[5th *July* 1832.]

No. 5. Duke of HAMILTON and BRANDON, Appellant.—*Lord Advocate* (*Jeffrey*) — *Follett.*

GEORGE ROBERTSON AIKMAN Esq., Respondent.—*Dr. Lushington* — *Merewether.*

Servitude.—In an action by the proprietor of houses and gardens in the town of Hamilton, to declare his right, generally, to take sand and gravel from the banks of the river Clyde, the property of another party, found (reversing the judgments of the Court of Session,) that, under his summons, he was not entitled to found upon the possession of persons, proprietors, and occupiers of houses and gardens in the town of Hamilton similarly situated with his houses and gardens, but had a title only to insist as one of the inhabitants of the town, or as owner of certain lands therein, to the effect of having his right of servitude, in right of and for the use of his own properties, tried by a jury.—Circumstances under which the claimant to a right of servitude held to be not bound, in order to support his action, to plead a right of commonty in the subject to which the alleged servitude attached.

2d DIVISION.
Lord Medwyn.

THIS appeal arose out of conjoined actions of advocation and of declarator, raised at the instance of Aikman against the Duke of Hamilton; which also brought up two applications for interdict, originally instituted in the Sheriff Court, at the instance of these parties against each other.

The questions at issue related, on the one hand, to the right of Aikman to take sand and gravel from the banks of the river Clyde by a road or passage entering from the end of the Hamilton Bridge, a

servitude or right prescribed, as was alleged, by immemorial usage; and, on the other, to the right of the Duke to exclude or prevent the exercise of that servitude, upon the ground, as was alleged, that it never existed, and that the sand and gravel, with the roads leading thereto, belonged in property exclusively to him.

The summons of declarator, inter alia, stated, that the pursuer in the action (Aikman) was proprietor and possessor, duly infeft, of the lands of Ross and Whitehill, lying in the parish and forming part of the barony and regality of Hamilton, and also proprietor of several houses and gardens within the burgh of Hamilton: That from time immemorial the pursuer and his predecessors in these properties had, in common with the other proprietors and inhabitants of the burgh and barony, enjoyed and exercised the right of taking sand and gravel from the river Clyde or its banks at any place found most convenient betwixt the mouth of the Avon and the mouth of the Hamilton Burn; and had also enjoyed and exercised a right of ingress and egress in various directions for that purpose, although, for a considerable time past, the principal road or entry had been by a passage which entered at or near the lower end of Hamilton Bridge on the left bank of the river, and by another passage which entered at or near the lower end of the bridge on the right bank of the river: That the ground lying contiguous to the sand and gravel on the left or western bank of the river, and consisting of several acres, extending from the bridge to the mouth of the Hamilton Burn, was originally, as well as was then, believed to be a common belonging to the burgesses and inhabitants of the town of Hamilton, who, for a period

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past all memory, had been in the practice of using it for bleaching their clothes, pasturing their cattle, and for other purposes: That for some time past the Duke of Hamilton and Brandon, whose ancestors had purchased, at different periods, the small adjoining properties, had, without any right or title whatever beyond mere tolerance, assumed and occupied that piece of ground or public property, in the same way as if it had originally belonged to him, or formed part of his own pleasure-grounds, notwithstanding the pursuer's undoubted right and title still to exercise and enjoy the free and uninterrupted right above mentioned; and that the Duke had some time ago formed the unwarrantable resolution of inclosing the banks of the river Clyde, for the illegal purpose of depriving the pursuer and others of that right, and with this view had caused a gate to be put across the roads or passages situated at the ends of the Hamilton Bridge, and had further asserted that the gravel-bank belonged in property exclusively to him, and that he was entitled to refuse all access to it, and to prevent sand or gravel being removed, except upon permission previously asked and obtained from him or those acting under his employment: That in this way an illegal and unwarrantable attempt had been made, on the part of the noble defender, to obstruct and impede the free and formerly uninterrupted access to the gravel-bank, as well as to deprive the pursuer and others of the undoubted right and privilege belonging to them of uplifting and away-taking sand and gravel therefrom at pleasure, as the pursuer and others had been accustomed to do for time immemorial: That the Duke refused to remove these obstructions from the accustomed roads or passages to the sand and gravel bank,

