In 1879 the pursuer bought a house in Hallcraig, Lanarkshire. The defender acted as his agent, and prepared the disposition of the property. The articles of roup contained the following clause:—"And it is hereby provided and declared that the exposers shall not be bound to deliver or exhibit searches of incumbrances over the said subjects; but in the event of any incumbrance being found by a purchaser to exist, and of the same being intimated to the exposers within six weeks after date of purchase of said subjects, the exposers shall be bound to purge the said lands and others thereof, and pay the expenses of the searches, or repay the purchaser the purchase price of the subjects, with interest from the date of purchase: Declaring, however, that if no such intimation be made to the exposers within said period of six weeks from date of sale, they shall not be bound to remove any incumbrances that may be found to exist, or to be at any expense in connection therewith." The missive of sale also bore that searches were not to be required at the expense of the sellers, but that if the purchaser made search and found any burdens, and intimated the same, in terms of the articles of roup, then the obligations thereby laid on the sellers should have full effect. The missive was framed and written by the defender. The defender was agent for the sellers, but according to agreement and to save expense he acted for all parties.

In the year 1885 a demand was made upon the pursuer, as proprietor of the subjects, for payment of the principal sum of £30, due to John Nimmo under a bond and disposition in security granted in his favour, dated the 23d, and recorded in the New General Register of Sasines at Edinburgh the 24th, both days of June 1857, extending over said subjects, together with a claim for interest thereon from its date at the rate of five per centum per annum till payment. The total sum due under the said bond and disposition in security was £73, 10s.

This action was brought to have the defender ordained to purge the property of this bond, or alternatively for payment to the pursuer of a sufficient sum to enable him to pay off the bond and interest.

The pursuer pleaded—"(1) The defender having, by his gross carelessness or culpable neglect of his professional duty as law-agent, in carrying through the transaction condescended on, failed in his duty to the pursuer, as condescended on, he is bound to make payment of the contents of the bond and disposition in security described in the summons, and the interest due thereon, and to obtain the record purged thereof, in terms of the first conclusion to that effect. (2) Failing the defender making such payment, and purging the record as aforesaid, the pursuer is entitled to decree, in terms of the alternative conclusion of the summons, in order that he may have the said bond discharged."

The defender pleaded—"(1) There having been no failure of duty, or want of professional skill on the part of the defender, he should be assoilzied. (2) The pursuer . . . . having authorised the defender to dispense with searches, the defender is entitled to absolvitor, with expenses."

The Lord Ordinary (M'Laren) after a proof assoilzied the defender.

"*Opinion.*—Mr Dickson having fully entered into the merits of the case has not removed the impression made on my mind by all the evidence in the case. It is an action against a solicitor to compel him to purge a small heritable property of a bond, and the ground of the claim is that the solicitor failed in his professional duty in not having caused a search for incumbrances to be made which would have led to the discovery of the bond. If this was a case of negligence—if the defender had forgotten to order the search—I should not accept readily an excuse that the client had not called on him to make the search. At all events in such a case I should require very clear evidence that the matter had been explained to the client, and that in the knowledge of his rights he had agreed to dispense with the performance of the duty. But in the present case my view is that the expense of a search was really disproportionate to the value of the property, and that the omission to require searches was not the result of negligence, but was a variation of the usual course of professional business common to larger transactions deliberately resolved upon by the different parties. Mr Macfarlane did not proceed rashly in the matter just assuming that the expense should be kept down, but he was at pains to ascertain whether in any reasonable probability there were existing bonds, and I think the explanations made to him (which were true in fact) were in the case of a property of such small amount sufficient to satisfy a reasonable man that searches might be dispensed with. I therefore fail to see that the advice given was unsound, or such as to render the party giving it liable in damages. If it was sound advice, and if Mr Macfarlane did his best to explain the matter to his client, I think he performed his professional duty. The loss which has resulted is therefore the loss of the pursuer, and he may recover part of it from the party who is liable primarily in payment of the sum secured by the bond. As to what that part may be we have no evidence, and this circumstance would have rendered it difficult for me to give an operative decree if I had come to the conclusion that the defender was liable."

Counsel for Pursuer—Dickson. Agents—J. & A. Hastie, S.S.C.

Counsel for Defender—Wallace. Agent—Alex. Morison, S.S.C.

