We must understand the legislature to have used the term "occupants of lands," in the same sense, with reference to the New Poor Law Act which was introduced into Scotland, as that in which it had been used with reference to the Poor Law Act in England. I think upon that ground, independently of the use of the word "heritage," it is quite clear that the decision at which the Court of Session have arrived is perfectly correct.

My Lords, that being so, the whole subject is exhausted except upon this point. It is said that there has been no decision that any person in the position of this Water Company is the owner of land. The word "owner," by the interpretation clause, I understand to mean a party owning, so to say, any interest—it is not confined to the owner of the fee simple. What Sir Frederick Thesiger pressed upon your Lordships is quite right, that it merely means that a tenant for life, or a tenant for years, or any man, in fact, who is possessed of any interest whatever, is to be an owner. Then it is said that no decision can be found which at all points to any person having an interest in pipes under the soil as the owner of that land. I do not feel the force of that argument. It was, no doubt, not necessary to come to any such decision upon the Statute of Elizabeth. The difficulty was not, whether he was an owner and occupier, but whether the right was a right adequately described under the words "occupant of land." When there has been a case decided with regard to occupation, it seems to follow, as of course—with no distinction between the occupier and the owner, the same party having both interests, he being both owner and occupier—that the decision of the point bears upon both ownership and occupation.

My Lords, although I think the decision of the Court of Session was perfectly right, no doubt the very able argument of Lord Moncreiff suggests very considerable doubts upon the subject, and if the matter were newly reasoned over, and if no Statute of Elizabeth had ever passed, I should have felt much weight in the argument of that learned Judge. It would be very dangerous for us to be refining upon a matter of such every day necessity. I think that what we understand to be the law should be acted upon as being the law: the construction of the statute being in conformity with perfect justice, namely, the equal rating of all persons who have a beneficial interest in the works in question for the relief of the poor. I think the decision to which the majority of the learned Judges (four out of five—the Lord Ordinary and three of the Judges of the Court of Session) have come, is conformable to precedent, conformable to principle, and is a decision which your Lordships ought to have no hesitation in affirming. I shall therefore move your Lordships that the decision of the Court below be affirmed with costs.

Interlocutors affirmed with costs.

Appellants' Solicitors, Richardson, Loch, and Maclaurin.—*Respondent's Solicitors*, Dodds and Greig.

FEBRUARY 24, 1854.

ROBERT YOUNG, *Appellant*, *v.* JAMES CUTHBERTSON and OTHERS, *Respondents.*

Highway—Public—Right of Way—Terminus of Way—Evidence—Issue—Bill of Exceptions—*In an action of declarator that there existed a public right of way through the lands of the defender, the Court of Session approved of this issue to try the question:—"Whether, for forty years and upwards prior to the year* 1827, *or for time immemorial, there existed a public right of way for foot passengers from the Kirktown of Burntisland, and harbour and royal burgh of Burntisland, or one or more of them, leading westwards, along or upon the margin of the sea beach, through the defender's lands, to the western extremity thereof, and thence proceeding to Starleyburn port and harbour, and to the port and harbour and old and new villages of Aberdour, or to one or more of them?" On a Bill of Exceptions:*

HELD (affirming judgment)—(1) *That it was sufficient for the pursuers to prove that there existed a public road to Starleyburn, and that it was not necessary to prove that it was a public place; nor, supposing it not to be a public place, what means of exit the public had therefrom to a public place; and* (2) *That in considering what was the road put in issue, the issue alone was to be looked at, and that it was not competent to construe the issue by a reference to the record.*

A public right of way means a right of way from one public place to another public place; but there may also be a public way like a cul de sac *in a town.*[1]

Young brought this case under review of the House of Lords by two appeals, pleading in the first appeal, that the interlocutor of 20th Dec. 1851, disallowing the exceptions to the ruling of

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[1] See previous reports 14 D. 300, 375, 465; 22 Sc. Jur. 152; 23 Sc. Jur. 587, 627; 24 Sc. Jur. 162, 216, 245. S. C. 1 Macq. Ap. 455: 26 Sc. Jur. 310.

