MACKINTOSH *v.* ROBERTSON.

but if not, he is the vehicle of the malice of another, and the law holds him answerable.

His Lordship then stated what parts of the issues he thought they might find for the pursuer, and what for the defender, and that the damages were emphatically a subject for the Jury.

Verdict.—The Jury found the fourth issue and part of the first for the defender, and the remainder of the first, and the second and third, for the pursuer—damages L. 100.

Jeffrey, *Moncreiff*, and *Cockburn*, for the Pursuer.
Forsyth and *More*, for the Defender.
(Agents, *Æneas Macbean*, w. s. and *W. & A. G. Ellis*, w. s.)

INVERNESS.

PRESENT,

LORD CHIEF COMMISSIONER.

1822. Sept. 20.

Finding for the defender on an issue, whether a piece of ground had been divided from the pursuer's property, and formed part of a highway.

MACKINTOSH *v.* ROBERTSON.

THIS was an action of reduction improbation of certain minutes of meetings of trustees upon certain roads in the county of Inverness.

ISSUE.

"Whether the piece of ground in dispute, "extending along the high road leading from "Inverness to Balloan and Strathnairne, was "divided from the defender's property of Ault-"naskeach, by a fence or ditch, and formed "part of the public highway, or the margin of "ground appertaining thereto, and an accessa-"ry part thereof, belonging to the pursuers, "as trustees for the public, till taken posses-"sion of by the defender, on or about August "1819?"

A case delayed for a day on Circuit, there being a prospect that a material witness would appear.

On the first day of the Circuit, when the case was called on for trial, Mr Cockburn moved to put off the case, on the ground of the absence of a material witness.

Mr Moncreiff denied that he was material.

LORD CHIEF COMMISSIONER.—I cannot take upon myself to say that he is not material, without going into the merits of the case. It is for the pursuer to judge of whether he is material. Though the pursuer swears that the witness is material, the case is not necessarily

MACKINTOSH *v.* ROBERTSON.

put off; but in this instance I will put off the case till to-morrow.

Cockburn.—The pursuer cannot go on to-morrow, as his counsel will not be here.

LORD CHIEF COMMISSIONER.—Counsel are here now, and I cannot put off the case indefinitely upon any such ground. The application is to put it off on the ground of the absence of a witness, who may arrive in the course of this day.

The witness did arrive, and when the case was again called on for trial,

Cockburn.—This case has excited much interest in this quarter; and, as it was before the Justices of Peace, all who then acted ought to have avoided interfering in this trial. The Sheriff-substitute ought not to have returned the 45 Jurymen, nor been present at the view, which was irregular in another point, that the agent acted as shower. We object to the viewers being upon this Jury.

Moncreiff, for the defender.—The view was quite regular, and the agent for the other party attended, and did not object.

LORD CHIEF COMMISSIONER.—I do not approve of this, but do not think it a sufficient ground for challenging the Jury.

When a witness was called,

Moncreiff.—The list, in which the name of this witness is contained, was not lodged in the Jury Court Office eight days before the trial.

LORD CHIEF COMMISSIONER.—The order to lodge a list in the Jury Court Office is merely directory. The list having been served on the party eight days ago, I cannot reject the witness, as there are no words in the act of sederunt entitling me to do so.

Mr Cockburn opened the case for the pursuer, and Mr Moncreiff for the defender.

LORD CHIEF COMMISSIONER.—In this case my duty is to make such observations on the fact as may assist you, and on the law to regulate and direct you. The question, you will observe, is not whether the road would be better or worse by having this, but whether it is a part of it or its margin.

The last part of the issue is, Whether it is the property of the pursuers? And this must

MACKINTOSH v. ROBERTSON.

depend on your finding on the first part; and if I tell you, that, though at one time left out of his farm by the defender, it was taken back within the term of prescription, then you are to hold it not their property.

In an uninclosed situation, highway may mean not a made road, but what the King's subjects travel upon; and part of the issue is meant to meet such a case.

His Lordship then stated what he considered proved, and observed, that plans are not to be excluded from the consideration of a Jury, if taken with a view to the trial; and if they are properly sworn to, they are very high evidence. But they are often made behind backs, when they are of no authority. In the present case the right of the party cannot be affected by any of the plans produced.

The question here is a mere question of fact. About 40 years ago, the possessor of this farm made the fence, and cut off this from his farm. It was used by the public, because the road was wet; but it was *also* used by the tenant, for the purpose of depositing the stones gathered from his farm, and he took the surface from part of it.

There is only one act of taking materials for

the road proved, which cannot establish it as appropriated for that purpose.

SIMPSON &Co. *v.* MACFARLANE and OTHERS.

Verdict—"For the defender."

Cockburn, for the Pursuer.
Moncreiff, for the Defender.
(Agents, *Æneas Macbean*, w. s. and *Macqueen & Mackintosh*, w. s.)

ABERDEEN.

PRESENT,

LORD CHIEF COMMISSIONER.

SIMPSON & Co. *v.* MACFARLANE, &c.

1822. Sept. 23.

Damages claimed for not delivering goods.

THIS was an action of damages against mercantile agents and the master of a vessel, for not delivering goods shipped for the pursuers.

DEFENCE for the agents, That they were justified in not delivering the goods.—For the shipmaster, That he acted under the orders of the agents.

ISSUES.

The issues contained an admission, that