DYCE, ... APPELLANT.

LADY JAMES HAY, . RESPONDENT (*a*).

1852.
25th, 27th, and 28th May.

There can be no prescriptive right in the nature of a servitude or easement so large as to preclude the ordinary uses of property by the owner of the lands affected.

Semble—That where a claim in the nature of a servitude or easement is incapable of judicial control and restriction, it cannot be sustained by prescription.

It does not follow that rights sustainable by grant are necessarily sustainable by prescription.

The law of Scotland agrees with the law of England in holding that the right to village greens and playgrounds stands upon a principle of original dedication to the use of the public.

Where new inventions come into use they may have the benefit of servitudes and easements; the law accommodating its practical operation to the varying circumstances of mankind.

Special order for the payment of costs.

ROBERT DYCE, a magistrate of Old Aberdeen, brought an action against Lady James Hay, alleging that he and the other inhabitants of New Aberdeen, Old Aberdeen, and the vicinity thereof, and the public generally, had used and enjoyed from time immemorial a certain footpath running along the bank of the River Don, on the Defender's estate; and further and more particularly alleging that a certain piece or strip of ground between the foot-path and the river, to the extent mentioned in the pleadings, had been from time immemorial used and resorted to by the Pursuer and the other inhabitants of the places aforesaid "for the purpose of recreation and taking air and exercise by walking over and through the same, and resting thereon as they saw proper." The summons concluded to have it declared that the foot-path in question was a public foot-path; and secondly that the piece or strip of ground aforesaid "was open and free to the Pursuer and others, and that they were entitled at all times to enjoy and recreate themselves thereon without let or hindrance from the Defender, for the convenience, comfort, and health of the Pursuer and others aforesaid, their families and dependents."

To this action a defence was put in by Lady James Hay, asserting that the Pursuer's claim imported a species of servitude, easement, or right, unknown and repugnant

(*a*) Reported Second Series, vol. xi. p. 1266.

to law, and supported by no legal or valid title on the part of those for whom the privilege was claimed.

The Pursuer proposed the following issue for trial by jury, namely:—

Whether from time immemorial the piece of river-bank, in the pleadings mentioned, had been resorted to, possessed, and enjoyed by the inhabitants and heritors of Aberdeen, Burgh of Old Aberdeen, village of Bridge of Don, and vicinity thereof, or of Old Aberdeen separately, or in conjunction with one or more of these places, for the purpose of recreation, and taking air and exercise, by walking over and through the same, and resting thereon, as they saw proper.

The *Lord Ordinary* (Lord *Murray*), instead of deciding the case himself, reported it to the Second Division, stating that the issue was objected to by Lady James Hay upon two grounds:—

1. That the Pursuer has no right, in respect of the want of any dominant tenement, to take such an issue.
2. That the servitude claimed is not a servitude recognised by the law of Scotland (*a*).

The Second Division disallowed the proposed issue, and repelled that conclusion of the summons which prayed a declaration that the piece or strip of ground aforesaid was subject to the claim stated in the summons. Mr. Dyce thereupon appealed to the House.

Mr. *Rolt* and Mr. *Johnstone*, for the Appellant, contended that the servitude claimed had been frequently given effect to by the law of Scotland, and cited

(*a*) Voluptatis causa servitus constitui non posse censetur. Cæpolla de servitutibus tam urbanorum quam rusticorum. Geneva, 1745. Huber præl. de Servit. The servitude here mentioned seems to correspond with the *servitus spatiandi* mentioned in the pleadings.

Sinclair v. *Dysart* (*a*), *Cleghorn* v. *Dempster* (*b*), *Earlsferry* v. *Malcolm* (*c*), *Dundee* v. *Hunter* (*d*), *Home* v. *Young* (*e*), *Fitch* v. *Rawlings* (*f*).

In support of the title to sue, they cited *Mercer* v. *Reid* (*g*), *Thorburn* v. *Charteris* (*h*), *Aikman* v. *Hamilton* (*i*), *Abbott* v. *Wheatly* (*j*).

Mr. *Anderson* and Mr. *Pirie*, for the Respondent: The servitude here asserted is discountenanced by Scotch law—*Harvie* v. *Rodgers* (*k*), *Fergusson* v. *Sherriff* (*l*), *Breadalbane* v. *McGregor* (*m*).

On the question of title, they cited *Dunse* v. *Hay* (*n*), *The Burntisland case* (*o*), *The Kilmarnock case* (*p*), *Home* v. *Young* (*q*), *Dempster* v. *Cleghorn*.

