1813.

WHITSON, &c. *v.* RAMSAY, &c.

JAMES WHITSON of Polcalk, Proprietor of the Mansion-House, Parks, and Glen of Kilry, and JOHN WHITSON, Feuar of Kilry, *Appellants;*

SIR JAMES RAMSAY of Banff, Bart., Eldest Son and Heir of the deceased SIR WILLIAM RAMSAY of Banff, Bart., by his Guardians, *Respondents.*

House of Lords, 14th April 1813.

PROPERTY—COMMON—SERVITUDE—DAMAGES FOR MOLESTATION.—A declarator had been raised, together with separate actions of interdict and molestation, against the appellants, to have it found that they had no right of property, or common, or pasturage, casting of fuel, feal, or divot, over the respondents' lands of Alyth and the lands of Drumheads, &c., and to declare the lines of march which divided these from the appellants' lands of Kilry, and not to molest them in their possession, and for damages for molestation. The defence was chiefly rested on immemorial possession had by the appellants and their tenants, and no exclusive title by the respondents. Held, though the proof of possession on both sides was contradictory, yet, from the presumptive real evidence, arising from the state of the *natural* marches on hill grounds, the respondents had made out their right, and were entitled to interdict and to damages for molestation.

An action of declarator was raised by the late Sir William Ramsay against the appellants, to have it found that the appellants, and other feuars of Kilry, had no right of property, or common pasturage, casting of fuel, &c., and pulling heather, over a considerable part of the Forest of Alyth, belonging to him; and to have it found, "That the boundary "or line of march betwixt the lands of the Forest of Alyth "and the said lands of Drumflognies or Drumheads, belonging "to the pursuer, and the lands and hill of Kilry, belonging to "the said Thomas Whitson, and the other feuars and pro-"prietors thereof after specified, and who have right of pro-"perty or servitude therein, runs as follows, viz. From the "dykes of Fernyhirst up the burn of Kilrie, as the said burn "runs to the stripe or run of water called Dock Latch, and "from thence, as the said Dock Latch runs, ascending west to "the top of the Hare Hill, and so west as wind and weather "shears, to the top of the meckle hill called Knockton, and "from that west to the top of the hill called Broomholms, "until it comes to the marches betwixt the said Forest of "Alyth and the lands belonging to the heritors of Glenisla, "and the boundaries being so ascertained and declared,

" march stones ought to be put in at the joint expense for " preventing encroachments in time coming."

To this action defences were lodged, stating, that the titles produced by the pursuer did not support his claim; and, in particular, "that the pursuer has concluded " ed for an extension of his line of march far beyond " the bounds it has ever been possessed by him, and which " would be an encroachment on the defenders' property. " But as the rights of parties must, in a great measure, be " regulated by the possession they have respectively had, it " will be proper that the pursuer give in a condescendence " of the possession he has had."

A proof was allowed to both parties, and reported. After which, the Lord Ordinary pronounced this interlocutor:— May 14, 1799.
" Having considered the mutual memorials and proofs, and " amidst the contradictory testimony of the witnesses, hav- " ing chiefly regard to that which is supported by the pre- " sumptive real evidence arising from natural marches in " hill grounds, finds, That the march betwixt the lands of " Kilry, belonging to the defenders, and the lands of Drum- " head and forest of Alyth, belonging to the pursuer, runs " from the dykes of Fernyhirst up the burn of Kilry, to the " stripe or run of water called Docklatch; then by the " said stripe, as far as it runs from thence to the top of the " Hare Hill; from the top of the Hare Hill, as wind and " water shears, to the top of the hill called Knockton; from " thence westward to the top of the hill called Broomholm; " and along that hill until it joins the march betwixt the " Forest of Alyth and the lands belonging to the heritors of "Glenisla; and the Lord Ordinary decerns and declares " accordingly, and dispenses with a representation against " this interlocutor." On representation the Lord Ordinary adhered. On further representation, the Lord Ordinary Nov. 12, 1800.
pronounced this interlocutor:—" Finds that the line of May 12, 1801.
" march described in his interlocutor, from the hill of Knock- " ton westward, to the top of the hill called Broomholm, " and along that hill until it joins the march betwixt the " Forest of Alyth and the lands belonging to the heritors " of Glenisla, can only be meant to ascertain the boundary " of the pursuer's property on that quarter; but with- " out determining what part on the other side of the line " may be claimed as property by the defenders, and what " by the heritors of Glenisla, or those of the Forest of " Alyth, who are no parties to this process; and with this " explanation the Lord Ordinary adheres to his interlocutor

1813.

