and only the forms of that Court as directed by law and shewn by their practice, I think that the act of parliament would be deemed to have given to the Court of Presbytery, as it then stood, the power to depose a schoolmaster, and without appeal. If, with the knowledge which the legislature must be considered to have had of the actual practice of these Courts, it intended not to give so great a power as that of deposing a man from his office, to which otherwise he was entitled for life, without appeal—if the legislature had intended to remedy what is now represented at your Lordships' bar as evils existing at that time — you cannot doubt that provision would have been made for that purpose. There is no such provision; and, therefore, on that act of parliament alone, I should submit to your Lordships that these are proceedings which cannot be allowed. I propose, therefore, to your Lordships, that this appeal be dismissed.

Interlocutor affirmed with costs.

First Division.—Lord Ivory, *Ordinary*.—William Rogers, *Appellant's Solicitor*.—Grahame, Weems and Grahame, *Respondents' Solicitors*.

JUNE 4, 1852.

HIS GRACE the DUKE of ATHOLE, *Appellant*, *v.* ALEXANDER TORRIE, ROBERT COX, and CHARLES LAW, *Respondents*.

Title to sue—Public Right of Way—Process—*Three parties setting themselves forth as residing in different towns, brought an action of declarator to have it found that a particular road was free to the public as a highway. The part of the country in which the alleged public road lay, was situated at a great distance from any of the three towns in which the pursuers resided, and they did not allege that they had any local connection with the district, and merely averred, that for time immemorial, they and the public were in the habit of using the road as a public road, for walking, riding, and driving cattle.*

HELD (affirming judgment), *that they had set forth a sufficient title to sue the declarator.*[1]

On appeal, the Duke of Athole in his *printed case* maintained that the judgment of the Court of Session of 12th Dec. 1849 ought to be reversed for the following reasons:—

1. The pursuers, as mere members of the public, had no right, title or interest, to pursue.—*Galbreath* v. *Armour*, 4 Bell's App. 374; Hume on Crimes; Ersk. 4, 1, 17; *Kerr* v. *Sir H. D. Hamilton*, 2 S. 149; *Oswald* v. *Lawrie*, 5 Mur. 6; *Berry* v. *Wilson*, M'F.'s Jury Cases, p. 91; *Forbes* v. *Forbes*, 7 S. 441; *Harvie* v. *Rogers*, 7 S. 287; *Anderson* v. *Earl of Morton*, 8 D. 1085; *Earl of Cassilis* v. *Town of Wigton*, Mor. 16,122; *Guild* v. *Scott*, 21st Dec. 1809, F. C.; *Tait* v. *Earl of Lauderdale*, 5 S. 330; *Marquis of Breadalbane* v. *M'Gregor*, 9 D. 210; *Duke of Hamilton* v. *Aikman*, 6 W. S. 70. 2. The title of the respondents is specially defective with reference to that portion of the conclusions which relates to the portions of road formed exclusively by the appellant's predecessors, for their private use. 3. The interlocutor of the Court, sustaining the title of the pursuers absolutely, is erroneous, even if the respondents were to be held entitled, in respect of their averments, to be admitted to prove their averments, with a view to establish their title.

The *respondents* in their *printed case* supported the judgment on the following ground:—Because the respondents have a good title to sue the action.—Stair, 2, 7, 9; Bankt. 2, 1, 17; Ersk. 2, 2, 5; *Lord Glenlee* in *Barber* v. *Grierson*, 5 S. 603; *Town of Edinburgh*, Mor. 1898; *Inhabitants of Caltoun*, Mor. 1899; *Commissaries of Edinburgh* v. *Commissary of Dunkeld*, Mor. 7558; *Anderson* v. *Magistrates of Wick*, Mor. 1842; *Earl of Hopetoun* v. *Officers of State*, Mor. 13,527; *Gibson-Craig* v. *Arbuthnot*, 3 S. 441; 1 Sh. Ap. 35; *Porteous* v. *Allen*, Mor. 14,512, and 5 Br. Sup. 598; *Campbell* v. *Campbell*, 5 Br. Sup. 599; *Earl of Cassilis* v. *Town of Wigton*, Mor. 16,122; *Guild* v. *Scott*, *supra*; *Macfarlane* v. *Mag. of Edinburgh*, 4 W. S. 76; *Todd* v. *Mag. of St. Andrews*, Mor. 1997.

