3d, 4th, and 5th exceptions, were not insisted on, as the cancellation of the shares, if it had any effect, might receive it in the accounting on that head, of which the pursuers admitted the competency, notwithstanding the verdict. This, my Lords, appears to me to be conclusive upon this head.

The appellant's remaining objections are technical ones, raised by the bill of exceptions on the trial of the second issue. The first objection was to the reception in evidence of the register of shareholders. The law enables companies to produce their registers as evidence, but provides, that the book should be authenticated by the common seal of the company being affixed thereto. The objection was, that the register was contained in several volumes, and that the last of the series only had the common seal of the company affixed to it. There were several very bulky volumes—they followed each other alphabetically and consecutively, and manifestly formed parts of the same series—and the last volume contained not only a completion of the register, but (which was not required by the act of parliament) at the end of it, and before the seal, a recapitulation of the contents of the preceding volumes. They were laid upon the table of this House, and every volume was a ponderous one. The contention was, that instead of being enclosed in several bindings for the sake of convenience, they ought to have been bound in one volume, which would have rendered it impossible to make use of them in the course of business. I think, my Lords, it would be contrary to the real meaning and spirit of the act, to put this restricted construction upon it. These volumes did together constitute a book containing a register of the shareholders, to which the common seal of the company was properly affixed. I rather think, that if the common seal had been affixed to every volume, the appellant would have considered the register still more objectionable.

The next exception to the ruling of the Judge was, that the evidence of the appointment of the finance committee, which was necessary in order to prove the call, was not admissible, because a minute of a board of the 18th of August 1846, at which the finance committee was appointed, was not signed. Now, this board was adjourned to the 19th of the same month, and the minute of the adjourned meeting is signed. The secretary to the company swore that it was one continuous meeting and minute, and that the next meeting was on the 1st of September, and that the minute of it begins—"The minutes of the last meeting, held 18th of August, read and confirmed," treating the 18th and 19th as one meeting. This is confirmed by the books. At all these meetings, Mr. Astell was in the chair, and he signed both the minutes of the adjourned meeting of the 19th of August, and of that of the 1st of September; and on the 27th of September, at a meeting the minute of which was regularly signed by the chairman, all committees were re-appointed. And all these proceedings took place before the first call. The objection was founded upon the 101st section of the Companies Clauses Consolidation Act, which required entries of minutes to be signed by the chairman of each meeting, and made such entries evidence. But, independently of the evidence furnished by the books of the company, the fact of the due appointment of the finance committee was proved by a witness, and his evidence was admissible evidence, for the act confers a privilege, but does not exclude other evidence of the fact. It is not necessary to make any further observations on these points, inasmuch as the validity of the minutes as signed, and the admissibility of the other evidence, will be ruled by your Lordships in favour of the respondents, upon the authority of *Miles* v. *Bough*, (3 Queen's Bench Reports, 845.)

The result is, that all the objections urged by the appellant's counsel at your Lordship's bar have failed, and therefore I beg to move that the appeal be dismissed with costs.

Interlocutor affirmed with costs.

First Division.—Law, Holmes, Anton and Turnbull, *Appellant's Solicitors.*—Baxter, Rose, and Norton, *Respondents' Solicitors.*

MAY 28, 1852.

ROBERT DYCE, *Appellant, v.* The Right Hon. ELIZABETH FORBES (LADY JAMES HAY), and Husband, *Respondents.*

Servitude—Easement of Recreation—Title to Sue—Process—*In an action of declarator brought by a party designed as residing in, and a magistrate of, a royal burgh, and founded on alleged prescriptive usage, to have it found that he had right to a servitude of walking and recreation over a piece of ground in the vicinity of the burgh.*

HELD (affirming judgment), *that such alleged servitude is not recognized in the law of Scotland, being incompatible with the ordinary use of the soil, and that there was no sufficient title to sue.*[1]

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[1] See previous report, 11 D. 1266; 21 Sc. Jur. 506. S. C. 1 Macq. Ap. 305; 24 Sc. Jur. 465.

The present action was brought in February 1848 by the appellant, as "residing in, and at present one of the magistrates of, the burgh of Old Aberdeen," to have it found that a piece of ground forming part of the respondents' estate of Seaton, situated on the south bank of the river Don, at a short distance from Old Aberdeen, was subject to the servitude indicated in the summons of declarator. The summons described the servitude to be, that the footpath and a considerable portion of the bank of the river shall be used and enjoyed by the public for all the ordinary purposes of recreation.

The Court approved of the following issue for trial by a jury: Whether, for forty years prior to the 1st of February 1848, or from time immemorial, there existed a public footpath or footway through the lands or property belonging to the defenders, and along the south or south-eastern bank of the river Don, from the commutation-road at or near the bridge of Balgownie, to a point on the line of the march, near to Gordon's Mills, which separates that portion of the defenders' lands or estate presently held on lease by Messrs. Milne, Cruden and Company, and Messrs. William Pirie and Company, from the rest of the defenders' lands and estate; and from that point to the commutation-road leading from Old Aberdeen to the village of Cotton and that neighbourhood, as also to the ferry across the said river, situated a short way below Gordon's Mills, and to these mills themselves, or any of these places? The Court refused to put another issue to the jury as to whether the whole river bank had been enjoyed by the public for time immemorial.

