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EARL OF MORTON. v STUART.

GEORGE, EARL OF MORTON, *Appellant;*
JAMES STUART, Esq., Younger of Dunearn, *Respondent.*

House of Lords, 21st June 1813.

SERVITUDE OF ROAD—PRESCRIPTIVE POSSESSION—CONDESCENDENCE.—An action was brought by the appellant of immunity from a servitude of two roads, claimed by the respondent, through the appellant's property. The respondent was ordered to give in a condescendence of what he claimed as servitudes, and by virtue of what right or title he was prepared to maintain his right to them. When given in, the condescendence was objected to, as not stating the nature or origin of the servitudes, or the ends or purposes to which the roads were put; and he proposed to establish the servitudes by prescriptive possession of other parties, different from the respondent and his predecessors and tenants; Held the condescendence relevant to go to proof. Reversed in the House of Lords, and case remitted to give in a new condescendence.

The appellant brought a declarator of immunity from a servitude of two roads, claimed by the respondent, through
Dec. 11, 1806. his property, in which action the Lord Ordinary ordered the respondent to give in a condescendence of what he claimed as a servitude, and of what he offered to prove in regard to the same.

In terms of this order, the following condescendence was given in:—

"1st. That the road from Easter Aberdour, which is "commonly called the Fishergate, leaves the south street of "Easter Aberdour, between the west gable of a house be-"longing to John Anderson feuar in Aberdour, and the east "gable of a house presently possessed by Mrs. Lochty; that "it enters a park or field belonging to the pursuer at the "south-east end of the lane running in that direction from "these gables; and that, after passing about half-way along "the east or upper side of that park, it inclines in a south-"westerly direction through the middle of it to the harbour, "which lies at its south-west end; and that the road lead-"ing to the Whitesands Bay leaves the said road to the "harbour about the middle of the east, or upper side of "that park, to a gate at a farm steading belonging to the "pursuer, called the Teind Barns; and from thence in a "south-easterly course to the bay.

2d. "The defender offers to prove, by parole testimony of

" witnesses who have access to know the fact, that these " roads have been uninterruptedly used; the first, namely, " that to the harbour, as a road for foot passengers, persons " on horseback, and carriages; and the other, to the White- " sands Bay, as a road for foot passengers, by all the pro- " prietors of grounds or houses situated on the east side of " the rivulet called Aberdour Burn, and lying in the parish " of Aberdour, and particularly by the defender and his pre- " decessors, (to whom the description applies), for a period " beyond the memory of man."

3d. He offers to prove, " that when the pursuer placed " gates on these roads several years ago, he did not attempt " to prevent their being used as before; and, indeed, he at " that time showed his own conviction that he could shut " up neither, at least as a road for passengers on foot, by " leaving an opening for passengers, on the west side of the " northmost gate, stepping-stones on the west side of the " two middle gates, and a wooden ladder on the east side " of the southmost gate." And,

4th. He offers to prove, "that the pursuer has lately erected " a high gate, which he keeps locked, at the south-east end " of the lane before mentioned, and a strong stone and lime " wall on the south-west side of the park or field before " described; by which illegal operations the said roads are " completely and effectually shut up."

The appellant objected to this condescendence being admitted to proof, as it did not state the nature or origin of the pretended servitudes, or the ends or purposes of them; while, on the other hand, it proposed to establish the respondent's right of servitude, by the alleged possession of *other parties, different from the respondent or his predecessors*, and proprietors of tenements no way connected with the lands of Hillside. He therefore submitted to the Lord Ordinary that this condescendence could not be admitted to proof, and that a new condescendence ought to be given in, stating clearly and explicitly the following points:—

1. Whether the pretended servitude was constituted by grant or by prescription; and what length of possession he undertook to prove in either case?

2. What were the ends and purposes to which the pretended servitude roads had been and were to be applied; and whether the use of both, or either of the roads, is for his own personal convenience and pleasure, or for any benefit connected with the land of Hillside as dominant tenement?

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3. What possession the respondent and his predecessors, proprietors of Hillside, and their tenants, have had of the pretended servitude roads, without reference to any possession that may have been had by the other proprietors of grounds or houses situated on the east side of Aberdour Burn?

4. Whether the stepping-stones, ladders, stiles, or other access to the appellant's different fields and inclosures were made, in any instance, at the requisition or desire of the respondent or his predecessors; and what those instances were?

