a right by prescription which would go to defeat the right of the party who is entitled to the soil.

Now, by the law of Scotland, these rights are much more circumscribed than they are by the law of England. It has been held, that there can be no right to an easement in Scotland to give a man a right to fish for trout off the land of another in a navigable river. No doubt there may be such a right in England—therefore the law of Scotland is more stringent than the law of England; and the law of Scotland does what could not be done by the law of England. It restricts the right, and it does not extend over the whole of the property,—which, I think, is a very strong argument against the general right here claimed—that where the right was one that could be maintained within certain limits, they held that it could not be maintained as a right *spatiandi;* and therefore they restricted it to what they considered reasonable limits, and held the portion set out, open to the enjoyment of the owner of the soil. Therefore, where it is a legal right, it is restricted; whereas this being a right, which I cannot hold to be illegal, yet a right which I cannot hold to lie in prescription, I think your Lordships will not arrive at that conclusion; but as the appellant himself says he is willing to have it restricted, it appears to me that that admission weakens his case. He could not help making the admission; but it shews his own sense that he could not establish a right to walk over the whole of this property just as he pleased; and I think your Lordships will arrive at the conclusion, that it would be utterly impossible for your Lordships to maintain the right, and at the same time to restrict it to any particular portion of this strip of land.

My Lords, the Courts of Scotland, in the exercise of these rights, have been very careful not to break into the right of property of the owner of the soil. In the case of a footpath running near a river, they have held that the persons who resort to that footpath are not at liberty to angle in the river from that footpath over the ground between the path and the river. That has been decided. So that you are restricted to the precise right which you have enjoyed. You are not at liberty to make use of the right of way for the purposes of strolling, or wandering, or amusing yourself there, for the purpose of enjoyment.

My Lords, I think, therefore, that, by the law of Scotland, this is a right which cannot be maintained. I think, moreover, that it is a right which ought not to be maintained. It is inconsistent with the general right of property; and it is not, as in the common case of servitude, a right which is consistent with an enjoyment in other respects—a limited enjoyment, no doubt, but still the enjoyment of a man's own soil; and therefore it cannot be maintained.

My Lords, the appellant, at the close of his case, brings to his aid the law of England, which, he says, is the same as the law of Scotland. I think he is mistaken. By the law of England, the inhabitants of a town or place cannot prescribe for any easement generally in the soil of another. They may support it by custom—the custom becomes the law of the place; but then the custom is not to be supported at all unless it be a good custom, and a reasonable custom; and they have therefore to shew that the right which they claim is reasonable. The question then would be, whether this would be reasonable or not by the law of England. But they could not prescribe this right by the law of England—they could only lay it as a custom; and, as a custom, the question would be, whether it was a good custom, and whether it was a reasonable custom. I think, therefore, that the law of England is different in its application from the law of Scotland; but it is merely referred to for the sake of illustration. This case must stand or fall according to the law of Scotland. I know that your Lordships will so far abide by that advice which it falls upon myself on this occasion to give, as strictly to decide this case upon the law of Scotland; and upon that law, as I understand it, I advise your Lordships to dismiss this appeal, and to affirm the interlocutor complained of, which I think is perfectly consistent with the law of Scotland, and meets, as it appears to me, the just and true merits of the case.

Interlocutor affirmed with costs.

Second Division.—Lord Murray, *Ordinary.*—Dodds and Greig, *Appellant's Solicitors.*—James Davidson, *Respondents' Solicitor.*

MAY 28, 1852.

SAMUEL FERGUSSON, *Appellant, v.* ADAM SKIRVING and others, *Respondents.*

Church—Process—Record of Presbytery, Authentication of—Statutes 1686, c. 3; 43 Geo. III. c. 54—*The Act* 1686, *c.* 3 *does not apply to judgments and sentences of Presbyteries; and a sentence of deposition of a schoolmaster is not invalid, because not signed at the time of its deliverance by the Moderator.*

A Presbytery may, if it thinks fit, cancel part of the record of its proceedings against a schoolmaster and proceed de novo.

A libel having been raised before a Presbytery,[1] against Samuel Fergusson, a schoolmaster, after the proof for the prosecution was closed, and the exculpatory proof partly led, the schoolmaster suspended on the ground that access to the proof had been denied him. The Lord Ordinary granted interim interdict against the respondents pronouncing any ultimate sentence of deposition; but the Presbytery proceeded in the cause, to the effect of finding the schoolmaster guilty. Subsequently, on their giving in a minute consenting that all proceedings, subsequent to the date of the refusal of access, should be held as cancelled, under a reservation to proceed with the case *de novo* as from that date, the Court recalled the interdict. Thereupon the Presbytery, the schoolmaster having refused to say whether he wished the proceedings in question cancelled or not, cancelled the same; and he having farther refused to lead additional proof, found him guilty, and pronounced sentence of deposition. An *action of reduction* was then raised, at the instance of the schoolmaster, on the ground that it was incompetent for the Presbytery to cancel their own proceedings, and to try him a second time—that the evidence of certain of his witnesses had been cancelled, which evidence it was impossible for him to replace—and that certain members of Presbytery were disqualified from judging in the case, by reason of agency.

