and futile. But notwithstanding we may, if we think that the conduct of the defenders has been unreasonable, undue, or excessive, and has caused unnecessary expense, find the executrix-dative entitled to an award of expenses. But after considering all that has been said on both sides I come to the conclusion that no unreasonable conduct can be laid at the door of the defenders.

The original pursuer of the action died in the month of July 1913. Immediately before the date of his death the record was closed and the case sent to the procedure roll by the Lord Ordinary. It stood there unheard at the date of the death. The defenders were willing to leave it alone. They made no move. They asked nothing of the pursuer as executrix of her husband. In my opinion it ought to have been left alone.

I am very far from saying that there may not be cases in which we should in our discretion allow actions to proceed which involve nothing except a question of expenses; but where in the early stages of a case a pursuer dies and there is no transmission of the right in respect of which the action is maintained to his representative, as is the case here, then I am very clearly of opinion that we ought not—to use the words of Lord Neaves in the case of *Dobie* v. *M'Farlane*, 18 D. 1043—to allow the representative "to follow out a litigation in which he can obtain no judgment on his proper demand." And therefore because a decree on the merits would in my judgment be futile, and the conduct of the defenders here has not been unreasonable, I am of opinion that this action ought to be dismissed, and that no expenses should be found due to or by either party.

I have to intimate that LORD JOHNSTON and LORD MACKENZIE concur in that opinion.

LORD SKERRINGTON—I concur with your Lordship.

LORD ORMIDALE was present at the advising, but had not heard the case.

The Court dismissed the action and found no expenses due to or by either party.

Counsel for the Reclaimer — Constable, K.C. — MacRobert. Agents — Gardiner & Macfie, S.S.C.

Counsel for the Respondents—Mackenzie, K.C.—J. B. Young. Agents—Weir & Macgregor, S.S.C.

Friday, March 27.

FIRST DIVISION.

[Sheriff Court at Aberdeen.

M'ROBERT *v.* REID AND OTHERS.

Road—Right-of-Way—Right of Frontager to Use it as an Access to his Property—Interdict—Defence—Relevancy.

When a public right-of-way is once established, the user cannot be confined to travellers from end to end. Accordingly a frontager whose lands abut on the public right-of-way is entitled in his capacity as a member of the public to use it as an access to his property from either terminus.

In an action by a proprietor against the owner of an adjoining estate to prevent him using as an access to his property a path which passed through his (the pursuer's lands), the defender, whose property abutted on the path in question, pleaded that he was entitled to use it in respect that it had been used by the public as a public right-of-way for more than forty years.

Held (*diss.* Lord Johnston) that the defender was entitled to plead the public right-of-way, and, the right having been vindicated, to *absolvitor.*

Opinion (*per* Lord Johnston) that the defender was not entitled in his capacity as a member of the public to use the route as an access for his property, and that accordingly as he did not plead a servitude of way, interdict should be granted as craved.

Expenses—Public Authorities Protection Act 1893 (56 *and* 57 *Vict. cap.* 61), *sec.* 1 (*b*) *—Applicability.*

The Public Authorities Protection Act 1893, section 1, enacts with regard to actions raised against any persons on account of acts done in pursuance of any Act of Parliament or of any public duty or authority, (*b*) "Whenever in any such action a judgment is obtained by the defendant it shall carry costs to be taxed as between solicitor and client."

An action between two adjacent proprietors in which the existence of a public right-of-way was involved, having been intimated to the District Committee of the County Council, the latter were, on their own motion, sisted as defenders to the action. The defenders, the District Committee, having been successful in vindicating the existence of the public right-of-way, and having been awarded expenses, moved that these should be taxed as between agent and client in respect of the Public Authorities Protection Act 1893.

Held that the Act was inapplicable to the circumstances of the case, and motion *refused.*

On 17th June 1911 Sir Alexander M'Robert, Douneside, Tarland, *pursuer*, brought an action against Edward A. Reid, the proprietor of the estate of Westtown, which lay immediately to the north of Douneside, *defender*, in which he craved interdict against the defender entering or trespassing upon his (the pursuer's) lands. Mr Reid lodged defences in which he admitted that he had been in the habit of passing through certain fields on the estate of Douneside when going to or coming from the village of Tarland in the south, but averred that he had done so in virtue of a public right-of-way running from Cushnie in the north across the hill of Cushnie and thence through the lands of Douneside to Tarland. On 26th July 1911 the Sheriff-Substitute (LAING) on the defender's motion appointed intimation of the action to be made to the Deeside District

Committee of the County Council of Aberdeen, who on 22nd September 1911 were, on their own motion, sisted as defenders to the action.

The pursuer pleaded, *inter alia*—"(1) The defender Edward A. Reid having trespassed on pursuer's lands as condescended on, pursuer is entitled to decree as craved. (2) There being no public right-of-way over pursuer's lands, pursuer is entitled to decree as craved. (3) The Deeside District Committee of the County Council of the county of Aberdeen having sisted themselves as defenders to the action, and there being no public right-of-way over pursuer's lands, decree of interdict should be pronounced against them."

The defender Reid pleaded—"The footpath in question having been used by the public as a right-of-way for a period of more than forty years, the defender should be assoilzied."

The defenders the Deeside District Committee, *inter alia*, pleaded—"(1) The said road through the pursuer's lands forming part of a public right-of-way, the pursuer is not entitled to interdict as craved. (2) The public having for more than the prescriptive period, without challenge or interruption and as matter of right, passed on foot through the pursuer's lands by the road now disputed, the pursuer is not entitled to prevent the other defender or other members of the public from using the same."

On 27th August 1912 the Sheriff-Substitute, after a proof the import of which sufficiently appears from their Lordships' opinions *infra*, pronounced the following interlocutor:—"*Finds in fact* (1) that the pursuer is proprietor of the lands of Douneside, Tarland, in the county of Aberdeen, and that the defender Reid is the proprietor of the lands of Westtown, Ranna, Tarland, aforesaid, the other defenders having sisted themselves as parties to the cause in exercise of the powers conferred upon them by section 42 of the Local Government (Scotland) Act 1894; (2) that in 1841 the estate of Ranna comprised Burnside (now Douneside), the hamlet of Westtown of Ranna, Rannagower, Oldmill and Newmill, which places were not separated from each other, nor from the rough hill ground of Cushnie hill, by either dykes or fences; (3) that in 1841 said estate of Ranna was purchased from the trustee of the late Marquis of Huntly and Earl of Aboyne by Mr William Adam, advocate, Aberdeen, and thereafter he began to improve it by making or repairing the plantation road (B-C-D) passing the entrance to Burnside, now Douneside, and by erecting dykes between the aforesaid places on said estate and between them and the rough hill ground of Cushnie hill; (4) that in or about 1848 Mr Adam built between Westtown and Douneside a double dyke, which on the Westtown side was almost level with the ground, but which on the Douneside side was 3½ feet high or thereby, and along the top of it he planted a double row of beech trees; (5) that prior to 1848 there extended across the Cushnie hill a public road or right-of-way, which consisting at first of two branches—one entering the hill from the public road almost opposite the farm of Balnakelly and proceeding past an old quarry to a point R on the eastern slope of Pressendie, the other entering the hill from the same public road, but nearer Kirkton of Cushnie, and proceeding to Badychark, and thence by a curve along the hillside until it met the first described branch at the said point R, became a single path at the said point R, and proceeding in a south-westerly direction between Pressendie and Pittenderrich, passed through said estate of Ranna by way of the said hamlet of Westtown of Ranna, thence through a field called the Well Park, and then down the burn side, past an old thatched cottage which stood on the site now occupied by the pursuer's house, where it joined the public road leading from Tarland to Burnside (now Douneside), which right-of-way from the said point R is described as R-Q-N-F-M-H-B; (6) that prior to 1848 there existed in connection with said right-of-way another right-of-way, which, diverging from the former at Badychark, proceeded by way of Hillside Croft to Burnside of Hallhead, from thence it went in a south-westerly direction over the eastern shoulder of Pittenderrich, and through the wood above Westtown to the point N, where it joined the first-mentioned right-of-way, which second right-of-way is described as T1-R3-S-U-V-W-Y1-P-O-N-F-M-H-B; (7) that prior to 1848 the said rights-of-way—particularly the first-mentioned—were greatly used by the inhabitants of Leochel Cushnie for the purpose of attending the important cattle, horse, and sheep markets held at Tarland, and the Small Debt Court held there, and of obtaining the services of the Tarland doctor or veterinary surgeon; (8) that between 1848 and 1868 the public going between Tarland and Leochel Cushnie continued to use the said rights-of-way across the Cushnie hill and through the said estate of Ranna by Westtown and Douneside; (9) that between 1848 and 1868 the said double dyke and beech hedge offered no obstacle to the public using said path, said dyke on the Douneside side being frequently broken down owing to the traffic across it; (10) that in 1868 the new farmhouse of Westtown was erected on its present site, and shortly thereafter the tenant thereof ploughed up that part of said right-of-way between the wood above Westtown and the old house of Westtown of Ranna, which is described as F-N; (11) that thereafter and up to the present time those using the first-mentioned right-of-way have left it at the point Q on the hill ground above Westtown, and, joining the second right-of-way at the point P, they and those who came by said second right-of-way have proceeded by the opening at the point O on to the lands of Westtown, thence straight down through Westtown and by the burn side past Douneside as formerly; (12) that in or about 1868 steps were inserted in the side of the double dyke next Douneside, but since that time the said steps have been frequently re-

newed or re-inserted, owing to the breaking down of the dyke on account of the traffic across it; (13) that prior to 1868 the path through the Well Park was used by the public even when said park was in crop, and both prior to and after 1868 the path alongside the field bordering on the burn side was used even when said field was under crop; (14) that in the line of said path as it crossed the said march dyke between Westtown and Douneside there were for many years boards nailed to said beech trees, but the boards having fallen off through decay, a small hinged gate was in 1904 hung by the witness Kennedy, at that time the tenant of Westtown, on to the opening in the fence at the point M on the Westtown side of the dyke; and (15) that it is not proved that the Oldmill road D-E and the track E-N on the estate of Melgum were used by the public as part of said public right-of-way over Cushnie hill: *Finds in law* that the defenders and all others are entitled to the free use and possession of said public rights-of-way, and that without any interference or interruption on the part of the pursuer, so far as they pass by the single path M-H-B through his lands: Therefore repels the first, second, and third pleas-in-law for the pursuer: Sustains the pleas-in-law for the defenders the Deeside District Committee of the County Council of the county of Aberdeen: Refuses the prayer of the initial writ: Finds the defender Reid entitled to expenses up to the date when said other defenders entered appearance, and thereafter finds them entitled to expenses as taxed between agent and client, in accordance with the provisions of the Public Authorities Protection Act 1893 (56 and 57 Vict. cap. 61), sec. 1 (*b*)."

