

* Saturday, October 19.

OUTER HOUSE.

[Lord Curriehill.

CAMPBELL DOUGLAS v. HOZIER.

Servitude—For Carts and Carriages—Loss of Right by Disuse.

A servitude of road both for carts and carriages and for foot-passengers was claimed where there was no writing or title to constitute it, and solely on the ground of immemorial use and possession. *Held* (by the Lord Ordinary (Curriehill), and acquiesced in), that, apart from the question upon the proof regarding the possession and use for a period of forty years, the evidence showed that the servitude, if it ever existed, had been virtually abandoned or sopited during a period of twenty-eight years previously to the bringing of the action, and that upon that ground (on the authority of the case of *Hill v. Ramsay*, H. of L., March 30, 1810, 5 Pat. Apps. 299), if upon no other, the defender fell to be assolizied.

This was an action at the instance of the Rev. Sholto Douglas Campbell Douglas against William Wallace Hozier of Tannochside, Lanarkshire, in which the pursuer sought to have it found that he was proprietor of a right of servitude of way for carts and carriages, and also for driving cattle and for horses and foot-passengers over a road upon the defender's lands. It was admitted that the road was in use by foot-passengers.

The defender averred, *inter alia*, as follows in his answers to the condescendence—"Any use of the said line of way by the pursuer or his predecessors within forty years prior to 1864 was as members of the public and not as proprietors of Rosehall. If either the pursuer or the public ever used the said line of way it was only as part of the said way or kirk-road (*i.e.*, between the villages or churches of Bothwell and Old Monkland, a distance of about three miles), and the same has been abandoned by disuse for more than forty years prior to the raising of this action. Further, any use which has been had thereof by the pursuer or his predecessors has been desultory and infrequent, and has not been of the character necessary to instruct or create the right now claimed. In the early part of the present century there was an entire alteration in the system of roads on Rosehall estate, and since that time any road which ever existed in or near the line of way above mentioned has been disused and abandoned. The pursuer has other and better accesses to his property; and the right now claimed would be a very serious burden to the defender, involving the passage of farm carts and other similar traffic over part of his avenue, which for more than forty years has been used exclusively as an approach to his mansion-house."

The pursuer pleaded—"The pursuer, as proprietor of the lands of Righead and Douglas-Support or Rosehall foresaid, being proprietor of, and he and his predecessors and their tenants and occupants of said lands having from time immemorial prior to 1864 used and exercised a right of

servitude of way for carts and carriages, and also for horses, cattle, and foot-passengers over the roads in question, and that as an access from the turnpike road to the pursuer's said lands, is entitled to decree of declarator and interdict as concluded for."

The defender, *inter alia*, pleaded—" (1) The pursuer is not entitled to decree as concluded for, in respect that no servitude of passage exists over the defender's lands in favour of the lands of the pursuer. (2) The pursuer is not entitled in the present action to found upon possession had by him or his predecessors as members of the public or in any other capacity than as proprietors of the lands libelled. (3) Any right of passage which ever existed in or near the line condescended on having been abandoned as above stated, and, *separatim*, having been lost by disuse for upwards of forty years, the defender should be assolizied."

The Lord Ordinary (CURRIEHILL), after proof had been led at length as to the use had of the road in question, pronounced an interlocutor assolizieing the defender from the conclusions of the summons.

His Lordship appended a note, in which he dealt at length with the evidence, finding that the allegations of use were not substantiated, and added—"But even in the most favourable view for the pursuer, that is, taking the commencement of the prescriptive period as being forty years before 1850, I am of opinion that, even if it could be held that a servitude had been constituted by forty years' regular possession before 1850, it has been virtually abandoned or sopited by disuse during the last twenty-eight years. The case appears to me to present in many respects a remarkable similarity to the case of *Hill v. Ramsay*, H. of L., 30th March 1810, 5 Pat. Apps. 299, in which it was held that forty years' disuse is not necessary to sopite a servitude of way which has been constituted solely by possession, and that proof of such disuse during from twenty to thirty years was sufficient. The opinions of the Judges noticed by Sir Islay Campbell in his Session Papers are very instructive on this point. Now, there has, in my opinion, been virtual disuse of that road for at least twenty-eight years, so that even if the servitude should be held to have existed prior to 1850 it has been sopited by disuse."

The interlocutor was acquiesced in.

Counsel for Pursuer—Johnstone. Agents—Gibson & Strathearn, W.S.

Counsel for Defender—Pearson. Agents—A. & A. Campbell, W.S.