Sol.-Gen. Kelly, and *Rolt* Q.C., for appellant.—The summons does not allege that any obstruction has been offered to the pursuers personally, and we admit that, if that had been so, they could in Scotland, as well as here, have an action of damages: *per* Lord Cottenham in *Ewing* v. *Com. of Police*, M'L. & Rob. 847. This, however, is not a personal action, but a declarator. Now, in England, if a person is obstructed on the highway, he can either bring his personal action or he may proceed by indictment, which at once settles the question, being *res judicata*. In Scotland, a similar remedy is sought by an action of declarator. Now, the

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[1] See previous report, 12 D. 328; 22 Sc. Jur. 86, 248. S. C. 1 Macq. Ap. 65; 24 Sc. Jur. 478.

pursuers allege that they have used the road; but that allegation, which is most material, is denied, and no issue has been directed to try it. It is therefore in the character of members of the public, that the pursuers seek to pursue; and the naked abstract question must be settled, whether an inhabitant of London, Paris, or Jerusalem—a mere citizen of the world—can sustain a declarator against a landed proprietor in Scotland, without having alleged or proved that he has used the road. For this proposition, neither convenience, justice, nor authority can be pleaded. 1. It would be most inconvenient and unjust, for the judgment would either be *res judicata* or it would not. If, as we hold, it would be not *res judicata*, then the moment one person has brought his declarator, and the defender has been assoilzied, another pursuer may start up, and so on in endless succession.

[LORD BROUGHAM.—But then the proprietor may bring his declarator if he were to be vexed in that way.]

But against whom could he bring it? how can he sue the public?

[LORD CHANCELLOR.—Would not the same evils result conversely? If a person were personally obstructed, and brought his action of damages, then another person obstructed would have to bring another action, and so on.]

That is more an evil inseparable from the nature of property. However, let us next suppose that the adjudication would be *res judicata*, then it would be a great hardship for a proprietor to be put to a proof of his title by the mere allegation of a stranger, who has no interest, that part of the proprietor's land is a public road. The contest might be most unequal; the pursuer might be backed by popular subscriptions, and might trust to the liberality of not impartial juries; while his opponent might have his land wrested from him, simply because he lacked sufficient funds to maintain his rights. We do not deny that the Crown could properly promote such an action, or some public body, as the road trustees of the district, or even a person locally resident on the line of road, or at either end.

[LORD BROUGHAM.—But suppose the road trustees refused to bring the action, are the public to have no remedy?]

That must be a matter for the discretion of the trustees. In many other cases, the same objection might be urged. Thus, in England, if the Attorney-General refuses to file an information, there is no help for it. In the next place, there is no authority for the abstract proposition, that one of the public can here pursue. In all questions of civil rights, the pursuer must have some interest—Ersk. 4, 1, 17; and all the cases prove, that hitherto it has always been persons locally interested who have been allowed to sue.—*Kerr* v. *Hamilton*, *Oswald* v. *Lawrie*, *Berry* v. *Wilson*, *Forbes* v. *Forbes*, *Harvie* v. *Rogers*, *Anderson* v. *Earl Morton*, *Cassilis* v. *Burgh of Wigton*, *Guild* v. *Scott—supra*; *Montgomery* v. *Macausland*, Mor. 2010; *Aitchison* v. *Mag. of Dunbar*, 14 S. 421; *Trinity House of Leith*, 7 S. 374. In *Ewing* v. *Com. of Police*, *supra*, certain residenters in Glasgow were held to have no title to sue for the inhabitants generally, in order to prevent a misapplication of the police funds; here the respondents seek to represent the whole public. In *Tait* v. *Earl of Lauderdale*, servants were not entitled to pursue a declarator like this; and if so, it is clear any one of the public, *qua* public, cannot sue.

[LORD CHANCELLOR.—That case merely shews that servants living with the family could not sue; and why?—because the master himself may not have made any claim to the road. The question is, if the Court did not there hold, that all the public, except servants living with the family, had a right to sue?]

At all events, the case shews there is some qualification to the general proposition.

[LORD CHANCELLOR.—Just this, that servants did not come within the definition of the word "public."]

The other pursuers there, however, were persons locally interested, for they were merchants in Lauder. At all events, the *onus* is not on us to prove the pursuers are within the exception; it is for them to shew they are within the rule. If the House is to decide the general question, how small a degree of interest ought to be sufficient to maintain an action like this, the line should be drawn so as to exclude all but those living on the line, or at either *terminus* of the road. *Lastly*, If the title of the pursuers be held good as to the old road, it is not good as to the new pieces of road formed by the appellant.

