An investigation of early authorities in Scots law for the public right to use roads

Exam number: 1659550

LLM by Research in Law

University of Edinburgh, January 2018

Word count: 29,953

(excluding cover page and bibliography)

CONTENTS

ABBREVIATIONS

1592 Act	APS iii 579 c78, RPS 1592/4/100, "Concerning the streets and passages of burghs"
1617 Justices Act	APS iv 535 c8, RPS 1617/5/22, article 8, "Regarding the justices for keeping of the king's majesty's peace and their constables"
1617 Prescription Act	APS iv 543 c12, RPS 1617/5/26, "Regarding prescription of heritable rights"
1661 Planting Act	APS vii 263 c284, RPS 1661/1/348, "Act for planting and enclosing of ground"
1878 Roads Act	Roads and Bridges (Scotland) Act 1878 c51
1973 Act	Prescription and Limitation Act (Scotland) Act 1973 c52
1984 Act	Roads (Scotland) Act 1984 c54
Bankton	Andrew McDouall, Lord Bankton, *An Institute of the Law of Scotland in Civil Rights* (1751-53, reprinted The Stair Society, vols 41-43, 1993-95)
Bell's Dictionary	G Watson, *Bell's Dictionary and Digest of the Law of Scotland* (7th ed, 1890, reprinted Edinburgh Legal Education Trust, 2012)
Bell, *Principles*	George Joseph Bell, *Principles of the Law of Scotland* (4th ed, 1839, reprinted Edinburgh Legal Education Trust, 2010)
Craig (Clyde)	Thomas Craig of Riccarton, *Jus Feudale* (3rd edn, T Ruddiman and W Ruddiman (eds), 1732; trans. JA Clyde, Lord Clyde, 1934)

Craig (Dodd)	Thomas Craig of Riccarton, *Jus Feudale* (trans. and ed. L Dodd, The Stair Society, vol 64, 2017)
Cusine and Paisley	DJ Cusine and RRM Paisley, *Servitudes and Rights of Way* (1998)
Erskine	John Erskine of Carnock, *An Institute of the Law of Scotland* (1st edn, 1773, reprinted Edinburgh Legal Education Trust, 2014)
Ferguson, *Roads*	J Ferguson, *The Law of Roads, Streets and Rights of Way in Scotland* (1904)
Hume, *Lectures*	GCH Paton (ed), *Baron David Hume's Lectures 1786-1822* (The Stair Society, vols 5, 13, 15, 17-19, 1939-1958)
Johnston, *Prescription*	D Johnston, *Prescription and Limitation* (2nd edn, 2012)
Napier	M Napier, *Commentaries on the Law of Prescription in Scotland* (1854)
Rankine, *Landownership*	J Rankine, *The Law of Land-Ownership in Scotland* (4th edn, 1909)
Reid, *Property*	KGC Reid (with GL Gretton, AGM Duncan, WM Gordon and AJ Gamble), *The Law of Property in Scotland* (1996)
SLC	Scottish Law Commission
Stair	James Dalrymple, Viscount Stair, *The Institutions of the Law of Scotland* (6th edn, DM Walker (ed), 1981)

CHAPTER 1: INTRODUCTION

A. Context for research

The law in Scotland relating to "public" roads is a confusing interaction of statutory and common law rules, many aspects of which remain uncertain. One of the most important of these relates to the constitution of a right by which individuals may use a road due to their status as members of the public. For the purposes of this research, the focus is on roads that are "public" in the sense of being subject to the existence of a public right of use. This right is distinct from the right of private landowners to use roads on their own lands, sometimes called "private roads proper".[1] Certain individuals other than the landowner may also use private roads, such as family, friends and tenants. Other visitors may use these roads in their official capacity, such as postal workers[2]. However, the legal justification for their use can be traced back to their relation or dealings with the landowner. Public roads may also be contrasted with the use of roads based on a landowner's inherent right of access over the land of others[3] or, much more importantly in practice, the doctrine of servitudes. The latter includes specific servitudes of road (or way[4]) giving a landowner a right of passage through a neighbour's land, and rights of passage required to make other types of servitudes work. For example, it was common in the past for inhabitants of a certain area to have a servitude of fuel relating to a particular moss or muir.[5] This would allow them to obtain peat or similar to use for fuel. If their own residence was not immediately on the bounds of the moss or muir, inhabitants would require access in order to exercise their right. Public rights, on the other hand, require no right of property and may be used by any member of the public.

Whilst these categories seem distinct, it is not always easy to ascertain which applies when the legal nature of a road is under dispute. Historically, various legal

[1] Ferguson, *Roads*, p1.
[2] Rankine, *Landownership*, p331.
[3] See *Bowers v. Kennedy*, 2000 SC 555.
[4] The plain meaning of "way" and "road" is synonymous according to various dictionary definitions. The Oxford English Dictionary Online provides as one definition of "road", "a way, line or path…" and of "way", "a track, a road, a path". Similar synonymy can be found in the Dictionary of the Scots Language (www.dsl.com) in entries relating to the period both before and after 1700. Although "road" might suggest a way that is more suitable for cars, it is used sometimes to indicate footpaths e.g. *Rodgers v Harvie*, (1827) 5 S. 917 is about "a public footpath or footroad".
[5] E.g. Stair, 2.7.13.

developments blurred the lines between categories.[6] In addition, the language used to describe a particular road varies widely between different sources. Although "highway" often denotes a public road, sometimes it is used to describe a servitude road or to indicate a public road that is suitable for carts rather than a public foot or bridle path.[7] Indeed, technical terms remain unsettled and interpretative questions still arise before the courts.[8] What is clear is the existence of different types of public roads. It is less clear whether the legal requirements for the constitution of public rights over these various types of roads differed.

Discussions of public rights to use roads in modern Scottish legal texts focus on the concept of public rights of way.[9] While a wider range of roads that might be used by the public is recognised, other public roads are only mentioned briefly in order to distinguish these from public rights of way.[10] Given the breadth of property law covered in these works, it is not surprising that public roads are not discussed in detail. Cusine and Paisley provide some further detail in the more specialised text *Servitudes and Rights of Way*.[11] Their analysis includes a summary of similarities and differences between roads subject to public rights of way and other public roads. However, this discussion remains relatively brief. Various issues are raised and a lack of clarity on these is acknowledged.[12] Further lack of clarity is acknowledged in discussion on methods for the constitution of public rights of way.[13] This is an area of law that remains unsettled.

---

[6] "Servitudes" was sometimes used to describe public rights even though there was no dominant tenement, e.g. Erskine, 2.9.12, although Erskine appears reluctant to use the term. Cases talk about public roads in terms of being a type of servitude. E.g. Lord Campbell in *Galbreath v Armour*, (1845) 4 Bell's App 374, 380. However, later cases make the difference between public roads and servitudes clear. E.g. Lord Deas in *Thomson v Murdoch*, (1862) 24 D 975, at 982. Another debate related to the ownership of the *solum* of public roads, discussed further in chap 3.

[7] In *Baillie v Town of Lanark*, (1693) Mor 7254 the "high way" is a road that a landowner is obliged to give to the proprietors of a particular croft. Various sources equate "highway" with a road that is capable of being used by carts and other wheeled vehicles. E.g. the defender in *Fordell v Weymes*, (1672) 2 Bro Sup 706 argued that the road could not be a highway because it was not suitable for such traffic.

[8] E.g. *Hamilton v Dumfries and Galloway Council*, 2008 SC 197.

[9] Reid, *Property* (A G M Duncan), paras 495-513. WM Gordon, *Scottish Land Law* (2nd edn, 1999), chap 24.

[10] Reid, *Property* (A G M Duncan), para 495. WM Gordon, *Scottish Land Law* (2nd edn, 1999), para 27-06.

[11] Cusine and Paisley, chap 18.

[12] *Ibid*. E.g. paras 18.01 and 18.07.

[13] Cusine and Paisley, chap 19. E.g. para 19.04 acknowledges two different readings of a particular statutory provision which, on one reading, is thought to provide authority for a local authority to declare a public right of way.

Two earlier works provide more in-depth discussion. The first is the only Scottish monograph on roads, written by James Ferguson in 1904.[14] The second is a work dedicated to the law of land ownership by John Rankine, the fourth and final edition of which was published in 1909.[15] This includes some detailed chapters on restrictions on land-ownership, such as those resulting from the existence of public roads. Both Ferguson and Rankine separate the broader concept of public roads into 1) public highways managed by the public authorities and 2) "mere"[16] public rights of way which were not. Statutory provision placed certain duties on the local authorities regarding public rights of way at that time. For example, the Local Government (Scotland) Act 1894 required local planning authorities to keep these open and free from obstruction.[17] However, these duties were far less onerous than those relating to public highways.[18] This clarity of division is not usually found in the early sources.[19] It has been observed that "the origin of the right [to use public roads] the law is content to leave in obscurity".[20] Nonetheless, subsequent disputes illustrate this is an area that requires further clarity.[21] The necessity of research in this area of law is widely acknowledged.[22] The purpose of this research is to make a start by investigation of the early authorities in Scots law.

B. Dissertation in outline

Broadly, this dissertation provides the results of that investigation and what this reveals about the public right to use certain roads in Scotland. The investigation covers the period up to the Roads and Bridges (Scotland) Act 1878. This marks an important point of consolidation in statutory road law, and follows a period during

[14] Ferguson, *Roads.*
[15] Rankine, *Landownership.* The fourth edition of this work has been used for this research. Comparison with earlier editions found no particular amendments of note for present purposes.
[16] Ferguson, *Roads*, p105.
[17] The Countryside (Scotland) Act 1967 requires local planning authorities to "assert, protect and keep open and free from obstruction or encroachment any public right of way" in their area, s46(1). This replaced a provision of the Local Government (Scotland) Act 1894, similar in substance, see Cusine and Paisley, para 19.03.
[18] Early statutory provisions are discussed in chap 2. Modern legislation contains many provisions re: the management of public roads. E.g. the Roads (Scotland) Act 1984 requires road authorities to provide lighting and have regard for the needs of disabled and blind people: ss35 and 120.
[19] Cusine and Paisley para 18.02 note the difficulty of distinguishing these types of road in early times.
[20] *Rhins District v Cuninghame*, 1917 2 S.L.T. 169 at 171.
[21] E.g. *Hamilton v Dumfries and Galloway Council*, 2008 S.C. 197.
[22] E.g. in GL Gretton and AJM Steven, *Property, Trusts and Succession* (2017), the authors note "This whole area of law is under-researched and difficult", para 19.23.

which some important cases were taken to the House of Lords which resolved particular points of controversy under the common law.[23]

There are three primary sources of authority for this period. The first is the statutory provisions enacted by the Scottish Parliament prior to the Union of 1707[24] and the UK Parliament at Westminster thereafter. The second is the texts of the institutional writers.[25] The third is the reports of cases before the Court of Session and, after 1707, the House of Lords as well. But although public roads crop up in cases for a wide variety of reasons,[26] relatively few discuss the constitution of public rights.

In order to provide some context, the road law found in statutes is considered first. This does not reveal any general provisions for the constitution of public rights over roads. However, the Acts in question contain much material of interest. The texts of the institutional writers are considered next. The writers tend to portray a consistent concept of public roads, or "King's highway", governed by the series of statutes. These public roads are contrasted primarily with servitudes, such that roads are categorised as one or the other.[27] However, despite this seemingly clear distinction, further scrutiny reveals evidence of other roads that do not seem to fit neatly into these categories.

Finally, the case law is examined for the light it sheds on methods for establishing the existence of a public right to use a road. The focus is on two particular doctrines through which rights are acquired based on long periods of possession. These are

[23] E.g. *Harvie v Rogers*, (1828) III Bligh NS 440, 4 ER 1396 and *Galbreath v Armour*, (1845) 4 Bell's App 374.
[24] The database of these created by St Andrews University has been the primary source used for this research, www.rps.ac.uk.
[25] This research has focused on the writing of Craig, Stair, Bankton, Erskine, Hume and Bell. Where multiple editions were published, the last edition published in the writer's lifetime has generally been used. As Craig wrote in Latin, two translations are relied upon. Craig (Dodd) is the most recent translation of the first book of Craig's text, and is also presented as a new edition. Craig (Clyde) is an earlier translation of the third edition of all three books. The latter has often been criticised as being too free in its translation. Dodd addressed this by providing the literal meaning of the Latin used by Craig, or Craig's meaning in comprehensible English where the literal translation was nonsensical: see Craig (Dodd) p ix.
[26] Often roads were significant landmarks used to describe land boundaries, e.g. "Ratification in favour of Sir Henry Bruce…", APS vii 578-632 cc43-94, RPS 1669/10/107. Applications for the privilege of holding fairs were made to Parliament by landowners keen to take advantage of the economic opportunities presented by the proximity of a public road. E.g. "Act for a fair and weekly market to Alexander Morrison…", APS *v*ii 633-664 cc133-135, RPS 1669/10/152. Other petitions were made by landowners seeking exemption from taxes or aid from Parliament due to the excessive burden of quartering soldiers placed on the inhabitants of certain lands due to their proximity to a public highway: e.g. "Act in favour of [*Dame Marie Erskine*]…", RPS 1649/1/421.
[27] Craig (Clyde), 2.8.4 ("ways and paths"); Stair, 2.7.10; Bankton, 2.7.17; Erskine, 2.9.12.

the common law doctrine of immemorial possession, and statutory positive prescription. The number of reported cases increases significantly after 1800. For the purposes of this research investigation focused on key cases. Initially these were identified within later relevant legal texts, particularly those by Ferguson and Rankine discussed above.

CHAPTER 2: STATUTORY ROAD LAW

Today the main legislation that governs public roads in Scotland is the Roads (Scotland) Act 1984. This defines a road as "a way…over which there is a public right of passage".[28] Further, a "public road" is defined as a road that is managed by the public authorities, whereas a "private road" is any other road over which there is a public right of passage.[29] Intuitively, this does not seem to correspond with what might be considered a public or private road in the ordinary use of these words.[30] Neither does it correspond with the explanations found in the institutional texts.[31] The terms "way" and "public right of passage" are not defined. Issues of terminology are outwith the scope of this research. However, it is of interest that the Act contains provisions for the creation of new roads intended for use by the public,[32] although it does not explain how any new "right of passage" is established in these circumstances. Neither does it refer to any other enactment, such as that governing the acquisition of real rights through long possession.[33] It is unclear, within the terms of this statute, how any dispute relating to the public right to use a particular road would be settled.

Roads used by the public first became the specific subject of Acts of Parliament in the sixteenth century. Legislative provisions relating to public roads multiplied in later centuries. Use of roads increased due to a number of factors including population and economic growth, and developments in engineering and technology. Institutional writers who discussed public roads considered these to be governed primarily by statute.[34] Specific statutes were generally cited to support this, though the choice of statutes varied between writers.[35] The statutes in question can be collectively viewed as early statutory road law. Given the strong and consistent association of public

[28] 1984 Act, s151(1).
[29] *Ibid*.
[30] A similar point is made by Lord Reed in *Hamilton v Dumfries and Galloway Council*, 2009 SC 277, para 41.
[31] See chap 3.
[32] Sections 19(1) and 20(1) provide public authorities with the power to construct new roads, which become public roads within the terms of the Act. S7 also provides power for public authorities to construct special roads, which may be restricted to a particular type of traffic. By s21(1), any other person who wishes to construct a new road must obtain consent from the appropriate public authority. These do not necessarily become public roads.
[33] The Prescription and Limitation (Scotland) Act 1973. See chap 4.
[34] Stair, 2.7.10; Bankton, 1.3.5 and 2.7.21-26; Erskine, 1.4.14 and 2.9.12; Bell, Principles, §§ 661-663.
[35] *Ibid*. Reasons for this are suggested in chap 3. Though Craig (Dodd) 1.16.10 does not cite any specific statute he does note that "They are publicly built and repaired".

roads with statute it seems sensible to start an investigation of early Scots law with a consideration of the main Acts of Parliament.

A. Sixteenth-century burgh roads

The first relevant Act of general application is the Act of 1555 "Concerning the common passage in burghs".[36] This stated that all common highways that "have been in use in free burghs previously" for passage to or from those burghs were to be observed and kept, especially those from free "dry" burghs to adjacent ports and harbours. If anyone impeded or obstructed these passages they were to be punished for oppression.

A subsequent statute of 1592, "Concerning the streets and passages of burghs"[37] ratified the earlier Act, and enacted further provisions. It complained that many "malicious persons" had created impediments in the form of ditches and dykes across the "accustomed passage used of before in transporting of victuals, fuels, provisions, merchandise and others for the maintenance of the common negotiation of the country". This had caused the lieges to undertake diversions of up to two miles. The quality of roads at that time would have been extremely poor and it is easy to perceive the great difficulty caused by these diversions for the transportation of goods before wide-spread use of wheeled vehicles and other modern technology.[38] Given the form and scale of the named impediments,[39] it seems unlikely these occurred without the authority of relevant landowners. This illustrates a particular tension between the rights of the public who needed to use these roads and landowners who sought to protect their property. The Act ordained that no one should impede the public passage on the roads. Acts of oppression were to be dealt with summarily by the Lords of Council and Session. Inferior judges were discharged

[36] Act of 1555, APS ii 498 c27, RPS A1555/6/28.
[37] Act of 1592, APS iii 579 c78, RPS 1592/4/100.
[38] Vehicles were introduced to different areas at different times. Research suggests the arrival of heavy wagons in southern Scotland in the second half of the eighteenth century: see A Fenton "The Distribution of Carts and Wagons" in A Fenton and G Stell, *Loads and Roads in Scotland and Beyond* (1984), p125. In *Forbes v Forbes*, (1829) 7 S 441 carts were introduced to the area local to the controverted road at the end of the eighteenth century. This appears to have been in North-East Scotland somewhere in the vicinity of Forres from brief investigation of the parties' title to lands in Auchernach and Inverernan.
[39] Sufficiently significant to require legislation to address the matter.

from dealing with these actions either by way of oppression or by the alternative, lesser action of molestation.[40]

The Acts did not provide for the constitution of any new public rights, or new public roads. Instead they were enacted primarily to protect public rights that already existed in relation to particular roads. Actions relating to interference with the public use of these roads were expedited by the 1592 Act "because of their great importance".[41] Free burghs, which had relatively large populations, were centres for significant economic activity. Despite the Acts' titles, they concerned the main roads that connected burghs with the outside world, not roads within the burghs. These roads would have been the main arterial routes for communication on land.[42]

The Acts do not provide any further explanatory provision to assist in ascertaining whether a particular road fell within their remit. There is very little evidence of disputes as to the nature of particular roads in the earliest Scots authority, which suggests the vast majority of these roads would have been obvious. This might explain why those responsible for the Acts did not see any need to include further definition of the roads in question. Stair indeed said that public roads were "patent to all the lieges".[43] However, one interesting case from the sixteenth century included in *Morison's Dictionary* suggests that occasional disputes relating to major routes did occur.

