Sheriff is right in holding that that is not within the sense of the statute a public carriage-way. When we are dealing here with a road which at its best is from 5 to 6 feet in width, it is worthy of observation that the provisions of the statute, sections 42 and 43, which provide for public carriage-ways, and enact that if such a carriage-way is carried over the line then the bridge must contain a clear breadth of 25 feet—if the railway is carried over the road it is the same, 25 feet must be allowed. That plainly does not point at a road of this kind, which at its best is from 5 to 6 feet wide, and that is one of the material circumstances, in my mind, in holding that this is really not a carriage-way within the meaning of the statute. It is true that even taking it as a highway, not a carriage-way within the meaning of the statute, this company, or the predecessors of the company, the Deeside line, ought to have obtained the authority of the Sheriff twenty-four years ago to the putting of these gates there, and should have presented an application to that effect. Well, there is no evidence that such an application was presented. Whether the company might not fairly say now that after such a lapse of time it is to be presumed that was done regularly I am not prepared to say, but I am of opinion that after such a lapse of time, the arrangements of the company having been accepted without challenge or objection by any person whatever, it is out of the question now to say that the arrangements in reference to this road shall be held illegal from an absence of this formality. I cannot doubt that if such an application had been presented to the Sheriff or the Justices the arrangements which the company made would have been sanctioned; and on the whole matter I am of opinion that the Sheriff's judgment should be adhered to. Of course I put my judgment, as your Lordships have done, on the first point you have dealt with, but I thought it right, as I had formed a view on the merits of the case, that I should express it for the benefit of the parties.

The Court pronounced this interlocutor:—

"Recall the interlocutor of the Sheriff-Substitute dated 23d December 1881, and of the Sheriff dated 14th March 1882: Find that on the night of the 13th or morning of 14th October 1880, two heifers, the property of the pursuer, were killed on the line of railway belonging to the defenders: Find that the said heifers found their way from the pursuer's farm on to the line of railway through a gate at a level-crossing which had been left open: Find that the pursuer has failed to prove that said gate was left open through any fault of the defenders, or anyone for whom they are responsible: Find that the level-crossing in question was made in terms of a decree-arbitral, made in a submission between Colonel Farquharson, the owner of the pursuer's farm, and the railway company in 1858: Find that from 1858 to the present time no one interested in the road crossed on the level has complained of the said level-crossing: Find that the pursuer, as tenant under the said Colonel Farquharson, has occupied the said farm continually since the year 1860, and has used the said level-crossing without objection: Find that in these circumstances the pursuer is not entitled to maintain any of the first six pleas stated by him on record: Therefore assoilzie the defenders, and decern," &c.

Counsel for Appellant (Pursuer) — Solicitor-General (Asher, Q.C.)—Pearson. Agent—Alexander Morrison, S.S.C.

Counsel for Respondents (Defenders)—Jameson—Ferguson. Agents—Gordon, Pringle, Dallas, & Co., W.S.

Friday, November 10.

SECOND DIVISION.

[Sheriff of Stirling, Dumbarton, and Clackmannan.

EWART *v.* BROWN.

Reparation—Excessive Punishment of Pupil by Schoolmaster—Assault.

In an action of damages against a teacher by the father of one of his pupils, on the ground that he had inflicted an excessive punishment, resulting in a serious illness, on the pursuer's son, it was proved that the defender had hit the boy a slight blow on the head with a "pointer," but not with any intention of injuring him, and not in a manner likely to cause serious injury. It was not proved that the illness from which the boy subsequently suffered was caused by what the defender had done. *Held* that in the circumstances the defender was not liable in damages for an assault upon the boy, but in respect that he was in the wrong in having used the "pointer" for such a purpose he was not entitled to his expenses.

