# Duffield Morgan v Lord Advocate

Creation of public rights of way – use as of right by the public for the prescriptive period ·
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Case Report: 2004 SLT 413; 2004 G.W.D. 10-239

Decision of the Court of Session, Outer House, 13th February 2004

**The facts:** The Pursuers were the owner of a historic property, Rowallan Castle, which had been placed under public guardianship in 1950 by their predecessors in title. The Lord Advocate represented Historic Scotland in the case as defender. The pursuers were seeking planning permission to convert the Castle into a hotel. The dispute between the parties was in relation to access over the road leading to the Castle.

**Legal arguments:** The principal question in the case was: what was the nature of the right of access which was detailed in the 1950 Agreement? The pursuers regarded it as being a public right of access that was capable of being lost by negative prescription under the Prescription and Limitations Act 1973. The defender argued that it was an incident of guardianship, terminable only by termination of the guardianship agreement and not separable from it.

Since the guardianship agreement was made, Historic Scotland and its predecessors had taken access to the castle from time to time, but members of the public had never taken access to the castle. Historic Scotland had not opened the castle to members of the public, nor arranged for, encouraged, caused, permitted or facilitated public access ‘as of right’ to members of the public.

The defenders argued that access had been purely within the terms of the guardianship agreement and Historic Scotland, therefore, had control over who could take access over the road. The agreement could not be seen to have created a public right of way by deed, because the guardians had control over when, if at all, access could be taken by the public. The agreement had not created a ‘right relating to property’ in favour of the public, and was therefore not covered by the terms of the 1973 Act.

**Decision:** The Court agreed with the defenders and found that access was within the terms of the guardianship agreement, and not affected by the 1973 Act.