

consideration of Irish law. It is true that in the Courts below there was no evidence of what the law of Ireland was, and those Courts therefore were unable to consider the question. But there is enough upon the pleadings to raise the point, and the peculiarity of the case is that what must necessarily have been a question of fact in the Courts below becomes a question of law in your Lordships' House. It is not competent to your Lordships on an Irish question, though involved in a Scotch appeal, to shut your eyes to the law of Ireland, and to determine the rights of the parties in the dark, as the Courts below were compelled to do. The authorities cited by the learned counsel for the appellant seem to show conclusively that in a case like the present your Lordships cannot divest yourselves of your judicial knowledge of Irish law.

The interlocutor of the 31st of May 1884, whether it be now appealable or not, does not, I think, present any difficulty. The interlocutor itself does not touch the question. There are expressions in the opinion of the Lord Ordinary which, taken apart from the context, seem to be unfavourable to the view now presented by the appellant. But the opinion was directed to a wholly different point. Proceeding on an erroneous assumption of what the law of Ireland was the defenders pleaded that the law of Ireland was a bar to the pursuer's remedy in a Scotch Court. And to that the opinion of the Lord Ordinary was addressed.

Upon these grounds, without expressing any opinion on the reasons upon which the decisions of the Lord Ordinary and the Court of Session are founded, I concur in the conclusion that the appeal ought to be allowed, and I agree as to costs.

Interlocutor of the Lord Ordinary of the 31st July 1884, and also the interlocutor of the Second Division of the 9th January 1885, and of the Lord Ordinary of the 31st January 1885, so far as the said interlocutors were appealed from, reversed, and cause remitted with the declaration that the appellant was not barred by the marriage-contract sought to be reduced from electing to take her legal rights as the widow of the deceased Henry Ritchie Cooper; no costs to either party in the House of Lords or in the Court of Session.

Counsel for the Appellant—Rigby, Q.C.—Salvesen—W. F. Hamilton. Agent—Andrew Beveridge, for H. B. & F. J. Dewar, W.S.

Counsel for the Respondents—Sol.-Gen. Robertson—E. W. Byrne. Agents—Grahames, Currey, & Spens, for Webster, Will, & Ritchie, S.S.C.

COURT OF SESSION.

Saturday, March 10.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

WINANS AND ANOTHER v. LORD
TWEEDMOUTH.

Heir of Entail—Permission to Adjoining Proprietor to Erect Bridge on Entailed Lands—Tolerance.

The proprietor of the estate of G, situated on the south side of a river, obtained, in the year 1858 from the heir of entail in possession of the lands of K upon the north side, permission to erect a bridge across the river to enable foot, horse, and cart traffic from G to reach the county road which ran along the north bank of the river. The bridge was solely for the convenience of the estate of G, and was built at the expense of the proprietor, who had an undertaking from the proprietor of K that it would not be interfered with during his lifetime. A short stretch of road was also formed through the entailed lands connecting the north end of the bridge with the county road. Prior to the erection of this bridge the traffic from G had crossed the river nearly at the same point by a ford. There was, however, no public right of way to or across this ford. Shortly after the date of the erection of the bridge the proprietor of G became tenant of the shootings on the estate of K. In 1885 he assigned the unexpired period of his lease of these shootings to W.

In an action raised in 1886 at the instance of W along with a succeeding proprietor of the lands of K, which had been disentailed in 1884, for declarator that they were entitled to shut up the bridge—*held* that a right of property in or servitude over the part of the estate of K, on which the bridge and its connection with the county road was formed, could not have been acquired except for a valuable consideration, because the estate was entailed; that the right gratuitously conferred on the proprietor of G was merely a use by tolerance during the grantor's lifetime; and that therefore the pursuers were entitled to close the bridge against traffic.

Road—Right of Way—Expenditure of Public Money—Public Place.

In an action of declarator of a public right of way along a highland road, which the pursuer averred ran from one public place to another, which right was alleged to have been acquired by prescriptive use, the Lord Ordinary found that there was a right of way along a section of the road in question. Considerable sums had been expended upon this section of the road by the county and district road trustees between 1814 and 1858, but since 1860 it had formed part of a private avenue, and no public money had been spent on it after that date, and it was not

included in the list of roads taken over by the trustees under the Roads and Bridges Act of 1878. This section of the road commenced at a village, and terminated at an old meal mill in disuse at the date of the action, where there were only three or four houses. The persons living upon the estate were only those employed in connection with it. The Lord Ordinary held that there was evidence to show that the former proprietor had consented to the appropriation of this portion of his land to the purposes of a public road; that if a road is public in the sense of being made and maintained at the public expense, and is with the proprietor's consent placed under the administration of the road authority, the law as to public *termini* is not applicable; and that in such a case the road trustees may lawfully make and maintain the road if one of the *termini* be a public place, and if along the road there are habitations and a population for whose accommodation a road is needed.

Held (rev. Lord M'Laren) that if only that section of the road which the Lord Ordinary had found to be a public road had been claimed on record, the claim would not have been relevant, because the road did not terminate at a public place; that it was not proved that the road had been appropriated to public purposes; but that even assuming the proprietor had made over the road to the road trustees, the condition upon which he had done so was that they were to repair and maintain it, and that on its abandonment by the trustees it reverted to the proprietor free from any public right of way.

Opinion (per Lord Mure)—That even if there was at one time a servitude road to the mill, when that mill ceased to exist the use necessarily came to an end.

The estate of Knockfin is situated on the north or left bank of the river Dhiag, which runs through Glen Affric, in the county of Inverness, in a north-easterly direction. On the Knockfin side of the river the population is very thin, as the ground is used for a deer forest.

The estate of Guisachan lies on the south or right bank of the river, and marches with Knockfin for a distance of 13 miles. The river Dhiag is the boundary between Knockfin and the Glen Affric shootings and Guisachan. The population on the Guisachan side of the river is more numerous, but consists wholly of persons employed on or about the estate.

Guisachan House lies about 200 yards to the south of the river. Within the policies are the ruins of an old mill, hereinafter called the Old Meal Mill, about 250 yards to the south of the house.

About 350 yards above, *i.e.*, to the west of the house, the Dhiag is crossed by a bridge called the Black Bridge. This is a foot bridge, the Knockfin end of which is about 300 yards from the Strathglass county road, which runs along the north bank of the river as afterwards described.

About 540 yards below, *i.e.*, to the east of Guisachan House, the Dhiag is crossed by the White Bridge. This is a substantial wooden structure, resting on stone abutments on each side, and suitable for carriage traffic. The

Knockfin end of this bridge is about 45 yards distant from the Strathglass county road, with which it is connected by a good road. On the south side there is a carriage road connecting the bridge with Guisachan House.

Near the Black Bridge there was formerly a ford, which till 1854, and occasionally later, was in use, but only for foot and horse traffic. Near the White Bridge there was also a ford, known as Cullessie Ford, which was occasionally used for cart traffic, but seldom if at all after the bridge was built. About a mile and three quarters below Guisachan House, and also on the south bank of the river, lies the village of Tomich. From this village a road runs up the south bank of the river passing in about a quarter of a mile the entrance to the avenue of Guisachan, and crosses the Dhiag at Knockfin Bridge. The road then runs along the north bank of the river, where it is known as the Strathglass County Road, passes the connection with the White and Black Bridges, and ends in a drove road to the west, about half a mile above Guisachan House.

From Tomich, as already stated, this road runs up the south bank of the river till it reaches the avenue gate of Guisachan. The avenue runs along the south bank of the river, and (disregarding a short stretch up to the house), reaches the site of the Old Meal Mill. Thereafter in a quarter of a mile it reaches the farmstead of Hilton or Tom-Guisachan, at which point a drove road strikes off southward—hereinafter called Road No. 5—leading to Glenmoriston. The avenue road continues westwards past Tom-Guisachan, up the south bank of the Dhiag to Cougie, many miles away, where there is only a shepherd's house. This road will hereafter be called Road No. 1.

From Tomich a road branches off the Strathglass County Road, close to the village, and runs westwards, south of and nearly parallel to the Guisachan avenue for about half a mile, and then strikes southwards at a point hereafter called H, across country to a point where it meets Road No. 5, the drove road to Glenmoriston. This is a drove road, and will hereafter, from the point H to the point where it joins the Glenmoriston Road, be called Road No. 6.

From a point in the avenue of Guisachan, about a quarter of a mile from the gate, a road runs up to join Road No. 6 at the point H where it strikes southward, and this short stretch is also included in Road No. 6, which thus extends from a point in the avenue of Guisachan to the point where it joins the Glenmoriston Road—No. 5.

Thus the point H, where Road No. 6 strikes southward may be reached from Tomich, either by following the road which branches off the Strathglass County Road, and runs south of and parallel with the Guisachan avenue, or by going along the Strathglass Road, through the avenue gate, along the avenue for about 200 yards, and then down Road No. 6.

In 1854 Lord Tweedmouth bought Guisachan from Fraser of Culbokie. At that date Duncan Chisholm was proprietor of Knockfin.

In 1858 Lord Tweedmouth erected the White Bridge. About the same time the use of the Old Meal Mill of Guisachan was discontinued, and a new mill was built to supply its place near Tomich, at Guisachan standing.

In 1858 Duncan Chisholm died, and was succeeded by James Sutherland Chisholm, from whom Lord Tweedmouth in 1869 obtained a lease for twenty-one years, from 1870, of the shootings *inter alia* of that part of Knockfin on the other side of the Dhiag from Guisachan House and policies.

James Sutherland Chisholm disentailed the estates in 1884. He died in 1885, and was succeeded by his son Roderick D. M. Chisholm.

In 1877 Lord Tweedmouth erected the Black Bridge over the Dhiag. This original bridge was carried away by a flood, and another was erected in 1881.

In 1881 William Louis Winans, an American citizen, became tenant of the grazings of Knockfin.

By deed of assignment dated in June 1885, Lord Tweedmouth, with consent of Roderick D. M. Chisholm, assigned his right to the Knockfin shootings to Winans. Under this deed Lord Tweedmouth made over to Winans certain subjects, "as well as any other buildings or constructions, and the additions and improvements of buildings at Aultbea and other places on or pertaining to the subjects hereby assigned, made by the said first party or his sub-tenant; and the first party hereby undertakes to put the second party into full and actual possession of the subjects hereby assigned," with certain small exceptions, "at the date of the assignment, and the whole buildings and other constructions which are to be delivered by the first party to the second party under this assignment are to be received by the second party in the order and condition in which they may be at the date of this transfer or assignment."

In 1887 Roderick Chisholm died; Mrs Annie Macdonnell or Chisholm, his mother, was his general disponee and representative.