The pursuer appealed, and argued—The evidence was insufficient to establish a public right-of-way. Local and partial user of the route in question might suffice to prove a servitude, but it could not set up a right-of-way—*Thomson* v. *Murdoch*, May 21, 1862, 24 D. 975; *Macfie* v. *Stewart*, January 24, 1872, 10 Macph. 408, 9 S.L.R. 240. Where the route claimed had deviated from an older route, unless the use of the substituted route had been acquiesced in by the proprietor of the *solum*, so as to disentitle him from saying that no right had been acquired, forty years' user of the new line must be proved, it was not enough to add the new user to that of the old—*Hozier* v. *Hawthorn*, March 19, 1884, 11 R. 766, 21 S.L.R. 631; *Kinross County Council* v. *Archibald*, December 15, 1899, 7 S.L.T. 305; *Cadell* v. *Stevenson*, April 19, 1900, 8 S.L.T. 8; *Kinloch* v. *Young*, 1911 S.C. (H.L.) 1, 47 S.L.R. 356. It was essential to the existence of a right-of-way (1) that both termini should be public places—*Duncan* v. *Lees*, December 13, 1870, 9 Macph. 274, 8 S.L.R. 218, and June 20, 1871, 9 Macph. 855, 8 S.L.R. 564; *Winans* v. *Lord Tweedmouth*, March 10, 1888, 15 R. 540, 25 S.L.R. 405; (2) that the line of route should be marked and definite—*Jenkins* v. *Murray*, July 12, 1866, 4 Macph. 1046, at p. 1050; *Mackintosh* v. *Moir*, February 28, 1871, 9 Macph. 574, 8 S.L.R. 382; and (3) that the user should be as of right for forty years, and from end to end of the route—*Mann* v. *Brodie*, May 4, 1885, 12 R. (H.L.) 52, 22 S.L.R. 730; *Scottish Right-of-Way Society, Limited* v. *Macpherson* (*Glendoll* case), July 6, 1887, 14 R. 875, 24 S.L.R. 629, *affd.* May 14, 1888, 15 R. (H.L.) 68, 25 S.L.R. 476. A *jus spatiendi* would not establish a right-of-way—*Jenkins* (*cit.*), *Mackintosh* (*cit.*). *Esto* that a public road might be a public place from which a right-of-way could start, the road at the northern terminus of this route was not a public road. It was neither a turnpike nor a statute-labour road. It could not therefore be said to be a public place. A proprietor whose land abutted on a public right-of-way was not entitled to plead the public right-of-way in defence to an action of interdict. He had no right to use the right-of-way, for it was only available to persons travelling from end to end of the route. *Esto* that in England a right-of-way was a "highway," and available to frontagers as if it were a navigable river, that depended on the English law of dedication to public use—the presumed origin of rights-of-way in England. As to the origin and nature of rights-of-way in England, reference was made to Glen on Highways (2nd ed.) 85, 183, 185, and 415; Smith's Leading Cases, ii, 164 *et seq.*; *The Queen* v. *Petrie*, 1855, 4 E. and B. 737; *Dawes* v. *Hawkins*, July 6, 1860, 29 L.J. (C.P.) 343; *Rangeley* v. *Midland Railway Company*, February 15, 1868, L.R., 3 Ch. App. 306, at p. 311. In Scotland the presumed origin was not dedication but prescription, and the right was not akin to highway but to servitude—Stair, ii, 7, 2; Ersk. Inst., ii, 9, 12; Bell's Prin., secs. 638, 659, 1010. The defenders' real answer was the existence of a servitude road, for that alone was consistent with the evidence, though it was not pleaded. It was well settled that the two rights might co-exist over the same *locus*—*Glen* (*cp. cit.*) 72; *Brownlow* v. *Tomlinson*, June 15, 1840, 1 M. and G. 484; *Duncan* v. *Louch*, February 4, 1845, 14 L.J. (Q.B.) 185; *Wells* v. *London, &c., Railway Company*, February 14, 1877, L.R., 5 C.D. 126. If the local and partial user were left out of account, the end-to-end user was so small that it must be ascribed to tolerance, and the pursuer therefore was entitled to interdict. *As to Expenses*—The District Committee, if successful, were not entitled to expenses as between agent and client, for where, as here, the action had not been brought against them, but they had appeared of their own free will, the Public Authorities Protection Act 1893 (56 and 57 Vict. cap. 61) was inapplicable.

Argued for respondents, the Deeside District Committee—Where, as here, the question was one of fact depending upon oral evidence, great weight ought to be given to the opinion of the Judge who heard and saw the witnesses—*per* the Lord Chancellor in *Kinloch* v. *Young* (*cit.*). *Esto* that the Sheriff-Substitute had presumed that the earlier user might be confirmed by the later, such a presumption was competent where, as here, it was a legitimate inference that the user was of the same character throughout—*Magistrates of Edinburgh* v.

North British Railway Company, March 17, 1904, 6 F. 620, at p. 634, 41 S.L.R. 492. A right-of-way was more akin to "highway" than to "servitude." It was a *res publica*, and open to all the lieges—*Galbreath* v. *Armour*, July 11, 1845, 4 Bell's App. 374, at p. 380; *Marquis of Breadalbane* v. *M'Gregor*, July 14, 1848, 7 Bell's App. 43, at p. 61; *Duke of Atholl* v. *Torrie*, December 12, 1849, 12 D. 328, *affd.* June 3, 1852, 1 Macq. 65, at p. 66; *Waddell* v. *Earl of Buchan*. March 26, 1868, 6 Macph. 690, at p. 699, 5 S.L.R. 410; *Sutherland* v. *Thomson*, February 29, 1876, 3 R. 485, at p. 496, 13 S.L.R. 311. *Esto* that to establish a right-of-way end-to-end user was essential, once it was established it was open to public use, and might be joined by the public at any point. The user thereafter might be through user or partial user as in the *Glendoll* case (*cit.*). A public right-of-way was akin to a navigable river which might be used by frontagers at any point—Glen on Highways, 73; Smith's L.C., ii, 164, *et seq.*; *Marshall* v. *Ulleswater Company*, November 27, 1871, L.R. 7 Q.B. 166, at p. 172; *Berridge* v. *Ward* (1860), 2 F. and F. 208, at 212; *Ramuz* v. *The Southend Local Board*, July 14, 1892, 67 L.T. 169. *Esto* that both termini must be public places—*Jenkins* (*cit.*); *Attorney-General* v. *Antrobus*, [1905] 2 Ch. 188, at p. 206—that was so here, for the northern terminus was a road to which the public had access and from which they could reach a public place, and that was sufficient—*Craufurd* v. *Menzies*, June 12, 1849, 11 D. 1127; *Campbell* v. *Lang*, June 19, 1851, 13 D. 1179, *affd.* May 6, 1853, 1 Macq. 451; *Cuthbertson* v. *Young*, December 20, 1851, 14 D. 300, *affd.* February 24, 1854, 1 Macq. 455. The defenders were clearly entitled to defend the action, for the interest to sue or defend a right-of-way action need neither be patrimonial nor local—Stair, ii, 7, 10; Ersk. Inst. ii, 9, 12; Rankine on Land Ownership, 342; *Macfie* v. *Scottish Right-of-Way Society, Limited*, July 14, 1884, 11 R. 1094, 21 S.L.R. 742; *Torrie* v. *Duke of Atholl* (*cit.*). Even a limited company might sue such an action —*Glendoll* case (*cit.*). It was the duty of the district committee to maintain the existence of a right-of-way, and that being so they had also an interest—*Rex* v. *Norfolk County Council*, [1901], 2 K.B. 268; *Thornhill* v. *Weeks*, [1913] 1 Ch. 438. Had they not done so they would have been barred from afterwards claiming the right-of-way. [Counsel then examined the evidence, maintaining that it was amply sufficient to establish the right-of-way claimed.] *As to Expenses*—The respondents had acted in the public interest in defending the action, and that being so they were entitled to expenses as between agent and client—Public Authorities Protection Act 1893 (*cit.*), sec. 1 (*b*); *Aird* v. *Tarbert School Board*, 1906, 1907 S.C. 305, 44 S.L.R. 223; *Greenwell* v. *Howell*, [1900] 1 Q.B. 535.

At advising—

LORD PRESIDENT—This is in some respects a singular case—in all respects a voluminous one—but as it was presented to us by counsel at the bar, a case by no means complex. It has received laborious and painstaking consideration from the Sheriff-Substitute at Aberdeen, whose views upon the evidence are before us in a note of remarkable ability, displaying an intimate and minute acquaintance with the relevant facts and a grasp of the legal principles applicable worthy of the highest commendation. If criticism were admissible on a judgment at once so careful and exhaustive I should be disposed to say that the Sheriff-Substitute was too methodical and too precise in dividing up the evidence before him, in parcelling out the witnesses and applying their evidence to definite epochs of time. For the case as it was made before us is a simple declarator of right-of-way at the instance of the Deeside District Committee of the County Council of the county of Aberdeen directed against the proprietor of Douneside, in which had the case been tried by jury the issue would probably have run something like this: Whether, for upwards of forty years or for a period beyond the memory of man, there existed a right-of-way for foot-passengers from the point A on the road leading from Tarland to Aberdeen to the points T1 and T2 in the Glen of Cushnie, proceeding through the property of Douneside on the line B H M and thence northwards at or near the line defined on the Ordnance Survey plan herewith produced.