The *pursuer* appealed to the House of Lords, maintaining in his *printed case* that the above interlocutor should be reversed for the following reasons:—1. The right of servitude or use of property claimed by the appellant over the strip of ground within the lands of Seaton, is maintainable on principles which have been frequently recognized and given effect to in the law and practice of Scotland—Stair, 2. 7. 1, 2, 9, 13; Ersk. 2. 9. 1, 2, 3; Bell's Prin. §§ 979 to 993 inclusive; *Sinclair* v. *Mag. of Dysart*, M. 14,519; *Carmichael* v. *Town of Falkland*, M. 10,916; *Jaffray* v. *Duke of Roxburgh*, M. 2340; Voet, 8, 3, 12; *Cleghorn* v. *Dempster*, M. 16,141; and *Mag. of Earlsferry* v. *Malcolm*, 7 S. 755; 11 S. 74; *Mag. of Dundee* v. *Hunter*, 6 D. 12; *Home and Milne* v. *Young or Gray*, 9 D. 286; Petersdorff's Abridg. vol. vii. p. 486, title "Custom." 2. The appellant possesses, and has set out, a good and sufficient title to entitle him to sue for the privilege or right of servitude in question.—*Mercer* v. *Reid*, 2 D. 520; *Mercer* v. *Rutherford*, 2 D. 616, and *Thorburn* v. *Charteris*, 4 D. 169; *Aikman* v. *Duke of Hamilton*, 6 W. S. 64; Bell's Prin. § 981; Stair, 2, 7, 9. 3. The interlocutor appealed from is erroneous, inasmuch as it is rested on an assumption of vagueness in the appellant's claim, and on other considerations, which cannot *hoc statu*, and before there has been any trial of the disputed and conflicting averments of parties, be given effect to.

The *respondents* in their *printed case* supported the interlocutor, on the following grounds:—1. Because the servitude claimed by the appellant is not known to, or recognized by, the law of Scotland.—Ersk. 2, 9, 39. Bell's Prin. 5, §§ 979, 981; Stair, 2. 7. 1—10. *Harvie* v. *Rodger*, *supra;* Statement of Lord Moncreiff in *Ferguson* v. *Sheriff*, 6 D. 1373; *Marquis of Breadalbane* v. *M'Gregor*, 7 Bell, Ap. 43; *Dempster* v. *Cleghorn*, M. 16,141, and *Mag. of Earlsferry* v. *Malcolm*, *supra*. 2. Because the appellant has no title under which he can maintain any claim of servitude.—*Feuars of Dunse* v. *Hay*, 1732, M. 1825; *case of Burntisland* in 1812, referred to in note of Lord Cunninghame in *case of Eyemouth*, 9 D. 293; *Kilmarnock*, 5 Brown's Sup. 406; *Home and Milne* v. *Young*, *supra; Sinclair* v. *Town of Dysart*, *supra; Wolfe Murray* v. *Mag. of Peebles*, Dec. 8, 1808, F. C.

Rolt Q.C., and *Johnstone*, for appellant. — It is said such a servitude as the present is unknown to the law of Scotland, because none of the institutional writers mentions it; but these writers do not profess, nor was it their object, to give a complete list of servitudes. They merely give instances of the general principle, which they allege to be this,—that servitudes are as various as the purposes to which land may be applied. To say that there is a certain definite number of servitudes, is absurd, for the habits of society change; and as the law adapts itself to these, it is obvious that no writer could possibly lay it down, that at an early period there were only a few servitudes, and that no others could ever exist or arise in all time coming. The reverse is deducible from the language of the authorities.—Stair, 2. 7. 1, 2, 9, 13; Ersk. Inst. 2. 9. 2, 3; Bell's Prin. §§ 979-993. The only question seems to be, when a servitude is claimed, whether it is for a lawful purpose, and whether there has been use or custom. Lord Cockburn (11 D. 1284) says,—though a servitude of recreation may arise a little later in the progress of society, it is as natural, legal and useful, as any other. It is said, also, this is a servitude *spatiandi*, and implies that the surface of the ground must be kept so as not to interfere with its enjoyment, but the same may be said of bleaching and golf-playing. It may be said, that the servitude could be enjoyed as well by cutting off a piece of the ground and appropriating it to the use of the inhabitants; but, if the privilege should be abused, the proper mode would be to apply to the Court of Session to prescribe the limits or conditions under which the inhabitants should use the ground. It may be doubted whether the Court has that power; but, at all events, it is not alleged to be necessary here. The right of walking and making parades over another's ground,

was recognized in *Mag. of Dundee* v. *Hunter;* the right of bleaching, *in Sinclair* v. *Town of Dysart;* and of golfing, in *Cleghorn* v. *Dempster*, and *Mag. of Earlsferry* v. *Malcolm;* while in *Home* v. *Young*, the inhabitants of a burgh were entitled to claim a servitude *spatiandi*, in the form of using a bleaching-ground and well. Not only, therefore, is a servitude of this kind known to the law of Scotland, but the appellant had a good title to sue. The character in which he claimed, was that of an inhabitant of a definite community, and that was quite sufficient.—*Sinclair* v. *Town of Dysart.* In the latter case, it was a corporation which sued; but here, also, the corporation of Old Aberdeen might have sued—and, therefore, a member of that corporation might. Our title is by no means vague, and a similar title has often been sustained.—*Mercer* v. *Reid*, *Thorburn* v. *Charteris*, *Home* v. *Young*, *Aikman* v. *D. of Hamilton—supra.* The right is not claimed for all the world, as was the case in *Breadalbane* v. *M'Gregor*, but merely for the inhabitants of a town. A custom alleged for a community, is a good ground of action both in Scotland and England. Thus, in England, it was held a legal custom for the inhabitants of a parish to play at proper games and sports—*Fitch* v. *Rawling*, 2 H. Black. 394; and also to go and dance on another's ground—*Abbott* v. *Weekly*, 1 Levinz, 177.

