Counsel for the Pursuers—Robertson. Agent—David Hunter, S.S.C.

Counsel for the Defenders—Darling. Agent—J. Stormonth Darling, W.S.

Tuesday, March 9.

SECOND DIVISION.

[Lord Shand, Ordinary.

WALLACE *v.* COMMISSIONERS OF POLICE OF DUNDEE AND OTHERS.

Declarator—Interdict—Right of Way—Prescriptive Use—Interruption—Proof.

The proprietor of a close in Dundee, who had absolute ownership under his titles except as to one part over which there was a servitude of light, claimed right to shut up the close and to build upon it.

The Police Commissioners asserted right to the close as a public thoroughfare under their control, and averred prescriptive use of forty years by the public.

Held, on the proof, that the proprietor had proved sufficient interruption to prevent the establishment of a right-of-way by forty years use, and that the control of the close by the police for the purposes of cleansing, lighting, and repairing gives no right to them in a question of right-of-way.

This was an action of declarator and interdict brought by John Wallace, iron merchant in Dundee, against the Police Commissioners of Dundee and others, in which he sought to have it found and declared that a portion of a certain close in Dundee, known as Butchart's Close, extending back from the Murraygate of Dundee for about 160 feet, is comprehended in and forms part of the property of the pursuer, and that he is entitled to shut it up and build upon it. The pursuer further craved interdict against the defenders using, entering, or passing over the said close, or generally from interfering with or molesting him in the full and free use of the close as his property.

The pursuer admitted that the north end of the close, towards the Meadowfield, is subject to a servitude of light in favour of a dwelling house situated there, and he therefore did not claim right to build over that part of the close.

The pursuer produced and founded upon his titles, one of which, dated 12th November 1873, contains the following declaration:—"Declaring always as it is by the disposition in my favour provided and declared, that neither the proprietors of the remainder of the said subjects last before described and not hereby disponed, nor their tenants, shall be entitled to object to the shutting up or building upon the portion of Butchart's Close upon or opposite to the subjects hereby disponed, should my said disponee or his foresaids wish to shut up or build upon the same, and on the other hand, it is also hereby declared that neither my said disponee nor his foresaids, nor his or their tenants, shall be entitled to object to the shutting up or building upon the portion of Butchart's Close upon or opposite to the remainder of the subjects not hereby disponed, should they wish to shut up or build upon the same." He also asserted that the close was his own exclusive property, free from any servitude or other right of passage or any other restriction.

The Commissioners of Police denied that the close in question was the private property of the pursuer, and averred that it was one of the public thoroughfares of Dundee, under the charge of the Police Commissioners, and paved, cleansed, and lighted by them; and further that the close had existed and been used as a thoroughfare and had been known only in that character for upwards of forty years.

The Lord Ordinary (SHAND) ordered a proof, and on the 6th of November issued the following interlocutor:—"Having heard counsel and considered the proof—Finds that for forty years and upwards prior to the raising of the present action, there existed a public right of way for foot passengers through the close or passage known as Butchart's Close in Dundee, between Murraygate and Meadowside of Dundee: Therefore assoilzies the defenders from the conclusions of the action, and decerns: Finds the pursuer liable to the defenders in expenses, and remits the account thereof, when lodged, to the Auditor to tax and report."

The pursuer reclaimed, and the Court appointed the case to be heard before seven Judges.

At advising—

LORD DEAS—The pursuer in this case is proprietor of certain subjects in Dundee, which are described in the disposition in favour of his author, William Butchart, dated 13th December 1790, as "All and Haill that tenement of land, back houses, and garden, which sometime belonged to Alexander Watson," "lying in the burgh of Dundee, on the north side of the Murraygate thereof, betwixt the lands sometime of Mr James Fiethie, now of on the west, the lands sometime of Alexander Bower and Samuel Chandler, now of on the east, the common meadows on the north, and the said street on the south parts."

The defenders allege that a lane or close called Butchart's Close, leading through the pursuer's property from the Murraygate on the north to what is now called Meadowside or Meadowside Street on the south, has been used by the public as a public close or street for foot passengers for the period of the long prescription, and consequently that a right of public foot-road exists over it, which the pursuer is not entitled to obstruct or interfere with.

The proof and productions do not furnish us with a precise description of the subjects through which the close runs, without the aid of verbal explanations, for which I was much indebted to the Dean of Faculty, on the one hand, and the Solicitor-General on the other, and which made that description quite intelligible. I do not say that these verbal explanations were essential to judgment, but they removed a certain vagueness which, to my mind at least, was unsatisfactory. Taking the benefit of them, I understand the nature of the pursuer's subjects to be this:—The length of the ground comprehended in the disposition just quoted of 1790, between the Murraygate and Woodside Street, is about 164 feet and a half, and in breadth, between the houses fronting Murraygate and backwards, is from 30 to 35 feet. The ground seems to run from the Murraygate towards Woodside Street in somewhat of a north easterly direction, but which is described in the

titles as "north," and to call it so is sufficiently accurate for all practical purposes.

The state of the subjects up to a date not quite ascertained, somewhere between 1818 and 1822 (probably about 1820), was this:—At the Murraygate end the pursuer's author, Butchart, had a house, still extant, the second storey of which filled the whole space betwixt the house which had belonged to Fiethie on the west, and the house which had belonged to Alexander Bower and Samuel Chandler on the east. But on the lower storey of Butchart's house a space of about four feet in breadth had been left next the gable wall (understood to be mutual) of what I shall call for brevity Fiethie's house, for a passage northward to Butchart's garden (mentioned in the disposition of 1790) and to his back houses (also mentioned in that disposition) situated on the east side of the passage, and occupied by his tenants, consisting, according to the defender's witness Peter Gillan, of about fifteen families.

