LORD DAVEY—I concur. I have carefully considered the judgment delivered by Lord Kincairney in the Outer House and by the Lord President with the concurrence of his colleagues in the Inner House and the decisions which are therein referred to —and I think that the opinion unanimously expressed by those learned Judges is amply borne out by the authorities quoted by them. Whatever doubts may have been entertained or different opinions expressed in former times, it must now be taken to be established by a series of authorities extending from at least the beginning of the last century that mussel scalps and mussel fishings may be a competent subject of grant by the Crown. I do not think that the attempt made by the appellants to explain the grants of mussel fishings by attributing them to the exercise of the prerogative of the Crown over property held in trust for the public in supposed analogy to English law can be maintained; and I think that the better opinion is that which I consider to be now established law in Scotland, viz.—that mussel fishings are part of the heritable patrimonial property of the Crown. I cannot add anything to the reasons for their judgment expressed by the learned judges.

LORD ROBERTSON—I entirely agree in the judgment of the Lord President and in the appreciation of that judgment expressed by my noble and learned friend on the Woolsack.

Counsel for the Pursuers (Appellants) —Haldane, K.C.—Macmillan—Grant Sanders. Agents—J. A. B. Horn, S.S.C., Edinburgh—Bramall, White, and Roberts, London.

Counsel for the Defender (Respondent) —The Lord Advocate (Dickson, K.C.)—The Solicitor-General (Dundas, K.C.)—Vaughan Hawkins—Pitman. Agents—Davidson & Syme, W.S., Edinburgh—R. Ellis Cunliffe, London.

COURT OF SESSION.

*Thursday, May 12.**

FIRST DIVISION.

[Lord Kincairney, Ordinary.

THE LORD PROVOST, MAGISTRATES, AND COUNCIL OF THE CITY OF EDINBURGH *v.* NORTH BRITISH RAILWAY COMPANY.

Road—Public Right-of-Way—Presumption—Prescription.

Where in an action for declarator of public right-of-way over a road which was originally a private road, use of the required character by the public during the later years of the prescriptive period is established, but the evidence as to the earlier years is indefinite or ambiguous, there can be no presumption that the use in the earlier years was of the same character as in the later, but the use must be established by distinct and positive evidence for the entire period.

Road—Public Right-of-Way—Prescription—Land Held for Statutory Purposes—Railway.

A railway company for the purpose of forming its line of railway acquired the *solum* of a private road and carried the road over the railway by a bridge. It subsequently acquired additional land, including the *solum* of a further portion of the road, for sidings and an enlargement of a goods station; but it did not at once use the portion occupied by the road, continuing to hold it until such time as it should be required. Some years later, the railway company having settled the private rights in the road, proposed to close it and to take down the bridge, which had become unsafe. In an action for declarator of public right-of-way over the road, based on the ground of prescriptive possession, *held* that such a right being inconsistent with the statutory purposes for which the railway company purchased and possessed the subjects could not be acquired, and that whether the lands had been purchased under compulsory powers or by agreement.

Road—Street—Private Street—Proprietor's Power to Convert to Other Uses—The Edinburgh Municipal and Police Act 1879 (42 *and* 43 *Vict. cap. cxxxii*), *secs.* 5, 112, *and* 151.

The Edinburgh and Municipal Police Act 1879, section 5, *inter alia*, defines "street" to include "any street, square, close, wynd, alley, highway, lane, road, thoroughfare, or other public passage or place and bridges open to be used by the public," and "private street" to mean "any street maintained by persons other than the Magistrates and Council."

Section 112, *inter alia*, enacts that the Magistrates and Council "shall have the charge, control, and superintendence of the carriageway of all streets and courts and foot-pavements and footpaths within the burgh by whomsoever maintained."

Section 151 provides—"No person shall make any encroachment, obstruction, or projection in, upon, or over any street, . . . or put up any steps, railings, gratings, erections, or projections which shall in any way interrupt, obstruct, limit, narrow, or interfere with same."

Held that while the owners of a private street must submit to the superintendence and control of the Magistrates for the safety and advantage of the community so long as the private street did in fact remain a street, the statute did not interfere with their right to convert their property to other uses if independently of the statute it

*Decided Thursday, March 17.

had not become the subject of any public right-of-way.

On 4th July 1844 the royal assent was given to an Act (7 and 8 Vict. cap. lxvi) for incorporating a railway company to be called the North British Railway Company, and to authorise that company to make a railway from the city of Edinburgh to the town of Berwick-upon-Tweed, with a branch to the town of Haddington, and to acquire certain lands for that purpose. By an Act passed in 1845 (8 and 9 Vict. cap. lxxxii) the company was authorised to acquire certain additional lands and to deviate the line of the railway. Under the powers of the said Acts the company constructed the authorised lines and, *inter alia*, acquired for that purpose from the Marquis of Abercorn certain portions of the farm of Duddingston Mains, tenanted by Mr William Hope, lying to the south of Portobello. Through the farm there ran a road leading past the farm-steading from a public road known as Milton Road to the High Street of Portobello, and in terms of an agreement under which Lord Abercorn withdrew his opposition to the bill this road was carried over the railway by a bridge. It was established during the case that Mr Hope had made the road, which was known as Hope's Road or Lane, shortly after his coming into possession of the farm in 1823.

In 1865 the company acquired further lands in the vicinity of this road, and the bridge was thereafter lengthened. In 1872 the company, by an agreement scheduled to the North British Railway Act 1872, agreed to purchase from the Duke of Abercorn 35·165 acres of land lying to the north of the railway, including the *solum* of part of Hope's Road, and to make certain substitute roads whenever the portion of the land occupied by Hope's Road came to be used. In terms of this agreement these lands were conveyed to the Company by disposition dated 9th and recorded 15th November 1875. In the same year the Duke of Abercorn disponed to the Benhar Coal Company, Limited, the remaining portions of the farm lying to the north and the whole of it lying to the south of the railway, and that company, after some litigation, in 1887 consented to the closing of Hope's Road and renounced its right to the roads proposed to be substituted.

