

reference to Mr M^cCreath was to embrace matters arising at the termination of the lease, as well as those disputes which might take place during its currency. Perhaps it was even more necessary to provide for the settlement of disputes at the termination of the lease than of disputes of the other class, because if landlord and tenant are on good terms, and are desiring to work the contract fairly, there may be no questions during the currency of the lease, but there must always be questions to settle at its termination. We are asked, however, to interfere on the ground that the arbiter in deciding this question has had to construe the lease, and it is said that his construction is so clearly wrong that the foundation of his award is taken away by his having proceeded upon a false basis. I can conceive a case where an award may be cut down or set aside on such a ground, but I think that it would be almost necessary to say that the decision was so manifestly and demonstrably unsound that no honest arbiter, properly conducting his case, could have come to that conclusion. Now, it is not suggested that the objection to this award is of the character which I have stated. So far from that being the case as regards the more important question, the opinion of the Lord Ordinary (with which I understand your Lordships are in agreement) is that with nothing but the lease before him he would come to the same conclusion as the arbiter. With regard to the engine seat, which certainly raises a troublesome legal question, I am not prepared, any more than the Lord-Ordinary, to say that the award is wrong, because I think it is quite possible that there may have been evidence before the arbiter that the tenant had taken over this engine seat, and that it had thereby become his property in the sense of the contract. If he took the view that, according to the true meaning of the contract the tenant was to be treated as the proprietor of fixtures which he had paid for, then I cannot say that I should pronounce that decision to be wrong. On the whole matter I agree with your Lordship that, subject to the slight alteration that may be necessary upon the first finding, we should adhere to the Lord-Ordinary's interlocutor.

LORD KINNEAR—I concur.

The Court adhered.

Counsel for the Pursuer and Respondent—The Dean of Faculty (Campbell, K.C.)—Cooper, K.C.—Hunter. Agents—Webster, Will & Co., S.S.C.

Counsel for the Defender and Reclaimer—The Solicitor-General (Clyde, K.C.)—C. D. Murray. Agents—Drummond & Reid, W.S.

Thursday, November 23.

SECOND DIVISION.

[Lord Low, Ordinary.

ROBERTSON AND OTHERS v. DUKE OF ATHOLL AND OTHERS.

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

In an action raised by members of the public against proprietors, for declarator that a right-of-way existed (1) from A to B *via* certain places, (2) also from A to B for the first part *via* the same places but for the latter part *via* certain other places, a portion of this latter part being claimed by alternative routes forming a bifurcation, the defenders argued for a proof in lieu of jury trial on the ground of (1) the complexity of rights-of-way sought to be established, (2) the danger of the jury being misled by the evidence, since part of the right-of-way claimed was an admitted right-of-way, another part was a tolerated route, and traffic from either end to and from a certain well near the right-of-way claimed was likely to be mistaken for through traffic.

Held 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 of declarator of right-of-way, brought by Robert Robertson, boot and shoemaker, Dunkeld, but to which, by interlocutor of 20th June 1905, the Reverend John White Hamilton, United Free Church Minister, Dunkeld, and John Murray, joiner, Dunkeld, were sisted as pursuers (see *ante*, May 5, 1905, 42 S.L.R. 601), against the Duke of Atholl and others. The pursuers sought to have it found and declared that there existed a public road or right-of-way for passage on foot and horseback, and also for driving cattle and sheep, (1) between Dunkeld and Kirkmichael *via* Santa Crux Well and certain named places, the route claimed being further identified by reference to certain points marked on a map produced with the summons, (2) between Dunkeld and Kirkmichael, also *via* Santa Crux Well as in (1), but thence *via* certain other named places also under reference to points marked in the said map. A portion of (2) was claimed by alternative routes. There was also an alternative conclusion for declarator that a public right-of-way existed between Dunkeld and Santa Crux Well which was not contended for in the Inner House, the pursuers there assenting to the defenders being assoilzied from it.

Defences were lodged for the Duke of Atholl, Charles Edward Stuart Chambers of Cardney, Frank Balfour of Kindrogan, and the trustees of the late Charles Trotter of Woodhill.

On 20th June 1905 the Lord Ordinary (Low) appointed the pursuers to lodge the issue or issues which they proposed for the trial of the cause.

