nothing more or less than a power of apportionment. It enables the holder of the power to divide the fund among the objects of the power in such proportion as he thinks proper. But it does not enable him to alter the quality of the estate which is settled on them by limiting an estate of fee to an estate of liferent, nor to confer a benefit on persons who are strangers to the power.

So standing the case, it remains for us to consider whether Mr Gillon's trust-settlement is a legal exercise of the power which he reserved. It is very plain that it is not. For it confers a benefit on Mrs John Gillon who is a stranger to the power. It limits the interest of his daughters, Mrs Wotherspoon and Mrs Dawson, to a liferent, and it gives the shares which these ladies are to liferent to their children respectively in fee. But inasmuch as Mrs Wotherspoon and Mrs Dawson survived their father, their children are not objects of the power.

It was maintained that the trust-deed might be supported in so far as within the power, though having no further effect. I think that this point is conclusively determined to the contrary by the case of *Blaikie*, 24 D. 589. Lord Curriehill says—"A failure to execute the power in any respect vitiates the whole appointment. The reason is that you cannot tell what appointment the party entrusted with the power would have made, had he known that what he attempted to do was to some extent at least inept."

The £2000 provided to Mrs Dawson in her marriage-contract is a debt due by her father, and therefore must be deducted from her succession before their succession is divided in terms of his marriage-contract. The legacy to J. D. Gillon is bad.

LORD LEE—I have found this case to be attended with difficulty, but on the authorities which were very fully cited and discussed I have come to be of the opinion expressed by Lord Rutherfurd Clark.

The LORD JUSTICE-CLERK concurred.

LORD YOUNG was not present at the discussion.

The Court pronounced the following interlocutor:—

> "The Lords having considered the special case and heard counsel for the parties thereon, Answer the first of the questions therein stated in the affirmative, and the third in the negative; the fourth to the effect that the sum of £2000 falls to be deducted before ascertaining the divisible amount of the conquest fund, and the fifth in the negative: Find and declare accordingly, and find it unnecessary to answer the second question, and decerns."

Counsel for First and Eighth Parties—Salvesen. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for Second and Third Parties—H. Johnston—Cook. Agents—W. & J. Cook, W.S.

Counsel for Fourth, Fifth, Sixth, and Seventh Parties—Asher, Q.C.—Gillespie. Agents—Alexander Morison, S.S.C.

Friday, January 24.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

DUKE OF ATHOLE *v.* M'INROY AND OTHERS (M'INROY'S TRUSTEES).

Servitude — Road — Right-of-Way — Occasional Use—Use for Sporting Purposes.

In an interdict against the use of a path through a mountain pass the respondent proved that for more than 40 years he and his predecessors had used the path as a convenient short cut in passing from one part of their shooting to another. This use was only occasional, extending to 10 or 12 times a year, and was only made late in the shooting season. Between 1846 and 1878 the path was scarcely used by the respondent. Although this use by the respondent was known to the complainer's foresters, there was no evidence that it had been under the immediate observation of the complainer or his ancestors except on one occasion in 1857 when the use was challenged. *Held* (*diss.* Lord Rutherfurd Clark) that there had been no use to support a claim on the part of the respondent to a servitude right-of-way.

This was an action of suspension and interdict whereby the Duke of Athole sought to prevent the respondents, the surviving trustees under the late James Patrick M'Inroy's trust-disposition and settlement, and William M'Inroy of Lude as an individual, from crossing by the Cromalton Pass from one part of the lands of Lude to another. The property of Lude marched with the forest of Athole, and at one point a long tongue of the forest land ran into Lude property, and for its length divided the Lude property into two. Across the base of this tongue of land ran the Cromalton Pass. Its total length was about 1000 yards, while the detour round the tongue of land was about 5 or 6 miles. This strip between the divided portions of Lude had been claimed by the late Mr M'Inroy of Lude until the late Duke of Athole, then Lord Glenlyon, put an end to it by declarator in 1841.

The complainer averred that the use of the Pass complained of diminished the value of the forest.

The respondents averred that "there has been for time immemorial a public road or right-of-way leading through the said Pass from the public road in Glen Tilt to the public drove road through Glenloch leading through Glen Fernat to Kirkmichael, where there is a market. The said road or right-of-way has been constantly used for cattle, horses, and foot-passengers by all and sundry the members of the public for time immemorial, and for more than forty years prior to the presentation of this note, and down to the present date without challenge by anyone. The respondents moreover have, by themselves, their tenants,

servants, dependants, and others, used as a matter of right for time immemorial, and at least for over forty years, and without challenge from the complainer or any other, the road leading through the said Pass for the purpose of going from one part of their lands at the east end thereof to their lands at the west end thereof, and for sheep and horses passing along the same."

