

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 ; MAT-
 THEW PALMER, in Drumdreg ; and DAVID } *Respondents.*
 GLEN, Writer in Dumfries, .

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

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stripe of land, three feet broad, between the dike that bounds Deadmanshirst and a ditch, *within* the respondents, Allan and Palmer's properties,—the dike being the boundary of the two properties. The moss ground marked C. on the plan, also claimed by the appellant, belonged to the respondent Glen, as acquired by him from the burgh of Dumfries. And the road in question was a road which lay intersected between Glen's property and the appellant's, and all of which the appellant claimed exclusive right to, as part and pertinent of his property, and as having been possessed as such for time immemorial.

The appellant having proceeded to dig pits or holes within the stripe of ground belonging to Allan and Palmer, they presented a petition to the magistrates and council of Dumfries (who were the parties from whom Allan derived his right), praying to prohibit and discharge him from disturbing their possession.

The appellant's answer was, that notwithstanding the ground lay on the outside of the bounding or march-dike of Deadmanshirst, yet it is a portion of these lands, and belonged to him as the proprietor thereof. This assertion was denied, the respondents alleging that the ground had been possessed as their property, at least since the date of their feu-charters in 1763. The magistrates granted an interim interdict, and remitted to a Committee of their body, to allow a proof, to visit the subjects in dispute, and finally to determine the premises. A proof was allowed accordingly. And

April 15, 1802. the Committee, in the first place, pronounced this judgment :—
 —“ In respect the petitioners have proved possession of the
 “ pieces of ground in dispute, for more than seven years,
 “ continue the interdicts formerly granted in time coming,
 “ and ordain the respondent to fill up the pits or holes
 “ complained of within eight days from this date, and de-
 “ cern accordingly, but find no expenses due, except the dues
 “ of extract, for which decern against the respondent
 “ Smyth.”

The appellant removed the case to the Court of Session by advocacy, and brought a declarator, which being conjoined, the Lord Ordinary pronounced this interlocutor :—
 July 9, 1803. “ Having considered the condescendence and answers
 “ thereto, and the whole process, in the declarator assoilzies
 “ the defenders and decerns; and in the advocacy advo-
 “ cates the cause, and continues the interdict; finds the pur-
 “ suer liable in expenses, and allows an account of the same

“ to be given in, but supersedes extract till the third sede-
 “ runt day in November next.”

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On representation, offering further proof as to the possession of the moss, the Lord Ordinary allowed a proof to both parties, upon considering which, he adhered to his former interlocutor. And, upon reclaiming petition to the Court, the Lords adhered, and refused the prayer of the petition.

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

Pleaded for the Appellant.—As to the stripe of ground, it is a general practice, in enclosing the burgh roads of Dumfries, to raise the dike out of the ditch or sheugh, and it is clearly instructed by the evidence that this practice was observed in enclosing the lands of Deadmanshirst. Further, it is instructed that the dike has been always repaired by the proprietors of Deadmanshirst with the materials taken from the ditch or sheugh in dispute; and that these proprietors reaped the grass which grew on the ditch, and on the brow of the ditch beyond it. 2. As to the moss ground, this belongs to the appellant, as part and pertinent of his principal subject; and the respondent Mr. Glen, in laying claim thereto, transgresses the limits of his property, as pointed out in his own title deeds. 3. The road in dispute is the appellant’s private property; the same having been purchased by one of his authors, Mr. Riddle, and enjoyed by his successors, as their exclusive right; cross bars having been put upon it by them to prevent others from using it without their leave; and any acts of possession by the respondent Glen, are proved to have arisen from mere tolerance.

Pleaded by the Respondents.—With regard to the stripe of land, if any difficulty arose from the smallness of the stripe in question, this has been entirely removed by the proof of possession had by the former author, and by the respondents’ tenants. The witnesses Richardson, Walker, Glassel, Tait, Carruthers, and Stein, depone to the respondents’ possessing, by ploughing up close to the very wall. Besides, in the title deeds of both parties, the dike of Deadmanshirst is described to be the boundary between the two properties. The appellant cannot claim a right of property beyond his own boundary. An adjacent subject may be acquired, as part and pertinent of another, by possession for forty years, but not where the property of the party claiming is held by a boundary charter which excludes all beyond. 2. As to the moss ground C, the subject conveyed to

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Mr. Riddle, the appellant's author, is the park or enclosure of Deadmanshirst, of which the moss ground C is no part, consequently, supposing Mr. Glen could not show this piece of ground to be his, it manifestly could not benefit the appellant, but it would revert back to the burgh of Dumfries. The appellant has no interest, therefore, to challenge his right; but, in point of fact, the ground in question was conveyed to the respondent Glen by the charter 1763. No doubt the appellant pleads possession as part and pertinent of his property, but, as already noticed, he cannot claim on this ground, because, 1st, He has a bounding charter; and, 2. Because if his charter was not a bounding one, he has not proved possession for forty years. 3. The appellant has not proved an exclusive right to the road described in his summons. Some of the witnesses depone to the purchase of the ground, on which this road is formed, by Mr. Riddle, his author, and Mr. Copland of Collieston. But, by the law of Scotland, the title to an heritable subject cannot be made out by parole testimony; and the proof amounts to no more than that a servitude in favour of these gentlemen was conferred by Swan, the proprietor of the ground. Such right in Messrs. Copland and Riddle is not incompatible, but perfectly consistent with a similar one being acquired by the respondent Glen. It is proved that the possession of the respondent and his tenant was nearly coeval with the formation of the road itself; and there is no evidence of any interruption or challenge of their right, except what is mentioned by John Dickson, the former proprietor of Deadmanshirst, that his father, on one occasion, prevented Robert Muir, the tenant of the respondent, from driving his cattle along the road. But he deponed, that since he first knew the properties in question, Mr. Glen and his tenants have been in use of driving their cattle up and down said road, and that he never challenged them for so doing except in the above instance.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed, with £100 costs.

For the Appellant, *Wm. Adam, Tho. W. Baird.*

For the Respondents, *Robert Corbet.*

NOTE.—Unreported in the Court of Session.