[LORD CHANCELLOR.—Yes; but in the case of a common playground of a village in England, the ground is held to be dedicated to the children or the inhabitants, and it is not necessary to allege the property in the ground to be in them.]

In this case, we admit the property in the soil seems to be in the respondents; but all that is necessary to be ascertained in the present appeal is, whether such a right can exist in law. The question of the property in the soil will afterwards be an element in the inquiry, whether the right does exist in the circumstances of the present case. It is quite possible that the owner of this ground may have dedicated it for the recreation of the inhabitants of Old Aberdeen.

Anderson Q. C., and *Pirie*, for respondent.—The appellant must prove, not only that there is such a thing in the law of Scotland as a servitude of recreation, but that it can be acquired by use and prescription. There is no trace in any authority of either doctrine; and such a right so acquired over the land of a third party, would be totally inconsistent with the ownership of such land. The appellant sues as an inhabitant,—it is a personal servitude he claims; and it is not in respect of any patrimonial interest, nor is it alleged that there has been any grant or contract to serve as the origin of the right. Now, the servitudes familiarly known to the law of Scotland, are quite distinct from other mere uses of property—Bell's Prin. § 979; but neither Stair nor Erskine, nor any recorded case, countenance a *servitus spatiandi.* If such a servitude were legal, the owner of the land would be bound to keep the surface of the soil in such a state as would not interfere with the recreation, walking and lying down of those who frequented it,—which would, in fact, supersede any useful purpose to which the land might be applied. The authorities are all against this doctrine. In *Harvie* v. *Rodger* this very point was raised, for a privilege of strolling was claimed there over a piece of ground on the banks of the Clyde, and an issue was asked to try that right, but it was refused as an impossible foundation for any such servitude. A right of footpath is quite distinct from such a right, and it is strictly construed. Thus in *Ferguson* v. *Sheriff*, a right of way along a river bank, implied no right to angle over the interjected strip of ground. So, in *Breadalbane* v. *M'Gregor*, a right to a drove-road implied no servitude to graze the cattle on the adjoining grounds. In *Dempster* v. *Cleghorn*, the right of golfing was dealt with as a right which had been reserved by former owners of the land in favour of themselves. In *Mag. of Earlsferry* v. *Malcolm*, a right of golfing was claimed along with a *jus spatiandi;* and while the former was allowed, the latter was discountenanced and rejected. Not only is the servitude unknown to the law, but the pursuer alleged no title sufficient to sustain it, even if it were held to be legal. He merely alleges that he is an inhabitant, and indicates no *prædium dominans* to which the servitude may be applied. A servitude must exist in respect to some property, and not in respect of the person.—*Feuars of Dunse* v. *Hay: per* Lord Cuninghame in *Home* v. *Young—supra.* The latter case was one of ground dedicated for centuries to the use of the inhabitants; and it was found an inhabitant had a good title to the use of a bleaching-ground and well. But that was not the case of a servitude established against a stranger third party, for the property over which the right was claimed was within the territory of the burgh itself.

LORD CHANCELLOR ST. LEONARDS.—My Lords, in this case, a very important question of law has been ably argued at your Lordships' bar, and now calls for your Lordships' decision. The right as originally claimed in the Court of Session, was by Mr. Dyce, who represented himself as being at present one of the magistrates of the burgh of Old Aberdeen, against Lady James Hay, and Lord Hay her husband; and the claim was of this nature: He claimed a right of way through certain property belonging to Lady Hay and Lord James Hay; and he claimed "that, *separatim*, and independently of the said footpath, road or way, being used and enjoyed as aforesaid, the whole river bank or piece of ground lying between the southern margin of the ground referred to as said path, and the river, inclusive of the space occupied by the said path, from the point where the path leaves the commutation-road at or near to Balgownie Bridge, as aforesaid, up to a place on said bank a short way below the mansion-house of Seaton,"—which