That is the issue to which I have applied my mind, and upon careful consideration of the evidence my verdict is in favour of the pursuers in the issue—the Deeside District Committee. I have reached that conclusion upon an independent examination of the evidence, uninfluenced, I acknowledge, by the fact that the Judge who heard and saw the witnesses and who in this case had the advantage of viewing the ground, had reached the same result. Because in questions of right-of-way credibility of witnesses and the balancing of their testimony in delicate scales is unusual. Criticism is in such cases as a rule, directed not against honesty and candour, but rather against inaccuracy of memory, inaccuracy of observation, and lack of opportunity for observance, as tested and tried by well-recognised physical features and undisputed facts.

Now in the present instance the Sheriff-Substitute has expressed a view favourable to the evidence of those witnesses for the defenders who were examined in Court before him. He believes that they gave their evidence honestly and to the best of their recollection. I loyally accept that testimony in favour of the defenders' witnesses, but I extend it to the pursuer's witnesses as well, as did I think counsel on both sides of the bar. And accepting the witnesses on both sides as honest and reliable evidence according to their lights and opportunities, the testimony in favour of the right-of-way from Cushnie Glen to Tarland, reaching the latter point through the estates of Westtown and Douneside, is, I am constrained to acknowledge, adequate in quantity and convincing in quality. Indeed when every allowance has been made for lack of memory and every deduction has been made for natural exaggeration on both sides, there

remains a solid body of testimony in favour of the right-of-way by the routes defined in the Sheriff-Substitute's interlocutor which is unequalled in any case with which I am acquainted.

The antecedent probabilities in favour of this right-of-way are cogent. At the northern end of the route you have a small group of farms and crofts. At the southern end we have the village of Tarland, a tiny centre of civilisation in its own way, with its shows, its fairs, and markets, and in bygone days its Sheriff Court, its shops, its doctor, and its veterinary surgeon. And although no doubt in recent times occasions for passing across the glen have been less frequent and possibly less urgent than they were in days gone by, Tarland still retains its fair, its shops, its population, its vet., and its doctor.

The route is certainly feasible, and the shortest and most convenient. But what is probably more to the purpose, there is no alternative, for the attempt to set up an alternative route by the line marked on the plan N E D came, I think, to hopeless grief.

There are five proprietors concerned. One of them admits the existence of the right-of-way. Another denies it, and three remain passive. Finally, the evidence of user is just such as one would naturally expect if there indeed existed such a right-of-way as is claimed. Farmers and farm servants crossed the glen to attend the fairs, the markets, the shows, and in times past the Sheriff Court. They crossed to visit their friends, to do shopping, to fetch the vet. and the doctor. Packmen and tramps crossed by it, and members of the public were occasionally seen upon it whose identity nobody recognised and whose mission no one knew. I apply to the evidence given before us in this case the language used by Lord Selborne in the case which comes nearest to it in the books. I mean the *Glen Doll* right-of-way case, 15 R. (H.L.) 68, where he says—"The evidence is as great in quantity and as cogent in its effect as could be expected under the circumstances of the place and of the country if the right did exist and had existed from a very remote period." In short, if a right-of-way in a sparsely peopled district is not proved by evidence such as we have here, then no right-of-way could be established in those remote districts of Scotland at all.

It would be idle and endless indeed to quote particular passages from the witnesses and to offer comment upon them. That task has been very well accomplished by the learned Sheriff-Substitute in his elaborate note. Suffice it to say that I have reached my conclusion by an independent examination of the evidence, and that I have read and re-read all the passages to which we were referred by counsel on both sides in their lengthy and very able arguments.

I ought to say that in considering whether the right-of-way was established or no I have confined my attention exclusively to the evidence of end-to-end user, buttressed, no doubt, by the evidence of those who used portions of the route, especially of those who when using portions of the route observed members of the public there.

I have not left out of account subordinate questions suggested by the evidence and raised by the arguments of counsel. The point on the route where we find the Cushnie terminus I regard as a public place in the sense in which that expression is used in cases such as this, for I adopt here the language of Lord President M'Neill in *Jenkins* v. *Murray*, 4 Macph. 1846, when he says—"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."

Now there is no averment and no plea on record to the effect that the Cushnie terminus is not a public place. Many witnesses say it is a public place. They were not cross-examined, and no witness says it is not a public place. I assume, therefore, in the absence of evidence to the contrary, that the people who started from that end were not trespassers and were lawfully where they commenced the route. I am not greatly concerned, once they started on the route, to examine precisely the line by which they passed up the hill—whether they passed to the east or the west side of the quarry, whether they remembered the existence of Polson's Well, or the precise pathway between the points Q and P. Nor am I greatly exercised to know who was the first wayfarer who crossed the hill and found himself confronted with the Wellpark fields ploughed up and the road from N to F obliterated, and what he did in that emergency. For I am satisfied on the evidence that he did not betake himself to the route N E D, although I cannot say when he first discovered the slap at O. But possibly the change was not so abrupt and dramatic as that. Things do not happen in that way in everyday life. There is some evidence to show that after the Wellpark fields were ploughed up the public just trampled over the path as before for a time, and probably only gradually adopted the route by O G M. But having examined all the voluminous evidence with regard to the point O, I am satisfied that there existed for the prescriptive period an opening of some kind, although the precise opening and the precise gateway may probably have been the work of Mr Gellie long years after. At the point M there has been a dyke since the days of William Adam probably, but it has never presented any serious obstacle to passage from one property to the other. It was broken down in the early days. Rough steps were inserted and renewed from time to time to help the traveller down the three and a half feet of depth between the estate of Douneside and the estate of Westtown. In short, neither at the point O nor at the point M did the traveller across the hill

encounter any formidable, much less insurmountable, obstacle.

All these subordinate points as I have called them shrink into comparative insignificance in face of the solid body of testimony of continuous and uninterrupted user unchallenged from end to end of the route across this hill for more than the prescriptive period.

But the existence of the right-of-way being established, the question still remains —what are the legal consequences in this case? The action is directed at the instance of the proprietor of Douneside against his next-door neighbour, the proprietor of Westtown. Its aim and object was to have the latter interdicted from trespassing upon the estate of Douneside, or, in other words, from using the path M H B upon the plan for any purpose whatsoever. For that was the only trespass complained of. The sole ground on which the proprietor of Westtown justified his user of the path was not that there was a prædial servitude in favour of Westtown as against Douneside in which Westtown was the dominant and Douneside the servient tenement, but on the ground that it formed a part of a right-of-way. In short, he maintained his position not as proprietor of Westtown but as a member of the public. And it seems to have been conceded before the Sheriff-Substitute that if the public footpath across the hill was established that was equivalent to absolvitor from the conclusions of the action, for, although a plea to relevancy was stated, it was of consent repelled, and counsel on both sides very frankly explained to us that it was not intended to raise this topic but merely to challenge the specification of the averments made by the pursuer in the case. And accordingly it seems very plain that the pursuer would never have embarked upon an inquiry so extensive and so expensive if in his opinion the result and effect would be *nil* upon his crave for interdict. In short, it was taken for granted, apparently, before the Sheriff-Substitute, that if a right of public footpath was once established, any member of the public, even although he chanced to be a neighbouring proprietor, could use it to traverse any part of the route as well as to traverse the whole route. And indeed that assumption seems to me to be correct in law, and I am not surprised that the Sheriff-Substitute was never invited to consider it. When it is realised what the meaning of "public right-of-way" is according to the law of Scotland it will at once become plain why the question of its effect in this action was never contested before the Sheriff-Substitute—then it is easy to see that the establishment of a public right-of-way here was not intended to be otherwise than equivalent to decree of absolvitor in the action.

As Erskine (ii, 9, 12) says—"The right of a public road or King's highway is not properly a servitude, but *publici juris*--common to all the members of the State, whether they are or are not proprietors of any tenement." And as Lord Curriehill observed, in *Waddell* v. *Earl of Buchan*, 6 Macph. 600—"A right of highway confers on the public a right to use the surface for the ordinary purposes of locomotion. It is a kind of right that has existed in this country and elsewhere from the infancy of civilisation. Means of travelling from one part of the country to another is absolutely essential to the very existence of society. Unless rights of highway belonged to the public the power of locomotion would be completely annihilated. In all civilised nations we find such a right belonging to the public. It was known in the Roman law as *res publica*. With us also it is *res publica*, and is vested in the Crown as a branch of the *Regalia* for behoof of the public. The nature of the right is a right to use the surface for purposes of locomotion by carriage or on foot, but not to exercise any other rights of property."

And similarly Lord Gifford, in *Sutherland* v. *Thomson*, 3 R. 485, says—"No doubt there is a broad and well-known distinction between a servitude footpath and a public footpath, the use of the one being confined to the residents in or the visitors to a dominant tenement, the use of the other being open to the whole public wherever they reside or wherever they are going."

The result in law then surely is that the whole route becomes *res publica*; and if so, it seems to me to be a self-contradictory proposition to say the whole route is *res publica*, and from the route a large section of the public is always to be excluded, to wit, those who propose to traverse only a portion and not to travel from end to end. There is no authority for it. No text writer can be quoted, no decision can be cited, no dictum can be discovered in favour of so extravagent a proposition as to say that from a *res publica* a large section of the public may at all times be excluded. If a public right-of-way be once established then no proprietor at any part of the route can prevent members of the public from using that part unless they undertake to use the whole route.

No doubt it is essential to the establishment of a public right-of-way that use from end to end, continuous and uninterrupted for the prescriptive period, be proved, yet when the right-of-way is once established the user cannot be confined to travellers from end to end. If otherwise, then the Deeside District Committee of the County Council of the County of Aberdeen would never have been admitted to this process. It is true their admission was contested, but not upon this ground, and once they were admitted the pursuer of the action straightway proceeded to amend his pleas, and so also did the defender. And the third plea-in-law for the pursuer, I observe, is—"That the Deeside District Committee of the County of Aberdeen having sisted themselves as defenders of the action, and there being no public right-of-way over the pursuer's lands, decree of interdict should be pronounced against them." In other words, the fate of the action against the Deeside District Committee depended, in the view of the pursuer, upon decree in favour of a public right-of-way being pronounced or not.