the Judge at the trial, should be reversed, because,—" 1. The words of the issue rendered it necessary for the respondents to prove a right of public footpath not only to Starleyburn, but beyond that place westward through the grounds or policy of Lord Morton, to the port and harbour or the old or new villages of Aberdour.—(1st Exception.) 2. At all events, in order to entitle the respondents to claim a verdict establishing a right of public way only so far as Starleyburn, it was necessary for them to prove that Starleyburn port and harbour was a public place, and as such, had existed for 40 years prior to 1827.—(2d, 3d, and 1st part of 5th Exception.)—Stair, ii. tit. 7, § 10. *Rodgers* v. *Harvey*, 4 Murr. 29. *Crawford* v. *Menzies*, 11 D. 1130. 3. It was not competent to direct the jury to return a verdict finding a public right of way from Kirktown to Starleyburn, and from Starleyburn directly north to the turnpike road between Burntisland and Aberdour.—(First part of 4th and 5th Exceptions.) 4. The direction that it would be sufficient to support the right of way claimed in the issue, if parties going from Burntisland to Starleyburn 'from thence *could* and *did* proceed by the road to Aberdour,' was erroneous; inasmuch as it left it to the jury to find a public right of way from Starleyburn to the turnpike road, although passengers had not used the road between Starleyburn and the high road for 40 years prior to 1827.—(Last part of 4th Exception.) 5. There was no proper evidence of possession by the public of such line of road between Starleyburn and the turnpike road during 40 years prior to 1827, sufficient to go to the jury.—(6th Exception.) 6. A direction ought to have been given to the jury that evidence of the interruption of the right of way claimed for 22 years after 1827, acquiesced in by the public during that period, was sufficient to exclude the right claimed on the part of the public.—(7th Exception.)—Bell's Principles, § 946; *Rogers* v. *Harvey*, 10th July 1827., F. C.; 3 W. S., 258. 7. The 8th exception ought to have been sustained, which was taken to the following direction of the presiding Judge,—'That if evidence was given to the jury 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 40 years prior to 1827, it was competent for the jury to presume, and when the evidence was consistent and uncontradicted, the jury ought, in point of law, to presume from such proof of the exercise of a right of way uninterrupted so far back as living testimony can go, a previous enjoyment corresponding to the manner in which it had been enjoyed during the period embraced in the evidence, if in itself satisfactory to them as to that period; and that the defender 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 40 years, supposing that the testimony, in their opinion, did not directly reach to these earlier years.'"

By a second appeal, he maintained that the interlocutor of 26th January 1850, repelling a preliminary defence to the title to sue, and that of 27th June 1851, fixing the form of issue to try the case, should be reversed, because,—" 1. Effect ought to have been given to the preliminary defences stated by him—*Crawford* v. *Menzies*, 11 D. 1130. 2. If it should be held that the proper construction of the issue settled by the interlocutor of 27th June 1851, relieves the respondents from the *onus* of proving that the road claimed by them proceeds throughout its course along or near to the sea shore or top of the sea beach from Kirktown of Burntisland to the two villages of Aberdour, or at all events to some public place, that interlocutor should be reversed. 3. That interlocutor was erroneous, in so far as it did not allow the appellant an issue of acquiescence on the part of the public in the obstructions which prevented the use of the road between 1827 and 1849, a period of 22 years; or, at all events, in so far as the issue excluded from the investigation the period between 1827 and 1849, the date of the action. 4. The exceptions stated for the appellant to the charge of the presiding Judge ought to have been allowed. 5. The verdict ought to be set aside, in respect of ambiguity, because not establishing by what line of way foot passengers are to proceed from Starleyburn to Aberdour; and in respect of surprise on the part of the appellant, as it necessarily adopted a line of road of which no previous notice was given on the record. 6. The pleas of acquiescence and homologation stated by the appellant ought to be sustained."

The *respondents* in their *printed case* supported the findings of the Court and verdict on the following grounds :—" 1. As the jury found that foot passengers exercising the right of way in dispute did, prescriptively or immemorially, proceed onwards from Starleyburn port and harbour, to the port and harbour and to the old and new villages of Aberdour, it was unnecessary to consider what might have been the rule of law applicable either to a finding expressly negativing the exercise of a right of way from Starleyburn onward to Aberdour, or of a finding simply affirming such right of way from Burntisland to Starleyburn. 2. Supposing the jury had affirmed the right of way simply from Burntisland to Starleyburn port and harbour, that would have been a valid and sufficient verdict for the respondents. 3. No verdict having been returned in the terms referred to in the appellant's 6th exception, that exception became inapplicable; and, even if it were otherwise, the exception itself was erroneous, both in law and with reference to the evidence, and the relative direction objected to in the appellant's 4th exception was unobjectionable. 4. Because proof that foot passengers exercising the right of way in dispute through the appellant's lands,

