1797.

DINGWALL v. FARQUHARSON. Nov. 28, 1794.

into expensive engagements with equestrians and stage performers, upon the faith that the amphitheatre would be ready to be opened at the date stipulated in the contract.

The Sheriff found, "that although it was proved that the "respondents were five or six weeks later of finishing the "work which they contracted with the defender (appellant), "to complete at Martinmas 1792, yet, that he had adduced "no proof that the ultimate finishing of the circus was re-"tarded, or that the alleged delay of opening it was owing to "the delay of the pursuers in implementing their contract."

This decree being extracted, a suspension was brought to the Court of Session.

May 21, 1795. July 6, —— Feb. 13, 1796.

The Lord Ordinary refused the bill; and, upon reclaiming petition, the Court adhered. And, on further petition, they adhered.

Against these interlocutors the present appeal was brought.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutors be affirmed: And it is farther ordered, that the appellant do pay, or cause to be paid, to the respondents £100 for costs, in respect of the said appeal.

For Appellant, *Wm. Adam*, *Tho. M'Donald*, *H. D. Inglis.*

For Respondents, *Sir J. Scott*, *Robt. Davidson.*

WM. DINGWALL of Bruckley, Esq. . . *Appellant;*
JAMES FARQUHARSON of Inverey, Esq. . *Respondent.*

House of Lords, 31st May 1797.

SERVITUDE OF PEAT—SERVITUDE OF ROAD.—(1.) The grant or tolerance of a right to take peat, was so worded as in one clause to apply to fifteen fires, while in the other clauses of the deed, it was conceived so as to mean fifteen families, without respect to the number of fires each family might use; the words fifteen families or fires, being apparently used in the sense that each family was counted as one fire, whether they used one or more fires in their houses. Held, that the grant was not limited to fifteen fires in all, but extended to the fire or fires which each family might use, not exceeding the number of fifteen families.

Also, that if the tenants should increase beyond the number of fifteen families, that they had a right to take peat on payment of the sum stipulated. (2d.) The deed also conferred a right of "*road*" or "*way*," for carrying their peats from the moss. Held, that this was to be construed to mean a *cart road*, convenient for carrying their peat from the moss, and not a *horse road*, as contended for by the appellant.

The appellant and respondent's estates lie adjoining to each other, in a part of Aberdeenshire where there is no coal. There was plenty of peat on the appellant's lands of Bruckley, but none on the respondent's lands and estate of Bruxie, which had been acquired, with all the rights and privileges belonging thereto, from a Mr. Keith.

Mr. Keith, the former proprietor of Bruxie, had entered into a contract with the appellant's father, by which the former purchased a privilege or right of drawing peats from the appellant's lands; and it is in regard to the extent to which he had right to this servitude of peat, as well as of a road-way to the peat mosses, that mutual declarators were brought by the parties.

The disposition or grant by the appellant's father was in Mar. 19, 1733.
these terms:—"Give, grant, and dispone in favour of William
"Keith, his heirs and assignees, an heritable and irredeem-
"able moss tolerance, upon the haill mosses of Bruckley
"and little Auchock, lying within the parish of Auchridie,
"and sheriffdom of Aberdeen, and belonging heritably to
"me, the said William Dingwall, for serving and accommo-
"dating the town and lands of Over Altrie, Middle Altrie,
"Nether Altrie, Carndell, Stockbridge, and Brownhill, lying
"within the parish of Old Deer, and sheriffdom of Aber-
"deen, and belonging heritably to the said William Keith,
"and all and every one of them, yearly, in all time coming,
"with the whole peats which the possessors of the several
"towns above specified, or any one or more of them, shall
"happen to have occasion for, within their own families,
"not exceeding the number of fifteen fires, over and above
"what is necessary for drying their corns growing on the
"said town and lands, and after allowing to the said Wil-
"liam Keith, and his heirs and successors, the whole peats
"they shall have occasion for within their own families,
"under the name of one single fire, hereby authorizing and
"empowering the said William Keith and his foresaids, and
"their haill tenants and sub-tenants, and possessors of the

1797.

DINGWALL v. FARQUHARSON.

"several lands above mentioned, belonging to the said "William Keith, to cast, win, and load as many peats "yearly, in all time coming, within the mosses above men- "tioned, as shall accommodate their families as above, "and to transport and load the same from the mosses above "mentioned, to the several lands above specified, by a con- "venient road or way, beginning at the burn upon the "north end of the town of Broomhill, and going hence "through the lands of Little Auchock, to the mosses above "specified, set apart, and marked by us, the said William "Keith and Mr. William Dingwall, beginning at the north "side of William Crichton's croft, and continuing to the "north side of Dubsdale, and going from the said two "points, in two straight lines, through the said mosses, to "the green ground upon the march of Meikle Auchock, "and north side of the said moss; providing, nevertheless, "like as it is hereby specially provided and declared, that "the above tolerance is granted and accepted with the ex- "press provision and condition, that in case the several "families upon the lands above mentioned, belonging to "the said William Keith, shall happen at any time here- "after to exceed the number of fifteen families, then, and "in that case, the said William Keith and his foresaids, "shall, by their acceptation hereof, be bound and obliged "to make yearly payment to me, the said William Ding- "wall, and my above written, of the sum of £1. 10s. Scots "money, for each of their families or fires above the num- "ber of fifteen, which shall happen to be accommodated "furth of the moss above specified."