The northern part of Hope's Road, extending up to the northern boundary of the Railway Company's property acquired under the Act of 1872, was taken over by the Police Commissioners of Portobello in 1883, and the southern portion from Milton Road up to the approach to the railway bridge was, at the request of the then proprietor of Duddingston Mains, Sir James Miller of Manderston, Bart., and his tenant Mr Simpson, taken over by the County Council of Mid-Lothian and added to the list of highways in 1887.

In 1896 the Burgh of Portobello was amalgamated with the City of Edinburgh, and in 1900 the boundaries of that City were extended by the Edinburgh Corporation Act 1900, so as to include the whole area within which Hope's Road was situated. By that Act the Edinburgh Municipal and Police Acts were made applicable to the City as extended.

In 1898 the Lord Provost, Magistrates, and Town Council of Edinburgh acquired from Sir James Miller 55·244 acres of land bounded on the north by the railway and on the east by Hope's Road, for the purposes of a public park. The direct access to this land from the central district of Portobello was by Hope's Road, but on 10th September 1902 the Railway Company intimated that the bridge carrying the road over the line was to be removed. Gates were subsequently erected at the points where the road passed over or was adjacent to the line of railway and the land belonging to the company. The public was prevented from using that part of the road, and the demolition of the bridge was thereafter commenced.

The Lord Provost, Magistrates, and Town Council of Edinburgh raised an action for declarator of public right-of-way over the road, and that the road was a street of the City of Edinburgh, and for interdict, &c., against the Railway Company. In it they pleaded, *inter alia*:—"(1) The pursuers are entitled to decree in terms of the declaratory conclusions of the summons, in respect that (*a*) the said road was a public carriageway or highway at and prior to 4th July 1844, and has continued to be such down to the present time; (*b*) the said road is a street of the City and Royal Burgh of Edinburgh within the meaning of the Edinburgh Police Acts 1879 to 1901."

A proof was taken, and the evidence showed very considerable use of the road by the public during recent years.

Upon 1st July 1903 the Lord Ordinary (KINCAIRNEY) found "(1) That it has not been proved that the portion of Hope's Lane belonging to or passing over the property of the Railway Company was a public carriageway or highway at and prior to 4th July 1844, or that it is so at the date of this action; (2) that it has not been established that there exists any public right-of-way over the said portion of the said road; (3) that the said portion of the said road is not a street of the City of Edinburgh within the meaning of the Edinburgh Municipal and Police Acts 1879 to 1901," and assoilzied the defenders.

Opinion.—"This action has been raised by the Magistrates of Edinburgh against the North British Railway Company, and it relates to a road or path called Hope's Lane, which leads from a point in Milton Road, past the farm steading of Duddingston Mains, and northward to the High Street of Portobello. It is carried over the North British Railway by a bridge, which the railway company intend to remove, or have commenced to remove, with the effect of destroying Hope's Lane as a continuous path between Milton Road and Portobello, and this operation is challenged by the Magistrates of Edinburgh. . . . .

"In these circumstances this action has been raised by the magistrates. It has four declaratory conclusions:—(1) that Hope's Lane was at 4th July 1844, and had been for

many years prior to that date, and has been since and is now, a public road, carriageway, or highway; (2) that on 10th September 1902 it was and now is a street of the burgh of Edinburgh, and that the defenders have no right to make any encroachment thereon which should interrupt, obstruct, limit, narrow, or interfere with the street. . . . .

"The pursuer's counsel argued only in support of the first and second conclusions, and not in support of the third and fourth. Further, he conceded that he could not successfully maintain the public right to the road before the railway was constructed. The questions therefore seem to be (1) whether the road had become a 'road, carriageway, or highway' since 1844, or otherwise since the construction of the railway; and (2) whether it is now a street in virtue of the provisions of the Edinburgh Muncipal and Police Act 1879. These questions are distinct. They are novel and difficult. The affirmance of either would be sufficient for the pursuers' declaratory conclusions. But their affirmance would be idle unless they warranted a judgment decerning the defenders to restore the bridge and to maintain the bridge and the road.

"The first conclusion is not expressed in the ordinary style of a declarator of right-of-way, and I am in doubt whether the action can be regarded as a declarator of right-of-way. If the first conclusion be not a declarator of right-of-way, I think it would be impossible to affirm it, because there can be no doubt, and I think it was admitted, that it cannot be affirmed that this road was in 1844 a public highway, and continued to be so. But I think that the action may be treated as a declarator of right-of-way. If so, the question takes this form—have the pursuers established a public right-of-way by possession of the public since 1844?

"The defenders maintained in the first place that such a right-of-way could not be established, whatever the proof of use may have been. They argued that a right-of-way could not be acquired over land belonging to a railway company if it interfered with the statutory use of the railway, and I concur in that argument. The defenders referred in particular to the case of *Mulliner* v. *The Midland Railway Company*, 1879, L.R. 11 Ch. D. 611, where it was decided that a railway company could not confer a right-of-way through a railway arch. I think the same principle was decided in *Oswald* v. *The Ayr Harbour Trustees*, 24th January 1883, 10 R. 472, *aff.* 10 R. (H.L.) 85. In the case of *The Grand Junction Canal Compauy* v. *Petty*, 1888, 21 Q.B.D. 273, it was held that a public right-of-way along the towing path of a canal might be established, but only because it appeared that the exercise of the right would not interfere injuriously with the statutory use of the canal. Reference also was made to the case of *The Kinross County Council* v. *Archibald*, 20th January 1900, 7 S.L.T. No. 308, to which, although it was only an Outer House case decided by myself, I refer because it contains a citation of the principal authorities on the question.

