not give them, and they have endeavoured to get a title by means of a sub-lease. These proceedings of the Railway Company have, at the first aspect of the case, a doubtful appearance, which is not removed on looking at the facts. Somerville, the tenant, has a lease of Kevock Mill and the adjoining lands, but he is plainly not entitled to use Kevock Mill except as a paper mill, and it is quite as clear that he is to hold the lands for agricultural purposes; but the purpose for which he has sub-let this piece of ground is to make a railway station—not a siding for his own accommodation—but a station of the railway, for the use of the public of the locality. That seems to me at present to be an inversion of the use for which this land was let to Mr Somerville. On the passed note, that may be seen to be too strict a view, but that is the view I am inclined to take at present. I think the title the Railway Company has acquired to the bit of ground is good for nothing in the present case. No doubt the complainer gave some ground himself as proprietor, but that is an altogether different case.

As to the use of the road, that is still clearer. The notion of this being a public road is out of the question. It never led farther than Kevock Mill, and the only character that it ever had was as the mill of a barony. That is not a public road, it is only a road for those going to the mill. The tenant of Kevock Mill, no doubt, is entitled to use it, but he attempts to communicate it to the Railway Company. That is just as strong an infringement of the rights of the proprietor as the other. But it is said, that when land is acquired for making a railway, every occupation road is given by implication for the use of the land acquired. According to that view, if a railway crossed a private avenue, they would be entitled to use it as an access to the railway, because getting ground through which the private road passes.

Lords Curriehill and Ardmillan concurred.

Lord Deas declined.

Agents for Complainer — Tods, Murray, & Jamieson, W.S.

Agents for Respondents—White-Millar & Robson, S.S.C.

Friday, July 12.

SECOND DIVISION.

M'COWAN *v.* SHIELDS AND OTHERS.

Prescription — Part and Pertinent — Acquiescence. Two conterminous proprietors both claimed a piece of ground. The defender having had possession for upwards of forty years, without a title, pleaded that the pursuer was barred by prescription and also acquiescence. Pleas repelled (the Lord Justice-Clerk dissenting).

This was a question which related to the property of a piece of ground lying between the pursuer's feu and ground held by the defenders under a ninety-nine years' lease. The pursuer Robert M'Cowan purchased in 1864 a cottage and piece of ground situated in the Holm of Cumnock. In the disposition the subjects are described as "All and whole that garden or piece of ground at the back of the Holm of Cumnock, sometime possessed by the deceased James Kirkland, and which he conveyed to David Kirkland by disposition and deed of settlement dated the 18th day of February 1824, and recorded in the Books of Council and Session the 4th day of January 1827, the same being described in the prior writs thereof as 'all and haill these two roods and twelve falls of ground or thereby, being the fourth and fifth lots of the holm called the Bridgend Holm of Sharkstone, as the same were pitted off separately, as mentioned in a feu disposition of the same granted by the Right Honourable William Earl of Dumfries to James Johnstone, dated 19th day of December 1767, and are now bounded by the lot of ground feued to James Perry on the east, by a ditch dyke and the high road upon the south and west, and by the water of Glaisnock on the north parts.'" The defender, David Shields, is a tenant, under the Marquis of Bute, of a piece of ground adjoining on the west. In the assignation and translation in favour of his author, the subjects to which he has right are described as "All and haill that piece of ground at the east end of the street called Bridgend, consisting of 23 falls 2 ells or thereby, bounded on the south by the highway, on the west by ground now belonging to Andrew Gemmel, writer, Glasgow, on the north by the water of Glaisnock, and on the east by the feu sometime of James Johnstone." James Johnstone was a predecessor of the pursuer. It is maintained by the pursuer that the defender, who has acquired additional ground by building a wall opposite his own ground, has taken possession of part of the property of the pursuer, extending to four falls and eleven ells or thereby, and on part of it has erected a washing-house, the chimneys of which are only a few feet distant from the windows of the pursuer's house.

The pursuer has brought this action of declarator, removal, and damages, and pleads (1) That by virtue of his titles, being owner of the ground of which the defender has illegally taken possession, a decree declaratory of the pursuer's right, and decerning the defender to remove, should be pronounced. (2) The said ground of which the defender has taken possession being within the boundaries of the pursuer's feu, as these are set forth in the titles of the property; and *separatim*, having for forty years prior to the usurpation complained of been possessed as part and pertinent thereof, he is entitled to decree of declarator and of removing. (3) The usurpation complained of being inconsistent with the defender's titles, his defences are unfounded, and decree as complained for should *de plano* be pronounced. (4) *Separatim*, that the pursuer is entitled to decree of removal. And (5) That the pursuer is entitled to damages.

The defender pleads—(1) That by virtue of his tack having right to the ground, and to erect buildings thereon, he is entitled to absolvitor. (2) The pursuer's title being a bounding title, and exclusive of the ground in question, the defender ought to be assoilzied. (3) The pursuer not being owner of the ground in question, the defender is entitled to absolvitor. (4) The pursuer is not entitled to support the conclusions of his action by averments of prescriptive possession, no such ground of action having been set forth in his original summons. (5) The pursuer's author having acquiesced in the operations complained of, the defender is entitled to be assoilzied. (6) The pursuer having suffered no damage, the defender is entitled to be assoilzied.