Wednesday, July 6.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

SCOTTISH RIGHTS OF WAY AND RECREATION SOCIETY (LIMITED) AND OTHERS *v.* MACPHERSON.

Road—Right-of-Way—Character of Use.

In an action of declarator of a public right of way for passengers on foot and horseback, and also for driving cattle and sheep, through a highland glen, brought against a proprietor through whose lands the alleged road ran—*held*, upon the evidence, that the

character of the use was such as to entitle the pursuers to decree of declarator of a public right of way for foot-passengers, and for driving cattle and sheep — *diss.* Lord Young, who was of opinion that the use was to be ascribed to the tolerance of the proprietor.

The Scottish Rights of Way and Recreation Society (Limited), in conjunction with Thomas Duncan of Clova, Kirriemuir, and James Farquharson, at one time a shepherd at Auchallater, near Braemar, raised this action against Duncan Macpherson, of Glen Doll, Cortachy, Kirriemuir, to have it found and declared that there existed a a public road or right-of-way for passage on foot and horseback, and also for driving cattle and sheep, in or near the direction shewn by the red line A, B, C, D, E on a plan produced, leading the said road from the point A or a point near thereto on the public highway between Braemar and Blairgowrie, ascending Glen Callater, and ascending the Glen of the White Water and Glen Doll to the point E or a point near thereto, on the public highway, proceeding down Glen Clova to Kirriemuir, so far as the said road passed through the property of the defender, and that the pursuers and the public generally were entitled to the free and lawful use and enjoyment thereof, for the purposes of passage on foot and on horseback, and of driving cattle and sheep, and that in the particular line and direction above mentioned, or in such line and direction as might be fixed by the Court, so far as the said road passed through the property of the defender, and that the defender had no right to impede or obstruct the pursuers and others foresaid in the said free use, possession and enjoyment of the said public right of way or any part thereof, or of any of these said rights, or to exclude them from access thereto. There were further conclusions for fixing the line of the road at the sight of the Court, and for the removal of all gates, water-fences, trees, and other obstructions in so far as they might exclude free and open access to the road, and for interdict against troubling and molesting the pursuers and all others in the peaceable use and enjoyment of the said road in all time coming.

The line of road began at or near the farm of Auchallater near Braemar, on the Invercauld estate belonging to Colonel Farquharson, being the point marked A on the plan. It proceeded in a south-easterly direction up Glen Callater, through Colonel Farquharson's property, past the point marked B on the plan, entered the defender's property at or near a hill named Tolmount, being the point marked C on the plan, and proceeded down the Glen of the White Water by the route commonly known as Jock's Road, thence down Glen Doll past the shooting-lodge of Glen Doll situated near the farm-steading of Acharn to the farm-house of Braedownie, at about fifty yards westwards from which, at the point marked D on the plan, it left the defender's property and emerged on the public road or highway to Kirriemuir and Forfar, thence proceeding down Glen Clova to the village of Milton of Clova, at the point marked E. It was between C and D, *i.e.*, between Tolmount and Braedownie by way of Jock's Road, that the defender denied the right-of-way. It was admitted that from D to E, *i.e.*, from Braedownie south-east to Milton of Clova, there was a county road. Before the action was raised, Colonel Farquharson admitted the existence of a right-of-way between A and C.

The pursuers averred that for time immemorial the road had been continuously and without interruption used by the public on foot and on horseback as a public road and as a public drove-road for cattle and sheep; that it afforded the only direct means of communication between Braemar and Glen Clova; that it was extensively used by drovers and others in Forfarshire resorting to the Braemar market, and by drovers and others proproceeding from the Braemar market to the Cullow market and other markets in Forfarshire; and that it was the ordinary route by which large numbers of cattle and sheep from Strathspey, Rhynie, and other districts which had been brought to Braemar were taken south to the Forfarshire markets. The defender denied these averments. It was admitted that he refused to recognise the pursuers' right over the road, and insisted on his right to plant trees, and to erect a gate, and keep it locked and refuse all access to the road, and to deal with the *solum* thereof as his own property.