The respondents pleaded—"(3) There being a public right-of-way through the said Pass the note should be refused. (4) *Separatim*, the respondents having a servitude right-of-way through the said Pass, the note should be refused."

Upon 23rd October 1888 the Lord Ordinary allowed a proof and appointed the respondents to lead.

The proof as to public right-of-way failed, and it was clear that the only use made of the Pass in connection with farming was for the purpose of bringing back sheep which had strayed from the property of Lude. It appeared that since 1821 the proprietors of Lude, their tenants and gamekeepers, had used this Pass as a short cut, Except between 1846 and 1878, when it was hardly used at all, the Pass was used by the respondent about ten or twelve times in the autumn and winter for shooting hinds when deerstalking was over in the Athole Forest. While the Pass was entirely in Athole property, the path began and ended in the Lude property, and the Duke and his people had used that part of it which traversed Lude for various purposes. The Pass had been used openly by the respondents, and, as some of the witnesses stated, in assertion of a right, and they had never been challenged, although occasionally the Duke's foresters had been met in the Pass. It was admitted that the respondents had no right to shoot in going through the Pass. The path was merely a track made by the passage of sheep and deer. No challenge from the Duke's people had been given before 1882, although the number of times in which the path was used were seven or ten in the year. One of the complainer's keepers deponed that between 1852 and 1857, when in the Pass with the late Duke of Athole and a forester, M'Ara, they saw the late Mr M'Inroy of Lude and his gamekeeper going through the Pass, and the Duke sent M'Ara to turn them back, which was done. Another gamekeeper deponed to having turned off the Lude gamekeeper upon a later occasion. It was in 1882 that the Duke of Athole first objected to the respondents' use of persons going through the Pass.

Upon 29th January 1889 the Lord Ordinary (KINNEAR) pronounced this interlocutor:—"Repels the third plea-in-law for the respondents, sustains the fourth plea-in-law for the respondents, repels the reasons of suspension and refuses the interdict, and decerns: Finds the respondents entitled to expenses, &c.

"*Opinion.* — The complainer seeks to obtain an interdict against the respondents, by which they are to be prohibited from passing to and fro by the Cromalton Pass, between that portion of their lands of Lude which lies to the east, and the portion of Lude which lies to the west of a hill called Carnlia of Ben-y-glo. The respondents plead that the interdict should be refused, first, because there is a public right-of-way through the Pass, and secondly, because they have a servitude right-of-way for the benefit of the estate of Lude.

"The first of these pleas cannot be sustained, because there is no evidence that the Pass has ever been used by anybody as a means of transit from one public place to another. But the evidence which has been adduced in support of the second plea requires serious consideration; and in order to appreciate its effect it is necessary to understand the relative situations of the two estates which are said to constitute the servient and dominant tenements with reference to the path over which it is said to extend.

"The Cromalton Pass is a narrow defile in the Ben-y-glo range of mountains. The hills to the north belong to the complainer, and at the point in question the hill to the south, which is called Carnlia, belongs partly to the complainer and partly to the respondents, the summit and the greater part of the northern slope being the property of the complainer, and the remainder of the hill forming part of the estate of Lude. The consequence of this position of the march between the two estates is, that it is impossible for the respondents or their tenants or servants to pass from the eastern to the western portion of Lude at the foot of Carnlia without either passing over the complainer's property in the Cromalton Pass for a distance of about 900 yards according to their own view, or 1300 or 1400 yards according to the complainer, or else going round by the south side of the hill for a distance of five or six miles. It is manifest that this is a state of matters in which a right of servitude over the one estate for the benefit of the other would very readily grow up, because if the people on Lude had any occasion to pass to and fro between the two portions of that estate which are separated by the Duke of Athole's property they would certainly be very apt to cross the piece of unenclosed moor land which is interposed unless they were prevented from doing so by the Duke. But the respondents do not maintain that the servitude they have acquired extends generally over the Pass, but that it affects a definite pathway by which the Pass is traversed, and it is a peculiar and a very important feature in the case that this pathway passes through both estates in such a manner that neither proprietor can make a convenient use of it without going upon his neighbour's land. There is some controversy as to its origin. But that does not appear to be of any material importance. Assuming that it was originally formed, as the complainer maintains, by the passage of sheep and deer, there can be no question that it is now a mountain pathway in a defined direction practicable for men and horses, and that it has been used as such for more than forty years by the complainer and his predecessors. It is a con-

