Whitelaw appealed.

WATSON and ASHER for him.

SHAND and KEIR in answer.

The Court adhered.

Agents for Pursuer—Millar, Allardice, & Robson, W.S.

Agent for Defender—A. Morison, S.S.C.

Saturday, October 28, and Thursday, November 2.

FIRST DIVISION.

MACKINTOSH AND OTHERS *v.* MOIR.

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

Process—Jury Trial—New Trial—Expenses—Road—Public Right of Way—Remit to Engineer to lay down line of Road. Where, in a declarator of a public right of way for carts as well as foot-passengers, owing to the insufficiency of the evidence adduced at the first trial, a new trial had been granted—*Held*, on a motion for a second new trial, that the evidence on all the controverted points having been materially strengthened at the second trial, and the same verdict pronounced by the jury, the Court were not warranted in disturbing it, though they expressed themselves still dissatisfied with the result, particularly as regarded the right of way "for carts and other conveyances."

Held, as to expenses, (*diss.* Lord Deas), that the mere difference in the amount of evidence adduced at the second trial was not enough to take the case out of the general rule; and full expenses given to the pursuers accordingly.

A new trial in this case was granted upon February 28th last, (*vide supra*, vol. viii, p. 382,) and upon May 24th and subsequent days the second trial took place, before Lord Gifford and a special jury. The issue was, as on the previous occasion —"Whether 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, or for any and which of these purposes, 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?"

The jury unanimously brought in a verdict finding for the pursuers in terms of the issue.

The defenders thereafter moved for a rule to shew cause why this verdict should not be set aside and a second new trial granted. The rule having been granted, parties were heard thereon towards the close of the summer session, when the Court required counsel for the pursuers to state whether they would be content to accept a public right of foot-road, provided the verdict were sustained to that effect, and give up their demand for a cart-road. The case was continued through the summer vacation in order to allow the pursuers to consider this suggestion.

At the meeting of the Court, HUNTER, for the pursuers, informed their Lordships that they declined to accept the above mentioned suggestion. The case was accordingly put out for advising on Saturday, October 28th. The evidence adverted to in their Lordships' opinions was the same in kind, though different in extent, and slightly different in substance, from that adduced at the previous trial.

At advising—

LORD GIFFORD—In this case I have come to be of opinion, although not without difficulty, that the verdict ought to be allowed to stand, and that the rule for a new trial should be discharged.

The verdict in question is the second verdict which the pursuers have obtained, the issue having now been twice tried. The second trial took place with a special jury, and I think both parties agree that the jury had every possible advantage, and that the case was fairly and fully tried. Now, of course, these circumstances would not prevent the Court from setting aside the verdict, and granting a third trial, if the verdict were clearly against evidence. I do not at all doubt the power or the duty of the Court to set aside any number of perverse verdicts when the interests of justice require it. But the fact that successive juries have returned the same verdict strengthens, to say the least, the presumption in their favour, and creates a probability, more or less strong, that the jury had some evidence on which they proceeded. In such cases I think the Court must be fully satisfied that the jury had absolutely no evidence on which they could legitimately go before sending the case for a third trial.

Now, in the present case I think that at the last trial there was evidence to go to the jury,—evidence which the jury might honestly and fairly consider as establishing the affirmative of the issue submitted to them. It is of course no ground for setting aside a verdict on a pure question of fact that the Judge or the Court have formed a different opinion upon the evidence. The jury are the proper judges of the evidence; and if there was room for a fair and honest difference of opinion on the evidence, this will be enough to support the verdict.

The verdict returned by the first jury was unanimously set aside by the Court; and if the evidence led at the second trial had been a mere repetition of what was laid before the first jury, I would have been for granting a third trial. But it appears to me the pursuers made a very different case at the last trial, and a much better case than that presented on the former occasion; and, without going at all into the evidence, I think it right to mention some of the particulars in which the case at the second trial was improved.

(1) There was new and better evidence explanatory of the old titles, and relative to the old names which occur in the old descriptions. The pursuers succeeded in raising a possibility that the titles might refer to an old road in the direction, or somewhat in the direction, of that now claimed by them,—an old road which was described as a hiegate descending from the Gallowhill. This would be of great importance to start with, and the jury might fairly give some weight to the old titles.

(2) There was better evidence regarding the bad and often impassable condition of the old Ferry Brae, rendering it likely that the line of road claimed would be taken both by foot-passengers and by vehicles; and there was better evidence that the line claimed was always a good and passable road.

(3) The evidence of the use and enjoyment of the right of way claimed was much better and stronger at the second trial than at the first. The pursuers judiciously excluded mere use by tenants of the estate of Milton, and by parties connected therewith, which bulked very largely at the first trial. The use founded on before the second jury

was a use by strangers and by parties from neighbouring villages who had no right and no excuse to be upon Milton lands. I think the use was also shown to have been more extensive and for more general purposes than appeared at the first trial; and there was less variation as to the line of road and its branches than arose under the first evidence.

