SUMMER SESSION, 1888.

HOUSE OF LORDS.

Monday, May 14.

(Before Lord Chancellor (Halsbury), Earl of Selborne, Lord Watson, Lord Fitzgerald, and Lord Macnaghten.)

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

(*Ante*, July 6, 1887, 24 S.L.R. 629; 14 R. 875.)

Road—Right of Way—Evidence of Public Use.

In an action of declarator that there had existed a public right of way for passengers on foot and on horseback, and for driving cattle and sheep through the Glen of the Doll in Forfarshire, it was proved that the pass formed the direct and natural access from Clova to Braemar, and that from time immemorial there had existed a well-known and well-defined track through the glen; that there had been a practice of drovers taking sheep by this track from the public market at Braemar in spring and autumn to a public market near Kirriemuir; that the track had been used by farmers in the district going to Clova or to Braemar, and occasionally by tourists going between these places; that there had been a repute in the district, both among the public and the proprietors of the ground over which the track passed, that there was a public right of way.

Held, on a consideration of the evidence (*aff.* judgment of the Second Division), that the use proved was, having regard to the nature of the district, sufficient in amount, and that it was to be attributed not to tolerance but to the assertion of a public right.

This case is reported *ante*, July 6, 1887, 24 S.L.R. 629, and 14 R. 875.

Macpherson appealed.

At delivering judgment—

The LORD CHANCELLOR—My Lords, looking at what has been said by Lord Young in this case, and at what has been the course of the evidence, if I had been unable to find an answer to the question which his Lordship has propounded, I certainly should have desired to hear the respondents in this appeal, but in considering the evidence which has been brought before us I should very much regret that upon what is after all a pure question of fact I should differ from such a large majority of the learned Judges—the Lord Ordinary and the majority of the Judges of the Court of Session—who had the facts before them, who must be very much better acquainted than I can be with the habits and practices of the country, and who are such very distinguished representatives of it.

My Lords, the question, in the mind of an English lawyer, is not only whether he can, on proper judicial evidence, determine that there has been an exercise of such a right of way as is here in question, but whether he can reasonably infer from that that the owner had a real intention of dedicating that way to the use of the public. That, however, is not the law of Scotland, and if it can be established that for the necessary period there has in fact been such a use of the way as negatives a mere licence or permission, then, as I understand the law of Scotland, that establishes absolutely the right of way in question.

Now, I have said that a question is put by Lord Young to which if I were not able to give an answer I should feel that the respondents ought to be able to furnish it to me. Lord Young, quoting the Lord Ordinary, says—"The question is, whether such use as has been proved is to be ascribed to tolerance or right. Why, I ventured to ask," says Lord Young, "is it not to be ascribed to tolerance? Does anybody think that an ordinary proprietor would have objected to it, or interfered with it by appealing to a court of law to prevent such use of it upon any of the occasions which have been referred to? Why, he would have been thought very ill of by his neighbours, and I think deservedly." Now, I say that if no answer could be given to that question I should take a different view from that which I have been at last compelled to take. But when I look at the evidence I find that besides the occasional and rare use of the way by

persons who would properly come within the ambit of Lord Young's observations, there are a set of facts which I think are not reconcileable with what his Lordship refers to as kindliness and good neighbourliness. If there is one fact more than another which stands out, as I think, clearly established by the evidence, and not qualified by any cross-examination, it is this, that upon this road from Braemar to Glen Clova there were at least two occasions in every year, and for a very considerable period, when those persons who had not been able to dispose of their sheep at Braemar made a regular, well-known, and ascertained practice of bringing those surplus sheep which they had not been able to dispose of at the Braemar market to the other market.

Now, I ask myself this question, whether in the first place I can infer from that state of facts that the proprietor was aware of what took place, I cannot doubt that dealing with such public rights and such public matters as the markets which persons in the neighbourhood were in the habit of going to and coming from, it would be almost impossible but that the proprietors would become acquainted with that practice. And the second question immediately follows, whether if he was aware of the long-continued and well-settled practice which was going on from year to year (not through the whole year of course, because the occasions did not arise, but on two ordinary and settled occasions in every year) the proprietor would, on the footing of its being a mere licence or permission, be likely to stand by and allow the right, which he must know would very probably be established by such constant user, to be established without interference or remonstrance on his part. My Lords, I have come to the conclusion that it would be impossible to sustain that contention. However goodnatured the proprietor might be, and however desirous of assisting his neighbours, I think he would desire to protect his rights by insisting upon some record of his rights, or some way of showing that what was being done was by his licence and permission, and not as of right; but I look in vain throughout the whole of this evidence for the least intimation of any effort on the part of the proprietor to impose upon those persons who were using this road, which was a wild mountain road, and one unfrequented no doubt on ordinary occasions, any kind of hindrance which could be removed by his permission.

