

No 41.

In a petition by Dalrymple, and others, it was *contended*, That the proposed alteration was contrary to the plan, on the faith of which they had purchased, and that it could not be carried into execution, without considerable danger and inconvenience to their properties, particularly without altering the situation of the outer door on the passage, so that they were entitled to prevent it.

Anderson, on the other hand, *maintained*, That he lay under no prohibition, express or implied, against using the room as a shop, and that, while his property would be much improved, by having a door separated from, and nearer to the street than that of his house, no injury of any sort could hence arise to the objectors, who, therefore, had no right to complain; 3d March 1784, Robertson against Ranken, *voce* SERVITUDE; 1791, Murray. *

The Court examined persons of skill in their own presence, and came to be satisfied, that the petitioners would not be hurt by the alterations objected to by them. But this notwithstanding, the general opinion was, that, as the petitioners had not merely a servitude *oneris ferendi* on the wall from which the door was to be opened, but a right of common property in the passage, no alteration whatever could be made on it without their consent.

THE LORDS " Altered the interlocutor reclaimed from, and remitted the cause *simpliciter* to the Dean of Guild, to refuse the original petition for John Anderson; but found no expenses due to either party."

A reclaiming petition was refused, (9th July,) without answers.

Lord Ordinary, *Meadowbank*.

For Anderson, *Hope, Monypenny*.

Alt. *Burnett*.

Clerk, *Gordon*.

D. D.

Fac. Col. No 129. p. 296.

1802. *May 18.*

MACNAIR *against* LORD CATHCART.

No 42.

Where property cannot be vindicated *in forma specificæ*, without great injury and devastation, the proprietor is obliged to accept an equivalent.

IN the year 1710, Sir John Schaw of Greenock, Baronet, disposed to Andrew Paterson, a tenement within the burgh and barony of Greenock, together with eight falls of ground adjoining, which were occupied as a garden. The boundaries of this piece of ground are ascertained, and described in the feu-contract. Paterson died about the year 1715, leaving three sons and one daughter.

His eldest son, Andrew, possessed these subjects, upon his title of apparençy, till his death in 1747. His youngest son died without issue; but his second son, James, had several children, the eldest of whom was George.

Andrew having left no children, and James being at that time out of the country, his sister Elizabeth, who resided in Greenock, entered into possession.

* Not reported.—See APPENDIX.

of his property, and obtained (14th March 1764) a precept of *clare constat* from the superior. She afterwards disposed the eight falls of ground, described in the original feu-contract, to James Ewing, mason in Greenock, who was infeft in the subject, (23d June 1766.) His son obtained a precept of *clare constat* from the superior; and afterwards disposed (4th July 1777) the ground to Lord Cathcart, and upon this disposition infeftment followed.

Lord Cathcart made this purchase, as being convenient for the line of a projected street through his property; and it was afterwards feued out to different individuals, in areas for building, with an obligation of absolute warrandice. The eight falls of ground, above mentioned, formed a part of one of these areas, and the ground has since been the property of different persons; and as it became a part of the town of Greenock, many valuable houses have been built upon it.

Matters remained in this situation till the year 1795, when a process of reduction was instituted by George Paterson, as heir to his grandfather, for setting aside the titles of his aunt Elizabeth, and, of course, the disposition to Lord Cathcart, which proceeded from her. Paterson assigned his right to insist in it to John McNair, writer in Greenock.

THE LORD ORDINARY (12th November 1800) pronounced the following interlocutor: "Finds, that restitution of the eight falls of ground in question, which belonged to the pursuer's author, George Paterson, is impracticable, part of said ground having been, many years ago, included in one of the principal streets of the town of Greenock, and the remainder of the said eight falls being the foundation upon which part of two different tenements of houses have been long ago erected: Finds, that the pursuer's author, George Paterson, was the legal proprietor of said ground, and that the pursuer, as in his right, is entitled to a full recompence for the value thereof: That, although the defender appears to have transacted *bona fide* in the purchase of the eight falls of ground, from one who had made up the form of a title thereto, he must be liable to the pursuer in a fair value or price for said ground; and, before answer as to the *quantum*, the Lord Ordinary desires to hear parties farther; or, what may be more suitable to the question, that the parties will name a valuator on each side, to report to the Lord Ordinary the sum that ought to be paid."

The pursuer reclaimed against this interlocutor; and *maintained*, That it was yet practicable to give him actual possession of this property; but the Court, considering the long silence of the pursuer and his authors, and their acquiescence in the great changes and commixtion of property, which, during that period, have taken place in the town of Greenock, whereby the ground in question could not now, without great injury and devastation, be restored in its former shape, found that the pursuer was barred from making his claim to the

No 42. property *in forma specifica*, and, therefore, adhered to the Lord Ordinary's interlocutor.

Lord Ordinary, *Armadale*.

Act. *Campbell*.

Agent, *Jo. Dillon*.

Alt. *Brown*.

Agent, *J. Somerville, Junior*.

Clerk, *Sinclair*.

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Eac. Col. No 39. p. 80.

1804. *March 10.* LORD GLENLEE *against* GORDON and Others.

No 43.

An heritor is not entitled to interrupt the natural course of a river, by collecting the water in a reservoir, and allowing it to run down as it suits his own conveyancy.

THE mansion-house of Barskimming, the seat of the Honourable Sir William Miller of Glenlee, Baronet, one of the Senators of the College of Justice, is situate upon the south bank of the river Ayr, which runs through his park and pleasure grounds. The mill of Barskimming, which is in the immediate neighbourhood, and which belongs to Lord Glenlee, is supplied with water by means of a loose parapet of stone, thrown across the river, a little below its junction with a stream called the Lugar. There is a flax-mill likewise upon the estate of Barskimming, which is supplied with water from the Ayr, by a dam constructed farther up the river, and before the confluence of the streams.

About two miles above Barskimming mill, upon the estate of a neighbouring heritor, there had been formerly a corn-mill, which, many years ago, was converted into a cotton manufactory, and the original dam was, upon that occasion, considerably enlarged, on account of the additional supply of water necessary for the machinery. This cotton work having become the property of John Gordon, and others, merchants in Glasgow, under the name of the Catrine Cotton Company, they, in the year 1801, constructed a large reservoir, occupying an acre of ground, for the purpose of accumulating the water during the night, when the stream, in its natural state, was insufficient for supplying their machinery. The water was thus collected, and let out as found necessary; so that, even in a dry season, there was a regular supply, for the purposes of the manufacture. But while the water was accumulating, no part of it was allowed to pass down the channel of the river. With the view of obtaining a still farther command of water, the Catrine Company, in the year 1802, were proceeding to construct another reservoir, of large dimensions, which would have been attended with the same effect, in a still greater degree, when Lord Glenlee raised a summons of declarator against the Company, concluding, "That the pursuer has, in virtue of his rights and infeftments, and possession for time immemorial, good and undoubted right and title to the full, free, and uninterrupted benefit and enjoyment of the whole of the water of the foresaid rivers of Ayr and Lugar, for all uses to which an heritor may lawfully employ the water of a river which runs through his lands, and, particularly, for the use of the said mill of Barskimming, according to use and wont; and that the said John