shews, that, in point of fact, this ground, the right over which was claimed, was near the mansion-house of Seaton; and it is explained by one of the expressions of one of the learned Judges in the Court below, that this ground formed what he called part of the lawn of the house, which I do not find proved in any part of the proceedings. Then he goes on to say, still describing it, "and opposite, or nearly so, to the house of Kettoch's Mill, where there is now, and has been for a long time back, a rough fence or paling across the said bank, with a gate or turnstile, or other passage for foot-passengers therein, being a distance or stretch of 823 yards or thereby,"—(that is, for the length of about half a mile)—"has been for time immemorial, or for 40 years and more, used, resorted to, possessed and enjoyed by the pursuer, and the other inhabitants and heritors of Aberdeen, Old Aberdeen, village of Bridge of Don, and the 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." Now, that was the claim; and it was prayed accordingly, that it might be found and declared that that portion of the river which has already been described, "is open and free to the pursuer and others foresaid; and that they are entitled, and have the right, at all times to enjoy and recreate themselves thereon, in manner and to the effect before stated, without let or hindrance from the defenders; and that the said right and privilege should be reserved entire, as they have been in time past, for the convenience, comfort, recreation and health of the pursuer and others foresaid, their families and dependants." The result follows, that a defence is put in, which claims this as enclosed property belonging to the defenders, and not subject to any such right, and even disputing the right of way; and two issues were directed, which ultimately, as amended, stood thus:—(I do not trouble your Lordships with the first issue as to the right of way, because that will go to a jury to be regularly tried, and is not now before your Lordships' House):—The second issue was directed in these words—"Whether, for 40 years prior to the said 1st February 1848, or for time immemorial, the river bank, or piece of ground lying between the river and the southern margin of the ground referred to as said footpath or road, inclusive of the space referred to as the said footpath or road, from at or near the said Balgownie Bridge up to a place on the said bank a short way below the mansion-house of Seaton,"—and so on, describing it as before—"or some other, and what portion of the said distance, has been resorted to, possessed and enjoyed by the inhabitants and heritors of Aberdeen, burgh of Old Aberdeen, village of Bridge of Don, and the 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." That was the issue which ultimately was directed. There was then an objection raised to any such issue being directed, and the matter was brought before the Lord Ordinary, and he reported the circumstances without giving any opinion thereon. The matter then came before the Lords of the Second Division, and they came to this resolution, which is the interlocutor complained of: They "disallow the second issue as amended, and repel the conclusions of the summons in so far as it concludes that it should be found and declared that the portion of river bank or piece of ground therein described, being the whole river bank or piece of ground lying between the southern margin of the ground referred to as said path, and the river, and extending as therein specified, is open to the pursuer and others therein mentioned, and that they are entitled, and have the right at all times to enjoy and recreate themselves thereon in manner and to the effect therein stated, without let or hindrance from the defenders; and that the said right and privilege should be reserved entire;" and they find the defenders entitled to their costs. The result was, therefore, that the issue having been directed in terms to try the question, the Lords of the Second Division (the Lord Ordinary giving no opinion) decided by a majority of three to one against the right; or, in other words, they decided that, by the law of Scotland, the easement or right pursued for was not such as, under the circumstances, could be maintained; and therefore no issue was directed to try the right.

The question which comes before your Lordships here, is represented to be one no doubt of great weight, and of great importance—of great importance as regards persons who are inhabitants of towns who may suppose they have this right, and of equal importance to the owners of property upon whose soil a right of this nature is claimed; and it is of importance in Scotland in this way, that where there is a right, as in this case, over an enclosure, if a right can be gained by the mere trespass of a party over a footpath where there is no enclosure, of course it would lead to a great restriction of the usual and common enjoyment of such property. Nobody enjoys a footpath across a field not enclosed, who has not constantly himself been guilty of wandering, and has constantly, at all events, seen others wandering, out of the line of path, and upon the general property through which the path ran. That is not a matter of right—it seldom becomes any matter of contention; and foot passengers who have no right to wander, take care not to do much harm; and the owners of property, knowing how difficult it is to restrain men, without an actual fence, within a certain number of feet, have submitted to the inconvenience, and have not attempted to restrain them. It is therefore of great importance to the public generally having

rights of footpath, that it should be ascertained whether, by the exercise of that right, or in the exercise of that right, wanderings and strollings on the general soil, independently and out of the line of footpath, can gain a right to the public so passing. I believe it would be more injury, if such a right could be gained in that way, than it would be benefit to the public. The observation I have just made is a general observation, which may or may not be applicable to this case; because, in this case, it may be that the right may be established as a right independently, and not connected with the footpath; that is to say, this right may have existed, if it can be maintained, although there was no right of way through the footpath from one point to another point.

Now, my Lords, before your Lordships enter into an examination of the particular law which is applicable to this case, it will be necessary to consider the general nature of the right which is claimed. The property over which this right is claimed, is an enclosed piece of ground; it is near the mansion-house; and it is asserted by the appellant himself, and he means to try that right, that there is a right of way through it. That right of way, therefore, so far, would account for the public constantly having had access, as it is insisted, and for its having been used. Whether it can be maintained or not, is for a jury to decide; but it accounts for the public having had access to that particular field, because if this right does not exist, yet access has been obtained by the footpath through this particular field. Now, it is just exactly that piece of ground upon which, naturally and almost inevitably, encroachments would be made; because the piece of ground, extending in length about half a mile, is of very moderate breadth, between the footpath and the river Don; it is of very moderate breadth,—in some places, I believe, not more than a couple of yards or some such thing; in some places 20 yards, but varying in breadth; and it is a mere strip of ground, of great importance to the Seaton family, running between the river Don and one of the boundaries of this particular road. Now, therefore, nothing could be so easy as for persons going along the property, to wander down to the edge of the river on so narrow a piece of ground as divides the river from the footpath; but it is an enclosed piece of ground, and that is not denied. The right which is claimed, is of this extensive nature—that the pursuer, who represents the whole burgh as its officer, claims as an inhabitant. It was admitted in the Court below, that he could not claim as a householder. It was not stated that he was a householder; but, in argument, he puts his right simply and only upon inhabitancy. The right claimed originally, was not only for Old Aberdeen, and New Aberdeen, and the vicinity, but it was for the public generally; it was a claim for all the Queen's subjects. Therefore, here was a right claimed for everybody, to go at all times upon the enclosed soil of a portion of the Seaton property near to the mansion-house, and to enjoy that for purposes of recreation just as they thought proper. Now, that in point of fact amounts to a claim of right which is entirely inconsistent with the right of property. In point of fact, that is another question. No man can be considered to have a right of property, worth holding, in a soil over which the whole world has a right to walk and disport itself at pleasure. I asked the learned counsel at the bar, what use could be made of this ground, and whether there were cattle, for example, upon it; and it was said, "Oh, yes; cattle might be put there." 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 it was said that they might mow the hay. I am afraid that no grass would grow under the feet of the inhabitants of Old Aberdeen and other places, which would ever come into a condition to be converted into hay. In short, I cannot myself imagine the use to which this property could be put, if that great power was to be held valid. Well, then, the appellant himself, finding that that was too large a power, altered his demand; and he restricted it to these general places, or to Old Aberdeen in connection with some of them. But why did he alter it? Not because the facts had been altered; not because there was anything in point of fact to vary the right; not because anything had occurred to shew that he had made a mistake; —but because he found that the law would be a little too strong for such a claim as that of all the world having a right to resort to this enclosed property whenever it pleased, and thus to take the right of ownership in point of fact from the owner of the soil;—therefore he restricted it.