Jan. 13, 1807. The Lord Ordinary pronounced this interlocutor: "Having considered the condescendence for the defender, with "the answers thereto: and being of opinion that the condescendence implies sufficiently the nature of the defender's "claim to the roads in question, as not to be defended on "any existing grant known to the defender; that the defender, in giving in the condescendence ordered, is nowise "called on to assign any particular uses for an access to the "sea-shore, which is *juris publici;* that the general use of "the road in question, by the feuars of Aberdour, may be "very material to ascertain, in leading any proof in support "of the defender's claim in behalf of Hillside, to the same "benefit; and that, as to the circumstances attending the "erection of gates, ladders, stepping-stones, it will be open "to both parties to ascertain them by proper interrogatories "to the witnesses to be adduced; before answer, allows to "the defender a proof of the facts averred in the condescendence, and to the pursuer a proof of the history detailed "in the answers, if he inclines to bring it, and to both parties a conjunct probation: and grants commission and "diligence to the Sheriff-depute of Fife, or James Glassford, "Esq., Advocate, to take the said proof." On two representations against this interlocutor by the appellant, the

May 12 and May 26, 1807. Lord Ordinary adhered. And, on reclaiming petition to the Court praying the Lords to alter the above interlocutor,

July 11, 1807. the Court, of this date, refused the prayer of the petition, and adhered.

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

*Pleaded for the Appellant.*—1. The respondent originally claimed right to the use of the roads in question, *as proprietor* of the *estate of Hillside*, that is to say, he claimed a right of servitude in favour of the estate of Hillside as the dominant tenement, over the barony of Aberdour as the servient

tenement; and it was expressly against this private claim that the appellant's action of declarator was directed. But, in answering the appellant's first representation, the respondent seemed to be desirous of evading the action as it had been brought, by shifting from his original claim, and contending that the two roads claimed were public roads. Therefore, even supposing the respondent to have been serious when he alleged, after the cause had sometime depended, that the roads in question were public, such allegation was altogether incompetent, and could not be entertained under the present action. If the respondent really means to lay aside his original pretensions to a right of servitude, and to insist for those roads as public, this, which would be a new and quite different case from the one really at issue, may, if he pleases, be tried in a separate action at his own instance, in which, both the correctness of the statement, and his title to maintain it, may be fairly discussed. But, 2. In the present suit the respondent, in his condescendence, has not offered to prove the whole of those circumstances which, by the law of Scotland, are requisite in order to constitute a servitude in favour of one tenement over another. 3. As a mere question of immunity from an alleged servitude, the condescendence given in by the respondent was objectionable, inasmuch as though every part of it, except that which relates to the possession of the respondent himself and his predecessors, as proprietors of Hillside, should be proved, such proof would have no effect in establishing the right of servitude claimed by him; on the other hand, should he fail in the whole of the proof of use and possession, except that of his own and his authors' use and possession, such failure would not in the least invalidate the right to the servitude so established by the use and possession of himself and his authors. 4. Personal servitudes are not recognised by the law of Scotland: and, from any explanations hitherto given by the respondent as to the uses of the servitude claimed by him, it appears to be in the nature of a personal servitude, and altogether different from a real or predial servitude, which is well known and accurately defined by the legal authorities applicable to this subject. Vide Ersk. B. iii. tit. 9, § 33; Craig, Lib. 1. Dieg. 15, § 15; Stair B. ii. tit. 1, § 5; Bank. B. i. tit. 3, § 4. Again, Stair, B. ii. tit. 7, § 1. And Erskine says, B. ii. tit. 9, § 3, "That a servitude by prescription is limited by the measure "or degree of the use had by the acquirer of it, agreeably

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"to the rule *tantum prescriptum quantum possessum.*" Therefore, nothing can more satisfactorily show that the only relevant possession in this case, is the possession of the respondent or his predecessors; and that the possession of the feuars of Aberdour, proprietors of distinct tenements, has no connection at all with the question at issue.