at least to leave the gate unlocked, to the effect that the pursuer, and others his tenants and possessors of the several heritable subjects before mentioned, might have at all times a free and ready access through the same; and to desist and cease from making any encroachments and innovations on the pursuer's rights, and from molesting or interrupting him in the free use, exercise, and enjoyment of the right of passage, and privilege of uplifting and away-taking the sand and gravel, according to use and wont: And therefore the pursuer concluded to have it found and declared, that the pursuer had, along with others, a right of access at all times to the sand and gravel bank, for the purpose of taking sand and gravel when it suits his convenience; and that the defender should be prohibited and discharged from interrupting the pursuer and others from the exercise of their right, servitude, and privilege, and be liable in damages for having shut up the access to the sand-bank.

The Duke stated in defence, 1st, That the pursuer has produced no title, by grant or otherwise, to the privilege here claimed. 2dly, That this privilege is not one of the ordinary predial servitudes recognized in the law of Scotland to which a prescriptive right can apply, and is not, from its nature, capable of that continued use of possession which is necessary to the plea of prescription. 3dly, That even if this were a right which could be acquired by prescription, the pursuer and his predecessors have not, in point of fact, acquired any such right. The defender and his predecessors have been, in virtue of their title-deeds, vesting in them the exclusive right of property, in possession of the lands comprehending the sand-bank in question ever since 1708, greatly more than forty years before the institu-

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tion of the present action; and this portion of his estate has for many years formed part of the park and pleasure-ground of the palace of Hamilton.

On the record being closed, the Lord Ordinary

June 11, 1829. "found it competent to establish a servitude, as is here "concluded for, by prescription, without any specific "grant, on the ground of uninterrupted use and pos- "session; and that the pursuer (respondent) has made "relevant allegations sufficient to entitle him to a proof; "and with these findings remits the case to the Jury "Court."

Nov. 14, 1829. The Duke having reclaimed to the Inner House, their Lordships recalled "the findings of the interlocutor "reclaimed against in hoc statu, sustain the pursuer's "title to insist, and remit to the Jury Court quoad "ultra." *

Feb. 18, 1830. Thereafter the cause was transmitted to the Jury Court, to prepare issues for trial; but a difference having arisen in regard to their preparation, the case was, of consent, "remitted back to the Court of Session, "in order to determine the extent to which the sum- "mons is relevant, and particularly with a view to the "following questions: primo, Whether, under the "summons, the pursuer, now respondent, is entitled "to plead that there is no right of any kind in the "defender to the sand and gravel bank libelled? "secundo, Whether, in this process, the pursuer is "bound to plead that he himself has a right of com- "monty in the said sand or gravel bank? tertio, Whe- "ther, under the said summons, the pursuer is entitled, "under his right of servitude or privilege, to found

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* 8 Shaw and Dunlop, 54.

" upon the possession of any persons other than him-
" self and his predecessors or authors, or his or their
" tenants?"

Under this remit, the Second Division found,
" 1st, That, under the summons, the pursuer is en-
" titled to plead that there is no right of any kind in
" the defender to the sand and gravel bank libelled;
" 2dly, That in this process the pursuer is not bound
" to plead that he himself has a right of commonty in
" the said sand or gravel bank; 3dly, That, under the
" summons, the pursuer is entitled, in support of the
" conclusions thereof, to found upon the possession of
" persons, proprietors and occupiers of houses and
" gardens in the town of Hamilton, similarly situated
" with the pursuer's houses and gardens there; and,
" with these findings, remit the case back to the Jury
" Court, reserving to the Jury Court all questions as to
" expenses hinc inde." *

The Duke of Hamilton appealed.

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July 17, 1830.

Appellant.—The respondent has not set forth any sufficient title to insist in this action. He does not allege that he holds a special grant of the right here claimed, or that the title-deeds of his estate of Ross, or of those houses in the burgh of Hamilton of which he is proprietor, contain any clause inferring any such burden on the appellant's estate. The respondent founds his claim upon alleged usage alone.