and proceeding onwards to Starleyburn port and harbour, could and did, prescriptively or immemorially, proceed thence to the port and harbour and old and new villages of Aberdour, whether through the grounds of Lord Morton, or by the highway, or otherwise, was, in any view, competent and sufficient to entitle the respondents to a verdict; and it was not necessary for the respondents to prove that such foot passengers passed exclusively through the grounds of Lord Morton, or substantially and conclusively to establish a right of public footpath through his Lordship's grounds. 5. Because the question to be tried under the issue was simply the right of way through the appellant's lands, and it was *jus tertii* to the appellant in what line or lines foot passengers, exercising that right, afterwards proceeded onwards to the port and harbour and old and new villages of Aberdour, or how they passed through the lands of other parties whose rights could not be adjudicated upon in this cause. 6. Because the appellant's 7th exception—which was not insisted on in the Court below—was excluded by the terms of the issue, besides being in itself untenable both in fact and in law. 7. Because evidence of the exercise of a public right of way as far back as living testimony can be expected to extend, although not in every instance, or only in a few instances, reaching backwards for 40 years, presumes the exercise of the right for the full period of 40 years; and the direction of the presiding Judge objected to in the appellant's 8th exception was correct and sound in law.

Lord Advocate Moncreiff, *Rolt* Q.C., and *A. A. Hutchison*, for appellant.—The pursuer having claimed a definite line of road, which was described in the summons, that was all which he was at liberty to establish by evidence, and any issue which varied in its description was incompetent. Now, the summons described the road as proceeding from the Kirktown of Burntisland, along the sea-shore *by* Starleyburn to Aberdour,—thereby using Starleyburn merely as a finger-post to indicate the direction. But the issue set up a road proceeding from the Kirktown *to* Starleyburn and old and new Aberdour, or to one or more of them,—thereby making Starleyburn the terminus, which it was not alleged to be in the summons. This was, therefore, an entirely new and distinct road, and such an issue ought not to have been allowed, even assuming that Starleyburn was a public place. But Starleyburn was not a public place in fact, and was proved not to be so at the trial. Now, by the law of Scotland, there can be no public right of way which does not lead to some public place as a terminus.—Stair, ii. 7, 10, *per* Adam, Chief C., in *Harvey* v. *Rodgers*, 4 Murr. 29; also, 3 W.S. 251; *Crawford* v. *Menzies; per* Lord Fullerton, in *Cuthbertson* v. *Young; per* Lord Cranworth, L.C., in *Campbell* v. *Lang*, ante, p. 236: 1 Macq. Ap. 451: 25 Sc. Jur. 393. There can be no such thing as a servitude of recreation or sauntering over another's ground.—*Dyce* v. *Hay*, ante, p. 83: 1 Macq. Ap. 305: 24 Sc. Jur. 465. There is also an English authority, *Woodyer* v. *Hadden*, 5 Taunt. 125. The only apparent hostile authority is Elchies' Annot., but that is an apocryphal work, the author being unknown. Such, therefore, being the law, it was absolutely necessary for the pursuers, seeing that Starleyburn had not been a public place for the prescriptive period, to prove that the road went to Aberdour, which could only be done by proving that it went through Lord Morton's lands—(first four exceptions). But the Judge told the jury it did not matter whether Starleyburn had been for 40 years a public place or not, and that it was enough if passengers could get in any way from Starleyburn to the turnpike road leading to Aberdour; whereas there was no proof of any right of way between Starleyburn and the turnpike road, nor was any such road alleged in the summons.

[LORD CHANCELLOR.—Why go back to the summons? The summons might perhaps shew that no such issue ought ever to have been granted; but in considering whether a direction to the jury was proper under a particular issue, of what use is it to refer to the summons?]

In construing an issue we can't go beyond the record. That can only be proved which is alleged in the summons. If, therefore, the summons set forth a particular road, no other road could be proved at the trial; and yet the judge told the jury it was immaterial to prove that this road went through Lord Morton's ground; indeed, he said that even if the passengers trespassed through Lord Morton's lands after reaching Starleyburn, that would be immaterial.

[LORD CHANCELLOR.—That, certainly, would be bad law to lay down to a jury. It is not very happily expressed, but the Judge no doubt meant, that it was not necessary to prove that there was a public right of way through Lord Morton's grounds, it being presumed that people could get lawfully to some public place beyond Starleyburn. The substance of the issue was—whether there was a public right of way through the appellant's lands.]