On 30th April 1886, Winans, as tenant of the Knockfin shootings, with consent of Roderick Chisholm, raised an action of declarator in the Court of Session against Lord Tweedmouth. Before the case was decided by the Lord Ordinary Roderick Chisholm died, and his mother Mrs Annie Chisholm was sisted as a pursuer in his stead. The summons contained five conclusions with reference to the pursuers' rights in the bridges over the river Dhiag and roads connecting these bridges with the public road on the north, and with reference to public rights of way over roads on the south bank of the river, *i.e.*, through Guisachan estate. Certain of these conclusions were abandoned, and the judgment of the Lord Ordinary upon certain others was acquiesced in. Those which it is necessary to set forth were as follows:—"It ought and should be found and declared, by decree of the Lords of our Council and Session, (*first*) that under and by virtue of a deed of assignment entered into between the pursuer William Louis Winans and the defender, dated 22nd and 24th June 1885, there were assigned to the said William Louis Winans the defender's whole right, title, and interest in and to (1) the northmost half of the two bridges erected by him across the river Dhiag, in the parish of Kiltarlity and county of Inverness . . . or one or more of them, the said bridges over the river Dhiag being situated, the one called the White Bridge, 540 yards or thereby north-east of

Guisachan House, belonging to the defender, and the other called the Black Bridge, 350 yards or thereby south-west of Guisachan House . . . and (2) in and to the roads and paths connecting the said bridges on the north with the public roads running through the lands of Knockfin belonging to the pursuer Roderick Donald Matheson Chisholm; (*second*) that the northmost half of the said two bridges erected by the defender across the river Dhiag are situated entirely within the said lands of Knockfin, and that the roads and paths connecting the northmost ends of the said bridges with the said public roads running through the lands of Knockfin are also situated entirely within the said lands; (*third*) that the pursuers are entitled at any time, and without any process of law, to shut up the said bridges, so far as situated on the lands of Knockfin, or one or more of them, and the said connecting roads and paths on the said lands, or one or more of them, by placing a fence or fences across the said bridges and connecting roads and paths, so far as situated on the lands of Knockfin, or one or more of them, so as to prevent the use of the said bridges and connecting roads and paths, or one or more of them, as accesses to or from the said public roads, the pursuers always leaving sufficient openings in any fence or fences which may be placed by them opposite the north end of the ford over the Dhiag, situated 450 yards or thereby north-east of Guisachan House, and opposite the north end of the other ford over the Dhiag, 875 yards or thereby, measuring along the course of the river, to the west of the ford above mentioned . . . and upon the line of the roads or paths connecting the said fords with the public roads running through the lands of Knockfin: Or otherwise, in the event of it being found that the pursuers are not entitled to shut up the said bridges and connecting roads and paths, or one or more of them, it ought and should be found and declared that there exists a public right of way for passengers, both on foot and by horse, and for cart and carriage traffic, and for the passage of cattle and sheep, or at all events, for foot-passengers over and along the same, or across and along such of the said bridges and connecting roads and paths as it may be found that the pursuers are not entitled to shut up, and also over and along the portions of the said bridges situated on the lands of Guisachan, and along the roads or paths connecting the said bridges, so far as situated on the lands of Guisachan, with the public roads on the south side of the river Dhiag . . . and that the pursuers and all others are entitled to use the same for all purposes of passage for which the said bridges and connecting roads and paths are available; and in that event it ought and should be further found and declared that the pursuers are entitled to erect gates across the said bridges and connecting roads or paths on the north side of the river Dhiag . . . (or across such of them as they may not be found entitled to shut up), without any restriction as to the height or method of construction of the same, provided only that the said gates shall be furnished with the same facilities for egress and ingress as exist in connection with the gates at present existing in connection with the said bridges and connecting roads and paths.

The fifth conclusion was for declarator of right of way for cart and carriage traffic, for passengers on foot and horseback, and for cattle and sheep, or at all events for foot-passengers—(1) By Road No 1 from Tomich by Guisachan Old Meal Mill, and Tom-Guisachan or Hilton to Cogie. (5) By Road No 5 from the point where it leaves No 1 near Tom-Guisachan or Hilton to Glenmoriston. (6) By Road No 6 from a point about 200 yards within the avenue gate of Guisachan and joining the road to Glenmoriston from Tom-Guisachan—Road No 5—about two miles south of Guisachan House.

The summons then concluded that the defender should be ordained to remove any gates or other obstruction which interrupted the free use of these roads, which had, it was alleged, been acquired by prescriptive use.

The facts and dates above stated were not disputed.

The pursuer averred with regard to the Black and White Bridges (omitting reference to a third bridge over the Leth Allt burn, which was removed by Lord Tweedmouth before the Lord Ordinary decided the case)—“(Cond. 3) During his tenancy under the said lease the defender erected two bridges in order to connect the estate of Guisachan belonging to him with the shooting grounds of Knockfin, of which he was tenant. One of these bridges is now known as the Black Bridge, and is situated on the River Dhiag, the *medium filium* of which at that point forms the boundary between the estates of Guisachan and Knockfin. The other bridge is to the west of the Black Bridge, and is situated on the Leth Allt Burn, which runs into the Dhiag. These bridges were erected about the year 1880 or 1881, and were used by the defender and his servants as a means of ingress and egress to and from his Knockfin shootings. Another bridge popularly known as the White Bridge had been erected by the defender about 1858, across the River Dhiag to the east of the Black Bridge. These three bridges are all built of wood, and the White Bridge is the only one of them available for cart traffic. When the defender constructed these bridges, he at the same time formed paths on both sides of the said rivers connecting the bridges with the public roads, which run along the north and south sides of the River Dhiag and the Leth Allt Burn. The northmost half of each of these three bridges is situated entirely within the lands of Knockfin, belonging to the pursuer the Chisholm.”“(Cond. 5) Under and by virtue of the said deed of assignment the defender's right, title, and interest in the said three bridges or at least the Knockfin ends of them, from the *medium filium* of the river Dhiag and the Leth Allt Burn respectively, and the roads and paths connecting them with the public roads on the north, were assigned to the pursuer Mr Winans. The said pursuer thereupon became entitled to deal with the said bridges, roads, and paths in such way as he thought fit, saving always such rights, if any, as the public might have acquired over the same. In point of fact, the public had not up to the date of the said assignment acquired any right of use or passage over the said bridges, roads, or paths, nor have they done so since. The pursuer Mr Winans is entitled to shut up the said bridges, roads, and paths, by running a fence or fences across the same, or in any other way, openings

being left by the said pursuer opposite the fords after mentioned. At all events, if the said pursuer be not entitled to shut up the said bridges, roads, and paths, he is entitled to run a fence or fences across these bridges, roads, and paths, provided only that he leaves gates in the fence or fences opposite the bridges, roads, and paths.” He further averred that in running a deer fence along the Knockfin side of the Dhiag he had left the access to the fords at the White and Black Bridges free.

The defender in answer stated—“Admitted that the bridge now known as the Black Bridge is situated on the river Dhiag, and was erected by the defender after his purchase of Guisachan, but explained that this bridge was erected in place of an old bridge which formerly stood at or near the same site, and had been carried away by a flood. This old bridge was in existence long before the defender purchased Guisachan, and had been erected and used in lieu of a ford road over the river Dhiag, which had been used by the proprietor and tenants of the estate of Guisachan from time immemorial as a means of access to and from the Strathglass County Road on the north side of the river. . . . Admitted that the bridge called the White Bridge, which crosses the Dhiag to the east of the Black Bridge, was erected by the defender about the year 1858. Admitted also that these bridges are built of wood, and that the White Bridge is the only one available for cart and carriage traffic. Explained and averred that the White Bridge was constructed with the consent of Duncan Chisholm of Chisholm, the predecessor of Mr Chisholm in the lands of Knockfin at the date of its erection, and that this bridge was built as a substitute for a ford road for foot-passengers, carriages, and horses which had from time immemorial existed and been used by the proprietors, tenants, and others, residents on the estate of Guisachan, as a means of access to and from the Strathglass County Road on the north side of the river. Admitted that the defender, in or about the year 1858, made a small piece of carriage road on the lands of Knockfin, with the consent of the proprietor of these lands, in place of the road formerly existing at the ford, and connecting the said bridge with the Strathglass County Road north of the Dhiag. The said ford road and the bridge road now substituted for it have been used by the proprietors of Guisachan as a right of way for carts, carriages, and horses, as well as foot-passengers for much more than the prescriptive period. Explained that from the dates of their construction, and at and after the date of the said deed of assignment the said bridges were in constant use by the defender and his servants and tenants on the estate of Guisachan, as roads or paths of access to and fro from the estate of Guisachan from and to the north side of the river Dhiag. . . . The road running by the White Bridge was in particular so used, as the ford road had been previously as one of the principal avenues or approaches to and from Guisachan House, and the road to Tomich, on the north side of the river Dhiag. They were so used without interruption or hindrance until quite recently, when the pursuer Winans erected a deer fence along the north side of the said river and burn, so as to cut off the access to the estate of Guisachan by these roads or paths.” He

further denied that Winans had acquired right to these bridges by virtue of the assignation, or that it was contemplated at the date of that deed that any such right should be conveyed to him.

In Cond. 11 the pursuers set forth as members of the public, that there were public rights of way over about twelve roads or paths on the Guisachan side of the Dhiag. Amongst these were the Roads Nos. 1, 5, and 6 above referred to. It was not averred in the condescendence that Guisachan Old Meal Mill was a public place.

The defender in answer stated—"Ans. 10 and 11. Admitted that on the south or Guisachan side the said fords and bridges over the river Dhiag substituted therefor connect with certain roads or paths situated on the estate of Guisachan, and in particular with the avenues and private roads or paths leading to the house of Guisachan and the Old Meal Mill of Guisachan. The Meal Mill has been disused for a long period. Denied that any of the said roads or paths are public. No members of the public have used the said roads and paths on the estate of Guisachan for time immemorial, or at all events for much more than forty years, as public roads or paths, and no member of the public now claims right so to use them. The only persons now resident on the Knockfin estate are the keepers, watchers, and other persons engaged in the preservation of game for the pursuer Winans, as he does not allow any agricultural or pastoral tenants or crofters to reside on it. The said keepers, watchers, and persons engaged in game preserving do not in fact use, and have never used, the Guisachan private roads as public roads. The real pursuer of the present action, Mr Winans, does not truly claim to use the said roads as a member of the public. He has inserted alternative and additional conclusions of declarator of public right of way over twelve or thereby different roads or portions of roads—most of which are situated in or near the policies of Guisachan—in his present action solely *in emulationem vicini*, and as a means of retaliation against the defender, who has obtained interim interdict in the Sheriff Court of Inverness-shire against him for cutting off, or attempting to cut off, by means of a deer fence, the rights of access which the proprietors of the estate of Guisachan have enjoyed from time immemorial, or at least for more than forty years, leading from the south or Guisachan side of the river Dhiag and Leth Allt Burn to the north side of the said river and burn and the Strathglass County Road."

With reference to the road from Glenmoriston to Tom-Guisachan—Road No. 5—the defender admitted that it was public from Glenmoriston to the point where it reached the opening of Road No. 6 (the road to Tomich), but not from that point to Tom-Guisachan. He also admitted that Road No. 6 was public from the point where it left Road No. 5 to the point H, where the road as above described turned eastwards, parallel to the avenue of Guisachan. He also admitted that this last mentioned road to Tomich was public, but denied that the short stretch from H to the avenue of Guisachan was public.

The pursuers pleaded—" (1) On a sound construction of the said deed of assignment, the pursuer William Louis Winans is entitled to decree in terms of the first declaratory conclusion

of the summons. (2) The northmost half of the said bridges being entirely constructed on the lands of Knockfin belonging to the pursuer the Chisholm, and tenanted by the pursuer Mr Winans, and the said connecting ways on the north being entirely situated on the said lands, the pursuers are entitled to decree in terms of the second declaratory conclusion of the summons. (3) The defender having no longer any right to the use of the bridges and connecting ways, so far as situated to the north of the said river and stream, and the public not having acquired any rights over the same, the pursuers are entitled to decree in terms of the first alternative of the third declaratory conclusion of the summons, or otherwise to decree in terms of the second alternative. (4) The said fords and connecting ways being public roads or rights of way, the pursuers are entitled to decree in terms of the fourth conclusion. (5) The roads labelled being public roads or rights of way, the pursuers are entitled to decree in terms of the fifth conclusion."