The proposed issues, which embodied the conclusions of the summons, were as follows:—“(1) Whether for forty years and upwards, or from time immemorial prior to 1904, there has been a public road or right-of-way for passage on foot and horseback, and also for driving sheep and cattle, or any and which of them, between Dunkeld and Kirkmichael, leading the said public road or right-of-way from the public highway between Dunkeld and Blairgowrie at or near the house known as Cally Lodge, at the point marked A on the map herewith produced, in a northerly direction past the houses of Hatton and Birkenburn to the Glack Sawmill; thence in a north-easterly direction across Cardney Hill to Grews or Santa Cruz Well at the point marked B on the said plan; thence in a north-easterly, northerly, and north-easterly direction past Easter Riemore across Riemore Hill, on the west side of Loch Benachally, to the estate of Woodhill; thence through the Woodhill estate in a northerly direction past Dalnabrick, Pitcarnick, Dalvey, Stronamuck, Cragansualtach, and the Kirkmichael Free Church to Kirkmichael, where it joins the public highway from Blairgowrie to Kirkmichael and Pitlochrie at or near the point marked C on said plan? (2) Whether for forty years and upwards, or from time immemorial prior to 1904, there has been a public road or right-of-way for passage on foot and horseback, and also for driving sheep and cattle, or any and which of them, between Dunkeld and Kirkmichael, leading the said public road from Cally Lodge aforesaid to Grews or Santa Cruz Well aforesaid until it reaches Riemore, being the road or way described in the first issue hereof; thence in a north-westerly and northerly direction up the bed of the Buckney Burn past Lochan Oisinnach Mhor to Lochan Oisinnach Bheag through the gate in the fence at the top of Loch Oisinnach Bheag at the point marked D on said plan, and downwards towards Loch Esk; thence by alternative routes, the first in a north-easterly, easterly, and northerly direction towards Cragansualtach, at the point marked E on said plan, and past the Free Church aforesaid; and the second by a ford over the Loch Esk Burn by Balnald plantation in a north-easterly direction to Balnakilly, and thereafter in an easterly direction, both to Kirkmichael, joining the public highway from Blairgowrie to Kirkmichael and Pitlochrie at or near the point marked C on said plan? Or alternatively (3) Whether for forty years and upwards, or from time immemorial prior to 1904, there has been a public road or right-of-way for passage on foot between Dunkeld and Grews or Santa Cruz Well aforesaid, leading the said public road or right-of-way from the said public highway between Dunkeld and Blairgowrie, at or near Cally Lodge aforesaid, and proceeding to Grews or Santa Cruz Well, at the point marked B on the said plan, by the road or way between these points described in the first issue hereof?”

On 4th July the Lord Ordinary (Low) pronounced the following interlocutor:—

“Disallows the issues proposed by the pursuers: Before answer, allows to the parties a proof of their respective averments, and to the pursuers a conjunct probation, to proceed on a day to be afterwards fixed.

Opinion—“I think that it must now be regarded as settled practice that an action of declarator of right-of-way will be sent to a jury unless it possesses some peculiarity which renders such a mode of trial inadvisable.

“In this case the pursuers claim three rights-of-way. The first two lead from Dunkeld to Kirkmichael. They both lead, in the first place, upon the same line, to a place called Santa Cruz, where there is a mineral well, but they then divide and proceed by different routes to Kirkmichael. If those had been the only ways claimed I should have had no doubt that the pursuers were entitled to have the case sent to a jury. But the pursuers claim alternatively a way leading to Santa Cruz Well and no further. It is evident that whether that is a relevant claim or not depends upon whether Santa Cruz Well is a public place. Now, the pursuers' averments in regard to Santa Cruz Well are these—‘The said well has been in existence for centuries, and has been and still is regularly visited by large numbers of people on account of the supposed medicinal quality and curative power of its waters. At the well there was a chapel which was used by pilgrims for devotional purposes. Tents were erected for the accommodation of the pilgrims, and refreshments were sold as openly as at a fair. The said Well was and is a public place.’

“I confess that I have great doubt as to the relevancy of these averments; it is not disputed that the Well is situated on the private property of the Duke of Atholl, and no such public right as that claimed by the pursuers has ever been recognised in Scotland as capable of being acquired by the prescriptive use of a well, whether medicinal or not. Such a right cannot be a servitude, and if it exists at all, must I apprehend, be based upon dedication to the public use from time immemorial. The doctrine of implied dedication to public uses has never been received with favour in the law of Scotland, but I do not think that the possibility of implying such dedication from immemorial use is altogether excluded. I therefore do not think that I would be justified in throwing out the claim without ascertaining the precise facts, and indeed the Solicitor-General, for the defenders, conceded that there must be inquiry. I am of opinion, however, that the question is one which is entirely unsuitable for a jury. It involves a question of law of a kind which has given rise to great controversy, and the result will probably depend upon the legal inference to be drawn from the facts. It therefore seems to me to be a typical case for an allowance of proof before answer, and, of course, if one part of the case is to be tried by way of proof, the other must be so also. I shall therefore allow a proof before answer upon the whole cause.”

The pursuers then lodged the following minute—"Hunter for the pursuers stated, and hereby states, that he departs from the third issue contained in the proposed issues for the pursuers, and craved, and hereby craves, the Lord Ordinary to approve of the first and second issues."