The defender averred that at the point D on the plan at Braedownie, which was near the entrance to the Glen of the Doll, the county road from Kirriemuir terminated, and that the termination of the county road marked the beginning of a well-defined farm road which was believed to be a right of way. That this farm road, which began on the defender's property, proceeded in a northerly direction until it reached the Cald Burn; and that at this point the road divided into two ways, one of which proceeded in a north-westerly direction along the Burn of Towal past the shooting lodge of Bachnagairn and onwards till it reached the lands of Colonel Farquharson at or near the point C, the terminus of the alleged right-of-way on the defender's property.

The pursuers pleaded—"(1) The road libelled having been used by the public as a public road or right-of-way in the manner condescended on for time immemorial or for the prescriptive period, the pursuers are entitled to the decrees of declarator concluded for. (2) The defender having obstructed the public use of said road, in the manner condescended on, the pursuers are entitled to the various decrees concluded for against him."

The defender pleaded—"(1) The pursuers' averments are irrelevant. (2) There never having been any public road nor right of way in the lines claimed by the pursuers, the defender should be assoilzied. (3) The defender's whole actings having been within his legal rights, he should be assoilzied. (4) The pursuers' averment being unfounded in fact, the defender should be assoilzied."

The evidence for the pursuers was as follows:—(1) As regarded the use of the road by foot-passengers for the prescriptive period — No tourist who had walked the road was adduced, but Stuart, a Braemar guide, gave evidence that he had taken people up to the Tolmount, and directed them to go down by the disputed road. The innkeeper, and late innkeeper, of Clova deponed that persons had arrived at the inn who to their knowledge had come by the road in dis-

pute. Two former ministers of Clova deponed to having had the road pointed out to them as a public road, and having used it. One of them had been shown it as a drove road by the late farmer at Braedownie, who was dead.

Lord Southesk, who was lessee of the Glen Doll shootings in 1862 and 1863, and who was proprietor from 1870 till 1877, deponed that he had always understood that the right of way existed.

Mr Gurney, who was proprietor of Glen Doll from 1877 till 1883, deponed that during the period of his ownership there was no road through Glen Doll, but that foot-passengers, sheep, or cattle could pass, and that in consequence he had given instructions that a space outside the infield dyke of Acharn should be left unplanted in order that sheep might pass that way.

It was proved that a bridge at Acharn over the Esk for the public road at Braedownie had been erected by public subscription. It was also proved that there was a milestone on the road to the west of Acharn marked "18 miles from Kirriemuir."

(2) As regarded use by drivers of sheep, cattle, &c.—Witnesses were adduced who deponed to having either actually themselves used the road or to having heard of others since dead using it. This use took place on two occasions in the year, when sheep were driven from Braemar to Cullow to the half-yearly markets. Of these witnesses there were two classes—(*a*) persons connected with the estate of Glen Doll as tenants, &c., (*b*) persons having no connection with the estate. The former spoke to specific occasions of sheep driving, the latter spoke to it at irregular intervals.

In the evidence for the defender it was shown that the tenants on the Glen Doll estate had supplied the drovers passing along the road with refreshment for themselves and fodder for the night for their stock. Since 1879, when the Cullow market ceased, the traffic had also ceased. The defender attempted to show that the Bachnagairn road was the better and superior road.

The Lord Ordinary (KINNEAR) pronounced the following interlocutor:—"Finds that there exists a public road or right-of-way for foot-passengers, and also for driving cattle and sheep, leading from the point A on the plan, or a point near thereto, on the public highway between Braemar and Blairgowrie, ascending Glen Callater and descending the Glen of the White Water and Glen Doll to the point E on the said plan, or a point near thereto on the public highway between Glen Clova and Kirriemuir, and that the pursuers and all others are entitled in time coming to the free use and possession of the said right-of-way so far as it passes through the property of the defender: Continues the cause in order that the particular line and direction of the said road as it passes through the defender's property may be defined; and grants leave to reclaim against this interlocutor, &c.

"*Opinion.*—The road in question is a natural hill pass between Aberdeenshire and Forfarshire. It traverses some very high ground, and is in some parts steep and rugged; but there is no doubt that it is a practicable way for foot-passengers and sheep. I do not think it proved that in its present condition it is a practicable road for cattle or horses. But for foot-passengers and sheep it is a practicable means of transit between Braemar and Glen Clova, and it has been used for these purposes for more than forty years.

"Much of the evidence is too general in its character if it had stood alone to establish a right-of-way. But when all necessary deductions upon this account have been made there still remains a sufficient body of testimony to prove that the road has been used as of right by the inhabitants of the district and others as a means of transit between Clova in Forfarshire and Braemar.

