known as the Royal Hotel, and that the disposition now tendered contains a reservation of minerals, whereas by the offer which she accepted she was entitled to have not only the surface of the ground purchased but the minerals also. I agree with your Lordship and the Lord Ordinary on this point. I need not say that the minerals under this property do not appear to be a valuable consideration for the purchase, and I make this observation because it is not difficult to presume that the right to such a shadowy subject might be easily waived. The facts of the case are that the titles were sent in the usual course to the purchaser's agent, who went over them, and returned them with observations on another matter, but made no reference to this objection, which was patent to the eye of anyone reading the titles. The other point raised was settled in full knowledge of this objection, and the purchaser took possession and continued thereafter in possession. In these circumstances I agree that she must be held to have waived objection to the title on this ground.

I also agree on the second point. Without going into the history of the case, I think that the transaction into which she entered is a bar to Mrs Newall now insisting upon having possession of the tap-room and stable. The evidence shows that it was distinctly pointed out to her that she was not to get possession of the tap-room and stable. In this knowledge she took a lease of these subjects, and she possesses them under that lease, and cannot, in my opinion, maintain now that they are part of the subjects sold.

Lord M'Laren—With regard to the first ground for setting aside the contract of sale, namely, the absence of a conveyance of the minerals, I am prepared to accept the ground of decision stated by the Lord Ordinary and your Lordships as sufficient for the decision of the case. I think, especially in the case of an objection which has no substance, if the agent of the purchaser points out certain objections to the title tendered, and says nothing about other objections, he, as representing his client, must be taken to have waived these latter objections. I desire to reserve my opinion on the question whether the purchaser of a dwelling-house on a feu is entitled to refuse the title tendered on the ground that it does not contain a conveyance of minerals. If the house were on a freehold I do not doubt he could, but it is notorious that a superior generally reserves the minerals to himself when giving off feus, and therefore there is no presumption that when a feu of building property is bought the minerals form part of the subject of sale. I have not had an opportunity of reading the case of *White* cited to us, which is said to be an authority to the contrary, but I understand that in that case the decision of Lord Young was reversed by a Court of three, who themselves differed in opinion, so that we have really the judgment of only two Judges against two.

It is hardly necessary that I should say anything on the part of the case to which the argument was mainly directed. The objection there urged would be substantial if made out, but for the reasons stated by your Lordship and the Lord Ordinary I think there is no foundation for it on the merits. The purchaser knew perfectly that she was not to get the tap-room and stable under the contract of sale, and in that knowledge agreed to take a lease of the very subjects which she now says formed part of the subject sold to her.

Lord Kinnear—I quite agree with the judgment which your Lordships have given, and therefore in concurring with the Lord Ordinary and with your Lordships on the first point, I do not assume that there is anything unsound in the defender's contention that under the missives of sale which she is asked to implement she was entitled to a conveyance of the lands with the minerals if she had taken the objection to the title tendered in due time. But I think it is a sufficient answer to the defender's contention that the objection—which is not material—was waived by her agent, who kept open certain questions as to the manner in which the title of the seller had been feudally completed, but without raising any question as to the minerals.

The Court adhered.

Counsel for the Reclaimers—Kennedy—J. W. Forbes. Agents—Forbes Dallas & Co., S.S.C.

Counsel for the Respondent—J. Wilson—Gray. Agent—Alex. Ross, S.S.C.

Thursday, November 17.

FIRST DIVISION.

HOPE *v.* GEMMELL AND OTHERS.

Jury Trial—Motion for New Trial—Juryman Visiting Locus during Progress of Trial—Act 55 *Geo. III. cap.* 42, *sec.* 6.

During a jury trial in an action which was raised for the purpose of negativing the existence of a right-of-way, evidence was led on five days. At the close of the first day's evidence one of the jury went with a friend who was not connected with the case to examine the *locus*, and walked over the road in question, and afterwards informed some of the other jurymen of what he had done. The jury having returned a verdict for the pursuer, the defender moved the Court to grant a new trial in terms of section 6 of the Act 55 Geo. III. c. 42, on the ground that the conduct of the juryman had rendered it impossible for the jury to return a verdict according to the evidence led before them. The Court *refused* to grant a new trial.