From the date of this deed of tolerance 1733, till within a few years before the actions were raised, no difference or dispute arose about the terms or construction of it.

Soon, however, after the respondent purchased the estate of Bruxie in 1778, the appellant attempted to restrict the tolerance of taking peat in the above grant, upon the idea that the right was only to the extent of fifteen fires, that is, one fire in each family. He further insisted that the tenants should take the use of a totally different road from that described in the contract, and had dug up ditches to obstruct the use of the old road. He further began to burn part of the moss, and to convert it into corn land, in order to destroy, at least to diminish, the extent of the servitude.

In these circumstances, the present actions of declarator were brought.

The appellant's action concluded to have it found, 1. That it was *optional to him*, to allow the tenants and possessors of the respondent's estate, to cast or carry off any greater quantity of peats than was sufficient to supply fifteen fires, even on payment of the sum stipulated in the tolerance. 2d. That they be prohibited from using any other road than the one described in the tolerance, and that "as a road for horses only."

The respondent's declarator concluded, 1st. That the respondent and his tenants have a right to carry off whatever quantity of peats they may have occasion for in their families, to the number of fifteen, whether they may happen to have one or more fires in each family. 2d. That they have a title to cast or carry away peats from these mosses, without the consent of the appellant, on paying to him the sum of £1. 10s. Scots annually, for each family, exceeding the number of fifteen. 3d. That the appellant is not entitled to change the respondent's road, or access to the mosses, but that he must keep the road described in the tolerance, open and patent for the use of the respondent and his tenants, and that they have not only a right to it as a foot road, but as a road for horses, carts, and carriages. 4th. That the appellant should be discharged from burning, and otherwise destroying, or admitting strangers to the said mosses, so as to hurt or infringe upon the right of the respondent, in the peaceable and quiet possession of his moss tolerance; and, lastly, that the appellant should be found liable in damages and expenses.

The appellant contended, 1st. By the express words of the contract, the respondent was only entitled to take peats for fifteen fires out of his mosses, without respect to the number of families. It was a tolerance to take peat sufficient for supplying fifteen fires, and no more; for if the meaning of the tolerance had been, that fifteen families, though using ever so many fires, should be entitled to take all the peats from the moss of Bruckley, the clause would have run in different terms, and the possessors of Bruxie would have been entitled to take what peats they had occasion for within their families, not exceeding the number of fifteen families. That the consideration which, by the separate clause of the deed, is stipulated to be paid for additional fires, over and above fifteen, being no more than 2s. 6d. per year, is an additional proof that the word "fires" is to be taken in the natural sense, as an annual

1797.

DINGWALL
v.
FARQUHARSON.

payment and compensation for as many peats as would supply the consumpt of one fire, but could not be deemed equivalent to the consumpt of a family keeping many fires. And lastly, as to the practice, it was contended, that about sixty years ago, there was not a house on any of the farms of the estate of Bruxie which contained two chimnies, so that it was impossible that any one of the possessors could use more than one fire at the period.

The respondent, on the other hand, contended, 1st. That the appellant's plea rested on a judaical construction of the words made use of in the deed of tolerance, without attending to the sense or meaning in which they were received in the country, and, indeed, made use of by the parties to this transaction. It was evident that the word fire was synonymous with the quantity of fuel consumed by an ordinary tenant, in that part of the country, for domestic purposes. That this was evident from the clause, declaring that the fuel consumed by the proprietor of Bruxie should be considered only as one fire, which it was proper to specify should be the case with regard to the proprietor of the estate, who had probably five or six fires within his house, and consumed five or six times the quantity of fuel an ordinary tenant would have occasion for; but that it was unnecessary to make such a declaration in regard to the tenants, who seldom had occasion to use more than one or two fires, and hence the words families and fires came to be used as synonymous terms. That if any doubt on this head could arise from the first clause in the contract, it was completely removed by the second, in which provision is made for the number of families on the estate of Bruxie exceeding fifteen, and it is declared in that event,—"That the sum of £1. 10s. Scots shall be payable for each of "their families or fires, above the number of fifteen, which "shall happen to be accommodated furth of the mosses "above specified." Thus, in the clearest manner, showing that the words "families" and "fires" were used in the contract in identically the same sense.