The Lord Ordinary allowed both parties, before answer, a proof of their respective averments on re-

cord and a conjunct probation; and after the proof had been led, found that, in point of fact, the pursuer had failed to prove that the piece of ground referred to in the summons was included within the boundaries contained in the title set forth by him in said conclusions and in the condescendence for him, or that the same had been possessed by him for forty years; and therefore found and declared, in terms of the first conclusion of the summons only, and assoilzied the defender from the remaining conclusions. The Lord Ordinary, in a note to his interlocutor, explains, that after a careful examination of plans which were referred to, and with the aid of the parole evidence, he has come to the conclusion that the piece of ground in dispute is not embraced within the boundaries of the pursuer's title. He is quite satisfied that the boundary of his property did not extend in a direct line to the Glaisnock beyond the beech tree, which was situated at the extremity of the fence forming the western boundary of the feu, but that the boundary there followed the line of the hedge running eastward, or north-eastward, and which separated the garden ground of the pursuer from the angular piece of ground coloured red on the plan. The possession had by the defender, and those through whom he derives right, goes strongly to support the view which the Lord Ordinary here takes, and is indeed, looking to the character and peculiar position of subject in dispute, incapable of any other explanation.

The pursuer reclaimed.

SOLICITOR-GENERAL and CRICHTON for him.

WATSON and MONTGOMERY for the respondents.

LORD COWAN—This is a case of no great pecuniary value to the parties, and it is unfortunate that much expense has been incurred in the decision. I cannot but regard the case as important in reference to titles to land, and in this view I have given great attention to the able argument which was submitted to us, and to the proof which has been led in the case. I have come to be of opinion that the interlocutor of the Lord Ordinary cannot stand, and that the pursuer is entitled to decree in terms of the first conclusion of the summons. The pursuer there concludes to have it found that he has sole right to "that garden or piece of ground at the back of the Holm of Cumnock, sometimes possessed by James Kirkland, and which he conveyed to David Kirkland by disposition and deed of settlement dated 18th February 1824, and recorded in the Books of Council and Session on 4th January 1827, the same being described in the prior writs thereof as "All and whole these two roods and twelve falls of ground or thereby, being the fourth and fifth lots of the holm called the Bridgend Holm of Sharkstone, as the said was pitted off separately, as mentioned in a feu-disposition of the same, granted by the Right Honourable the Earl of Dumfries to James Johnstone, dated the 19th day of December 1767, and are now bounded by a lot of ground feued to James Perry on the east, by a ditch dyke and the high road upon the south and west, and by the water of Glaisnock on the north parts." This the defender resists, in so far as the pursuer claims right to a piece of ground described or coloured red on the plan, extending to four falls and eleven ells, and pleads a tack dated 1789, granted by the Earl of Dumfries to his author, by virtue of which he claims to have the pursuer's property limited by a hedge which has been there for a long time. Now, between 1767, when this feu-disposition was granted, and 1786, when the tack was granted, these estates had come under an entail, and hence it is that all the subsequent grants are in the form of ninety-nine years' lease under the Montgomery Act. Now, I find that in all the rights, whether feus or tacks, the subjects are always taken as bounded by the water of Glaisnock. The question is, What was the true boundary of this feu on the west in 1767, when it was feued out? It is described in the disposition by the Earl of Dumfries to James Johnston as bounded by the ditch dyke and the high road on the south and west. The way this ditch dyke ran is established by the proof to have been from the south-west corner of the feu in a straight line to the stream. This drain was covered up in 1851. Let us now see how the case was met by the defenders. The defenders led a great deal of evidence to show that the piece of ground has been for a long period in their own possession. That the pursuers acquiesced in the present state of possession, and allowed the defenders to erect buildings on this piece of ground. Now, I am not in a position to say that these facts have not been established by the defender, so that I take these facts as proved, and consider what is the legal effect of them. In the first place, as regards the hedge, I think it must have been erected at a very early period. The words "surrounded by a hedge," have got into the titles in a charter of confirmation obtained in 1843, and we have to say whether the direction of the hedge is to affect the feu-right. If this were a question between superior and vassal, it could not affect the vassal's right, for charters by progress are not construed to have the effect of limiting the feu-right. There is no doubt there has been possession on the part of the defender for a long period, and we have to consider what effect is to be given to this possession. Now, Erskine lays it down that possession of land without a title gives no right. But here it seems to me that possession was not only without title but against title. With regard to the plea of acquiescence, it cannot be supported simply by possession. Mere tolerance is not enough, and I do not think that the defender has proved anything more.

LORD BENHOLME and LORD NEAVES concurred with LORD COWAN.

The LORD JUSTICE-CLERK—This is a case of great hardship to one of the parties, who has possessed without challenge for upwards of forty years. But the question must be decided on principles of law. We have here one party pursuing another to deprive him of his possession, and I think the pursuer must make out a very clear case. The pursuer has founded his case on possession prior to the possession of the defender, and I think that he was bound to prove his allegation of possession, and as he has failed to do so, I think the presumption is that the possession was in other hands.

The Court (the Lord Justice-Clerk dissenting) recalled the interlocutor of the Lord Ordinary, decerned in terms of the conclusions of the summons, and granted decree against the defender for removal.

Agents for the Pursuers—Tait & Crichton, W.S.

Agents for the Defenders—J. & F. Anderson, W.S.

Friday, July 12.

ELLIOT AND OTHERS *v.* HUNTER.

Manse—Heritors—Repairs—Additions. A manse had been built in 1840, and occupied by the then