titled to expenses in the Inferior Court and in this Court," &c.

Counsel for Appellant—Armour. Agent—N. J. Finlay, W.S.

Counsel for Respondent—Dickson. Agents—Rhind, Lindsay, & Wallace, W.S.

Friday, January 30.

SECOND DIVISION.

[Sheriff of Dumfries and Galloway.

GALLOWAY *v.* COWDEN.

Lease—Service Road—Lease of Farm as Possessed by Outgoing Tenant.

Two farms, the property of the same proprietor, were let by him "as previously possessed" by the outgoing tenants. A service road ran along close to the march within one of the farms, but formed a short route between the steading of the other farm and certain fields near the march. In an action to prevent the tenant of the latter farm from using the road, *held* that the road had been so used during the previous tenancy of the farms, and therefore (distinguishing from *Duncan* v. *Scott*, June 20, 1876, 3 R. (H. L.) 69) that it might still be lawfully used as an accessory of the defender's farm; and (2) that no case for regulation of the road had been established.

Peter Cowden and James Galloway entered at Martinmas 1874 and Martinmas 1880 respectively as tenants of the adjoining farms of Cardrain and East Muntloch, in the county of Wigtown, both the property of the Earl of Stair. Galloway's lease of East Muntloch provided that the farm was to be let to him "as presently occupied by David M'Kitterick," while Cowden's lease of Cardrain provided that it was let to him as "presently possessed by Alexander Drynan." The farms lay between the two public roads known as the Cardryne Road and the Cairngaan Road, and were separated by a march-fence extending nearly the whole way between these two public roads. On the north side of this fence there was a service road from the Cardryne Road on the west to the Cairngaan Road on the east, passing wholly through Galloway's lands. About 200 yards from its junction with the Cairngaan Road it struck northwards through a field of Galloway's.

Galloway raised this action to have Cowden interdicted from making any breach or opening in the march-fence between the farms, and from driving carts through these openings on to the cross road. He averred that the cross road was wholly on the lands let to him, and was kept up by him alone, and that the defender was wrongfully making an opening in the march-fence and carting turnips from one of his fields along the service road and out on to the public road to the east of his farm, and was thus cutting up and injuring the service road.

The defender averred that under his lease he became tenant and occupant of his farm "as then possessed by Alexander Drynan." "(Stat. 2.) The defender's predecessors in said farms or lands regularly used the road condescended on by the pursuer both as a footway and for the passage of horses and wheeled vehicles by making openings from time to time in said fence as occasion required, and otherwise, and the defender has since his entry to the foresaid subjects used and enjoyed the said road in a similar way and to a similar extent up to the intimation of the interim interdict granted against him at the pursuer's instance in this action. The defender is entitled, in accordance with the practice of his predecessors in said farm, and in virtue of his rights and privileges as tenant thereof, to make openings in said fence to enable him to obtain access to said road, and to fill up such openings when such purposes are served. The said road could not be used by the defender for the benefit and uses of his said farm unless access is obtained thereto through said fence as formerly. The public have regularly, continuously, and uninterruptedly used and enjoyed the road condescended on as a footway and for the passage of horses and wheeled vehicles from time immemorial, or for a period of upwards of forty years prior to the present time." He further averred that it would be a serious hardship and inconvenience to him to have to use other routes which made the distance for carting several miles greater.

The pursuer pleaded, *inter alia*—"(2) The defender as tenant of the farm of Cardrain having no right of passage therefrom, to, or servitude over the road through the pursuer's farm, ought to be interdicted from driving carts or otherwise using said road by means of said communication in the march-fence."

The defender pleaded—"(1) The defender having possessed and enjoyed the use of the road condescended on for upwards of seven years is entitled to a possessory judgment. . . . (3) The defender having leased his farm as held by his predecessors, is entitled to the privileges enjoyed by them, and the use of the road in question being one of these, the interim interdict should be recalled, and he should be assoilzied, with expenses." He also pleaded, *separatim*, that the disputed road was a public road.

Proof was led, the import of which appears from the note of the Sheriff-Substitute and the opinion of Lord Craighill.