Sometime between 1818 and 1822 Butchart erected a tenement on his garden, or on that part of it which abutted on Meadowside, and in doing so he so far followed the fashion of the house at the Murraygate end of his property as to leave a covered passage through the lower storey, whereby the occupants of his new tenement had direct ingress and egress to and from Meadowside, and his other tenants in the close, as well as himself, had the means of passing in and out either at the Murraygate or Woodside end of his property as they thought proper. An uncovered portion of Butchart's ground was thus left between the old tenement and the new, and in 1822 Butchart, on the occasion of building a stable on part of that ground, entered into a transaction with Daniel Macintosh, who had acquired Fiethie's subjects immediately on the west, whereby, on payment by Macintosh of £65, Butchart bound himself to keep his stable 8 feet 9 inches distant from the west wall of Macintosh's house for preservation of Macintosh's lights, and not to raise the side walls of the stables—which were to be 32 feet in length—above the height of 15 feet 9 inches from the ground, or to raise the roof of the stable more than 8½ feet higher than the side walls. This transaction was embodied in a deed of servitude executed on 2d August 1822, and the stable, then in course of erection, was completed accordingly.

Butchart's house fronting Murraygate was stated at the bar to have no direct entrance from the street. The new tenement erected by Butchart at the other end of the close has a door entering from the close to the upper portions of the building, and a door entering to the ground flat direct from Meadowside Street. With the exception of this last mentioned door, all the doors of the pursuer's subjects enter from the close. The whole subjects on the east side of the close belonged to Butchart and now belong to the pursuer. All the occupants of these subjects had and have thus to enter through one or other of the two covered passages in order to get to the premises occupied by them. On the other hand, although the proprietor of the subjects stretching along and forming the pursuer's western boundary has extended his back buildings to within a few feet of Meadowside (as we see from the Ordnance plan) covering nearly all of what was his garden, he has no door or entrance from Butchart's Close, but enters by doors from a throughgoing close situated on the other—that is, the western—side of his subjects, although he may probably have also a door or doors direct from Murraygate or Meadowside—a fact left unexplained, and which is not material. Two material facts, however, become clear from this minute description of the subjects, 1st, that the close or passage is essential for the occupants of the pursuer's subjects; and, 2d, that no use of that close or passage can be made by the proprietors on either side unless it be as members of the public, and accordingly we find that no right to enter the close is asserted by any one whatever in any other capacity.

It is now necessary to notice that, in erecting his tenement at the Meadowside end of his ground Butchart made preparation for a door there, by inserting in the wall an iron hook in the usual manner for a crook and band hinged door, which was accordingly forthwith put on, having a lock and key or rather keys for the use of himself and his tenants. It is proved that "the stone work is of the same date as the building, and has been constructed for a door." Butchart at the same time formed a recess in the wall so that the door when opened back might not to any extent obstruct the narrow passage through the archway or what we familiarly call the "pend." This fact may account for some of the witnesses, who no doubt passed through the close, saying they did not see the door, which is stated to have been much of the same colour with and scarcely distinguishable from the wall.

At the time when the door was put on there were, with the exception of a public school or schools, no houses in Meadowside, which was then a public green. It was not till 1825 that the Magistrates and Council obtained an Act of Parliament authorising the green to be built upon, on condition of a public bleaching green being provided elsewhere. This condition was ultimately complied with, and in course of years Meadowside has come to be covered by buildings, leaving only the breadth of a street now called Meadowside Street, running at right angles across the end of what had been the gardens of Butchart and the other Murraygate proprietors, and parallel to Murraygate Street. Of course the door upon the close could not aid Butchart's tenants in getting into their houses, nor could it be intended to obstruct their entrance, and as there was nobody else to be kept out except the public, it follows that the object of the door must have been to keep out the public and prevent their passing through. The portion of the public most likely at that time to have taken advantage of the opening were the scholars, for there were then, as I have said, no buildings on Woodside except the schools, and most probably it was the existence of the schools, coupled with the opportunity of connecting the door with the new building, and recessing it in the wall, which led to the door being put on at that end of the close in place of the Murraygate end, where no door was necessary so long as there was no through-going close.

The door thus put on by Butchart continued in its place for nearly fifty years. Butchart died on or about 1832, and was succeeded by his daughter, Mrs M'Cleish, who died in March 1862. There can be no doubt that the door was still there at Mrs M'Leish's death. She left a son John M'Leish, who came home from Autralia in 1867. His sister Mrs Fyall, who then occupied the house in which her mother had died, says the door was still there

at that time, and the witness Arklay says the same thing. Mrs Fyall further says, her brother John M'Leish replaced the door by an iron gate after he returned home. The witness Allan says the iron gate was put up by Macdonald in May 1871. And whether this date be correct or not the cross examination suggests no doubt of its being so. Some of the witnesses think there was an interval of three or four years between the removal of the door as having become useless from age, and the substitution of the iron gate. The door may however have been dilapidated and standing back in the recess, scarcely observable during that time; but the precise dates either of taking off the wooden door or putting on the iron gate are not material. All or nearly all the witnesses are agreed that the door was there within the last ten or twelve years, and that an iron gate put on by John M'Leish was still there after his death, thus bringing us down to within a very short period of the commencement of this litigation.

Next as to the use made of the door and gate. It admits of no doubt at all that during the whole period of Mrs M'Leish's life the door was frequently kept locked during the night, and by no means unfrequently during the day, and that this practice, although latterly not so well observed, continued to some extent after Mrs M'Leish's death with reference both to the door and the gate successively down nearly to the present time. Neither does it admit of any doubt—1st, That the object of the practice was to exclude the public; and 2d, that the effect of it was to exclude the public upon all the occasions when the door or gate was locked.