"Now, in this case it is true that the land acquired in 1872 to the north of the railway and between it and Portobello has not hitherto been put to much use—still it appears from the evidence of the witness Boath that the Railway Company are about to put it to the use for which it was originally acquired, that is for marshalling trains and for additional sidings; that they require it for these purposes, and that the use of it for these public purposes would be very seriously interfered with if it were held that there was a public right-of-way through the middle of it. I think the principle must apply that the Railway Company could not dedicate that land to the public use and so withdraw it from its statutory use; and I think it follows that if that be so a right-of-way over it could not be acquired. The question has not arisen frequently, but the principle seems fairly clear.

"The question about the bridge is a little different. I think it proved that the bridge has become dangerous, and the Railway Company must either take it down or repair it. I cannot find any obligation on them to the public to repair it, and I am not aware that any obligation of that kind arises in servitudes of right-of-way. Even although a public right-of-way should be held established, it would not follow that the Railway Company could be called on by the Magistrates, as representing the public and vindicating a public right, to repair or restore the bridge.

"On these grounds I hold that the pursuers cannot establish the right-of-way which they allege, supposing that what they allege is a right-of-way.

"Supposing the specialty absent, that the right-of-way asserted is over land belonging to a railway company and over a railway bridge, the question whether a right-of-way would have been established over the road depends on the proof which has been led, and is not without difficulty. The road begins as a private farm road. I think there is no room for a presumed grant, if that be ever a consideration in questions of right-of-way; and I take it that it must be held to have been a farm road in 1844. In all the transactions in reference to the road in 1844 or 1845 and in 1872 there can be no doubt that the road was treated as a private road. There is no trace of the suggestion that it was regarded as a public road. Further, it bears the name of Hope's Lane, which favours the view that it was Mr Hope's private road. There was a gate and a notice that it was private at one end, but I think it not proved that the gate was ever locked, and it was removed altogether about 1875 or thereby. But certainly for a great many years back everybody who chose used this road, and a good number did who were not going to Duddingston Mains. There has been for more than thirty years no hindrance to the public use. That was natural, because it was a road running from the heart of a town straight into the country,

and to whatever places the country roads might lead to. It seems certain that the defenders never endeavoured to hinder anyone from using it. I do not find any clear evidence of anyone being turned or checked from 1870 downwards. It may be that before that Mr Hope made some endeavours to keep the road to himself. But they were never energetic, and I think Mr Hope admits that about the seventies his interest in the matter abated. The proof is very simple with very little detail. I would not have much doubt that general use without check might be held proved for thirty or thirty-five years, and that it might be regarded as use 'as of right.' But I doubt whether the full forty years could be counted. But it is not necessary for me to express a final opinion on the point as I am against the pursuers on the ground previously explained.'

"For these reasons I am of opinion that the pursuers have not established that Hope's Lane was in 1844, or has continued to be, or is now, a public road or highway; and further, that they have not proved that there is a public right-of-way along that road, and therefore that the defenders are entitled to be assoilzied from the first declaratory conclusion of the summons.

"The object of the second conclusion, as explained at the debate, is to establish that Hope's Lane is a street within the meaning of the Edinburgh Police Act 1879, that the provisions of that Act in regard to streets apply to it, and that in respect of these provisions it is under the sole charge and control of the Magistrates. This conclusion, it may be observed, is not framed as alternative to the first conclusion, but as consistent with it. But it may be doubted whether it would be consistent with a conclusion expressed in the usual words of style of a declarator of right-of-way. That difficulty has been avoided by the unusual manner in which the first conclusion is expressed.

"The question whether Hope's Lane is a street within the meaning of the Act of 1879 depends in the first place on the Corporation Act which came into operation on 1st November 1900, by which Hope's Lane was brought for the first time within the municipal boundaries. The only section of that Act quoted on record is the 23rd, which declares that all the roads within the districts annexed, which are vested in the authorities specified, are to be vested in the Corporation. That section may apply to the north part of Hope's Lane between Argyle Crescent and the High Street of Portobello, and also possibly to the south part between Milton Road and the south approach to the railway bridge, which was put in the list of the county roads; but it cannot apply to the intermediate part, which is the only part really in question in this action, because it was not vested in any of these authorities. Hope's Lane, therefore, as a whole, in particular that part of Hope's Lane, is not expressly transferred as a road to or expressly vested in the Corporation. But by section 21 it is enacted in general terms that the provisions of the Edinburgh Police Acts shall apply to the extended boundaries of the burgh in the same way as they apply to the pre-existing boundaries; and I am therefore of opinion that any provisions of the Act of 1879 which would have applied to Hope's Lane had it been within the old boundaries, apply to it as being within the extended boundaries.

"The question depends, therefore, on the Act of 1879, and the only clauses of that Act to which it is necessary to refer seem to be the 5th, which is the interpretation clause, and sections 112 and 151. The pursuers' argument is that section 5 determines that Hope's Lane is to be regarded as a street, while section 112 confers the sole control of all streets to the Magistrates, and section 151 prohibits the interference of anyone else. Now, the words of sections 112 and 151 appear to me to be so wide, absolute, and imperative in regard to the powers of the Magistrates over streets, that I am unable to see how their absolute control over Hope's Lane, if it be a street, can be disputed. It seems to be no matter whether Hope's Lane were regarded as a public street or a private street. I suppose if it be a street it would be said to be a private street, but the control of the Magistrates over it would not be thereby affected, and no question which is raised in this case depends on the distinction between a public and a private street.