*Pleaded for the Respondent.*—The facts offered to be proved in his condescendence are undeniably relevant; in other words, they must, if established by proof, serve as a complete legal defence against this action of declarator. The purpose of the action was to obtain a decree, declaring the whole barony of Aberdour free from the burden of a servitude in favour of the proprietors of Hillside; and, against such an action, it is sufficient to aver, as the respondent has done in the second article of his condescendence, that the roads in question, passing through the barony of Aberdour, have been uninterruptedly used by the inhabitants of the village, and by him and his predecessors, for a period beyond the memory of man. This is a distinct and specific allegation of a servitude by prescription, which may be proved by parole testimony, and indeed, from its nature, is only capable of being so proved. 2. Yet the appellant contends that the respondent was bound to explain the purposes of these roads, during the previous possession, but there is no authority for this laid down in the law-writers; and the Lord Ordinary has rightly found, in regard to this, that he "is no-"wise called on to assign any particular uses for any access "to the sea-shore, which is *juris publici.*" Even if he admitted that the chief object was bathing, this would not assert a right to a servitude merely *personal.* His allegation is, that he and his predecessors have travelled to a particular bay for time immemorial, through the appellant's property, which is a servitude of way. 3. Nor is the proof of possession of the feuars of Aberdour inadmissible in establishing this right of way, because, as the Lord Ordinary has said in his interlocutor, "The general use of the road in question, by the "feuars of Aberdour, may be very material to ascertain, in "leading any proof in support of the defender's claim in behalf "of Hillside to the same benefit." In addition to this, the respondent would observe, that, according to his statement, which, in a question of relevancy, must be held as true, the use of these roads was enjoyed uninterruptedly by a certain description of persons, and he, as included within that description, must be entitled to vindicate his right. The

right of the public to these roads may be inferred, from the general and immemorial use of them by the proprietors of the subjects to the east of Aberdour Burn; but, could it be maintained that these proprietors are not, as such, entitled to vindicate that use, because the public would be benefited by their succeeding in the claim? And if these proprietors are entitled to make their right effectual, shall the same privilege be denied to the respondent, who is the most considerable of them? The objection of the appellant proceeds on a mis-statement or misapprehension of the nature of the respondent's right. The right is claimed, not as a servitude attached to the lands of Hillside exclusively, but as a common benefit pertaining to the whole lands and houses to the eastward of a stream separating Easter and Wester Aberdour. The possession of the other villagers may therefore be pleaded upon by the respondent; and, besides, it must be obvious, that if the possession has been universal, the appellant has no interest in bringing an action of immunity against any one individual. On this hypothesis, every proprietor of lands and houses has a right to demand that the road shall be kept open; and, of consequence, the proof allowed in the Court of Session is of importance, 1st, In establishing the right claimed by the respondent; and, 2d, In showing that the appellant has no interest in the issue of the present action.

After hearing counsel,

THE LORD CHANCELLOR ELDON said,

" My Lords,

" In this cause there arise two questions, 1. Whether the Court of Session should not call upon Mr. Stuart to state the purposes for which he claims the roads in question? 2. Whether he ought not to be confined to proof of possession had by himself and his predecessors, proprietors of the lands of Hillside?

" On the first of these, I have no conception that the interlocutor of the Lord Ordinary, of the 11th of December 1806, ordaining the respondent to give in a condescendence of '*what he claimed*,' could be held to mean less, than that he should state the nature of the servitude claimed.

" This claim being for a right to certain roads through the appellant's property, the proof might show a right to them for general purposes, for only one limited purpose, or for a variety of specific purposes. The respondent stated that he claimed two roads of different kinds, one a foot road, and the other a road for horses and

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carriages; but if the argument at the bar was well founded, there was no occasion for him to have said even so much in his condescendence.

"It was said that the road claimed to the harbour of Aberdour belonged to the proprietors of tenements to the eastward of Aberdour Burn, and that this being a right of road to a public harbour, it was sufficient to condescend upon the *terminus ad quem*; but I cannot accede to this doctrine. It was not said that this was a public road; but that it belonged to the proprietors of certain tenements. As such, it might be for particular purposes only—such as for bringing to these tenements commodities landed in the harbour; but this is quite different from a road to be used by all his Majesty's subjects for all purposes and on all occasions. If it was a road for particular purposes only, the persons entitled to use it for these purposes might clearly be prevented from using it for any other purposes, as not within the rights granted to, or acquired by them.

"As to the right of footpath, the Lord Ordinary thinks that the sea-shore, being *publici juris*, the respondent was not obliged to assign any particular uses for an access to it. But I conceive that, as different persons might have different uses for an access to the sea-shore, it was necessary for the respondent to state what use *he* proposed to make of such access.

"On the second question, nothing could be more convenient to a party in the situation of the respondent, than to proceed, as he claims a right to do. He says, let me enter into my proof of what the roads are, and when the proof is completed, the Court may declare for what purposes they are to be used.

"But when the right claimed is a servitude by prescription in favour of the lands of Hillside, can proof be allowed as to any right claimed or enjoyed by the proprietors of other lands?

"If it can, only see what inconveniences might result from this, if all the prescriptions were not the same. The prescription of A would not be effectual for B, nor B's for C, and so on. When the respondent, instead of confining himself to the prescriptive right of himself and the proprietors of Hillside, proposes to give proof as to the possession of A, B, and C, of the roads in question, all this may go for nothing: If he should show that A, B, and C, used these roads for *certain* purposes, this would not show that the respondent had a right to use them for any purpose.