The locking of the door and gate implies, of course, that the proprietor kept a key or keys, and it appears that keys were also furnished to some of the tenants. The locking of the door in Mrs M'Leish's time is very specially spoken to by her daughter Mrs Fyall, who was born in the close 46 years ago, and lived there till within the last 3 years. She says—"my father died a long time before my mother. I think I was about 14 years of age when he died. He was terrible pointed about having the door locked. I can't say that the door was kept much locked during the day. In fact we did not like to lock it during the day for the tenants, but it was usually locked at night. The hour of locking varied. I think some of the tenants at last got keys for themselves. I have often seen people coming into the close from the Murraygate and having to turn back because the door was shut." She adds, on cross examination, "I have heard my mother saying that it was a private close, and that she had a right to lock it."

The witnesses next in importance to Mrs Fyall, as to the locking of the door, are the two sisters Jane and Elizabeth Baxter, because they lived in the close for 11 years, viz., from 1835 to 1846, and had the best possible means of knowledge. Jane Baxter says "When I lived in Butchart's Close there was a door at the top of the close. It was very often locked, both at night and during the day. (Q) Was it more frequently locked during the night than during the day?—(A) Much about it. I can scarcely say. I knew in the evening that it was locked by my father being out, and our having to watch for him coming in, and having to open the gate for him with a key. My father was Mrs M'Leish's tenant and had a key as her tenant. We got the key from Mrs M'Leish." In answer to the cross question "During how many years do you think you had a key," she says "Perhaps the most of them, but I cannot tell exactly when we got it. We gave up the key when we left."

In like manner Elizabeth Baxter says "We had a key to the gate at the top of the close, and had often to open it at night to let my father in, and to lock it again afterwards. I have found the gate locked during the day, and opened it when it was locked." Then she speaks to the only occasion on which she remembers precisely what it was which led her to open the door during the day, viz., to let in a "certain gentleman" who beckoned to her at the window, and which fact obviously remained on her memory because he was a certain and not an uncertain gentleman. In answer to the Court she says there was no particular time of the day or night for locking the door, "just when the landlady thought proper, she had it at her own will." "(Q) How often in the course of the winter had you to come down and unlock the gate to let your father in?—(A) Once or twice a week I think, but I cannot be certain."

The evidence of these three witnesses, Mrs Fyall, and the two Misses Baxter, is supplemented and amply corroborated by numerous other witnesses if corroboration were deemed necessary. I shall briefly refer to some of them, because it is the locking the door from time to time which gives its chief importance to the existence of the door. Taking them in the order of the proof, we have in the outset the defenders' witness Mrs Watson, whose evidence is valuable because she *is* a leading witness for the defenders. Mrs Watson says "When I knew the place first Mrs M'Leish had a door at the top of the close on the left-hand side going up from Murraygate, which closed up the entry when the landlady pleased. That door was there a long time before 1822. I cannot say how long. At that time any person used the close who could win through it, but when it was shut they could not, and had to turn back again. I have seen the schoolboys turned when they came, and the door shut long before 1840. I don't remember of anybody being turned for many a day. After I went to Butchart's Close I saw people turned many a time. I have seen Mrs M'Leish shut the door, that was Mr M'Leish's wife. I never saw an iron gate, but I believe one was put on after the wooden door was away." On the cross examination Mrs Watson says Mrs M'Leish had the property from the time her father died till she died herself. "(Q) Did she lock the gate whenever she chose all the time? (A) Whenever she got in a passion with boys running about the close she locked it till it pleased her to open it. (Q) When she locked it did it stop everybody from going up and down the close? (A) Yes." Being asked how long Mrs M'Leish would keep the door shut at a time, the witness says "If any of her tenants were going in she would come and open it and lock it again. That was during the daytime. (Q) Can you tell me if she locked the door every night or all night? (A) No. She just locked it when she pleased. (Q) Have you often seen people coming in, finding the door locked and going back to Murraygate again? (A) I have seen that. (Q) All over the 30 years she had the place?—(A) Yes. I was not long in the close before she got the property, and do not know so much about what her father did."

This evidence, coming from the defenders' witness is so conclusive as to Mrs M'Leish's practice that it is hardly necessary to refer any of the pursuer's wit-