The defender pleaded—" (1) The averments of the pursuers are neither relevant nor sufficient to support any of the conclusions of the summons. (2) The said deed of assignment not having conveyed or assigned to the pursuer Winans any right or interest in the bridges in dispute, or any part of them, the defender should be absolved from the first declaratory conclusion of the summons. (3) The said bridges and connecting ways on the north of the river Dhiag having been made as substitutes for existing rights of way belonging to the proprietor and estate of Guisachan, the pursuer is not entitled to decree in terms of the second and third declaratory conclusions. (4) The said bridges and connecting ways having been made at great expense by the defender, and consented to and acquiesced in by the successive proprietors of Knockfin from the dates of their formation down to the present time, neither he nor anyone in his right can now object to or interfere with their use as roads of access to the estate of Guisachan. (5) The said bridges and connecting ways having been openly used with the knowledge of the pursuers, both at and after the date of the said deed of assignment, as roads of access to the estate of Guisachan by the defender and his servants and tenants, the pursuers are personally barred from insisting on decree in terms of the third declaratory conclusion. (8) None of the roads labelled, with the exception of the roads admitted to be public in the defender's answer to article 10 and 11 of the condescendence, being public roads or rights of way, or at all events not being so in so far as they pass over any part of the lands of Guisachan, the defender is entitled to absolvitor from the fifth declaratory conclusion."

Proof was led in the whole cause, from which it appeared with regard to:—

(1) *The White Bridge.*—This bridge was erected by the defender in 1858. At that date the defender was tenant of the Knockfin shootings. Before commencing the bridge he asked permission from Duncan Chisholm, who was heir of entail in possession of Knockfin, to do so at his own expense. It appeared from the evidence that the defender built the bridge on a simple authority from the Chisholm—not given in writing, or at least for which no writing was

produced—on the understanding that it should not be interfered with during the Chisholm's life. On this point Lord Tweedmouth deponed—“I became anxious to have a bridge over the Dhiag for the purpose of getting out to the Knockfin Road, which was the only public parliamentary road, and a road which appears in the Highland Roads and Bridges Report from 1817. Duncan Chisholm was proprietor of the Chisholm property at that time. I was acquainted with him for many years before I purchased Guisachan, and after I purchased it he was in the habit of visiting at my house in London. He died in the end of 1858 or beginning of 1859. His factor at that time was Mr Robertson, and Mr Brown was acting for me. I was in communication with Mr Brown on the subject of this bridge, and also with the Chisholm. No. 186 of process is a letter which I received from Mr Brown on the subject of the bridge. I saw the Chisholm in London more than once on the subject of erecting this bridge. My firm impression is that it was by correspondence—but the letter I cannot find, and I am not going to say positively that it was by letter—but my firm impression is that the request was made by letter to Duncan Chisholm for an excambion. I applied to the Chisholm for permission to erect the White Bridge. (Q) Did you get his permission in writing?—(A) I believe I did. I have searched my repositories for any written permission, but I have not been able to find any. I may add that Mr Brown would communicate with Messrs Stewart, Rule, & Burns, who were my agents. They have now ceased to be my agents, and are acting for Mr Winans, so that it was impossible for me to apply to them as to whether Mr Brown had consulted them on the legal points of the question. I have not found any letter from the Chisholm in my repositories. Mr Brown was acting for me at the time. I was frequently in the habit of sending papers to him connected with the estate matters. I have caused examination to be made through my agent of Mr Brown's repositories also, but without finding a letter. I am quite positive that I had direct communication with the Chisholm on the subject of the erection of the new bridge. (Q) Did you receive his permission?—(A) Yes. I am positive of that, and I may also say that the Chisholm was anxious for an excambion. Mr Robertson, the factor, said there were difficulties in the way, and Mr Brown said there were none. I am positive as to these facts. There was some earth taken from the Chisholm's side for filling up in making the bridge. (Q) Was that done with the Chisholm's permission?—(A) Certainly. I would never have thought of putting this bridge on the Chisholm's property without consulting him. I was not present when the bridge was built or earth carted. I have never had any personal communication with Mr Robertson on the subject. My communication was with the Chisholm direct in London. (Q) Was the bridge in fact built shortly after you obtained the Chisholm's permission?—(A) Yes, it was commenced in the beginning of 1857. There was a road made, connecting the north end of the bridge with the Knockfin Road from 1857 down to the recent dispute. I have used the bridge and road for an access to Guisachan House daily and without objection by anybody.”

The letter from Mr Brown, No. 186 of process, referred to in Lord Tweedmouth's evidence, was dated 26th February 1858, and was in these terms:—“I went to Guisachan last Monday evening, accompanied by Mr Geo. G. Mackay of Inverness, and Mr William Robertson, the Chisholm's factor, met me there in good time on Tuesday morning. He is under the impression that the entail prevents the Chisholm from conveying any portion (however small) of the estate under a feu-charter, without the consent of the next heirs of entail, and as the Chisholm's next heirs are not known, he believes, or at all events asserts, that it is impossible for the Chisholm to grant a feu of the site for the lodge. I am persuaded that Robertson is wrong, as I know there is an old statute still in force, under which any proprietor in possession of an entailed estate can feu to the extent of half an acre by one deed. But it was quite unnecessary for me to argue the point with the factor, as he seemed confirmed in his own conceit. He, however, expressed his decided opinion in favour of the road and bridge, and assured me that the Chisholm would not only offer you no opposition to the formation and erection of them, but also that he would never think of finding fault with them after they are constructed, during his lifetime; and Robertson said that he was certain the Chisholm would give you an obligatory letter to that effect. In this case, and seeing that the lodge would answer as well, and might be made to look better if built on your own side of the water, I would advise you not to press for a feu right, but make the road and build the bridge under a simple authority from the Chisholm. The road must ever after the Chisholm's death appear a necessary connection of your estate with the parliamentary road, which no Court would order to be shut up without your consent.”

After Duncan Chisholm's death the succeeding heirs, viz. :—James Sutherland Chisholm and Roderick D. M. Chisholm (one of the pursuers) did not take any steps to have the bridge shut up until Winans blocked up the Knockfin access to the bridge, by putting a deer fence across it.

In the lease to the defender from James Sutherland Chisholm of the Glen Affarie shootings, granted in 1869, provision was made for the tenant taking over all bridges, roads, &c., on the shootings, but no special mention was made of the White Bridge.

In 1885, as already explained, Lord Tweedmouth assigned the unexpired portion of the lease to Winans.

(2) *The Black Bridge.*—This bridge for foot-passengers was erected by the defender in 1877 at his own expense. The first bridge was carried away by a flood, and another was erected in 1881. No permission was obtained from the Chisholm of the day for its erection, but nothing was done by him or his successor to interfere with its use or maintenance.

With reference to the Black Bridge Lord Tweedmouth deponed:—“(Q) With regard to the Black Bridge, has there all along been a ford there?—(A) Yes. I used that for riding as far back as 1851. It was the ford principally used in crossing back and forward from either side. There was a loose plank tied to the Guisachan side which, when any person wanted to cross, was turned over the deep portion, because the

stream came rather deeper to our side. That plank was once or twice washed away. It was my understanding that there had been a bridge a long time back at that place. There is at present a bridge there called the Black Bridge. You can ride ponies over it. It was erected in 1877, and was washed away, and the present bridge was put up about 1881. I substituted the Black Bridge for the plank, because one of my daughters did not like to go over the plank.—(Q) Was it done in pursuance of any express arrangements with the Chisholm, or because you understood there had been a bridge there before?—(A) There was no leave or permission of any kind given for that bridge."

The Lord Ordinary found, and it was thereafter taken as a fact in the case, that there were no public rights of way to the fords near these two bridges on the Guisachan side of the river. The White Bridge and connecting roads were largely used by the defender for bringing coals, luggage, &c., to the house from Tomich, so that such heavy traffic did not go along the avenue.

(3) *Road No. 1.*—This road may be considered in two sections. Section 1, the "Guisachan Road" from Tomich through the avenue gate, and ending at a bridge over a burn in the avenue a short distance nearer Tomich than the house itself. Section 2, the "Cougie Road" from this bridge past Guisachan Old Meal Mill, then past Tom-Guisachan or Hilton where Road No. 5 from Glenmoriston joins it, and so on to Cougie.

Section 1. There was no dispute as to this road from Tomich to the avenue gate. The minutes of the Inverness-shire Road Trustees, extending from 1803 to 1878, showed that in 1814-15, 1818, and 1821 the trustees expended public money to a considerable extent on this road. The Strathglass District Road Trustees were constituted by a private Act of Parliament in 1830. From that date to 1860, during most of which time Fraser of Culbokie was proprietor of Guisachan, the District Road Trustees expended public money on, and in fact maintained the road. The money was voted on the application of the proprietor, and was sometimes voted at meetings at which he was personally present. The last date on which money was so voted was in 1858. From a minute of the trustees of date 17th May 1856, it appeared that Lord Tweedmouth had applied for leave to alter the line of this road slightly at his own expense, and that leave to do so was granted. In 1860 Lord Tweedmouth converted it into the private avenue of Guisachan House. In 1879 the county adopted the Roads and Bridges Act of 1878. Neither this road nor the part of it to Cougie was included in the list of roads taken over by the trustees under the provisions of sec. 41 of the Act. The evidence showed that at Guisachan Old Meal Mill, before it was abandoned, there were only two or three houses. These were pulled down when the mill was given up. There was little evidence of any use being made of the road by the general public, any use that there was being chiefly by farmers driving to the mill to have meal ground there.

Section 2. It was proved that money had been spent on this part of the road by the road trustees in the same way, but to a less extent than on Section 1. Section 2, which led to Cougie, passed only two or three scattered houses on the way, and at Cougie there was only a shepherd's

house. The road was much used for shooting purposes by the proprietors of Guisachan, but the evidence of use by the public was even slighter than in the case of Section 1.

Road No. 6.—The defender admitted, as before stated, that there was a drove road from Glenmoriston partly by Road No. 5, then by Road No. 6, and by the road described above as running nearly parallel to the avenue. The only question therefore came to be, which of the two alternative roads, that admitted by the defender, or that claimed by the pursuers, viz., by the short stretch between H, the point where the Glenmoriston road strikes southwards, and the avenue, and thence along the avenue to the east, should be adopted.

As a mere matter of convenience it did not appear, which line was the more convenient for the public, or which was the line most frequently used. It was, however, proved that the route claimed by the pursuers had been shut up by the defender in 1860, and that no complaints as to that act had ever been made before or since this action was raised by any member of the public. It was not proved that Winans (who did not tender himself as a witness) had suffered from the road he claimed being shut up, or indeed that he had ever used the roads claimed as public on the Guisachan side of the river. Lord Tweedmouth further deposed—and no attempt was made to contradict his statement—that he had never turned off any person from the estate.