Fergusson now appealed against the judgments of the Court of Session.

Bovill, for appellant.—The leading objection is, that the minutes of Presbytery are not signed by the moderators respectively of the meetings of which each sets forth the proceedings. At this moment, the original minute of 10th Aug. 1846 is not signed by any person whatever, with or without authority. The statute 1686, c. 3, is absolute and universal in its language, and clearly comprehends the case of a Presbytery, being *quoad hoc* a Court. Unless usage, therefore, can defeat an act of parliament, which is clear in its language, the judgment so unauthenticated is null.—*Smith* v. *Macaulay*, 9 D. 190; *Dickson's case*, Mor. 7464. Parole evidence is not sufficient to prove a sentence of a kirk-session.—*Hugh Fraser*, 2 Swint. Just. C. 443. It is said the practice of church courts is peculiar; but that practice is not uniform,—and even if it were, it could not avail, for in this instance the Presbytery sat as a criminal court, and the statute must be construed most strictly in favour of the appellant. No mere absence of a usage in conformity with a statute, can contradict that statute, nor can a statute be partly in desuetude and partly *in viridi observantiâ*. In *Dickson's case*, this very plea was urged, that it was the practice of the church courts not to sign their sentences, yet the Court held there was no evidence of the sentence of deposition. (The other points were merely stated, and no additional authorities cited to those previously relied on.)

Rolt Q.C., and *Anderson* Q.C., for respondents. — The mode of signature here adopted was quite sufficient. The practice is for the clerk to write out a rough draft of the minutes, which is read over at the next meeting, and, on being approved, is signed by the moderator and clerk of that next meeting. It is not unlike the way in which a registrar in Chancery here draws up a decree of the Court, or in which a Lord Ordinary in Scotland draws up his interlocutor, which is seldom or never signed at the time. Here the practice followed is the universal practice of Presbyteries in Scotland,—and at common law, therefore, the proceedings are quite correct; but it is said, the statute 1686 strikes at the practice. The only thing made imperative by that act is, that the clerk is not to give a copy of the minutes till they be signed; the other part of the statute is merely directory. At the time that act passed, there was no Court of Presbytery in existence, as episcopacy was then the order of church government; and *Dickson's case* shews—1. that it never had been the practice for the minutes of each day to be signed at the time; and, 2. that the statute 1686 did not apply to Presbyteries. This universal usage, therefore, will explain the construction given to that act of parliament. This was not a criminal proceeding at all, but merely a matter of church discipline. The cases cited do not support the other side.

LORD CHANCELLOR ST. LEONARDS.—My Lords, this case is one in which certainly the appellant has no merits; and if, therefore, he is to succeed, it must be upon some legal point. The legal points are certainly none of them of substance—they are simply technical ones of form; and your Lordships will be anxious if you can, according to the law of Scotland, to decide against them.

The first point is, that the sentence pronounced by the Presbytery was not signed according to the directions of the act of 1686. In point of fact, that act of Parliament has never directly been held to apply to the decisions of the Presbytery; for the interlocutor which was given in *Dickson's case*, cannot be considered as a decision upon the subject. One of the Judges expressly states, that the general opinion has been, that the act of 1686 does not apply to Courts of Presbytery. Now the act itself, which consists of very few words, is drawn in very singular terms, if it was meant to apply to Courts of Presbytery; for it says, "Our Sovereign Lord, with advice and consent of his estates of parliament, statutes and ordains, that from and after the 1st of November next, all interlocutors pronounced by the Lords of Council and Session, and all other Judges within the kingdom, shall be signed by the President of the Court, or the Judge pronouncer thereof: And His Majesty, with advice foresaid, prohibits and discharges the clerks,

[1] See previous reports, 12 D. 1145; 22 Sc. Jur. 493. S. C. 1 Macq. Ap. 232: 24 Sc. Jur. 473.