tinuous path which passes from the complainer's property to the west, or north-west of the Lude estate, through a portion of that estate at the west end of the Pass, then through the complainer's property in the Pass, and again, at the east end of the Pass, through another portion of the Lude estate. It does not appear to be impracticable, but it is admitted that it is not convenient to reach the Cromalton Pass from the west without going through Lude, and it is proved by the evidence on both sides that the complainer and his predecessors, and their keepers, foresters, and others authorised by them, have in fact been accustomed to use the pathway on Lude for the purpose of reaching the other portion of the same pathway where it traverses the Cromalton Pass. If the complainer were now maintaining a right of servitude over Lude I should think it very difficult for the respondents, in the face of the evidence which has been led, to resist that claim. The only question is, whether, while they have submitted to the use which the Dukes of Athole have made of the Lude estate, they have acquired any corresponding right over that portion of the path which passes through the property of the Duke?

"Their case is, that they have made use of the pathway for more than forty years on all occasions when they required to do so for the convenient enjoyment of their own estate, and I think this is proved. But the question remains whether these occasions have been sufficient in number and character to establish a right of servitude.

"There appear to be two purposes only for which this part of the estate can be beneficially used—sheep pasture and sport; and it is therefore in connection with one or other of these two purposes that the respondents have required to traverse the Cromalton Pass. The evidence of use for the first of these purposes appears to me to be insufficient. There can be no doubt that the tenants and shepherds of Lude have been in the habit for a long course of years of making use of the path in dispute for bringing back strayed sheep which had wandered over the march into the Athole Forest. They could not do otherwise if the strayed sheep were to be recovered. But when two adjoining properties in such a country as that in question are not divided by fences or by any natural barrier, it is inevitable that sheep should find their way across the march, and if the proprietor or his tenant to whom they belong follows them into his neighbour's land, and brings them back by the nearest way, he does so in the exercise of an entirely different right from a servitude right-of-way. No use of this kind therefore will avail to establish such a servitude. There is some evidence that the path may have been used by shepherds in the course of their employment on other occasions. But it is too vague in character, and the occasions to which it refers are too infrequent to be taken into account.

"But the use for the purpose of sport is, in my opinion, proved to have been such as to infer a right. It is proved by the respondent Mr William M'Inroy that he first went through the Pass with the Lude gamekeeper in 1843, when he was a boy of twelve, and he gives this account of his subsequent use of it—'In 1846 I began to shoot regularly on the Lude moors. Between that and 1878 I was frequently shooting in the neighbourhood of Carnlia. (Q) And when you had occasion to pass from the west side of Carnlia to the east side of Carnlia while shooting, how did you go?—(A) After I began to shoot, and when I used the Pass, I kept the path until I got to the shoulder of the hill at the east end; and in going the reverse way from east to west, when I got to the end of the Pass where the hill widened out I went in any direction that suited for shooting purposes. . . . Between 1846 and the present time I have gone through the Cromalton Pass sixty or seventy times. I always went through the Cromalton Pass when it suited my convenience to do so. I understood in my early days, before I began to shoot, that we were to use the Pass whenever we chose, and that we had a right to do so, but we were not shoot while in it. I was led to understand that both from my father and from the old keeper. In going through the Pass myself I always did so in the exercise of that right. I never fired a shot in it. I never heard a doubt expressed as to my right to walk through the Pass.'

"His evidence is confirmed by the Rev. Donald Gordon, who is the son of the keeper to whom he refers. And it is proved by the witnesses Admiral Hay, Mr John Hay, William Carrick, and Angus Cameron that the practice to which Mr M'Inroy speaks, of going through the Pass whenever it was convenient for the purpose of shooting, or for keepers going over the ground, has been continued down to the present time without any interruption until 1882, when the keeper Cameron was informed by the complainer that he was trespassing. Nothing followed upon that challenge, and the respondents and their tenants and servants have continued to use the Pass since 1882, as they did before, until the present proceedings were taken. It is said that a great part of this use is not available as evidence of right, because it does not appear whether the witnesses kept the path, and if they were in the Pass but not on the path, it is possible that their trespass upon the Duke's ground is to be attributed to a claim of property which the late Mr M'Inroy had put forward in the ground which is now admitted to belong to the complainer between the two divided portions of the Lude estate, and it is said that the claim was maintained until the late Duke, then Lord Glenlyon, put an end to it by legal proceedings instituted in 1840. This observation may apply to the evidence of Colonel M'Inroy of the Burn, because he speaks to a period when the claim of property had not been abandoned, and he is unable to define the particular part of the Pass by which he was in the habit of going from one side of the Carnlia Hill to the other. But it does not apply to the evidence of Mr

