

[HEARD 13th—JUDGMENT 14th July, 1848.]*

The Most Noble the MARQUIS OF BREADALBANE, *Appellant*.

JAMES MCGREGOR, and others, *Respondents*.

9 B.M. 210

Prescription—Servitude—Drove-Road.—A right for the public generally to have stated resting stances on a drove-road, for cattle using the road, and to pasture the cattle, while resting, on the lands adjoining the stances, is one unknown in law.

Appeal.—An interlocutor remitting for trial by jury a cause not appropriated by the Jury Acts for decision by that mode, may be appealed without leave of the Court below.

Ibid.—An objection to the competence of an appeal ought to be taken immediately on its being presented.

THE Appellant presented a note of suspension and interdict against the Respondents, praying to have them, and all persons employed by them, interdicted from using his lands and farm of Inverouran, or any part of them, for the purpose of resting or feeding cattle or sheep, or for any other purpose, and from trespassing in any way upon the land.

The Respondents were either tenants or proprietors of land, situated, some in distant parts of the kingdom, others more or less near, but none of them contiguous to, the lands of the Appellant, or they were merely dealers in cattle residing promiscuously throughout England and Scotland. In answer to the Appellant's application, the Respondents averred that for centuries the proprietors and tenants of land in the North of Scotland, and those who dealt with them had been in the practice of driving their sheep and cattle to and from the

* This case was, by mistake, omitted at its proper date.

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fairs and markets of England and Scotland, along a drove-road which ran through the lands of the Appellant. That in 1745 a Parliamentary road had been formed upon this drove-road, and in 1803 it had been placed under the management of Parliamentary Commissioners. That on their journey certain places, called drove-stances or stages, for resting and refreshing sheep were indispensable, and had existed on the road in question for centuries past, and there were rates of charge for every hundred sheep and every score of cattle, attached to each stance, which had been fixed from time immemorial. That these drove-stances had been immemorially used “by the proprietors, tenantry, and dealers from or connected with the districts of Appin, Morven,” and a variety of other districts stated by name, “the Islands of Skye, Harris,” &c., “and generally the south-western portions of the counties of Sutherland, Ross, and Inverness, and especially by the Respondents, and their predecessors, either as proprietors or tenants of lands situated in said districts, and also by the public generally,” and in particular the drove-stance at Inverouran had been so enjoyed. That the Appellant proposed to remove this stance to Clifton, 7 miles to the south of Inverouran, or 17 miles to the south of Kingshouse, the first stance to the north of Inverouran, a distance which was beyond the physical capacity of the animals to travel, consistently with safe and judicious driving.

The Appellant pleaded in support of his suspension that “the averments of the Respondents were not relevant to support the claim made by them to the use of his property, against his will or without his consent for resting or feeding their cattle or sheep; more especially, in respect the Respondents had not averred the existence of any title to any servitude or pasturage or other servitude over his property, or even specified any tenements which could in law be held as dominant tenements, or a dominant tenement, to which

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“ such right was said to be attached ;—in respect the Respon-
“ dents had not averred the existence at any time, of any
“ drove-roads as distinguished from a public road or highway ;—
“ in respect the Respondents had not made any averments as to
“ possession, which could in law be held as possession, to the
“ effect of establishing any right of servitude, or other right
“ in or over his property ;—and in respect there was no prin-
“ ciple or authority in the law to the effect that a proprietor of
“ lands adjacent to a drove-road, and *multo majus* a proprietor
“ of lands adjacent to a turnpike road, or a military road, or a
“ public road or highway, was under any obligation to provide
“ accommodation for men or horses, or cattle or sheep, or other
“ animals, passing along such road.

“ That the proceedings complained of ought to be suspended,
“ and the interdict granted, in respect of his right of property
“ in the lands and farms referred to, and in respect no use had
“ ever been had of, or in regard to, that property, by the
“ Respondents or others, but what was reconcileable with, as it
“ proceeded from, his exclusive right of property, and that of
“ his predecessors, and the exclusive though temporary right
“ of his or their tenants to the use of that property.

“ That even if the Respondents had the right of servitude,
“ or other right claimed by them, the Appellant, in virtue of
“ his right of property, was entitled to change the state and
“ arrangements of his property in the way he did in 1842, and
“ previously in 1835.”