"It is true that the use which has been proved, taking all the evidence together, is by no means extensive. There could be little or no use made of such a pass during the winter months, and even during that part of the year when it was practicable and convenient to travel by it there may have been weeks together without any stranger to the estate making any use of the road. The most important purpose for which it would appear to have been used by persons not resident on the estate was the driving of sheep from Braemar to Forfarshire; and this could not have occurred more than once or twice in any year. Nor does the use for any other purpose, which can be referred to as an assertion of right appear to have been much more frequent. The uses which have been proved, therefore, would probably be altogether insufficient to establish a public right if the road in question had traversed a populous district well provided with other means of communication. But the extent of the use which will indicate right must depend upon the nature of the country and the requirements of the inhabitants. It must be such a use as might reasonably be expected if the way were reputed to be public, and admitted to be so by the proprietors of the land, and I think the use which has been proved is just what might have been expected in such a district. The material point is that the pass through Glen Doll is the natural and direct means of access to Braemar on the one side and Clova on the other. The only road which can reasonably be brought into competition with it—that by Bachnagairn—does not seem to have been used to anything like the same extent; and it does not appear that anybody ever abstained from using it who might have been expected to do so if it had been admittedly public.

"It is said, however, that the evidence is not only scanty, but that if uses which in no way indicate an assertion of right are disregarded, there has been hardly any use, except on very rare occasions, which might easily escape the notice of a proprietor; and in the application of this argument it is said that the use of the path through Glen Doll by the tenants of that estate, and by the tenants on the neighbouring estates, ought not to be taken into consideration. In so far as regards the tenants in Glen Doll this observation appears to me to be well founded. But it does not apply with the same force to the tenants of neighbouring proprietors, nor to persons living in Clova, who, although they might be tenants of the proprietor of Glen Doll, had no occasion to make use of a way through the Glen for the enjoyment of their tenancy. It may be that a proprietor may be disposed to allow his

own tenants, or those of his neighbours, to make use of roads on his estate which he does not throw open to the public. But it does not follow that the use by such persons of such a way as that in question is to be thrown altogether out of consideration. The greater part of the population in such a district must be tenants either of the proprietor whose land is traversed by the alleged road or of his neighbours. It is true that the use of a road by farmers or others living on the line of road exclusively will not prove a public right, because it does not prove that the road is used as a means of communication between two public places. But it may still be taken into account along with other evidence, although it is in itself the use of a part only, and not of the whole line of road, of which it is necessary that a public use should be proved. The question is, whether such use as has been proved, taking all the evidence together, is to be ascribed to tolerance or to the assertion of a right?

"But the most important evidence of any specific use of the road is that by drovers and cattle-dealers who were accustomed to take sheep which had not been sold at the Braemar market to the market at Cullow in Forfarshire. This use alone would probably be sufficient to establish the pursuers' case, because it cannot be explained by tolerance. It is said to be obsolete, because the market at Cullow has been discontinued. But there is nothing to show it may not be resumed; and if it were certain that this particular use was now at an end, that would not affect its value as a piece of evidence to show that during the period of prescription the road had been resorted to by the public, and not merely by privileged persons.

"Taking the whole evidence together, I think there is enough to show that there was such a use of the road by the inhabitants of the district generally, in the course of their ordinary avocations, as to infer a public right. I do not think it possible to ascribe this use to tolerance. There can be no question that the pass through Glen Doll was generally reputed to be a public right-of-way. Those who used it did so because they believed they had a right to use it. There is no evidence that anybody ever asked leave of the proprietor of Glen Doll to use it. And it is certain that there is no room for the suggestion of tolerance during the ownership of Mr Gurney and of Lord Southesk, because they both of them say that they believed that there was a public right of way through their property. It may be that they did not feel the public use to be at all burdensome, and they might have been willing to submit to it irrespective of right. But their evidence shows that they did not understand that they were tolerating a use which they might put a stop to; but they, as well as the inhabitants of the district, believed they had no right to object. There is a material piece of evidence to the same effect, but of much earlier date than the ownership of Lord Southesk—the evidence of a witness named Ogilvy, who was examined on commission, and who speaks to the objection entertained by his father, who was a tenant in Glen Doll, to the use by the public of the road through the Glen, and says that his father was desirous to put a stop to it, but became satisfied that there was no use in attempting to do so, because there was a public right of way. There is some real evidence in the same direction, because the construction of the bridge at Acharn by subscription indicates a belief on the part of the subscribers that the public had an interest in the access to Glen Doll. Although I do not think there is evidence of the use of the road by cattle to any material extent, it does not seem necessary to qualify the terms of the declarator on that account, because it would be within the public right to use it for cattle if it be a drove road for sheep.

