

1767.

ROBERT PRINGLE of Clifton, - - Appellant;

PRINGLE  
v.  
DUKE OF  
ROXBURGH,  
&c.

DUKE of ROXBURGH, and MR. M·DOUGALL, }  
his Grace's Lessee of Caverton Mill, } Respondents.

House of Lords, 2d Feb. 1767.

## SERVITUDE OF AQUÆDUCTUS—PART AND PERTINENT—POSSESSION.—

Circumstances in which found, that a party had a right to the run of water, or a servitude of aqueduct, through a neighbour's lands, without any express grant, but as part and pertinent of a mill; and was entitled to access to do all acts to keep it in repair; and had good right to question the acts of the proprietor, through whose lands it flowed, in so far as these tended to injure or diminish the flow of water to his mill.

The Duke of Roxburgh stood infeft, on charters from the Crown, of very ancient dates, in the lands and mill of Caverton, with *parts* and *pertinents*; and when the Duke's ancestors got grants of this mill from the Crown, with parts and pertinents, the aqueducts necessary for the service of the mill, the Duke alleged, must have been comprised within those grants.

The mill of Caverton yielded his Grace a considerable rent, and he alleged that it had been supplied from time immemorial with water, by an aqueduct taken from the river Kail, upwards of a mile above Caverton mill, where, by a bulwark or cauld, raised upon Mr. Nisbet of Dirleton's land, a sufficient quantity of water was forced into the *aqueduct*, and thence conveyed, partly through Mr. Nisbet's land and partly through Mr. Pringle's (appellant's) land, to Caverton mill. The Caverton mill depended entirely upon this supply of water, for the service of the mill, and it was scarcely sufficient in dry seasons for this purpose. The aqueduct had been thus possessed and enjoyed by the Duke and his ancestors, for time out of mind.

The appellant was owner of the mill of Linton, which, he averred, was originally supplied with water by a natural current from Linton lake, situated within his own property; but this water in time proving insufficient for the use of his mill, the appellant's ancestors made the aqueduct in question, by means of a bulwark, or cauld across the river Kail, in order to force a sufficient supply of water through the adjacent lands of Mr. Nisbet of Dirleton to his own mill of Linton,

which supply of water, after passing the appellant's lands, entered those of the Duke of Roxburgh, a little above Caverton mill, and served that mill.

In consequence of certain operations resorted to by Mr. Pringle, which tended in their nature to diminish the flow of water, so as to stop entirely the respondent's mill, and to increase the flow by means of sluices to his own mill, the Duke, along with the lessee of his mill, raised the present action of declarator to have it found, that the Duke had a right to the said water for the use of his mill of Caverton; *or at least, a right of servitude*; and that the sluices and bulwarks erected by the defender (appellant) to diminish the flow of water ought to be removed, or that it should be declared that the respondent lessee should have liberty to open and make use of said sluices at his pleasure, so that his mill may be sufficiently served with water. A proof was allowed of the facts. Upon consideration of which, and after hearing counsel, the Lords of Session, of this date, pro-

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nounced this interlocutor, "The Lords having advised the  
" state of the process, testimonies of witnesses adduced,  
" writs produced, and heard parties procurators thereon,  
" they find, (1mo), That the Duke of Roxburgh has right to  
" the run of water, from the cauld upon the water of Kail  
" below Grubbet Mill, through the defender's (appellant's)  
" grounds to Linton mill, and from thence to his mill of Cav-  
" erton, for the service of the said mill, and that he has a  
" servitude upon the defender's lands for maintaining his  
" right to the said run of water. (2d), Find that the de-  
" fender is entitled to keep up and use the two sluices,  
" erected upon the said run of water, below the said cauld,  
" in order to prevent the water thereby issuing, from over-  
" flowing his low grounds, in time of high water or floods.  
" (3d), But find that the said sluices ought not to be used,  
" to the prejudice of the said mill of Caverton, by obstruct-  
" ing its being at all times supplied with a sufficiency of  
" water, for the service of the said mill. And further find,  
" (4th), That the Duke of Roxburgh and his tenants in the  
" said mill of Caverton, have right to repair the foresaid  
" cauld, upon the water of Kail below Grubbet mill, when  
" occasion requires, as also, to cleanse and repair the fore-  
" said mill-lead or aqueduct from Caverton mill upwards to  
" the aforesaid cauld below Grubbet mill, and decern and  
" declare accordingly." A reclaiming petition was pre-  
sented against this interlocutor, upon consideration of which,

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with answers, the Court adhered. And the appellant now brought these judgments by appeal to the House of Lords.

