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

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

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

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

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

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

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

Lord Adam concurred.

The Court adhered.

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

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

Wednesday, November 4.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

GOLDIE *v.* SHEDDEN AND OTHERS.

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

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

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

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

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

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

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

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

"*Opinion.*—I took time to consider this case, that I might examine the authorities regarding the possibility of supplying the want of a subscription to a testamentary writing. There is no question of donation raised on the record, and the only question I have to consider is, Whether the words written on the back of two deposit-receipts amount to a testamentary disposal of the sums of money contained in these documents? The words are in each case—'Mr Lewis Shedden, i leave this to my sister Janet Shedden.'

"I think these words are to be read as if the writing had been, 'I, Lewis Shedden, leave this,' &c., and I so considered them. My individual opinion has always been in favour of a strict interpretation of the rule of law which prescribes that every testament disposing of property exceeding the value of £100 Scots must be in writing. An unsigned writing is in my view not a writing by which the writer intended to bind himself or to dispose of anything, and if this rule is broken down I am afraid that great injustice might be done to heirs and next-of-kin. It is very common for persons who are possessed of property to make memoranda of what they propose to do for their relatives when they may think it proper to execute a will, and it must frequently happen that such memoranda are left unsigned for future consideration. If it is known and understood that subscription is necessary to a will, the existence of such memoranda will not be a cause of embarrassment either to the writer in his lifetime (in case he may have mislaid them) or to his executors after his death. But if exceptions are to be admitted the Court will in such cases be called on to determine from surrounding circumstances whether the particular writing was or was not intended to be a will. When a testator puts his name to a paper which professes to dispose of the estate which may belong to him at death, this is presumed to be his will, unless the contrary is established, and in general the presumption can only be displaced by showing that it was a paper of instructions to a solicitor, or that being a will it was subsequently cancelled or revoked.

"But this is a very different thing from allowing it to be shown by evidence that a writing which is defective in the essentials of a testamentary act was intended by the writer to have effect as such. The distinction between such a proceeding and the sustaining of a verbal or nuncupative will is very slender, and I should not be in favour of making it.

"This subject was very deliberately considered by the First Division of the Court in the recent case of *Skinner*, and in the unanimous judgment there pronounced I understand their Lordships to have expressed the opinion—(1) That they would not in the future sustain any document as a will which did not bear the subscription of the testator; and (2) that the recital of the testator's name in the commencement of a holograph writing would not be sustained as a subscription or its equivalent.

"If I were to sustain these writings I think I should be going against the opinion of a higher Court, and an opinion in which as a lawyer I entirely concur. The judgment will therefore be for the defenders, with expenses."

The pursuer reclaimed, and argued—The *dictum* in Stair, iv. 42, 6, was ambiguous. The true import of the passage was that given by Lord Young in the case of *Russell's Trustees* v. *Henderson*, Dec. 11, 1883, 11 R. 283. The presumption that an unsigned deed was incomplete could be rebutted by facts and circumstances extrinsic to the deed, which could be proved by parole. Here there was delivery in such circumstances as to show that it was certain the deceased intended these writings to be his will. Even if Lord Stair's *dictum* was to be strictly construed, the pursuer was entitled to prevail, because the holograph writing was on an authentic writ. Such writings had been sustained when on bonds and bills—*Currence* v. *Halkett*, 2 Br. Supp. 121, Bell's Lect. i. 82.

Argued for the defenders—This case was ruled by *Skinner* v. *Forbes*, Nov. 13, 1883, 11 R. 88; *Dunlop* v. *Dunlop*, June 11, 1839, 1 D. 912.

