RODGERS v. HARVEY.

no more. Human ingenuity cannot strike the exact sum, but the best way of getting at it is by balancing the opinions of intelligent witnesses publicly examined before a jury. If any principles of law are laid down in cases of this sort, they ought to be questioned at the time, and a bill of exceptions tendered. After a few of this great class of cases have been tried, principles will be established which will enable the parties to classify the remainder, and to settle them privately. In the present case, what I stated was advice to the jury, not direction in law.

The rule was discharged, subject to the correction of an error in the verdict.

PRESENT,

THE LORD CHIEF COMMISSIONER.

RODGERS *v.* HARVEY.

1826. Jan. 13.

Found that a public footpath existed for forty years and upwards.

AN action of declarator to have it found that a public road or footpath existed along the north bank of the river Clyde from the city of Glasgow to the village of Carmyle.

RODGERS v. HARVEY.

DEFENCE.—There is no title or interest to pursue, as a popular action is incompetent. The averments of possession in the summons are irrelevant, as they only amount to trespasses.

ISSUE.

"Whether, for forty years and upwards, "prior to the months of March, April, or May "1822, there existed a public foot-path or "foot-road along the right bank of the river "Clyde, from the city of Glasgow, from the "place called the Green to the village of Car-"myle, situated on the said bank of the said "river?"

Penny opened the case for the pursuers, and stated, that he would prove immemorial possession of the path, and that other proprietors, when inclosing their ground, ordered the path to be left open.

Moncreiff, for the defender, said, That, by the titles of the defender, his property was bounded by the river, not by any public road, and there was no mention of any servitude. The defender built walls cross this alleged road, which stood unchallenged for a year, till they were demolished by a mob. Had this been a public road the Justices of Peace would have stopped the building.

At first the pursuers claimed a servitude of strolling over a part of the property, but this being decided against them, they now claim a *public* defined road from Glasgow to Carmyle, that is, a road from one public place to another. There is no question here, as in Smith's case, as to a private road. As they have no title, they must prove peaceable and uninterrupted possession for forty years; but we shall prove numerous and various interruptions. The distance by this alleged road is seven miles, and by the direct road only four and a-half, so that this could not be used for the purpose of communication. The evidence for the pursuer is questionable, as the witnesses are inhabitants of the places said to be interested in the road.

Stair B. II. t. 7, § 10. Smith *v.* Knowles, 3. Mur. Rep. 419.

A surveyor was called to produce a plan.

Jeffrey objects, It was not produced eight days ago.

LORD CHIEF COMMISSIONER.—The act of sederunt makes it admissible; but the tighter the rule is drawn the better.

Jeffrey.—The case is now limited to the point in issue, whatever may be in the summons. It is said a public road must connect public

RODGERS v. HARVEY.

places, and this does so. It connects the extreme points, and a number of intermediate points; and though it may not be the shortest road between the extreme points, it is between the intermediate ones. The question turns on the interruptions, but proof of occasional interruptions is not sufficient to take away a road which has existed for time immemorial. A mere threat is no interruption,—it must be effectual, or by some legal process. There was no such interruption from 1760 to 1822, and though a hundred had been stopped, thousands passed. In the case of Knowles the possession was very limited. It is said the witnesses were interested, but *every* person is interested in a public road.

LORD CHIEF COMMISSIONER.—This, like every other case, is to be tried without excitation. It is a dry question of whether the pursuer has made out the issue, and the Court of Session will then decide the rights of the parties.

The words of the issue are important, as the question is, Whether there was *a* public footpath? and not whether it was *the* path now existing, or whether this was the only path, but whether there was a path by means of which you might go from Glasgow to Carmyle,—a mode by which the king's subjects may travel from the one

to the other? The law of public road is, that they must be from one public place to another. In proving his case, the pursuer may make such stops as he chooses, but you must be satisfied that the proof extends the whole distance before you can make a return for him. There is contrariety of evidence which you must reconcile; but the case of the defender is not inconsistent with the idea of a road if the pursuer has made it out.

If the pursuer has made out that a road existed for forty years, then the right to use it may be taken away by a decree of a court, or it may be defeated by an interruption which has been acquiesced in.

The pursuer has proved different parts of the road to have been used, and that in some of them, when the lands were enclosed, styles were left. It was unnecessary, where styles were left, to prove any person passing; nor is it necessary that any one should have gone the whole way from Glasgow to Carmyle, provided the different portions make up the whole. The evidence is, that the proprietors defended their property as far as they could without interrupting the road; and where a public right is established over private property, when it has been devoted to the use of the pub-

RODGERS v. HARVEY.

lic, it requires very strong proof to defeat it. Some of the witnesses for the defender speak to barricados near the river, which could not be passed, but others state that openings were left at a different place. If you think the witnesses for the defender mistaken, then there is no conflicting evidence, but if not, then you have to reconcile the contrary evidence.

If the public had been excluded for forty years, this no doubt would have taken away their right; but if you think the interruption not sufficient, then you will find for the pursuer. The proof as to the utility of the road, and of it being nearly double the distance, is *evidentia rei*, and is proper for your consideration, but it is only a presumption against it being a road.