There was, however, no evidence that people could get lawfully from Starleyburn to the turnpike road. Then the issue was wrongly framed, inasmuch as it laid the use to be for 40 years prior to 1827, instead of 40 years prior to 1849, the commencement of the action. This was also a variance from the summons, and it operated unjustly, because it prevented us giving evidence of the important fact, that the public by acquiescence since 1827 had lost the right of way, if they ever had any. The acquiescence of the public for so long a period as 22 years would, in point of law, exclude their claim altogether.—Bell's Pr., sect. 945. *Ayton* v. *Melville*, Mor. Ap., "Property," No. 6. *Marquis of Abercorn* v. *Langmuir*, 20th May 1820, F.C. *D. of Portland* v.

Samson, 5 D. 476. Such at least is the case of private individuals, and there seems no reason why the public should not lose a right of this nature in the same way.
[LORD CHANCELLOR.—But how can a few individuals, by acquiescence, bind the public? A proprietor may cause an interruption, but it does not follow that a jury would hold such interruption to be lawful.]

The private proprietor can raise a declarator against two or three individuals, and a decree in that declarator will effectually bind the public. So, conversely, there seems no reason why the public may not lose by disuse or acquiescence their right of way. Lord Lyndhurst, in *Rodgers* v. *Harvey*, 3 W. S. 251, said, "a subsequent interruption not acquiesced in will not bar the public,"—thereby implying, that, if acquiesced in, it would bar the public. This is not like the case of a public trust, against which prescription would not run, but it is a *quasi* patrimonial right, which, though it might be gained by 40 years' prescription, might be lost by interruption and acquiescence for a much shorter period. (The eighth exception is fully noticed in the judgment.)

Sol.-Gen. Bethell, and *Anderson* Q.C., for respondents, were not called upon.

LORD CHANCELLOR CRANWORTH.—My Lords, in this case there are two appeals—one against the interlocutor settling the form of the issue, and the other upon certain exceptions which were taken by the defender to the direction of the learned Judge who tried the issue. The reason why I am proceeding to move your Lordships to give judgment in this case, after having heard the case of the appellant only, is, because I am of opinion that the arguments have not at all shaken the propriety of the course which was taken in the Court below, and therefore there is no necessity for further occupying your Lordships' time.

The question arose in this way:—A claim was set up to a right of way to the public from Burntisland to the sea shore, in front of property now belonging to the original defender, the present appellant Mr. Young, to a place called Starleyburn, and from thence on to Aberdour. The summons was set out—the defender denied that there was any such right of way, and eventually an issue was directed in these terms:—"Whether for 40 years and upwards prior to the year 1827, or for time immemorial, there existed a public right of way for foot passengers from the Kirktown of Burntisland, and harbour and royal burgh of Burntisland, or one or more of them, leading westwards, along or upon the margin of the sea beach, through the defender's lands, to the western extremity thereof, and thence proceeding to Starleyburn port and harbour, and to the port and harbour and old and new villages of Aberdour, or to one or more of them?"

Now, one of the pleas before your Lordships is as to the propriety of that issue. It is said that the issue was directed in an improper form upon one or two grounds. First of all, it was said that the issue was—Whether, for 40 years and upwards prior to the year 1827, or for time immemorial, there existed this public right of way? It was said that was an erroneous way of directing the issue, which should have been — Whether, for 40 years prior to the time of commencing the proceedings, there existed this public right of way? I am rather inclined to think that that would have been a more correct mode of directing the issue; but that is an objection which cannot lie in the mouth of the present appellant. It was the other party who would have had to complain of his being put to prove more than he ought to have been put to prove, namely, that he was put to prove the right of way for time immemorial, or for 40 years and upwards prior to the year 1827—that is, from the year 1787—whereas, in truth, it would have been sufficient for him to have proved the right of way for 40 years prior to the commencement of these proceedings, which was in the year 1849. I am rather inclined to think that that would, in the respondents' mouth, have been an objection, but it does not at all lie in the mouth of the present appellant to set up that objection, because to him it was an advantage instead of a disadvantage that there was too onerous an issue imposed upon the other side. It was supposed, that by this form of directing the issue, he, the appellant, was shut out from an advantage which he otherwise would have had, in proving that during 22 yoars (from 1827 to 1849) he had been in possession of the property, and that he had either constantly, or nearly constantly, shut out people from the enjoyment of this supposed right of way. That is quite immaterial. The issue had not shut him out from proving those facts, because when the pursuer undertook to prove that, for time immemorial, or for 40 years and upwards prior to 1827, there existed a public right of way, the fact that for the last 22 years the public had been excluded, (if they had been excluded,) would have been just as relevant as upon an issue, whether for 40 years preceding the action there had been a public right of way. The issue has, in the form in which it was directed, imposed upon the party who was to maintain the affirmative, the burden of proving the right of way too far back probably: but that is an objection not lying in the mouth of Mr. Young, though it would have been a good objection in the mouth of the other party. I think, therefore, there is no ground for setting aside this interlocutor.

