DUKE OF ATHOLL, APPELLANT.
TORRIE AND OTHERS, RESPONDENTS.

1852.
3rd and 4th June.

THE facts of this case appear in the twelfth volume of the Court of Session Reports (*a*).

An action was instituted by the Respondents against the Duke, to have it found and declared that a certain road from Blair Athol to Braemar, popularly known as the passage of Glen Tilt, was a *public* road, and that the Pursuers and "all others" were entitled to the free and uninterrupted enjoyment thereof.

To this action his Grace, as the owner of Glen Tilt, put in a preliminary defence denying the Pursuers' title to *sue*.

The *Lord Ordinary* (Lord *Ivory*), on the 15th of June, 1849, repelled the Duke's defence, "and sustained the title of the Pursuers to insist in the action."

His Lordship on the same occasion issued the following note or memorandum, giving a concise statement of the pleadings, and explaining the grounds of his decision:—

The Pursuers' allegations, in point of fact, must in the present stage of the proceedings *be taken as true*. It is averred, 1. That *the Road* sought to be declared, is, and from time immemorial has been, a public road,—used and travelled on by the public on foot and on horseback,—frequented as a drove-road by drovers and their sheep or cattle,—the regular, and main, and only direct thoroughfare for purposes of business or recreation of the district; as such, until lately, maintained in whole or in part at the public expense, or by statute-labour, &c. &c.; and, accordingly, that, were it now to be closed, the Pursuers and the public would thereby be deprived of the direct and common means of communication with the upper part of the valley of the Dee, and with the

An averment by parties residing near a road, that they and "others of the public" have constantly used it, and paid for its repair, is sufficient, in point of pleading, to support an action to have that road declared public.

The case of a road dedicated to the public is not a case of servitude.

An action of declarator is, by the law of Scotland, the proper mode of establishing the right to a public way.

Semble. That such action may be maintained by *any* private party on behalf of the public; there being in Scotland no remedy corresponding with an English indictment.

Semble. That the right to *sue* is commensurate with the right to *use*.

Semble. That a landowner may maintain an action of declarator to exclude the public from a road; but how far the decision would bind or be *res judicata*—*Quære*.

(*a*) By Messrs. Young, Tennent, Fraser, & Murray; and usually called the Second or New Series, p. 328.

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public roads or paths leading therefrom to the valleys of the Avon or the Spey. It is averred, 2. That the Defender or his predecessors have illegally set up gates, fences, and other interruptions, across this road, and have for some years back used various means to stop up, obstruct, or obliterate the same, and to deprive the Pursuers and the public of the use thereof; that, in particular, the Defender has interrupted and threatened individuals passing along the said road, and has employed gamekeepers and other persons to prevent and interrupt their so passing; that since the commencement of these proceedings, he has so stopped and interrupted the Pursuers themselves; and that he accordingly now disputes upon the Record that there is any public road, or any right in the public to travel, through Glen Tilt; and that all persons attempting so to travel without his consent, are guilty of trespass, and subject in consequence to pains and penalties.

In this state of matters, *assuming it to be true*, it is surely impossible to dispute that somewhere or other there must exist a legal remedy for the very grievous wrong thereby inflicted on the public. In England, it is believed such a remedy would be found in the proceeding of *indictment*. But with us, no such course is open; and redress must therefore, of necessity, be sought by way of action. No doubt, as is laid down by Erskine, 4, 1, 17, "We have admitted no action in our law, upon questions of civil right, which can be pursued by any other than the person interested." But if, according to Stair, 2, 7, 10, highways be "patent to all the lieges, without respect to land," and as in the parallel passage of Erskine, 2, 2, 5, "their use belongs to all the subjects or members of the Kingdom, and to those strangers to whom it allows the liberty of trade,"—it would be difficult to maintain that any party against whom a highway is closed, or to whom its use is denied, and all access prohibited and prevented, is a "person interested" in the sense here intended.

