

Lord Cowan in his opinion in the case of *Corrie*, by an offer either to take the child into his own house, or to make other arrangements for its aliment, it appears to the Lord Ordinary that the proposed arrangement for the aliment of the pursuer's child is one which, in the circumstances, he would not be warranted in refusing to give effect to."

Yuill appealed.

MACDONALD and HARPER for him.

PATTISON and LANG in answer.

The Court unanimously adhered.

Agents for Reclaimer—Morton, Whitehead, & Greig, W.S.

Agents for Respondent—Keegan & Welsh, S.S.C.

Saturday, March 2.

FIRST DIVISION.

MACKINTOSH AND OTHERS v. MOIR.

(*Vide ante*, vol. viii, pp. 382, 428).

Process—Verdict—Application thereof—Road—Public Right of Way.

In an action of declarator of public right of way in a certain direction between two given terminal points, a verdict was obtained by the pursuers upon the usual issue. *Held* that it was the province of the Court, in the exercise of its equitable functions, to lay down a line of road as convenient as possible for the public consistently with not laying too severe a burden upon the proprietor, and that they were not fettered by the exact terms of the issue and verdict, as an English Court of common law might be; but, having informed their minds by the aid of the jury, were bound to look to the conclusions of the action, and giving due weight to equitable consideration, to give decree accordingly.

Observation as to the misunderstanding which existed in the minds of their Lordships as to the powers of the Court of Session when delivering judgment in *White v. Lord Morton's Trustees*, July 13, 1866, 4 Macph., House of Lords, 53.

In this case the jury having pronounced a verdict in the following terms—"that for forty years, or for time immemorial prior to 1844, there existed a public road or right of way for horses, carts, and other conveyances, and also for foot-passengers, leading from Hillfoot Street, Dunoon, through the lands of Milton and Gallowhill, to Argyll Street of Dunoon, in or near the direction shown by the red line on the plan, No. 6 of process." Thereupon their Lordships pronounced the following order:—

"*Edinburgh, 2d November 1871.*—The Lords having heard counsel for the parties on the notice of motion for the pursuers, No. 147 of process, apply the verdict found by the jury in this cause; of consent of both parties remit to Mr James Peddie, civil engineer, Edinburgh, to visit the ground, and to report on what line the road ought to be laid down consistently with the verdict, and of what breadth the said road ought to be, and to lay down the said line on a plan to accompany his report; and the pursuers entitled to the expenses hitherto incurred in this process; allows accounts to be given in, and when lodged, remit the same to the auditor to tax and report."

The following was Mr Peddie's report:—

"In obedience to the above interlocutor, the reporter visited the ground along with the parties, and carefully examined the line of road, taking the necessary levels and measurements, and has fully considered the matters involved in the remit, and now begs to submit the following report, with accompanying plan.

"The red line shown on plan No. 6 of process, which is referred to in the verdict, is shown on the plan now submitted by the red line A B C D. The reporter is of opinion that, consistently with the verdict, this line of road may be improved by taking the course from B to C shown by the blue line on the plan. This is in effect merely straightening the red line, by taking out an unnecessary bend on that line. There would, besides, be saved a rise of 5 feet, and the gradients would be improved, as will be seen by the comparative statement of gradients given afterwards.

"At the meeting on the ground the defender proposed another line on which the road might be laid down, as being better and more convenient for the public in respect of gradients, and at the same time more suitable for the defender in the event of his feuing the ground for building purposes. This line, as since modified, is shown on the plan by the brown line from B to C.

"The reporter has examined this proposed line, and finds that, as respects gradients, it would form a better line of road than either the red or the blue line. For about 100 yards this brown line takes the course of a road 12 feet wide already made. Compared with the red line, this line would save a rise of 12 feet; and as compared with the blue line it would save a rise of 7 feet.

"The following is a comparative statement of the lengths and gradients of the three lines:—The distance from B to C along the course of the red line, is 213 yards; along the blue line it is 207 yards; and along the brown line it is 211 yards.

"Laying out a road along these three lines with the same amount of earthwork, the gradients, beginning from B, would be—

On the red line—

For 23 yards,	1 in 25 up.
" 55 do.,	1 in 15 do.
" 32 do.,	Level.
" 55 do.,	1 in 15 down.
" 48 do.,	1 in 9 do.

213 yards.

On the blue line the gradients would be—

For 74 yards,	1 in 25 up.
" 35 do.,	Level.
" 40 do.,	1 in 25 down.
" 48 do.,	1 in 9 do.

207 yards.

And on the brown line they would be—

For 36 yards,	1 in 50 up.
" 38 do.,	Level.
" 100 do.,	1 in 60 down.
" 37 do.,	1 in 11.

211 yards.

"An examination of this table will show that the brown line is, in respect of gradient, preferable to the others. But as it is for a considerable part of the length from 20 to 22 yards distant from the red line, the reporter has doubts whether it can be laid down consistently with the verdict. This point he therefore respectfully submits to the consideration of the Court.

“The reporter considers that the road should be 20 feet broad, exclusive of bank, fence, or ditch.”