Then, it is said the issue was—Whether there was this public right of way to Starleyburn port and harbour, and to the port and harbour and old and new villages of Aberdour, or to one or more of them? That, it is said, was an objectionable form of framing the issue, for this reason: Starleyburn port and harbour, it is alleged, is not a public place, and if it is not a public place,

the right of way up to that non-public place would not be a public right of way. But this objection is involved in two contradictions, inasmuch as what the pursuers undertook to prove was the existence of a public right of way "to Starleyburn port and harbour, and to the port and harbour and old and new villages of Aberdour, or to one or more of them." Assuming that a public right of way means a right of way from one public point to another public point, the pursuers, in order to establish this right of way, must prove either that Starleyburn port was of itself a public place, or if not, that this right of way was a public right of way, because it went on beyond Starleyburn port. Although I do not think that this issue is framed in the most apt mode in which the issue might have been framed, yet it distinctly raises the point which was meant to be tried, and the only point which ought to be tried, namely, whether there was a public right of way for 40 years in front of the grounds of the defender Mr. Young?

Obiter, there was an objection made as to whether the law had been rightly laid down in some prior cases. One case which was before your Lordships' House last Session suggests that a public right of way means a right of way from one public place to another. I believe that, for a common purpose, that is quite accurately stated—by which I mean, if Starleyburn had been a mere private house, and the public had been in the habit of going from Burntisland to Starleyburn and back again, that would not have been a public right of way. The proof of that is this: If the owner of the lands through which the way went had purchased this private house, he could have destroyed the house and shut up the way, and there would have been an end of it. Generally speaking, a public right of way means a right of way from one public place to some other public place. It was suggested that that description may not be always perfectly accurate, because there may be a place like a *cul de sac* in a town; and perhaps the existence of such places may shew that there may be cases in which that description is not quite accurate; but for a common purpose it is accurate to say, that a public way means a public way from one town to another, or from one public road to another public road, with a public terminus at each end. That being so, that settles the appeal, so far as relates to the form of the issue.

Now, my Lords, I come to the more material arguments, upon which I think there is no doubt at all, namely, the numerous exceptions which were taken to the directions given by the learned Judge to the jury. There were no less than eight exceptions taken, and it appears to me that they have all entirely fallen to the ground. I have only to state what those exceptions are, and the few observations I shall make will shew why I think they are utterly unfounded.

The *first* exception is—"His Lordship directed the jury that the pursuers' case, under the words of the issue, did not render it necessary for them to prove a right of footpath through the grounds or policy of Lord Morton to the port and harbour or the old or new villages of Aberdour." No doubt the road which was described was the road passing through the grounds of the defender Mr. Young, and described as continued on to Aberdour through the grounds of Lord Morton. I take it, it was so. I think that that is not quite accurate, because the road is described in the summons and condescendence as going through the grounds of Lord Morton after it had left the defender's grounds. It was perhaps necessary to shew that the road which went through the defender's ground, in some mode or other, went through Lord Morton's ground on towards Aberdour. Perhaps that was so; but it would be tying up the pursuers far too strongly and strictly to say, having proved all that was held to be material between the pursuers, who are the public, and the defender Mr. Young, namely, that there was a public right of way through his grounds, that they would be thrown back, because they did not carry it on to Aberdour precisely in the mode they had indicated. That is not a part of the issue. All that was material in the issue was, whether there was a right of way through the defender's grounds to Aberdour, so as to become a public right of way. The circumstance that the road went to Aberdour through Lord Morton's grounds was immaterial to the issue. So the learned Judge thought, and, as I think, quite rightly. Therefore the first exception falls to the ground.