upon their peril, to extract any acts or decreets, unless the interlocutors, which are the warrants thereof, be signed as said is: Declaring hereby the extracts which shall be given out otherways, to be void and null." The distinction there is singular. It is not declared by the act, that the judgment shall be void if it is not signed; but it is declared, that the extracts which shall be given out shall be void and null unless the judgment has been signed. There is a good deal, therefore, in the argument, that the act of parliament is directory in the first instance, and that it is imperative in the second. There is a nullity pronounced as against extracts; but there is no nullity pronounced as against the judgment itself. Experience shews that the interlocutors, properly so called, are not signed at the time; and that is really the objection which is now taken at your Lordships' bar. The judgment is pronounced on one day, and the interlocutor is signed on another. With our own practice we have nothing to do—it is to be decided upon the law of Scotland; and it is impossible that the course of justice should proceed, if there was too much particularity. The act of parliament does not say that it shall be signed at the time; but it says that it shall be signed; and subsequent signature has always been deemed sufficient.

Now, in point of construction, I should myself have doubted whether this act of parliament could extend to Courts of Presbytery, because it must mean other Judges of the same Court; and if it had been intended to extend to Courts of Presbytery, it would have said so; but no such words are used, and there are very good reasons why they are not.

But, then, chapter 18 of the same act of parliament—which is, "An act appointing the publication of the testimonies of witnesses,"—has been relied upon, in which, different words being used in several parts of the act of parliament, the same expression occurs, "other Judges;" but the words are not the same that precede it; for it says, "before the Lords of Privy Council, Lords of Session, and all other Judges within this kingdom;" and then it goes on to abrogate "any law or act of parliament, custom or usage to the contrary notwithstanding." I think, therefore, there is a plain distinction in the acts, and that chapter 18 might well be allowed to apply to all Judges, at the same time that chapter 3 might not be extended to the decisions themselves of Courts of Presbytery. However, your Lordships are not called upon to decide that point; because I must take an ancient statute like that, to operate according to the construction which it has received in Scotland from the time that it passed. Now, my Lords, how do we arrive at a knowledge of that construction? By the acts of the Presbytery—by the submission to those acts—by the non-challenging of them, for the two instances that have been produced prove nothing—by the non-challenging of the acts of Presbytery; and there being no single instance of an attempt to set aside the deposition of a minister by the Presbytery, for want of that very form which never had been obeyed, or never has been carried into execution *modo et formâ*, which it has been insisted it ought to be, at your Lordships' bar. All practice therefore shews, that the act has been construed not to extend to such cases. And what would be the effect of your Lordships now deciding according to the appellant's view?—That every single act of Presbytery, unchallenged during the whole course of that time, must now be considered to have been improperly made; and such of them as are still within the reach of remedies, would at once bring into the courts a flood of cases of this sort, in order to set aside these decisions of Presbytery in like cases, upon the ground of informality. I think, my Lords, that the construction which has been by general consent put on that act of parliament in Scotland, verified by the acts of Presbytery, submitted to by Her Majesty's lieges there, and not challenged by the Courts or in the Courts, is according to the clear intent of the act of parliament.

My Lords, I may observe, that the word "interlocutor" is a technical word, which at that period, at all events, could not have been held to apply to the acts of Presbytery. There is no such word in chapter 18; and that of itself seems to me to confine the operation of the act to those cases in which the sentences pronounced were in the form of interlocutors. The sentences of Presbytery were not in that form. That would be an additional ground for considering, that the act 1686, c. 3, did not extend to cases of this sort.

My Lords, if that be so, there would be an end of the question; but if it were otherwise, there would still remain a very serious question, whether these particular sentences were not signed sufficiently within the act of parliament. The act does not require that they should be signed at the time. It is impossible to say, that if there are continued meetings, the Court of Presbytery has merely this jurisdiction. It has other jurisdiction. It never was intended by the act of 1686, that the Court should be cut into two, as it were, and should be held to one particular jurisdiction, and should not proceed on other business; and this, therefore, like other business, was conducted in a formal and regular way, according to the forms of justice—certainly according to the forms of justice as administered in the Presbytery, and I think good forms they were; and all the documents ultimately received the signature of the judicial authorities. The judicial authorities there are the Presbytery. Any member of Presbytery would be competent enough to sign, if he were deputed to sign; and if you take the first of these sentences or declarations, why it is not signed at once, but it is read and approved of at a meeting of the Presbytery, and then signed; and it so happens that these things are signed by persons who were present, and formed part of the Court at which the original order was made, although they did not happen to fill the chair as

the moderator on that occasion. This act of parliament says that the moderator is to sign; and, therefore, by a general and proper construction, your Lordships would be most anxious not to set aside a real judicial decision, deliberately and carefully pronounced, upon a mere question of form, without substance.