nesses on that point. It is fair, however, to Mrs M'Leish to mention that the same witness, viz., Mary Morton, who speaks most strongly of that lady's passionate manner in coming out in "a great pergand" as the witness calls it, and putting away "schoolboys and the like,"—being asked on behalf of the defenders by way of insinuation, whether Mrs M'Leish was "eccentric—queer?" she answers—No. "She was just ill-natured if she saw anybody go into her close. She was a fine well-living woman." The same witness had just before said that the door "was sometimes kept locked all the day when I was young, and sometimes it was open." John Cooper, whose age is 85, says he often went up Butcharts Close prior to 1848, to get to Meadowside. "I remember of there being a door at the top of the close. I often found it shut and locked. I was a boy when I first found it shut and locked. This was during the daytime. I never considered I had a right to go up that close on account of the door being there. (Q) Was you sometimes turned back?—(A) Always when the door was locked. (Q) Did anybody ever turn you back?—(A) Yes. Mrs M'Leish used to turn us back. I have gone through that close to get to my work in the morning and been turned back. Afterwards I made a point of noticing whether the door was shut or open before I entered the close at the Murraygate end. The witness afterwards says he is certain that Mrs M'Leish turned him back a dozen times when he was a boy, but he did not give her the chance when he became a man, as he went only early in the morning, and he could see from the Murraygate end whether the door was shut, and if it was he did not go in. He also says that he has seen the door locked during the day, more for the boys he supposes than for others. James Cunningham, whose age is 52, and who lived at the foot of Butchart's Close from 1840 till 1865, speaks to the door being locked against the scholars when he was a boy. He says, the boys very frequently annoyed Mrs M'Leish, "she often came down stairs and locked it with a key, and would not open it perhaps till the following morning. I have seen that happen." James Westwood, whose age is 63, says that from 1832 till 1836 he wrought to a cabinetmaker in Butchart's Close, and had occasion to be there every day. "I remember the door at the upper end of it. That door was always shut and locked in the morning when I came to my work. During the daytime the door was sometimes shut, but more frequently open." In the cross examination he says, "We left at 7 o'clock in the evening, and I have seen it locked at that time. In the winter time it was locked about twilight." Being asked whether he had gone 5 or 6 times and found it locked, he answers, "I have gone twenty times and found it locked. That was about six o'clock in the morning both in summer and winter." Being asked how often he had put his hand in it and found it locked, he says "I can't exactly say, several times." Mrs Kelt whose age is 48, says that prior to 1840, when she was at school the door, "was sometimes shut during the day," but when it was open she and the other girls used to steal up to avoid the old lady, who turned them back, and had sometimes drenched her with water. On the cross examination the witness says "I found it locked dozens of times."—that it was generally shut about ten o'clock in the morning, but not always,—that she cannot tell how often she herself put her hand in it and found it locked. "(Q) Did you do it ten times?—(A) Oftener I believe." Alexander Wilson, who was born in 1825, and has lived since then in the immediate neighbourhood of the close, says his recollection goes back about forty years, when he was at Hamilton's school. He speaks to the door being pretty often locked when he came out of school. He also says "I have found the door locked at night;" and he speaks to an occasion, within the last 18 or 20 years, when a young man chased by the police was caught inside the door between ten and eleven o'clock at night, in consequence of the door being shut, the impression made on the witness by what he saw at the time obviously being that the door was locked as well as shut. Allan Macdonald speaks to the locking of the iron gate subsequent to May 1871; and Thos. Kinnear speaks to the close having been within his beat as a police constable for about six weeks in July and August 1860, and having "found the door locked on two different nights during the six weeks." The last witness I shall refer to on this point is John Martin, who was born in 1822 or 1823, and remembers the close as long as he can remember anything. He says "I used to play about the close 44 years ago, and for 35 years or so I used to go up and down it frequently." That the door at the Meadowside end "had a lock upon it. I used often to find it locked down to the time old Mrs M'Leish died, and to the best of my opinion I would say it was pretty steadily kept locked during her lifetime." He further says that when he was a boy he believes he found it locked at every hour of the day, and that he can further speak to having found it locked on various occasions after he became a lad. He adds "I went to be an apprentice slater when I was about 16 years of age, and during my five years apprenticeship I used to pass the door five or six times perhaps in a forenoon, and I repeatedly found it locked."

It is impossible to say that there is not here a formidable body of evidence of substantial interruptions, extending, at intervals, over the whole period from the erection of Butchart's new tenement almost to the present time, coeval with the extensive use which the public have undoubtedly had during the same period of the close or passage in dispute. But before I consider the effect of these two elements in combination, it is important to observe that the period to be taken into account in considering whether the defenders have proved their case, is exclusively the period between the erection of that new tenement and the date of raising the present action. There is no evidence whatever of the exercise of a right of public road through the pursuer's property anterior to the erection of that tenement. The only witness who seems at first sight to carry the existence of a through going passage further back is the old man John Arklay, who says he has known the close since 1809; but who also says the door—obviously meaning the door in question—existed before he first began to go about the close, so that his knowledge of the door and of the Meadowside end of the close are coeval with each other, and it is quite clear that he neither speaks nor means to speak of any opening at that end of the close before the door was put on. It has been suggested, however, that proof of public use during the last 40 years may presume prior public use for time immemorial. But that would be a total misapplication of a principle which applies only in

circumstances quite different from what we have here. Suppose a road has been shut up for the last 35 or 38 years, but proof is adduced that for time beyond the reach of human memory before the commencement of these years the road had been unequivocally used as a public road, the law presumes the usage to have gone back for the prescriptive period of 40 years, although human memory does not extend so far. But that principle has no application whatever to the present case, where the pursuer's evidence commences at a date quite within human memory—namely a date between 1818 and 1822, probably as I have said about 1820—and not a single witness says that at that date there was any prior immemorial usage in the case. This of itself is conclusive; for in the absence of all proof of immemorial usage the presumption applicable to the period prior to the date spoken to is a presumption in favour of the proprietor, who is not called upon to adduce evidence to disprove the immemorial existence of a burden which is not even pretended to have been immemorial; for it is rather remarkable that the defenders' third plea in law is based entirely on the usage as a thoroughfare for 40 years and upwards, and in their fifth statement of facts the 40 years' usage is carefully distinguished from the usage of cleaning and lighting (founded on the second plea) which usage is said to have been immemorial.

But even if the presumption were not in favour of freedom, as it clearly is here, there would be no incompetency in a case like this, and indeed there is no incompetency in any case, in ascertaining, if you can, at what period a path or passage first came to exist and to be used by the public, and by whom and for what purpose that path had been called into existence. Our law of prescription does not limit the ascertainment of facts like these to the last 40 years, and it would be most unfortunate if it did, for there can be no question that these facts do and ought very deeply to affect the complexion of all that has followed upon them, and the weight of the *onus* incumbent on the parties respectively in a question of public road. If the proprietor can prove by parole testimony that at a date, however remote within human memory, or if he can prove by a writing, however ancient, that he formed a particular road or path at his own expense and for his own purposes through his own ground, where no road or path previously existed, and that the path has always been and continues to be used by him for these purposes for which he made it, nobody can doubt that these facts raise a very different question, and infer a very different *onus* on the parties respectively, from what would be incumbent on them if law were to prevent the proprietor proving any such facts unless they had occurred within the last 40 years.

