Tuesday, March 1.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

HOPE *v.* GEMMELL AND OTHERS.

Process—Proof or Jury Trial—Right-of-Way.

In an action raised by a proprietor against certain members of the public to have it declared that a road running through a portion of his estate from one public road to another was private, and that the public were not entitled to use it, the pursuer moved for a proof on the ground that public feeling, throughout the area from which jurors would be drawn, had been so inflamed in regard to the matter in dispute that the pursuer would be prejudiced by a jury trial, and that for this state of matters the defenders were largely responsible.

In support of this contention he produced, *inter alia*, an article discussing the question, which he averred was supplied by one of the defenders, and which was published a month before the action was raised in an evening newspaper admittedly enjoying a large circulation in the district. He also produced a violent article on the subject which appeared subsequently to the raising of the action in a local monthly periodical with a limited circulation.

Held (*rev.* judgment of Lord Kyllachy) that there was nothing to take the case out of the settled rule of practice that right-of-way cases should be tried by a jury.

This was an action raised on 29th September 1897 by Sir William Hope of Craighall against James Gemmell, Musselburgh, and others, concluding for declarator that the pursuer had the sole right and property of the lands of Pinkie, and that free of any public road, footpath, or right-of-way through the farm of Pinkiehill, and that a certain road shewn on a sheet of the Ordnance Survey was a private road belonging to the pursuer, and that neither the defenders nor any other members of the public were entitled to use the same without his consent. There was also a conclusion to have the defenders interdicted from entering upon the farm of Pinkiehill, and in particular from entering upon the said road, as well as from injuring or destroying any gates or fences across the said road.

The pursuer averred—"(Cond. 2) One of the farms on the pursuer's said estate is now known as the farm of Pinkiehill. The said farm is tinted red on the sheet of the Ordnance Survey herewith produced and referred to. A road starts from the point A on the said Ordnance Survey sheet and proceeds south for about 530 yards by the points marked B and C, and then proceeds westwards for 250 yards or thereby till it meets at the point marked D, the public road leading from Inveresk eastwards towards Elphingstone. The said road is a private road, and there is no right-of-way along the same. It was made and has all along been maintained by the pursuer's authors and himself, and their and his tenants, for the purposes of the said estate in general, and for the use of the said lands now known as the farm of Pinkiehill in particular."

To this the defenders answered as follows—"(Ans. 2) Admitted that one of the farms is known by the name of Pinkiehill. The Ordnance Survey sheet is referred to. Admitted that the said road, which is a public road is correctly described. Denied that it is a private road. Explained and averred that the termini of the said road are public highways, and the road itself is a public road, and leads from Musselburgh to Crookston, Elphingstone, Deantown, Carberry, and other places. It has been used by the general public as a public thoroughfare not only for foot-passenger traffic but for vehicles from time immemorial, and for a longer period than during the last forty years; or at all events there is a public right-of-way over it, which has been used by the public as a means of communication between said places from time immemorial, and until the present year neither the pursuer nor his authors ever challenged the said public right."

The pursuer further averred—"(Cond. 4) The defender Gemmell and others have, by speeches and writing in the public prints, been endeavouring by all means in their power to stir up and inflame public feeling in connection with the matter, and to induce all and sundry to trespass on the said road, alleging that the public have right to use the same, and the present action has accordingly been rendered necessary."

The third plea-in-law for the defenders was in the following terms:—"There being a public right-of-way over the said road, which has existed for more than forty years, the declaratory conclusions of the summons ought to be refused."

The case having been sent to the procedure roll, the pursuer lodged a minute submitting that it was not suitable for jury trial, and moving the Lord Ordinary to pronounce an order for proof, and to fix a diet thereof, in respect of the following considerations:—"*First.* That it would be difficult, if not impossible, for a jury to discriminate between use of the disputed road due entirely to tolerance, and use thereof, if any, as matter of right.

"*Second.* That public feeling had been so stirred up and inflamed with regard to the matter in dispute, throughout the whole area from which jurors would be drawn, as well in Edinburgh as in Musselburgh and the more immediate vicinity, that the pursuer would be prejudiced by a jury trial, and that for this state of things the defenders, or some of them, were largely responsible.

"In support of this contention he produced at the bar—1. Large placard convening the

meeting-demonstration of 21st August 1897, at which the gate was destroyed, as stated on record (article 3 of the condescendence).

"2. *The Musselburgh Monthly Reporter*, an organ of democratic socialism for Musselburgh and district, for August 1897, containing (page 20) an advertisement in similar terms; as also (page 13) two editorial notes as to the said contemplated demonstration.