Under these circumstances, my Lords, I cannot but feel that the observations made by the Lord Justice-Clerk and Lord Craighill are well founded; and apart altogether from what I should certainly regard as absolutely insufficient to establish any such right, namely, the evidence of the occasional and rare use of this road by travellers passing through, or botanist excursions, or the use by friends and neighbours, who are clearly proved to have used part of the road, and might very well be supposed to use that part of the road without any supposed right to traverse it from end to end, apart from all that class of evidence, to which I think Lord Young's observations apply with great force, I cannot reconcile this market user, which was of necessity from one end to the other, because it was from one market to the other, and which was continuous from year to year on the particular occasions whenever a market was held, with anything but the existence of a public right, and under those circumstances I move your Lordships that the judgment of the Court below be affirmed, and that the appeal be dismissed with costs.

Earl of Selborne—My Lords, I entirely agree, and I am so well satisfied with the reasons given by the majority of the Judges in the Court below and by the Lord Ordinary that I do not think it necessary to say more than a very few words.

It appears to me, in the first place, that 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, and that being so, I think it would be rather alarming if without evidence of some kind to counterbalance the impression so made the evidence given were held insufficient, because it would follow from that that practically under such circumstances no amount of evidence at all would establish such a right. Well, is there evidence to counterbalance it? I own that I think there is none.

Now, when you have the fact of user of a road of this description in the manner and to the extent which would be the natural consequence of its being a matter of public right, and that fact proved by a sufficient amount of evidence, how is that to be met? According to the well-known text of the civil law a claim of right of this kind will be repelled if it is shown to have been enjoyed either *vi* (which is out of the question here, for certainly there has been no force) or *clam* (which I think is equally out of the question, for whatever use there was was so public that it must have been known) or *precario;* and that is the real question here. What is suggested by Lord Young is that it is consistent with the evidence in this case that what was done should have been done *precario*—that is, by sufferance, by virtue of leave and licence from time to time on each particular occasion, to those who would otherwise have been trespassers. Now, I confess that upon such evidence as we have here I think that is a strong proposition unless there are some definite facts brought forward in support of it. When I speak of "such evidence as we have here," I refer more particularly to those things which are most unequivocal, that this passage has taken place along a definite track (I think the evidence shows that even at the point where it is least definite, namely, towards the summit at Jock's Road, the boulders have been cleared away, and there is a sort of ladder or staircase in the rock, such as most people are familiar with in very mountainous districts and countries) from one public terminus to the other public terminus, there is a known line of passage and a definite track. It is not as if people make their own way, one in one direction and one in another; but the evidence appears to me to show without controversy or contradiction that this is a definite passage between one public terminus and another, which according to the law of Scotland is necessary to make a public way; it must be a sufficiently definite track. Then, in the next place, although except at certain periods and for certain purposes the use of it may be so casual that if that had

stood alone it might have been insufficient to make out the right, yet the very periodicity and the nature of the purposes which at those periods caused the use of it to take place, give emphasis to all the other circumstances as calculated to call the attention of the proprietors and occupiers to the matter, and to lead either to interference or to definite permission if the thing were not of right. And I may mention (not supposing that so remarkable and conspicuous an instance frequently took place) the evidence which is not controverted about the several droves of sheep which several diffierent persons took over the pass in 1875. It seems to me that that alone must have brought the parties into a sort of conflict with each other, and have led to an understanding whether the thing was to go on upon the footing of a right or otherwise if it had been really challenged.

