be in order. The defender has in fact accepted a different title, because I understand he considers the consent of Mr Macqueen and Mr Knox equivalent to a disposition by them; but the natural implement of the undertaking in the minute of sale would be a disposition by Mr Macqueen and Mr Knox. Whether they would have implemented their bargain by granting in the first place a disposition to Charles William Mackenzie, and recording it, and then tendering a disposition by Mackenzie to the defender, I do not say. That question is not raised by the record. No such step has been taken, and no disposition of that kind has been offered.

"The question now is, whether a clause of absolute warrandice by them should be inserted in the title as it stands. I am disposed to think that it should. I think the question is, whether such a clause would have been appropriate in a disposition by Mr Macqueen and Mr Knox, and if so, whether it should be inserted in the disposition tendered and accepted as equivalent to such a disposition. There is very little authority on the point, and the precise question is, so far as I am aware, a new question. The pursuers argued that Macqueen and Knox should only give the warrandice proper to trustees; and it is well settled that that is warrandice from fact and deed—Bell's Prin. sec. 2000. That rule seems to rest on the case of *Forbes' Trustees* v. *Mackintosh*, June 15, 1822, 1 S. D. 497—and I have not found any later case. The case of *Read* v. *Storie*, July 9, 1831, 9 S. 925, quoted by the defender, does not seem to apply at all, because there the absolute warrandice of the trustee was not asked, but the warrandice of creditors. That does not, however, signify, because no doubt the rule has been fixed by *Forbes' Trustees* v. *Mackintosh*, that trustees when selling an estate are not bound to grant absolute warrandice, but only warrandice from fact and deed.

"It appears clearly from the reports of *Forbes' Trustees* v. *Mackintosh* that the sellers acted throughout ostensibly as trustees, and that their own title was on the face of it a trust title. The sale was by public roup, and the articles of roup bore that 'the exposers as trustees foresaid' bound themselves, '*qua* trustees,' to 'grant a disposition.' The rule founded on *Forbes' Trustees* v. *Mackintosh* goes, I think, no further than that case authorises, which is, that trustees acting openly and professedly as such are not bound beyond warrandice from fact and deed. Does, then, that decision and the rule and practice resting on it apply in this case, where Macqueen and Knox had an absolute title to the property, and where there is no allusion in the minute of sale to their trust title? I think not. I think that a party contracting with another with an absolute recorded title has no call to inquire further. The defender quoted the case of *The Union Bank* v. *The National Bank*, December 10, 1886, 14 R. (H.L.) 1, in support of that doctrine, about which there is no doubt. Such a contractor is entitled to rely on the absolute title, and where a person who is truly a trustee takes an absolute title he must accept the consequence of absolute ownership. It is averred that the defender knew that Macqueen and Knox were only the nominees of Mackenzie. The defender denies that averment, and at first I thought that it might be proper to allow a proof on the point; but I have come to think that such knowledge would not signify, and that the defender would in any case be entitled to rely on the absolute right of Mr Macqueen and Mr Knox resulting from their absolute title.

"I am therefore of opinion that the defender is not bound to accept the title offered unless the clause of absolute warrandice struck out by Macqueen and Knox on revisal be restored.

"I cannot go any further at present. A decision on the question of interest raised by the conclusions of the summons and the defender's fifth plea would be premature and unsafe until the disposition is adjusted."

Counsel for the Pursuers—A. O. M. Mackenzie. Agents—Mackay & Young, W.S.

Counsel for the Defender—Cook. Agent—Henry Bower, S.S.C.

Thursday, November 23.

OUTER HOUSE.

[Lord Low.

NELSON'S TRUSTEES *v.* M'CAIG.

Process — Proof — Interdict — Possessory Action—Limitation of Proof to Possessory Period—Road.

In an action raised by the proprietors of certain lands to have the owner of the adjoining lands interdicted from constructing a road upon their property, the respondent alleged the existence of a public road, or alternatively of a servitude road, upon the complainers' lands. The complainers denied the existence of such a road.

Held that the respondent's averments regarding the existence of the alleged road could not be competently established in a possessory action, and that the proof with respect to the use thereof must be limited to the possessory period.

Mrs Jessie Kemp or Nelson and others, the trustees of the late Thomas Nelson, proprietors of the estate of Achnacloich in Argyleshire, presented a note of suspension and interdict against John Stuart M'Caig, proprietor of the adjoining lands of Ardnaskie, craving the Court to interdict the respondent from constructing or proceeding further with the construction of a road upon, or from otherwise encroaching on, the complainers' lands, and to ordain him to restore the ground to its former condition.

