1781.

WILLIAM WADDELL of Papperthills, - *Appellant;*
JOHN RUSSELL of Bentfoot, - - *Respondent.*

WADDELL v. RUSSELL.

House of Lords, 10*th December* 1781.

SERVITUDE OF MINERAL WELL—POSSESSORY JUDGMENT.—A party claimed a servitude over a mineral well in his neighbour's field, near the mutual fence dividing their properties, and alleged the use and possession thereof for time immemorial. The Sheriff sustained his claim as a servitude. On advocation the interlocutor was varied, so as to leave out any finding as to a servitude. Held in the Court of Session and House of Lords, that he was entitled to the possessory judgment, as to his use of the well, and to have access thereto by a stile over the stone wall.

The appellant and respondent were conterminous proprietors, having estates marching with each other. Near to the march, and almost in a line with it, there was a mineral well, *on the appellant's side* of the march, claimed by him as his exclusive property. In the several proceedings as to the repair and straightening of the marches, this right had never been disputed by the respondent. But afterwards, when a stone dyke was, by order of the Sheriff, ordered to be built at their mutual expense, as a march wall between the two properties, the respondent laid claim to a right of servitude in the well, and accordingly presented a petition to the Sheriff, praying that he had such a servitude; and that he ought to have access to it by a stile, made in the proposed new wall. This petition was amended by another praying to allow him to make a proper entry to the well, through the march dyke, at their mutual expense, or at his own. In answer, it was pleaded, that there could be no servitude of a medicinal well, as, from the nature and quality of the thing, it was quite inconsistent with a servitude—that the respondent had plenty of water within his own property, and that he had no more right to such a servitude, by merely resorting to this well, than the people from all quarters of the adjacent country had, who resorted to it in the same manner, because if he had, every person far and near would be entitled to a servitude over it on the same ground. The water, by its mineral quality, is not adapted to the uses of a dominant tenement. There can therefore be no real servitude over it, and the law of Scotland does not recognize a personal servitude. The well is exclusively within the pro-

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perty and enclosures of the appellant, who is therefore entitled to debar all access thereto.

Mar. 24, 1778. The Sheriff-substitute found "it averred by the pursuer, "and not denied by the defender, that he and his family "have been in the constant uninterrupted practice of tak- "ing water from the mineral well in the defender's property, "mentioned in the pleadings: Therefore finds, that the "pursuer has a servitude of taking water from the said well; "and allows him, at his own charges, to put up a proper "foot style across the march dyke, to be upheld by him at "his own expense in time coming, so as he and his family "may have a foot passage to the said well; and prohibits "and discharges the said defender from troubling or mo- "lesting the pursuer and his foresaids, in the use of said "servitude." In an advocation, the Lord Ordinary pronoun-

Feb. 4, 1780. ced this interlocutor, "Remit the cause to the Sheriff, with "this instruction, to vary his interlocutor of date 24th March "1778, by leaving out these words, "Therefore finds, that "the pursuer has a servitude of taking water from the "well."

On representation his Lordship adhered, explaining that

Feb. 24, 1780. "the pursuer (respondent) was entitled to a possessory "judgment, and that neither party have brought a declara- "tor relating to the well." On reclaiming petition to the

July 12, 1780. Court, their Lordships adhered to the Lord Ordinary's inter-

Feb. 7 and 10, 1781. locutor, after a proof adduced by both parties as to the use

Feb. 23, 1781. and possession.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—It being admitted that the property of the well belongs to the appellant, it is incumbent on the respondent claiming a servitude over it, not only to establish that a medicinal well is a proper subject of servitude, but also that the usage and possession had by him constitutes such; and that he still holds and enjoys that possession, in order to support a possessory judgment. Here nothing of all this can be established. A servitude of water from a well is clearly a rural servitude, *servitus aquæhaustus*, which, according to Erskine "is a right competent to a land- "holder of watering his cattle at any river, brook, well, or "pond, that runs through or stands in his neighbour's "grounds." The basis of such servitude is its use to the neighbour claiming it, but law will not authorize him to break into his neighbour's grounds, when he has abundance

of water in his own grounds, merely for the purpose of getting at a mineral water, which can be of little or no use to him. Such water cannot be made use of for family and domestic purposes, for washing linen, or for watering cattle, and therefore cannot be the object of a prædial servitude. Even supposing it capable of such, all claim of this nature was given up at the time of straighting the marches by the erection of the stone wall, which totally excluded the respondent, and in which he has acquiesced for many years without objection, and without claiming any such right. This at all events debars him from a possessory judgment.

Pleaded for the Respondent.—It is proved, and otherwise admitted, that the respondent's family has been in the uninterrupted possession of the well in question, from time immemorial, and this was enough to establish the right claimed, be the qualities of the water what they may. No apparent prejudice could possibly arise by the respondent's family continuing to use it. And the argument resorted to, from the peculiar quality of the water, as unfit for family use, but only useful as a medicine, and therefore not a subject on which a servitude could be constituted, ought to be disregarded, because the proof and admissions as to actual use by his family, was sufficient to confute this supposition.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed, with the following variation, (viz. 1st, that in the interlocutor of the Sheriff-substitute, of the 24th March 1778, the words (of said servitude) be left out: And the words (thereof) inserted instead thereof; And it is further ordered that the Court of Session in Scotland, do give direction to the said Sheriff-substitute to vary the said interlocutor accordingly.

For Appellant, *Henry. Dundas, Thomas Erskine.*
For Respondent, *Alex. Murray, Dav. Rae, Will. Baillie.*

NOTE.—This case not reported in the Court of Session. The decision seems only to go the length of giving a possessory judgment, leaving the question of servitude open; which had not been regularly brought before the Court.