the guardians of public money had no legal position that would have justified them in making the payment. I feel sympathy, as the Lord Chancellor has expressed and as Lord Guthrie has expressed, and as I believe all the learned Judges who have considered the case have expressed—sympathy with an old public servant who spent so many years of his life in the service of the town, but those are not topics that can be given undue weight to when the matter comes now to the arbitrament of legal decision. We must adopt a legal view of a legal claim.

I entirely concur with the judgments of the learned Judges in Scotland and with the opinion expressed by my noble and learned friend on the Woolsack, that the appeal should be dismissed with costs.

LORD KINNEAR—I agree entirely in all that has been said by my noble and learned friends.

I think this is a mere question of fact. I have no doubt that the original pursuer, the late Mr Mackison, was employed to do a considerable amount of work that was not probably within the contemplation of parties when his appointment as borough engineer was made; but the question is whether there was any agreement between him and the Town Council that he should receive extra payment for such work. He was bound to give his whole time to the service of the Town Council—he is not therefore in the position of an ordinary professional man who may say—When employment is offered to me and I accept it there is an implied obligation to pay me for it either according to some settled rate or upon a *quantum meruit*. He was engaged to give his whole time to the service of the Town Council, and when he was asked to do more work than was directly within the scope of his employment as defined on his appointment it is necessary for him to prove that there was a contract to employ him on these terms. Now that, as I say, is a mere question of fact.

I will only add, that agreeing as I do with all that has been said, I agree also with Lord Low's statement of the facts and his comment upon the evidence, and therefore it is unnecessary to say more than that I concur in the judgment proposed.

LORD SHAW OF DUNFERMLINE—I may be allowed to concur in the remarks made by my noble and learned friend on the Woolsack as to the conciseness and skill with which the appellant's case has been presented by his learned counsel at your Lordships' bar.

With reference to the doctrine as to the increase of the burden of proof in proportion to the delay in taking proceedings, when the trial is to be a trial on an issue of fact nothing further needs to be said on the general rule than what was laid down by Lord Selborne in the passage which has been quoted. But I should desire to add these two propositions with regard to that general rule. First of all, I think the doctrine as to the burden of proof in consequence of delay is specially applicable in the case of a servant who is salaried for his full time; and, in the second place, I think it is specially applicable in the case of the employee of a body who under their various statutes are bound from year to year to render an account of their intromissions to a varying public and to adjust their assessments to meet the expenditure from year to year. Notwithstanding those two specialties, I do not of course exclude the possibility of establishing such a case as is here put forward, namely, that the contract of employment was for the extra services of such salaried official in respect of extra work performed by him. I only call attention to the fact that those specialties largely increase the burden of proving such a case in a court of justice. On this case had a claim, at least in any respect approaching the enormous aggregate now presented to your Lordships, been made upon the Town Council of Dundee at any time during the thirty odd years when these remunerations were alleged to have been incurred, I cannot doubt that such a claim, so put forward, would have been dealt with either by a severance of the relation between the two parties and the treatment of the matter then and there, when all the parties were alive, as a question of contract upon which the evidence would have been easily available, or, on the other hand—and perhaps that would be a more reasonable ground—by an increase to the annual allowances of salary to be paid to Mr Mackison.

On these grounds I desire to express my entire concurrence with the judgment in the Court below, and in particular with the opinion of Lord Low.

Their Lordships dismissed the appeal.

Counsel for the Pursuers (Appellants)—T. B. Morison, K.C.—Lowson. Agents—G. R. Stewart, S.S.C., Edinburgh—James Millar & Coleman, London.

Counsel for the Defenders (Respondents)—Chree — Macmillan. Agents — Morton, Smart, Macdonald, & Prosser, W.S., Edinburgh—William Robertson & Co., Westminster.

Friday, December 17, 1909.

(Before the Lord Chancellor (Loreburn), Lord Atkinson, and Lord Shaw.)

KINLOCH AND ANOTHER (KINLOCH'S TRUSTEES) *v.* YOUNG.

Road—Right-of-Way—Prescriptive Public Use—Deviation and Substitution.

Circumstances in which *held* that for the purpose of establishing by prescriptive use a public right-of-way from one highway to another, which use did not extend to the full prescriptive period, it was right to take into consideration the earlier use of a way between the

two highways, although such way began and finished at different points and followed throughout a different line.

Proof—Evidence—Road—Right-of-Way—Prescription—General Use—Tenants' Use—Judge of First Instance.

Evidence held sufficient to establish by prescriptive use a right-of-way for foot-passengers where the use was that chiefly of tenants, but where little more could be looked for.

Observations (*per* the Lord Chancellor) on the preponderant weight to be given to the opinion of the Judge of First Instance where the question came to rest on oral evidence.

Process—Proof or Jury Trial—Road—Right-of-Way—Prescription—Deviation.

Held (*per* Lord Ordinary, Salvesen) that inquiry should be by proof and not by jury trial in an action as to the existence through prescriptive use of a public right-of-way, in which arose the question whether and to what extent there could be taken into account use, at an earlier period, of an entirely different line of passage.

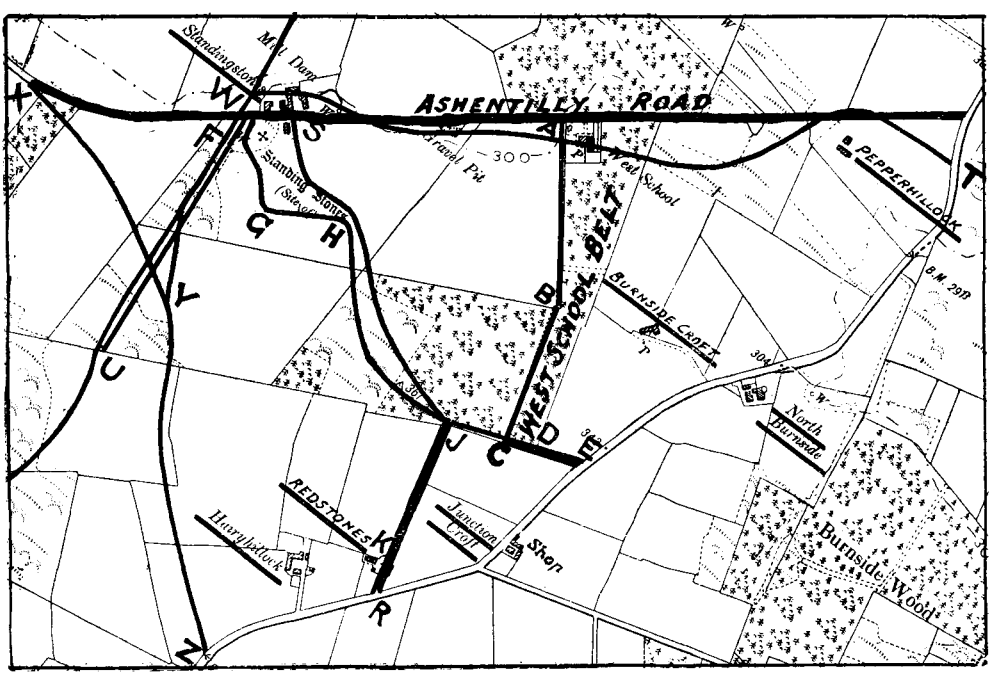
On 19th June 1907 Robert Kinloch, W.S., Perth, and another, the testamentary trustees of the late Alexander John Kinloch of Altries, in the county of Kincardine, who died on 19th July 1879, brought an action against John Young, farmer, Easter Tilbouries, which adjoins Altries. In it the pursuers sought declarator "that the estate service road through the said lands and estate of Altries, now belonging to the pursuers, and which service road leads in a continuous line from a point on the road between the Netherley turnpike road and Easter Ashentilly, immediately to the west of the West School of the parish of Maryculter and marked A on the plan produced herewith, to a point on the said Netherley turnpike road marked E on the said plan, and which service road is shown by a red line on the said plan, is private and belongs exclusively to the pursuers, and that no public road, footpath, or public right-of-way for traffic of any description exists through the said lands and estate of Altries along the line of the said service road, or along any other line connecting the said respective points A and E on said respective roads," with corresponding interdict.