I am of opinion, in conformity with the views I have expressed, that the judgment of the learned Sheriff-Substitute should substantially be affirmed, that the first, second, and third pleas for the pursuer ought to be repelled, and that the pleas-in-law for the defenders ought to be sustained. But with regard to the last finding in the Sheriff-Substitute's interlocutor, relating to the application to this process of the Public Authorities Protection Act 1893, I am very clearly of opinion that the statute on which the Sheriff-Substitute founds does not apply to this case, and accordingly that that portion of his interlocutor ought to be recalled.

LORD JOHNSTON—A question is raised in this case which I think is new, viz., whether a proprietor whose property is on the route of a public right-of-way, from one public place to another, can claim to use a portion of the route as though it were a prædial servitude attaching to his own property. I state the question thus, because it seems to me that that is the real question, and that it is necessary to distinguish between his claim as proprietor and his claim as member of the public.

His claim as proprietor derives no added force from the fact that he may also represent himself as a member of the public. His claim as member of the public stands by itself, and receives no added force from the fact that he is also a proprietor on the route.

I think that it must be inferred from the fact that the original defender has endeavoured to step out of the case and leave his defence to the District Committee that he has no faith in his position as proprietor on the route. Yet I think that that is the true ground of his claim, and would be successful, for reasons which I shall afterwards state, but for a specialty applying to his particular property as acquired by him.

But the case has been presented to us, not by the original and true defender, but by the District Committee. Their concern is only with the question of public right-of-way, and with the defence of the original defender as a member of the public. While I must consider this question first, I must decline to confine my attention to it, for I think that it has been astutely put forward to draw away attention from the true question.

Were the question merely, Has a public right-of-way been established from the Cushnie neighbourhood to Tarland? I should acquiesce, though with some qualification, in your Lordship's opinion that such has been established. A most unnecessary effort was made to fix the Cushnie point of departure at a definite spot. This entirely failed, for the points marked T1 and T2 on the plan are no more public places than any other points on a road to a peat moss passing into and losing itself in the moor. This peat road is no public road except as it may be part of the right-of-way claimed. But in the case of a public right-of-way in such a district as this is, and still more as it was generations ago, I think that one is bound to look at things reasonably and broadly. If the way claimed was only to and from the Glen of Cushnie, I should doubt whether two small farms, a croft, and a keeper's cottage supplied a public who could acquire a public right-of-way, or anything but a servitude right-of-way, for the benefit of the estate from which they held. But I think that there is evidence sufficient to satisfy the Court that, if not earlier, at least from the beginning of and into the last quarter of the last century there was local traffic, not merely from the small Glen of Cushnie, but from Donside to the north, and probably from Milton of Cushnie to the east, which found a route to Tarland by the line of the right-of-way claimed and *vice versa*. I do not think that it is necessary that such local traffic should point to a definite spot and say there the right-of-way begins. But the most exacting demand would, I think, in this case be met by pointing to the old Kirkton of Cushnie, not the farm of that name, but the site of the old kirk and kirkyard.

Though there are various paths to start with over the moor, they soon concentrate on a definite route over the hill by Pressendye and Pittenderick, which route first rises 800 feet on the way southward, and then comes down more than 1000 feet before it reaches the point in dispute. Returning to the plan, the route as it descends the south side of Pittenderick was once perfectly definite, passing through the Rannagower Woods by Q to N, there entering the cultivated land not enclosed till after 1840, and passing along a farm road to the houses of Westtown of Rannagower, now removed, at the point marked F. From this point I am satisfied that the real route of the right-of-way was from F by D round to C B, and thence to Tarland at A. I say this because the right-of-way, whatever its route, was, at one time at anyrate a cart track, and still is for part at least of the way. Steep as it was, there is evidence that carts, doubtless of the hill-farm pattern, occasionally went the whole way across between the Kirkton and Tarland. Cart traffic always takes the line of least resistance, *vide* the angled detour between Q and N, and a glance at the Ordnance Survey contours shows that F D C B was a much more natural and possible cart route than F B direct. That D C B was a track of the same character as that which crossed the hill I have no doubt—I am not suggesting that it was then as it is now a made road—and for this further reason, that there was at the time I am speaking of no other means of access to the crofts of Rannagower proper, or to the more important holding of Oldmill, both then parts of the same estate as Westtown and Douneside (then called Burnside). But I am quite ready to accept that foot-passengers took a short cut, just as they could get it, from the Westtown houses at F to the road at or about C and B. I am no believer in a regular road through the Wellpark from F to M as laid down on the plans. I think that this use was a matter of tolerance, largely accounted for by the half enclosed nature of the land, and by the relationships and friendships and coming and going

among the occupants of the various farms and crofts forming the then united property of Ranna. The above is the general deduction which I have drawn from a great mass of evidence led in this case. But I desire to say that the major portion of the evidence is to my mind valueless as direct evidence of a public right-of-way—much of it altogether valueless. It is that of relatives and friends visiting relatives and friends, and neither coming from Kirkton of Cushnie nor going to Tarland or *vice versa*—of cross-country journeys using the track for part of the way—of individuals who thought they had a right to use the track on the way to shoot, to gather blaeberries, to roam through the woods or over the hill, and such like usurpers of a *jus spatiandi.* But in all the chaff there are sufficient grains of wheat to justify the conclusions which I have above stated. And I do not disregard the fact that such evidence as I would reject on the main issue is good evidence of the existence of a track in the line of the public right-of-way now claimed, and such evidence is always valuable in corroboration.

I have said that the pursuer's lands of Douneside, the defender's lands of Westtown of Rannagower, Rannagower Crofts and hill ground since planted, and Oldmill, with perhaps some other pendicles, in the early part of the last century comprised one estate of Ranna. In 1841, I think, it was acquired by William Adam, who retained it till 1866-68, and who enclosed and developed the property. In 1865 he proposed to sell the estate in whole or in lots, and had a plan prepared by Mr James Beattie, surveyor, which is of the utmost importance. It shows the old hill path coming down through Ranna Woods, as I have described it, by Q and N to F and thence by D to C B and Tarland. But it shows no footpaths through the fields, and no trace of what is afterwards said to have happened in the way of changing about the route of the right-of-way. This plan is no evidence against the public. Nay, it may be evidence, and to some extent I think is, in their favour.

The lands of Ranna were sold in lots—Oldmill and Rannagower crofts and hill ground with pendicles to Milne of Melgum, an adjoining property to the west, in 1868; Westtown in the same year to George Adam, the defender's author; and also in the same year Douneside to Ross, the pursuer's author. In point of fact the sales appear to have been made *unico contextu*, the titles being dated within a month in this order, Douneside first, Westtown second, and Oldmill last.

Shortly after acquiring Westtown, George Adam proceeded to plough up the old track from N to F. This was acquiesced in, and shows that the need for the route for any wheel traffic was now at an end. But it is alleged that while they acquiesced in the closing of the route N F D, the public made for themselves a new route, which the defender marks on his plan as in the line Q P O G M H B, and this is the line now claimed. After his acquisition George Adam also removed the houses at F where there had been more than one holding, and built the present farmhouse of Westtown at G for his whole lands. After his acquisition the pursuer built the present Douneside, more or less shifting its site also. I am not going to canvas the evidence for the alleged new route, Q P O G M H B. I content myself with saying that it is difficult to be satisfied that any particular route, Q P O, has been used or possessed. But it is equally difficult to maintain that people have not, in gradually diminishing numbers, since the alterations on Westtown, been coming and going through the wood, somehow or anyhow, from about Q to about O, and thence along the fence and small burn from O to G and from G by M and H to the public road at B on the way to Tarland. That there is evidence in abundance of user of it between the two farms of Westtown at G and Douneside at H, and evidence of plenty of people using it as a means of merely getting up to the hillside above, is uncontroverted. But such evidence is valueless if attention be confined to the question of public right-of-way. At the same time, of genuine users of this route, as a substitute for the old right-of-way from Kirkton of Cushnie to Tarland and *vice versa*, there are a few, though a very few, the need for the right-of-way proper having more or less ceased, and its use being in consequence in the course of dying out. I do not therefore think myself justified in disputing your Lordship's conclusion that if, as I hold, there was once a right-of-way from Kirkton of Cushnie by Pressendye and the route Q N F D C B to Tarland, there is sufficient evidence to establish its diversion for foot-passengers to the line Q P O G M H B.

Now comes the question, Can the Reids and their people, having no occasion to use the right-of-way for its proper purpose of passage from Tarland to Kirkton of Cushnie or *vice versa*, claim to make use of it as a right-of-way for themselves from Westtown into Tarland? I take their claim first as based on their right as members of the public. As such they get no assistance from the fact that Mr Reid is proprietor and they occupants of Westtown, though this was by no means kept clear in the argument, in which a good deal was done to confuse the issue by standing on two stools at the same time. I am not able to decide this question on the analogy of what I am told is the law of England. I cannot pretend to know that law or its principles. But I understand the law of Scotland to be, that to establish a right-of-way it must be proved to run from one public place to another, and can only be established by user from one terminus to the other—further, that a public right-of-way can be lost by disuse. In this latter point I am informed that the law of Scotland differs from the law of England. If so, I think that the difference is essential. But whatever the law of England is, we know and have to apply the law of Scotland in this case. Suppose that the right-of-way, now moribund, to be already dead as a public right-of-way, there being no question of

prædial servitude, from Kirkton of Cushnie as far as the confines of Westtown at either N or O, could it be kept alive through its whole length by continued use from the farm of Westtown at G on to Tarland? To that question there can, I imagine, be only one answer, and that in the negative. As the evidence of user between Tarland and Westtown would be no evidence to establish a public right-of-way between Tarland and Cushnie, so it would be no evidence of retention of the right-of-way between Tarland and Cushnie. And as Westtown is not a public place it would be no evidence to establish a more limited but public right of-way between Westtown and Tarland. It follows, I think, as a necessary corollary, that the Reids and their people cannot as members of the public claim to have established a public right-of-way from Westtown to Tarland, or a right to use the public right-of-way between Cushnie and Tarland, as an access merely from Westtown to Tarland. But it does not follow that the owner of Westtown has no right to a way on the line of the assumed public right-of-way from his farm of Westtown to Tarland. It is at this point I think that the case has miscarried. It seemed incomprehensible that a proprietor on the route of a right-of-way should not have right to use that right-of-way from his particular property to either end or over any length of it. And it was taken for granted that he had such right. But there was a failure, in my opinion, to discriminate. It was too readily assumed that this emanated from the public right-of-way — was a mere consequence of it. If so, and it is part of the public right, any member of the public who by tolerance of a proprietor on the route, nay even by trespass, can reach the line of the right-of-way, has the same right, which is alien to the conception of a public right-of-way in Scotland, as evidenced by what is required to establish one.