Strang v Sandilands[44] was an action for it to be heard and seen that the defender had contravened an act of lawburrows.[45] The pursuers were the Laird of Balcaskie and Florence Strang, who was presumably one of the Laird's tenants. The act of lawburrows, entered previously in the books of Secret Council, obliged the defender not to "trouble or molest the pursuers in body or goods".[46] Two particular points in

[40] Molestation was the usual action pursued by parties being troubled in possession of real rights before the ordinary judges. See Stair, 1.9.28.
[41] Sir George Mackenzie of Rosehaugh, *Observations on the Acts of Parliament* (1687).
[42] Ferguson, *Roads*, p3. The majority of goods would be transported by water at this time, hence the concern with access to seaports, but the burghs would also require access to each other for important political and administrative communications.
[43] Stair, 2.7.10.
[44] *Strangs v Sandilands*, (1591) Mor 8024.
[45] Lawburrows was an early form of caution lodged with the courts. An individual could be required to give security against any future acts of violence towards the complainer, either to their person or their possessions. Contravention was an action which could be raised by the protected individual when the terms of the caution had been breached. See *Bell's Dictionary*, p642.
[46] *Strangs v Sandilands*, (1591) Mor 8024.

this case are of interest for the present research. First, the defender had allegedly contravened this act by blocking a road such that the pursuer could not transport corn through the lands of Abercromby. The road is described as a "high passage", which suggests it may have been an important route although this is unclear. The second point of interest is the reference to another action, which does not appear to have been reported. This was to resolve the "*right* of the said gate and passage", as opposed to simply addressing the blockage. The Laird of Balcaskie and Florence Strang were joined by the inhabitants of Pittenweem as pursuers in this second action. This illustrates a wide interest that appears more public in nature. This case must have been high-profile involving as it did two important landowners, the Laird of Balcaskie and the Laird of St Monace. It was of sufficient note to be cited by Stair.[47] Although the result of this second case is not known, it is interesting that it occurred in 1591. The issues involved in this case may have contributed to Parliament's decision to enact the second Act of 1592, strengthening protection of the public right to use the main arterial routes.

A handful of subsequent cases appealed to the authority of roads legislation to support claims to a public right to roads. In *Fordell v Weymes*,[48] the pursuer founded his claim to a highway "in law, viz. the 53d act Queen Mary, Parliament 1555, and act 156 in 1592: where all high ways and passages leading to sea-ports, &c. are commanded to be inviolably observed; and that none interrupt the Burghs or other lieges in their going or passing, under the pain of oppression". The controverted road led from the burgh of Innerkeything, which was situated on the coast, to the alleged port at Aberdour. The defender argued that the Acts were inapplicable for three reasons. First, the Acts only applied to inland burghs. Second, the Acts only applied to roads to public ports and there was no such port at Aberdour. Third, these Acts only applied to burgh roads that existed at the time the Acts came into force. So far as the report discloses, neither party expanded these arguments further. Neither were they addressed by the court, which made its decision on other grounds.[49] Therefore the appeal to these Acts does not seem to have had any effect. The Acts

[47] Stair, 1.9.30.
[48] *Fordell v Weymes*, (1672) 2 Bro Sup 706.
[49] Discussed in chap 4.

were cited by parties for similar reasons in other cases too but without success. [50] None of these cases appear to have involved major roads.[51]

B. Seventeenth-century statute-labour roads

The next set of statutes related to what later became known as "statute-labour roads"[52] and illustrates considerable concern with the quality of public roads.

In 1617 an Act ("the 1617 Justices Act") was passed "Regarding the justices for keeping of the king's majesty's peace and their constables".[53] Justices of the peace were persons appointed to keep the peace within certain districts,[54] their duties and powers being governed by statutory enactments such as this. The Act gave justices of the peace power to make orders for "mending of all highways to or from any market town or sea port" within their shire. If anyone refused to comply with these orders, the justices could punish them at their discretion.[55] The justices were also given power to punish anyone who blocked passages or created trouble for passengers "according to the quality of their offence".[56] The justices' jurisdiction over these roads appears to have co-existed with that of the Court of Session. Bankton observed that the express power introduced for justices to punish those blocking highways modified the 1592 Act, which had excluded the jurisdiction of ordinary judges.[57] The 1617 Act therefore strengthened protection of passage on these roads and introduced new statutory requirements for public authorities to maintain particular roads.

The Act appears to apply to roads that lead to or from "any" sea port, not just those adjacent to free burghs that lay inland. Although this might suggest a wider range of roads than was covered by the earlier Acts, it may simply have been an attempt to

[50] *Earl of Aberdeen v Forbes*, (1684) 3 Bro Sup 509 and *Duke of Roxburghe v Town of Dunbar*, (1713) Mor 10883.
[51] In *Fordell v Weymes*, (1672) 2 Bro Sup 706 and *Duke of Roxburghe v Town of Dunbar,* (1713) Mor 10883 only servitude rights were found. In *Earl of Aberdeen v Forbes*, (1684) 3 Bro Sup 509 the pursuer's lands were declared free of any highway or servitude.
[52] Ferguson, *Roads*, p3.
[53] Act of 1617, article 8, APS iv 535 c8, RPS 1617/5/22.
[54] *Bell's Dictionary*, p625.
[55] 1617 Justices Act, article 8. This also made provision for complaints to be heard by the Privy Council where punishment was considered too severe.
[56] There is an evocative example in William Forbes, *The Institutes of the Law of Scotland* (1722, reprinted Edinburgh Legal Education Trust, 2012) in "Of common Nusances", p615. This is the "throwing, casting or firing of Squibs, Serpents, Rockets, or other Fireworks, in, or into any publick street, Highway, Road or Passage".
[57] See Bankton, 2.7.26, although he refers to a later Act of 1661 that made similar provision.

refine the description of the roads Parliament intended to protect. Either way, the roads here appear to be main arterial routes used to transport the necessities for basic survival and wider economic activity. As with previous legislation, the 1617 Justices Act did not make provision for the constitution of any public right to use such roads.

One further type of road is explicitly acknowledged in the 1617 Justices Act. "All other ways from any town in the parish to parish churches" were to be maintained "the same".[58] In addition, if the justices found "any necessity of other ways" from town to church they were to inform the Privy Council who would provide direction.[59] This appears to be the first general statutory provision that recognised a need for new roads available for public use. The Act does not include any express provision on the constitution of rights to use these roads and the Privy Council's powers are not further explained.

There was no parallel provision in the Act for new roads to market towns and sea-ports, and it is improbable that any implicit power to constitute such roads would have been derived from the maintenance duties placed upon the justices. This suggests the existing network of roads already in place by the sixteenth century was generally sufficient to meet public needs at that time.

The 1617 Justices Act prescribed the breadth of roads to market towns as 20 feet at least.[60] If any were broader these were to be maintained "the same so to remain unaltered or changed". There is evidence in case reports that parties argued that a road of less than the prescribed width could not be a road the public could use.[61]

A further Act was passed in 1661, titled "Commission and instructions to the justices of peace and constables"[62] which repeated the provisions of the 1617 Act. An "Act for planting and enclosing of ground"[63] was also passed in the same year. Though not specifically a road law, it introduced a new provision relating to roads. Private

[58] 1617 Justices Act, article 8. This presumably meant the same state as they were in at the time of the Act.
[59] *Ibid*.
[60] 1617 Justices Act, article 8.
[61] E.g. the defender's duply in *Fordell v Weymes*, (1672) 2 Bro Sup 706 includes this argument, although he appears to have confused the provisions of the 1617 Justices Act with principles of Roman law, *octo pedes in porrectum et sexdecim in anfractum*.
[62] Act of 1661, APS vii 306 c338, RPS 1661/1/423.
[63] Act of 1661, APS vii 263 c284, RPS 1661/1/348.

landowners could apply to the justices and other ordinary judges[64] for authority to change the route of a highway that went through their land, provided it was not moved "above 200 ells upon their whole ground". In a case from 1747, the court was of the opinion that this provision was specific to public highways.[65]

In 1669 an "Act for repairing highways and bridges"[66] observed that the duties placed on the justices by earlier Acts had "proven ineffectual". This was blamed on the absence of any power to enforce the statute-labour requirements by warrants or otherwise. The Act sought to address that by broadening the responsibility on public authorities to maintain the roads and making further administrative provisions. Sheriffs were ordained to meet with the justices on the first Tuesday of May each year. At this meeting a majority was to "set down a particular list of the highways, bridges and ferries within their bounds". This is the first statutory requirement for an official record of public roads to be kept.

Under the 1669 Act the sheriffs and justices were to divide the highway repairs between the various parishes within their bounds to ensure an equal burden, appoint overseers and surveyors, and meet from time to time until the "survey list and division of the said highways is closed". The Act then detailed the process by which inhabitants were called and put to work on the roads.[67] As before, highways were to be 20 feet broad at least. They were also to be repaired so that "horses and carts may travel summer and winter".

If the route of a highway needed to be changed due to its condition, three justices were to be appointed to visit the relevant section and set out boundaries for its replacement. They were to estimate damages suffered by "parties prejudiced" who would receive satisfaction from the shire. This would presumably include owners and tenants of land over which the replacement section would run, whose ability to use the land would be restricted by it. Justices were to meet regularly in June and July for the next three years to monitor progress and impose fines on justices and overseers failing in their duties. Landowners had a particular responsibility to agree

[64] *Ibid*. "At the sight of the sheriffs, stewarts, lords of regalities, barons and justices of peace in their respective bounds".
[65] *Urie v Stewart*, (1747) Mor 14524. The court held the "highway" in the Act to be specifically the "King's highway".
[66] Act of 1669, APS vii 574 c37, RPS 1669/10/53.
[67] This included provisions as to equipment, wages, the number of days and when inhabitants must work, and penalties for absence.

among themselves the stents, or taxes, they would pay in order to raise additional funds for repairs where statute-labour alone was insufficient. Further provisions provided justices with powers to punish those who broke or abused the highways and to ensure any monies gifted[68] for work on highways were properly applied.

The Act conferred various responsibilities for oversight on the Privy Council. The convener of the justices was required to account for progress annually to the Privy Council, which would then provide authority to enable enforcement of the various penalties.[69] The Council was given power to authorise moderate customs[70] at bridges, causeways and ferries (forming parts of the highways) for their maintenance. The Council could also "take such course" as it considered expedient to ensure roads were repaired where justices and landowners failed in their duties, and appoint overseers for this purpose.

Finally, duties were placed on labourers of land beside the highways. The labourers were to fence the land on which they laboured with dyke and ditch or hedge, with the fencing placed such that it did not encroach on the prescribed breadth of road. They were to be fined by the justices for impediments such as rubbish and dung thrown on the highway next to their land, unless they could produce the real culprit.

A short Act of 1670, an "Act concerning highways",[71] modified the time of year at which statute work could be required. It also gave justices power to commute statute work for those liable who lived "at great distance" from the roads in exchange for a small sum of money. This was to be used to pay for workmen in their place.

These Acts, however, had only limited effect. In 1686 an "Act anent highways and bridges"[72] again ratified and approved earlier Acts. It further provided "for the more effectual prosecution of these acts" that the commissioners of supply in the shires were required to meet with the justices, and act in the same manner as the justices under the earlier Acts. Administrative detail followed regarding meetings, fines for absence and an increase in the number of days of labour. This further legislation,

[68] By way of mortifications or destinations.
[69] Letters of horning and poinding would be provided.
[70] There is evidence of earlier commissions set up by Parliament to consider such grants. E.g. a private Act of 1661 granted authority for a custom to be exacted at a bridge over the Fleet: APS vii 240-241 cc262-264, RPS 1661/1/328.
[71] Act of 1670, APS viii 18 c13, RPS 1670/7/19.
[72] Act of 1686, APS viii 590 c13, RPS 1686/4/28.

and the increase in public authorities with responsibility for the roads, suggests a system of governance that was far from being successful.

The final Act in this century, an "Act for repairing highways and filling up coal holes" in 1698,[73] not only ratified but "revived and renewed" all former Acts for repairing highways. It also required landowners to fill up or fence off coal holes and pits near roads to make them secure "from the hazard of either body or beast". Despite the increase in legislative oversight, it seems the state of public roads was still far from fit for purpose.

Although the seventeenth-century statutes were cited in some early cases, these relate primarily to the interpretation of statute-labour requirements[74] and the extent of the statutory powers of justices and other judges to change or close existing roads that had been used by the public.[75] They were not cited as authority in the few cases which disputed the existence of a public right to use particular roads.

As well as the various general Acts, numerous private Acts were passed by Parliament in relation to public roads during the seventeenth century. At that time landowners were being encouraged to enclose their lands for planting.[76] These landowners frequently applied to Parliament for permission to change the route of existing public roads where they crossed lands they planned to enclose.[77] Other landowners received similar permission due to the impact on their privacy of a public road near to their house.[78] Applications were also made by landowners to hold fairs and markets on their lands due to the proximity of a public road.[79] This suggests a significant level of traffic and illustrates the commercial activity that could be created by existence of these roads.

[73] RPS A1698/7/5.
[74] E.g. *Hamilton v Inhabitants of Kirkcaldy*, (1750) Mor 13159; *Arbuthnot v Justices of Kincardine*, (1754) Mor 13160.
[75] E.g. *Turner v Roxburgh*, (1749) Mor 7605; *Napier v Robison*, (1782) Mor 7624.
[76] Fn 63.
[77] Petitions to Parliament continued e.g. "Act in favour of Lord Basil Hamilton", RPS 1698/7/48. This involved changing the route of a highway more than the 200 ells of the 1661 Planting Act, fn 63.
[78] E.g. "Ratification in favour of John Malcolm", RPS 1645/7/24/90, allowed such a change, to reduce the hurt and noise experienced by a landowner and his tenants.
[79] E.g. APS vii 633-664 cc133-35, RPS 1669/10/152.

The right to collect tolls on particular roads was regularly granted by Parliament to burghs or landowners.[80] In exchange these conferred responsibility on the grantee for the maintenance of particular causeways and bridges. The sections maintained under these arrangements were parts of the public road network, supplementing the maintenance completed under the statute-labour Acts.

There are a couple of examples of Parliament providing authority for the constitution of new roads. However, the public nature of these roads is unclear. These are discussed alongside evidence of other roads below.[81]

C. Eighteenth-century turnpike roads

Evidently the combination of statute-labour and tolls proved insufficient for the efficient maintenance of roads. An innovation appeared at the start of the eighteenth century in the form of turnpike arrangements. Under these, tolls were collected from road users and applied to the maintenance of significant sections of road. These were managed by trustees appointed by special Acts, which also stipulated the duties and powers of the trustees. The first turnpike Act in Scotland was passed in 1713[82] though by mid-century this form of road management was still considered in its infancy.[83] Between 1750 and 1844, however, over 350 turnpike Acts were passed.[84] These took the form of public local Acts which were not routinely published until the end of the eighteenth century. These Acts were limited in duration and applied to particular sections of road within the existing network.[85] However, subsequent to the Union of 1707 further general public Acts relating to the roads of "that part of Great Britain called Scotland" were also passed. These show the statute-labour system and turnpike arrangements existing in parallel. Some were significantly longer than their predecessors[86] including detailed provisions on the

[80] Tolls were payments relating to the use of the road, not necessarily based upon the transport of goods. Mostly these were for maintenance of bridges, but some were particular to a stretch of road. E.g. RPS A1663/6/2 allowed a landowner to take payments for passage by carts and horses to maintain the highway from Corstorphine to Colbridge.
[81] See chap 3.
[82] Public Act, 13 Anne c30. Available from the Parliamentary Archives.
[83] Bankton, 2.7.25.
[84] Ferguson, *Roads*, p112; Cusine and Paisley, p716.
[85] *Ibid*.
[86] Two later Acts, 4 Geo IV c49 and 1 & 2 Will IV c43, each contain over 110 provisions.

public administration and repair of the roads and regulation of their use. Some of the most interesting provisions are discussed below. [87]

In 1718 “An Act for amending and making more effectual the Laws for repairing the Highways, Bridges and Ferries in that Part of Great Britain called Scotland” was passed.[88] It required “all laws and statutes in force” to be put into execution, though it also made some particular alterations and repeals relating to the statute-labour system.[89] Two points are of note. First, surveyors and overseers appointed by the justices or commissioners of supply were required to carry out surveys of roads allocated to them every six months, or sooner if required by the justices, to account for their condition and to carry out necessary repairs.[90] This illustrates an increasing requirement for official records of roads managed by public authorities. Second, any parts of the previous Acts relating to the Scottish Privy Council, which was abolished in 1708 after the Union, were no longer to be effective.[91] This would have included the provision relating to new ways from parish towns to churches.[92]

In 1758 “An Act for the better Preservation of the Turnpike Roads in that Part of Great Britain called Scotland”[93] addressed the degradation of roads due to “the great and excessive weights” of loads drawn by four or more horses or other draught animals. It imposed additional tolls on these loads and avoidance penalties, although various exceptions were also prescribed.

The last Act of the eighteenth century[94] in 1771 was “An Act for widening the Highways in that part of Great Britain called Scotland”.[95] This noted that highways were under the management of the justices of peace and commissioners of supply except turnpike roads made under special Acts. It referred to the provisions of the 1669 Act and again required highways to be widened to at least 20 feet. It also

[87] Ferguson, *Roads*, p110 suggests other Acts were applicable in Scotland. The Act 7 Geo II c9 required hedges by highways to be kept in order, the Act 26 Geo II c28 required pits made for road materials to be fenced off and the Act 27 Geo II c16 enacted penalties for drivers destroying turnpikes and other road property. These Acts were repealed before the end of the period under consideration.
[88] 5 Geo I c30.
[89] *Ibid*, s1.
[90] *Ibid*, s5.
[91] *Ibid*, s1
[92] 1617 Justice Act, Article 8. See discussion footnoted at 58-59.
[93] 32 Geo II c15.
[94] Although one further public general statute re: roads in Scotland was passed in 1772, it related to road traffic law, rules for those using the road, rather than the management or constitution of roads: see “An Act for the better Regulation of Carters…” 12 Geo III c45.
[95] 11 Geo III c53.

empowered the justices and commissioners of supply, or trustees or commissioners for turnpike roads, to widen roads further, up to a maximum of 30 feet excluding the bank and ditch on each side.[96] Full satisfaction was to be paid to "owners and lessees of lands, for so much ground as shall be taken" for this widening of the roads over and above the twenty foot, or present breadth where this was more.[97] The Act does not explain what is meant by ground "taken" and so it is unclear the impact this had on landowners' rights. Justices could also authorise the removal of fences, with damages payable to landowners.[98]

D. Nineteenth-century military roads and consolidation

Although numerous roads had been constructed in the Highlands for military purposes under the authority of military law,[99] these were not the subject of statutory intervention until the nineteenth century. Various Acts were then passed which authorised the expenditure of public money on the construction of these roads, appointed parliamentary commissioners to oversee this and regulated their management and maintenance.[100] The commissioners were to decide which roads should be made and erected after receiving advice from an appointed surveyor.[101] The roads in question appear to have been a combination of improvements to existing roads and the construction of new roads: the list of the roads to be "made" was to be sent to the Justices of counties "through which the said Roads, or any of them, *is or are intended* to pass".[102] Commissioners were able to "take ground" for the making of roads, against payment of compensation,[103] although as before the impact on landowners' rights is unclear. Although the military need for these roads eventually ceased to exist, their benefit to the public was acknowledged and the allocation of public funds for their repair continued.[104] The Acts do not explain the constitution of the public's right to use these roads at any point. Responsibility for

[96] *Ibid*, ss2-3.
[97] *Ibid*, s3 and s5.
[98] *Ibid*, s5.
[99] Ferguson, *Roads*, p116.
[100] 43 Geo III c80, 50 Geo III c43, 54 Geo III c104, 55 Geo III c121, 59 Geo III c135, 4 Geo IV c56, 5 Geo IV c38, 14 & 15 Vict c66 and 18 & 19 Vict c113.
[101] 43 Geo III c80 s2.
[102] *Ibid*.
[103] 43 Geo III c80 ss 9-12.
[104] 43 Geo III c80 s1 referred to "fisheries encouraged" and "industries of inhabitants promoted" by these roads. 54 Geo III c104 s1 noted the roads were no longer necessary for military communications, but ought to be maintained for other purposes.

funding repairs was shared with county authorities for a period[105] until the parliamentary commission was dissolved in 1862, after which responsibility for maintaining the roads was transferred to the commissioners of supply.[106]

Four general Acts were passed which led to significant change in the management of the wider public-road network at the end of the period under research.