William M'Inroy, or to that of the other witnesses I have mentioned. The hill has all along been admitted to be on the Duke's property. It lies on the north side of a burn which runs through the Pass, and Mr M'Inroy's claim did not extend to that side. Mr M'Inroy says distinctly that after 1846 he kept the path after entering the Pass, and the other witnesses concur in saying that whenever they entered the Pass they coupled the dogs and refrained from shooting in accordance with the late Mr M'Inroy's instructions. It is quite plain therefore that they were passing over ground which did not belong to Mr M'Inroy. I think it proved, as the result of the evidence, that the proprietors and shooting tenants of Lude and their gamekeepers have been in the habit for more than forty years of passing over the ground in dispute on all occasions when it was necessary or convenient for them to use it as a means of transit from one part of Lude to another, and that they did so in the assertion of a right, but not a right of property, because, while they held themselves entitled to pass over the ground, they did not hold themselves entitled to hunt it with dogs or to shoot game upon it. The only evidence to the contrary is that of a witness, John Stewart, who speaks to an occasion, between 1852 and 1857, when the late Mr M'Inroy and his keeper, Gordon, were observed by the late Duke of Athole in the Pass, and were turned back by the Duke's orders. Two other witnesses say that they heard of this incident from a keeper who is now dead. I attach no importance to this evidence, because all the parties to the interview are dead, and it is impossible to tell whether Mr M'Inroy was on the path or on some other part of the ground within the Pass, or where he was going, or why he turned back, if he did turn back, or what was said to induce him to do so. But it is certain that he did not cease to assert or to exercise his right of passage when it was convenient for him to do so. If any inference can be drawn from this incident, therefore, it makes against the complainer's case, because it shows that the respondents and their predecessors have continued to assert their right in spite of a challenge so far back as 1857, and that no attempt has been made to make the challenge effectual.

"The question that remains is, whether the use, which I hold to be proved, is sufficient in law to establish a servitude? and I see no reason to the contrary. The exercise of a right to shoot game in such a county as that in question is, so far as regards the legal character of the right, a beneficial occupation of land just as much as any other kind of occupation. The notion that it is a mere personal franchise as distinguished from the occupation of land has been rejected in a series of cases, of which *Bulloch* v. *Stewart*, 8 R. 331, may be referred to as the most recent. And therefore if a landowner finds it necessary for the advantageous exercise of this particular use of his estate to pass over his neighbour's pathway as a means of transit between two portions of his own estate, and if he makes use of it for this purpose for a sufficient length of time, he will in my judgment establish a servitude of way just as if he had used the path for the benefit of an agricultural or pastoral subject. The only question is, whether he has in fact used it on all occasions when he required to do so? and on this point I think the evidence is in favour of the respondents."

The complainer reclaimed, and argued—(1) A limited right such as shooting could not establish a servitude right of road. The use here was even more limited than a right of shooting, as all that the Lord Ordinary had found the respondent entitled to was a right of passing over the Duke of Athole's lands from one part of the Lude estate to another for the purpose of sporting. (2) The only use that was attempted to be proved was a use during part of the year, and it was not even shown that this use was made every year so that the use was not continuous. (3) The use had not been uninterrupted, as on each occasion that any of the Lude people had been found by the Duke or his keepers they had turned them back. If there had been any use as alleged, it was only by toleration, and in exercise of good neighbourhood, while knowledge of the use had not been brought home to the Duke of Athole or his factor—*Chatto* v. *Lockhart*, March 5, 1790, Hume 734; *Purdie* v. *Steil*, July 20, 1749, M. 14,511; *Earl of Morton* v. *Stuart*, June 21, 1813, 5 Pat. App. 720; *Napier's Trustees* v. *Morrison*, July 19, 1851, 13 D. 1404; *Scottish Rights of Way, &c. Society* v. *Macpherson*, July 6, 1887, 14 R. 875—*aff.* May 14, 1888, 15 R. (H. of L.), 68; Rankine on Landownership, 350; *Gibb* v. *Bruce*, December 1, 1837, 16 S. 169; *Marquis of Breadalbane* v. *M'Gregor and Others*, December 3, 1846, 9 D. 210.