This brings me to what I think is the real question in this case and the question which it was raised to determine, viz.—Whether the proprietor of Westtown, not as member of the public but as proprietor of Westtown, has or has not a right-of-way through Douneside to Tarland for himself and those employed on his farm of Westtown. The miscarriage in the case has, I think, arisen from resting on public right and failing to observe that every public right-of-way contains *in gremio* of it the possibility of innumerable private or prædial servitudes of way covering sections of its length. If a house is situated on the route, there is no practicable possibility of, and possibly little interest in, the other proprietors along the route preventing its owner making such use of portions of the right-of-way track as will establish contemporaneously with the public right-of-way a private or servitude right-of-way over their lands in favour of his intermediate property. It is for this reason, I imagine, that the question we are now considering has never arisen. And I would have no hesitation, in other circumstances, in holding that Mr Reid had acquired a right to use the right-of-way route from his house to Tarland through the pursuer's lands not as a member of the public and as by virtue of a public right-of-way from Cushnie to Tarland, but as the proprietor of Westtown, which had as dominant tenement, acquired alongside of or *unico contextu* with the public right-of-way a servitude right-of-way over the pursuer's lands as servient.

But there are circumstances which make this case an exception from the rule which would thus generally apply and which bar Mr Reid establishing such private right.

Prior to 1866-68 the lands of Westtown and Douneside were in one hand. There could be no question of servitude in favour of one over the other. In 1866-68 they were for the first time severed, and since that date have been separately occupied. In selling Westtown there was no servitude granted in its favour by the former proprietor of both over the lands of Douneside. Nor was there any "way of necessity" through these lands. Westtown had its own good and ample access provided by the route G F D, and has so still. Moreover, the plan already referred to, on which the sales of the various parcels were made, shows emphatically that there was no intention to give a right-of-way to the one subject over the other. A servitude right-of-way involves the conception of a grant. Possession implies the grant, but possession will not establish a right if the circumstances of the severance of the properties, as disclosed from the titles or from their history as otherwise known, show, as they do here, that there was no such grant. Any user which would in other circumstances amount to possession implying a prior grant will in that case be referred to tolerance. And here we do not need even to rely upon this general doctrine, for we have ample evidence that the user of the path from the new site of Westtown at G through the lands of the pursuer to the public road at Tarland was *de facto* of tolerance. It commenced in relationship among the occupants of the two farms. It continued in the convenience accorded as a matter of good neighbourhood. That it was of tolerance was thereafter recognised. At times leave was asked and leave granted. In these circumstances there is no ground for holding that the property of Westtown has acquired any such servitude right-of-way over Douneside in the route claimed as in my opinion must be shown if the proprietor of Westtown is to establish a right to use a road through his neighbour's property of Douneside into the neighbouring village of Tarland. The user has become burdensome, and the tolerance has been withdrawn.

I cannot but feel that, at least from my point of view, there has been a grave miscarriage of process. I feel, in common I know, with your Lordships, a great disinclination to reflect upon the skill of the parties' advisers, and also upon the conduct of the case by the Sheriff-Substitute. The former have, I think, involved their clients in great but misdirected expense, and the latter has taken excessive trouble over a

question which was not in my opinion properly before him, because it was not competently raised as a defence by the only defender called, and because the compearing defenders should not have been permitted to raise it in this process. But I cannot allow such disinclination to affect my judgment, because I cannot do so without adopting and continuing the mistakes which have been made.

1st. As the action came into Court, it was a mere interdict by one proprietor against his neighbour for trespass by the latter upon the former's ground. It raised a question of trespass versus prædial servitude only.

2nd. The defender did not meet the charge of trespass by claiming a prædial servitude, but asserted a public right-of-way.

3rd. This defence was not, for the reasons I have stated, competent in his mouth to support his user. The alleged public right-of-way is some three miles long. Defender's and pursuer's lands cover a short bit of it at one end, probably not a third of a mile all told. A proprietor on the route of a public right-of-way has, I think and have already said, no right to use the route, in his capacity as a member of the public to which it is dedicated as a private access for his property through his neighbour's ground to a point desired. If he has right so to use it, it can only be as a prædial servitude of his property. He may indeed very easily acquire such servitude right-of-way in the line of the public right-of-way. Yet notwithstanding, the legal complexion of his right is that of a private servitude of way. The present case is an excellent example and test of the reason of the thing. If there is a public right-of-way through the pursuer's ground, the use of it is intermittent and comparatively innocuous by the true public of the *terminus a quo* and the *terminus ad quem*. But the defender's use of it is continuous and onerous to a degree, and if owing to special circumstances he has acquired no private servitude right-of-way in the line of the public right-of-way, and yet is to be allowed to use the route of the public right-of-way for his private purpose of getting from his lands to Tarland, because it is the route of a public right-of-way, this would be enormously to enhance the burden upon one particular proprietor on the route of the public right-of-way, not for the benefit of the public but of a neighbouring property. The defender cannot, in my opinion, plead in defence to this action of trespass the public right-of-way.

4th. But while the record was still open, the defender, having astutely set abroad a cry that a right-of-way was being endangered, and having hoodwinked the Tarland Parish Council by a bogus round-robin from the Cushnie neighbourhood, first the Parish Council and then the District Committee rushed into the breach to pull his chestnut out of the fire for him, without considering two important matters—(1) Did the question between the pursuer and the defender really raise any question of public right-of-way in which the public were at all seriously interested; and (2) did the process admit of any question of public right-of-way being tried? Both these questions should, I think, have been answered in the negative. One of the most astounding things in the case is, that their own minutes and correspondence show that if the original parties, the owners of Douneside and Westtown, could have agreed in their private interest, the District Committee would have been satisfied in the public interest, thus recognising how entirely a private matter the whole question was.

5th. From this point there has, I think, been entire miscarriage. Before the record was even closed, the Sheriff, on the motion of the defender, ordered intimation of the dependence of the action to the District Committee. The District Committee having taken two months to consider, voluntarily appeared by minute and were sisted as defenders to maintain the existence of the public right-of-way. The pursuer opposed, as I understand, their appearance and the course of procedure to which that appearance led, and was overruled by the Sheriff. But the pursuer did not take any proper plea, nor did he, as he ought to have done, appeal before going to proof. Instead, he allowed himself to be drawn on to join issue with the District Committee. The defender, on the other hand, slipped quietly out of any participation in the defence, though he has obtained no sist as against him of the process, which is directed against him personally and against him only. The case has gone to proof and to judgment. and has occupied many days in the proof, has resulted in a most elaborate note on the evidence by the Sheriff-Substitute, and has led to a most inordinately long hearing before this Court. Yet I regret to say that it is my opinion that we ought now to go back to the point where the record was closed, and that all this time and expense have been wasted.

6th. I take the position of the District Committee first. They are sisted as defenders and they lodge a defence which is based entirely upon the assertion of a public right-of-way.

They do appear to have considered what the effect of their appearance was, but at the same time they do not appear to have done so with full appreciation. The interdict was directed solely against the private defender. The fact of the District Committee ranging themselves as defenders alongside of the private defender could only result in an operative decree for or against the private defender. It was not possible that the Sheriff should interdict the District Committee as compearing defenders from trespass. For a District Committee do not themselves use such a road, and are not therefore apposite parties to be called in an interdict. On the one hand, their appearance in the action of interdict limits them to protect the principal defender. They make common cause with him. If they can help him to establish a defence competent to him they may effectually support him. But they cannot protect him by establishing a defence which is not

in his mouth to plead. Moreover, they can by their appearance in the process get no effective decision of the question in which only they are *ex hypothesi* interested, viz.—the question of a public right-of-way. The alleged route goes through three other proprietors' lands, as well as those of the defender and pursuer. It is quite inconceivable to me that by intimation of this process of interdict to those three proprietors any obligation was imposed on them to come in and stand their trial. Had they done so they would merely have emulated the conduct of the District Committee themselves, and have rushed in where they had no call to enter. On the other hand, no decree could be pronounced settling the question of a public right-of-way at the instance of the District Committee even in a question between them and the pursuer. The Sheriff-Substitute has felt the pinch, for while he has found in his fifth finding that a public right-of-way exists over the whole route alleged, and repels pleas for the pursuer and sustains pleas for the defender, all that he is able to do in the way of decree is to refuse the prayer of the initial writ which was one craving interdict against the Reids for trespass. He could pronounce no decree declaratory of a public right-of-way in favour of anybody or against anybody. What the District Committee ought to have done if they were anxious to vindicate a right-of-way which they thought was challenged, and were satisfied was of public value, was to have left the defender Reid to fight his own battle in the interdict process, and only, if and when they were advised it was necessary, to have raised a declarator of public right-of-way in their own name and interest against the whole proprietors concerned. The almost fantastic procedure which has been followed in this case would thus have been avoided.

7th. I take next the position of the defender. I can quite understand his anxiety to throw his defence over on to the shoulders of the District Committee. He doubtless knew very well that the public right-of-way was moribund and that it would do him little harm to admit it, so far as his own property was concerned, if by doing so he could ride in on the back of the District Committee and avoid the question of a private servitude right-of-way. For doubtless he had not much faith in his claim to such. And I am not surprised. For his title when examined entirely negatives the suggestion.

I conclude, therefore, that the only judgment we ought to pronounce is one recalling the Sheriff-Substitute's interlocutors—finding that there are no *termini habiles* in the record under which we can competently determine the question of public right-of-way as between the pursuer and the compearing defenders the District Committee; refusing to entertain their pleas; finding that the defenders the Reids are not *in titulo* to plead a public right-of-way as defence to the action; and, as he has stated no other plea, granting interdict against him as craved.