In 1823 "An Act for regulating Turnpike Roads…"[107] repealed various earlier enactments as far as they related to turnpike roads.[108] This was an attempt to introduce "one uniform system…for regulating the management and maintenance of turnpike roads".[109] The provisions of this Act were to "extend" to other Acts of Parliament relating to turnpike roads which were either already in force or thereafter passed, except where the latter Acts provided express variations.[110] The trustees constituted under these other Acts were ascribed the powers contained in the 1823 Act for "making, widening, turning" etc turnpike roads in Scotland.[111] It made provision for many familiar issues such as the duties of the trustees and other officials, funds and materials for maintenance, and the regulation of tolls and vehicles using the road. While it did not provide any general authority for the creation of new roads, it provided road trustees with certain powers to acquire lands and buildings. As before, trustees could widen roads to twenty feet with landowners only receiving compensation for any fences changed to facilitate this.[112] In addition, trustees could widen a road to forty feet provided full satisfaction was paid to affected landowner for lands "taken" over twenty feet.[113] This suggests an inherent right to take twenty feet without compensation. Unlike earlier Acts, further detail was included on the processes involved. One provision made it lawful for trustees to "treat, contract and agree for" land and for landowners to "sell, feu, let and convey" their lands to trustees.[114] However, trustees were also "empowered to take and

[105] 50 Geo III c43.
[106] 25 & 26 Vict c105, ss3-5.
[107] 4 Geo IV c49.
[108] *Ibid*, s1. The Acts repealed were: Act of 1669, APS vii 574 c37, RPS 1669/10/53; Act of 1670, APS viii 18 c13, RPS 1670/7/19; Act of 1686, APS viii 590 c13, RPS 1686/4/28; 5 Geo I c30; 11 Geo III c53; and 12 Geo III c45. Each was discussed earlier.
[109] *Ibid*, s2.
[110] *Ibid*. This suggests the many local Acts, although this is not explicit. There are exceptions: see s3 and s114.
[111] *Ibid*, s2.
[112] *Ibid*, s56.
[113] *Ibid*, s57.
[114] *Ibid*, s58.

acquire" lands by the same provision, presumably when landowners refused to treat.[115] Indeed, the next provision prescribed a compulsory process to be followed when a landowner refused to treat.[116] The sheriff could adjudge the value of lands and amount of compensation to be paid.[117] However, the exact outcome of the compulsory process is unclear. Although trustees had "a right to take the said lands", what exactly could be taken was not explained.[118] It was provided that lands "shall become the property of the said trustees by the simple discharge of the agreed price or appraised value thereof", whereupon the trustees "may take and use the said lands…as if the respective proprietors thereof had executed in their favour regular dispositions of the same, and infeftments had followed thereon".[119] Although this might be taken to suggest the transfer of property without requiring the usual legal process, the meaning is unclear.

The 1823 Act was relatively short-lived. It was repealed, along with other enactments,[120] by "An Act for amending and making more effectual the Laws concerning Turnpike Roads in Scotland" in 1831.[121] It seems that the 1821 Act required amendment and that further regulation was needed.[122] Many of the provisions of the 1831 Act provide clarification on previous provisions.[123] Although the provisions regarding acquisition of property by the trustees were expressed differently in places, these remained substantively unchanged.[124]

These Acts left the exact impact on property rights of the widening of roads unclear. In *Waddell v Buchan*,[125] however, the courts were called on to interpret similar provisions made by a local Act. This provided that road trustees could take and use grounds for these roads "as fully and effectively ever thereafter as if the respective

[115] *Ibid*.
[116] *Ibid*, s59.
[117] *Ibid*.
[118] *Ibid*.
[119] *Ibid*, s62.
[120] 1 & 2 Will IV c43, s1. As well as those listed in fn 108, the Act of 1661, APS vii 263 c284, RPS 1661/1/348 (discussed above) was repealed as well as two further Acts one of which (APS viii 488 c49, RPS 1685/4/73) related to the application of penalties under a second planting Act to repair roads, and the other (33 Geo III c69) related to duties on the transport of coal.
[121] 1 & 2 Will IV c43.
[122] *Ibid*, s1.
[123] For example, the 1831 Act was explicitly to "extend" to local Acts of Parliament. *Ibid*, s2 and see fn 110.
[124] *Ibid*, ss61, 63-64 and 67.
[125] (1868) 6 M 690. This involved roads in the counties of Edinburgh and Linlithgow.

proprietors had executed regular dispositions of the same". This was construed as a right to take and use grounds for limited purposes only, i.e. the making and maintaining of the particular roads.[126] It was not held to imply the transfer of any absolute right to property. It seems likely the general Acts would be similarly construed.[127]

The statute-labour system continued under the authority of earlier Acts. An Act of 1845[128] acknowledged the need for uniformity in the system of road management,[129] and included justices within the definition of "trustees" of the roads.[130] Trustees were given the power to take material from private lands, provided satisfaction was paid to the landowner.[131] However, no provision was made for the acquisition of property similar to those of the turnpike Acts above.

The last Act to be considered is the Roads and Bridges (Scotland) Act 1878.[132] This consolidated the management of public roads into the hands of a single authority. County road trustees were prescribed, who would appoint a board to exercise the powers conferred by the Act.[133] This replaced the separate statute-labour, turnpike and other arrangements. Counties could decide whether to continue under the provisions of local Acts or adopt the 1878 Act during a transition period of five years.[134] After that, local Acts ceased to be in force. County road trustees were responsible for all roads that were "public" in the sense of being maintained at public expense.[135] These were defined as "highways" by the Act, the first statute to provide a formal definition.[136] All tolls, statute-labour and other payments for the upkeep of roads were abolished.[137] Instead, roads were to be maintained by assessments on lands and heritages within districts.[138] A list of highways was to be made up and

[126] See the comments of the Lord President (Inglis) at p697-98 and of Lord Deas at p700.
[127] Property rights are also considered in chap 3.
[128] 8 & 9 Vict c41: "An Act for amending the Laws concerning Highways [etc], and the making and maintaining thereof by Statute Service".
[129] *Ibid*, s1.
[130] *Ibid*, s2.
[131] *Ibid*, s18. Satisfaction covered the materials taken as well as surface damage incurred to surrounding private lands when conveying materials to roads for repairs.
[132] 41 & 42 Vict c51.
[133] *Ibid*, ss12-15.
[134] *Ibid*, s4.
[135] *Ibid*, s11.
[136] *Ibid*, s3. The full definition includes turnpike roads, statute-labour roads, Highland roads, public streets and roads within burghs.
[137] *Ibid*, s33. Other payments were causeway mails taken on certain stretches of road in burghs.
[138] *Ibid*, s52.

maintained by the board, which would comprise only roads that had been maintained out of public funds prior to the Act.[139]

The Act made specific provisions for the creation of new highways. First, subject to certain procedure and the relevant landowner's consent, the trustees could declare "any road or bridge" not previously maintained by public funds a highway within the meaning of the Act.[140] This would then be added to the board's list. The provision is wide and does not restrict roads to those which had previously been in use by the public. Second, and subject to approval of the trustees and consent of the district committee, the board might resolve to construct any new public road they considered requisite.[141] This is the first general provision for the construction of new public roads. Whilst it seems logical that roads maintained at the public expense would be available for general public use, cases before the courts illustrate this was not always the case.[142] The constitution or existence of public rights to use roads within the remit of the 1878 Act is unfortunately left unexplained. The continued lack of provisions dealing with this could suggest the common law was thought to be clear at that time. Alternatively it may have been considered an issue of insufficient significance to require a legislative solution. However, the rise in number of disputes brought before the courts suggests the issue was increasing in prevalence.[143]

E. Summary of the statutory road law

The earliest statutory road law describes roads in general terms as those between burghs and ports. Later, simply "road" or "highway" is used without further description. "Highway" is eventually defined in 1878 as a road managed by a public authority.[144] The lack of a more detailed description suggests these roads were generally obvious and that nothing more was considered necessary. This is supported at first by Stair, who said that public roads were "patent to all the lieges",[145] and by the lack of early court cases contesting rights to use such roads.

---

[139] *Ibid*, s41.
[140] *Ibid*, s42.
[141] *Ibid*, s58.
[142] E.g. *Wallace v Thornton,* (1875) 2 R 565. The road in question had been maintained at the public expense in respect of e.g. paving and lighting, but the court established that the public use was based upon the landowner's tolerance rather than a public right.
[143] Some of these are discussed in chap 4.
[144] Fns 135-136.
[145] Stair, 2.7.10.

This legislative review illustrates the significant increase in regulation of public roads over the period considered. The primary purpose appears to have been the facilitation and protection of an existing public right to use an existing network of roads. This was achieved by provisions relating to three broad areas. First, maintenance and repair of roads became the responsibility of particular public authorities to ensure they were fit for purpose and available for public use. Second, duties were placed upon adjoining landowners and labourers of that land to ensure that private property did not have an adverse impact on the road. Third, use of the road was regulated to prevent damage to the road itself and harm to members of the public using it. The need to balance the public rights with private property rights is also evident. For example, powers created for public authorities to take materials or use lands for road repairs were accompanied by provision of compensation for affected landowners.

The general Acts regulated a network of roads that was already in existence. The need for new roads was met by private or local Acts until the end of the period under review. However, the majority of “new” roads appear to have been replacement sections for existing routes which needed to be changed due to degradation or land policies, such as planting. The lack of any general provision for the constitution of new roads for public use before 1878 suggests the existing network was sufficient to meet the vast majority of public needs until that time – sufficient at least in terms of the routes and destinations these gave access to, if not the physical quality of the roads which was one of the primary concerns of the statutory provisions.

Although these Acts related to the public use of roads, they did not explain the constitution of public rights or make provision to help resolve disputes relating to these. It is therefore necessary to seek further explanation from alternative sources of authority.

CHAPTER 3: THE KING'S HIGHWAY AND OTHER ROADS

A. Introduction to the King's highway

The institutional writers refer to statute in their passages on public roads although the statutes chosen are usually not the same.[146] The passages in question are brief and the writers appear to have selected those Acts that provided the strongest support for the particular points they wish to make.[147] A consistent thread is that the early writers associate statutory public roads with "the King's highway".[148] Later writers simply use "road" or "highway",[149] but these are still strongly associated with the Crown.

Despite the writers' clear association with statutory roads, the phrase "The King's highway" does not appear in any of the early general public Acts relating to roads. However, it is in other Parliamentary records[150] and in case reports.[151] Although not employed in legislation, the legislative highway was treated as reference particularly to the King's highways by the courts in some cases.[152] The King's highway was sometimes referred to simply as "the ordinary road".[153] When the description of a route was included in sources referring to the King's highway, this generally accords with the notion of the main arterial routes for travel and transport.[154]

Another common feature of the institutional writings is the presentation of roads within two particular categories, either the King's highway, for public use, or private roads. Private roads included roads used by landowners for their own purposes on their own land as well as roads used by landowners over lands of another. The latter

[146] With the exception of Craig who does not refer to any statute.
[147] See sect B and C below.
[148] Craig (Dodd), 1.16.10; Stair, 2.7.10; Bankton, 2.3.108; Erskine, 2.9.12.
[149] Hume, Lectures, IV, 241; Bell*, Principles*, §§ 659 *et seq*. and 1010.
[150] Including proceedings of the lords auditors and private Acts, e.g. RPS 1483/10/45 and RPS 1648/3/162.
[151] E.g. *White v Wemyss*, (1700) Mor 10881.
[152] In both *Fardell v Wemyss*, (1673) Mor 10880 and *Earl of Aberdeen v Forbes*, (1684) 3 Bro Sup 509, parties cited statute to support their argument that a road was the "king's highway". In *Urie v Stewart*, (1747) Mor 14524, the court concluded that the reference to "highway" in the 1661 Planting Act meant the King's highway.
[153] Fn 154. Also RPS 1607/3/31.
[154] For example, in an Act "Regarding the King's Calsie at Cowiemonth", RPS A1630/7/58 the route went from "the north to the south parts of that our kingdom". In the "Act for a market to be kept at Fettercairn", APS viii 18-53, cc14-61, RPS 1670/7/39 the route went "between Edinburgh and Inverness".

were based on the doctrine of servitudes or free ish and entry.[155] This does not allow for any public right to use private roads or for public roads that were not part of the network that made up the King's highway.

However, further scrutiny of the institutional works and other sources suggests the distinction is not necessarily as neat as it first appears. Roads are sometimes contrasted with the King's highway without fitting into the categories of private roads presented by the writers. Reference to roads was often combined with words such as "public" or "common". Sometimes these terms appear to be interchangeable and without any particular technical meaning.[156] At other times they appear to distinguish different types of road available for public use. Evidence of other public roads that were not part of the King's highway is discussed further after consideration of the law presented by the institutional writers.[157]

An important point that arose in various cases before the courts related to the "property" of the King's highway. One view was that the physical road was public property as part of the patrimony of the Crown.[158] Another view considered the King's highway to be an incorporeal public right to use the road. It was this incorporeal right that was included in the patrimony of the Crown, the *solum* of the road belonging to the owner of the lands adjoining the road.[159] Some statements made by the institutional writers, discussed below, seem to support the first position. However, the House of Lords resolved this debate in the important case of *Galbreath v Armour*[160] in the mid-nineteenth century by upholding the latter view. Despite this decision, it took some time for this position to be fully understood and accepted. It seems likely that the interpretation of statements made by the institutional writers contributed to that delay.[161]

[155] A landowner's inherent right of access to his land: see *Bowers v. Kennedy*, 2000 SC 555.
[156] The 1592 Act, APS iii 579 c78, RPS 1592/4/100, contains reference to both public and common passages. In *Fordell v Weymes*, (1672) 2 Bro Sup 706, the Lords are reported as ordaining witness to be examined about the existence of "a common high way; and how long; and if not a public way, then…"
[157] See sect E below.
[158] E.g. the court's observation at first instance in *Duke of Roxburghe v Town of Dunbar*, (1713) Mor 10883.
[159] Argued by the reclaimer in *Duke of Roxburghe v Town of Dunbar*, (1713) Mor 10883.
[160] (1845) 4 Bell's App 374.
[161] E.g. Ferguson, *Roads*, pp5-6.

B. Craig and Stair

Before considering passages particular to public roads, it is helpful to understand a little of the contextual position of these within the institutional works. The earlier writers developed a division of "things", or rights over things, according to their inherent nature, the law by which they were governed or the uses to which they could be put.[162] This "division of things" followed a tradition established by the Roman legal writers.[163]

The details of the Roman version are open to interpretation and remain the subject of debate. For example, it is uncertain who owned things categorised as *res communes* or as *res publicae*.[164] It is open to argument whether things in these categories were considered *res nullius*, owned by no one, or as owned by the State. It is possible that some of the *res publicae* were the property of private individuals or corporations.[165] It is also uncertain whether the use of these things was open to everyone or restricted to Roman citizens, and the reason for the distinction between these separate categories remains unclear.[166] Both categories placed limits on rights of ownership over certain resources deemed necessary for the use of everyone.[167] As the focus was on public use, the question of ownership was less relevant. The public's right to use these things would exist regardless of the answer.

In writing within this Roman tradition the institutional writers provide insight as to the juridical nature of certain things, including public roads, and on the legal justification for these in Scots law.

(1) Craig

The earliest Scottish text to include an account of the division of things was Craig's *Jus Feudale*. It was first published in 1655, though it is thought it was written around 1600.[168] Craig categorises roads and highways as amongst public property, which is

[162] Craig (Dodd) provides a division of things in book 1, title 15. Stair provides an account of property that includes explanation of the various real rights at the start of book 2, title 1. Bankton provides a division of both things and rights in book 1, title 3 and book 2, title 1 respectively. Erskine provides a division of rights in book 2, title 1.
[163] A fuller account of the division of things is provided in J Robbie, *Private Water Rights* (2015), chap 2.
[164] *Ibid*, para 2-04.
[165] *Ibid*, para 2-05.
[166] *Ibid*, para 2-09.
[167] *Ibid*, para 2-13.
[168] See Craig (Dodd), pp xxxi-xxxii.

"the common property of all people or nations".[169] However, Craig also states that "Roads and highways, though also of public right, are nowadays also counted amongst the regalia and are considered to belong to the prince".[170] These statements are reconcilable if the use of the road and ownership of the physical property are treated as two separate things. Whilst the public right to use the roads was common property, and so belonged to everyone, the physical property belonged to the Crown. This is consistent with Craig's discussion of other things belonging to all men which immediately follows. The use of these is generally available to everyone, whereas explanations of ownership vary. Some are *res nullius,*[171] others are owned by the Crown[172] or by private individuals.[173]

Craig's main passage relating to public roads is in his chapter dealing with the King's right over feus and *regalia*.[174] For Craig, the concept of *regalia* appears to be more important than the category of public things and takes precedence when these overlap.[175] The *regalia* are "rights and incorporeals" counted among the royal patrimony.[176] Craig accepts the list enumerated in *Libri Feudorum* and discusses each in turn.[177] Not all of the things included in the regalia are available for use by the wider public.[178] Thus, status as *regalia* does not necessarily impute some inherent right of public use.

Craig explains that some of the *regalian* rights are inalienable and cannot be the subject of a grant by the Crown.[179] Others may be disponed to private individuals provided the sovereign's interest is not prejudiced.[180] It is unclear how this distinction applied to public roads. Possibly the sovereign's interest in the King's highway was the highway's availability for public use. Thus, on disponing the physical property of

[169] Craig (Dodd), 1.15.13.
[170] Craig (Dodd), 1.15.15.
[171] Craig (Dodd), 1.15.13 says it is impossible to prevent anyone from using air, which is incapable of sale or any kind of commercial dealing.
[172] Navigation on the sea belongs to everyone, though "ownership of it is nowadays believed to belong to those to whom the nearest territory belongs" i.e. the territorial monarchs: see 1.15.13.
[173] Although sea-ports are also *regalia*, "they are sometimes made the property of private individuals": see 1.15.15.
[174] Craig (Dodd), 1.16.
[175] J Robbie, Private Water Rights (2015), para 2-27.
[176] Craig (Dodd), 1.16.7.
[177] Craig (Dodd), 1.16.8.
[178] The list includes arsenals, the mint and various sources of income such as taxes and forfeitures: see 1.16.8.
[179] Craig (Dodd), 1.16.43-44.
[180] Craig (Dodd), 1.16.45.

the road to private landowners, the public right to use the roads could not be diminished. However, this is not explained.

Under “public ways” Craig indicates the public authority’s oversight of the roads, as they are “publicly built and repaired, and commissioners for the building of public roads used to be appointed”.[181] It is unclear what Craig meant by “publicly built”, whether this meant the original formation of a road for public use or simply a purpose built surface on a road already in use by the public. However, use of the past tense accords with the notion of an existing network of roads already in use by the sixteenth century. Although published in 1655, *Jus Feudale* was completed before the 1617 Justices Act was passed, which may explain the lack of statutory support for the public repair of roads.[182] In this passage, Craig states that “the *solum* of a public way is public or royal”.[183] Craig seems to have considered the original ownership of the physical roads to have been with the Crown, like the other *regalia*, whether the property of these was then alienable or not.

Although an ancillary right to pasture horses on the banks of the public way is discussed,[184] Craig does not explain the principal right to use roads. He notes the duty of the local magistrates to “keep these highways safe and secure from robbers, thieves, robbers, bandits and highwaymen”, but protection of passage under the Roads Acts is not mentioned. Craig contrasts public ways with private ways which “give access to [a] feu over the lands of others”.[185] However, other than the implicit suggestion that might be taken from this, that public ways to do not lead to private lands in the form of a feu, Craig does not stipulate any particular features required for a way to be considered public.