The defender, *inter alia*, pleaded—"(2) A public right-of-way having existed for more than forty years by the road described in the summons, and the road for which it was substitute and deviation, the defender should be assoilzied with expenses."

The *nature of the case* and of the *evidence* and the *facts* as established by proof are given in the *opinions* of the Lord Ordinary (Salvesen). See also the *opinion* of Lord Low.

On 14th November 1907 the Lord Ordinary allowed parties a proof of their averments, the defender to lead in the proof.

Opinion.—"In this case the pursuers seek a decree that a certain road marked on a plan relative to the Summons with the letters A B C D E, and passing over the lands of Altries, belonging to them, is a private service road, and that the public have no right to use it. The action is defended by a farmer who resides in the neighbourhood, and the defence is of a somewhat unusual nature. Shortly stated, it is to the effect that for forty years prior



to 1866 there was a right-of-way over the pursuers' lands between the two public roads which are connected by the road described in the summons, but which commenced and ended at different points. The line which this alleged right-of-way took is not described, nor are the two points at which it left the public roads in question indicated, except in a very general way. Over forty years ago it is said that this undefined road was diverted at its southmost end so as to make it emerge on the Netherley public road along the line C D E; and that about 1875, when the rest of the road, A B C, was formed by the proprietors of the estate, that road was used as a substitute and deviation from the road hitherto in use, the site of the old road being ploughed up. Accordingly in order to establish the public right to use the road described in the summons, the defender requires to make out that there was a public right-of-way across the pursuers' estate and connecting the two public roads, which was diverted for part of its length at some time prior to the prescriptive period, and then, so far as not diverted, abandoned when the road A B C D E was formed. It was strongly pressed upon me that these averments were irrelevant; and I must say that I think the defender ought to have described the line of road which he says existed for the prescriptive period before there was any diversion, and ought still to do so by reference to a plan. I do not think, however, that it would be safe at this stage to repel the defences, as I think it conceivable that if a road connecting the same public places was subsequently made at a different point by the proprietors of the estate and used by the public in place of that formerly in use, the public might be held to have accepted said road in substitution of the previous right-of-way.

"Enough, however, has been said to indicate that this is a very special case and (as I think) to justify the pursuers' demand that the inquiry should be by proof rather than by jury trial. I fully admit that although an action of declarator of a right-of-way is not one of the cases appropriated by statute to jury trial, it is the settled practice of the Court to have it so tried unless there are specialities which make such a trial inappropriate. Here I think there are such circumstances, and indeed the defender's case seems to be unique (so far as the reported cases are concerned) in this respect, that the right-of-way is never said to have been obstructed by the proprietors so as to compel the public to deviate from it. The case rather seems to be that the proprietors having *ex gratia* provided a more convenient road between the same public places, the public commenced to use this new road without objection, under an implied agreement with the proprietors that it was in substitution of the old right-of-way. Obviously these facts may raise difficult questions of law which I think can better be determined after a proof than by a jury. I am fortified in this view by the circumstance that the only two cases to which I was referred where diversions or deviations from a public right-of-way were possessed for less than the prescriptive period the inquiry was by way of proof (*Hozier*, 11 R. 766; *Kinross County Council*, 7 S.L.T. 305). I accordingly allow the parties a proof of their averments, the defender to lead in the proof."

On 3rd June 1908 the Lord Ordinary pronounced an interlocutor in which he found and declared that a public right-of-way for foot-passengers only existed along the line of the road described in the summons, and interdicted the defender from riding or driving over the same; *quoad ultra* assoilzied him from the conclusions of the summons, and allowed him one-half of his expenses.

Opinion.—"This action relates to an alleged right-of-way between two public roads called Netherley Road and Ashentilly Road, both in the parish of Maryculter and county of Kincardine. The land over which the right-of-way is claimed belongs to the pursuers, and forms part of the estate of Altries, which extends to about 3000 acres, and comprises a large part of the parish. The only other property on the north side lying in the same parish is that of Tilbouries, a small estate of about 500 acres, comprising two or three farms, of one of which the defender is the tenant. This estate at one time belonged to the same owners as Altries, but was severed from it by a sale in 1839. On the west side of the parish of Maryculter there are a number of other properties, the people living on which, however, with one or two exceptions, did not figure prominently in the proof.

"The road in question, which is lettered A B C D E on the Ordnance Survey plan produced by the pursuers, forms a short-cut between the two public roads already referred to; and for those who have occasion to use it saves them a detour of about half-a-mile. It is a rough cart-track, which has never been suited for fully loaded vehicles, and has not at any time been used by any wheeled traffic except farmers' carts. It was only formed in 1874 so far as the part between the letters A and D is concerned; so that there has not been time for the public to acquire this road by prescriptive possession. The defender's case accordingly is that this part of the road was taken by the public in substitution of a right-of-way which previously existed along the line F G H J C D E, and which served substantially the same purpose of connecting the two public roads. This defence makes the case so special that I thought it unsuitable for trial by jury, and accordingly the evidence in the case has been taken before myself.

"The first question I have to consider is whether prior to 1873 or 1874, when the use of the road or track between C and F was admittedly discontinued by the public, the defender has succeeded in establishing such prescriptive use by the public as to impose upon the track between these points the character of a right-of-way. Unfortun-

ately for him, owing to the long time during which the road A B C D E has been in use, the memory of his oldest witness does not go further back than 1844, or only thirty years before the date when the track was in part ploughed up and its use wholly discontinued. At that date the track seems to have divided at the letter J into two branches, one of which joined the Netherley Road at the steading of Redstones, and the other at the point E. For many years the former track was the one mainly used by carts, although occasionally carts are proved to have passed along the track from J to E. At this early date the whole of the land through which the track passed consisted of unenclosed moorland. About 1864 the tenant of Redstones commenced to improve his land, and to enclose with dykes the portion over which the cart-track J K passed. The land was put into crop, and this part of the track was from that time closed. There is no evidence of any objection being taken by those who had been in the habit of using the cart-track, possibly because it was almost equally convenient to proceed along the track from J to E, which had been in occasional use all along. About 1873, however, the tenant of Standingstones also commenced to improve and enclose the land on which the path from J to F was situated. He did not, however, interfere with the southmost part of the track, and traces of it can still be seen where it runs through a wood planted by the present Mr Kinloch, but the northmost portion was ploughed up; and although foot-passengers continued to cross the ploughed land in the line of the old road, they ceased to do so when the new road along the line A B C D was shortly thereafter opened.