Accordingly, if before bringing the present action, the Pursuers (as is averred on the Record in regard to others) had actually been interrupted and turned off the road, when travelling along it in the exercise of their supposed right, the *Lord Ordinary* sees no room to doubt that this would have qualified an undoubted title and interest to prosecute declarator. For, as "Declarators may be in all points of right and possession," so they "may be pursued for instructing and clearing any kind of right relating to liberty, dominion, or obligation;" (Stair, 4, 3, 47;) and though "they are not to be raised or insisted in where there is no competition or pretence of any other right," (Ibid.) yet, even in this respect, there could here have been no colour of objection; inasmuch as the Defender not only most strenuously disputes the right asserted by the Pursuers, but contends for a directly opposite and conflicting right, as belonging to himself.

But it was not necessary that the Pursuers should thus expose themselves to an actual collision with the Defender. It was enough that the latter (as is averred) had, by his previous conduct towards others, made known what were his pretensions, and his determination, at his own hand, to assert and make them good. The Defender can hardly be allowed to say that, had the Pursuers attempted to use the road, they would have been treated by him differently. For they have, since the institution of this process, brought matters fairly to the test, by making the attempt; and, as was to have been anticipated, they were stopped and turned back.

The Pursuers, therefore, in respect of title and interest, stand very much in the same situation with the parties at whose instance, in various cases, questions have heretofore been raised in regard to the right of drove-road. It is their interest in the use of the road as *res publica*, which constitutes their title. It is not as owners or possessors of any dominant tenement, asserting an ordinary right of servitude, that they pursue; and of course no written title is necessary to be produced in support of their action. To repeat the words of Lord Stair, already quoted, the highway is "patent to all the lieges, without respect to land." Accordingly, though all the proprietors in the district, and all the tenants and residenters in the immediate neighbourhood, were to combine, it is beyond their united power to shut up what is a public highway; and were they to make the attempt, every party entitled to travel along the road would, in the very interest implied in that right, have sufficient title to prosecute declarator, or any other necessary process to preserve and keep it open.

The principle now laid down appears to receive strong illustration from such cases as *Scott* (*a*), where "action was sustained at the instance of those having occasion to travel a turnpike road, concluding against the trustees to put the road in repair, or to remove the toll-bar;" and *Earl of Cassilis* (*b*), where, at the instance of parties similarly situated, in respect of the right to use, a declarator was in like manner sustained against the Burgh of Wigton and other Burghs, and against sundry particular heritors, concluding for immunity "from tolls for cattle passing through these towns, or by certain roads or bridges leading through their grounds, or those of the other Defenders." And this, notwithstanding it was contended, very much to the same effect as is now done by the Defender, that the Pursuers had "no title to pursue this general declarator for the lieges; and it ought not to be sustained for themselves, as no *absolvitor* can be proceeded upon it; and they are obliging the Defenders vexatiously to show their writings; but if any unjust toll is asked of any in particular, he may, in a proper

(*a*) *Guild* v. *Scott*, Faculty Collection of Decisions, 21st December, 1809.
(*b*) *Earl of Cassilis* v. *Burgh of Wigton*, Morr. 16122.

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way, obtain a remedy against it." If, in the present case, the Defender had shaped his obstruction in the form of an exaction of toll, as the price of being allowed to pass along the road, these authorities would have afforded an express precedent for declarator of immunity at the Pursuers' instance.

It only remains to notice the Defender's observation, that in all of these cases the action was brought at the instance of parties who actually used the disputed roads. But so it is also averred here, the express allegation of the Pursuers being, that they have, all and each of them, "travelled on the said road," and "been in use to proceed along it, when travelling between Aberdeen, or other places on the Dee and Blair-Athole," or "between their respective places of residence and the upper parts of the valley of the Dee, as also between their respective places of residence and the valleys of the Avon and the Spey." And the injury, accordingly, of which they complain is, that the shutting of this "regular road and thoroughfare" will deprive them "of the means of communication between these important places, &c., otherwise than by adopting indirect roads, and making a circuit of many miles."

