made available for the payment of damages. In regard to the manner of appeal, I am not much moved by the objections that were taken to that part of the pursuer's case. The Lord Ordinary says that the action is directed against an act of the committee of the society and not of the society itself. I do not see that. As I gather from the rules of the society, the committee had power to pronounce the decision they did pronounce, if there were grounds for it. Accordingly, the defenders themselves do not take this ground on the record. In their second plea-in-law, they speak of what was done as "the decision of the society," and in the same way throughout the record. Then again, it is said Dugald Blue did not take the right course in order to obtain review of the decision. I was very anxious in the course of the debate to know what was the right course, but I could get no answer on the subject. I do not know, in reference to an institution of this kind, the laws of which prescribe no special form of appeal, any better plan than that which was adopted of addressing the president. But there is a broader question raised in this case, and one of far more importance, which indeed is at the foundation of the Lord Ordinary's judgment—namely, whether a demand for damages, or rather for reparation, of the wrong complained of, is competent against the society, or whether it should be directed against the individual wrongdoers, and the cases of Findlater *v.* Duncan, and Ross *v.* Heriot's Hospital were referred to. Now, in the first place, this society itself states the thing done as having been done by itself. The defenders so represent it on the record. But further, I think the nature of this case, and the character of this institution, take them out of the rule of Findlater *v.* Duncan. In that case, the matter did not undergo much discussion in the Court here. I was counsel for the trustees, and tried hard to be heard on the point, but I did not get much encouragement. In the House of Lords, however, the question did undergo some discussion, and was made the ground of judgment. But what is the nature of this institution? It is formed for the purpose of managing funds which are contributed by its members for the benefit of the members, and the result of expelling this man was to enrich themselves, and to put into the coffers of the society what ought to be in the pursuer's pocket. That is quite a different case from that of Heriot's Hospital, and I am therefore of opinion that the Lord Ordinary's interlocutor cannot be sustained. I may state also that this claim is one for reparation. Suppose the pursuer to be right, reinstatement as a member, which the defenders say is all he is entitled to, is not sufficient, because since the pursuer's expulsion he has been deprived of his allowance.

LORD CURRIEHILL—I am of the same opinion, and I may state that, having examined carefully the rules of this society, I am satisfied that its funds are in a totally different position from those of the Road Trustees in Findlater *v.* Duncan, and those of Heriot's Hospital. I am clear that this society may incur liability, either *ex contractu* or for reparation.

LORD DEAS—The Lord Ordinary bases his interlocutor mainly on the cases of Findlater *v.* Duncan, and Ross *v.* Heriot's Hospital, as preventing this action lying against the funds of the society. I am very clear that so to apply these cases is a total misapplication of the doctrine which they contain. This is a society—in other words a company—but over and above that, it is defending a claim made on its own funds. The office-bearers, in what they did, were acting within their powers, and protecting the funds from a demand made on them, and it would be very extraordinary to hold that the funds of the society are not liable to meet the present claim, if it is well founded.

Lord ARDMILLAN—Whether Dugald Blue was rightly or wrongly expelled is not the question now before us; he was in either case entitled, under the rules, to the arbitration which he demanded. And I have no doubt that where such a wrong as is here complained of is done by a society, consisting of contributors, in the administration of funds which the members contribute, the funds of the society must be answerable.

The Court therefore recalled the Lord Ordinary's interlocutor, repelled the pleas in law which he had sustained, and found the defenders liable in expenses since the date of closing the record.

Agent for Pursuer—John Thomson, S.S.C,

Agents for Defender—Patrick, M'Ewan, & Carment, W.S.

JENKINS AND OTHERS *v.* MURRAY.

Road—Right of Way—New Trial. Verdict for the pursuers in a right-of-way case set aside. Observations as to the evidence required to support such an action.

This was a motion to set aside the verdict of a jury and grant a new trial in a declarator of right of way, raised by certain inhabitants of Stirling and the neighbourhood against Colonel Murray of Polmaise and Touchadam; and the question was as to a path over the hill known as the "Gillies' Hill," situated in the neighbourhood of Stirling, and overlooking the field of Bannockburn. This path was some time ago closed by Colonel Murray, who is in the course of erecting a new mansion-house in the vicinity; and the present action was brought for the purpose of having it opened up. The issue sent to the jury was as follows:—

"Whether, for forty years and upwards, or for time immemorial prior to 1864, there existed a public right of way for foot-passengers from a point on the public turnpike or statute-labour road leading from Stirling to Glasgow, marked C on the copy Ordnance Survey map, No. 4 of process, through the defender's lands, as delineated by a line coloured green on the said map, to another point marked D on the said map, also situated on the said public turnpike or statute-labour road, and near to the Murrayshall Lime Works?"

The trial of the case commenced on Wednesday the 7th March last, and was concluded on the Saturday following. Evidence was led at great length on both sides.

The jury returned a unanimous verdict for the pursuers, and the defender having obtained a rule to show cause why the verdict should not be set aside as contrary to evidence,

MILLAR, for the pursuers (with him BALFOUR and W. MACKINTOSH) showed cause, and

YOUNG (with him GIFFORD and JOHNSTONE) was heard in reply.