WHITSON, &c. *v.* RAMSAY, &c.

" of 14th May 1799." Two more representations were given in, but refused. And, on reclaiming petition to the Court, the Lords adhered. And also adhered on two further reclaiming petitions: an appeal was brought against these interlocutors to the House of Lords, and, pending that appeal, the appellants brought an action of reduction of the decree, upon the ground of *res noviter veniens ad notitiam.*

June 2 and 17, —— Nov. 12, —— Feb. 9, and 20 Feb. 1802.

An objection having been taken in the Court of Session, that this action could not proceed pending the appeal to the House of Lords; this appeal was allowed to be withdrawn, subject to the payment of forty guineas of costs. The action of reduction was then allowed to proceed. The defences stated to this action were, 1. That the decree called for could not be produced, it being in London, in consequence of the appellant's appeal. 2. That the matters in dispute between the parties were well adjudged, and determined in regular form, in the proceedings which ended in the decree now under reduction. The *res noviter* founded on was the discovery of written evidence, which established. as the appellants averred, that their authors had exclusively possessed the grounds in dispute. On the other hand, in the division of the Forest of Alyth, in 1719 and 1761, it appeared the boundaries and marches had been fixed, and that the appellants' authors did not appear to object.

May 27, 1806. The Lord Ordinary assoilzed the defenders from the conclusions of this reduction. On reclaiming petition, the Court

June 13, —— adhered.

Notwithstanding these several judgments, the appellants continued to pasture their cattle on the grounds, which had been found to belong to Sir William Ramsay, as formerly, whereupon the present action of molestation was raised, concluding that they should be decerned to desist from doing so in all time coming, and also for damages; and, at same time, a suspension and interdict was presented. These actions having been conjoined, the Lord Ordinary, of this date, pronounced this interlocutor:—" Having heard parties' procurators,

Feb. 27, 1805.

" sustains the pursuers' titles, and finds, That the defenders " must not trouble or molest the pursuers in possession of the " lands in question, or any part thereof, in all time coming, " and decern accordingly. And further, finds the defend- " ers liable to the pursuers in damages, and allows a conde- " scendence thereof to be given in; and further, suspends, " interdicts, and discharges the chargers, their servants, or " any other employed by them, from molesting the sus- " penders in the peaceable possession of any part of the said

"lands, and from digging peats or turf in the moss men-
"tioned in the suspension, or from carrying any that may
"have been dug there, and decerns. Finds the defenders,
"chargers in the conjoined actions, liable to the pur-
"suers in expenses, and allows an account thereof to be
"given in; but supersedes extract till the sederunt day in
"May next."

On reclaiming petition, the Court remitted to the Lord Ordinary to hear parties further on any point not yet disposed of, but *quoad ultra* adhered.

Against the above interlocutors, in all the actions, the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—The respondent, Sir James Ramsay, is bound to make out the affirmative of the conclusions of the summons of declarator, or he must fail in his action. He has, however, not only not done so, but the plan, pursuant to which he received his allotment of the Forest of Alyth, negatives the boundary contended for by him, which is further negatived by the testimony of many of his own witnesses, and by the evidence of all those examined on the part of the appellants. 2. The only rights proved to have been exercised by the respondents over the ground in question were, (1.) The erection of swine cruives on the skairs, which have been removed. (2.) The cutting of some turf on the stairs, in which his tenants were interrupted by the proprietors of Kilry, whose tenants also cut turf there. (3.) The pasturing of cattle by his tenants in *common* with the tenants of Kilry. The removal of the swine cruives, and the interruption in cutting turf, made it impossible to contend that any title by possession could be acquired in these instances; and the pasturing of the cattle of the respondent's tenants, as appears from the proof, was at a period when all the cattle in the neighbourhood pastured promiscuously, and marches were not kept; and it is not proved that any of these rights continued to be exercised for the period of forty years, which is necessary to give a prescriptive title by possession according to the law of Scotland. But even if they had continued to be exercised without interruption for such a length of time, the utmost they could confer on the respondent would be a right of servitude, or they might entitle the respondent to insist for a division of the ground as a common property, in which division all the ground occasionally possessed by the appellants would be included; but the respondent is now insisting in a declarator of exclusive property without a sufficient title, and he has totally failed in

1813.