On 25th May 1887 the Lord Ordinary (M'LAREN) pronounced this interlocutor:—"Finds with reference to the first, second, and third conclusions of the summons, that the right of the pursuers to the northmost half of the bridge sometime erected across the Leth Alt Burn is not disputed, and that the said bridge having been removed, it is unnecessary to dispose of the same by decree: And with respect to the two bridges erected by the defender across the river Dhiag, Finds that the northmost half thereof, and the roads or paths connecting the said bridges on the north with the Strathglass County Road, are the property of the pursuer Mrs Chisholm, and are within the possession of the pursuer Mr Winans as her tenant: Finds also that the pursuers are entitled to close the said bridges against traffic, under the conditions and with the reservations as concluded for: Under the fifth conclusion, Finds that there is a public right of way from points to be hereafter determined,—the one between the bridge of Knockfin and the village of Tomich, and the other near Guisachan Old Mill, being a part of the way No. 1 of said conclusion: Finds also that there is a public right of way for passengers, horses, and cattle by the way No. 6 of said conclusion, and by so much of the way No. 5 thereof as connects Glenmoriston directly with No. 6, and ultimately with the Strathglass County Road: Finds of consent that there is a public right of way by the Road No. 7 of said conclusion: *Quoad ultra* assoilzies the defender from the conclusions of the summons, and decerns: Finds neither party entitled to expenses."

"*Opinion.*—This is an action instituted by Mr William Louis Winans, who is tenant of extensive moors and forests in the North Highlands, and the late Mr Chisholm of Chisholm, the proprietor of one of these subjects, against Lord Tweed-

mouth, who is proprietor of the estate of Guisachan, in Inverness-shire.

“The conclusions are twofold—*First*, The pursuers claim a right to shut up two bridges over the Dhiag, and one bridge over the Leth Alt Burn, which were put up by Lord Tweedmouth at a time when his Lordship was tenant of the lands now occupied by Mr Winans, for the purpose of establishing communications between the two estates. *Secondly*, The pursuers (suing as members of the public) claim certain rights of way, seven in number, over the estate of Guisachan. Mrs Chisholm has now been sisted as general disponent and representative of her son, whose death took place some time after the proof was led, and while the case was under consideration.

“It may conduce to clearness if I begin by announcing my decision on these points. I find for the pursuers on the matter of the right to close the two bridges which cross the Dhiag. The bridge over the Leth Alt Burn was given up by defender's counsel, and, as I understand, has been destroyed. I find that there is a public right of way from points to be hereafter determined—the one near the bridge of Knockfin, the other near Guisachan Old Mill, being a part of the way claimed as No 1 in the summons. I also find that there is a public right of way for passengers, horses, and cattle by the Road No. 6 of the series, and by so much of the Road No. 5 as connects Glenmoriston directly with Road No. 6, and ultimately with the Strathglass County Road. I shall define the right of way here found in such a way as will make it clear that it forms a thoroughfare between two public highways. I shall also declare the public right of way by Road No. 7, in conformity with the consent which I understood to be given by defender's counsel. In regard to all the other rights of way claimed by the pursuers on behalf of the public, I shall assoilzie the defender Lord Tweedmouth from the conclusions of the summons.

“With respect to the two bridges over the Dhiag, the facts are these:—The Dhiag, which flows in a north-easterly direction through Strathglass, is crossed by the county road at the Bridge of Knockfin about a mile and a-half below Guisachan House—Guisachan House being situated on the right bank of the stream, while the county road is carried along the left bank from the Bridge of Knockfin to a point about half a mile higher than Guisachan House, where it terminates. Access to Guisachan House is obtained by a carriage road (being one of the roads in dispute) which leaves the county road on the hither side of the Bridge of Knockfin, and leads straight to Guisachan. Soon after Lord Tweedmouth acquired the estate of Guisachan it was found that it would be for the convenience of those residing in the mansion-house to have a bridge over the Dhiag near the mansion, enabling them to get to the county road without going round by Knockfin. The defender asked permission of the Chisholm (Mr Duncan Chisholm being then the proprietor and head of the family) to form a bridge at his own expense connecting Guisachan with the county road. I am satisfied, on the evidence of Lord Tweedmouth and of Mr George G. Mackay, that the Chisholm did in fact give his permission to Lord Tweedmouth to form the bridge, and the bridge (known as the

White Bridge) was built accordingly at Lord Tweedmouth's expense in the year 1858. It has since been constantly used for the cart and carriage traffic of Guisachan until its use was challenged by Mr Winans in a way which is not to be admired, viz., by carrying a deer fence across the approach to the bridge.

“It is for consideration what is the nature of the right acquired by the defender in virtue of the permission given to erect the bridge, and in considering this question it is to be observed that Mr Duncan Chisholm's right to his own estate was that of an heir of entail.

“There is no evidence that Lord Tweedmouth desired either a right of property in, or a servitude over, the small part of the Chisholm property on which he proposed to form the bridge, and its connection with the county road. If such a right had been desired, the right could not have been acquired except for a valuable consideration, because the Chisholm estates were entailed. But there is no evidence that Lord Tweedmouth desired anything more than that a bridge and approach should be formed for his convenience, he undertaking their formation, because it was for his convenience, and receiving from the Chisholm all the right which he was able gratuitously to confer, namely, a use by tolerance during the grantor's lifetime.

“Mr Duncan Chisholm was succeeded in the possession of his estates by Mr James Sutherland Chisholm, a distant relative, who, again, was succeeded by Mr Roderick D. M. Chisholm, one of the pursuers in this action. Neither of these gentlemen took any step to terminate or interrupt the defender's use of the White Bridge; nor did they or either of them do anything to confirm that right. During the greater part of this time, the defender was tenant of the Glen Affarie forest, being the part of the Chisholm estate on which the White Bridge was formed—first as a sub-tenant holding from Colonel Inge, and later as a tenant under a lease for twenty-one years obtained from Mr James Sutherland Chisholm on the expiration of Colonel Inge's holding.

“In the lease, which provides for the use of bridges made and to be made on the Glen Affarie property, nothing is said regarding the White Bridge over the Dhiag, and I conclude that the use of this bridge was continued, as it had begun, on no higher title than tolerance. In 1885 Lord Tweedmouth sub-let the Glen Affarie shootings to Mr Winans, and again nothing is said as to the White Bridge over the Dhiag. But it is evident that the conditions were altered by this arrangement. While Lord Tweedmouth was in the occupation of the lands on both sides of the Dhiag there were reasons for allowing him the use of the bridge, which ceased to exist when he assigned his interest in the Glen Affarie shootings to Mr Winans. Accordingly it is not surprising that the late Mr Chisholm and his successor, Mrs Chisholm of Chisholm, should have thought fit to support Mr Winans in this part of the case. Lord Tweedmouth's use of the bridge being, as I hold, merely tolerance, it could not compete with the right of possession acquired by Mr Winans under the assignment of 1885. It would then rest with Mr Winans, as tenant in possession, to say whether, as a matter of courtesy or good neighbourhood, he would allow Lord Tweed-

mouth to have the use of the bridge. He is not entitled to pull down the bridge, nor do the pursuers ask a declaration that they are entitled to do so. The bridge was put up with the consent of a former proprietor, who had a right to make improvements on his property. It is partly on Lord Tweedmouth's property, and it is an improvement pertaining to the two estates. It must stand (unless the two proprietors agree to remove it) on the chance that at some future time they may agree to open it. This cannot be done (in my opinion) as long as Mr Winans retains his objection to the use of the bridge. But at the expiration of the lease it will be in the power of Mrs Chisholm, if she chooses, to throw open the bridge under such conditions as to the use to be made of it as the joint-owners may mutually agree on.

"All that I have said about the nature of the occupation of the White Bridge, and the absence of any title or usufruct on the part of the defender, applies to the Black Bridge, which is besides only a foot-bridge in connection with a forest-path. It is therefore unnecessary that I should state separately my reasons for making the declaration desired by the pursuer regarding this bridge. This disposes of the first, second, and third of the conclusions of the summons.

"I proceed to the consideration of the second branch of the pursuers' case—that relating to the seven rights of way claimed on behalf of the public over Guisachan estate. I may here remark that the mode of description of these ways followed by the pursuer is somewhat arbitrary, and the division into seven ways does not appear to me to correspond to the natural lines of communication of the estate, but rather to have been selected with reference to the pursuers' own views and claims in this action. I shall, however, endeavour to deal with the questions as nearly as possible in the order in which they are presented in the summons.

"I postpone consideration of the fourth conclusion, which relates to rights of way by certain fords over the Dhiag claimed in connection with the other ways in question, because it is obvious that the fords are merely parts of the ways claimed, and the right to their use cannot be advantageously considered apart from the right to the ways to which they are said to be accessory.

"Under the fifth conclusion of the summons I consider, first, Road No. 1, as there described. For reasons which will immediately be apparent, I must deal separately with the sections of this road, four in number, as to which the evidence and the legal considerations applicable to that evidence are distinct. These are—Section 1, from the county road near the village of Tomich (near Knockfin Bridge) to Guisachan Mill; section 2, from Guisachan Mill to Cougie, where the road claimed branches in two different directions; sections 3 and 4, the two branch ways leading respectively to Kintail and Glenmoriston.

"The question is really more simple than it at first appears, because from Cougie, whence the two ways diverge to Kintail and Glenmoriston, (1) there is not and never was a made road to either of these places, and (2) there is no evidence (not enough, as I think, to deserve serious consideration) of a public right of way constituted or perpetuated by immemorial use. On this part of the case I find without doubt or difficulty for

the defender. The question is thus limited to sections 1 and 2 of the way in question, or the part extending from Tomich or Knockfin by Guisachan Mill to Cougie. Cougie was, before Lord Tweedmouth's acquisition of the property, a shepherd's cottage. It is now, I understand, a keeper's house—not in any view, present or retrospective, a public place whereto a right of way could be acquired by prescriptive use.

"But it is contended that there is a public right of way from Tomich or Knockfin to Cougie, because the road connecting these places, and especially the section from Knockfin to the Mill of Guisachan, is a made road, maintained by and under the administration of the Strathglass District Road Trustees. This is a question to which I have given a great deal of consideration, and I shall state briefly the conclusions at which I have arrived.

"When a claim is made on behalf of the public, whether to a right of way or to the use of any common or unenclosed ground or other heritable property for purposes of utility or recreation, the public right must of course be referable to some known legal category, and in general such a right, if it exists, must be referred either to purchase, to presumed grant as proved by prescriptive use, or to actual grant or dedication to public uses, the evidence of which is not necessarily connected with prescriptive enjoyment. In former cases—one of them relating to the right of the inhabitants of Callander to the square in which the church is situated—I have expressed the opinion that if a superior or proprietor lays out a piece of ground—a road, a square, or a garden—for the use of his tenants or disponees, this is evidence of an appropriation of the subject to their use which, in conjunction with evidence of actual use may satisfy a court of law that the subject was irrevocably appropriated to public uses so as to disentitle the owner to shut up the subject or convert it to other uses. There is not much authority on this topic, but I think there is none which is contrary to what I have said. The law is stiff on the subject of written titles to heritable property; but it is not of such cast-iron rigidity as to oppose itself to the acquisition of rights of use by the public in the only way in which such rights can be acquired—by *de facto* appropriation of the land to the service of the community. Especially is this the case with respect to the appropriation of land for the purposes of inland communication, because it is matter of general experience that the acquisition of a road by purchase is a very unusual thing, and that the more usual, if not universal arrangement, is that in which the proprietor gives the site of the road in consideration of the benefit to his estate of having a way made through it, while the road trustees undertake the cost of making and maintaining the road, or, as the case may be, of putting in repair and maintaining an existing road. In such cases no deed of conveyance is necessary, because the proprietor of the estate through which the road is carried does not intend to part with the *solum* of the property, but only to make an irrevocable grant of the use of the surface for public purposes.