At advising,

The LORD PRESIDENT—This case was fully and very anxiously argued to us, and the question which we have to deal with is, whether we are to set aside the verdict of the jury. That is always a grave matter, unless it be very palpable that the jury had gone grievously wrong; and we have always a leaning to support the verdict of a jury, if there are fair grounds for supporting it. There may be conflicting evidence, but that there is mere

conflicting evidence is not a sufficient reason for setting aside the verdict of a jury. In considering the weight which is due to evidence, we must look at it with reference to the circumstances of the case and the principles which ought to guide the decision of the case. There may be a great deal of general evidence in one direction—*i.e.*, a number of witnesses speaking to one result; but still there may be rules and principles which may deprive that kind of evidence of due weight, or of any weight at all, in the question of what the verdict ought to be. As for instance, it is not enough that a number of witnesses say that they have walked along a road, or have seen people on the road, in a question of right-of-way. We must have something more particular than that. We must know something about how they came to be there, what they were doing there, and whether the circumstances under which they were there were such as indicated a right-of-way, or did not indicate a right-of-way. All these matters are for consideration. Now the issue in this case was whether there existed a public right-of-way for foot-passengers from a certain point C to a certain point D delineated upon the plan. That is a question whether the public had a right-of-way—that is, whether it was a public way for transit from one public point to another. I think that a public road is a public place from which a right-of-way may go, and at which a right-of-way may terminate. As we generally understand the question, it requires that it shall be from one public place to another. That is, it is a way by which the public are entitled to go from one public place to another. That is the meaning of a right-of-way. It is from a place where the public are entitled to be to a place where the public are entitled to be, as from one part of a public road to another part of a public road, or from one village to another village, and so forth. Now, I think that the *termini* taken here are *termini* which entitled the pursuers to have this matter investigated; that is, the alleged right-of-way is from one part of a public road to another part of a public road. Still the question remains whether from time immemorial, or for forty years, that existed as a right-of-way. The resort to a place does not necessarily make a right-of-way. For, going for the mere purpose of strolling upon unenclosed ground for a length of time, does not necessarily make a right-of-way. The going along this path to the letter G, we shall say, which is a place that people were accustomed to stroll to when it was an unenclosed common, would not necessarily make a right-of-way. But the use by the public of the line from the point C to the point D as a means of transit in their ordinary avocations, if established, will make a right-of-way. In this case, and indeed in most cases, it is desirable to look as far back as we can into the commencement of this resort to it, and see if we can trace the purposes for which the path was used. I think it is pretty apparent that there was a considerable piece of ground to the south, as we may call it, or to the left, as it has been called, entering from the point C, and going towards D, which was what was called a common. That does not mean a place where there were common rights. It means just a piece of open, unenclosed ground, not protected, and where people are very much in use to stroll, and having the aspect in that respect of a common. But that does not mean that there was any common right in it. It was the exclusive property of the proprietor. Now, the custom of going along part of this road, and strolling over that common, especially upon Sundays, and for purposes of recreation, would not constitute a right of way. It was not a way from one place to another place. It does appear that there was here a good deal of that kind of thing for a considerable time. Persons were in use to go from the point C along the way now claimed towards the point G, and to stroll down upon the unenclosed ground. I think that that kind of thing would not constitute a right of way, or a right to go there; and that appeared to have been the condition of things at an early period here. But if that right is pushed on from G by the line now claimed, so as give the public access to the statute-labour road at D, and is used as a way in passing on their avocations from one point to the other, the circumstance that the part of it from C to G was originally merely a path by which people strolled, and was not a public right of way, will not prevent it from becoming a public right of way by the continued use of it, along with the other portion, so as to extend it to another public place, if that is done for a sufficient length of time. And the point really for consideration in this case is, whether that has occurred here or no, whether that which was a road up to the letter G, accounted for by the defender's evidence, and even by the pursuer's evidence, as a stroll road for the purpose of getting a view, has been continued for a sufficient length of time as a way for passing on to the letter D, in the exercise of their avocations by the public. It is not enough that persons belonging to the property of Mr Murray, to whom the ground belongs, have been in use to pass in that direction. That will not make it a right of way. As, for instance, if the people at Murrayshall or Kay's House, who were the tenants of Mr Murray, used and were allowed to use this passage through his ground, that would not make it a public right of way. Indeed, if it terminated at Murrayshall or at Kay's House, it would not be a public right of way, because it would not terminate at any public place at all, but at a private road belonging to the estate; and the use so had by these persons could not be regarded as a use by the public, but as a use permitted by the proprietor to persons who were his own tenants, and to whom it was convenient to have that mode of passing along. There is also another class of evidence here that I don't think can be accounted as much in establishing the public right of way from C to D. I mean the resort to it of persons who went no farther than the letter G just for the view, and who went back again, and who in later more than in earlier times, strolled in that direction. That is not much in a case of this kind, because that is not using it as a public way from C to D; and so also I attach very little importance to the case of the invalid gentleman who walked there, and was not prevented from doing so, or to the case of the clergyman who was seen meditating there. I don't think these things would establish a right of way. They are to be accounted for by the sort of tolerance that every proprietor gives to persons who are doing no harm, and who are claiming no right as members of the public, and were really not going from one public place to another, or using it as a public road. Nor would I attach much importance to the passage along that road of persons who were going to fish in the Limestone Burn or in the Endrick. These were not fishermen—tenants of fishings—I understand, but anglers—amateur sportsmen. I think there is a sort of tolerance of these persons everywhere. They are not prevented from making the best of their way to the streams where they are to fish. People rather like to see them, and I