LORD SKERRINGTON—In this action for trespass the Sheriff-Substitute, after a lengthy and elaborate inquiry into the facts, issued a very able and careful judgment by which he refused the application for interdict, and in substance declared that there had been constituted by prescriptive user a public right-of-way for foot-passengers leading in a north-easterly direction from the village of Tarland through the estate of Douneside (formerly called Burnside) now belonging to the pursuer, then through the adjoining estate of Westtown of Ranna now belonging to the original defender Mr Reid, and then by two routes across a hilly moorland to two points situated on what he held to be a public road in the Glen of Cushnie. The alleged right-of-way, so far as passing over the pursuer's property, is 525 yards in length; in Mr Reid's property it is 1085 yards in length; but the total distance from Tarland to Cushnie Glen is more than four miles. In the course of the debate doubts occurred to me whether this action as laid was a competent process in which to decide any such question, but on further consideration I am satisfied that these doubts were unfounded. It seems strange, in the first place, that a public right-of-way should be declared to exist not only over the estates of the pursuer and of the defender Mr Reid, but also over two estates whose owners were not called as defenders, and whom the judgment in this litigation will not bind. It must, however, be kept in view that according to our forms of process a person who is cited as a defender cannot be forced to appear so as to make the judgment conclusive and binding upon him. Accordingly, even if the two landowners to whom I have referred had been cited as defenders in the present action, or preferably in an action of declarator at the instance of the compearing defenders the Deeside District Committee, they could not have been compelled to lodge defences, and a decree in absence against them would not have constituted *res judicata*. Some such consideration probably led to the decision in the case of *Crauford* v. *Menzies*, (1849) 11 D. 1127, where the Court, without stating any reason, repelled as "untenable" the objection that all parties interested in the right-of-way had not been called. This decision has ruled the subsequent practice. The next difficulty was created by the form of the initial writ, which did not ask for a declarator negativing any public right-of-way over the pursuer's property, but simply asked for interdict against trespass by Mr Reid and Mrs Reid. It appears, however, from the third and fifth articles of the condescendence that the action was brought for the express purpose of negativing a claim on the part of Mr Reid to the effect that he was entitled to use as an access to his property of Westtown from the village of Tarland a public right-of-way with which he alleged that the pursuer's property of Douneside was burdened. In his defences Mr Reid repeated this contention, and

maintained that he was entitled to use as an access to his property from the village of Tarland a road or footpath on the estate of Douneside which he alleged to have been used by the public from time immemorial as part of a public right-of-way which led from Tarland northwards through the lands of Douneside and Westtown, and through two other estates until it reached points situated on public roads in the parish of Cushnie. No objection was stated in the Sheriff Court to the relevancy of this defence. It was, however, argued to us by the pursuer's counsel that the owner of a property traversed by a public right-of-way which passes over the lands of several proprietors between its public termini is not entitled to use the right-of-way as an access from either terminus to his own estate, but that, in common with all other members of the public, he may use it only for the purpose of end-to-end traffic between the two termini. In accordance with this view of the law the pursuer's counsel maintained that even if the Sheriff was right in finding that the alleged public right-of-way had been established, his client was entitled to interdict Mr Reid from using the track as an access to his property from the village of Tarland or for any purpose except through traffic between Tarland and Cushnie Glen. On the other hand, the pursuer's counsel stated that if the Sheriff's judgment as to the right-of-way should be recalled he claimed right to an interdict against Mr Reid entering upon the estate of Douneside for any purpose whatsoever. It will be seen, therefore, that the existence of the alleged public right-of-way was a matter upon which the Sheriff was entitled and bound to adjudicate as between the pursuer and Mr Reid in order to enable him to decide whether the pursuer was entitled to an interdict against Mr Reid, and if so in what terms. Prior to the Sheriff Courts Act of 1907 a Sheriff had no jurisdiction to give anything but a possessory judgment on such a question — *Thomson* v. *Murdoch*, (1862), 24 D. 975, *per* Lord Deas, p. 982. By that statute he was given jurisdiction in all actions of declarator with certain specified exceptions which do not include declarators affirming or negativing a public right-of-way. It follows that if a question as to the existence of a public right-of-way is raised in defence the Sheriff is bound to decide it upon its merits, just as he was under the old law held to be not entitled to confine himself to a merely possessory judgment in a case where the existence of a servitude was in dispute—*Gow's Trustees* v. *Mealls*, (1875) 2 R. 729. If I am right in thinking that the existence or non-existence of the alleged public right-of-way was competently in issue as between the pursuer and Mr Reid, it follows that the Deeside District Committee were entitled, in terms of section 42 of the Local Government (Scotland) Act 1894, to be sisted as defenders, and were properly so sisted in order to enable them to vindicate the alleged right-of-way. The pursuer did not appeal against the interlocutor sisting the District Committee as defenders. On the contrary, he consented to his plea to the relevancy being repelled, and joined issue with them and went to proof as to the existence of the alleged public right-of-way. In intervening in this litigation there is no reason to suppose that the District Committee acted otherwise than from a sense of public duty, and this Court is not concerned with any question except as regards the competency of their intervention. From the date when they were sisted as defenders Mr Reid ceased to take an active part in the litigation, and he was not represented in this Court. He left his defence, as he was entitled to leave it, to the District Committee.

In the view which I have stated as to the relevancy of Mr Reid's defence, it is not necessary, though it may be convenient, to express an opinion as to whether a member of the public may lawfully use a public right-of-way as an access to his own premises or for any purpose except passing from the one public terminus to the other. In order to establish the existence of a public right-of-way it must be proved that the public have for the prescriptive period traversed the way from end to end. It does not, however, follow that after a public right-of-way has come into existence by prescriptive user the public are limited in all time to the kind of user by which alone their right was constituted. It is true that there are similarities between a public right-of-way and a private servitude both in the manner in which they may be acquired and also in regard to the right of the owner of the *solum* to use his ground for any purpose not inconsistent with the right of passage. But it would not be safe to argue from these similarities that the maxim *tantum præscriptum quantum possessum* applies to a public right-of-way with the same strictness as to a servitude. Indications to the contrary are to be found in the authorities—*Mackenzie* v. *Bankes*, (1868) 6 Macph. 936. On the other hand, it would be equally unsafe to argue that a public right-of-way is a highway and then to assume that in Scotland there is no difference between one class of highway and another. Rights-of-way undoubtedly stand in a class by themselves—*per* Lord President Dunedin in *Reilly* v. *Greenfield Coal and Brick Company, Limited*, 1909 S.C. 1338. In particular, the public must take them as they find them and not alter their character — *per* Lord President Inglis in *Mackenzie*. So, too, I should expect to find some legal differences between (1) a highway included in the list made up under section 41 of the Roads and Bridges (Scotland) Act 1878; and (2) a highway, once a turnpike or statute-labour road but no longer maintained at the public expense; and (3) what Lord Dunedin, in the case of *Reilly*, described as "one of those still older roads in Scotland for which there is no actual *nomen juris*, and which, though neither statute-labour roads nor turnpike roads, have still been public roads from time immemorial." In the south of Scotland stretches of the great Roman road and of other artificial roads of venerable but unknown origin are still used by the public

even for cart traffic, though their surface has become entirely overgrown. There is not much authority in Scotland as to the extent and limits of the right enjoyed by the public in the different classes of highways, but, in my view, there is one quality which is essential and which must be common to all of them, viz., that the surface of a highway and every square inch of it belongs to the public, not, of course, in property, but in order that it may be used for certain purposes. Hence there is no room for any question as to public termini, because at every step one passes from one public place to another. The primary right of the public in a highway is that of passage, but if this point be kept in view one may say, as Lord Curriehill did in *Waddell* v. *Buchan*, (1868) 6 Macph. 690, at p. 699, that "the nature of the right is a right to use the surface for the purposes of locomotion." In short, a member of the public has a *jus spatiandi* within the limits of a highway which he may exercise as he thinks fit, provided the eccentricity of his course does not disturb the public traffic or the public peace. Lord Curriehill's definition is not inconsistent with the views expressed by Lord Dunedin in *M'Ara* v. *Magistrates of Edinburgh*, 1913 S.C., at p. 1073, and with certain English cases, where a member of the public was held to be a trespasser because he had done something which exceeded the ordinary and reasonable user of a highway—*Harrison* v. *Rutland*, [1893] 1 Q.B. 142; *Hickman* v. *Maisey*, [1900] 1 Q.B. 752. So far I have been speaking of an ordinary member of the public, but if he happens to be also the owner of land fronting or abutting on a highway, he has superadded to his public right a right which is peculiar to himself and which is attached to and enhances the value of his estate, viz., the right to step from the highway on to his private property and *vice versa*. This is familiar law in the case of ordinary public roads and streets, and was implied in the decision in *Walker's Trustees* v. *Caledonian Railway Company*, (1881) 8 R. 405, *affd.* 9 R. (H.L.) 19. The same principle should equally hold good in the case of a public right-of-way provided the circumstances admit of its application. It applies to the right of a riparian owner to use a navigable river, as was illustrated in the case of *Lyon* v. *Fishmongers Company*, (1876) 1 App. Cas. 663, cited by Lord Blackburn in his opinion in *Walker's Trustees*. In the case of *Colquhoun's Trustees* v. *Orr Ewing & Company*, (1877) 4 R. 344, *revd.* 4 R. (H.L.) 116, the reversal did not throw any doubt upon the soundness of the view taken in this Court to the effect that the public had acquired by prescription a right of navigation similar to a right-of-way over a non-tidal part of the River Leven. Both the Lord President (p. 350) and Lord Shand (p. 359) referred to the fact that the river had a public terminus at each end, viz., Loch Lomond and the sea. It cannot seriously be suggested that this public right (after it had come into existence) might be lawfully exercised only by navigating from the loch to the sea or *vice versa*, or that the riparian owners on the river did not enjoy a valuable private right of access for the purpose of using the navigable river. For these reasons, I do not think that there is any substance in the argument addressed to us by the pursuer's counsel on this point. There are many differences between the law of England and that of Scotland in regard to highways, but it is at least relevant to point out that a very serious restriction on the rights of the public which, according to this argument, affects public rights-of-way in Scotland as distinguished from other highways is not sanctioned by the law of England or, so far as appears, by that of any other country. In the case of *Marshall* v. *Ulleswater Company*, (1871) L.R., 7 Q.B. 166, Blackburn, J., said (p. 172), "It is well-established law that where there is a public highway the owners of land adjoining thereto have a right to go upon the highway from any spot on their own land. They cannot, of course, pass over the soil of others without leave; and he who has dedicated the road to the public at large has no right to complain that a particular individual has come upon it at one spot rather than another." In Scotland the origin of a public right of highway is attributed not to dedication by the landowner but to possession by the public; but this difference in theory does not involve any such practical difference as would follow if the argument of the pursuer's counsel were to be sustained.