Bethell Q.C., and *Anderson* Q.C., for respondents.—This is a mere demurrer; we must assume that the allegations of the pursuers are true for the purpose of determining whether they have a title.. It is said we sue as members of the public; but we are not reduced to stand on the abstract proposition. We allege that we have used the road, and one of us is an inhabitant of the county town, and has contributed to keep up the road in question. It is also said, we allege no wrong done to us individually; but that is not necessary in declaratory actions. We allege obstructions offered to others, and it was not necessary for us to go and put ourselves in the way of being personally obstructed.

[LORD CHANCELLOR.—Is an allegation of obstructions offered subsequently to the summons, good?]

Yes; in Scotland.—*Gibson-Craig* v. *Arbuthnot*, *supra*. It was not, however, necessary for us

to allege any obstruction at all.—*Earl of Hopetoun* v. *Officers of State, supra.* It might, no doubt, be a matter of costs if a pursuer raise his declarator, where the right has not been denied or impeded; still the title would be sufficient. All the authorities shew, that the right to use the highway is in the public—Stair, 2, 7, 9; Bankt. 2, 1, 17; Ersk. 2, 2, 5; and it is equally plain, that a declarator may be instituted to clear any kind of right.—*Barber* v. *Grierson, Town of Edinburgh, Inhab. of Calton, Commissaries of Edinburgh* v. *Commissary of Dunkeld, Anderson* v. *Mag. of Wick—supra.* It follows, therefore, that we have the right in us, and yet we cannot establish it, if we have no good title to pursue here. But the law cannot be supposed to leave us without remedy. It is said we are not locally interested, and that the authorities are against us; but we say the authorities favour us.

[LORD CHANCELLOR.—Has there ever been a case, where a mere member of the public has been a pursuer—that is, where the mere abstract right has been sustained?]

No; we admit there is none. But the explanation is obvious. It has merely so happened, that those residing near the spot, and who were most likely to suffer inconvenience, were the first to become pursuers; but it does not follow that these did not sue simply as members of the public. One of the public may sue in the case of ferries—*Macfarlane* v. *Mag. of Edinburgh, supra;* and in tolls—*Todd* v. *Mag. of St. Andrews, supra.* The title of the pursuers is stronger than in many of the cases cited against us—as in *Porteous* v. *Allen, Campbell* v. *Campbell, Cassilis* v. *Burgh of Wigton—supra.* The degree of interest required is not very great. In *Tait* v. *Lauderdale, supra,* some servants were held good pursuers. In *Kerr* v. *Hamilton, supra,* some farmers in the neighbourhood. In *Harvie* v. *Rogers, supra,* they are described "residenters in the neighbourhood," which we ourselves are. So in *Mackintosh* v. *Stirling Road Tr.* 12 D. 85; *Young* v. *Cuthbertson,* 12 D. 521; *Campbell* v. *Lang,* 13 D. 1179. In all these cases, the right of one of the public to sue is more or less implied. The case of *Campbell* v. *Lang* was one where the proprietor himself raised the declarator.

[LORD CHANCELLOR.—Can the proprietor single out any person to bring his declarator against; and do you hold the adjudication to be *res judicata?*]

He generally selects those most likely to use the road; and the decision is *res judicata.*

[LORD CHANCELLOR.—Does the Court then take any mode of seeing that the public are duly represented?]

Yes; practically, due care is taken. Lastly, if the present action be not sustained, and if it be held that none but a person resident in the district can sue, it will be in effect a denial of justice; for there are only a few cottages here and there in the neighbourhood, and the tenants are all servants of the appellant, who would have no motive to pursue.

Kelly replied.—It is said, first, that there has been a user of the road by the pursuers—and then that it is immaterial to allege such user. Now, that allegation of user has been denied; and if the interlocutor of the Court below be affirmed, the effect will be to dispense with proof of that user.

[*Mr. Bethell.*—That point has not been raised here, or below. All that was raised was, whether it was material to allege user, but not whether the interlocutor of the Lord Ordinary will relieve us from proof of user.]

The averment of user is met by a denial.