The complainers averred that the respondent, in connection with a system of roads

which he was constructing through his estate of Ardnaskie, was illegally proceeding to construct a continuation of said roads on the complainers' lands of Achnacloich. The respondent in answer averred that he was engaged in repairing part of a road which ran through the complainers' lands, and which, owing to the action of the sea, had fallen into disrepair. He averred that the road in question had been, at all events for the prescriptive period, a public road, formerly under the administration of the District Road Trustees, and now of the County Council of Argyleshire; or alternatively, that it was a public right-of-way; or at all events, a servitude road for the use and convenience of his own lands.

The complainers denied that any such public or servitude road ever existed on their lands.

The complainers maintained that the respondent's averments regarding the existence of a public or a servitude road could not competently be proved in the present action, but must be established in an action of declarator; and they accordingly moved the Lord Ordinary to sist the process in order that the respondent might bring such an action; alternatively they contended that the proof should be limited to the use had during seven years prior to the operations complained of.

Authorities cited by complainers—*Ferrier* v. *Walker*, February 14, 1832, 10 S. 317; *Liston* v. *Galloway*, December 3, 1835, 14 S. 97; *Lovat* v. *Fraser*, December 19, 1845, 8 D. 316; *Duke of Atholl* v. *Torrie*, June 3, 1852, 1 Macq. 65; *Calder* v. *Adams*, March 2, 1870, 8 Macph. 645; *Grierson* v. *School Board of Sandsting*, January 21, 1882, 9 R. 437; Mackay's Manual, pp. 177, 379, 452.

Authority cited by respondent—*M'Kerron* v. *Gordon*, February 15, 1876, 3 R. 429.

On 23rd November 1899 the Lord Ordinary (Low) before answer allowed the parties a proof of their averments, but in regard to the existence and use of the road in question, limited the proof to the period of seven years prior to the date of the operations complained of.

Opinion.—"I think that there must be inquiry in this case, and the question is whether the proof should be in any way limited.

"The respondent has admittedly crossed the boundary between his lands and those of the complainers, and commenced certain operations upon the latter. The respondent says that a road runs through his lands and the complainers' lands, and that he was repairing a part of the road which had been injured by the action of the sea. If there was in fact a road through the complainers' lands, or if the respondent was doing no more than what was necessary to make it passable, the complainers may have no right to object. The latter however aver that there is no road from the respondent's lands over their lands and that when this note was brought he was proceeding to construct a road through a grass field where no road previously existed. The complainers' averments therefore are clearly relevant.

"The respondent does not seem to be sure as to the nature of the road which he claims, because he alleges that it is either a public highway vested in the County Road Trustees, or a public right-of-way, or a servitude road in favour of his property.

"The complainers object to have these questions tried in this process, and contend that if the respondent desires to raise a question of a public road or a servitude road he ought to bring an action of declarator. They accordingly asked that the process should be sisted to allow the respondent to bring a declarator, or that the proof should be limited to the use which has been had of the alleged road for the possessory period.

"The respondent on the other hand argued that he was entitled not only to prove possession for the last seven years, but to go back to the origin of the possession in order to show that it was lawful. The authority chiefly relied upon by the respondent was the case of *M'Kerron* v. *Gordon* (3 R. 429). There Gordon brought a petition in the Sheriff Court to have M'Kerron and others interdicted from trespassing upon his lands. The respondents in their answer claimed a right-of-way and brought a counter petition to have Gordon interdicted from shutting up the way. A proof was led from which it appeared that the way had originally been a public road, which, however, the Road Trustees had lawfully shut up many years before, but that notwithstanding the shutting up of the road the public had continued to use it, although the proprietor had tried to prevent them doing so. The Sheriff-Substitute interdicted Gordon from shutting up the road, but the Sheriff recalled this interlocutor and granted interdict in Gordon's favour. The case then came before the Second Division, and it was held (*diss.* Lord Gifford) that although possession was proved by the public for more than seven years, it was also proved that the possession was in its origin unlawful, and that therefore Gordon was entitled to interdict. Lord Gifford was of opinion that the Sheriff ought to have given effect to the possession which was proved, leaving the question of permanent right to be decided in a declarator.

"That was obviously a very special case which was decided upon evidence which had been actually taken, and I do not think that it can be regarded as laying down any general rule to the effect that it is competent to determine questions of permanent right in a purely possessory action. This appears to me to be an action of that nature. If, as the complainers aver, there has been no use of a road across their lands from those of the respondent, then I do not think that the latter was entitled to enter and commence operations upon the complainer's lands, although he may be in a position to establish right to the road which he alleges in an appropriate action.