The respondents argued—*Prima facie* there was strong probability of the existence of a servitude right-of-way. It was very convenient and almost necessary. Both ends of the path rested upon Lude property, and the Duke could not step out of the Pass without trespassing. A servitude could be acquired by use for a limited purpose, *e.g.*, turf roads and kirk roads. Here the only use that could be made of the lands was for sporting or pasturage purposes. The respondents did not press the claims for a servitude for pasturage purposes, but they had shown that for a very much longer period than forty years the proprietors and tenants of Lude had been in the habit of going through this Pass on their way from one part of the estate to another. The possession had been continuous, because although it had not been for every time of year, the Pass had been used for a part of every year when needed. It had also been uninterrupted, as neither the appellant or any of his servants had challenged the right of the respondents till 1882. The attempts that had been made to prove that on two occasions the Lude people had been stopped in their passage through the Pass were altogether too vague and unsatisfactory to show that the right to challenge them had

been exercised. But if these occasions were to be taken for any purpose, they must be held to show that the use made by Lude was not given as of toleration, but was continued and claimed after challenge. It was not necessary to show that the owner of the servient tenement knew of the right that was being exercised if it was done in an open manner—*Ross* v. *Ross*, February 19, 1751, M. 14,531; *Porteous and Others* v. *Allan and Another*, June 17, 1773, M. 14,512; *Malcolm* v. *Loyd*, February 4, 1886, 13 R. 512. This right added to the value of the Lude estate—*Stewart* v. *Bulloch*, January 14, 1881, 8 R. 381.

At advising—

LORD JUSTICE-CLERK—In this note of suspension and interdict the Duke of Athole seeks to have the respondents, who are the proprietors of the estate of Lude, interdicted from using a track in Cromalton Pass upon his property, so as to pass from one part of Lude estate to another. The respondents maintain that there is a public right of footpath along this track, and that the estate of Lude has a servitude over the Pass entitling them on the estate to use the track for passage. The Lord Ordinary has found that there is no public right-of-way, and this part of his judgment is acquiesced in. He has found that the respondents have established by evidence the existence of a right in favour of Lude and the use of a path through the Cromalton Pass. He has therefore found in effect that the respondents have for forty years or for time immemorial had peaceable and uninterrupted possession of a path through the Pass. After hearing the debate and reading the proof, I have come to the conclusion that there is not such evidence as will support the respondents' case, which although in form an answer to the note of suspension, is practically a declarator in which the burden of proof is on the respondent.

It is important, in the first place, to give attention to the character of the place at which the alleged right exists, and of the surrounding lands. The effect to be given to evidence of possession, both as to its quantity and character, depends to a great extent on the situation and characteristics of the locality. The same kind of possession may tend to indicate assertion of a right, or be reasonably attributable to the tolerance of good neighbourhood, according to the surrounding circumstances. Now, in this case the ground is of no value except for hill-feeding either for sheep or deer and for grouse. The place is very little frequented, and it is just the sort of place where a short cut is very likely to be used occasionally when it is necessary to pass from one part of a shooting to another. The use is likely to be only occasional and not to be observed on more than a small proportion of the occasions on which it may occur. Accordingly, what one would expect appears in this case. The proof clearly shows that any use there has been was very occasional indeed, and I fail altogether to find any substantial evidence that any use which was made came under the observation of the complainer as the assertion of a right. There is certainly one instance spoken to, but that can be of no avail to the respondents, for on that occasion the evidence as far as it goes indicates that there was distinct challenge which was not resisted, the person who was using the path having turned back. I do not attach much importance to this incident, as I do not think that the evidence about it is as complete as the complainer should have made it. But as practically the only occasion of importance definitely spoken to where those who represented both parties met on the ground, it is certainly not favourable to the respondents. Mr William M'Inroy, who speaks to having often gone by the Pass, stated the character of his possession very fairly. His purpose in going by the Pass was to go from one part of the Lude deer-stalking ground to another without making a long detour. Now, it appears that from 1846 to 1878 he scarcely used it at all, as he was not stalking deer during those years, but only shooting grouse, and that it was not necessary to go by the Pass when shooting grouse. I do not find in his evidence anything to indicate that the use was a known use and a use in assertion of right. Colonel M'Inroy confirms this evidence, stating that the Pass was not used for grouse-shooting, and when asked whether the Athole people knew of his using the path, answers—"I don't know; they may have known—they could have known." This seems to me a fair representation of the evidence generally as to use, and as to knowledge of use on the part of the complainer. I cannot consider such evidence as sufficient to establish that there has been from time immemorial an adverse right possessed and asserted by the proprietors of Lude to crop the complainer's ground. It is evident that on such a piece of hill ground an occasional traversing of a path such as this may well be unobserved, and if in very rare cases it be observed it may be thought unimportant, and be tolerated from good neighbourhood, nothing having been brought to the proprietor's notice suggesting that anyone is asserting a right. It is quite true that in a district of the country like that in question such frequent use is not to be expected as would be the case in more closely peopled estates, and there can be no doubt that a much smaller amount of evidence of adverse possession would be sufficient to prove the right than would be necessary in lower ground. But the character of the possession as being in the exercise of right must be proved by the litigant asserting the claim of the alleged dominant tenement whatever be the locality. It is for him to prove, and to prove conclusively, that what was done was in the assertion of a right, and so done as to bring the assertion of the right home to the proprietor of the tenement which is said to be servient. In my opinion the respondents have failed to prove that they have used this path in the exercise of a right, and therefore I would move your Lordships to recal the interlocutor of the Lord Ordinary, and to grant interdict in

terms of the prayer of the complainer's note of suspension.