Sutherland v. *Prestongrange Co.*, March 2, 1888, 15 R. 494, *distinguished.*

An action at the instance of Sir William

Hope of Craighall, against Mr James Gemmell, 15 Wedderburn Terrace, Inveresk, Musselburgh, was tried at Edinburgh on the 22nd, 23rd, 24th, 27th, and 28th June, upon the following issue—"Whether for forty years and upwards, or for time immemorial prior to 1897, there has been a public road or right-of-way for vehicles and foot-passengers, or either of them, leading from a point at or near to the northern entrance to the house and grounds of Pinkieburn, in the county of Midlothian, in a direction southwards for about 530 yards, and then westwards for about 250 yards, until it meets the public road from Inveresk to Crookston, and elsewhere in said county, as shown on the plan No. 7 of process, and marked thereon with the letters A, B, C, D?"

The jury returned a verdict in favour of the pursuer negativing this issue.

The defenders moved for a new trial on grounds contained in the following affidavit by one of the jurymen:—"The trial and evidence for the parties in this case was commenced on Wednesday, the 22nd day of June 1898. On the evening of the said Wednesday, after part of the evidence had been led, I, with a view to forming an opinion upon the subject-matter of dispute, in company with my brother-in-law, visited the road in question, and walked over it from the point A to where it joins the Crookston Road at point D. I did not inform the agent on either side of my intention to do so. At my subsequent meetings in Court on the succeeding days of the trial, I informed the other jurymen, or some of them, that I had seen the road in dispute. After the jury had retired to consider their verdict, there were produced by one or more of the jurymen cuttings or extracts from one or more of the newspapers, containing condensed reports of the evidence led at the trial, and which extracts were referred to, perused, and considered by the jury in arriving at a verdict. R. MANSON.

"Sworn at Edinburgh the Fifth day of July 1898 before me

THOS. G. DICKSON, Justice of the Peace for the Stewartry of Kirkcudbright."

Section 6 of the Act 55 Geo. III. cap. 42, enacts—"And be it further enacted . . . it shall be lawful and competent for the party who is dissatisfied with the verdict to apply to the Division of the Court of Session which directed the issue, for a new trial on the ground of the verdict being contrary to evidence, . . . or for such other cause as is essential to the justice of the case."

The Court having granted a rule, the pursuer moved that the rule should be discharged.

Argued for pursuer—The juryman had learned nothing by his visit which could affect the verdict—in fact nothing more than what he would have known by previous knowledge had he been a native of the place. In cases where the Court had granted a new trial for a reason such as this, something had been learned to affect the judgment of the case—*Sutherland* v. *Prestongrange Co.*, March 2, 1888, 15 R. 494; *Hattie* v. *Leitch*, July 19, 1889, 16 R. 1128.

Argued for defenders—The case was ruled by *Sutherland*, where allowing for the different circumstances precisely the same incident took place. The juryman had on his own confession proceeded on something else than the evidence led in Court, and had turned himself into a witness. It would be different if he knew the spot from previous knowledge, but he had gone there with a view to forming an opinion.

LORD PRESIDENT—We can only grant a new trial if we find that it is required for some cause essential to the justice of the case. The trial was of a right-of-way, and while of course the right asserted relates to the road, yet the main question at issue before the jury was whether there had been acquired by 40 years' prescriptive use a right on the part of the public to use that road. The main question, therefore, was one of history, and while it has been said that a visit to the road necessarily made some impression on the mind of the observer, that does not carry one very far. I suppose that if an accident occurred in any of the public streets of Edinburgh, and the question were whether the person whose vehicle caused the accident were to blame or not, the same question would be raised if one of the jurymen on his way home paused in the street in which the accident occurred and looked at the *locus*. It would be said then, just as it has been said here, that it is impossible to conjecture, still less to assert, what impression as to the incidents of the accident may not have been made by that casual inspection, but then, I suppose, we should be peremptorily called back to the question whether that is a cause essential to the justice of the case.

We were told this question was ruled by the case of *Sutherland* v. *The Prestongrange Coal Co.*, and that case affords a very instructive example, by way of contrast, of how the Court regards such matters. In that case the cause of action was a colliery accident, and the question was whether in the working of the colliery there had been blame attaching to the colliery owner. The whole of the evidence had been led, when a juryman bethought him that he would go down to the spot, not for the purpose of seeing the colliery, but for the purpose of ascertaining the method of working. He not only got a hutch and performed some experiments in working by himself, but he had the working explained to him by the defenders' manager. It thus appeared that that juryman, having heard the evidence, went down and tried the case over again. He held an inquest on the spot, performed experiments, and heard evidence on his own account. Accordingly, that was a case of inquiry collateral to and really superseding the trial in which the juryman was supposed to have participated. Accordingly, the case of *Sutherland* is no authority at all for the course we are invited to take. It is perfectly true that in the normal case jurymen are assumed, and generally are found, to be entirely ignorant of the place

where the thing occurred, but it would be a very strong thing to say that because a person is acquainted with some noted and familiar place he should be rejected as a juryman.