"The new road ran for most of its way alongside a dyke which bounded on the south a plantation now called the 'School Belt.' There seems to have previously been a track of some kind along this line, although there is no evidence of any appreciable use by the public. After the passing of the Education Act a board school required to be built for this part of the parish, and a feu was granted by the late Mr Kinloch of part of the ground belonging to the 'School Belt' adjoining the Ashentilly Road. There can be no doubt that, at all events, the tenants of Altries were displeased at the cart-track which had passed through the farm of Standingstones being closed, and a deputation waited upon the proprietor to induce him to open a road that would serve the same purpose. On what grounds the application was based does not clearly appear, but the result was that Mr Kinloch consented to a cart-track being formed along the line A B C D E. The actual work was done by the tenants on the estate who had occasion to use the road, and it is not proved that any outsider contributed to the cost. In 1883, owing to the marshy character of the ground, the road required to be repaired, and some farmers from adjoining properties assisted the tenants of the estate to do so. This does not seem to have been known to the present pursuers, nor is it distinctly proved that even the ground officer was aware of it, although there is perhaps a presumption that he would learn of it at the time. In 1890, at the request of the farmer of Standingstones, swing-gates were put up across the road at the two places marked A and B, the proprietor contributing the wood and the tenants or servants on the estate the necessary labour. In 1898 the pursuer Kinloch, who factored the estate of Altries, resolved to make a plantation on what had hitherto been rough moorland, and before doing so he proceeded to enclose the land. For this purpose a dyke was run at right angles to the 'School Belt' and across the cart-road, and this effectually for the time being stopped the passage of carts. This part of the dyke was sometime thereafter either pulled down or got so out of repair that it formed no obstruction to carts. In 1904 the pursuers wished to stop any public use by carts of the road, and they accordingly put locks upon the gates which already existed. The locks were, however, broken, and new padlocks were put on in 1906. The gates were then cut through by the defender, and iron plates were put on to prevent a similar occurrence, but it is unnecessary to go into details, as the defender by this time had definitely asserted on behalf of the public a right to use the road for cart traffic as well as for foot-passengers, with the result that the present action was brought to try the question.

"The public claim to a right-of-way for wheeled traffic may I think be disposed of on the facts without deciding any question of law. There is undoubtedly some evidence that between 1844 and 1874 carts occasionally passed along the line F G H J C D E. For the most part, however, these carts belonged to tenants on Altries estate, and they used the track only when they were empty or nearly so. At times also an occasional cow seems to have been led along this road on its way to Durris, where there was a market, long since discontinued. Perhaps also carts may sometimes have taken a few bags of corn to be ground at Crynoch Mill by this road. Apart from the use by tenants on Altries, which in itself was comparatively slight, the occasions when carts were taken along this road by people from neighbouring properties must have been very rare. People who lived on the farms of Redstones and Standingstones during the period in question were examined, and their evidence is to the effect that they were not aware of any use by the public of the track in question for carts or cattle. The defender argued that the use of the road from 1844 and onwards entitled him to presume a similar use for at least ten years previously. In my opinion any presumption that there might be is displaced by the proof. In 1838 there existed a road which was used by carts through the farm of Hairyhillock along the line Z Y F shown on the plan; and this seems to have been the road that was at first used as a short-cut between Standingstones and the Netherley Road.

At that time the road that is now called the Ashentilly Road did not exist, although a road substantially on the same line is shown on the 1838 map, but it went no further than Standingstones, although there was a road leading in a north-westerly direction which may have joined the public road to Deeside. Both the road Z Y F and the road last-mentioned have, however, long since disappeared; and I think it must be assumed that they could not have been public roads, otherwise the proprietor would not have been entitled to have them obliterated. The use of the road between Redstones and Standingstones seems to have originated after the road Z Y F was closed in consequence of improvements on Hairyhillock Farm; and the earliest use of the new short-cut cannot therefore be placed before 1840. This road which went through rough unenclosed land, was probably formed and mainly used by tenants on the estate, and it was natural enough in these circumstances that others should have occasionally taken the liberty of using it, and that nobody thought it worth while to prevent them. I am unable, however, to hold that it was used as matter of right by the public for wheeled traffic or that the extent of the use was such as to impress upon the road the character of a public road for carts. The tenants of Redstones and Standingstones did not regard the existence of the road as any obstacle to their improving their respective farms, and when the fields belonging to Redstones were enclosed there was no public protest. Even at a later date, when the improvements on Standingstones rendered it necessary to plough up the track, there is no evidence that any owners of carts attempted to force a passage. The tenants indeed upon the estate petitioned for a substitute road being opened, but their action rather indicates that the road had been used mainly as a convenience by them. The subsequent interruptions of wheeled traffic to which I have already referred are also significant, because I hold it proved that these were acquiesced in for considerable periods of time, and that it was only latterly that the theory of the road along the 'School Belt' being a public road was developed. The strongest point in the defender's favour is the evidence that others than the tenants took part in the improvement of the road in 1883, a circumstance of which Mr Kinloch was unable to afford any explanation. This, however, by itself falls far short of establishing a right-of-way for wheeled traffic, for the two or three farmers from neighbouring estates who helped to repair the road had at the time the privilege of using it, and may quite well have thought that they should do something in return at the same time that they made the road more serviceable. For many years, except by the tenants of Altries, practically no use has been made of the road by carts. Durris market has disappeared, and the peat-mosses from which the farmers used to fetch their fuel have become exhausted or the use of coal has been substituted for peat, and so far as I can see nobody will be appreciably prejudiced by the road being closed to the public for wheeled traffic. I have accordingly come to the conclusion that the defender has failed to establish such use of the formerly existing road and its successor, so far as wheeled traffic is concerned, as to justify him in resisting the conclusions of the action to that effect.

"The public claim to a right of footpath stands in a different position. Although the earliest date spoken to is 1844, there is nothing to exclude the possibility of the track between Standingstones and the south end of the 'School Belt' having been used for foot-passengers. The smithy to the west of Standingstones is of ancient date, and Crynock Mill has also apparently existed from time immemorial. For a number of people outside Altries estate who had occasion to go from the south or east to the smithy, and for people having errands at the mill, the short-cut claimed by the defender must always have been a convenience and may be assumed to have been used. So also people going on foot to Durris Market would save some time by going along this road, although it may be safely inferred that prior to 1844 comparatively few people did in point of fact use the track. After the Disruption, however, a Free Church was erected on Altries estate to the south of Burnside Farm, and from that time onwards the use of the track on Sundays by people resident on the estate of Tilbouries was constant and regular. The children from the same property who attended the Free Church School also made daily use of the track from that time until the West School on the Ashentilly road was built. Somewhere about 1864 a shop was put up to the north of Redstones, and people who had occasion to go to it from the north and west side naturally used the track which came out close to the shop. This foot traffic was continuous and absolutely uninterrupted until the new road A B C D E was made. Even after the cart-road had been ploughed up people continued to cross the ploughed land in the line of the old track on foot in spite of efforts that were made to stop them by the farmer and his wife; and there can be no doubt that prior to 1875 there was a general belief in the district that the public had established a right-of-way. Mr Troup, the estate joiner, who was ground officer under Grant, and Grant himself, are said to have admitted in conversation that there was a right-of-way. Since 1875, when the equally convenient track was made along the line A B C D E, the use of this track by foot-passengers has continued without interruption and at least to the same extent. Church people, school children, and persons having occasion to go to the shop or to the smithy have regularly used the road and have never once been interfered with. Indeed, the right of foot-passengers seems to have been recognised, because when the dyke, which for some years obstructed carts, was made, stepping-stones were provided for