The Respondents answered that they, “ their authors and pre-
“ decessors, and the public at large, having for time immemorial,
“ at least for forty years, had the use and occupation of the
“ drove-stance in question, on payment of the fixed and accus-
“ tomed rate ; and this use and occupation being indispensable
“ for the use as a drove-road of the road in question, the
“ Respondents were entitled to the continuance of the same use

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“and occupation, on the same terms, conform to immemorial
“use and wont.”

The cause having been remitted to the issue clerks to prepare an issue between the parties, an objection was taken by the Appellant that the averments of the Respondents were not relevant to support an issue. This objection was disposed of by the Court by an interlocutor finding that there “are relevant
“averments fit to be the subject of a jury trial.”

The appeal was taken against this interlocutor.

The Lord Advocate and *Mr. Bethell* for the Appellant.

I. The Appellant does not deny the right of the Respondents, and of the public at large, to use the road in question *qua* road; but that right does not give them any title to use his lands for feeding the sheep and cattle they may drive along the road, without his consent. It may be true, as averred by the Respondents, that they and their predecessors, and the public at large, have had the use and occupation of the drove-stance on payment of a fixed rate; but that does not infer any right in them, or in the public, to compel the Appellant or his tenants to continue the sale of this use and occupation upon the same terms, or upon any terms whatever. The Appellant is under no restraint to discontinue the arrangement so soon as it suits his convenience or inclination so to do. The Respondents may cease taking their cattle to the stance whensoever they choose; and, on the other hand, the Appellant is equally at liberty to prevent them continuing to do so.

But the Respondents say it is indispensable to the use of the road, as a drove-road, that there should be a drove-stance, else the road could not be used. That may be true; but still it does not necessarily follow that the Appellant is compellable to give this accommodation in the particular locality in which they have chosen to demand it, or even to give it at all. The necessity for

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the accommodation, though admitted, leaves the matter just where it was—the subject of negotiation between the parties—as all accommodation for men or cattle upon every public road is, although equally indispensable to its use with that which is claimed in the present instance.

II. If the Respondents meant to rest their claim to the stance and pasturage, upon the ground of its being a servitude to which they had acquired right, it would have been necessary for them, before being allowed to prove this right, to aver the possession or ownership of some lands in respect of which the servitude had been acquired; for in the law of Scotland there are no such rights as personal servitudes, but *prædium servit prædio*. There must, therefore, be a dominant as well as a servient tenement—one to which the servitude is due, as well as one by which it is due (*Ersk.* ii. 9, 5). But there is no averment upon the record either of possession of, or property in, any land in respect of which the right in question is claimed. This averment is the more especially necessary because the particular servitude claimed—that of pasturage—is regulated as to its extent by the extent of the land in right of which it is asserted (*Ersk.* ii. 9, 14); and the benefit of it cannot be communicated by the owner of the dominant tenement to the cattle or sheep of other persons. Earl of Breadalbane, *Elchie's Rep. voce Servitude*; *Murray v. Magistrates of Peebles*, 8th December, 1808, *F.C.* Nay, more, the dominant tenement, if not immediately contiguous to the servient, must at all events be in the neighbourhood of it (*Ersk.* ii. 9, 33; *Heinec ad Pande*, ii. 160); whereas in the present instance the right is claimed, not for any particular lands, but for whole districts or tracts of country lying at the distance of 60, 80, and even 100 miles from the servient tenement.

III. If this right of pasturage be claimed as a privilege common to the whole public, such a claim can only be supported by averments that the lands over which it is claimed or the right

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itself is *inter regalia*, and held by the Crown for the benefit of the community; but the Respondents have not ventured to make any such averment, for a good reason, because it would be inconsistent with the fact, and is directly negatived by the admitted payment by every one who has hitherto had the benefit of the pasturage.

IV. The right cannot be claimed as an accessory to the public drove-road, which the Appellant admits does run through his lands, and the use of which he does not dispute, for the use of such a road is for *passage* only. No doubt, as *Stair* ii. 1. 7 says, the pasturage of the way follows the way itself, and that also the Appellant does not dispute. But there is no authority for saying that a right to the use of the way gives a right to the use of the pasturage, not of the land forming part of the way, but running along the side of it. No doubt in *Campbell v. Campbell*, 5 *Bro. Supp.* 599 it is said that such a right was there claimed, but the Report does not show that the claim was allowed; on the contrary, the reservation from the interdict *uti possidetis* as to ground under crop or enclosed would lead to the inference that the decision was confined to the roads alone.