2d point. As to whether it was optional to the appellant to exclude the respondent's tenants, in so far as they should exceed the number of fifteen, from his mosses, even upon the payment of the stipulated sum of £1. 10s. Scots, for each of the additional families or fires? It was contended for the appellant, that the dispositive clause, or that part of the deed of tolerance which contains the grant of the servitude, is only

confined to fuel to supply fifteen fires, and that there was not one word, from beginning to the end of the deed, importing the grant of a servitude of fuel for more fires. So that the original limitation being confined to fuel for fifteen fires, the proprietor of the servient tenement is left free to exercise his option, in regard to a supply of fuel beyond that number. In answer, the respondent contended, that this construction of the grant was totally at variance with the direct terms used. It expressly provided, in the first place, for fire to fifteen families, and, in the second place, and by a separate clause, it provides for a supply of fuel to the respondent's tenants, should they increase beyond, or exceed that number of families. In the latter case, the price or consideration stipulated was fixed at £1. 10s. Scots per annum, besides the price paid for the grant conferred for the accommodation of the respondent's tenants. The grant is as absolute for the number beyond fifteen families, as for the fifteen families themselves; and therefore, it was not left optional to the appellant to admit or disallow fuel to the number beyond fifteen families.

3d point is, Whether the respondent is entitled to a cart road, for transporting his peats, or if he is limited, as the appellant contends, to a horse road only, for carrying the peats on horses' backs, and in creels or hurdles? The respondent maintains that, on this subject, the deed of tolerance is conclusive. It allows the tenants a liberty to transport their peats "by a convenient *road* or *way*, beginning at the little burn upon the north side of Brownhill, &c., "*set apart by us, the said William Keith and William* "*Dingwall.*" In the law of Scotland, which in this particular is borrowed from the Roman law, there are three different servitudes of roads known and established, viz., "Iter, actus, et via. Iter is a right of a horse or foot passage; actus is a right of carriages drawn by men, and of driving cattle; via comprehends the other two, and, besides, includes a right of driving carriages with horses, or other beasts of draught." And Erskine further mentions, that there are servitudes by the usages of Scotland, analogous to these, for foot road, horse road, a cart or coach road. As, therefore, by the words of the grant, the respondent is entitled to a *road* or *way*, there can be no doubt he is entitled to a cart road.

Ersk. B. 2, Tit. 9, § 12.

The Lord Ordinary pronounced this interlocutor:—"The Lord Ordinary having considered the mutual memorials, Nov. 12, 1793.

1797.

DINGWALL v. FARQUHARSON.

" together with the heritable moss tolerance, Finds, that " the respondent, Inverey, as proprietor of the estate of " Bruxie, is entitled to the privilege of moss upon the mosses " of Bruckley and Little Auchock, for serving and accom- " modating the towns and lands of Over Altrie, Middle " Altrie, Nether Altrie, Carndel, Stockbridge, and Brown- " hill, with the whole peats which the possessors of these " towns, or any of them, shall have occasion for in their " families, the same, however, being limited to the number " of fifteen fires, besides what is necessary for drying their " corns; and reckoning the whole peats which the proprie- " tor of Bruxie shall have occasion for in his own family, as " one of the said fifteen fires. Finds, that Inverey (respon- " dent) and his tenants, in the town and lands above men- " tioned, are entitled to a convenient cart road in the direc- " tion specified in the said moss tolerance, for transporting " their peats from the said mosses to the several lands: " Finds, that in case the several families upon the lands above " mentioned, shall happen at any time to exceed the number " of fifteen, in that case, Inverey (respondent) shall be en- " titled to take peats from the said mosses, for the accom- " modation of the extra families, but shall be obliged to pay " yearly to the proprietor of the said mosses, the sum of £1. " 10s. Scots, for each fire made use of by such of the said fa- " milies as exceed the number of fifteen, and decerns." On re-

June 12, 1794. presentation from both parties, the Lord Ordinary adhered. On further representation, his Lordship pronounced this interlocu-

Dec. 20, —— tor :—" Finds, that by the just construction of the tolerance, " explained by subsequent practice, the privilege of moss " therein specified, is granted to the use of fifteen families, " and not limited to fifteen fires, and with this alteration " adheres to the interlocutor above pronounced. A third

Jan. 23, 1795. representation was refused. On petition to the whole

Feb. 28, —— Court, the Lords adhered to the Lord Ordinary's interlocu-

Mar. 11, —— tors. And on further petition, they adhered.

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

After hearing counsel, it was

Ordered and adjudged that the interlocutors be affirmed.

For Appellant, *Sir J. Scott, W. Grant.*

For Respondent, *J. Anstruther, Chas. Hay.*