

judicata it is necessary to keep in mind what are the facts necessary to found such a plea. All that is here averred is that the lands have not been localled on. It is stated that the lands were originally entered in the proven rental, and that on an objection being taken they did not appear in the state of teinds upon which the final locality was adjusted. But in the cases of *Earl of Hopetoun v. Ramsay*, 3 D. 685, *aff.* 5 Bell's App. 69, and *Dundas v. Waddell*, 6 R. 345, *rev.* 7 R. (H. of L.) 19, the legal question which formed the merits of those cases, viz., whether the heritor had a *decimæ inclusæ* right, had been distinctly raised on the pleadings in former processes, and judgment had been pronounced upon that point. In the *Hopetoun* case it was argued that the judgment in the previous process had been of consent, and in the case of *Dundas* that the mind of the Court had not been applied to the point, and that therefore there had been no *judicium*. But still in both cases it was held that there was evidence from the proceedings to show that the point had been raised, and the plea of *res judicata* was therefore given effect to. It was considered that it did not need the application of the mind of the Court to the argument provided the point had been raised and decided. That is my reading of the cases of *Hopetoun* and *Dundas*, and I do not think that these cases lay down that rule for the first time, though they may lay it down for the first time in regard to teind cases.

The question here is whether the question as to the valuation of Dalness was raised in the previous proceedings or not. There is no averment that the lands of Dalness were valued, but only that the lands were entered in the proven rental as worth £300 a-year, and were struck out. It is not alleged that this was done because the teinds were valued, and accordingly I do not think there is any evidence, or indeed any relevant averment, that at the date of that locality the lands of Dalness were valued. I am therefore unable to concur with the Lord Ordinary.

LORD SHAND—I am of the same opinion as your Lordships.

The strength of the respondent's case seems to lie in the presumption that as the sub-commissioners professed to value the whole of the lands in the parish, therefore Dalness was included. This presumption is further strengthened by the fact that although there have been various localities, even in comparatively recent times, yet no stipend has ever been localled upon the lands of Dalness. I am very far from undervaluing these presumptions. They are strong, and unless rebutted they would probably be considered strong enough to induce the Court to hold that the lands were valued. But I think that in the present case they have been rebutted, and that on account of the important considerations which have been mentioned by Lord Adam.

Dalness has been known by a separate name from the earliest time, and yet we are asked to hold that in the decree of valuation it is included under the name Inverawe. Further, the lands of Dalness were important and valuable, and are situated at a considerable distance from Inverawe, the intervening lands being separately valued. These, in my opinion, are the considerations which lead to the conclusion that Dalness was not valued.

The absence of the lands from the decree of valuation might arise from various causes. No doubt if the objector could say that the only reason why they are not included is because they must have been included in the general name of Inverawe her case would be strong. But she has not been successful in excluding other explanations. The lands of Dalness may have been omitted from error, or probably because of the mistaken view that a royal forest is not subject to the payment of teind. That would be sufficient to account for the omission, but the law upon that point has now been cleared up, and if such was the view of the parties that was no reason why the lands should not now be localled upon for stipend.

With regard to the question of *res judicata*, if it had been pleaded that Dalness was a royal forest, and that plea had been given effect to, or if in the process of locality a question had been raised as to the liability of the lands for stipend, and after the point had been stated the lands had been struck out of the proven rental, or out of the state of teinds, then, on the authority of *Dundas v. Waddell*, I think the plea would have been good. But for some unknown reason the lands were not included in the proven rental or in the state of teinds, and I much fear that if we were to adhere to the interlocutor of the Lord Ordinary we would find it necessary to hold, whenever lands were not included in the proven rental or state of teind, that the question of their liability was *res judicata*.

I am therefore of opinion that this case is distinguishable from that of *Dundas v. Waddell*, and both upon the merits and also upon the question of *res judicata* I think that the pursuer is entitled to succeed.

The LORD PRESIDENT concurred.

The Court recalled the interlocutor of the Lord Ordinary, repelled the defences, and found, declared, and decerned in terms of the conclusions of the libel.

Counsel for the Pursuer (Reclaimers)—Graham Murray — Liddall. Agent—J. B. McIntosh, S.S.C.

Counsel for Defenders (Respondents)—Gloag—Mackay. Agents—Mackenzie & Kermack, W.S.

Friday, June 12.

SECOND DIVISION.

LUCOVICH, PETITIONER.

Shipping Law—Bond of Bottomry—Petition to Arrest and Dismantle Vessel.

A creditor in a bottomry bond having petitioned the Court for warrant to arrest and, if necessary, to dismantle the ship over which it was granted, on the ground that it was about to proceed to sea without satisfying the bond, the Court, at the calling in the Single Bills, granted warrant to arrest *ad interim* pending the lodging of answers to the petition.