At advising—

Lord President—This is an action of declarator at the instance of Mrs Goldie, with consent of her husband, to have it found and declared "that the writings following, namely, the words 'Mr Lewis Shedden i leave this to my sister Janet Shedden,' written upon the back of a deposit-receipt of date 11th October 1880, granted by the Clydesdale Banking Company at their office in Stewarton, in favour of the deceased Lewis Shedden, Kilmaurs, for the sum of One hundred and seventy-two pounds sterling, and the like words written upon the back of a deposit-receipt, of date 9th December 1882, granted by the Royal Bank of Scotland at their office in Kilmarnock, in favour of the said Lewis Shedden, for the sum of Sixty pounds sterling, are both holograph of the said deceased Lewis Shedden, gardener, Regent Street, Kilmarnock, and are valid and effectual testamentary bequests in favour of the pursuer Mrs Janet Shedden or Goldie of the said deposit-receipts respectively, and of the sums—principal and interest—therein contained." There is therefore clearly no question of donation; it is not alleged that the deposit-receipts or the sums contained in them were made the subjects of gift, either *inter vivos* or *mortis causa*. The documents are relied on as valid testamentary bequests, and if they are not that the pursuer, admittedly, cannot prevail.

The defence is that the documents are not holograph of the deceased, and also that they are not subscribed by him, and that therefore they cannot receive effect as testamentary writings. It is not now disputed that the writing is the handwriting of the deceased, but it is maintained that the documents are unsubscribed. Now, the words used are a little peculiar, because the testator sets himself out as Mr Lewis Shedden. The Lord Ordinary says that he thinks that the words must be read thus, "I, Lewis Shedden, leave this," &c. I quite agree with his Lordship that this is the fair construction to be put upon the words, and the name therefore appears in the body of the writing, if so short a writing can be said to have a body. The name of the deceased is in the body of the writing, and it was therefore contended (1) that the document must be held to be subscribed, and (2) that though the document by itself might not constitute a testamentary writing, that yet it might be shown by the evidence of witnesses that it was Mr Shedden's intention to make this the expression of his testamentary intentions. It appears to me in these circumstances that the case is ruled by the case of *Skinner*, 13th Nov. 1883, 11 R. 88. It was there held to be a settled rule that a document, though holograph, and containing the name of the supposed testator at the beginning, was not effectual unless subscribed.

I am not prepared to go back upon that judgment, for I think it is in accordance with previous authorities, and especially with the passage in Lord Stair (iv. 42, 6), on which I then took occasion to comment, and I adhere to the construction there given. If parole evidence is admitted in this case, it can only be to prove that though the deceased did not subscribe these documents he intended that they, though unsubscribed, should receive effect as his testamentary writings. I do not think that can be proved by parole.

I think it was implied in our judgment in the case of *Skinner* that such evidence could not be admitted, and I am clearly of opinion that such evidence is incompetent. The present case strikes me as being a very instructive example of the danger of admitting such evidence, for we find that it is the persons who are directly interested in supporting the validity of the will, and no-one else, who come forward as witnesses, and further, that no-one else had access to the repositories of the deceased down to and at the time of his death. I mention this to show how dangerous I think it would be to relax this rule with regard to admitting parole evidence.

There was cited to us a case which was decided in the Second Division, and if the two cases had been absolutely contradictory we would have taken means to obtain an authoritative judgment upon the matter. But as I see that the learned Judges who decided the case of *Russell's Trustees*, 11 Dec. 1883, 11 R. 283, disclaim all intention of challenging the judgment in the case of *Skinner*, I do not think it is necessary we should resort to that necessity, and I refrain from doing so all the more willingly because the sum at stake in this case is so small.

I am therefore of opinion that we should adhere.

LORD MURE—I am of the same opinion. There is here no question of donation, the question simply being whether these documents *per se* constitute testamentary writs.

The Lord Ordinary has decided that an unsigned writing, though holograph, cannot be regarded as a good will. I agree with the Lord Ordinary, and think that the matter was settled by the case of *Skinner*, to which your Lordship has referred, the soundness of which I have no reason to doubt.

LORD SHAND—I am of the same opinion. This is not a case of the class in which a person is possessed of a deposit-receipt which a banker will pay upon endorsation, who has endorsed the receipt and given it to another for the purpose of uplifting the money. We have had many cases of that class, and in them parole evidence was admitted on the question of intention, to show on behalf of whom the money was to be uplifted. That class of cases ranks as donations, either present donations or donations *mortis causa*. But such a case is here excluded by the terms of the writing itself, "Mr Lewis Shedden, I leave this to my sister Janet Shedden." From that mode of expression it must result that this must be a testamentary writing or nothing.