Lord Chancellor's opinion.

The LORD CHANCELLOR (*r*):

The question brought up by this appeal is represented to be one of great weight and importance both as regards the inhabitants of towns, and the owners of property upon whose soil a right such as that here in contest may be claimed.

Nobody enjoys a right of foot-path across a field not inclosed who has not constantly himself been guilty of wandering, and who has not at all events seen others wandering out of the line of path, and upon the general property through which it runs. In such cases foot-passengers, who have no right to wander, take care not to do much harm; and the owners of property, knowing

(*a*) Morr. Dict. 14519. (*b*) Morr. Dict. 16141; 2 Dow. 40.
(*c*) 7 Shaw, 755. (*d*) 6 Second Series, 12.
(*e*) 9 Second Series, 286.
(*f*) 7 Petersdorff's Abr. 486; 2 H. Black, 394.
(*g*) 2 Second Series, 520. (*h*) 4 Second Series, 169.
(*i*) 6 Wil. & Sh. App. Ca. 64. (*j*) 1 Levinz.
(*k*) 4 Murr. Jur. Rep. 25.
(*l*) 6 Second Series, 1373; 11 Second Series, 1281.
(*m*) 7 Bell's App. Ca. 43. (*n*) Morr. Dict. 1825.
(*o*) Cited 9 Dun. 293. (*p*) 5 Brown's Supp. 406.
(*q*) 9 Second Series, 286. (*r*) Lord St. Leonards.

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how difficult it is to restrain men without an actual fence within a certain number of feet, have usually submitted to the inconvenience without making any attempt to repress it.

It is therefore of great importance to the public generally having rights of foot-path, that it should be ascertained, whether, in the exercise of such rights, their wanderings and strollings out of the line of a foot-path will found a claim such as that advanced in the present case. For my own part, I believe it would be more injurious than beneficial to the public if such rights could be gained in such a way.

But, my Lords, the right of recreation on this strip or piece of land adjoining the foot-path is also claimed on the foundation of an independent privilege unconnected with the foot-path. In other words, your Lordships have to consider whether the right of recreation may not have existed—and whether it might not have been maintained—even although there had been no foot-path in the case.

Now, before your Lordships enter into an examination of the particular law which is applicable to this case, it is necessary to consider the general nature of the right which is claimed. The property over which this right is claimed is an inclosed piece of ground. It is near the mansion-house of the Respondent. The Appellant asserts a right of way through that inclosure. The right of way, therefore, would so far account for the public constantly having had access to that particular field. And it is exactly that piece of ground upon which naturally and almost inevitably encroachments would have been made; the strip, as it is called, extending in length about half a mile, of very moderate breadth, between the foot-path and the River Don, in some places, I believe, not more than a couple of yards, in other places twenty yards, in breadth. It is indeed

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a mere strip of ground, but of great importance to the Respondent's family.

What is insisted upon, therefore, is of this extensive nature, that the Pursuer claims as an inhabitant, but, in fact, on behalf of all the Queen's subjects, the right to go at all times upon the inclosed soil of a portion of the Appellant's property near the mansion-house, for the purposes of recreation just as they think proper. Now, that I conceive is a claim so large as to be entirely inconsistent with the right of property; for no man can be considered to have a right of property, worth holding, in a soil over which the whole world has the privilege to walk and disport itself at pleasure. I asked the learned counsel at the Bar, what use could be made of this ground by the owner if it were subject to this universal claim; and whether there were cattle for example put upon it? It was in answer said, "Oh, yes! cattle might be put there." My Lords, I think that black cattle would very ill comport with the comfort of the citizens in their recreation on this narrow strip of ground during the summer season. Then we were told that they might mow the hay. I am afraid that no grass capable of being converted into hay would grow under the feet of the inhabitants of Old Aberdeen, and the other populous places in the pleadings mentioned. In short, I cannot myself imagine the use to which this property could be turned, if that great power claimed on the public behalf was to be held valid. But then, the Appellant, finding himself pressed on this point—finding that he could not support his demand on behalf of the public generally—restricted it to Old Aberdeen in connection with some of the other places mentioned in the pleadings. But why did he alter his claim? Not because the facts had been altered, nor because the right had been altered; but because he found that

the law would be a little too strong for a demand of this large and unprecedented nature to be tolerated.