foot-passengers; and when the locked gates were put up to exclude the carts or those who did not possess keys, wicket-gates were erected alongside of them. For sixty-five years, therefore, all classes of foot-passengers who had occasion to take a short-cut between the two public roads have gone along the road F G H J C D E or the substituted road A B C D E. Unlike the cart traffic, this use by the public was well known to the ground officers on the estate, and no attempt has been made even yet to interfere with it, unless indeed by the service of the present action. It was contended by Mr Morison for the pursuers that as the Free Church was erected on part of Altries, which was not feued but leased on a yearly lease, the use by the people belonging to that church must be treated as in the nature of a privilege terminable at the will of the proprietor, just in the same way as the lease of the church undoubtedly is. If this had been the only possible road to the church the argument might have been more forcible, but it rather occurs to me that the fact that the proprietor of Altries had so complete a hold over the Free Church people and did not exercise it to prevent them from crossing his lands by the track in question tends rather to strengthen the presumption of a public right-of-way. The circumstance that the road was diverted along the greater part of its length in 1875, and that the public abandoned the old track for the new one, does not in my opinion weaken their claim. The new road was just as convenient for the majority as the old one. It came out at the same point on the Netherley Road, and by using it instead of crossing the now enclosed land over which the old path had gone they showed a neighbourly and friendly spirit towards the proprietor and his tenants. I think it would be unfortunate if it were held that there was any legal difficulty in treating the new road as a substitute for the old one, and the case of *Hozier*, 11 R. 766, is an authority for the proposition that every part of a road need not have been traversed for the prescriptive period if it can be inferred that such part was taken as a substitute for another pre-existing track. It may be doubtful whether the evidence entitles me to presume that for forty years prior to 1875 there had been continuous user as matter of right of the old track which came out at Standingstones, but if one is entitled to add the thirty-three years' uninterrupted possession of the track A B C D E to the previous use of the road F G H J C D E, I have no hesitation in holding that the legal requirements laid down by Lord Watson in the case of *Mann* v. *Brodie*, 12 R. (H.L.) 57, for the constitution of a public right-of-way have been satisfied. The user has been continuous without interruption for at least sixty-five years, and for at least the last forty years I think it has been as matter of right. I do not see that there is any room for explaining the use on the footing of mere tolerance. It may be that the proprietor never considered it worth his while to stop the public use; but such acquiescence or indifference is a necessary condition of the public ever acquiring a right of user which in its inception must have been a trespass. I accordingly reach the conclusion that the pursuers are not entitled to exclude the defender and other members of the public from using the road in question for foot traffic, and that the defender is entitled to be assoilzied from the conclusions to that effect."

The pursuers reclaimed.

At advising—

LORD LOW—The evidence seems to me to show that there has always been a certain amount of cart traffic between the Ashentilly Road on the north and the Netherley Road on the south by farmers on the pursuers' estate and others in the neighbourhood. For that purpose three lines of road appear to have been used in succession—that is to say, when one road was rendered impassable by planting or by reclamation of waste land another route was followed.

The first road of which there is any evidence crossed the farm of Hairyhillock. That is the road marked X Y Z on the pursuers' plan. The entry to that road at the point X was closed by the planting in 1842 of the Cockley Belt, and then apparently the road used for a short time was that marked upon the plan F Y Z, the part from Y to Z being approximately upon the line of a very old road about which practically nothing is now known. Sometime, probably a few years, after the Cockley Belt was planted the farm of Hairyhillock, which up to that time had been almost entirely moorland, appears to have been brought into cultivation and division fences erected, the result of which was to block the road between X and Y. The Hairyhillock Road having thus been closed, the traffic was diverted to the farm of Standingstones. The route adopted (which I shall call the Standingstones Road) left the Ashentilly Road at the point F and then proceeded in a south-easterly direction, substantially upon the lines F G H J. From the point J the road is said to have divided, one branch reaching the Netherley Road at the point R and the other at the point E. My impression is that the route originally taken entered the Netherley Road at the point R, and that the other route to E was only adopted when the building or the repair of the march fence between the farms of Redstones and Standingstones obstructed the road between J and R. But however that may be, the route across Standingstones from the point F continued to be used until it in turn was rendered, about 1873 or 1874, impassable by the breaking up of the moorland over which the track passed and the building of certain fences across the track. The road now in question was then opened under circumstances which I shall narrate presently.

If I am right in the view which I have expressed that the Standingstones Road did not come into existence until after

1842, and that prior to that time the Hairyhillock route was used, then it follows that in 1875 when the Standingstones Road was shut up there was no public right-of-way between the Ashentilly and the Netherley public roads. The presumption from the fact that the Hairyhillock Road was shut up by planting and cultivating the land is that it was not a public right-of-way, and the Standingstones Road had not been used for forty years when it also was shut up, and therefore, whatever the use which had been made of it (a point upon which I shall have something to say presently), the public could not have acquired a right-of-way.

As that is a very important point, it is right that I should refer in some detail to the evidence upon which I have been led to the conclusion which I have indicated.

The road X Y Z is shown upon the plan No. 54 of process, which is dated in 1838, and which bears a docket to the effect that it is a plan of that part of the estate of Maryculter sold by William Gordon of Fyvie to the trustees of James Kinloch and referred to in the disposition by Mr Gordon. The plan shows no road across Standingstones, nor does it show the Ashentilly Road as it exists at present. The present Ashentilly Road from its junction with the Netherley Road at Pepperhillock to the point X was not made until 1840, and although according to No. 54 of process there was a road of some sort from Standingstones farmhouse to Pepperhillock, being the road marked W T on pursuers' plan, there was no road between Standingstones house and the point X. The witness Mr Walker, who knows the ground, says that the plan is very minute and accurate, and I think that it may be taken as reliable evidence as to what roads existed at its date.

Several witnesses mention the Hairyhillock Road, but I shall only refer to the evidence of two of them, John Sinclair and Alexander Walker. Sinclair entered the service of George Silver, tenant of Standingstones farm, in 1852, and he says that Silver told him about an old road from a point in the Cockley planting (obviously the road X Y Z), but the witness says it "was shut by that time and trenched," which I take to mean that the ground was under cultivation. Walker's evidence is that his family came to Westside, which is a little to the south of the road in question, in 1844. As, however, the witness was then only between four and five years old, he probably took little notice of roads until some years later. But however that may be, he says that the road which he first remembers went across Hairyhillock from the Netherley Road, and came out at the west side of Standingstones house. That must have been the road X Y Z. Walker's evidence is at first sight not very easy to reconcile with that given by John Gillespie. The latter went to Cockley farm as a servant in 1845, when he was twenty-one years of age, and he says that the only road in his time was the Standingstones Road. He does not say, however, when he first became acquainted with the road. His first use of the road appears to have been to take an empty cart over it for the purpose of getting peat at the Netherley Moss for the ground officer who then lived at Burnside Croft. Gillespie does not say when he first began so to use the road, and for anything that appears to the contrary it may have been a considerable time after he came to Cockley, and looking to the situation of that farm there was no reason why he should ever be near the road until he had some special occasion, such as carting peats to Burnside, to use it. It therefore seems to me that Gillespie's evidence is not necessarily contradictory to that of Walker, to the effect that within his memory the Hairyhillock Road was still in use.