I agree in thinking that this case is practically ruled by that of *Skinner*. The name is here at the beginning of the writing, but that has not the efficacy of a subscription, and it is impossible for the Court to hold that this document was intended as a testamentary writing without the testator's signature. The law has laid down the rule, and I think it is much safer that subscription should be necessary. As I said in the case of *Skinner*, the testator might have deferred making up his mind, and nothing could be more dangerous than to predicate what the state of his mind was.

With reference to the passage cited from Stair, I notice that I said in *Skinner's* case that the true principle of the decision in the previous case of *Dunlop*, 1 D. 912, was really that enunciated by Lord Stair, viz., "that when a holograph testamentary deed found in the repositories of the deceased is unsigned, it is to be held as an uncompleted act from which the party has resiled." It is true that for the purposes of that case the remark was limited to documents found in the repositories of the deceased, but I do not think that the proposition should be so limited.

In *Russell's Trustees* one learned Judge, after quoting the passage from Stair (iv. 42, 6)—("Holograph writs subscribed are unquestionably the strongest probation by writ, and least imitable. But if they be not subscribed they are understood to be incomplete acts from which the party hath resiled")—observes, "The true meaning is not that subscription is necessary, but merely that it is a reasonable conclusion, and one which a court of law will understand, that if a writ is not subscribed it is incomplete, and that the writer meant it to be incomplete." According to that the word "understood" implies that it is a question of circumstances. It appears to me, however, that the word "understood" is tantamount to "held" and I do not concur in the view that it is used in the loose sense. Nor do I think that the passage which follows tends to support that view, namely, "Yet, if they be written in count-books or on authentic writs, they are probative, and resiling is not presumed." Lord Stair means by that, I think, that where you are dealing with account-books, which never require subscription, or when you have, for example, on the back of a bond an acknowledgment of interest received, no subscription is needed. But where a document requires subscription I do not think Stair dispenses with it.

The reclaimers here also founded on the alleged delivery of the documents, but I am not satisfied that has been proved. The parties who were with the deceased at the time of his death are all interested, and I do not think there is satisfactory proof of delivery.

On the whole matter, I agree with your Lordship that we should adhere. I may add that if the fund had been larger I should have wished the opinion of the whole Court to have been taken on this case.

LORD ADAM—As I was not a party to the decision in *Skinner's* case I think I may be allowed to say that in my humble opinion that decision is a sound one. It was decided in that case that a holograph testamentary writing, superscribed but not subscribed, was defective and not valid. That defect cannot, I think, be cured by parole evidence to show that the maker intended the writing though unsubscribed to be an expression of his testamentary intention. In *Skinner's* case the document was found in the repositories of the deceased; here it was found in the hands of an interested party, but the delivery is only founded on as an item to show that the deceased intended the document to be a testamentary writing. In my opinion you cannot have parole to prove that. The Lord Ordinary has not expressed any opinion as to whether he believed the witnesses or not, but I concur in thinking that it would be impossible to have a case more strikingly illustrative of the danger of leaving the question of whether a person has died testate or intestate to depend on such evidence.

The Court adhered.

Counsel for Pursuer—Lang—C. N. Johnston. Agents—Smith & Mason, S.S.C.

Counsel for Defenders—Strachan. Agents—Mack & Grant, S.S.C.

Wednesday, November 4.

FIRST DIVISION.

[Lord Trayner, Ordinary.

STRAIN *v.* STRAIN.

Husband and Wife—Separation—Cruelty—Communication of Venereal Disease.

The reckless communication by a husband of venereal disease to his wife *held* to be cruelty entitling her to decree of separation and aliment.