LORD YOUNG.—I am of the same opinion. I think that the Duke of Athole, the complainer, is entitled to our judgment unless the respondent Mr M'Inroy asserts and succeeds in establishing a right of servitude of road, of which servitude the Duke of Athole's estate is the servient and Mr M'Inroy's estate is the dominant tenement. There is nothing in the titles of either party to suggest that such a servitude exists, nor is there any writing to show that any proprietor of the Duke of Athole's estates had ever subjected his lands to such a burden in favour of the proprietor of Lude estate. The respondent therefore is driven to rely upon the use, more or less frequent, which was made by himself and his tenants, of this road through the Pass as a short cut across the Duke of Athole's lands, in passing from one portion of the Lude estate to another.

The Lord Ordinary is of opinion that the use which undoubtedly was made of this land was made as in assertion of a right. Now, that is a question of fact to be determined upon the evidence. Any passage by one man over the property of another may be done in the assertion of a right, and where the use that is made of the road is that of a convenient passage from one part of the user's property to another part, the evidence may satisfy the Court that this use was made in exercise of a right. But then the use must be as in exercise of a right, although the mode in which that right had been originally granted had been lost and forgotten. Now, I am of opinion that the use which was made of this Pass, was not done in exercise of a right. In all these questions of right-of-way, the question arises how can we most reasonably account for the use that is made of another person's land. In this case I think we can most reasonably account for it on the ground of good neighbourhood. No proprietor would willfuly prevent his neighbour crossing his lands if that crossing was doing him no harm, unless his neighbour should be offensive in his conduct. In this case the use was not prevented, and it would probably have been unneighbourly conduct if the Duke of Athole for the time being had interfered with the use of the Pass made by the Lude people, so long as it was not doing him any harm. I think it right to notice at this time that it was intimated for the Duke of Athole that he had no intention to interfere with the use of the Pass at certain times, so long as it was not attempted to be done in the exercise of a right. I think as a matter of fact the Duke of Athole did not desire to interfere with the occasional use of the Pass, but I do not think that he ever did subject or intended to subject his land to a burden that might at some time be a detriment to him, for the benefit of the Lude estate, and if the proprietor of Lude had at any time gone to the Duke of Athole and asked him if he would subject his land to such a burden, that the Duke of Athole would at once have declined to do so. I only wish to state that the evidence of use in this case is not such as to establish to my satisfaction that it was made in exercise of a right.

LORD RUTHERFURD CLARK—I am sorry that I must differ from the opinions expressed by your Lordships. I think that the Lord Ordinary is right, and that for the reasons expressed in his note. I should therefore be only taking up time if I were to repeat them.

LORD LEE—The only question raised by this reclaiming-note—at least the only question argued to us—is whether such use is proved to have been made of the Cromalton Pass by the proprietors of Lude as to support their claim to a servitude right-of-way for the purposes of sport?

It was not maintained that the evidence is sufficient to support a public right-of-way, or even of a servitude right for the purposes of sheep pasture. Upon these points the Lord Ordinary's judgment was not challenged by the respondents. And after a careful examination of the whole evidence for the purpose of forming an opinion upon the remaining question, I cannot doubt that the respondents were well advised in refraining from argument upon the points on which the Lord Ordinary was against them. For I think that some of the evidence brought forward in connection with the alleged use for purposes of sheep pasture has an adverse bearing on the respondents' claim.

I am unable to concur in the opinion of the Lord Ordinary in so far as he holds the evidence sufficient. It appears to me that in order to find that evidence sufficient the Court must be satisfied, on a reasonable view of it, that it establishes a use such as to infer submission for the requisite period of prescription to a known assertion of the alleged right, or at least to an assertion of it which must be presumed to have been known.