John Ewart, shoemaker, residing in Alva, for himself and as administrator-in-law for David Ewart, his son, raised an action in the Sheriff Court at Stirling against James Vernon Brown, headmaster of Alva Academy, under the following circumstances:—Upon Wednesday the 14th September 1881 the defender struck the pursuer's son, who was a pupil under his charge, upon the head with a wooden rod or pointer. It was proved that the defender did not give this stroke in anger or with intent to hurt the boy, and it was proved that the stroke was not a severe one. The defender was not in the habit of using the "pointer" as an instrument of punishment, but occasionally he used it to attract the attention of boys who were not attentive to their work. The boy deponed that he felt stupified by the blow. He, however, joined his companions' games, and returned to school in the afternoon. He was at school on Thursday, but not on Friday. There was no school on Saturday, but he was out on that day, and though he deponed that he suffered from sickness and pain that day, persons who knew him well observed nothing the matter with him. He did not leave his bed on Sunday. On Monday a medical man named Lindsay was sent for and saw him. There were then no external marks on the boy's head. Congestion of the brain came on, and he was ill for six weeks. A second doctor saw him on September 28th. He differed from the first in this respect, that he did not attribute the illness to the blow.

The medical men agreed in saying that they would have expected that a blow sufficiently serious to produce the congestion of the brain from which the boy suffered would have left external symptoms on the boy's head.

The Sheriff-Substitute found in fact—"(1) That in the month of September last David Ewart, a son of the pursuer, was attending the Academy at Alva, of which the defender is the head master; (2) That on 14th September last, while the defender was teaching the class of which the said David Ewart was one, he struck the said David Ewart on the head with a stick or pointer; (3) That in consequence of said blow the said David Ewart was affected with congestion of the brain, and was confined to bed for a period of six weeks; (4) That the defender was not justified by his position of schoolmaster in using a pointer as an instrument of punishment, and especially he was not justified in using it in the manner above stated; (5) That the defender's treatment of the said David Ewart amounted in law to an assault, for which he is liable to the pursuer in damages; Modifies the same to £10 sterling, for which decerns against the defender; Finds him liable in expenses of process; Allows an account," &c.

"*Note.*—There seems to be no doubt on the evidence that the defender was in the habit, as he himself admits, of using a heavy stick or pointer 'to tap the boys on the head if they were inattentive,' and that on the 14th September last he did tap David Ewart on his head, and pretty smartly. The boy was not stunned, but, as he explains, was rendered stupid, and after a little while was able to join his companions at their games and go home and tell his mother. There was no bleeding, and on the Monday following Wednesday the 14th there was no trace of the blow in wound or swelling on the head. On that day, however, the boy fell sick, and was confined to bed with serious symptoms of congestion of the brain for the following six weeks. There is no reason to suppose that the defender was enraged or vindictive, or that he intended to hurt this boy when he tapped him on the head. On the other hand, he admits that he does not use the pointer for punishment, but merely for the purpose of attracting the attention of his careless pupils. But, in the opinion of the Sheriff-Substitute, a heavy stick like a pointer is not a proper instrument of chastisement, and certainly the use which defender made of it, by tapping the pursuer's son on the head, was most imprudent and unjustifiable.

"A schoolmaster is invested by law with the power of giving his pupils moderate and reasonable corporal punishment; but the law will not protect him when his chastisement is unnatural, improper, or excessive. In the present case the Sheriff-Substitute thinks that the defender had no right to strike a pupil with the stick or 'pointer,' and certainly that he was not justified in tapping him upon the head. Unfortunately the medical evidence is not so satisfactory as could be desired. On the whole, however, the Sheriff-Substitute is satisfied, from his own statement, and the testimony of those who have the best means of knowing, that the boy has sustained no permanent injury.

"Accordingly, the Sheriff-Substitute has assessed the damages, to which in the circumstances he considers that the boy's father is entitled, at the sum of £10.

"At the same time he has allowed the pursuer expenses of process, as he thinks that the case was one which could not with advantage have been disposed of in the Small Debt Court."

The Sheriff recalled this interlocutor and found —"(1) That the pursuer's son David Ewart was a pupil at the Academy at Alva of which the defender is headmaster; (2) That on Wednesday 14th September 1881 the defender, while engaged in teaching the class in which the said David Ewart was, struck the said David Ewart on the head with a wooden pointer; (3) That the blow was slight, and did not amount to an assault or to excessive or illegal chastisement; (4) Finds it not proved that the illness from which the said David Ewart subsequently suffered was occasioned by the said blow; Therefore recalls the interlocutor of the Sheriff-Substitute, dated 16th May, and assoilzies the defender from the conclusions of the summons; Finds him entitled to expenses, subject to modification to the extent of one-fourth thereof," &c.