(2) Stair

In his *Institutions*, first published in 1681, Stair does not categorise things as such but rather deals with the development of rights to things over time. He starts with the real right of ‘commonty’, a right that everyone has to use certain things that cannot

[181] Craig (Dodd), 1.16.10.
[182] Fn 168.
[183] Craig (Dodd), 1.16.10.
[184] Craig (Dodd), 1.16.10 mentions that those who use the roads have the right to pasture horses and take grass.
[185] Craig (Clyde), 2.8.4.

be appropriated.[186] This is followed by an account of the appropriation of other types of thing, and the various real rights over these. Stair, like Craig, discusses the *regalia*, which are appropriated to "princes and states".[187] Unlike Craig, he rejects the authority of the *Libri Feudorum*.[188] Public roads are not included in the list of *regalia* by Stair and there is no indication he considered the *solum* of the highway to be the property of the Crown. Instead, Stair explains, "Of things appropriated there remains still the common use of ways and passages".[189] These are "necessarily required for the use of man; and therefore understood as an use reserved, both in their tacit consent to appropriation and in their custom".[190] Stair therefore provides two specific sources of authority for a public right to use certain roads, tacit consent and custom. This account provides an explanation of public rights to use ancient roads that existed, or were thought to have existed, when lands were originally appropriated into private ownership.[191]

In an important passage in his chapter on servitudes, Stair distinguishes between public and private ways, stating:

> "There is another distinction of ways amongst the Romans, and with us, in public and private ways. Public ways are these which are constitute for public use, and which go from one public place to another, as from one burgh to another, or from a burgh to a public port; this is called a highway, and by the Romans, an imperial or pretorian way, and with us, the King's highway; for preservation whereof, there are express statutes, Parl. 1555, cap. 53. [A.P.S. II, 498, c.27], Parl. 1592, c. 159. [A.P.S. III, 579, c.78] and this is patent to all the lieges, without respect to any land, yea and to all strangers having freedom of traffic."[192]

[186] Such as air and running water: see Stair, 2.1.5.
[187] The items Stair includes in the *regalia* are discussed in 2.3.60 *et seq*.
[188] Stair, 2.3.1 says the *Libri feudorum* has "great respect amongst lawyers", yet it is "but the observations of a private person" and not law.
[189] Stair, 2.1.5.
[190] *Ibid*.
[191] This passage is part of an account of the original development of heritable rights. Within this context the right of common ways appears to have been reserved during the original appropriation of things.
[192] Stair, 2.7.10.

In contrast, private ways are:

> "constitute by private parties, for private use, whereof both, or at least one end, is to a private place, and is a proper servitude to the use of that place for which it is constitute: so a way, the one end whereof is at a public place, may be a private way, if the other end thereof be from or for the use of a private place; as a way from a private place to a city or church, which doth not fall in to any public way; for in so far it remaineth private, and cannot be made use of, but for the behoof of the place or ground from which it comes…"[193]

Although several of the seventeenth-century Acts had been passed by the time the *Institutions* was published, Stair only cites the 1555 and 1592 Acts. Given the breadth of his work and the corresponding need for brevity, Stair may have only cited what he considered as the most important legislation.[194] His selection suggests a primary concern with the incorporeal right to use the roads. The physical state of the roads appears to be of less importance to Stair.

Given the lack of requirement for title to property ("without respect to any land"), the public ways appear to correspond with the use of ways "common to all"[195] described in the first passage mentioned earlier. However, in this second passage Stair appears to introduce two conditions necessary for a road to be considered public. First, the road must lead from one public place to another, such as a burgh to a public port. Second, it must have been "constitute for public use". This passage seems to suggest that if a road met the necessary conditions described, the public automatically had a right to use it.

The first condition finds support from statements made by other writers discussed below.[196] It also appears to have been widely accepted as evidenced by early case reports. In *Fordell v Weymes*,[197] for example, both parties acknowledged that, if a public port exists, the public must have right of passage to it by some means. The pursuer argued that the port in question was public in nature; the defender argued that it was not. However, although the courts ordered evidence to be taken as to the

[193] *Ibid*.
[194] The 1555 and 1592 Acts created powers for the Court of Session, relating to the serious offence of oppression. Later Acts created powers for the justices of the peace.
[195] Stair, 2.1.5.
[196] Bankton, 2.7.21; Erskine, 2.6.17.
[197] *Fordell v Weymes*, (1672) 2 Bro Sup 706.

public nature of the port, the case was decided on other grounds. In *Earl of Aberdeen v Forbes*[198] the defender alleged a road to be the King's highway on the basis that it led from one burgh to another, or to a sea-port. The Lords sustained the allegation and allowed proof. But the defender failed to produce evidence in time and therefore the point was, again, not addressed by the court. It is unclear from these cases whether having public places at either end would have been sufficient in itself to establish a public right to use the road or whether other conditions would also need to be met.

Of the writers, only Stair explicitly states the second condition, that public ways are those "constitute for public use". Unfortunately, Stair does not explain how a road could be constitute for public use. Neither is it clear who could constitute a road for public use. One possibility recalls Craig's statement that roads were once built by public commissioners.[199] This suggests public roads were made for public use by an appropriate public authority. However, Stair does not restrict the constitution to public authorities. It is possible a landowner could constitute a public road, by way of a grant, express or implied, and such an owner might be a private individual. This second condition is not easily discernible in early case reports. However, one nineteenth-century case deals with the particular passage by Stair.

In *Moncreiffe v Lord Provost of Perth and others*[200] the pursuer sought to establish that a road created under statute was a "proper public road". The pursuer owned lands adjoining the controverted road and sought access to the road for purposes unconnected with the harbour. The defenders, who together formed the Perth Harbour Commissioners, argued that the road was for harbour purposes only, that they were not bound to permit any party to use the road for purposes unconnected with the harbour, and so it was not a proper public road. The defenders had previously been given statutory powers to improve Perth harbour and its facilities. This included powers to erect new harbours and create new roads. Although the new road had been created under statute, the judges dealt with the question of public right to the road on the basis of the common law.[201] The decision was unanimous in

[198] *Earl of Aberdeen v Forbes*, (1684) 3 Bro Sup 509.
[199] Fn 181.
[200] (1842) 5 D 298.
[201] This is stated by the Lord President in his opinion, with which the other judges generally concurred.

favour of the pursuer. The pursuer had cited Stair's passage in support of his argument and it was also cited by two judges in the reasons for their decision.[202]

Whilst it was held that "a road from a burgh to its harbour was a proper public road", thus meeting the first of Stair's conditions, the second condition was not so directly addressed. The circumstances of the road's construction was noted by three of the judges. Lord Mackenzie considered that the statutory power was "just power to create a public road to the new harbour".[203] Lord Jeffrey remarked that "the defenders put down a public road".[204] Lord Fullerton noted the defenders had admitted they had constructed a road communicating between the harbour and town.[205] He considered this to be "the very definition of a public road, in the terms which have been read from Lord Stair."[206] Not only was the road from a public harbour to town, "The defenders were not private parties, or acting for private purposes. They were statutory commissioners acting for public purpose".[207] These remarks suggest the Lords had considered both conditions contained in Stair's passage. However, the Lord President (Boyle) did not mention creation of the road for the public *per se*. Rather he considered the "new" road as "just a prolongation of the road to the old port".[208] This associated the controverted section of road with one that had been used by the public in the past and was presumably (given Perth's status as a burgh) part of the existing network of public roads. The other judges concurred with the Lord President's statement. It is unclear how this question would have been settled, if there had been no connection with an existing road.

Stair's two conditions arise to varying extent in a number of other nineteenth-century cases, and these are discussed later, in the context of arguments that founded on long possession by the public.[209] Meeting these two conditions does not appear to have been conclusive in itself in determining whether the public had a right to use a public road or not.

---

[202] The Lord President and Lord Fullerton.
[203] *Ibid*, at 303.
[204] *Ibid*, at 304.
[205] *Ibid*, at 303.
[206] *Ibid*.
[207] *Ibid*.
[208] *Ibid*, at 302.
[209] Discussed in chap 4.

As noted above, Stair says ways are either public or private. Public ways are the King's highway, whereas private ways are servitudes. Earlier in his title on servitudes, Stair explains that servitudes are constituted by possession along with consent or prescription.[210] But he goes on to discuss a third option based on the doctrine of "immemorial possession".[211] He says that "a way to the kirk be due to all parties in the parish" and "the like would be sustained [on the basis of immemorial possession] for passage to market towns, or public ports, till there be access to a high-way". This suggests individuals had a right to go from private lands to public roads which led in turn to churches, towns and ports.[212] The particular example Stair provides is a court case which related to a servitude of way from a private house to the kirk.[213] However, the passage in question seems to suggest a broader right than that of a praedial servitude requiring title to land. Although many parties in a parish would be able to ascribe their use of roads to rights in land, such as landowners and tenants, or their family and servants, this becomes more tenuous for others. For example, parishes were required to take responsibility for the unemployed, poor and destitute in their area, and these parties would still have been expected to attend church. It seems likely that travellers and others not necessarily connected with the parish would also have been able to use these roads.[214] This passage suggests the existence of ways that might be available for public use, rather than a strict servitude, but without these having the full status of the King's highway. Evidence that supports this idea of a wider network of roads is discussed further below.[215]

From the focus of these passages it seems that Stair considers the right to use the ways of greater importance than notions of public ownership of the *solum* of the roads. But while Stair sheds more light on public rights over roads than Craig, he still does not provide a fully comprehensive explanation.

---

[210] Stair, 2.7.1.
[211] Stair, 2.7.2.
[212] This is supported by *Moncreiffe v Lord Provost of Perth and Others*, (1842) 5 D 298 in which the main issue was access to the road in question, although the decision was based upon its status as a public road rather than on immemorial possession.
[213] *Neilson v Sheriff of Galloway*, (1623) Mor 10880.
[214] This network of roads, broader than the main arterial routes, is alluded to in *Porteous v Allan*, (1769) 5 Bro Sup 598.
[215] Section E.

C. Later institutional writers

The relevant passages by Craig and Stair introduce concepts such as the *regalia* and the contrast between public and private ways. As these topics have already been considered in some detail, it is possible to cover the later writers more concisely.

(1) Bankton

Bankton's institutional text was first published in 1751. In his "Division and Quality of Things",[216] Bankton says that public things, including highways, "belong in property to the sovereign power of the nation, but whereof the use is common to those of that nation, and to others as members of the human society".[217] Like Craig, he includes public highways within the *regalia*[218] because of the importance of "free passage and commerce" through the country.[219] Bankton explains that the use and benefit of some *regalia*, including public highways, may be communicated to the subjects while the property remains in the Crown.[220] Unfortunately he does not expand upon this statement to explain the mechanism for communication of this right.

There is more on public roads in Bankton than in any other writer. For the most part this is found in his title on servitudes, in which he states[221] "ways are either private or public".[222] Private ways are servitudes leading to private grounds. Public roads are those "as lead to or from market-towns and sea-ports".[223] The remaining passages relate to statutory provisions for public supervision of the highways as to their maintenance and the protection of public passage.[224] Bankton makes the most reference to statute, citing both the sixteenth- and seventeenth-century roads Acts.[225]

---

[216] Bankton, 1. 3.
[217] Bankton, 1.3.4.
[218] Bankton, 2.3.108
[219] Bankton, 2.7.27.
[220] Bankton, 2.3.107-108.
[221] Bankton, 2. 7.
[222] Bankton, 2.7.17.
[223] Bankton, 2.7.21.
[224] Bankton, 2.7.21-26.
[225] Most of Bankton's passages on the subject of public roads include reference to road-related Acts: see 1.3.5, 2.7.21-23 and 2.7.26.

(2) Erskine

Erskine died in 1768 shortly before the first edition of his *Institute* was published in 1773 with the assistance of an editor. The editor added asterisked footnotes detailing relevant cases decided after Erskine's death. Otherwise the work was Erskine's own.

Erskine too includes highways within public things and the *regalia*. The property of public things belongs to the state in which they lie, and their use to "all the subjects or the members of the kingdom, and to those strangers to whom it allows trade".[226] However, certain *regalia*, including the King's highway, are "little capable of property, and are chiefly adapted to public use" and "the King's right in them is truly no more than a trust for the behoof of his people".[227] From these statements it is unclear whether Erskine considered the *solum* of the highways to be Crown property or not.

In a separate passage on the limits or restraints placed on rights of property by the law, Erskine includes an example of "a highway to be carried through the property of a private person" on grounds of "public necessity or utility".[228] In this case the person must be paid "the full equivalent" for "quitting" the grounds to be used.[229] However, it is only "such part of his grounds as is necessary for that purpose" that is required to be given up. It is unclear whether Erskine thought landowners were required to give up their right to the property entirely i.e. *a coelo usque ad centrum,* or whether the presence of the road simply limited their ability to use their land. The only authority Erskine provides for roads made on this basis is the "supreme power" as required by the "public police" i.e. Parliament and the regulations.[230] This recalls the various private and local Acts made by Parliament discussed elsewhere.[231]

Erskine also defines the King's highway by the places to which it leads, "one city, borough, public port or ferry, to another".[232] In his title on servitudes Erskine expressly mentions a "right of a public road, or King's highway".[233] However, he does

[226] Erskine, 2.1.5. The use of these public things is "exempt from commerce". This refers to the Roman concept of *res extra commercium*. Though the terms exact meaning is unclear, it is thought this meant property exempted from private law relations: see J Robbie, *Private Water Rights*, para 2-04.
[227] Erskine, 2.6.17.
[228] Erskine, 2.1.2.
[229] *Ibid*.
[230] *Ibid.*
[231] E.g. see fns 77-78 and 278.
[232] Erskine, 2.6.17.
[233] Erskine, 2.9.12.

not explain how such a right is constituted. While other writers contrast public ways with servitudes, Erskine suggests the distinction may be less clear. Whilst he agrees that public rights are "not properly a servitude", he says that "if they are to be considered as servitudes, they fall under that kind of them which get the name *legal*; for sundry statutes have been enacted for preserving highways".[234] The statutes to which Erskine refers were the most recent general roads Acts at his time of writing.[235] As demonstrated above, none of these statutes made provision for the constitution of public rights of use. However, Erskine's view that public roads could be considered legal servitudes suggests that these might come into existence by operation of the law. Taking Erskine's passages on public roads together, his justification for public use of the ancient network of roads seems to come from its inclusion within the *regalia* in ancient times, any subsequent changes or additions to that network requiring the authority of Parliament.

(3) Hume

Hume took a very different approach. His main work exists in the form of a manuscript which was the basis of his lectures to students in 1821-1822. This was published by an editor over a century later.[236]

The *regalia* are presented primarily as limitations on rights of private property,[237] and highways are dealt with in this context rather than being contrasted with private servitude roads. Hume says that the *regalia* generally are "the property of the King".[238] Those that were originally *res publicae* were considered so "either on account of their subservience to general use, or by reason of their natural condition, as refusing complete occupancy, or exclusive possession".[239] However, the *regalia* are not held "as absolute property"; rather the King has these in "the character of guardian for public uses" so he can protect them.[240] Further, Hume describes how

[234] *Ibid*.
[235] *Ibid*. He refers to Acts from 1669, 1670, 1686 and 1719. Although there are later Acts that could be categorised as general roads Acts applicable in Scotland, these relate to specific duties of adjoining landowners and obtaining materials for repair, or to turnpike roads. The editor has added an Act, 11 Geo III c53, which was passed after Erskine's death.
[236] GCH Paton (ed), *Baron David Hume's Lectures 1786-1822* (The Stair Society, vols 5, 13, 15, 17-19, 1939-1958), "Hume, *Lectures*"
[237] Hume, *Lectures*, IV, 237.
[238] *Ibid*, 238-9.
[239] *Ibid*.
[240] *Ibid*, 239.

"the heritors through whose lands [the highway] passes" do not have an exclusive interest in the soil between the ditches of the highway, "in as far as these may in any wise be conducive or subservient to the convenience of passage".[241] So the restriction on rights of property is only as far as is needed for the public right to use the highway. Although it is not entirely clear, this suggests it is the public right that Hume considered to be the property of the King, not the *solum* of the road.

(4) Bell

The final institutional text considered, Bell's *Principles of the Law of Scotland*, was first published in 1829. Bell was responsible for four editions, the last of which was published in 1839. In his title "Of public property in the sovereign, as trustee for the subject",[242] Bell says "Many things by law excepted from the ordinary rules of appropriation are reserved for the use of the public".[243] These are the *res publicae*, including public roads. Because "these are necessary for the public use and intercourse", they are "vested in the Crown in trust for the subject".[244] Although Bell explains ownership of other *regalia*,[245] it is not clear whether it is the *solum* of the road or the right to use it that is vested in the Crown. However, in his discussion on burgh streets, Bell says these are held by the magistrates under the Crown.[246] The roads cannot be appropriated by the magistrates for building or for letting out by feu.[247] He also notes that turnpike trustees have a statutory power to "purchase lands necessary for improving the roads".[248] This suggests it is the *solum* that Bell considered to be the property of the Crown.

The remainder of Bell's explanation of roads is primarily concerned with management. He cites the most recent general roads Acts in support of this discussion.[249] Bell is the first writer to make an explicit distinction between different types of public road, although only on the basis of the system for public management

---

[241] *Ibid*, 241.
[242] Bell, *Principles*, pt 2, ch 1, tit 1.
[243] Bell, *Principles*, § 638.
[244] *Ibid*.
[245] E.g. the Sovereign is proprietor of "seas within cannon-shot of the land" etc: see § 639. The shore is granted as part and pertinent with adjacent lands: § 642.
[246] Bell, *Principles*, § 660.
[247] *Ibid*.
[248] Bell, *Principles*, § 661.
[249] Bell, *Principles*, §§ 661 and 662. Bell cites 4 Geo IV c49 and 1 and 2 Will IV c43 re: turnpike roads, and 3 and 4 Will IV c 33 re: Highland Roads. He also refers to an Act, 1 and 2 Vict c118, making provision regarding the postal services.

of “Roads or Highways proper” and “Parish Roads”.[250] According to Bell the former are turnpike roads, the latter those that continue to be maintained under the statute-labour system.[251] Bell also mentions Highland roads, but simply refers the reader to a particular statutory enactment.[252]

Although Bell, like earlier writers, contrasts public roads with servitude roads, this comparison does not shed any particular light on the constitution of public rights to use roads.[253]

D. Summary of the institutional texts

It is not always clear whether the institutional writers thought it was the property of the road or the right to use it that was reserved for the public. This left open the question of ownership, and with it such matters as the right to mine for coal and other minerals[254] and control of utilities affecting roads, such as pipes laid underneath.[255] The view that the *solum* was publicly owned was sometimes employed by those seeking to persuade the court that a right to use a particular road existed, or not.[256] At one point the court in *Duke of Roxburghe v Town of Dunbar* observed that, on a road becoming public, somehow the property of that road was transferred from the existing owner to the state.[257] The debate as to who owned public roads was finally settled in a nineteenth-century case, *Galbreath v Armour*,[258] where the House of Lords held that the public right to highways was an incorporeal right to use the *solum* for the purpose of passage, the right of property in the *solum* remaining with the owner of the adjoining land. Of course, the owner of the land might be a public authority. Even so, a public right of use did not follow as a matter of course. For instance, the public are not automatically allowed to use roads on land

[250] Bell, *Principles*, §§ 661 and 663.
[251] *Ibid*.
[252] Bell, *Principles*, § 662; 3 and 4 Will IV c 33.
[253] Bell, *Principles*, §§ 659 and 1010.
[254] For example, it is acknowledged in the reclaimers’ argument in the early case of *Duke of Roxburghe v Town of Dunbar*, (1713) Mor 10883. It is discussed in cases before the House of Lords, e.g. Lord Campbell in *Galbreath v Armour*, (1845) 4 Bell’s App 374, at 380 and *Marquis of Breadalbane v McGregor*, (1848) 7 Bell’s App 43, at 60. It forms the substantive point at issue in *Waddell v Earl of Buchan*, (1868) 6 M 690.
[255] This was the substantive point at issue in the leading case of *Galbreath v Armour*, (1845) 4 Bell’s App 374.
[256] For example, this was used in the defender’s argument in *Fordell v Weymes*, (1672) 2 Bro Sup 706 to support the assertion that there was no public road on their land.
[257] (1713) Mor 10883. The court made this observation when advising at first instance.
[258] (1845) 4 Bell’s App 374.

occupied by military bases. Although the decision in *Galbreath* took some time to be fully accepted,[259] decisions relating to the existence of public rights to use roads were not usually founded on this point alone. The fact of ownership was not conclusive in itself. Rather, it seems to have been a contributing factor taken into account in cases decided on different grounds.[260] At all events, the writers are clear and consistent that, regardless as to who owned public roads, these were available for the general public to use.