"It does not appear to me to be material to the question of right that sheep-drovers in coming through Glen Doll were at one time in the habit of crossing the stream which runs through the Glen, and taking the south side, and afterwards were more in the habit of keeping to the north. But there is a question as to which the parties are not agreed—whether the line of road should now be laid down on the north or on the south? Both parties, however, agree that the question of right should be finally determined before the line is definitely fixed, and I have therefore granted leave to reclaim."

The defender reclaimed, and argued—The evidence adduced to establish a public right-of-way here was not of the quality or extent which the law required. Indeed, a fair criticism to make upon it was to say that if the right of way Society intended to raise their action on this sort of evidence, there was a great danger that proprietors in their own interests would in future shut up from the public access to walks within their policies which formerly they had been glad to throw open. It was a striking fact that in an action raised in the interest of the public pedestrian, no tourist had been brought forward to give evidence of having walked the road in question. It was an exhaustive description of the evidence to say that it related to the driving of sheep from Braemar to Cullow, and was limited to the contingency of drovers failing to sell their stock at Braemar. An examination of the evidence on this point showed (1) that the driving of sheep was limited to persons who belonged as tenants or otherwise to the Glen Doll estate; (2) that when drovers unconnected with the estate used the road on their way to or from the markets, they received, as of tolerance, refreshment from the proprietor's servants or his tenants, and their stock were also foddered for the night. This was just gratuitous giving of lodgings for the night, and could hardly be ascribed to assertion of right. It was not enough otherwise to show that persons had occasionally seen people going along the road, and the same might be said of the hearsay evidence of dead persons. The road was not even the most direct and convenient road to Braemar, the Bachnagairn road not being so steep. Even the guide who was adduced deponed that he had never travelled the whole of the road in question. The evidence of witnesses who spoke to driving their sheep from the neighbouring farms was of no importance. They did not use the road as of right, and their use was of a sporadic and scattered character. A great deal of the traffic was just that of the proprietor. Since the market at Cullow ceased in 1879 there was no evidence of use. There was then nothing like the habitual resort to market by people of the district—the use was a contingent and occasional and not a systematic one. The next question, then, was *quo animo*

was the practice suffered by the proprietor? Was it to be inferred from a man's allowing people to pass through his property occasionally that there was assertion of right? The defender could have no possible interest or reason to object. Indeed, he would have acted harshly and oppressively if he had done so. The whole evidence, then, only related to a practice which must on every view of it be ascribed to tolerance.

The respondents replied — The question for the Court here was, whether upon the evidence the use of the road was as of right, or was to be accounted for by mere tolerance? Taking the road as a public one by tradition, was the traffic proved of such a character as to indicate a public road?—*Napier's Trustees* v. *Morrison*, July 19, 1851, 13 D. 1404; *Mackintosh and Others* v. *Moir*, February 28, 1871, 9 Macph. 574. The nature and character of the country through which the road ran was undoubtedly to be considered, and the Lord Ordinary had taken this view. The road was the natural and only direct one for those going from Braemar to Clova, and was no steeper, except at Jock's Road, than Bachnagairn. All the pursuers' witnesses said that they considered it a public road. The point most relied on by the defender was that the use of the road seemed to be confined to drovers driving sheep between the two markets. It was very natural that the drovers should mention having seen people connected with the Glen Doll estate using the road, for they would be just the persons best known to them, and therefore most likely to be noticed by them, but they all said further that they frequently saw others using the road whom they could not identify. But the evidence was certainly not to be attributed to these two markets, for it was most clearly proved that the use was habitual at other times. The point made about supplying the drovers, as of tolerance and good neighbourhood, with refreshment must be discounted. It was ridiculous to say that there was no right of way because refreshment had been given. Though no tourist had been adduced, yet there was ample evidence that many were seen using the road. The guide at one end of the road said that he had directed pedestrians to the road, and the innkeeper at the other end said he had received them. If the road was a public one, then the fact that the market at Cullow had ceased to exist did not affect its character—*Duke of Athole* v. *Torrie*, June 3, 1852, *per* Lord Ivory, 1 Macq. 70; *Marquis of Breadalbane* v. *M'Gregor*, July 14, 1848, 7 Bell's App. 61. There were also two pieces of real evidence in support of the pursuers' contention in the bridge at Acharn and the milestone. On the whole matter the traffic proved was in no sense to be ascribed to mere tolerance. It amounted to an assertion of right by the public.