Now, I have seldom seen a case better reasoned from the Bench, or more elaborately considered, than the present case; and the Judges in the Court below stated, (in which I entirely concur,) that although this right as first claimed is restricted, yet that the restriction cannot alter the nature of the right. When you look at the number of persons—some hundreds or thousands, for example—for whom this right is claimed, with their families and dependants, and the nature of the ground, it is in effect a demand on the part of the public generally, to resort for recreation, exercise, strolling, and lying down particularly; for when they walk or tire themselves, they claim a right of reposing themselves on the surface of the soil; and, therefore, I do in effect consider that it is still a right and demand, on the part of the public generally, through the medium of this claim, to resort to this place. In that respect, I think it varies from a great many, and indeed from all the cases that have been decided. On the part of the appellant, I have not really heard a single authority cited, except that early case, in which the point was not in fact decided,

to which I shall call your Lordships' attention, and I am not aware of any authority which goes to establish this universal right. There are authorities, which no one disputes, in which the law of Scotland seems to have been exceedingly chary in establishing rights of this nature. Your Lordships have been pressed very much with the case of the right of playing golf; but in that very case, although it is a pastime and healthful exercise which the Courts would be inclined to cherish, it was established with difficulty by the law of Scotland. It has been restricted when it has been established; and where the right has been shewn to have been exercised over the whole of a piece of ground, and holes made in the ground, and where the state of the ground has shewn that the right has been exercised from time immemorial over every part where the game would be carried on, the Court, by its own power, has restricted the exercise of that right within boundaries and limits, and has ordered those limits and boundaries to be defined and set out; and it is singular enough, that in this very case, the appellant admits that this right may be restricted by the Court; so that the claim is, a general right to walk on the whole of this ground and to repose on it, and so on, with a power in the Court of Session to tell them in what direction they are to go, and in what position they are to repose. That is the sort of right which is claimed.

Now, my Lords, before I enter upon the cases, there is one thing upon which I must particularly guard myself, and beg anxiously that it may not be understood that any opinion is expressed by this House adverse to that right to which the right in question in this case has been improperly assimilated—I mean the public right of village greens, and village playgrounds, and such matters, which have 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 that afterwards—I pressed him upon it; and it is admitted, and it is clear, that the law of Scotland, in that respect, agrees with the law of England. If there is a piece of ground unenclosed, as there generally is—not that enclosure would prevent it, unless there was an exercise of adverse right—dedicated from a time which would be described, or for which a custom might be laid, dedicated for such a time to public sports generally, or to village recreation, to the children of the village, the children from school, nobody can suppose that such right can at all be affected by any decision at which your Lordships may arrive in regard to the right which is claimed upon this enclosure, under the circumstances which I have mentioned. Those rights will remain untouched—they are unassailable; and nothing which is done by your Lordships in deciding this case, can be considered as at all bearing on those rights.

Now, my Lords, there are a good many cases which I think also we should take care to except, and which in point of fact have no real bearing upon this case. A good many of the appellant's cases are not applicable. They are not properly rangeable under the head of law which your Lordships are called upon to consider. Some of the most important cases which have been relied on, are cases of that nature—that is, they are cases in which the property belonged to a corporation, in which persons claiming under and as part of the corporation, persons who were represented by the corporation, have claimed certain rights, that is, *inter se;* they say, "This property belongs to us all, who represent the inhabitants; we the inhabitants have certain rights of playing games, and of easement or servitude; we have these rights as against you the corporation; you are the trustees in effect for us; it belongs to the family; we are members of that family; and you are bound to let us have those enjoyments which at all times we have received." That has nothing to do with this case, and it has not the remotest bearing upon it. This is the case of a corporation, not shewing how near the ground is to Old Aberdeen; and your Lordships cannot be supposed to know judicially what the distance of Old Aberdeen is from this piece of ground—it may be a day's journey for aught I know—I am sure it is not, but I mean that judicially I do not know, and there is nothing to inform me. This is the case of a corporation claiming a right in another man's soil adversely to him, not connected with it, having no more connection with Old Aberdeen than any other property which may happen to be at a distance from Old Aberdeen, having no natural connection with the property; and that right is claimed in the soil for all the inhabitants of these various places. I therefore consider that those cases have no bearing upon the case now before your Lordships, which must depend upon its own merits.

Now, my Lords, very considerable arguments have been pressed upon your Lordships, as to whether it is possible for Mr. Dyce to represent the persons on behalf of whom he claims; whether, looking at the law of Scotland, which in that respect differs from the law of England, he can be considered as having this dominant tenement, which will apply to the servient tenement, and give the right. I think your Lordships need not go into that point, because the decision upon the general point renders it unnecessary; but there is that question, and a great many other questions, which it would be necessary for your Lordships to decide, and a very grave question as regards the appellant's title, if your Lordships were about to decide in favour of the appellant, and against the judgment of the Court below.