I think it impossible to read the proof in the present case, and to take into account the real evidence deducible from what has not been attempted to be proved, as well as from what has been proved, without being impressed with the conviction that there had been no use of the close by the public as a thoroughfare before Butchart built his new tenement upon his garden; that he then opened up the passage at his own expense for a purpose useful and indeed essential to the beneficial enjoyment of his property; that he and his successors have used the passage for that purpose ever since, and that so long as the state of the property is not changed it is essential to their own enjoyment of it that they should continue to use the passage in a way which necessarily leaves it accessible to a considerable portion of the public. To insist upon all the members of the fifteen families who live in the close going out and in by keys only, and locking the door behind them, and all their friends, visitors, and customers getting in by ringing bells which the inmates must answer, and passing out with an attendant to lock the door behind them, would be obviously impracticable, and to have sentinels constantly on the watch to enquire into the whereabouts of every one who enters when the door is not locked, and turn back intruders who do not allege some errand in the close, would plainly be equally impracticable; so that to sustain the claim of the defenders upon the proof led by them would be very like condemning every proprietor who forms a throughgoing close to have the burden of a public road imposed upon him whether he will or not.

A public road through a garden, as Lord Neaves I think observed during the discussion, is not very usual. The fruit and the vegetables would be apt to disappear. If there had been such a road through Butchart's garden before he built his new tenement upon it there could have been no difficulty in adducing proof of the fact, and it is inconceivable that the defenders would not have attempted to do so. It is equally inconceivable that when Butchart put on a door and locked it in the face of the public, nobody should have objected to the existing footroad, if there was an existing footroad, being thus obstructed, and that, on the contrary, at the fiat of a feeble old lady, for more than 40 years thereafter nobody whom she forbade to pass should ever have insisted on getting through, but everybody she desired to turn should have ungrudgingly turned and gone back. I think the inference is irresistible that there had been no previous public use of a passage through the garden, even if the presumption to that effect in favour of the proprietor were not of itself sufficient, which I think it is.

The strength of the pursuer's position is as proprietor of the *solum*, and the extent of the *onus* thereby thrown upon the defenders seems to me to have been somewhat overlooked by the Lord Ordinary, and hence alone, I think, has arisen any room for difference of opinion as to the result. The existence of the footroad claimed is not alluded to in the pursuer's title-deeds either as a boundary or in any other way. The pursuer's boundary on the west is there stated to be the subjects formerly belonging to Fiethie. The law in no case presumes the existence of a public road across the private property of an individual. The *onus* of proving that burden rests on the party or parties alleging it. If not established by writing, it must be established by proof of its uninterrupted exercise as matter of right for at least forty years, that is essential to the constitution of the right. If the interruptions have been successfully resisted by the public—if the individuals challenged have uniformly or generally disregarded the challenge and gone on in the face of it—if the barriers from time to time erected against them have been destroyed as often as they were put up, and the proprietor has taken no legal steps to protect himself against such masterful proceedings, he may very well be held to have acquiesced in the public

claim at the lapse of the prescriptive period. But here the assertion of right is all on the side of the proprietor, and the acquiescence is all on the side of the public. The right of the proprietor was asserted from first to last by the existence of the door, locked at pleasure by night and by day, as suited himself or herself, without regard to what did or did not suit the public, which state of matters was acquiesced in by the public. Every man, woman, and child who were challenged acquiesced in the challenge, and only returned when they saw an opportunity afforded by the door standing unlocked to suit the proprietor's own exigencies, and nobody on the outlook to interfere. The *onus* incumbent on the pursuers to prove uninterrupted exercise of the right claimed by them for the prescriptive period fails even in the face of their own evidence, as we have seen from the deposition of Mrs Watson, which applies to the whole period from the putting up of the door prior to 1822 to the death of Mrs M'Leish in 1862. Day and night during all that time, according to Mrs Watson, Mrs M'Leish exercised her pleasure over the door and consequently over the passage, and nobody resisted. Even, however, if the *onus* incumbent on the defenders could be held to have been to any extent shifted by their proof, the references I have made to the proof of the pursuer would leave no doubt upon my mind that the constitution of the alleged public right has not been established.

If this would be the fair and legal result of the evidence, apart from what is founded upon the lighting and cleansing of the close, the paving of it by the Commissioners in 1867, and the occasional repairs, vaguely alleged to have been previously made upon it, I do not suppose I need detain your Lordships by remarking upon the comparative unimportance of these circumstances in a question like the present. We have more than once had occasion to lay it down that the question—what is to be held to be a street, or a public street, in the sense of a Police Act—may be, and generally is, quite different from the question, what is to be held a public street, or a public footpath, in a question like the present; and if the Lord Ordinary had not thought my opinion in the case of *Cargill* to be somewhat favourable to the view he takes on that point, I should have thought it to be pretty clearly the other way. It is necessary that closes, whether they be thoroughfares or *culs de sac*, into which the public are induced to enter, should be made safe and wholesome for the public, by being lighted and cleaned, so long as they are accessible to and used by the public, however the rights either of property or servitude may stand; and it is not incumbent on the Commissioners to enter into litigation with ndividuals upon these points before they can exercise their jurisdiction over such places, and expend public money upon them for the public benefit, and I should have so construed the Police Statutes applicable to Dundee even if it had not been proved to demonstration, as it is, that in practice the Commissioners themselves have so construed the statutes. As to the slight repairs occasionally made on the solum of the close (proved to have been very dirty at the best), and the alternate paving of it in 1867, there might be found in the end more economical methods of keeping the close clean and wholesome than constant and unsuccessful sweeping of a rough and irregular surface. The proprietor had no interest to object to such improvements, but the reverse, and in no view even can they be regarded as material elements in the present question.