Now I think that it may be assumed that the Hairyhillock Road and the Standingstones Road were not in use at the same time, because they served the same purpose and the distance between them was inconsiderable. The plan No. 54 of process shows that the Hairyhillock Road did, and the Standingstones Road did not, exist in 1838, and Sinclair's evidence establishes that the Hairyhillock Road was completely closed and had disappeared in 1852. Now it is proved that the Cockley Belt was planted in 1842, and that shut up the portion of the Hairyhillock Road between X and Y. When precisely the portion of that road between Y and Z was also rendered impassable by cultivation and the building of fences does not appear, but if Walker's evidence is to be accepted it could not have been until some years after the planting of the Cockley Belt. The reasonable inference from the evidence therefore seems to me to be that the Standingstones Road did not come into use until after the middle of the 'forties. Even, however, if it came into use in 1842, when the Cockley Belt was planted, that use had not continued for forty years when in 1874 the road was shut up.

The Standingstones Road was used without interruption until 1870, when one Bruce became tenant of Standingstones under a lease which appears to have taken him bound to bring part of the moorland, of which the farm in great part consisted, under cultivation. He accordingly first ploughed up part of the ground (about the letters F G) over which the road passed, and then in 1873 or 1874 he built a division dyke which crossed the road. There is no evidence that any objection or protest was taken at the time, but in 1875 there was a meeting of some of the tenants on the estate who were anxious to have a road between the Ashentilly and Netherley Roads, and it was resolved to send a deputation to Mr Kinloch, the proprietor, to ask him to give a road. It is not clear whether or not the deputation ever went to Mr Kinloch. I rather think it did not, but the matter was brought to his notice, probably by the ground officer, and he consented to a road on the line now in dispute being used, the tenant of Standingstones also consenting. The line agreed upon was accordingly made passable for

cart traffic by certain of the tenants and neighbours, and with certain interruptions, to which I shall refer presently, has to some extent been used ever since.

Now I have already pointed out that the Standingstones Road was adopted because the Hairyhillock Road was closed by estate improvements, and therefore the presumption is that the latter road was not a public right-of-way. The Standingstones Road in turn was closed by estate improvements before it had been for forty years in use, and the road in dispute was then adopted, but had been in use only for thirty-two years when the present action was brought.

These circumstances constitute a formidable obstacle to the defender's claim, but he maintains that in 1875 the proprietor of Altries recognised that there was a public right-of-way by the Standingstones Road, and that he offered, and the public accepted, the road in question as a substitute for the Standingstones Road. The defender's averments on that point are contained in article 2 of his statement of facts, and are as follows:—"Part of the ground traversed by the road leading from Standingstones to C was waste land, and about the time the said school was built the pursuers' tenant at Standingstones was in course of reclaiming the said waste ground. For the convenience of the pursuers and their said tenant, the general public who were using the said road agreed to deviate from the said line of access from the Ashentilly Road to the Netherley Road, and to make and use as a substitute and deviation the road described in the summons. On their so doing, the said tenant, with the knowledge and acquiescence of the pursuers' predecessors, ploughed up the site of the old road or part thereof, and the pursuers and their predecessors allowed the public, in recognition of their right to the said old road, to appropriate and use the road marked A to E as a substitute and diverted right-of-way. The public left the old road only on obtaining the said substituted line of road."

That statement is plainly not in accordance with fact, in so far as it is averred that the Standingstones road was not ploughed up until the existing road had been given as a substitute, because it is proved that for a considerable time before the existing road was given the old road had not only been ploughed up but a wall had been built across it. The question, however, remains whether it is proved that the new road 'was allowed to the public in recognition of their right to said old road?'

I have already said that in 1875 a meeting was held in regard to the shutting up of the Standingstones Road, when it was resolved to ask the proprietor to give another road instead. There appear to have been seven persons present at the meeting, and they were all tenants on the Altries estate. Three of these persons were witnesses, namely, George Robertson, a witness for the defender, and James King and Alexander Walker, witnesses for the pursuers. Another witness, William Bruce, a son of the gentleman who was tenant of Standingstones in 1875, who was at the meeting, narrated what his father told him about it.

Robertson was tenant of Cockley Smithy at the time, and probably he was more interested than anyone in having a road, because it was a near cut to his smithy, and seems to have been chiefly used for that purpose. His account of what occurred at the meeting was as follows—"There was a discussion about Mr Bruce's dyke shutting up the right-of-way. The whole situation was discussed, and a resolution was come to to see to get a substitute for the road that was closed up. Mr Bruce did not question the right of the people to go along the track where he had built his dykes. He quite understood that he could not stop the people from coming that way. The meeting was unanimous about that. (Q) Was there any discussion as to what was to be the substitute if the people would give up the track from the well across?—(A) Yes, and Mr Bruce was willing to allow them to go along the dyke side—the School Belt. That was the proposal, that they should come off the Ashentilly Road at the top of what is now called the School Belt instead of at the well.'

Then he was asked, 'Was anything said as to what would happen to the dykes that Mr Bruce was putting up if there was no arrangement for a substitute road?' and the answer was, 'Yes, it was suggested that they would force their right-of-way if they did not get a substitute. They were to force it by taking down the dykes.' In cross-examination, when pressed to specify any person who said that the road which had been obstructed was a public right-of-way which could not be stopped he mentioned Mr Bruce. In reference to that answer, it seems somewhat strange that the only person whom Robertson could mention as having said that the old road was a public right-of way and could not be shut up was the very man who had in fact shut it up.

William Bruce says that he remembers the meeting, that his father was present, and that the latter "told me and the household in general what had happened at it. He said that the result of the meeting was that they had chosen the wood side for a road to settle disputes." That does not amount to much, but I may observe that William Bruce was only some eight years old at the time of the meeting.

Unfortunately neither King nor Walker were asked anything about the meeting. It was explained that they were examined on commission before the proof was taken, and that the pursuers did not then know that they had been at the meeting. I rather think that the defender must have been in the same position, because it seems to me that the evidence which both of them gave in chief very naturally suggested that they should be asked in cross-examination about the meeting. Thus King said that he regarded the use of the Standing-

stones Road as a "privilege," while Robertson's evidence is that those who attended the meeting were unanimous that it was a matter of right. Then King, after describing how Bruce improved the lands of Standingstones and built dykes which shut up the road, gave the following account of the way in which the existing road was obtained. He says—"I and some of the Altries tenants asked the ground officer Henry Grant where we would get a road to the smiddy now. He gave me a reply. I cannot tell his exact words; we got leave to come down the back of the School Belt. The leave was given by Grant. After leave was got, I and some of the other tenants made up the road. We filled up some of the ditches with wet grass, and redd up some old stone dykes, and made it so that we could get up and down with a horse and cart. The road was not good enough for a loaded cart; we could go to the smiddy with a plough or two or a light cart. After using the road for a year or two there was a wet hole which required filling up, and most of those who were using the road assisted with carts and labour in filling it up. James Allan of Easter Tilbouries gave two carts, and Gammie of Wester Tilbouries gave two carts also."