(4) At the second trial, exceptions, more or less satisfactory, were given of the delay which had arisen in bringing the present action; and the defender's allegation of acquiescence, and the very strong argument which he founded thereon, were to a large extent displaced. The circumstances in which the defender's new house was built, the manner in which the alleged road was shut up, and the action taken by the villagers, or some of them, in regard to it, certainly make the defender's plea of acquiescence much weaker than it originally seemed.

The great difficulty no doubt remains, that the use of the road or line of way claimed, such as it was, may have been by the mere sufferance of the proprieter of Gallowhill, and so could never establish either in the users or in any one else an absolute right. This, however, like all the other points of the case, was a question for the jury. Whether a thing was done by tolerance or as of right is matter of inference, looking to the whole circumstances; and, while I cannot say that I agree with the jury, I am not prepared to set aside their verdict. I think therefore the rule should be discharged.

Lord Deas—At the first trial a verdict was returned which we were all agreed could not stand. I am of opinion that at the second trial the pursuers have materially improved their position so far as the foot-road is concerned, and so far as that goes I am not inclined again to disturb the verdict.

With respect to the cart-road claimed, I will not say that the evidence is not improved, but there is still room to doubt whether anything like reasonable evidence has been produced. Had I been called upon along with the jury to pronounce judgment in the case, I must say I should have been very much inclined to decide against the pursuers—at any rate, on this part of the case. But though this is my own impression, I feel it very much removed by the opinion of your Lordships, and particularly by that of your Lordship who presided at the trial, to the effect that we should not grant a second new trial at all. Therefore, though I am of opinion that it is exceedingly difficult to say anything in favour of that verdict as a whole, I am not disposed to differ from your Lordships in refusing a second new trial.

Lord Ardmillan—I concur without difficulty on the first part of the case. At the second trial the case put before the jury was distinctly a better one for the pursuers, and I do not think we should be justified in setting aside the verdict so far as that part of it is concerned. I had, like my brother Lord Deas, considerable difficulty as to the other part of the verdict. But though I do not approve of it, still I am not disposed to grant this motion for a new trial, for even if the case were to go again before a jury, I see no probability that the verdict would be different from that already returned.

Lord Kinloch—I am dissatisfied with this verdict. Had I been on the jury I would not have concurred in it. But, all this notwithstanding, I am against allowing another trial. The question raised by the issue was a proper jury question on evidence. Undoubtedly there were legal considerations of a general character which entered into the discussion; such as the necessity of establishing a public road over unenclosed ground by evidence of a peculiarly strong and clear description, showing not mere tolerance, but a conceived right. But these considerations did not raise any definite point of law on which the case hung, but were only of importance so far as they bore on the evidence in matter of fact, to which it was the special province of the jury to apply them. The considerations have on two several occasions been fully laid before the jury; and they have twice affirmed the existence of a public right of way for foot-passengers, horses and carriages. I think the case cannot be carried further. Jury trial must have fair play given to it, so long as it is a recognised mode of dispensing justice in civil actions. The result of this case may increase my doubts as to the fitness of the judicial instrument, but having fairly applied it, the Court cannot, I think, further interfere.

Lord President—I concur in the opinion of Lord Gifford. The rule will be discharged.

Thursday, November 2.

Fraser, for the pursuers, moved the Court to apply the verdict, to the effect of finding the pursuers entitled to the right of way in the direction specified in the issue, and to ordain the defender to remove all obstructions from the said line of road, reserving to the pursuers right to apply to the Court at any future time, in the event of the defenders not removing the said obstructions, for power to remove them at his expense.

Solicitor-General, for the defender, maintained that, in respect of the terms of the issue and verdict, which left the line of road quite indefinite, he was entitled to demand that, before any final judgment was pronounced against him, steps be taken to limit and define the line of road claimed.

Fraser, for the pursuers—We have no objection to follow the course taken in the *Aberdour* case, to which I beg to refer your Lordships, and accept a remit to an engineer to lay down the line and breadth of the road, and report to your Lordships.

This being accordingly agreed to, the Court pronounced an interlocutor to the following effect:—"Apply the verdict, and, of consent of the parties to the cause, remit to , civil engineer, to visit the ground and report in what line the road should run, and of what breadth it should be, and to lay down the same on a plan to accompany his report."

Thereafter the Lord Advocate, for the pursuers, moved for the whole expenses in the cause.

Solicitor-General, for the defender, objected to being found liable in the whole expenses, on the ground that the first trial had been set aside because there had really been no evidence brought forward whatever to substantiate the pursuers' case. The pursuers, at the second trial, having exactly the same means of evidence open to them as previously, did in your Lordships' opinion materially improve their case, so much in fact that they not only got a second verdict in their favour, but one which your Lordships on consideration of the evidence, allowed to stand. It is true the motion

for expenses cannot be resisted so far as the second trial is concerned. But, as to the first, the pursuers have clearly failed in their duty in not bringing such evidence as might be reasonably expected to lead to a verdict in their favour. There may not be any case in the books entirely on all fours with the present, but the rule at any rate, where the verdicts in the two trials have differed, has always been that the party ultimately succeeding does not get his expenses in the first trial. Here it was found that the pursuers, through their own fault, ought not to have succeeded in the first trial, and the rule therefore should be the same.

