YOUNG, ... APPELLANT.
CUTHBERTSON AND OTHERS, . . RESPONDENTS (*a*).

1854. 13*th*, 14*th*, *and* 24*th Feb.*

Although a public way may pass through private property, it must have at each end a public terminus.

The terminus of a public way may be sufficient, although it have not in the ordinary sense an *exit*. It may be a *Cul de Sac*.

But a mere private place, not admitting of a passage through or beyond it, cannot form the terminus of a public way.

Upon evidence satisfactory and uncontradicted, showing a public right of way as far back as the memory of living witnesses can be expected to extend, the Jury may presume a previous enjoyment corresponding with that evidence.

Non-user or obstruction of a public right of way may be evidence for the Jury that the right does not exist,—but whether it can be evidence to show that the right has been lost, *Quœre*.

Remarks by the LORD CHANCELLOR, tending to induce a greater accuracy and strictness in the framing of issues and directing of Juries in Scotland.

AN issue was directed to try the question whether for forty years prior to 1827, or from time immemorial, there existed a public right of way from Burntisland through the Appellant's lands to Starleyburn and Aberdour; and this issue was tried before the *Lord Justice-Clerk* (*Hope*) and a jury in November, 1851, when various exceptions were taken by the Appellant's counsel to his Lordship's direction. The verdict was for the Respondents.

Upon consideration of the exceptions, the Court

(*a*) Reported, Second Series, vol. xiv. pp. 300, 375, 465.

below, by the decision under appeal, had disallowed them.

The *Lord Advocate* (*Moncreiff*) and Mr. *Rolt*, for the Appellant: Substantially there are but two questions for determination. The first is whether the learned Judge was right in holding it not necessary that a public way should terminate in a public place. The second question is, whether the Appellant was not improperly excluded from proving a cesser of the way, by an interruption acquiesced in on the part of the public.

Now, as to the first question, we contend that, by the law of Scotland, a public right of way means a right to the public of passing from one public place to another public place. *Campbell* v. *Lang* (*a*). The learned Judge in his charge held the contrary.

[LORD CHANCELLOR (*b*): Suppose a right of way from Hyde Park Corner to the Addison Road. It would not be necessary to prove that the Addison Road had been a public place for forty years. It would be enough to show that the way was public to Oxford. Besides, it may not always be indispensable to show an *exit*. The way may terminate in a *cul de sac*, such as Connaught Place (*c*). There is an old case where it was held that there might be an easement of dancing in a neighbour's field though inclosed (*d*).]

But there was a miscarriage, because we were excluded from proving cesser by interruption acquiesced in for twenty-three years. The user of the public was discontinued. The issue ought not to have been for forty years prior to 1827, but for forty years prior to the bringing of the action. By the law of

(*a*) *Ante*, p. 451.
(*b*) Lord Cranworth.
(*c*) Or Ely Place.
(*d*) *Abbot* v. *Weekly*, 1 Levinz. 176.

Scotland a right of way may be acquired by forty years' possession, but it may be lost by less (*a*). The acquiescence of the public will bind the public.

[LORD CHANCELLOR: Could any one object on the part of the public? Will non-user or obstruction destroy the right? In this country magistrates order roads to be shut up. The non-user or obstruction of a public right of way might be evidence for the jury that the right did not exist. But would it show that it had been lost?]

The *Solicitor-General* (*Bethell*), and Mr. *Anderson*, for the Respondents.

The LORD CHANCELLOR (*b*):

Lord Chancellor's opinion.

My Lords, the objection that the issue was for forty years prior to 1827, instead of for forty years prior to the commencement of proceedings, may perhaps be well founded. I am inclined to think that the latter would have been the correct mode of directing the issue. But this is an objection which cannot lie in the mouth of the Appellant, although it might in that of the Respondents, to whom it was open to complain that they were put to prove the right of way from time immemorial, or for forty years, prior to 1827; whereas it would have been sufficient for them to establish the right of way for forty years prior to the commencement of these proceedings, namely, in 1849. It was therefore an advantage to the Appellant, instead of a disadvantage, that an issue too onerous was imposed on the Respondents. The issue did not shut out the Appellant from proving the facts which he alleges he was prevented from proving.