My Lords, I then ask the question, Whether there has been any leave or licence or tolerance or sufferance, regarded as a question of fact. Is there any evidence whatever given in support of an affirmative opinion? Absolutely none. I find from the beginning to the end not a trace of such a thing, not only not proof of there having been any act which would fairly have had that meaning, but I do not find the least trace of its having been suggested or thought of by anybody. On the contrary, it is to my mind fully proved both that the parties who used this road understood themselves to be doing so as of right without its necessitating anybody's permission, and that the occupiers and owners, at least for a very considerable time from the present (though perhaps not enough by itself to have established a right), understood that to be so, acquiesced in it, and themselves acted upon that supposition. There were several instances. I will not insist upon them as enough to establish the thing, because the dates of them may be too recent. There was the soliciting of public subscriptions, and the obtaining of them, for a bridge in which the public would have had no interest whatever except upon the supposition that this was a public right. Then when one of the owners planted a certain place a space was left on purpose for this road, clearly because it was a public road; and there were some other things which I need not mention, but it is enough to say that it appears to me to be the true result of the evidence that everybody, both those who used the road and those over whose ground it was used, thought and acted upon the opinion that it was a matter of public right and not to be resisted. As far as there is evidence at all it is all that way.

Under these circumstances I confess that I do not think it possible to differ from the conclusion arrived at in the Court below.

Lord Watson—My Lords, having regard to the character of the track in dispute, and to the thin population of the district in which it is situated, I think the amount of actual user for upwards of forty years past has been just such as might have been expected if it had been admittedly a public way.

That being so, the case is narrowed to this issue—Was such use bad in the exercise and assertion of a public right, or must it be ascribed to the tolerance of successive proprietors? Notwithstanding the able arguments addressed to us by the Solicitor-General for Scotland and Mr Asher I have been unable to come to the conclusion that the use was by sufferance merely. It appears to me to have been generally understood, as well by those who used the road as by those who stood by, and saw it used, that foot-passengers and drovers were free to pass along it as a matter of right, and that no permission was required.

After the observations which have been made by the Lord Chancellor and by the noble and learned Earl opposite, it is unnecessary for me to refer to the evidence in detail. I concur in the judgment which has been proposed.

Lord Fitzgerald—My Lords, I also concur, and especially in the observations which have been made by my noble and learned friend opposite (Lord Watson). If this case had gone before a jury the question to be submitted to the jury would have been whether there had been an exercise as of right of the user of this way; and I should say that the proper inference to be deduced by the jury from the evidence would have been that there had been that continuous exercise—an exercise not by sufferance but as of right. The case comes, as far as I am concerned, in a still stronger light before me, for the Lord Ordinary who heard the witnesses and examined into the case in detail comes to that conclusion, and his decision is adopted by the majority of the Judges of the Court of Session. Upon the question of fact, or of the fair inference to be deduced from the facts in proof, I should have been slow indeed to take an adverse view if the question had been decided upon its being submitted to a jury, but still more so when the determination is that of so many able and learned Judges conversant with the law of Scotland, and with the mode of dealing with rights of this kind in Scotland. When we find, then, that there is evidence of the user of this way as of right, extending over a period of at least forty years, or more than forty years, even if we had some evidence of interruption or intended interruption it would be valueless.

The law on this subject was stated fifty or sixty years ago by the then Lord Commissioner in very clear terms. I allude to *Harvie's* case (3 Wilson & Shaw's Reports in the House of Lords on appeal from Scotland), which was brought up to this House by appeal in 1828, and in which the ruling of the Lord Commissioner in point of law to the jury in the view which they took of the facts was adopted by Lord Eldon. Lord Eldon puts it thus—"The learned Judge in substance told the jury, There is evidence from which you may assume that for a particular period, namely, for forty years, this way had been exercised without interruption. If you are of that opinion, then that is, according to the law of Scotland, sufficient to establish a prescriptive right of way; and if that right of way be once established in the manner I have stated, then I tell you in point of law that subsequent interruptions not acquiesced in cannot defeat the right so acquired."

We had a great deal of consideration of the law of Scotland on this subject in the case of *Mann* v. *Brodie*, and *Harvie's* case decided by this House in 1828 is a distinct confirmation of the doctrine which I have mentioned.

I am therefore of opinion that the interlocutor of the Court below ought to be affirmed.

Lord Macnaghten—My Lords, I am also of the same opinion.

Interlocutors appealed from affirmed and appeal dismissed with costs.

Counsel for the Appellant—Sol.-Gen. Robertson—Asher, Q.C. — Cosens. Agents — Iliffes, Henley, & Sweet, for Tait & Crighton, W.S.

Counsel for the Respondents—Balfour, Q.C. —Graham Murray — W. C. Smith. Agents — Keeping & Gloag, for Andrew Newlands, S.S.C.