"The question therefore is, is Hope's Lane a street within the meaning of the Act 1879? The pursuers maintain that the words in section 5, interpreting the word 'street,' necessitate the conclusion that Hope's Lane is a street. The date to which the conclusion of the summons applies is 10th September 1902, which is the date when the Railway Company intimated their intention to destroy the bridge, but the true date when the statute began to affect the road is 1st November 1900.

"It is, I think, important to have in view at the outset what was the position of the part of the road which passes over the railway property at that date. If, as I must assume, the views which I have expressed in dealing with the first conclusion were well founded, the position of the road at that time was this. It was a road passing over property belonging to a Railway Company and acquired by the Railway Company for statutory purposes. There is a small part in reference to which the question has been raised whether what the Railway Company acquired was a right to the *solum* or only a right of passage across the *solum*. That question only relates to a small portion of the road, and I am not able to see that it affects the present question. I therefore deal with the road as unaffected by that specialty, and take the question as if it were about the whole portion of the road passing over or on the defenders' property.

"The road then was the property of the pursuers, and it was *ex hypothesi* unaffected by any public right-of-way. The owners of the 35 acres north of the railway by their disposition expressly authorised the Rail-

way Company to close the road, and if they had done so at the date of the disposition I cannot see that anyone would have had any right or title to object. But as it happened, not having any immediate use to which to put the land, they did not shut the road, but allowed it, by inadvertence or mistake, to remain as it was; but still it was a road passing over railway property which the Railway Company had then right to close when they pleased, which was always liable to be used for railway purposes, and which, as I understand, the Railway Company now think should be applied to railway purposes—a point which I think they have sufficiently proved.

"That being the position of the road at 1st November 1900, and also at 10th September 1902, what the pursuers maintain is that the effect of the inclusion of the road within the extended boundaries is that that portion of the railway property over which the road passes, dedicated, as I think it was, to railway uses, was withdrawn from the control and management of the Railway Company and placed under the sole control of the Magistrates of Edinburgh. I understand that the Railway Company intend or intended to use the ground to the north of their railway as a space for a marshalling yard and for additional sidings, and now it is said that an Edinburgh street under the charge of Edinburgh Magistrates passes through the middle of it.

"That appears to be a startling and, one might say, an unlikely result of the extension of the burgh boundaries. But unlikely or not, the question whether it is so or not must depend on the words of the statute, and mainly on the interpretation clause.

"The interpretation of the word 'street' in the interpretation clause is certainly expressed in language which is extremely comprehensive, and which would certainly include Hope's Lane in the enumeration of the varieties of roads which are specified. There can be no doubt about that. There are, so far as I have been able to see, only two phrases or expressions which can be appealed to as qualifyng the otherwise unlimited generality of the interpretation.

"At the commencement of clause 5 there is this provision, that the several words and expressions interpreted shall have the meanings assigned to them, 'unless there be something in the subjects or context repugnant to such construction.' It was contended for the defenders that there was repugnancy in holding that a piece of railway property acquired for purposes connected with the railway should be affirmed to be a street under the control of the Magistrates.

"I was not favourably impressed with this suggestion when it was made, but on reconsideration I am disposed to accept it. It is not very easy to attach any meaning at all to the phrase 'something repugnant in the subject.' But the words were meant to have, and must receive, some meaning and effect, and the more vague they are the more they seem to authorise a certain latitude of interpretation of the words to which they refer. The subject is a piece of railway property dedicated to railway uses, and I am inclined to think that it is not wholly meaningless to affirm that there is repugnancy between that subject and a street under the sole control of the Magistrates. I have great difficulty in agreeing with the pursuer's contention in this matter, and I am certainly not unwilling to accept the assistance of these qualifying words, difficult of interpretation as they are, in aiding to surmount that difficulty.

"The other qualifying words in the interpretation clause are the words 'open to be used by the public.' These words also appear extremely ill-selected. I understand them to refer to all the varieties of roads previously expressed. The pursuers contended that they are satisfied by use by the public in fact, whether it was use as of right or not, however inconsiderable the duration of that use may have been. But I am unable to adopt that view. The words are words of qualification, qualifying the generality of such words as street, or road, or thoroughfare, or highway; and if it had been intended to refer to use in fact, I think the words employed would have been 'used by the public.' Such words would have adequately and fully expressed use in fact. But the words are 'open to be used by the public.' The words 'open to be' are absolutely superfluous if all that was intended was to express use in point of fact. They receive no meaning unless they are held to mean something different from use in fact, and I think that the words do not exclude considerations of right; and it appears to me that a road passing across railway property is not necessarily a road open to be used by the public although it has been in fact so used.

"The point is no doubt narrow and difficult, but I am disposed to hold that a road held by a railway company subject to its statutory obligations, and with right to close it, is not a road open to be used by the public, and therefore is not a street. I therefore come to the conclusion that the portion of Hope's Lane which passes over the property of the Railway Company is not of necessity a street within the meaning of the statute, and therefore that the defenders are entitled to absolvitor from the second conclusion also.

"As I noticed at the outset, I understand that the first and second conclusions were the only portions of the summons to which the argument of the pursuers was directed. No grounds were stated for the third conclusion, which has reference to the Portobello Public Park. No doubt the action of the Railway Company, if they take down the bridge, will injuriously affect the access to the public park; but still it appears that, apart from Hope's Lane, the inhabitants of Portobello will still have convenient access to the park, although probably not so convenient as by Hope's Lane. But I think that no decreet

was asked in terms of the third conclusion; and it does not appear that the pursuers have any title to maintain the fourth conclusion, which I understood was not insisted in.

"On the whole matter I conclude that the defenders are entitled to absolvitor."