The report being laid before the Court, counsel were heard upon it for both parties, when certain objections and suggestions were made on both sides, particularly by the pursuer, that the reporter had gone beyond the terms of his remit, and that the Court, in the face of the *Aberdour* case, 4 Macph. (H. of L.), 53, could not give the road most strongly recommended by him.

At advising—

LORD PRESIDENT—We are here engaged in a duty which we are bound to discharge in the exercise of our well recognised functions. I say this, because of a misunderstanding which prevailed in the minds of their Lordships in the House of Lords in the case of *White v. Lord Morton's Trustees*. Their Lordships in that case seem to have thought that after a verdict the duty of this Court was merely formal and ministerial—that in fact we could give judgment only in the exact terms and words of the verdict. Now, this Court never has been so fettered. The conclusions of such an action of declarator, although specifying the direction of the road claimed, leaves it to the discretion of the Court to lay down the line of road itself. Accordingly, in this action, following the perfectly established style in such actions of declarator, the pursuers contend for “a public road or right of way for horses, carts, and other conveyances, whether with or without wheels, and also for foot-passengers, leading from Hillfoot Street, Dunoon, through the lands of Milton and Gallowhill to Argyle Street of Dunoon, in or near the direction shown by the red line on the plan herewith produced; and that it ought and should be declared, by decree foresaid, that the pursuers and the public generally are entitled to the free use, possession, and enjoyment thereof, and that in the particular line and direction above mentioned, or in such other particular line and direction as may be fixed and determined by our said Lords, and that the said defender has no right to impede or obstruct the pursuers and others foresaid in the said free use, possession, and enjoyment of the said public right of way, or any part thereof, or of any of their said rights and privileges, nor to exclude them from access thereto.”

Under such a summons the question which the Court sends to the jury is not in what particular line a public road or right of way exists, but whether the public have acquired and possessed any right of way at all in the general direction specified. When a verdict is returned for the information of the Court, it is then the duty of the Court, when that verdict is favourable to the pursuers, to determine the exact line of road which the pursuers and the public are entitled to use. Such an exercise of discretion may indeed be incompetent to a Court of common law. But it seems to have been forgotten by the House of Lords that this is a Court of equity as well as law, and determines the rights of parties not by fixed rules, but by the justice and equity of the case.

I think it right to make these observations, in case of this or any similar case being taken on appeal to the House of Lords.

In the present case, the verdict of the jury affirms that there does exist a public road or right of way leading from Hillfoot Street, Dunoon, through the lands of Milton and Gallowhill to Argyle Street of Dunoon, in or near the direction shown by the red line on the plan No. 6 of process.

Of course, if the Court had no power or discretion in the matter, all that could be done would be to issue decree of declarator in these terms. Nothing could be more unfortunate for the parties than such a result. The whole question would remain open in the future as to how and within what limits the public were to be entitled to exercise their rights. This case, therefore, is just a very apt illustration of the absolute necessity of a Court like this, possessing the discretionary power which I have explained. Accordingly, when this verdict came before us to be applied, we pronounced an interlocutor, which was very properly acquiesced in by the parties, remitting to Mr James Peddie, civil engineer, Edinburgh, to visit the ground, and to report on what line the road ought to be laid down consistently with the verdict, and of what breadth the said road ought to be, and to lay down the said line on a plan to accompany his report. Now, we have before us Mr Peddie's report and plan, and he gives three possible lines to choose between. The one is the same as the red line in the plan accompanying the summons. The second is a blue line, and the third a brown, in reference to which Mr Peddie reports that it is better and more convenient for the public, in respect of gradients, &c. Now, these are certainly very important points in favour of this line of road, and from the report we see that the gradients are really very superior to those of the other lines of road. The only objection suggested by the pursuers' counsel is that the brown line does not consist with the verdict. Now, I really can hardly understand this objection, seeing that the pursuers' counsel admit that the red line is not necessarily to be the actual line of road. It is quite out of the question to maintain such a contention now, for, as I have already explained, the conclusions of the summons would entirely contradict it. The question therefore comes to be, whether the variance is so great between the brown and red lines that the brown line does not come within the description of the road given in the summons. Now, this description only indicates the direction of the road so far as the points of the compass go, and any road running generally in such direction, and having its termini at the specified termini, is quite within the conclusions of the summons and the verdict.

There remains, indeed, another objection taken by the pursuer, but it is one of sentiment and taste merely. In constructing a road we are generally accustomed to consult an engineer rather than a landscape painter. In short, we require to take a very prosaic view of the matter, and make the most convenient road for the public, consistently with not laying too heavy a burden upon the proprietor. The view I take, therefore, is that the brown line should be chosen, giving effect to the suggestion of the defender, that the terminus should be slightly changed at one end.

The width of the road is to be 20 feet, and certainly under this summons we can give the public nothing more than a road of a certain reasonable breadth. On the question, whether they are entitled to anything more than a mere road, I give no opinion. Only, I must say I never before heard of such a contention.

The other Judges concurred.

Agents for Pursuers—Skene & Peacock, W.S.
Agents for Defender—Duncan & Black, W.S.