about as plain a case as ever was, and as to any complaint against the conduct of the railway company and of the Woods, who acted for the company, it not only seems to be utterly unfounded, but it does seem to me that they behaved in the very fairest way.

LORD MACNAGHTEN and LORD MORRIS concurred.

The House ordered and adjudged that the interlocutor appealed from be reversed, and the defenders (appellants) be assoilzied.

Counsel for the Appellants—Finlay, Q.C. —Haldane, Q.C. Agents—Loch & Goodhart, for Wm. White-Millar, S.S.C.

Counsel for the Respondent—Rhind—Baxter. Agent—A. Beveridge, for Wm. Officer, S.S.C.

Thursday, July 2.

(Before the Earl of Selborne and Lords Watson and Bramwell.)

M'INROY *v.* THE DUKE OF ATHOLE.

(*Ante*, vol. xxvii. p. 341, and 17 R. 456.)

Servitude — Road — Right-of-Way — Occasional Use—Use for Sport.

In an interdict against the use of a path through a mountain pass the respondent proved that for more than forty years he and his predecessors had used the path as a convenient short cut in passing from one part of their shooting to another. This use was only occasional—extending to ten or twelve times a-year—and was only made late in the shooting season. Between 1846 and 1878 the path was scarcely used by the respondent. Although this use by the respondent was known to the complainer's foresters, there was no evidence that it had been under the immediate observation of the complainer or his ancesters except on one occasion in 1857 when the use was challenged.

Held (*aff.* the decision of the Second Division) that there had been no use to support a claim on the part of the respondent to a servitude right-of-way.

This case is reported *ante*, vol. xxvii. p. 341, and 17 R. 456.

The respondent in the Court of Session appealed.

At delivering judgment—

LORD WATSON—My Lords, the Cromalton Pass is a natural hollow about 1000 yards in length between two mountains forming part of the Ben-y-Ghlo range. It runs nearly due east and west, and the Cromalton Burn, which has its source to the north, flows along the bottom of the pass for more than half its length on the western side, and then enters the estate of Lude belonging to the appellant. The pass and the land on either side of it are the property of the respondent. Carn Liath, one of the mountains enclosing it, rises on the south to the height of 3193 feet above sea level, but only the upper part, which apparently comprises about one-third of its altitude, belongs to the respondent. The lower two-thirds are included in the estate of Lude, which surrounds Carn Liath on the east, south, and west, and comes up to both ends of the pass. The mountain range to the north of the pass is the property of the respondent.

On the north side of the pass there is a track or path continuing all the way through it, which forms the subject of the present controversy. Starting from the west the track runs along the hill face a considerable distance above the Cromalton Burn, which it eventually crosses, and is then continued along the hillside until it reaches the lands of Lude on the east. In this action the appellants asserted their right to use the track, on the ground that it formed part of an old public road leading from Glen Tilt in the north-west to Glenferrate and Kirkmichael in the south-east, and alternatively that they had acquired by prescriptive use a praedial servitude of way for themselves, their tenants, servants, and others occupying the lands of Lude.

The appellants were allowed a proof of both alternatives, but they appear to have abandoned at a very early stage their claim for a public right-of-way. The user upon which they relied in the Court below as sufficient to constitute a servitude was by the family of Lude, their game tenants, and gamekeepers, for sporting purposes, and by shepherds on their farms of Monzie and Glenloch, which are on opposite sides of Carn Liath.

The Lord Ordinary (KINNEAR) and all the learned Judges of the Second Division were of opinion that the appellants have failed to show that there was any user by shepherds as in the assertion of a right. The Lord Ordinary being of opinion that the track had been used as of right during the prescriptive period for sporting purposes, sustained the alternative claim of the appellants as made by them on record. In the Inner House his interlocutor was reversed, and the respondent obtained interdict as craved. In the argument addressed to this House on behalf of the appellants their claim was limited to a servitude of way for purposes connected with sport.

I think it right to say that I entirely concur in the observations which were made by the late Lord Lee upon the interlocutor of the Lord Ordinary. Assuming that the appellants had in the open assertion of a right persistently used the track for the purpose of shooting or watching game, I do not think they could thereby acquire the right to free passage for every man, woman, and child on the estate of Lude, for any purpose whatever. I cannot conceive how a general servitude of way could arise in a case like the present, where it is clear that the use had by Lude shepherds during the prescriptive period was by permission and not as of right.