"*Note.*—If it had been necessary, in order to reach a conclusion opposed to that of the Sheriff-Substitute, to take in considering the evidence a view of the credibility of the witnesses, differing materially from that which he has taken, the Sheriff could not without much difficulty have reached that conclusion. But the Sheriff thinks that it is not so, and that his dissent from the Sheriff-Substitute's view of the case regards not so much the evidence as the inference from it which the Sheriff-Substitute has drawn, and in which the Sheriff is unable to follow him. The Sheriff does not reject any of the evidence on which the Sheriff-Substitute has proceeded, but he cannot adopt the inference that the illness from which the boy David Ewart suffered was caused by or connected with the blow which he received from the defender.

"If attention be confined in the first place to the direct evidence of the alleged assault, apart from the illness which followed, the blow would appear to have been very slight indeed. There is no proof that it was inflicted violently or hastily, or when the defender was irritated or had lost his self-control. Nothing of that kind is suggested. The blow was certainly not inflicted with intent to injure, and it is far from clear that it was inflicted with intent to punish. The defender denies that he used the pointer as an instrument of punishment, and he is corroborated in that by the boy William M'Kinnon. The defender admits that he may have touched some of the boys with the pointer to attract their attention, but he refuses to admit that he struck the boy David Ewart with it at all. That he did strike or touch David Ewart with it on the head is, it is thought, proved. But it may possibly be the case that the defender intended to do no more than touch him in order to attract his attention, and that he forgot or overlooked so trivial a circumstance. It may be that the pointer lighted on the boy's head more sharply than the defender intended or was aware of. But it is hard to understand how he could have struck a blow of any considerable degree of severity without being aware of it, and hard to believe, contrary to his distinct evidence, that he was and is aware of having struck that blow. Be that as it

may, the evidence of the other boys would certainly lead to the belief that the blow was a slight one. David Ewart says that it made him stupid, and that he sat down, but in that he is not corroborated. Other boys, as Muir and M'Kinnon, were also struck, as it seemed to them, in the same way as Ewart. No bad consequences happened, and but for David Ewart's illness his case would have been the same as theirs ; and it is thought that in the case of none of them would there have been room for an action of damages but for Ewart's illness.

"The Sheriff does not mean to suggest that the defender was free from blame in rapping or touching the boys on the head with the pointer. He thinks he was to blame; but it is one thing to say that and another thing to say that he committed an assault, or so exceeded his powers as a teacher as to be liable in damages. It appears to the Sheriff that a schoolmaster ought not to be interfered with by the Court for every slight excess, or supposed excess, in severity of discipline, or for every mistake or imprudence in regard to the manner in which the discipline is administered On the whole, he thinks that there would have been no case against the defender had David Ewart's illness not supervened. But if so, it follows that unless it be proved that the illness was caused by the blow, the action must fail, and the Sheriff has been unable to think that it was so caused.

"Such a consequence from so slight a blow would be the most unlooked-for and unexpected thing in the world. Still, if it really did follow, the defender would probably be answerable ; but it is necessary to consider the evidence very carefully in order to ascertain whether the connection between the blow and the illness has been proved. It need not be denied that strong and plausible grounds are not awanting for the contention that that connection has been made. But the mere coincidence that the illness followed the blow is not of itself sufficient.

"It is not quite clear that the illness was cerebral congestion ; but as Dr Lindsay, who had the best opportunity of judging, thought that it was, it probably ought to be taken to have been so.