Even, however, had the Pursuers' averments not been so expressed as to their actual use of the road in time past, their right to use it in time to come would still have been undoubted; and the *Lord Ordinary* is not prepared to say that this of itself would not have constituted a sufficient interest to entitle them to resist and oppose the Defender's attempt *vi & facti* (for such is the allegation) to exclude them and the rest of the public from what they distinctly allege to have been an ancient, and to be still an existing, public way.

The case of *Tait* (*a*) does not seem at all of weight as an adverse authority. For the only point decided was, that in a case of proper parish roads, which had been shut up by decree of the proper authorities, and another and approved line substituted in its stead, mere servants, hired from term to term, having no fixed settlement of their own, but living in family with their masters, had no title, because they had no proper or abiding interest, to prosecute a reduction of the decree; Lord *Balgray* significantly asking, "if the master has agreed, or does not object, to the alteration of the road, what right or title has his servant to resist it, and put himself in opposition to his master?" Even in that case, however, none of the Judges doubted or called in question the general principle, that interest in the road was sufficient to give title to pursue in questions of this class. Lord *Craigie*, indeed, remarked, that as "the road is alleged to be a public kirk and market road, he apprehended that any member of the

(*a*) *Tait* v. *Lord Lauderdale*, 10th Feb. 1827, 5 Shaw & D. 306.

community, who can show sufficient interest, is entitled to resist any alteration."

The Duke reclaimed against the *Lord Ordinary's* interlocutor to the First Division of the Court of Session who, on the 12th of December, 1849, unanimously adhered to and confirmed his Lordship's decision (*a*).

His Grace, being still dissatisfied, appealed for justice to the House of Lords; and was there met by the Pursuers in the character of Respondents.

The *Solicitor-General* (Sir *Fitzroy Kelly*) and Mr. *Rolt*, for the Appellant: There is no authority or principle which can justify a proceeding by private parties in vindication of a right merely public. Infinite inconvenience will arise if such a suit be countenanced. A perfect stranger having no connexion with Glen Tilt may maintain it. And the owners of land in Scotland will be exposed to perpetual vexation. [Lord BROUGHAM: Why might not a proprietor prevent that mischief by bringing an action to have it declared that his land was free from such a claim?] In England the remedy would be by indictment under the control of the Attorney-General. [Lord BROUGHAM: You know well that such indictments, though technically of a public character, rarely fall under the Attorney-General's notice. They are usually left to the private party.] The Attorney-General may stop a vexatious indictment by a *nolle prosequi;* but in Scotland the proceeding is subject to no check. The consequences, therefore, of affirming this judgment will be serious. The principle, moreover, on which it rests is entirely new in the law of Scotland. Erskine, 4. 1. 17. *Galbreath* v. *Armour* (*b*), *Kerr* v. *Hamilton* (*c*), *Oswald*

(*a*) The Judges present were the Lord Justice-General (Boyle), Lord Mackenzie, and Lord Jeffrey. Lord Fullerton was absent.

(*b*) Bell's App. Ca. 374.

(*c*) 23rd January, 1823, 2 Shaw, 149.

v. *Lawrie* (*a*), *Berrie* v. *Wilson* (*b*), *Forbes* v. *Forbes* (*c*), *Harvie* v. *Rogers* (*d*), *Anderson* v. *Earl of Morton* (*e*), *Earl of Cassilis* v. *Burgh of Wigton* (*f*), *Guild* v. *Scott* (*g*), *Tait* v. *Lord Lauderdale* (*h*), *Lord Breadalbane* v. *Mc Gregor* (*i*), *Ewing* v. *Glasgow Police Commissioners* (*k*), *Anderson* v. *Morton* (*l*). By these authorities the right to sue is so limited and restricted, as in general, if not in every case, to depend on one or other of the following circumstances:—1. Special damage from actual obstruction; 2. Actual interest, as that of Road Trustees, or Justices of the Peace invested with the care of public ways; or, 3. Ownership of land, or residency in the immediate vicinity, and consequent user of the road in question. Any claim on the part of the general public, independent of locality, is therefore unsustainable.