In arriving at a conclusion hostile to the contention of the public, it is consolatory to reflect that, except thieves and prostitutes who are proved to have been taking the benefit of the close since there has ceased to be "a fine well-living woman" like Mrs M'Leish to thrash them, the respectable portion of the public will lose little by the pursuer's object being carried out—of substituting for the close "commercial buildings and warehouses." Some of the defenders' keenest witnesses to the vindication of public rights tell us that the close in question, and other closes in Murraygate Street which lead through to Meadowside, are situated between Panmure Street on the one hand and Meadow Entry on the other, both unexceptional cart and carriage streets, leading direct from Murraygate to Meadowside; that the distance between these two streets measuring along the Murraygate is from 50 to 60 yards, and that the difference in time by taking either of them, instead of the close, is two or three minutes.

My opinion is that the interlocutor complained of should be recalled, and decree pronounced in terms of the conclusions of the summons.

Lords Ardmillan and Neaves concurred with Lord Deas.

Lord Ormidale—The question in this case is, whether Butchart's Close in the town of Dundee is or is not a public thoroughfare between two streets of that town—the Murraygate on the one hand, and Meadowside on the other.

The pursuer, who has some property in the close, has brought the present action to have it declared that it is not a public thoroughfare, and that the public have no right to use it. The defender Mr Thornton, clerk to and as representing the Dundee Police Commissioners, resists the action, on the ground that the close is a public thoroughfare, and as such has been used by the public for fifty years and upwards prior to the institution of the action.

The Lord Ordinary allowed the parties a proof, and as it appeared from title-deeds produced that the *solum* of the close belonged to a certain extent to the pursuer, he appointed the defender to lead in the proof. On ultimately advising the case along with the proof, the Lord Ordinary found the defence established, and assoilzied the defenders from the conclusions of the action. The pursuer has reclaimed against the Lord Ordinary's judgment, and the Court has now to determine whether it ought to be affirmed or altered.

I am of opinion that the Lord Ordinary's judgment is, on the grounds stated by him, well-founded, and that it ought to be adhered to.

That the close in question has for more than fifty years prior to the institution of the present action been greatly used by all classes of the inhabitants of Dundee seems to me to be indisputable on the proof. It may, indeed, well be doubted, having regard to the evidence of many of the witnesses, and especially that of Peter Gillen, William Hean, and Peter Arklay, whether it ought not to be held, on the principles given effect to in the case of *Harvie* v. *Rodgers and Others*, 3 Wilson & Shaw, p. 251, and many subsequent cases, that as

the right to the use of the close in question has been shown to have existed beyond the memory of man, that it lies upon the pursuer to make out that he had by interruptions acquiesced in, put an end to that right. It has been said no doubt, that there were gardens at one time behind the houses in the close which must have effectually prevented a thoroughfare from the Murraygate to Meadowside; but none of the witnesses speak to any such gardens except James M'Laren, and he merely speaks inferentially from indications on an old plan. It is true that the witness John Cooper says that he remembers a green at the back of the Murraygate houses, but he adds that the close "came down by the side of the green." I cannot see, therefore, that the pursuer's point, founded upon the assumption that there were pieces of garden ground behind the Murraygate houses which prevented the close extending to Meadowside, has been at all made out.

Dealing, however, with the case as the Lord Ordinary appears to have done, on the footing that it lay upon the defenders to show that for the prescriptive period before the institution of the present action the close has been used as a public thoroughfare, I am unable to resist the conviction that they have succeeded in doing so. It is said, however, by the pursuer, that the use of the close has been had, not in the exercise or assertion of right by the public, but by the tolerance merely of the pursuer and his predecessors; and in support of this contention the pursuer mainly relies upon the circumstance that for the greater part of the period embraced by the proof there was a gate kept frequently shut, and occasionally locked, at the Meadowside end of the close, which had the necessary effect of so obstructing or interrupting the alleged use of the close by the public as to prevent them acquiring by prescription the right they claim to it as a public thoroughfare. But I concur with the Lord Ordinary in thinking that the alleged obstruction was not in the circumstances sufficient. Many of the witnesses who have known and frequented the close for more than forty years do not appear to have ever seen the gate; and, with very few and unimportant exceptions, none of them say that they were by that or any other obstruction prevented from using the close whenever they required to do so. Besides, the object of having occasionally a shut or locked gate on the close seems to have been to prevent, not the legitimate use of it as a public thoroughfare, but the resort to it in the daytime of schoolboys for the purpose of mischief or noisy diversion, and during the night of loose and improper characters.

In short, it appears to me that while it has been proved that Butchart's Close has for forty years and upwards prior to the institution of the present action been used by the inhabitants and others frequenting the town of Dundee as a public thoroughfare whenever they required it, there has, on the other hand, been no obstruction to such use proved on the part of the pursuer sufficient to prevent the acquisition by prescriptive possession of the right claimed by the defenders. And in support of this view I agree with the Lord Ordinary in thinking that the paving and repairing of the close, since at least 1850, by the public authorities, and at the public expense, is a fact of much importance—a fact, indeed, which the pursuer has not attempted to get over or explain. It is not to be supposed that the public authorities should, out of the public rates, have paved and kept up a private close; nor can the pursuer, in the face of that fact, be permitted now, except on the clearest grounds, to maintain that the public are not entitled to the use of the close.

For these reasons, generally stated, and without entering into a minute examination of the voluminous proof in the case, which can only be properly judged of by a perusal of it as a whole, I am of opinion that the Lord Ordinary's interlocutor ought to be adhered to. The case is essentially a jury one, and therefore the verdict of the Lord Ordinary who, as a jury, saw and heard the witnesses—an advantage which this Court has not had—ought not, I think in the circumstances, to be interfered with.

Lord Gifford—I have found this case to be attended with great delicacy and difficulty, and notwithstanding the very full discussion and the full consideration it has received, although I have formed an opinion, I cannot say that I entertain it with much confidence.

On the whole, however, I am disposed to agree with the Lord Ordinary, and although looking to the opinions which the majority of your Lordships have expressed, I must needs feel greater diffidence than ever in the conclusion at which I had arrived. Still, as I remain of opinion that the judgment of the Lord Ordinary is right, I think it my duty to the parties to express very shortly the grounds on which my opinion rests.