This was an action of separation on the ground of cruelty at the instance of Mrs Mary Thomson or Strain against her husband Hugh Strain junior, colliery manager, Merrybank Cottage, Nettlehole, Airdrie, to whom she was married on 15th April 1884. One of the acts of cruelty on which the action was founded consisted in the communication by the defender to the pursuer of venereal disease. Other acts of cruelty were averred, which, however, it is not necessary to refer to.

The defender denied that he had communicated the disease to pursuer, and further pleaded—"(2) The defender not having wilfully and knowingly communicated venereal disease to the pursuer, he is entitled to absolvitor."

A proof was led, the import of which sufficiently appears from the opinions of the Lord Ordinary and Lord Shand *infra.*

The Lord Ordinary (TRAYNER) found the defender guilty of cruelty, and granted decree of separation *a mensa et thoro* in all time coming.

"*Opinion.*—. . . . . It is an ascertained fact that the defender was affected with venereal disease at the time of his marriage; and it is also an ascertained fact that he communicated that disease to the pursuer. But all the authorities combine in saying that that is not enough to warrant a decree of separation on the ground of cruelty—the disease must be communicated by the husband to the wife wilfully and knowingly. I can understand cases happening where a husband might communicate a disease of that kind to his wife where it could not be said that it was either wilfully or knowingly done; but I don't think that is the case I am dealing with here at all. The defender knew undoubtedly in the beginning of 1884 that he was suffering from venereal disease, because in the beginning of that year he went to a person for remedies to be applied for his recovery from that disease. Unfortunately he went to a very unqualified person, but he did go to that person knowing quite well what was the matter with him, because he went on the recommendation of somebody who knew that that person (Gibson) gave remedies or prescribed remedies for that particular disorder. Now, it is proved—and I would like to give the defender the full benefit of it—that he went to this man Gibson shortly before his marriage and asked whether he was in a condition safely to marry, looking to what had been his health in the immediately preceding month; and it may be quite true, also, that Gibson told him he was. But I don't think the defender discharged his duty by doing that. By going to a person utterly unqualified to advise him upon such a subject—a subject involving the happiness of his married life, his duty to the woman he was going to marry, and the safety of her constitution—by merely going upon the advice of a quack, who had no medical qualification at all, it does not seem to me that the defender discharged the duty that he owed, first to himself, and secondly to the woman he was going to marry. He knew that he was ill with an infectious and loathsome disorder; and I think the defender's conduct in marrying the pursuer without taking proper advice as to his condition, and the probable consequences of marriage in that condition, amounted, in the language of the authorities, to a wilful and reckless communication to his wife of the disorder from which he had been suffering. There are other circumstances brought out in the proof which go to support the view that the defender knew of his condition at the time of his marriage. I believe the pursuer when she says that for the first day or two after marriage the defender did not exercise his marital privilege. I see no reason why she should have said this if it was not true; and it goes very much to satisfy me that the defender knew what was the matter with him, and feared the consequences, when he abstained in these circumstances from exercising his marital privilege. The story about his being hurt may be quite true; but that was a hurt, as now stated by himself, to his side and back, and one that in no way hindered him from the exercise of his conjugal duty. I am therefore satisfied that he was not only aware of his illness but that he was for the time abstaining from marital privilege on account of that knowledge. I am further satisfied on the evidence that the defender was during the period of the marriage trip using remedies for the purpose of curing himself. In the whole circumstances I am of opinion that the defender wilfully communicated this disease to his wife, and that that was legal cruelty entitling her to separation."

The defender reclaimed, and argued—In order to constitute cruelty it was necessary for the pursuer to prove that the defender communicated the disease to her "wilfully and knowingly." The proof did not come up to that—Fraser on Husband and Wife, ii. 891; *Morphetr* v. *Morphetr*, L.R., 1 P. & D. 702; *Ciocci* v. *Ciocci*, 1 Spinks, 129; *Cohetr* v. *Cohetr*, 1 Curteis, 680.

The pursuer replied—It was not necessary that the defender should have acted "wilfully and knowingly." It was enough to constitute cruelty if he acted recklessly—*Chesnutt* v. *Ches-*