[LORD CHANCELLOR.—If the Court below had really held that it was not necessary to prove user, then you would be excluded from giving evidence of that user; but that point has not been decided by the Court below, otherwise we should also have to decide it. The Court merely holds that the title of the pursuers is sufficient, but does not relieve them from proving hereafter all they have alleged.]

But since their allegation of user is denied, can there be any other character left them in which to sue except *qua* public? For if it be held they have a good title at present, then any allegation of fact for the purpose of determining whether they have such title or no, is at an end. Besides, as to the new drives, we say that at least the pursuers have no title *quoad* them, and the interlocutor of the Lord Ordinary is wrong so far.

[LORD CHANCELLOR.—The result of affirming the interlocutor will be, that it will still go to the jury as a fair question for them, whether the appellant's allowing the public to use the new pieces of road, does not raise an inference that he had dedicated the ground to the use of the public.]

LORD CHANCELLOR ST. LEONARDS.—My Lords, my noble and learned friend, whose assistance your Lordships have had during a part of the argument, not having heard the whole of the argument, although he does not dissent from the recommendation which I am about to make to your Lordships, does not deem it right to join in recommending your Lordships to take any particular course.

My Lords, this case after all turns out not to be one of really any importance in point of law. The merits of the case, that is, whether or not Glen-Tilt is or is not a public right of way, are not now in question. The simple question is, whether the pursuers in the Court below have a right to sue in the character in which they have presented themselves to the Court. Now, a

good deal of contention has arisen as to what was the effect of the averments, and how far they could or could not conclude the appellant in respect of certain things which he says that he has a right to have proved. It was insisted at the opening of the case, that it was necessary to prove a user of the road by the pursuers, in order to enable them to maintain the action ; and it was further insisted, that the effect of the interlocutor pronounced by the Lord Ordinary, and confirmed by the First Division, was to decide that question against the appellant—namely, the necessity of proving a user of the road. That has led to considerable discussion at your Lordships' bar, and now it seems to be admitted on both sides—that is, the one side is not doubting, and the other side is admitting, that that question is not concluded, but that the pursuers having, by their own declarator, averred that they have used the road, and put that user as part of the proof of their title, will have to prove that fact in the course of the further proceedings in the Court below.

Now, that relieves your Lordships at once from considerable difficulty ; and I believe that that which has been admitted at the bar is the law of Scotland ; and I conceive, that, according to the true meaning of the interlocutor, it merely decides that the pursuers, with the averments which they have made, although they are denied, have a right in Court to pursue the question, but not at all deciding any question of fact between the averments on the one hand and the denial on the other, which facts, as far as they are necessary, must be proved at the trial before the jury.

Now it occurred to me, my Lords—and a difficulty certainly may exist, and I was anxious that your Lordships' House should be guarded against that difficulty—that it may happen, that still in the Court below the Judges may ultimately decide, that it is not necessary, in an action of declarator of this sort, that there should be a user of the road by those individuals, the pursuers, who are suing on behalf of themselves and the public ; and I do not apprehend that the question of law will be concluded, because it would be quite competent, I apprehend, for the Court in Scotland to deal with that point of law ultimately upon this record ; and if they dealt with it contrary to what was considered to be the law of Scotland, the party aggrieved would have still a right to come to your Lordships' bar. I apprehend, therefore, that the case as it now stands is relieved from those difficulties ; and then the question is, whether, taking these averments as standing, as the averments which are to be looked at in order to maintain, if they are capable of maintaining, the pursuers' title, the pursuers have or have not a title to pursue.

Now, the character in which they sue (and it is sufficient if one or more of them has the title) is shewn by their description—"Alexander Torrie, advocate, residing in Aberdeen ; Robert Cox, writer to the signet, residing in Edinburgh ; and Charles Law, merchant, residing in Perth." Now, take the latter, for example ; he resides in the very county in which the road is situated ; he is a residenter at what may fairly be called, of course, one of the termini ; and he has, according to his own averment, himself paid composition money, service money, for the repairs of the road in the district where this very road, if it be a public road, exists. It may or may not be true, and hereafter it will be submitted to proof ;—but supposing there is no law against it, it would seem that the rights here stated, with the statements in the condescendence, would exclude any question arising ; for, by their condescendence, they positively state, that they have all used the road—that they have occasion to use the road—and that they cannot go from one terminus to the other terminus except by means of this road, unless they go circuitously 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 used the road, and having only a right in common with the others of Her Majesty's subjects? That question, if it be one, may never arise upon this record ; because, if the averments are proved, the case will come so nearly, if not so entirely, within the authorities, as that really there may be no question to decide.