Overall the writers discuss public roads as particular "things" that already existed when "things" generally were appropriated into private ownership. These roads were reserved from that appropriation due to their necessity for the public utility. For most writers, this reservation is justified by the feudal theory of the *regalia*.[261] Nonetheless, very few arguments appeal to their status as such in actions seeking to establish a public right to use roads. In *Marquess of Breadalbane v M'Gregor and Others*[262] the suspender acknowledged that "Highways are no doubt public rights, and are *inter regalia*", citing various writers in support of this. In this case the nature of the highway was not in dispute and so the point was not taken up by the court. In two nineteenth-century cases, Lord Curriehill acknowledged the public roads as *inter regalia.*[263] However, as modern writers point out, explanations of the *regalia* are complex and the exact meaning of *regalia* remains unclear.[264] Theories of *regalia* do not appear to have formed the foundation for any decisions by the court.

The original division of things, a mythical event from some unknown past, did not fix for all time the number and routes of public roads in Scotland. On the contrary, the

[259] E.g. in *Torrie v Duke of Athol*, (1849) 12 D 328, Lord Mackenzie said that "Our law holds that the public roads are the property of the Crown. That doctrine has been a little disturbed in one case by the House of Lords; but still the right existed at one time." See discussion in Ferguson, *Roads*, pp5-6.
[260] In *Duke of Roxburghe v Town of Dunbar*, (1713) Mor 10883 the court held that "in highways through a private subject's ground, the Crown acquires the property of the road". This was the reason for prescription being necessary to establish such a right. In *Forbes v Forbes*, (1829) 7 S 441, Lord Glenlee considered that "the soil occupied by a public road belongs to the public". However, the right to use the road was proven on the basis of long possession by the public. Lord Glenlee's comment was addressed in *Galbreath v Armour,* (1845) 4 Bell's App 374. Lord Campbell emphasised Lord Glenlee's following remark, that the public "may make such use of it as may be necessary for the purposes of the public", at 381. This, it was explained, showed Lord Glenlee had considered the soil of the road only public insofar as it was subject to the right to use the road.
[261] All except Stair.
[262] (1846) 9 D 210.
[263] *Thomson v Murdoch*, (1862) 24 D 975; *Waddell v Earl of Buchan*, (1868) 6 M 690.
[264] Cusine and Paisley, para 18.07.

court's observation in *Duke of Roxburghe v Town of Dunbar*[265] above suggested roads might become available for public use at a later date. Some of the writers, acknowledging the need for new roads, suggest legal rules to explain how these occurred. Sometimes the roads in question appear to be new sections required for an existing road rather than a wholly new road. For example, a route might need to be changed due to effects of weather or for the purposes of improving the general quality of the road.[266] Erskine, however, talks of new public roads without seeming to make any explicit connection to existing roads.[267] He considers this a matter of public policy, under the authority of Parliament, which could justify the creation of brand-new roads for public use, as well as changes to existing roads. None of this, however, explains how the public right to use such roads arose.

Stair, Bankton and Erskine all state that public roads lead to burghs or market-towns or ports or ferries, which suggests they saw this as a defining requirement. The other writers are silent on this point. Stair also states that public roads are those constituted for public use, suggesting that he saw this as a second requirement. This is not mentioned by any of the other writers, although there is possible support from Craig and Erskine.[268] To some extent, Stair's two conditions were acknowledged by the courts. However, there is no evidence to suggest these were conclusive in themselves. Rather, they were relevant for the purpose of establishing a public right to use a road on the basis of long possession.[269] Stair himself mentions a public right to access public roads on the basis of immemorial possession, via roads that did not form part of the King's highway. Evidence for these other roads is discussed next.

E. Evidence of other types of public road

Certain roads are mentioned in early sources which appear to have an element of public use. However, the use can usually be ascribed either to a servitude right or to the user's relationship with the landowner. For example, one private Act grants

[265] (1713) Mor 10883: see fn 257.
[266] Bankton, 2.7.21; Erskine, 2.1.2.
[267] Erskine, 2.1.2.
[268] Craig, in respect that they were "publicly built", fn 181; Erskine in respect that new highways required Parliamentary authority, fn 230.
[269] Chap 4.

authority to “make roads and routes” for access to mines, houses, mills and fire works, all of which would have been in private ownership.[270]

Despite the specific provision found in the 1617 Justices Act, kirk-roads were also regarded as servitudes in early cases. It is usually clear that the person claiming the right to a kirk road is proprietor of a dominant tenement.[271] However, sometimes the facts suggest a wider, quasi-public interest. In *Bruce v Wardlaw*[272] the pursuers included two heritors, their families and tenants plus other parishioners “residing in the north and east parts of the parish”. This suggests the convergence of various routes onto one road at or before the point at which it reached the defender’s lands. Possibly the courts considered each road to be an individual servitude. Alternatively they may have applied the law of servitudes by analogy. In any case, statutory road law was not discussed and the road does not appear to have been treated as “public” despite the wider interest. This case may have been influenced by the earlier decision in *Urie v Stewart*[273] where the court held that kirk-roads were not part of the King’s highway, and so were not “public” in that sense.[274] However, this case had only one pursuer and so seems to be more clearly a servitude case.

There is evidence of roads that were available for wider public use and were not dealt with as servitudes. These were contrasted with the King’s highway. In one case from 1662 a petition was submitted to Parliament by the owner of lands located near Cramond Bridge in the environs of Edinburgh.[275] Crossing the river was necessary to get from Edinburgh to the Queen’s Ferry, an important crossing point over the Firth of Forth. The high volume of traffic seems to have caused degradation of the roads and a slow passage over the bridge, contributing to the circumstances complained of in the petition. As a result, many people did not make use of the bridge, or the road leading to it from Edinburgh. Instead they landed by boat at the coble of Cramond by the sea,[276] before making use of a way through the petitioner’s lands to get to the ferry.[277] The petitioner asked Parliament for permission to close up this way. The

[270] “Ratification in favour of Sir Thomas Hamilton of Binning…”, RPS 1607/3/40.
[271] E.g. the road in *Neilson v Sheriff of Galloway*, (1623) Mor 10880 was from the pursuer’s “own house to the church”.
[272] (1748) Mor 14525.
[273] (1747) Mor 14524.
[274] So these roads could not be cast about by the power conferred by the 1661 Planting Act.
[275] See fn 278.
[276] Coble was another name for a ferry.
[277] The route is described in the second Cramond Act, see fn 278.

public would then have to use the Edinburgh road unless a suitable alternative could be found from the coble.

The petition resulted in two private Acts of Parliament, the first including the original petition.[278] The petitioner argued that the way in question was a "private way", not a "public highway" and there were "other conveniences and passages of ways" nearby. He asked for permission to stop the way so passengers could either go to the "ordinary highway" (the second Act calls this "the King's highway") or "some other way may be found". Parliament set up a commission to consider the situation. If they could "find the conveniency of another way" they were to "appoint the same for the passage of travellers" and stop the existing way so it was "no longer a common passage". The determination of this commission was to be recorded in the books of Parliament and have the full strength and authority of an Act of Parliament. The second Act recorded the commission's determination. A new way was found as "the only common way and passage for travellers" from the coble to the South Queensferry and the original way was to be stopped.

The language used suggests the existence of roads for public use that were not part of "the King's highway", or "the ordinary way". However, it does not go so far as to suggest a new public right to use a road has been created. Rather, the way found to be convenient by the commission was appointed as "the only" common way from that point. This suggests ways might be used lawfully by the wider public without holding the full status of "public ways".

In addition, if it was a private road with no public or servitude rights over it the landowner could stop it up as he chose. The petitioner described the road as "being *only at first* for the private use" of previous landowners.[279] This suggests he considered other rights to the road to have arisen subsequently. If servitude rights existed this would have been purely a private matter for the ordinary courts. By lodging the petition with Parliament, the landowner further acknowledged the existence of a public right to use the road. There is nothing in the petition to explain

[278] Act for changing the way between the south ferry and Cramond, APS vii 391-401 cc39-49, RPS 1662/5/59; Act for the highway between south ferry and Cramond, RPS 1662/5/127.
[279] APS vii 391-401 cc39-49, RPS 1662/5/59.

the constitution of this right other than the implication this may have been on the basis of the public use described.

Although this case does not necessarily relate to the constitution of new rights it provides interesting insight into the procedure followed by Parliament in relation to public roads. Similar procedure was followed in many cases concerning changes to public roads, although these were usually more clearly the King's highway.[280] Possibly Parliament had a similar procedure in mind when enacting the provision regarding Privy Council direction for new ways to churches in the 1617 and 1661 Justices Acts, discussed above.[281] However, there appears to be no Parliamentary record of such directions and so it remains conjectural.

Common ways in other sources appear to indicate roads that were used by landowners based upon their inherent right of access to lands.[282] As stated at the outset, the terms often hold no technical meaning and might be interchangeable. These concepts often appear to be contrasted with each other without any comprehensive explanation of the rights involved or differences between them.

The case of *Porteous v Allan*[283] provides clearer evidence of different types of public road. The report opens with: "Besides the public and private roads for the use of travellers through Scotland, there are other roads, called cattle or drove roads, which have received the sanction of the Supreme Court". This suggests that both "public" and "private" roads can be used by the public. However, the difference between these roads is not explained. Possibly "public" in this context means those roads thought to be owned by the Crown, or protected and maintained under statute by the public authorities. The "private" roads might suggest a potential starting point for further developments leading to the future concept of "public rights of way". However, there is insufficient evidence to make a strong case for this from the

[280] E.g. RPS A1663/6/25 and APS viii 591, c15, RPS 1686/4/31. Parliament appointed commissions to investigate.
[281] Fns 58-59.
[282] E.g. *Poufoulis v Rashiehill*, (1714) Mor 9342, a case about sea-greens, also mentions a clause that includes the right to use common passages as part and pertinent to lands owned by the defenders who were heritors of neighbouring lands.
[283] *Porteous v Allan*, (1769) 5 Bro Sup 598.

evidence available from that time. The concept of public rights of way does not appear in sources of Scots law until the nineteenth century.[284]

The pursuers in *Porteous* laid successful claim to a right to a third type of road, a drove road. Drove roads were roads used to get cattle, sheep and other beasts to markets some distance from the lands in which they were reared. It seems clear from the opening statement of the report that these roads were not part of the King's highway.[285] Although this is categorised as a servitude case in *Morison's Dictionary*, the road in question does not neatly fit that category either. The multiple pursuers suggest a wider interest, more public than private in nature. In total there appear to have been eighteen pursuers from various parishes.[286] This does not necessarily preclude the right of use being rationalised as multiple servitude rights rather than a public right. However, another fact is particularly significant: the road stretched for many miles, whereas a servitude right must meet the requirement of *vicinitas*.[287] Although *vicinitas* is open to definition, *Porteous* seems to stretch this considerably as the road led from various parishes to get to a market in Kilbride over 15 miles away. In addition, other tenements would exist between the parishes at the start and the market at the end, through which the drove road would pass. It is not clear how a servitude right would justify the right to traverse these other lands. The subsequent case of *Campbells v Campbells* illustrates similar facts.[288] The drove roads appear to have been categorised as public roads by later writers, though they do not appear to have been called "public" at that time.[289]

Although a wider range of roads appeared to be recognised in Scots law, there was no clear taxonomy and terms remained unfixed. The network of roads that existed in fact did not fit neatly into the divisions presented by the institutional writers. There does not appear to have been any definition of a "public road" or a clear explanation

[284] There are two occurrences of "rights of way" in the Records of the Parliament of Scotland: see RPS 1645/7/24/87 and RPS 1662/5/127; but these, respectively, are in a title and note added later. On Westlaw, the first Scottish case to refer to a "right of way" refers to a private right agreed between adjoining landowners in 1824: see *Westerna v Duke of Hamilton*, (1824) 3 S 24. Shortly after this the phrase was used with regard to public rights. It is used in reports of the important case *Rodgers v Harvie*, (1827) 5 S 917, discussed further below.
[285] "*Besides* the public and private roads…" i.e. a third type was identified.
[286] A later report detailing a reclaiming action clarifies the number of pursuers: see *Porteous v Allan*, (1773) Mor 14512.
[287] Cusine and Paisley, para 2.52.
[288] (1777) 5 Bro Sup 599. In this case cattle dealers asserted a right to a road used by drovers to bring cattle from the Western Isles to lands on the Cowal peninsula, located on the western mainland.
[289] Ferguson, *Roads*, p2.

of which roads the public could use. In all likelihood this was probably because the vast majority of roads that were available to the public were both historic and obvious, and so disputes did not arise very often. However, when disputes did occur, the type of road does not seem to have provided the answer. Rather, the courts looked to the history of possession of the road for the solution.

CHAPTER 4: ACQUISITION OF PUBLIC RIGHTS THROUGH POSSESSION

Brief consideration of the current law provides useful context before turning to earlier sources. The process leading to the current legislation evidences a widely held understanding of the law relating to the constitution of public rights of way. This does not appear to accord with the position gleaned from the few early sources that touch on this.

A. The modern Scots law of positive prescription

The acquisition of rights through long possession or use is governed by the Prescription and Limitation (Scotland) Act 1973. It provides for the establishment of "title to interest in land and of positive servitudes and of public rights of way" by way of positive prescription.[290] The provision relating specifically to public rights of way is found in s3(3) and is as follows:

> "If a public right of way over land has been possessed by the public for a continuous period of twenty years openly, peaceably and without judicial interruption, then, as from the expiration of that period, the existence of the right of way as so possessed shall be exempt from challenge."

The Act leaves the definition of certain elements of the law unanswered. For example, what is a "public right of way" and how does this relate to the "public right of passage" in the Roads (Scotland) Act 1984 discussed above?[291] Exactly how do the public "possess" a right of way? Certain rules have been developed by the courts to deal with some of these issues. Others, including the overall coherence of terminology, require further work. For present purposes there are two important points to note. First, s3(3) protects the existence of a right in the public to use roads, if the required possession can be established. Second, unlike servitudes and ownership of land, title to property is not required to establish a public right of way.[292]

[290] See the preamble to the Act.
[291] See chap 2.
[292] For prescription of title to land a deed is required: ss1 and 2. Only the proprietor of a dominant tenement may establish a servitude through positive prescription. Therefore, although this does not necessarily require an explicit title for the servitude, the party must have title to the dominant tenement receiving praedial benefit from that servitude. For more on servitudes see Cusine and Paisley.

The 1973 Act is the result of work carried out by the Scottish Law Commission ("the SLC") as part of its first programme of reform.[293] The work undertaken is summarised in a memorandum that outlined the findings of a consultation exercise,[294] and a subsequent report which made recommendations to Parliament.[295] These summarised the law prior to the enactment of the 1973 Act. In brief, prescription of heritable property *must* be based upon recorded title followed by possession for the prescriptive period[296] and servitudes *may* be constituted by express grant with similar possession.[297] In these two circumstances the prescriptive possession would operate to cure any defects in title or grant respectively. Servitudes *may* also be created by exercise of the right during the prescriptive period without any antecedent grant.[298] Finally, rights of way and other public rights *are also* created by use for the prescriptive period. The lack of consultation responses specific to these points suggests their general acceptance.[299] Whether this meant that statutory positive prescription was the only method for constitution of such public rights prior the 1973 Act is unclear.[300]

The report introduced positive prescription by stating that: "In the case of servitudes and rights of way, it operates either to create the right or to make good a defect in the grant of a right".[301] This acknowledged that a public right of way might be constituted by grant too. However, the substantive content made no further mention of this.

Two of the SLC's recommendations significantly changed the law of positive prescription affecting public rights of way.[302] First, the prescriptive period was

---

[293] Johnston, *Prescription*, para 1.09.
[294] Scottish Law Commission, *Consultative Memorandum No 9: Prescription and Limitation of Actions* (1969) ("Memorandum"), available online at https://www.scotlawcom.gov.uk/files/6113/1221/2684/cm09.pdf.
[295] Scottish Law Commission, *Report No. 15: Reform of the Law Relating to Prescription and Limitation of Actions* (1970) ("Report"), available online at https://www.scotlawcom.gov.uk/files/5012/7989/7430/rep15.pdf.
[296] See Memorandum, para 14(1) and Report, para 11(1).
[297] Memorandum, para 15(1) and Report, para 12(1).
[298] This grant would be of the servitude. The person basing a claim on a servitude would still require title to the dominant tenement.
[299] Consultation participants are listed in Appendix A to the Report. They include a wide range of representatives from public authorities, the legal profession, and academics. The Scottish Rights of Way Society Ltd is included in that list.
[300] Presumably this was purely discussing civil law methods, rather than suggesting the legislature would not be able to constitute such public rights through statutory enactments.
[301] Report, para 9.
[302] The recommendations are contained in para 19 of the Report.

reduced from 40 years to 20 years.[303] Second, previous defences that extended the prescriptive period were abolished.[304] The remainder of the law of positive prescription relating to public rights of way was substantially unchanged.[305] The SLC considered that "for all practical purposes the law of positive prescription relating to heritage" was entirely statutory.[306] This is supported by other writers. Johnston stated "the history of prescription in Scots law is a history of statutes".[307] However, the SLC also acknowledged "traces of a common law doctrine of prescription" without providing further explanation.[308] On closer inspection, the relationship between the 1973 Act's statutory predecessors and public rights of way is not clear.

B. Statutory prescription in early Scots law

The main legislation on prescription prior to 1973 was an Act of 1617, "Regarding prescription of heritable rights" ("the 1617 Prescription Act").[309] Despite the general view that prescription of heritable rights was unknown in the law of Scotland before this Act, there is evidence of statutory provisions that performed similar functions. [310] However, these earlier provisions related specifically to landownership and annual-rents. By contrast, the 1617 Act extended to "lands, baronies, annualrents *and other heritage*".[311]

The first relevant provision of the 1617 Prescription Act is as follows:

> "And his majesty, according to his fatherly care which his majesty has to ease and remove the grievances of his subjects, being willing to cut off all occasions of pleas and to put them in certainty of their heritage in all time coming, therefore his majesty, with advice and consent of the estates of parliament, by the tenor of this present act, statutes, finds and declares that

[303] Enacted in s3(3) of the 1973 Act.
[304] These were exceptions to the running of the prescriptive period based on periods during which the party against whom prescription ran was held to be legal incapacitated.
[305] Johnston, *Prescription*, para 1.06 ("to a great extent, the Act simply restates the broad principle which applied to positive prescription in the past").
[306] SLC Report, para 10.
[307] Johnston, *Prescription*, para 1.24.
[308] SLC Report, para 10.
[309] Act of 1617, APS iv 543 c12, RPS 1617/5/26. Although the Conveyancing (Scotland) Acts of 1874 and 1924 made certain amendments, these expressly excluded servitudes, public rights of way and other public rights: see Johnston, *Prescription*, para 19.01.
[310] CM Campbell, *Positive Prescription of Landownership in Scots Law*, PhD thesis, University of Edinburgh (2014), chap 3; ASS Peterson, *The Positive Prescription of Servitudes in Scots Law*, PhD thesis, University of Edinburgh (2016), chap 2, intro.
[311] Act of 1617, APS iv 543 c12, RPS 1617/5/26.

> whatsoever his majesty's lieges, their predecessors and authors have possessed heretofore, or shall happen to possess in time coming by themselves, their tenants and others having their rights, their lands, baronies, annualrents and other heritage by virtue of their heritable infeftments made to them by his majesty, or others their superiors and authors for the space of 40 years, continuously and together following and ensuing the date of their said infeftments, and that peaceably without any lawful interruption made to them therein during the said space of 40 years, that such persons, their heirs and successors shall never be troubled, pursued nor deprived in the heritable right and property of their said lands and heritages foresaid by his majesty or others their superiors and authors, their heirs and successors, nor by any other person pretending right to the same by virtue of prior infeftments, public[312] or private, nor upon no other ground, reason or argument competent of law, except for falsehood"

Thus, it provided that in order to obtain certainty of title to heritable property, forty years possession was required after becoming infeft in that property.[313] The possession must have been continuous and peaceable without lawful interruption.