Sir F. Kelly, Mr. Rolt, and Mr. Anderson for the Respondents.—The only question which can be decided upon this appeal is the relevancy of the Respondents' averments to justify sending them for trial by an issue. The import of the interlocutor complained of is, that there is nothing so repugnant or unjust in the right claimed as to preclude a trial of the facts in order to ascertain the nature of the right and the circumstances under which it is claimed.

The averments are, that places for resting and refreshing sheep and cattle are invariable and indispensable accompaniments of a drove-road; that the stance in question has been immemorially attached to the drove-road passing through Inverouran, and has been immemorially used by the proprietors and

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tenants of certain districts, and especially by the Respondents, every one of whom is either a tenant or a proprietor of land in one of the districts. The only question, then, can be, whether this is such a right as the law recognizes and as may exist; because if it be, there is sufficient averment to try the question.

[*Lord Campbell.*—How do you define the right?]

A right to a public drove-road with right of places for feeding and resting for all cattle travelling along the road, they paying a fixed sum at certain places, of which Inverouran is one. Unless there be such a right, there cannot be any exit for the cattle from the districts in respect of which it is claimed. It is said that this right, if it exist at all, must be a servitude, and then it is asked, where is the dominant tenement? But *Stair* ii. 7. 10 says, “Ways are part of the reservation from property, and the necessary vestige of the ancient community of the earth; free ish and entry is implied in the very right of property. It is the necessary effect of property rather than a servitude.”

If this right of passage is to be called a servitude, it certainly is not in any case in respect of any dominant tenement. Nevertheless, in the present instance, complaint is made that the right claimed is ill-defined, because it is made in behalf of a district embracing all the north-west of Scotland; but *Hamilton v. Aikman*, 5 *Jur.* 7. and *Home v. Young*, 9 *Co. of Sess.*, *Ca.* 286, and *Hailes*, Dec. 280, were instances of easements sustained in favour of the inhabitants generally of a town and burgh, and *Porteous v. Allan*, *Mor.* 14,512, and *Campbell v. Campbell*, 5 *Bro. Supp.* 599, are examples of a claim similar to the present made, in these instances, as in this, on behalf of the inhabitants of extensive districts of country. The cases therefore, and institutional writers, show that it is not necessary for the Respondents to found their claim upon the possession of a dominant tenement.

Porteous v. Allan, and *Campbell v. Campbell*, further establish that a right of road for the passage of cattle by a way

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not used for the passage of carts or carriages, is recognized in the law of Scotland, in mountainous districts, and that this right may be acquired by the inhabitants of the remoter districts, to whom it is absolutely necessary as a means of communication with the low-lying countries. If it be conceded that there is this right of drove-road, then pasturage along the road, and stances for the resting of the cattle must be an accessory to the right of passage, for without the one the enjoyment of the other would plainly be impossible; and if that be conceded, all that can remain is proof of the possession and mode of enjoyment by those on behalf of whom the right is claimed, that is to say, of the positions or locality of the resting stances. The Respondents made substantive averments upon this subject in the Court below, and were prepared to support them by evidence. If they had been allowed to do so, the evidence would have shown, not only the existence of the right, but its indispensability—the absolute necessity that there is for it. No doubt the averments did include a statement that a fixed sum had been in use to be paid for the stances and pasturage; and there may be an anomaly in this. It may not exist in the case of any other easement or servitude; but it does not follow that this must negative the right itself, if indeed it should not rather support it. If a right of passage for cattle and sheep where there is no passage for carts or carriages be admitted, from the mere necessity of the case, as one of “the vestiges of the ancient “community of the earth;” the very same necessity will support the claim for resting and pasturage, not over every part of the road, for that would be both impracticable as well as unnecessary, but at certain fixed points; and if the enjoyment at these points be established from time immemorial, as was averred here, the law will not inquire how this originated, or the particular mode or terms upon which the right was conceded, any more than it will make such an inquiry as to the right of way. And if the averment extend to showing that a