think that cannot be made much of as evidence in a case of this kind. But there is evidence of another kind here, as to the use of this road by persons who did not belong to any of these classes. There is not a very great deal of that when you abstract from it those that I have alluded to; and, in the first aspect of it there is the appearance of more than there really is, because when a witness says—"I have seen several people going that road up about Gillies' Hill; I don't know what they were doing, but they were there;" that is not evidence of the use of that as a public way, not at all; but a considerable portion of the evidence here is of that kind. Now, I don't found much upon that. I think it is too vague, especially when we see that this was an unenclosed common, and that people were not prevented from lounging upon it, as we find from the evidence. But there is some evidence as to persons who passed along there, going to certain places. There is not a great deal of that, I must say. There is not a great deal of evidence as to persons who went in at C and came out at D, in their way, upon business, to some place beyond D. There is very little of that. There is a nailer of St Ninians who says he has been often on the road, but he does not say what he was doing there, or that he was using it as a passage. He frequently went to Murrayshall with nails, but he says plainly that he would not go by that road going there; it was out of his way. Now, going from St Ninians, I don't see where it was on his way to go to. I don't see that it was on his way to go to any place by that road. There is other evidence of that kind. Then there is a consideration connected with this case, when we are asked to look at the character of the evidence brought forward to establish this road as a right of way from one place to another, and I think it is a circumstance of some consequence, looking to whether the rather vague statement of the errand of the people who were seen there is to be considered and it is this—it is proved that from C to D is longer by the road in question than by the statute-labour road between the same points, and it is still further going from St Ninians in that way. A right of way may be very easily accounted for when there is a short cut obtained by it. People take it as the nearest and most convenient way. But when they go round about in this way, it may be that they are induced to do so from the greater comfort and interest of the road, and I by no means say that that is not a mode in which a right of public way may be acquired. I think that may be a reason for the public choosing to resort to it, but then it requires a considerable body of evidence to satisfy one that that is really the use that they were making of it. Then there is a class of people who have resorted to this road, viz., the Craigend miners. Those that are spoken of are people who lived at Torbrex, which is away beyond C. They came down to C, and then along that road to Craigend, which is not laid down on this plan, but we see where it is on plan No. 4. Several people say they met the Torbrex miners there; but the evidence does not show by what route they had come to the path in question, or by what route they had left it. And there is evidence from two witnesses at least, that the Craigend miners went by Touchadam smithy, and by a road along there said to be no road at all, but which, I think, is described in the proof as Cadger's Lane. Now it is impossible to look at the map that has Craigend upon it, and the line that these people had to take, without seeing that they would have been making an immense detour if they had come round to the point D along the public road, and then gone up again. Their short course plainly was by the Cadger's Lane, a very natural way for them to go if they were permitted. That would be shorter for them apparently, or fully as short as going from Touchadam smithy by the public road. The whole distance of the line claimed in this action is about 1680 yards, or about 80 yards less than a mile; but the Cadger's Lane is plainly the road that it would have been most natural for these people to take. And it would have been most unnatural for them to go this way. But when we are not told which way they went, and when we see what was the natural road for them to take, we may conclude that that was not the use of this road from one public place to another, but that it was the use of this lane to get into another lane which was a private road. Now, when you take away all these exceptional kinds of witnesses—witnesses that are really not germane to the question of the public use of this as a right-of-way—I can find but a very small residuum of evidence going to the use of it at all. I think there is a great deal of evidence of people having been allowed for a length of time to stroll down in any way they liked from G through the grounds; and when we come to inquire when it was that there was a road out at Bates' house, it rather appears to me that until a comparatively late period there was no particular way that they went by. They strolled down through the common, and got out somewhere near that, but not always there. Some of them seem to have got out a little below Kay's house, and some of them where the road went to the lime-stone mines, entering upon the Murrayshall road, and following it part of the way; and we find that there were alterations made on these lime-kilns, one in 1818, and another so late as 1839 or 1840, which make it pretty plain that the road which is now claimed over part of these places, had no existence in 1839 or 1840. Therefore I think that if these things are properly considered, if you take the whole history of the case and apply it to that state of matters, with a view to what it is that constitutes a right-of-way,—viz., not that people have strolled about there, but that they used it as a public road to take them from one public place to another on their ordinary avocations, I think that the evidence is short of the establishment of a right-of-way in this case, especially when contrasted with the evidence which is given by factors and others on the part of the defender. And although upon the first argument in the case I was very much impressed with the argument presented by Mr Millar, yet, on coming to study the evidence, and see what it is that is legitimate evidence in support of this issue, and what it is that must be deducted from it, I have come to the conclusion that there really has been no right-of-way for forty years past on the line claimed by the pursuers. The first part of it up to G was not originally, I think, at all a public right-of-way; and I do not think that what has been done from G to D has been such as to constitute a continuous right-of-way to D, and therefore, I am for setting aside this verdict. I do not attach much importance, though in strict pleading one might say something about it, to the deviation in the path proved, compared with the line claimed, soon after leaving G at the Balloch. Twenty-five yards is the utmost, I think, that is spoken to at any point, and setting aside that, which is not the ground on which I go here, I rest my conclusion that the verdict cannot stand upon

this, that I don't think it was made out that there was a public right-of-way from G to D such as entitled the public to claim it as a right-of-way for forty years, or would have converted the part from C to G into a public right-of-way, which, I think, it was not originally.