Verdict—"For the pursuers."

PRESENT,

LORDS CHIEF COMMISSIONER, GILLIES, AND CRINGLETIE.

1826. Feb. 2.

Circumstances in which the Court granted a rule to show cause, at the same time expressing a doubt whether they would grant a new trial.

Skene moved for a rule to show cause why a new trial should not be granted, on the ground

RODGERS v. HARVEY.

that the claim here was made by the pursuers as *cuivis e populo*, and that they were bound to prove, but had failed in proving, forty years peaceable and undisturbed possession, 1617, c. 12. Stair B. 2, T. 7, § 2 and 10, and B. 2, T. 12, § 11. There is here no evidence of any one going from Glasgow to Carmyle, and there is proof of interruption.

D. of Roxburgh *v.* Magistrates of Dunbar, 5th June 1713, Mor. 10883. Nicolson *v.* Laird of Balbirnie, &c. 14th Nov. 1662, Mor. 11291.

LORD CHIEF COMMISSIONER.—There are many reasons for granting a rule that may not apply to granting a new trial. In this case, as the subject here is important, and the party if he fails must pay the costs, the Court is disposed to grant the rule without hearing more.

It was suggested, that, if Mr Skene had any other point, he ought now to state it.

Skene.—We also contend that the question, Whether the public acquiesced in the interruption? ought not to have been submitted to the jury, as the question here was, Whether they had acquired a road? and not whether they had lost an admitted right of road.

LORD CHIEF COMMISSIONER.—No objection was taken to the law at the time. According to my recollection my statement was,

RODGERS v. HARVEY.

that there was evidence that a road existed long before forty years, and that being the nature of the evidence, the question turned on the interruptions; that if these were made, and not objected to by the public, then the right previously existing might be defeated; but that, if the interruptions were resisted at the time, or within a legal time, then the right of the public remained entire.

Skene.—We object to this law.

PRESENT,

FOUR LORDS COMMISSIONERS—LORD PITMILLY ABSENT.

1826. March 1.

When a rule to show cause is granted the Court must hear counsel in support of it, before refusing the new trial.

LORD CHIEF COMMISSIONER.—The former act of sederunt required that the report of the trial should be read in Court, but that being repealed, and there being nothing of it in the act of Parliament, and the object being to follow that course which will make the subject best understood, I shall not now occupy time by reading the evidence, as the Judges have read it.

This motion is rested partly on the ground

of misdirection, but I am not aware of the nature of it. I referred to the evidence of a road prior to forty years ago, and of the subsequent interruptions, and left it to the jury on the evidence, who returned a verdict perfectly satisfactory.

LORD GILLIES suggested that there was no necessity for hearing Mr Jeffrey against the rule, as the Court were satisfied on the evidence; but the Lord Chief Commissioner said they must hear Mr Moncreiff in support of the rule, and therefore Mr Jeffrey had better state shortly his reasons against a new trial.

Jeffrey.—It is said the evidence was of idle people strolling on the bank of the river; but in addition, it was proved to be a road to fords and ferries, and the road being established beyond all memory, one or ten people being stopped is no interruption of all the others who used it. The putting up of styles defeats the interruptions, and the authorities referred to confirm our case.

Moncreiff.—In our titles the river is the boundary, and the wall built by the defender stood for a year. The pursuers have no titles, and having no title, they must prove continued,

RODGERS
v.
HARVEY.

uninterrupted, and peaceable possession for forty years of a road from one public place to another ; but this was used only for health and recreation, and the evidence is cut down by the evidence for the defender. This is not a case where a right of road was established which is to be taken away by interruptions. The pursuers must prove peaceable possession during forty years, and have failed in this.

LORD CHIEF COMMISSIONER.—There is no decided case on the question, but from the books I think the doctrine is supported in principle.

There may be a case where it is competent to apply for a new trial without any direction having been given by the Judge—a case may occur where the facts are insufficient to support the action. In this case I stated what I considered to constitute a public way, and that the jury were to consider whether the evidence established an immemorial way ; and that where the road or way was immemorial the interruptions must be effectual.

Moncreiff.—If it was that the interruption must be effectual at all times, we may not have proved it ; but we cannot admit the statement on the other side, that interruption of an indi-

vidual is no interruption of the public. If I interrupt a single person it proves that the pursuers had not the peaceable possession necessary to acquire such a right.

RODGERS v. HARVEY.

The verdict is contrary to evidence in the literal sense, and it is contrary to law, because I proved interruptions which are incompatible with peaceable possession. *Successful* interruption is not necessary.

LORD CHIEF COMMISSIONER.—From the importance of the case, the Court will take time to consider.

1826. March 8.

When a public road is proved to have existed for forty years, it must have been effectually interrupted to cut off the right of the public.