"Now, taking first the section of road from Knockfin or Tomich to Guisachan Mill, it is my opinion that such an appropriation to public uses was made by Mr Fraser of Culbokie, the former

proprietor of Guisachan. The printed excerpts from the minutes of meetings of the Strathglass District Road Trustees prove conclusively that from 1831 to 1861 (a period of thirty years) this road was maintained at the public expense, and that it was treated in all respects as one of the public roads of the county falling within the administration of the district trust. The money voted year by year for the repair of this road was voted on the application of the proprietor, and very often at meetings of the road trustees at which he was personally present. The trustees never disputed their liability to maintain the road, nor, so far as the minutes show, did the proprietor reserve a right to close the road, or lay claim to any higher interest in it, or any right different from the bare right of property which the other proprietors of the district had in the county roads passing through their respective estates. If this was the position of Mr Fraser of Culbokie, Lord Tweedmouth did not claim any different position after he acquired the property. In a minute, dated 17th May 1856, it is stated that Mr Marjoribanks of Guisachan (Lord Tweedmouth) wished 'to have the line of the Guisachan Road, in so far as it passes through his place, altered.' The minute then describes the alteration in terms which I need not read, an alteration which it is stated has been already made, 'in hopes that when it has been completed to the satisfaction of the trustees or their overseer, they would sanction this alteration on the road, and adopt the same as part of the district road, and allow the present line either to be shut up or made private at Mr Marjoribanks' pleasure.' Nothing can more clearly show that the defender, on taking over the property, recognised that the road to Guisachan was a public road under the management of the district trustees. The trustees evidently so understood the application, because they took it into consideration, and recognising that the proposal was 'just and reasonable,' resolved 'to sanction the alteration if satisfied with the execution of the work'—that is, of the substituted road and bridge over the Guisachan Burn.

"Now, the argument against the right of the public is that the administration of the road by the road trustees was not continued for forty years, and that Guisachan Mill is not a public place. To the first objection I think it is a sufficient answer that immemorial use (limited in proof to forty years) is only required where the public are claiming a right adversely to the proprietor, and when there is no direct evidence of grant or appropriation of the road to public uses. In a case like the present, where the proprietor is shown to have consented to the appropriation of his land to the purposes of a public road, a much shorter period of use than forty years is probably sufficient to establish the public right. I do not hold that the obtaining money from the rates in one year would be sufficient evidence of appropriation, nor do I say that any set period is necessary. There must be evidence to satisfy the Court of the proprietor's consent to make an irrevocable appropriation of land to purposes of public utility; and this, when followed by actual possession on the part of the public, and actual administration by the local authority continued for a reasonable time, will, in my opinion, suffice to constitute the right.

"Then as to Guisachan not being a public place, if this argument were good for anything, there would not be half-a-dozen roads in all the Highland counties from which the public might not be excluded at the pleasure of the proprietors. Very few of the Highland roads are thoroughfares; only the main lines of communication from one county to another cross the watersheds which divide the mountain districts. It is the normal condition of things in these counties that a district road is carried upland through a valley or glen as far as the habitable tract of land extends, and there it comes abruptly to an end. Of course, if it be a private road, the public never can acquire a right of way over it, because it does not terminate at a place of public resort. But if the road is public in the sense that it is made and maintained at the public expense, and is, with the proprietor's consent, placed under the administration of the local authority charged with the duty of providing means of communication for the district, then it appears to me that the law as to public *termini* is not applicable. In such a case the only question is whether the road is one which the trustees may lawfully make and maintain; and it is obvious that they may do so if one of the *termini* be a public place, and if along the line of the road there are habitations and a population for whose accommodation a road is needed. In the present case the road led to a mill, a place to which the farmers had to drive, and there is evidence of the existence of a village or scattered cottages at Mid-Guisachan, which have since been removed. There was also the mansion-house of Guisachan to which the road led; and I see no reason to doubt that the trustees were properly administering the assessments in so far as these were applied to the maintenance of the Guisachan Road.

"It was explained in the evidence that since 1861 Lord Tweedmouth had improved the road in question, and had formed an entrance to it, with a lodge and gates, and had to some extent altered the direction of the road near Guisachan House. I am thus left in some uncertainty as to the actual limits of the old district road; but if counsel are not agreed as to this, I may make a remit to some person in the locality to suggest a suitable place for the *terminus* of the road in so far as public.

"Nothing that I decree will prejudice the right of the defender to apply to the County Road Trustees to have the road shut up, as being no longer necessary for the accommodation of the public, should the facts warrant such an application.

"I come now to the section of right of way No. 1, which extends from Guisachan Mill to Cougie. Now, as to this section there is evidence that during the period already referred to, 1831-1861, small sums of money were voted by the Strathglass Road Trustees for the repair of the 'Cougie Road.' But it is also clearly proved that there never was a road in the proper sense from Guisachan Mill to Cougie, and that the sums voted were such as would be totally inadequate even to the maintenance of a footpath. There was, moreover, no population whose wants were to be supplied, because the path led only to a shepherd's house, and it is at least questionable whether the sums voted under this

head were a proper application of the road-trust funds.

“I have already explained that, in my view, the question whether a road has been irrevocably appropriated by a proprietor to public purposes by making it over to road trustees is a question of fact in which all the circumstances are to be weighed. In regard to this small portion of a mountain track not leading to any place, and not really required for public purposes, there is not, to my mind, satisfactory and unequivocal evidence of its appropriation to the uses of the public. There is the fact that Mr Fraser of Culbokie received small sums of public money for its repair during a period of thirty years; but there are no other circumstances of weight, and I rather incline to look upon this as an instance of somewhat lax administration of the road money. With respect to the rights of way claimed under Nos. 2, 3, and 4, I shall say nothing except that paths of this description traversing a private estate are not proper subjects of a public right of way, and that the case relating to them has failed.

“Nos. 5 and 6 taken together constitute a way from the Bridge of Knockfin to Glenmoriston. Starting from the Glenmoriston side there is one way only over the hill, but at a point about $1\frac{1}{2}$ miles distant from Guisachan the path bifurcates—one branch leads directly down a steep descent to Guisachan Mill, whence access to Bridge of Knockfin is obtained by the Road No. 1, already considered. The other branch or fork leads in a more gradual slope and in a direct line to Knockfin. The way No. 5 of the summons is the way from Glenmoriston to Guisachan Mill. No. 6 is the branch to Knockfin.

“Now it is clearly established, as is indeed admitted by the defender, that there is a drove road from Glenmoriston to Strathglass in the direction indicated. And having regard to past practice, and the reason of the thing, I am clearly of opinion that the pursuers are not entitled to Nos. 5 and 6 together, but are only entitled to one way from Glenmoriston to Strathglass. The question is, to which of these ways. The defender contends that No. 6, or the straight line to Knockfin, ought to be declared the line of the right of way, urging that the evidence of use preponderates in favour of that way, which is also the nearest and the most convenient. In this view of the evidence, and on all the grounds enumerated, I think the defender's case is well founded. Indeed, I am at a loss to see any reason, except a controversial one, which could induce the pursuers to hunt up evidence in favour of carrying the public way past Guisachan House after the defender had intimated in the record that he conceded the alternative way leading to Knockfin by No. 6. There is evidence that both ways have been used during the prescriptive period, but in the view I take it is not necessary to analyse the evidence, because the convenience of the proprietor and of the only section of the public who use the way—drovers, with their sheep and cattle—alike point to No. 6 as the preferable route.

“Way No. 7 is admitted on record, and no evidence was led regarding it. If a declaratory finding is desired regarding it, I understand the defender does not object.

“I now return to conclusion fourth, the consideration of which was postponed, because the conclusion has reference to certain fords on the Dhiag to which it is alleged that the public are entitled in connection with the various rights of way claimed under conclusion fifth. Now, the only ways whereby the fords would be accessible to the public are those which I have negatived, being the way (part of No. 1) leading from Guisachan to Congie, and the way (part of No. 5) leading from the fork in the Glenmoriston Road into a connection near Guisachan House, with the aforesaid way No. 1. The disallowance of these two ways carries with it the disallowance of the claim to the fords, which, besides, have not been shown to be necessary for the service of the public.

“The pursuer Mr Winans, whose name stands first in the summons, and who is understood to be the chief promoter of the action, did not tender himself as a witness. He has not asserted that he desires to use any of the ways claimed, and it has not been shown that any of them would be subservient to his convenience as tenant of the adjoining property. He professes to be a suitor on behalf of the public, but there is no evidence that any member of the British public ever asked him to sue on his behalf, or ever complained of being prevented from passing over Lord Tweedmouth's estate. Lord Tweedmouth gave evidence that he never turned any person off his estate, and that no one who asked permission to view it was ever refused. In this general statement I presume the pursuers are meant to be included. His Lordship's evidence on this subject is uncontradicted. It therefore appears to me that the action is wholly unnecessary in the interests of the public and of the pursuers, and that while on some points the pursuers have had a technical success they are not entitled to the expenses of the litigation.”

The defender reclaimed, with leave of the Lord Ordinary, and argued—(1) *The White Bridge*.—It was incompetent for the Lord Ordinary under the conclusions of the summons to find that Mrs Chisholm was proprietrix of the northmost end of this bridge. The question really was as to the right of the pursuer Winans to shut it up under the third conclusion of the summons. Even if there had been no communication with the Chisholm in 1858, objection to the erection of this bridge was barred by acquiescence. But full consent had been obtained, and there was nothing to show it was limited or conditional, or given only for the Chisholm's lifetime. There had always been a right of servitude in favour of Guisachan over Cullessie ford, and this bridge was a substitute for the ford. This was proved by the evidence, and especially by the presence of the Chisholm's factor at the marking out and adjusting of the site of the bridge. The difficulties of the factor were as to a proposed excambion, lest that should infer a contravention of the entail and consequent irritancy. The substitution of one servitude road for another, no greater burden being put upon the servient tenement, was an act of ordinary administration competent to an heir of entail in possession. Even if it was an alienation, challenge was only competent during the contravener's lifetime by an action of irritancy at the instance of the substitute heir of

entail. It was too late for Sutherland Chisholm to challenge the act after he succeeded to the estates, still more after he had disentailed the estates, and it was still more incompetent for Roderick Chisholm, the original pursuer in this action, who succeeded to the estates as a fee-simple proprietor, to bring a challenge thirty years after the consent had been given and the bridge had been erected.—Bell's Prin. 946, 947; *Kincaid v. Stirling*, January 12, 1750, M. 8403; *Aytoun v. Douglas*, July 1, 1800, M. Property App. No. 5; *Macdonald v. Farquharson*, January 24, 1832, 10 S. 236; *Duke of Buccleuch v. Magistrates of Edinburgh*, February 17, 1865, 3 Macph. 528; *Cowan v. Lord Kinnard*, December 15, 1865, 4 Macph. 236; *Sanderson v. Geddes*, July 17, 1876, 1 R. 1198; *Grahame v. Magistrates of Kirkcaldy*, January 19, 1881, 8 R. 395, and July 6, 1882, 9 R. (H.L.) 91 (Lord Watson's review of previous cases); Sandford on Entails, p. 431; More's Notes to Stair, p. 190; *Lothian v. Willyson*, February 13, 1725, M. 15,554; *Earl of Kinnoull v. Keir*, January 18, 1814, F.C.; *Pullarton v. Hamilton (Bargany case)*, July 26, 1822, 1 Sh. App. 265, and June 20, 1825, 1 W. & S. 410; *Maxwell v. Maxwell*, December 15, 1843, 6 D. 255; *Marquis of Huntly v. Nicol*, January 9, 1858, 20 D. 374; *Innes v. Hepburn*, May 18, 1859, 21 D. 832; *Earl of Leven and Melville v. Cartwright*, June 12, 1861, 23 D. 1038; *White v. Lord Morton's Trustees (Aberdour cases)*, July 13, 1866, 4 Macph. (H.L.) 53; *Stewart v. Stewart (Murthly case)*, July 5, 1877, 4 R. 981.