I shall now consider whether the Sheriff reached a sound conclusion on the evidence when he held that the compearing defenders the Deeside District Committee had discharged the burden of proof which they had undertaken, and had succeeded in proving prescriptive possession on the part of the public of the right-of-way in question. As I have already stated, there are really two routes over the moorland, and, moreover, one of these has two branches. Unless when it is necessary to distinguish, I shall refer to all these routes as forming one right-of-way. Both in the Sheriff Court and here it was strongly urged in the argument for the pursuer that the defenders had failed to lead any evidence from which it was competent for a Court to find that the northern termini of the alleged right-of-way, viz., the points T1 and T2, are public places. I so state the question because the pursuer led no evidence at all in regard to this matter, and did not cross-examine the defenders' witnesses upon their testimony in regard to it. Accordingly, if there is any competent evidence on this point it is uncontradicted and may be accepted. On the other hand, if there is no competent evidence in support of the crucial fact that the points T1 and T2 are situated on a public road the defenders have failed to prove their case. The whole point of the pursuer's criticism consists in the fact that no witness for the defenders deponed in so many words that the road leading up to the Glen of Cushnie was a public road, but that they all simply described it as such without stating any reason justifying this description. It is suggested that the description was put into their mouths by the solicitor

who examined them. Any such suggestion is futile in the case of the defenders' expert, Mr Jenkins, C.E., who gave his evidence on the first day of the proof, and who presumably had some reason for so describing the road. The validity of this reason could have been at once tested if he had been asked on behalf of the pursuer to state it. The suggestion is equally futile in the case of Mr Clayton, the road surveyor to the Deeside District Committee, who would not have ventured to describe the road as public unless he had some reason, good or bad, for doing so. For all that appears in the proof the road, though now in bad condition, may be entered on the statutory list of highways, or may have been at one time a statute-labour road, or may on some other ground be in fact and in law a public road. In addition to these two witnesses a large number of others, two of whom were adduced by the pursuer, described the road as public. It is contrary to an elementary rule of procedure that a party should be allowed to criticise evidence on the ground of its generality when he himself refrained from asking the witnesses for the particulars which he subsequently desiderates. In such cases the presumption is that he had good reason for believing that any further questions would not help but would hurt his case. The proof in the Sheriff Court was conducted with great ability on both sides, and one can draw one's own inferences as to a failure to cross-examine, which must have been due to policy and not to oversight. I hold it proved that the points T1 and T2 are public places within the meaning of the familiar rule applicable to the constitution of public rights-of-way.

A large number of witnesses were examined on behalf of the defenders in support of the alleged right-of-way, the oldest of whom speaks to the period from 1837 to 1843. The testimony of this witness as printed seems to me to be somewhat confused and unsatisfactory, but the Sheriff-Substitute, who was in a better position to judge of its value than I am, evidently attached importance to it, and also to the evidence of a few other old witnesses, of whom only two I think professed to have used any of the routes from end to end prior to the year 1848. He was also influenced by the antecedent probability that so convenient an access from the Cushnie district to the village of Tarland with its many markets, its Small-Debt Courts, and other attractions, must have been used by the public from time immemorial. Upon these grounds he has in his fifth and sixth findings affirmed that there existed prior to 1848 as public rights-of-way, not indeed all the routes which the compearing defenders claimed in their defences, but the two routes (one with two branches) to which alone I have thought it necessary to make any reference. In my view the evidence applicable to this early period is quite insufficient both in quantity and in quality to warrant the inference that the public had used these routes as of right during the period of forty years ending in 1848. In his note the Sheriff-Substitute says that alternatively the evidence "certainly warrants the inference that such a right of way existed for the prescriptive period prior to 1868." In reaching this conclusion the Sheriff-Substitute did not commit the error attributed to him by the pursuer's counsel of dividing the evidence into watertight compartments and considering each separately. It appears from his note that he considered the evidence from beginning to end as a whole. I hesitate to differ from the Judge of first instance who saw and heard the witnesses, and who also visited the ground in company with an expert on each side—a competent though somewhat unusual proceeding, the purpose of which, as explained by Sheriff Dove Wilson, Practice in the Sheriff Court (3rd ed.), p. 273, is merely to enable the Judge to understand the evidence. But I cannot bring myself to hold that the evidence applicable to the period prior to 1868, of which very little applied to an earlier date than 1848, justifies the inference of continuous public user for forty years commencing in the year 1828. The practical result of such a finding would be to decide the case in favour of the defenders, as it would be hopeless for the pursuer to demonstrate from the evidence that a right-of-way existing in 1868 had been lost by continuous non-user during forty years. I should be slow to draw an inference in fact which would have the effect of reversing the usual consequences of *mora*, and which would make the pursuer and not the public suffer for the delay in bringing the question to judgment. While I differ from the learned Sheriff-Substitute as to the inferences which ought to be drawn from the evidence of the defenders' witnesses, I do not differ from him in his views as to the import of their testimony and in his estimate of its value. His substantial ground of judgment—continuous public user for more than sixty years prior to the raising of the action—remains, and it lies upon the pursuer to displace it by showing that the Sheriff-Substitute has fallen into some error in his treatment or appreciation of the evidence. The pursuer's counsel have criticised the evidence with conspicuous ability, but their criticisms, though in certain points unanswerable, did not undermine or shake my confidence in the substantial and honest character of the case so laboriously built up by the defenders.

The salient feature of the present case is one which, in my opinion, does not admit of dispute, viz., that from the earliest date referred to in the evidence down to the year 1868 numbers of persons, including both residents in the locality and strangers coming from a distance, regularly walked over the moors to the markets at Tarland from the Glen of Cushnie, and returned by the same way. These persons came by various routes, but they all led to the point N which is situated on or near the north-west march of the property now known as Westtown. Two questions then arise — (1) Have the defenders sufficiently proved that this traffic passed from T1 and T2 to N substantially in the lines affirmed by the Sheriff-Substitute? and (2) Have they further

proved that from the point N the traffic reached Tarland by passing first through Westtown and then through Douneside substantially as found by the Sheriff-Substitute? As regards both these questions, as also in regard to what happened from 1868 onwards, the pursuer's counsel subjected the evidence of the defender's witnesses to a rigorous and minute criticism, which if accepted as a reasonable method of dealing with evidence would make it almost impossible to establish any right-of-way in Scotland. Indeed, every word of the opinion of the Lord Chancellor (Loreburn) in *Kinloch* v. *Young*, 1911 S.C. (H.L.) 1, might appropriately be repeated in the present case. I attach especial importance to the fact that the Judge of first instance both visited the ground and heard the evidence, because one of the chief complaints of the pursuer's counsel was that the defender's witnesses were either too vague and general as to the precise route which they travelled, or that if they spoke with precision they did so with the help of a plan which by its marks and lettering suggested the answer which the examiner desired to elicit. Even an intelligent witness with an accurate memory may find it difficult without the help of a plan to give an intelligible and definite description of a complicated route over moorlands, woodlands, and fields. The Sheriff-Substitute was in a much better position than we are to decide whether the use which was made of the plans by the solicitors on both sides was in the circumstances fair or unfair, and was of a kind which added to or detracted from the value of the testimony. Again, his knowledge of the ground would throw light upon evidence which, as printed, may appear to be very indefinite. Another point of attack was in regard to the persons who found their way to the point N in going to the Tarland markets. How can we be sure that any individual who did not himself appear and say so in the witness-box ever walked the whole way from T1 and T2 by one or other of the routes in question? He might have come across country or by some other track, and joined the route at any point between T1 and T2 on the north and N on the south. In some cases local men deponed that they had walked along one or other of the routes from end to end, but they were characterised as members of a "family party" or of a "stage army." There are only a few farms in the Glen of Cushnie, and accordingly the number of witnesses who could speak to using one or other of the alleged rights-of-way from end to end was necessarily limited, more particularly seeing that the importance of Tarland as a local centre for markets, &c., has very much diminished in recent years. In addition to a respectable body of witnesses who speak to having themselves used one or other of the routes for the purpose of end-to-end traffic, there is a large body of testimony to the effect that both "Cushnie people" and also complete strangers were in the habit of walking along the routes on their way to and from the markets. It is not reasonable to criticise such evidence on the ground that a witness is either unable to recollect the name of any Cushnie man whom he saw using the road, or if he does remember, mentions one of the limited group to whom I have referred. Lastly, the Sheriff-Substitute was entitled, in my judgment, to attach weight as he did to the testimony of a number of witnesses who had never traversed either route from end to end, but who had used longer or shorter sections of one or other. No amount of such evidence would by itself establish a public right-of-way, but in conjunction with the more direct testimony to which I have referred it is of value as proving the existence of the various parts of an available and recognised route which the public could use if they wished to go on foot from Cushnie Glen to Tarland. In the present case evidence of this kind made it impossible for the pursuer's counsel to argue that there ever existed any effective obstruction at the point M where the route crossed an ancient double dyke which since 1868 has formed the march between Westtown on the north and Douneside on the south. Similar evidence demolished the suggestion that since the year 1868 the public could not use the alleged right-of-way without climbing a wall at the point O. After weighing the evidence as a whole, my verdict is that its cumulative effect is irresistible as regards the continuous use by the public as of right of the routes from T1 and T2 to N for many years prior to 1868. As regards the line which the traffic took from the point N to the village of Tarland during this period, it is, I think, conclusively proved that the bulk of it went down the farm road to the point F, which was at that time the site of the farmhouse of Westtown. I do not believe that many foot-passengers took the roundabout way N E D as suggested by the pursuer. Having reached the farmhouse at F, a foot-passenger could either go south-westwards to D and reach Tarland by the route F D C B A, thus avoiding altogether what is now the pursuer's property, or he could go southwards by the more direct route F M H B A, which passes through the pursuer's property from M to B. The road A, B, must always have been the access from Tarland to Burnside (now Douneside), and its continuation B C D must always, I suspect, have been used as a rough cart access from Tarland to Westtown and to certain other farms. These farms, as also Burnside and Westtown, were until 1868 in the ownership of a Mr Adam, who bought them in the year 1841. Between 1841 and 1848 Mr Adam made a proper road along the line B C D. He also erected a double dyke between the farm of Westtown and that of Burnside, which after 1868 formed the march dyke between the properties. He thus compelled any cart traffic which came to F *en route* for Tarland to go by his new road. It is proved, however, that foot-passengers refused to take this longer route and persisted in following the shorter route which crosses the dyke into Burnside at the point M. Admittedly this dyke never formed an effective obstacle to traffic, and at a later period (after 1868) steps were provided. Accordingly I hold it proved that for some twenty years before

1868 the public regularly and continuously passed on foot through what is now the pursuer's property in going and returning between Tarland and the points T1 and T2 by one or other of the routes described in the Sheriff-Substitute's interlocutor. In this user there was nothing suggestive of tolerance.