"3. *The Musselburgh Monthly Reporter* for September 1897, containing (page 22) an account of the demonstration on 21st August, and reporting speeches by the defender Gemmell, therein described as 'Parish Councillor Gemmell,' the defender Joseph Young, therein described as 'Comrade Joe Young,' and others, dealing with the merits of the present case, and also endeavouring to mix it up with questions of general politics, with the view of biassing the minds of those who would otherwise have taken no interest in the matter.

"4. *The Edinburgh Evening News* for Saturday, August 28th 1897, containing (page 4) an elaborate article, illustrated with reproductions of maps and plans, entitled 'The Musselburgh Road Dispute—the Claim for Right-of-way.' *The Evening News* is a respectable and widely circulated paper, and this article was distinctly calculated to prejudice the mind of anyone reading it against the pursuer. From information received, the pursuer believes and avers that the said article, or at all events the information therein contained, was supplied by the defender James Gemmell.

"5. *The Musselburgh News* of Friday, September 10th 1897, containing (page 4) report of meeting of Inveresk Parish Council, including speech thereat by the defender James Gemmell. In said speech the merits of the present case are discussed to the disadvantage of the pursuer.

"6. *The Musselburgh Monthly Reporter* for October 1897, containing (page 32) an article entitled 'In Militant Mood,' wherein the merits of this case are discussed, and abusive language made use of concerning the pursuer. Said article states that 'although of the eight persons summoned only two are I. L. Peers, the Musselburgh branch of the I. L. P. has determined to fight the question to an issue.' The two persons described as I. L. Peers'—by which it is understood is meant 'democratic socialists' or members of the 'Independent Labour Party'—are the defenders Joseph Young and James Young, described in the said journal as 'Comrade Joe Young' and 'Comrade James Young.' The said journal is controlled by and is the avowed organ of the said organisation, and in particular of the Musselburgh branch thereof, and the said two defenders are responsible for the said article 'In Militant Mood,' which was inserted for the purpose and with the effect of exciting public opinion against the pursuer with regard to the merits of the present dispute. The said October number also contains (page 36) an advertisement in which the defender Joseph Young appeals for subscriptions in aid of the defence."

The defenders lodged answers to the pursuer's minute submitting — "*First.* That the question at issue between the parties, as set forth upon record, was purely a question of fact, and that it is pre-eminently suited for trial by jury, and that no good or sufficient reasons have been assigned by the pursuer why such a trial should not take place.

"*Second.* (*a*) That the statement by the pursuer that public feeling had been stirred up and inflamed in the whole area from which jurors would be drawn was without foundation, as with the single exception of the public meeting held on 21st August 1897, referred to in the placard No. 14 of process, and which was brought about in consequence of the erection by the pursuer of a gate at the entrance to and thus closing the right-of-way referred to on record, and so excluding the public, not a single public meeting had been called or held in relation to the subject-matter in dispute, and no steps have been taken by or on behalf of the defenders to educate or otherwise influence the public mind since the raising of the present action, and the public themselves have not taken any action in that direction. This the defenders believe was mainly in consequence of the general belief that the pursuer would take action to convene the County Council, who would be called upon on behalf of the public to defend the action.

"(*b*) *The Musselburgh Monthly Reporter* referred to is, it is believed, a small local monthly newspaper, recently started (the issue produced and referred to is vol. i., No. 3). It is intended and it is believed is confined to socialists within the burgh of Musselburgh, and its circulation is necessarily limited. It is neither well circulated nor well read, and it is believed not a single person outside of the burgh has ever seen the reports therein referred to. The copy referred to was published before the raising of the present action.

"(*c*) No. 16 of process (vol. i., No. 4, of the said *Reporter*) was also published before the raising of the present action, and the defenders were not the authors of any statement or articles therein, or in the previous or subsequent issue referred to of the paper. It is admitted that Mr Gemmell, the defender, is a member of the Parish Council and also of the District Committee of the County Council.

"(*d*) The article in the *Evening News* was written and published before the raising of the present action, and, with that single exception, and in the 'reports' referred to, so far as known to the defenders, not a single notice has appeared in the public prints relating to the subject-matter in dispute, which is of no interest to anyone excepting parties resident within the burgh of Musselburgh.

"(*e*) Mr Gemmell, as a member of the Parish Council, was present at the meeting reported in the *Musselburgh News* (No. 18

of process), and reference is made to the said report.