Mr. *Bethell* and Mr. *Anderson*, for the Respondents: The facts alleged by the Respondents must at this stage of the suit be taken to be admitted, as in the case of an English demurrer. Therefore the road in question, for the purposes of the present argument, is assumed to be a *public* road. The interlocutors appealed from merely over-rule the preliminary defence which went to prevent the Respondents even from being *heard*. They are not simply agitating a public question. They have likewise a private *interest*. [LORD CHAN-

(*a*) Nov. 1828, 5 Murray, 6.
(*b*) 13th July, 1838, Mc Farlane, 91.
(*c*) 20th Feb. 1829, 7 Shaw, 441.
(*d*) 17th Jan. 1829, 7 Shaw, 287.
(*e*) 9 July, 1846, 8 Second Ser. 1085.
(*f*) 11th July, 1750, Morr. 16122.
(*g*) 21st Dec. 1809, Fac. Coll.
(*h*) 10 Feb. 1827, 5 Shaw & D. 330. (*i*) 9 Murray, 210.
(*k*) Mc Lean & Rob. 847; and more especially the remarks of Lord Chancellor Cottenham.
(*l*) 9th July, 1846, Second Ser. 1085.

CELLOR: What is meant by the allegation of interruption after the institution of the suit?] The case of *Craig* v. *Arbuthnot* (*a*) shows that a wrong done *pendente lite* would support the action. A declarator is by the law of Scotland the only remedy appropriate to the circumstances of the present case. Its extensive use and application appears from Lord Stair's work (*b*), where that great legal writer lays it down that "declaratory actions may be pursued for clearing *any* kind of right relating to liberty, dominion, or obligation." The general rule to this effect was recently affirmed by the Court of Session without any qualification, in *Barber* v. *Grierson* (*c*). And the decisions upon such declarators bind the public and are *res judicatæ*. *Forbes* v. *Forbes* (*d*), *Campbell* v. *Lang* (*e*), *Young* v. *Cuthbertson* (*f*). [Lord BROUGHAM: Is it not still an open question in Scotland how far you can bind those who are not made parties to the suit? There might be a collusive declarator.] [The LORD CHANCELLOR: Does the Court take means to see that the public is represented in these cases?]

The limitation and restriction of the right to sue attempted to be set up by the Appellant, is unsupported by authority and altogether fictitious.

Lord Chancellor's opinion.

The LORD CHANCELLOR (*g*):

My Lords, the merits of this cause are not now before the House. The simple question to be decided is whether the Respondents *have a right to sue*; a question, after all, not of any real importance or difficulty in point of law.

(*a*) 4 Shaw & D. 440.
(*b*) B. 4, T. 3, § 47.
(*c*) 5 Shaw & D. 603.
(*d*) 20th Feb. 1829, 7 Shaw & D. 440.
(*e*) 19th June, 1851, 13 New Ser. 1179.
(*f*) 9th July, 1851, 13 New Ser. 1308.
(*g*) Lord St. Leonards.

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A good deal of contention has arisen as to the effect of the averments. It was insisted, at the opening of the case, that the Respondents must prove a *user* of the road; and it was further urged, that the effect of the decision appealed from was to determine that point against the Appellant.

It seems now, however, to be admitted on both sides that *that* question is *not* concluded; and that it will be competent for the Court in Scotland to deal with it as may be fit in course of the further proceedings.