Lord CURRIEHILL—The issue in this case is, whether there has existed a right-of-way between the two points mentioned for a period of forty years and upwards. Now, in dealing with the case, we must understand distinctly what is meant by a public right-of-way. A public right-of-way does not mean a path that has been used by the proprietor of the ground himself, or by his tenants, or by the families dependent upon his tenants. That is, the owner of the property using it for his own behoof, either directly or through others depending upon him. In the second place, a public right-of-way is something entirely different from a servitude of right-of-way. A right of servitude is where the path is a pertinent of another property. But what we are dealing with here is a right which the public hold and are entitled to use, whether they have any other property or not. In the third place, a right-of-way, and particularly a right of foot-way, through a man's ground means not a right of promenading within that ground—going in at a certain point and promenading indiscriminately over the ground, and coming away again. They must go through the ground from an entry at one place to an ish at another. And lastly, the two points where the ish and the entry are must be public places. I think a public road is a public place, in the sense in which that expression is used. But the two points must be public places. It will not do for the people to enter the ground of a proprietor, and walk about in it as much as they choose, and come out where they entered. That will not make a right-of-way. The line of road must be a marked line. Persons will never make a line of footpath by straying in fifty different lines over a man's property. It must be one particular path, and it must be continued for a period of forty years or upwards, and it must be continued over the whole path. If it is continued for forty years only half the way, and not the rest of the way, that will not make it a footpath through the ground. Now, such being in my opinion the meaning of the issue in this case, the question is, have the pursuers supported it by evidence? I must say that, in studying the case in order to see what the evidence goes to, we are met at the outset by a considerable improbability of this being a public right-of-way, for various reasons. As your Lordship has pointed out, this is a right-of-way from one part of a public road to another point of the same road. The public have an excellent public road, supported at the public expense, for travelling between these two points; and I think there is a considerable improbability that, having that benefit supplied to them at the public expense, they used this road as a road for travelling between these two points. In the first place, the road in question is longer; it is not a great distance altogether, but still the road in question is longer than the public made road that was open to them. In the next place, it is more difficult, and in some places it is very difficult, as we see from the evidence and from the plan. It is very steep indeed at some places. Therefore it is both longer and more difficult. Then there is another circumstance which is a mere element in the improbability—viz., that in the Ordnance plan which is made part of the issue, there is no continuous road from one of these points to the other. The footpath marked on that plan ends within the grounds. I don't lay much stress on that, but it is one element among others which makes me require very clear proof to overcome these improbabilities. Then, when I examine the proof, I think with your Lordship that it is very peculiar. I think there is abundance of evidence to prove a public road, if the point G at the top of the Gillies' Hill was a public place, and if the question was whether there was a road from C to G. There is plenty of evidence as to people using that portion of the road—enough to have made that much of it a public road. But that is not the question before us. The question before us is whether there was a public road from C to D, a considerable distance beyond the top of the Gillies' Hill, and the point upon which I feel difficulty is this, whether that path is continued as a public road, using that expression in the sense in which I have stated—whether there is any evidence of a public road from G to D—from the top of the Gillies' Hill to the public road. Now, on analysing the evidence, it certainly came to assume a different aspect in my mind from what it did on the first blush, because in the questions that were put to the witnesses in the pursuers' evidence there is not a sufficient discrimination as to the use of the road to the south-west of the point G, as compared with the use of the road between C and G. When I come to analyse the evidence, I find that there is very little evidence indeed as to the public having had any access from G to D. No doubt there was a use of the road to the westward of G to some extent. But, in the first place, it was used by the tenants of the farm of Murrayshall and their servants, and people going on business or visiting at Murrayshall. I see it stated that there are no fewer than fourteen inmates of Murrayshall itself, and that was the nearest road for them to go to Stirling, and for people visiting them. Then there was the forester living at Kay's House; and after the limeworks commenced in 1818, there were the miners excavating the limestone quarries, and the people manufacturing the limestone at the kilns. All these persons used the road, but they were persons employed on the defender's own property. Then we have what staggered me a good deal at first—the fact that the Craigend miners, coming from a property beyond the public road altogether, used this road from C to G, or to the Murrayshall road, but they did not use it from that to D. There are two witnesses, one of them at page 36, who tell us that they did not join the road till they were near Murrayshall road, entirely away from G. So that when you deduct the Murrayshall tenants and their servants and dependants, the Murrayshall miners and the Craigend miners, and also the persons who went to Gillies' Hill and no further, I don't find that there remains enough of evidence to prove anything like a public road from the foot of the Gillies' Hill to the point D. And therefore if we were left to the mere balancing of the evidence to which I have alluded, I think there would be a very strong preponderance against the pursuers. But the matter does not even rest there. We have the evidence of two of the factors upon the estate, going back to the year 1815, the whole period of the investigation, and they state positively that the road terminated at Murrayshall farm-house, and Kay's House, and went no further. These are persons who knew the road all along, and whose attention was called to it more than any other persons; and both of these gentlemen are no longer in the employment of the defender, so that

there can be no question as to their credibility. That is corroborated by the tenants of the limestone, who gave evidence to the same effect, and I think that their evidence excludes very much the evidence of the pursuers. But even the evidence of the pursuers does not take them to the point D; it certainly does not take them to the point D before the year 1818, for the pursuers' witnesses tell us expressly that there was no road there on that side of Bates' house at all prior to 1818, and therefore the character of the usage prior to 1818 was not that of using it as a public road. We get then the character of the usage prior to that date, and I see no evidence that subsequent to that date it acquired a different character. Putting all these things together, I have come with your Lordship to be clearly of opinion that this verdict is against evidence.