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consideration has been paid for the benefit enjoyed, this is only so much deducted from the hardship which the necessity of the case imposed upon the party by whom the enjoyment is conceded. He has payment made to him for the forced use of his pasturage, instead of having to give it for nothing, as in the case of the use of his ground for the passage of the cattle; but the fact of the payment no way detracts from the necessity which is the foundation of the right of way, as it is of the right of pasturage. In *Roxburgh v. Dunbar*, *Forbes' Cases*, 675, the inhabitants of the town of Dunbar were found entitled to carry their fish over the lands of the Duke of Roxburgh, when prevented reaching their own harbour by the state of the weather, upon paying so much for every loaded horse or cart. That case shows that a servitude for which a consideration is paid, is not unknown in the law of Scotland.

Apart from the merits, this appeal is incompetent, inasmuch as it has not been brought with the leave of the Court below. By the 4th sect. of 59 Geo. III. a power is given to the Court to remit for trial by jury such cases, not coming within the enumeration in the 1st sect. of cases appropriated by the statute itself for trial by jury, as in the opinion of the Court are proper to be tried by that mode, and by the 15th sect. of the statute no appeal is given against the decision of the Court upon the question of remit or no remit, unless with the special leave of the Court first asked and obtained: and this provision was substantially re-enacted by the 33d sect. of 6 Geo. IV. cap. 120. Before, therefore, any appeal could have been taken in the present case it would have been necessary for the Appellant to have had the leave of the Court, and not having either asked or obtained it, the appeal cannot be entertained.

The Lord Advocate in reply, was directed by the Lord Chancellor to confine his observations to the point of competency.

The Lord Advocate, in reply.—It is too late now to object to the competency, that should have been done before the appeal

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Committee, while as yet the cases were not prepared, or any other expense incurred; now the whole mischief has already occurred which the statute intended to prevent. But in truth there is nothing in the objection, for the terms of the 33d sect. of 6 Geo. IV. show that it has reference only to the cases which had been enumerated, as those which must be sent for trial by jury, without leaving any discretion to be exercised by the Court upon the subject. The present not being one of the enumerated cases, rests on the older statutes.

LORD CHANCELLOR.—My Lords, in this case there was a preliminary objection raised. It was a matter of discussion how far the appeal from this interlocutor was competent, on the ground of the case being one of those with respect to which the Act provides that it shall not be the subject of appeal on interlocutory matter. My Lords, I have looked into the Acts; and it appears to me, that the section of the Act of Parliament which is relied upon does not apply to this case. That section refers either to cases which are enumerated in the Act of Parliament, as those which must, of necessity, go to the Jury Court, or to those cases in which the Lord Ordinary sees reason to send them there in the first instance; and it does not refer to those cases where the Court of Session, having jurisdiction over the matter, finds it necessary, for the purpose of disposing of the case, to direct an issue to be tried. The Judges were divided in the Court below, as regards the appeal being prohibited by the section in question, but now I apprehend the appeal is competent; and, therefore, we have now to look to the merits disclosed in the proceedings before the Court of Session. I must observe, however, that, if this had been a case of incompetency, the parties have not followed the right course. They ought to have brought that objection before the consideration of the House at an earlier stage of the appeal, for the purpose of the case being dismissed as incompetent. It would then have

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been referred to the Appeal Committee, and would have been disposed of before the expense of attending at the Bar of the House had been incurred. But, my Lords, it is quite sufficient for the present purpose to say, that there is no ground for the objection on the score of competency.

The question then is, whether the interlocutor of the Court of Session appealed from, can be supported? Now, the interlocutor finds that there are relevant averments fit to be submitted to a jury trial, which I construe to mean, not that it is a matter depending upon a fact to be tried, but that there are averments which, in point of fact, if found one way, in favour of the right claimed, would not only enable the Court, but make it the duty of the Court, under this declarator, to find that the custom was good on behalf of those who claimed the benefit of it. We have, therefore, to see what the custom is, as it is alleged by the Respondents. Now, the Respondents state that, “for centuries, the proprietors and tenantry northward of the Grampians, and those dealing with them, have been in the practice of driving sheep and cattle, to and from the southern fairs and markets of Scotland and England, along two lines of drove-road.” It then describes the roads by which these cattle were said to be driven; and it then says—“This drove-road”—which is one of those described—“by Glencoe and the Blackmount, was used for driving sheep.” Then, in the second statement, it says—“On their journey, certain places for resting and refreshing sheep and cattle are indispensable. These places are generally situated at the average distance of ten miles from one another—being the safe and proper distance sheep and cattle on a journey can daily travel without sustaining serious injury—and they are called drove-stances or stages, and are invariable and indispensable accompaniments of drove-roads; and on the great drove-road by Glencoe and the Blackmount, above described, there have been, for centuries past, and as far back as its history reaches, drove-stances