I concur generally in the views and reasonings of the Lord Ordinary, and in this case, as indeed in all cases of fact where the Lord Ordinary has had the advantage of himself seeing and hearing the witnesses—of observing their demeanour and judging of their intelligence—I attach very great weight to the impression which the evidence as a whole has made upon the Judge who took the evidence, and who is in a better position in many respects than a court of review can ever be.

The question in the present case is really a jury question. Such cases are almost always tried by juries, unless some special reason can be given for a contrary course, and although when Lord Ordinary I never refused, when both parties concurred in requesting me, to accept the functions of a jury, still I cannot help regretting that the present case was not tried by jury in the ordinary way. I think a jury would have been a very appropriate tribunal for such a question.

As it is, however, the Court must dispose of the case upon the evidence just as a jury would have done, for the nature of the question is the same whatever be the form of trial, and in such cases I think it is of advantage to keep steadily in view what would have been the issue sent to a jury.

According to modern style the issue in the present case would have been, "Whether for 40 years or from time immemorial there has existed a right of way for foot passengers through Butchart's Close, Dundee, between the Murraygate and Meadowside of Dundee." This is the issue which the Court must try—a pure question of fact, to be decided upon the evidence alone,—although it is quite true that the evidence must be viewed according to certain legal principles which the presiding Judge would have laid down to the jury if the case had been sent for jury trial.

Now taking first the evidence for the defenders,

the Police Commissioners of Dundee, I think it is quite clear that they have abundantly proved by every kind of evidence and by witnesses of all classes and ranks, that the public of Dundee have, for a period far exceeding 40 years, used Butchart's Close as a public foot passage between Meadowside and Murraygate. For a very large number of persons it forms the shortest road, and although the saving in time by the use of Butchart's Close is not very great, there being other accesses between Murraygate and Meadowside, still time is valuable in Dundee, and there can be no doubt whatever that Butchart's Close was used by a large number of persons as their nearest and most convenient way. Almost all the witnesses for the Police Commissioners also prove that the public use of the close was absolutely unchallenged and uninterrupted. The public were never stopped or challenged in their free use of the close as a footpath and thoroughfare, and although one or two of the defenders' witnesses speak to the locked gate upon which the pursuer Mr Wallace's case exclusively turns, I think it must be admitted that, looking to the evidence led by the Police Commissioners alone, they have abundantly proved their case. The difficulty really arises upon the evidence adduced by Mr Wallace in reference to the alleged locked gate by which he says the privacy of the close was preserved. I will return to this immediately as raising the only question in the case. In the meantime I think it of importance to keep clearly in view the effect of the proof of public, general, and uninterrupted use of the close.

It is impossible to say when the public use of the close as an open thoroughfare originally began. There is in the present case rather a scarcity of old witnesses, a scarcity not properly accounted for. The oldest witnesses—I mean the witnesses who speak to the use of the close at the remotest period—are, John Arklay, seventy-nine, Alexander Tawse, eighty-six, James Reid, seventy-four. Arklay speaks to the close since 1809, Tawse since 1825, and Reid for fifty-four years, that is to 1820. All say that there was public passage since they knew the close—Arklay, speaking from 1809, when he was fourteen years of age. It is said that the back tenement, being the tenement next Meadowside, was built about the year 1820, or shortly before, but this nowhere distinctly appears, the only trace being that in the bond of servitude, dated August 1822—the tenement at Meadowside is said to have been then lately erected. But the expression "lately" will cover a great many years; and as I read the evidence I think none of the witnesses distinctly remembers or describes the state of matters before the Meadowside tenement was built. There is no evidence either one way or another as to the state of possession before the Meadowside tenement was built and when the ground was used as a garden, and although the word "garden" occurs in the disposition of 1790, that may be a much older description, applicable to a former state of matters. We have not the original grant and no title older than 1790. If there was no road before the erection of the Meadowside tenement, and if that tenement was only built about 1820, it is very strange that Mr Wallace has adduced no evidence to this effect and should have left us without any trace of the commencement of the passage.

In this state of the evidence it is impossible to say whether, before the Meadowside tenement was built, there was or was not the same passage up by the side of the garden and into Meadowside as here was after the Meadowside tenement was erected. There was always occasion to go to the meadows for bleaching and other purposes, and no witness has been brought who can remember a time when there was not access through Butchart's close. I do not think Mr Wallace is entitled to assume, as was done by his counsel, that the use of the passage only began after the erection of the Meadowside tenement. On the contrary, I think this is a case to which the ordinary rule applies, that possession and right of way having been proved as far back as the memory of the oldest witnesses extends, the use is presumed to have been precisely the same previous to the memory of these oldest witnesses. This was the rule laid down both in this Court and in the House of Lords in the well-known case of *Harvey* v. *Rodgers*, July 8, 1828, 2 W. and S. 251. In the present case possession being proved up to 1809, and there being no evidence prior to that date, the possession must be held to stretch backwards as far as is necessary for the establishment of the right. In *Harvey* v. *Rodgers* only thirty-four years' possession was proved prior to interruption, but there being no contrary proof regarding prior possession, the uninterrupted possession was held to have been established for at least forty years.

Assuming, then, as I think I may, that the evidence relied on by the Commissioners, taken by itself, is amply sufficient to warrant a verdict in their favour. I proceed to the only difficulty in the case, which is, whether the evidence of interruption by means of a locked gate, upon which evidence the defender in the issue relies, is sufficient to negative and overcome the case of the Police Commissioners. I think the Lord Ordinary quite rightly treats the question as an interruption of the right claimed by the public. He says it must be shown that the "door or gate had been used as a bar to the thoroughfare with such frequency or for such periods, although at intervals, as to give distinct notice to the public that their use, as a matter of right, was questioned and interrupted." I think this is the real question at issue—Did the locked gate, relied upon by Mr Wallace, really form a substantial and actual interruption of the right and use had and enjoyed by the public? If it did, so that uninterrupted use for forty years cannot be affirmed, then the verdict must be for the pursuer Mr Wallace. If, however, the gate was so used as *not* to form or create an interruption of the public use, then the verdict must be for the Commissioners of Police.