Unlike the 1973 Act, there is no mention of servitudes and public rights of way. According to Lord Kames, the 1617 Act was passed to secure property after long possession against competing claims of title that could become difficult to defend due to the loss of ancient title deeds.[314] However, the drafting of the above provision extends the 1617 Act to "other heritage".

A second provision immediately following the first introduced a further requirement:

> "providing they be able to show and produce a charter of the said lands and others foresaid granted to them or their predecessors by their said superiors and authors preceding the entry of the said 40 years' possession, with the instrument of sasine following thereupon; or where there is no charter extant, that they show and produce instruments of sasine, one or more, continued

[312] "Public" in this provision relates to a particular method of infeftment in heritable property rather than indicating any right in the public.
[313] "Infeftment" was the feudal term for being formally clothed in the feu. Title and infeftment were both required to complete any real right in lands.
[314] Lord Kames, *Elucidations Respecting the Common and Statute Law of Scotland* (1777), Art 33 (263).

> and standing together for the said space of 40 years, either proceeding upon retours or upon precepts of *clare constat*, which rights his majesty, with advice and consent of the estates foresaid, finds and declares to be good, valid and sufficient rights (being invested with the said peaceable and continual possession of 40 years without any lawful interruption as said is) for possession of the heritable right of the same lands and others foresaid."

Therefore, a party seeking to rely on statutory positive prescription had to produce evidence of appropriate conveyance establishing their title.

Given the requirements of title and infeftment, it is initially unclear how the 1617 Prescription Act could extend in application to rights other than landownership. Nonetheless, the Act was applied to rights such as tack and heritable office.[315] In particular, the Act was quickly accepted as a basis for the constitution of servitude rights.[316] However, this required the claimant to be infeft in a dominant tenement which would receive praedial benefit from the servitude. One of the key differences between servitudes and public rights is that any member of the public can exercise the latter without requiring any title to or infeftment in property.[317] Despite the view that the 1973 Act was essentially a restatement of the law that developed under the operation of the 1617 Prescription Act,[318] therefore, the terms of the latter seem to exclude its application to public rights. Very few early cases before the courts specifically discuss the constitution of public rights over roads and, although those that do refer to possession of the road and "prescription", the statute does not appear to be the basis for constitution of such rights in those cases.[319]

For example, in *Earl of Aberdeen v Forbes*[320] the pursuer sought declarator that his lands were free of highways for leading of peats. The defender, in return, offered to prove that the way in question was the King's highway because it went from one

[315] Erskine, 3.7.3. Bankton, 2.12.2. In *Home v Officers of State*, (1758) Mor 10777 the court applied the 1617 Prescription Act to the right of patronage.
[316] See ASS Peterson, *The Positive Prescription of Servitudes in Scots Law*, PhD thesis, University of Edinburgh (2016), chap 2.
[317] This is made clear by Stair 2.7.10 who states the King's highway is "patent to all the lieges, without respect to any land".
[318] Napier, *Prescription*, 1.06. CM Campbell, *Positive Prescription of Landownership in Scots Law*, PhD thesis, University of Edinburgh (2014), p6.
[319] *Fordell v Weymes*, (1672) 2 Bro Sup 706 and *Duke of Roxburghe v Town of Dunbar*, (1713) Mor 10883 are discussed further below.
[320] *Earl of Aberdeen v Forbes*, (1684) 3 Bro Sup 509.

royal burgh to another, or to a sea-port directly. The Lords allowed proof on this point. However, it is reported that the Lords also "adhered" to "the Act" and allowed the defender to prove he had prescribed a way for peats by forty years possession. Although four roads Acts were listed to support the defender's argument[321] and the 1617 Prescription Act was not explicitly included, the latter is the only Act to which the Lords could have "adhered" that established rights through possession. This suggests the defender may have been arguing for the existence of two separate rights: first, a public right to use the road due to its status as the King's highway, and second, a servitude right based upon his own private possession. The pursuer's response addressed both elements. He argued specifically against use of the road for the transportation of peats despite an existing right to transport lime, founding on the maxim *tantum praescriptum quantum possessum*.[322] This maxim is applicable to servitudes, whilst the King's highway was not restricted to one particular purpose.[323] He then contested the public nature of the terminus of the road to argue against the allegation of its being a King's highway. In the event, the defender was unable to produce evidence to support his allegations and so lost the case. The pursuer's lands were declared free "of any high-ways for leading of peats; and found [the defender] had not proven his right of servitude".[324] The court does not make further mention of the King's highway. It seems clear that any reference to the 1617 Prescription Act related to the servitude right alone. However, there is evidence in other cases that possession was the basis on which courts would determine questions of a public right.

C. Immemorial possession: early roads cases

Alasdair Peterson has argued for the existence of an alternative method for the acquisition of servitude rights through long possession based on "immemorial possession",[325] which continued to be available well after the 1617 Prescription

[321] *Ibid*. "For high-ways consider the 53d Act Parl. 155; 156th Act 1592; 38th Act 1661, article, Of the High Ways; and 16th Act 1669."
[322] "There is only prescription in so far as there has been possession": *Trayner's Latin Maxims* (4th edn, 1993), p595.
[323] *Forbes v Forbes*, (1829) 7 S 441.
[324] *Earl of Aberdeen v Forbes*, (1684) 3 Bro Sup 509.
[325] ASS Peterson, *The Positive Prescription of Servitudes in Scots Law*, PhD thesis, University of Edinburgh (2016), chap 2. For its role in the constitution of certain water rights, see J Robbie, *Private Water Rights* (2015), paras 5-19 to 5-22.

Act.[326] It seems that the two methods, immemorial possession and statutory prescription, co-existed, with parties selecting the basis best suited to their situation.[327] Statutory prescription might appeal due to the certainty of protection under the provisions of the 1617 Act, provided its conditions were met. However, there were two particular advantages attached to immemorial possession.

The first advantage is illustrated by the case of *Neilson v Sheriff of Galloway*.[328] In this case, the pursuer sought declarator of a servitude of access from his house to the parish church through the defender's lands. The pursuer claimed the servitude on the basis of 30 years possession without interruption, without libelling any title. The action was sustained by the Lords "albeit there was no writ". However, the Lords also found the possession "ought to be proven to immemorial and past memory of man, and would not sustain the offer to prove possession for 30 or 40 years." In this case the pursuer was unsuccessful as he was unable to prove possession for the required period. The important point is that the action appears to have been sustained by the court on the basis of possession alone. Whether immemorial possession was considered to be a common law form of "prescription" or an entirely separate doctrine,[329] it provides a more obvious foundation for the constitution of public rights that were not based upon any title to property.

The second advantage of immemorial possession relates to the burden of proof involved in establishing a right. Statutory prescription required forty years of continuous, uninterrupted possession within living memory. Immemorial possession placed a heavier burden of proof than the statute, going back further than forty years. This was continuous possession from the point of an alleged interruption backwards to a point in time "past memory of man".[330] If proven, the burden then shifted to the other party to prove the right had been extinguished by forty years of continuous interruption.[331] Although a heavier burden, immemorial possession might be

[326] E.g. *Borthwick v Laird of Kirkland*, (1677) 2 Bro Sup 215.
[327] Peterson, fn 325.
[328] (1623) Mor 10880.
[329] Peterson (fn 325) says the two are conceptually distinct. Stair 2.12.12 appears to take the same view, stating: "By our ancient custom, there was no place for prescription in any case, which hath been corrected by our statutes…". However, Stair 2.7.2 recognised immemorial possession in his discussion of kirk-roads and *Neilson*.
[330] *Bell's Dictionary*, p518. Evidence of this is also found in the cases. In *Neilson* the court is stated as requiring possession "immemorial and past memory of man", (1623) Mor 10880.
[331] ASS Peterson (fn 325), chap 2, section B(3).

preferred by a party seeking to establish the right, who could not prove forty years continuous possession within living memory. In practice, founding on immemorial possession might mean proving continuous possession for considerably less than forty years. In *Nicolson v Lairds of Bightie and Babirnie*[332] only twenty years possession was proved before the first interruption. However, because the first interruption was fifty years before the case was heard, the possessory requirement was held to be met by the twenty years as this took the evidence back to the start of living memory at the time of the action.

In the above scenario, immemorial possession was preferred because possession for forty years could not be proven. However, there are also suggestions that the latter was somehow equivalent to the former without reference to the statutory period. Although in *Neilson*[333] the court appears to reject forty years, Stair unequivocally states "yet forty years is equivalent and always equiparate to immemorial possession".[334] The exact relationship between immemorial possession and the alternative "forty years" is unclear at this point.

Two important seventeenth-century cases address the acquisition of public rights to use roads based on possession. Both are categorised as "prescription" cases in *Morison's Dictionary*.[335] Both are also presented as servitude cases[336] although these involved claims for public rights too. These two cases were reported in relative detail, which was unusual for cases at that time. The reports provide an interesting insight on the complexity of court actions at that time.

(1) Fordell v Weymes

This case is reported both in both *Morison's Dictionary* and, at greater length, in *Brown's Supplement*.[337] The former report was written by Lord Gosford, a Senator of the College of Justice at the time the case was decided. The latter report was by Lord Fountainhall, who became a Senator later, in 1689.[338] Narrative elements suggest Fountainhall may have been counsel for the pursuer. Much later, in 1851,

[332] (1662) Mor 11291.
[333] *Neilson v Sheriff of Galloway*, (1623) Mor 10880.
[334] Stair, 2.7.2.
[335] *Fardell v Wemyss*, (1673) Mor 10880; *Duke of Roxburghe v Town of Dunbar*, (1713) Mor 10883.
[336] *Ibid*. Both are categorised by Morison as "PRESCRIPTION. DIVISION III. What Title requisite in the Positive Prescription. SECT. X. *Servitus Itineris*".
[337] *Fardell v Wemyss*, (1673) Mor 10880; *Fordell v Weymes*, (1672) 2 Bro Sup 706.
[338] DM Walker, *The Scottish Jurists*, (1985), p179.

his report was later disparaged by the Lord Justice-Clerk (Hope),[339] perhaps on account of the colloquial terms and derogatory remarks about colleagues.[340] However, its overall consistency with the report by Lord Gosford suggests it was faithful on points of fact and law.

This case took considerable time to progress. It was first debated in December 1672 and a course of reply, duply, triply and quadruply followed before the Lords ordained proof before answer. The first interlocutor appears to have been in June 1673 and there is evidence of several more stages after that.[341] As well as the two main parties to the action, others appear to have been involved in the litigation at certain stages, including two towns and an Earl.

The pursuer sought declarator of a highway for carrying coals from his lands to an alleged public harbour by a way through the defender's lands. Although the two reports differ in length and focus, they concur as to the main points argued and the eventual outcome. According to Lord Fountainhall, the pursuer's declarator was "to hear and see it found and declared that he and his predecessors had for the space of forty years and upwards, been in possession of the harbour of Aberdour, and of the high way leading through [the defender's lands], for driving coals" and "as also, had right to the said highway and passage, and had according carried their corns and other goods to the said harbour…till they were wrongously debarred" by the defender.[342]

Arguments by the parties focused on four key elements.[343] First, the parties agreed that if the harbour to which the road led was public, the public would need to have

[339] *Napier's Trustees v Morrison*, (1851) 13 D 1404.
[340] *Fordell v Weymes*, (1672) 2 Bro Sup 706. Fountainhall seems to suggest that Lord Craigie, the Lord Ordinary at one stage, was biased due to his dislike of the defender. He is described as "thought to have haughed" (i.e. ham-strung, see http://www.dsl.ac.uk/entry/snd/hoch_n_v1, II v. 2) the defender at one point. A member of the pursuer's legal team, Sir George Mackenzie, was described as having "wild notions".
[341] The defender sought reduction of the servitude based on paction. Fordell attempted to have the right to a way declared based on the Town's possession. When this failed he persuaded the court to determine the matter of right based on possession. The court then found a servitude based on possession. However, given Sir George Mackenzie's subsequent "wild notions", it appears that the defender reclaimed against the servitude too, in pursuit of a broader, public right.
[342] *Fordell v Weymes*, (1672) 2 Bro Sup 706.
[343] Each of these is reported more fully in *Fordell v Weymes*, (1672) 2 Bro Sup 706.

some way to access it.[344] However, the public nature of the harbour was disputed.[345] Despite considerable efforts by both parties and the Lords having earlier ordained proof on this point, the court refused to make a finding regarding the nature of the port. Second, the pursuer invoked the provisions of the 1555 and 1592 Acts protecting highways between burghs and public ports to support his claim. The defender argued that the road in question did not fall within the remit of these Acts. There is no indication from the reports as to whether this point was considered relevant or not. The third element related to possession of the road and whether this was sufficient to establish the existence of the pursuer's right to use the road.[346] This is discussed further below. A fourth emerged regarding constitution of a servitude right based on contract. The defender argued there was no highway over the lands, only a private road for the defender's own use, which the pursuer had used based on a previous "tolerance agreed" with the pursuer's predecessor. This appears to indicate a formal agreement rather than the landowner's tolerance in the sense of passive allowance. This argument initially produced an unexpected result for the defender.[347] Although not explicitly sought by either party, the Lords found formal constitution of a servitude based on this tolerance. This was favourable for the defender as he had grounds to seek reduction of the servitude, which would leave the defender without any right to use the road. However, this was not the final result, which was based upon evidenced possession.

The pursuer's declarator for possession of the harbour and high way was based upon possession "for the space of forty years and upwards".[348] However, the pursuer offered to prove immemorial possession.[349] The pursuer went on to argue that possession "without interruption, past memory of man" was sufficient without writ.[350] Although the defender argued prescription required some form of title, the court held the pursuer's claim competent. After further stages pursued by both parties, the

[344] The defenders admit if this was the case "certainly a way leading to [the public harbour] must be granted", presumably by the landowner: (1672), 2 Bro Sup 706.
[345] The pursuer's allegation that the port was public is also reported by Gosford: *Fardell v Wemyss*, (1673) Mor 10880.
[346] Again also detailed by Gosford.
[347] This is only reported by Fountainhall.
[348] *Ibid*.
[349] Both "immemorial possession" and "past all memory" are reported by Fountainhall. And "Past memory of man" by Gosford.
[350] Gosford makes it explicit no writ was required.

Lords found constitution of a servitude based on possession.[351] The consistency between reports as to the particular wording of the Lords' decision suggests the requirement was to prove possession for the period of forty years. Immemorial possession appears to have been considered sufficient to fulfil that requirement. Given the issue of title and lack of reference to the 1617 Prescription Act in the substantive part of the parties' arguments, this suggests the acquisition of right on the basis of possession for a period of forty years received authority from the common law.

Certain points were subsequently tested by counsel for the defence, which included particular reference to the 1617 Act. Fountainhall reported that Sir George Mackenzie[352] "came in with two wild notions". Mackenzie argued the period of prescription for the pursuer could not start until 1617, because prescription of heritable rights was not "known nor received in Scotland till the Parliament 1617". He also argued immemorial possession had not been proven, but "only" forty years.[353] However, these points were rejected by the Lords "with pity and disdain".[354] The 1617 Act did not exclude possession prior to its enactment from counting toward prescription.[355] Fountainhall also noted that cases founded on "immemorial possession of forty years", such as *Neilson*,[356] might rely on periods of possession that occurred before implementation of the Act.[357] Although support from civilian texts for different periods is noted, Fountainhall observed "our law makes no difference at all".[358] Thus, Fountainhall and the Lords in this case appear to have agreed with Stair that immemorial possession was equivalent to forty years.[359]

[351] (1673) Mor 10880 and (1672) 2 Bro Sup 706.
[352] *Fordell v Weymes*, (1672) 2 Bro Sup 706. Although it is not explicit, the narrative suggests Mackenzie was acting on behalf of the defender.
[353] *Ibid*. Mackenzie may not just have been seeking any argument that would further the case of his client. Fountainhall notes Mackenzie "so valued himself upon thir [sic] light imaginations, that he would have wagered upon their solidarity against any".
[354] *Ibid*.
[355] Although the Act did allow a thirteen-year period subsequent to its enactment, ending in 1630, during which time claims could be raised by those who would lose out due to its provisions. See CM Campbell, *Positive Prescription of Landownership in Scots Law*, PhD these, University of Edinburgh (2014), pp68-69.
[356] *Neilson v Sheriff of Galloway*, (1623) Mor 10880.
[357] *Fordell v Weymes*, (1672) 2 Bro Sup 706. Fountainhall explicitly references the *Neilson* case.
[358] *Ibid*.
[359] Stair, 2.7.2.

In this case the possession was found to constitute a private, servitude right. The pursuer based his claim to use a road for a specific purpose, transporting coal, on possession.[360] Use of the highway in his claim is described more broadly, for the transport of corns and other goods.[361] The latter suggests a public right, supported by his subsequent arguments. The proof ordained by the Lords addresses these separately. Witnesses were examined as to the "repute" of the road as public, and how long.[362] Evidence of the pursuer's "use" as a servitude road was also obtained.[363] Like *Earl of Aberdeen*,[364] it is not clear how these two arguments interacted, if at all. However, this case suggests that the evidence of use was based upon the nature of the particular pursuer. After the court's initial pronouncement of a servitude based on the tolerance, the pursuer took further action to establish a right based on other grounds.[365] The pursuer "stirred up the town of Innerkeythin" to assert their right to use the road. However, although the town was initially involved as a party to the case, it withdrew at some point. Therefore, nothing could be found in the town's favour as "no witnesses [were] led upon their possession".[366] It seems the pursuer had only represented his own private rights, rather than a wider public interest. The explanation provided by Fountainhall suggests a claim for a right more public in nature may have been competent, had the town remained party to the action. In that case, it is not clear whether the town's possession would have been sufficient on its own, or whether other conditions would also need to be met.

(2) Duke of Roxburghe v Town of Dunbar

This second case is reported in *Morison's Dictionary*.[367] The defenders included the magistrates, town council and inhabitants of the Town of Dunbar. This illustrates a wider, public involvement and the court explicitly addressed constitution of a right to use "public ways".

[360] Reported by both Gosford and Fountainhall.
[361] Fountainhall.
[362] *Ibid*.
[363] *Ibid*.
[364] Fn 320.
[365] *Ibid*. This would have ensured the pursuer's right to use the road even if the defender managed to reduce the servitude based on paction.
[366] *Ibid*.
[367] *Duke of Roxburghe v Town of Dunbar*, (1713) Mor 10883.

In February 1713 the Duke of Roxburghe sought a declarator that an area of links[368] in his property was free from any servitude roads. The Town of Dunbar sought declarator of a right to "all highways through the links" and interdict to prevent the Duke completing an enclosure blocking their access to the seashore. The right to highways was founded on possession "past memory of man". The arguments presented at first instance are not reported. However, the Lords found "no public way can be made upon the Duke's property without his consent, or the uninterrupted prescription for 40 years".[369] The Lords upheld a right of passage for fishermen and others to lead fish and "necessaries for fishing" to and from Dunbar and the neighbouring country, but exercisable only in return for a small payment to the Duke when bad weather meant fishermen could not land at Dunbar. This limited right for a specific purpose is more akin to a servitude than a public right. The Duke was awarded declarator of property, qualified by this specific right. The Town of Dunbar reclaimed against this decision.