(LORD PRESIDENT—The principle on which the rule is founded is rather that the party losing a verdict is not to get the expenses of that trial.)

SOLICITOR-GENERAL—I can only refer to two cases—those of *Millar* v. *Hunter*, 24 Nov. 1865, 4 Macph. 78, and *Urquhart* v. *Bonar*, Nov. 21, 1866, 5 Macph. 45. The ground upon which I maintain that the pursuers are not entitled to the expenses of the first trial, is simply that it was their fault in not properly preparing for the trial that they were not successful at once. If they had come as well prepared to the first trial as they did to the second, there would have been no need of such second trial.

LORD ADVOCATE, in reply, contended that, as far as he was aware, there had been no case in the Courts in which a pursuer, having succeeded in both trials, had not got the whole expenses of the cause. There was indeed an apparent exception to this in the case of *Stewart* v. *Caledonian Railway Co.*, 4 Feb. 1870, 7 Scot. Law Rep. 277, but there the Court went on the ground that though the verdict in both trials was nominally for the pursuer, yet as the first was set aside on his own motion, it must be considered as substantially against him, and that it was only upon a second trial that he got a right verdict. In the case of *Millar* v. *Hunter*, quoted, the verdicts, though both for the pursuer, were not by any means the same. If the pursuer brings evidence which convinces the jury which he has to meet of the justice of his case, he has discharged all that can reasonably be expected of him. That the pursuers did in this case in both trials. And the end of all this litigation is that you find that there is that public right of way here for which the pursuers have all along been contending, and that, through the defender's opposition, it is only after two trials that the ends of justice have been attained. The pursuers have been successful throughout, and should have their whole expenses, unless some real miscarriage of the case can be brought home to them, which the defender here has failed to do.

The Court (*diss.* Lord Deas) awarded the pursuers their expenses in both trials, on the ground that the difference in the amount of evidence adduced at the two trials was not sufficient to take the case out of the general rule, which gave full expenses to a party successful in both trials.

Counsel for Pursuer—Lord Advocate (YOUNG) Fraser, and Hunter. Agents—W. F. Skene & Peacock, W.S.

Counsel for Defenders — Solicitor-General (CLARK) and Crichton. Agents—Duncan, Dewar, & Black, W.S.

Friday, November 3.

R. M. TRAPPES, PETITIONER.

Statute 22 *and* 23 *Vict. c.* 63—19 *and* 20 *Vict. c.* 79 (*Bankruptcy Act*). Case remitted by the Court of Chancery in England for opinion of the Court of Session, on the application of the Bankruptcy (Scotland) Act 1856.

Certain questions involving the law of Scotland having arisen in a suit in the Court of Chancery for the distribution of the estate of an English testatrix, the Lord Chancellor ordered a case to be adjusted for opinion of the Court of Session.

R. M. Trappes, one of the parties to the suit, presented the present petition to the Court to appoint an early day for the hearing of the case.

The case was stated as follows:—"Mrs Graham, a testatrix domiciled in England, by her will, dated the 16th of February 1863, after reciting that she 'was enabled to appoint by will (subject to the life interests of her mother, Anna Maria Payne,') certain property, which she referred to in her will as 'the trust-premises,' bequeathed and appointed the same to trustees, upon trust, that the said trustees should out of the trust-premises pay certain legacies; and then the will proceeded as follows (being, for convenience of reference, divided into clauses).

"Clause 1. And upon further trust, that my said trustees shall, out of the income of the said trust-premises, or if that shall be insufficient, then out of the principal thereof, pay to my husband an annuity of £100 during his life (but subject to the provisoes with respect to the said annuity hereinafter contained), the said annuity to be paid by equal half-yearly payments, the first of such payments to be made at the expiration of six calendar months after the decease of the survivor of me and my said mother.

"Clause 2. Provided always, and I hereby declare, that if my said husband shall become bankrupt, or shall assign, charge, or incumber, or attempt or affect to assign, charge, or incumber, the said annuity of £100, or do or suffer any act whereby the same annuity, or any part thereof, would, if belonging absolutely to him, become vested in any other person or persons, then and in such case the said annuity shall not be payable, or shall cease to be payable, as the case may require, in the same manner as if my said husband were dead.

"Clause 3. Provided also, and I hereby further declare, that it shall be lawful for my said trustees or trustee, if they or he shall, in their or his absolute discretion, think fit, and without assigning any reason for so doing, at any time or times, to refuse or discontinue the payment to my said husband of the said annuity of £100, or any part thereof, during the whole or any portion of his life, and in such case the said annuity, or such payment or payments thereof as my said trustees or trustee shall refuse to make to my said husband as aforesaid, shall sink into the income of the said trust-premises for the benefit of the person or persons for the time being entitled to such income, it being my wish and intention that the payment of the said annuity to my said husband shall be according to the discretion of my said trustees or trustee in all respects.

"The facts are as follows:—On the 7th May 1861, Mr Graham, the husband of the testatrix, whilst residing at Portobello, was sequestrated on