*Pleaded for the Appellant.*—The question at issue in the present case was, not whether a lessee of the respondent's mill of Caverton shall enjoy the benefit of the water running from the appellant's mill, but whether he can have a right of property in the water of this rivulet running through the appellant's grounds, as to insist, that the appellant shall suffer, or allow to be admitted without control, such a quantity of water as may overflow and destroy his fields, worth 30s. per acre. The interlocutor now appealed from, gives to the respondent and lessee the command of this rivulet, and, consequently, subjects the appellant to a servitude, which, under the arbitrary management of a tenant of a mill, may become extremely injurious to the appellant's lands, by allowing the water to overflow; while, it is manifest, he has a clear right to preserve his own estate, as he has hitherto immemorially done, from such overflowings. Besides, it is in evidence, that the aqueduct in question was originally cut by his ancestors, for the supply of his mill of Linton; and that they had erected, altered, and improved the bulwark at their pleasure, and, therefore, the aqueduct and bulwark were subject to his exclusive command; and the interlocutor is therefore erroneous, in so far as it finds that the respondent has a servitude on the appellant's lands, for maintaining his right to the run of water, from the river Kail to Caverton mill, and to repair the said bulwark and aqueduct. The appellant has a clear interest to preserve the water for keeping his own mill going, and is perfectly willing that the full benefit of that water should flow freely to the respondent's mill. All that he insists in is, to be allowed to protect himself against the overflowings of his banks in high floods, and the means taken by him for this purpose, were both legitimate and necessary, and not such as injured the flow of water for the service of the respondent's mill of Caverton.

*Pleaded for the Respondents.*—It has been established by evidence, that the respondent the Duke of Roxburgh, and his ancestors, have, under grants from the Crown of the lands and mill of Caverton, been in immemorial possession of this aqueduct, and a servitude of *aquæductus* has thereby been established as part and pertinent of their mill, which is a sufficient title, without any express grant of aqueduct. It is further established by the proof, that as long as the present operations of the appellant remain, and the water is with-

drawn in the manner described, the Duke cannot procure a sufficient supply of water for the service of his mill, because these operations, in their nature, obstruct the flow of water for that purpose. And as there were strong grounds for believing that the servitude had its origin in conferring a benefit on the Caverton mill, this mill having been erected long prior to the appellant's, and the aqueduct then in existence, flowing through Nisbet's and the appellant's lands, and serving his mill, every presumption is in favour of the right of servitude, and also to a sufficient flow of water, with right to repair and cleanse the caulds and aqueducts.

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After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutors complained of be, and the same are hereby affirmed; and it is further ordered, that the appellant do pay to the respondents £100 costs.

For Appellant, *C. Yorke, Al. Wedderburn.*

For Respondents, *R. Makcintosh, Alexander Wight.*

*Note.*—Not reported in Court of Session Reports.

[M. 5253.]

MRS. EUPHAM HAMILTON, Widow of CHARLES HAMILTON, Esq., and BETHIA and CHARLOTTE HAMILTON, their Daughters,	}	<i>Appellants;</i>
ARCHIBALD HAMILTON, Esq. of Rosehall		
		<i>Respondent.</i>

House of Lords, 5th April 1767.

HEIR AND EXECUTOR—APPARENCY—RENTS.—Held, reversing the judgment of the Court of Session, that the executors, and not the heir of a party who died in possession of an estate on apparency, was entitled to the arrears of rents unuplifted at her death.

The heir to the estate of Rosehall died in apparency, after possession of the estate for some years. She had left arrears of rent in the hands of the tenants, unuplifted by her at the time of her death. In a competition between the heir to the estate and her executors, it was objected to by the heir, that these arrears of rents did not pass to her executors, as she had died uninfest and in apparency, while the estate