I do not intend to examine the evidence in detail, for I am only anxious to explain the principle upon which I have come—though I admit not without hesitation—to the same conclusion as that reached by Lord Ormidale and by the Lord Ordinary.

Now, it appears to me that, in order to prevent the public from acquiring a right of way or passage, the interruption or stoppage of the use must be open, effectual, and distinct, so as clearly to notify to those who claim the right that it is disputed and disallowed. I think it must be such as to put the public necessarily to the choice either to submit to be deprived of the use of the road, or to vindicate their right *via facti* or in a Court of law.

In the present case, I do not think that the locked gate was used to stop the traffic in the close in such a manner as to certiorate the public that

their right of way was disputed. The use by the public was open and notorious; the gate was never used to stop the public traffic. It will not be enough to allow the traffic to flow unchallenged all day and then merely to shut the close now and then at night, when no one requires to use it. If the public claim and are allowed free passage, it will not do merely to stop children who are annoying the residents by playing in the close. Effectually to interrupt a public use it is the public that must be stopped, and not children; for although it may be true that, if there be a right of way at all children have as much right as adults, still children have not the same means or power to vindicate their rights, and their submitting to exclusion will not affect or bind the public.

Acting as a juryman, therefore, I take the same view of the alleged interruptions that the Lord Ordinary has done. I think they are not sufficient to prevent a verdict that for more than forty years the public have had the uninterrupted use of the right of way.

I am also much moved by the evidence that the paving of the close and the upholding of the roadway in repair has been in the hands of the Commissioners of Police. It is true that the complete paving of the close was only in 1867, but it seems sufficiently established that for many years before the whole repairs were undertaken and carried out by the police authorities at the expense of the public. Since 1850 the close has also been drained at public cost, and as a public place. Facts like these give a colour and a character to the use of the road as a passage which greatly strengthens the case of the Commissioners.

While, however, I am not able to concur in the judgment now to be pronounced by the Court, I have great satisfaction in the very full and careful discussion and consideration which the case has received. I quite understand and appreciate the view which the majority of your Lordships have taken, and I admit the force of the consideration by which it is supported. In a question of considerable local importance and interest I think the parties and the public of Dundee have every reason to be satisfied that the case had been most carefully, fairly, and fully tried.

LORD MURE—I have little to add to what has been already said. I concur in the opinion of Lord Deas. My only difficulty is whether a good deal of the proof does not refer to a period beyond the 40 years. After that we have the stoppage of Mrs M'Leish and of school children, but not so much stopping of the public.

The question then arises, was this stopping of the last 40 years such as to stop the public? Is there distinct evidence of interruption of the public for 40 years prior to this action? From 1835 to 1846 Baxter had a key of the door in the close from Mrs M'Leish. Mrs Fyal confirms this from 1830 to the present time. Mrs Watson gives the same evidence with regard to the time from 1840 to 1865.

On the other hand, we have the total failure on the part of the defenders to prove the use of the close as a thoroughfare.

LORD JUSTICE-CLERK—My Lords, after the full and exhaustive statement of Lord Deas it is quite unnecessary to detail the grounds of my entire concurrence with his opinion.

I agree with Lord Gifford that this is a jury question, and if it were the facts alone we had to deal with, I might lean to the opinion of the Lord Ordinary. But it is the effect and the quality of the facts set forth that present the important matter for consideration.

My Lords Ormidale and Gifford said that this close had been used by the public for more than 40 years. But did they use it as a thoroughfare to which the public had right? I think not. On the contrary, we have constant assertion by the owner of the *solum* of his right to deal with the close as he pleased. It is therefore of no moment that he allowed the public to pass through during the day and stopped them at night, so long as they passed or were stopped at his will.

The proprietor of a passage need not tell the public why he shuts the door at night and leaves it open in the day time, it is enough that he asserts his right. If I thought that the evidence of public use went back to 1809, *Harvie's* case would apply, but I think the evidence is against such use.

The property was in Butchart, and in building the close he made provision for excluding the public, and this exclusion lasted for more than 40 years.

Your Lordships will therefore recall the Lord Ordinary's interlocutor, and grant decree in terms of the conclusions of the summons.

Counsel for Pursuer—Dean of Faculty (Clark) Q.C. and Balfour. Agents—Lindsay, Paterson & Hall, W.S.

Counsel for Defender—Solicitor-General (Watson) and Asher. Agents—Leburn, Henderson & Wilson, S.S.C.

Friday, March 5.

FIRST DIVISION.

[Lord Mackenzie, Ordinary.

JAMES S. ROUGH *v.* PETER MOIR AND PATRICK BIRNIE.

Sale—Warranty—Mercantile Law Amendment Act, sec. 5.

In a case where a horse, sold by public roup, had been described in the sale catalogue by the seller as having been "regularly driven in single and double haness," *held* that this amounted to a warranty that it was fit for those purposes.

Rough, the pursuer of this action sent a horse to be sold by public roup by the defender Moir, who was an auctioneer, and by Rough's instructions it was described in the catalogue as having "been driven regularly in single and double harness." It was bought by the other defender, Birnie, who, on trying it, at once returned it as being disconform to the description, and received back the price which he had paid. It was re-sold by Moir at a slight reduction, and Rough raised this action to recover the price.

The Lord Ordinary (MACKENZIE) pronounced the following interlocutor:—

"*Edinburgh, December* 16, 1874.—The Lord Ordinary having heard counsel, and considered the closed record, proof, and process, assoilzies the de-