The pursuers reclaimed, and argued—(1) The evidence established the necessary use by the public during recent years, and though the evidence as to the earlier years of the prescriptive period was naturally not so clear, read with the evidence as to the later it was quite sufficient. It was not necessary to prove any grant—*Mann* v. *Brodie*, May 4, 1885, 12 R. (H.L.) 52, 22 S.L.R. 730; and while the private origin of the road might throw a greater burden of proof on the pursuers, it did not foreclose the question, and grant would easily be presumed—*Napier's Trustees* v. *Morrison*, July 19, 1851, 13 D. 1404. That the subjects were held by a railway company was no bar, for a highway—which term included footway (Rankine, Landownership, 3rd ed. p. 293; Railways Clauses Consolidation Act 1845, sec. 52)—could be acquired on land held for other purposes—*Rex* v. *Inhabitants of Leake* [1833], 5 B. and Ad. 469; *Grand Junction Canal Company* v. *Petty* [1888], 21 Q.B.D. 273; *Mulliner* v. *Midland Railway Company* [1879], 11 Ch. D. 611; *Gonty* v. *Manchester, Sheffield, and Lincolnshire Railway Company* [1896], 2 Q.B. 439; *Foster* v. *London, Chatham, and Dover Railway Company* [1895], 1 Q.B. 711. In some cases the right had not been successfully maintained, but that was always on the special ground that it was inconsistent with the purpose for which the land was held—*Great Western Railway Company* v. *Talbot* [1902], 2 Ch. 759; *Oswald* v. *Ayr Harbour Trustees*, January 24, 1883, 10 R. 472, 10 R. (H.L.) 85, 20 S.L.R. 873. These cases were not inconsistent with the general rule that a right-of-way could be prescribed in such circumstances—*Caledonian Railway Company* v. *Turcan & Company*, February 22, 1898, 25 R. (H.L.) 7, at p. 17, 35 S.L.R. 404; and they were of no force here, as the right claimed was not incompatible with the railway's purpose. It had allowed the road or bridge to be used for a long period as a public road, and it could not turn round now; and it was to be remembered in this connection that a private statute was to be interpreted against the private company and in favour of the public—*Galloway* v. *Mayor of London* [1866], L.R., 1 H.L. 34. But the land here had not been acquired under a statute by compulsory purchase, but by agreement. It was consequently held as a private individual might have held it, and while it was true that part had been used for a statutory purpose, the portion occupied by the road had not. It could not be contended that all land held by a railway was excluded from the operation of prescription—*City of Glasgow Union Railway Company* v. *Caledonian Railway Company*, July 22, 1871, 7 Macph. 1072, *aff.* 9 Macph., H.L. 115. The only restriction really was if the right claimed impinged on the full execution of the particular statutory power for which the land was acquired and held—*Glasgow and South-Western Railway Company* v. *Magistrates of Glasgow*, July 17, 1894, 21 R. 1033, 22 R. (H.L.) 29, 32 S.L.R. 733; *Caledonian Railway Company* v. *Corporation of Glasgow*, February 20, 1901, 3 F. 526, 38 S.L.R. 376. The difficulty about maintaining the bridge did not arise, for if necessary the right to use it implied a right to repair it—*Greenwich District* v. *Maudslay* [1870], L.R., 5 Q.B. 397; *Grand Surrey Canal Company* v. *Hall* [1840], 1 M. and G. 392. The question of tolerance did not arise, for objection to use had not been enforced—Rankine, Landownership, 3rd ed. p. 295; *Wallace* v. *Police Commissioners of Dundee*, March 9, 1875, 2 R. 565, 12 S.L.R. 361. (2) This road was clearly a street within the definition of the Edinburgh Acts, and so could not be closed without the consent of the Magistrates. That was a result of the road coming within the burgh, and it might in some cases be a hardship, but in others it was a benefit. It was impossible that the owner should have power in a town to close a street without any consent on behalf of the public. The case of the *Kinning Park Commissioners* v. *Thomson & Company* (*infra*) was not applicable, for the statute in question there left the power with the proprietor.

The respondents argued—The evidence did not establish the right claimed. Being originally a private road it must be shown when the use became public and of right, and that time must be sufficiently far back to give forty years' possession. No attempt had been made to do this. But even the use in the later years was of no moment for it was over railway property held for its statutory purposes, and the right claimed was inconsistent with these purposes—*Ellice's Trustees* v. *Caledonian Canal Commissioners*, January 28, 1904, 41 S.L.R. 260. The proprietor was not bound to maintain a bridge, and so the road claimed was across a main-line of railway —*Regina* v. *Bexley Heath Railway Company* [1896], 2 Q.B. 74. The cases cited were against the appellants. (2) The road was not a street in the sense that it could not be shut up. The statute did not vest it in the Magistrates, but only gave power to regulate so long as it remained a street. There was nothing in that power inconsistent with a power in the proprietor to close the street whenever he liked. He could not be prevented from making a different use of his property if he chose—*Commissioners of Kinning Park* v. *Thomson & Company*, February 22, 1877, 4 R. 528, 14 S.L.R. 372, was an authority directly in point.