As for the track in dispute, the evidence

satisfies me that it is not part of a continuous way made by or for human use, but that it owes its formation to deer and sheep, although it has been occasionally used by men when it suited their convenience. The only witness who suggests the contrary is Mr Young, who is under the impression that deer "rather avoid paths," but he admits that he "cannot speak about deer." There are no fences of any kind in the locality, which is on the outskirts of the great deer forest of Athole, and it appears that at certain seasons the deer which are bred in the forest descend below the pass in search of food. The season for shooting stags commences in the beginning of August, and ends before the middle of October, and during that period some deer are to be found in the vicinity of the pass. But the chief exodus from the forest is during the late autumn or winter months, when stags are out of season, and only the hinds are fit objects for a sportsman's rifle. The respondent has a few sheep upon that part of the forest upon which the sheep from Lude ground are constantly straying and being driven back. These facts sufficiently account for the numerous short tracks at the west end of the pass, which were erroneously supposed by Mr Young to be human footpaths.

The evidence of the appellants with reference to the use of the track for shooting purposes connected with the estate of Lude covers the whole period from the year 1821 until 1887, when the challenge was given which led to the institution of the present action. But from 1821 the proprietor of Lude asserted right to the ownership of the whole of the upper part of Ben Liath down to the centre of the pass, and he shot over that part of the pass which he claimed until the respondent's right to these subjects was established by a decree of the Court of Session in 1841. During the period preceding 1841 Lude sportsmen were in the occasional habit of using the pass for the purpose of getting from their ground on the east side of Ben Liath to their ground on the west, and *vice versa;* but whilst the evidence shows that in some of these occasions they shot over that part of the pass which they then claimed, there is neither probability nor proof that they either used or claimed the right to use the track now in dispute.

The case of the appellants must therefore depend upon their evidence of continuous and uninterrupted possession of the right which they now claim during the period of forty-six years following 1841. It is unnecessary to enter into the details of that evidence. It comes to this, that at certain seasons in each year the proprietors of Lude and their friends or game tenants, in the course of their sport on the upper moors of Lude, used to go to their ground on the other side of Carn Liath, which they did by means of the track, and also that their keepers sometimes used the track in going their rounds. It appears to have been rarely used by sportsmen in pursuit of game, but when there were no deer on the west face of Carn Liath, stalkers found the track to be a convenient means of getting to the east face instead of going round the south end of the hill. The Lude ground is not in the strictest sense of the term a forest, and deerstalking upon it was chiefly confined to the hinds which descend from the higher grounds and frequent the sides of Carn Liath during the winter months. Even at that season the use of the track was not regular but occasional.

I do not find it necessary to consider, for the purposes of this appeal, the point discussed by some of the learned Judges of the Inner House touching the amount of tolerance which ought to be implied on the part of a proprietor who sees a party of sportsmen taking a short cut across his land in order to reach another part of their ground. That must depend upon the circumstances of each case. If the respondent and his predecessor had been aware of the use made of the track by the Lude sportsmen at certain seasons in each of forty-six consecutive years, I should have had great difficulty in coming to the conclusion that such user was merely tolerated. But it appears to me that the facts of this case absolutely exclude the idea of tolerance. The only inference which I can draw from the proof is, that had the respondent or his predecessor known of that use they would immediately have done their best to put a stop to it.

I do not doubt that in order to found a prescriptive right of servitude according to Scots law, acts of possession must be overt, in the sense that they must in themselves be of such a character or be done in such circumstances as to indicate unequivocally to the proprietor of the servient tenement the fact that a right is asserted, and the nature of the right. The proprietor who seeks to establish the right cannot, in my opinion, avail himself of any acts of possession *in alieno solo* unless he is able to show that they either were known, or ought to have been known, to its owner or to the persons to whom he entrusted the charge of his property.

In many—indeed in most—cases where a servitude of way is claimed, the natural and necessary inference arising from its local situation is that the user must have been known to the owner of the *solum* or to those whose duty it was to give him information. But that is an inference which it would be very unsafe to derive from the mere fact of the occasional user of an isolated deer track, in a region remote from public observation, which is only visited at rare intervals by a few sportsmen, foresters, or shepherds.