Now, the whole difficulty has arisen from the difference between the law of Scotland and the law of England. In the law of England, we are not reduced to the difficulty which now exists, and which has been the subject of the argument at the bar, because there may be an indictment, and any person, under the direction and guidance of the officers of the Crown, can, by indictment, try the right to a road on behalf of the public generally.[1] There is no such mode

[1] This seems an inadvertence. In England no leave of the Crown or of the officers of the Crown is needed in order to lay an indictment against a person for obstructing a highway ; and the prosecutor does not require to prove that he ever used the highway. *R.* v. *Wright*, 3 B. & Ad. 681 ; *R.* v. *United Kingdom Telegraph Co.*, 31 L. J. M. C. 169. An individual who is actually obstructed in the use of a highway, may if he chooses bring an action for damage caused by the obstruction, and very slight evidence of damage will support the action. *Green* v. *London Omnibus Co.*, 7 C. B. N. S., 290.

of establishing a right by the law of Scotland; and, therefore, the question is, whether this mode be or be not legal. If this mode be not legal, there is no other mode, that I am aware of, in which a man who has a right generally, supposing the question to arise upon a general right, can try the question.

Now, as it has been admitted that the public generally have a right to use the road—and of course we are always assuming, for the purposes of this argument, that the right to the road is established—assuming that every man has a right to use the road, it would seem to follow, that every man has a right to vindicate his right to that user. It is not denied that he may pursue his right in respect of any special obstruction which causes damage; but the question is, whether, by the law of Scotland, he can institute an action of declarator to establish that general right. Why should he not? Great inconvenience has been shewn, I admit; but that arises from the law of Scotland itself—from there being nothing like an indictment, with power in a judicial officer to direct the proceedings. That, therefore, leads to great inconvenience. But that cannot take away the right. If the right exists, there must be a mode of exercising that right.

Now it is not denied, on the part of the appellant, that there are a great many people who can exercise that right. They do not deny the universality of the right over the road; but they wish to limit, and insist on limiting, and confining to certain classes of the public, the right to vindicate the public right of road, which is, for this purpose, admitted to exist.

Now, it would be rather singular if, the law of Scotland not having anywhere said so, we had found that right very strictly limited. I asked the learned counsel to be so good, as they talked of limits, to put down in writing what the limit was; and I now have it before me, and I will presently read it to your Lordships.

But, in the *first* place, how stand the authorities? A great many of them have been cited, and much commented upon. On the one side, namely on the part of the appellant, every case which has been cited is to a certain extent a decision in favour of the right of certain bodies, of certain persons, inhabitants, and other portions of the public, other classes of the public, other individuals of the public—every case establishes the right of some class, or some persons, to institute an action of this sort on behalf of the public, to establish a public right. Well, then, the question is, whether you can logically proceed, according to the law of Scotland, to say, that although those cases have hitherto only arisen, and although, in those cases which arise, and may hereafter arise, in almost every case the party suing has some immediate connection with the road—that is to say, where it is a road thirty miles long, it is said that a man must live alongside of the road—it is a long distance, and, in an ordinary case, you would probably find that the person obstructed would be a person living on the spot,—it is admitted that you may take persons at either of the termini in towns contiguous. What distance? How much out of the town? A yard out of the town, or a mile? Where are you to stop? A man lives out of the town—he uses the road daily—has he no right to sue as an inhabitant of the town? Where will you stop if you let in the suburbs of the town? The suburbs, if they extend in Scotland as they do here, may sometimes extend to miles? Where would you stop? Nobody pretends to draw the limit. But, then, the argument on the other side on the part of the appellant, is,—you cannot shew me a case in which any man, simply as one of the public, has been allowed to maintain an action of declarator. Is there any case in which such a right has been denied? The answer to it is, No; and therefore all the cases, as far as they go, establish step by step the rights of the different bodies, and classes of persons, and individuals who have brought actions of declarator, as portions of the public, as parcel of the public, as individuals of the public, having the right—and, in every case, the right to maintain the action has been maintained. If that be so, that at least assists us a part of our way to arrive at the point, whether any individual may not sue, as a part of the public, for a declarator in respect of a public right.