On 7th July the Lord Ordinary pronounced this interlocutor—"The Lord Ordinary having heard counsel upon the minute for the pursuers, refuses the same in respect that it is not competent for the Lord Ordinary to deal therewith, he having disallowed the issues proposed by the pursuers by the immediately preceding interlocutor."

The pursuers reclaimed against the interlocutor of 4th July 1905.

In the course of the argument in the Inner House, the defenders (respondents) argued that the rights-of-way claimed were not sufficiently identified, and that, though certain points were referred to on the map produced, they were far apart, and no line was drawn between them. The pursuers (reclaimers) while maintaining that it was not necessary there should be a line on the plan (*Mackintosh v. Moir*, February 28, 1872, 10 Macph. 517, 9 S.L.R. 300), agreed to lodge plans for the convenience of the Court with lines shewing roughly the rights-of-way claimed, and to enable these plans to be prepared the further hearing was postponed for a week. At the continued hearing of the case the pursuers (reclaimers) further agreed that said lines should also be marked on the plan produced with the summons, and that reference should be made in the proposed issues to this plan. They also consented to the defenders being assoilzied from the alternative conclusion of the summons which was embodied in the third issue proposed in the Outer House.

The reclaimers (pursuers) now argued—The case should be sent to a jury. The Lord Ordinary would have done so if it had not been for the right-of-way claimed to Santa Cruz Well in the alternative conclusion of the summons. That conclusion having been given up, the judgment was really in their favour. The fact that there were two bifurcations did not make this a complex right-of-way case, and it was the settled practice to send ordinary cases of declarators of rights-of-way to a jury. Even supposing there were difficulties of question of fact, these were perfectly suitable for trial by jury—*Nairn v. Speedie and Others*, March 3, 1899, 1 F. 635, 36 S.L.R. 501; *Hope v. Gemmell*, March 1, 1898, 25 R. 678, 35 S.L.R. 528; *Fraser Tytler's Trustees v. Milton*, March 15, 1890, 17 R. 670, 27 S.L.R. 533; *Blair v. Macfie*, February 2, 1884, 11 R. 515, 21 S.L.R. 349. Though there was an alternative claim of servitude in the case of *Paterson v. Airdrie and Coatbridge Water Company*, February 14, 1893, 20 R. 370, 30 S.L.R. 637, it was sent to be tried by jury. The case of *Mackintosh and Others v. Moir*, February 28, 1871, 9 Macph. 574, 8 S.L.R. 382, referred to by defenders, was sent to a jury. They relied on modern cases; those referred to by the defenders were all old.

The respondents (defenders) argued—Even though the alternative conclusion had been abandoned, the case ought not to be sent to a jury. The Court had a free discretion in the matter. This was not one of the enumerated causes, and there was no warrant for erecting the series of decisions quoted by the pursuers into a rule of practice binding on the Court—certainly not on that Division. Further, so far as the Second Division was concerned this matter stood as left by *Macfie v. Stewart*, January 24, 1872, 10 Macph. 408, 9 S.L.R. 240, and the views there expressed were also held by the First Division up to and including the case of *Fraser Tytler's Trustees*. The case ought not to be sent to be tried by jury because of (1) the complexity of the rights-of-way sought to be established, which appeared from the proposed issues—Two rights-of-way were claimed, partly the same and partly different, and one of these had an alternative loop—because of (2) the danger of the jury being misled by the evidence owing to the following facts, that part of the right-of-way claimed was an admitted right-of-way, that another part was a tolerated route, that people went to Santa Cruz Well from either end, that there was a tolerated access to Santa Cruz Well. The jury would find it difficult to sift what was evidence of through traffic and what was evidence of right. On the dangers of evidence calculated to mislead they referred to Lord Deas' opinion in *Mackintosh v. Moir*, February 28, 1871, 9 Macph. 574, at p. 577. The Court should apply the same standard as in *Fraser Tytler's Trustees*.

At advising—

LORD JUSTICE-CLERK—I think there can be no doubt that—although cases of this kind have not recently come before this Division—it has come to be well established as matter of practice in cases that have come before the First Division, that, where the question of right-of-way which is raised is a pure question of fact without any complication of any kind, a case ought in ordinary course to be sent to a jury. I cannot help saying for myself I think that is about the worst way of trying a right-of-way case that can be imagined. But it has been practically settled that if it is a question of fact it is to go to a jury. Now, when this case first presented itself in the Outer House, Lord Low saw ground for sending it, not to a jury, but to proof before himself, and if the case had been in the exact position it was in when it was debated in the Procedure Roll before him we should certainly have held that his judgment was right. There was then a question of a difficult kind indeed, involving questions of law which might depend on evidence led at the trial, namely, whether any person going up from Dunkeld towards Kirkmichael might be held, on reaching Santa Cruz Well, to have reached a public place. That of course might have raised a very difficult question as to the law applicable to the facts, but that point has now been given up, and the question is whether there have from time immemorial, or for forty years,

been public roads from Dunkeld on the lines marked on the plan, coming out at what is undoubtedly a public place at Kirk-michael. It seems to me that that is a question as to which, according to the decisions, there is no ground for not allowing it to be tried by jury. I am therefore of opinion that we should recal the interlocutor. Of course the issues must be with reference to a plan.