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No doubt a right of proper servitude may be acquired by a dominant tenement — as part and pertinent of lands—by continued usage, without any express grant

* 8 Shaw and Dunlop, p. 943.

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from the proprietor of the servient tenement; but the right here claimed is not one of the servitudes recognized in the law of Scotland. It is a right totally without precedent. It is not properly a servitude, the precise extent of which can be defined, but a claim to take away the solum, and to deprive the appellant of the land itself; and this alleged right to the substance of his estate is restricted within no conceivable limit. It is not confined to the use of the properties of which the respondent is owner, but may at his will or caprice, if he prevail in this action, be extended to the whole gravelly land on this part of the banks of the Clyde to any extent; and, if he find it a marketable commodity, he may not only carry it off for the use of himself for every tenement of which he is proprietor, but may dispose of it ad libitum by sale to others. It is very clear that such an anomalous right cannot be acquired by mere usage.

But even if the respondent's title were sufficient, he has stated no relevant allegation of possession. The mere fact of sand and gravel having been taken from the appellant's estate is not sufficient per se to establish such a servitude. A pursuer is not entitled to require a defender to take any issue in any action instituted for the purpose of vindicating a right. The defender in possession may stand upon his right, and is not bound to assist the pursuer's case by proving any thing. The appellant and his authors having, in virtue of their title-deeds, been in possession of the lands comprehending the sand-bank in question for a period greatly beyond forty years before the institution of the present action, he is not bound to take an issue to prove his right to this sand-bank, any more than to establish his

right to any other part of his estate; and even if he could be required in this action to prove his right to land of which he is in possession, that right, depending upon the import of feudal titles, must be decided by a court of law, and does not form a proper question for a jury trial.

Neither is the respondent entitled to what he terms "a negative issue,"—that there is no right of any kind in the appellant in the bank in question. The respondent does not any where allege that he himself is proprietor of this sand-bank; and therefore there are no termini habiles in this action to entitle him to a proof that the appellant is not proprietor. If the parties could be compelled to join issue on such a proof, the appellant might in like manner be bound to enter into similar discussions, with all and sundry, with regard to every other portion of his estate.

Further, the respondent is only entitled to vindicate the right of servitude claimed by himself and his tenants as proprietor and occupants of the estate of Ross, and of certain houses in the town of Hamilton. It is too plain for argument, that the respondent cannot found on the possession of parties similarly situated as proprietors and occupiers in Hamilton with the respondent; and even in point of form there are no termini habiles in the summons to authorize any issue with regard to the use of this alleged servitude by those who are not parties to the suit. In all predial servitudes it is necessary that there should be both a servient and a dominant tenement, and the proprietor of the servient tenement is entitled to resist any proof, as to the extension of the servitude, beyond what applies to the uses and purposes of the property of

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the pursuer of the action; nor can he, in an action insisted in by the pursuer alone, have such a right of servitude established against him in the person of others.— Stair, II. 7, 5, &c.; Sinclair, 10 Feb. 1779, (14,159); Earl of Morton, 20 June 1760; Wolfe Murray, 8 Dec. 1808, (F. C.)

Respondent.— The respondent has a good and sufficient title to pursue, and to a negative issue that there is no right of any kind in the appellant to the sand and gravel bank in question. He is also entitled to plead, *merely* that he has a privilege or servitude of taking sand and gravel, without being bound to plead that he has a common property in the said bank; and he is entitled, in support of his claim of servitude, quà proprietor of houses and tenements within the town of Hamilton, to found upon the possession of other proprietors within the town.— Stair, II. 7, 1, &c.; Ersk. II. 9, 3; Wolfe Murray, ut supra; Harvey, 8 July 1828, (3 Wilson and Shaw, 251.)