In cross-examination King was asked whether it was not well known generally in the district that the Standingstones Road was a right-of-way, and his answer was—"I never heard about this one being a right-of-way—we took it for a smiddy road. The right-of-way road was done away with. . . . The old right-of-way came in at the west of Hairyhillock and led across and out near Standingstones.' That plainly refers to the road F Y Z.

The witness Walker lived at Westside from 1844 to 1884. In his evidence he first told about the Hairyhillock Road in terms to which I have already referred, and then he said that the people going to the Free Church used the Standingstones Road across the moor, entering from the Ashentilly Road at Standingstones house and coming on to the Netherley Road at the point E, but he says that he did not know of carts going that way and never saw carts doing so. That is rather striking evidence when given by a man who for forty years lived in close proximity to the roads in question. Indeed he says that from his place he could see the Hairyhillock Road. I do not of course mean to suggest that Walker's evidence casts doubt upon the evidence of other witnesses that the Standingstones Road was in fact used by carts. That road was undoubtedly so used to some extent, but I think that Walker's evidence does tend to show (what I shall afterwards have occasion to refer to) that the use which was made of the road was inconsiderable and only occasional. In the meantime, however, I am referring to Walker's evidence, and also to that of King, to see how far it is consistent with Robertson's evidence of what passed at the meeting, of which according to him Walker was chairman. Now I cannot reconcile the evidence given by King and Walker with Robertson's account of the meeting. There is no reason to suppose that King and Walker were not honest witnesses, but if they were so I cannot believe that the meeting of which they formed part was unanimous in holding that the Standingstones Road was a public right-of-way; that all those present at the meeting were prepared to pull down the dykes across the old road if a substitute road was not granted, and that the meeting resolved unanimously to demand from the proprietor a substitute road as a matter of right. I therefore think that Robertson's evidence upon this point is unreliable. I do not accuse him of wilful falsehood, but I think that the probability is that his recollection of what passed is at fault or that he attributes to the meeting views which he himself held.

Further, the facts (1) that the meeting was composed entirely of tenants upon the estate, and (2) that the proprietor's consent to the new line of road being used was apparently given without delay or hesitation, and was communicated to the tenants by a verbal message through the ground officer, are much more suggestive of a concession by a landlord to his tenants than an acknowledgment and recognition by a proprietor of a public right-of-way. A proprietor of lands does not generally favour the establishment of a right-of-way over his property, because it is apt to bring undesirable persons—such as tramps and poachers—about the place, and it may seriously interfere with future improvements of the property. Therefore if the claim had been for a public right-of-way, one would not have expected to find that the matter was so simply and informally settled. Again, why should Mr Kinloch have acknowledged that a public right-of-way existed. The Standingstones road had not been in existence for forty years, and even if it had been so, I think that it might have been questioned whether the use which had been made of it was sufficient to establish a right-of-way. In the first place, the use which was made of the road was extremely small in amount, with the exception that it was regularly used from about 1844 onwards by people going to the Free Church. The latter, however, is a matter with which I shall deal separately; in the meantime I am referring more particularly to the cart-and-horse traffic. In regard to that traffic the road was occasionally used for the purpose of reaching Cockley Smithy on the one side and Crynock Mill and certain mosses now disused on the other. The track was so rough that it could only be used by empty carts or with a light load, and so small was the traffic that a good many witnesses who lived for years in the vicinity of the road never saw anyone using it. Further, those who did use the road were mostly tenants upon the Altries estate or upon the estate of Tilbouries, which adjoins and runs into Altries and at one time formed part of that property. There is indeed some evidence that occa-

sionally the road was used for taking cattle to a market which was held at some not very well-defined place farther up the Dee, but the evidence in regard to such use is somewhat vague and does not I think bulk largely in the case. When it is remembered that the road was a mere track across a rough unenclosed moorland of I imagine but little value, there is much weight in the view that the use which was made of it was of a kind and amount which was rather to be ascribed to tolerance than to the assertion of a right. It therefore seems to me that the inference from the evidence as to the circumstances under which Mr Kinloch consented to a road on the line of the existing road being used points to its having been rather a privilege which he gave to his tenants than an acknowledgment of a right-of-way on the part of the public.

The defender founded upon the fact that the road was made passable (by removing boulders, filling up marshy places, and the like) not only by tenants upon the estate but by some of the neighbouring farmers. No doubt the fact of a road being repaired by the public is generally evidence of a public right, but in this case I think it is not so. If the road was granted by Mr Kinloch merely as a concession to his own tenants it was very natural that the tenants and any neighbours who would get the benefit of the road should do what was necessary to render it capable of use. If on the other hand Mr Kinloch was in the position of admitting that for his own purposes he had obstructed and shut up a public right-of-way his obligation would have been to give as a substitute, not merely a line upon which a road might be formed, but a road as capable of being used as that which he had shut up.

Further, the history of the road from its opening in 1875 until this action was brought seems to me to be inconsistent with the idea that it was given as a substitute for an admitted right-of-way. The Mr Kinloch who was the proprietor of Altries and granted the road in 1875 died in 1879, leaving the estate to his testamentary trustees, and from the date of his death until this action was brought his son, the witness A. J. Kinloch, acted as factor to the trustees. Prior to 1879 the family had resided at Park, another estate belonging to Mr Kinloch, about four miles from Altries, but in 1880 his widow took up her residence at Altries House and Mr A. J. Kinloch lived with her. He continued to reside there until 1883. From that year until 1892 he lived first at Broughty Ferry and then at Liverpool, but he continued to act as factor upon the Altries estate and frequently visited it. In 1892 he took up his permanent residence at Altries House.

Mr A. J. Kinloch says that although he was aware that people used the road in question, and had previously crossed from the Ashentilly Road to the Netherley Road by Standingstones, he never heard it suggested that there was a right-of-way until the defender made an application to the Parish Council in 1899. I think that that statement is confirmed by what Mr A. J. Kinloch actually did. In 1898 (I do not consider it necessary to refer to one or two incidents which occurred prior to that year) Mr A. J. Kinloch planted part of the ground lying to the west of the School Belt. In order to enclose the new plantation he built a wall running west from the point B, at which point it was built up to and joined the wall (running north and south) of the School Belt. The result was that this new wall shut up the road for cart and horse traffic, but steps were put in for the use of foot-passengers. No suggestion was made against Mr Kinloch's honesty as a witness, and his evidence seems to me to be both frank and fair, and apart from that it is unlikely that, acting as he was as factor for a body of trustees, he should have done a thing so likely to bring trouble as the obstruction of a public right-of-way. I have therefore no hesitation in accepting his statement that he had no idea of the road being, or being claimed to be, a right-of-way. The road was, however, to his knowledge one which his father had more than twenty years earlier given his tenants permission to use, and he was aware that they and some of the neighbours had been at some labour and expense, both when permission to use the road was given and some years later, to put it into a condition capable of being used. That being so, Mr Kinloch's action in building a wall across the road at first sight appears rather high-handed, and somewhat like a breach of faith with the tenants. Unfortunately, that view was not put to him, but it seems to be plain enough from his evidence that his information and belief was that the road had fallen into disuse except for people going on foot to the Free Church and children going to the public school—a use for which he provided by putting steps into the wall; and what he did in 1904 (which I shall presently narrate) shows that he had no desire to deprive the tenants upon the estate of a road which was a convenience to them.