With three exceptions, upon which great stress was laid in the argument addressed to us by the junior counsel for the appellants, not one of the numerous witnesses examined for them was able to say that a Lude sportsman or a Lude keeper was ever in the course of these forty-six years seen upon the track either by the respondent's servants, by the shepherds on the adjoining lands, or by any other person. The exceptions were these—Angus Cameron, who has been head keeper at Lude since

1871, says that in 1872 or 1873, when he was going through the pass with Mr James M'Inroy, a son of the late proprietor, they met one of the Duke's foresters, who did not find fault with them. He does not say at what season, or that they were either grouse-shooting or deerstalking, so that taken by itself the incident is immaterial. The witness Gordon, who was examined on interrogatories in Canada, says that he never met the Duke's foresters in the pass itself, but that they were in the neighbourhood when he went through it with his father, then head keeper at Lude. But it is obvious that his statement refers to the period antecedent to 1841, because he states his understanding to have been "that the property on both sides of it (that is, the pass) belonged to Mr M'Inroy." The third exception is the witness William Carrick, who was an under keeper at Lude for three years between 1868 and 1871. He certainly does state in his examination-in-chief that when going through the pass he met the respondent's foresters on several occasions. But on cross-examination he explains that "the only time that I met any of the keepers right in the pass was when I was with them shooting foxes."

The appellants' own evidence points strongly to the inference that their use of the track was made in such circumstances that it was not likely to come, and in point of fact never came, to the knowledge of the respondent or his predecessors. But the matter does not rest there. A large and concurrent amount of testimony has been adduced by the respondent, which shows that the appellants' user was unseen by and unknown to the proprietors of the Athole forest and their shepherds and foresters, and that testimony is not confined to servants upon the Athole estate. Amongst others, David Guild, who was the appellants' tenant in Monzie from 1867—that is, for twenty years before this dispute arose—never heard of his landlord or anybody else using the Cromalton Pass in order to get from his farm to the east side of Carn Liath.

There are two incidents established by the proof which appear to me to have a significant bearing upon this part of the case.

The first of these occurred between 1852 and 1857, and is spoken of by John Stewart, at that time a forester in the employment of the late Duke of Athole. The Duke was in the pass with his retainers when he saw the late Mr M'Inroy of Lude and his keeper, who were also going through the pass westwards, having entered it from the east. The Duke, in the hearing of the witness, who was close beside him, gave orders to his head keeper to go and turn back the intruders. The order was obeyed, and the witness said Mr M'Inroy and his keeper returned in the direction from which they came. I see no reason to question the accuracy of this statement. The Lord Ordinary, before whom the witness was examined, suggests no doubt as to his credibility, although he makes light of the circumstance mainly because Mr M'Inroy continued notwithstanding to assert and use his right. I should agree with the Lord Ordinary's estimate if I were, as he appears to have been, satisfied that the previous and subsequent user were open to observation, and known to the person who challenged it on that occasion. Persistent use in the face of challenge is a clear assertion of right; but I can find no grounds for supposing that Mr M'Inroy either previously or subsequently used the track or the pass in such a way as to indicate that he was asserting a right. If that be so—and in my opinion it was so—the conduct of Mr M'Inroy was well calculated to assure his Grace of Athole that he was making no pretension to a right-of-way through the Cromalton Pass. The next occasion was in September 1882, at a time when the mansion and shootings of Lude were let to Sir A. B. Walker. The present respondent was shooting in the pass when he observed traces of a party having passed along the track with a horse. He immediately wrote to Cameron, the appellants' head keeper, stating his belief that the party must have come from Lude, and intimating that the keepers and others from Lude must understand that they were trespassing when they went up the Cromalton. His Grace treated the trespass as one arising from the inadvertence of the keepers, and informed Cameron that if it were repeated he would be obliged to complain to Mr M'Inroy, who is the leading appellant.

Cameron forwarded the respondent's communication to the appellant under cover of a letter, asking for directions, in which he says with respect to the track, "I was told some time ago that it was an old drove road; if such is the case, the Duke cannot prevent us taking it." Mr M'Inroy's reply has not been preserved, but the tenour of it may be implied from Cameron's answer, which is in these terms—"I am glad we have done nothing wrong. I am perfectly sure the late Mr M'Inroy would never have allowed me to cross the Cromalton unless he had right to do it. We have not crossed it since, but will do so some day this week."

Whatever may have been the instructions given by Mr M'Inroy to his keeper, it is certain that he neither answered the respondent's letter himself nor directed his keeper to do so, and that no answer was sent.