LORD WYNFORD—The respondent, who was the pursuer in an action of declarator, claimed, as proprietor and possessor, duly infeft, of the lands of Ross and Whitehill, in the parish and part of the barony and regality of Hamilton, and also as proprietor of several houses and gardens within the burgh of Hamilton, the right of taking sand and gravel from certain parts of the river Clyde, and from certain parts of the banks of that river, which the owners of houses and gardens similarly situated with those of the pursuer had. The pursuer further insisted that the ground contiguous to the sand and gravel on the western bank of the river was a common

belonging to the burgesses and inhabitants of Hamilton, who had been in the practice of using it for bleaching clothes, depasturing their cattle, and other purposes; and that for some time past the Duke had, without title, occupied that piece of common land as his own exclusive property; that the Duke had excluded the pursuer and others from access to the bank, and deprived them of the privilege of taking sand and gravel therefrom. The pursuer required to have it declared, that the pursuer and others had a right to take sand and gravel from the bank when it suited their convenience; and that the Duke should be prohibited from interrupting the pursuer and others in the exercise of their right, and be held liable to damages for having stopped the access to the bank. The defender pleaded to this summons, and the case was submitted to the Lord Ordinary, and the interlocutor pronounced by his Lordship was appealed from to the Second Division of the Court of Session, which found, 1st, That under this summons the pursuer is entitled to plead that there is no right of any kind in the defender to the land from which the pursuer claims a right for himself and others to take sand and gravel. 2dly, That in this process the pursuer is not bound to plead that he himself has any right of commonalty on the bank. 3dly, That, under the summons, the pursuer is entitled to found upon the possession of persons, proprietors and occupiers of houses similarly situated with the pursuer's houses and gardens there. This interlocutor is appealed against. It states the points for your Lordships' decision, so that it is not necessary that I should now trouble you with the interlocutor of the Lord Ordinary, or with the pleadings in the cause. Upon the first point I would observe, that if the pur-

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suer did not, by his summons, show that he had a right in the maintenance of which it was material for him to have it declared, that the defender had no right to the land from which he had excluded the pursuer, this part of the interlocutor could not be maintained. A pursuer can have no right to dispute the title of one who is in possession of lands, without showing that he either claims the land for himself, or some interest in it. To allow a title to be challenged without some opposing claim would be to encourage vexatious litigation. But the pursuer says, I have a right to take gravel and sand from a certain bank of yours; to get at it I must pass over the land that is immediately contiguous to it; and I cannot exercise my right, because you, the defender, claiming the exclusive right to that land, have prevented me from entering upon it. I, the pursuer, to whomsoever that land belongs, have a right of way over it, for the purpose of getting sand or gravel. I further say, that you, the defender, have no right to stop me, for you are not the exclusive owner of that land, but it is a piece of common land belonging to the burgesses and inhabitants of Hamilton, of whom I am one. If the noble defender brought an action against the pursuer for passing over this land, might he not justify the supposed trespass on both or either of those grounds? And if he can, he might make them the foundation of an action of declarator. He would not have been a trespasser if he was exercising a right of way, and still less so, if the person who attempted to prevent his using the way had no right to the lands over which the supposed trespasser passed, but which lands actually belonged to himself and others. The two answers are consistent, and both just and legal answers to the action. A party

choosing to have a right declared of which he is deprived before he formally declares it, may, I apprehend, have his action of declarator. I think, therefore, my Lords, there is no ground of appeal against this first branch of the interlocutor complained of. These observations are an answer to the objections made to the second branch of this interlocutor. To the third branch there are two unanswerable objections. It affirms the claim in the summons to take sand and gravel generally for any purpose. The case to which your Lordships have been referred by the learned Counsel proves that such a claim cannot be supported by the law of Scotland. I remember that whilst I held the office of Attorney General to the Duke of Cornwall certain tenants of the duchy lands took granite and slates from the quarries of the Duke, and sent them to London for sale. I proceeded against them in the Court of Chancery for an account of all the granite and slates which they had taken from the quarries and applied to any other purpose than that of employing them on the estate held of the duchy. They set up custom for the tenants of the duchy to take slates and granite from the quarries of the Duke, and dispose of them in any manner they pleased, and asked for an issue to ascertain this custom. I insisted that the custom could not have a good beginning, and was on that account illegal. The Noble Earl who for so many years presided in this House held, that the custom set up was illegal, refused the issue, and decreed that an account should be taken as prayed. Although the decisions of English courts are of no direct authority on questions of Scotch law, a concurrence of Scotch and English decisions prove that the principles on which they are founded are just. It has been insisted at the bar that