In the present case the impression produced upon the mind of the juryman who visited the road, on the merits of the historical question of prescriptive possession, is far too remote to approach a cause essential to the justice of the case.

LORD ADAM—I agree. The only ground upon which we are asked to sustain this rule is that circumstances have occurred which make it essential to the justice of the case that a new trial should be granted. In *Sutherland* the facts which were considered to make this essential were that one of the jurymen made inquiries at his own hand, went down to study the working of the pit,' which he went over with the defenders manager, and made up his mind after doing this, besides impressing the other jurymen. It was said by Mr Salvesen on that case that the assistance of the defenders' manager may have led to a verdict being given in their favour, but if this were a good ground for granting a new trial, it would be equally good had the verdict been the other way, and accordingly that case has no bearing upon the present question, which I agree with your Lordship is quite different. We are told in point of fact that a juryman visited the road in question and walked over it, and that he informed some of the other jurymen he had seen the road in dispute. But I think he was in no different position with respect to the road than if he had from local residence been familiar with it. I cannot see that his having walked there makes it essential to have a new trial.

LORD M'LAREN — In considering this question it must not be left out of view that we have nothing before us but the affidavit of a juryman, and that the evidence is not given under the test of cross-examination, and is therefore not of the same value as evidence given in the usual way. But the parties are agreed in treating the affidavit as substantially representing the facts upon which the objection is founded. Now, the statute under which jury trial was instituted in Scotland, while giving the right to apply for a new trial on certain definite specified grounds, also gives a right with reference to other matters which are not defined except as being "essential to the justice of the case," and this is the criterion by which this application must be tried. The cases which have been held to fall within the general words of the statute have been cases arising out of the misconduct of jurymen either in communicating privately with the parties or instituting an independent inquiry of their own. Of the first class I think there has only been one instance, so far as the records of the Courts gives us information. The cases of the second class are also very rare, and I for one do not entertain the slightest apprehension that anything we decide will have any effect in causing laxity on the part of jurors regarding their duties in the trial of cases. It is quite true that jurymen and judges are under the necessity of looking at the external facts of a case through the spectacles furnished to them by counsel and witnesses, and however different and distorted may be the images thus produced, those who are to decide the case are not entitled to go and use their eyes and look at the facts for themselves. The rule may sometimes be inconvenient, but the obvious reason and advantage of it is that a juryman going to look at the thing for himself might be led into serious error by confounding what he sees with the state of facts which existed when the cause of action arose.

Now, the question here is, whether the juryman has violated the rule of good conduct by making inquiries for himself independently of the evidence laid before the Court. I think the facts do not amount to a case of that kind. All that he did was to walk along the road in company with a person who is not said to have had any interest in the case, and he could learn nothing from his inspection of the road except its geographical position, which he already knew from the plans produced and explained in Court. I do not commend the action of the juryman in going to the road on purpose to look at it. He ought to have known that it was better to avoid doing anything that might give rise to doubts about the verdict. But it is another thing to say that he learned something which prejudiced his mind in giving the verdict, and I am not of opinion that he did so. I therefore agree that the rule should be discharged.

LORD KINNEAR—I am of the same opinion. I do not think it essential to the justice of this case that it should be tried over again by a jury not one of whom has seen the road in question, for that is the real ground upon which we are asked to grant a new trial. I do not think that the circumstance of this juryman having walked over the road is material to show that he considered the question, which he was bound by his oath to try on the evidence, subject to prejudice derived from separate inquiries of his own. He made no inquiries, according to the evidence he merely looked at the road, and by doing so he only acquired the information which he might have already possessed had he known the road beforehand. Nobody says that it would be a sufficient ground for upsetting the verdict if he had had this previous knowledge, or if he had acquired the same amount of knowledge by the study of a map in his own possession.

The case of *Sutherland* appears to me to be distinguished from the present case, for the reasons clearly stated by Mr Salvesen when commenting on that decision. The only distinction, he said, is the difference of circumstances. That is true, but I think that circumstances make all the difference, for the reasons which have been explained by your Lordships.

LORD KYLLACHY—I concur, and desire only to add, that having tried the case and

heard the argument I am satisfied that nothing visible to any juryman walking along this road could have affected in the slightest degree his judgment upon any matter really material to the issue which had to be tried.