The reclaimers argued that forty years prescription was not necessary, as highways did not fall under the 1617 Prescription Act. Rather, a shorter period would suffice provided sufficient frequency of use was proved. The 1555 and 1592 Acts were cited although it is unclear how these supported this point. The respondent conceded that roads within the remit of these Acts must certainly be preserved, but disputed the relevance of the Acts to the road in question. He also argued that use and custom, for the purpose of acquiring a right, simply meant forty years, "the term prefixed by law". It is unclear whether the respondent considered this term fixed by the 1617 Prescription Act, or broader common law principles. However, he argued that highways were "regulated by our own laws, require the same length of time to constitute them through another's property as any other right by mere time". The Lords appeared to agree, as they adhered to their former interlocutor.

At first instance the court had observed that "in highways through a private subject's grounds, the Crown acquires the property of the road, which makes the prescription of the 40 years necessary". Although the reclaimers went on to argue that the

[368] "The sandy undulating ground, gen. covered with turf, bent grass, gorse, etc., which is freq. found near the sea-shore on a flat part of the coast, and is often common ground belonging to the nearest town." See http://dsl.ac.uk/entry/snd/links.
[369] First interlocutor, (1713) Mor 10883.

property remained with the private landowner, the court did not address the point on this occasion.

The case was not wholly unsuccessful for the town, however. It had also argued the public had a right of access to the seashore under an Act of Parliament.[370] Although the Lords denied the right to a horse and cart road, a public way to the seashore was found to exist for access by foot. The exact basis for this decision is not reported. Given the unequivocal wording of the earlier interlocutor, to which the court ultimately adhered,[371] it is hard to conceive that this way could have been found without some evidence of the town's possession. No other explanation is offered in the report.

In both *Fordell v Weymes* and *Duke of Roxburghe v Town of Dunbar* the court appears to have found the right least burdensome for the landowner consistent with meeting the pursuer's needs. This illustrates a desire to achieve a balance between competing interests. A public road would impose a considerable burden on landowners causing degradation to the soil of the road, impact on privacy and a reduction in the value of their lands. On the other hand, such roads were necessary for the public in their daily lives for commerce, society and basic survival.

(3) Other early cases

Although evidence from early case reports is scarce there are others which suggest certain rights, that appear to be more public in nature than servitude rights, were found on the basis of immemorial possession.

In the 1769 case of *Porteous v Allan*[372] the Lords found the pursuers had a right to use a road "upon proof of immemorial possession". In the report of a reclaiming action four years later[373] the decision is restated as finding the right proven "by prescription". The reclaimers argued that the pursuers must have claimed a praedial servitude and raised their lack of title to do so. However, the petition was refused without answer and unfortunately the basis for this decision is not reported. The

[370] "Act for advancing the fishing trade in and about this kingdom", APS xi 292, c48, RPS 1705/6/192.
[371] Fn 369.
[372] (1769) 5 Bro Sup 598.
[373] *William Porteous, and Others, Storemasters in the Parishes of Douglas, Lesmahago, and Muirkirk v Joseph Allan of Castlebrocket, and Alexander Morton of Chappel*, (1773) Mor 14512. The many pursuers listed in the full title illustrates the broad, public nature of these disputes.

pursuers sued on the basis of their status as "store-masters" and tenants,[374] rather than as members of the public. Possibly the court may have considered this status sufficient to secure a servitude right. However, as shown by earlier analysis the right to the drove road does not seem to meet the principle of *vicinitas* required for servitude rights, which suggests a broader, public right.[375]

A similar case followed shortly after, *Campbells v Campbells*,[376] where the pursuers were granted interdict *uti possidetis* in relation to certain drove roads. Although possession went to proof, any subsequent action does not appear to be reported. The basis of the decision is not detailed, but is reported as "the same question" as the report immediately before it in *Brown's Supplement*, which was *Porteous v Allan*.[377]

Finally, in the case of *Napier v Robison* [378] in 1782, the justices of peace were held to have exceeded their powers by shutting up a road that had been "immemorially possessed by the public".

D. Nineteenth-century developments

As case reporting became more widespread during the nineteenth century, the number of reported cases involving rights over roads increased. Various rules were judicially developed in relation to the acquisition of rights to roads based on long periods of possession. Those relating to servitude roads have been the subject of recent research.[379] Some of the rules relating to public rights are similar, although important differences exist.[380] It is not feasible to undertake a full exploration of these rules within the scope of the present research. However, starting with cases cited in the important works of Ferguson and Rankine, it is possible to track developments of particular points raised by the investigation of earlier sources.

[374] The report of the reclaiming action includes tenants in the description of pursuers in the Lord Ordinary's interlocutor, (1773) Mor 14512.
[375] Chap 3, section E.
[376] *Campbells v Campbells*, (1777) 5 Bro Sup 599.
[377] (1769) 5 Bro Sup 598.
[378] (1782) Mor 7624.
[379] ASS Peterson *The Positive Prescription of Servitudes in Scots Law*, PhD thesis, University of Edinburgh (2016).
[380] These differences are set out by Lord Deas in *Thomson v Murdoch*, (1862) 24 D 975, at 982.

(1) Immemorial possession and forty years

In cases alleging a public right to use a road, proof of possession would be held before the matter of rights was settled. Possession was usually, although not always, determined by a jury.[381]

Rodgers v Harvie[382] is an important case which was eventually brought before the House of Lords, as *Harvie v Rogers*,[383] in 1828. A public right was claimed in respect of a road which led from the city of Glasgow to the village of Carmyle along a bank of the River Clyde. The issue sent to the jury was "whether for forty years and upwards, prior to the months of March, April or May 1822, there existed a public footpath or footroad along [the route described]".[384] On the basis of the evidence, the jury returned a verdict for the pursuer. Although only forty years is mentioned in the formal issue, the use proved was immemorial possession. The defender tendered a bill of exceptions on the basis that, *inter alia*, the pursuer had not proved forty years of possession. The pursuer answered that, on proof of immemorial possession, "the right must be held in law to have been then in the public".[385] The Court of Session appears to have agreed with the pursuer, though it is not made explicit in the report of the case. The court unanimously disallowed the exception, but did not provide any explanation for its decision.

The defender appealed to the House of Lords,[386] which adhered to the previous decision, but with reasons. According to the Lord Chancellor, evidence had been obtained that carried "as far back as the memory of any witness could extend" but this fell short of forty years.[387] It was therefore "competent for the jury to presume, and they ought in point of law to be directed by the learned judge to presume…a previous enjoyment corresponding with the manner in which it had been enjoyed" for the period proved.[388] In that case the period proved back as far as memory could extend was thirty-four years. In effect the trial judge had told the jury "there is

[381] In *Macfie v Stewart*, (1872) 10 M 408 the case was tried by the court rather than a jury due to its complexity. This involved alternative claims for a public right of way and a servitude road.
[382] Various stages are reported: (1826) 4 Murr 25, (1827) 5 S 917, (1828) III Bligh NS 440 ER 1396, (1828) 3 W&S 251, (1829) 7 S 287 and (1830) 8 S 611.
[383] (1828) III Bligh NS 440 ER 1396. Also reported as *Harvie v Rodgers*, (1828) 3 W&S 251.
[384] (1826) 4 Murr 25, at 26, repeated in the later reports.
[385] (1827) 5 S 917, at 918.
[386] (1828) III Bligh NS 440 ER 1396; (1828) 3 W&S 251.
[387] (1828) III Bligh NS, at 446.
[388] *Ibid*.

evidence, from which you may assume that [for] a particular period, namely forty years" the road in question had been used without interruption.[389] "According to the law of Scotland" this was sufficient to establish the public right to the road.[390] Thus, time immemorial was sufficient from which to presume forty years possession. The onus then fell on the defender either to rebut the presumption[391] or to prove that effective interruptions had extinguished the right. The defender was unable to do either and so lost his case.[392]

In *Rodgers v Harvie*, forty years possession was found to be the required period of possession in order to establish the right. Possession beyond memory had a merely subordinate function as a presumption which, if established, was sufficient to infer possession for forty years. This seems to follow the unequivocal requirement of possession for forty years held by court in *Duke of Roxburghe v Town of Dunbar*, above.[393] Other cases seem to have taken the same view. For example, in *Forbes v Forbes* in 1829 the pursuer sought to exclude carts from a road.[394] Forty years was the only period of possession referenced in the opening narrative summary, the pursuer's statement, and statements by the court.[395] The defender argued that the pursuer had admitted the existence of a public road for horse and foot "for time immemorial, and upwards of forty years". The statement seems simply to have been seeking to put forty years possession beyond doubt rather than presenting an alternative basis.

It is not always clear that the two concepts interacted in this way. The decision of the House of Lords in *Harvie v Rogers*[396] was in January 1828. In November of the same year a similar issue was tried before the jury court in *Oswald v Laurie*.[397] This time the issue asked "whether, for time immemorial or for forty years" the public road had existed. In his directions to the jury the Lord Chief Commissioner said: "The question is, whether immemorially (and forty years is equivalent to this) there has

[389] *Ibid*.
[390] *Ibid*.
[391] For an example where the presumption was overturned see *Magistrates of Elgin v Robertson*, (1862) 24 D 301.
[392] (1828) III Bligh NS 440 ER 1396.
[393] (1713) Mor 10883.
[394] *Forbes v Forbes*, (1829) 7 S 441.
[395] *Ibid*. See Lord Pitmilly's judgement.
[396] (1828) III Bligh NS 440 ER 1396.
[397] (1828) 5 Murr 6.

been a highway…"[398] This suggests time immemorial was the overarching requirement, for which forty years might suffice.

Other remarks made by individual judges suggest the concept of time immemorial may have had wider application. In *Napier's Trustees v Morrison* Lord Cockburn said "wherever forty years means immemorial, and immemorial means forty years, it deserves consideration whether we should ever use them both in an issue."[399] He went on to say that "There may be cases, and this is one of them, where these words may not be the same."[400] He further remarked "if the road was made by the owner" it was made about forty years ago, but that it was also possible a public road may have existed for time immemorial, which "may extend beyond the date" the owner made the road.[401] In this case the pursuer had argued that the public were in use of a road made by him on his own land for his own private purposes. Lord Cockburn suggested that, instead, it was possible that the pursuer may have built his road on top of an existing road already used by the public. Possibly, therefore, he simply meant that competing rights might be alleged to have existed for different lengths of time. This case is discussed further below. However, the exact meaning of Lord Cockburn's remarks as to the difference between forty years and immemorial possession remains unclear. In a later case, *Davidson v Earl of Fife*,[402] the report refers overwhelmingly to forty years, but the Lord Justice-Clerk (Inglis) explained that this was "taken as being in general a sufficient equivalent" of immemorial possession.[403]

However, the cases researched demonstrate that forty years possession was the prevalent form of proof. The heavier burden generally required to prove immemorial possession could require evidence going back some seventy years or more before the date of the action.[404] The prevalence of forty years might simply have been due to it being the lesser period in most cases. The primary use of immemorial possession seems to have been a fall-back option for parties who could not prove

[398] *Ibid*, 12.
[399] (1851) 13 D 1404, 1408.
[400] *Ibid*.
[401] *Ibid*.
[402] (1863) 1 M 874.
[403] *Ibid*, at 884.
[404] In *Harvie v Rogers*, (1828) III Bligh NS 440 ER 1396, the evidence went back as far as seventy years. See also earlier discussion of *Nicolson v Bightie*, (1662) Mor 11291, fn 332.

forty years continuous possession within living memory, as in the case of *Harvie v Rogers*.[405] By the end of the period under consideration, time immemorial no longer appears to be conceptually distinct from forty years possession.

(2) Prescription of public rights to use roads

Cases relating to public rights over roads continued to be categorised as "prescription" in case reports.[406] In addition, rights based on evidence of forty years or immemorial possession were often discussed in the courts as involving the prescription of rights.[407] In the main, this use of the term does not seem to have been challenged. There is nothing to suggest that any of these cases was appealing to the statutory form of positive prescription. However, it was a point of particular discussion in one case, where the Lord Justice-Clerk (Inglis) was keen to ensure no confusion arose due to the use of the term.

Davidson, &c v Earl of Fife, &c was a case regarding a road that had been closed by the defender, and which the pursuer alleged had been used by the public "for forty years and upwards".[408] In initial statements giving their opinion, the Lord Justice-Clerk and Lord Cowan refer only to "forty years" or time immemorial.[409] However, Lord Benholme refers several times to the acquisition or loss of the right through forty years use or disuse as being positive and negative prescription.[410] Lord Neaves also refers to prescription.[411] A second round of opinions was initiated by the Lord Justice-Clerk who sought to clarify the use of this term. He had "the greatest doubt" as to the applicability of statutory prescription, which was prescription in "the proper and statutory sense of the term".[412] Instead, he understood the term to refer "merely to that presumption which arises from immemorial possession, for which forty years'

[405] (1828) III Bligh NS 440 ER 1396.
[406] E.g. *Rodgers v Harvie*, (1827) 5 S 917; *Mercer v Reid*, (1840) 2 D 520; *Marquess of Breadalbane v McGregor and Others*, (1846) 9 D 210; *Craufurd v Menzies*, (1849) 11 D 1127; *Napier's Trustees v Morrison*, (1851) 13 D 1404.
[407] In *Rodgers v Harvie*, (1827) 5 S 917 the pursuer refers to prescription in his response to the defender's exceptions. In *Harvie v Rogers*, (1828) III Bligh NS 440 prescription is used in the opening summary to the report and by the Lord Chancellor in his summary of the Lord Ordinary's directions, at 446. It is also used in other cases: e.g. Lord Medwyn in *Mercer v Reid*, (1840) 2 D 520, at 524; Lord Jeffrey in *Marquess of Breadalbane v McGregor*, (1846) 9 D 210, at 218; Lord Murray in *Napier's Trustees v Morrison*, (1851) 13 D 1404, at 1410; the Lord Justice-Clerk (Hope) in *Cuthbertson v Young*, (1851) 14 D 300, at 304.
[408] (1863) 1 M 874.
[409] *Ibid*, 880-81.
[410] *Ibid*, 881-82.
[411] *Ibid*, 883-84.
[412] *Ibid*, 884.

possession is taken as being in general a sufficient equivalent".[413] Lords Cowan and Neaves agreed, the latter explaining that his use of the term was simply to "distinguish this from prescriptions properly speaking".[414] Lord Benholme, however, said he knew "of no forty years that is not introduced by the statute".[415] Despite the judges' different views on use of the term, they appear to have agreed that statutory prescription was not applicable in that case. The term "prescription" continued to be used by individual judges in subsequent cases.[416] That no further clarification appears to have been sought suggests that the meaning of the term within the context of those cases was generally understood by the court.

Only two explicit references to the 1617 Prescription Act appeared in the set of nineteenth-century cases considered for this research, and on both occasions, the Act was invoked by the party who sought to defeat the public right to the road in question. In *Harvie v Rodgers*[417] the pursuer had proven public use of a road for time immemorial, rather than a continuous period of forty years. The latter was the period required by the Act, where it applied. The defender argued that the pursuer had not made his case, having failed to prove forty years, and cited the 1617 Act in support. The court found in favour of the pursuers without addressing the applicability, or not, of the 1617 Act.

In *Crauford v Menzies*,[418] the defender objected to the date in the pursuer's proposed issue, which did not take into account the period of the defender's minority. In support he cited the 1617 Act, which excluded minority from the calculation of the prescriptive period. The pursuer argued that the public could acquire a right of way by forty years uninterrupted possession at common law and so the statute, and hence the minority exception, did not apply. In addition, as the road led through the lands of several proprietors, if each were to plead the minority exception this would lead to the assertion of the right being "rendered perfectly impracticable".[419]

---

[413] *Ibid*.
[414] *Ibid*, 884-85.
[415] *Ibid*, 884.
[416] For example: *Jenkins v Murray,* (1866) 4 M 1046, 1052-53; *Scott v Home Drummond*, (1867) 5 M 771, 772; *Lyell v Gardyne*, (1867) 6 M 42, 43; *Mackenzie v Bankes*, (1868) 6 M 936, 939; *Jenkins v Robertson*, (1868) 6 M 951, 952*; MacIntosh and Other v Moir*, (1871) 9 M 574, 576 and 579; *Wallace v Thornton,* (1875) 2 R 565, 572 and 578-80.
[417] (1828) 3 W&S 251.
[418] (1849) 11 D 1127.
[419] *Ibid*, 1129.

Nonetheless, the court held that the period of the defender's minority should be excluded.

The decision was unanimous, although the exact reasons for it are unclear. The Lord President (Boyle) merely observed the importance of the "privilege of minors" without providing any authority.[420] Lord Mackenzie said "there is no doubt the public can acquire a right of way by forty years possession; but the public must do so on the same conditions as individuals".[421] This may suggest that Lord Mackenzie considered statutory prescription only applicable to cases involving rights of individuals, not the wider public. Only Lord Jeffrey directly addressed the defender's appeal to the 1617 Act, saying that: "If it be true, that previous to the date of the statute, the common law enabled parties to acquire a right by forty years' possession, I think it will also be found that such a claim was always barred by minority. The statute applies generally to all such claims; I conceive it to be merely declaratory of the law, and I therefore give no effect to [the pursuer's] argument".[422]

Unlike the approach taken to other heritable rights, such as servitudes,[423] tacks and hereditary offices,[424] there does not appear to have been any attempt by the court to extend the 1617 Act to public rights over roads. Rather, the court seems to have employed the common law, using "prescription" merely as a convenient label.[425]

(3) Other factors

Possession appears to have been the foundation for establishing the existence of public rights to use roads, whether the road in question was the King's highway, roads maintained by public authorities or other roads.[426] However, the requisite possession was not sufficient on its own. Other factors were also taken into account. Some related to the character of the road. Others had regard to the character of

[420] *Ibid*.
[421] *Ibid*.
[422] *Ibid*, 1129-30.
[423] ASS Peterson discusses extension of the Act to servitudes in *The Positive Prescription of Servitudes in Scots Law*, PhD thesis, University of Edinburgh (2016).
[424] See fn 315.
[425] ASS Peterson, fn 423, tracks the development of the law of prescription from Roman law into modern European laws.
[426] In *Rodgers v Harvie*, (1826) 4 Murr 25, the Lord Chief Commissioner said: "the right of highway is in the Crown for the benefit of the subject, and that it is the same in the greatest high-way or most insignificant foot-path. The way to establish either is by proving that they have been immemorially used by the subjects as a way." *Oswald v Lawrie*, (1828) 5 Murr 6 was an action by road trustees to have it found that a public road had existed on the basis of possession.

possession upon which the right was founded. One of the most important aspects was to determine whether possession was based on public right or simply the landowner's tolerance. If possession was by tolerance the public's use of the road was dependent on the landowner's continued tolerance which could be withdrawn at any time. Often there was contradictory evidence which had to be weighed and decided by a jury. A number of verdicts were overturned and in some cases special juries[427] were appointed due to the complexities involved.[428] Full analysis of these factors is not within scope of this research. However, two in particular recall conditions identified during analysis of the institutional texts and deserve some consideration.[429] First, a public road must lead to a public place at either end. Second, a public road must be "constitute" for the public use.[430]

At the jury trial of *Rodgers v Harvie*,[431] the Lord Chief Commissioner gave direction that "the law of public road is, that they must be from one public place to another". This point was not contested, nor was the public status of either *terminus*. The route described in the issue went "from the city of Glasgow to the village of Carmyle". Various cases illustrate similarly apparent public *termini*.[432] Where the public status of an alleged *terminus* was not apparent, it was necessary for the party seeking to establish the public right to bring appropriate proof. The institutional writers provided some clear examples of public places: burghs, market-towns, ports and ferries.[433] But places called "ports" by locals were not necessarily considered to be public by the courts.[434] In addition, a wider range of public places was recognised by the courts than had been suggested by the institutional writers, for example public roads[435] and, as in *Rodgers v Harvie* and other cases,[436] smaller settlements such

[427] Special juries consisted of wealthier landowners, who qualified on the basis they paid land-taxes above a prescribed level. See *Bell's Dictionary*, p612.
[428] E.g. *Magistrates of Elgin v Robertson*, (1862) 24 D 788; *Jenkins v Murray*, (1866) 5 M 39.
[429] In particular Stair: see discussion in chap 3.
[430] *Ibid*.
[431] (1826) 4 Murr 25.
[432] E.g. in *Mercer v Reid*, (1840) 2 D 520 the route went from the village of Bridgend to Melrose. In *Craufurd v Menzies*, (1849) 11 D 1127 the route was from Glasgow to Kirkintilloch.
[433] Stair, 2.7.10; Bankton, 2.7.21; Erskine 2.6.17.
[434] *Darrie v Drummond*, (1865) 3 M 496 involved routes from the village of Coldingham-shore to a port at Pettycurwick. The pursuer was unable to prove the port public. However, sufficient evidence was provided in a subsequent action: see *Scott v Drummond*, (1866) 4 M 819; *Scott Home v Drummond*, (1867) 5 M 771.
[435] *Jenkins v Murray*, (1866) 4 M 1046.
[436] Fns 431-432.

as villages. Further exploration of what constitutes a public place is outwith the scope of this research. However, this was not the only complexity involved.