The Sheriff-Substitute (MAXWELL) pronounced this interlocutor:—"Finds that the pursuer has been tenant of the farm of East Muntloch from Martinmas 1880; finds that the defender has been tenant of the farm of Cardrain from Martinmas 1874; finds that there is a cross road from the Cardryne public road to the Cairngaan public road, along the north side of the march fence between said farms; finds that the defender and his predecessors have for more than seven years prior to November 29, 1882, been in continuous possession, and have used and exercised the right of access along said cross road to their fields on the said farm of Cardrain, south of said march fence; therefore finds, in point of law, that defender is entitled to the benefit of a possessory judgment; therefore recals the interim interdict, assoilzies the defender from the conclusions of the petition, &c.

"*Note.*— . . . . The real question at issue between the parties appears to be whether the defender is entitled to make openings in the march-fence, and to use the road as a means of access from the two public roads to the three fields on his farm south of the march-fence. The defender,

who led in the proof, alleges that he is entitled to use the road in this manner, on three grounds—(*First*), That he has possessed and enjoyed the use of the road in this manner for more than seven years; (*Second*), That he holds the farm as possessed by his predecessors therein; and (*Third*), That the road in question is a public one. I am of opinion that he has succeeded in establishing the first and second of these pleas, and that therefore the interim interdict must be recalled.

"I think the defender has clearly established that since his entry to the farm he has used this road as a communication between his farm and the two public roads. The pursuer does not adduce any witnesses who can contradict the fact of the road being so used. It appears from some of his witnesses that a former tenant in East Muntloch had objected to certain parties using the road, but that was certainly previous to 1872, when the pursuer's predecessor entered the farm. From the evidence of Drynan, defender's predecessor in Cardrain, it appears that he, and his father before him, used the road in the same manner as the defender whenever it suited them to do so. The defender, therefore, having proved that he has enjoyed the use of this road as a communication to the public roads from his farm for more than seven years, and that it was so possessed by his predecessor, is, on the authority of *Macdonald* v. *Dempster*, November 15, 1871, entitled to a possessory judgment. Lord Cowan in his judgment in that case quotes with approval the principle laid down by Lord Balgray in *Liston* v. *Galloway*, 14 S. 97, as applicable to such cases, viz.—'That a party who has enjoyed peaceable possession of a right for seven years, is entitled to be protected in it against summary invasion of the state of possession.' Now, I think it sufficiently established by the defender that he has been seven years in peaceable and uninterrupted possession of this right of access before the pursuer objected. It is not quite clear when the pursuer first objected. He cannot himself remember. So I take it to be by his letter of November 29, 1882.

"The pursuer, however, further contends, that according to the terms of defender's lease he cannot make an opening in the march-fence as a communication between his farm and the road. In terms of the fourteenth clause of their respective leases, the burden rests upon them of repairing the fences, and this being a mutual fence, it is for each of them to assist in keeping it in repair; and it is contended for the pursuer, that the defender by making these openings does not observe this stipulation of the lease. It appears that neither the defender nor his predecessors have put gates in these openings, but have only put in flakes, or some other temporary obstruction, because an opening is not constantly required to each field. I do not think the defender, by making these openings, even if, as alleged by the pursuer, he sometimes delayed too long in building them up, can be held to have contravened this clause of his lease. It was also argued for the pursuer that he suffered loss from the defender's cattle trespassing on his farm by way of these openings. It is not clearly proved whether the cattle came through these openings or over the march fence, which does not seem to be of the best description. However that may be, the pursuer has his remedy under the Act 1686, c. 11, and his having suffered in this way cannot, I think, entitle him to have the defender interdicted from using the road as an access to his farm.

"It was further contended for the pursuer, that if the defender was allowed to use this road, which the pursuer only is bound to maintain under the sixteenth clause of his lease, then a greater burden is laid upon the pursuer than appears from the terms of his lease. This may be so, and may give the pursuer a right of relief against his landlord, but cannot, I conceive, affect the defender's right to use the road." . . . .