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“ at stated distances for the resting of the sheep and cattle ;
 “ there are fixed rates of charge for every hundred sheep, and
 “ every score of cattle attached to such stance, and these rates—
 “ generally 1s. 6*d.* for every hundred sheep, and the like for
 “ every score of cattle, for each night—have been fixed for
 “ time immemorial.” Then it states—“ These several drove-
 “ stances have been immemorially used and enjoyed by the
 “ proprietors, tenantry, and dealers, from or connected with”
 certain districts which are enumerated, “ and, generally, the
 “ south-western portions of the counties of Sutherland, Ross,
 “ and Inverness, and especially by the Respondents and their
 “ predecessors, either as proprietors or tenants of lands situated
 “ in said districts—every one of the Respondents being either a
 “ proprietor of lands, or a tenant of lands, in one or other of
 “ said districts—and also by the public generally : In parti-
 “ cular, the drove-stance at Inverouran has been so used and
 “ enjoyed.” Then we find, in the plea in law for the Res-
 pondents, it is thus stated—“ The Respondents, their authors,
 “ and predecessors, and the public at large, having, for
 “ time immemorial, at least for forty years, had the use and
 “ occupation of the drove-stance hereinbefore described, on
 “ payment of the fixed and accustomed rate, and the said use
 “ and occupation being indispensable for the use, as a drove-
 “ road, of the road mentioned in article first hereof, the Res-
 “ pondents are entitled to the continuance of same use and
 “ occupation on the same terms, conform to immemorial use
 “ and wont.” Now, although the statement enumerates certain
 districts, they are, in fact, a large portion of the northern part
 of Scotland ; but that is very immaterial, because it is accom-
 panied with a claim for the public generally. It is not in
 respect of any tenancy or servitude, or any connection between
 those who occupy and enjoy the land from which the sheep and
 cattle came, and the individual who occupies the land over
 which this pasture is claimed ; but it is for the public generally.

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In the first place, the use of the drove-road is not in dispute ; but this right is claimed as necessary and incident to the enjoyment of the drove-road. The claim is, to have the benefit and right of the pasturage for sheep and cattle over certain pastures, the extent of which is not ascertained in the proceedings, but in certain districts totally unconnected in any other way with the drove-roads, except as, according to the statement of the Respondents, for the purpose of pasturing their cattle. It is, therefore, a right of pasturage claimed as an incident to a drove-road. My Lords, I cannot possibly understand the statement made, or the claim insisted upon, by the party otherwise than in that sense—for I only use the very words on which they claim it themselves. The question is simply, whether such a claim can be maintained in point of law? We have in vain listened in order to see what authority there is for that proposition. If there had been authority for it in the law of Scotland, we must have endeavoured to discover the principle on which the decisions had taken place. But it so happens that there is no authority—there were only two cases in which the claim ever was raised, and in these it was not decided. It has been a claim which parties have been anxious to establish ; but there has been no decision in its favour.

Then, if there is no decision in its favour, is it possible to support it upon principle? It is a claim of a right of pasturage over certain portions of land—the extent of which is not ascertained—belonging to another individual, in respect of what? Why, in respect of the right to drive cattle through the land—that is, of a right of passage. As incident to that, and as necessary and indispensable to its enjoyment, a right is claimed of pasturage at large over certain unascertained districts, extended beyond the limits necessary for the passage of the cattle. I can find no authority for that—none has been referred to, to justify the House in coming to the conclusion, that the right so claimed has been established by decision. Therefore, in the absence of

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any decision, it was treated by the Court below as a perfectly new case. My Lords, in the absence of such decision, I cannot advise your Lordships to establish, as a principle, that there is such a right as that claimed. If you agree with this view of the case, I should advise your Lordships to negative the finding of the Court of Session that the averments are relevant for the purpose of the issue; to discharge the interlocutor; and to remit the case back to the Court of Session, to take such course as to that Court shall seem fit.

