number of magistrates or councillors, taking upon them to separate from the majority, who had been such for the year preceding, and also taking upon them to make a distinct and separate election. 5. That, in terms of the statute, 16 Geo. II. c. 11, it was in certain essential respects the act of the minority of magistrates, councillors, and deacons, respectively, separating from the majority of those having right to act by the constitution of the burgh, and making a separate election of magistrates and councillors.

Mar. 5, 1805.

After proof and much discussion, the Court pronounced this interlocutor, "Repel the objections stated in the complaint, with regard to the summoning the council for the "meeting of 28th September 1803; but find that there was "not a majority of councillors present to constitute a legal "meeting of council upon the said 28th September; and, "therefore, sustain the objection stated on that head, and, "before answer as to the other points in the cause, appoint "the counsel for the said parties to give in memorials to "see and interchange the same betwixt   and "the second box day in the ensuing vacation."

May 28, 1805.

On reclaiming petition, the Court adhered.

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

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellants, *Thos. Plumer, David Boyle.*

For the Respondents, *Henry Erskine, John Clerk, Wm. Adam, Thos. Thomson.*

NOTE.—Unreported in the Court of Session.

ROBERT HILL, Esq. W.S., ... *Appellant;*

ANDREW RAMSAY of Whitehill, Heir-at-Law of GEORGE RAMSAY, late of Whitehill, } *Respondent.*

House of Lords, 30th March 1810.

SERVITUDE OF ROAD—PRESCRIPTIVE USE AND POSSESSION—DERELICTION.—A servitude of road was claimed, where there was no writing or title to constitute the servitude, and solely on the ground of immemorial use and possession. Held, on the evidence produced, that though the possession and use were proved for a period of forty years, yet, as it was also proved, that, for a period

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of twenty or thirty years, that possession had been interrupted by ploughing the lands over which the servitude of road was claimed, the same was to be held as having been abandoned and dereliquished; and the possession therefore being not continuous but interrupted, the same was not effectual to constitute the servitude claimed.

The appellant, Mr. Hill, purchased a farm, called Firth, from Mr. Cadell of Banton, being part of the lands of Auchindinny, conterminous with the lands of Kirkettle, then belonging to the respondent's brother, the deceased George Ramsay of Whitehill.

Soon after this purchase, Mr. Hill raised an action before the Court of Session in Scotland, claiming the servitude of a road through the inclosures of the lands of Kirkettle, belonging to the respondent, or through Kirkettle Haugh, upon the banks of the river Esk, setting forth "that his predecessors in the lands of Firth, had, by themselves, or their tenants therein, or servants, or others employed on these lands, been in the uninterrupted possession of a road from the ford in the water of Esk, at the foot of Kirkettle cleugh, passing through the lands belonging to Major Ramsay," for more than forty years.

Major Ramsay alleged, that the field called Carty Haugh, and the other fields interjacent, had been ploughed for a period beyond the memory of man, without any space for a road through them; and that, more than thirty years ago, Mr. Ramsay had planned and executed enclosures of the whole farm of Kirkettle, without the least idea of any such road, and without any objection being made, either by the proprietor or the tenant of the farm of Firth.

The Court ordered an eye-sketch of the present aspect of the ground to be made out, over which it was said the servitude road ran.

A proof was also led on both sides in support of their respective allegations. This having been reported, it appeared from the proof that the use and possession, at least for forty years, was made out by the witnesses; but, on the other hand, there was proof of interruption in the ploughing up the land over which the servitude was claimed, for many years, and the usage itself had ceased for a period of twenty or thirty years anterior to the present action.

The appellant contended that the eye-sketch proved that the track of road in question remained distinct, excepting in some places, where, from recent agricultural operations, it had been obliterated. That the evidence proved a

distinct and uninterrupted use in the occupiers of the farm of Firth of the road in question, in every way in which that use was susceptible, from the year 1737 to 1795, though, subsequent to the year 1784, the use was less frequent than previous to that period. That the evidence founded on by the respondent confirmed that of the appellant as to the use, and where it did not, it was merely negative, and no way inconsistent with the testimony given by the appellant's witnesses. That the appellant's predecessors were infeft in this farm, with parts and pertinents; and the use of the road for forty years, being once made out in point of fact, the servitude was established, which could not be lost, except by a disuse of forty years.

The respondent contended, it was doubtful how far, when a country is lying open and uninclosed, the occasional passage of a few people, through any particular part of it, is sufficient to create or constitute the legal servitude of a road, where such passage is neither the ordinary nor necessary communication with the place. 2. Whether, when such occasional passage goes through arable ground, the labouring and cropping of that ground without challenge, and without leaving any space for a road, is not real evidence that such road is not at all a matter of right, or at least, that this ploughing is complete interruption, *via facti*, to bar the acquiring any servitude. 3. When a road can only be used in a particular way, and for a particular purpose, and when, from the change of circumstances, that purpose no longer takes place, whether the party who is allowed that use, is entitled from mere whim, or any other motive, to reclaim that use. 4. Whether a right to any road, which is founded on no other title but mere possession, and no wise supported by any contract or other written title, may be revived, after being in complete disuse for a period of twenty or thirty years, as it was undoubtedly proved to have been in this case. It was clear that the object of the appellant's proof was to establish, by parole evidence, such a degree of use by his predecessors, at some former period of the road in question, as was sufficient to create a legal right in him again to revive the use. But the respondent contended that this claim, in such circumstances, was untenable.

June 23, 1803.

The Lord Ordinary found the use and possession of the road proved, and that "the right of using the same has not "been altogether abandoned or lost by dereliction of forty "years." On representation, his Lordship adhered. But, on reclaiming petition to the Court, the Lords altered and

May 25, 1804.

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sustained the respondent's defences, and assoilzied. On further petition, the Court adhered.

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

Jan. 22, 1805.

Pleaded for the Appellant.—According to the law of Scotland, possession for forty years gives a right to a road; and, according to the evidence adduced in this case, there has been possession for a longer period than forty years of the road in question. The possession was not occasional, but constant and continuous, and this right cannot be lost except by a disuse of forty years.

Pleaded for the Respondent.—It is clearly established by the proof, that there never was at any one period such use of a road in the line in question, as to create a servitude upon the respondent's lands; so that if the question were to be judged of as matters stood thirty years ago, there would not be the smallest ground for supporting the claim of the appellant. Where the constitution of a road depends upon use merely, and not upon writing, the use proved must be continuous, general, uniform, and uninterrupted; but where it is only, as in this case, an ambiguous and limited use, and interrupted, it cannot avail. If the constitution of the right was founded on writing, then it would be immaterial what kind of use had followed; but here, where no writing exists, and where the whole claim is rested on right acquired by use, that possession must be of the most unequivocal nature, and be continuous and uninterrupted for forty years. It is proved by the witnesses on both sides, that the ground over which this road is said to have ran, was ploughed and otherwise laboured without the smallest regard to such road. It is more than thirty years since Mr. Ramsay began to enclose these lands; and he never heard of such road, nor was any objection stated to these operations during all that time. A right founded on possession alone must, from its very nature, depend upon the continuance of that possession, and no more discontinuance is necessary to put an end to the right than what is necessary to show that the disuse is deliberate and intentional. *Eodem modo amititur possessio quo aquiritur.*

After hearing counsel, it was

Ordered that the interlocutors complained of be, and the same are hereby affirmed.

For Appellant, *Wm. Adam*, *Henry Brougham.*

For Respondent, *Wm. Alexander*, *Fra. Horner.*

Note.—Unreported in the Court of Session.