At advising—

Lord Justice-Clerk—This case raises a question of some importance in regard to rights of way. The Lord Ordinary has sustained the right of way, and has given decree accordingly, and I have come—though not without difficulty, for I think the case very narrow, and in some respects an exceptional case on this branch of the law—to concur with the views which the Lord Ordinary has very clearly expressed in his note. The territory through which the supposed or alleged right of way exists is a stretch of 14 or 16 miles in the northern part of Aberdeenshire, running from Castleton of Braemar in the north-west to the vicinity of Kirriemuir, in Forfarshire, on the south-east. The nature of the ground through which this right of way is said to exist is rough and steep, rising to a summit at about the centre of the road about a thousand feet above the level of the sea. It is an unformed road as far as metalling or any care of that kind is concerned, but it is a distinct track and perfectly well known. It is said to have been used without challenge for more than the prescriptive period, and certainly it has been used for that period, and without challenge. Whether the public have used it in the sense necessary to create a right of road in the public is really the question that is raised here.

Now, it must be conceded, and is conceded both in the argument and by the Lord Ordinary in his note, that the public use is more slender than generally takes place in a case of right of way. But one reason for that is that it is in a district of country not over-populated, wild, and remote, and that the use which has been made of this road is one adapted to the characteristics of a country of that kind—namely, for driving sheep—for that is the main use that has been made of it—from Castleton of Braemar—where there is a market—to Kirriemuir, where there is also a public market held twice a-year; and the nature of the use is, without going into details, that from time immemorial it has been the habit, or rather had been the habit, of the persons in the district to use this mode of transit from the one market to the other. These markets were public markets; and if the nature of the use has been sufficient and sufficiently long continued to amount to the assertion of a right, I think that is a sufficient use of the road to justify the decree that has been given. Whether it is so or not is the real question which we have to consider, and as I have already said, I concur with the Lord Ordinary that a use such as I have described is a sufficient use, uninterrupted and unchallenged, to found the right contended for by the pursuers. The Lord Ordinary has gone very fully into the general facts of the case. I entirely agree with him, and I do not think it necessary to say more than that I concur in his judgment.

Lord Craighill—I think the Lord Ordinary is right, and I concur with him in the result as well as in the reasons which he has presented in support of his judgment, that from time immemorial there was a road in the line of that which has been claimed by the pursuers. Nor has there ever been any opposition or obstruction to the right. The defender two or three years ago blocked the way by a gate. That of itself is a strong consideration in favour of the view which the Lord Ordinary has adopted. But I do not rest my opinion upon presumption. I think the evidence has established certain facts which are conclusive of the question. In the first place, the use of the road has, I think, been established, and that use has not been confined to those who lived on the ground or near to the road, but has been taken by others who were strangers to the neighbourhood. It is said that many of those who used the road were farmers upon