Then it is said in the *second* exception—"His Lordship directed the jury that it was sufficient if a public right of way should be established to Starleyburn." The issue raised the point whether there was a public right of way *inter alios locos* to Starleyburn; and his Lordship directed that it was quite sufficient if the jury found that there was such a public right of way. No doubt that was perfectly right. If Starleyburn port is not a public place, upon which subject there is a good deal of conflicting evidence, then, in order to prove a public right of way, the party must prove that the road at Starleyburn, and beyond Starleyburn on to Aberdour, is a public road. So the learned Judge held, and so I quite think.

The *third* exception is—"His Lordship directed the jury that, to support such public right of way, it was not necessary that Starleyburn port and harbour should have existed for 40 years prior to 1827; and that if the port and harbour of Starleyburn is the private property of Lord Morton, that fact would be no answer to the pursuers' claims of a right of way, if proved in point of fact." The learned Judge was perfectly right in making that statement. In order to prove a public right of way, it could not be necessary to shew that Starleyburn port had existed for 40 years. As I said in the course of the argument, you might as well contend that you could not prove a public right of way through Addison Place, because Addison Place had not existed from

time immemorial, or for a certain number of years. It would not be necessary to prove that Addison Place had existed, but that the *locus* had existed as a place through which a public right of way went. Therefore, it is perfectly clear that the learned Judge gave a right direction.

Then the *fourth* exception is—"His Lordship directed the jury that the right of way claimed would be completely established for the pursuers, as against the present defender, if foot passengers using that right of way could and did proceed from Starleyburn to the harbour or villages of old and new Aberdour by the highroad, without going through Lord Morton's policy grounds: and that, even if the pursuers should fail in proving in this action any right of way through such policy grounds—a right which they could not vindicate or make effectual in this process—still the right of way might be fully proved and found by the jury as far as Starleyburn, if parties from thence could and did proceed by the road to Aberdour, supposing any such exit from Starleyburn is necessary in point of law." The learned Judge could give no other direction. If there is a footroad to the public from Burntisland to Starleyburn, and thence by the highroad to Aberdour, it is quite immaterial whether it goes through Lord Morton's grounds or not—though the parties in the summons thought it did. All that is essential to prove is, that the road went through the defender's ground. They may prove it a part of the way, and then, I think, the right beyond Starleyburn is settled, by shewing that the passengers went from Starleyburn by the highroad or by any other mode. The exception suggests that that would be trespassing, and that the parties went by trespass on from Starleyburn. I think that would be a violent interpretation indeed, when it is said that it is sufficient to prove the right of way to Starleyburn, and from thence parties could and did proceed by the highroad to Aberdour. Of course it is meant that they could lawfully proceed—nobody can be misled by that.

Then the appellant says, that the learned Judge was wrong for not giving three directions—First of all, "That it was necessary for the pursuers, in order to entitle them to a verdict under the issue, to prove either that Starleyburn had been a public place for 40 years prior to 1827, or to prove a public right of way for that period along the sea beach, through Lord Morton's grounds, from Burntisland or Kirktown to the port and harbour or the old or new villages of Aberdour." That forms just the converse of what I have stated. It was not necessary for the learned Judge so to direct the jury, and if he had so directed the jury, he would have directed them wrong.

Then the appellant says that the learned Judge ought to have directed the jury, "That it is not competent under the issue and record to return a verdict finding a public right of way from Burntisland or Kirktown to Starleyburn port and harbour, and thence to the highway, and thence by the highway to the port and harbour or old or new villages of Aberdour." It was competent. If you could prove it to be a public right of way, it was not necessary for the learned Judge to direct the contrary. Then the appellant says—"But if it be competent, then there was, in law, no evidence to go to the jury of such a right for 40 years prior to 1827." Although it is alleged that there is no evidence, I have found four witnesses who speak upon the subject, one of whom, an old woman, as I recollect from her evidence, distinctly says, that in the year 1775 she remembers folks used to go along that road ever since she was a child eight or ten years old, she knew it very well. Starleyburn port was not built then, and they went on that road. Some say they went through Lord Morton's ground, and some by the highroad; but it is impossible to say that there was not evidence for the jury. Some jurymen might have thought it weak evidence, and some strong, but the learned Judge had only to leave the question to them, as the matter of fact went upon that which was clearly sufficient evidence.