(2) *The Black Bridge*.—Guisachan had always had an artificial means of crossing the river at this point. There had always, or at least for forty years, been some kind of a bridge there. In erecting the Black Bridge Lord Tweedmouth had merely done what it was necessary for him to do in order to exercise his undoubted right. It was the right of the owner of a dominant tenement to restore a bridge which had been knocked down or to put up a bridge where a ford on a servitude road had become impassable—Stair ii, 7, 10; *Clelland v. Clelland*, January 19, 1619, M. 12,769; *Malcolm v. Lloyd*, February 4, 1886, 13 R. 512. This bridge did not pass by assignation to Mr Winans, for it was not—any more than the White Bridge—an incident of the sporting rights of the Glen Affric shootings. There was no conclusion in the summons warranting the Lord Ordinary's finding that the northmost end of the bridge was Mrs Chisholm's property.

(3) *Rights of Way*.—Road No. 1.—The respondents had admitted there was no evidence to instruct a right of way beyond the Old Meal Mill. It was incompetent for the Lord Ordinary to find there was a right of way to that spot, viz., over part of the road claimed, because there was no conclusion to that effect in the summons. Further, the Old Meal Mill was not a public terminus. It had been taken down by the proprietor of Guisachan without remonstrance about 1856, and its site was a grass plot. No public use even of that part of the road had been proved, and consequently there had been no prescriptive use for forty years. The theory of dedication relied on by the Lord Ordinary was quite unknown to the law of Scotland. Dedication, even by the law of England, must be to the public, but here, if at

all, it had been to the district. The expenditure of public money on this road had probably all along been illegal. The expenditure had always been for the benefit of the owner of the property, not of the public, and all expenditure of public money ceased in 1858. Since then this road had been used as a private avenue without objection from either the public or the road trustees, and it was not in the list of roads transferred to the new body of trustees under the Roads and Bridges Act, 1878—*Poole v. Huskinson*, January 19, 1843, 11 Mees. & Wels. 827; *Dyce v. Hay*, May 25, 1852, 1 Macq. 305; *Duke of Atholl v. Torrie (Glen Tilt case)*, June 3, 1852, 1 Macq. 65; *Henderson v. Earl of Minto (Lochgelly case)*, June 1, 1860, 22 D. 1126; *Darrie v. Drummond*, February 10, 1865, 3 Macph. 496; *Jenkins v. Murray*, July 12, 1866, 4 Macph. 1046; *Duncan v. Lees (St Andrews and Kinkell Harbour case)*, December 13, 1870, 9 Macph. 274, and June 20, 1871, 9 Macph. 855; *Brodie v. Mann (Kilbarchan case)*, June 13, 1884, 11 R. 925, and May 4, 1885, 12 R. (H.L.) 52. As to No. 6.—The line admitted by Lord Tweedmouth from the point H through the farm-steading to Tomich was the true public road. It had been used by the public to the exclusion of the line claimed by Mr Winans since 1870, and it was the shorter road of the two. The object of the respondent in claiming the other line was simply to get on to the appellant's avenue and through the appellant's lodge gate—*White v. Lord Morton's Trustees, supra*; *Mackintosh v. Moir*, March 2, 1872, 10 Macph. 517.

Argued for the respondents—

(1) *The White Bridge*.—The respondents had not asked for declarator that the northmost end of the bridge was Mrs Chisholm's property, because, although they did not see how the opposite view could be maintained, she was willing that the bridge should remain until better times or altered circumstances. The consent given by the Chisholm in 1858 was and could be only for his lifetime. This was proved by the letter of his factor. To have created a perpetual burden over Knockfin would have been an alienation, and therefore a contravention of the entail. The substitution theory had been reared up for the purposes of this case. Guisachan had never had a servitude right over the Cullessie ford. If there was not a public right over it, there was at least a mutual right possessed by the tenants on both sides of the river, irrespective of whether they belonged to Guisachan or to Knockfin. Lord Tweedmouth had admitted in his evidence that he was ignorant at that date of the existence of a ford. The case of acquiescence (*Duke of Buccleuch v. Magistrates of Edinburgh*) founded on by the appellant differed in so many points from this case as to have no bearing upon it. The length of time here which had elapsed was of no consequence when combined with the facts that for two years after Duncan Chisholm's death in 1858 there had been an interregnum in the proprietorship of Knockfin, and that in 1864 Lord Tweedmouth became the tenant of Knockfin shootings, so that thereafter his use of the bridge was not adverse to the proprietor. If Duncan Chisholm contravened the entail, Sutherland Chisholm could challenge the illegal act even after his succession—*Innes v. Mordaunt*, July 5, 1822, 1 Sh. App. 169—and even after he had disentailed

the estate. His son and successor Roderick, the original pursuer, was not barred from challenging this act of alienation although he had succeeded as fee-simple proprietor, for he was entitled to the estate free of anything that had been illegitimately put upon it. The bridge, and consequently the right to shut it up, had passed to the respondent Winans under and by virtue of the assignation.

(2) *The Black Bridge*.—There was no consent at all given for the erection of this bridge; it was erected by Lord Tweedmouth when he was tenant of Knockfin, simply for his convenience in enjoying the subjects he had leased. There was no right of servitude, and no ford there. Indeed, the only ford was 135 yards further up the river. Before the erection of this bridge a plank was kept on the Guisachan side to enable the people to get over the deep water—to act as a stepping-stone in fact. That was all, and the right not having been there, it was unnecessary to look at *Clelland's* case. Besides, this bridge also fell under the assignation in favour of Winans.

(3) *Rights of Way*.—Road No. 1 bore the name for years of a district road. It was Lord Tweedmouth who turned this road into a private avenue. Before his days there was no gate and no lodge, and the road led up to the threshold of the mansion-house, which was then rather a centre of population than a secluded building. "Dedication" did not need to be pleaded. Public money was spent upon this road as *de facto* a public road as far back as 1820 and down to 1860, and by accepting money for its upkeep Lord Tweedmouth and his predecessors and authors conceded this was a public road. The Old Meal Mill, not necessarily *qua* mill, but as representing the centre of the district, marked sufficiently a public *terminus*, after which point the farmers and others took their private roads to their own houses. To refuse to admit it was a public place would be to refuse public access to villages at the head of highland glens. The *Kinkell Harbour* case was in the respondents' favour. As to road No. 6—The true line was by the avenue. Lord Tweedmouth's having insisted upon people going round by his line since 1870 did not deprive the public of the true line. If the respondents wished to cross from Knockfin to Glenmoriston they would have to go a detour of 1000 yards if the steading route were adopted. The case of *Mackintosh* was not in point. There was no law to the effect that the convenience of the proprietor should be consulted contrary to the interest of the public. *Hozier v. Hawthorne*, March 19, 1884, 11 R. 766, though not an authority for the respondents, illustrated this point.

At advising—

LORD ADAM—The pursuer of this action, Mr Winans, is tenant of the shootings and grazings of the lands of Knockfin. The other pursuer, Mr Chisholm, is proprietor of these lands. The defender Lord Tweedmouth is proprietor of the adjoining lands of Guisachan.

The pursuers seek to have it found and declared that they possess certain rights and interests in these bridges, two over the Dhiag river and one over the Leth Alt Burn, the river and burn forming the boundary between their respective estates of Knockfin and Guisachan. The

pursuers also, as representing the public, seek to have it found and declared that there exist certain public rights of way or roads over the estate of Guisachan as described in the summons, and shown on a plan produced. These roads, with their branches, are fifteen in number.

The interlocutor of the Lord Ordinary submitted to review disposes of all these claims. The interlocutor has been acquiesced in by both parties, except as regards three of the findings therein. These have reference (1) to the White and Black Bridges, two of the three bridges above mentioned; (2) to the road marked No. 1 on the plan; and (3) to the road marked No. 6 thereon.

With reference to the White and Black Bridges, I think it is necessary in order to a just appreciation of the rights of parties to ascertain the circumstances and conditions under which they were erected.

The river Dhiag, as I have said, forms the boundary between the Chisholm's lands of Knockfin, which lie on the left or north bank of the river, and Lord Tweedmouth's lands of Guisachan, which lie on the right or south bank.

The Strathglass County Road crosses from the south to the north bank of the river, by the Tomich Bridge, some distance below the White Bridge, and then runs westwards through the lands of Knockfin, and ends at a point about half-a-mile higher up the river than Guisachan House, on the opposite side. From the point where the road terminates there is a drove road leading to Kintail. The White Bridge is about 45 yards distant from this county road, and the Black Bridge about 300 yards.

The population on the Knockfin side of the river is and always has been very sparse, only amounting to half-a-dozen, more or less. The population on the Guisachan side is more numerous, amounting to 230 or 240, but it is all employed on or connected with the estate. There appears to be no general public on either side.

Lord Tweedmouth purchased Guisachan in 1854. At that time, although the people on the estate crossed the river when it was low wherever they found it convenient, there existed three fords by which they got access to the county road, one called Cullessie Ford, near where the White Bridge now is, another near the Black Bridge, and a third further up, but with it we have no concern. The ford near the Black Bridge seems to have been used only for foot and horse traffic, but the ford at the White Bridge was also occasionally used for cart traffic. But the traffic was small, as the Guisachan people had access to the county road before it crossed to the Knockfin side by roads on their own side of the river, and so to the south and east, from or to which nearly all the traffic went and came.

The Lord Ordinary has found, and it must be taken as a fact in this case, that there were no public rights of way to or across these fords.

The White Bridge was erected in the beginning of 1858. It is a substantial carriage bridge, constructed of wood, about 72 feet long, and 16 feet 6 inches wide, and resting on stone abutments on both sides. Those on the Knockfin side occupy about 8 or 10 square yards. There is a road about 15 feet wide connecting it with the county road. It cost Lord Tweedmouth between £200 and £300.

That this road and bridge are of considerable convenience to Lord Tweedmouth there is no doubt. "For what purpose," he is asked, "did you use the White Bridge and the public road down the opposite side? For ourselves. It was a variety. We could walk or ride down one side of the river and up the other. It was also of the greatest importance for Guisachan in this respect that all our coal, luggage, and supplies came that way, by the Knockfin public road, and crossed by the White Bridge. We found that a very great convenience."

It would seem therefore that this bridge was erected solely for the benefit of the Guisachan estate. That being so, I think it would be extremely difficult to support a claim to erect and maintain such a bridge and the road leading from it to the county road without the consent, express or implied, of the proprietor of Knockfin.

Lord Tweedmouth accordingly does not do so. He says—"I would never have thought of putting the bridge on the Chisholm's property without his consent." Then he says—"I became anxious to have a bridge over the Dhiag for the purpose of getting out to the Knockfin Road, which was the only public parliamentary road, and a road which appears in the Highland Roads and Bridges Reports from 1817. Duncan Chisholm was proprietor of the Chisholm property at that time. I was acquainted with him for many years before I purchased Guisachan, and after I purchased it he was in the habit of visiting at my house in London. He died in the end of 1858 or beginning of 1859. His factor at that time was Mr Robertson, and Mr Brown was acting for me. I was in communication with Mr Brown on the subject of this bridge, and also with the Chisholm. No. 186 of process is a letter which I received from Mr Brown on the subject of the bridge. I saw the Chisholm in London more than once on the subject of erecting this bridge. My firm impression is that it was by correspondence, but the letter I cannot find, and I am not going to say positively that it was by letter, but my firm impression is that the request was made by letter to Duncan Chisholm for an excambion. I applied to the Chisholm for permission to erect the White Bridge. (Q) Did you get his permission in writing?—(A) I believe I did. I have searched my repositories for any written permission, but I have not been able to find any. I am quite positive that I had direct communication with the Chisholm on the subject of the erection of the new bridge. (Q) Did you receive his permission?—(A) Yes, I am positive of that, and I may also say that the Chisholm was anxious for an excambion. Mr Robertson, the factor, said there were difficulties in the way, and Mr Brown said there were none. I am positive as to these facts."