the lands over which the road was carried, and their servants and visitors, and that these witnesses should be put out of account in considering what is the use which has been made of the road. If these witnesses had used only a part of the road, this consideration would have been material, it would undoubtedly have diminished the value of the testimony of those witnesses. But when we find that they used the road from end to end, one part in going one way, and the other part going in the other direction, thus traversing ground which in part was not the property of the landlord, I think the use had by them of the road as a whole is available to the pursuers in proving the right of way over this road. For one thing, it shows certainly the need for such a road, as well as that the road was used. Without this road the witnesses referred to might have travelled from their farms to Forfarshire on the one side and to Aberdeenshire on the other, but they could not have gone from the one shire to the other without the public road. In the second place, however, that by which I am most impressed in the use of the road is its use as a means of communication between Braemar market and the market at Cullow. These markets were separated in point of time only by two or three days, and the course followed by cattle-dealers was to take the stock which remained unsold at Braemar across the country to the coming market at Cullow. The defender treats this part of the evidence as if the use was only that of an individual. In my opinion it is the use, not of an individual, but of a class—that is to say, of the public. Those who went to the first market, arranged, if necessary, to go to the second, taking their unsold stock with them. What the number of men or animals might be depended on circumstances. Sometimes it would be comparatively large, at other times comparatively small, but all arranged for the use of this road were its use required. Now, this seems to me to be inconsistent with the notion that the road was used as if it were a matter of tolerance. Such a use of the road is only to be explained by the repute of the road as a way open to the public. Much has been said by the defender as to the small number of those by whom the road was used. Everything of course is relative, and it appears to me that, according to the evidence, as much use has been proved as could reasonably have been expected. No tourists who went by this road have been examined, but that there were tourists as well as others unconnected with neighbouring farms or with markets who used this road is, I think, amply proved. Guides went with them to a certain point and showed them the way beyond, and on all occasions the way by which they were taken was held out and was taken to be a road which was open to the public. There is also the real evidence afforded by the bridge and milestone.

On the whole matter, looking to the extent of the use, and looking to the character of the use, especially by those who used it for public market purposes, I am satisfied that this road, which has existed from time immemorial, has for more than the prescriptive period been used as, and in fact was, a public road.

Lord Rutherfurd Clark concurred.

Lord Young—The question before us is one of fact, and as the Lord Ordinary has an opinion—not a strong opinion—on that question of fact, and as all your Lordships agree with him, I can have no confidence in my own opinion on it, which, however, I am bound in duty to say is different. I think the right of road has not been established.

The conclusion of the action is for declarator that there is a right of road for foot-passengers, horses, cattle, and sheep in a certain direction through the defender's property, as part of a road between two admittedly public places. There is no ground for declaring that alleged public road unless we find it in the proof of the use. We know very well that there are many public roads in the country—old, well-recognised public roads—the origin of which we are entirely ignorant of, and regarding which there is no evidence at all that that they are public roads except that they have always been regarded and used as such; and that is really the nature and character of all cases of this description, where the party affirming the right of way appeals to use. It may be appealed to, as I have said, with respect to the oldest and best recognised public roads in the country. Now, there has been some use, no doubt—usage of a passage along the line in question, particularly twice a-year, and that at a bygone period, because the occasions for passing there twice a-year have now and have for a while ceased to exist, and the question, as the Lord Ordinary rightly puts it, is whether such use as has been proved, taking all the evidence together, is to be ascribed to tolerance or to the assertion of a right. The only criticism I make upon that is that I should add to the words "assertion of a right" these words, "understood as such and and assented to by the owner of the soil."

Now, my opinion is that there has been no use here which, upon the assumption of the total absence of right, I should have expected any ordinarily reasonable proprietor to interfere with. It is a remote part of the country, where there is very little passage, and that is a consideration which tells both ways—it is a circumstance which turns in favour of the one side in one view, and in favour of the other side in another view. The Lord Ordinary says the uses which have been proved would probably be altogether insufficient to establish a public right if the road in question had traversed a populous district well provided with other means of communication. Well, twice a year farmers in that neighbourhood, occupying farms upon the property through which the line runs—it is not yet defined, and indeed this case is continued in order that the line, which is not definite now, may be defined by the Lord Ordinary—but twice a-year farmers used the road in taking sheep to and from market. And, as Lord Craighill has observed, when sheep were not sold at one market they were brought along this line to another, this line being the shortest way to that other. We have evidence that persons driving these sheep upon these rare occasions were hospitably entertained by shepherds having houses or huts in the neighbourhood. They were provided with lodgings and with food, and the sheep were allowed to pasture. That was nothing but good neighbourhood, exactly what I should have expected upon the assumption that

there was no right of way existing; none asserted, none recognised—nothing but ordinary good feeling and good neighbourhood appealed to. If that be the correct view, I cannot ascribe that to right which may be and is reasonably accounted for, not by any exceptional goodness, but to the mere fact of a disposition to prevent others from taking a use which does no harm, and which is so infrequent as, even at the period when the most frequent use was made of it, not to exceed twice a year.