Now, my Lords, with these observations, I will at once proceed to call your Lordships' attention to the authorities which are relied on by the different parties, which really bear on this case.

The main authority, and indeed, after great attention, I am bound to say the only authority, in support of the appellant's case, is the Dundee case. I can find no other authority which bears directly upon the question as an actual authority, if that is to be considered as an authority. In the case of *Inhabitants of Dundee* v. *Hunter*, it is stated that, "upon the banks of the Tay, in the immediate vicinity of Dundee, there is a piece of ground about half a mile in length, called the Magdalen Yard. The lands of Blackness surround it on three sides, and on the fourth it is bounded by the Tay." Then comes this statement, upon which the whole of the argument turned:—"Nearly 200 years ago, this piece of ground was the subject of dispute between the proprietor of Blackness," (whose lands surrounded on three sides the piece of land in question,) "and the inhabitants of Dundee. Both parties claimed the property of the ground, and mutual actions of declarator were brought:"—(I would call your Lordships' attention to that circumstance—each party claimed the actual soil:)—"The former," that is, the proprietor of Blackness, "founded his claim upon the infeftment of himself and his predecessors in the said lands of Blackness, as part and portion whereof he alleged the said Magdalen Yard had been possessed past the memory of man," (he claimed therefore the soil of that as part of the general estate,)—"and specially on the acts of proprietorship performed by him and his predecessors in pasturing on the said green or yard, and debarring all others from pasturing on the same—this having been the chief act of proprietorship competent to them, in consequence of a servitude of walking, and taking air and exercise, on the said green or yard, enjoyed by the inhabitants of Dundee, and under reservation of which he claimed the property. The latter alleged, that the yard had been marked and set off from the lands of Blackness, as the property of the burgh, by certain march-stones set up in the yard in 1619, some of which, they alleged, had the burgh of Dundee's arms thereon." These actions came on, and the Court "found it proved that John Wedderburn of Blackness, and his predecessors and authors, heritors of Blackness, and their tenants, have been these 40 years in possession of pasturage in said Magdalen Yard, without interruption,—and found the magistrates and inhabitants of the said burgh of Dundee, their possession of pasturage in the same not proven; and found that the town has no common good marching with the said Magdalen Yard, but that the same has the lands of Blackness upon the east, north, and west parts, and the river Tay on the south; and found it proven that the march-stones standing betwixt the lands of Blackness and the Magdalen Yard, were set down for keeping the Magdalen Yard from tillage." Then the Court pronounced their final decree in these terms—"That Wedderburn was entitled to the right of pasturing, and the magistrates and inhabitants of Dundee have only the privilege of walking in the said Magdalen Yard, and making parades therein." Now, it is said that this amounts to a decision, and that if it does not amount to a decision, at all events it proves that the right exists. The facts are very simple. The lands of the proprietor of Blackness surrounded the piece of land in question on three sides, and the other side went down to the river; he said, I am entitled under an infeftment, but that infeftment is subject to a reservation to the town of a right of walking over it. Nobody doubts that you may reserve such a right; and nobody doubts that you may, if you please, grant such a right. How it is to be the subject of grant, is another question, but it is the subject of grant; and I shall presently advert to an objection made by the learned counsel for the appellant—"Oh! if you once admit it is a subject of grant, then my case is irresistible." We shall see presently how that is; but here he says, "I claim the soil under an infeftment; it passed to me as part of Blackness; but I have only enjoyed the pasturage, because I took it under a reservation of a right to the inhabitants of Dundee of walking over it, and therefore I could not use it for any other purpose." The inhabitants of Dundee said, "No doubt we go over it, but we go over it as our own property; and we claim the right." The Court said, "You the inhabitants of Dundee have not established any right beyond that which is admitted, and is not claimed adversely to you, but the owner of the soil claims the soil subject to that very right; you are entitled to that right, which he admits is your right with the reservation; and you are entitled to nothing more. When the case came, at this later time, for decision, it was only upon this—that the owner of Blackness then claimed a right of property as he had originally done; and the question was, whether it was then open to him, after what had passed at that early day, to claim the property; and it was held by the Court, that he had still the right, and was not excluded by the former interlocutor, and that, therefore, he might still maintain his right of property. I consider, therefore, that case as deciding nothing on this ground. It shews that such a right may exist under a reservation. It does not shew that such a right could be established adversely unless on the infeftment or the reservation; and I am not at all prepared to say, that if the proper forms were adhered to, such a right may not be granted; but I may here observe, that it does not follow, that because a right may be granted—that is, that it is grantable by law—therefore it may be prescribed for. It is one thing to shew that a man may have done such an act, and it is another thing to find the right in what he may be supposed to have done.

My Lords, I am not aware of any other authority which really bears on this case on the part of the appellant. Your Lordships were very much pressed with the case of *Home* v. *Young*. It does not touch the question; it has nothing to do with the question; it shews generally what the

law of Scotland is; but it does not touch this question at all. I entirely agree with the learned Judges below in what has been decided before this case, in this respect. I think that there is nothing in the law of Scotland which prevents what are called new rights coming under an old principle; and, therefore, the case of bleaching,—which, because it was a new process, was in the first instance held to give no right in a case of this sort,—was ultimately held, I think, to fall within the same rule as other proper servitudes; and, therefore, the law of this country, and the law of Scotland, frequently is enabled to adapt itself to changes in the circumstances of mankind, without doing violence to its original principles and rules; and although the case is a new one, that of bleaching, it falls within the same principle. New appliances have arisen, and new inventions have been made in later times, and those having been applied in that manner to old enjoyments, the law naturally adapts itself. But this, as I have observed, is an argument that cannot apply to this case, because nobody supposes that recreation, taking air and exercise, is any particular novelty or invention; or that, when you are tired, if you are in a meadow and you lie down to repose yourself, (and that is an easement, if it be one, which has been enjoyed from a very early date,) it can hardly be brought within the category of modern inventions.