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When you look at the number of persons, some hundreds of thousands perhaps, for whom this right is claimed, with their families and dependents, it is in effect a demand on the part of the public at large to resort to this spot for recreation, exercise, strolling, and lying down particularly; for when they walk or get tired, they claim a right of reposing themselves on the surface of the soil. In this respect I apprehend the case varies from a great many, and indeed from all the cases that have been decided. There are cases indeed in which the law of Scotland seems to have been exceedingly chary in establishing rights approximating in character to the present. Your Lordships have been pressed very much with the decisions in favour of the right of golf-playing; but although golf-playing is a healthful exercise, which the Courts would be inclined to cherish, it was not established without difficulty; and it was fenced by fetters when allowed; for even where the right had been enjoyed from time immemorial, the Court, by its own power, restricted the exercise of the right within limits and boundaries, and ordered those limits and boundaries to be defined and set out. In the case now before your Lordships, the Appellant suggests that the right claimed by him may also be restricted by the Court; so that what is claimed is a general right to walk over this ground, and to seek recreation and repose on it for all mankind, with a power in the Court of Session to prescribe the manner in which the enjoyment shall take place! Your Lordships must, however, at once perceive that if such an universal privilege were conceded, to restrain or regulate the mode and limits of enjoyment would be altogether impracticable.

Now, my Lords, before I enter upon the cases, there

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is one thing as to which I must particularly guard myself, and I must anxiously beg that the House may not be understood as expressing any adverse opinion; I mean that right to which the right in question in this case has been improperly assimilated; the right of village greens and village play-grounds, the enjoyment of which has been dedicated to the public. One of the learned counsel for the Appellant seemed to argue that there could be no such dedication by the law of Scotland. I think he withdrew from that position afterwards. I pressed him upon it, and it is now admitted to be clear that the law of Scotland in that respect agrees with the law of England. If there be a piece of ground uninclosed (not that I mean to say inclosure would make any difference, unless there was an exercise of adverse right); but I say, if there be a piece of ground uninclosed, and dedicated from time immemorial to the public, from which a custom may be laid for sports generally, or for village recreations, nobody, I trust, will suppose that such rights can at all be affected or disturbed by any decision at which your Lordships may arrive upon the present appeal. Those rights will remain untouched, and are unassailable, be the fate of this case what it may.

My Lords, there are a good many other cases which I think we should likewise take care to except. The Appellant's authorities are, in fact, not properly rangeable under the head of law, which your Lordships are now called upon to consider. Some of the most important of them are corporation cases, where the inhabitants of towns claimed rights as against their corporation; that corporation being in fact trustees for the inhabitants; and the claim was one not between the corporation and the public, but between the governing body of a corporate place and the bulk of its own population. Such cases have, and can have, no bearing on the present.

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My Lords, there has been considerable argument upon the questions, whether it is possible for Mr. Dyce to represent the persons on behalf of whom he claims; and whether, looking at the law of Scotland, which in that respect differs from the law of England, he can be considered as having the necessary dominant tenement which will apply to the servient tenement, and support the right. I think your Lordships need not go into these points, which, however, it would be necessary to consider; as well as a great many other, and some of them very grave questions, respecting the Appellant's title,—if your Lordships were about to decide in his favour, and against the judgment of the Court below.

The main authority, and indeed after great attention I am bound to say the only authority, in support of the Appellant, is the *Dundee case* (*a*). But that case was one of express reservation by the very terms of the infeftment; and I am not at all prepared to say that if the proper forms had been adhered to, such a right might not have been granted; but I may here observe that it does not follow, that, because a right may be granted—that is, because it is grantable by law,—therefore it may be prescribed for.

I apprehend, my Lords, that the case of *Home* v. *Young* does not touch the question before you; but I entirely agree with the learned Judges below that there is no rule in the law of Scotland which prevents modern inventions and new operations from being governed by old and settled legal principles. Thus, when the art of bleaching came into use, there was nothing in its novelty which should exclude it from the benefit of a servitude or easement, if such servitude or easement on other legal grounds was maintainable. The category

(*a*) *Dundee* v. *Hunter*, *suprà*, p. 307.

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of servitudes and easements must alter and expand with the changes that take place in the circumstances of mankind. The law of this country, as well as the law of Scotland, frequently moulds its practical operation without doing any violence to its original principles. But the argument to which I am referring can have no application to this case; because I fancy no one supposes that recreation, taking the air, and strolling, are to be regarded as any particular novelties; or that if you are tired in a meadow, and lie down to repose yourself, the refreshment thence arising can reasonably be described as an invention. The case of *Home* v. *Young*, therefore, in which these arguments were used, has nothing to do with the present.