It is, I should think, very far from being in the interests of those who wish to maintain public rights of way to proclaim to all landed proprietors of hillsides and barren country—"Now remember, that—although people are doing you no harm by taking this occasional use of your property, really affording society to your people who live in this remote and out-of-the-way place, and who are willing to afford hospitality to them—although it will do you no harm, although even a tourist wishing a picturesque view, climb up a hillside without you even knowing it, certainly doing you no harm, and with which a good-natured man would not interfere—unless you set watchers, unless you take precautions to prevent it, there will be a public right-of-way established and declared which will eventually prejudice you in the event of your desiring to use your property in a way which this would interfere with." I should think that a very undesirable proclamation to make to all landed proprietors, and, besides, we must have some consideration for this, that to watch a road over a barren country, extending to 14 miles, to turn off trespassers—assuming them to be trespassers—is entirely out of the question. You cannot do it, and what I proceed upon here, therefore, is that there was a very occasional and rare and harmless use made here, such as no ordinary proprietor or tenant would under ordinary circumstances dream of interfering with, and that if the character of a public road depends upon usage, assertion openly made and openly assented to, that there is no such case established here. I therefore not only think that the case is narrow in the sense of there being very little usage, but that there is no evidence of usage at all, or, I should say, evidence of very little. So far as my judgment goes I think the conclusion that by such evidence a public right is established is absolutely hurtful and prejudicial to the public, because it will set all proprietors upon their guard to stop innocent, and to them perfectly harmless, use as the only way in which they can prevent a public right being established. The Lord Ordinary, in the passage which I have already read, says the question is whether such use as has been proved is to be ascribed to right or tolerance by the proprietor. Why is it not to be ascribed to tolerance? Does anybody think that an ordinary proprietor would have objected to it, or interfered by applying to a court of law to prevent it on any of the occasions referred to? He would have got a very bad character among his neighbours, and I think deservedly so. And why? Because he was intolerant. But if he is not intolerant, and does not appeal to a court of law to stop what is affording innocent amusement, however rare and occasional, to some, and also convenience, also very rare and occasional, to others—if he is not intolerant, and does not appeal to a court of law—he is to be told: "It is not toleration at all, it is matter of right, and the use you may think right hereafter to make of your property will be interfered with by declaring a public right along a particular line. The absence of intolerance on your part shall not be ascribed to tolerance, but to a right asserted and yielded to." I think it right to make these observations because they are expressive of the opinions and views that press upon my mind, although I repeat what I began by saying that the question is one of fact, and your Lordships agreeing with the Lord Ordinary have given an answer to it. I can have no confidence in my own opinion to the contrary.

The Court adhered, and remitted the case to the Lord Ordinary for further procedure.

Counsel for the Reclaimer—Sol.-Gen. Robertson—Asher, Q.C.—Cosens. Agents—Tait & Crichton, W.S.

Counsel for the Respondents—Graham Murray—W. C. Smith—A. S. D. Thomson. Agent—Andrew Newlands, S.S.C.

Friday, July 8.

FIRST DIVISION.

THE COUNTY ROAD TRUSTEES OF THE COUNTY OF THE LOWER WARD OF LANARK *v.* MAGISTRATES OF GLASGOW AND OTHERS.

Road—Bridge partly in a Burgh and partly in a County, and Accommodating Outside Traffic—Liability for Maintenance—Roads and Bridges (Scotland) Act 1878 (41 *and* 42 *Vict. cap.* 51), *sec.* 88.

In the case of a bridge which was locally situated partly in a county and partly in a burgh, and which accommodated traffic from an adjoining county and an adjoining burgh, *held* that under the 88th section of the Roads and Bridges (Scotland) Act 1878 the Secretary of State had power to determine, if he saw fit, that the bridge should be deemed to belong in common to the two counties and the two burghs, and to apportion among them, in such way as he should think right, the expense of managing, maintaining, repairing, or rebuilding the bridge.

Right to Participate in Management.

Held that the two districts within which the bridge was not locally situated were entitled, as they were liable for its maintenance, to be represented in its management.

On the line of the Dalmarnock Road, between the city of Glasgow and the burgh of Rutherglen, the river Clyde was crossed by a bridge called Dalmarnock Bridge. The northern half of the said bridge was locally situated within the burgh of Glasgow, and the southern half was situated in the county of the Lower Ward of Lanark. The bridge was in a bad state of repair, and, owing to its construction and condition, required to be replaced by a new bridge. The County Road Trustees of the Lower Ward of Lanark applied