My Lords, as far as the authorities go, they are decidedly all favourable to the respondents, and against the appellant. I admit they do not decide the point which has now been argued at your Lordships' bar, but to a great extent they do decide the point; 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 the right to sue—and that it falls upon those who maintain that that right is to be limited, to shew that, by the law of Scotland, it has been limited, or that, by the law of Scotland, it ought to be limited. They have failed to shew that it has been limited; and they have failed, I think, to shew that it ought to be limited. That is very inconvenient, I admit; but fortunately it is not practically inconvenient. No inconvenience has ever resulted in practice. I believe, my Lords, that no inconvenience ever will result in practice by establishing the general right. Men do not go in a quixotic way to institute actions of declarator as to a right of road with which they are not naturally connected, or for the use of which they have no occasion. The law, therefore, is general; but no doubt the application of that law in general, as it has been in all cases in point

of fact, (and one can hardly suppose a case of exception,) will be confined to persons who have clearly the right, even according to the admissions at the bar, to maintain the action.

But when we look at the other side, very strong cases of inconvenience have been put by the Solicitor-General; and, no doubt, on the one side and on the other, it would be very inconvenient that a man having no connection whatever with Glen-Tilt or with Scotland, residing in a remote part of England, should think fit to maintain an action of this sort; and it is rather an expensive proceeding—it would be a singular amusement to resort to; but I think there is not any great danger of it. Now, the danger practically is greater on the other side. It is quite clear from two of the cases which were cited by Mr. Anderson, of *Campbell* v. *Lang*, and *Forbes* v. *Ferguson*, that as any of the public can maintain an action to establish a general right for the public, so, on the other hand, the owner of the property may maintain an action of declarator against certain members of the public, in order to establish his right to exclude the public. I think those cases clearly establish that. Then it is put in argument very fairly—See what an inconvenience it would lead to—the Duke of Athole might institute an action of declarator against any person now at the bar, in order to establish his right to this property, discharged of the public right of road. That case may happen; but a court of law, my Lords, cannot deal with such extravagant cases. They are not likely to arise; and if they should arise, they would be an abuse of the law, and would be sure to be corrected;—because, suppose, for instance, that the Duke of Athole thought fit to institute himself an action of declarator for the purpose of having it declared that the public had no right to use this road: He might do so: Against whom is he likely to do so? Why, against the very persons whom he thinks most troublesome, and would wish most to exclude; and I should be very much surprised indeed if the Duke of Athole should fix on any other persons than such persons as Alexander Torrie, Robert Cox, and Charles Law. I think those are precisely the persons whom he would probably fix upon as defenders in an action of that sort. It would be wild to suppose that he would bring such an action against simply an indifferent person, because that action would not bind as *res judicata* the whole of the public; and, therefore, a mere action, without any substance, such as has been supposed, would operate to no purpose—it would really be thrown away—it would have no effect—it would not have been properly tried. The Judges would be aware of that, and the question would come to be tried over again before a jury, with full consideration, and with very considerable damage to a party who had instituted an improper action of declarator against a person who never meant to use the road, and knew nothing about the road. So that that again, although it is a power which may be abused, yet, practically, there is fortunately no chance of any such abuse ever existing.

My Lords, it comes simply round to the question, whether or not this right should be extended generally, supposing that general question to be now at issue at your Lordships' bar; because, looking at this case—looking at the situation of the pursuers—looking at the place where they reside, and the facts averred by them—I am very far from certain that the great question which has been agitated at your Lordships' bar will arise in this case; but if it do arise, I apprehend there is no great difficulty in disposing of it, after an examination of the authorities.

Now, my Lords, as to the case of *Tait* v. *Lord Lauderdale*, we have had a great deal of discussion upon whether servants were properly or not excluded. I am quite unaware how that bears upon this question; for supposing the case was rightly decided as to that point, and that servants living in a house with their master have no right to sue—what then? Then, in the shape in which we are now considering the question, they do not form part of the public. What then? Then the public consist of rather more limited classes, but the rights of the public are just where they were, and the persons here pursuing are not servants; and, therefore, I am not aware how that case at all bears upon 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 of Lauder, and the contention arose in respect of places contiguous to Lauder, no doubt; I think that must be inferred. But what then? The opinions of the Judges I think are very strong on that point, because it is impossible to read their opinions, although they are not precise, without coming to the conclusion that they considered the right on the part of the pursuers was a right in those 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; and 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. Now, my Lords, the learned counsel, 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 was a servitude. It is no such thing. I apprehend that several times lately we had those rights in Scotland confounded. A servitude is one thing, but a general right upon a dedication to the public is another thing. This is a road, with a right to the whole world to traverse it, on the assumption on which we are now arguing this case, and therefore it has nothing to do with a dominant tenement and 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 (as I have already said) should not the public have a right to sue? That it is necessary to be patrimonial, as it has been argued, is entirely out of the question. That it should be local, we have no authority whatever beyond this, that in most of the cases which have been decided—and if there were 50 more cases to be decided hereafter, or 5000, you would find in all of them, I would venture to say, the same element—namely, that the persons suing would be persons residing in some place or other which would come within the definition here stated. That does not prove it is necessary that they should.