My Lords, the character in which these parties sue is shown by their description:—"Alexander Torrie, *residing in Aberdeen;* Robert Cox, *residing in Edinburgh;* and Charles Law, *residing in Perth.*" Now take the latter, for example; he belongs to the very county where this road is situate; residing at what may fairly be called one of the termini; and he has, according to his own averment, himself paid composition and service-money for its repair. By their condescendence the Respondents positively state that they have all used the road, that they still have occasion to use it, and that they cannot go from one terminus to the other except by means of it, unless by resorting to a circuit of many miles, which they are not bound to do. Now, supposing those facts to be proved, they would present a very different case from that which has been the subject of contention at your Lordships' bar; for the question here has been made an abstract question,—can one of her Majesty's subjects institute an action of this sort on behalf of the public, not having himself used the road, and having only a right in common with the rest of the community. *That* controversy, if it be one, may never arise; because if the averments are proved, the case will come so nearly within the authorities, that there may be no legal question to decide.

Now, the difficulty of this case has mainly arisen

from the difference between the law of Scotland and the law of England. By the law of England any person, under the guidance of the officers of the Crown, can try the right to a road, on behalf of the public generally, by indictment. But the law of Scotland provides no such method of establishing a right; and, therefore, the question is, whether the course adopted in the present case be or be not legal. If it be not legal, there is no other mode that I am aware of, in which, supposing the controversy to be one of general right, it can in Scotland be brought to trial.

Now, assuming for the purposes of the present argument that the public generally have a right to use this road, it would seem to follow that every man may vindicate that right. It is not denied that he may pursue his right in respect of any special obstruction which causes damages; but the question is whether by the law of Scotland he can institute a declarator to establish a general public right? Why should he not? Great inconvenience, it is said, may arise from such a suit. Extreme cases have been put by the Appellant's counsel. But if the right exists, it will not be taken away by showing inconvenience.

The Appellant desires to limit and confine to certain classes the title to vindicate the public right of road, which, for this purpose, is admitted to exist. It would, I apprehend, have been rather singular, if, by the law of Scotland, that right had been very strictly limited and tied down.

How stand the authorities? On the side of the Appellant, every case which has been cited is, *to a certain extent*, a decision in favour of the right to institute an action of this sort on behalf of the public. But then the argument, on the part of the Appellant, is,—you cannot show me a case in which any man, *simply as one of the public*, has been allowed to maintain an

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action of declarator. Is there any case in which such a right has been denied? The answer is, no; and therefore all the cases, *as far as they go*, establish the rights of the different persons who have brought actions of declarator as portions of the public, and in every case the right to maintain such actions has been sustained.

As far as they go, then, the authorities are in fact all in favour of the Respondents and against the Appellant. I admit they do not decide the precise point which has now been argued at your Lordships' bar; but to a great extent they do decide it; and then the question is, whether we are bound by the law of Scotland to go to the whole extent or not; that is, whether the cases which have been decided, have been decided on the general principle, that *the right to sue must be commensurate with the right to use;* that *whoever has the right to use, has also the right to sue;* and that it falls upon those who maintain that *that* right is to be limited, to show that by the law of Scotland it has been limited, or ought to be limited. They have failed to show that it has been limited; and they have failed, I think, to show that it ought to be limited. And whatever may be the theoretical or speculative objections to this state of things, I believe, my Lords, that no practical inconvenience has ever been felt or ever will arise from it. Men are not so fond of litigation as quixotically to institute actions of declarator to try rights of road with which they are not naturally connected, or for the use of which they have not some occasion.

Very strong cases of inconvenience have been put by the *Solicitor-General*; and no doubt there would be some hardship if a man having no connexion whatever with Glen Tilt or with Scotland, residing perhaps in a remote part of England, should think fit to maintain