On appeal the Sheriff (MACPHERSON) pronounced this interlocutor:—"Adheres to the interlocutor appealed against, except (1) in so far as it assoilzies the defender from the conclusions of the petition, and in place thereof recals, in *hoc statu*, the said words; and except (2) in so far as the said interlocutor finds the pursuer liable to the defender in expenses; and recals the said finding, and in place thereof Finds the pursuer liable to the defender in expenses up to the date of the appeal, except the expenses of the proof; finds neither party entitled to said expenses, nor to expenses in the appeal: *Quoad ultra*, remits to the Sheriff-Substitute to proceed with the cause.

"*Note.*—Whether the question raised is of real importance to the pursuer or not, the defender has shown a material interest in the road across the pursuer's farm, and in having access to it, several even of the pursuer's witnesses saying that such access and use at certain times save the defender three miles of cartage, but the defender does not seem to have been careful of the pursuer's interests in the manner of the use of the road to which it has been found that he has established a possessory right.

"It is unnecessary to go in detail into the evidence. The effect is to show that it is the pursuer, not the defender, who is seeking to invert the recent possession. This he may have a right to do, but not in a process of interdict. Never was a case in which a right-of-way could have been less satisfactorily tried, for both pursuer and defender are mere tenants of the same landlord, and he is not made a party to the action, yet the question was proposed to be raised, and a great deal of evidence led upon it. The whole proof on both sides has been most unwarrantably protracted, and instead of trying to apportion the faults it has seemed best to allow neither party the expense of it.

"I mentioned this case at the last sittings at Stranraer, stating my view of the evidence in the hope that the parties might see fit to take it out of Court by some arrangement for the benefit of both. However loose the practice of the occupants of the land adjoining the road in question may have been, or however common such practice may have been in Galloway or elsewhere, it is quite out of keeping with modern usage, and now that there is but one tenant on each side of the march-dyke the place or places of access to the road should be regulated, and a proper gate or gates should be erected. The interlocutor has been framed so that it may still be ascertained by agreement between the parties, or by remit to a man of skill, what sort of access and whereto the road is required for the convenient and economical enjoyment of the defender's farm. This seems eminently a case where regulation

may perfectly secure both the rights and convenience of both parties."

The defender appealed, and argued — The Sheriff was wrong in ordering further procedure. The case was exhausted by the Sheriff-Substitute, whose interlocutor was right. The defender's title was his lease, and under it he held his lands "as possessed by Alexander Drynan." How were they possessed at that time? The proof was conclusive of the fact that the service-road was used exactly in the same manner as the defender used it. The case fell to be distinguished from *Duncan* v. *Scott*, June 20, 1876, 3 R. (H. of L.) 69, in which there was no previous possession to refer back to for a definition of rights. He was entitled on a consideration of the proof to a possessory judgment, and as the pursuer's rights in the march-fence were in no way imperilled there was no need for the further procedure ordered by the Sheriff.

The pursuer replied—The service-road was wholly on his lands; therefore, *prima facie*, the defender's use of it was illegal. The defender's encroachments on the march-fence partook of the nature of an unusual and burdensome right—Hume's Decisions, November 14, 1797, p. 798—of which he must offer conclusive proof if he was to obtain a possessory judgment—*Gow's Trustees* v. *Mealls*, May 28, 1875, 2 R. 729. But the proof was by no means conclusive in his favour, and rather went to show that the right was exercised by his predecessors through the mere tolerance of his neighbours. The words "as possessed by Alexander Drynan" merely designated the subjects, and did not refer to the use of them—*Alexander* v. *Butchart*, November 24, 1875, 3 R. 156. The case fell to be ruled by *Duncan* v. *Scott*, *cit. supra*. The Sheriff was right in ordering further procedure for regulating the mode of access to the road.

