# Malcolm v Lloyd

Different kinds of use of rights of way · https://scotways.com/ken/malcolm-v-lloyd/

Case Report: (1886) 13 R 512

**Key points:** Private servitude right of way - servitude for sleds, carts, horses, cattle and foot passengers - whether the category of use may be extended - effect of evolving modes of transport.

**The facts:** Malcolm claimed a private servitude right over Lloyd's lands to the public road at Loch Fyne for (1) carts, (2) horses and cattle and (3) pedestrians. It had been held by a jury in 1885 that a road for foot passengers and horses had existed for 40 years, for carts since 1854, and for sleds for a previous period of 10 years before that. Sleds being regarded as an earlier form of cart, the Court accordingly held that there was, therefore, a servitude right for carts (10 years' use by sleds + 32 years' use by carts). Lloyd appealed against this finding and argued that to extend the servitude to include carts was an unwarranted extension of the burden on his lands.

**Decision:** Scots Law recognised three kinds of servitude roads: (a) foot, (b) horse and (c) cart or carriage. As the existing uses proved by Malcolm extended beyond the use by horses to include first sleds then later, carts, this case must fall in category (c). Hence the servitude had been established as one for carts as well as for other uses, a cart and a sled both being in the nature of devices adapted for the carriage of goods.

**Comments:** This case deals with a private servitude right, but the Lord President stated that the distinction between public and private servitude rights did not enter into the case. It is some authority for the argument that a new type of vehicle if in its nature it is similar to an existing type, may be included within a particular category of right of way.

Cases referred to:
(1) Forbes v Forbes (1829) FC 75411 (Not in Ken).
(2) Mackenzie v Bankes (1868) 6 M 936
(3) Hozier v Hawthorne 1884 11 R 766