Then it was said that the issue was objectionable for this reason, that Starleyburn is not a public place;

(*a*) *Duke of Portland* v. *Samson*, Second Series, vol. v. 476.
(*b*) Lord Cranworth.

Lord Chancellor's opinion.

but even supposing that Starleyburn is not a public place, still if the right of way went beyond it, that would be sufficient. If indeed Starleyburn had been a mere private house, to which the public had been in the habit of going from Burntisland and returning back again, I believe the case would not have properly come within the description of a public right of way; for the owner might destroy the house and shut up the way, and then there would be an end of it. But here the right of way extended further. It had a public terminus at each end.

If Starleyburn were not a public place, then in order to prove a public right of way, the party must prove that the road to Starleyburn, and beyond Starleyburn on to Aberdour, was a public road. So held the learned Judge, and I quite agree.

The third exception was to the direction of the learned Judge, that, in order to support such public right of way, it was not necessary that Starleyburn should have existed for forty years prior to 1827, and that the fact of its being private property would be no answer to the Respondents' claim of a public right of way. The learned Judge, in so holding, was, in my opinion, perfectly right. It was enough that the *locus* existed through which the public right of way went.

It was further objected to the learned Judge's direction that he told the jury that the right of way might be fully established "if it were proved that persons proceeded from thence to Aberdour, supposing any such exit from Starleyburn is necessary in point of law." The learned Judge could give no other direction. All that it is essential to prove is, that the road went through the Appellant's ground *as a part of the way*, and the right beyond Starleyburn is settled by showing that from thence parties proceeded, *i. e.*, lawfully proceeded, to Aberdour.

Lord Chancellor's opinion.

It was contended that the learned Judge ought to have told the jury, "that evidence of the interruption of the right of way for twenty-two years after 1827, acquiesced in by the public for that period, was sufficient in law to exclude such right of way on the part of the public." I can find no such provision as that in the law of Scotland any more than I can in the law of England. Whether a person excludes the public is a question of degree; and the acquiescence of the public is also a question of degree. Certainly, the fact that a person has for twenty-two years prevented people from doing what they had done before for forty years, does not of itself destroy the right. The complaint is that the learned Judge did not tell the jury that it did. The fact of exclusion for twenty-two years is evidence that no right ever existed—but such evidence may be met by counter evidence.

Then comes the last exception, which is, that the learned Judge directed the jury, that

If evidence was given satisfactory to their minds, of the existence of a public footpath as far back as the memory of living witnesses could be expected to extend, although such testimony did not either in any instance, or only in a few cases, go back distinctly as far as forty years prior to 1827, still it was competent for the jury to presume, and (the evidence being consistent and uncontradicted) the jury ought, in point of law, to presume a previous enjoyment corresponding with the manner in which it had been enjoyed during the period embraced by the evidence, and the Appellant was not entitled to the verdict on the ground that the evidence so laid before them did not positively apply to the first years of that period of forty years, supposing that the testimony in their opinion did not directly reach to these earlier years.

The learned Judge was quite right in this direction; otherwise what an absurdity are we involved in, both in Scotland and in England, when we have to prove that parties have enjoyed an established right from time immemorial! We never can carry it back to the very commencement, or anything like it.

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Lord Chancellor's opinion.

I should add however that I understand the learned Judge, when he used the expression "the *jury ought to presume*," not to be stating a proposition in law on which the jury were bound to act, but merely to be pointing out what was an almost irresistible inference in point of fact.

I must observe upon this occasion, as I have on one or two other occasions, that the learned Judges in Scotland are a little loose in their way of framing issues, and sometimes perhaps a little loose in their mode of directing juries; and if I had thought that there was anything really wrong here, I should have felt myself bound to yield to these exceptions; but I am happy to say that in the present case I see nothing substantially wrong.

Interlocutors affirmed, with Costs (*a*).

(*a*) See the preceding case.

RICHARDSON, LOCH, & McLAURIN.—DEANS & ROGERS.