At advising—

Lord Craighill—There is brought up by this appeal an action which depended in the Sheriff Court of Dumfries between the appellant Cowden and the respondent Galloway, the latter being pursuer and the former defender in this action. The question for decision is, whether the defender is entitled to use a service-road which runs along the march-fence between their two farms, and on the pursuer's side of that fence? The use of this road is a material advantage to the defender, inasmuch as were he deprived of that the crops upon his fields contiguous to the march would have to be carted to the steading by a way much longer than is afforded by the service-road. The service-road is used only at the time when the crops are to be removed, and the manner in which the removal is effected is this—A slap or opening is made in the march-dyke. Through that the carts are taken to the road, and when for the time all that is required has been obtained the slap or opening is rebuilt, and things are restored to their original condition. The pursuer objects to the use thus taken of the service-road, alleging that it is a trespass, and the purpose of the action is to prevent that use from being continued. The controversy between the parties is, whether there has been use by the defender and his predecessor of this road, and if so, whether in the face of the pursuer's opposition it may be continued? The Sheriff-Substitute has decided in favour of the defender, finding him entitled to a possessory judgment, and has assoilzied him from the conclusions of the petition, but the Sheriff, though taking the same view of the facts as the Sheriff-Substitute, and also of their legal bearing, has recalled the absolvitor and the finding of expenses in favour of the defender; *quoad ultra*, the cause was remitted to the Sheriff-Substitute that it might be further proceeded with, what was in view of the Sheriff in sending back the case obviously being that the use of the service-road by the defender should be placed under such regulations as in the circumstances might be thought necessary or expedient.

In deciding between the parties, it appears to me to be necessary to notice the terms of the leases which were granted by the Earl of Stair to the parties respectively. The lease of the pursuer, which was subsequent in date to that of the defender, was a lease of the farm of East Muntloch "as presently occupied by David M'Kitterick," while the lease of the farm of Cardrain was granted to the defender "as presently possessed by Alexander Drynan." We are thus led to inquire how the farms respectively were possessed. What was the extent, and what were the privileges or conditions under which the farms were to be held? As to the extent there is no controversy. The dispute relates to the privileges or incidents which are said to be connected by use with the occupation of the defender's farm. If it shall appear that the use of the road in question was one of these, then the defender would have right to that which his predecessor had used. This appears to me to be the legal import of the lease which was granted to the defender. On the other hand, as the pursuer acquired his farm as that was "presently occupied," any burden to which it was subject in favour of the defender must continue to be a burden during the defender's occupation. The terms of these leases as granted by Lord Stair with the present and previous possession, are, I think, the considerations by which their respective rights in this controversy must be determined. The claim of the defender is not to a servitude. Were the case otherwise the claim could not be sustained, for he has no title upon which such a right could be acquired, and the circumstances are such at anyrate as exclude the acquisition of such a right. The question simply is, whether a right to the use of this road was granted to the defender? That depends upon the further question, whether when the lease was granted the use of the service road was an accessory to the occupation of the farm. A proof has been led, and the conclusion to which I have come is that the road in question has been used, not merely by the defender, but was for many years used by the defender's predecessors. Nor was there any objection to its use until the pursuer interfered and sought to take away the use which had been previously enjoyed. There is thus, as I think, title, and there is possession upon the title. The title is the lease, the possession is the use of the road which has long been enjoyed.

The pursuer contends that the case of *Duncan* v. *Scott*, decided in the House of Lords June 20, 1876, 3 R. (H. of L.) 69, rules the present case, but I am of a contrary opinion, as the circumstances of the two cases so far as material are dissimilar; there the missives made no reference to the possession by the previous tenant.

This is expressly stated in the report, and obviously was one of the considerations by which the judgment was influenced. Here, not merely is there reference to previous possession in the lease to the defender, but there is a similar reference in the case of the pursuer. So far, therefore, from being adverse, the decision referred to seems to me to support the defender's contention, for as I read the opinion of the Lord Chancellor, if there had been anything in the lease by which not expressly but by implication the farm as previously possessed had been let to the tenant, and the previous possession had included the use of the road in dispute, the judgment appealed against would not have been reversed.

Of course, though the defender is in my opinion entitled to the use of the road, the use must be taken with reasonable consideration for the interests of the pursuer, and had it appeared that avoidable injury to the pursuer's land had been caused, a remedy against that might, on the pursuer's complaint, have been afforded; but such is not the case presented by the pursuer, nor is there any ground for such a complaint supported by the proof.