LORD BROUGHAM.—My Lords, I entirely agree with my noble and learned friend on both points. First, as to the competency of the appeal upon the provisions of the Appeal Act, 6 George IV., and also upon the merits of the case. Upon the Appeal Act, there can be no doubt whatever, in my opinion. I have referred, with my noble and learned friend near me, to the two cases which have been referred to; and we thought that the one did not help the case, and the other, we thought, did not injure or affect the case of the Respondents; so that those two cases have nothing to do with the question. If there were decided cases supporting such a claim—however difficult, as lawyers, we might find it to be to uphold such a claim as this, resting on no intelligible principle whatever—we should have been bound to adhere to the decisions that led to that conclusion. None such, however, has been cited. The question appears to have been ventilated repeatedly—at least in those two cases—but never decided.

There is no authority for such a claim on principle; and it is one of the most absurd of which I ever heard. It is anything for anybody. There is no district pointed out, in which the party claiming must be owner or resident, but any person coming there for any purpose in the north may claim this right. It takes a wide range, and might include all the Highlands. Then, if it is good for anything, it is good for *redeundo*

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as well as *eundo*. The same cattle are not very likely to be taken back; but, supposing others are taken to improve the breeds in the north, I do not see why the same claim should not be set up for such cattle and others to the south and south-east.

It is a claim founded on a right of way. It is a claim made because there is a way—a “drove-road,” as it is called—and which has not been disputed. It has been stated as if that were put in issue—which it has not been. I do not apprehend that it has been disputed. The Appellant here (the Defendant below) is not interested in disputing the right of driving cattle there. It is not very clearly stated in respect of what the right exists; but still he has no interest to dispute it. But to say, because I have a right to drive cattle over a certain common, or over a certain district of country, that I have therefore a right to depasture those cattle, is as perfectly a new proposition, in point of law, as I ever heard contended for. When you have a drift-road here—a right to drive cattle over grass-lands—there is no doubt that the cattle may take a few blades of grass without committing a trespass. No doubt, it is hardly possible but that they must pick a little now and then: it is almost necessarily incident to driving cattle over a pasture. But this is a claim of right to stop for a night at a time on what is called a stance—which is a wide bit of land adjoining the road; it is not the roadside, but the adjoining land. Even upon the road, that would be doubtful. But that is not the question. One of the learned Judges says this is a sort of elongation or extension of the right of way. I think it is a very curious extension of the right of way that you should have a right of eating and feeding. It may be a very good, necessary, and laudable thing to be done on a journey; but it is no part of the travelling on the road that I should eat; and, therefore, it is very fit that I should pay for what I eat, and also for what

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the cattle eat. I cannot at all see that this is necessary to the right of way—in such a manner at least. To make anything good of their argument, it must be made out that it is so incident to the right of way—that it is a necessary parcel to the right of way. Nothing of that kind has been done. I am, therefore, clearly of opinion, that this right does not exist; and that it cannot be supported.

LORD CAMPBELL.—My Lords, I do not feel it necessary to add anything to the observations which have been already made to your Lordships, on the two points which have been discussed by my noble and learned friends who have preceded me. On the subject of competency, I do not doubt that the appeal is competent. On the merits I have a clear and strong opinion. I am very anxious that it should be understood that we say nothing at all respecting the drove-road. This appeal by Lord Breadalbane has nothing to do with the drove-road—that is not in dispute, and, probably, he cannot dispute it. The appeal relates to the stances only. What are the stances? The stances are fields or portions of the mountain adjoining the drove-way, over which it is contended that cattle have a right to pasture on their way from the north to the south; and it is very material that your Lordships should bear in mind what the claim is that is now set up. It is not at all a right of passage; but it is a right of pasture. It is a right to take the profits of the soil without the consent of the owner of the soil—certainly on payment of certain fixed remuneration—which is supposed not to arise from contract, but to be matter of right.