Whether the wall which was built across the road was intentionally interfered with or not is not very clear, but it blocked the road to cart traffic until 1904, when some of the tenants represented to Mr Kinloch that the road was a convenience to them as a way to the smithy and joiner's shop, and he at once made an opening in the wall in which he put a gate. He also put a gate at the point C where the road turned eastwards, having some years earlier put a fence on the north side of the road (that is, between it and the School Belt) at that part. The gates were fitted with padlocks and chains in case, Mr Kinloch says, they were left open and cattle got into the young plantation, and he gave keys to all the tenants on the estate who wanted them. At the same time, for the convenience of foot-passengers, he made wickets at the side of each gate. I may say here that after the gates had been in use for some time the padlocks were broken, and when

renewed the woodwork was sawn through. The result was that the present action was brought.

In the meantime, in 1899, the defender had written to the Parish Council complaining of the wall which had been built 'across the public right-of-way near West School,' and requesting that it should be removed at an early date, as it was 'very inconvenient for myself and others in the neighbourhood when going to Stonehaven."

When that letter first came before the Parish Council a committee was appointed to inquire into the matter. Mr Kinloch, who was chairman of the Council, was at that time from home, but he had returned when, and was present at, the meeting of the Council to which the committee made their report. The minute of the meeting bears that the committee reported that they had visited the road, and "Found the said road had a wall put across it about two years ago and steps for foot-passengers: Found the original road demolished: Found this road would save parties going to the southward about half-a-mile of the distance going round. From information gathered, the road in dispute had been opened in place of the old road about twenty-five years ago."

I take it that what is there spoken of as the "original road" and the "old road" is the Standingstones Road.

The minute then proceeds—"The chairman stated that his late father had, on requisition, granted the use of this road to his tenants in 1876; and there was no claim or allusion made to its being a right-of-way at that date." The Council then, "after a lengthy discussion," resolved that they had not sufficient evidence to justify them in making a representation to the District Committee.

The defender challenged the statement said to have been made to the Council by Mr Kinloch that there had been no claim that the road was a right-of-way, and founded on the evidence given by several witnesses to the effect that when the present road was given in 1875, Grant, the ground-officer at Park, who also supervised the estate of Altries, and Troup, the resident ground-officer at Altries, admitted that the Standingstones Road was a right-of-way. The importance of that evidence is that the Mr Kinloch of that time, who granted the road, seems to have been represented, and to have allowed the matter to be arranged by Grant and Troup. Unfortunately no question was put to the witness Mr A. J. Kinloch in regard to the statement attributed to him in the minute, but he said quite distinctly that neither Grant nor Troup (both of whom are dead) ever suggested to him that there was or had been a right-of-way between the Ashentilly and the Netherley Roads.

I confess that I do not attach much weight to the evidence of what was said by Grant and Troup in regard to there being a right-of-way, not because I doubt the honesty of any of the witnesses, but for this reason. There is no doubt that from time immemorial people had made their way across the moor from the Ashentilly to the Netherley Road, and doubtless Grant and Troup, who were old men and had apparently lived all their lives in the district, were aware that that was the case, and admitted that it was so when the Standingstones Road was closed; and to the country people who were agitating for a road the admission that a road on one line or other had always been used might very naturally be taken as an admission of a public right-of-way. Further, I think that it is worthy of observation that when the wall was built across the present road in 1898 Troup never suggested to Mr Kinloch that he was obstructing a public right-of-way. Now Troup was the ground-officer and had been so in 1875, and he seems to have had a good deal to do with the opening of the new road in that year. Therefore if his understanding was that that road was a right-of-way which had been given as a substitute for a previous right-of-way, I think that he would have warned the factor that he might get the trustees into trouble if he obstructed the road.

I have now, I think, dealt with all the material circumstances bearing on the question whether the defender has established his claim to a right-of-way for all purposes. I am of opinion that he has not done so. In my judgment it is in the first place proved that a right-of-way had not been acquired over the Standingstones Road in 1875 when that road was shut up; and, in the second place, that it is not proved that the present road was given as a substitute for the Standingstones Road upon the footing and understanding that the latter road was a public right-of-way. On the contrary, I think that the fair inference from the evidence is that it was given by the then proprietor as a privilege for the convenience of his tenants. Accordingly I am of opinion that the Lord Ordinary was right in holding that a public right-of-way for cart traffic has not been established.

But the Lord Ordinary has also held that there is a public right-of-way for foot-passengers. I think that the same considerations which have led me to the conclusion that the public have not acquired a right-of-way for horses and carts apply equally to the case of foot-passengers, but as the Lord Ordinary is of a different opinion I think it right to consider separately how the case stands in regard to foot-passengers.

There is no doubt that the Standingstones Road was, probably during the whole period of its existence, regularly used by people going to the Free Church, and the existing road has been used in the same way and also by children going to the West School. There is also some evidence that children used the Standingstones Road for the purpose of attending a school in connection with the Free Church which seems to have at one time existed. But apart from that evidence as to the use of the roads, there is practically no evidence of use by foot-passengers. The main uses

of the roads were, as I have already said, to reach the peat mosses and Crynoch Mill on the one side, and the smithy on the other. But that must have been almost entirely horse and cart traffic. No doubt a person might occasionally go on foot with a message to the smithy or the mill, but in the general case the errand to the smithy would be to get a horse shod or a plough or other farm implement repaired, and the usual object of going to a mill is either to take corn to be ground or to bring back meal. Accordingly, apart from the churchgoers and school children, almost the whole of the evidence is in regard to cart traffic, and although there are a good many general statements that people on foot used the roads, I think that it is plain that if the evidence in regard to cart traffic and to people going to church and school was left out of view, there would be no evidence remaining upon which it could be suggested that a claim to a public footpath could be sustained.

The Free Church appears to have been built, or the building of it to have been commenced, in 1844. The adherents of the Free Church in the district had great difficulty in obtaining a site for a church, and Mr Kinloch (the gentleman who granted the road in question in 1875), although he was not a Free Churchman, gave them a site apparently upon a lease from year to year at a rent of 1s. per annum. I understand that that is the title upon which the church is still held. Now Mr Kinloch having shown so much goodwill to the Free Church, it would have been very remarkable if he had ever thought of objecting to the families of his tenants or near neighbours who belonged to the Free Church taking a near cut across an open moor on Sundays, and I doubt very much whether that practice even if continued for forty years would in the circumstances have established a right-of-way. As it was, when the new road was opened in 1875 the churchgoers went by it, so that there is no road which they have used for forty years. In regard to children going to school, I do not think there is any evidence when the Free Church School was established, and I fancy it was discontinued when the West School was built, but the evidence in regard to the former school is very shadowy. The West School was built after the passing of the Education Act 1872, and the children went to it by the road in dispute. I rather think indeed they must have gone to school upon the line of that road before it was opened to cart traffic, because the witness Alexander Walker, who was a member of the first School Board, states very emphatically that permission was obtained for the children to go to school that way.