LORD CHIEF COMMISSIONER. *—After stating the evidence of styles his Lordship said, the next question was, Whether a prescriptive road was established? No doubt there was important evidence on this, which carried it back beyond memory, and there were witnesses who traced it back about fifty-six years, and there was nothing to detract from the presumption of its existing prior to the memory of those

---

* Being employed out of Court, I was not present during the whole time his Lordship was delivering his opinion.

RODGERS
v.
HARVEY.

witnesses. The evidence was as far back as testimony could go, and there being no traditionary evidence to contradict this, or raise a presumption against it, I left it to the jury to consider whether this was peaceable possession, and stated that possession might be necessary to establish the right in the public or the Crown.

In this state it remained till between 1782 and 1796; and if evidence is brought as long as human memory can go, and there is no evidence or tradition to the contrary, it is a fair question for the jury whether there is an immemorial right of way.

Next as to the interruptions, I gave it as my opinion that the interruptions must be effectual, that the party must possess his property for forty years independent of the right of way, and it does not appear that there was here any interruption to defeat the prior right of the public.

So far as I can find from the books, though there is very little on the subject, the right of highway is in the Crown for the benefit of the subject, and that it is the same in the greatest high-way and most insignificant foot-path. The way to establish either is by proving that they have been immemorially used by the subjects as a way. How is the king to be deprived of this

but by a contrary right established in an individual, by his having interrupted it for the period of prescription. But it is not necessary for us to say what is proved, but merely that there was a case for the jury—that there was evidence, and that it was left to the jury—that there was contrary evidence, and that they came to the conclusion that the way was established, —and that there is no ground to induce the Court to set aside the verdict.

LORD GILLIES.—This is substantially an application on the ground of the verdict being contrary to evidence. At the time the rule was granted, I thought there had been a direction given in point of law, but when I found it had been left to the jury, I thought it had been properly left, and that the jury had come to the right conclusion.

There is no doubt that the same rule applies to common-ways and footpaths, and here the question is, Whether the public has acquired the right? The question turns on usage, and I have seldom seen so strong a proof on that subject.

As to interruptions, it was said that so and so was proved, but that was for the jury. The road may have been interrupted one day and open the next.

RODGERS v. HARVEY.

LORD CRINGLETIE.—I thought the road established for more than forty years; and in absence of proof to the contrary, we must suppose that it existed immemorially. There was no evidence as to interruptions more than about thirty years ago, and there being conflicting evidence on the subject, who was to judge of that but the jury? It was within their province, and we are not to overhaul their proceeding, or set aside their verdict, unless it is very much against evidence, and in this case, had I been to judge of it, I would have come to the same conclusion. The interruptions were of persons who left the water side and trespassed on the grounds.

LORD MACKENZIE.—I am of the same opinion, and, looking to the issue, I doubt if immemorial possession was necessary, as the question is merely as to the possession of a road for forty years. The law is important, but a party having a title that does not mention the road is not exclusive of the road. The question arises of road or no road, and is not properly a question of prescription; but I do not go on this. And if the question were, whether there were forty years uninterrupted possession, I could not say the verdict was wrong. The jury might

have thought there was evidence of forty years peaceable possession prior to the interruption.

Moncreiff.—We mean to except to the doctrine laid down, that the interruption must be effectual, and that it is too late unless it took place forty years ago.

When the Court refuse a new trial it is incompetent to except to law stated by an individual Judge, if not necessary to the decision.

Jeffrey.—It is incompetent to except to the opinion of an individual Judge.

LORD CHIEF COMMISSIONER.—The verdict establishes that there was an immemorial road, and after the right is established there is no proof of interruption to shake that right.

LORD GILLIES.—There may be various and separate grounds on which individual Judges found their opinions; but the question is, Whether the judgment sustaining the verdict is contrary to law? My opinion was, that the evidence was properly left to the jury, and that they gave the proper decision.

LORD CHIEF COMMISSIONER.—I trust it will be attended to that no exception was taken at the trial. It is the duty of a Judge to direct the jury in point of law; and we must attend to how far it is competent under the 17th sec-

59 Geo. III. c. 35. § 17.

DAVIDSON v. DUNBAR.

tion for the party to except now, when none was taken at the trial. The act ties it down to the direction given to the jury. It would be the wildest work were we to allow an exception to be taken to the opinion of a Judge, who takes wider ground than is necessary. *

Jeffrey and *Penny*, for the Pursuers.
Moncreiff, *Cockburn*, and *Skene*, for the Defender.
(Agents, *John Bisset*, s. s. c., and *Macmillan & Grant*.)

PRESENT,

LORDS CHIEF COMMISSIONER, PITMILLY, AND MACKENZIE.

1826. March 13.

DAVIDSON v. DUNBAR.

Damages to a tenant against his landlord for detaining certain goods on the farm, &c. but for the defender on other points.

AN action of damages by a tenant ejected from a farm against his landlord for detaining his property on the farm; seizing and detaining his horse and cart when sent to carry off the property; and for obtaining his incarceration as guilty of theft.

---

* N. B.—A bill of exceptions was tendered to the law laid down at the trial, but the exception was disallowed, and the law confirmed by the Second Division of the Court of Session.—See Fac. Coll. 10th July 1827.