COURT OF SESSION.

Saturday, May 19.

FIRST DIVISION.

BROAD *v.* DAY AND OTHERS.

(*Ante*, p. 445.)

Company—Companies Clauses Consolidation (Scotland) Act, 1845, *secs.* 56 *and* 57—*Judicial Factor.*

In a petition under sections 56 and 57 of the Companies Clauses Act, 1845, presented by a mortgagee upon whose mortgage the interest was overdue, for the appointment of a person "to receive the whole or a competent part of the tolls or sums liable to the payment of such interest" until it should be fully paid, *held* that though the person to be appointed was called in sec. 56 a judicial factor, he was in reality only a receiver, and had none of the powers of management belonging to a judicial factor, and that therefore a nominee of the petitioner, to whom there was no personal objection, might be appointed, though this was opposed by other mortgagees.

This petition was presented by Mr Harrington Evans Broad, the holder of certain mortgages for £3370 and other sums of the Edinburgh Northern Tramways Company, incorporated under the Edinburgh Northern Tramways Act, 1884, for the appointment of Mr D. N. Cotton, chartered accountant, Edinburgh, who was the auditor of the company, as judicial factor upon the undertaking, in terms of the provisions of the 56th and 57th sections of the Companies Clauses Consolidation (Scotland) Act, 1845, such an application being authorised by the terms of the Tramway Company's special Act.

The Companies Clauses Act provides, section 56—"Where, by the special Act, the mortgagees of the company shall be empowered to enforce the payment of the arrears of interest, or the arrears of principal and interest, due on such mortgages, by the appointment of a judicial factor, then, if within thirty days after the interest accruing upon any such mortgage or bond has become payable, and after demand thereof in writing, the same be not paid, the mortgagee may, without prejudice to his right to sue for the interest so in arrear in any competent court, require the appointment of a judicial factor, by an application to be made as hereinafter provided; and if within six months after the principal money owing upon any such mortgage or bond has become payable, and after the demand thereof in writing, the same be not paid, the mortgagee, without prejudice to his right to sue for such principal money, together with all arrears of interest, in any competent court, may, if his debt amount to the prescribed sum alone, or if his debt does not amount to the prescribed sum, he may, in conjunction with other mortgagees whose debts being so in arrear, after demands as aforesaid, shall, together with his, amount to the prescribed sum, require the appointment of a judicial factor, by an application to be made as hereinafter provided."

Section 57—"Every application for a judicial factor in the cases aforesaid shall be made to the Court of Session, and on any such application so made, and after hearing the parties, it shall be lawful for the said Court, by order in writing, to appoint some person to receive the whole or a competent part of the tolls or sums liable to the payment of such interest, or such principal and interest, as the case may be, until such interest, or until such principal and interest, as the case may be, together with all costs, including the charges of receiving the tolls or sums aforesaid, be fully paid; and upon such appointment being made all such tolls and sums of money as aforesaid, shall be paid to and received by the person so to be appointed; and the money so to be received shall be so much money received by or to the use of the party to whom such interest, or such principal and interest, as the case may be, shall be then due, and on whose behalf such judicial factor shall have been appointed; and after such interest and costs, or such principal, interest, and costs have been so received, the power of such judicial factor shall cease, and he shall be bound to account to the company for his intromissions, or the sums received by him, and to pay over to their treasurer any balance that may be in his hands."

Answers were lodged for S. H. Day and others, who stated that they were interested as mortgagees and shareholders of the company to the extent of nearly £20,000. They objected upon various grounds to the appointment of a nominee of the petitioner, but stated no personal objection to Mr Cotton. They also stated that they had no objection to the appointment of a neutral person selected by the Court.

At advising—

Lord President—Although the person to be appointed is called a judicial factor in the petition and in the statute that is a little misleading, because he is not clothed with the powers of an ordinary judicial factor at all, nor is he appointed under the statute as manager as in the case of *Haldane* v. *Girvan and Portpatrick Junction Railway Company*, March 18, 1881, 8 R. 669. He is what is called in England a "receiver," and so far as indicated he is appointed to receive a competent part of the income, and apply it in payment of the overdue interest on the petitioner's mortgage. That is the whole object of the application. The mortgagee, as soon as his interest is overdue, is entitled as a matter of legal right