As regards the period after 1868, the whole situation was changed by the sale and consequent division of the property which from 1841 had belonged to Mr William Adam or his testamentary trustees. In 1868 Westtown was bought by Mr Reid's predecessor in title, and Douneside by the predecessor of the pursuer. The farmhouse of Westtown was shifted further to the east and the road N F was ploughed up. But the public coming on foot from the hill path did not, in my view of the evidence, even then adopt as their regular route to Tarland the devious way through the right angle N E D over what was then a different estate. On the contrary, they insisted on making their way through Westtown to the point M, and thence through Douneside by the old route. In order to get to M they began by keeping the original course N F M, but they afterwards regularly followed a more direct route which commenced at the point O. From O they walked straight down to the new farmhouse at G and thence to the march at M. It may be imagined that this alleged deviation of the route from the course which it had formerly followed as it traversed the lands of Westtown met with hostile criticism at every point, but in my opinion the attack was unsuccessful. I have already referred to the suggestion, of which a great deal more was made in the argument than at the proof, to the effect that until about 1900 there was no opening at the point O available for the passage of the public from the hill path into Westtown. The great weight of the evidence is to the effect that there was nothing at the point O which obstructed the free passage of the public. The pursuer further led some evidence to the effect that Mr Ross, the purchaser of Douneside, prevented tramps and some other persons from passing through his property from B to M, and his counsel argued that this discrimination on the part of Mr Ross indicated that any persons who passed through Douneside did so by tolerance. This argument is sound enough so far as it goes, but it is clear that Mr Ross did not effectually interrupt the public traffic through his property, which, on my view of the evidence, continued on the old footing and not on the footing of tolerance. In the circumstances much more active steps would have been necessary in order to prevent the public from acquiring a right-of-way. The defenders have in my opinion proved uninterrupted and continuous user by the public of the right-of-way from Cushnie Glen to Tarland by the substituted route through Westtown, and thence by the old route through Douneside from 1868 to the present time. As I have already stated, the number of persons going from Cushnie Glen to Tarland has diminished in recent years, but the traffic still continues.

The present litigation is one of great importance to the parties, if only on the ground of the expense inevitable in a case where it was necessary for each party to adduce such an unusual number of witnesses. I have therefore repeatedly considered and weighed the evidence upon each side, but I do not think that it would serve any good purpose to state in greater detail my reasons for thinking that each link in a somewhat lengthy chain of reasoning has proved strong enough to bear the strain to which the pursuer's counsel subjected it. It is not necessary that we should fix the date at which, in our view, the public acquired a good right by prescriptive user, but if necessary to do so I should fix a date long prior to the raising of the present action. I accordingly advise your Lordships to recal the interlocutor appealed against, and to pronounce a finding in fact of the kind which a jury would have made if the case had been tried upon an issue in the usual form, viz., that for forty years and upwards prior to 1911 there have existed public footpaths or rights-of-way for foot-passengers in or near the directions of the red lines marked A B H M G O P Y1 W V U S R3 T1 and A B H M G O P Q R, and thence to R2 and T2, and also from R to R1 S R3 and T1 — all leading from the village of Tarland to T1 and T2, being points on the public road in the Glen of Cushnie. As the result of some such finding we should sustain the plea-in-law for Mr Reid in his defences, and the pleas-in-law for the compearing defenders in their revised defences, and refuse the prayer of the initial writ.

As regards expenses, we were told that the Sheriff-Substitute was mistaken in supposing that the pursuer conceded the right of the compearing defenders to expenses as taxed between agent and client. I can find no warrant for any such finding in the language used by the Public Authorities Protection Act 1893. These defenders will therefore be allowed their expenses in the Sheriff Court and in this Court on the ordinary scale. The Sheriff-Substitute's award of expenses to Mr Reid and his findings as to the special debate fee and the skilled witnesses will be repeated.

The LORD PRESIDENT stated that LORD JOHNSTON concurred in holding that with regard to the taxation of the defenders' expenses the Public Authorities Protection Act was inapplicable.

LORD MACKENZIE was absent.

The Court pronounced this interlocutor—

"Recal the interlocutor of the Sheriff-Substitute: Find in fact that for forty years and upwards prior to 1911 there have existed public footpaths or rights-of-way for foot-passengers in or near the directions of the red lines marked A B H M G O P Y1 W V U S R3 T1 and A B H M G O P Q R, and thence to R2 and T2, and also from R to R1 S R3 and T1—all leading from the village of Tarland to T1 and T2, being points on the public road in the Glen of Cushnie, all as shown on the plan No. 19

of process: Therefore sustain the plea-in-law for Mr Reid in his defences . . . and the pleas-in-law for the compearing defenders in their revised defences. . . . : Refuse the prayer of the initial writ, and decern: Of new find the defender Reid entitled to expenses up to the date when said other defenders entered appearance, and thereafter find them entitled to expenses both in the Sheriff Court and in this Court, and remit," &c.

Counsel for Appellant—Murray, K.C.—A. M. Mackay. Agent—R. C. Gray, S.S.C.

Counsel for Respondents—Macmillan, K.C.—C. H. Brown. Agents—Ronald & Ritchie, S.S.C.

HOUSE OF LORDS.

Thursday, May 14.

(Before the Lord Chancellor (Haldane), Lord Atkinson, Lord Shaw, Lord Sumner, Lord Parker, and Lord Parmoor.)

GIBSON & COMPANY *v.* WISHART.

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58)—*Review of Weekly Payment—Date from which Review is Open.*

Where employers apply for a review of the compensation payable by them weekly to a workman under an arbiter's award, on the ground that the workman's incapacity ceased at a date antecedent to the date of the application, at which date they have in fact ceased payment, the review may be, not only from the date of the application, but from such date, subsequent to the antecedent date stated in the application, as in fact it is found that the incapacity ceased.

Donaldson Brothers v. *Cowan*, 1909 S.C. 1292, 46 S.L.R. 920, *overruled.*

On November 4, 1912, George Gibson & Company, shipowners, Leith, *appellants*, applied for review of the weekly payment of compensation payable by them to Peter Wishart, *respondent*, and being dissatisfied with the award of the Sheriff-Substitute (Guy) acting as arbiter, appealed to the Court of Session.

The Stated Case set forth—". . . . The respondent on 11th May 1912 applied for an award of compensation against the appellants under the said Act at the rate of 14s. per week as from 23rd April 1912, in respect of injuries sustained by him on said last-mentioned date by accident to his right hand, arising out of and in the course of his employment with the appellants as a dock labourer. On 5th August 1912 I issued my award, in which I found that the respondent was then totally incapacitated, and found him entitled to compensation at the rate of 14s. per week from and after 23rd April 1912. The appellants paid the respondent compensation in terms of said award up to 24th September 1912. On 4th November 1912 the appellants presented an application for review of the compensation payable to the respondent, and craved me to end the compensation as at 24th September 1912, or diminish the same, or to do otherwise in the premises as might seem proper. They, *inter alia*, averred that the respondent had, since 24th September 1912, completely recovered from his said accident, and was working in England, and earning the ordinary rate of wages there. The respondent averred in his defences that he was at the date of his defences (18th November 1912) still incapacitated as the result of said accident, and was only earning 23s. per week, which was all that he was able to earn in consequence of his injuries. At the diet of proof on 24th December 1912 the respondent's counsel stated at the Bar that he consented to the compensation being ended as at 4th November 1912. The appellants thereafter led evidence. The respondent led no evidence, did not cross-examine the appellants' witnesses, and took no part in the proof. . . .

"I found as a fact that on 24th September 1912 the respondent had recovered complete capacity for work.

"In these circumstances I ended the compensation payable by the appellants to the respondent under the award dated 5th August 1912, as at said 4th November 1912, the date of the presentation of this application for review, and I found the respondent liable to the appellants in expenses. I would have ended the compensation as at said 24th September 1912 had it been competent for me in this application to do so; but I held that it was not competent for me to do so, in respect that by doing so I would be disturbing a decree of Court as at a date when there was no proper application to enable this to be done."

The *questions of law* were—"(1) Was it competent for me to end the respondent's compensation at 24th September 1912? (2) Ought I to have ended the compensation at that date?"

On 28th June 1913 their Lordships of the Second Division delivered these opinions:—

Lord Dundas—. . . The arbiter in declining to end the compensation as at a date antecedent to that of the application proceeded upon the authority of *Donaldson Brothers* v. *Cowan* (1909 S.C. 1292). In that case the application for review, under Schedule I (16) of the Act 1906, was made to the arbiter on 30th December 1908. The arbiter found in fact that the workman had on 24th October 1908 completely recovered capacity, but he ended the compensation only as from the date of his own decision—23rd February 1909—in deference to the cases of *Steel* (1902, 5 F. 244, 40 S.L.R. 205), and *Pumpherston Oil Company* (1903, 5 F. 963, 40 S.L.R. 724). The question of law stated to the Court was whether the compensation ought to have been ended as at the date of the arbiter's judgment (23rd February 1909), or as at the date (24th October 1908) when the arbiter found that the workman's incapacity had ceased. The case was sent to a bench of Seven Judges in order that the two cases mentioned, which decided that compensation could not competently be ended at any