Now, my Lords, the way in which the learned counsel, who are very competent to do it, have stated to your Lordships what they contend for, and for which I am very much obliged to them, is this:—"*First*, that the authorities have not hitherto determined the extent of the locality, or the precise limits within which ownership or residency, &c. will entitle; but they have negatived the right as existing in the subjects of the realm independent of the locality." Now, the latter part is not correct: It is a statement of law which does not exist. The cases have not negatived the right beyond the extent to which, in each case, it was necessary for the Court to decide: Then this proposition admits that the authorities have not hitherto determined the extent of the locality, or the precise limits within which ownership or residency will entitle. Then comes the other part:—"But, *secondly*, if locality is now for the first time to be defined." Upon that I must observe, that it is not required to be defined; but when the appellant tells you that the right is to be confined to the locality, he imposes upon himself the necessity of telling you what are the limits of that locality. It is not required by your Lordships—it is required by the appellant's argument; for he tells your Lordships that there must be either patrimonial right or local. That has been distinctly argued. Then your Lordships ask, If it be local, tell us the limits. They say, "If locality is now for the first time to be defined, it must be limited to the parishes and towns through which the road in question passes, and the parishes and towns situate at, and adjoining to, either terminus of the same road." Those are the terms in which the learned counsel state the way in which they would satisfy what are the limits of the right claimed. It is only necessary to read that second proposition, to shew that this cannot be a rule capable of being adopted. Why should it be adopted? Where is the law? No case has been produced, nor can any case be produced to establish it; and why should it be established? Why is there to be a limit of a particular town at the end of each terminus, for example, as I before stated, when every inhabitant beyond that town has an equal right with the inhabitants of the particular town? Why, therefore, the right existing beyond the town—are you to build a wall round the town, and exclude the persons who happen to reside near it? It is quite clear therefore to me, my Lords, that the attempt which has been made to establish this on local grounds, and to define that locality, (and the necessity for the definition has only arisen from the argument of the appellant himself, and not from any rule of law,) shews clearly that this is a contention on the part of the appellant which cannot be maintained. I do not apprehend that the affirmance of the interlocutor in the Court below will work any prejudice to the appellant. I believe that he will be left precisely as he stood when he first came to your Lordships' bar, and that nothing which has passed in the Court below will prejudice him in requiring the right claimed to be proved according to the law of Scotland, whatever it may turn out to be, and in establishing, if he can, his right to exclude Her Majesty's subjects from Glen-Tilt.

My Lords, I propose therefore to your Lordships to affirm the interlocutor of the Court below, and, of course, necessarily with costs.

Interlocutors affirmed with costs.

First Division.—Lord Ivory, *Ordinary*.—Spottiswoode and Robertson, *Appellant's Solicitors*.—Dodds and Greig, *Respondents' Solicitors*.

JUNE 11, 1852.

DR. HUGH MACPHERSON and another (Macpherson's Executors), *Appellants*, *v.* MISS ANN MACPHERSON, *Respondent*.—*Ex parte* JAMES TYTLER.

Trust Settlement—Testament—Heritable and Moveable—Heir and Executor—Mora.—Accounting.—Personal Bar—*A testator, by an English will and testament, directed his executors, after setting apart a portion of his moveable property for the purpose of paying legacies and annuities, to consolidate his whole heritable and moveable estate into one fund, to be invested in land in Scotland, to be entailed on a series of heirs specified in a tailzie previously executed by him; and there was further a direction to invest, in the same way, the capital sums set apart for yielding the annuities, as they fell in. The executors, who were unable for several years after the testator's death to find an investment of land in Scotland for the fortune, which*