I am therefore of opinion that the pursuers are entitled to succeed. Their counsel, however, intimated that they did not ask that interdict should be granted but only decree of declarator.

The LORD JUSTICE-CLERK and LORD ARDWALL concurred.

The Court recalled the interlocutor reclaimed against, found and declared in terms of the declaratory conclusions of the summons, of consent dismissed the conclusions for interdict, and found the pursuers entitled to expenses.

The defender appealed to the House of Lords. His contention was—(1) That it was not necessary to prove prescriptive use of one particular line of road; where there was a partial deviation of a road possessed for a considerable number of years by the public on a possession claimed to be that of public right-of-way, and where the deviated road continued to be used substantially for the same purposes, and to serve the same public places, then the user had before and after the deviation and substitution was to be regarded as one continuous user for the purposes of prescriptive possession—*Hosier* v. *Hawthorne*, March 19, 1884, 11 R. 766, 21 S.L.R. 631; *Cadell* v. *Stevenson*, April 19, 1900, 8 S.L.T. 8; *Kinross County Council* v. *Archibald*, December 15, 1899, 7 S.L.T. 305. (2) That the sufficiency of the amount of user was to be judged in relation to the situation and character of the road in question—*Macpherson* v. *Scottish Rights-of-Way Society*, July 6, 1887, 14 R. 875, 24 S.L.R. 629. (3) That supposing it were necessary to prove prescriptive possession prior to the deviation, the long continuous use of the early road proved, going back as far as it was possible to prove anything by evidence, raised, in the entire absence of any evidence to the contrary effect, a presumption that it had continued for the prescriptive period—*Harvie* v. *Rodgers*, July 8, 1828, 3 W. & S. 251; *Cuthbertson* v. *Young*, December 20, 1851, 14 D. 300, February 24, 1854, 1 Macq. 455; *Mann* v. *Brodie*, May 4, 1885, 12 R. (H.L.) 52, at p. 61, 22 S.L.R. 730.

The pursuers (respondents) contended—(1) That the defender was not entitled to any presumption in favour of the public character of any user prior to the period when it might be established by him, and, so established, the use must be for forty years—*Elgin Magistrates* v. *Robertson*, January 17, 1862, 24 D. 301. (2) That the user proved was attributable to tolerance—*Mann* v. *Brodie*, *cit. sup.* at p. 58; *Jenkins* v. *Murray*, July 12, 1866, 4 Macph. 1046, 2 S.L.R. 190; *Macintosh* v. *Moir*, February 28, 1871, 9 Macph. 574, 8 S.L.R. 382.

LORD CHANCELLOR—In this case I think there is no real question of law, although I must observe that if the argument or rather the suggestion of the learned counsel for the respondents were to prevail it would be very difficult to establish any right-of-way in Scotland at all. These questions before us are merely questions of fact—of fact pure and simple. Perhaps there has been a good deal of feeling about this case, but there is very little pecuniary interest at stake, and it is lamentable to see so much expense wasted upon so small a subject.

In these circumstances, after a long and patient hearing, the Lord Ordinary found

that a right-of-way was established for foot passengers. The Second Division reversed this finding. They examined for themselves apparently the evidence on paper, and they disbelieved a witness to whom his opponents themselves appear to have given complete credit at the trial.

Then this case is brought here, and your Lordships are invited to a similar dissection of the paper evidence, and to decide whether this or that witness is to be accepted.

Now your Lordships have very frequently drawn attention to the exceptional value of the opinion of the Judge of First Instance where the decision rests upon oral evidence. It is absolutely necessary, no doubt, not to admit finality for any decision of a Judge of First Instance, and it is impossible to define or even to outline the circumstances in which his opinion on such matters ought to be overruled, but there is such infinite variety of circumstances for consideration which must or may arise, and it may be that there has been misapprehension or that there has been miscarriage at the trial. But this House and other Courts of Appeal have always to remember that the Judge of First Instance has had the opportunity of watching the demeanour of witnesses—that he observes as we cannot observe the drift and conduct of the case; and also that he has impressed upon him by hearing every word the scope and nature of the evidence in a way that is denied to any Court of Appeal. Even the most minute study by a Court of Appeal fails to produce the same vivid appreciation of what the witnesses say or what they omit to say.

All this is particularly applicable in a case where a mass of rather tedious witnesses referring to details and maps, some of them old, and most of them speaking to small facts as to which the test of memory is important, have appeared before the Judge of First Instance.

Under these conditions your Lordships are confronted with a choice between the opinion of Lord Salvesen and the opinion of the Second Division upon these questions of pure fact. Having heard the evidence sifted for nearly two days I myself very distinctly prefer the conclusions of Lord Salvesen on their own merits even if I had to judge of it upon paper, and indeed it seems to me that the pursuers' witnesses largely admitted the defender's case, and the defender's case on paper appears to me to have been unusually strong. In any case, however, when it is considered what advantages Lord Salvesen had in forming his opinion, in my view there are overwhelming grounds for supporting his decree. It seems to me quite possible that there may have been an old right-of-way shifted for common convenience more than once as the moorland became cultivated. It is enough, however, to say that free and unchallenged use for more than the necessary period has been established, if you accumulate as you are entitled to do the user of the earlier with that of the substituted way.

We have no right to set ourselves to pick to pieces first one and then another piece of evidence on the footing that the evidence is not to be considered collectively and cumulatively. To my mind the weight is overwhelming in favour of Lord Salvesen's view. If indeed Lord Salvesen had found in favour of a way for wheel traffic as well as for foot traffic I should have supported him, and so far as I can see on paper I would have preferred this conclusion, but with the disadvantages under which I labour I do not feel myself at liberty to find that as a fact in view of the contrary opinion of Lord Salvesen, confirmed by the Second Division.

I should therefore advise your Lordships to reverse the decision of the Second Division.

LORD ATKINSON—I concur.

LORD SHAW OF DUNFERMLINE — The language of the judgment just delivered by the noble and learned Lord on the Woolsack exactly expresses the opinion I have formed.

Their Lordships reversed the decision of the Second Division and restored that of the Lord Ordinary, with expenses to the defender in both Courts.

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VALUATION APPEAL COURT.

Monday, February 28.

(Before Lord Low, Lord Dundas, and Lord Mackenzie.)

NORTH BRITISH AND MERCANTILE INSURANCE COMPANY *v.* EDINBURGH ASSESSOR.

Valuation Cases—"Yearly Rent or Value"—Method of Arriving at Value where no Similar Premises—Insurance Office—Comparison by Floorage with Shops Actually Let in Same Street—Necessity that Method be Adopted in its Entirety.

The principle adopted by the Assessor in valuing shops on the street level in Princes Street is to apply a certain rate per square foot of floorage area for a distance of fifty feet back from the street front, and then to apply half that rate to the portion immediately behind.

In valuing an insurance office, there being no building of a similar nature in the street with which to compare it, the Assessor arrived at his valuation by comparison with shops actually let, but in respect that the premises were