My Lords, the authorities on the other side appear to be as conclusive for the respondents as the appellant is destitute of any authority in his favour. The first case to which I would refer your Lordships, is the *case of Dunse;* and there it was held, that there could be no general right prescribed for a part of the inhabitants of a town generally—that is, without property, and that it must be measured by property. In England, we know that that right of pasturage is by *levant* and *couchant*—that is, it is measured by the number of cattle which you have the means of housing and providing for in winter. In Scotland, it has been held, that a general right could not be maintained by inhabitants of a town generally to pasturage on land. That, so far therefore as it goes, is in favour of the restriction of these rights.

Now, the case of the *Marquis of Breadalbane* v. *M'Gregor*, 7 Bell's App. 43, is an important case also on this subject. There you may say the right was claimed for the whole world; in point of fact, everybody coming from the north to the south might claim a right to certain resting-stances on a drove-road which it was not contested belonged to Lord Breadalbane; and they claimed a right to make what they called drove-stances on the side of that road. They said that the distance was too great for their cattle to travel without rest, and that, therefore, they were entitled to stop at convenient distances—in point of fact, to depasture their cattle on the land adjoining the stances, wherever it was necessary. The Court of Session so far gave way to that, as to send it to an issue for trial by jury; but your Lordships' House, upon very sufficient reasons, as I apprehend, decided that no such right existed to have drove-stances; that there had been, no doubt, 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, cropping the grass on each side of the road, that that could give no right, and that a mere right to use the road would give no possible right to have abiding places at any convenient or any distances on the road at one side or the other. Accordingly, this House decided against the right, and stopped the trial of the issue which had been directed. There is an authority against the appellant; and if you will apply the drove-road to the particular footpath across this place, and if, instead of cattle from the north to the south, you take the gentle inhabitants of Old Aberdeen and other places, you will find that it fits much more closely to this case than at first might be imagined; because, as the cattle in their progress required rest and nutriment, so the same thing might happen with persons using this footpath.

My Lords, the next case is an infinitely stronger case, and is a clear decision, I consider, upon this very question—I mean the important case of *Harvie* v. *Rodgers*, (4 Murr. 25.) It is pretty accurately stated in the respondents' case, and is an important case. We have had the book, and I have read it, and it is accurately stated in the respondents' case. The claim there was in point of fact to a certain right, and, besides that right, to the right and privilege of passing along the same, and walking thereon; and they insisted that they had the right "at all times, and on all occasions, to resort to the said piece of ground, and road or path within the bounds aforesaid, and there to exercise the privilege, and enjoy the comfort of a free passage along the same, and of walking thereon for any lawful purpose, according to immemorial use and custom; and that the said right and privilege should be reserved entire, as it has been in times past, for the convenience, comfort, and recreation and health of the pursuers and their families, and other inhabitants, and others foresaid, who shall resort to the foresaid piece of ground and road or path." Now, it appears by the report, that the general right was not admitted to be tried, and the particular right was admitted to be tried, and, therefore, there was no doubt that, as far as it appears, the right in question now claimed was not admitted; but that was said to be a very short and unsatisfactory mode, being merely a statement without a decision. Now, Lord Moncreiff has made observations on that case which entirely gave an answer to the case as reported in the jury reports. Lord Moncreiff was himself counsel in the cause, and he thus explains that case,—"Towards the end of the hearing, the case of *Rodgers* v. *Harvie* was mentioned, but it was much misapprehended. In that case, 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," he says, "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." In another place he observed,—"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 enclosed 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; and the injury to the proprietors in such a thing, when asserted as matter of right, must be apparent." He then observes again—"In the case of Harvie, the whole claim was restricted, before it went to a jury, to a right of way; for, though an use of general walking over the ground was averred, no issue was given on that, so that it is a case against the pursuer." It is clear that was a direct decision of the Court of Session against this right; and that decision was acquiesced in, and never brought by way of appeal to your Lordships' House. It is not conclusive on the case, because your Lordships must now decide this case on the merits; but it proves that the decision in this case is not the first decision at which the Courts of Scotland have arrived on the very point in issue between the parties at your Lordships' bar on the present occasion, and therefore it is to be considered as an authority which has been acquiesced in.

My Lords, some important observations were made by Lord Eldon, when the case was before your Lordships' House, upon the right of servitude which was claimed in the case of *Dempster* v. *Cleghorn*, (2 Dow, 40,) and there it was a right of servitude of playing golf over certain property,—and the question there arose with regard to the right of the owner of the soil, in consequence of that right existing, of playing the game of golf; and that ultimately turned upon the question, of whether he could or could not keep rabbits on the soil, to the destruction in point of fact, or the interruption of the play at the game of golf. Now, in advising your Lordships in the first instance in that case, Lord Eldon made these observations—"But the question was, whether a servitude could be supported which subverted the use of the property over which it was claimed? If there was a reservation, had they the full benefit of that reservation?" Then he asked, whether they might keep sheep, and so on. On a subsequent day, he makes some observations which refer to a point upon which I have already observed. He says—"At the bar here, the title had been more strongly argued on the ground of the acts of the corporation, reserving the privilege by contract; and 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 the point to which I was before calling your Lordships' attention, he makes these observations—"He regretted the existence of the necessity to send this back again; but 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 without laying down the rule of law in any distinct manner, 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.