LORD KYLLACHY—I concur with what your Lordship has said. I quite agree that cases of this kind would be much better tried by a judge than by a jury; but I am afraid that except in special cases the practice is settled the other way. In the present case I do not think that there is anything in the circumstances which would justify me in differing from the view of the Lord Ordinary that, the alternative conclusion of the summons being withdrawn, there must be a trial by jury.

LORD STORMONTH DARLING and LORD LOW concurred.

The Court pronounced this interlocutor—“Recal the . . . interlocutor reclaimed against: Assolzie the defenders from the alternative conclusions of the action and decern: Appoint the pursuers to lodge issues within eight days, and find no expenses due to or by either party since 4th July last.

The issues as finally adjusted and approved were as follows—“(1) Whether for forty years and upward, or from time immemorial prior to 1904, there has been a public road or right-of-way for passage on foot and horseback, and also for driving cattle and sheep, or any and which of them, between Dunkeld and Kirkmichael, leading the said public road or right-of-way from the public highway between Dunkeld and Blairgowrie at or near the house known as Cally Lodge at the point marked A on the map No. 7 of process in a northerly direction past the houses of Hatton and Birkenburn to the Glack Sawmill; thence in a north-easterly direction across Cardney Hill to Grews or Santa Crux Well at the point marked B on the said map; thence in a north-easterly, northerly, and north-easterly direction past Easter Riemore, across Riemore Hill, on the west side of Loch Benachally, to the estate of Woodhill; thence through the Woodhill estate in a northerly direction past Dalnabrick, Pitcarnick, Dalvey, Stronamuck, Cragansuالتach, and the Kirkmichael Free Church to Kirkmichael, where it joins the public highway from Blairgowrie to Kirkmichael and Pitlochrie at or near the point marked C on said map on or near the line coloured red on said map? (2) Whether for forty years and upwards, or from time immemorial prior to 1904, there has been a public road or right-of-way for passage on foot and horseback, and also for driving sheep and cattle, or any and which of them, between Dunkeld and Kirkmichael, leading the said public road from Cally Lodge aforesaid to Grews or Santa Crux Well

aforesaid until it reaches Riemore, being the road or way described in the first issue; thence in a north-westerly and northerly direction up the bed of the Buckney Burn past Lochan Oisinneach Mhor to Lochan Oisinneach Bheag through the gate in the fence at the top of Lochan Oisinneach Bheag at the point marked D on said plan, and downwards towards Loch Esk; thence by alternative routes, the first in a north-easterly, easterly, and northerly direction towards Cragansuالتach, at the point marked E on said map, and past the Free Church aforesaid; and the second by a ford over the Loch Esk Burn by Balnald plantation in a north-easterly direction to Balnakilly, and thereafter in an easterly direction, both to Kirkmichael, joining the public highway from Blairgowrie to Kirkmichael and Pitlochrie at or near the point marked C on said map on or near the lines coloured red on the said map?”

Counsel for Pursuers (Reclaimers)—Ure, K.C.—Hunter, K.C.—J. A. Macdonald. Agents—Gordon, Falconer, & Fairweather, W.S.

Counsel for Defenders (Respondents)—Solicitor-General (Clyde, K.C.)—Macphail. Agents—Tods, Murray, & Jamieson, W.S.

Thursday, December 7.

SECOND DIVISION.

[Sheriff Court of Lanarkshire
at Glasgow

KIRK'S TRUSTEES v. WALKER AND OTHERS.

Succession—Trust—Vesting—Repugnancy—Discretionary Power of Trustees to Withhold Payment—Conditional Institution of Issue of Beneficiary—“Dying,” meaning Dying before Receiving Payment, and not Dying before Term when Legacy might have been Paid.

A testator who died in 1884 conveyed to trustees his whole estate, *inter alia*, “(Second) For payment at the first term of Whitsunday or Martinmas after my death . . . to my nephews” A and B, “equally between them, the sum of £1000, but declaring that it shall be in the power of my said trustees to withhold payment of this legacy in whole or part for such time as they may think proper, and to apply the income, or such part of the capital as they may think proper, for the benefit of the legatees, declaring that the trustees shall be entitled to exercise an absolute discretion as to the extent and manner in which this legacy, and the income thereof, shall be paid to or applied for the benefit of the legatees, and in the event of either of the said” A or B “dying, leaving lawful issue, my trustees shall be entitled to apply such deceiver's share of the legacy for behoof of such issue in