At advising—

LORD KINNEAR—The practical question in this case is whether the pursuers have right to compel the North British Railway Company to carry a certain road or lane over their railway by means of a bridge; to maintain the road so far as it passes over lands belonging to them or is formed upon the bridge, and the bridge itself, at their own expense; and to restore any part of

the road which they have closed up, and to re-erect any part of the bridge which they have removed. This demand is rested upon two different grounds—first, that the road or lane, including the bridge over the railway, is a public road; and secondly, that, including the railway bridge, it is a street of the city of Edinburgh within the meaning of the Edinburgh Municipal and Police Acts, and under the charge, control, and superintendence of the pursuers. The first of these grounds, as explained in the argument, means that the public has acquired a right-of-way over the road, of which the railway bridge forms a part, by immemorial use and possession, for it is not alleged that a public right has been created in any other way; and that is a right which can only be established by sufficient evidence of continuous, peaceable, and uninterrupted possession for forty years. . . . Whether a right-of-way across the main line of a public railway can be acquired by mere use is a question which we shall have to consider. But in the first place I think it will be convenient to consider the evidence of public use without reference to that specialty, and in the same way as if the pursuers were endeavouring to establish a right-of-way over the property of a private landowner. In this view of the case the questions which have to be answered are those stated by Lord Watson in *Mann* v. *Brodie* (12 R. (H.L.) 52)—first, whether the pursuers have proved public use, such as cannot reasonably be ascribed to the licence of the proprietor, of the whole road from one terminus to another for the full period required by law; and secondly, whether the amount of use proved is such as might have been reasonably expected if the road in dispute had been an undoubted public highway. On both of these points I am of opinion that the pursuers' evidence has entirely failed.

[*His Lordship, after dealing with the evidence as to the origin of the road, continued*]—I take it to be beyond dispute that the road was made by the elder Mr Hope as a private farm road, that he intended it for the benefit of his own house and farm exclusively, that he took care to give notice of this intention to all concerned by putting up his gate with the notice board attached to it, and that he and his son did in fact turn people back who used it without permission.

Now, I do not say that the origin of the road is at all conclusive of the question of right. I am not disposed to hold, although some authority for the proposition may be found in *Morrison* v. *Napier* (13 D. 1404), that the mere fact of a landowner having made a road on his own private property for his own private purposes gives him a good answer in law to an action founded on public possession for forty years. But it is in my opinion a circumstance of the greatest possible weight as evidence tending to show that such use as may have been had of this road is not to be ascribed to public right but to the tolerance of the proprietor. It follows as a necessary consequence from the proved facts as to the making of the road that everybody who used it for many years after it was made did so only by the authority or the tolerance of Mr Hope. And accordingly when the pursuers' counsel was asked if the use of the road during the earlier years of its existence was by tolerance, when did it cease to be by tolerance,? the question seemed to me exceedingly pertinent; and I cannot say that I thought the learned counsel in his very able argument grappled with it successfully.

It is by no means, as he seemed to suppose, a mere logical puzzle. For if it be admitted that there was at first a use by tolerance, the pursuers' argument must assume that there was a change at some time, and if he has to prove possession as of right for a certain prescriptive period, the question when the change began is vital. I do not think it doubtful that a use which began by tolerance may be followed by a use as of public right, if the facts are sufficient to prove it. For a practice which was originally occasional and confined to a small number of persons may in course of time be followed by a practice too extensive and persistent to be accounted for otherwise than as an assertion of public right, and the proprietor may very reasonably be held to have submitted to a public assertion instead of giving his licence to a privileged few. But then it must be proved that there has been such a change of attitude on both sides. And I do not think that this means, as Mr Clyde argued, merely that the onus is heavier. The essential distinction in my mind lies in the point of time to which the evidence must specifically relate. In every case of right depending upon prescriptive possession, it must of course be proved that the possession has extended over the full period of prescription. But in cases of public right-of-way it has been frequently laid down that although the evidence applicable to the earlier years of the forty may be scanty or lacking, it may nevertheless be presumed, if the circumstances of the case will sustain the inference, that the user which is proved during the later years has been of the same character throughout. Lord Watson has pointed out in *Brodie* v. *Mann* (12 R. (H.L.) 52) that this is a presumption not of law but of fact; but it is in general a reasonable inference, and it arises with special force when the road in question has been used continuously, but the evidence as to the character of such user for the earlier period has been indefinite or ambiguous, and during the later period distinct and conclusive. In such cases it has been held that the earlier user may be explained and confirmed by the later. But no presumption of that kind can be admissible in a case where it is conceded that in the beginning the persons who used the road must have done so by the licence or tolerance of the proprietor. If in such a case a subsequent user should be proved, which taken by itself might indicate assertion of right with submission by the proprietor, no inference whatever can be drawn from the character of the user during the later period to qualify or explain the user during the earlier period. The

hypothesis is that there has been a change in the mode or in the amount of user, and the change cannot be presumed to have taken place before it is proved to have taken place. It follows that in the present case the pursuers must prove by distinct and positive evidence that the public had possessed the road as of right during the whole forty years. If they have not covered the whole ground, it is nothing to the purpose that they may have proved public user for thirty or for five and thirty years. In my opinion, therefore, the evidence which has been adduced of use and possession from 1869 or 1870 onwards is altogether irrelevant, except in so far as it can be proved to be an exact continuance of user which had prevailed from the beginning of the forty years. The impossibility of admitting the general presumption is very strikingly illustrated by the circumstances of the present case. For the pursuers have proved that during the last thirty years the use of the road has been continually increasing, and the impediments to its use continually diminishing. People forgot the origin of the road, Mr Hope relaxed his vigilance when he was about to leave the place, the indications of private right gradually disappeared, the notice board was taken away, the gate fell into disrepair, many new houses were built between Portobello and Duddingston, and many new people were thus brought into the neighbourhood to whom the road was convenient and accessible and who knew nothing about its history. Finally, a new tenant, Mr Simpson, came to Duddingston Mains in 1882, who knew nothing of the alleged right of his predecessor Mr Hope, but who found that the public were using the road, as he says "freely," and that he himself had to maintain the part of it from the Milton Road to the railway bridge since his landlords by the terms of their lease were under no obligation to do so. His interest therefore was to get rid of the expense of maintenance, and accordingly he applied to the County Council to take it over, which they agreed to do. All this is evidence tending to prove public right during the time to which it relates. But it is irrelevant to the question whether there was a public right before that time. I come therefore to the examination of the pursuers' evidence with this observation, that in my opinion no part of it which relates exclusively to a period within the forty years before 1902 is to be taken into account, except in so far as it may instruct the continued exercise of a right already asserted at the beginning of the forty years. I do not propose, however, to examine the evidence in detail, because to take witness by witness would occupy, unnecessarily, a great deal too much of your Lordships' time. I think it enough to state the view which I have formed, after reading and considering it as carefully as I can, of its true import and effect. [*His Lordship then dealt with the evidence for the pursuers*].