"The time which elapsed after the blow before the illness took a serious turn affords a strong ground for doubting the connection between them, though it certainly is far from being conclusive. The boy complained of headache on the Wednesday, but then and on the Thursday he went to school and to play as usual. On Friday it is not clear why he did not go to school, but on Saturday he went to the rifle range. The Sheriff was referred to a passage in Taylor's Medical Jurisprudence indicating that after a blow on the head some time might elapse before serious consequences were developed. It may be so, and no doubt in some cases is so, still the passage quoted is sufficient to show that such a lapse of time is exceptional and unusual, and founds some argument against attributing a cerebral illness to a previous blow.

"It is more important, however, to advert to the slightness of the blow, as appearing from the direct evidence already referred to. The boy's mother says that on Wednesday the boy's head was swelled. It is difficult to feel sure that she was right in believing that. She does not say it was sensitive to the touch. Mrs Lochhead found no mark at all on Sunday night, and Dr Lindsay depones that on Monday there was none. The blow, if it can be called a blow, was struck without irritation and without violence. It caused no sickness, and in the opinion of the Sheriff no insensibility, and by the Monday it had left no mark at all. The Sheriff is unable to believe that such a serious consequence as severe cerebral congestion could have followed from a blow of the kind. No doubt Dr Lindsay attributes the illness to the blow, but it does not appear what information he had, or what impression he was under as to the severity of the blow, and there are passages in his evidence which require attention. His opinion does not appear to be very confident. Symptoms and appearances were awanting which he would have expected. Towards the end of his evidence he says—'I think the illness arose from injury to the head caused by a stroke or fall.' How he came to speak of a fall as a possible cause does not appear, but certainly the suggestion leads one to doubt whether he had inquired minutely into the actual facts of the case, or if he had, whether he had not some reason for suspecting that the boy might have had a fall.

"Dr Cunningham had not equal opportunities for judging of the nature of the boy's illness. On that point Dr Lindsay is the better witness. But Dr Cunningham heard the whole evidence, and was informed, as Dr Lindsay may not have been, as to the amount of the violence used, and at the close of his evidence he gives his opinion distinctly—'From what I have heard of the evidence, I do not think the stroke on Wednesday could have caused the effects which were visible to Dr Lindsay on the Monday.' That appears to the Sheriff to be a reasonable opinion, and he thinks it an important piece of medical evidence.

"On the whole, while the Sheriff does not arrive at a different conclusion from that of the Sheriff-Substitute without a good deal of misgiving, he has been unable, after repeated consideration of the case, to hold any other opinion than that it is much more likely that the boy's illness, whatever it was, arose from natural causes than from a blow which appears to have been so totally inadequate to have caused it.

"Expenses have been modified, because the Sheriff considers the defender's plea-in-law to have been unfounded, although the pursuer's conduct in withdrawing the charge lodged with the School Board and bringing an action in Court is not well explained. [*This referred to a plea founded on an alleged retractation by the pursuer of all charges against the defender.*] The Sheriff has also had regard to the fact that the infliction of the blow, denied (presumably forgot) by the defender, has been proved."

The pursuer appealed.

At advising—

Lord Young—This is a distressing case. The defender is a young schoolmaster only twenty-five years of age, and during the short time he has been engaged in his profession he has recommended himself to his employers as an efficient teacher—so much so to his present employers that, as appears from the proof, they have raised his salary. But he did undoubtedly bring his pointer—the instrument which he used in directing attention to maps or diagrams—into contact with a