I have no doubt that, as Lord Tweedmouth says, he obtained the Chisholm's permission to erect the bridge. It is to be regretted that if the permission was given by a letter, the correspondence has not been recovered, that it might have been seen what were the terms and conditions, if any, on which the permission was granted. Lord Tweedmouth was not asked any questions on the subject, but the letter from Mr Brown referred to by him (which has been produced) shows what was the state of mind of the

Chisholm's advisers, and presumably of his own on the subject.

The letter is dated 26th February 1858, and records the result of a meeting between Mr Brown, Lord Tweedmouth's factor, and Mr Robertson, the Chisholm's factor. It appears that Lord Tweedmouth had also desired to obtain a feu of a site for a lodge from the Chisholm, and Mr Brown, after stating Mr Robertson's opinion that it was impossible for the Chisholm as an heir of entail to grant a feu, goes on to say—"He, however, expressed his decided opinion in favour of the road and bridge, and assured me that the Chisholm would not only offer you no opposition to the formation and erection of them, but also that he would never think of finding fault with them after they are constructed during his lifetime, and Robertson said he was certain the Chisholm would give you an obligatory letter to this effect." Then he adds—"I would advise you not to press for a feu-right, but to make the road and build the bridge under a simple authority from the Chisholm. Meantime as I found Robertson so well inclined towards you and your improvement. . . I resolved to contract for making the road on the line you had fixed upon when last at Guisachan."

It would appear therefore that Lord Tweedmouth was advised to build the bridge under a simple authority from the Chisholm, with an undertaking that it should not be interfered with during the Chisholm's life. I do not think that there is any evidence that Lord Tweedmouth ever sought or obtained any higher or more permanent right. I concur in what the Lord Ordinary says on this part of the case—"There is," he says, "no evidence that Lord Tweedmouth desired either a right of property in or a servitude over the small part of the Chisholm property on which he proposed to form the bridge, and its connection with the county road. If such a right had been desired the right could not have been acquired except for a valuable consideration, because the Chisholm estates were entailed. But there is no evidence that Lord Tweedmouth desired anything more than that a bridge and approach should be formed for his convenience, he undertaking their formation because it was for his convenience, and receiving from the Chisholm all the right which he was able gratuitously to confer, viz., a use by tolerance during the grantor's lifetime."

If, then, the bridge and road were originally constructed on this footing, the question arises whether anything has since occurred by which Lord Tweedmouth has acquired a right to have them maintained as permanent burdens on the Chisholm's property.

It appears that the Chisholm who granted the permission died in the same year, 1858, as the bridge was built. He was succeeded by Sutherland Chisholm, who died in 1885, and who disentailed the estates in 1884. He again was succeeded by Roderick Chisholm, who died in 1887, and was one of the pursuers of this action. And he again was succeeded by Mrs Chisholm, one of the present pursuers.

I am not aware that there is any positive act condescended on from which it is to be implied that any of these successive proprietors consented that the road and bridge should become

permanent burdens on the Chisholm estate. All that they did was to allow Lord Tweedmouth to use and enjoy the bridge and road as he had done before. I do not see that that conferred on Lord Tweedmouth any different or more permanent right than he had before. But there were special reasons why they should not have interfered with his use of the bridge and road. In 1854 Lord Tweedmouth became tenant of the shootings of Affarie, which included Knockfin, by an assignation to the unexpired period of the lease of the then tenant Colonel Inge, and on the expiry of this lease he took a new lease of these shootings for twenty-one years from 1870, the unexpired period of which he in 1885 assigned to Mr Winans. There were obvious reasons therefore why the proprietors of Knockfin should not interfere with the access of their shooting tenant to the shootings which they had let to him. I think therefore that Lord Tweedmouth's right to use the bridge and road remained what it was originally, a right only so long as he had the permission or tolerance of the proprietor of Knockfin.

It was contended, however, by the defender that he was entitled to maintain the bridge as in substitution for the ford. Naturally the traffic which used to pass by the ford has been diverted to the bridge. The bridge, however, was not originally erected as a substitute for the ford, because, as Lord Tweedmouth tells us, he did not then know of its existence, but for his own convenience, and I know no authority which suggests that a permanent structure such as this can be maintained on another man's land against his will in place of a ford, which is as practicable and passable as ever it was.

With reference to the Black Bridge, it was erected by Lord Tweedmouth in 1877, afterwards carried away by the river in a flood, and replaced by him in 1881. It was erected by Lord Tweedmouth at his own cost, without any permission from the Chisholm, he being tenant of the Knockfin shootings at the time. The Chisholms are not said to have done anything implying consent to the erecting or maintenance of this bridge, except that they did not interfere with its erection or use—that is, that they have tolerated it. It is also said that this bridge was substituted for the ford near it. It is not disputed that there is this ford, and that at the ford there was a plank chained to the Guisachan side, and extending not wholly, but I think partly only, across the river, which was used to facilitate the passage of the ford. I am not of opinion that these facts can justify the retention of the bridge.

I am therefore of opinion with the Lord Ordinary that Lord Tweedmouth has not instructed any legal right to retain these roads and bridges. But I do not altogether agree with his Lordship's findings on the subject. His Lordship finds that the northmost half thereof, and the roads or paths connecting the said bridges on the north with the Strathglass County Road, are the property of the pursuer Mrs Chisholm, and are within the possession of the pursuer Mr Winans as her tenant. It is said that the finding that half of the bridges are the property of Mrs Chisholm is not within the conclusions of the action, and I think that is so. But I think further that the reasoning of the Lord Ordinary as to these bridges does not lead to the conclusion he has

drawn. If, as his Lordship thinks, and I concur with him, the bridges were erected and used by the permission or tolerance of the Chisholm, and that permission or tolerance be withdrawn, the result is not that the property of the bridges, or of any part of them, passes to the Chisholm, but that if so desired Lord Tweedmouth must remove them. I think therefore that this finding of the interlocutor should be recalled. But I concur in the next finding that the pursuers are entitled to close the bridges against traffic under the conditions and reservations as concluded for, and that is practically all that they seek.

The next finding in the interlocutor to which the reclaimer objected is that in which the Lord Ordinary, under the fifth conclusion, finds that there is a public right of way from points to be hereafter determined, the one between the bridge of Knockfin and the village of Tomich, and the other near Guisachan Old Mill, being part of the way No. 1 of said conclusion.

It will be observed that the public right of way which the Lord Ordinary has thus found is the first part of the road claimed in that conclusion. That road is therein further defined as leading from Guisachan Old Mill to Cougie, and from Cougie by two branches, one leading to Glen Affarie and Kintail, and the other joining the county road running through Glenmoriston. On record the right of way is said to have been acquired by the public by prescriptive use, as such rights of way are generally acquired. It is not said to have been acquired by dedication, or in any other way than that of prescriptive use. Now, by the law of Scotland, beyond question, a public road capable of being acquired by prescriptive use must be a thoroughfare—a road leading from one public place to another. The claim therefore to the road, as described in the conclusion of the action and on record, was a perfectly relevant claim, because it defined such a road. But if only that part of the road which the Lord Ordinary has found to be a public road had been claimed, it would not have been a relevant claim, because the road does not terminate in a public place, and I do not see how the Court could have done otherwise than dismiss such a claim as irrelevant. The Lord Ordinary, however, has sustained the claim, and it is necessary to consider the grounds on which he has done so, and to ascertain the facts on which he has proceeded.

It appears that the Strathglass District Road Trustees were constituted under a private Road Act obtained in 1830, and their minutes from 1831 to 1861 have been produced.

The names of two roads appear in these minutes — the Guisachan Road, and the other the Cougie Road—the one being the road in question therein described as leading to a bridge over the burn at Guisachan. On crossing this bridge the road branches, one branch leading to Guisachan House, and the other to the Old Mill at Guisachan, and thence westwards to Cougie. This last branch is the Cougie Road. These roads appear in the minutes generally as separate roads, but sometimes they both pass under the name of the Guisachan Road. It further appears that these roads were treated exactly in the same way as any other district road under charge of the trustees. Money was regularly allocated for and expended upon their mainten-

ance and repair down to the year 1858, after which no money was allocated or expended upon them.

The minutes of the Inverness-shire Road Trustees from 1803 to 1878 have also been produced, and these minutes show that in 1814-15, 1818, and 1821 considerable sums were expended by the County Road Trustees on the Guisachan Road, and other evidence in process shows that money at these early dates was expended by the trustees on this road. Presumably therefore the road has been treated as a road under charge of the road trustees from a very early period.

But no money has been expended on the Guisachan Road by the trustees since 1858. Since 1860 it has formed the private avenue to Guisachan House, and has been maintained by Lord Tweedmouth.

In 1879 the Roads and Bridges Act 1878 was adopted by the county. In the list of roads taken over by the trustees under section 41 of that Act this road is not included. If it legally was a district road it must be held to have been finally abandoned by the trustees, because it is enacted by that section that the roads, highways, and bridges on such list, and no other, shall be maintained and repaired out of the assessments levied under the Act. Presumably the road was not included in the list, because there was no such public use of it as to justify its retention as a district road.

Such being the facts, in my opinion neither the Guisachan Road nor the Cougie Road was a public road such as the road trustees were entitled to maintain out of the public assessments. The Guisachan Road led only to Guisachan House and the Old Meal Mill, where there were three or four houses only, and the Cougie Road led only to a shepherd's cottage, passing one or two houses on the way. Of this road the Lord Ordinary says that there never was a road, in the proper sense, from Guisachan Mill to Cougie, and that it was a mountain track not leading to any place, and not really required for public purposes. He says again that there was no population whose wants were to be supplied, because the path led only to a shepherd's house. This is all true, and it shows the kind of road on which the trustees considered it consistent with their duty to expend the public assessments. The Lord Ordinary has held, I think rightly, that this Cougie Road is not a public road, and therefore it follows that the expenditure upon it by the road trustees was illegal, and that there was no appropriation of it to the public.

But I am unable to see any such difference between this road and the Guisachan Road as can warrant me in coming to a different conclusion with regard to the latter from that at which the Lord Ordinary has arrived with regard to the former.

In the case of the Guisachan Road there was no doubt an existing road, upon which somewhat larger sums of money had been expended than on the Cougie Road, and there were a few more people living at the Guisachan Mill than at Cougie, to whom, and to whose friends when they came to see them, the road no doubt was an accommodation, and there is evidence that a neighbouring farmer occasionally—but only very occasionally—sent grain to be ground at the old mill. But these do not constitute the public, and

there is no other evidence of public use, and that being so, I do not think there is any other material difference between the two roads.

To hold such roads to be public roads would be a serious matter, because in that case the road trustees would be bound to maintain and repair them at the expense of the public, who would derive no corresponding benefit from the expenditure. I think it is a mistake to say that such roads were maintained for the benefit of the public.