Lord DEAS—When I first read this proof, and heard the argument for the rule, it appeared to me that there were difficulties in the way of supporting this verdict; but I thought that they were difficulties which might be removed, and it was for that reason that I pressed them upon Mr Millar's attention, that he might give to them such answers as they admitted of. When I came to read the proof again attentively the difficulties which I had originally, in place of being removed, were confirmed. I agree with the observations which have been made by your Lordship as to there being a great deal less evidence of the use of this as a public road, when you analyse the proof, than what at first sight there appears to be. The probability, *prima facie*, is not great in favour of a public road there, because it goes from one part of a public road to another part of the same public road. It is not a path between one public road and another. It is a path from one part of a public road to another part of the same public road. It would be quite intelligible if it were considerably shorter or considerably easier. But it is not a very likely thing when it is both longer and more difficult—it is not likely, I mean, so far as business purposes or utility are concerned. There is another peculiarity here, that when you come to what is said to be the end of this path at D there is no village there, and there is no village near it. We don't hear much of any place of any importance till you get to Glasgow, some thirty or forty miles off. It is only a road for foot-passengers. At the earlier pe riod to which this proof relates there were not a great many people who walked from Stirling to Glasgow, and there are still fewer now. And it is not said in the proof that this road was used for walking from Stirling or St Ninians to Glasgow. I rather think there is only one person who says that that ever was done. Now it is quite true that the point that is reached is a public place, in the sense stated by your Lordship, that it is sufficient to entitle the party to an issue that the road claimed goes from one public road to another part of the same public road; in that sense it is a public place, but except for the purpose of getting somewhere else, it is not a public place in any other sense. It is not a public place like a village or a town. I don't mean to suggest that there may not be a public road for recreation. But if you look upon this road in that light, there is excessively little proof of people using it for recreation. There was a good deal of use of a part of it to G before the ground was enclosed, but beyond that there is almost no proof of its being used for recreation. There is very little proof of its having been used for business purposes, and for such purposes you would naturally expect people to take the shortest and easiest road. Indeed, it is a strong thing against the probability of a road being a public road that it is not useful for business purposes. As to anglers, they are tolerated by everybody, but this road is not the nearest way to the Limestone Burn, or to the Endrick, the most important burn, which is twelve miles off. Therefore it is not the nearest way to anglers, who of all people are likely to take the nearest road, and are most privileged to do so. But while I agree with the observations that have been made upon the evidence, I confess that if it was merely a question of the kind which would be to a considerable extent a jury question, I would hesitate to set aside the verdict, even though I thought it was wrong, which I certainly do. It is not enough to set aside a verdict in a case of this kind that we would not have agreed with the jury, and I would hesitate to set aside this verdict if I thought that there existed law and facts which might reasonably entitle the pursuers on another trial to get a favourable verdict. But the conclusion I have come to is that the law and the facts, so far as it is possible to see, are such that the pursuers cannot expect to succeed on another trial any more than in this, and I shall indicate shortly on what grounds I think so. It is perfectly clear that since the date when this ground, which is called the common, was cultivated and enclosed there has not been a sufficient period of time to found a claim to a public road. I need hardly say that I quite agree with your Lordship that what is called a common here was not a common. We do use the words common and commonty in Scotland to mean a common or commonty of property, but they are frequently used also in a vulgar sense to signify a piece of ground which is allowed to be treated as if it were a common. This ground until a comparatively recent period was undoubtedly in that position. All the pursuers' witnesses agree that nobody was excluded from it; they were allowed to wander over it as they pleased, and they almost all add the most conclusive reason, "We were doing no harm," or rather, "We could do no harm." It being a piece of ground of that kind on which nobody could do any harm, everybody was allowed to go at his pleasure, so much so, that it came to be called the common. Now, the time at which it was enclosed, and the public were excluded from strolling over it, is not very clearly fixed in the proof, but it is perfectly clear that it is within the last twenty or thirty years. That is the utmost time since the ground was enclosed. There was always a wall on the right hand side on going from Stirling along the fir park, but there was no wall on the other side till a comparatively recent period. There are two cross-dykes now, one at B and one E. First one of these was built, and then the other. It does not very distinctly appear when the long line of wall which completely encloses the common was erected; but I rather suppose that if it was done probably when the cross-dyke was made, the other would be built from C to meet the angle, so that the whole of the wall round there may not have been built at one time. But the first of it plainly is not more than twenty or thirty years old. Well, then, there has not been time since then to prescribe a right of road if it was not prescribed before. Now, the state of matters before there was any enclosure was what your Lordships have mentioned; the whole of the ground along there was allowed to be treated as a common, and the important question arises whether, during that