In *Campbell v Lang*[437] issues had been allowed to determine the existence of a public path along two routes from the burgh of Renfrew to "the rivers Cart and Clyde, at a point at or near the confluence of the said rivers".[438] The judgement was appealed to the House of Lords in 1853 on the basis, *inter alia*, that (1) a public right of way must lead from one public place to another, and (2) the confluence of two rivers was not a public place.[439] Although the first point was agreed, the court made no finding on the second. The Lord Chancellor (Lord Cranworth) held "if [the party] is entitled to a public right of way proceeding in that direction, up to what is not itself a public place, but yet has a right to go on to the public place, it will be strictly true to say, that he has a right of way from the place in question, up to the spot in question, viz. the confluence of the two rivers".[440] The question was not whether the confluence was a public place, but whether the route proved by possession to that point then continued on towards a public place. The issues relating to the public path were approved in that instance.

A second such case came before the House of Lords in 1854, *Young v Cuthbertson*.[441] An issue had previously been approved which described the contested route as "from the Kirkton of Burntisland, and harbour and royal burgh of Burntisland, or one or more of them…through the defender's lands, to the western extremity thereof, and thence proceeding to Starleyburn port and harbour, and to the port and harbour, and old and new villages of Aberdour, or one or more of them".[442] A right of way was then established on the basis of sufficient public possession from Burntisland as far as Starleyburn. However, Starleyburn had not been held a public place, and public possession of the part of the alleged route from Starleyburn to Aberdour had not been proved.[443] Instead, it was established that the public could go on to reach Aberdour, which was uncontestededly a public place, by an alternative

[437] (1853) 15 D (HL) 41; (1853) 1 Macq 451.
[438] (1853) 15 D (HL) 41.
[439] *Ibid*.
[440] *Ibid*, 43.
[441] (1854) 17 D (HL) 2; (1854) 1 Macq 455.
[442] See the report of an earlier stage: *Cuthbertson v Young*, (1851) 14 D 300, at 301.
[443] The difference in route is described in the exceptions listed in (1851) 14 D 300, at 301-302. The original route from Starleyburn to Aberdour led through another landowner's property, and was subject to separate court action, *Hay v Earl of Morton*, (1861) 24 D 116.

route.[444] The judgement was affirmed by the House of Lords on appeal. The Lord Chancellor thought that "having a public place at each *terminus* [Burntisland and Aberdour], the right claimed is properly a public right of way. It was enough that the *locus* [Starleyburn] existed through which the public right of way went". It was unnecessary to prove that *locus* a public place; rather "it was only essential to prove that a right of way should exist through the appellant's lands as part of the way; the right as far as and beyond Starleyburn was settled by showing that from thence parties lawfully proceeded to Aberdour."[445]

Thus the end of the route for which proof of public possession was required did not necessarily need to be public itself. Rather, it had to be a place from which the public could lawfully proceed to a public place. Although the need for public *termini* at each end of the full route of a public road was generally acknowledged, it was not always simple to determine. The exact requirements did not appear settled.[446]

The second condition, that a public road must have been "constitute" for the public use, was discussed in relatively fewer sources. These dealt with constitution in terms of the original purpose for which a road was constructed. In *Napier's Trustees v Morrison*[447] the pursuers sought declarator that a footpath through their property was a private road, whilst the defenders claimed it was public. Part way through the proof the presiding judge recommended an unusual verdict. This was to find possession in favour of the defenders, but give the pursuers leave to move for judgement in their favour if the court held the defenders could not acquire the public right to a footpath along the road. It was admitted that possession "as public footroads" in the issue related only to evidence of use by the public and did not bear on the question "of title to acquire the legal right".[448] The pursuers accordingly moved to have judgement in their favour. The court found that the road "was made originally…by the proprietor of the lands, for his own use" and that public possession did not, "in the circumstances, establish a right of way for foot passengers along the said road".[449] However, this

[444] A public highway accessible at Starleyburn.
[445] (1854) 17 D (HL) 2, at 3-4.
[446] E.g. Lord Deas remarked in *Thomson v Murdoch*, (1862) 24 D 975, 982-83, "The Sheriff here says it is settled law, that if one terminus be a public place, the road may be a public one. That may be the law, but I doubt whether it is settled law…"
[447] (1851) 13 D 1404.
[448] *Ibid*, 1405.
[449] *Ibid*, 1410.

was not a unanimous decision. Lord Cockburn, dissenting, brought his judgement to a close with the words: “There are innumerable roads, all over the country, which mere long usage has made as public as if they were city streets; and I am alarmed at the doctrine, that these may all be reclaimed whenever it can be shown, historically, that ages ago they began by being made by the owners of the adjoining land.”[450]

Evidence from later cases suggests the mode by which the road was first constructed was not such a decisive factor, but rather indicated whether a road was used by the public on the basis of public right or landowner tolerance.[451] However, very few cases discuss this point and so it, too, remains unsettled at the end of the period under research.

[450] *Ibid*.
[451] *Lyell v Gardyne*, (1866) 2 SLR 251 and (1867) 6 M 42; *Wallace v Thornton,* (1875) 2 R 565.

CHAPTER 5: CONCLUSIONS

This investigation of the early sources presents a picture of an ancient network of roads known as the King's highway, which was available for public use. This network appears to have been sufficient to meet the vast majority of public needs until the nineteenth century: sufficient at least in terms of the routes provided and destinations to which these led, if not the physical condition of the roads.

Early statutory road law demonstrates considerable concern with maintenance and repair. There was no general statutory provision for the creation of new public roads until the end of the period under consideration.[452] Now and then specific provisions in general Acts suggested that new roads were required.[453] However, there was no explanation of the constitution of public rights to use roads, existing or otherwise. Changes were made to existing roads by private and local Acts, to overcome degradation due to weather or heavy use and to facilitate landownership policies such as planting and enclosing.[454] These changes would have been relatively small in the context of the overall network of roads. There is very little evidence for entirely new roads built for public use. Rather, a convenient existing way would be found by the appropriate public authorities where possible, and appointed to be "the way" available for the public to use by Parliament, or by a specific commission with delegated authority.[455] It is unclear whether, in these instances, a new public right was created or an existing right was formally recognised by Parliament. The primary exception, where new roads seem to have been required, is the military roads in the Highlands.[456] However, the Acts regulating these do not provide any explanation for the constitution of public rights to use them.

Most of the discussion by institutional writers accords with this notion of an ancient network of roads. Although not explicit, justification for the public use of roads appears to be provided by explanations of the division of things, or rights to things, when things were first appropriated by mankind. For the majority of writers, the authority for public roads came from their being part of the *regalia*.[457] Stair's

[452] Roads and Bridges (Scotland) Act 1878, 41 & 42 Vict c51, s42 and s58: see chap 2, section D.
[453] The Justices Act 1617 recognised the need for new ways to churches: see chap 2, section B.
[454] Act for planting and enclosing of ground, APS vii 263 c284, RPS 1661/1/348.
[455] See discussion of the Cramond Acts in chap 3, section E, and also fn 280 for other examples.
[456] Chap 2, section D.
[457] Craig (Dodd), 1.15.15; Erskine, 2.6.17; Hume, *Lectures*, IV, 238-9; Bell, *Principles §* 638 et seq.

explanation, however, was based upon tacit consent and custom.[458] The public, according to the writers, could use the roads because they were part of an ancient network that had never been appropriated into private ownership. However, this does not explain how the public might obtain a right to use a road in later times.

Although there is no systematic discussion of the constitution of new public roads, or new public rights to use existing roads, statements by certain writers acknowledge this possibility. Erskine considered this a matter of public policy requiring Parliamentary authority.[459] Stair suggested two common law conditions to establish the existence of a public road.[460] First, a public road must lead from and to a public place. Second, a public road must have been constituted for the public use. These find support, to some extent, from other writers. However, investigation of cases before the courts found that these conditions were not sufficient in themselves to establish a public right of use.[461]

Instead, the court, invoking the doctrine of immemorial possession, looked to the history of possession. This required the party seeking to assert the public right to prove “forty years” or “immemorial” possession of the road by the public at large. Although the historical relationship between these concepts is unclear, by the nineteenth century the main use of immemorial possession appears to have been the presumption it raised.[462] Where a continuous period of forty years possession could not be proved, immemorial possession could be proved instead. If a party could prove public possession of a road from a point within forty years of an alleged interruption back to the point at which living memory began, the assumption arose that the state of possession prior to that point was the same, from which forty years possession could be inferred. The onus was then on the other party to disprove that the state of possession prior to the start of living memory was indeed the same.[463]

Although the period of possession required was forty years, the same as the statutory requirement for positive prescription, and although it was often discussed as bring “prescription”, it seems clear that it did not develop from the provisions of

[458] Stair, 2.1.5.
[459] Erskine, 2.1.2.
[460] Stair, 2.7.10.
[461] Chap 3, section B(2).
[462] Confirmed in *Harvie v Rogers,* (1828) III Bligh NS 440 ER 1396.
[463] Chap 4, section D(1).

the 1617 Prescription Act.[464] Instead, it appears to have been adopted by the courts as a pragmatic solution to deal with an increasing number of disputes over public roads, based upon common law principles.

This concept of immemorial possession can be reconciled with Stair's proposition of tacit consent and custom. The acquiescence of the landowner is implied by the uninterrupted long possession on the part of the public, which also evidences a local custom as to the use of the road. It can also be reconciled with the two further conditions set out by Stair.[465] Thus it was clear that a public road must lead from one public place to another even if the exact requirements to meet this condition were not fully developed in the period under consideration.[466] Furthermore, there was also at least some discussion regarding the circumstances of the original constitution of the road, i.e. whether it was for public or private use. In one case the court viewed this as decisive,[467] but it was more usually simply one of the factors taken into account when deciding whether a road was used by the public on the basis of the landowner's tolerance or not.[468] However, there is very little evidence on this point. Exploration of these conditions demonstrates that this remained an unsettled are of law at the end of the period under research.

[464] Chap 4, section D(2).
[465] Fn 460.
[466] Chap 4, section D(3).
[467] *Napier's Trustees v Morrison*, (1851) 13 D 1404.
[468] Fn 451.

BIBLIOGRAPHY

Legal works

- GJ Bell, *Principles of the Law of Scotland* (4th edn, 1839, reprinted Edinburgh Legal Education Trust, 2010)
- J Chisholm et al (eds), *Green's Encyclopaedia of the Law of Scotland* (2nd edn, 1914)
- T Craig of Riccarton, *Jus Feudale*, book 1 (L Dodd (trans and ed), The Stair Society, vol 64, 2017)
- T Craig of Riccarton, Jus Feudale (2nd edn, Mencken (ed), 1716)
- T Craig of Riccarton, *Jus Feudale* (3rd edn, T Ruddiman and W Ruddiman (eds), 1732; trans JA Clyde, Lord Clyde, 1934)
- DJ Cusine and RRM Paisley, *Servitudes and Rights of Way* (1998)
- J Eaton Dykes and D Stuart, *Manual of the Roads and Bridges (Scotland) Act 1878* (1890)
- J Erskine of Carnock, *An Institute of the Law of Scotland* (1st edn, 1773, reprinted Edinburgh Legal Education Trust, 2014)
- J Erskine, *An Institute of the Law of Scotland* (6th edn**,** J Ivory (ed), 1824-28)
- A Faulds, T Craggs and J Saunders, *Scottish Roads Law* (2nd edn, 2008)
- J Ferguson, *The Law of Roads, Streets and Rights of Way in Scotland* (1904)
- W Forbes, *Great Body of the Law of Scotland*, vol 1 (unpublished, available at*:* *http://www.forbes.gla.ac.uk/contents/)*
- W Forbes, *The Institutes of the Law of Scotland* (1722, reprint Edinburgh Legal Education Trust, 2012)
- WM Gloag and C Henderson, *The Law of Scotland* (14th edn, H MacQueen and The Right Honorable Lord Eassie (eds), 2017)
- WM Gordon, *Scottish Land Law* (2nd edn, 1999)
- WM Gordon and S Wortley, *Scottish Land Law*, vol 1 (3rd edn, 2009)
- GL Gretton and AJM Steven, *Property, Trusts and Succession* (2nd edn, 2017)
- D Johnston, *Prescription and Limitation* (2nd edn, 2012)
- H Home, Lord Kames, *Elucidations Respecting the Common and Statute Law of Scotland* (1777)

- Sir George Mackenzie of Rosehaugh, *Observations on the Acts of Parliament, made by King James the First, King James the Second, King James the Third, King James the Fourth, King James the Fifth, Queen Mary, King James the Sixth, King Charles the First, King Charles the Second* (1687)
- Sir George Mackenzie of Rosehaugh, *The Institutions of the Law of Scotland* (2nd edn, 1688)
- A McDouall, Lord Bankton, *An Institute of the Law of Scotland in Civil Rights* (1751-53, reprinted The Stair Society, vols 41-43, 1993-95)
- M Napier, *Commentaries on the Law of Prescription in Scotland* (1854)
- RRM Paisley, *Access Rights and Rights of Way: A Guide to the Law in Scotland* (2006)
- RRM Paisley, *Land Law* (2000)
- D Parratt, *The Development and Use of Written Pleadings in Scots Civil Procedure* (The Stair Society, vol 48, 2006)
- GCH Paton (ed), *Baron David Hume's Lectures 1786-1822* (The Stair Society, vols 5, 13, 15, 17-19, 1939-1958)
- J Rankine, *The Law of Landownership in Scotland* (1st edn, 1879)
- J Rankine, *The Law of Landownership in Scotland* (2nd edn, 1884)
- J Rankine, *The Law of Landownership in Scotland* (3rd edn, 1891)
- J Rankine, *The Law of Land-Ownership in Scotland* (4th edn, 1909)
- KGC Reid (with GL Gretton, AGM Duncan, WM Gordon and AJ Gamble), *The Law of Property in Scotland* (1996)
- KGC Reid and GL Gretton, *Conveyancing 2009* (2010)
- KGC Reid and R Zimmermann (eds), *A History of Private Law in Scotland*, vols 1 and 2 (2000)
- J Robbie, *Private Water Rights* (2015)
- W Ross, *Lectures on the Practice of the Law of Scotland: in two volumes* (1792)
- J Russell, *New form of process before court of session* (2nd edn, 1799)
- TB Smith, *A Short Commentary on the Law of Scotland* (1962)
- J Dalrymple, Viscount Stair, *The Institutions of the Law of Scotland* (6th edn, DM Walker (ed), 1981)

- The Stair Society, *An Introductory Survey of the Sources and Literature of Scots Law* (vol 1, 1936)
- *Trayner's Latin Maxims* (4th edn, 1993)
- DM Walker, *The Scottish Jurists* (1985)
- G Watson, *Bell's Dictionary and Digest of the Law of Scotland* (7th edn, 1890, reprint Edinburgh Legal Education Trust, 2012)

Other works

- A Fenton and G Stell (eds), *Loads and Roads in Scotland and Beyond* (1984)
- ARB Haldane, *New Ways Through the Glens* (1995)
- ARB Haldane, *The Drove Roads of Scotland* (2008)
- JJ Mackay, *Border Highways* (1998)
- C Taylor, *Roads & Tracks of Britain* (1979)
- W Taylor, *The Military Roads in Scotland* (1996)

Articles and chapters from edited books

- D Cabrelli, "The landlocked proprietor's right of access" 2001 SLT (News) 25
- J Cairns, "Historical Introduction", in KGC Reid and R Zimmermann (eds), *A History of Private Law in Scotland*, vol 1 (2000)
- H Fairhurst, "The roads of Scotland I. Roman roads", *Scottish Geographical Magazine* (1955), 71:2, 77-82.
- A Fenton "The Distribution of Carts and Wagons" in A Fenton and G Stell, *Loads and Roads in Scotland and Beyond* (1984)
- GL Gretton, "Ownership and its objects" (2007) 71 *Rabels Zetischrift* 802
- G Jackson, "Roads", *The Laws of Scotland: Stair Memorial Encyclopaedia* (vol 20, 1991, revised for 2nd reissue by P McDonald, 2008)
- AL Jarman, "Customary Rights in Scots Law: Test Cases on Access to Land in the Nineteenth Century" (2007) 28 *Journal of Legal History* 207
- DG Moir, "The roads of Scotland II. Statute labour roads: The first phase", *Scottish Geographical Magazine* (1957), 73:2, 101-110.

- DG Moir, “The roads of Scotland II. Statute labour roads: The second phase”, *Scottish Geographical Magazine* (1957), 73:3, 167-175.
- KGC Reid, “A note on law reporting”, in KGC Reid and R Zimmermann (eds), *A History of Private Law in Scotland*, vol 1 (2000)
- KGC Reid, “Property law: sources and doctrine”, in KGC Reid and R Zimmermann (eds), *A History of Private Law in Scotland*, vol 1 (2000)

PhD theses

- CM Campbell, *Positive Prescription of Landownership in Scots Law*, PhD thesis, University of Edinburgh (2014)
- ASS Peterson, *The Positive Prescription of Servitudes in Scots Law*, PhD thesis, University of Edinburgh (2016)

Other sources

- *Public General Statutes Affecting Scotland from the Beginning of the First Parliament of Great Britain 6 Anne, A.D. 1707 to the End of the Fourteenth Parliament of the United Kingdom 10 & 11 Victoria, A.D. 1847*, vols 1-3 (1876, pub W Blackwood)
- Scottish Law Commission, *Consultative Memorandum No 9: Prescription and Limitation of Actions* (1969)
- Scottish Law Commission, *Report No. 15: Reform of the Law Relating to Prescription and Limitation of Actions* (1970)
- Scottish Law Commission, *Eighth Programme of Law Reform* (Scot Law Com No 220, 2010)
- *Statutes at Large*, vols 5, 6, 7 and 8 (1764, printed by M Basket, and by H Woodfall and W Strahan)
- *Statutes at Large*, vol 11 (1774, printed by C Eyre and W Strahan, and by W Strahan and M Woodfall)
- *Statutes at Large*, vol 16 (1794, printed by C Eyre and A Strahan, and by A Strahan and W Woodfall)

- *Statutes at Large of the United Kingdom of Great Britain and Ireland*, vols 1, 4, 5, 6, 7 and 9 (1804, 1812, 1814, 1816, 1817 and 1824, printed by G Eyre and A Strahan, and by A Strahan)
- *Statutes at Large of the United Kingdom of Great Britain and Ireland*, vols 12, 14 and 17 (1832, 1838 and 1845, printed by G Eyre and A Spottiswoode)
- *Statutes at Large of the United Kingdom of Great Britain and Ireland*, vols 20, 22 and 25 (1851, 1855 and 1862, printed by GE Eyre and W Spottiswoode)
- *The Law Reports: Statutes,* vol 13 (1878, printed by GE Eyre and W Spottiswoode)
- University of St Andrews, *The Records of the Parliament of Scotland to 1707*, database (available at http://rps.ac.uk/)