They were maintained for the benefit of the Guisachan estate, and the proprietors and tenants thereof, as apparently certain other roads in the district in a similar situation were maintained for the benefit of the respective proprietors on whose estates they were situated, who paid large assessments themselves, and who no doubt were very glad to get if they could a contribution from the assessments to assist in their maintenance, or, as appears to have been sometimes the case, to recoup themselves in sums they had previously expended on them. As regards the rights of the public, I do not think the Guisachan Road was any more appropriated to public purposes than the Cougie Road.

But even assuming that the Guisachan Road was a proper district road, and was properly maintained by the trustees, I should not draw from these facts the inference which the pursuers maintain must be drawn. They say that there must be presumed to have been a grant by the proprietor of an unconditional public right of way such as is presumed from prescriptive use. I think that the grant to be presumed is that the road was made over to the road trustees to be maintained as a district road, and subject to all the incidents attaching to such a road, including, for example, a right to apply to the trustees to have it closed if of no public use—a grant irrevocable, perhaps, but not unconditional. The Lord Ordinary remarks—"It is a matter of general experience that the acquisition of a road by purchase is a very unusual thing, and that the more usual, if not universal, arrangement is that in which the proprietor gives the site of the road in consideration of the benefit to his estate of having a way made through it, while the road trustees undertake the cost of making and maintaining the road, or, as the case may be, of putting in repair and maintaining an existing road." That probably is a correct representation of what takes place in such cases. But what is to be the result if, as in this case, the road trustees abandon the road so given to them? If the consideration in respect of which the proprietor is presumed to give the road is that the road trustees are to undertake to repair and maintain the road, and if they, as the representatives of the public, refuse to continue that undertaking, then it appears to me that the road should revert to the proprietor in the like condition in which he gave it, and free from any right of way. It does not appear to me to be consistent with justice or equity that where one of the parties to the contract breaks it by non-fulfilment of the conditions he should nevertheless enjoy the benefits of it unconditionally. If therefore this road was at one time a proper district road I think that on its abandonment by the trustees it reverted to the proprietors free from any public right of way.

The Lord Ordinary further says—"Nothing

that I decree will prejudice the right of the defender to apply to the County Road Trustees to have the road shut up as being no longer necessary for the accommodation of the public should the facts warrant such an application." But the County Road Trustees have now no power to close this road, because it is not on the list of roads taken over by them, and it is only these roads, and no others, that are under their control and management.

Moreover, at common law the road trustees have no power whatever over a right of way acquired by the public such as the Lord Ordinary has decreed for in this case. They cannot close a road over which a public right of way has been acquired. Such a right of way, and a district road under statutory management are in contemplation of law two entirely different things.

Reference has been made to certain cases in which it has been found that if a superior or proprietor lays out a piece of ground, a road, a square, or a garden, for the use of his feu or disponees it is evidence of an appropriation of the subject to their use, which in conjunction with evidence of actual use may satisfy a court of law that the subject was irrevocably appropriated to public uses so as to disentitle the owner to shut up the subject or to convert it to other uses. I do not see, however, that cases between disponents and feuars, or superiors and vassals, in which the public are not concerned, can have any bearing on a question between a proprietor and the public such as this is.

Neither do I think that the class of cases referred to by the Lord Chancellor in *Dyce v. Hay*, of village greens and playgrounds, presumed to be dedicated to the public, apply to this case. A different class of considerations arises in these from any we have here.

For these reasons I am of opinion that if the claim to this road had been competently raised on the record it ought to have been repelled, and the defender assoilzied from the whole of the fifth conclusion of the summons as regards Road No. 1.

The only other question submitted for our consideration was this—The Lord Ordinary finds that there is a public right of way for carriages, horses, and cattle by the way No. 6, and by so much of the way No. 5 as connects Glenmoriston directly with No. 6, and ultimately with the Strathglass County Road.

The road thus found by the Lord Ordinary to exist is described in the summons as "a road leading from the road first above described (No. 1) at a point 220 yards or thereby south-west of the gatekeeper's lodge at Tomich, crossing the Road No. 7 at a point 550 yards or thereby north-east of Balcladdich," thence running as therein described.

It is to this part of the finding of the Lord Ordinary as to Road No. 6 that the defender objects. The defender's admission with regard to the road is that there is a drove road from Glenmoriston to Tomich by Road No. 6, by a line (shown on a plan produced) which does not materially differ from the line claimed by the pursuers, until it reaches a point marked H on the plan, and then it is described as running "thereafter by the road leading past Guisachan steading to Tomich, also coloured brown on the said plan." This point H, as I understand,

corresponds with the point described in the summons as being 550 yards north-east of Balcladdich.

The question therefore is, whether the proper line of Road No. 6, from this point to Tomich, is round by Road No. 1, or by the road leading past Guisachan steading?

This is a question of very considerable importance to Lord Tweedmouth, because Road No. 1 is now the avenue to his house, and by the findings in the interlocutor part of the drove road runs along a part of it.

It will be observed that there is no admission by the defender that the part of Road No. 6 in dispute is the proper line of the drove road. It is not contended that both alternative lines from the point in question are to be maintained, and there is little or no evidence as to which of the two is the more suitable line for the drover public. But the road claimed by the pursuer has been closed since 1860 without any objection from the portion of the public chiefly interested, the drovers, or from anyone else. I think it may be safely concluded that the alternative road has been found equally convenient by the public, and I think it may reasonably be supposed that Mr Winans does not altogether represent the public interest with regard to this road.

The question does not seem to have been brought under the notice of the Lord Ordinary, at least there is no allusion to it in his note. On the whole, I think that the Court should find that the line of road is that admitted on record by the defender. This exhausts all the questions argued before us.

LORD PRESIDENT—I have had the advantage of reading and fully considering the opinion which has just been delivered by Lord Adam, and I entirely concur with his Lordship throughout.

LORD MURE—On the question raised as to the bridges I concur substantially in the result at which the Lord Ordinary has arrived, very much on the same grounds as those which have now been explained by Lord Adam, and subject to the qualification which has been suggested in his opinion.

But as to the rights of way claimed I cannot altogether agree with the Lord Ordinary. I differ from him in his finding as to right of way No. 1, in so far as he decides that there is a public right of way from Tomich to Guisachan Old Mill, which is not alleged in the record to have been a public place, and is now beyond doubt not a place of that description. The Lord Ordinary has, however, found this road to be a public right of way from Tomich to the Old Meal Mill, while he has negatived the claim to have it declared public beyond that place, and on to Cougie, Glenmoriston, and other places mentioned in the summons. As regards the portion from the old mill to Cougie and Glenmoriston, &c., I agree with the Lord Ordinary. I think that there is no evidence sufficient to instruct the existence of any road beyond the mill, with any pretensions to the character of a public right of way.

That being so, the question as to Road No 1 is reduced to the portion which leads from Tomich to the old mill, and upon this I agree in the view Lord Adam has taken of the case. The

old mill is not now a public place, for it has for long ceased to exist; and in the view I take of the evidence it never was a public place in the sense in which that expression is understood in dealing with questions of this description. There being admittedly no road beyond the mill in the direction of Cougie, it was not a place the general public had anything to do with, or ever required to go to, and the road to it was merely for the use of those who required to go to the mill, viz., the tenants on the Guisachan property or any other parties who required or were entitled to have their grain ground at the mill. There is, as I read the proof, no sufficient evidence of this road having been used for any other purpose; and as there is no public right of way beyond the old mill it is difficult to see who the public were that were to use the road from Tomich to the mill except those who required to go to the mill. In the most favourable view of the case therefore for the pursuer, the use, as I conceive, amounted to nothing more than the use of a servitude road to a mill, and when the mill ceased to exist, which it did many years ago, that use necessarily came to an end. That is the view I take of the evidence of use apart from the question raised upon the proof, though not upon the record, as to the effect of the expenditure made by the road trustees upon a part of the road for some years prior to 1861. Upon that point I concur in the opinion of Lord Adam.

The Court pronounced this interlocutor:—

“Recal the Lord Ordinary’s interlocutor: Find and declare in terms of the second conclusion of the summons, and of the first alternative of the third conclusion of the summons, with the exception of the portions of the said conclusions relating to the bridge erected across the Leth Alt Burn, of which it is unnecessary to dispose, the said bridge having been removed by the defender since the date of the summons: Find and declare with reference to the fifth conclusion of the summons, and of consent, (1) that there is a public right of way for passengers, horses, and cattle and sheep from Glenmoriston to Strathglass by the road marked No. 5 on the plan, No. 6 of process, produced by the pursuers, from Glenmoriston to the point where it meets the road marked No. 6, and therefrom by the road marked No. 6 on said plan, until it reaches the north side of the Burn Allt Ball a Chladaich, and thence by the track or course coloured brown, and marked with the letters G H on the plan produced by the defender, No. 10 of process, and thereafter by the road leading past Guisachan steading to Tomich, also coloured brown on the said last-mentioned plan; and (2) that there is a public right of way for passengers, horses, and cattle, and sheep by the road from Corriemony, marked No. 7, to the point where it meets the road marked No. 7B on the said plan, and thence past the Guisachan steading to Tomich by the road coloured brown on the said plan produced by the defender: *Quoad ultra* assoilzie the defender from the conclusions of the summons, and decern: Find neither party entitled to expenses.”

Counsel for the Pursuers and Respondents—Sol.-Gen. Robertson—Sir C. Pearson—Guthrie—Macphail. Agents—Hagart & Burn Murdoch, W.S.

Counsel for the Defender and Reclaimer—Asher Q. C.—Mackay—Ure. Agents—J. & A. Peddie & Ivory, W.S.

HOUSE OF LORDS.

Thursday, March 12.

(Before the Lord Chancellor (Halsbury), Lord Watson, and Lord Macnaghten.)

EDWARD (MRS BAXTER’S EXECUTOR) *v.*
CHEYNE AND ANOTHER (DR BOYD
BAXTER’S TRUSTEES).

(*Ante*, June 27, 1884, 21 S.L.R. 670, and
11 R. 996.)

Husband and Wife—Jus Relictæ—Implied Renunciation—Wife’s Signature to Husband’s Settlement.

A husband by his trust-disposition and settlement gave his wife the liferent of his whole means and estate, and in the fourth purpose directed his trustees “after the death of the survivor of me and my said wife, and with her consent and full approval (in token of which she has subscribed this deed),” to pay over a large number of legacies, many of them to relatives of his wife. By the fifth purpose he directed that after the death of his widow his household furniture should be divided among certain of her relatives. The residue was to be devoted to religious and charitable purposes. The wife signed the deed. She survived her husband only a few weeks. Her executor, in a multipoleinding brought by the husband’s trustees, claimed her terce and *jus relictæ*, maintaining that her consent had been given to the legacies only, and not to the whole settlement.

Held (*aff.* judgment of Second Division) that the fourth purpose and the antecedent provision of liferent were so intimately connected with each other that the wife by her consent to the legacies must be regarded as having assented to her husband’s disposal of the whole estate.

This case is reported *ante*, June 27, 1884, 21 S.L.R. 670, and 11 R. 996.

The claimant Allan Edward, Mrs Baxter’s executor, appealed.

At delivering judgment—

LORD WATSON—My Lords, I have come without difficulty to the conclusion that the interlocutors appealed from ought not to be disturbed.

The general principles of law applicable to the case have not been disputed. When there is no antenuptial contract, and the husband makes a voluntary provision in favour of his widow, as in full of her legal claims, she is put to her election, and in the event of her death before she has had the opportunity of making her choice, the right