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whatever right may be granted may be prescribed for. The converse of the proposition is universally true, that whatever may be prescribed for may be granted. But a man may make a foolish grant, which will bind him and his successors; but it would not be right to presume that he had made such a grant on any evidence short of the grant itself. Lawyers often say that a right claimed by prescription is so absurd or unjust that it never could have been granted by the predecessors of him against whom it is claimed, and on that ground deny the validity of the prescription. They could not say that of a grant when produced: the instrument would repel the presumption of its non-existence. It is often not true that what may be granted may be prescribed for. We can believe that a lord who grants an estate to a vassal may grant him the means of repairing or improving that estate; he may give his vassal the right to take sand or gravel to be employed on the estate granted. There is a reasonable ground for presuming such a grant, and such a limited right of taking sand or gravel may be prescribed for. But is it possible to suppose that any man granting a house or other such property would confer on the grantee a right to take as much gravel as he pleased, and to sell it or dispose of it for any purpose but the repair or improvement of the estate granted? The tenants under such a grant might take away all the sand and gravel, and leave none for the lord or the tenantry. The decision referred to shows that such an unlimited grant is not consistent with Scotch law, and reason tells us that this decision is right. I therefore advise your Lordships to reverse the part of the interlocutor which affirms that general claim. The interlocutor further affirms that part of the sum-

mons which founds upon the possession of persons, proprietors and occupiers of houses and gardens in the town of Hamilton, similarly situated with the pursuer's houses and gardens there. The pursuer, as the owner of Ross and Whitehill, may prescribe for sand and gravel for the use of those estates; as owner of the other houses which he has in Hamilton, he may prescribe for sand and gravel for the use of them; but then he should state in right of what houses he prescribes, that the defender may know what claim he is called on to answer, the jury may know what claim they are to try, and the record may afterwards show what claim is established or disallowed. He may insist on a custom for all the owners of houses and gardens in Hamilton to take sand and gravel from the place in question; but he only claims this right as belonging to houses similarly situated with those of the pursuer; he does not specify which houses belonging to the pursuer have the character which confers this right. Do the words "similarly situated" refer to some particular part of the town in which the houses stand, or to the size of the houses, or to the number of windows that they contain, or to what? Your Lordships must perceive, that as judicial proceedings are not only to determine but to perpetuate the evidence of rights that are ascertained by the judgments of courts, the pleadings mentioned in this interlocutor do not describe the pursuer's claim with the precision that is necessary when you are putting the claims of litigant parties on the records of courts of judicature. To try this case fairly before the jury, it will be necessary to reverse the interlocutor of the Lord Ordinary, and also that of the Court, and to send this

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case back to the Court of Session, with your Lordships' direction as to the further proceedings.

The House of Lords ordered and adjudged, "That the "interlocutor of the 14th day of November 1829, com- "plained of in the said appeal, be, and the same is hereby "reversed: And it is further ordered and adjudged, That "the interlocutor of the 17th day of June 1830, also com- "plained of in the said appeal, in so far as it finds that, "under the summons, the pursuer is entitled, in support "of the conclusions thereof, to found upon the possession "of persons, proprietors and occupiers of houses and gar- "dens in the town of Hamilton similarly situated with the "pursuer's houses and gardens there, be, and the same is "hereby reversed: And it is declared, That the respondent "has a title only to insist in this action as one of the inha- "bitants of Hamilton, or as owner of certain lands therein, "to the effect of having it tried by a jury whether or not "he has a right of servitude to take sand and gravel from "the ground in question, in right of and for the use of "his own properties: And it is further ordered, That the "cause be remitted back to the Court of Session, to do "therein as shall be just and consistent with this judgment "and declaration."

RICHARDSON and CONNELL — MONCREIFF and WEBSTER, — Solicitors.