Then, again, supposing those books were open to objection, (which I do not think they are,) there is a subsequent record. Take the case of the Lord Ordinary himself when he draws up an interlocutor. We know that an interlocutor is in a minute; he does not sign that; it is afterwards formally considered; he takes time to consider the form of it; and that form is prepared; and at a subsequent day within some reasonable time, he signs that; and that, even under the express words of the act, is a satisfaction and a compliance with the act of parliament. Then, where there are no such words, by the spirit of the act it is to apply, and could only apply, according to other forms; that is, they must comply with the directions of the act, if they are within it, with reference to other forms. Then this is a regular entry, and signed by the moderator of the day on which the subject is shewn to have been considered. That book is of itself a record, and, as such, would satisfy the clear intent of the act of parliament.

Now, the argument, that the doctrine of desuetude applies to this act of parliament, has, I think, been properly given up. This act of parliament has not fallen into desuetude—it is in operation at this moment, and the question is really not a question of desuetude—but what is the construction of the act of parliament according to the usages and the views of the Courts of Scotland? Now, it is quite manifest that the Judges in Scotland (and no exception has been taken to that) have considered themselves, not only at liberty, but bound, to refer to the usage in the case of the Presbyteries, in order to ascertain whether or not, by law, these things were properly signed. Accordingly, they made that reference; and there is a very elaborate report. If it is supposed that every Presbytery in Scotland would have adopted the same rule, without some superintending authority directing them and giving them the rule, of course that you could not expect to find; but you find a very sensible rule laid down by the leading Presbytery, the present Assembly of Edinburgh,—and that leading rule is an exceedingly sensible one, and applies to this case. There is no doubt about the way in which these books have been prepared; and I can only say, as regards the practice, that I think the practice would control the effect; that is, they would have effect by giving construction to the statute, and considering what had been the practice of the different Presbyteries, as shewing the construction and the operation of the act of parliament. But I own that I was quite surprised when I called for the books. I had understood that, as in Dickson's case, your Lordships would have had on the table some books with scratches, and scrawls, and dottings, and blottings, and things which are somewhat unintelligible, and not conformable to the purposes of justice. I never, in my life, saw anything more regular than the minutes which have been handed up to your Lordships, and those minutes again transcribed and formed into a record, in a book which is the actual book of the Court. So that here the subject has nothing to complain of. I venture to say, that if you call for the minutes of any judicial body that ever existed, you can hardly expect to find so much regularity, so much care, or so much precision, as has been applied in Scotland to the very case which is now in consideration at your Lordships' bar. My humble advice, therefore, to your Lordships will be, to consider that there has been a due compliance with the law of Scotland, under the act of parliament, or independently of the act of parliament, or by construction of the act of parliament; and that, consequently, the first objection cannot be maintained.

Well, now, my Lords, I need not trouble your Lordships with any other objections. The most material is that of the cancellation. It is perfectly clear that no objection can arise upon that act; for it was an act which was done by the direction of the Court of Session. I think it was acquiesced in by Mr. Fergusson the schoolmaster; and it was done by the Presbytery under the direction, I may say, clearly of the Court itself; and, therefore, I think it is not open to any objection. Substantially it is open to no objection. It is a simple technicality, because Mr. Fergusson had the option of having all the evidence remain, or as much of it as he liked. He was obstinately silent; he would not concur; and it was no question, therefore, of cancellation.

My Lords, I think that all the other objections fall to the ground.

My Lords, I may remark, that a point was raised, in the opening, upon the Schoolmasters' Act; but that point was not insisted upon in the reply. I think it was properly not insisted upon in the reply, because the act of George the Third does not touch the point. That gives the power, but it does not direct that power to be exercised in any particular manner; and I consider that act of parliament as a confirmation, rather than as any obstacle in the way of the practice of the Courts of Presbytery; for when, at that late period, the parliament gave the Courts of Presbytery a power without appeal to decide upon the merits of questions respecting schoolmasters, when the legislature must be taken to have known what the practice then was in regard to the signing of judgments and otherwise in the proceedings of the Presbytery, it does not provide any particular mode of giving those judgments, or of signing them,—that must be considered, as far as it goes, as really a confirmation of the Court according to its then state of practice; and giving to it the state in which the legislature was then dealing with that Court, with all the forms of that Court,

and only the forms of that Court as directed by law and shewn by their practice, I think that the act of parliament would be deemed to have given to the Court of Presbytery, as it then stood, the power to depose a schoolmaster, and without appeal. If, with the knowledge which the legislature must be considered to have had of the actual practice of these Courts, it intended not to give so great a power as that of deposing a man from his office, to which otherwise he was entitled for life, without appeal—if the legislature had intended to remedy what is now represented at your Lordships' bar as evils existing at that time — you cannot doubt that provision would have been made for that purpose. There is no such provision; and, therefore, on that act of parliament alone, I should submit to your Lordships that these are proceedings which cannot be allowed. I propose, therefore, to your Lordships, that this appeal be dismissed.