"I am therefore of opinion that the proof should not be allowed to go beyond the use of the alleged road for the period of seven years prior to the operations complained of."

Counsel for the Complainers—Grainger Stewart. Agents — Millar, Robson, & M'Lean, W.S.

Counsel for the Respondent — Chree. Agents—J. K. & W. P. Lindsay, W.S.

Friday, December 15.

OUTER HOUSE.

[Lord Stormonth Darling.

BREWIS (LIQUIDATOR OF THE SCOTTISH HERITAGES COMPANY, LIMITED), PETITIONER.

Company—Winding-up under Supervision of the Court—Committee of Advice—Remuneration.

In the liquidation of a company under supervision of the Court certain shareholders and creditors were appointed a committee of advice to act with the liquidator. *Held* that they were not entitled to remuneration for their services out of the assets of the liquidation.

At an extraordinary general meeting of the Scottish Heritages Company, Limited, held on 14th May 1891, it was resolved that the company should be wound up voluntarily. Mr John Brewis, C.A., was appointed liquidator, and three shareholders were nominated as a committee to advise with him. A supervision order was subsequently pronounced by the Court, in which the nomination of the committee was confirmed, with the addition of two creditors to their number. The proceedings in the liquidation lasted for several years, and the committee advised with the liquidator with reference to the various questions that arose for determination.

On 27th April 1899 the liquidator presented a note to the Court craving, *inter alia*, that his accounts should be remitted for audit to an accountant; and he further submitted that the question whether any and what sum should be paid to the members of the advising committee for their services should be included in the remit. He stated that the creditors of the company had received payment of their debts in full, and that there was in his hands a surplus sufficient to pay the interest due thereon.

The petitioner moved the Lord Ordinary to include the question of the committee's remuneration in the remit to an accountant, and argued — Such remuneration was frequently paid in practice, and allowed for in the Accountant's reports, which were approved by the Court. In particular, the Court had expressly sanctioned the payment of fees in the liquidation of *The City of Glasgow Bank* (1883) and *The California Red Wood Company* (1887) (unreported).

The Lord Ordinary (STORMONTH DARLING) refused the motion.

Opinion.—"In my judicial experience of liquidations, now extending over nine years, this is the first time I have had to consider the question of remunerating a committee of advice out of the funds of the liquidation. If such a payment were ever to be made, this would not be an unfavourable case for making it, because the liquidation has lasted since 1891, and has resulted in the creditors receiving full payment of the principal amount of their claims, in addition to which they may possibly receive the whole or some part of the interest accruing thereon since the date of liquidation. Moreover, there have been questions of difficulty arising in the course of the liquidation which, I have no doubt, have engaged the attention of the committee of advice.

"In the company statutes applicable to Scotland there is no express reference to a committee of advice, and consequently nothing to suggest that remuneration to them should form part of the costs of liquidation. On principle I regard such remuneration as open to serious objection. Whether drawn from the class of creditors or contributories the members of a committee of advice are appointed by their fellow-sufferers to superintend and advise the liquidator, but they are selected rather for their general business capacity and standing, and for their direct personal interest in the winding-up, than for any special qualification as experts. The office which they hold is analogous to the purely gratuitous office of commissioner on a bankrupt estate, and is substantially that of a trustee who is or may be also a beneficiary. That such an office should carry remuneration, with all the consequences which that entails, seems to me not only inconsistent with its essential character, but inexpedient in the interests of those who suffer by unsuccessful joint-stock trading.

"If remuneration were to be sanctioned in one case, there is no reason why it should not be demanded in every other, for it could only be sanctioned as part of the costs of liquidation, and these are of course preferential payments. I do not believe that there has ever been the least difficulty in inducing men of position to act on such committees without remuneration. I speak of the services of the committee as such, because I do not doubt that if it were found advisable to appoint some individual member of the committee possessing special knowledge or skill to perform some special duty, it might be competent to recompense him for his services. That is provided for in England by the 160th of the general rules framed by the Lord Chancellor and the President of the Board of Trade under the Winding-up Act of 1890. But the rule is precise in requiring this to be allowed only by an order of the Court, which shall specify the nature of the special service, and in forbidding any payment out of the assets of the liquidation to members of a committee of inspection for discharging their duties as such. This is all the more significant, because a committee of inspection under the Act of 1890 has regular meetings and prescribed duties, and absence from a certain number of meetings without leave is visited by loss of office. It is most