Tuesday, July 15.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

MACFIE *v.* BLAIR AND BARTHOLOMEW AND OTHERS.

(See *ante*, p. 349, 2d February.)

Road — Right-of-Way — Process — Title to Sue and Defend—Actio popularis—*Appearance by Public Company—Caution for Expenses—Companies Act* 1862 (25 *and* 26 *Vict. c.* 89), *sec.* 69.

An action of declarator having been brought by a proprietor against two persons as representing the public, to have it found that his lands were free of any servitude of right-of-way, before defences were due a limited company called the Scottish Right-of-Way and Recreation Society (Limited) craved by minute to be sisted and to be allowed to lodge defences. The Court granted the motion, on the ground that a judgment against the society obtained by the pursuer would, in a question with the public, be *res judicata*, and reserved to the pursuer the right to move that the society should find caution for expenses.

The matter in dispute in this action is fully explained in *Blair* v. *Macfie*, *ante*, p. 349. That action was abandoned by the pursuer on payment of expenses in common form. Thereafter this action of declarator at the instance of Macfie of Dreghorn was raised against John Blair, Writer to the Signet, Edinburgh (pursuer of the previous action), and John Bartholomew, lithographer, Edinburgh, as representing the public, in which the pursuer sought to have it found and declared that he had the sole and exclusive right to the lands of Dreghorn, Colinton, and others, free of any servitude of road or passage or public right-of-way for passengers by foot or horse; and further, that he was entitled to exclude the defenders and all other members of the public from entering, walking, riding, or driving through or upon the said lands and estate of Dreghorn, or any part thereof, and in particular that there was no public right-of-way through the estate in four directions as claimed in the previous action. Before defences were due "The Scottish Right-of-Way and Recreation Society (Limited)" put in a minute craving that they might be sisted as defenders in the action, in the following terms: — "Johnstone for the said Scottish Right-of-Way and Recreation Society (Limited) craved, and hereby craves, the Lord Ordinary to be sisted in the said action."

The Lord Ordinary on 1st July 1884 sisted the said society in terms of their minute, and allowed defences for them to be received. He also granted the pursuer leave to reclaim.

Argued for him — The society had no title to defend; they represented no one, and the state of their funds was most unsatisfactory. If the pursuer was successful a judgment obtained against such a company would not be *res judicata* of the matter in dispute. This society represented no public interest, and the shares might come to be held by foreigners over whom this Court would have no jurisdiction. If they were sisted it should only be on condition that they found caution.—*Jenkins* v. *Robertson*, March 20, 1869, 7 Macph. 709, and *Duke of Athole* v. *Torrie*, June 3 and 4, 1852, 1 Macq. 65.

Argued for respondents—The company had substantial means, having 88 fully paid-up shares of £1 each, and there were 314 shares upon which 5s. each had been paid-up. The society was entitled to have a judgment upon its title to appear, and if that was once settled, it was ready to find caution for such sum as the Court might think necessary.

The Companies Act 1862 (25 and 26 Vict. cap 89), sec. 69, provides that "Where a limited company is plaintiff or pursuer in any action, suit, or other legal proceedings, any judge having jurisdiction in the matter may, if it appears by any credible testimony that there is reason to believe that if the defendant be successful in his defence the assets of the company will be insufficient to pay his costs, require sufficient security to be given for such costs, and may stay all proceedings until such security is given."

The Court gave the society an opportunity of amending their minute to the effect of stating in detail their exact financial position in regard to the number of shares fully paid-up and also the number subscribed for. The society declined to amend, and craved the judgment of the Court upon the minute as it stood, with such explanations as were made at the bar. The substance of these explanations has already been stated in the respondents' argument, the only other material facts being that the society had been in existence since 26th March 1884, that its capital was £5000, consisting of 5000 shares of £1 each, that the funds then in hand amounted to £266, 9s. 2d., that the shares allotted had been taken up by sixty-eight individual members, and that there were nineteen directors, of whom the Lord Provost of Edinburgh was chairman.

At advising—

Lord President—The Court is of opinion that the interlocutor of the Lord Ordinary must be affirmed, and that the title of this society to be sisted as defenders in the action must be sustained. A judgment obtained by the pursuer against this society will be *res judicata* in any question with the public, and therefore any objection upon that point is removed. With regard to the other matter raised in the discussion, namely, the question of caution, that is fully reserved, and it will be in the power of the pursuer, when the case goes back to the Lord Ordinary, to move that the defenders find caution for expenses. We are further of opinion that we do not require the authority of sec. 69 of the Companies Act of 1862 to enable us to pronounce such an order.

The Court adhered to the Lord Ordinary's interlocutor, and refused the reclaiming-note.

Counsel for Pursuer—Trayner—Thorburn—Graham Murray. Agents—Macandrew, Wright, Ellis, & Blyth, W.S.

Counsel for Defenders (The Society)—Solicitor-General Asher, Q.C.—R. Johnstone—W. C. Smith. Agent—Andrew Newlands, S.S.C.