"If the respondent's right is founded on prescription, then he must prove his own case. If it were founded in a grant to himself and others, then he might prove the possession of these others, to show that his own right was not lost by non-use, even though he should have used it himself. I have brought these points under your Lordships' consideration at present. On Friday next I shall be ready to state what occurs to me as the fit judgment in this case."

On the 21st June 1813, his Lordship resumed the case.

" My Lords,

" In resuming this case, I shall read the summons of declarator to you. (Summons read.) I observe that this action had two objects; 1. To declare that the proprietors of the barony of Aberdour were free from any servitude to the lands of Hillside of the roads which were claimed; and, 2. If a servitude was found to exist, to have the extent of it defined.

" The defence was, that by *prescription* the proprietor of Hillside had a right to the roads in question. This appears to be a sufficient answer to what was asked by the appellant, as to the respondent showing by what title he claimed the road in question.

" The Lord Ordinary, on the 11th of December 1806, ordained the defender to give in a condescendence of *what* he claimed, and what he offered to prove.

" A condescendence was accordingly given in. (Here his Lordship read the same.) The appellant insisted in the Court below, as he has done at the bar, that this was not such a condescendence as ought to have been received, as it neither set out the nature nor the purposes of the servitude claimed, and he called for a new condescendence on the following points :— 1. Whether it was claimed by grant or by prescription? As to this, it appears to me that this was sufficiently set out in the defences. He there claimed a right by prescription, and he must be held to mean such a length of prescription as would confirm such a right. 2. What were the ends and purposes to which the roads were to be applied? 3. What purposes the respondent and his predecessors have had of the roads in question, without reference to the possession of any other person? 4. Whether the stepping-stones laid down, or stiles made in the walls through which the roads were claimed, had been made at the requisition of the respondent or his predecessor, or not?

" As to this last, I do not think that it is necessary for us to make any alteration in the interlocutors. It would be in the power of the parties, at taking the proof, to put such questions to the witnesses as would bring out with sufficient distinctness the different matters mentioned in this article.

" As to the second and third articles, the Lord Ordinary has expressed himself thus, in the interlocutor of 13th January 1807: —' That the defender is no wise called on to assign any particular ' uses for an access to the sea-shore, which is *juris publici*, and that ' the general use of the road in question, by the feuars of Aberdour, ' may be very material to ascertain, in leading any proof in support ' of the defender's claim in behalf of Hillside to the same benefit.' I cannot admit what is here laid down as to the right of access to the sea-shore without some qualification. It is somewhat extraordinary that this doctrine, as to its being unnecessary to assign

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any particular uses for an access to the sea-shore, as being *juris publici*, should be stated in an interlocutor which had reference to two roads, one of which was claimed merely as a footpath, the other as a road for horses and carriages. Thus, on the admission of the defender himself, this right of access to the sea shore does not give a road for every purpose.

But it was said, it would appear from the proof what were the uses to which the roads claimed could be applied. It appears to me, however, that, before leading the proof, the pursuer has a right to know what one party has to prove and the other to disprove. Suppose a footpath were claimed for access to the sea-shore for the purposes of bathing, if the Court was of opinion that a servitude for the purposes of bathing could not be maintained, there would be no occasion to go into proof with regard to it.

" As to the other road, it was said that this must be a road for all purposes, because it was a road to a public harbour. This might be true of a highway, open and public for all the king's subjects; but it is very different here, where the question is, if this road belongs to the proprietor of a certain estate or not?

" It matters not in this case, what might or what may or may not be competent to the feuars of Aberdour. It is possible that they may have a very limited right in the road in question, such as to bring home articles to their tenements or the like. Any proof as to them is either unnecessary, or it is inadmissible, where the respondent founds his claim on prescription. He must make out his case by proof of the roads having been used, not by these feuars, but by himself and his predecessors, or their tenants.

" In these respects, therefore, I conceive that the judgment must be altered by your Lordships."

It was therefore ordered and adjudged that the interlocutors of the Lord Ordinary, of 12th and 26th May 1807, and of the Lords of Session, of 10th July 1807, be reversed. And it is further ordered, that the cause be remitted back to the Court of Session, to review the interlocutor of the Lord Ordinary of 13th January 1807; and to ordain the defender to lodge a new condescendence, stating particularly what he claims, and what he offers to prove, and that the Court do then proceed as shall seem just.

For the Appellant, *Sir Samuel Romilly*, *Tho. W. Baird.*
For the Respondent, *Wm. Adam*. *Wm. Erskine.*