"(*f*) The *Reporter* (No. 19 of process) referred to was issued a day or two after the present summons had been served, and so far as is known to the defenders, it is the only public reference which has been made to the action since it was raised, excepting the advertisement therein contained appealing for subscriptions in aid of the defence.

"(*g*) Generally it is denied that the defenders have, with the exception of getting subscriptions for the defence, made any reference to this action or the merits thereof in public. None of the defenders have done anything to cause the said newspapers to insert the said paragraphs, which, it is submitted, with one exception, are fair comments on a public question, and have no tendency to inflame the public mind against the pursuer or his rights in this action. The speech made by the defender Gemmell at the Parish Council meeting fairly represents the attitude which the defenders took up in this matter. In these circumstances, and seeing, in any event, that the defenders have done nothing to cause the newspapers to make the said comments, it is submitted that it would be a hardship if the action of third parties unconnected with this suit should in any way prejudice the rights of the defenders."

On 26th January 1898 the Lord Ordinary (KYLLACHY) pronounced an interlocutor allowing parties a proof of their averments and the pursuers a conjunct probation, to proceed on a day to be afterwards fixed.

Opinion.—"I have come to the conclusion that in this case I should not order issues, but appoint a proof. I do not say that it would, in my opinion, be impossible, by a careful exercise of the right of challenge and otherwise to obtain a fair trial by a jury drawn from Edinburgh and the neighbourhood of the question which is here at issue. But having read the placard, speeches, and publications in the pursuer's minute — including among others the article in the *Edinburgh Evening News*, of which a copy is produced—I do feel that there is a substantial risk of prejudice having been induced with respect to the matters at issue in the minds of persons who are likely to form the panel from which the jury in this case would fall to be drawn. I am therefore of opinion that these circumstances bring the case sufficiently within the rule, or rather the exception, recognised by the Court in the case of *Blair* v. *Macfie*. It is true that it is not in this case admitted that the publications complained of were made or inspired by the parties who now seek jury trial, but I do not consider that that fact is essential; and I may add that it does strike me as of some significance that the pursuer having by his minute made a specific statement as to the authorship of the article in the *Evening News*, the defenders in their answers neither admit nor deny that statement. As I have said, however, I do not consider the matter of the authorship of the article to be essential. I shall allow a proof before answer."

The defenders reclaimed, and argued—The Lord Ordinary was wrong. The well-settled rule was that right-of-way cases should go to a jury, and that had been given effect to in the recent case of *Paterson* v. *Airdrie and Coatbridge Water Company*, February 14, 1893, 20 R. 370. To take a case out of the general rule there must be something special about it, *e.g.*, the question at issue must be extremely complicated and difficult as in *Fraser Tytler's Trustees* v. *Milton*, March 15, 1890, 17 R. 670; or the person who brought the action into Court must have done something, such as starting a newspaper correspondence, to prejudice the public mind, as in *Blair* v. *Macfie*, February 2, 1884, 11 R. 515, where the element of complication was also present. Here neither of these circumstances was to be found. There were doubtless questions of law involved, but so there were in every right-of-way case, and the mere fact that legal questions were inextricably mixed up with questions of fact would not suffice to warrant a departure from the ordinary rule—see *Black* v. *Mason*, February 18, 1881, 8 R. 497, March 18, 1881, 8 R. 666. There was nothing in the newspaper articles here complained of to prejudice the public mind.

Argued for the pursuer—Without denying that the old practice was to send right-of-way cases to a jury, the tendency in modern times was to try them before a judge—see Lord Shand's opinion in *Macfie*, *ut sup.* at p. 518, and in *Fraser Tytler's Trustees*, *ut sup.* at p. 673, and Lord M'Laren's opinion in *Fraser Tytler's Trustees*, *ibid.*, where it was expressly said that such questions should be left to the decision of a judge. Exceptions to the old rule had not been infrequent, *e.g.*, *Macfie*, *ut sup.*, *Fraser Tytler*, *ut sup.*, and the *Glendoll* case, *Scottish Rights-of-Way and Recreation Society* v. *Macpherson*, October 23, 1886, 14 R. 7, 74. Here, as in the *Glendoll* case, there had been articles in the newspapers. Here, too, there was not a pure and unqualified question of fact in dispute, but a question of fact with a legal aspect. A jury was therefore not the most suitable tribunal—*Mackintosh and Others* v. *Moir*, February 28, 1871, 9 Macph. 574, *per* Lord Gifford, 581.