Taking all the positive evidence adduced by the pursuers,—subject to the qualifications I have mentioned,—I think it altogether insufficient to prove public use, and in amount it certainly fails to satisfy the criterion proposed by Lord Watson, because it is part of the pursuers' case that the road is of the greatest possible use and convenience to the inhabitants of Portobello, and the amount of use proved within the limits explained is very much less than that which the inhabitants of so populous a place might have been expected to make of a convenient road. But the pursuers' evidence is not to be taken alone; and even if it were sufficient in itself, so long as it is unqualified by the contrary evidence for the defenders, it appears to me that when the whole facts are taken together the public right is disproved. [*His Lordship then dealt with the evidence for the defenders.*]

If I am right in this view of the evidence there is an end of the case in so far as it depends upon public right-of-way. But if I am wrong the question arises to which I referred at the outset, whether the public can by mere user acquire a right-of-way across property belonging to the defenders and occupied for the purposes of their railway; and the question whether such right has been acquired is said to depend upon different considerations according as it affects the line of railway or the 35 acres. The supposed difference appears to me to be of no consequence, because no public right can be acquired by user over any part of the road unless it extends from terminus to terminus; and if the North British Railway be a sufficient obstruction to exclude the passage of the public from the 35 acres to High Street, Portobello, it follows that the public can have no right to enter the 35 acres.

But to take the two pieces of land separately, I am of opinion, in the first place, that no right-of-way can be acquired by user over the line of the defenders' railway, and especially at a point where the railway traffic is so great as on the main line close to Portobello Station. It must always be presumed that if people having no statutory right of any kind have been allowed to cross the line, their passage is permitted only so long as it does not interfere with the purposes of the railway traffic. That a public right of passage at the point in question, now that the bridge is gone, would be incompatible with the conduct of the traffic is obvious, and there is no evidence and no suggestion to the contrary. But the pursuers' case must be that, bridge or no bridge, the public in general has an absolute and unqualified right to cross the line by virtue of a public right-of-way. It is true that they conclude for declarator that the defenders are bound to maintain and restore the bridge. But that is maintainable on the assumption that the road was a public road when the company acquired the land, and that assumption is entirely and confessedly displaced by the evidence. No right which might have been subsequently acquired would enable the public to insist upon the maintenance of a

bridge, because it is clear in law that a right-of-way, whether public or private, is a mere right of passage, and will not enable the public or a dominant owner to compel the servient owners to keep up bridges. The pursuers' case therefore is that they are entitled to pass over the line, in whatever condition the bridge may be, in the mere exercise of a right to travel on foot or in carriages from Milton Road to High Street, Portobello. I am of opinion that no such right can be maintained, and that on the same principle on which it has been repeatedly held that a railway company cannot voluntarily grant a right inconsistent with the performance of the purposes for which it has acquired its land. I assent entirely to the doctrine laid down by Lord Watson that the reference of the prescriptive right-of-way to an implied grant is a juridical speculation to account for an established rule, and not itself a rule of law. But at the same time I do not think it possible that a right-of-way which it would be *ultra vires* to grant can be lawfully acquired by user. The two elements which go to establish the right—the assertion of right on the one hand and the acquiescence of the landowner on the other—are both excluded *ex hypothesi*. A landowner who has no power to grant has no power to acquiesce; and persons who may find it convenient to traverse a piece of ground which has been set aside by Act of Parliament for specific statutory purposes cannot be presumed to be thereby asserting a right to override the statute and to divert the land to other and incompatible purposes. It cannot be held that the inhabitants of Portobello are empowered by any amount of user to acquire a right to defeat the North British Railway Acts and impede the traffic which the Railway Company was authorised and constructed to carry on for the benefit of the public. In so far as regards the facts, the other piece of ground seems to me to be in exactly the same position as the railway line. The 35 acres were acquired for the purpose of making a siding and a marshalling yard. The defenders' case is that a public right-of-way over the ground would be altogether incompatible with these purposes, which are, however, indispensable for the proper conduct of the traffic; and there is no evidence to the contrary. But it is said that the principle does not apply because the ground was not acquired in the exercise of compulsory powers. I do not see that that makes any difference. The pursuer's counsel founded their argument on Lord Halsbury's statement of the principle in *Foster* v. *The London, Chatham, and Dover Railway Company* [1895], 1 Q.B. 711—"The Legislature has given power to the Railway Company to take land compulsorily in consideration of the benefit which the public would derive from their carrying on the business of the railway company, and in my view they could be restrained from alienating the property they had taken if they were to affect to deal with it in such a way as would disable them from carrying on their business as a railway company, because in so doing they would be departing from the bargain to carry on their public business, which the Legislature has in fact imposed upon them as the consideration for the grant of compulsory powers to take land." But the limitation of their powers to grant servitudes is not therefore confined to the land acquired by compulsion. All the powers conferred upon the Railway Company are given for the same consideration; and all the property they may acquire by virtue of these powers must be held subject to the same condition, that it is to be used in furtherance and not in obstruction of the purposes of their Act of Parliament. If this be so, it would seem to follow that no servitude or right-of-way can be granted or acquired over land bought to serve as a goods station and marshalling land except with a view to the traffic of the railway. I am not prepared, therefore, to hold that the pursuers have shown any solid distinction between the 35 acres and the railway line. But I repeat that it is not, in my opinion, necessary to decide the point; because if the defenders can exclude the public from the line of rails over which the bridge was formerly carried, that is enough to exclude them from the 35 acres also. They have *ex hypothesi* no right to enter on the 35 acres except for the purpose of crossing the railway in order to reach the High Street of Portobello, and if they are not allowed to cross the railway, then the entire foundation of their claim to enter the 35 acres is gone.