WHITSON, &c. *v.* RAMSAY, &c.

proving forty years uninterrupted possession. 3. At all events, the plan made out by Mr. Graham of Balgowan, and delivered to the respondent when he purchased the property, ought to have been produced, from which, according to the appellants' information, it would have appeared that his predecessor did not pretend right to the ground in question.

Pleaded for the Respondents.—As to the original action, the silence of the proprietors of the lands of Kilry, while proceedings were taking place of a very public nature, for a division of the Forest of Alyth, before different courts of law, and by arbitration, during a period of upwards of seventy years, and their not laying claim to any share of the property to be divided, show in the most decisive manner that they had no right to claim a share in such a division. 2. The marches between the respondent's estates and the properties of the appellants, are established in the most clear and explicit manner by the witnesses adduced in his behalf; though some contradictory evidence appears in behalf of the appellants, yet it is not of so decisive a character as *that* on the other side; and the respondent's witnesses are, from their superior means of information, or from their situations, more entitled to credit than those examined by the appellants. There is also evidence tending to show that some of the marches contended for by the appellants, had reference to the boundaries of persons in former times, claiming an interest in the Forest of Alyth, who are no parties in the present cause; the evidence adduced by the respondents is also supported by the nature and situation of the marches concluded for, and by the names of the ground now in dispute; while some of the best informed of the witnesses on the other side are not agreed as to the marches which the appellants wish to set up by their evidence. 3. The third reclaiming petition of the defenders in that action was justly refused by the Court as contrary to the act of sederunt, or rule of Court for the regulation of their proceedings. The matter of fact therein stated was not new matter of fact, but had already been argued upon by both parties. 4. The claim for the joint pasturage was never started till after the proof was concluded in the cause; this pasturage was merely by sufferance on both sides, and created no servitude. It would at least operate as strongly against the appellant as to his property as in his favour; for, if established, not only the respondent, but other proprietors, would

be entitled to a similar right of pasturage over the lands of Kilry. As to the reduction. The matter alleged as *noviter veniens ad notitiam* was such as might have been brought forward in the former cause with a very slight exertion of industry; and, on this ground alone, it ought to have been rejected by the Court. Besides, the matter was objectionable itself. It was the *ex parte* depositions of witnesses, without its being known in what cause they were given. And whatever the import of these might have been, they could have no weight in this cause.

After hearing counsel,

It was ordered and adjudged that the interlocutors be, and the same are hereby affirmed.

For the Appellants, *Wm. Adam, John Hagart, Fra. Horner.*

For Respondents, *Sir Samuel Romilly, David Douglas.*

NOTE.—Unreported in the Court of Session.

CHRISTOPHER SMYTH, Writer in Dumfries, *Appellant;*

JOHN ALLAN, Merchant in Dumfries; MATTHEW PALMER, in Drumdreg; and DAVID GLEN, Writer in Dumfries, . } *Respondents.*

House of Lords, 10th May 1813.

PROPERTY — ROAD—MOSS GROUND — PART AND PERTINENT — PAROLE TESTIMONY.—(1.) A party claimed exclusive right to a stripe of ground along a ditch or wall. And also a piece of moss ground, as part and pertinent of his property. He held a bounding charter, and failed to prove forty years' possession. Held that he had no claim. (2.) He also claimed exclusive right to a road; he could show no written title to this, but offered parole evidence that his predecessor had, along with another, purchased the ground for the road. Held this parole evidence insufficient against the respondents' possession and use of the road as a pertinent of their property.

A claim was made by the appellant to the property of a certain piece of moss ground, within the territory of the burgh of Dumfries. 2. To a ditch on the boundary line of his property, called Deadmanshirst or Lochisle. 3. To exclusive right to a road intersecting the appellant's and the respondents' lands.

What was called a ditch by the appellant, consisted of a