Then it is stated that the learned Judge ought to have told the jury, "That evidence of the interruption of the right of way claimed for 22 years after 1827, acquiesced in by the public for that period, is 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. A person excluding 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 22 years prevented people from doing what they had done before for 40 years, does not of itself destroy the right. The complaint is that the learned Judge did not tell the jury that it did.

Then there comes the *last* exception, which is, that the learned Judge directed the jury, that if evidence was given to them, 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 40 years prior to 1827, it was competent for the jury to presume, and when the evidence was consistent and uncontradicted, the jury ought in point of law to presume, from such proof of the exercise of a right of way uninterrupted so far back as living testimony can go, a previous enjoyment, corresponding to the manner in which it had been enjoyed during the period embraced in the evidence, if in itself satisfactory to them as to that period, and that the defender 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 40 years—supposing that the testimony, in their opinion, did not directly reach to those earlier years. In fact, the evidence did not reach to those

earlier years; but the learned Judge was quite right in his direction, otherwise what an absurdity we are 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 anything like proof of the commencement. The period here which they had to prove was, I think, erroneous in the way in which the issue was framed. The issue was framed as against the pursuers, but not as against the present appellant. The pursuers had to prove that the right had existed either from time immemorial, or for 40 years prior to 1827—that would be the year 1787, and there is evidence which distinctly went beyond that. All that the learned Judge said, was—You may, if the evidence satisfies you, if for any reason it cannot be carried quite back to 1787, go as far as the memory of living witnesses goes; and the law authorizes you in so doing. Upon all these points it seems to me that the learned Judge gave the jury an accurate direction. I confess 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 a little loose in the mode in which they direct the juries; and if I had thought that there was anything really wrong here, I should, perhaps, have felt myself bound to have yielded to these exceptions; but I am happy to say that I see nothing wrong. There is, I may remark, one expression which I think a Judge would not have used in directing a jury in England, namely, "when the evidence was consistent and uncontradicted, the jury ought, in point of law, to presume,"—that is not the happiest way of expressing it; only he goes on to negative what had been contended on the other hand, that it was not competent to them so to find—they could not find the 40 years' enjoyment without distinct evidence of that period of time. He says—That is not so; you may presume it, if the evidence seems to you to be all consistent. The law delights in favouring possession as it has been enjoyed, and authorizes you in one sense, and not only sanctions, but directs you to act upon it.

It appears to me, my Lords, that both these appeals have been brought without any sort of foundation. I shall therefore move your Lordships to dismiss them, and affirm the interlocutors of the Court below.

Interlocutors in each appeal affirmed with costs.

Appellant's Solicitors, Richardson, Loch and Maclaurin.—*Respondents' Solicitors*, Deans and Rogers.

FEBRUARY 27, 1854.

MELROSE and COMPANY, *Appellants*, v. HASTIE and COMPANY, *Respondents*.

Appeal to House of Lords—Competency—Process—Retention—Interlocutor disallowing exceptions.—48 Geo. III., c. 151, § 15—Statute 55 Geo. III., c. 42, § 7—*A question having arisen as to the right to the delivery of a quantity of sugar, an action was brought by the party claiming it, and it went to trial on an issue before a jury. A verdict was returned for the pursuers, but it was set aside by the Court, on a bill of exceptions to the ruling of the Judge, on 7th February* 1850, *and a new trial granted. A second trial took place, in which a verdict was returned for the defenders in March* 1850, *and, on a bill of exceptions presented by the pursuers, the Court, on 7th March* 1851, *disallowed the bill of exceptions; on 9th February* 1852 *the pursuers appealed to the House of Lords.*

HELD *that as the first interlocutor disposed of exceptions, the appeal, not being brought within fourteen days, was too late:* 55 Geo. III., c. 42, § 7.

HELD FURTHER, *that an interlocutor settling an issue is subject to appeal.*[1]

Melrose and Company appealed against the interlocutors of Feb. 1850, and of March and Dec. 1851.

The respondents, in their case, stated the objection to the competency of the appeal—"In respect the statutory period within which the interlocutors complained of could be appealed against had elapsed before the appeal was presented, and therefore the interlocutors are now final, and cannot be reviewed."

The Appeal Committee ordered this objection to be reserved till the hearing of the appeal.

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[1] See previous report 13 D. 881; 22 Sc. Jur. 207; 23 Sc. Jur. 398; 24 Sc. Jur. 120. S. C. 1 Macq. Ap. 698: 26 Sc. Jur. 319.