On 12th June 1885 Antone Treffone Lucovich,

shipowner, of Bute Docks, Cardiff, presented this petition praying the Court to fence and arrest the steamship "Cavendish," at present lying in the Leith Docks, her hull, keel, engines, spars, sails, and stores, with her float boats, furniture, and appurtenances, the freight due by the various receivers of the cargo discharged by her at Leith and to grant warrant for putting the said warrant into all lawful execution, to the dismantling of the said steamship if necessary.

The petitioner stated that the ship had in February been stranded near Trieste and floated off and towed there, and in consequence of her damage having made her unseaworthy, been placed in dock for repairs; that the master being obliged to provide for the crew and the expense of repairs and provisions for the voyage home (and the vessel being under judicial arrest for the expense of sailing), found it necessary in order to save the vessel to the owners and bring her home (after failing to get an ordinary loan and to obtain money from the owners, whom he had informed of the amount needed), to grant a bottomry bond to the petitioner's cedent in Trieste for £5000, payable within three days of arrival at Leith, by which bond a special lien as security of the loan was constituted over the ship, her hull, keel, engines, &c.; that the petitioner was now indorsee of the bond, and had failed to obtain the money from the master, who refused or delayed payment; that the petitioner was therefore about to sue him therefor, but the ship having been made ready for sea, arrestment was necessary to prevent her from proceeding to sea without payment, whereby the petitioner's only security would be lost.

The Court pronounced this interlocutor:—

"Appoint the petition to be intimated on the walls and in the minute-book in common form, and with a copy of this deliverance to be served on Eltringham MacDowell [the master], named in the petition, and allow him to appear at the bar of this Court tomorrow at ten o'clock and lodge answers to the petition within eight days after service of this deliverance if so advised; grant warrant to messenger-at-arms to arrest the steamship 'Cavendish' *ad interim*, and that on exhibition of a certified copy of this interlocutor, and appoint the execution of arrestment to be reported to the Court within twenty-four hours."

MacDowell, the master, next day appeared at the bar of the Court and undertook that his ship would not leave Leith until the matter in dispute with the petitioner was settled.

The petitioner intimated that he was satisfied with this undertaking, and did not further insist on the prayer of the petition.

LORDS YOUNG and RUTHERFURD CLARK were absent.

Counsel for Petitioner—Dickson. Agents—Boyd, Jameson, & Kelly, W. S.

HOUSE OF LORDS.

Monday, May 4.

(Before Lords Blackburn, Watson, and Fitzgerald).

BRODIE AND ANOTHER *v.* MANN.

(*Ante*, vol. xxi. p. 675, 11 R. 925—
13th June 1884.

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

For 37 years from 1846 the public were excluded from use of a road passing through the estate of G. In an action raised at the end of that time to have it declared that the road was a public right-of-way, it was proved that from 1820 to 1846 the road was used by the public continuously and as matter of right. With regard to the period before 1820 the evidence was conflicting. *Held* (*rev.* judgment of First Division) that the evidence of public use prior to that year was not sufficiently strong to overcome the presumption against the public arising from the fact of exclusion during the long period of 37 years.

This case is reported in Court of Session, *ante*, vol. xxi. p. 675, and 11 R. 925—13th June 1884.

The defender Mr Mann appealed.

At delivering judgment—

LORD BLACKBURN—My Lords, the Lord Ordinary in this case, by his interlocutor, having considered the proof, "found it proved that the defender and his predecessors in title have excluded the public from the use of the road in question since the year 1846, and that there is no proof of the assertion of a right on the part of the public since that year; finds it not proved that the road in question had been a public road during the period of 40 years antecedent to the year 1847," and he gave judgment for the defenders.

The pursuers reclaimed, as they had a right to do, and the Judges of the First Division recalled the interlocutor, and found it proved that "the road in question had been a public road during the period of 40 years antecedent to the commencement of the year 1847, and gave judgment for the pursuers. They differed from the Lord Ordinary, not as to any question of law, but as to the effect of the evidence.

My Lords, there was not anything in the nature of the evidence to give the Lord Ordinary, though he heard the witnesses, better means of judging than the Judges of the First Division or your Lordships, who only read the notes; and the Judges, I think, owed it to the respondents to form their own opinion and to act upon it if it was different from that of the Lord Ordinary. I think now that your Lordships owe it to the appellant to form your own opinion and to act upon it though it is different from that of the Inner Division. I need not say that I should not lightly differ from them, even though in so doing I agreed with the Lord Ordinary.

The evidence is voluminous, but there is no difference between the Judges below except as to the effect that ought to be given to the evidence