The Court discharged the rule, and refused to grant a new trial.

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

Counsel for the Defenders — Salvesen. Agent—Marcus J. Brown, S.S.C.

Saturday, November 19.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

BISSET *v.* MAGISTRATES OF ABERDEEN.

Lease—Naturalia of Lease—Obligation to Grant Feu—Whether Personal or Transmissible against Singular Successors.

A lease for 999 years granted in 1768 contained an obligation on the granter to deliver to the lessee, his heirs, executors, and successors, at any time they should desire the same, a feu-charter of the ground contained in the lease on the conditions therein mentioned.

Held (*aff.* judgment of the Lord Ordinary) that this obligation was personal to the granter and did not transmit against singular successors.

Wight v. *Earl of Hopetoun*, November 17, 1763, M. 10,461, *distinguished.*

By tack between George Meek at Gilcomstone and Christian M'Pherson, his spouse, and John Smith, square wright in Aberdeen, dated 22nd February 1768, and recorded 28th May 1866, the said George Meek and Christian M'Pherson let to the said John Smith certain heritable property in Aberdeen for 999 years from Martinmas 1767 at a yearly rent of £1 sterling. This tack contained the following clause:—“And sicklike the said George Meek and Christian M'Pherson oblige them to subscribe and deliver to the said John Smith and his foresaids (his heirs, executors, and successors), upon their own proper charges and expenses, at any time they shall desire the same, a charter upon the foresaid piece of ground which is to contain the above and all other usual clauses, and it is to be thereby declared that the said John Smith and his foresaids are to pay the foresaid sum of One pound sterling as a constant and perpetual feu-duty in all time thereafter, and that every heir is to pay the first year of his entry a tenth part of the said feu-duty, and every singular successor one-half of the said feu-duty upon his receiving a charter, and all the charters and entrys are to contain a power to poind for payment of the said feu-duties, and if two terms run in one, the same to be an irritancy, and both parties bind and oblige them to perform the premises to each other, under the penalty of Five pounds sterling money, to be paid by the party breaker to the party performer or willing to perform the premises over and above performance.” In virtue of a series of dispositions to singular successors, the last of which was by Robert Wallace to the Town Council of Aberdeen, and was dated 18th and recorded 21st November 1893, the Town Council became the heritable proprietors of the said subjects. In virtue of a series of assignations, the last of which was dated 21st July 1880, Joseph Bisset, house proprietor, Aberdeen, became the lessee in right of said tack.

On 20th August 1897 John Bisset raised an action against the Lord Provost, Magistrates, and Town Council of the city and royal burgh of Aberdeen, in which he sought, *inter alia* (second), to have it found and declared that the defenders as heritable proprietors of the subjects of the lease were bound to grant in favour of the pursuer, his heirs and successors, upon their own proper charges and expenses, at any time they should desire the same, a feu-charter of these subjects, containing all usual and necessary clauses, and under the conditions, restrictions, and stipulations contained in the lease, and upon it being so found and declared, to have the defenders ordained to execute and deliver to the pursuer or his foresaids a feu-charter in these terms, to be adjusted at sight of the Court under a penalty of £500 damages in case of failure.

The pursuer pleaded—“(2) The defenders being bound, in terms of said tack or lease, to grant a feu-charter of the subjects to the pursuer and his foresaids whenever called upon, decree should be pronounced in terms of the declaratory conclusions of the summons, and for implement. (3) Failing implement of said decree within such time as the Court may fix, the pursuer is entitled to decree for damages as concluded for.”

The defender pleaded—“(3) The defenders should be assoilzied from the conclusions seeking to have them ordained to execute a charter in respect that (*a*) no obligation is in terms imposed by the said lease on singular successors of the lessors to grant such a charter, and (*b*) *separatim* the obligation contained in the lease to grant a charter is not *inter essentialia* of a lease, and is not binding on singular successors of the lessors.”

On 1st June 1898 the Lord Ordinary (KYLLACHY) assoilzied the defenders from the conclusion of the summons.

Note.—. . . “With regard to the second conclusion I need only say a word. The pursuer seeks to have it affirmed that the defenders being now in right of the subjects of his lease, and as such the singular successors of the original lessor, are bound to grant him a feu-charter in terms of a certain clause in his lease. Now, it is quite true that the lease contains an obligation on the lessor to that effect; but while this is so, I am unable to hold that an obligation of that kind contained in a building lease transmits against singular successors.