Now, then, what is the nature of the right? I find nothing in the law of Scotland which has gone to the extent now claimed. No case has been cited in which there is a single word which, according to its proper interpretation, gives countenance to the claim of the appellant at your Lordships' bar. All the rights which have been established, (and which have been established with difficulty,) are particular easements which nobody ought to find fault with. The case of golfing, which is the strongest, was established with difficulty. There can be no doubt that certain persons may obtain a right by prescription to play certain lawful games on another man's soil; but whether you can have a right by prescription which shall go to the extent of depriving a man of the soil which belongs to him, is quite another question. I have already said that it might be the subject of grant; but if it is the subject of grant, does it therefore follow that it can be prescribed for? Certainly not; because, to establish a prescription, you must not be merely satisfied that the man had the ability to do the act, but, if some men have not the ability —that is, if by law the particular right could not have been granted—then *cadit quæstio*, of course it could not be established; but the converse, that he had the ability to do the act, by no means establishes that therefore it could be prescribed for. To be prescribed for, you must be satisfied that it is an act which the party has done,—you must come to the conclusion that there has been a grant; but who can come to the conclusion, that a man has made an indefinite grant to let in the whole of the public upon an enclosure near to his own house, for the purpose of their possession and enjoyment? It is said to be for the purpose, no doubt, of recreation, and so on; but they claim the possession and enjoyment of this piece of enclosed ground near to the mansion-house of Seaton. It is inconsistent with the exercise of the rights of property; and although the Courts would be compelled to give effect to an actual sale of the right, yet the Courts would not admit

a right by prescription which would go to defeat the right of the party who is entitled to the soil.

Now, by the law of Scotland, these rights are much more circumscribed than they are by the law of England. It has been held, that there can be no right to an easement in Scotland to give a man a right to fish for trout off the land of another in a navigable river. No doubt there may be such a right in England—therefore the law of Scotland is more stringent than the law of England; and the law of Scotland does what could not be done by the law of England. It restricts the right, and it does not extend over the whole of the property,—which, I think, is a very strong argument against the general right here claimed—that where the right was one that could be maintained within certain limits, they held that it could not be maintained as a right *spatiandi;* and therefore they restricted it to what they considered reasonable limits, and held the portion set out, open to the enjoyment of the owner of the soil. Therefore, where it is a legal right, it is restricted; whereas this being a right, which I cannot hold to be illegal, yet a right which I cannot hold to lie in prescription, I think your Lordships will not arrive at that conclusion; but as the appellant himself says he is willing to have it restricted, it appears to me that that admission weakens his case. He could not help making the admission; but it shews his own sense that he could not establish a right to walk over the whole of this property just as he pleased; and I think your Lordships will arrive at the conclusion, that it would be utterly impossible for your Lordships to maintain the right, and at the same time to restrict it to any particular portion of this strip of land.

My Lords, the Courts of Scotland, in the exercise of these rights, have been very careful not to break into the right of property of the owner of the soil. In the case of a footpath running near a river, they have held that the persons who resort to that footpath are not at liberty to angle in the river from that footpath over the ground between the path and the river. That has been decided. So that you are restricted to the precise right which you have enjoyed. You are not at liberty to make use of the right of way for the purposes of strolling, or wandering, or amusing yourself there, for the purpose of enjoyment.

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. It is inconsistent with the general right of property; and it is not, as in the common case of servitude, a right which is consistent with an enjoyment in other respects—a limited enjoyment, no doubt, but still the enjoyment of a man's own soil; and therefore it cannot be maintained.

My Lords, the appellant, at the close of his case, brings to his aid the law of England, which, he says, is the same as the law of Scotland. I think he is mistaken. By the law of England, the inhabitants of a town or place cannot prescribe for any easement generally in the soil of another. They may support it by custom—the custom becomes the law of the place; but then the custom is not to be supported at all unless it be a good custom, and a reasonable custom; and they have therefore to shew that the right which they claim is reasonable. The question then would be, whether this would be reasonable or not by the law of England. But they could not prescribe this right by the law of England—they could only lay it as a custom; and, as a custom, the question would be, whether it was a good custom, and whether it was a reasonable custom. I think, therefore, that the law of England is different in its application from the law of Scotland; but it is merely referred to for the sake of illustration. This case must stand or fall according to the law of Scotland. I know that your Lordships will so far abide by that advice which it falls upon myself on this occasion to give, as strictly to decide this case upon the law of Scotland; and upon that law, as I understand it, I advise your Lordships to dismiss this appeal, and to affirm the interlocutor complained of, which I think is perfectly consistent with the law of Scotland, and meets, as it appears to me, the just and true merits of the case.

Interlocutor affirmed with costs.

Second Division.—Lord Murray, *Ordinary.*—Dodds and Greig, *Appellant's Solicitors.*—James Davidson, *Respondents' Solicitor.*

MAY 28, 1852.

SAMUEL FERGUSSON, *Appellant, v.* ADAM SKIRVING and others, *Respondents.*

Church—Process—Record of Presbytery, Authentication of—Statutes 1686, c. 3; 43 Geo. III. c. 54—*The Act* 1686, *c.* 3 *does not apply to judgments and sentences of Presbyteries; and a sentence of deposition of a schoolmaster is not invalid, because not signed at the time of its deliverance by the Moderator.*

A Presbytery may, if it thinks fit, cancel part of the record of its proceedings against a schoolmaster and proceed de novo.