The public may very well have a right of passage, but a right to take the soil, or the profits of the soil, without the consent of the owner, is a thing wholly unknown to the law of England, and, I think, wholly unknown to the law of Scotland. There may very well be a drove-road established by usage, and that

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drove-road may be open to all the Queen's subjects; but a drove-road is only a right of passage for cattle along the road—it gives that right, and nothing more.

But what is claimed here is a right to stop upon the adjoining territory, and that the cattle should be depastured upon that territory; and it is a claim, my Lords, not confined to any particular district; for, looking at the language of the claim, it amounts to a claim for all the Queen's subjects coming from the north to the south—it must, of necessity, belong to them also in going from the south to the north.

This claim, it is allowed on all hands, is novel in the Courts of Justice in Scotland; because—unless as limited in the case of the Campbells, which seems to have caused infinite astonishment—we find no authority for it either in the Scottish text-writers, or in the decisions of the Courts of Justice. The Judges, on all hands, allow that it is novel.

Then, if this is novel—if there is no authority for it in the text-writers, or in decided cases—it must be shown that it rests on principle. Upon what principle does it rest? It is said that it is necessary. What! can there be no drove-road without a right of stance? Is there any such thing in England? In England we have drove-roads, which we call drift-roads; but the right of stance was never dreamt of. Why is it necessary for a drove-road more than any other road? Suppose that there had been a road established through these glens, which the Queen's subjects had a right to use for carriages as well as for driving their cattle, and that carriages were driven along it—would this claim apply to such a road as that? If so, you must say that, wherever there is a public road over which cattle may be driven, either in common with carriages, or without carriages, that every ten miles there must of necessity be a right of pasture.

Certainly, that is a thing that was never heard of, or dreamt of, before. But then the very ingenious Judge to whom my

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noble and learned friend has referred (Lord Jeffrey) draws an analogy, and says, this is no more than an expansion of the drove-road; because he likens it most ingeniously to a river swelling every now and then into a lake; and he says a lake is only an expansion of the river, and the stance is only an expansion of the drove-road. Surely, if this stance and drove-way were a case of the same nature as a river which, after being contracted between mountains, and dashing along over rocks, expands into a lake, that might be so. But, with great deference to that most learned and able Judge—whom I infinitely respect as well as esteem—there is no resemblance between a drove-road and a river; because the drove-road is simply the right of passage, and between stance and stance there is no right of pasture.

I observe it is stated that the pasture upon the drove-road belongs to those who use the drove-road. Now, that I take leave very much to doubt, or, I might say, to deny. The notion has been suggested, that, wherever a road is established, the soil of the road belongs to the public. That is a fallacy. There may be a road established by usage for forty years; but the soil of the road continues to belong to the co-terminous owner. If there are minerals under the road, the minerals are his; if trees grow upon the road, the trees are his; if there is grass upon the road, he may take the grass—subject always to the public servitude. My noble and learned friend said the cattle may, no doubt, nibble as they pass along the drove-road; but that is not a matter of right—it is a matter of accident; and it might be stated, in pleading, by way of excuse, not as a matter of right. I believe, on this point, the law of Scotland and the law of England are the same. Suppose an action of trespass is brought by the owner of a close for driving cattle along the close, the defendant would say that he had a right of driving his cattle through the drove-road existing in the said close; and supposing the declaration stated the cattle were driven along his close, and

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that they ate the grass as they went along—it would be necessary for the defendant to justify both. He would justify going along the close by the drove-road. Then he would say, when the pleadings were in Latin, that, *raptim et sparsim*, the cattle ate the grass, which was done unavoidably—not that they had a right to pasture on the drove-road, but that, by stealth, and by accident, the cattle did eat a few of the blades of grass. It is merely an excuse for the trespass—it is not a right. Now, such is the nature of the drove-road—there is no right. Therefore, I think that the learned Judge's ingenious analogy fails in supposing that, upon the drove-road, there is the right of depasturing cattle.