period, before the enclosure, we can hold that the members of the public who were going along that disputed path, were going on any other footing than they were going on the rest of the common. If the line of path had been from A to D direct, or, even after going along as far as B or E, if it had gone from B or E direct across), which there was nothing to prevent them doing if they had chosen, if it had been in that direction, it would have looked like a path to D, which is said to be the terminus. They had the opportunity open to them, but that is not the line of path at all. The line of path at that time, and up to a period not very long before the enclosure, was just where it is now, straight across to Murrayshall farm; and it is more recently than that that they have begun to turn back again, for what, I think, is nearly one-fourth of the whole way; but the beaten path which originally existed was from C to Murrayshall farm. Now, I don't mean to suggest that where there is an open moor, and people are allowed to go on any part of it they like, it is impracticable to prescribe a right of road across that moor in a particular line, but the question whether that is done depends a good deal upon circumstances. If across the middle of the moor there is a beaten path used by the public which is of no use to the proprietor, which he does not require at all, although they might have gone on any part of the moor if they had chosen, that would indicate a using of a particular path to go to a particular place, more particularly if there is a place at the end of it that it is convenient or useful to get to. If that path was made at his expense it would be very clear, but suppose that, instead of being made at his expense, it is the nearest way from his mansion-house or his farm-house to the town, which is at the other end of it, and his people and dependents go that way, and make a path that way, that does not indicate much of a right on the part of the public to that particular path more than to the rest of the moor, though they walk upon that line. Now, that appears to me to have been the state of this path up till the date of these enclosures. It was required for Murrayshall farm; it was the nearest way for the people living there to go to Stirling, and they used it for that purpose. That perfectly accounts for how it comes about that there was a beaten path along that line and not in other parts of what is called the common; and, as Lord Curriehill pointed out, that beaten path plainly existed long before the public attempted or it was possible for them when they came near Murrayshall farm-house to turn down to the point D. Up to 1818, at all events, there was no way of getting down from Murrayshall to D except by the Murrayshall farm road. Up to 1818 it is quite plain that it was a path from Stirling to Murrayshall farm, and nowhere else at all. Therefore you have that path made by the people of Murrayshall for their own use, and required for their own use. In that state of matters, when the whole ground is equally open to the public, the question is—Are the public going in that direction to Murrayshall acquiring any more right to the path than they are acquiring to the rest of the ground? It appears to me that during that period they are going on both on the same principle and on the same footing. They have no more right to the one than to the other. They could not get to any place but Murrayshall; and though all the world had gone that way to Murrayshall that was merely the use by the proprietor of his own ground. So that it seems to me that taking the law and the facts together—and any facts that can possibly come out, unless all this evidence is erroneous together, which there is no ground for supposing—taking any reasonable view of the facts, either proved or which can be proved—it seems to me to come to this, that up to the time when that ground was enclosed you have no right whatever to distinguish between the principle on which the public were going along that path, and the principle on which they might pass over any other part of the ground. And all that is very much confirmed by what your Lordship pointed out, and what we heard a great deal about in the discussion, that until this ground was enclosed the use that was made of the path, so far as it can be called a use by the public, was not to go to the point D, but to go to the top of the hill to the point G, which they very naturally did, because that was the beaten path. But the going for any period of time to G at the top of the hill, and coming back again, when they had no occasion to get any further, and could not get any further, plainly was not prescribing a right of road. It is a remarkable feature in this case, which I don't remember to have seen in any other—and I asked the parties if they could mention any other, and they could not—that during the period founded on in the issue, prior to 1864 or about that time, nobody ever was challenged going here, either on the path or on the common. There was no challenge whatever at any time of anybody. Now, that is very peculiar, because it is quite plain that if a proprietor has on his property an approach or a path which he requires for his own purpose, and if he allows the public to go on it for a hundred years by mere tolerance, that gives them no right. The question always is whether it is tolerance merely, and if it is quite apparent that it was tolerance, no right would be acquired. If there be challenges now and then, and people persist in going nevertheless, that is very much against the supposition of tolerance. And if, as in Harvey's case, the proprietor puts up walls and obstructions from time to time to stop the people, and they knock them down, it is very difficult to reconcile that with the notion of tolerance. There were no doubt fences put up here, and steps left in them, but all these were required for the Murrayshall people, and there is nothing here to indicate that the use which the public took of it was not tolerance. Although it is not a road constructed as an approach to a mansion-house, it is a footpath made by the proprietor for his own use and behoof, and I don't see anything in this case to show that it was anything else but tolerance all along. Admittedly it was tolerance till a recent period. In regard to going to the top of the hill and down again, it would have been an unreasonable thing to stop people going in the then state of matters. I have some acquaintance with hills myself, and I would think it a most unreasonable thing if I were prevented from going to the top of a hill and down again. I never was prevented, and I hope never will be. But that does not give a right, and it is not pretended that that is done in the exercise of a right. Again, in the question of tolerance, something depends on the nature of the road and the uses of it. It would be more difficult to suppose that a man was tolerating people driving carts and carriages upon his road than to suppose that he was allowing them to walk upon it. This is only claimed as a footpath. There was no annoyance to the proprietor in people walking there; he was put to no expense or inconvenience,

and there is nothing in the nature of the thing to show that it was not tolerance. And when you combine that with the other view that they were tolerated to go upon the whole of that common, and that they did not go in the direction of D at all, but went in the direction of Murrayshall, I think there is nothing in the facts proved, or in any state of facts consistent with the facts which have been proved on both sides, that could make out a right of public way here. And taking that view of it, I have no hesitation in concurring in setting aside the verdict, because, looking at it in that way, I think it is not interfering in any degree with the province of the jury. There is no view that any jury or any Court could take upon these facts, or on any facts consistent with them, which to my mind would enable them to say that this was a public right of road.