Now, I think that there is at the foundation of the Lord Ordinary's judgment upon the evidence a very serious difficulty. He sustains "a servitude right-of-way through the said Pass." He does so in general terms, but I presume that the plea so sustained is not intended to be applicable to any but foot-passengers. But even taking it as limited to foot-passengers, the Lord Ordinary holds a servitude right-of-way for foot passengers to have been constituted in favour of Lude by use for forty years during the shooting season, and for the more convenient access to sport on their own portion of this unenclosed moorland of a short cut through ground belonging to his neighbour the Duke of Athole. In short, he reads into Lude title a grant, or presumed grant, of a servitude right-of-way by evidence that the Dukes of Athole have for forty years allowed the proprietors of Lude to take the short cut for the limited purpose of pursuing in the most convenient way the sport of shooting game upon their own lands.

I know no example of such a limited use being construed as inferring a servitude right-of-way, and I am disposed to think that even if the evidence were sufficient to prove knowledge on the part of the Dukes of Athole, the case would fall under the principle applied in the case of *Purdie* v. *Steil* (M. 14,511), reported by Kilkerran, where Thomas Purdie, having been in the use of bringing home his corns after harvest through a ridge of ground belonging to Steil and his authors after their corns were cut down, "and that for the space of forty years," this was found not to establish a servitude.

One of the distinctions noted by Erskine and other authorities between servitudes by grant and servitudes by prescription is, that "a servitude by grant, though accompanied only with a partial possession, must be governed as to degree by the tenor of the grant so as to entitle the possessor to the exercise of the right as ample as it was at first granted, when he thinks fit to use it to its full extent. But a servitude by prescription is generally limited to the measure of the use had by the acquirer of it, agreeably to the maxim, *tantum præscriptum, quantum possessum.*"

Yet it is proposed to be found that a use of going occasionally in the shooting season by this short cut for the purpose of shooting on the Lude ground is sufficient to constitute by prescription a servitude right-of-way.

I venture to doubt whether the proprietors of Scotland, familiar as they must be with the practice of occasionally, in pursuance of sport, taking a short cut through each other's lands, have any idea that by so doing they may acquire servitude rights-of-way for their respective estates. So far as the law reports show, no such idea has ever occurred to any of them until it was pleaded in this case.

Apart, however, from the question whether such use is sufficient in kind to establish a servitude right-of-way by prescription, I am of opinion that the evidence in this case is not such as to raise any presumption of knowledge of the alleged use, and is clearly insufficient to support the conclusion that the Dukes of Athole must in fact have known such use to be claimed as matter of right.

In the first place, the occasions on which use was made by Lude of this pass as a short cut were few in number. They were late in the season, after the deer-stalking in the Athole forest was over. The evidence adduced for the respondent shows that it was not used for grouse shooting purposes, or at any time in the year excepting late autumn or winter. The number of such occasions is not stated to have exceeded ten or twelve in the year, and one of the shepherds examined for the respondent, when asked the question, "Did you know that the Lude people used the Pass?" answered, "I cannot say that I have seen them." That some of the foresters in Athole may have occasionally seen Lude people there appears to me of little consequence if it is proved (as I think it is) that the late Duke, on the only occasion when he saw them, challenged the right with apparent success, and that the present Duke gave instructions on the subject as soon as he came to know of the practice, which seems to have been in 1882. I regard the evidence of the forester John Stewart as of more importance than the Lord Ordinary attaches to it. It is of course insufficient to prove interruption, if interruption were necessary to be proved. The importance of it is, firstly, that unless he has sworn to a falsehood he never knew of the Lude people going through the Pass except on one occasion about 1852; and, secondly, that on that occasion Sandy M'Ara, the head keeper, was sent by the late Duke to go and turn them back. What Sandy M'Ara may have said in carrying out his orders, and whether he may not have asked them to turn as a favour, we do not know; for he was too ill to be examined, and died before the conclusion of the proof. But if John Stewart is to be believed—and the Lord Ordinary does not say that he disbelieved him—his evidence proves that the late Duke was left in ignorance that any claim to use the Pass as of right was asserted. I think there is no evidence of actual knowledge affecting the proprietor of Athole prior to 1882.

Even if it had been clearly proved that the Duke's foresters had on some occasions seen Lude people going through the Pass, I should think it unreasonable to infer from their silence on such occasions that the Duke must have known of such use of it. For the foresters would not be likely to interfere without instructions, unless it appeared necessary, or even to report the matter unless they understood it to be done in assertion of a right.

Another consideration which weighs a good deal with me, and which does not appear to have been submitted to the Lord Ordinary, is that the proceedings in the action of 1862, referred to in the proof, and reported in 24 Macph. 673, are inconsistent with the notion that at that time the late Duke of Athole had any idea that he was allowing to grow up a practice on the part of the Lude people, of using his ground for the purpose of pursuing on Lude the sport of deer-stalking. For in that case he claimed the exclusive right to the deer, and to have Lude prevented shooting deer at all even on his own ground.