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an action of this sort. But it would be rather an expensive proceeding—a costly amusement to resort to; and one, I think, of which there is not much danger. The danger practically is greater the other way. It seems clear, however, from two of the cases, *Forbes* v. *Forbes*, and *Campbell* v. *Lang*, that as any member of the community can maintain an action to establish a general right on behalf of the public, so, on the other hand, the owner of the property may maintain an action of declarator to establish his right to exclude the public. I think those cases establish that general proposition. But then it is said, see what an inconvenience this would lead to; because the Duke of Atholl might institute an action of declarator against any person now at the bar, in order to establish his right to this property discharged and free from the public right of road. That case may possibly happen; but it is not very likely that the Courts will have often to deal with such extravagant possibilities, which, if they should arise, would be an abuse of the law, and would be sure to be corrected. Suppose, for instance, that the Duke of Atholl thought fit himself to institute an action of declarator, for the purpose of having it established that the public had no right to use this road. He might do so. Against whom would he be likely to proceed? Why, against the very persons whom he desires most to exclude; and I should be very much surprised indeed, if his Grace should fix on any other persons than such persons as "Alexander Torrie, Robert Cox, and Charles Law," the present Respondents. I think those are precisely the persons, or sorts of persons, whom he would probably fix upon as defenders. It would be wild to bring such an action against an indifferent stranger, because it would not bind as *res judicata* the whole of the public. It would operate to no purpose and would be really thrown away.

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Looking, therefore, my Lords, at the situation of the Respondents, and adverting to the places where they reside, and the facts averred by them, I am very far from certain that the general public question which has been agitated at your Lordships' bar will arise in this case; but if it do arise, I apprehend there will be no great difficulty in disposing of it, after an examination of the authorities.

Upon the case of *Tait* v. *Lord Lauderdale*, we have had a great deal of discussion, as to whether servants were properly or not excluded. I do not see how that discussion bears upon this question; for suppose that servants, living with their master, have no right to sue —what then? The rights of the public are just where they were. The persons prosecuting the present suit are *not* servants; and, therefore, I am not aware how that case applies to the point now before your Lordships. But that case does bear in this manner—that there were several classes of people there, and among others "merchants in Lauder;" and the contention arose in respect of places contiguous to Lauder; I think that must be inferred. The opinions of the Judges are very strong, and it is impossible to read them without coming to the conclusion that they considered the right to be in the Pursuers as a portion of the public; not because they were merchants in Lauder, but because, being merchants in Lauder, they were a portion of the public, and, as a portion of the public, had a right to sue. It seems to me, my Lords, that every case, to the extent to which it goes, is an authority for the Respondents; and every case, to the extent to which it goes, is an authority against the Appellant.

The learned counsel of the Appellant, as I understand their contention, say that the right must be either patrimonial or local; and they seemed to be very much disposed to argue, if they could have done so, that it

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was a servitude. But it is clear that it is not a servitude. A servitude is one thing; but a general right upon a dedication to the public is another thing. According to the assumption of the present argument, this is a road, with a right to the whole world to traverse it; and therefore it has nothing to do with a dominant tenement, or a servient tenement, and there is no question of servitude. The question is—is this road or not dedicated to the use of the public? If it be dedicated to the use of the public, why should not the public have a right to sue? That there should be a patrimonial or local interest, as has been argued this morning, is, I apprehend, entirely out of the question. There is no authority for such a proposition beyond this—that in most of the cases you find (as might have been expected) that the persons suing were persons who had, in fact, either some patrimonial or some local interest in the question; and if there had been ever so many more cases, the same element would probably have been found. But this by no means proves the necessity of such interest to support the proceeding.

In conclusion, my Lords, I have to observe, that when the Appellant affirms that the right to sue in these cases is to be subject to certain limitations and restrictions, he imposes on himself the necessity of telling your Lordships what those limitations and restrictions are to be. But his attempt to do this has only shown the impossibility of laying down any general rule capable of adoption;—and fortunately none is required.

I propose, therefore, my Lords, that the House affirm the interlocutor of the Court below; and necessarily with costs. It will, however, remain open to the Appellant to insist that the Respondents shall prove their right, according to the law of Scotland, whatever

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it may turn out to be. And this decision will leave him still at liberty to exclude, if he can, her Majesty's subjects from Glen Tilt (*a*).

Interlocutors affirmed, with Costs.

(*a*) Lord Brougham, not having been present during the entire argument, took no part in the above Judgment; but the Lord Chancellor stated that his noble and learned friend in no respect dissented from the course recommended to the House.

SPOTTISWOODE & ROBERTSON.—DODDS & GREIG.