Lord ARDMILLAN—I have had some difficulty on one part of this case. I certainly feel that there are to my mind grounds which are quite satisfactory why I could not have come to the verdict to which the jury came. I think it is not a verdict which the evidence supports. But my difficulty was that it being, as has been already stated by your Lordship, not the practice of the Court to set aside a verdict merely because the Court could not have come to the same conclusion; and it being of course very undesirable that there should be a succession of trials of a case of this kind, where perhaps there might be a succession of verdicts in the same way, it was necessary, if we could see our way, to find some ground upon which this verdict would be set aside that would be strong enough to support a judgment, as it were, upon the case such as might prevent the further litigation of the question, because unless we could find grounds that went up to that point I don't know that it is desirable to upset a verdict on a question of this kind. Now, I have, after a very anxious consideration of the proof, come to the conclusion that, taking the facts of this case as we have them on both sides, there is really no case for the pursuers upon these facts. Every demand for a right-of-way across the property of another rests, in my view, upon grant either instructed or presumed. Instructed grant, or dedication to the public use by the proprietor, is no part of this case. It is not alleged. But grant of this right-of-way from point to point, it is offered to instruct by the evidence of immemorial use, and it is upon that presumption that the rule of admitting immemorial use to come in place of a direct grant is allowed. Now, it is quite true that we have a public road, which is a public place in a sense, at each end of this alleged right-of-way. But it is also true that between the point C, where you enter it upon the Stirling side, and the point D, where you leave it upon the side, I may say, nearest Glasgow—for there is no other place of any considerable importance nearer in that direction—there is no public place. That, I think, is a most important circumstance. The Gillies' Hill and the point of view there is not a public place. It is upon the private property of Mr Murray, and no right-of-way can be established for the mere purpose of going to the Gillies' Hill, taking a view, and returning to the point C. That has not been contended by the pursuers. But that is the first point you reach; and I think you must leave out of view, in considering the evidence to establish the right-of-way from point to point, all the traversers of the path, who go only for the purpose of seeing the view, and either return the way they came, or stroll down what was in old times an open and unenclosed common towards the south and south-east. Now, that must form a large deduction from the evidence that has been led. Then, I think, there must be another large deduction—viz., the tenant of Murrayshall, his family, servants, and workmen, because no right-of-way, as a burden upon the landlord's right, can be created by the walking of his own tenants or servants, or his tenants' servants, along his own property. Their walking along that line was in the exercise of his possession, and could not be laying or paving the way for a demand for a public right. These, therefore, must be deducted. Then I come to what is certainly a critical part of the case, and one not very easy to understand. If the road had terminated at the place called the Balloch by going out to Murrayshall, I don't think it could really be susceptible of argument that there was no public right-of-way. There was no public right-of-way if it had stopped at G. There was no public right-of-way if it went on to Murrayshall on the defender's own estate. Neither was there a public right of way if, besides going to Murrayshall, it had turned and gone down the Balloch to Kay's House, because Kay was a tenant of the defender, and the pathway from the Murrayshall path to his house was nothing more than an extension of the defender's own right to a tenant of his own. Now, upon that point, after the best study I have been able to give to the evidence, I have come to the conclusion that there was till more recent years a gap in this line of way. I don't rely upon the divergence that there is between the line alleged by the pursuers and laid down on their plan, and the line which they now say they have proved. I am not disposed to hold them very tightly to that. A moderate divergence may be admitted in such a matter. I don't say this divergence is excessive, though it is rather greater than usual. But the fact that there is a divergence, and that the pursuers themselves have not been quite sure of their line, is a fact in entire accordance with the evidence of some of the witnesses that in old times the way stopped there. I shall not go through the many passages in the evidence bringing out that point. I shall just mention one or two. (His Lordship then referred to pp. 35 F, 34 C, 42 B, 43 C, and 29 F) Now, I think that that evidence is in entire accordance with the fact that the pursuers themselves have had difficulty in even stating the line their alleged right-of-way takes after it ceases to be a Murrayshall path, and before it gets out at D. Then we have abundant evidence, on which I shall not dilate, as to the kilns, the roads made to the kilns, and the use of these roads by the proprietor, and ultimately, at a much later period, as to this alleged pathway falling into these roads, not a thing pre-existent to these roads, but falling into these roads, and thus making an apparent public pathway when it was merely the using of an existing road which the proprietor had made. Then there is evidence that at one place near a kiln there was a narrow bit of road on the top of a dyke on which it was possible for a man to walk. One of the witnesses gives a very graphic description of that by saying that it was a place where a man might walk if his feet would carry him. It appears to me that it is one of the most singular modes of proving a right-of-way in the public—the public including people of all ages—that it should actually be part of the right-of-way, necessary to its connection from point to point, that for a bit of the way the public should walk on a place twenty-one inches wide, on the top of a dyke, with