Interlocutor affirmed with costs.

First Division.—Lord Ivory, *Ordinary*.—William Rogers, *Appellant's Solicitor*.—Grahame, Weems and Grahame, *Respondents' Solicitors*.

JUNE 4, 1852.

HIS GRACE the DUKE of ATHOLE, *Appellant*, *v.* ALEXANDER TORRIE, ROBERT COX, and CHARLES LAW, *Respondents*.

Title to sue—Public Right of Way—Process—*Three parties setting themselves forth as residing in different towns, brought an action of declarator to have it found that a particular road was free to the public as a highway. The part of the country in which the alleged public road lay, was situated at a great distance from any of the three towns in which the pursuers resided, and they did not allege that they had any local connection with the district, and merely averred, that for time immemorial, they and the public were in the habit of using the road as a public road, for walking, riding, and driving cattle.*

HELD (affirming judgment), *that they had set forth a sufficient title to sue the declarator.*[1]

On appeal, the Duke of Athole in his *printed case* maintained that the judgment of the Court of Session of 12th Dec. 1849 ought to be reversed for the following reasons:—

1. The pursuers, as mere members of the public, had no right, title or interest, to pursue.—*Galbreath* v. *Armour*, 4 Bell's App. 374; Hume on Crimes; Ersk. 4, 1, 17; *Kerr* v. *Sir H. D. Hamilton*, 2 S. 149; *Oswald* v. *Lawrie*, 5 Mur. 6; *Berry* v. *Wilson*, M'F.'s Jury Cases, p. 91; *Forbes* v. *Forbes*, 7 S. 441; *Harvie* v. *Rogers*, 7 S. 287; *Anderson* v. *Earl of Morton*, 8 D. 1085; *Earl of Cassilis* v. *Town of Wigton*, Mor. 16,122; *Guild* v. *Scott*, 21st Dec. 1809, F. C.; *Tait* v. *Earl of Lauderdale*, 5 S. 330; *Marquis of Breadalbane* v. *M'Gregor*, 9 D. 210; *Duke of Hamilton* v. *Aikman*, 6 W. S. 70. 2. The title of the respondents is specially defective with reference to that portion of the conclusions which relates to the portions of road formed exclusively by the appellant's predecessors, for their private use. 3. The interlocutor of the Court, sustaining the title of the pursuers absolutely, is erroneous, even if the respondents were to be held entitled, in respect of their averments, to be admitted to prove their averments, with a view to establish their title.

The *respondents* in their *printed case* supported the judgment on the following ground:—Because the respondents have a good title to sue the action.—Stair, 2, 7, 9; Bankt. 2, 1, 17; Ersk. 2, 2, 5; *Lord Glenlee* in *Barber* v. *Grierson*, 5 S. 603; *Town of Edinburgh*, Mor. 1898; *Inhabitants of Caltoun*, Mor. 1899; *Commissaries of Edinburgh* v. *Commissary of Dunkeld*, Mor. 7558; *Anderson* v. *Magistrates of Wick*, Mor. 1842; *Earl of Hopetoun* v. *Officers of State*, Mor. 13,527; *Gibson-Craig* v. *Arbuthnot*, 3 S. 441; 1 Sh. Ap. 35; *Porteous* v. *Allen*, Mor. 14,512, and 5 Br. Sup. 598; *Campbell* v. *Campbell*, 5 Br. Sup. 599; *Earl of Cassilis* v. *Town of Wigton*, Mor. 16,122; *Guild* v. *Scott*, *supra*; *Macfarlane* v. *Mag. of Edinburgh*, 4 W. S. 76; *Todd* v. *Mag. of St. Andrews*, Mor. 1997.

Sol.-Gen. Kelly, and *Rolt* Q.C., for appellant.—The summons does not allege that any obstruction has been offered to the pursuers personally, and we admit that, if that had been so, they could in Scotland, as well as here, have an action of damages: *per* Lord Cottenham in *Ewing* v. *Com. of Police*, M'L. & Rob. 847. This, however, is not a personal action, but a declarator. Now, in England, if a person is obstructed on the highway, he can either bring his personal action or he may proceed by indictment, which at once settles the question, being *res judicata*. In Scotland, a similar remedy is sought by an action of declarator. Now, the

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[1] See previous report, 12 D. 328; 22 Sc. Jur. 86, 248. S. C. 1 Macq. Ap. 65; 24 Sc. Jur. 478.