boy's head. The boy says that this was because he could not spell a word. It may have been to arouse him, and bring his attention back to his lessons. But the pointer was brought into contact with his head. The Sheriff-Substitute says very properly that it was "most imprudent and unjustifiable." The Sheriff, using milder language, says that he "does not mean to suggest that the defender was free from blame in rapping or touching the boys on the head with the pointer. He thinks he was to blame." Unfortunately this particular boy took ill on the Sunday after this took place, and on Monday the matter seemed so serious that the doctor was sent for. Congestion of the brain supervened, and he was confined to bed for six weeks. The doctor who attended him thinks, on the balance of probabilities, that his illness was attributable to some violence on the head, and that the use of the pointer on the previous Wednesday, although it left no marks, would account for the illness, and is the most plausible explanation of it. He does not say it may not be attributable to other causes. He considers this the most plausible supposition on the balance of evidence. Another doctor who had not the same opportunities, but who had opportunities approximately similar for applying his mind to the question, differs. The Sheriff-Substitute thinks with the first doctor, and the Sheriff with the second. In these circumstances it is impossible not to say that the matter is unattended with doubt, and the appellant's counsel pleading against the Sheriff's judgment—a judgment thoughtfully and carefully prepared—have satisfied me that the case is doubtful but not that the Sheriff is wrong. Therefore I humbly suggest to your Lordships, if the case appear to your Lordships in the same light, that the Sheriff's judgment ought to be affirmed. The defender, however, who will thus prevail, is a wrongdoer. It is a fact—both the Sheriffs says so, and it could not be reasonably disputed on his behalf—that he was wrong, because it is impossible to foretell the result of a blow on the head with a stick. Congestion of the brain here prevailed, and it is doubtful if it was a result of the blow. The Sheriffs differ indeed on that question. I think the transgressor should not have an award with expenses. I should therefore suggest that the Sheriff's interlocutor on the merits of the case, both as to facts and law, be affirmed, but recalled as far as expenses are concerned.

The Lord Justice-Clerk, Lord Craighill, and Lord Rutherfurd-Clark concurred.

The Court affirmed the interlocutor of the Sheriff, but found no expenses due in this Court or in the Sheriff Court.

Counsel for Pursuer (Appellant)—Scott—Watt. Agent—James M'Caul, S.S.C.

Counsel for Defender (Respondent)—Shaw. Agents—Fyfe, Miller, Fyfe, & Ireland, S.S.C.

Friday, November 10.

SECOND DIVISION.

[Sheriff of Dumfries and Galloway.

M'GAWS *v.* GALLOWAY.

Aliment—Donation—Donatio non præsumitur.

A brother lived with his sister (both being in poor circumstances), and contributed to their joint expenditure until his means failed. Thereafter she, with the assistance of her son-in-law, supported him for many years till her means were almost exhausted. He then obtained parochial relief. Before his death prospects of a succession opened, and he made a will leaving specific legacies and the residue to his sister and her son-in-law, and appointing the latter his executor. His sister constituted her claim for aliment after his death by decree against his executor. The funds in the executor's hands were insufficient to satisfy both his and the sister's claims for aliment and the legacies. In an action at the instance of the special legatees for the amount of their legacies, it was proved that the deceased was desirous to repay his sister and her son-in-law the money they had spent in his support. *Held* that in the circumstances there was no presumption that the aliment had been given by way of donation, and that the claims for aliment were therefore preferable to the legacies.

This was an appeal in conjoined actions raised in the Sheriff Court of Dumfries and Galloway at Stranraer, at the instance of William, James, and Alexander M'Gaw against James Galloway, as executor-nominate of the deceased John Corkran, or otherwise as vitious intromitter with his goods, and also as an individual, to recover legacies of £50, £50, and £20 bequeathed to them respectively by Corkran.

The facts of the case were as follow:—John Corkran, who had been unsuccessful as a farmer, gave up business about the year 1843, and went to live with his sister Mrs Elizabeth Corkran or M'Culloch. He had no means, or if he had 'any they were very scanty. She supported him almost entirely, chiefly with money received from her son James M'Culloch. In 1868 her means became nearly exhausted, and Corkran obtained parochial relief. He continued to live with her, and was supported until his death in 1878 mainly by the defender Galloway, Mrs M'Culloch's son-in-law. He was predeceased by a Miss Jane Milwie, a relative, who died in 1877 intestate, and he considered himself, and was considered by his relatives, as one of her next-of-kin, and as such entitled to succeed to one-third of her estate, which was known to be considerable. Shortly after Miss Milwie's death Corkran made a will, in which he bequeathed the legacies now sued for to the pursuers, and left the residue of the estate, one-half to his sister Mrs M'Culloch in liferent, with the fee to the defender, and the other half absolutely to the defender. He did this in anticipation of his expected succession, which, however, did not take effect as expected, since he did not prove to be entitled to succeed to Miss Milwie in the character which he believed that he held. About a year, however, after his death his exe-