a lime quarry in the immediate neighbourhood. That, to my mind, cannot be part of a public right-of-way, and it seems to be a strong confirmation of the testimony to which I have alluded that at Kay's House there was a gap in this line. Now, that being the case, I think we must deduct a great deal of the general evidence as to people being seen coming out at the point D, because it was quite easy for them to get to D when they were at G by walking across the common and coming down in many ways, without coming through the Balloch, and down that peculiar piece of ground, which is rough and deviating, and uncertain even to the pursuers themselves, between Kay's House and the point D. Now, when you have so defective a proof of that important piece of the line, I think we are shut up to this conclusion, that excluding the mere strollers, and excluding the proprietors, tenants, and dependents, and excluding the workers at the kilns and mines upon the proprietor's property, the residuum of persons who were traversing this alleged pathway is reduced to a very limited amount indeed; and even that residuum is capable of still further reduction when you consider that a portion of it consists of the Craigend miners. And so far as I can understand the evidence, if these men went the nearest and most convenient way they would not go to the point D at all, but, coming up from Touchadam smithy, they would cross to near Kay's House, and get into the Murrayshall pathway. Now that, I think, brings the case very much to this, that you have now, and from what we can gather of the facts would likely have again if there were another trial, a great defect in the proof of a connected line of way from point to point. I don't mean to say that the fact that the road claimed is longer and steeper and rougher than the statute-labour road is of itself sufficient to make it impossible that the public could establish a right-of-way there; but these are circumstances which make it more difficult to establish, and make it less likely that there should be a right-of-way there. With that qualification, I am of opinion that the line of way alleged here has not been made out from end to end, from one public place to another, and that a decided break in any portion of it between the two public places is now, and must hereafter be, fatal to the demand for this right-of-way.

The LORD PRESIDENT—Then we make the rule absolute, and set aside the verdict.

Expenses reserved.

Agent for Pursuers—George Donaldson, S.S.C.

Agents for Defender—Russell & Nicolson, C.S.

MOSES AND ANOTHER *v.* GIFFORD.

*Bankruptcy—Recal of Sequestration—*23 *and* 24 *Vict. c.* 33, *sec.* 2. A sequestration recalled in respect (1) the bankrupt was an Englishman and his creditors chiefly English; and (2) he had applied for sequestration under a designation calculated to mislead his English creditors.

The respondent John George Gifford, who is, or was in 1864, a clerk in holy orders, and curate of the chapelry of Holdenhurst, in England, had his estates sequestrated by the Lord Ordinary on 6th May 1864. The application for sequestration was made in name of "John George Gifford, clerk, residing at Innerleithen, in the county of Peebles," and the concurring creditor was John James Wynter Gifford, of Hertingfordbury, in the county of Hertford, the bankrupt's son, who was represented as a creditor to the amount required by law. In July 1864 the petitioners, two creditors of the respondent, presented an application for recal of the sequestration. The application for recal was founded on section 2 of the Act 23 and 24 Vict. c. 33, which provides that, "if in any case where sequestration has been or shall be awarded in Scotland, it shall appear to the Court of Session, or to the Lord Ordinary, upon a summary petition by the accountant in bankruptcy, or any creditor, or other person having interest, presented to either Division of the said Court, or to the Lord Ordinary, at any time within three months after the date of the sequestration, that a majority of the creditors in number and value reside in England or in Ireland, and that, from the situation of the property of the bankrupt or other causes, his estate and effects ought to be distributed among the creditors, under the bankrupt or insolvent laws of England or Ireland, the said Court, in either Division thereof, or the Lord Ordinary, after such inquiry as to them shall seem fit, may recal the sequestration."

It was averred that the bankrupt's permanent domicile was in England, and that his whole estate and effects were situated there; and he had admitted in his examination under the sequestration, which was taken in London on commission on 30th June 1864, that he had upwards of twenty creditors resident in England, whose united debts amounted to upwards of £2590; that he had only two Scotch creditors, whose debts amounted to £10, 15s.; and that he had five French creditors, whose united debts amounted to £236. No procedure took place under this application for a long time, but on 31st May last Lord Mure appointed intimation to be made to the respondent personally, his agent having ceased to act for him, and in respect of non-appearance, his Lordship on 19th June last recalled the sequestration.

The bankrupt reclaimed.

SCOTT, for him, argued that the Lord Ordinary was not entitled to proceed to recal the sequestration merely because of no appearance. The letter intimating the interlocutor of 31st May last had not been received.

The LORD PRESIDENT said that that might be a ground for reponing the bankrupt on conditions, and counsel were asked to speak to the merits of the application.

SCOTT argued—When the sequestration was awarded the bankrupt was resident in Scotland. It was not sufficient ground for recalling it that a majority of the creditors were resident in England. The clause of the statute relied on required something more, and there was no other ground suggested here.

F. W. CLARK was heard in support of the application for recal. The sequestration was a mere device to obtain protection from the diligence of the English creditors, who were misled by the deceptive character of the designation assumed by the bankrupt, and under which his estates were sequestrated.

The LORD PRESIDENT—We have now heard the merits of this case. I think the Lord Ordinary was quite warranted in the circumstances in pronouncing the interlocutor reclaimed against. But we might, on conditions, have recalled that interlocutor if we thought it right after hearing the case to do so. I think, however, it is very clear, from the statement of the bankrupt himself, that he came to Scotland for the purpose of availing himself of the Scotch law of bankruptcy, not choosing to place himself under the bankruptcy