My Lords, the authorities appear to be as conclusive for the Respondent as they are against the Appellant; and among them the first to which I would refer your Lordships is the case of *Dunse* (*a*), where it was held in effect that a right of servitude could not be sustained by the inhabitants of a town generally without tenements to support it; and that the right must be measured by the property. In England we know that the right of pasturage is by *levant* and *couchant;* that is, it is governed by the number of cattle which you have the means of housing and providing for in winter.

The next case which supports the Respondent is that of the *Marquis of Breadalbane* v. *McGregor;* which is very important. There you may say the right was claimed for the whole world,—the allegation having been that every body coming from the north to the south was entitled to use certain resting stances on a drove road passing through the estate of Lord Breadalbane. The Pursuers, moreover, asserted that

(*a*) *Dunse* v. *Hay*, *suprà*, p. 307.

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as the distance was too great for their cattle to travel without rest, they had therefore a right to stop at convenient distances, and to depasture them on the land adjoining the stances whenever they found it necessary to do so. The Court of Session so far gave way to this pretension, as to send it for trial by jury; but your Lordships, upon very sufficient reasons, as I apprehend, decided that no such universal right could exist. That there had been encroachments by the cattle in their progress from the north to the south, and if they returned, as they might do, from the south to the north might have been the case; but this House held that that circumstance could found no right whatever. Accordingly your Lordships stopped the trial of the issue which had been directed. Now, if you will apply the same principle to the present case, and if, instead of cattle, you take the gentle inhabitants of Aberdeen and its vicinity, you will find that it fits much more closely than at first might be imagined.

My Lords, the next case is an infinitely stronger one, and is a clear decision, I consider, upon this very question; I mean the case of *Harvie* v. *Rodgers*. Lord *Moncreiff*, who was himself counsel in the cause, thus explains it:—

> The Pursuer did at first claim a right for the public of strolling or wandering generally over the banks of the Clyde within Harvie's grounds. But this was resisted, and the Court refused to grant any issue on it; and the only issue sent to trial was distinctly of a public footpath from the City of Glasgow or the Green, to the village of Carmyle. This goes directly to the point, that though there may be a right of road to the public through private grounds, it is as a road or passage only, and for no other purpose. A *servitus spatiandi* over open ground which has in some manner been devoted to public use, is also intelligible and known to the law; but such a right as that here claimed over private inclosed grounds, not made for the public, but for private parties, and having no written title connected with the grounds, for merely walking over them, and resting thereon according to their pleasure, is a thing of which, I believe, there has hitherto been no example.

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My Lords, some important observations were made by Lord *Eldon* in this House, in the case of *Dempster* v. *Cleghorn,* where a right of playing golf was claimed over certain property; and the question arose, whether the owner could or could not keep rabbits on the soil, to the destruction or interruption of this game of golf. Lord *Eldon* remarked that the question was, "whether a servitude could be supported which subverted the use of the property over which it was claimed?" On a subsequent day, he adverted to a point upon which I have already observed. He said that "certainly it was a different question whether such a title could be set up by prescription, and whether it might be reserved by bargain." Upon another point to which I have also called your Lordships' attention, he held "that it was a strong thing to say that all who chose to do so might play at golf on a man's ground; and for that purpose destroy all the produce which it was best calculated to yield, and prevent its being used for those ends to which alone it could be applied beneficially for the owner." It is quite clear, therefore, that the impression on the mind of Lord *Eldon* was, that no such right could be claimed as would be inconsistent with the rights of property.

My Lords, I think, therefore, that by the law of Scotland, this is a right which cannot be maintained. I think, moreover, that it is a right which ought not to be maintained.

The Appellant has endeavoured to invoke the aid of the law of England in his favour; but I apprehend the law of England is more decidedly against him even than that of Scotland; by which last, however, it falls upon the House to be governed exclusively in the present instance, and in accordance with which, as I understand that law, I now humbly advise your Lordships to dismiss this appeal, and to affirm the interlocutors complained of.

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IT IS ORDERED and adjudged, that the said petition and appeal be, and is hereby dismissed this House, and that the said interlocutors therein complained of, be, and the same are hereby affirmed: and it is further ordered, that the Appellant do pay or cause to be paid to the said Respondent the costs incurred in respect of the said appeal, the amount thereof to be certified by the Clerk Assistant: and it is also further ordered, that unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be and is hereby remitted back to the Court of Session in Scotland, or to the *Lord Ordinary* officiating on the Bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.