LORD PRESIDENT—There have been cases in which from their nature it has appeared that the question to be tried is not a pure question of fact, but that questions of fact and questions of law are so interwoven as not to be separable. Where such a case is presented the Court may deem it more appropriate to be tried by a judge than by a jury. But where the case is a plain sailing question of right-of-way, I take it that our practice is settled that it should go to a jury unless cause is shown.

Now, the present case is a perfectly simple uncomplicated case of right-of way, and accordingly, but for the extraneous circumstances upon which the Lord Ordinary has proceeded, I should imagine that it could not avoid being tried by a jury in ordinary course.

Now, let us see what there is which it is supposed may have so prejudiced the minds of the panel as to endanger the prospect of a fair trial. Two things are pointed to. The first is certain publications of a periodical called the *Musselburgh Monthly Reporter*, about which we know nothing except what we are told to-day, and that is, that it is a publication whose circulation is among a small class of the not very large community of Musselburgh. It is not represented to us that it is a publication which has access to the general public from whom the panel is drawn—still less, that those who read it pay any attention to it. The other publication is that of an account of the question given in an Edinburgh evening newspaper which is said to have a large circulation. We have that account before us, embellished with plans, and there is nothing in it which, I should suppose, would leave any indelible impression upon the mind of anyone who perused it, especially considering that its publication took place a good many months ago. Therefore as the question is not what certain obscure persons have said about this, but what is the probable effect in the way of prepossession on the part of the panel, I cannot say that I see any reason whatever to suppose that the forty-five men who come here will know or care more about this than about any other right-of-way that is tried. In these circumstances I see no adequate reason for departing from what I consider to be the settled rule of practice that right-of-way cases, unless distinguished in their quality or circumstances by some marked characteristic, should go to trial before a jury. I am therefore for recalling the interlocutor reclaimed against, and remitting to the Lord Ordinary to allow issues to be lodged.

LORD ADAM—This appears to me to be as simple a case of right-of-way as we can well have, the question being, whether the particular road mentioned in Cond. 2 is a private road or a public road. The case is not complicated, as were the cases of *Blair* and *Fraser-Tytler*, with questions with other proprietors, and about other roads. I agree, therefore, that if it had not been for certain circumstances that have been referred to, there could have been no doubt that the case should go to a jury, which is a far better tribunal than a judge in this class of case. The special circumstance is that there have been published certain speeches and articles in connection with the dispute which has arisen, and the Lord Ordinary thinks that there is a substantial risk of prejudice having been induced in the minds of persons who might form the jury. If that were so, then I would agree with the course proposed by the Lord Ordinary, but from all that I have heard I do not think that they will have that tendency.

That being so, I think the case should be remitted back to the Lord Ordinary for jury trial.

LORD M'LAREN—I have always thought, and in former cases have expressed the opinion, that right-of-way cases are better suited for trial by a judge than by a judge and a jury, because they often raise very difficult questions of evidence. But the settled course of practice is to send such cases to a jury, and I accept that practice and see no reason for departing from it in the present instance. It is not said that the case presents any specialty which justifies an application to have it tried in any other than the usual way. As regards the ground on which the Lord Ordinary has exercised his discretion, I feel very unwilling to interfere, but considering that there has been no attempt to influence the public mind through newspapers or otherwise since the case came into Court, I am unable to say that the mere fact of agitation before the case came into Court is a reason for withdrawing the case from a jury. There is nothing wrong in such an agitation. While the case is in preparation, and whatever may be said as to the good taste of the articles which have been brought under our notice, it is at least to the credit of the newspapers in question that they have ceased to interfere in the matter since the case came into Court.

LORD KINNEAR—I agree with your Lordship, in the first place, that according to settled practice, a question of right-of-way ought to be sent to a jury, unless some special cause can be shown for holding that that would not be a satisfactory method of trial, and, secondly, that here no sufficient ground has been shown for taking the case out of the ordinary course. I quite agree that we ought to have great respect for an exercise of discretion by the Lord Ordinary, but in this particular case the ground upon which he has exercised his discretion would have a somewhat general bearing, and since the question has been brought before us by reclaiming-note, I think we ought to proceed upon our own judgment.

The Court recalled the interlocutor of the Lord Ordinary, and remitted to his Lordship to adjust the issue or issues proposed for the trial of the cause, and to proceed.

Counsel for the Pursuer—Sol.-Gen. Dickson, Q.C.—Macphail. Agents—Melville & Lindesay, W.S.

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