It remains to consider the second ground of action—that Hope's Road, including the railway bridge, is one of the streets of Edinburgh under the control and supervision of the Provost and Magistrates; and I am of opinion that this gronnd also is untenable.

The argument is based on the Edinburgh Corporation Act 1900, which extended the boundaries of the city and royal burgh so as to include the area in which Hope's Lane is situated, read along with the Edinburgh Municipal and Police Act 1879. It is not maintained that the part of the road which passes through the Railway Company's property is carried to the Corporation by the vesting clauses of the former Act. But that Act contains a clause which applies the provisions of the Act of 1879 to the area now brought within the municipal boundaries; and the piece of road in question is said to have been made a street of the city of Edinburgh by force of sections 5, 112, and 151 of the last-mentioned Act. The most material clause according to the argument is the fifth, which defines private street to include "any street, square, close, wynd, alley, highway, lane, road, thoroughfare, or other public passage or place, and bridges open to be used by the public;" and private street is defined to mean "street maintained by persons other than the Magistrates and Council." If the road in dispute can be shown to be a street by virtue of the definition, it is said to be vested in and placed under the control and superintendence of the Magistrates by the 112th section, and all "encroachments,

obstructions, or projections on, upon, or over it" are forbidden by the 151st.

The first part of the definition covers only public passages or places, and this branch of the argument must be taken on the assumption that the pieces of ground in dispute are not public unless they are made so by the Edinburgh Police and Municipal Statutes. But it is said that so far at least as the railway bridge is concerned, it is covered by the words "bridges open to the public." These are words of ordinary language and they do not appear to be very difficult of interpretation. A bridge is not open to the public if the public is prevented from making use of it by any physical or legal obstruction, and the definition must therefore mean that it is physically accessible, and that the public is either entitled or allowed to enter upon it. But the words of definition describe a condition of fact without any implication of legal right or liability. So long as that condition of fact continues the definition applies. If it is lawfully altered the definition applies no longer. There is nothing in words that are merely descriptive to import a transference of rights of property from one person to another or from a private owner to the public. But the pursuers' argument is that once the definition is satisfied the 112th section comes in to vest the roads or bridges in the Magistrates, and that on the same condition the Magistrates may under the 151st section order the removal of all obstructions, encroachments, and projections. But in so far at least as regards streets not at "present maintained by the Magistrates and Council," the 112th section vests no right in the Magistrates beyond "charge, control, and superintendence;" and the criterion of the power to control and regulate is the fact that a street or bridge is open to the public. If the ground is not already subject to a public right, there is no positive enactment that touches the inherent power of the private owner to exclude the public, and if the public has been allowed to pass out of mere good will, and so long only as their passage is not inconsistent with the use and occupation by the proprietor of his own property, there is nothing in the statute to prevent the proprietor from taking his road or bridge outside the definition by appropriating it to purposes inconsistent with public use. It is familiar that landowners within burghs may lay out ground for streets in such a way as to create an indefeasible right in the public or in a community of feuars; or again they may allow the public to make use of their land in such a way and for so long a time as to found a prescriptive right. In either case their private street will continue to be a street in perpetuity. But the pursuers' argument is that if they once allow the public to enter upon a road or bridge, although not for long enough to found a prescriptive right, and without creating an adverse right in any other form, the supereminent right of the Magistrates comes in to compel them to keep their property open to the public for all time. This is confiscation of private property for the benefit of the community, without compensation, and without the previous notice which is generally exacted before power is given by Parliament, even to purchase without the owner's consent. A construction of an Act of Parliament so inconsistent with the ordinary methods of legislation ought not to be adopted if it is not the plain meaning of clear language, and I find nothing in the Act to support it. The true effect of the clauses founded on seems to me to be that so long as private streets are streets in fact, the owners must submit to the superintendence and control of the magistrates, for the safety and advantage of the community. But I find nothing to interfere with the legal right of private owners to convert their property to other uses, if independently of the police statute it has not become the subject of any public right-of-way. Even if this were doubtful, however, I should not be able to read the pursuers' statute of 1879 as repealing to any effect the statutes of the North British Railway Company, or enabling the Magistrates to interfere with the statutory purposes for which the company holds its property.

For these reasons I am for adhering substantially to the Lord Ordinary's interlocutor.

The Lord President, Lord Adam, and Lord M'Laren concurred.

The Court recalled the Lord Ordinary's findings and adhered so far as he assoilzied the defenders.

Counsel for the Appellants—Clyde, K.C.—Cooper. Agent—Thomas Hunter, W.S.

Counsel for the Respondents—The Dean of Faculty (Asher, K.C.)—Ure, K.C.—Grierson. Agent—James Watson, S.S.C.

Tuesday, February 2.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

ALLISON v. ALLISON AND OTHERS.

Proof — Contract — Innominate and Unusual Contract — Salary and Share of Profits.

In an action of count, reckoning, and payment against the trustees of his brother, a wood merchant, the pursuer averred that he acted as manager in the timber yard of his brother at a specified salary with an allowance for house rent, "together with one-fourth of the profits of the business," and that with one exception he did not draw out his share of the profits in each year as it accrued, but allowed it to remain in his brother's hands.

The defenders pleaded that as the pursuer's averments set forth an innominate and unusual contract, the