It is said that there was a well-marked path. But Admiral Hay and other persons, examined for the respondents, prove that it was just such a track as deer and sheep naturally make in such a place.

The evidence as to the period prior to 1841 loses all effect when it is remembered that at that time Lude was claiming the property of this ground.

If it had been proved that the Duke of Athole ever claimed to use this track, as a path made partly through Lude ground and partly through the Athole estate, the case might have presented a different aspect. But I think that there is no evidence of such a claim; and any such claim on the part of the Duke of Athole was

expressly repudiated by his counsel. The respondent cannot force such a claim upon the Duke for the purpose of aiding his argument.

On these grounds I am for recalling this interlocutor, and finding that the respondents have failed to prove their alleged right, and therefore of granting interdict craved.

The Court pronounced this judgment:—

"The Lords having heard counsel for the parties on the reclaiming-note for the complainer against Lord Kinnear's interlocutor of 29th January 1889, Recal the said interlocutor, grant interdict in terms of the prayer of the note of suspension and interdict: Find the complainer entitled to expenses," &c.

Counsel for the Appellant — Guthrie—Graham Murray. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Respondents — Lord Advocate Robertson—D.-F. Balfour—C. S. Dickson. Agents—Davidson & Syme, W.S.

Friday, January 24.

OUTER HOUSE.

[Lord Trayner.

A *v.* B.

Process—Evidence—Divorce—Identification—Competency of Using Photograph where Party fails to Appear after Citation on Order by the Court for Identification.

Where a party to an action of divorce has been cited to appear at the trial and fails to appear, it is competent to show a photograph of such party to witnesses for the purpose of identification.

Observations on *Grieve* v. *Grieve*, May 22, 1885, 12 R. 964.

This was an action of divorce on the ground of adultery. The defender, who was in England, was cited to appear at the trial upon a warrant in the special form necessary for the citation of witnesses who are in England. She failed to appear. The pursuer proposed to show a photograph of the defender to witnesses for the purpose of identification. The defender objected.

Counsel for the pursuer was not called on.

The Lord Ordinary (TRAYNER) allowed the photograph to be used, reserving the objection till the conclusion of the evidence.

"*Opinion.*—I entertain no doubt upon this question. The rule I understand to be that when the Court has pronounced an order appointing a defender to appear for identification, and the defender being cited on that order fails to appear, then a photograph of the defender may be used for purposes of identification—*Forbes* v. *Forbes*, 24 D. 145. Such a defender cannot object that the use of a photograph in such circumstances is inadmissible, being only secondary evidence, because that defender has, himself or herself, rendered it necessary to resort to secondary evidence by refusing to obey the orders of Court. I confess to some surprise at hearing the opinion of Lord Fraser, which the counsel for the defender quoted (*Grieve* v. *Grieve*, May 22, 1885, 12 R. 964), because this matter of identification by a photograph was a subject of conversation between his Lordship and myself on more than one occasion, in the course of which he never suggested that before using a photograph it was necessary (where a defender ordered to appear had failed to do so) to resort to the apprehension of the defender or letters of second diligence, nor that a photograph could only be used when personal attendance could not thus be enforced. On the contrary, I understood Lord Fraser to hold the view I have stated as my understanding of the rule upon this subject.

"Without discussing this matter, I may perhaps say that the course which, upon the authority of Lord Fraser's decision, the defender's counsel maintains to be settled would at the least be a very inconvenient one. Letters of second diligence or warrant to apprehend cannot be obtained until, on the case being called for proof, it is ascertained that the defender has not appeared for identification in obedience to the order of Court. To apply for letters of second diligence at that stage would necessarily involve the postponement of the proof, which would again involve the discharge of all the witnesses in attendance, and entail on the pursuer an expense and inconvenience which should not be imposed upon him if it can be avoided.

"As regards the merits of this case, I think that the pursuer has established his averments, and I shall therefore pronounce decree of divorce."

Decree of divorce was pronounced.

Counsel for the Pursuer—D.-F. Balfour—Low. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Defender—Sir C. Pearson—Sym. Agents—H. J. Rollo & Robertson, W.S.

Tuesday, February 18.

SECOND DIVISION.

[Sheriff of Fife and Kinross.

M'LEOD *v.* TANCRED, ARROL, & COMPANY.

Process—Jurisdiction—Proof.

In an action of reparation raised in a Sheriff Court, the defenders pleaded "no jurisdiction." The Sheriff-Substitute allowed the parties a proof of their averments, "reserving the question of jurisdiction to be tried along with the merits." Upon the pursuer appealing for jury trial, the Court *held* that the procedure adopted was wrong, unless