But then we come to the stance; the essence of the stance is the right of pasturage, to take the produce of the soil. Now, there may very well be a drove-road. A drove-road is an easement which is exercised by all the Queen's subjects, and is merely a right of passage, and may be exercised by an indefinite number.. But when you come to take the produce of the soil, and eat the grass that is growing in those fields, it cannot be claimed by the public—and it would be absurd, because what part of the public is to have this right? Suppose there comes drove after drove, when the land is quite bare is it to be enlarged? Is the owner of the land to be obliged to bring down hay or grass for the purpose of feeding them? The thing becomes absurd when you say that the whole of the Queen's subjects have a right to pasture on any particular spot. For these reasons, it seems to me that this right cannot be supported. Then, we are told that it is inconsistent with the duties of property to deny such an accommodation to the public. My Lords, a court of justice cannot enter into this consideration. It is said here that Lord Breadalbane has offered other stances equally commodious; but into that we cannot inquire. It would have been the same for our decision if he had refused the stance altogether. It would have been

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the same to us sitting in our judicial capacity. But, my Lords, wherever there is an abuse of property, the proper method of proceeding is, not for a court of justice to exceed the law, but for the Legislature to interfere; and if it should happen that there should be such an abuse of property as that persons coming from a distant region of the north were not allowed to have stances for resting and feeding their cattle, I for one should not hesitate for a moment about assisting, and affording to them a remedy. Such an abuse of property should be remedied by the Legislature, and not by courts of justice. There is considerable analogy as to what my noble and learned friend near me suggests with regard to stances for places of worship. I think the noble Appellant will not deny that it would be a great abuse of the rights of property if the proprietor of extensive districts were to refuse stances or sites for erecting places of religious worship, where God may be prayed to according to the religious notions of any particular sect; and I am sure that he would most willingly concur in any remedy that may be proposed for such an evil. I should say, likewise, that if there were a denial of sites for the refreshment of cattle, that would be an equally good ground for interference by the Legislature; but that is no ground at all for perverting the law.

For these reasons, I entirely concur in the opinion which has been given by my noble and learned friends.

With respect to the payments, it is quite clear that these were conventional—that they were matters of contract, and not payments to be made in the enforcement of the right.

But the ground of my judgment is, that this alleged claim cannot be supported in law; and, if there had been a verdict of a jury finding that there was such a custom, I should say the custom was void, and ought not to be carried into effect.

Lord Brougham.—I cannot agree with my noble and learned friend's view on the subject of legislation. I do not pledge myself upon legislation as he has done, and as, I daresay, the

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noble Appellant would do. My noble friend's argument, as regards all persons claiming a right of pasture for their cattle, is very admirable; and it shows that it would be impossible to draw the inference, from a right of way, that there was a right of pasturage. The right of way may be claimed by all the Queen's subjects, because it is the common right; but the right of pasturage is inconsistent with that, for one party may take it away, and then the rest would go without it; therefore they cannot all have it.

Lord Campbell.—The old distinction in the law of England is, that a *profit a prendre* can only be prescribed for in a *que state*—that is, there must be, as in the Scotch law, a dominant estate, and a servitude attached thereto. But with regard to a simple easement, that may be claimed by all. I believe, on a proper discussion, the law of Scotland will be found to be the same.

Sir F. Kelly.—As I understand your Lordships' judgment, it proceeds exclusively on the claim to the stance. Your Lordships will be pleased so to frame the decree as to leave open the question as to the right to the drove-way.

Lord Chancellor.—Yes; we do not interfere with that. We send the case back to the Court of Session, to deal with it as they may think right, according to the declaration negating the finding of the Court of Session.

Lord Advocate.—That there are no relevant averments to support the claim to the drove-stance.

Lord Brougham.—It is said to be irrelevant with respect to the stance exclusively.

Lord Advocate.—Your Lordships will reserve the costs in the Court below.

Lord Chancellor.—There were no costs given below.

Lord Advocate.—What I ask is, that your Lordships will reserve them; because the Court below might think itself precluded from giving costs by this proceeding.

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Lord Chancellor.—The interlocutor does not touch the question of costs.

Lord Advocate.—That, my Lord, is quite understood here ; but, in the Court below, there is a difficulty—whether we can claim costs in the Court below prior to appeal.

Lord Chancellor.—I understand the effect will be, to remit the case back just as it stood before the interlocutor was pronounced, but with a declaration, that the interlocutor was wrong.

Lord Brougham.—The Court below will go on from that point in the case as if the judgment of relevancy and this appeal had not taken place.

GRAHAM, WEEMS and GRAHAM—THOMAS DEANS.