I cannot understand why no answer was sent to the respondent's communication, and the appellants' counsel made no attempt to explain it. Going through the pass next week was no answer, unless there was someone there to see on the respondent's behalf. The terms of the communication implied that the writer was unaware of there having been any previous use of the pass, and unless he came to know of its being used subsequently by the Lude people, the silence of Cameron and his master would naturally be construed as an admission of trespass. I entertain no doubt that it was so construed, and that the respondent was unaware of the continuance of the use for five years afterwards.

In these circumstances I have no difficulty in coming to the conclusion that there has not been an open and unequivocal assertion of the rights which the appellants claim, such as the law requires in order to the constitution of a servitude of way; and I therefore move that the interlocutor of the Inner House be affirmed and the appeal dismissed with costs.

LORD BRAMWELL—My Lords, I agree entirely with the opinion of my noble and learned friend Lord Watson. But as I believe this to be an honest case, I wish to show the appellants that I have not come to a conclusion they probably will think wrong without forming an opinion of my own on it.

That there would be a path or track in the pass or depression between the two mountains called Cromalton Pass is certain. Whoever and whatever had to go from the east of those mountains to the west, or the west to the east—man, deer, or sheep—would naturally take that route which would be the easiest. Accordingly we find the marked track, the use of which has been discussed, and we find it has been used in a variety of ways.

The appellants have claimed a right of public way, a right for sheep from the part of Lude on one side of the pass to the other, and a right to pass to and fro for sporting purposes. All these claims are given up except the claim of a right for sporting purposes. Of course there having been claims that could not be maintained would not preclude the appellants from the right to one which they could maintain. But I cannot help thinking that it furnishes an argument against them that there should have been uses of the way which were trespasses or permissive. According to English law, the owner of strayed sheep though liable for their trespass would have a right to get them back, at all events after request to the owner of the land where they were to restore them. But the user in support of the right now alone claimed must be examined.

Now, there is no doubt evidence of a user of this path by the occupiers of Lude for the purpose of getting from one side of the pass to the other for sporting purposes on the Lude property; and if that user had been frequent enough to the knowledge of the respondent and the predecessors, and persisted in after objection by them, the right might have been established. But in my opinion the user proved is insufficient. In the first place, up to 1841 the Lude proprietors claimed a right to the property in Carn Liath, and could go over it or the lower part of it from one side to the other without using the path. It is true they did not claim the soil of the path or track, and it may have been easier to go along it than over a place where there was no track. But it certainly is unlikely that they had a right-of-way over the Duke's ground close alongside what they thought their own property. Admiral M'Inroy speaks doubtfully as to what route he took. There is then the user since 1841, which, I repeat, if sufficient and shown to be known to the respondent and his predecessors, might establish the right. But there are only two cases where that knowledge is shown. That in 1857, when the then Duke turned back the then Mr M'Inroy, who submitted, and thereby recognised that he had no right to be on the track. The other is the Duke's letter to the keeper in 1882, communicated to the appellant, and the statements in it not contested. I think these two matters decisive. As to the Athole foresters not informing the Duke, and not objecting to the use of the path, there are not many occasions on which they are shown to have been aware of its use. I think it quite possible that they may not have known the rights of the case, and if they did, may not have wished to be tale-bearers against persons with whom they had probably some friendship or acquaintanceship, and who perhaps were trespassing when it was not an objectionable time of year. Lastly, there is this, that the place in question was remote, little used, and difficult to protect. Believing though I do in the good faith of the appellant and his witnesses, I am satisfied he has not made out his case.

EARL OF SELBORNE—My Lords, I had partly prepared my opinion in this case when I saw in print that which has just been delivered by my noble and learned friend Lord Watson. I found the view which he had taken to agree so entirely with that which I had myself formed, and the manner in which the reasons for that view were stated so satisfactorily to my mind, that I thought I should be unnecessarily occupying the time of your Lordships if I did more than express my entire agreement.

Their Lordships affirmed the interlocutors appealed from and dismissed the appeal with costs.

Counsel for the Appellants—Asher, Q.C. —Ure. Agents—Faithful & Owen, for Davidson & Syme, W.S.

Counsel for the Respondent—D.-F. Balfour, Q.C.—Graham Murray. Agents—Grahames, Currey, & Spens, for Tods, Murray, & Jamieson, W.S.