Upon all these things the Sheriff and the Sheriff-Substitute are agreed; but the Sheriff is of opinion that the use of the road by the defender ought to be made the subject of regulation, and this is the reason for which the absolvitor granted by the Sheriff-Substitute was recalled and the action remitted for further procedure. The defender's use of the road, however, appears to me not to require regulation. There has been no abuse, and therefore there is nothing calling for a remedy by regulation. Furthermore, regulation might create difficulties not easily solved. What seems to be pointed at is the construction of a gate in the march fence through which access could be obtained from the defender's fields to the road upon the pursuer's farm. But who would bear the expense of such a provision? The pursuer is not liable, nor is there liability on the defender, whose right is not made dependent upon the formation of such an access. And what of Lord Stair? He might not approve of such a proceeding, and at the end of defender's lease he might ask that things should be restored to their former condition. All these considerations seem to me to render inexpedient any attempt at regulation in the circumstances of the present case.

Whether, had more been asked by the defender, we might not have given more than a possessory judgment need not be considered, for the defender is content to take things as these have been left by the Sheriff-Substitute.

Lord Rutherfurd Clark and Lord Adam concurred.

The Lord Justice-Clerk and Lord Young were absent.

The Court pronounced this interlocutor:—

"Find that by the lease to the pursuer, which was granted in 1880, the farm of East Muntloch was let to him as occupied at the time by David M'Kitterick: Find that by the lease to the defender, which was granted in 1874, by the same landlord, the farm of Cardrain was let to him as then possessed by Alexander Drynan: Find that the defender since his entry to his farm has used the service-road in question as an accessory of his farm, in manner described in the record, and that it was so used by his predecessor in the occupancy of the farm: Find that in these circumstances the defender is entitled to continue in use of said road as formerly enjoyed, and that no case for the regulation of this use has been established: Therefore recal the interlocutor of the Sheriff appealed against; affirm the judgment of the Sheriff-Substitute; find the defender entitled to expenses in the Inferior Court in so far as not found due by the judgment of the Sheriff-Substitute, and to expenses in this Court," &c.

Counsel for Appellant—J. P. B. Robertson—Dunsmore. Agent—David Milne, S.S.C.

Counsel for Respondent — Jameson — Law. Agents—Smith & Mason, S.S.C.

Friday, January 30.

FIRST DIVISION.

GLASGOW SHIPOWNERS ASSOCIATION *v.* CLYDE TRUSTEES AND LORD BLANTYRE.

Process—Sisting Party—Suspension and Interdict—Competency.

In a suspension and interdict against carrying out certain operations upon a navigable river, a minute was lodged for a third party who had a substantial interest to have the operations carried on, craving to be sisted as a respondent in the action. The Court *repelled* an objection to the competency of the proposed appearance, sisted the minuter, and allowed him to lodge answers if so advised.

This note of suspension and interdict was presented by the Glasgow Shipowners Association, and by certain shipowners in Glasgow, the chairman and members of the association, as such, and also as individuals, against the trustees of the Clyde Navigation. The complainers craved that the respondents should be interdicted from executing any works for the lengthening or extension, towards the centre of the river Clyde, of the piers or slipways on both sides of the river at the East Ferry at Erskine.

Answers were lodged for the respondents, in which, *inter alia*, they stated that the operations complained of were being undertaken by them in obedience to an interlocutor of the First Division of the Court of Session, pronounced on 14th March 1883, affirmed by the House of Lords on 24th March 1884, ordaining them to execute the works complained of, for the extension of the Erskine ferry slips towards the centre of the river. These interlocutors were pronounced in an action of declarator, &c. at the instance of *Lord Blantyre* v. *Clyde Trustees*, not reported upon this point. In that action the Clyde Trustees resisted, but unsuccessfully, a demand by Lord Blantyre that the ferry slips should be extended. Delay having taken place in the execution of the works ordained to be executed by the Clyde Trustees, Lord Blantyre brought the